

Before the
COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In the Matter of

Determination of Rates and Terms for
Preexisting Subscription and Satellite Digital
Audio Radio Services

Docket No. 2011-1 CRB PSS/Satellite II

WRITTEN DIRECT STATEMENT OF MUSIC CHOICE

Pursuant to 37 C.F.R. § 351.4 and the Copyright Royalty Board's Order dated August 17, 2011, Music Choice, through its undersigned counsel, respectfully submits its written direct statement.

CONTENTS OF MUSIC CHOICE'S WRITTEN DIRECT CASE

TAB A: WITNESS TESTIMONY

Pursuant to 37 C.F.R. § 351.4(b)(1) and the Copyright Royalty Board's Order dated August 17, 2011, Music Choice submits written direct testimony from the following expert and fact witnesses, included at Tab A:

(1) David J. Del Beccaro, the President and Chief Executive Officer of Music Choice, will testify concerning the business operations of Music Choice and the various reasons why a reduction in the royalty rate for pre-existing subscription services will further the policy objectives of the Section 114 license. Mr. Del Beccaro will further testify concerning the lack of any true marketplace value for the Section 112 ephemeral license royalty rate and the absence of any need to modify the existing regulations associated with the pre-existing subscription services license.

(2) Damon Williams, Vice President of Programming and Production for Music Choice, will testify concerning the promotional effects of Music Choice, particularly how the service increases record sales and fosters the creation of new artistic works. Mr. Williams will also testify regarding the technological and programming improvements made to the Music Choice service since the last proceeding, and the ways in which Music Choice contributes creative content to the Music Choice residential service, independent of the sound recordings played on the audio channels.

(3) Dr. Gregory Crawford, Ph.D., Academic Affiliate with Bates White Economic Research, will give his expert opinion as to the proper rates to be set in this proceeding. He will explain why the sum of Music Choice’s musical works performance license rates is the best available marketplace benchmark, based on empirical evidence and established economic principles and why a reasonable rate in this case must be less than the musical works rate. He will also analyze the musical works benchmark in light of the Section 801(b)(1) policy factors to propose a reasonable rate for the Section 114 license.

TAB B: MUSIC CHOICE EXHIBITS

Pursuant to 37 C.F.R. § 351.4(b)(1) and the Copyright Royalty Board’s Order dated August 17, 2011, Music Choice submits the following exhibits, included at Tab B:

Exhibit #	Sponsored By	Description	Restricted
MC 1	Del Beccaro	List of Speaking Engagements of David J. Del Beccaro	
MC 2	Del Beccaro	Opinion of the Register of Copyright, dated October 20, 2006	
MC 3	Del Beccaro	License Agreement between Digital Cable Radio Associates, L.P. (“DCR”) and Sony Music Entertainment Inc. (Jan. 21, 1993)	
MC 4	Del Beccaro	License Agreement between DCR and EMI Music, Inc. (Apr. 8, 1994)	
MC 5	Del Beccaro	License Agreement between DCR and Warner Music Group Inc. (Jan. 21, 1993)	

MC 6	Del Beccaro	Decision of the Copyright Board of Canada ("CBC"), "Reasons for the decision certifying NRCC, Tariff 1.A (Commercial Radio) for the years 1998 to 2002" (Aug. 13, 1999)	
MC 7	Del Beccaro	Decision of the CBC, "Reasons for the decision certifying the tariff for pay audio services for the years 1997 to 2002" (Mar. 15, 2002)	
MC 8	Del Beccaro	Decision of the CBC, "Reasons for the decision certifying the tariff to be collected by SOCAN (2005-2009), NRCC (2007-2010), and CSI (2006-2009) in respect of Multi-Channel Subscription Satellite Radio Services" (Apr. 8, 2009)	
MC 9	Del Beccaro	Decision of the CBC, "SOCAN and Re:Sound Tariffs 1.C (CBC Radio) 2006-2011" (July 8, 2011)	
MC 10	Del Beccaro	Music Choice Europe Study (1996)	
MC 11	Del Beccaro	Printout of current rate schedules for commercial broadcasting services from the PRS and PPL websites	
MC 12	Del Beccaro	Interim Decision of the Copyright Tribunal Decision (UK) setting the musical composition performance royalty rates for webcasters (July 19, 2007)	
MC 13	Del Beccaro	Printout of the current webcasting FAQ and rate schedule published on the website of Phonographic Performance Limited (UK)	
MC 14	Del Beccaro	Printout of the current webcasting royalty rate schedule published on the website of the Performing Rights Society (UK)	
MC 15	Del Beccaro	Testimony of Richard Boulton submitted by RIAA in the last Section 115 proceeding	
MC 16	Del Beccaro	Testimony of Geoffrey Michael Taylor submitted by RIAA in the last Section 115 proceeding	
MC 17	Del Beccaro	Current License Agreement between ASCAP and Music Choice (Dec. 22, 2010)	
MC 18	Del Beccaro	Current License Agreement between BMI and Music Choice (Dec. 21, 2010)	
MC 19	Del Beccaro	Current License Agreement between SESAC and Music Choice (June 16, 2008)	X
MC 20	Del Beccaro	Previous License Agreement between ASCAP and Music Choice (Oct. 25, 2006)	
MC 21	Del Beccaro	Previous License Agreement between BMI and Music Choice (Jan. 1, 2006)	
MC 22	Del Beccaro, Williams	Music Choice's current channel lineup listing	
MC 23	Del Beccaro, Williams	Copies of Music Choice's current on-screen layouts	

MC 24	Del Beccaro	Music Choice spreadsheet summary of financial results and projections	X
MC 25	Del Beccaro	Copies of recent articles from Billboard Magazine discussing recent Soundscan reports of music industry sales figures	
MC 26	Del Beccaro	Printout of a summary of 2010 year end statistics for US music sales published on the RIAA website.	
MC 27	Williams	List of recent public speaking engagements and press for Damon Williams	
MC 28	Williams	Testimonials	
MC 29	Williams	Photographs and a listing of plaques displayed at Music Choice	
MC 30	Williams	Emails and faxes from record labels and artists, thanking Music Choice for promoting their records	
MC 31	Williams	List of artists and label representatives who have visited Music Choice	
MC 32	Williams	Examples of promotional email blasts	
MC 33	Williams	A Maroon 5 email advertisement	
MC 34	Williams	2004 Arbitron study	
MC 35	Williams	2008 OTX study	
MC 36	Williams	2010 Experian Simmons survey	
MC 37	Williams	2005 Arbitron study	
MC 38	Williams	2011 Ipsos OTX MediaCT study	
MC 39	Williams	Big Sean panel images and promotional press	
MC 40	Williams	Trin-i-tee panel images and promotional press	
MC 41	Williams	Mindless Behavior promotional press	
MC 42	Williams	Brad Paisley panel image, Facebook post and grant of right	
MC 43	Williams	Internal Music Choice study of Trapt promotion summary	
MC 44	Williams	Internal Music Choice study of Disturbed promotion	
MC 45	Williams	Internal Music Choice studies of Shadows Fall promotion	
MC 46	Williams	Internal Music Choice study of God Forbid promotion	
MC 47	Williams	Examples of various on-screen advertising panels run in connection with such promotions, organized by record labels	
MC 48	Williams	Copies of agreements to display entire record album at no charge with various record labels	
MC 49	Williams	An email from a record label requesting purchasing capability from Music Choice channels	
MC 50	Williams	Examples of You and the Artist screens	X

MC 51	Williams	Examples of ad panels that ran on our audio service and Music Choice eblasts to promote J. Cole on Live Undefined	
MC 52	Crawford	CV of Dr. Gregory Crawford, Ph.D.	
MC 53	Crawford	Excerpt from oral testimony of Dr. Michael D. Pelcovits, Docket No. 2006-1 CRB DSTRA (May 1, 2007) pp. 220-21	X
MC 54	Crawford	Richard Caves, <i>Creative Industries: Contracts between Art and Commerce</i> (Massachusetts: Harvard University Press, 2000) p. 292	
MC 55	Crawford	"The Infinite Dial: Digital Platforms and the Future of Radio," Edison Research and Arbitron (2010) p. 87	
MC 56	Crawford	"NARM Research Report: Consumers & Music Discovery," The NPD Group (Nov. 2011) pp. 6, 13, 42, 44, 47	X
MC 57	Crawford	"Let's Play: American Music Business," Recording Industry Association of America (2010) p. 13	
MC 58	Crawford	"The Digital Music Industry Outlook", Business Insights (Jul. 2011) p. 26	
MC 59	Crawford	Rebuttal testimony of Charles Ciongoli, Docket No. 2006-1 CRB DSTRA (Jul. 2007) p. 3	
MC 60	Crawford	Rebuttal testimony of Mark Eisenberg, Docket No. 2006-1 CRB DSTRA (Jul. 2007) pp. 11-12	
MC 61	Crawford	Written testimony of Adam B. Jaffe, Docket No. 2005-1 CRJ DTRA pp. 19-25	
MC 62	Crawford	Expert Report of Dr. John R. Woodbury, Docket No. 2006-1 CRB DSTRA (Oct. 30, 2006) pp. 36-38	
MC 63	Crawford	Report of the Copyright Arbitration Royalty Panel (Nov. 12, 1997) p. 61	
MC 64	Crawford	Alejandro Zentner, "Measuring the Effect of Music Downloads on Music Purchases," <i>Journal of Law and Economics</i> 49, no. 1 (Apr. 2006): pp. 63-90	
MC 65	Crawford	Stan Liebowitz, "File Sharing: Creative Destruction or Just Plain Destruction?," <i>Journal of Law and Economics</i> 49, no. 1 (Apr. 2006): p. 1-28	
MC 66	Crawford	Rafael Rob and Joel Waldfogel, "Piracy on the High C's: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students," <i>Journal of Law and Economics</i> 48, no. 1 (Apr. 2006): pp. 29-62	

PROPOSED RATE FOR MUSIC CHOICE

Pursuant to 37 C.F.R. § 351.4(b)(3), Music Choice proposes that the Section 114 sound recording performance license rate for Music Choice be reduced to 2.6 percent of gross revenues as that term is currently defined in the applicable regulations. Because the ephemeral copies made by Music Choice have no independent economic value and recent agreements covering the ephemeral right have folded the ephemeral copy license into the performance fee, Music Choice proposes that the Section 112 ephemeral license be included within the 2.6 percent royalty rate. If any additional value is ascribed to the ephemeral license, Music Choice proposes that the Section 112 rate be set no higher than a flat fee of \$100 per year.

Music Choice proposes that no changes are necessary to the applicable regulations.

Dated: November 29, 2011

Respectfully submitted,

Music Choice

By: 

Paul M. Fakler (NY Bar No. 2940435)
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DECLARATION AND RULE 11 CERTIFICATION OF PAUL FAKLER

PAUL M. FAKLER, declare:

1. My name is Paul M. Fakler. I am a partner with Arent Fox LLP, counsel to Music Choice in the above captioned proceeding.

2. Pursuant to 37 C.F.R. § 350.4(e)(1) and the Copyright Royalty Judge's Order dated November 16, 2011 (the "Protective Order"), Music Choice, through its undersigned counsel, respectfully submits this affidavit and Rule 11 Certification concerning Protected Material, as that term is used and defined in the Protective Order.

3. This affidavit and Rule 11 Certification is being submitted simultaneously with the Written Direct Statement of Music Choice and all accompanying written direct testimony and exhibits.

4. I have reviewed the Written Direct Statement, the Testimony of David J. Del Beccaro, the Testimony of Damon Williams, the Testimony of Dr. Gregory Crawford, and all exhibits submitted by Music Choice in this proceeding.

5. As discussed below and after consultation with my client, I have determined that portions of the testimony and exhibits contain Protected Material in accordance with the Protective Order.

6. Such Protected Material includes, but is not limited to testimony and exhibits involving (a) contracts, contractual terms or contract strategy that are proprietary, not available to the public, commercially sensitive and, in some instances, are subject to express confidentiality provisions with third parties; and (b) highly confidential business information, financial projections, financial data, and competitive strategy that are proprietary, not available to the public, and commercially sensitive.

7. If this commercial or financial information were to become public, it would provide an unfair competitive advantage to Music Choice's competitors and entities with whom they do business and negotiate. Public disclosure of this information would place Music Choice at a significant commercial disadvantage and would seriously jeopardize its business interests.

8. Portions of the written direct statement and their accompanying exhibits submitted by Music Choice clearly meet the definition of "Protected Material." Specifically, as summarized below, the following witnesses' statements and exhibits contain commercial and financial material that is proprietary, not known to the public and the disclosure of which would place Music Choice at a significant commercial disadvantage or would unfairly advantage competitors and other parties.

a. The Testimony of David J. Del Beccaro contains detailed non-public financial information and projections relating to Music Choice's business, as well as information about current contracts, including those subject to confidentiality provisions. Mr. Del Beccaro also sponsors exhibits that contain confidential financial information about

Music Choice's income and expenses. The information in both the written testimony and the exhibits is at a level of specificity that is not disclosed to the public; if it were disclosed, it would competitively disadvantage Music Choice while providing a competitive advantage to other parties in the industry.

b. The Testimony of Damon Williams contains detailed non-public commercial information related to planned, but not yet executed, programming, design, promotion and technological changes to the Music Choice residential service. Mr. Williams also sponsors an exhibit that contains proprietary non-public information related to one of those planned changes. None of this information is publicly known or available. Disclosure of the commercial details contained in Mr. Williams's testimony and exhibits would competitively disadvantage Music Choice while providing its competitors with an unfair commercial advantage.

c. The Testimony of Dr. Gregory Crawford contains detailed non-public financial information relating to Music Choice's business. Dr. Crawford also sponsors exhibits that contain restricted deposition testimony subject to the protective order in Docket No. 2006-1 CRB DSTRA, and a research report obtained subject to a confidentiality agreement. The information in both the written testimony and the exhibits is at a level of specificity that is not disclosed to the public; if it were disclosed, it would competitively disadvantage Music Choice while providing a competitive advantage to other parties in the industry.

9. All redacted materials designated as "RESTRICTED" contains commercial or financial information that Music Choice has reasonably determined in good faith that, if

disclosed, would either competitively disadvantage Music Choice or provide a competitive advantage to another party.

10. Attached hereto is a Redaction Log, as required by paragraph 10(b) of the Protective Order, identifying each redaction contained in the Testimony of David J. Del Beccaro, Damon Williams, Dr. Gregory Crawford, Ph.D., as well as any exhibit or other document submitted that is designated Restricted.

11. Within the Redaction Log, each listing of a redaction or Restricted document identifies the document, the page and line number of each redaction, and a brief description of the nature of the redacted Protected Material.

12. I am authorized to submit this affidavit on behalf of Music Choice. I have reviewed the redactions set forth in the Redaction Log and to the best of my knowledge, information and belief, the redacted information meets the definition of Restricted Information contained in the Protective Order. At the time this Affidavit is made, good cause exists for the treatment of the information as Protected Material in order to prevent certain business and competitive harm that would result from the disclosure of such information while, at the same time, enabling Music Choice to provide the Copyright Royalty Judges with the most complete record possible on which to base its determination in this proceeding.

Pursuant to 28 U.S.C. §1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: November 29, 2011

Respectfully submitted,

Music Choice

By: 

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**MUSIC CHOICE REDACTION LOG
 FOR WRITTEN DIRECT STATEMENT AND EXHIBITS**

Witness	Pages, Exhibit	Description
Del Beccaro	Page 4, line 13	Financial information concerning royalties paid to SoundExchange by Music Choice.
Del Beccaro	Page 7, lines 6 to 8	Financial information concerning royalties paid by Music Choice to SoundExchange.
Del Beccaro	Page 10, lines 6 and 15	Financial information including financial terms of confidential license agreement between Music Choice and SESAC.
Del Beccaro	Page 12, lines 4 and 5	Financial information concerning Music Choice's average revenues per customer.
Del Beccaro	Page 12, line 23 to Page 13, line 3	Commercial information concerning current terms of agreements between Music Choice and its affiliates and between Music Choice and various record labels.
Del Beccaro	Page 21, line 21 to page 22, line 1; page 22, lines 9 to 13; page 23, lines 5 and 6	Financial and commercial information concerning confidential license agreement between Music Choice and SESAC.
Del Beccaro	Page 25, line 5	Financial information concerning Music Choice's current programming expenses.
Del Beccaro	Page 28, line 7	Financial information concerning Music Choice's average revenues per customer.
Del Beccaro	Page 31, lines 6 to 7	Commercial information regarding Music Choice's planned but not yet executed changes to its residential service.
Del Beccaro	Page 31, lines 18 to 20, 22 to 23; page 32, lines 1, 3 and 5; page 33, line 12	Financial information concerning Music Choice's capital investments.

Del Beccaro	Page 33, lines 21 to 23; page 34, lines 4 to 6	Financial information concerning Music Choice's profits and losses.
Del Beccaro	Page 34, lines 13 to 14	Financial and commercial information regarding royalties paid to record labels by Music Choice.
Del Beccaro	Page 35, lines 3 to 5	Commercial information concerning current terms of agreements between Music Choice and affiliates and between Music Choice and various record labels.
Del Beccaro	Page 35, line 21 to page 36, line 4	Information concerning Music Choice's financial projections.
Del Beccaro	Page 37, lines 5 to 6; page 38, lines 3, 4, 7 to 9	Commercial and financial information concerning Music Choice's relationships with affiliates.
Del Beccaro	Page 38, lines 15 to 16; page 39, line 22	Financial information concerning Music Choice's capital investments.
Del Beccaro	Page 39, line 5	Financial information concerning Music Choice's income and expenses.
Del Beccaro	Page 40, lines 9 and 10	Financial information concerning Music Choice's average fees per customer.
Del Beccaro	Page 40, line 16	Financial information concerning Music Choice's revenue growth.
Del Beccaro	Page 41, lines 1 to 12	Chart showing Music Choice's financial performance and projections.
Del Beccaro	Page 41, lines 18 to 20	Commercial information concerning negotiations between Music Choice and its affiliates.
Del Beccaro	Page 41, line 21 to page 42, line 2	Information concerning Music Choice's financial projections.
Del Beccaro	Page 42, lines 17 and 18	Financial Information concerning Music Choice's profits and losses.
Del Beccaro	Page 45, lines 9 and 11	Financial information concerning royalties paid to SoundExchange.
Del Beccaro	Page 48, line 19, and page 49, line 3	Information concerning financial terms of confidential agreement between Music Choice and SESAC.
Del Beccaro	Exhibit MC 19	Confidential license agreement between Music Choice and SESAC.
Del Beccaro	Exhibit MC 24	Summaries of Music Choice financial results and projections.
Williams	Page 21, line 4; page 25, lines 17 to 20; page 25, line 22 to page 26, line 3; page 26, lines 5 to 12; page 26, line 20 to page 27, line 15	Information regarding Music Choice's planned, but not yet executed, changes to its residential service
Williams	Page 30, lines 22 to 23	Proprietary information regarding Music Choice programming decisions.

Williams	Exhibit MC 50	Screen-shots of planned Music Choice programming, promotional and design changes.
Crawford	Page 7, ¶ 13, n. 4	Restricted deposition testimony subject to the protective order entered in Docket No. 2006-1 CRB DSTRA.
Crawford	Page 42, ¶ 146	Information concerning financial terms of confidential agreement between Music Choice and SESAC.
Crawford	Pages 43-44, ¶¶ 152 to 154	Information concerning Music Choice's financial performance.
Crawford	Page 45, ¶ 162	Information concerning Music Choice financial projections.
Crawford	Page 46, ¶ 166	Information concerning Music Choice's capital investments.
Crawford	Pages 47-48, ¶¶ 169, 170, 173, 176	Information concerning Music Choice's financial performance.
Crawford	Pages 60-61, Appendix B	Music Choice financial statements
Crawford	Exhibit MC 53	Restricted deposition testimony subject to the protective order entered in Docket No. 2006-1 CRB DSTRA.
Crawford	Exhibit MC 56	Proprietary research report subject to a confidentiality agreement.

Tab A

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

In the Matter of:

Determination of Rates and Terms for
Preexisting Subscription Services and
Satellite Digital Audio Radio Services

Docket No. 2011-1
CRB PSS/Satellite II

TESTIMONY OF DAVID J. DEL BECCARO

My name is David J. Del Beccaro and I am the President and CEO of Music Choice. I have overseen all aspects of Music Choice since the company's inception in 1987. I submit this testimony in connection with the above-captioned proceeding, in which the Copyright Royalty Judges ("CRJ") will adjust the rates for the statutory license used by Music Choice for the public performance of sound recordings as a preexisting subscription service pursuant to 17 U.S.C. § 114(f)(1).

My Background

I helped commercialize Music Choice (formerly named Digital Cable Radio Associates) beginning in 1987, when I served as Vice President, Business Development for Jerrold Communications ("Jerrold"), a division of General Instrument Corporation ("GI"). After approximately four years of product development and market testing within Jerrold, I helped secure financing for the digital music service concept through a partnership of major cable and music companies, beginning in 1991 when the company launched as a stand-alone entity. Between 1991 and 2000, a number of major companies became investors in the venture through

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various predecessors and affiliates. Those companies are now: Comcast Corporation; Cox Communications, Inc.; Time Warner Cable, Inc.; EMI Music, Inc.; Motorola, Inc.; Microsoft Corporation; Sony Corporation of America; and Time Warner Inc. Notably, these partners include both companies that own record labels and companies that own cable companies. All of the deals we do with those record labels and cable companies owned by our partners have been conducted at arm's length, with no favoritism shown to Music Choice. Indeed, some of the most difficult and protracted negotiations have been those with our cable company partners. Nor are we in any position to show favoritism to cable or record companies owned by our partners as we have several partners with no record label or cable affiliates. Further, no single partner holds a controlling interest in Music Choice and, in fact, as a group the non-cable partners hold a significantly greater ownership interest (by a two to one margin) in Music Choice than our cable partners do as a group.

In my capacity as President and CEO of Music Choice over the past twenty years, I have devised, implemented and overseen various changes in the company's offerings and technologies, as the company has had to adapt to an increasingly difficult and competitive market for cable music services. In this time, I have become intimately familiar with various facets of the music industry, including the production and promotion of sound recordings, artist promotion, and the many forms of broadcasting and digital music services available in the marketplace. I have been quoted in The New York Times, Los Angeles Times, Associated Press, Reuters, MultiChannel News, and Billboard, among other national publications on various topics related to music and technology. A list of my recent speaking engagements on these topics is submitted as Exhibit MC 1.

Prior to holding my current position, I served as the Vice President of New Business Development at Jerrold, as noted above. Before joining Jerrold, I held various marketing and financial positions at GI and Ford Motor Company. I have B.S. and M.S. degrees in Industrial Engineering from Stanford University and a B.A. in Management Engineering from Claremont McKenna College.

I am familiar with the operations of Music Choice and its relationships with copyright owners and their representatives, including the American Society of Composers, Authors and Publishers, (“ASCAP”), Broadcast Music, Inc. (“BMI”), SESAC, Inc. (“SESAC”), the Recording Industry Association of America (“RIAA”), SoundExchange and other licensing entities. As part of my responsibilities as President and CEO of Music Choice, I also keep myself generally apprised of the copyright licensing costs faced by similar businesses in the United States and other countries. The following testimony is based upon my personal knowledge and information available to me in the course of performing my duties as President and CEO of Music Choice.

The Music Choice Service

Music Choice’s residential service that is the subject of this proceeding is a music service comprised of 46 channels of diverse audio programming, which we plan on expanding to over 300 channels in the first quarter of 2012. Each channel provides a distinct musical genre or sub-genre to the listener. Our service is delivered to customers primarily by cable operators as part of a package of offerings to customers in the home (*e.g.*, the Music Choice service is included by cable operators as part of their digital basic cable service to their customers). Virtually all customers receive all 46 of our channels through our

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residential service. Our programming currently reaches almost 52 million residential customers across the United States.

Music Choice provides its audio service to residential customers under the statutory license for the public performance of sound recordings by a “preexisting subscription service” (“PSS”), as that term is defined in Section 114(j)(11) of the Copyright Act. We fully comply with the sound recording performance complement, as required by the statutory license. Accordingly, we do not play more than three different selections of sound recordings from any one phonorecord within a three hour period on any of our channels. We do not consecutively play more than four sound recordings by the same artist or from a compilation set of phonorecords within a three hour period on any of our channels. We do not pre-announce our play list. We make regular reports of our programming, and regularly remit the required license fees to SoundExchange. Since the statutory license was enacted in 1995, Music Choice has paid the record labels over [[REDACTED]] in royalties.

The Applicable PSS Rate-Setting Standard

As a PSS, the Music Choice residential audio service is subject to a special standard under Sections 114(f)(1) and 801(b)(1) of the Copyright Act. As the Register of Copyrights confirmed in connection with the last PSS rate proceeding, this standard is designed to protect the business expectancies of the few pioneering digital music services that were making digital performances of sound recordings prior to 1995, when the limited digital performance right for sound recordings first came into existence, and 1998, when the rate standard for certain statutory licenses were modified to a market-based standard for newer services that first entered the market thereafter. A copy of the Register’s decision, discussing the history of the PSS rate-setting standard is submitted as Exhibit MC 2.

As noted above, I began commercializing the Music Choice service in 1987. At that time, there was no public performance right of any kind for sound recordings. When the service was actually launched to customers in 1991, after significant investment by Music Choice in new technology and systems, there still was no public performance right for sound recordings. Because of this, Music Choice had no reason to believe that it would ever have to pay a penny for the sound recording performance right (just like its primary competitor at the time, terrestrial radio). The legal landscape started to change in the mid-90s, and sound recording owners were granted a very limited digital performance right in 1995. Partly in order to protect the few existing digital music services, like Music Choice, at the same time Congress created the new performance right it also created a compulsory license. Congress provided that the rate for this license would be set, not as a pure market rate, but rather by evaluation of four policy-based factors now codified in Section 801(b), which required consideration of, among other things, the digital music services' financial conditions, marketplace realities and the avoidance of disruption to the services' markets.

The legal landscape changed yet again in 1998, with the passage of the Digital Millennium Copyright Act. In that legislation, Congress changed the rate-setting standard for new digital music services to a market-based, willing buyer / willing seller standard. In doing so, however, Congress went out of its way to allow the three preexisting subscription services, Music Choice, DMX and Muzak, to keep the non-market, policy-based rate-setting standard. As the Register of Copyrights noted in her decision, Congress grandfathered the standard for the PSS to protect their business expectancies, in recognition that they had launched new businesses and invested significant sums under a very different set of legal rules than those that would be applied to new services.

Consequently, and unlike most other statutory licenses for the sound recording digital performance right, the PSS license standard provides for a “reasonable royalty” that is set without reference to a market rate, other than having a market rate as its absolute upper boundary. According to the statute, the reasonable royalty rate is set based upon evaluation of the following policy objectives:

- (A) To maximize the availability of creative works to the public.
- (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
- (C) To reflect the relative roles of the copyright owner and the copyright user with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
- (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

17 U.S.C. § 801(b)(1).

History of PSS Rate Setting

During the first rate-setting proceeding for preexisting subscription services, commenced in 1996, the Copyright Arbitration Royalty Panel (“CARP”) initially set the royalty rate at 5 percent of gross domestic revenue from each licensed residential service. On appeal, in 1998, the Librarian of Congress adjusted the rate to 6.5 percent and that rate was affirmed on appeal to the District of Columbia Circuit. That original royalty rate has not been adjusted through the CARP (now the CRJ) process since that time. The first time the rate was subject to adjustment, Music Choice settled with SoundExchange solely to avoid the prohibitive costs associated with the CARP process. Due to an inequality in bargaining power, discussed further below, Music Choice was forced to accept a rate increase to 7

percent for 2002 to 2003 and 7.25 percent for 2004 through 2007. This increase in no way reflected any of the statutory policy objectives relevant to this proceeding, nor was it a true willing buyer / willing seller, marketplace transaction. The increase was simply a result of the fact that Music Choice could not, from a business perspective, justify the expense in money and staff resources for another proceeding so soon after the conclusion of the appeal process of the first proceeding. [[REDACTED]

[[REDACTED]]

Despite repeated efforts by Music Choice to engage in settlement discussions, when the royalty rate came up for adjustment again in 2006, SoundExchange did not negotiate a settlement until directed to by the CRJ during the direct trial opening arguments in June 2007. By the time they complied, Music Choice had already incurred over a million dollars in legal fees and again was forced to agree to a slight increase, to 7.5 percent in the final rate period year of 2012, in order to avoid incurring millions more in legal fees. This too was not a marketplace transaction. It was our hope, however, that having been taken to task by the Judges in the last proceeding, SoundExchange would be more willing to negotiate a reasonable settlement this time around. Unfortunately, that was not the case. Despite the fact that Music Choice reached out to SoundExchange many months before the voluntary negotiation period began for this proceeding, SoundExchange did not engage in settlement discussions until after the negotiation period was over. Even then, and after we shared our financial data (without any reciprocity), we received the same old demands that our rate be significantly increased, with no serious economic justification given other than the fact that

the cost of a proceeding would be far more burdensome on Music Choice than on SoundExchange.

As the Judges may be aware, these proceedings cost millions of dollars in legal and expert fees for each party. For a company the size of Music Choice, the cost of a rate-setting proceeding creates enormous pressure to settle, even at unfair rates. That pressure is not felt evenly by Music Choice and SoundExchange. Notably, unlike the record labels and artists, Music Choice's interests are not represented by a large trade organization. Indeed, because DMX had to file for bankruptcy and sell off its assets, and Muzak's participation in the market is miniscule, Music Choice must directly bear the entire burden and costs of PSS rate-setting itself. SoundExchange, on the other hand, has no independent business to protect or to "distract" it from hyperlitigation of these proceedings. Moreover, all of its litigation expenses are merely deducted from the royalties it collects from licensees like Music Choice.

Consequently, SoundExchange has no incentive whatsoever to enter into reasonable settlements and has every incentive to force Music Choice into these proceedings every five years unless Music Choice agrees to a substantial increase in its royalty rate. This dynamic is worsened by the fact that the PSS rates are adjusted in a joint proceeding with the SDARS, a service with a completely different market structure, fundamentally different demand characteristics, and incomparably higher revenues. From SoundExchange's point of view, once it is already committed to a proceeding against the SDARS, it does not cost much more incrementally to put on a marginal case against Music Choice. But SoundExchange is very cognizant of the severe impact the costs will have on Music Choice. Finally, SoundExchange does not view the proceeding as carrying any risk. Whether Music Choice's

rate is lowered or increased, the difference in resulting royalties to any of the record labels or artists is insignificant.

Given SoundExchange's pattern of conduct, it has become clear to Music Choice that it cannot continue to be forced into ever-increasing settlements. If this continues, Music Choice will eventually be put out of business. As demonstrated below, the original rate set by the CARP was already too high, largely because the CARP substantially overestimated Music Choice's license rate for the performance of musical compositions. If we do not make a stand in this proceeding and get a corrected and reasonable rate, set pursuant to the applicable policy factors instead of the exercise of SoundExchange's unfair bargaining leverage, the viability of Music Choice's business is at risk.

Summary of Music Choice's Rate Proposal

Music Choice proposes a sound recording performance license rate for our preexisting subscription service of 2.6 percent of service revenues. The original 6.5 percent rate was the product not only of a full CARP but also two levels of appeal. While the standard and method for setting the rate by the Librarian of Congress in that proceeding was upheld by the District of Columbia Circuit and remains applicable to this proceeding, the Librarian specifically noted that changed factual circumstances considered by that standard might justify adjusting the rate in future proceedings. Fifteen years later, every relevant change in circumstance indicates that the royalty rate should be lowered.

First, the Librarian correctly used the sum of the services' license rates for the digital performance of the underlying musical compositions paid to ASCAP, BMI and SESAC to establish the highest possible reasonable rate for the equivalent digital sound recording performance license. The Librarian relied upon the CARP's estimate of ten percent of

revenues as the sum of the maximum likely composition performance licenses. That figure was estimated because certain of the licenses were in a period of negotiation and litigation, and therefore had not been finally set. Nor had there been a history of final rates during prior periods because the services were new at the time. As it turned out, the CARP's estimate was too high. In fact, the sum of Music Choice's current license fees paid to ASCAP, BMI and SESAC is [[REDACTED]] of the estimate upon which the original rate was based. This change in circumstance alone warrants a significant reduction in the sound recording performance rate.

Next, the Librarian considered the various evidence relevant to the policy objectives contained in the statute, and used those considerations to set the reasonable royalty rate at 6.5 percent, or 65 percent of the highest estimate of the aggregate musical composition rate. Changes in circumstances during the intervening fifteen years, however, have only strengthened Music Choice's case under each of the policy factors, discussed below. Consequently, the rate should be adjusted to less than 65 percent of the composition performance benchmark. I believe the rate should be adjusted to [[REDACTED]] of this benchmark as discussed below.

For example, the evidence of the benefits to the record labels from the Music Choice service is much stronger now than it was at the time of the original CARP. Our service drives record sales, particularly in genres for which the labels most need the help. The record labels themselves have repeatedly acknowledged these key facts. It is clear that Music Choice, to a far greater degree than in 1996, promotes artists who work in genres outside the top-40 mainstream, who are not promoted by terrestrial radio and are therefore at the greatest risk of losing their recording contracts. In 1996, Music Choice only made 31

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channels available to its customers. All of the channels added to its product offering since that time play music in genres and sub-genres not likely to be played virtually anywhere in the United States over terrestrial radio and therefore provide a major promotional benefit that would not have otherwise occurred without Music Choice. By helping keep these at-risk artists in their contracts and therefore releasing new albums, our service leads to the net creation of more music and in a more diverse array of genres.

Over the last fifteen years, Music Choice has continued to invest in technology and improvements to the Music Choice service, particularly in improvements like on-screen display of promotional graphics and information about the sound recordings being broadcast, information and trivia about the artist and song, and incorporation of social media and features such as live user texting on-screen to promote user engagement with the music content featured on the channels, all of which have increased the promotional value of our service to the record labels. Recent surveys have shown that our subscribers are highly satisfied with the programming and frequently view the on-screen information about the song and artist. Since the first CARP it has become increasingly clear that Music Choice provides numerous acknowledged promotional benefits, at no additional risk, to the record labels and artists. In fact, studies consistently show that Music Choice listeners buy much more recorded music than non-Music Choice listeners.

At the same time, Music Choice's residential business has not been stable or profitable on a cumulative basis, and shows no prospect for any meaningful additional growth. While the business has grown since 1996 in terms of overall revenue and subscribers and has, in certain years, finally generated a modest profit on an annual basis, the overall business is still basically flat and is expected to operate at a loss on an annual

basis for at least the next few years. Twenty years after launch, the residential service is a mature business, with no new expectation or avenue for market growth. Various market forces have driven the average fee per customer paid to Music Choice for its residential audio service down from [[REDACTED]] at the time of the first CARP, to [[REDACTED]] at the time of the last CRJ proceeding, to a mere [[REDACTED]] today.

Since the time of the 1996 CARP proceeding, Music Choice has been subject to increasing competition, which further reduces our negotiating leverage. We have faced competition in the residential audio market from much larger companies like Sirius XM, new market entrants such as Stingray Digital (Galaxie Music Service), and “over-the-top” (“OTT”) providers such as Pandora and iHeartRadio, which are available in the home through Internet-connected television and Internet-connected devices. The limitation on cable bandwidth into the home means that Music Choice is also in direct competition with non-music services to be a part of the cable operators’ channel lineups. And consolidation in the cable industry gives each multiple system operator (“MSO”) more leverage in their negotiations with content providers. As noted above, the fact that Music Choice has MSO partners is irrelevant -- negotiations between Music Choice and its MSO investors are arms-length, without any unique benefit to either party. Nor does EMI or Sony being partners in Music Choice inure to Music Choice’s benefit in securing music content.

Our attempts over the years to increase our profitability through advertising revenue and other initiatives have failed. To maintain its viability as a business, Music Choice has been developing supplemental video services, such as an on-demand music video service (“VOD”) and the SWRV video channel for our cable affiliates, which are not covered by the statutory license and present their own significant challenges. Even though [[REDACTED]]

[REDACTED]
[REDACTED]
[REDACTED]]]. After twenty years as a stand-alone company, the Music Choice residential business is still not profitable on a cumulative basis and still has not returned the initial capital investment of its investors. Music Choice has been unfairly burdened with the existing rate, and if that rate is left in place, Music Choice may never be able to provide a fair return on our investors' capital.

Finally, it is clear that reducing the royalty rate will minimize the disruptive impact on the industries involved. Music Choice is still a very small company, both in size and in revenues. Lowering the royalty rate will help Music Choice withstand the various market pressures it is experiencing. Any resulting reduction in revenues to the record labels (which would still provide more revenue than if Music Choice were forced to discontinue its service), would represent a tiny fraction of the labels' overall revenues and would not even be felt by that industry. Notably, the record labels do not incur any additional costs in connection with the Music Choice service. Every penny paid to them by Music Choice is pure profit, generated at significant cost and risk to Music Choice.

After consideration of the marketplace benchmark provided by Music Choice's musical composition performance licenses, the sound recording performance licenses between Music Choice and three of the major record labels, and the statutory policy objectives, the sound recording performance license rate for Music Choice should be reduced to 2.6 percent.

With respect to the Section 112 royalty for ephemeral copies, it is clear that these copies have no independent economic value to Music Choice, any other digital music service, or even the record labels themselves. I am not aware of any marketplace performance license in which the record labels have ever collected fees for ephemeral copies in addition to the performance fees. In recognition of this marketplace reality, all agreements of which I am aware that cover the ephemeral right have folded the ephemeral copy fee into the performance fee, merely designating a certain percentage of the performance royalty as attributable to the ephemeral license. Music Choice suggests that the ephemeral rate should be, as it consistently has been, included within the 2.6 percent rate. If the Judges find that they must set an independent rate for the Section 112 license, the rate should be a nominal flat fee of \$100 per year, which is consistent with the lack of actual independent value placed on the right in the marketplace.

Finally, the various regulations associated with the PSS license have been in place, substantively unchanged, for many years. Both Music Choice and SoundExchange have ample experience operating under the current regulations, and there have been no problems sufficient to warrant any change to those regulations in this proceeding.

The following outlines Music Choice's rate proposal in more detail including (i) the appropriate marketplace benchmark to set the highest possible reasonable royalty rate for Music Choice, and (ii) the downward adjustment in that benchmark warranted through application of the statutory policy objectives:

I. Marketplace Benchmarks For The Digital Performance Right

For the reasons I discussed above regarding Music Choice's status as a PSS, and the extreme differences between the market for Music Choice's residential audio service and all

other digital music services, there simply is no other music service sufficiently comparable to provide a fair benchmark for the marketplace value of Music Choice's sound recording performance right. Music Choice's musical composition licenses grant the exact same right (public performance) for the exact same service (Music Choice's residential audio service). The only differences between the two licenses are that (1) the Section 114 license is more limited, due to the sound recording performance complement and various other restrictions on our programming such as the prohibition on pre-announcement of playlists; (2) the music composition licenses, in the aggregate, cover all of the music we play, while the Section 114 license does not cover pre-1972 sound recordings or recordings we make ourselves in our studios (at no cost to the record labels); and (3) a different, but related, music copyright is being licensed. The first two differences make the Section 114 license less valuable to Music Choice than the musical composition license. The third has no impact on value whatsoever. The two rights are not only related, but interconnected. Indeed, the Section 114 license would be unusable, and consequently worth nothing, if Music Choice did not also secure the musical composition performance rights.

The only marketplace points of reference remotely usable in connection with the four policy factors of Section 801(b) remain, as the Librarian of Congress recognized, Music Choice's musical composition performance licenses and, to a lesser degree, the voluntary agreements Music Choice entered into with three major record labels prior to the institution of the sound recording performance right.

1. Music Choice's Licenses With Record Labels

In 1993 and 1994, prior to the creation of the digital performance right, certain of the major record labels, namely Warner Music Group, Sony Music and EMI Music, invested in

Music Choice. In connection with that investment, and for the purpose of establishing that there was a recognized value to the performance of sound recordings, the record labels insisted that Music Choice agree to pay those labels a license fee. At the time, Warner, Sony and EMI collectively controlled over two-thirds of the market for sound recordings and therefore had significant bargaining power. Also, Music Choice was desperate to add partners that would contribute capital to the company and the music companies were willing to do so – partially in trade for Music Choice agreeing to a royalty rate at the requested amount. The royalty rate was two percent of revenue, adjusted for the percentage of each record company’s music played on the Music Choice service so that two percent would cover the entire record industry. Copies of these licenses are submitted as Exhibits MC 3, 4 and 5. Although these royalty payments were agreed to before there was an independent obligation to pay for the performance of sound recordings, I believe based upon my experience negotiating these deals that the two percent rate (allocated among the whole record industry) represented the value the record labels hoped to place on the sound recording performance right.

2. Music Choice’s Composition Performance Licenses

The Librarian set the highest possible reasonable rate as the sum of all three blanket licenses from ASCAP, BMI and SESAC for the performance of the musical compositions. Although those licenses covered a different (but related) copyrighted work, the underlying musical composition performed in the sound recording, the Librarian used the composition performance licenses as the benchmark because (1) they covered the exact same licensee for the exact same service and the exact same right (public performance); and (2) extrinsic evidence

indicated that the marketplace value for the composition right was equivalent to or greater than the value of the sound recording right in analogous scenarios.

Based upon my knowledge and experience in the music industry, and my research and inquiries into the licensing practices of other copyright users, I still believe that where both the sound recording right and composition right are licensed for programmed, performance-based music services, the royalty rate for those licenses is equivalent or the rate for the composition right is slightly higher. The equivalence between fees for the sound recording and music composition rights is supported by the rates set in Canada and Europe.

a. Canada

In Canada rates have been set by the Copyright Board of Canada (“CBC”) for many different music performance services, including terrestrial radio, non-interactive webcasting, cable music services, satellite music services and others. Although the specific rates for these different types of services vary according to their differing market characteristics, as would be expected, the ratio of the musical composition performance royalty rate to the sound recording performance royalty rate is always equivalent, adjusted only for differences in the percentage of the total available catalogue represented by the respective collecting societies. In these various proceedings, the sound recording rights holders are represented by Re:Sound (formerly called NRCC), and the musical composition rights holders are represented by SOCAN.

In these proceedings, the CBC has repeatedly and consistently found that the performance royalty rates for sound recordings and musical compositions have equivalent value, adjusted only for the relative catalogue coverage of the respective collecting societies. In an early example, NRCC participated in a proceeding to set performance royalty rates for commercial radio, shortly after sound recordings were first given a performance right in Canada. A copy of the CBC’s 1999

rate decision in that proceeding is attached as Exhibit MC 6. In that decision, the CBC used the existing musical composition rate for commercial radio as a benchmark to set the new rates for the sound recording performance right. (MC 6, pp. 30-33).

Similarly, in 2002 the CBC set both the sound recording and musical composition royalty rate for cable music services. A copy of the rate decision in that proceeding is attached as Exhibit MC 7. In that proceeding, the CBC (noting various prior precedent) found that the musical composition and sound recording performance rates should be equivalent. (MC 7, p. 14).

More recently, in 2009, the CBC set the musical composition and sound recording performance rates for satellite music services in Canada. A copy of the rate decision from that proceeding is attached as Exhibit MC 8. In that case, both the music publishers and the record labels agreed that their respective royalty rates should be equivalent, based upon established precedent, again adjusted for catalogue coverage. (MC 8, pp.50, 58).

And most recently, in July 2011, the CBC set the sound recording and musical composition royalty rates paid by the Canadian Broadcasting Corporation for radio services. A copy of the rate decision from that proceeding is attached as Exhibit MC 9. In that proceeding, all parties (including the record labels) as well as the CBC agreed that the sound recording and musical composition rates should be equivalent. (MC 9, pp. 4, 6, 15, 17, 30).

b. Europe

In the first CARP proceeding, Music Choice introduced a study conducted on behalf of Music Choice Europe (“MCE”), an affiliated company at that time, which provides a very similar service to ours in Europe. The study was conducted for the purpose of allowing MCE to negotiate its performance licenses in Europe, where there already was a sound recording performance right. A copy of that study is submitted as Exhibit MC 10. That study shows that the

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average royalty paid for the sound recording performance right is equal to or less than the royalty paid for the composition performance right. In 2002, as we were preparing for the second CARP proceeding that ultimately settled, we again contacted MCE and to our understanding the respective rates actually being paid across Europe by MCE for the sound recording performance right were roughly equal to the royalty rates paid for the composition right.

More recently, in the United Kingdom, the performance license rates charged to terrestrial radio and other music services for the right to perform musical compositions and sound recordings are administered by The Performing Rights Society (“PRS”) and Phonographic Performance Limited (“PPL”), respectively. The sound recording performance royalty rates in the UK for commercial broadcasting services, including terrestrial radio and cable music services similar to Music Choice, are less than the rates for the musical composition performance rights. For example, if Music Choice’s service were transmitted through cable in the UK, Music Choice would pay 5.25 percent of 85 percent of gross revenue for the musical composition performance right but would only pay 5 percent of 85 percent of gross revenue for the sound recording performance right. Copies of the rate schedules from the PRS and PPL websites, reflecting those rates, are attached as Exhibit MC 11.

Like the United States and Canadian systems, European rates may be set by a government body in the absence of industry agreements. In the UK, that entity is the Copyright Tribunal. In 2007, the UK Copyright Tribunal set the musical composition performance royalty rates for webcasters. A copy of that Tribunal decision is attached as Exhibit MC 12. As a preliminary matter, that decision notes that the rates were set pursuant to a marketplace, willing buyer / willing seller standard. (MC 12, ¶ 49). The Tribunal noted that where a music service requires a performance license for both sound recordings and the underlying musical compositions, the

Tribunal has repeatedly “held that (a) these two types of rights are legitimate comparators, and (b) there is no reason to treat one as being qualitatively superior to the other.” (MC 12, ¶ 53). Consequently, the Tribunal used the existing webcaster sound recording royalty rates as a benchmark and set the musical composition rate for non-interactive (or “pure”) webcasting at the greater of 5.75 percent of gross revenue or .055p per stream. The sound recording royalty for non-interactive webcasting did not have a percentage of revenue metric, but was (and still is) .058p per stream. A copy of the current webcasting FAQ and rate schedule, published by PPL, is attached as Exhibit MC 13.

Recently, PRS has revised the musical composition performance rate for webcasters, raising the percentage of revenue rate to 6.5 percent, and slightly lowering the per-stream minimum to .05p. A copy of the current PRS webcasting royalty rate schedule is attached as Exhibit MC 14. It is not clear whether PPL will also lower its per-stream rate in response, particularly because it does not get a percentage of revenue royalty and cannot institute the equivalent raise in that component of the rate charged by PRS. In any event, the musical composition and sound recording performance rates for webcasting in the UK (and by extension many other countries in the EU) remain equivalent.

Notably, in the last Section 115 rate proceeding (in which the record labels are the statutory licensees) the RIAA argued strongly that UK and other foreign royalty rates were good benchmarks for setting the equivalent United States rates. Copies of the written testimony of Richard Boulton and Geoffrey Michael Taylor, submitted by the RIAA in that proceeding, are attached as Exhibits MC 15 and 16. I do not believe that the particular license rates in Europe and Canada necessarily determine what the specific market rate in the United States should be for the sound recording right. However, comparison of the

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respective foreign rates in each country, apples to apples, for the sound recording and musical composition performance rights *does* demonstrate that when both rights are licensed in the same country for the same type of performance, the value attributed to the performance of the sound recordings, relative to the value attributed to the performance of the underlying musical compositions, is equivalent.

Because there have not been any other comparable marketplace licenses negotiated since the first PSS CARP, the sum of the musical composition blanket license rates paid to ASCAP, BMI and SESAC remains the best marketplace point of reference to set the highest possible reasonable rate for the PSS sound recording performance license. The relevance of the composition licenses was previously determined by the Librarian of Congress and affirmed by the District of Columbia Circuit. However, the Librarian had to rely upon the CARP's estimate of that aggregate rate because Music Choice had no licenses with BMI or SESAC at the time, and only an interim license with ASCAP. The ASCAP interim rate was a temporary rate, set as a placeholder during the first negotiations with ASCAP, and was the subject of a rate proceeding at the time of the CARP. Nor was there a history of prior final rates, because Music Choice was (at the time) a new service. The Librarian used the high end of the CARP's estimate of the aggregate musical composition performance license fees, ten percent of gross revenue, as the highest point in the benchmark range of possible reasonable rates.

The actual rates now paid by Music Choice to ASCAP, BMI and SESAC, however, are much lower than the estimate used by the Librarian. Music Choice pays 2.5 percent each to ASCAP and BMI, and pays [REDACTED]

[REDACTED]

[REDACTED]

performance licenses (10 percent of revenues), or 6.5 percent of revenues. Even if changed circumstances had not strengthened Music Choice's case for a lower rate under the statutory policies, the use of actual data instead of an estimate for Music Choice's composition performance licenses, alone, justifies a change in the rate from 6.5 percent to 65 percent of [[REDACTED]], or [[REDACTED]]. Circumstances *have* changed, however, and in ways that warrant a further reduction of the statutory license rate to a maximum of [[REDACTED]] of the benchmark, or 2.6 percent of gross revenues, a rate very close to the 2 percent rate Music Choice actually negotiated with three of the major record labels. This rate is further supported by the testimony of Dr. Gregory Crawford, submitted as part of Music Choice's written direct case. I will address each of the statutory policy objectives in turn.

A. To Maximize The Availability Of Creative Works To The Public

Music Choice maximizes the availability of creative works to the public in a number of ways, and to a much greater degree than it did at the time of the first CARP, or even the prior CRJ proceeding. First, Music Choice invests a significant amount of creative effort and expense in creating its channels. Since the time of the original CARP, Music Choice has expanded its channels from 31 to 46, and we are planning to expand that lineup to over 300 channels during the first quarter of 2012, thereby significantly expanding the output of our residential programming and greatly increasing the amount of its creative works made available to the public through the Music Choice service. Virtually none of the channels added to complete the new 300 channel lineup are in formats made available anywhere in the United States by terrestrial radio. Copies of the current Music Choice channel lineup and the planned expanded lineup are submitted as Exhibit MC 22.

As further described in the testimony of Damon Williams, each of these channels is programmed by individuals with deep musical knowledge and experience (not the automated algorithms used by others), in a creative manner calculated to appeal to listeners. Each day of programming is the product of thousands of creative choices in the selection and ordering of many individual songs. Indeed, because of the creative work that goes into each day of Music Choice's programming, the music channels created by Music Choice constitute creative works in their own right and have value independent of the underlying sound recordings. Given that all music broadcast services have access to the same sound recordings, Music Choice's creative contribution of selecting and sequencing the songs performed on its channels is a primary way that Music Choice differentiates itself from its competition and provides value to customers, which is a key factor in our ability to charge higher rates than our competitors. Recognizing the importance and value of this crucial function, we have greatly increased the size and depth of our programming and content staff, from 16 in 1996 to 43 today, with a planned increase to 58 by 2017. We also use programming consultants in addition to our staff, and have 9 such consultants presently working with us. We have another 22 employees dedicated to various creative production duties resulting from our service enhancements and expansions, and this number is expected to grow to 32 by 2017.

Each channel also includes original on-screen content created by Music Choice, including not only promotional information designed to promote sales of the recordings, but also creative visuals and graphics, designed to stimulate customers to look at the screen and become personally engaged with the music (via texting, social media, etc.), all to the benefit of the record labels. Music Choice did not produce any of this content at the time of the first CARP. As described in the testimony of Damon Williams, recent surveys have shown that our customers

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frequently view the promotional information displayed on the television screen during play, and that a majority of our customers value being exposed to new artists and songs via Music Choice's programming. Examples of Music Choice's on-screen layouts are submitted as Exhibit MC 23. Music Choice has increased its programming and content creation costs from \$1.2 million in 1996 to [[REDACTED]] this year.

The Music Choice service also drives the creation of new sound recordings. As described in more detail below and in the testimony of Damon Williams, the Music Choice service promotes and increases the sale of sound recordings, as acknowledged by the record labels and artists themselves. The promotional effect of the Music Choice service is also proven by the conduct of the record labels, which provide Music Choice with free copies of every new recording and actively seek to have those recordings played on Music Choice and to work with Music Choice on other value-added artist promotions, all of which increases artist exposure and record sales. This behavior has increased substantially since the original CARP. The labels would obviously not work so hard to get us to play their records if airplay on Music Choice did not have promotional value. Likewise, they would not develop the special promotions with us if those promotions were not effective. Music Choice's contribution to increased sales, which costs the record labels nothing, obviously leads to an increase in the record labels' profits, which in turn gives the labels more money to sign and produce new artists. While this fact is relevant to the other policy objectives, discussed below, it is also relevant to the first objective because our service promotes many artists that cannot be promoted by the labels themselves or by terrestrial radio.

The labels have chosen to organize their business in a way that only allows them to focus their promotional activities on a very small fraction of the artists who they believe are

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most likely to be successful. This often becomes a self-fulfilling prophecy: without promotion new recordings do not sell in any significant number. At the same time, the number one promotional vehicle for sound recordings, terrestrial radio, has been significantly consolidated over the past ten years. A small handful of companies now own almost all of the radio stations. To achieve economies of scale, programming responsibilities have been consolidated. Moreover, in order to promote the few signed artists predicted to succeed, as noted above, the labels encourage the radio stations to play the new recordings from those artists, to the exclusion of others. All of these and other factors have led to a broadcasting landscape where there are few programming formats played on the radio, which leads to fewer and fewer songs getting radio airplay.

The Music Choice service is free of these limitations, because the service programs 46 (and soon hundreds of) different stations available through its residential audio service, covering a wide variety of genres and sub-genres, including many formats that do not receive significant, if any, airplay on terrestrial radio. Consequently, and as explained further in the testimony of Damon Williams, the Music Choice service helps sell recordings by artists who would otherwise be much less likely to succeed. When an artist's album does not sell a large number of copies the artist is usually dropped by the label, a fate common among artists who are not actively pushed by the labels and not played in heavy rotation on terrestrial radio. Therefore, the sales generated by exposure on Music Choice allow artists, who otherwise might fail, to keep their recording contracts and create new recordings.

This key promotional effect is much greater now than it was at the time of the original CARP, in part due to the expansion of our channels, noted above, and our increase in subscribers from about two million at the time of the first CARP to almost 52 million

today. Additionally, we have greatly improved various features of the service that promote record sales. For example, as noted, we have significantly increased the promotional information displayed on the television screen when a recording is played (which did not even exist at the time of the first CARP), and also redesigned the screen to add high definition graphics, texting and other user generated content, so that the customer is more likely to view the screen while listening.

Finally, the CARP and Librarian found that the Music Choice service presented no risk of displacing record sales. This is still true. The Music Choice service complies with the sound recording performance complement, which is specifically designed to avoid such sales displacement. It would be very inconvenient for a Music Choice customer to try to record our broadcasts, and even if they did, we do not pre-announce our playlists, so a customer would not know which songs they were going to record. Any recording made would also be a lower-quality analog recording, not a digital one. There are far easier ways for a consumer who wants free music to get it, including digital file sharing or on-demand streaming services such as Spotify or Grooveshark. There is simply no reason to believe that our service displaces sales.

B. To Afford The Copyright Owner A Fair Return For His Creative Work And The Copyright User A Fair Income Under Existing Economic Conditions

Under existing economic conditions and the current royalty rate, Music Choice is not earning a fair income. As will be discussed in more detail below, Music Choice is struggling in an increasingly competitive market. Not only is Music Choice competing with the rest of the cable television lineup for carriage with cable companies, but it is also competing with

other residential music offerings that enter the marketplace from time to time, including, those provided by Sirius XM Radio, a new Canadian competitor, Galaxie, and over-the-top (“OTT”) providers like Pandora available through Internet-connected televisions or other devices. These competitive pressures, combined with consolidation in the cable industry, have given MSOs significantly more leverage in negotiating fees, resulting in Music Choice’s revenue per subscriber for its residential audio service falling steadily over the past fifteen years from [[REDACTED]] in 1996 to [[REDACTED]] today.

The Music Choice residential business has still not become profitable on a cumulative basis, after fifteen years of paying the royalty. We will not be able to return our investors’ capital investments, much less provide any additional return on those investments, for some time, rendering it difficult to attract any new capital. In contrast, every penny paid to the record labels for this statutory license is pure profit. The labels do not invest any additional capital or incur any additional costs in connection with the royalty they get from us. Under these circumstances, this policy objective clearly weighs, along with the others, in favor of lowering the rate paid by Music Choice.

C. To Reflect The Relative Roles Of Copyright Owners And Users In Making The Product Available To The Public With Respect To The Relative Creative Contribution, Technological Contribution, Capital Investment, Cost, Risk And Contribution To The Opening Of New Markets For Creative Expression And Media For Their Communication

The Librarian construed “the product made available to the public” as referring to both the sound recordings and the Music Choice service, and went on to find that all but the first sub-factor favored Music Choice and weighed in favor of setting a lower rate. The

intervening years have only made Music Choice's case for a lower rate stronger. A discussion of each of the sub-factors follows:

1. Relative Creative Contribution

In the original CARP, the Librarian adopted without comment the CARP's conclusion that the record labels' and artists' creative contribution to the creation of sound recordings was greater than Music Choice's creative contribution to its service. In the intervening years, however, Music Choice has greatly increased its creative contribution to the service. As noted above, we have increased the channels offered through our service from 31 channels to 46, with plans to expand further to over 300 in the first quarter of 2012. Virtually all customers with access to the Music Choice service currently receive all of our channels. Each of these channels is individually programmed, based upon many creative choices in the selection and ordering of songs. Music Choice also has increased the quantity and quality of its on-screen visual content included with the service. In 1996, we had no on-screen component of our service other than an essentially blank screen, with basic song identification information. Now, we produce original, high definition on-screen panels, designed specifically to increase consumer awareness of the artists and promote their music. Music Choice also develops and produces, at its own expense, various promotional content for broadcast in partnership with the record labels and artists, such as on-screen advertisements, artist interviews, shows, live performance recordings and other types of creative content.

In short, Music Choice's creative contribution to its service is much greater than was the case in 1996 and goes far beyond the mere "programming concepts" noted by the Librarian.

2. Relative Technological Contribution

In the original proceeding, the CARP and Librarian found that this factor weighed in favor of Music Choice, based upon the fact that Music Choice had created various technological components of its system for the purpose of opening new avenues for transmitting sound recordings to a larger and more diverse audience. This technology included technology to uplink the programming signals to satellites and transmit them through cable services, technology to identify the name of the sound recording and artist during the performance, and technology for programming, encryption and transmission of the programming containing the sound recordings. The CARP and Librarian contrasted these technological contributions with the fact that the record labels created no new technology related to the Music Choice service.

Music Choice has made numerous additional technological contributions to its service since the original CARP, designed to further increase the exposure of the sound recordings to new and larger audiences, and specifically to enhance the promotional value of the service to the record labels. Examples include the previously described improvements to the on-screen displays containing promotional information about the song and artist; the creation of production studios where artists visit and record the value-added promotional recordings discussed above that are featured on the Music Choice service, improvements to the digital playback system to improve the programmers' flexibility to provide deeper music lists and more interesting mixes on more channels; the creation of data center and disaster recovery systems necessary to operate a 24/7 network and improvements in the Music Choice website, including functionality allowing customers to purchase CDs and downloads of songs played on the Music Choice service. We have also continued to improve the satellite uplink and other technologies noted

by the CARP and Librarian, to put more channels on satellite for distribution. We have also developed technology to integrate our residential audio service with various social networking platforms, such as Twitter and Facebook, as well as texting, all to promote customer engagement, which in turn increases the promotional value of the service to the record labels and artists. We are currently in the process of developing, partially at the record labels' request, new functionality to [[REDACTED]].

3. Relative Capital Investments

This factor is closely related to the prior factor, because each of the improvements listed above required significant financial investments. In finding that this factor weighed in favor of Music Choice at the time of the first CARP, the CARP and Librarian noted that Music Choice had spent \$10 million on equipment and technology, while the record labels had not invested any money at all with respect to the equipment and technology used to transmit their sound recordings to the public in connection with our service. While the record labels still have not had to make any investments in equipment or technology to facilitate Music Choice's transmission of their sound recordings to the public, Music Choice, as noted above, has made substantial additional investments since the original CARP for equipment and technology. Examples include [[REDACTED]] to develop our on-screen displays containing the promotional artwork and information described above; [[REDACTED]] in the creation of an office and production studio in Manhattan where artists visit and record value-added promotional recordings that are in turn featured on the Music Choice service, [[REDACTED]] to build the new digital playback system referenced above and to move the system to Manhattan; and [[REDACTED]] to improve the Music Choice website.

From 2007 through 2010, Music Choice has spent an additional [[REDACTED]] on product development, product enhancement and infrastructure. So far in 2011 alone, we have invested an additional [[REDACTED]] in these areas, with another [[REDACTED]] in spending committed through year end. Music Choice's total investment in these areas is now over [[REDACTED]] times the original investment noted by the CARP and Librarian.

4. Relative costs and risks

The CARP and Librarian properly found that the costs and risks incurred by Music Choice outweighed any costs and risks incurred by the record labels for the purpose of this factor. In particular, the Librarian noted that the Music Choice service actually decreased the risk to the record labels by promoting record sales. Fifteen years later, the relative costs and risks weigh even more in favor of allowing Music Choice a lower royalty rate.

(a) Music Choice lowers the record labels' costs

As a preliminary matter, it is important to note that all of the costs incurred by the record labels in connection with their sound recordings are sunk costs. As previously noted, the Music Choice service does not increase those costs in any way. In fact, Music Choice substantially lowers the cost to the record labels for the promotion of their sound recordings. As described in more detail above and in the testimony of Damon Williams, Music Choice provides various value-added promotions to the record labels and artists. The record labels frequently thank us and recognize the promotional value they receive. These special promotions, which began after the original CARP proceeding, are provided free of charge to the record labels.

(b) Music Choice lowers the record labels' risks

The Librarian correctly noted that even back in 1996, the Music Choice service lowered the record labels' risk by increasing record sales. This fact is even more true today, as the promotional impact to the record labels is much stronger, as described in more detail in the testimony of Damon Williams, and mentioned above with respect to maximizing the creative works made available to the public.

(c) Music Choice continues to incur significant costs and its risks have increased

The road to financial viability upon which Music Choice has traveled – and continues to travel – is neither straight nor short. For almost 25 years, Music Choice has struggled to launch, sustain, and grow our domestic residential services in a highly competitive and rapidly changing marketplace. To date, our investors have invested over [[REDACTED]] of capital to fuel our continuing operations. Significantly, Music Choice has dedicated this capital to deploy domestic residential services that provide invaluable promotional benefits to the record industry.

Despite our best efforts, we have not yet recouped accumulated losses from our domestic residential operations, and we will not likely do so for several years, if at all. In the first CARP proceeding, we submitted a proposed five-year budget in which we projected domestic residential operations of Music Choice would achieve over \$75 million in total gains between 1996 and 2001. Unfortunately, our domestic residential operations actually incurred additional losses of [[REDACTED]] during that period.

[[REDACTED]]

[[REDACTED]] Business has

been relatively flat over the last decade and our financial future remains as uncertain as ever. On a cumulative basis, accounting for the years of losses experienced prior to 2001 and more recently, the Music Choice residential business has still not become profitable. As of the end of 2010 Music Choice had a cumulative loss of [REDACTED]

[REDACTED] The above projections assume a best case scenario, however it is very possible that we could lose significant business during this license period as described in more detail below in our downside financial scenarios, thereby significantly worsening our cumulative losses. Any improvement in our future cumulative loss position is dependent upon the success of our new products (such as SWRV), which have yet to be proven and, as evidenced by our present financials, past attempts to generate new revenue have proven unsuccessful. Further, any success in these products will inure to the benefit of the record labels [REDACTED].

Since the last CARP, Music Choice has relied almost exclusively upon licensing fee revenues from cable operators to sustain its operations, albeit at levels far below our investors' expectations. As our licensing fee rates have been driven down, Music Choice attempted to develop an advertising program and other revenue streams, but those efforts have been unsuccessful. I believe that our revenues, profitability and return on investment for the residential service will continue to be limited to, and constrained by, our licensing fees. We have continuously tightened our belts as a company during our 20 years of operation. In response to increasing competition and extreme downward pressure on the rates we can charge for our service, we have run a very lean operation.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Music Choice's domestic residential services face increasing competition in a rapidly changing marketplace. As previously noted and described in more detail below, Music Choice competes for customers, listeners, and advertising revenue with many businesses, including traditional AM/FM radio and digital AM/FM radio, Galaxie (a Canadian entrant to the United States marketplace with low prices), Internet-based audio providers and other actual or potential DBS and cable audio service providers. We must also compete with major cable network channels, such as ESPN, for licensing fees and bandwidth from the cable carriers.

Traditional AM/FM radio already has a well-established and dominant market presence for its services and generally offers free broadcast reception supported by commercial advertising, rather than by a licensing fee. These radio stations are currently enhancing their existing broadcasts with additional digital quality services utilizing new technology. These incumbent providers of audio entertainment services typically maintain longstanding relationships with advertisers and possess greater resources than Music Choice does.

Galaxie is a Canadian digital pay television audio service owned by Stingray Digital, which purchased it from the Canadian Broadcasting Company. Galaxie has recently expanded its efforts to compete in the United States cable market and has made significant inroads by offering low rates (though not necessarily as broad a service offering) as well as other perquisites like free

satellite receivers and VOD equipment to cable carriers. As with XM's and Sirius's entry to the market, discussed above, Galaxie merely hands off its existing programming (programmed for the Canadian market) to U.S. cable companies. As recognized in the CBC's rate decision for the Canadian cable audio license, the cable audio market in Canada is radically different, and more profitable, than the market in the United States. (MC 7, p. 3). In just the last few months, [[REDACTED] [REDACTED]].

Pandora and other "over-the-top" ("OTT") content providers represent a new competitive entrant into the residential audio market. Over-the-top refers to the delivery of video and audio to a consumer's television without the MSO being involved in the control or distribution of the content itself. Consumers are increasingly accessing OTT content on their television through Internet-connected devices such as PCs, laptops, tablets, set top boxes and gaming consoles, not to mention Internet-connected televisions. For example, Verizon's FIOS television service carries Pandora and iHeartRadio, as well as Music Choice, to their subscribers, but delivers the services through the set top box via its fiber-optic cable and outside of the cable television pipeline. The rise of the Internet-connected television will make direct access to audio programming by residential consumers more prevalent, and may cause MSO's to rethink the need to carry and pay Music Choice separately for what their consumers can access on their television for free. Recently, Spotify, a very popular service in Europe, entered the US music streaming market. And in November, Google and Apple, the twin 800-pound gorillas of the technology world, both announced music streaming services. GoogleTV promises to effectively bring the entire Internet and all of its music delivery services (*e.g.* Pandora, LastFM, Spotify, Live365, Shoutcast, etc.) to the television. If a significant portion of residential music consumers shift to OTT content, the economic impact on cable delivery will be enormous.

To illustrate the potential impact of competition on our business model, we need only look to the past. Between October 1994 and November 2005, Music Choice was carried on DIRECTV, a satellite provider of television services. [[REDACTED]]
[[REDACTED]] In November 2005, DIRECTV removed us from their platform and replaced our music channels with those from XM Satellite Radio, which merely handed off its already existing satellite radio music channels. That affiliate loss alone resulted in our net income dropping by approximately [[REDACTED]] on an annualized basis.

[[REDACTED]]
[[REDACTED]]
[[REDACTED]]

Music Choice Is A Capital Intensive Business.

In the original CARP proceeding, it was acknowledged that PSS companies required a tremendous capital investment to start operations and require significant ongoing operating capital to cover costs. That is certainly true in the case of Music Choice. Since January 1, 1998, Music Choice has required additional capital infusions of [[REDACTED]]. To date, our investors have had to make capital contributions of over [[REDACTED]] to fund the Company. The [[REDACTED]] capital contribution is [[REDACTED]] the investment contemplated in our original business plans. After twenty years, the Music Choice residential service has yet to earn back this original capital or provide any return on these investments and has no near term prospects for doing so.

Music Choice Has Accumulated Significant Expenditures and Losses Since the original CARP.

Although Music Choice has been providing domestic residential services for over twenty years, our accumulated operating expenses incurred through the end of 2010 exceeded accumulated revenues for domestic residential operations by over [REDACTED]. Given our continuing need to make additional investments to maintain and improve our service to compete in a difficult marketplace, we cannot estimate when, if ever, our accumulated revenues will exceed total operating expenses for domestic residential operations if we continue to pay the existing PSS rate.

Music Choice Has Made Substantial Investments in Services That Provide Invaluable Promotional Benefits to the Recording Industry.

In the original CARP, Music Choice indicated that it had dedicated approximately 97 percent of all operating expenses to “program, playback, uplink, market, and sell” Music Choice programming. At the time, more than 40 percent of those expenses were dedicated to marketing and sales related expenses used to obtain distribution of the service with cable systems.

Since the time of the last CARP, Music Choice has continued to make substantial investments in these services. From 1996 through the present, Music Choice has dedicated almost all of its operating expenditures to program, playback, uplink, market, and sell programming. Among other things, these operating expenses have been incurred to make all of the improvements I described above, which add to the promotional value of the service to artists and record labels. In total, Music Choice has invested approximately [REDACTED] over the past fifteen years to develop, market, program and operate the Music Choice residential service.

Music Choice's Financial Performance and Projections Strongly Suggest That We Will Only Be Marginally Profitable Under Our Current Basic Service Model.

Over the past fifteen years, Music Choice's financial performance strongly suggests that our basic service model will be only modestly profitable at best. In the original CARP, Music Choice testified that we had charged a price of \$2.50 when our domestic residential services were sold as a premium service (*i.e.*, a la carte). Once Music Choice migrated away from our unsuccessful premium service model, we started pricing our domestic residential services as a basic digital offering for \$1.00 per customer/per month. By 1996, Music Choice averaged only [[REDACTED]] per customer for its residential audio service and this number is now down to [[REDACTED]] per customer.

Even before the original CARP was completed, Music Choice began to experience downward pressure on licensing fees. Since completion of the original CARP, the downward pressure on licensing fees has only intensified. The financial data set forth in Exhibit MC 24 illustrates this trend quite clearly. Music Choice's domestic residential customer base has grown approximately 2600 percent from the end of 1996 through the end of 2011. In contrast, domestic residential revenues have only grown at approximately [[REDACTED]] the rate of our growth in customer base.

To further illustrate the downward pressure on rates, I have set forth the following chart, which breaks down the average (per customer/per month) rates for Music Choice's residential audio service at various points from 1996 to 2011, with projections under the two scenarios I mentioned above:

[[

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Current forecast	1996	1998	2002	2006	2011	2014	2017
(Assumes all affiliations continue through '10)							
Customers (.000's)	1,983	4,979	25,333	31,742	51,956	54,921	56,628
Fee/Customer/Mo (\$'s)	0.298	0.262	0.116	0.090	0.072	0.072	0.061

Downside #1 forecast	1996	1998	2002	2006	2011	2014	2017
(Assumes losing ATT in 2014 and 50 percent of all expiring agreements)							
Customers (.000's)	1,983	4,979	25,333	31,742	51,956	50,005	51,282
Fee/Customer/Mo (\$'s)	0.298	0.262	0.116	0.090	0.072	0.061	0.045

Downside #2 forecast	1996	1998	2002	2006	2011	2014	2017
(Assumes losing Cablevision in 2013, ATT in 2014, and 70 percent of all expiring agreements)							
Customers (.000's)	1,983	4,979	25,333	31,74	51,956	43,574	43,112
Fee/Customer/Mo (\$'s)	0.298	0.262	0.116	0.090	0.072	0.064	0.045

]]

As the above chart indicates, the average per customer licensing fee that Music Choice has been able to generate for its residential audio service has dropped significantly from the rate ranges set forth in the original CARP. Music Choice has experienced — and continues to experience — significant pricing pressure when we renegotiate licensing fee arrangements with cable affiliates, due in part to increased consolidation in the cable industry, [[

]]. At the same time, as described in more detail above, increased competition in the residential audio market has decreased our bargaining leverage. These downside scenarios have an even greater impact on our cumulative loss position — [[

[REDACTED]

[REDACTED]].

For the reasons noted above, we have learned that we can no longer depend upon customer growth or rate increases to generate additional revenues (and profits) on a going forward basis. At this level, Music Choice’s licensing fees will be insufficient to achieve cumulative profitability or any reasonable return on investment in the foreseeable future for Music Choice’s domestic residential operations if the sound recording royalty remains at the current 7.5 percent rate, or even the original 6.5 percent rate.

We Have Been Unable to Successfully Deploy a New Business Model to Ensure Our Long-Term Viability.

In 1997, the Librarian found that Music Choice and other digital audio services were “struggling to create an industry and to stay in that business.” That finding is equally true for us today. In the last CARP, we had submitted a proposed five-year budget in which we projected that our domestic residential operations would achieve over \$75 million in total net gains between 1996 and 2001. Unfortunately, the financial performance of our residential operations during those years yielded additional losses, leaving Music Choice’s accumulated losses in 2001 at [[REDACTED]]. As of the end of 2010, our accumulated losses have been reduced, but remain high at over [[REDACTED]]. As previously discussed, Music Choice has attempted to implement an advertising revenue model to supplement the declining license fee rates, but this model has failed to generate significant revenues.

Cost and Risk Summary

In summary, the financial history of Music Choice indicates that the Company has failed to recoup investment and costs as quickly as anticipated. While Music Choice’s

domestic residential services has occasionally generated a modest profit in certain years, this annual profitability has been sporadic and is in no way assured in the future. Moreover, on a cumulative basis, even after twenty years of operation, our residential audio business remains unprofitable and will remain so under the current rates for the foreseeable future.

A “snapshot” approach in this proceeding would provide little, if any, indication of Music Choice’s financial success and viability on a going forward basis. From our investors’ perspective, and in terms of return on their investments, the business has a long way to go towards being profitable. Indeed, the long-term profitability and viability of Music Choice is dependent upon its ability to overcome serious competitive, industry, and marketplace challenges in the next several years. The royalty rate set by the original CARP based on its erroneous estimate of the applicable composition performance fees has only exacerbated the pressures on Music Choice. A failure to lower the royalty will eliminate any realistic hope of achieving cumulative profitability and return on investment for our partners.

In contrast, the record labels have consistently remained profitable, even during recent periods of decreased unit sales. Moreover, according to recent Soundscan reports, overall unit sales have actually increased significantly this year, reversing the recent downward trend for the record labels. Copies of recent articles discussing the Soundscan report are attached as Exhibit MC 25. This factor continues to weigh strongly in Music Choice’s favor and justify a lower rate.

5. Relative contribution to the opening of new markets for creative expression and media for their communication

It was obvious to the CARP and the Librarian that Music Choice, by the very nature of its service, contributed more to the opening of new markets for creative expression for the

very same reasons discussed above, including providing greater exposure to a broader range of music than terrestrial radio and promoting record sales in that broader range. As I have described above, these features of the Music Choice service have greatly increased since the original CARP.

6. Conclusion on relative roles

The Librarian set the 6.5 percent rate in the original CARP proceeding based on his finding that the relative contribution of Music Choice in all but the first of the factors above outweighed the contribution of the record labels. For the reasons stated above, Music Choice's relative contribution in all five factors has greatly increased since that time.

D. To Minimize Any Disruptive Impact On The Structure Of The Industries Involved And On Generally Prevailing Industry Practices

In finding that this statutory policy objective weighed in favor of setting a lower rate, the CARP and Librarian found two factors particularly compelling. First, that setting a rate too high ran the risk of having a catastrophic impact on the preexisting subscription services. Second, because the record labels were so large and had so much revenue compared to the services, the difference between a high and low royalty for the services would have a negligible impact on the recording industry, if any. These facts have only increased in relevance and truth.

The rate set in the original CARP proceeding was obviously too high, in large part due to the CARP's inaccurate estimate of the services' composition performance right licenses. This is proven by the fact that of the three original services, only Music Choice remains a substantial force in this market. As noted above, DMX declared bankruptcy and sold off its assets. Muzak's residential service is inconsequential to its overall business. The

industry has been disrupted by the original rate, which must now be reduced pursuant to this policy objective. As I described above, this disruption has only been amplified by the nature of these rate proceedings, in which Music Choice as the sole surviving PSS must spend millions of dollars to avoid Sound Exchange's demands for massive rate increases that would put Music Choice out of business.

As explained in detail above, Music Choice's residential service continues to be marginal at best and faces increasing risks and competitive threats. The record labels remain much larger and continue to generate much more revenue than Music Choice, putting them in a far superior position to absorb the impact of a lower rate. The entire [[REDACTED]] in royalties Music Choice has paid the record labels over the last fifteen years amounts to less than [[REDACTED]] of the retail value of the labels' total shipment of sound recordings in 2010 alone, which was just under \$7 billion. A copy of the RIAA's 2010 year-end statistics, downloaded from the RIAA website, is submitted as Exhibit MC 26. In this context, it is clear that this policy objective weighs even more heavily than at the time of the original CARP.

Finally, setting a lower rate for Music Choice will not have any precedential value with respect to the record labels' negotiations or proceedings for other licenses. For example, in the 2006 SDARS proceeding rate decision, the Judges noted that respective markets for Music Choice and Sirius XM are so fundamentally different, including with respect to demand characteristics, that the Music Choice rate is absolutely unusable as a benchmark for the SDARS rate. These same fundamental differences exist when Music Choice's market is compared to that for any other music service. Section 114(f)(1) of the Copyright Act expressly provides that the terms and rates of the statutory license "shall

distinguish among the different types of digital audio transmissions.” The Librarian correctly held that “[t]his language gives the Panel and the parties broad discretion in setting rates for different types of digital audio services, when such distinction is warranted.”

III. Ephemeral License

The ephemeral license provided in Section 112(e) of the Copyright Act has no independent economic value to Music Choice. These copies are not sold or distributed, and are not used for any purpose other than to facilitate our licensed performances. I am unaware of any marketplace context in which the record labels seek, or get, a separate payment for ephemeral copies. Traditionally the ephemeral rate has been included within the section 114 performance rate, and a certain percentage of that royalty is apportioned to the section 112 license. Consequently, the ephemeral license fee should be included within the 2.6 percent fee for the performance license, and attributed a small percentage of that fee. If the Judges feel compelled to impose a separate fee for the section 112 license, however, the royalty should be set as a nominal \$100 flat fee per year, in recognition of the reality that such copies have never had any recognized incremental value in the marketplace.

Notably, we had to make such copies at the time of the first CARP. Although we operated the system using a CD jukebox, for the 60 to 70 percent of the recordings we featured on more than one channel, we made one to five copies of each recording. Those copies were not separately valued at that time. Nor did the record labels ever ask for a fee to make those copies. Although we no longer play directly from CDs and therefore make more overall copies for our current system, we still make far fewer copies than other digital broadcasters, such as webcasters, make. In our current system, a new song is first copied from a CD into the programming server array. That copy is automatically transmitted down to the

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playback server array and to a backup server array located at our corporate offices in Horsham, Pennsylvania. From there, the recording is copied to the playback and redundant Horsham playout computer for the channel in which the song is programmed. In all, this process creates five copies.

If a song is going to be programmed in multiple channels, this process is duplicated, resulting in five additional copies of that track for each extra channel on which it airs. Because we have increased our channel lineup and consequently program more narrowly focused formats, we now estimate that only approximately 15 percent of our music is programmed in more than one channel. Even fewer recordings are programmed in more than two channels. Due to this substantial decrease in the number of songs played across multiple channels, the great majority of our songs are copied only five times. Because some of the songs were copied five times under the old system, for a certain number of songs we do not make any more copies in the new system than we did at the time of the first CARP.

It bears repeating that none of these copies have independent value to Music Choice. It is clear that even the record labels do not consider the ephemeral license to have any independent worth to Music Choice. In our settlement of the second CARP proceeding, the record labels did not negotiate the rate separately, we specifically discussed with RIAA and SoundExchange that the copies provided no added value to our customers, and our resulting royalty rate did not break out the ephemeral license as a separate fee or even apportion a percentage of our performance rate to the ephemeral license.

The labels did a similar thing when they settled with the webcasters. In the original webcasters CARP, the ephemeral license rate was set at 8.8 percent of the total performance license fee. When the rate came up for renewal and was settled, the settlement rates folded the

ephemeral license into the performance license, although they allocated 8.8 percent of the license fee to the ephemeral license. Notably, however, the SoundExchange website does not mention the ephemeral license in its schedule of current webcasting rates, and certainly does not attribute any portion of the current fee to ephemeral copies. The bottom line is simple--you pay a fee for the performance, which is what digital broadcasters are in business to do, and that license includes the necessary incidental rights to operate the service. If an additional amount is set, however, it should be no greater than a \$100 flat fee.

IV. Regulations

The various regulations associated with the PSS license have been in place, substantively unchanged, for many years. Both Music Choice and SoundExchange have ample experience operating under the current regulations, and there have been no problems sufficient to warrant any change to those regulations in this proceeding.

V. Summary Conclusion

In summary, Music Choice's rate proposal is as follows:

- Music Choice's PSS license rate should be 2.6 percent of residential service revenues, as presently defined by the regulations. The starting point for this analysis, and only viable benchmark license for Music Choice, remains the same benchmark originally used to set its rate: Music Choice's musical composition performance rates with ASCAP, BMI and SESAC. Presently, these rates total approximately [[REDACTED]]. This rate represents the high limit of the range of possible reasonable rates.

- Also consistent with the prior CARP, the 4 statutory policy objectives must be applied to the benchmark to adjust and set the appropriate rate from within the range of reasonable rates. As noted above, given changing circumstances in the 15 years since the last

CARP, which set the rate at 65 percent of the estimated musical composition rate, application of the policy based objectives in light of changed circumstances warrants a larger downward adjustment, by [[REDACTED]] percent, resulting in a rate of 2.6 percent.

- The facts regarding Music Choice's residential business support this rate determination/downward adjustment. While Music Choice has continued to invest significant amounts over the past fifteen years to build a quality music service that provides recognized value to record labels at no cost or risk to them, due to increased market pressures and declining revenue per subscriber, Music Choice's residential business remains unprofitable on a cumulative basis and is unable to provide a reasonable return to its investors under the current PSS rate.

- As to the ephemeral license, this right has no value to Music Choice independent of the performance right and evidence supports that there is no actual independent value for the ephemeral right in the marketplace. Accordingly, as has been done in prior proceedings, the ephemeral rate should be included in the performance rate or have a nominal rate attributed to it (\$100 per year).

- There is no need for any change to the other PSS regulation terms and conditions.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed in Horsham, Pennsylvania on the 28th of November, 2011.



David J. DeBeccaro

Tab B

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Before the
COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In the Matter of

Determination of Rates and Terms for
Preexisting Subscription and Satellite
Digital
Audio Radio Services

Docket No. 2011-1 CRB PSS/Satellite II

TESTIMONY OF DAMON WILLIAMS

My name is Damon Williams. I am the Vice President of Programming and Content Development for Music Choice. In that capacity, I oversee the direction and strategy for video and audio programming at Music Choice and also lead the team that develops artist-content initiatives in coordination with the record labels. I also oversee all label relationships, including working directly with record label executives, managers and artists to further their promotional strategies through various aspects of the Music Choice service. I submit this testimony to explain the many ways in which the Music Choice residential audio service promotes records and the artists and labels who produce them, and particularly how the Music Choice service helps drive record sales and leads to the creation of more recordings. I will also describe some of the many ways in which Music Choice contributes original, creative content to its residential audio service and in doing so creates value independent of the musical sound recordings we play.

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My Background

I joined Music Choice in 1998, spending my first years with the company as the lead programmer for the urban music channels, which remain among the most popular channels in the Music Choice lineup. My vision for compelling urban programming was realized with the introduction of Tha' Corner, the first uncut rap show for television, which I both directed and produced. In addition, I wrote and hosted a four-part audio series called "The History of Hip-Hop" which aired on the Music Choice Hip-Hop and R&B channel. I have brought both up-and-coming and established recording artists into Music Choice's New York City production studio for exclusive interviews and studio sessions, and have played a lead role in the research and content development efforts at Music Choice.

As a leading music programmer in the country's broadcast industry, I had over fifteen years of broadcast programming experience prior to joining Music Choice, which included driving the ratings of Radio One's WKYS in Washington, D.C. to the number one spot in only six months. Under my direction, that station earned Gavin Magazines' Urban Station of the Year Award, and I was presented with the programmer of the year award from Impact Magazine in 1997. Prior to my work at WKYS, I served as the program director of Infinity Broadcasting's hip-hop station WPGC-AM where I spearheaded the crossover of the station's format from hip-hop to gospel, overseeing programming in both formats. Prior to that, in November of 1992, I was selected to help Willis Broadcasting put a new mainstream urban station 92.1-KISS-FM on the air. During my tenure at KISS-FM, the station was considered a key breakout station for new artists by many record labels such as Def Jam Records, Bad Boy Records and Jive

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Records. During my tenure there, I was also recognized by Rapsheet Magazine as “DJ of the Month.”

In my career, both in terrestrial radio and at Music Choice, I have built relationships with record labels and artists by helping to promote their records and break new artists. I am familiar with the operations of Music Choice and with its relationships with record labels and artists. I am also familiar with various other aspects of the music industry such as the promotional effect of broadcasting, including terrestrial radio and digital broadcasting, on record sales and artist development. As part of my responsibilities as Vice President of Programming and Content Development for Music Choice, I also keep myself generally aware of the programming activities of other broadcasters, including various digital music services, and the promotional strategies employed by the record labels and artists. A list of my recent public speaking engagements on music industry issues and press in which I have been quoted is submitted as Exhibit MC 27.

Additionally, I serve as Chairman of the R&B Foundation. Since its founding in 1988, the R&B Foundation has launched several award winning programs to educate the public and to provide opportunities for Rhythm & Blues artists to work. Among other things, the R&B Foundation assisted R&B artists who did not receive royalties, provided financial support and preserved the history and legacy of R&B music. Key Board members include Zach Horowitz and Jeff Harleston (Universal Music Group), Del Bryant and Charlie Feldman (BMI), Terry Stewart (The Rock and Roll Hall of Fame), Paul Schaffer (The Late Show with David Letterman), Kenny Gamble and Bonnie Raitt (Advisory Board). More information on the R&B Foundation can be found at:

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<http://www.rhythm-n-blues.org/abouthistory.php>. As Chairman, I oversee all aspects of the R&B Foundation's programs for artists including the administration of \$1.5 million in grant funds from Universal Records and Motown/Gordy Records.

Although Music Choice has branched out into other areas, including on-demand video and the SWRV video channel, the residential audio service is the heart and soul of what we do. It is our core service, and is our service that most customers have and know. Moreover, Music Choice, our cable distributors and the record labels all view our newer video channels as interrelated with our residential audio service, particularly with respect to artist promotion. The following testimony is based upon my personal knowledge and information available to me in the course of performing my duties as Vice President of Programming and Content Development for Music Choice.

I. AIRPLAY ON MUSIC CHOICE PROMOTES ARTISTS AND SELLS RECORDS

From my experience in the broadcasting industry, both at Music Choice and at various terrestrial radio stations, I know that playing music on the Music Choice residential service increases record sales. This promotional effect is acknowledged by the record labels and artists in a number of ways. Record labels and artists frequently give us verbal and written testimonials. Some examples of testimonials we have received include the following:

Music Choice is probably the single most effective radio outlet for my artists to gain exposure, build name recognition and drive sales. Time and time again, when my artists say that someone heard their project, Music Choice almost exclusively comes back as being the source.
Adam Leibovitz, ASL Music Media & Promotion

Music Choice is instrumental in promoting our clients music. Tracking trends show a spike in sales at Amazon once Music Choice adds tracks. Also, we receive wonderful feedback via email from listeners who discover our clients on Music Choice. Airplay and exposure from Music

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Choice make a positive impact for us in regards to sales and artist development. We cherish our working relationship with the programmers at Music Choice and look forward to another decade of bringing music to your listeners.

Karen Doran, Evolution Promotion

Music Choice is in households across the country, and that opportunity gives our records National exposure in markets that may not have an appropriate radio station.

Tyson Haller, Warner Music Group

There's nothing more rewarding than talking to someone at a show and finding out that they're there because they heard about the band from Music Choice. While the choices of places to find new music have increased dramatically in the last decade, Music Choice remains one of the most effective ways to give new and established bands guaranteed exposure.

Bram Teitelman, METALINSIDER.NET

Music Choice has done more to further the careers of independent artists than just about any other program. It seems all artists get an equal shot at airplay mostly based upon the quality of the music, not the notoriety behind the name, which is how it should be. We really appreciate what Music Choice has done for our clients.

Kevin Wood, New Vision Promotion/New Vision Music

Music Choice broadcast coverage IS practically everywhere in the country; it is simply the widest possible syndicated coverage you can get for your music. While its certainly great to get airplay on hi-watt stations in big markets, in my experience it is even better to reach a captive audience comprised of the people living in remote locations where there may (or more likely may not) be any jazz radio stations at all. Not only are these listeners on average more devoted fans and a committed and regular audience to the service but I believe they are more likely to actually follow through and spend their dollar to buy our product when they hear something they like.

Additionally, not only do you reach more people, on average you get more spins! In marketing classes they teach that no one buys anything until they have heard about it at least three times. Music Choice creates steady exposure for our products by consistently presenting a tastefully sensible and tight playlist with regular repetition of titles. Furthermore, the service's constant presentation of graphics and factoids also facilitates branding and increased listener awareness of the artist and the label's product. Lastly, unlike most radio stations nowadays, Music Choice upholds high quality control standards on its service thanks to the solid

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professional communications and gatekeeping job performed by the music director and his associates.

In closing, let me say unequivocally that all of us at Posi-Tone Records hold Music Choice in the highest regard professionally and consider the service to be an invaluable asset to our business in the continued marketing recognition, development of our brand and ultimately the sale of our musical products.

Marc Free, Posi-Tone Records

Plain and simple - I love Music Choice. I have been fortunate enough to have many of the bands at Atlantic receive their first exposure to the masses on Music Choice.

Brian Corona, Atlantic Records

A list of these, and many other, testimonials is submitted as Exhibit MC 28. The record labels have also sent us commemorative plaques. The plaques are given to various key music programmers and stations around the country by record labels as a “thank you” for helping them achieve milestone record sales and airplay. We receive these plaques because we play and support these artists heavily throughout the lifespan of each of their projects. Not every station or channel in the broadcast industry receives these plaques, only those outlets that the labels feel greatly contributed to the success of their projects and increased sales. Receiving these plaques is a true acknowledgement of our value to the labels. Examples of the inscriptions on these plaques include recognition of Music Choice and its employees individually for:

RIAA certified Gold sales of more than 500,000 copies of the Metal Blade Records DVD “Amon Amarth’s Wrath of the Norsemen”

Taylor Swift’s “Incredible 2010”

RIAA certified Gold sales of more than 500,000 copies of the Sony Classical Release “Songs of Joy and Peace”

RIAA certified Gold sales of more than 500,00 copies of the Loyaute/Glassnote Records album “Wolfgang Amadeus Phoenix” and RIAA certified Platinum sales of more than 1,000,000 copies of Gentlemen of the Road/Glassnote Records album “Sigh No More”

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RIAA certified Platinum sales of more than 1,000,000 copies of the Glassnote Records/ILG single “Fall for You” by Secondhand Serenade

RIAA certified sales of more than 500,000 copies of the Roadrunner Records compact disc “Come What(ever) May”

#1 Billboard single “We Belong Together” by Mariah Carey — from Island Def Jam Music

One million copies sold of “Tha Eastsidaz” by Snoop Dogg and the Eastsidaz — from TVT Records

#1 Billboard Urban Single for song “Whatever” by Jill Scott — from Hidden Beach Records

Recognition of Music Choice help in selling more than nine million copies of the following albums: Mary J. Blige — “Mary Common”; Shaggy — “Hotshot”; The Roots — “Things Fall Apart”; GZA — “Beneath the Surface” — from Universal Music Group

Recognition of Music Choice support of Loud Records artists: Big Pun and Mobb Deep — from Loud Records

Def Jam Records thanks you for committing support for the following artists: Redman; Ludachris; L.L. Cool J; Method Man; Foxy Brown; Ja Rule; Funkmaster Flex — from Island Def Jam Records

Platinum sales award for “Vol. 3: Subliminal Verses” by Slipknot — from Roadrunner Records

5X Platinum sales award “The Long Road” by Nickelback — from Roadrunner Records

Gold sales award “The Silence In Black & White” by Hawthorne Heights — from Victory Records

Gold sales award “We Are Not Alone” by Breaking Benjamin — from Hollywood Records

Representative photographs and a listing of these and other plaques, which are proudly displayed at Music Choice, are submitted as Exhibit MC 29.

The record labels and artists’ management also send us free promotional copies of every new recording that is released, and actively lobby us to include their records on our

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service. They do this because they know that Music Choice provides a national platform to break new artists and sell records. This activity, however, was not always the norm. When I joined Music Choice in 1998, Music Choice and digital broadcasting were just beginning to be recognized by the record labels and artists as a viable and consistent outlet for record and new artist promotion. Consequently, at that time, the labels, especially the major labels, did not actively lobby us to put their records on Music Choice, and the promotional divisions of the labels did not “service” Music Choice nearly to the extent they do today. “Service” is a term used in the radio industry for various ways that the record labels try to get radio stations to play records, including providing free copies of the records to stations; in 1998, we were not receiving many free CDs from the record labels.

All of this has changed dramatically. In 1999, I changed the programming philosophy at Music Choice, emphasizing new music as a key programming strategy. In 2001, Music Choice secured a deal with Nielsen’s Broadcast Data Systems (“BDS”) to begin tracking our playlists. BDS is one of the key organizations that monitor the playlists of terrestrial radio stations and other media outlets. BDS is the most trusted service and relied upon by the record labels to determine which records are getting airplay in the various markets across the country. In order to secure this deal, the record labels had to speak up on our behalf. Mark Tindall, then a Senior Vice President and General Manager of West Coast Operations at BDS, reached out to the labels and asked them whether they wanted Music Choice included in the BDS reports, and the labels said yes. After BDS began tracking Music Choice in 2001, the labels were able to more easily see the huge promotional impact provided by our residential audio service, and they

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began more aggressively seeking to have their records played on Music Choice, including servicing Music Choice with free CDs and other promotional material in the same manner they would with terrestrial radio.

As we improved the Music Choice service to upgrade the on-screen content and began custom promotions with artists, including interviews and shows (such as our Artist of the Month promotion), Music Choice's value to the record labels and artists continued to increase. Today, the labels clearly recognize Music Choice as a key component of their national strategy. We now receive free copies of every CD that is released. The record labels also provide Music Choice direct electronic access to a vast library of digital tracks, which our programmers can download for free via password-protected websites. The record labels proactively call us weekly to get information such as play statistics, feedback on their artists and discuss strategies for promoting records and breaking new artists.

Music Choice is extensively serviced by both major record labels and many of the independents. We are treated no differently, with respect to servicing or requests for promotion of recordings, by the record labels whose parent corporations are partners in Music Choice. Nor do we treat those labels any differently. In fact, I have never gotten the impression that the employees I deal with at EMI or Sony labels even know that they, or their parent corporations, have any affiliation with Music Choice.

Examples of emails and faxes from record labels and artists thanking Music Choice for promoting their records are submitted as Exhibit MC 30. Again, we receive many of these thanks via email, fax, orally and in interviews since we directly partner with the labels on many promotions. Artists and representatives of the record labels also

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frequently visit our offices in person to give programmers of the Music Choice channels a chance to listen to new music, speak with the artists and find out more about the music. Artists and labels typically time their visits in conjunction with a record release. A list of artists and label representatives who have visited Music Choice over the past year is submitted as Exhibit MC 31. The examples of testimonials, plaques, communications and visits I am providing in this testimony are a small portion of what we have received over the time I have worked at Music Choice.

A key part of the promotion of a new artist is creating a “story” for that artist. That story is used to convince major labels to sign an artist, to persuade radio stations and video outlets to play that artist and to promote that artist as many ways possible. Play on the Music Choice residential audio service is an important part of creating a new artist’s story, which the artist then uses to generate buzz and leverages into further exposure and promotion. The labels use the evidence of heavy airplay on Music Choice to convince terrestrial radio stations to start playing a song from new and established artists. I have had numerous terrestrial radio programmers tell me that they played a song on their station only after hearing it on Music Choice. Additional record label promotional email blasts acknowledging Music Choice’s airplay and impact are submitted as Exhibit MC 32.

Music Choice has become a proving ground for breaking new artists, and a key part of the record labels’ marketing strategy. Record labels solicit our input when they decide whether to sign new artists, particularly artists that we are playing. For example, Lil Jon is now a successful rap artist who has sold millions of records. When Music Choice first started playing him, he was not nationally well known and was on a small

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independent label based in Atlanta. After we gave him significant airplay, TVT Records called us and asked what we thought about him, what we thought of his long-range potential and what kind of feedback we were getting on him. TVT went on to sign Lil Jon and his first album released on TVT went multi-platinum. Many other artists, including Chris Brown, have acknowledged the impact Music Choice has had in “breaking” them as new artists through Music Choice-produced shows such as “Fresh Crops” which focused exclusively on promoting new, emerging artists and programming initiatives such as Artist of the Month, New Rookie Smell, Rock U and Tha’ Corner. Recently, Music Choice launched its Live Undefined program (described in more detail below), where Music Choice films emerging artists performing stripped down versions of their songs from a location of their choosing and airs these performances on Music Choice’s audio channels and video services.

Music Choice remains a mainstay promotional resource for established artists as well. For example, Music Choice and SWRV were prominently featured in a recent Maroon 5 email advertisement circulated by the record label to all radio and television networks across the country. A copy of the email advertisement is submitted as Exhibit MC 33. This email advertisement highlights Music Choice and SWRV, among others, as key promotional outlets that drive record sales and encourage and influence other stations and services to promote Maroon 5.

Music Choice has spent a significant amount of resources to improve its residential service in ways that are designed to sell records. For example, we have constantly improved and upgraded our on-screen display, which features key marketing information such as the artist’s name and album title, as well as artist facts, album

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artwork artist images and more. The on-screen display is designed to draw customers' eyes to the screen where they can quickly learn what music is available for purchase either via our website or in the general marketplace. Once a consumer hears a song on Music Choice, they have all the information they need to make a purchasing decision. The labels, artists and managers love this feature of our service because this information is not available while listening to terrestrial radio. Examples of what our on-screen display looks like while a song is playing are submitted as Exhibit MC 23. This is a massive improvement over what the screen looked like when I first started at MusicChoice. At that time, customers essentially saw a blank screen with only the song information printed on it.

Music Choice has conducted numerous studies showing that our customers frequently look at the artist and album names while listening to the service. One such survey, conducted by Arbitron in 2004, showed that 85% of our customers look at the screen to read the name of the artist while a song is playing, and 84% look to read the name of the song. The results of that survey are submitted as Exhibit MC 34.

Customers also believe Music Choice is a great place to discover new artists and music. A survey by OTX in 2008 showed that 66% of our customers agree that Music Choice audio channels are a great place to discover new artists and music. The results of that survey are submitted as Exhibit MC 35. In fact, a recent Experian Simmons survey from 2010 shows that Music Choice viewers and listeners exhibit a strong propensity to purchase music. Further, Music Choice audio channel listeners, age 12 and above, are 69% more likely than the average person, age 12 and above, to have purchased 10 or

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more CDs or downloads in the past year. The results of that survey are submitted as Exhibit MC 36.

A study by Arbitron in 2005 also specifically confirmed that the Music Choice residential music service sells records for the labels. In that study, almost 40% of customers surveyed said that they had bought a record specifically because they heard it on Music Choice. A copy of the results of that survey is submitted as Exhibit MC 37. That study also found that 91% of our customers look at the screen to read the name of the artist performing, and 86% look to see the name of the song.

A more recent study by OTX in 2008 shows a similar pattern – with almost one-third of our customers buying music they listen to on Music Choice. *See* Exhibit MC 35. Indeed, an Ipsos OTX MediaCT study in 2011 shows that more than half of our customers look at the screen at least once during each song. This same 2011 study also shows that listener satisfaction is highly favorable and has grown since 2008, particularly among younger listeners and females. A copy of the results of that survey is submitted as Exhibit MC 38.

II. MUSIC CHOICE CREATES CUSTOM PROMOTIONS FOR RECORD LABELS AND ARTISTS

Music Choice also sells records by doing artist-specific promotions at the request of the record labels. Music Choice spends significant resources on these promotions at no cost to the record labels. Custom promotions that we do on behalf of the record labels involve heavy promotion of a band's new album prior to and leading up to the official release of the album.

For example, in 2011, Music Choice partnered with Island Def Jam Records to promote a new artist, Big Sean, via airplay on our music channels, combined with a

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targeted marketing campaign. The marketing campaign offered consumers the opportunity to receive a free download of a Big Sean's new song "Almost Wrote You A Love Song" prior to the release of his album "Finally Famous." The goal of the partnership was to create awareness and buzz around Big Sean by leveraging a new promotional tool: QR codes. A QR code is a type of barcode capable of storing and delivering many forms of data directly to a mobile-phone user. For example, viewers of The Cut show who scanned the QR code that appeared on the screen when Big Sean was featured on the show received a free song which they could instantaneously listen to on their mobile phones. Notably, the use of QR codes shows how record labels are willing to test new promotional vehicles with Music Choice and see us as a partner to innovate with. Copies of Big Sean panel images and promotional press are submitted as Exhibit MC 39.

In connection with this promotion, Music Choice increased airplay of Big Sean's song to "power rotation" – it was put on the list of songs that get the most airplay, getting played several times a day – and ad panels on his songs and similar artist songs ran on our audio channels over a four week period.

Big Sean's debut album sold 84,000 copies in its first week and ranked #3 on The Billboard Hot 200 – a huge debut for a new artist. Big Sean's manager, Mike Brinkley, had this to say "Music Choice has supported Big Sean's music for a long time, so we were more than happy to participate in The Cut." This promotional effort is also an example, among many, where Music Choice was ahead of radio airplay – before an album came out – and the labels viewed Music Choice as a valuable pre-release promotion outlet.

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Music Choice also partnered with Universal Records label Music World to pre-promote the release of a new Gospel album from Trin-i-tee 5:7 on our audio channels. As part of this process Music World gave us a “grant of right” – which is significant because the grant of right conferred to Music Choice a much broader spectrum of rights than we have under the compulsory license to use the album, including the rights (1) to play the entire album at one time and (2) to play the tracks on the album prior to its commercial release.

Music Choice’s efforts in promoting Trin-i-tee 5:7 included airing the “Angel & Chanelle” album in full on the Gospel audio channel, featuring “Heaven Hear My Heart” and “Over and Over” music videos on Music Choice’s Video On Demand channel and airing promotional panels on the following audio channels: Gospel, R&B Soul and Classic R&B. Promotion of Trin-i-tee 5:7 on our audio channels is estimated to have reached 24 million households. After seeing the artwork of the panels running across Gospel, R&B Soul and Classic R&B, Music World’s reaction was “Love it!” Additional marketing included: (1) promotion in connection with Music Choice’s social media presence (on platforms such as Facebook & Twitter) which reaches an estimated 215,000 Music Choice fans; (2) 30-second television advertising spots on networks such as WE, Bravo, BET, TV One, Centric, VH1, Gospel Music Channel, Telemundo and Warner Bros.; (3) full page ads in Rolling Out; (4) logo or hotlink inclusion of a Trin-i-tee 5:7 banner on <http://www.MusicWorldent.com>; and (5) eblasts – a form of email marketing – targeted to Trin-i-tee 5:7 and Music World email subscriber lists consisting of over 100,000 people who, as fans, are the most likely to buy Trin-i-tee 5:7’s new release. These promotions include Music Choice’s logo to create awareness that content, like

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Trin-i-tee 5:7's album, is available on Music Choice and to draw consumers to the Music Choice platform to experience artist content. The Music Choice endorsement also lends credibility to a new artist or to a new project from an established artist. This promotion typifies how Music Choice provides value to an artist with limited alternative outlets because, as gospel artists, the band lacked broad commercial popularity over more traditional formats. The Trin-i-tee 5:7 album ultimately debuted at #1 on the Gospel charts and the label credited Music Choice for playing a big role in that success. With this project, consumers are more likely to purchase a Trin-i-tee 5:7 CD because they are exposed to the new album through Music Choice's platforms. Copies of Trin-i-tee 5:7 panel images, promotional press and emails from Music World thanking Music Choice are submitted as Exhibit MC 40.

Music Choice also recently worked with Interscope Records to break a new Interscope band, Mindless Behavior, by running a series of promotions, on-channel and off-channel, to help drive record sales. We used the audio channels to start the partnership off with extensive airplay and built upon that exposure with the following additional promotions: (1) Mindless Behavior debuted on Music Choice Video On Demand as the #1 video with over 800,000 views in its first week, beating out Beyonce; and (2) Music Choice executed a consumer awareness campaign for Mindless Behavior on our SWRV video channel by having the band meet fans in New York City and perform for hundreds of Music Choice fans at a SWRV promotion in New Jersey. This project illustrates how Music Choice leverages the full spectrum of all its services – audio channels, Video On Demand and SWRV – to enhance the promotional value of our audio service to the artist and record labels. By increasing the points of contact with the artist

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or song, Music Choice deepens the consumer's connection with an artist or song, which ultimately translates to additional sales. It is important to note that Interscope solicited Music Choice to promote this brand new band which, at the time, was not getting airplay anywhere else through traditional outlets such as radio or MTV. Copies of Mindless Behavior promotional press in connection with this Music Choice promotion are submitted as Exhibit MC 41.

In 2010, at the request of Arista Nashville, Music Choice promoted Brad Paisley's new album Hits Alive. Brad Paisley is one of country music's biggest stars and has been around for about 15 years. As part of the promotion campaign, Music Choice received a grant of right from the labels to pre-announce the release of Brad Paisley's new album. Music Choice agreed to play songs from the album on Music Choice's Today's Country channel throughout the entire day of the release. Music Choice complemented this promotion with promotions over the Music Choice Facebook and Twitter presence, in which Brad Paisley posted and tweeted about the release. Copies of a Brad Paisley panel image, Facebook post and grant of right are submitted as Exhibit MC 42.

Another example is a promotion we did with the band Trapt in 2005, for the release of their new album "Someone in Control." In addition to airing the record in its entirety on the Rock channel we also included advertising panels featuring the band's live concert dates, ticket purchase information, artist facts and band news items. On-screen advertising panels were shown 4 times per hour and whenever one of the band's songs was played. Record sales data we obtained from Soundscan indicated there was a positive impact on sales of "Someone In Control" during the promotion period. The

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album was the top selling hard rock album for the first week of its release. A copy of an internal Music Choice study of this promotion is submitted as Exhibit MC 43.

Yet another good example is a similar promotion we did with the band Disturbed in 2005, for the release of their new album "Ten Thousand Fists." The album played on the Rock channel from September 6, 2005 through September 20, 2005 in an album premiere show. According to our calculations the 1,079 advertising panels that we put on the screen during the show's two week run would have been seen approximately 30 million times. The advertising panels promoted the date of the album release, the band's website and the album premiere show on Music Choice. Following this audio show, the album debuted at #1, selling 239,000 copies during its first week. Soundscan data for that album also indicated a positive impact on record sales on release and during the remainder of the promotion period. A copy of an internal Music Choice study of this promotion is submitted as Exhibit MC 44.

We also ran a promotion for the heavy metal band Shadows Fall in 2004. This promotion featured an hour-long show, including the band's new album "The War Within," in its entirety and audio clips from band members explaining aspects of the album. The show ran 12 times on the Music Choice Metal channel during the 6 days leading up to the record release of "The War Within," and the 6 days directly following. The promotion included on-screen advertising panels run during the show promoting the album and various information about the band. We estimate that during the 12 days that this show aired, these advertising panels promoting "The War Within" were seen approximately 6 million times by Music Choice listeners nationwide. Some of the advertising panels directed customers to the Music Choice website, offering additional

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information and the ability to purchase the album. "The War Within" went on to sell over a quarter million copies. Subsequently, Shadows Fall has become a popular metal act and signed with major label Atlantic Records. In recognition of this promotion, we received the following quote from George Vallee of Century Media Records:

Music Choice's audio promotions have been extremely beneficial to Century Media Records especially in the case of Shadows Fall's 'Declassified' promo. This promotion ran the week before the album's release and in turn helped the disc debut at #20 in the Billboard Top 200 chart, which is a first for our label. Music Choice is a platform that has a huge impact on our target market and in turn results in higher CD sales. We could not be happier with Music Choice's services and look forward to working together more in the future.

Three Music Choice employees received plaques from Century Media showing their gratitude. Copies of two internal studies of this promotion created by Music Choice are submitted as Exhibit MC 45.

Another example of this kind of custom promotion is one we did in 2005 for the band God Forbid to promote their new album "IV: Constitution of Treason." Music Choice featured the album on its "Declassified" program on the Metal channel, played in its entirety with interview segments from the band in-between the songs. The show aired for one week prior to the release date of the CD. On-screen advertising panels ran for one week prior to the "Declassified" show to advertise the show. Advertising panels were also displayed in connection with the program, promoting the new record and the release date. In total, there were 540 on-screen advertisements for the "Declassified" program, and 820 advertisements promoting the release of the record. When the record was released, it had the highest opening week in CD sales for any of the band's 4 albums. In fact, during the first week of its release "IV: Constitution of Treason" sold 4 times as many units as any of the band's prior records did in their first week of release. God

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Forbid's fans posted many positive comments on the band's MySpace web page about the album specifically mentioning that they heard it on Music Choice. A copy of an internal Music Choice study of this promotion, including sales information and examples of fan comments and advertisement panels, is submitted as Exhibit MC 46.

Examples of various on-screen advertising panels run in connection with such promotions, organized by record label, are submitted as Exhibit MC 47. Notably, the record labels find these promotions so valuable that they grant us, at no charge, the right to play the entire album during the promotion which we would not normally be allowed to do. Copies of agreements with various record labels, granting us these rights, are submitted as Exhibit MC 48.

Other kinds of custom promotion that we do are artist interviews and other live recordings. We moved our programming office into New York City in late 2001 and built a production studio to interview artists as they visited the office to promote their records. Our programs continued to grow in popularity and result in increased artist demand. Music Choice soon moved again in 2005 to a dramatically larger office with more studio capacity to keep up with our product expansion, including accommodating the continued increase in promotional interviews. We have now become a regular promotional stop for artists when they introduce a new CD or are promoting a live show. The first year we had any artists in the studio at all was 2002, and we had 54 artist visits that year. From 2003 through 2010, over 1250 artists visited Music Choice's studio for interviews; and this year through November 5 we had 63 artist visits. During many of these visits, Music Choice produced promotional recordings of the artists at no cost to the record labels, which are featured on our residential audio and video services.

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As discussed in greater detail below, in addition to Live Undefined which launched in October of this year, Music Choice plans to offer even more types of custom promotions through various content offerings in programs strictly about the artists like:

[[REDACTED]].

III. THE PROMOTIONAL VALUE PROVIDED BY THE MUSIC CHOICE SERVICE LEADS TO THE CREATION OF MORE RECORDINGS

The promotional effect of the Music Choice audio service leads to the creation of more records. First, the sales that we increase in the ways I described above create more profit for the record labels, which they can then use to produce more records and invest in new artists. Additionally, however, Music Choice helps sell records for many artists who do not get actively promoted by the record labels or played on terrestrial radio. Without the national promotion and resulting sales these artists get from Music Choice, some of these artists would likely lose their recording contracts and cease releasing records.

Beyond playing formats or less popular music that are otherwise not heard, Music Choice also plays deeper cuts from an album; this has always been part of our programming philosophy. Music Choice plays more than just the top songs from an album that terrestrial radio plays. Indeed, this is even more important today as the record labels have converted to a digital “singles” (e.g., iTunes) purchasing model versus the “album” model of the past. Whereas, in the past, a consumer needed to purchase the entire album regardless of whether they wanted the deeper cut singles, in a singles market, these songs would never be individually purchased if outlets like Music Choice did not play them and thereby add sales value to the record labels.

Another way Music Choice facilitates the creation of more recordings is through airplay. The single biggest driver of record sales is exposure through airplay. Consumers

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do not usually buy records that they have not heard before. Terrestrial radio is still the primary way that consumers hear new records. Over the past several years, however, consolidation in the industry has made it harder and harder for the record labels to promote new artists on terrestrial radio.

The latest phase of this consolidation began in the late 1990s, while I was still working in terrestrial radio. In the early to mid 1990s, you would typically have two or three independent stations in larger markets playing similar formats. As a result, more formats were economically viable. Each station had a clear personality and freedom to play whichever records it wanted. Beginning in 1996, when Congress relaxed cross-ownership rules for media companies, radio consolidators like Clear Channel began to buy radio properties around the nation. By the late 1990s, the few companies owning most of the stations went to a “cluster” strategy, where each company focused on a particular format or musical genre to “own” in a given market. The company would then focus its resources on that format and eliminate the competition for the format in that market. Unprofitable formats were eliminated and radio station personalities disappeared. Today, only a few formats are economically viable.

After consolidation, the companies set up a system where programming was taken out of the hands of the individual stations. Instead, one program director would dictate the playlists for many of the stations in a given format. The consolidators were able to improve the cost structure of radio stations this way. However, it severely restricted the number of new records that could be added to the playlist each week and consequently lowered the number of new records that could be pushed by the labels. This starkly contrasts with Music Choice’s approach, which is to invest in increasing programming

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staff who are tasked with creating individualized programming for each channel. Where a typical market has only a limited number of formats featured on terrestrial radio, Music Choice presently offers 46 channels and soon will have over 300 channels. If you listen to terrestrial radio anywhere in the country for a particular format, you will basically hear the same several songs played over and over again. This tightening of the playlists also seriously limited the number of new artists that the record labels can break on terrestrial radio.

Record labels sign a large number of new artists every year to recording contracts. Getting signed, however, does not mean that an artist will be successful. Especially given the consolidation of the radio industry, the record labels can only push a small fraction of those bands on terrestrial radio. It is not surprising, then, that the vast majority of records produced by the labels are not profitable. Instead, the labels have to try to make up for those losses with sales from the few records that they do push. For the artists that do not get actively pushed by the labels and do not get airplay on terrestrial radio, the outlook is not good. If an artist's first record does not sell enough copies, the artist will often be dropped by the record label and will not be able to make any more records.

Music Choice provided, and still provides, a solution to this serious problem for artists and record labels. We have many channels, which allows us to broadcast many different formats and sub-formats, including many formats that are often ignored on terrestrial radio. Heavy metal, jazz, gospel, roots, dance music, easy listening, blues, classical and certain kinds of hip-hop music are good examples of such formats. Although these formats may get some airplay on local college radio, Music Choice

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provides a far more powerful promotional push because it is a national platform available to many millions of listeners. The labels appreciate the impact Music Choice has on sales for these kinds of artists, as shown by this recent testimonial:

Music choice helps us promote our bands in a variety of ways. They give exposure to our artists – both established artists and baby bands. Their audience is important – and another piece of the puzzle in connecting the dots with consumers. They educate listeners/viewers with facts on bands so that they know more about the artists than just knowing a song. And in today's information overload society – that's a good thing – because consumers have so many choices and so many distractions – the more they can learn about an artist – the better chance they may buy their music or go see them at a show. – Phil Kaso, Northeast Regional Promotion Director, Roadrunner Records

Because Music Choice promotes record sales in many formats that are not covered by terrestrial radio, those sales allow the labels to recoup their investments, help keep the artists in those formats from losing their recording contracts and allow those artists to keep making records. Moreover, even if those sales came at the expense of sales of recordings by other, superstar, artists pushed by the labels on terrestrial radio (and I have not seen any evidence of such sales substitution), the net result would still be more new music being created, released and enjoyed because the superstars would still sell enough to keep their recording deals.

IV. THE PROMOTIONAL VALUE PROVIDED BY THE MUSIC CHOICE SERVICE HAS GREATLY INCREASED SINCE 1998

Since I arrived at Music Choice in 1998, the promotional value of the Music Choice service has significantly increased, and so has the record labels' and artists' recognition of that value. In early 1998, Music Choice had approximately 5 million customers. Today, that number has grown to almost 52 million customers by the end of the year 2011. The number of channels we program has also increased from 31 to 46 with a total channel offering of approximately 300 expected by the first quarter of 2012.

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A copy of the new proposed channel lineup for 2012 is submitted as Exhibit MC 22.

Notably, a substantial amount of these new channels will be in genres and sub-genres that are not featured by terrestrial radio. This tremendous increase in customers and channels means that the nationwide promotion and exposure offered by Music Choice reaches far more potential record-buyers and at the same time the promotional effect is more targeted towards listeners who are inclined to buy the particular type of music played on the channel. As noted above, Music Choice has also improved its service during that time with respect to features like the on-screen display, with appealing visuals, larger artist images and images in high-definition, which provides crucial information for consumers who want to buy the music they hear. Not only has Music Choice improved its services, but it has greatly expanded its service offerings to include video services paired with audio services that further enhance the promotional value of the Music Choice service. Our artist promotions now feature elements across audio and video channels.

Within the next few months, Music Choice will unveil an updated look and user experience with audio screen features that will enhance our value and promotional ability for artists and record labels and make the screens more engaging. The Music Choice audio channels will be [[REDACTED]

REDACTED]]. The Music Choice audio channels will soon include [[REDACTED]

REDACTED]]. Additional features under development for integration into the audio channel on-screen display include new content offerings such as: [[REDACTED]

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[REDACTED]
[REDACTED]
[REDACTED]].

Music Choice audio channels will also leverage technology features – such as
[[REDACTED]] – to extend user engagement. [[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[[REDACTED]] While Music Choice makes
substantial investments in improving the screen quality and functionality to engage
customers, artists and record labels continue to benefit from such Music Choice
initiatives at no cost.

A prime example of record labels recognizing the value of Music Choice has been
their requests to Music Choice to offer a retail component that would create awareness to
help drive record sales. A copy of an email from a record label requesting purchasing
capability from Music Choice channels is submitted as Exhibit MC 49. In response to
these types of requests, Music Choice is [[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

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performance and recording on the audio channels. In fact, all live performances on Live Undefined are being played on our audio channels. As part of our overall promotion, Music Choice included banners for J. Cole on our website with links to iTunes to purchase his music. J. Cole secured the biggest first week debut album in 2011 and is the biggest digital album debut of any new artist since January 2010. Examples of ad panels that ran on our audio service and Music Choice eblasts to promote J. Cole on Live Undefined show are submitted as Exhibit MC 51. Another artist featured on Live Undefined, whose program aired on November 21, is Def Jam Recording artist Patrick Stump, who Music Choice filmed at the Peterson Automotive Museum in Los Angeles, California. Patrick Stump, the lead singer of pop/rock band Fall Out Boy, performed from his solo album, provided an in-depth interview and even gave some behind-the-scenes footage. The program for KrucialKeys recording artist Mateo, who was filmed at the AM Studios Art Gallery on 39th Street in New York City, also aired on November 21. Upcoming programs include artists Jacks Mannequin, Yelawolf, Skylar Grey and Miguel. Live Undefined adds significant value to the record labels by helping to break new artists and extending the life of an artist's song and airplay. For this type of promotion, Music Choice is at the same time creating musical works and increasing artist exposure at no cost to the record labels. By tuning in to a Music Choice-produced performance, a consumer can discover an up-and-coming artist like J. Cole and purchase his music.

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V. MUSIC CHOICE'S HIGH QUALITY PROGRAMMING OF ITS MUSIC CHANNELS AND OTHER ORIGINAL PROGRAMMING ARE VALUABLE AND INDEPENDENT CREATIVE CONTRIBUTIONS TO THE MUSIC CHOICE RESIDENTIAL SERVICE

Our customers do not listen to Music Choice for the purpose of hearing a particular song or even artist. They can use CDs, downloads and interactive webcasting to get that experience when they want to select the specific songs they hear. Customers listen to Music Choice when they want someone else to create a music experience for them based upon music formats they like (even if it is music they have never heard before). Facing a landscape where Music Choice competes with other programmed music services that have access to the same universe of sound recordings, Music Choice separates itself from other services with our quality programming that, in turn, provides significant value to our customers. To achieve this competitive advantage, Music Choice invests substantial time and money on programming staff who are experts in their genres and sub-genres and are able to provide unique experiences for each channel. Music Choice's present programming, creative/production and content development staff numbers 65, with an additional 9 programming consultants to assist with audio programming for certain formats. Music Choice expects to grow its programming staff considerably, however, with 9 additional employees in 2012 and another 16 employees by 2017. Some of the ways Music Choice succeeds in providing quality programming is by (1) categorizing music to better control playback and consumer experience; (2) structuring the playback with rules and clocks to maintain professional playback; (3) ensuring the programming of sufficient hits to provide comfort for our listeners; (4) managing music discovery through playback; and (5) minimizing excessive artist, title and sound duplication.

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The Music Choice paradigm is to program our audio channels in order to create unique destinations that meet the wide variety of musical tastes in the marketplace. Music Choice researches the music, emphasizes the big-hit songs, features core artists and strategically offers album cuts and B-sides. Our programming is philosophy-based, not just rule-based, and therefore cannot be replicated by the computers or algorithms used by many of our competitors.

For example, the Music Choice Hip-Hop and R&B channel programming is hit driven, but very aggressive on new music and artists. The programming clocks are thoughtfully designed to create an experience that exposes consumers to their favorite songs but ensures that listeners are exposed to a certain mix of new music and artists per session by offering a larger active library consisting of Hip-Hop and R&B hits, album cuts, remixes and imports. This channel has a fun youthful appeal, yet it is not edgy like Rap because our programmers take the time to program it as a unique destination. The Music Choice Rap channel, on the other hand, maintains an edgy, uncut and raw mood, tempo and sound. The programming comes from content that goes from 1992 to the present and it is not hit driven like Hip-Hop and R&B. The channel focuses on creating an experience through a mix of album cuts, one-off tracks, regional music and new rap music. Different from the Music Choice Hip-Hop and R&B and Rap channels, the Gospel channel programming philosophy is to create an uplifting and inspirational destination for listeners. Recognizing that gospel music as a whole has shifted over the last ten years, Music Choice strategically programs the current mix of [[REDACTED]] contemporary gospel to [[REDACTED]] traditional. These articulable and individualized

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programming philosophies are vehicles for Music Choice to deliver quality programming and ultimately achieve customer satisfaction.

Additionally, Music Choice has been able to make its Video On-Demand service the #1 destination for a 13-24 year-old consumer to watch today's most popular music videos by featuring thousands of current hit videos that appeal to the "everyday" music consumer, making the most popular content available in easy-to-find categories, but also offers niche music styles and a deep catalog that appeals to a broader audience and offering original shows, specialty feature programming like playlists, era and mood-based destinations that all help to round out the customer experience.

By contrast, Music Choice competitors often encounter shortcomings in their programming that result from reliance on "shuffle" play services because they do not strategically program service, repetitive session experiences where the same titles are used over and over to begin a session, subjective "metadata referencing" which causes the same artists and same titles to playback too often, deceptive music style depth that gives only the appearance of a larger channel offering and overly simple like-or-dislike grouping that allows disliked artists or songs to re-appear in future sessions. Services exhibiting these qualities, like Slacker Personal Radio, iHeart Radio and Last.fm, tend to achieve the same result: customer dissatisfaction.

Summing up, the value of the Music Choice service has grown significantly since the time of the first CARP proceeding; we are now available in many more homes, we have invested in significant product improvements such as our custom promotions and on-screen features and we continue to invest and provide greater value to the record labels at no cost to them. More than adding value to the record labels and artists, the

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Music Choice residential audio service also provides independent, creative contributions through the high quality programming of its audio channels and self-produced original recordings and other content. The testimony above confirms that Music Choice offers a compelling service that provides multiple points of consumer exposure and engagement for record labels and artists, who have frequently acknowledged that our residential service helps promote artists, drive record sales and facilitate the creation of more recordings, especially in genres that are underserved by the labels' other promotional channels such as terrestrial radio.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing
is true and correct.

Executed in West Orange, New Jersey on the 28th of November, 2011.

A handwritten signature in black ink that reads "Damon Williams". The signature is written in a cursive style with a horizontal line underneath the name.

DAMON WILLIAMS

Tab C

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

In the Matter of)

Determination of Rates and Terms for Preexisting)
Subscription Services and Satellite Digital Audio Radio)
Services)

) Docket No. 2011-1 CRB PSS/Satellite II
)
)
)
)
)

TESTIMONY OF GREGORY S. CRAWFORD, PhD

November 29, 2011

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I. Introduction

I.A. Summary of qualifications and experience

- (1) I am Gregory S. Crawford, Professor of Economics at the University of Warwick in the United Kingdom. I received a PhD in economics from Stanford University in 1998. I was an assistant professor at Duke University and an assistant and later associate professor at the University of Arizona. In 2007-08, I served as Chief Economist at the Federal Communications Commission (FCC), an independent federal regulatory agency charged with regulating a number of media and communications industries, including the broadcast and cable television industries. I reported directly to the Chairman of the FCC and advised him and his staff on a number of topics in these industries, including mergers, spectrum auction design, media ownership, network neutrality, and bundling. After my service at the FCC, I joined the Department of Economics at the University of Warwick as a full professor. I am Director of Research for the economics department. In 2011, I was invited to be a research fellow at the Centre for Economic Policy Research (“CEPR”), one of the leading European research networks in economics.
- (2) I conduct research on topics in both industrial organization and law and economics. Much of my research has analyzed the cable and satellite television industries. I have published extensively at the intersection of these fields, evaluating conditions of demand and supply within the cable television industry and the consequences of regulation on economic outcomes in cable markets.¹ When the National Bureau of Economic Research (NBER) commissioned a volume analyzing the consequences of economic regulation across a number of American industries, I was asked to write the chapter on cable television.² I have published numerous academic articles in such outlets as the *American Economic Review*, *Econometrica*, the *RAND Journal of Economics*, and the *Journal of Law and Economics*.
- (3) I have testified once previously before the Copyright Royalty Board (“CRB”), as a rebuttal witness for the Commercial Television Claimants in the matter of the distribution of copyright royalties for the distant importation of broadcast television signals in 2004 and 2005. My *curriculum vitae* is submitted as Exhibit MC 52.

¹ Gregory S. Crawford, “The Impact of the 1992 Cable Act on Household Demand and Welfare,” *RAND Journal of Economics* 31, no. 3 (2000): 422–49; Gregory S. Crawford and Matthew Shum, “Monopoly Quality Degradation and Regulation in Cable Television,” *Journal of Law and Economics* 50, no. 1 (Feb. 2007): 181–209; Gregory S. Crawford and Joseph Cullen, “Bundling, Product Choice, and Efficiency: Should Cable Television Networks Be Offered A La Carte?,” *Information Economics and Policy* 19, no. 3–4 (Oct. 2007): 379–404; Gregory S. Crawford and Ali Yurukoglu, “The Welfare Effects of Bundling in Multichannel Television Markets,” *American Economic Review*, forthcoming.

² The NBER is a private, nonprofit research organization dedicated to studying the science and empirics of economics. It is the largest economics research organization in the United States. The chapter is titled, “Cable Regulation in the Satellite Era,” Chapter 5 in Rose, N., ed., “Economic Regulation and Its Reform: What Have We Learned?” forthcoming, University of Chicago Press.

- (4) I am being compensated for my time on this matter at a rate of \$700 per hour.

I.B. Scope of charge and summary conclusion

- (5) Counsel for Music Choice has asked me to evaluate the market for Music Choice’s residential music service and to recommend a range of royalty rates for the license of digital performance rights in sound recordings (“DPRSR”) for Music Choice’s residential music services pursuant to 17 U.S.C. 114(f) of the Copyright Act (the “Act”). Furthermore, it is my understanding that Music Choice is considered a pre-existing subscription service (“PSS”) under the Act. As a result, the range of royalty rates I recommend are intended to consider the following statutory objectives set forth in Section 801(b)(1) of the Act:
1. To maximize the availability of creative works to the public;
 2. To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;
 3. To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; and
 4. To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.³
- (6) Accordingly, the methodology I present considers not only appropriate benchmark royalties that reflect arm’s-length negotiations between PSS such as Music Choice and independent third parties for the license of DPRSR, it also considers Music Choice’s financial capacity to pay the royalty while at the same time earning a rate of return that is consistent with its capital investments and risks incurred in providing its residential music service to its listeners.
- (7) To evaluate these questions, I introduce an economic framework based on non-cooperative bargaining between firms. This framework maps well to the economic environment governing negotiations between copyright owners and copyright users both in general and with regard to negotiations over digital performance rights. I use it to identify three key factors that determine the royalties that would likely arise as a consequence of arm’s-length negotiations between Music Choice and the owners of DPRSR and to evaluate the suitability of alternative real-world benchmarks for such negotiations.

³ 17 U.S.C. 801(b)(1)

- (8) The range of royalties I recommend is related to, but not equal to, the combined royalties paid by Music Choice to ASCAP, BMI, and SESAC for digital performance rights in musical works ("DPRMW") that underlie the performance of sound recordings ("Benchmark Rate"). The critical aspect of this rate is that it reflects demand characteristics that are unique to the residential audio service offered by Music Choice. While it reflects a different set of rights, I demonstrate that there is a close relationship in the predicted outcomes of negotiations between the rights holders of sound recordings and musical compositions *for PSS markets* (though not necessarily in other markets) that make them comparable. This makes the PSS musical composition rate an ideal benchmark.
- (9) While a useful starting point, in my opinion the Benchmark Rate is higher than the true market sound recording performance royalty rate for Music Choice. I show that, in a free and open market, the predicted PSS sound recording performance royalty rate should be lower than the PSS musical composition performance royalty rate. This is due to the fact that the PSS's promotional activities act as a complement to, and not as a substitute for, sales of CDs and other forms of music. These promotional activities disproportionately benefit the record labels compared to the copyright owners of musical composition performance rights. Consequently, in a free and open market, record labels would be willing to license sound recording performance rights to a PSS such as Music Choice at a lower royalty rate than copyright owners would be willing to license musical composition performance rights.
- (10) Empirical support for this conclusion can be found in the royalty rates charged cable audio services similar to Music Choice, radio stations and other pre-programmed music services in Europe and Canada by musical composition and sound recording performance rights organizations. If Music Choice were broadcasting in the U.K., it would pay less for the sound recording performance right than it would for the musical composition performance right. Like PSSs, commercial broadcast radio is widely recognized to provide a promotional benefit to performance rights holders. A study of commercial radio in twelve European countries demonstrated that in all except for one, the average royalty for musical composition performance rights was higher than that for sound recording performance rights. These relative levels suggest that the promotional benefits flow more to copyright owners of sound recording performance rights than to copyright owners of musical composition performance rights. As I show in my report, the rulings by the rate-setting agency in Canada for various different types of pre-programmed music services also reflects this relationship.
- (11) The final range of royalty rates I recommend for the PSS sound recording performance royalty rate is between 0.61 percent and 2.43 percent of residential service revenues and under no circumstances should be higher than 3.04 percent of residential service revenues. This range is consistent both with rates that would result from arm's-length transactions and the statutory objectives of the Act. Significantly, royalties above this rate would not leave Music Choice with a fair income under prevailing economic conditions. At the current rate of 7.25 percent, Music Choice has not realized profits sufficient to cover its cost of capital over the past five years, resulting in economic losses.

This rate is expected to rise to a high of 7.5 percent next year. Such an outcome would be unexpected in a marketplace transaction, much less from an administrative proceeding with statutory factors designed to protect the business expectancies of PSSs like Music Choice. In contrast, the royalty rates I recommend would have left Music Choice with profits that both covered its cost of capital and allowed it a reasonable share of the economic profits created by its service. The range of rates I am recommending will also increase the likelihood that Music Choice will earn its cost of capital on a going-forward basis. As such, Music Choice will be incentivized to make the necessary investments in facilities, equipment, and software programs to continue to enhance and expand its residential service offerings.

- (12) The musical composition performance royalty rates charged to Music Choice represent a superior Benchmark Rate compared to other potential benchmarks such as the sound recording performance royalty rates paid by interactive webcasters. Music Choice's residential services reflect certain demand characteristics that make this business materially different from interactive webcasters. For example, the demand for interactive webcasters' services stem directly from active consumer choices. In contrast, the demand for Music Choice's residential service is derived indirectly as a result of cable operators choosing to provide a service ancillary to its primary cable television offerings, and reflects the programming decisions of staff. In addition, interactive webcasting services allow customers to listen to music almost anywhere, whereas Music Choice is listened to almost exclusively in the home. I demonstrate that these differences (among others) have an important effect on the factors that determine negotiated royalties in those markets that make such royalties an inappropriate benchmark for PSS sound recording performance royalty rates. In previous proceedings an expert for the record companies has himself identified significant differences in these markets that make the use of interactive webcasting rates invalid as a benchmark for PSS.⁴ These differences are reflected in the low per-subscriber fees Music Choice earns relative to interactive webcasting and other less passive channels of music distribution. Due to Music Choice's unique demand characteristics, any benchmark should be from a market with these same characteristics, reinforcing my conclusion that rates for PSS musical composition performance royalty rates are the only reliable marketplace benchmark.
- (13) This report is organized as follows. Section II provides a brief description of Music Choice's residential service business, including its role within the music industry supply chain. In Section III, I describe the economic principles that determine how a PSS sound recording performance royalty rate would likely be set in the absence of a statutory license. The result is a non-cooperative bargaining framework that reflects the economic environment faced by PSS providers, their input providers,

⁴ In the 2006 proceeding concerning PSS, when Dr. Pelcovits was questioned about the appropriateness of a webcasting benchmark for the DPRSR in PSS given Music Choice's meager revenue subscription fee, Dr. Pelcovits stated that he [redacted] See oral testimony of Dr. Michael D. Pelcovits, Docket No. 2006-1 CRB DSTR (May 1, 2007) at 220-21 submitted as Exhibit MC 53.

including both copyright owners of sound recording and musical composition performance rights, and their output purchasers, both cable systems and the ultimate consumers, residential households. The non-cooperative bargaining framework I introduce is important as it motivates my arguments about the appropriate benchmark to use to establish reasonable PSS sound recording performance royalty rates.

- (14) My primary conclusion, presented in Section IV, is that the musical composition performance royalty rate paid by Music Choice is the benchmark that most closely approximates the economic value of sound recording performance rights for Music Choice. I also show that the sound recording performance royalty rates for Interactive Webcasting services would be an inappropriate benchmark and demonstrate how my non-cooperative framework can rationalize royalties for sound recording performance rights lower than those for musical composition performance rights for PSSs, but higher than those for musical composition performance rights for Interactive Webcasting services.
- (15) In Section V, I consider how the statutory objectives articulated in the Act influence the calculation of a reasonable rate. Relative to arguments made in previous proceedings, I explicitly account most closely for two of these objectives: “to afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions” and “to minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.”⁵ In particular, I derive an appropriate range of royalties for Music Choice that directly reflects these objectives. To do so, I analyze Music Choice’s recent financial results in relation to its overall cost of capital. I highlight the important investments that Music Choice has made, which serve to increase listeners’ access to music and also serve as an important promotional vehicle for the record companies. I then map Music Choice’s financial data into the economic profit, or surplus, created by its residential audio service, to demonstrate how alternative assumptions on how that surplus should be fairly shared between copyright owners of sound recording performance rights and Music Choice yield a range of reasonable PSS sound recording performance royalty rates between 0.61 and 2.43 percent. I summarize my overall conclusions in Section VI.

II. Overview of Music Choice’s residential services business

II.A. Industry overview

- (16) In this short section, I briefly describe how music is produced and sold to highlight elements of the process that are important for my subsequent analysis of PSS royalty rates for DPRSR.

⁵ 17 U.S.C. 801(b)(1)(B)

- (17) "Making music" involves a series of steps, including the creation, promotion, and licensing and distribution of the music. Music creation involves composing, recording, mixing, engineering, and manufacturing recorded music products such as CDs and vinyl record albums.⁶ The cost of recording, while relatively high, has decreased significantly in recent years as new technologies have resulted in the proliferation of independent record labels and home recording studios. In fact, one such technology, Pro Tools, will enable a home computer to function as a recording studio for a fraction of the cost of what it did in the past.⁷
- (18) Once recorded, record companies have traditionally made consumers aware of new music by promoting it on terrestrial radio.⁸ However, the record labels produced more music than radio stations could air, encouraging them to pay radio stations to promote their music (so-called "payola"). Although this practice was outlawed in 1960, record companies continue to pay radio stations through independent promoters who influence radio stations playlists. Their payments can be substantial. In 1985, the music industry collectively paid between \$60 and \$80 million for airplay. This compared to the industry pre-tax profits of \$200 million. It was estimated that the cost of promoting a single hit through this method was approximately \$150,000.⁹ Today, although still important, terrestrial radio is a less important medium for discovering new music, particularly for younger people who discover new music from a wide variety of media.¹⁰ Indeed, a recent study by the National Association of Recording Merchandisers ("NARM"), a trade association for music wholesalers and retailers, places television as the second most popular place to discover music.¹¹
- (19) The licensing and distribution of music has also changed substantially over time. Historically, the music industry received the bulk of its revenue via the distribution of physical media (records, cassettes, CDs, etc.) As recently as 2005, 92 percent of record industry revenues were obtained via sales of physical media. The last several years, however, have seen a dramatic increase in the digital delivery of music. By 2009, physical media accounted for only 59 percent of industry revenue, followed by digital downloads at 26 percent (up from 4 percent in 2005).¹² Global digital music

⁶ Joel Waldfoegel, "Copyright Protection, Technological Change, and the Quality of New Products: Evidence from Recorded Music since Napster," (working paper, Oct. 2011) at 21.

⁷ Donald Bell, "Avid Introduces new Pro Tools Studio Bundles," CNET, Oct. 1, 2010 (http://news.cnet.com/8301-179_105-20018292.html).

⁸ Waldfoegel (2011) at 21.

⁹ Richard Caves, *Creative Industries: Contracts between Art and Commerce* (Massachusetts: Harvard University Press, 2000) at 292. An excerpt of this book is submitted as Exhibit MC 54.

¹⁰ "The Infinite Dial: Digital Platforms and the Future of Radio," Edison Research and Arbitron (2010) at 87. An excerpt of this study is submitted as Exhibit MC 55.

¹¹ "NARM Research Report: Consumers & Music Discovery," The NPD Group (Nov. 2011) at 42. An excerpt of this study is submitted as Exhibit MC 56.

¹² "Let's Play: American Music Business," Recording Industry Association of America (2010) at 13. See Exhibit MC 57 for full document.

revenues are predicted to continue to grow, surpassing sales in physical formats in 2013 and growing to 71 percent of total industry revenue by 2015.¹³

- (20) The method by which users consume music has important implications for the relative benefits of the various participants in the music industry supply chain. In the 1996 rate proceeding for the PSS sound recording performance rights, the record labels presented evidence showing that for every dollar spent on a CD, 5 cents went to copyright owners of musical works, 7–10 cents went to the recording artist, and 56–88 cents went to the record companies.¹⁴ I am aware of no evidence that the shares of different rights holders of CD sales are qualitatively dissimilar today.
- (21) As described above, CD sales are still the source for the majority of music industry revenues, but their importance is falling in favor of digitally delivered music products. Because it is typically perceived to be confidential business information, detailed information about sound recording and musical composition performance rights royalties for such products are hard to find. In *Webcaster II*, however, the Copyright Royalty Judges, citing evidence provided by a music industry executive familiar with such contracts, concluded that “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.”¹⁵
- (22) This difference in the relative benefit to rights holders from the licensing and purchase of music through alternative distribution channels will have an important influence on the results of my analysis. A key premise, supported by the evidence above, is that *record labels benefit more* than copyright owners of musical compositions both from the licensing of rights for a variety of digital audio products in music distribution markets and markets directly substitutable for distribution (e.g., interactive webcasting services, digital downloads) as well as from the sale of physical CDs. According to the industry's own expert, Mr. Charles Ciongoli, “the sound recording business [is] like being in the stock market—high risk, high reward—and the music publishing business [is] like the bond market - low risk, consistent and lower returns.”¹⁶ Another expert appearing on behalf of the record labels, Mark Eisenberg, agreed that sound recording copyright owners make more money from the sale of a CD or a digital download than do musical composition copyright owners.¹⁷ I use this conclusion in my analysis below.

¹³ “The Digital Music Industry Outlook”, Business Insights (Jul. 2011) at 26. An excerpt of this study is submitted as Exhibit MC 58.

¹⁴ 63 FR at 25405 (May 8, 1998).

¹⁵ 72 FR at 24094 (May 1, 2007).

¹⁶ See Exhibit MC 59 for rebuttal testimony of Charles Ciongoli, Docket No. 2006–1 CRB DSTRA (Jul. 2007) at 3.

¹⁷ See Exhibit MC 60 for rebuttal testimony of Mark Eisenberg, Docket No. 2006–1 CRB DSTRA (Jul. 2007) at 11–2.

II.B. Music Choice's residential services business

- (23) I understand that the idea for Music Choice began in 1987 when General Instrument Corporation developed the technology to digitally transmit audio over cable systems. In 1991, Music Choice (at the time known as Digital Cable Radio Associates), was launched as a stand-alone entity.¹⁸
- (24) From these beginnings, I understand that Music Choice's residential music service now offers 46 diverse music channels to nearly 52 million residential cable subscribers across the United States.¹⁹ Music Choice's music channels cover a broad range of tastes, including R&B, hip hop, jazz, classical, dance, theatrical, and several subgenres of rock. The company's non-stop music broadcasts include both an audio and visual component.²⁰ As the songs are being broadcasted, I understand that the television screen displays promotional graphics, artist photos, trivia facts about the song, album and artist, and information directing users to record stores or artist websites. Recently, Music Choice incorporated social media features on-screen to further promote user engagement with the music content and increase awareness of the artists.²¹ I understand that Music Choice develops and produces custom promotional content such as artist interviews and shows, all at its own expense.²²
- (25) I also understand that Music Choice strictly complies with the sound recording performance complement as required by the statutory license. In accordance with the Act, Music Choice does not pre-announce songs, play more than three different selections from any one album within a three hour period, or play consecutively more than four selections by the same artist or from a compilation set of albums within a three hour period on any of its channels.²³ I understand that these restrictions are intended to limit the use of Music Choice's service as a substitute for CD purchases.

III. An economic framework for determining marketplace royalty rates

III.A. Overview and summary results

- (26) In this section I introduce a non-cooperative bargaining framework to estimate the arm's-length royalty for the sound recording performance rights for Music Choice, and to predict other relationships regarding the royalty rates for sound recording and musical composition performance

¹⁸ Testimony of David J. Del Beccaro at 1.

¹⁹ Ibid. at 3-4.

²⁰ www.musicchoice.com.

²¹ Testimony of David J. Del Beccaro at 31.

²² Testimony of Damon Williams at 9.

²³ Testimony of David J. Del Beccaro at 4.

rights in related markets. The simplest non-cooperative bargaining models analyze negotiations in a bilateral monopoly between a single buyer and a single seller. Nobel-prize-winning economist John Nash established long ago that there is a unique solution to bargaining problems between bilateral monopolists that satisfy certain reasonable properties of rational behavior.²⁴ Such problems are called Nash Bargaining Problems and his solution to them is called the Nash Bargaining Solution.

- (27) An extension to allow for asymmetric bargaining power (with associated Asymmetric Nash Bargaining Solution) can be rationalized as the unique outcome of a bargaining problem in which each party to the bargain alternates making offers until an agreement is reached.²⁵ This is a realistic depiction of bargaining in many market environments, including those for digital performance rights. The Asymmetric Nash Bargaining Framework is among the most widely applied tools within economics to analyze negotiations between firms.
- (28) In what follows, I use the solutions from a bilateral monopoly Asymmetric Nash Bargaining Problem to derive certain essential results, and then demonstrate how these results can be used to understand the determinants of PSS sound recording performance royalties.²⁶ In particular, I use the model to show the following:
1. The factors that determine bargaining outcomes for sound recording performance rights for PSSs are closely related to those that determine outcomes for musical composition performance rights for PSSs. Furthermore, the sound recording performance royalty rate for PSSs should be less than the musical composition royalty rate for PSSs;
 2. The factors that determine bargaining outcomes for sound recording performance rights for PSSs are very different from those that determine outcomes for sound recording performance rights in interactive webcasting ("IW"). Furthermore, while the IW sound recording royalty rates should be higher than PSS sound recording royalty rates, the characteristics of PSS and IW are so different that it is not possible to quantify these differences with any degree of probative accuracy; and
 3. The sound recording royalty rates in IW should be greater than the musical composition royalty rates in IW.

²⁴ The four properties are Invariance to Equivalent Utility Representations, Pareto Efficiency, Symmetry, and Independence of Irrelevant Alternatives. See John F. Nash, Jr. "The Bargaining Problem," *Econometrica* 18, no. 2 (Apr. 1950): 155–62 and Abhinay Muthoo, *Bargaining Theory with Applications* (Cambridge: Cambridge University Press, 1999) at Chapter 2.

²⁵ Muthoo (1999), Chapter 3.

²⁶ Appendix A provides the mathematical foundations both for this bilateral monopoly model as well as a richer model that allows for two types of inputs (DPRSR and DPRMW), multiple firms providing each input, and multiple PSS providers.

- (29) Before discussing how each of these results was derived, I describe the relevant assumptions and facts that underlie the model and results.

III.B. Model Assumptions

III.B.1. The hypothetical market

- (30) One purpose of the bargaining framework I introduce here is to estimate the royalty rate that would exist between the record labels and PSSs in general, and Music Choice in particular, in the absence of a compulsory license. Although there are a number of possible scenarios for this hypothetical market (e.g., the record companies negotiating jointly with the PSS providers), I assume that this market is best characterized as sellers of sound recording performance rights (i.e., the record labels) negotiating individually with individual buyers of sound recording performance rights for PSSs (i.e., Music Choice and any other potential buyer).
- (31) While the outcomes in a hypothetical marketplace between record labels and PSS are of primary interest, there are three other related markets that also play a role in determining such outcomes. The first such group of markets is the set of markets for other *inputs* required by PSS providers in order to offer their service. The most important of these inputs are the digital performance rights for musical compositions, the licenses for which must be negotiated with the performing-rights organizations (“PROs”) that control them, notably ASCAP, BMI, and SESAC.²⁷
- (32) The second group of markets important for understanding outcomes in the hypothetical market is the set of markets for PSS *outputs*. PSS providers themselves combine other inputs (created by the PSS) with sound recording and musical composition performance rights to produce a set of audio “channels” that they in turn sell to cable, telecommunications, and satellite television providers. The FCC calls such firms Multi-channel Video Programming Distributors (“MVPDs”).²⁸ MVPDs, in turn, bundle these audio channels with other, predominantly video, television channels and offer them for sale to households, typically in a digital cable package.
- (33) The final group of markets important for understanding outcomes in the hypothetical market is the set of markets *served by the same buyers and sellers*. This turns out not to be relevant for the buyers in this market, PSSs, as each of the PSS providers only offers services in the PSS market. It is very

²⁷ The copyright owners of musical works are the songwriters who author them or, more typically, the music publishing companies who acquire the rights from the songwriters. These music publishers and songwriters typically join PROs and appoint the PRO as their licensing agent for the public performance right. The PRO then handles the voluminous task of identifying users, issuing licenses, collecting royalties, and distributing those royalties to the appropriate music publishers and songwriters. See Marie Connolly and Alan B. Krueger, “Rockonomics: The Economics of Popular Music” in *Handbook on the Economics of Art and Culture* (Amsterdam: Elsevier, 2006) at Chapter 20.

²⁸ “Thirteenth Annual Report on the Status of Competition in the Market for the Delivery of Video Programming,” FCC (2009) MB Docket 06-189.

relevant, however, for the copyright owners of sound recording performance rights (record labels). It is widely understood that record labels license rights to perform sound recordings to a wide variety of buyers, including PSS providers, SDARS providers, and Webcasters. They also physically produce and sell CDs directly to consumers and license the sale of digital downloads. As I show below, understanding the relationship between the rights licensed in the PSS market and the profitability of these other performance and distribution channels is critical to determining a marketplace royalty for sound recording performance rights for PSSs.

III.B.2. Bilateral framework

- (34) Recent authors have extended Nash's bilateral concept to allow for marketplace outcomes to depend on the actions of multiple upstream and downstream firms.²⁹ While these extensions would appear to be relevant in the market for DPRSR in PSS, the essential insights are present in Nash's solution for bilateral monopoly.
- (35) To see this, briefly consider a bargaining problem between multiple record labels and multiple PSS providers. In this more complex setting, one could still use a non-cooperative bargaining framework to characterize royalties for each PSS in their negotiations with each record company. One could then add up the predicted royalties paid by each PSS across these record companies to determine a "total sound recording royalty" that each PSS would pay for licenses covering all recorded music. One could then average this total sound recording royalty across PSSs and argue this average royalty is a good approximation of a marketplace rate for a statutory blanket license for DPRSR. In the case of symmetric record labels (i.e. all of a roughly comparable size) and symmetric PSS providers (similarly), this average total sound recording royalty would likely be identical to that arising from bilateral monopoly negotiations between a single record label and a single PSS provider.³⁰ Even in the absence of symmetry, the royalty predicted in a bilateral framework would reasonably approximate the weighted-average-total-royalty describe above. In what follows, I therefore assume a bilateral framework and describe, where relevant, how deviations in the predicted outcomes from this framework would be affected by multiple firms up- or downstream.

²⁹ Henrick Horn and Asher Wolinsky, "Bilateral Monopolies and Incentives for Merger," *RAND Journal of Economics* 19, no. 3 (1988): 408-19.

³⁰The equivalence should be true as long as a PSS provider could not offer a viable PSS service in the absence of an agreement with *all* (major) record companies. This is consistent with my understanding of the business environment facing Music Choice: they would not be able to operate a viable PSS without DPRSR licenses covering the vast majority of the licensable music library (Interview of David Del Beccaro, Nov. 22, 2011).

III.C. Bilateral market power (Why use a non-cooperative bargaining model?)

- (36) The use of a non-cooperative bargaining framework also depends on the assumption that the record companies and PSS providers both have a certain degree of market power. In the context of the market for DPRSR for PSSs, this assumption is reasonable. Marketplace outcomes between willing buyers and sellers are typically articulated by the intersection of a downward-sloping marginal revenue (or demand) curve and an upward-sloping marginal cost (or supply) curve. This framework for evaluating market outcomes works well when markets are perfectly competitive or when there is some market power on only *one side* of a market.³¹ In markets where there are small numbers of both buyers and sellers and each has some degree of market power, however, this kind of “marginal analysis” proves less useful. Economists have found that modeling marketplace outcomes with bilateral market power as *bargains* is more realistic.³²
- (37) In the current instance, both the record companies and PSS providers have a certain degree of market power. For the record companies, market power is manifest in the form of their ownership of sound recording performance rights, without which it is not legal to digitally broadcast most songs in the U.S. Record labels are therefore able to exercise market power over those songs for which they own the sound recording performance rights.
- (38) PSS providers’ current product offerings and established relationship with MVPDs also afford them with a certain degree of market power. The PSS providers possess a unique bundle of technology that would also be costly and time consuming for any other firms to duplicate. Furthermore, they have negotiated long-term contracts with individual MVPDs that would be costly for another firm to duplicate. PSS providers are therefore able to exercise some degree of market power as a buyer of sound recording performance rights in their negotiations with rights holders due to their ongoing business relationships with MVPDs.
- (39) Given that both PSS providers and record companies have some market power, I conclude that a non-cooperative bargaining model is an appropriate framework for modeling market outcomes for the PSS sound recording performance rights in the absence of a compulsory license.

³¹ In such settings, firms optimally equate marginal revenues with marginal costs to determine their profit-maximizing prices or quantities.

³² Alvin E. Roth, “Bargaining (Economic theories of bargaining),” in *Social Science Encyclopedia* (London: Routledge, 1996) at 46–7.

III.C.1. Nash bargains: Surplus, threat points and bargaining power

III.C.1.a. Overview of general factors

- (40) One attractive feature of the Asymmetric Nash Bargaining Framework is that it yields intuitive predictions about how outcomes are determined when firms negotiate. In what follows, I consider the negotiation between an upstream firm (e.g., a record label) and a downstream firm (e.g., a PSS provider).
- (41) The Asymmetric Nash Bargaining Solution identifies three fundamental factors that determine how two firms "split a pie". I call these the "Three Nash Factors." They are:
- **The Combined Agreement Surplus:** The combined agreement surplus is the combined "surplus" to both the upstream and downstream firms in the market under study from reaching an agreement. For DPRSR in PSS, the combined agreement surplus is simply the revenue earned by the PSS provider in the market for PSS less all the non-DPRSR costs they face.³³
 - **Each Firm's Threat Point:** Each firm in a negotiation must allow for the possibility that no agreement will be reached. The surplus each receives in such a case is called their disagreement point or "threat point".
 - I call the difference between the combined agreement surplus and the sum of the firm's threat points the *Incremental Surplus*. It is the "pie to be split", i.e. the surplus the firms could earn from an agreement above and beyond what they could earn in the absence of an agreement.
 - **Each Firm's Bargaining Power:** Each firm's bargaining power is a number between 0 and 1 measuring the strength of that firm in the negotiations.³⁴ Economic estimates of bargaining power have historically been related to each party's patience in a negotiation, with greater patience yielding greater bargaining power.³⁵ I understand that this is consistent with the nature of bargaining between Music Choice and the copyright owners with whom they negotiate.³⁶

³³ "Surplus" is the payment a good or service can command beyond the amount needed to cover its cost of production. It is sometimes also called "Economic Profit". It is related to but distinct from conventional notions of profit. The differences are two. First, profit in the conventional sense is typically meant to measure the return on the capital invested in a firm. Such returns to capital are not part of surplus (economic profit) as they are part of the costs of providing a service and should therefore be counted as part of the PSS provider's costs. Second, the profit of the PSS would normally count DPRSR as one of its costs. As that is the thing being determined in the bargaining model, however, it is excluded from their costs and retained in the combined agreement surplus.

³⁴ The bargaining power of the PSS provider is just one minus that of the record company.

³⁵ See Muthoo (1999) at 51.

³⁶ Interview with David Del Beccaro, Nov. 26, 2011.

- (42) The Asymmetric Nash Bargaining Solution demonstrates that these three “Nash Factors” determine royalties in a simple and intuitive way:

The royalty received by each firm in a bargain equals its threat point plus its bargaining power times the incremental surplus.

- (43) Muthoo (1999) describes the Nash Bargaining Solution as “splitting the difference”. Two simple examples modeled on the features of the market for DPRSR for PSSs nicely demonstrate this feature and provide some intuition on how each of the Nash Factors influences bargaining outcomes.
- (44) Example 1: No Threat Points—Consider two firms bargaining in a market: an upstream record label and a downstream PSS provider. Suppose for simplicity that the combined agreement surplus between them in the PSS market is 20 and that each firm’s threat point is zero. In this case, the “difference-to-be-split”, or incremental surplus, is just the combined agreement surplus of 20. Further suppose that each firm is equally patient in the negotiations and therefore has equal bargaining power (equal to 0.5). The Asymmetric Nash Bargaining Solution says that each firm gets their threat point (zero) and shares this surplus equally. Thus, the record label and PSS provider each get a royalty of 10. Nash Bargaining “splits the pie”.
- (45) Example 2: With Threat Points—A second example demonstrates the influence threat points have on bargaining outcomes. As above, let the combined agreement profit in the PSS market be 20. Suppose, however, that the record label earns an additional surplus (profit) of 4 in another market (e.g. from CD sales) if it is able to reach an agreement with the PSS provider in the PSS market.³⁷ Its threat point in the bargaining problem is its surplus in the case of *disagreement*. In case of disagreement, the record label loses the CD sales and its threat point is therefore -4.³⁸ Suppose the threat point for the PSS provider continues to be zero.
- (46) Royalties in this bargaining problem are slightly more complicated. The incremental surplus, or difference-to-be-split, is now the combined agreement profit of 20 from the PSS market minus the sum of the threat points of the two firm, -4, for a total of $20 - (-4) = 24$. This is *more* than the surplus available in the PSS market alone because of the additional benefit the record label gets from CD sales stimulated by the promotional effect of the PSS. As above, suppose each firm is equally patient and has equal bargaining power (0.5). The Asymmetric Nash Bargaining Solution says the royalty to the PSS provider is equal to its threat point (zero) plus one half the incremental surplus of 24, or 12. The royalty to the record company is equal to its threat point (-4) plus one half the incremental surplus (12), or 8. Of the combined agreement surplus in the PSS market of 20, the record label gets 8 and the PSS provider 12.

³⁷This example anticipates the application of the framework to the actual PSS market where copyright owners benefit from the promotional effect of an agreement in the PSS market.

³⁸ The model allows for the possibility of positive or negative threat points.

- (47) Lest this seem unfair, recall that in the case of agreement that the record label also gets a surplus of 4 from *outside* the PSS market, e.g. due to CD sales. If one includes this into its overall benefit from an agreement with the PSS provider, then you see that each firm gets 12, i.e. each firm shares equally the total surplus *across all markets* of 24.
- (48) The royalty calculated above is measured in surplus (dollars), not as a share of revenue (as is typical in many digital audio markets). It can easily be converted into a share of revenue, however, for a vertical market like that for DPRSR in PSS where the downstream PSS provider sells a product and passes on a portion of its revenue from those sales to the upstream record company. In this case, the appropriate royalty rate is simply the royalty (measured in dollars) divided by the PSS provider's revenue.
- (49) While straightforward within a single market, care must be taken *comparing* royalty rates across markets. Two markets may have the same royalty (measured in dollars) but very different royalty *rates*. A simple example shows why.
- (50) In Example 1 above, the combined agreement profits were 20, there were no threat points, and the record label and PSS provider had the same bargaining power, yielding a royalty to each of 10. If the combined agreement profits of 20 arose from a downstream market where the PSS provider had revenue of 20 and no costs, then the appropriate revenue royalty rate would be 50 percent (record label royalty of 10 divided by PSS revenue of 20). If the combined agreement profit of 20 arose from a downstream market with revenue of 40 and costs of 20, however, then the appropriate revenue royalty rate would be 25 percent (record label royalty of 10 divided by PSS revenue of 40). For a given amount of combined agreement surplus, higher costs generally imply lower (revenue) royalty rates.

III.C.1.b. Nash Bargains for DPRSR for PSS

- (51) This framework is extremely useful for determining a reasonable PSS sound recording performance royalty. I begin by using it to understand the determinants of royalties in the hypothetical market for DPRSR in PSS. To do so, I consider the three factors as they pertain to that hypothetical market.

III.C.1.b.i. Combined surplus

- (52) The Combined Agreement Surplus is straightforward. It is simply the combined surplus to both the record label and PSS provider in the PSS market when an agreement is reached. This is just the total profits earned by the PSS provider before payment of the sound recording performance royalty.

III.C.1.b.ii. Threat points

- (53) The threat point for the PSS provider is similarly straightforward. In the absence of an agreement with any of the major record labels, the PSS provider cannot produce any music channels and therefore cannot earn any surplus. Its threat position, therefore, is zero.³⁹
- (54) The threat point for the record label, however, is more nuanced. Like the PSS provider, in the absence of an agreement, the record label receives no revenue *from the PSS market*. As a result, that portion of its threat position is likewise zero.⁴⁰
- (55) However, failure to reach an agreement with PSS providers has additional implications for the record label. In addition to licensing sound recording performance rights in the PSS market, the record label *also* licenses the performance rights to its sound recordings in other, non-PSS markets. They also sell music in the form of CDs to consumers through various distribution channels. Failure to reach an agreement with the PSS could have an adverse impact on these additional revenue streams. Indeed, a large body of evidence suggests there are significant promotional benefits of PSS on record label sales (and thus record company profit). The following paragraphs summarize this evidence.
- (56) In its 1998 ruling for DPRSR for PSSs, the Librarian of Congress noted that the Copyright Arbitration Royalty Panel reasonably found that the record companies did not incur a risk from lost sales due to the PSSs' activities.⁴¹ Indeed, the Librarian noted that the Panel believed that PSS decreased the risk to the recording companies because digital audio services have substantial promotional value.⁴² According to the Panel, the promotional value came from the constant airplay of new types of music not readily accessible in the marketplace, which in turn stimulated record sales. In fact, the record companies' own expert acknowledged, "there (are) promotional benefits to

³⁹This assumption was also discussed in Section III.B.2. It is consistent with my understanding of the business environment facing Music Choice. I note here that relaxing this assumption would only strengthen my arguments as a PSS provider that is able to offer a viable service in the absence of an agreement with a single record company would only strengthen the PSS provider's threat position, increasing its portion of the surplus, and reducing the royalty to the record company. As I repeat this type of analysis several times in the balance of my report (for different rights and/or output markets), it is convenient to assume that the threat point is zero. None of the qualitative conclusions in my report are influenced by assuming a zero threat point for a PSS provider (or any other downstream digital music service provider).

⁴⁰Here is one place where the simplification provided by the bilateral monopoly framework could influence the predictions of the model. Allowing for multiple PSS providers would simply mean that the record label would earn no surplus in the market covered by that PSS provider. It could earn surplus from markets covered by other PSS providers, but that would be true with or without an agreement with a given PSS. Only if MVPDs were able and willing to switch PSS providers in the case the given PSS provider and record label couldn't reach an agreement (unlikely given the long-term contracts in the industry) or households were willing to switch MVPDs in such a case (also unlikely as I know of no evidence to suggest audio music channels are sufficiently important to induce households to switch MVPDs) could the record label earn incremental surplus in the case of disagreement and an environment with multiple PSS providers. Because these effects are likely to be negligible, I conclude that assuming this threat point is zero is reasonable.

⁴¹ 63 FR 25407 (May 8, 1998).

⁴² 63 FR 25408 (May 8, 1998).

recording companies from record companies having their music played on radio stations or digital music services.”⁴³

- (57) Furthermore, the testimony of Music Choice Vice President of Programming and Content Development, Damon Williams, provides many examples of promotional activities that Music Choice engages in on behalf of the record labels and performing artists.⁴⁴ I will not list these numerous activities here, but as an economist, it is implausible to me that the record companies would devote substantial resources to co-promote activities with Music Choice if they provided no benefit to the record companies and artists.
- (58) That PSSs provide a promotional benefit to record labels is further supported by the fact that the record labels themselves provide Music Choice with “promotional copies” of their every new recording and attempt to persuade Music Choice to play these recordings on its service. It is my understanding that these efforts on the part of the record companies have continued to increase in recent years.⁴⁵ Given Music Choice’s extremely broad playlist, it would appear that this benefit is greatest for those artists that might not receive airplay on terrestrial radio, which I understand has been broadcasting an increasingly condensed and homogenized playlist to the exclusion of less mainstream artists like those featured on Music Choice.⁴⁶ In contrast, it is my understanding that Music Choice has expanded the number of channels offered on its services from 31 in 1996 to 46 today, with plans to expand to more than 300 channels in the near future.⁴⁷ Because each channel represents a unique genre or subgenre of music, I would expect that this expansion of channels would increase Music Choice’s playlist and thus increase the exposure of lesser-known artists that might not otherwise be heard on commercial radio.
- (59) I also understand that the record labels and artists provide promotional plaques to Music Choice acknowledging their contributions to the record companies’ ability to reach certain milestones in record sales.⁴⁸ I also understand that the record labels and artists regularly send emails and faxes thanking Music Choice for promoting their records (see Exhibit MC 29).
- (60) Furthermore, there is empirical support for the fact that Music Choice provides a promotional benefit to both sound recording and musical composition performance rights holders. An online survey conducted in 2011 by the research firm NPD Group noted some interesting facts that suggest that Music Choice provides promotional benefits to the record companies and artists. According to the survey, listeners value learning about their favorite artists and new music.⁴⁹ Not surprisingly, the

⁴³ Ibid.

⁴⁴ Testimony of Damon Williams at 9–12.

⁴⁵ Ibid. at 7–9.

⁴⁶ Ibid. at 22–4.

⁴⁷ Testimony of David J. Del Beccaro at 3, 10.

⁴⁸ Testimony of Damon Williams at 6.

⁴⁹ See Exhibit MC 56 for “NARM Research Report: Consumers & Music Discovery,” The NPD Group (Nov. 2011) at 6.

greatest consumers of music have the strongest appetite for music discovery.⁵⁰ It is my understanding that Music Choice's on-air displays provide important information about artists that listeners otherwise might not have easy access to. For example, I understand that Music Choice has enhanced its on-screen displays, which now include important marketing information such as the artist's name and album title and date, as well as artist facts, album artwork, artist images, and more. Furthermore, I understand that these displays are far more informative than the displays used by Music Choice in 1996.⁵¹ A study by Ipsos OTX MediaCT in 2011 shows that more than half of Music Choice's customers look at the screen at least once during each song. This same 2011 study also shows that listener satisfaction is highly favorable and has grown since 2008, particularly among younger listeners and women (see Exhibit MC 38).

- (61) In light of these investments by Music Choice, it is not surprising that the NPD survey respondents ranked TV and TV music channels as the second most important medium for discovering new music.⁵² The survey specifically cited Music Choice as being listened to by younger, heavier buyers of music, which reflects the "multi-platform" behavior of those who spend the most time listening to music.⁵³
- (62) A recent Experian Simmons survey from 2010 corroborates this fact. It shows that Music Choice viewers and listeners exhibit a strong propensity to purchase music. According to the survey, monthly Music Choice audio channel listeners, age 12 and above, are 69 percent more likely than the average person, age 12 and above, to have purchased 10 or more CDs or downloads in the past year (see Exhibit MC 36). A 2008 study by OTX shows a similar relationship between Music Choice listeners and CD purchases. It shows that almost one-third of Music Choice customers buy the music they hear on Music Choice (see Exhibit MC 35).
- (63) Taken together, these facts provide an enormity of evidence that Music Choice provides a promotional benefit to sound recording copyright holders. This promotional benefit, in turn, would have an important impact on the outcomes of negotiations in a hypothetical marketplace between PSS providers and record companies.
- (64) To see this, suppose this promotional benefit takes the form of a certain share of PSS subscribers who purchase an additional CD per month because of their exposure to the music from their PSS. If the record label cannot reach agreement with the PSS provider on the licensing of sound recording performance rights, those potential PSS subscribers will not receive the PSS service and will not purchase those additional CDs. In the case of disagreement, the record label would *lose* this promotional benefit. As in the Example 2 above, its threat point is therefore *negative*.

⁵⁰ Ibid. at 13.

⁵¹ Testimony of Damon Williams at 9.

⁵² See Exhibit MC 56 for "NARM Research Report: Consumers & Music Discovery," The NPD Group (Nov. 2011) at 42.

⁵³ Ibid. at 44.

III.C.1.b.iii. Bargaining power

- (65) The last Nash Factor, the bargaining power for the record label in its negotiations with a PSS over the surplus, is difficult to determine. Theoretical research in this area has linked bargaining power to each firm's patience in a negotiation.⁵⁴ Most record labels and PSS providers are long-standing firms with a history of successful negotiations, so there is nothing *a priori* to suggest that one is more or less patient than the other. Furthermore, estimating bargaining parameters of firms in marketplace settings is a challenging undertaking at the frontier of economic research.⁵⁵ For simplicity, I assume the bargaining power of each is equal. This is consistent with my understanding of Music Choice's experiences bargaining in arm's-length negotiations with sound recording performance rights holders in markets for music videos.⁵⁶
- (66) Combining these factors yields a simple representation of the royalty to each of the record label and the PSS in the hypothetical market for sound recording performance rights for PSSs. This formula is qualitatively similar to that in the second example above: The PSS provider earns its threat point (zero) plus half of the incremental surplus given by the combined agreement surplus in the PSS market *plus* the promotional benefit to the record labels from the PSS service.⁵⁷ The record label does *less* well from the PSS market: it earns the same share of the incremental surplus, but loses the value of the promotional benefit from PSSs embodied in its negative threat position.⁵⁸

IV. Applying the Nash Bargaining Framework to Evaluate Benchmark Markets

IV.A. Overview

- (67) In this section, I use the Nash Bargaining Framework introduced above to evaluate alternative benchmark markets for sound recording performance rights for PSSs. My primary conclusion is that the royalty rate for musical composition performance rights for PSSs is the benchmark that most

⁵⁴Muthoo (1999) at 51.

⁵⁵In Crawford and Yurukoglu (forthcoming), the authors estimate bargaining parameters in markets for cable television channels and find estimates that range from 0.17 and 0.77 with a mean of 0.56 (with larger values indicating more bargaining power for cable and satellite television systems relative to cable television channel owners).

⁵⁶Interview with David Del Beccaro, November 26, 2011.

⁵⁷The incremental surplus is the difference between the combined agreement surplus and the record label's threat position, the lost promotional benefits (a negative number). As in the second example in the section above, subtracting a negative number yields a positive number and thus a *larger* pie: the combined agreement surplus plus the record label's promotional benefit in case of agreement.

⁵⁸As in example 2, it earns it back on its surplus in those other markets. Thus the overall split of surplus (i.e. including the promotional benefit in the calculation) is equal.

closely approximates the economic value of sound recording performance rights for PSSs. I support this argument in four steps.

- (68) First, in Section IV.B below, I describe the five dimensions of a market that would make it an ideal benchmark for the hypothetical market for DPRSR in PSS. These are: (1) whether outcomes in the market are due to marketplace negotiations between willing buyers and sellers; (2) the sellers and the rights they are selling; (3) the buyers in the market; (4) the products being purchased; and (5) the active versus passive nature of purchase and consumption by the ultimate users of the service.
- (69) Second, in Section IV.C, I consider the merits of using DPRMW in the market for PSS providers as a benchmark for DPRSR in the market for PSS providers. I compare the characteristics of the musical works market in PSS to the ideal benchmark and note it only materially differs with respect to a single criterion, the rights being sold (i.e. SR versus MW). I also survey previous proceedings in which the musical works rate has been proposed as a benchmark for the sound recording rate. In the only previous proceeding to set a royalty rate for PSS, the DPRMW was used as the appropriate benchmark and this decision was upheld by the appellate court. I then evaluate the predictions of the Nash Bargaining Framework for DPRMW in PSS and demonstrate that they predict a royalty for DPRSR that is *strictly less* than a similar royalty for DPRMW due to the returns record labels earn on products for which PSS provides a promotional benefit (e.g. CD and download sales).
- (70) Third, in Section IV.D, I motivate why other benchmarks used to set the DPRSR in alternative markets, for example webcasters, would be inappropriate for the DPRSR in PSS. I compare these markets with the markets for DPRSR and find that they differ in many ways, including that the buyers are different, the products being purchased are different, and the nature of purchase and consumption of those products by consumers is different. The Nash Bargaining Framework is useful here as well as it shows that accounting for these differences can rationalize marketplace evidence that royalties for DPRSR are greater than DPRMW in these markets due to the substitutability of webcasting products with rights holders' other products and the opposite prediction this has compared to PSS providers on record labels versus PRO threat positions and consequent royalty rates.
- (71) Finally, in Section IV.E below, I provide corroborative evidence from international markets for each of these conclusions.

IV.B. Features of an Ideal Benchmark Market for DPRSR in PSS

- (72) My goal in this report is to motivate a range of reasonable rates for sound recording performance rights for PSSs. As described above, these rates approximate those that would be obtained from a hypothetical market between willing buyers and sellers of such rights. By construction, this hypothetical market doesn't exist. As such, it is reasonable to try to find a benchmark market, the rates in which might serve as a useful guide for rates in the hypothetical market. This approach

has been well-established in previous proceedings before the Copyright Royalty Judges and its predecessors for the estimation of reasonable royalties for sound recording performance rights both for PSSs and in other markets.

(73) Because a market for sound recording performance rights for PSSs doesn't exist, no other market will be a perfect benchmark. That being said, there are five characteristics of markets that such an idealized benchmark would satisfy. They are these:

1. Marketplace outcomes: Since the hypothetical benchmark market is one of willing buyers and willing sellers agreeing to royalties in an open market, an ideal benchmark market would also have this feature. This is contrasted with benchmark rates that are set in a statutory proceeding or are influenced by other non-market factors.

2. Same sellers, same rights: In the ideal benchmark market, the same sellers (record labels and/or their representative rights organizations) would be selling the same rights (digital performance rights for sound recordings) as in the hypothetical market for sound recording performance rights for PSSs.

3. Same buyers: In the ideal benchmark market, the same buyers, PSS providers, would buy the rights as in the hypothetical market.

4. Buyers selling the same products: In the ideal benchmark market, the buyers who purchase sound recording performance rights would themselves sell the same products to further buyers in downstream markets. In the hypothetical PSS market, buyers package sound recording performance rights with other inputs (notably musical composition performing rights as well as the PSS's own original creative content) to create audio channels. They then sell the rights to bundles of these channels to multi-channel video distributors (MVPDs) who, in turn, bundle them with digital video channels and sell them to households as part of a digital television service.

5. Ultimate consumers using the same method of purchase and consumption: In an ideal benchmark market, the ultimate consumers of the products in which sound recording performance rights are embodied would purchase and consume them in the same manner as in the PSS market. In the market for sound recording performance rights for PSSs, MVPDs arrange long-term contracts with PSS providers and then resell the digital music service to households as part of their digital television offerings. Households purchase access to those services for a monthly fee and then consume them (or not) at their leisure over the course of each month. Critically, this consumption is *passive*: the PSS provider selects the particular tracks to play on each of its channels and the consumer can either listen or not to those channels.

Note that characteristics (3), (4), and (5) together determine the willingness to pay (or demand) by buyers for PSS.

IV.C. DPRMW in the market for PSS as a benchmark for DPRSR in the market for PSS

- (74) The two primary conclusions in this report are that: 1) the royalty for musical composition performance rights for PSSs is the benchmark that most closely approximates the royalty for sound recording performance rights in a hypothetical market for PSSs; and 2) the royalty for sound recording performance rights for PSSs should be *strictly less* than that for musical composition performance right for PSSs. In this section, I support these claims. I begin by surveying evidence in related proceedings on the comparability of the musical composition and sound recording rates.

IV.C.1. Previous Decisions on the Usefulness of a Musical Composition Rate as a Benchmark for a Sound Recording Rate

- (75) The usefulness of musical composition performance rights as a benchmark for sound recording performance rights has been much discussed in previous proceedings setting rates for both PSS and related services. In *Webcaster II*, Professor Adam Jaffe, writing on behalf of the webcasters, advocated the use of the musical works benchmark for DPRSR in the non-interactive webcasting market. Professor Jaffe made two arguments. First, he argued that because buyers of these rights needed both sound recording and musical composition rights in order to make a public performance, their value would be the same. Second, he argued that the costs to both sound recording and musical composition rights holders are sunk and that they would therefore approach negotiations in the same way. He concluded that the “the musical works royalty [in this market] would be equivalent to the sound recording royalty.”⁵⁹ In the 2006 SDARS proceeding, Dr. John R. Woodbury, writing on behalf of SDARS, articulated similar arguments.⁶⁰
- (76) In both cases, the Copyright Royalty Board rejected using a musical composition rate as a benchmark for the sound recording rate. In *Webcaster II*, they found that “the sellers of the two rights are different and that they are selling different rights,” confronting Prof. Jaffe’s model with “substantial empirical evidence ... 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.” They concluded that “Dr. Jaffe’s proffered benchmark is not useful to our determination of an appropriate benchmark from which to derive applicable rates.”⁶¹
- (77) In the 2006 SDARS proceeding, the Board reached similar conclusions. They reiterated the different sellers/different rights point, adding “many products and services require several essential inputs, but

⁵⁹ Written testimony of Adam B. Jaffe, Docket No. 2005–1 CRJ DTRA at 19–25. Jaffe’s testimony is submitted as Exhibit MC 61.

⁶⁰ Expert Report of Dr. John R. Woodbury, Docket No. 2006–1 CRB DSTR (Oct. 30, 2006) at 36–8. Dr. Woodbury’s report is submitted as Exhibit MC 62.

⁶¹ 72 FR at 24094–5 (May 1, 2007).

that fact alone does not lead to price parity across those inputs”. They also again found “the marketplace evidence from other digital markets ... casts substantial doubt on the reasonableness of using the preferred musical works rates as a benchmark for the sound recording rates to be determined in this proceeding.”⁶²

- (78) By contrast, in the first royalty proceeding concerning PSSs in 1996, the CARP initially determined the PSS sound recording performance royalty rate to be 5 percent.⁶³ On appeal, the Librarian of Congress changed the rate to 6.5 percent by first using an estimated PSS musical composition royalty rate of 10 percent as a benchmark and then adjusting this rate downwards in consideration of the four statutory objectives.⁶⁴ The decision to use the musical composition performance rates as a benchmark was later upheld on appeal by the District of Columbia Circuit.⁶⁵ I understand David Del Beccaro provides further details about the use of the musical works rate as a benchmark in that proceeding in his written testimony.
- (79) I conclude that the evidence in the existing record regarding the suitability of musical composition performance rights for PSSs as a benchmark for sound recording performance rights for PSSs is mixed. That being said, I will argue below in favor of its use. Importantly, my arguments are different from those used in previous proceedings. I agree with Drs. Jaffe and Woodbury that the value of sound recording and musical performance rights for PSSs imply the same *threat point* for a PSS provider, but I disagree with their conclusions: this does *not* mean that they should command the same royalty. The other Nash Factors, the combined agreement profit, the threat point of the rights holder, and the bargaining power of each party, also matter. Accounting for these features shows that, in fact, the royalty for sound recording performance rights for PSSs should be *less* than or, under limited conditions, equal to the royalty for musical composition performance rights for PSSs. I demonstrate this after comparing the market for musical composition performance rights for PSSs to the ideal benchmark.

IV.C.2. Comparing the market for DPRMW in PSS with the Ideal Benchmark

- (80) Comparing the market for DPRMW in PSS with the characteristics of the ideal benchmark market demonstrates that the market for DPRMW satisfies many of the desired criteria. The market for DPRMW in PSS has the same buyers as the ideal benchmark (PSS providers), these buyers sell the same products (bundles of audio channels), and the ultimate consumers purchase and consume that product in the same way.

⁶² Final Determination of Rates and Terms, Docket No. 2006-1 CRB DSTR A at 37-8.

⁶³ Report of the Copyright Arbitration Royalty Panel (Nov. 12, 1997) at 61.

⁶⁴ 63 FR at 25409-10 (May 8, 1998).

⁶⁵ *Recording Industry Association of America v. Librarian of Congress*, 176 F.3d 528, 532 (D.C. Cir. 1999).

- (81) There are only two differences between the market for DPRMW in PSS and the ideal benchmark. The first is modest. PSS providers now negotiate royalty agreements with the performing rights organizations that manage copyrights for musical works. These are marketplace negotiations between willing buyers and willing sellers. While ASCAP and BMI are required to enter into licenses on a reasonable fee basis by the consent decrees agreed to in 1941 (and subsequently amended to settle antitrust actions), the compulsory nature of these blanket licenses does not affect the fact that they reflect market-based transactions. Indeed, the rate-setting courts enforcing the consent decrees set the rates pursuant to a willing buyer/willing seller standard.⁶⁶
- (82) The second difference is more substantive. In the market for DPRSR in PSS, the sellers are record labels selling digital performance rights for sound recordings. In the market for DPRMW in PSS, the sellers are the performing rights organizations (acting on behalf of copyright holders) selling digital performance rights for musical works. I consider the consequence of this difference in Section IV.C.3 below, however, and show that it is negligible.

IV.C.3. Comparing Nash Bargains for DPRMW and DPRSR in PSS

- (83) In what follows, I use the same Nash framework I used above to analyze the factors determining marketplace for DPRMW in PSS. Doing so demonstrates the usefulness of musical works royalties as a benchmark for sound recording royalties for PSS.
- (84) To see this, consider the negotiations between a single *performing rights organization* (“PRO”) and a single PSS provider.⁶⁷ In particular, consider each of the three Nash Factors in the market for DPRMW in PSS and further consider how each compares with the same factor in the market for DPRSR in PSS:

IV.C.3.a.i. Combined surplus

- (85) The combined agreement surplus in the market between a PRO and a PSS provider for DPRMW in PSS is straightforward. It is simply the combined surplus to them both in the PSS market when an agreement is reached.
- (86) Is this greater or smaller than the analogous combined agreement surplus between the *record label* and PSS provider in the PSS market? It is (slightly) *greater*. In practice, they are likely to be very close to each other. The combined agreement surplus for the record-label-PSS negotiation is the combined surplus from offering PSS service given the royalties paid to the PRO (among other costs)

⁶⁶ *ASCAP v. Showtime/The Movie Channel, Inc.* (“*Showtime*”), 912 F.2d 563 (2d Cir. 1990).

⁶⁷ For convenience, I again analyze bargaining outcomes in the case of bilateral monopoly rather than a richer and more realistic setting with multiple PROs and multiple PSS providers. The reasons are the same as those I described in Section III.C.3 above: the results are qualitatively the same as those from the richer environment, but are easier to describe. Where they differ, I describe the differences in the footnotes.

while the combined agreement surplus for the PRO-PSS negotiation is the combined agreement surplus from offering PSS service given the royalties paid to the record label (and the same other costs). If the royalties paid to each digital performance rights holder was the same, then the combined agreement surplus would be the same. I will argue below, however, that royalties to record labels should be *less than* royalties to PROs. In this case, the combined agreement surplus in the PRO-PSS negotiation is slightly higher.

IV.C.3.a.ii. Threat points

- (87) The threat point for the PSS provider is similarly straightforward. In the absence of an agreement, the PSS provider again cannot produce any music channels and therefore cannot earn any surplus. Its threat position is again zero.⁶⁸ It is therefore the same as the threat position of the PSS in negotiations with the record company.
- (88) This last conclusion was central to Drs. Jaffe's and Woodbury's arguments: a PSS provider needs both sound recording and musical composition rights in order to offer a PSS. Without *either* of them, they cannot offer a service. In the non-cooperative bargaining framework I introduce here, this implies that the PSS provider's *threat point* is the same. It does *not*, however, support their conclusions that the *royalties* are the same. To evaluate that proposition requires evaluating the effects of the different rights being licensed on the *other* Nash Factors.
- (89) The threat point for the PRO follows that for the record company in my previous analysis. In the absence of an agreement, the PRO receives no revenue *from the PSS market*. However, the PRO, like the record label, also earns profit from their musical composition performance rights in other, non-PSS markets. For example, the copyright owners represented by the PROs (music publishers and songwriters) license the musical works right for use in various non-performance-based distribution markets, such as digital downloads and physical products like CDs. As for the record label, this introduces a promotional benefit to the PRO. As for the record label, failing to reach an agreement with a PSS provider means the members of the PRO would *lose* this promotional benefit. Its threat point is likewise *negative*.⁶⁹
- (90) Is this threat point greater or smaller than the analogous threat point for the record label in their negotiations with the PSS provider? A critical element of my analysis is that it is *greater*. The

⁶⁸ As in the analysis of the negotiation between a record label and a PSS above, relaxing this assumption would only strengthen my conclusions.

⁶⁹ In actuality neither ASCAP nor BMI can refuse to license, the consequences of which I discuss in the next footnote. I also note that ASCAP and BMI are not-for-profit membership associations, meaning they are composed of the songwriters and music publishers they represent (SESAC is a for-profit membership association). These entities act as licensing agents for the song copyright owners, but only for the public performance right and only as part of a "blanket license" of the entire catalogue represented by the particular PRO. When records or downloads are sold, the PRO is not involved but the royalties flow to the same publishers and songwriters that are members of the PROs.

reason, as discussed in Section II above, is that copyright owners of sound recording performance rights earn relatively more from the other, non-PSS distribution markets described above than do copyright owners of musical composition performance rights. Because copyright owners of musical composition performance rights lose less when an agreement cannot be reached with the PSS provider, their threat point is higher (i.e., less negative) than that for copyright owners of sound recording performance rights.

IV.C.3.a.iii. Bargaining Power

- (91) The bargaining power for the PRO in its negotiations with a PSS is difficult to determine. I am unaware of any evidence to suggest PROs would be any more or less patient than PSS providers in their negotiations over rights.⁷⁰ For Music Choice, I understand that they are both equally patient in negotiations over performance rights for music videos.⁷¹ As such, I assume that the bargaining power of each is equal. In this case, the bargaining power of the PRO in negotiations with the PSS provider is also equal to the bargaining power of the record label in similar such negotiations.

IV.C.3.a.iv. Comparing predicted royalties based on their component Nash Factors

- (92) I am now in a position both to compare the royalty to a PRO in negotiations with a PSS provider to the same royalty to a record label. The Asymmetric Nash Bargaining Solution determines that the royalty to the PRO from a negotiation with the PSS provider is equal to *minus* its promotional benefit in non-PSS markets plus half of the incremental surplus given by the sum of the combined agreement surplus in the PRO-PSS market and that promotional benefit. Similarly, the royalty to the record label is equal to *minus* its promotional benefit in non-PSS markets plus half of the incremental surplus given by the sum of the combined agreement surplus in the record-label-PSS market and that promotional benefit.
- (93) In both negotiations, the predicted threat point for the PSS is zero. In both negotiations, the predicted bargaining power is equal. The only Nash Factors that differ across the negotiations are the combined agreement surplus in the PRO-PSS and record label-PSS markets and the threat position of the rights holders. Even these are similar in kind, the combined agreement surplus arising from revenues in the PSS market and the threat position of the rights holder depending on its surplus from the promotional benefits provided by PSS.

⁷⁰ One difference between the negotiations between a PSS and a PRO versus that between a PSS and a record label (in the hypothetical market) is that PROs cannot refuse to license their musical composition performance rights. This difference is likely to be immaterial, however. While the record label does not *have* to license its sound recording performance rights, it would be foolish not to. By assumption, the pie to be split in the PSS market is positive. As such, theory predicts the record label will also not refuse to license its rights.

⁷¹ Interview with David Del Beccaro, November 26, 2011. Note that bargaining power in the Nash framework relates to bargaining power in marketplace negotiations between two firms, particularly a PSS and an individual record label. In his written declaration at 6 and 9, David Del Beccaro discusses Music Choice's unequal bargaining power relative to SoundExchange, an entity representing all record labels, in the context of negotiations entered in the shadow of a costly rate proceeding. That is a very different concept.

- (94) Based on the strong similarity in the Nash Factors underlying bargaining outcomes in the markets for DPRMW in PSS and the hypothetical market for DPRSR in PSS, I conclude that marketplace evidence on royalties for DPRMW in PSS would be an ideal benchmark for royalties that would obtain in the hypothetical market for DPRSR in PSS.
- (95) That being said, the Nash Factors do not suggest that the two royalties should be the same. Because the lost promotional benefits are smaller to the songwriters and publishers represented by a PRO than a record company and the combined agreement surplus in a PRO-PSS negotiation is slightly higher than that in a record-company-PSS negotiation, I conclude that marketplace royalties to PROs are greater than the royalties that would be agreed in a hypothetical negotiation with record labels, or to put it another way, that the royalty for DPRSR in PSS obtaining in a hypothetical market would be *strictly less* than the royalty for DPRMW in PSS.⁷²
- (96) Importantly, this conclusion for royalties also applies for royalty *rates*. Since DPRSR and DPRMW are both sold to PSSs, they may both be divided by the same revenue, the revenue of the PSS provider, in order to calculate a royalty rate. Thus if the royalty to DPRSR in PSS is less than the royalty to DPRMW in PSS, so too should the royalty rate to DPRSR in PSS be less than the royalty rate to DPRMW in PSS.

IV.D. DPRMW in IW as a benchmark for DPRSR in PSS

- (97) Another of the conclusions in this report is that royalty rates for DPRSR for IW services *cannot* approximate the royalty rate that would obtain in a hypothetical market for DPRSR in PSS and therefore should not be used as a benchmark for DPRSR in PSS in this proceeding. In this section, I support that claim. I also demonstrate that the same Nash Factors that predict a lower royalty for DPRSR than DPRMW for PSSs (as discussed above) can rationalize marketplace evidence from related proceedings of a higher royalty for DPRSR than DPRMW for IW and other digital markets. I begin by surveying evidence in related proceedings on the comparability of sound recording rates in IW as a benchmark for sound recording rates in related markets.

⁷²Consider a simple numerical example to illustrate this point. In my second example in Section III.C.2 above, I showed that a negotiation between a record label and a PSS with combined agreement surplus of 20, threat points of -4 (for the record company) and 0 (for the PSS), and equal bargaining power implied the record label received a royalty of 8. In this section I argue that a negotiation between a PRO and a PSS would yield a *greater* combined agreement surplus (i.e. 22 instead of 20), a *greater* threat point for the PRO (i.e., -2 instead of -4), the *same* threat point for the PSS (zero), and the same bargaining power (0.5). In this case, the royalty to the PRO is its threat point (-2) plus half the sum of the incremental surplus given by the sum of the combined agreement surplus and the promotional benefit in case of agreement ($22+2=24$), for a total royalty of 10. This is greater than the royalty of 8 received by the record label in the example.

IV.D.1. Previous Decisions on the Usefulness of DPRSR in IW

- (98) The usefulness of DPRSR in IW as a benchmark for DPRSR in related markets has been discussed in previous proceedings setting rates for related markets. In *Webcaster II*, Dr. Michael Pelcovits, writing on behalf of SoundExchange, advocated the use of the DPRSR in IW for DPRSR in the non-interactive webcasting market.⁷³ In the 2006 SDARS proceeding, Dr. Janusz Ordover, writing on behalf of SoundExchange, advocated “using a variety of agreements covering other distribution channels for digital music (e.g., interactive subscription services, cellular ringtones, etc.)” as a benchmark for DPRSR in SDARS.⁷⁴
- (99) In both cases, the Copyright Royalty Judges found this benchmark useful. In *Webcaster II*, the Judges based the rate for non-interactive webcasting services on the interactive webcasting rate after allowing for an adjustment provided by Dr. Pelcovits for the difference in interactivity.⁷⁵ In SDARS 2006, they concluded “the 13 percent rate [given by Dr. Ordover’s interactivity-adjusted interactive webcasting benchmark expressed as a percentage of revenue] identified hereinabove marks the upper boundary for a zone of reasonableness for potential marketplace benchmarks...”⁷⁶
- (100) I conclude that the evidence in the existing record regarding the suitability of DPRSR in interactive webcasting (“IW”) as a benchmark for DPRSR in non-interactive webcasting (“NIW”) and SDARS seems favorable for these other markets. Despite this, I argue below against its use for PSSs. I show how the differences between DPRSR in IW and the ideal benchmark described above translate directly into Nash Factors that preclude the use of royalty rates for DPRSR in IW as benchmarks for PSS. Despite this, I show that the same Nash Factors that rationalize royalties for DPRSR less than those for DPRMW can *also* explain why royalties for DPRSR exceed those for DPRMW in IW, indicating that marketplace evidence of that fact is *not* conclusive about the suitability of DPRMW as a benchmark for DPRSR for PSSs.
- (101) I begin by comparing the market for DPRSR in IW to the ideal benchmark.

IV.D.2. Comparing the market for DPRSR for IW with the Ideal Benchmark

- (102) Comparing the market for DPRSR in IW with the characteristics of the ideal benchmark market demonstrates that the market for DPRSR in IW satisfies only two of the desired criteria. It compares well to the ideal benchmark market in that it relies on true marketplace negotiations between willing buyers and willing sellers for the same set of rights, digital performance rights in sound recordings.

⁷³ 72 FR at 24092 (May 1, 2007).

⁷⁴ Final Determination of Rates and Terms, Docket No. 2006-1 CRB DSTR A at 50.

⁷⁵ 72 FR at 24095 (May 1, 2007).

⁷⁶ Final Determination of Rates and Terms, Docket No. 2006-1 CRB DSTR A at 54.

- (103) It differs, however, in all other important ways from the ideal benchmark. First, the buyers in IW markets are different from those in the ideal benchmark market. Instead of analyzing royalties paid by PSS providers for DPRSR, it analyzes royalties paid by IW providers for DPRSR. This could have several meaningful effects, but I focus on one in my analysis below: the cost base. As I showed in the last section, one may be able to use a comparison of Nash Factors to infer royalties in the hypothetical market for DPRSR in PSS from a closely related benchmark market (e.g., DPRMW in PSS). As I discussed in the introduction to the Nash Bargaining Solution, however, one may *not* necessarily translate this difference in royalties to differences in royalty *rates*: differences in the share of costs in revenue can yield markedly different optimal royalty rates as a share of revenue for equivalent implied royalty levels (as a portion of surplus or economic profit). I show below how this difference makes the market for DPRSR in IW inappropriate for use as a benchmark for DPRSR in PSS.
- (104) Second, the set of products sold by buyers differs in the IW market from the ideal benchmark market. Whereas PSS providers sell their services to MVPD providers who then bundle them with video channels into a digital cable package, IW providers sell access to a library of music directly to consumers. Although both IW and PSS offer music services at the most general level, in all other probative respects the IW services are fundamentally different than those of the PSS: consumers are able to browse a large library of titles, construct their own playlists, and (critically) play tracks on demand. I show below how this difference makes the market for DPRSR in IW inappropriate for use as a benchmark for DPRSR in PSS.
- (105) Finally, the on-demand, or interactive, nature of IW differs significantly from the passive consumption experience of PSS. Ultimate consumers of PSS service receive a service similar in important ways with commercial broadcast radio. If they subscribe to Music Choice, they may select among 46 audio channels according to the genre of the music played on that channel. By contrast, consumers of IW services receive access to a library of as many as 13 *million* tracks.⁷⁷ They may choose who and what they would like to listen to whenever they like. They may also be able to transfer that music to a portable music device to listen where they like. This has important implications for how they value the service.
- (106) In addition to the significant differences in terms of the breadth of music catalogue, other fundamental differences exist in these two unique listening options. In IW the listener is able to select specific songs and listen to them one at a time in the desired sequence. IW requires no programming by the service provider. This represents a more active listening experience than PSS. With PSS the listener allows a third party to select music for them from a particular genre or subgenre. The listener derives value from the programming quality. I understand Music Choice has a staff of 65 programmers, creative/production and content developers, with an additional 9

⁷⁷www.rhapsody.com/freetrial.

programming consultants to assist with audio programming.⁷⁸ In this sense PSS is a qualitatively different listening experience. For a listener, these two listening experiences are fundamentally different. For example a listener may prefer to listen to IW when he knows exactly which songs he wants to hear and can devote the time and effort to make each selection. That same listener might prefer to listen to Music Choice while in his living room, spending time with his family or friends and using the Music Choice audio service to play a continuous stream of music without any effort or distractions other than selecting a channel. To such a listener these two products are not substitutes. Given the lack of substitutability between the two listening environments they are simply not comparable to one another. Consequently, the use of DPRSR in IW royalties as a benchmark for PSS is incorrect.

- (107) In the 2006 SDARS proceeding, the record companies' own expert, Dr. Janusz Ordover, reached a similar conclusion regarding the importance of differences in demand characteristics for the comparability of royalty rates across potential benchmark markets.⁷⁹ In rebutting the presumption that the PSS market was an appropriate benchmark for SDARS, he noted how differences in demand for various music services were reflected in the differences in royalty rates for the license of sound recording performance rights across markets.⁸⁰ I agree with this observation. To support his argument, Dr. Ordover noted that PSS service providers had initially attempted to sell their service *al a carte* and that this business model was unsuccessful. He also noted that their unique demand characteristics were reflected in Music Choice's low per-subscriber fees. All of these arguments apply equally well to the differences between PSSs and interactive webcasting services. The fundamental differences in the demand for PSS and IW services prevent the latter from being an appropriate benchmark.

IV.D.3. Comparing Nash Bargains for DPRSR in IW to DPRSR in PSS

- (108) In what follows, I use the same Nash framework I used above to analyze the factors determining marketplace for DPRSR in IW. Doing so demonstrates the challenges of using them as benchmarks for sound recording royalties for PSS.
- (109) To see this, consider the negotiations between a single record label and a single IW.⁸¹ In particular, consider each of the three Nash Factors in the market for DPRSR in PSS and further consider how it compares with the same factor in the market for DPRSR in PSS.

⁷⁸ Testimony of Damon Williams at 29.

⁷⁹ See Exhibit MC 63 for rebuttal testimony of Janusz Ordover, Docket No. 2006-1 CRB DSTR (July, 2007) at 8.

⁸⁰ *Ibid.* at 6.

⁸¹ For convenience, I again analyze bargaining outcomes in the case of bilateral monopoly rather than the richer and more realistic setting with multiple record labels and multiple IW providers. It again has no qualitative effect on my conclusions.

IV.D.3.a.i. Combined surplus

- (110) The combined agreement surplus between the record label and IW in the IW market is straightforward. It is simply the combined surplus to them both in the IW market when an agreement is reached.
- (111) Is this greater or smaller than the analogous combined agreement surplus between the record label and PSS provider in the PSS market? While it is difficult to tell, it is very likely greater. The combined agreement surplus in the PSS market is the surplus (i.e. economic profit) from selling access to a passive bundle of audio channels further bundled with video channels to MVPDs for eventual resale to households. The combined agreement surplus in the IW market is the surplus from selling access to a bundle of audio tracks directly to individuals that can be consumed on demand.
- (112) The stark differences in the buyers, products, and method of consumption described above between the PSS and IW markets render comparisons of the combined agreement surplus in the markets challenging. However, in both of the previous proceedings surveyed above, royalty rates were *lowered* to account for the benefits to consumers of interactivity. Similarly, per-subscriber fees paid by consumers for interactive webcasting services are significantly higher than the per-subscriber fees paid by cable operators for PSSs. This evidence suggests that the combined agreement surplus is likely to be greater in IW than in PSS.

IV.D.3.a.ii. Threat points

- (113) The threat point for the IW provider is again straightforward. In the absence of an agreement, I assume the IW provider cannot provide a viable on-demand music service and therefore cannot earn any surplus. Its threat position is zero.⁸² As such, its value is the same in both PSS and IW markets.
- (114) The threat point for the record label, however, is very different. As always, in the absence of an agreement, the record label receives no revenue *from the IW market*. However, the record label also licenses its sound recording rights to markets other than IW, including for the delivery of digital downloads, and also sells physical products like CDs. The critical difference between the PSS and IW markets is the profit effects on the record labels of disagreement with their downstream partners. Whereas PSSs are *complementary* to other primary distribution channels used by rights holders (i.e. they provide a promotional benefit), I believe there is considerable evidence that IW *substitutes* for other distribution channels, in particularly for the sale of CDs and digital downloads. Much of this evidence comes from the impact that digital downloads have on CD sales. According to a recent study from the NDP Group, music downloads are having a substantial impact on sales of CDs. According to a recent report on the study, "All that [increases of music downloads] comes at the expense of almost 17 million fewer CD buyers in 2008 compared to the prior year". Further, "The

⁸² As in the analysis of the negotiation between a record label and a PSS above, relaxing this assumption would only strengthen my conclusions.

decline in CD buyers cuts across all demographic groups, but was particularly focused on teens and consumers age 50 and older.”⁸³

- (115) The academic literature also overwhelmingly supports the proposition that internet downloads adversely impact the sales of CDs. One author estimates that music downloads through peer-to-peer file sharing reduce the probability of buying a CD by 30 percent.⁸⁴ Another author notes that his study, and in fact almost all econometric studies, have found that digital downloads negatively impacted sales of CDs.⁸⁵ Yet another study finds that each music download reduces CD purchases by 0.2 or more.⁸⁶
- (116) This substitution effect appears to carry over to internet services such as interactive webcasting. Interactive webcasting is essentially equivalent to downloading with one simple tradeoff. In downloading the user typically receives a permanent copy of the downloaded songs. In interactive webcasting the user’s copy is temporary, typically lasting only as long as the subscription service is being purchased. The tradeoff is that with interactive webcasting, the user has access to a much broader catalogue of music. In fact, Rhapsody, one of the largest interactive webcasters, makes the claim that with their service, “You don’t have to buy songs...” It is hard to imagine that a service that provides unlimited access to over 13 million songs that you can access from your computer, home audio system, or with mobile apps for smart phones,⁸⁷ is not a substitute for music downloads. If interactive webcasting is a substitute for music downloads, which in turn are substitutes for CDs, it has to be the case that interactive webcasting is a substitute for CDs. Finally, the study by the NPD group notes, “we cannot expect conversion [from discovery of music to purchase] to be quite as high given the overwhelming amount of content available to sample via online sources.”⁸⁸ It also finds that a substantial portion of listeners find less of a need to purchase music because it is so readily available over the Internet.⁸⁹ A similarly large portion of listeners find that as long as they can listen to music from their favorite artists, they don’t need to own the CD or digital song/album.⁹⁰ This increased access was found to be the greatest deterrent to music purchases.⁹¹ All this suggests that

⁸³ Andrew Nusca, “CD Sales Drop, Digital Downloads on the Rise,” ZDNet Blog (Mar. 17, 2009) <http://www.zdnet.com/blog/btl/cd-sales-drop-digital-downloads-on-the-rise/14758>.

⁸⁴ Alejandro Zentner, “Measuring the Effect of Music Downloads on Music Purchases,” *Journal of Law and Economics* 49, no. 1 (Apr. 2006): 63–90 is submitted as Exhibit MC 64.

⁸⁵ Stan Liebowitz, “File Sharing: Creative Destruction or Just Plain Destruction?” *Journal of Law and Economics* 49, no. 1 (Apr. 2006): 1–28 is submitted as Exhibit MC 65.

⁸⁶ Rafael Rob and Joel Waldfogel, “Piracy on the High C’s: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students,” *Journal of Law and Economics* 48, no. 1 (Apr. 2006): 29–62 is submitted as Exhibit MC 66.

⁸⁷ www.rhapsody.com/freetrial.

⁸⁸ See Exhibit MC 56 for “NARM Research Report: Consumers & Music Discovery,” The NPD Group (Nov. 2011) at 47.

⁸⁹ See Exhibit MC 56 for “NARM Research Report: Consumers & Music Discovery,” The NPD Group (Nov. 2011) at 22.

⁹⁰ See Exhibit MC 56 for “NARM Research Report: Consumers & Music Discovery,” The NPD Group (Nov. 2011) at 21.

⁹¹ See Exhibit MC 56 for “NARM Research Report: Consumers & Music Discovery,” The NPD Group (Nov. 2011) at 56.

online services, including music downloads and interactive webcasting, adversely effects sales of CDs.

- (117) This substitution effect has an important effect on the record label's threat position. To see this, suppose this substitution effect takes the form of a certain share of IW subscribers who *do not* purchase an additional CD per month because of their ability to play music on *demand* on the IW service.⁹² If the record label cannot reach agreement with the IW provider on DPRSR on NIW, those potential IW subscribers will not receive IW service and will *instead* increase spending on CDs or music downloads. In the case of disagreement, the record label *would gain* this substitution of purchases. Its threat point is therefore *positive*.
- (118) Is this *threat* point greater or smaller than the analogous threat point for *the record labels* in their negotiations with the PSS provider? As the record label's threat position is positive in IW markets and negative in PSS markets, it must be *greater* in IW markets.

IV.D.3.a.iii. Bargaining power

- (119) The bargaining power for the record labels in its negotiations with an IW is difficult to determine. Without evidence to suggest record labels would be any more or less patient than IW providers, for simplicity I again assume that the bargaining power of each is equal. In this case, the bargaining power of the record labels is the same in negotiations with both IW and PSS providers.

IV.D.3.a.iv. Comparing predicted royalties based on their component Nash Factors

- (120) I am now in a position to compare the royalty to a record label in negotiations with an IW provider to the same royalty from a PSS provider. The Asymmetric Nash Bargaining Solution determines that the royalty to the record label from a negotiation with the IW provider is equal to its substitution benefit in non-PSS markets (e.g., increased CD sales if no agreement can be reached in IW) plus half of the incremental surplus given by the difference between the combined agreement surplus in the record-label-IW market and that substitution benefit.
- (121) By contrast, I showed earlier that the royalty to the record label in the PSS market was equal to *minus* its promotional benefit in non-PSS markets (e.g., lost CD sales) plus half of the incremental surplus given by the sum of the combined agreement surplus in the record-label-PSS market and that promotional benefit.
- (122) In both negotiations, the predicted threat point for the distributor (PSS and IW) is zero. In both negotiations, the predicted bargaining power is also equal. However, the two remaining Nash Factors

⁹²The exact form of the substitution effect is immaterial. It may be that an IW subscriber elects to purchase digital downloads if IW isn't available. The important thing is that the record label *loses other sales* due to its participation in the IW market

are *fundamentally different* across markets. The combined agreement surplus in the record label-PSS market arises from sales of PSS to cable MVPDs that bundle PSS with other video channels for sale to households. In contrast, the combined agreement surplus in the record label-IW market arises from direct sales to individuals for access to a library containing millions of songs that can be accessed on demand.

- (123) Previous proceedings in which the IW benchmark has been used have adjusted royalty rates for interactivity, but that is just one difference in the nature of demand for the two services.⁹³ That the set of buyers is motivated to purchase for different reasons, and that PSS are bundled with video services when offered for sale to households, complicates valuing the difference in combined surplus.⁹⁴ Also complicating a comparison are differences in the cost base between PSS and IW providers.⁹⁵
- (124) Furthermore, the threat points of PSS and IW providers are diametrically opposed. Whereas PSS are complementary with record companies' non-PSS services, implying a negative threat point, IW are substitutable with them, implying a positive one. Relying on IW as a benchmark market would mean adjusting for this important difference. Credibly doing so would only be possible with empirical estimates of *both* effects, a very great challenge.
- (125) Because the combined agreement surplus and record label threat points are likely larger in IW than PSS, I can conclude that royalties for DPRSR in IW should be *strictly greater* than royalties for DPRSR in PSS. Based on the substantial differences in the Nash Factors underlying bargaining outcomes in the two markets and the challenges in controlling for these differences, however, I conclude the market for DPRSR in IW would be inappropriate as a benchmark for the royalties that would obtain in the hypothetical market for DPRSR in PSS.

IV.D.4. Comparing DPRSR in IW to DPRMW in IW

- (126) In its rejection of DPRMW in PSS as a benchmark for DPRSR in PSS, the Copyright Royalty Judges cited evidence that marketplace royalty rates for sound recording rights are higher than those for musical works in a variety of digital audio markets, including interactive webcasting and digital downloads.⁹⁶ In this section, I demonstrate that such a finding is perfectly consistent with the Nash Factors in those markets and should not be taken as evidence that DPRMW in PSS is an inappropriate benchmark for DPRSR in PSS.

⁹³ Evaluating these adjustments is difficult given the proprietary nature of the agreements on which they are drawn.

⁹⁴ Crawford and Yurukoglu (forthcoming), demonstrate important differences in the value to content providers in the market for multi-channel television service when channels are offered in bundles versus a la carte.

⁹⁵ As described above, for a given royalty, the appropriate royalty *rate* depends on the share of costs in revenue.

⁹⁶ Final Determination of Rates and Terms, Docket No. 2006-1 CRB DSTRA at 38.

- (127) I do so by again using the Nash framework, this time to analyze marketplace outcomes in the market for DPRMW in IW. Doing so provides a useful comparison with DPRSR in IW.
- (128) Consider the negotiations between a single PRO and a single IW. In particular, consider the three Nash Factors in the market for DPRMW in IW, and further consider how each of these factors compares with the same factor in the market for DPRSR in IW.

IV.D.4.a.i. Combined surplus

- (129) The combined agreement surplus is straightforward. It is simply the combined surplus to both the PRO and the IW in the IW market when an agreement is reached.
- (130) Is this greater or smaller than the analogous combined agreement surplus between the *record label* and IW provider in the IW market? It is *smaller*. To begin, they are likely very similar to each other. The combined agreement surplus for the record-label-IW negotiations is the combined surplus from offering IW given the royalties paid to the PRO while the combined agreement surplus for the PRO-IW negotiation is the combined agreement surplus from offering IW service given the royalties paid to the record label. If the royalties paid to each digital performance rights holder was the same, then the combined agreement surplus would be the same. I argue below, however, that royalties to record labels should be *more than* royalties to PROs. In this case, the combined agreement surplus in the PRO-IW negotiation is itself slightly higher.

IV.D.4.a.ii. Threat points

- (131) The threat position for the IW provider is similarly straightforward. In the absence of an agreement, the IW provider cannot provide a subscription service and therefore cannot earn any surplus. Its threat position is again zero. As such, its value is the same for both the record label and PRO.
- (132) The threat position for the PRO is the same as that for a record label. As for the record label, in the absence of an agreement, the PRO receives no revenue *from the IW market*. However, the PRO, like the record label, also licenses the rights to its musical works to other, non-digital music services, and its constituent members, the music publishers and songwriters, license the musical works for use in distribution products such as CDs, digital downloads, ringtones etc. As for the record label, this introduces a substitution effect. As for the record label, failing to reach an agreement with the digital music services provider means the PRO would earn sales from other distribution channels (e.g. digital downloads). Its threat point is therefore *positive*.
- (133) Is this threat point greater or smaller than the analogous threat point for the record label in their negotiations with the IW provider? It is *smaller*. I established in Section II that record labels earn relatively more from the other, non-PSS, distribution-based markets described above than do musical

composition copyright owners. Because PROs gain less when an agreement cannot be reached with the IW provider, their threat point is lower than that for the record labels.

IV.D.4.a.iii. Bargaining power

- (134) As above, the bargaining power for the PRO in its negotiations with a IW is difficult to determine. Without evidence to suggest PROs would be any more or less patient than record labels in their negotiations with IW providers, for simplicity I assume that the bargaining power of each is equal.

IV.D.4.a.iv. Comparing predicted royalties based on Nash Factors

- (135) I am now in a position both to determine the form of the royalty to a PRO in negotiations with an IW provider and compare it to the same royalty paid to a record label. The Asymmetric Nash Bargaining Solution determines that the royalty to the PRO from a negotiation with the IW provider is equal to its substitution benefit in non-PSS markets (i.e., CD sales if no agreement can be reached in IW) plus half of the incremental surplus given by the difference between the combined agreement surplus in the PRO-IW market and that substitution benefit.
- (136) Similarly, the royalty to the record label in the IW market equals its substitution benefit in non-PSS markets plus half of the incremental surplus given by the difference between the combined agreement surplus in the PRO-IW market and that substitution benefit. Because the substitution benefit and combined agreement surplus are higher for the record label than the PRO, so too will their royalty be higher *in the IW market*.

IV.E. Empirical evidence to substantiate relative royalties for DPRSR and DPRMW

- (137) I understand that David Del Beccaro has described the structure of relative royalties for DPRSR and DPRMW in a number of international markets.⁹⁷ In this section, I briefly describe how that evidence corroborates the predictions of the relative royalties paid to sound recording and musical works rights holders I described above.

IV.E.1.a. Evidence from the United Kingdom

- (138) With respect to rights for other audio services, royalties in the UK for terrestrial radio, digital audio broadcasting, satellite, and cable radio all fall under a single, "commercial radio" license. The current royalty rates for the performance of musical compositions is 5.25 percent of net broadcasting revenue (NBR, defined as 85 percent of gross revenue), while the royalty rate for the performance of sound

⁹⁷ Testimony of David J. Del Beccaro at 17–21.

recordings is 5.00 percent of NBR.⁹⁸ This corroborates perfectly my analysis of the royalties for DPRSR versus DPRMW in PSS. Moreover, it is particularly instructive because these are the very rates that would be applicable to Music Choice if its residential audio service were broadcast in the UK.

- (139) In the United Kingdom, royalties for both sound recording and musical composition rights are determined by the UK Copyright Tribunal if there is no industry agreement. In deciding royalties for webcasters, the Tribunal has taken the position that the royalty for sound recording performance rights is comparable to that for musical composition performance rights. In its 2007 webcaster decision, they ruled that there is no inherent justification for charging a higher royalty for a sound recording compared to a musical works right. Indeed, in cases where the exploitation of music requires licenses both from the owners of the rights in the composition and that of the owners of the rights in the sound recordings, the Tribunal held “(a) *these two types of rights are legitimate comparators, and (b) there is no reason to treat one as being qualitatively superior to the other*” (see Exhibit MC 12 at 20). If one disregards the higher benefit record labels receive compared to composers for sales in non-webcasting markets, as the UK Copyright Tribunal has done, then my analysis of the relative royalties for DPRSR and DPRMW in IW above would also predict equal rates for sound recording and musical works rights in IW.

IV.E.1.b. Evidence from the Copyright Board of Canada

- (140) The Copyright Board of Canada (“CBC”) has long held the position that sound recordings and musical composition are of comparable value. In 1999, the CBC ruled that radio musical compositions royalties should be equivalent to musical composition royalty rates adjusted for the degree to which the music catalogue was covered by the respective rights (see Exhibit MC 6 at 30). In 2002, the CBC took a similar position by ruling that sound recording rates should be equivalent to musical composition rates for cable music services (see Exhibit MC 7 at 14). In 2009, record labels *themselves* agreed that musical compositions were of comparable value to sound recordings with respect to satellite music services (see Exhibit MC 8 at 50). Finally, a recent 2011 CBC ruling pertaining to public radio reflected the understanding that composition rights and performance rights were equivalent (see Exhibit MC 9 at 30). In fact, the agency representing the musical licensing company that collects performance royalties on behalf of record companies asked the Board to continue to set royalties as a portion of the royalties paid for composition rights (see Exhibit MC 9 at 4).
- (141) Evidence from Canada provides qualified support for my conclusions of the relative value of sound recording and musical works rights for PSS. Whereas I predict royalties for sound recording that are strictly less than those for musical works for PSS, this result is predicated on the finding that record

⁹⁸ See Exhibit MC 11.

labels benefit more from the promotional effects of PSS than do composers. If one chooses not to account for that effect, as none of the Canadian decisions do, then my analysis of the relative royalties for DPRSR and DPRMW in PSS above would predict equal rates for sound recording and musical works rights in PSS.

IV.E.1.c. Evidence from Broadcast Radio in Europe

- (142) Empirical data from the European commercial broadcast radio market also reflect the understanding that performance rights for sound recordings are of equivalent value to those for musical works. The earliest evidence comes from a 1995 survey, sponsored by Music Choice Europe, of royalties paid by European radio stations for sound recording and musical works on commercial broadcast radio. The study surveyed 12 European countries and found that the weighted average royalty rates were 4.6 percent for musical works copyright owners and 3.1 percent for sound recording copyright owners.⁹⁹ In fact, in every one of the 12 countries included in the study, with the exception of France, the royalty rate for sound recordings was less than or equal to the royalty rate for musical works.
- (143) How relevant are these findings for my earlier results? I did not analyze the market for commercial radio, so a direct comparison is impossible. That being said, it is widely understood that commercial radio, like PSS, provides promotional benefits to both record labels and composers. Furthermore, I did demonstrate that it is these promotional benefits, and the greater reward received by record companies relative to composers from those benefits, that is the factor that dictates a lower rate for sound recording royalties in marketplace negotiations. That sound recording performance rights rates are almost everywhere lower for commercial broadcast radio, a promotional service, certainly corroborates that they should be lower for other promotional services, including PSS.

IV.E.1.d. Summary

- (144) The international evidence clearly corroborates the primary point of my analysis: that the royalty rate for DPRSR in PSS should be less than or equal to the rate for DPRMW in PSS.

V. Evaluation of the Statutory Factors

V.A. Overview

- (145) In the last section, I concluded that a marketplace royalty rate for digital performance rights for sound recordings in PSS would be strictly less than the royalty rate for digital performance rights in musical

⁹⁹ European Entertainment Consultants, "Music Choice Europe, Broadcast Royalty Payments in Europe," (May 1995) at 6. The countries surveyed were Belgium/Luxembourg, Finland, France, Germany, Ireland, Italy, The Netherlands, Portugal, Spain, Sweden, Switzerland, and the UK. The study is submitted as Exhibit MC 10.

works currently negotiated between performing rights organizations and PSS providers like Music Choice. I understand that the PSS license standard, however, provides for a “reasonable royalty” that is set without reference to a market rate other than having a market rate as its absolute upper boundary.¹⁰⁰

(146) I understand that from 2006 through 2010, Music Choice paid the PROs a combined royalty of approximately [REDACTED] percent of Music Choice’s audio revenue to license DPRMW.¹⁰¹ I further understand that Music Choice is in negotiations with ASCAP and BMI for the current rate period. At this time the parties have entered an interim agreement to carry forward the prior negotiated rates and Music Choice expects the royalty rates to remain at the same level. Thus [REDACTED] percent of Music Choice’s residential audio revenues should serve as an upper bound on the royalty set for digital performance rights in sound recordings on PSS.

(147) I further understand that the reasonable royalty rate is set based upon evaluation of the following policy objectives:

- To maximize the availability of creative works to the public;
- To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;
- To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; and
- To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.¹⁰²

(148) I understand that a full discussion of each of these factors and the impact they should have on a reasonable rate for DPRSR in PSS is included in the statement of David J. Del Beccaro.¹⁰³ My goal in this section is to contribute to that analysis by focusing on the impact of two of these factors on a reasonable rate for DPRSR in PSS. The two I consider are the second (“Fair return/fair income”) and fourth (“Minimize any disruptive impact”) factors.

(149) In what follows, I define what constitutes a fair income and discuss how financial data from the operations of Music Choice’s residential music business can be used to yield a range of reasonable

¹⁰⁰ Testimony of David J. Del Beccaro at 6.

¹⁰¹ Ibid. at 22.

¹⁰² 17 U.S.C. 801(b)(1)

¹⁰³ Testimony of David J. Del Beccaro at 22-45.

royalty rates to evaluate that statutory objective. I also define what constitutes a disruptive impact and discuss how the same analysis can be used to evaluate that statutory objective.

V.B. To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions

V.B.1. Overview

- (150) Although there is no standard or absolute economic definition of “fair income” or “fair return” of which I am aware, I believe a reasonable interpretation of this concept is that a record label and PSS provider should each receive an income from the sale of PSS that covers their costs (including their costs of capital) and allows each to share a portion of the economic profits (or surplus) created by the sale of PSS under existing economic conditions.
- (151) In what follows, I provide an overview of Music Choice’s historical financial results and from those results construct an estimate of the economic profits that should be fairly shared. While I use it differently, this surplus is closely related to the combined agreement surplus I described above and used to evaluate the determinants of marketplace royalty rates that would arise in a hypothetical market from negotiations between record labels and PSS providers over the licensing of digital performance rights for sound recordings.

V.B.2. Music Choice’s Historic Financial Results

- (152) Appendix B.1 summarizes what I understand to be Music Choice’s operating results for its residential business from 2006-2010.¹⁰⁴ The business can be characterized as having low profit and modest growth. Revenues have been growing at a [REDACTED] percent average annual rate over the past four years. At the same time, the number of subscribers who now have access to Music Choice’s service offerings has increased [REDACTED], average annual growth rate from [REDACTED]. This has occurred while average monthly subscriber fees have declined from [REDACTED]. While Music Choice has been able to greatly expand the number of households with access to its programming, because of reductions in its subscriber fees it has seen only a modest increase in revenues.
- (153) During the same period Music Choice’s costs have increased [REDACTED]. Regarding individual cost categories, Music Choice’s programming and

¹⁰⁴ This financial statement data was provided to me by Music Choice management and includes the results for its residential music service. I understand that it excludes revenues for its commercial music service business and all non-operating activities.

operations costs have increased at a [[REDACTED]] average annual rate. In addition, [[REDACTED]]
[[REDACTED]]. I understand that these increased costs are the result of Music Choice's business plan to broaden and expand its overall residential service offering. I discuss some of these costs below.

- (154) Music Choice's increased costs and modest revenue growth have put downward pressure on its operating profits. For example, while quite variable, Music Choice's operating profits in its residential music business have declined from [[REDACTED]]
[[REDACTED]]. For the 5-year period as a whole, Music Choice's realized a cumulative operating loss of [[REDACTED]].

V.C. Determining a Fair Income for Music Choice

- (155) These financial data can be used to evaluate a fair income for Music Choice mandated by the statutory objective described above.

V.C.1. The Surplus to be Split

- (156) In my opinion, the critical element in determining a fair income for Music Choice (and by inference a fair return for the record labels) are the expected economic profits (or surplus) from the provision of Music Choice's residential music service. The royalty rates predicted by the non-cooperative bargaining framework I introduced above also depended on the surplus created by the provision of PSS. I can use those insights to estimate the expected surplus that would give Music Choice a fair income on its investments.
- (157) In Section III.C.1.b above, I determined that the combined agreement surplus in a negotiation between a PSS provider like Music Choice and a record label was the combined surplus to both the record label and PSS provider in the PSS market when an agreement is reached. I found that this is just the total profits earned by the PSS provider before payment of the royalty for digital performance rights for sound recordings.
- (158) I also introduced the concept of a threat point and showed that, because the record label also earns profits from other, non-PSS markets, and that there is a promotional benefit to the record label from licensing performance rights for PSS service, that this promotional benefit is also part of the incremental surplus that is divided by the parties.¹⁰⁵

¹⁰⁵ Example 2 in Section III.C.1 made this point clear. The total "difference-to-be-split" between a record label and PSS provider included the combined agreement surplus of 20 as well as the promotional benefit to the record label of 4.

- (159) Thus, the economic profits to be fairly split are as in the bargaining model: the non-DPRSR profits of Music Choice and the promotional benefit to the record labels of the Music Choice service.
- (160) Unfortunately, I do not have an estimate of the economic profits associated with the promotional benefits to the record companies of the Music Choice service.¹⁰⁶ As a result, I exclude this promotional benefit from my analysis. This lowers the expected total surplus (i.e., combined agreement surplus plus promotional benefit) to be fairly shared, and effectively allocates the entire the promotional benefit the record labels, making my estimate of the expected surplus to be fairly shared a lower bound on the true surplus. As a result, my analysis of a fair income for Music Choice is likely to be conservative.

V.C.2. Historical Financial Data

- (161) With perfect foresight, my estimate of a fair income to Music Choice would be based on their future profitability over the term of the license agreement. It is very difficult, however, to predict with accuracy what any firm's future profitability is likely to be. Furthermore, basing an analysis of a fair return on predicted future revenue and cost estimates would open those estimates to detailed scrutiny and introduce an additional source of unwelcome uncertainty into the analysis.
- (162) Instead, I base my analysis on Music Choice's historical financial results. I assume that Music Choice's financial performance between 2006 and 2010 is a good estimate of their expected future financial performance. Because Music Choice is in a relatively mature market with relatively stable operating results, this assumption is not unreasonable. In practice, I understand this to be a very conservative assumption. In his statement, I understand David Del Beccaro provides estimates of revenue growth [[REDACTED]].¹⁰⁷
- (163) As a result, I feel comfortable assuming that their expected future performance is likely to be *no more profitable* than their financial performance between 2006 and 2010. In what follows, I take their reported past performance as my estimate of their future performance.

V.C.3. Capital Costs

- (164) As described in Section III.C.1 above, an important difference between economic profit and conventional notions of accounting profit relate to the treatment of capital costs not reflected on the financial statements (i.e., non-debt related financing costs). The calculation of economic profit (or

¹⁰⁶ Nor do I have estimates of the share of record company costs that could reasonably be allocated to the Music Choice service. Given the miniscule share of total record label revenues contributed by Music Choice royalties, I anticipate that any such costs would be negligible.

¹⁰⁷ Testimony of David J. Del Beccaro at 39-41.

surplus) requires subtracting these capital costs, which are necessary for a firm to operate its business.¹⁰⁸

- (165) Given Music Choice’s significant capital requirements, the ability for it to earn its cost of capital is paramount to it remaining competitive. It is a long-established tenant of finance that firms must realize profits sufficient to cover their cost of capital. Due to the highly competitive nature of capital markets, if a company does not earn its cost of capital it will not be able to attract the funds necessary to replace existing assets and thus will shrink, and eventually go out of business. In this sense, the cost of capital is a cost that must be recouped just like all other costs.¹⁰⁹
- (166) It is my understanding that Music Choice has made substantial investments in equipment and technology in order to remain competitive. Examples include [[REDACTED]]. In total, Music Choice has spent nearly [[REDACTED]] on product development, product enhancement and infrastructure from 2007-2010. In fact, it is my understanding that Music Choice has made over [[REDACTED]] in investments in marketing, programming, and other developmental costs since 1996.¹¹⁰ In order for Music Choice to attract the capital necessary to make these investments, it must earn returns equal to its cost of capital over the long run.
- (167) I use the capital asset pricing model (“CAPM”) to estimate Music Choice’s cost of capital.¹¹¹ Under the CAPM, a firm’s cost of capital is based on the expected return required to induce investment in a particular asset, in this case Music Choice. The required return of any asset must be linked to the relevant risk associated with the asset. The CAPM evaluates the expected returns of a particular asset as a function of its non-diversifiable risk only. This is based on the idea that if risks can be diversified, investors should not be compensated for assuming those risks. A company’s non-diversifiable risk is sometimes referred to as its beta or β . In the analysis presented below, I assume that Music Choice’s beta is equal to the average beta for the market as a whole (i.e., one). This is

¹⁰⁸ I use operating profit as a measure of accounting profit, which excludes interest expense.

¹⁰⁹ This view is shared by an expert for the record companies. In the analysis of the surplus created by SDARS used to estimate a royalty based on a cooperative bargaining framework, Dr. Michael Pelcovits calculated SDARS surplus net of their costs of capital. Final Determination of Rates and Terms, Docket No. 2006-1 CRB DSTR at 48

¹¹⁰ See Exhibit MC 24.

¹¹¹ The CAPM is perhaps the most widely used model for estimating the cost of capital. William Sharpe, Harry Markowitz and Merton Miller jointly received the Nobel Memorial Prize in Economics for developing the CAPM.

equivalent to assuming that Music Choice is no more or no less risky than the overall market in the aggregate.¹¹²

V.C.4. Estimating the Surplus to be Fairly Shared

- (168) To estimate the expected total surplus to be fairly shared, I performed the following steps:
1. I obtained Music Choice's 2006-2010 income statements and balance sheet for its residential music service business (see Appendix B.1 and B.2);¹¹³ I adjusted Music Choice's 2006-2010 operating profit to remove the actual royalty paid by Music Choice for digital performance rights for sound recordings. The result is equal to Music Choice's royalty-adjusted operating income (see Appendix B.3);
 2. I applied the capital asset pricing model ("CAPM") to Music Choice's 2006-2010 balance sheet pertaining to its residential music services business to derive Music Choice's expected rate of return on assets (see Appendix B.4); This yielded an estimate of 8.33 percent.
 3. For each year, I multiplied Music Choice's expected rate of return on assets (8.33 percent) by its average operating assets (total assets less accounts receivable and cash) for its residential music services business from 2006 to 2010. This yielded Music Choice's cost of capital for its residential music services business (see Appendix B.3);¹¹⁴
 4. For each year, I subtracted Music Choice's cost of capital from its royalty adjusted operating profits for its residential music services business to derive its residual profits each year (see Appendix B.3);
- (169) This analysis results in cumulative returns for Music Choice in excess of its cost of capital (but before the payment of royalties for digital performance rights for sound recordings) of [REDACTED] from 2006 – 2010.

V.C.5. Estimating a Fair Income for Music Choice

- (170) My estimate of the expected surplus to be fairly shared is the total of [REDACTED] from 2006-2010. This represents 3.04 percent of Music Choice's 2006-2010 residential audio revenues.

¹¹² Richard A. Brealey and Stewart C. Myers, *Principles of Corporate Finance* (New York: McGraw-Hill, 2003) at 195.

¹¹³ All financial data was provided to me by Music Choice management and includes the results for its residential music service.

¹¹⁴ The returns to financial assets such as accounts receivable and cash are typically set to the interest rate paid on cash balances held in relatively riskless demand deposits. Given the current interest rate environment, I have conservatively assumed that this interest rate is zero.

- (171) The goal of this statutory objective is “To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions”. I argued above that a reasonable interpretation of “fair income” is that Music Choice should receive an income its residential music services business that covers its expected costs (including its costs of capital) and allows it to share a portion of the expected economic profits (or surplus) created by that business under expected economic conditions.
- (172) It is immediately evident that the current royalty rate of 7.25 percent of its residential music service revenues did not satisfy the definition of a fair income over the period 2006-2010 and therefore does not satisfy the definition of a fair expected income for future years. Not only does that give Music Choice *no* portion of the expected economic profits created by its music business, it doesn’t even cover its expected cost of capital. I return to this point when discussing the fourth statutory objective below.
- (173) What then is a fair income for Music Choice? I conclude that an equal division of this expected surplus would be fair, particularly in that it does not include any of the expected promotional benefits to the record labels of its service (all of which accrue to them). If the surplus from its residential music business had been divided equally, Music Choice’s economic profit over this period would have been [[REDACTED]], or 1.52 percent of their residential audio revenues.
- (174) While an even division of the surplus is fair, it is also reasonable to consider a broader range of surplus divisions. For example, a royalty at or more than 3.04 percent of Music Choice’s residential audio revenue would give all of the expected surplus from Music Choice’s residential music business to the record labels and leave it with no expected surplus at all. It is hard to consider that to be fair.
- (175) By contrast, a zero royalty would give the record labels no expected surplus from Music Choice’s residential music business and leave it all to Music Choice. While the record labels would continue to receive the expected promotional benefits of Music Choice’s service, this is hard to quantify and one could argue that too wouldn’t be fair.
- (176) I therefore conclude that a fair income to Music Choice would likely lie in the range of 20 to 80 percent of the expected surplus created by its residential music business. Based on Music Choice’s historical financial performance, this amounts to an expected economic profit of [[REDACTED]] over the five-year period, or 0.61 percent to 2.43 percent of their residential audio revenues. Under no circumstances would a fair return exceed an estimated 3.04 percent of their residential audio revenues. I understand that Music Choice’s proposed sound recording performance license rate is 2.6 percent of audio revenues and conclude that this proposal lies within the upper end of the full range of revenues that would constitute a fair income.

V.D. To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

- (177) Although there is no standard economic definition of a “disruptive impact on the structure of industries,” I believe that this reasonably can be interpreted to mean that a reasonable royalty rate for digital performance rights for sound recordings should not be set so high as to endanger the long-term viability of either the copyright owner or copyright user.
- (178) Given the relatively inconsequential revenue stream the Music Choice royalty represents to the record labels, this factor must be evaluated in terms of the impact to Music Choice alone. It is unlikely that the presence of absence of Music Choice’s residential music business will make or break a record label. As articulated by Music Choice CEO, David J. Del Beccaro, the converse is absolutely true.¹¹⁵
- (179) The financial analysis in this section indicates that the current royalty rate for digital performance rights for sound recordings of 7.25 percent, which is expected to rise to 7.5 percent next year, does not allow Music Choice to cover its cost of capital. Indeed, it is more than double the maximum rate that would allow Music Choice to recover its expected costs of capital based on conservative estimates of its future business prospects. This rate jeopardizes Music Choice’s ability to continue to make the capital investments necessary to remain competitive.
- (180) It is my understanding that of the three music services involved in the original proceeding, only Music Choice remains as a substantial market player. Both Muzak and DMX have since had to file for bankruptcy. Muzak is currently only a minor player in the PSS market and DMX no longer exists as a PSS. These facts clearly suggest that the original royalty rate set by the Panel was set too high.
- (181) In order to enable Music Choice’s residential audio business to remain viable on an ongoing basis, mitigating any disruptive impact to the PSS industry, it is critical that its royalty rate be reduced.

V.E. Summary results

- (182) To meet the third statutory objectives of the Act, the royalty for the DPRSR should be set such that Music Choice is able to earn a fair income under existing economic conditions.¹¹⁶ Although the term “fair income” has no exact definition in economics or finance, I interpret the term to mean that Music

¹¹⁵ Testimony of David J. Del Beccaro at 9 and 42-43.

¹¹⁶ 17U.S.C. 801(b)(1).

Choice's return on its investments, after payment of the royalty to the Sound Exchange, should be commensurate with the risks incurred in providing its residential music services. Although I do not attempt to explicitly account for the other statutory factors, based on my understanding of Music Choice's significant contributions in making music available to a wide audience, it is my opinion that explicitly accounting for these factors would serve to argue for a royalty rate at the lower end of the range I propose.

- (183) It is important to keep in mind that the 0.61 to 2.43 percent royalty range I recommend (with an absolute maximum of 3.04 percent) is based on Music Choice's historical financial results under the assumption that its relatively recent historical results reflect current economic conditions. In this sense the royalty rate satisfies the "current economic conditions" criterion of the Act. If economic conditions deteriorate for Music Choice, payment of a 3.04 percent royalty, for example, would likely mean that Music Choice will not earn its cost of capital on a going forward basis. In contrast, if current economic conditions improve significantly, such as rate would allow Music Choice to likely earn profits in excess of its cost of capital. This result appears to be unlikely. In my opinion, setting a royalty above 3.04 percent would put Music Choice at significant risk of exiting the industry as its former competitors have done, thus cutting off an important means of transmitting music to its 52 million subscribers.

VI. Conclusion

- (184) The range of royalty rates derived in this report considers appropriate benchmark royalties that reflect arm's-length negotiations between PSS such as Music Choice and independent record companies as well as the statutory objectives of the Act. I derive the range of royalties based on non-cooperative bargaining model between firms. Within this framework I identify three key factors that determine the royalties that would likely arise as a consequence of arm's-length negotiations between Music Choice and the owners of DPRSR and evaluate the suitability of alternative real-world benchmarks for such negotiations. My primary conclusion is that the DPRSW royalty rate paid by Music Choice is the benchmark that most closely approximates the economic value of sound recording performance rights for Music Choice. I also demonstrate that the sound recording performance royalty rates for IW services would be an inappropriate benchmark, and further demonstrate how my non-cooperative framework can rationalize royalties for sound recording performance rights lower than those for musical composition performance rights for PSSs, but higher than those for musical composition performance rights for IW services.
- (185) I conclude from this analysis that the appropriate royalty rate should be based on, but not equal to, the combined royalties paid by Music Choice to ASCAP, BMI, and SESAC for DPRMW that underlie

the performance of sound recordings. I then show that in a free and open market the predicted PSS sound recording performance royalty rate should be equal to or lower than the PSS musical composition performance due to the promotional benefits the PSS service provides to the record companies. I support this conclusion with empirical data from royalty rates for DPRSR and DPRMW in international markets.

- (186) Based on this analysis I conclude that PSS sound recording performance royalty rate is between 0.61 percent and 2.43 percent of Music Choice's residential service revenues and under no circumstances should be higher than 3.04 percent of its residential service revenues. This range is consistent both with rates that would result from arm's-length transactions and the statutory objectives of the Act. Significantly, unlike the current royalty of 7.25 percent, which yields economic losses for Music Choice, the royalties I derive would leave Music Choice with a fair income under prevailing economic conditions.

Appendix A. A non-cooperative bargaining framework

In Section III of my report, I introduce a non-cooperative bargaining framework to understand how royalties would be determined in a hypothetical market for the digital performance right for sound recording (DPRSR) in a pre-existing subscription service (PSS). I also use the framework to compare the determinants of royalties in the hypothetical market with the determinants of royalties in other, related, markets. In this Appendix, I present the details of this framework that are summarized in the body of my report.

In the report, I analyze negotiations between a single upstream seller (a copyright owner) and a single downstream buyer (a copyright user). This is a bilateral monopoly framework. In many of the actual markets where royalties for the use of copyrights are negotiated, however, there may be multiple sellers and multiple buyers. In what follows, I first present the bilateral monopoly framework and derive the predictions from that framework. I then extend it to the case of multiple buyers and sellers and demonstrate that the qualitative features from the bilateral framework remain.

For the bilateral monopoly framework, I introduce the model in terms of the negotiations between a single PSS provider and a single record label given a pre-existing agreement with a single performing rights organization (PRO). This is for expositional convenience. The model applies equally well to any negotiation between an upstream copyright owner and a downstream copyright user in the presence of a pre-existing agreement with another copyright owner. For example, in what follows, I use the same framework to analyze negotiations between a PSS and a PRO in the presence of a pre-existing agreement with a record label and consider the equilibrium of these two negotiations. In my report, I also use the framework to analyze the equilibrium of separate negotiations between a record label and an interactive webcaster on the one hand and a PRO and an interactive webcaster (IW) on the other. I also use the same naming convention for the framework with multiple copyright owners and users.

1. Bargaining for DPRSR in PSS under bilateral monopoly

In this section I describe a model of non-cooperative bargaining between a single PSS provider, indexed by d , and a single record label, indexed by r , in the presence of a pre-existing agreement between the PSS and a performing rights organization, indexed by w .

The bargaining problem is specified as follows. I assume that the upstream record company and downstream PSS provider meet to negotiate terms of the royalty paid by the PSS provider to the record company. I further assume that they bargain over whether to form an agreement and, if so, at what royalty (measured in profits paid from a downstream firm to an upstream firm).¹¹⁷ The ultimate

¹¹⁷ This is for analytical convenience. It is straightforward to translate a profit-based royalty into a royalty rate as a share of revenue by simply dividing the profit-based royalty for the upstream firm by the downstream firm's revenues.

profits to each player depends on whether an agreement was reached, what royalty was paid, and the nature of demand and cost (including musical works royalties) in the upstream and downstream markets.

Let r_r be the royalty (measured in profits) paid by a PSS provider to a record label as a result of their negotiation, let r_{dr} be the portion of profits the PSS provider retains, and let $r^{dr} = \{r_{dr}, r_r\}$ denote the pair of royalties arising from negotiations between the PSS provider and the record label. Likewise $r^{dw} = \{r_{dw}, r_w\}$ denote a similar pair of royalties arising from separate negotiations between the PSS provider and a PRO.

I assume that these bilateral meetings result in the Asymmetric Nash Bargaining Solution. This solution concept can be rationalized as the unique outcome of a bargaining problem in which each party to the bargain alternates making offers until an agreement is reached.¹¹⁸ This is a realistic depiction of bargaining in many market environments, including those for digital performance rights.

Under the Asymmetric Nash Bargaining Solution, the royalty resulting from a bilateral meeting between each PSS, d , and each record company, r , maximizes the bilateral Nash Product:

$$r_r = \arg \max NP(r_r, r_w) = (\pi_r(r_r, r_w) - \pi_r(\sim, r_w))^{b_{dr}} (\pi_d(r_r, r_w) - \pi_d(\sim, r_w))^{1-b_{dr}} \quad (1)$$

where r_r is royalty paid from d to r , $\pi_r(r_r, r_w)$ and $\pi_d(r_r, r_w)$ are the economic profits (also called “surplus”) to r and d , respectively, in the case of agreement, $\pi_r(\sim, r_w)$ and $\pi_d(\sim, r_w)$ are the economic profits to r and d , respectively, in case of disagreement, and b_{dr} is the bargaining power of the record label with respect to the PSS provider.¹¹⁹

There is a straightforward intuition for the Nash Product. It says that the optimal royalty that yields the Asymmetric Nash Bargaining Solution is obtained as the value that maximizes a (geometrically) weighted average of two incremental profits: the incremental profit the record label gets from an agreement at royalty r_r compared to no agreement, $\pi_r(r_r, r_w) - \pi_r(\sim, r_w)$, and the incremental profit the PSS provider gets at royalty r_r compared to no agreement, $\pi_d(r_r, r_w) - \pi_d(\sim, r_w)$.¹²⁰

The weighting is done according to the bargaining power of the record label. Economic estimates of bargaining power have historically been related to each party's patience in a negotiation, with greater patience yielding greater bargaining power.¹²¹ As b_{dr} approaches 1, it is only the record label's

¹¹⁸ Abhinav Muthoo, *Bargaining Theory with Applications* (Cambridge: Cambridge University Press, 1999) at Chapter 2.

¹¹⁹ I only need to solve for the royalty to the record label, r_r , as the profit retained by the PSS provider will just be the portion of the incremental surplus that remains after paying the record label's royalty, r_r .

¹²⁰ Note that the same royalty enters both weighted averages as each additional dollar paid from the PSS distributor, d , to the record label, r , in royalty, r_r , reduces his own retained profits by a dollar.

¹²¹ See Muthoo (1999) at 51.

incremental profits that matter (it has all the bargaining power), and the PSS distributor gets no more than it would in the absence of an agreement. As b_{dr} approaches 0, it is only the PSS distributor's incremental profits that matter, and the record label gets no more than it would in the absence of an agreement. As we will see below, if $b_{dr} = 0.5$, the PSS provider and record label split equally the incremental surplus created by an agreement.

PSS versus Other Markets

To use this framework to understand outcomes in the market for DPRSR in PSS, it is useful to dig deeper into the components of each of the profit measures above. In particular, it is important to understand whether the profit either the PSS provider or record label earns from an agreement is influenced by outcomes in markets *other than* the PSS market.

PSS providers only produce PSS. They do not produce any other service that could be influenced by the outcomes of its bargaining with record labels. The profits to the downstream PSS, $\pi_d(r_r, r_w)$ and/or $\pi_d(\sim, r_w)$, therefore depend only on the profits in its own (PSS) market.

In contrast, record labels license the performance rights to their sound recordings across a wide variety of markets. They also sell physical CDs. The profits to the upstream record label, $\pi_r(r_r, r_w)$ and/or $\pi_r(\sim, r_w)$, therefore depends on the profits in each of these markets (PSS and non-PSS).

As such, I separate the profits for the record labels into two parts: that part arising from PSS, which I denote "PSS", and that part arising from all markets excluding PSS, which I denote "-PSS". This is true both when an agreement is reached and when it has not:

$$\pi_r(r_r, r_w) = \pi_r^{PSS}(r_r, r_w) + \pi_r^{-PSS}(r_r, r_w)$$

$$\pi_r(\sim, r_w) = \pi_r^{PSS}(\sim, r_w) + \pi_r^{-PSS}(\sim, r_w)$$

As noted above, downstream PSS providers earn profits only in their own (PSS) markets. For consistency, I therefore restate profits to downstream firms as PSS profits:

$$\pi_d(r_r, r_w) = \pi_d^{PSS}(r_r, r_w)$$

$$\pi_d(\sim, r_w) = \pi_d^{PSS,d}(\sim, r_w)$$

Nash Bargaining and Threat Points

Once we allow for profits to record labels from other markets, it is convenient to re-write the Nash Product above to separate out the profits coming from the PSS market versus other markets:

$$r_r = \arg \max NP(r_r, r_w) = (\pi_r^{PSS}(r_r, r_w) - TP_r(\sim, r_w))^{b_{dr}} (\pi_d^{PSS}(r_r, r_w) - TP_d(\sim, r_w))^{1-b_{dr}}$$

where $TP_r(\sim, r_w)$ and $TP_d(\sim, r_w)$ are the 'Threat 'P'oints for record label and PSS provider, respectively. I show below how I have incorporated profits in other markets into these threat points.

Threat points are very important elements in any bargaining framework. They capture the profit to each firm in case of disagreement. If a party has a stronger threat point, they are better off if an agreement can't be reached and, as I'll show below, earn a larger royalty.

The threat points above are defined as follows:

$$TP_d(\sim, r_w) = \pi_d^{PSS}(\sim, r_w)$$

$$TP_r(\sim, r_w) = \pi_r^{PSS}(\sim, r_w) + (\pi_r^{-PSS}(\sim, r_w) - \pi_r^{-PSS}(r_r, r_w)) = \pi_r^{PSS}(\sim, r_w) + \Delta\pi_r^{-PSS}(r_r, r_w)$$

For the PSS provider, d , the threat point is no different than in the original Nash Product. It is its profit in the PSS market in case of disagreement with the record label. For the record label, r , however, there are two terms in its threat point. The first is analogous to the PSS provider's: it is the economic profit the record label earns in the PSS market in case of disagreement with the PSS provider. The second is different, however. It measures the extra profit it earns in *other* (non-PSS) markets if it *can't* reach an agreement in the PSS market, $\pi_r^{-PSS}(\sim, r_w) - \pi_r^{-PSS}(r_r, r_w)$. For convenience, I label this extra profit in non-PSS markets in case of the inability to reach an agreement in the PSS market as $\Delta\pi_r^{-PSS}(r_r, r_w)$.

The Musical Works Market and Equilibrium

Everything to this point has taken the musical works royalty, r_w , paid by the PSS provider, d , to the PRO, w , as given. In practice, both the sound recording and musical works royalties, r_r and r_w , will be determined as the result of an economic equilibrium. In other words, the sound recording royalty, r_r , that is determined as a function of the musical works royalty, r_w , must be consistent with the value of the musical works royalty that is determined as a function of the sound recording royalty.

To achieve this equilibrium, I assume that each set of negotiations are simultaneous and separate, so other royalty agreements are not known but conjectured. The equilibrium of this game, interpreted as a Nash equilibrium between Nash Bargains by Horn and Wolinsky (1988),¹²² yields royalties given by the Asymmetric Nash Bargaining Solution:

$$r_r^* = TP_r(r_r, r_w) + b_{dr} (\pi_r^{PSS}(r_w) - TP_d(\sim, r_w) - TP_r(r_r, r_w))$$

¹²²Henrick Horn and Asher Wolinsky, "Bilateral Monopolies and Incentives for Merger," *RAND Journal of Economics* 19, no. 3 (1988): 408-19.

where $\pi^{PSS}(r_w) = \pi_d^{PSS}(r_r, r_w) + \pi_r^{PSS}(r_r, r_w)$ is the combined economic profit (surplus) to both the PSS provider and the record label from reaching an agreement in the PSS market. In my report, I call this the “Combined Agreement Surplus”. It depends only on the musical works royalty, r_w , as the sound recording royalty, r_r , simply determines what portion of the combined agreement surplus should go to the record label versus the PSS provider (and therefore doesn’t affect the combined agreement surplus itself). I call the difference between the combined agreement surplus and the sum of the threat points, $\pi^{PSS}(r_w) - TP_d(\sim, r_w) - TP_r(r_r, r_w)$, the “Incremental Surplus”.

Let r_{dr}^* be the profits retained by PSS provider, d , (i.e. those profits that aren’t paid as royalties to record company r). These are given by a symmetric formula

$$r_{dr}^* = TP_d(\sim, r_w) + (1 - b_{dr})(\pi^{PSS}(r_w) - TP_d(\sim, r_w) - TP_r(r_r, r_w))$$

In the body of the text, I describe these formulas as follows:

The royalty received by each firm in a bargain equals its threat point plus its bargaining power times the incremental surplus.

2. Bargaining for DPRSR in PSS with multiple upstream and downstream firms

I now extend my non-cooperative bargaining framework to allow for multiple upstream record labels, multiple upstream PROs, and multiple downstream PSS providers.

The bargaining problem is specified as follows. Let $r = 1, \dots, R$ index (upstream) record companies negotiating digital performance rights for sound recordings, let $w = 1, \dots, W$ index upstream PROs negotiating digital performance rights for musical works, and let $d = 1, \dots, D$ index (downstream) PSS providers.

I assume that each upstream record company and downstream PSS provider meets bilaterally in simultaneous negotiations. I further assume that they bargain over whether to form an agreement and, if so, at what royalty (measured in profits paid from the downstream PSS provider to the upstream record company). The ultimate profits to each player depend on whether an agreement was reached, what royalty was paid, and the nature of demand, cost (including musical works royalties), and competition in each upstream and downstream market.

Let $r = \{r_{dr}\}$, $d = 1, \dots, D$ and $r = 1, \dots, R$ be the full set of royalties paid by downstream firm d to record company r and divide these royalties into those paid from d to r , r_{dr} , and r' , all other royalties paid from this and other PSS to other record companies. Let $w = \{w_{dw}\}$, $d = 1, \dots, D$ and $w = 1, \dots, W$ be the full set of royalties paid by downstream firm d to PRO w . Similarly partition w into w_{dw} and w' , all other royalties paid from this and other PSS to other PROs.

I assume that these bilateral meetings result in the asymmetric Nash Bargaining Solution. In this case, the royalty resulting from a bilateral meeting between each PSS, d , and each record company, r , maximizes the bilateral Nash Product:

$$r_{dr} = \arg \max NP(r_{dr}, r', w) = (\pi_r(r_{dr}, r', w) - \pi_r(\sim, r', w))^{b_{dr}} (\pi_d(r_{dr}, r', w) - \pi_d(\sim, r', w))^{1-b_{dr}} \quad (2)$$

where r_{dr} is royalty paid from d to r , $\pi_d(r_{dr}, r', w)$ and $\pi_r(r_{dr}, r', w)$ are the profits to d and r , respectively, in the case of agreement, $\pi_d(\sim, r', w)$ and $\pi_r(\sim, r', w)$ are the profits to d and r , respectively, in case of disagreement, and b_{dr} is the bargaining power of record label r with respect to PSS provider d . The only difference in the Nash Product under bilateral oligopoly relative to that under bilateral monopoly is the dependence of profits to each firm on the royalties paid by this and other PSS providers to other record labels, r' .

a. PSS versus Other markets

To use this framework to understand bargaining outcomes, it is useful to dig deeper into the components of each of the profit measures above. In particular, it is important to understand whether the profit either the PSS provider or record label earns from an agreement is influenced by outcomes (1) in the PSS market from other providers of PSS services and/or other record labels and (2) in markets *other than* the PSS market. I describe the influence profits from these other markets have on bargaining outcomes in what follows.

A record label, r , earn profits in the PSS market both from PSS operator d as well as other PSS operators, which I will label “- d ”. As above, they also license the performance rights to their sound recordings and sell physical CDs in other, non-PSS, markets, which I will label “-PSS”.

As such, I separate the profits to record company, r , into three parts: that part arising from sales of PSS provider d , which I label “PSS, d ”, that part arising from sales of other PSS providers, which I label “PSS,- d ”, that part arising from all markets excluding PSS, which I denote “-PSS”. This is true both when an agreement is reached and when it has not:

$$\pi_r(r_{dr}, r', w) = \pi_r^{PSS}(r_{dr}, r', w) + \pi_r^{-PSS}(r_{dr}, r', w) = \pi_r^{PSS,d}(r_{dr}, r', w) + \pi_r^{PSS,-d}(r_{dr}, r', w) + \pi_r^{-PSS}(r_{dr}, r', w)$$

$$\pi_r(\sim, r', w) = \pi_r^{PSS}(\sim, r', w) + \pi_r^{-PSS}(\sim, r', w) = \pi_r^{PSS,d}(\sim, r', w) + \pi_r^{PSS,-d}(\sim, r', w) + \pi_r^{-PSS}(\sim, r', w)$$

Unlike for record labels, downstream firms only earn profits in their own PSS market. They have no profits from other markets, “-PSS”. Furthermore, these profits include profits from both record label r and other record labels, “- r ”. For consistency, I restate profits to PSS provider d as as PSS profits in d 's market, which I denote “PSS, d ”:

$$\pi_d(r_{dr}, r', w) = \pi_d^{PSS,d}(r_{dr}, r', w)$$

$$\pi_d(\sim, r', w) = \pi_d^{PSS,d}(\sim, r', w)$$

We can use these terms to reorganize the Nash Product in Equation (2) above, this time focusing on profits within the PSS market serviced by PSS provider, d :

$$r_{dr} = \arg \max NP(r_{dr}, r', w) = (\pi_r^{PSS,d}(r_{dr}, r', w) - TP_r(\sim, r', w))^{b_{dr}} (\pi_d^{PSS,d}(r_{dr}, r', w) - TP_d(\sim, r', w))^{1-b_{dr}}$$

where, as above, $TP_r(\sim, r', w)$ and $TP_d(\sim, r', w)$ are the 'Threat' Points for record label r and PSS provider, d , respectively.

The threat points are defined as follows:

$$TP_d(\sim, r', w) = \pi_d^{PSS,d}(\sim, r', w)$$

$$TP_r(r_{dr}, r', r_w) = \pi_r^{PSS,d}(\sim, r', r_w) + (\pi_r^{PSS,-d}(\sim, r', r_w) - \pi_r^{PSS,-d}(r_{dr}, r', r_w)) + (\pi_r^{-PSS}(\sim, r', r_w) - \pi_r^{-PSS}(r_{dr}, r', r_w))$$

For the PSS provider, d , the threat point is no different than in the original Nash Product. It is its profit in the PSS market in case of disagreement with the record label. For the record label, r , however, there are now *three* terms in its threat point. The first is analogous to the PSS provider's: it is the economic profit the record label earns in PSS provider d 's PSS market in case of disagreement with the PSS provider. The third measures the extra profit it earns in *other* (non-PSS) markets if it *can't* reach an agreement in the PSS market, $\pi_r^{-PSS}(\sim, r', r_w) - \pi_r^{-PSS}(r_{dr}, r', r_w)$. For convenience, as above, I label this extra profit in non-PSS markets $\Delta\pi_r^{-PSS}(r_{dr}, r', r_w)$.

It is the second term that is due to the presence of upstream and downstream firms. It measures the extra profit record label r earns from sales in other PSS markets in case of disagreement with PSS provider d . I label this extra profit in non- d PSS markets $\Delta\pi_r^{PSS,-d}(r_{dr}, r', r_w)$.

The Musical Works Market and Equilibrium

Everything to this point has taken the musical works royalty, r_{dw} , paid by each PSS provider, d , to each PRO, w , as given. In practice, all the sound recording and musical works royalties, r_{dr} and r_{dw} , will be determined as the result of an economic equilibrium. In other words, the sound recording royalties, r_{dr} , that are determined as a function of the musical works royalties, r_{dw} , must be consistent with the value of the musical works royalties that is determined as a function of the sound recording

royalties. Similarly each sound recording royalty must be consistent with each other sound recording royalty and all the musical works royalties.

To achieve this equilibrium, I assume that each set of negotiations are simultaneous and separate, so other royalty agreements are not known but conjectured. The equilibrium of this game, interpreted as a Nash equilibrium between Nash Bargains, yields royalties given by the Asymmetric Nash Bargaining Solution:

$$r_{dr}^* = TP_r(r_{dr}, r', r_w) + b_{dr}(\pi^{PSS,d}(r', r_w) - TP_d(\sim, r', w) - TP_r(r_{dr}, r', w))$$

where $\pi^{PSS,d}(r', r_w) = \pi_d^{PSS,d}(r_r, r', r_w) + \pi_r^{PSS,d}(r_r, r', r_w)$ is the combined economic profit (surplus) to both the PSS provider and the record label from reaching an agreement in the PSS market served by PSS provider d . This is again the “Combined Agreement Surplus” in the PSS market served by PSS provider d . I call the difference between the combined agreement surplus and the sum of the threat points, $\pi^{PSS,d}(r', r_w) - TP_d(\sim, r', w) - TP_r(r_r, r', w)$, the “Incremental Surplus”.

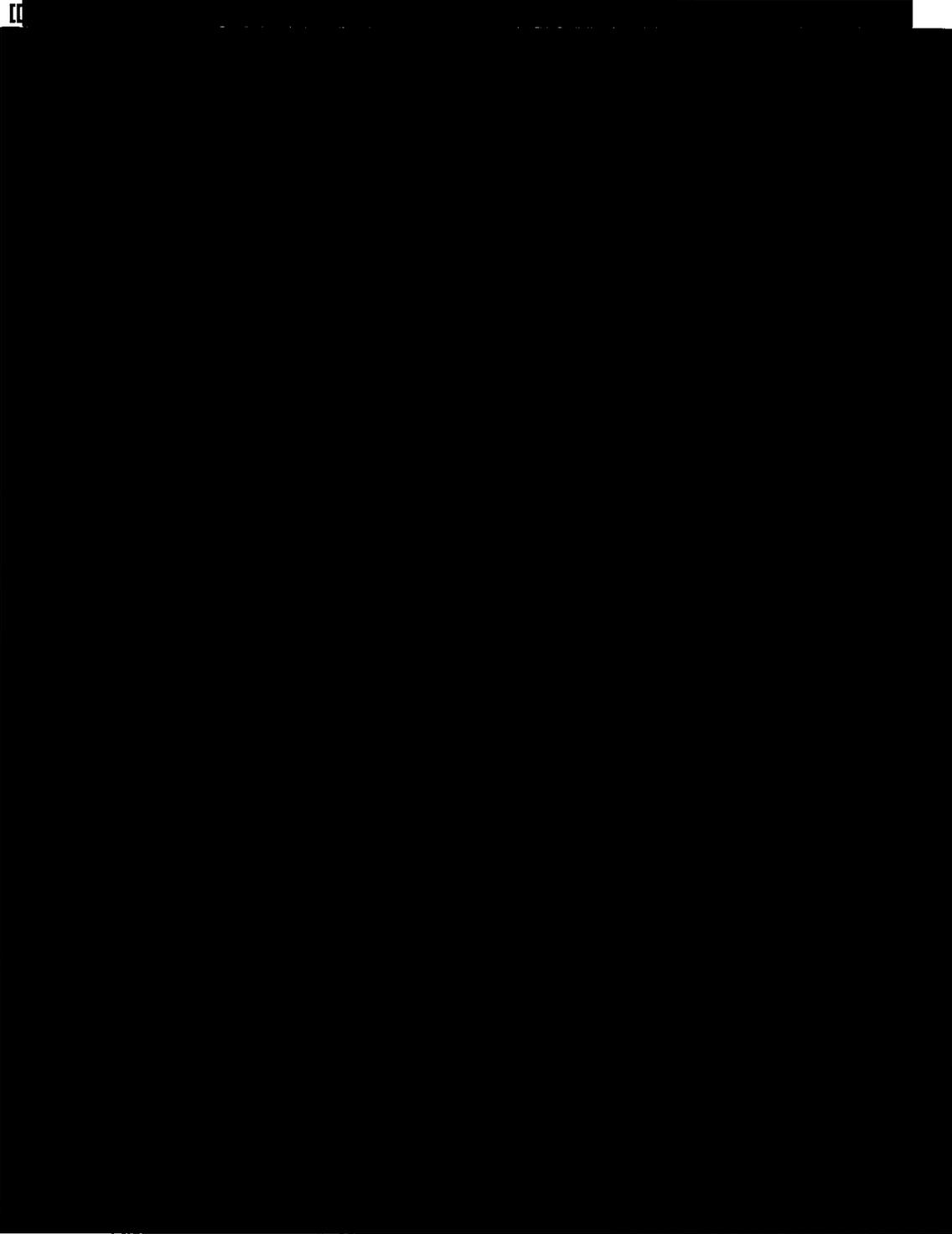
Let r_{dr}^* be the profits retained by PSS d , i.e. those profits that aren't paid as royalties to record company r . These are given by a symmetric formula

$$r_{dr}^* = TP_d(\sim, r', r_w) + (1 - b_{dr})(\pi^{PSS,d}(r, w) - TP_d(\sim, r', r_w) - TP_r(r_{dr}, r', w))$$

These formulas show that the qualitative features of royalties this more complicated model are effectively the same as in the bilateral monopoly model:

The royalty received by each firm in a bargain equals its threat point plus its bargaining power times the incremental surplus.

Appendix B. Estimation of expected surplus





II

Appendix B.4: Expected Return on Assets

Step 1: Calculation of Equity Beta

Source: Bloomberg
Relative index: S&P 500
Period: Monthly
Start Date: 31-Jan-06
End Date: 30-Dec-10
Beta Type: Raw
Equity Beta: 1.00

Step 2: Calculation of Asset Beta

Debt/TEV: 0.00%
Debt Beta: 0.25

Equity/TEV: 100.00%
Equity Beta: 1.00

Asset Beta: 1.00

Step 1: Calculation of Expected Return on Assets

Risk-free rate: 2.83%
Risk-premium: 5.50%
Asset Beta: 1.00

Expected return on assets: 8.33%

Sources:

1. Equity Beta: Music Choice's beta assumed to be equal to beta for the market as a whole
2. Risk-free rate: <http://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=longtermrate>
3. Equity risk premium: <http://www.cxoadvisory.com/13357/equity-premium/the-2011-equity-risk-premiums-from-academia-and-practitioners/>

Notes:

1. Risk-free rate is the 20-year constant maturity based on outstanding Treasury bonds as of 11/2011.2.
2. All data are year-end figures unless otherwise noted.

Appendix C. Materials relied upon

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17. Rafael Rob and Joel Waldfogel, “Piracy on the High C’s: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students,” *Journal of Law and Economics* 48, no. 1 (Apr. 2006): 29–62.
18. 63 FR 25394–415, “Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings,” Docket No. 96-5 CARP DSTRA (May 8, 1998).
19. 68 FR 4744–7, “Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings by Preexisting Subscription Services,” Docket No. 2001-1 CARP DSTRA2 (Jan. 30, 2003).
20. 68 FR 29837–41, “Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings by Preexisting Subscription Services,” Docket No. 2001-1 CARP DSTRA2 (Jul. 3, 2003).
21. 72 FR 24084–114, “Digital Performance of Sound Recordings and Ephemeral Recordings,” Docket No. 2005-1 CRB DTRA (May 1, 2007).
22. Rebuttal testimony of Charles Ciongoli, Docket No. 2006–1 CRB DSTRA (Jul. 2007).
23. Rebuttal testimony of Mark Eisenberg, Docket No. 2006–1 CRB DSTRA (Jul. 2007).
24. Testimony of David J. Del Beccaro and exhibits cited therein.
25. Testimony of Damon Williams and exhibits cited therein..
26. Expert Report of Dr. John R. Woodbury, Docket No. 2006–1 CRB DSTRA (Oct. 30, 2006).

27. Report of the Copyright Arbitration Royalty Panel (Nov. 12, 1997).
28. *Recording Industry Association of America v. Librarian of Congress*, 176 F.3d 528, 532 (D.C. Cir. 1999).
29. *ASCAP v. Showtime/The Movie Channel, Inc. ("Showtime")*, 912 F.2d 563 (2d Cir. 1990).
30. Final Determination of Rates and Terms, Docket No. 2006-1 CRB DSTRA.
31. Music Choice's 2006-2010 financial statements for its residential music service business.
32. Rebuttal testimony of Janusz Ordover, Docket No. 2006-1 CRB DSTRA (Jul. 2007).

Testimony of Gregory S. Crawford, PhD

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Date: 11/28/2011

A handwritten signature in black ink, appearing to read "Gregory S. Crawford", is written over a horizontal line.

Gregory S. Crawford, PhD

MC 1

DAVID J. DEL BECCARO SPEAKING ENGAGEMENTS

<u>DATE</u>	<u>FORUM</u>	<u>TOPIC</u>
11/2011	Digital Media East	"Monetization: Predictions & Provocations -- How to Build Sustainable Business Models around Television & Video Content"
03/2008	Digital Media Wire Digital Music Forum	"State of the Digital Union"
10/2007	Digital Music Forum West	"State of the Digital Union"
02/2007	Digital Music Wire Digital Music Forum East 2007	"State of the Digital Union"
01/2007	Digital Hollywood at CES	"TV & Interactivity: Evolving Content & Business Models" (upcoming)
11/2006	Digital Media Wire's Future of Television Forum	"Outlook for Digital Media and the TV Industry" (upcoming)
10/2006	Digital Media Wire's Digital Music Forum	"Advertising, Promotions & Digital Music"
10/2006	Digital Hollywood Fall	"Television 2.0"
04/2006	Billboard's MECCA Event at CTIA	"Mobile Entertainment Content, Commerce & Application"
03/2006	Digital Media Wire's Digital Music Forum	"Featured Interview"
11/2005	Digital Media Wire's Future of Television Forum	"Killer Apps: Technology Beyond TiVo"
09/2005	CTIA-The Wireless Association®	Panel: "Video: Finding Mobile Video's ROI"
03/2004	iHollywood Forum's Digital Media Summit	
12/2003	iHollywood Forum's Music 2.0 Conference	"Remixing the Home"
09/2003	Digital Media Wire's Future of Entertainment Forum	"New Age Programming: Evolving Content Strategies in the Technology Age"
09/2003	CTIA-The Wireless Association®	
07/2003	Jupiter PLUG.IN Event	"Digital Music Programming"
03/2003	Digital Music Forum	"Survivors in the Music-Tech Industry"
01/2003	Digital Hollywood at CES	"SVOD and the Set-Top Box-DVD"

MC 2

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Copyright Royalty Board

Before the
U.S. Copyright Office
Library of Congress
Washington, D.C. 20559

ORIGINAL

In the Matter of)
)
)

Adjusting of Rates and Terms for)
Preexisting Subscription Services and)
Satellite Digital Audio Radio Services)
_____)

Docket No. RF 2006-2

In the Matter of)
)
)

Digital Performance Right in Sound)
Recordings and Ephemeral Recordings)
For a New Subscription Service)
_____)

Docket No. RF 2006-3

MEMORANDUM OPINION

I. Introduction

On September 20, 2006, the Copyright Royalty Board (“Board”), acting on requests by SoundExchange, Inc. (“SoundExchange”) and pursuant to 17 U.S.C. § 802(f)(1)(B), referred a novel question of law¹ to the Register of Copyrights (“Register”) regarding the conditions under which an entity may be a “preexisting subscription service” under 17 U.S.C. § 114(j)(11). Specifically, the Board requested a decision by the Register as to the following:

Is the universe of preexisting subscription services—defined in 17 U.S.C. § 114(j)(11) as services which perform sound recordings by means of noninteractive audio-only subscription digital audio transmissions and which were in existence and making such transmissions to the public for a fee on or before July 31, 1998 – [limited by]² law to only Muzak (provided

¹ A “novel question of law” is a question of law that has not been determined in prior decisions, determinations, and rulings described in Section 803(a) of the Copyright Act. See 17 U.S.C. § 802(f)(1)(B)(ii).

² The bracketed words are omitted in the Board’s order for Docket No. 2006-01 DSTR.

over the DiSH Network), Music Choice, and DMX?³

The Board also stated that it “specifically reserves any questions regarding successorship for its own subsequent determination as questions of fact or mixed questions of fact and law.”

In sum, eligibility for a preexisting subscription service license is limited to subscription services that satisfy the definition of 17 U.S.C. § 114(j)(11), which includes being in operation on July 31, 1998 and continuously operating since that time. In 1998, Congress identified those entities which satisfied the definition and were eligible at that time as being DMX, Music Choice and the DiSH Network. Therefore, today, those same services are the only ones that may qualify as being preexisting subscription services, since they are the only ones which can satisfy the requirement of being in operation as of July 31, 1998. Moreover, for purposes of participating in a rate setting proceeding, the term “preexisting subscription service” is best interpreted as meaning the business entity which operates under the statutory license. A determination of whether DMX is the same service that was identified by the legislative history in 1998 and has operated continuously since that time requires a factual analysis that is beyond the scope of the Register’s authority for questions presented under 17 U.S.C. § 802(f)(1)(B).

II. BACKGROUND AND GENERAL OVERVIEW

A. Parties and Nature of Dispute

In Docket No. 2005-5 CRB DTNSRA, SoundExchange, representing copyright owners of digital audio sound recordings, alleges that Sirius Satellite Radio (hereafter, “Sirius”), which is a user of sound recordings by publicly performing them as digital audio transmissions, does not satisfy the eligibility criteria to operate under the § 114 statutory license as a preexisting subscription service. In Docket No. 2006-1 CRB DSTRA, the same dispute is repeated between those two parties.⁴ There is an additional party in Docket No. RF 2006-1 CRB DSTRA because SoundExchange raises similar objections against DMX, Inc. (hereafter, “DMX”), which also publicly performs digital audio sound recordings.

B. Historical Background to Legal Disputes

The factual allegations are briefly summarized here to put the legal arguments in context. However, evaluation of the limited factual arguments presented in the briefs are beyond the scope of this decision and will not be considered by the Register in rendering her decision on the novel question of law referred by the Board. SoundExchange alleges that Sirius and DMX are not eligible for a statutory license for preexisting subscription services because they are not the entities that were in existence and

³ The Board orders quoted a portion of subparagraph (11). This is the entire provision:

A “preexisting subscription service” is a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

⁴ The briefs filed by SoundExchange in the two proceedings are identical, as are those filed by Sirius.

making digital audio transmissions on or before July 31, 1998. SoundExchange argues that Sirius is a completely different company than Muzak, the entity that is eligible for a preexisting subscription service license.

DMX bases its eligibility on the fact that it now owns and operates the service historically known as DMX. DMX has been continuously performing sound recordings by means of digital audio transmission since 1986. It is not disputed that, since 1986, the business known as DMX changed ownership and was restructured many times, including four times since 1998.

As a subsidiary of Maxide Acquisition, Inc., DMX went into bankruptcy proceedings in 2005. The current entity operating as DMX was acquired by THP Capstar Acquisition Corp. as part of the bankruptcy proceedings. SoundExchange was a party to those proceedings, as a creditor to DMX. The current DMX did not assume liability for royalties owed to SoundExchange by the DMX business entity that incurred those obligations prior to the bankruptcy proceedings. While there is agreement on that fact, there appears to be disagreement about the nature of the interests acquired by the current entity operating as DMX. SoundExchange states that the current business entity that is DMX, Inc. is not a successor in interest to the business that previously operated as DMX because it acquired some but not all of the DMX operations. DMX responds that it acquired assets sufficient to operate the DMX subscription service. On June 3, 2005, DMX filed a *Notice of Use of Sound Recordings Under Statutory License* as a preexisting subscription service, under the name THP Capstar Acquisition Corp. d/b/a DMX Music.

C. LEGAL BACKGROUND

1. Statutory Framework: The Digital Millennium Copyright Act

The Digital Millennium Copyright Act (“DMCA”), enacted in 1998, amended the law for the statutory license to perform sound recordings as digital audio transmissions by adding the statutory provisions at issue here, among other changes. Pub. L. No. 105-304, 112 Stat. 2860, 2891, 2897-99 (Oct. 28, 1998). A major goal of the DMCA is to establish a market-based standard for setting royalty rates paid to copyright owners for use of their works under the § 114 statutory license. This standard, codified at 17 U.S.C. § 114(f)(2)(B), requires that rates and terms be set to reflect those that “would have been negotiated in the marketplace between a willing buyer and a willing seller.” This standard must be used to set rates for all services making digital transmissions of sound recordings under the § 114 statutory license, except for the preexisting subscription services. Rates for the preexisting subscription services are set based upon the statutory factors set forth at 17 U.S.C. § 801(b)(1),⁵ and this did not change with the passage of the DMCA. That means that licensees operating under the statutory license as preexisting subscription services have the right to operate under terms and rates that were first set by a Copyright

⁵ The current provisions of 17 U.S.C. § 801(b)(1) are a reenactment of those that were in effect in 1998. The Copyright Royalty and Distribution Reform Act of 2004 completely revised Chapter 8 of title 17, *United States Code*. Pub. L. No. 108-419, 118 Stat. 2341 (2004). There are only minor differences between the language that was in effect for that provision in 1998 and what is currently in effect. The provisions of 17 U.S.C. § 802(b)(1) that were in effect in 1998 are contained in the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 2594 (1976), as amended by the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336, 348 (1995); Copyright Technical Amendments, Pub. L. No. 105-80, 111 Stat. 1529, 1533 (1997) and the Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2902 (1998).

Arbitration Royalty Panel (CARP)⁶ in May of 1998, and readjusted in July of 2003,⁷ in accordance with the § 801(b)(1) standard. Thus, it becomes important to determine which services qualify as a preexisting subscription service.

While the statute does not specifically identify which services meet the statutory definition of a preexisting subscription service, the DMCA conference report states very specifically that there are three services that satisfy the definition of a preexisting subscription service and identifies each service by name several times throughout the report. H.R. Conf. Rep. No. 105-796, at 80-81 and 89 (1998). At one place, the report states:

There was [*sic*] only three such services that exist: DMX (operated by TCI Music), Music Choice (operated by Digital Cable Radio Associates), and the DiSH Network (operated by Muzak). As of July 31, 1998, DMX and Music Choice made transmissions via both cable and satellite media; the DiSH Network was available only via satellite.

Id. at 81.

And again, in its comments about the procedures in 17 U.S.C. § 114(f)(1) for determining reasonable rates and terms for the preexisting services, the conference report identifies each service that qualifies as a preexisting service:

The conferees note that this subsection applies only to the three services considered preexisting subscription services, DMX, Music Choice and the DiSH Network, and the two services considered preexisting satellite digital audio radio services, CD Radio and American Mobile Radio Corporation.

⁶ As part of the changes made by the Copyright Royalty and Distribution Reform Act of 2004, the Board, which referred the question to the Register under consideration here, replaced the CARP system that had been established in 1993 with the passage of the Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304.

⁷ In 1995, Congress established the digital performance right for sound recordings subject to certain limitations including a statutory license. Digital Performance Right in Sound Recordings Act of 1995 (“DPRSRA”), Pub. L. No. 104-39, 109 Stat. 336 (1995). A subscription digital audio service could operate under the statutory license to publicly perform sound recordings by means of a digital audio transmission, provided that the service satisfied certain conditions. One of the conditions was to pay a royalty that would be determined by a CARP with reference to four objectives set forth at 17 U.S.C. § 801(b)(1). The initial rate setting proceeding began in 1996, early in the history of services making digital audio transmissions. The entities that participated in the proceedings as services making digital audio transmissions were Muzak, Digital Cable Radio Associates (operating under the trade name Music Choice) and DMX, Inc. (which merged into TCI Music, Inc. during the proceeding). See *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 63 Fed. Reg. 25,394 (May 8, 1998). In that proceeding, the CARP ultimately concluded that, at that time in the development of those types of services, it set a low rate favoring the license holders “because a rate set toward the high end would thwart the statutory objectives under current market conditions. The CARP expressly noted that a future CARP may reach an entirely different result based on the then-current economic state of the industry and new information on the Services’ impact on the marketplace.” *Id.* at 25,405. These rates and terms were adjusted in 2003 in accordance with an agreement negotiated by the interested parties. See 68 Fed. Reg. 4744 (January 30, 2003) and 68 Fed. Reg. 39,837 (July 3, 2003).

Id. at 85. *See also id* at 89.⁸ (final recitation of names of preexisting services as part of discussion in the section discussing the definition of the term, preexisting subscription service).

The DMCA conference report also discusses the reasons why Congress decided not to subject these preexisting services to the new rate setting standard or impose additional limitations on their transmissions. Specifically, the conference report states that the rationale for its grandfathering provisions is to “prevent disruption of the existing operations by such services,” and it explains that the grandfathering provisions for preexisting satellite digital audio radio services and their “historical operations” have a similar rationale. *Id.* at 81. The report also explains that a preexisting service does not lose its designation as such in the event the service decides to utilize a new transmission medium, provided that the subscription transmissions are similar. In explaining this nuance, the conference report states:

In grandfathering these services, the conferee’s objective was to limit the grandfather to their existing services in the same transmission medium and to any new services in a new transmission medium where only transmissions similar to their existing service are provided. Thus, if a cable subscription music service making transmission on July 31, 1998, were to offer the same music service through the Internet, then such Internet service would be considered part of a preexisting subscription service.

If, however, a subscription service making transmissions on July 31, 1998, were to offer a new service either in the same or new transmission medium by taking advantage [*sic*] of the capabilities of that medium, such new service would not qualify as a preexisting subscription service. For example, a service that offers video programming, such as advertising or other content, would not qualify as a preexisting service, provided that the video programming is not merely information about the service itself, the sound recordings being transmitted, the featured artists, composers or songwriters, or an advertisement to purchase the sound recording transmitted.

Id. at 89.⁹

Thus, it is clear why a service would seek to be classified as a preexisting subscription service for purposes of §114. A designation as a preexisting subscription service means that the service will pay royalty fees that are set according to a standard that may result in below market rates and it has the added benefit that the service can make its offerings of subscription transmissions in a new medium without losing its status as a preexisting service. The legislative history construing the statutory framework that provides for these services also makes clear that these benefits are limited to only a handful of

⁸ The language used here also appears in an earlier congressional report on the DMCA. Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998. *House Comm. on the Judiciary*, 105th Congress, at 60 [Comm. Print 1998].

⁹ *Id.*

services that were in operation on July 31, 1998.¹⁰

2. Summary of the Parties' Legal Arguments

a. SoundExchange Legal Arguments

Statutory Language. SoundExchange argues that neither DMX nor Sirius is eligible for a statutory license for preexisting subscription services because they do not satisfy the statutory requirements for preexisting subscription services. SoundExchange argues that the statutory license for preexisting subscription services is limited to “business entities which were ‘in existence and ...making [digital audio] transmissions to the public for a fee on or before July 31, 1998,’ 17 U.S.C. § 114(j)(11) and are specifically named” in the DMCA’s legislative history. *Initial Brief of SoundExchange Addressing the Question Referred to the Register Concerning the Universe of Services Eligible for the Preexisting Subscription Service Compulsory License (“SoundExchange Brief”)*, at 2. It states that the definition of preexisting subscription services “speaks of a service as something that is *in existence* and *making transmissions* as of July 31, 1998.” *Id.* at 11. SoundExchange also argues that the language of the statutory definition should be interpreted so that an “entity” is a preexisting subscription service, citing as evidence, 17 U.S.C. § 114(e)(1) and (2), which provides authority for parties to negotiate. SoundExchange argues that § 114(e) read in conjunction with the definition at § 114(j)(11) makes it clear that preexisting services are the business entities identified in the legislative history.

Legislative History. SoundExchange argues that the statutory license for preexisting subscription services was created solely for the entities identified in the legislative history and “solely for the purpose of preserving *their* business expectancy of operating under the legal standard for setting rates and terms that existed prior to the DMCA.” *Id.* In support, SoundExchange quotes the conference report language that states the purpose of the exemptions is to “prevent disruption of *existing operations* by such services.” *Id.* at 2,13. SoundExchange contends that Congress intended to benefit those companies that had made a substantial prior investment in digital audio transmission services in reliance on the preexisting rate standard and were in fact making such transmissions. *SoundExchange Brief*, at 3. SoundExchange states that the conference report establishes a requirement that there are only three entities qualified to be preexisting subscription services and the three must be limited to those specifically identified by name.

SoundExchange alleges that once the business expectancy of the entity identified in the legislative history is “extinguished,” the statutory license ceases to exist. *Id.* at 4 and 11. It objects to any subsequent entity benefitting from the grandfathering provision as creating a “freely alienable property right to the predecessor legal regime for new market entrants,” which, SoundExchange maintains, Congress did not intend. *Id.*

Principle of Narrow Construction. In additional arguments, SoundExchange cautions that the Register should adhere to the principle that, since statutory licenses are derogations of the rights of copyright owners, they must be construed as narrowly as possible, both in the scope of the license and the eligibility criteria. *Id.* at 14. In light of this principle, SoundExchange advocates that these statutory licenses should be interpreted narrowly to “restrict the perpetuation or expansion” of the preexisting subscription services statutory licenses. *Id.* at 15. SoundExchange points out that the grandfathering

¹⁰ *Id.*

provision is a deep government intrusion into the market place that is potentially discriminatory and that, in the past, the Register herself expressed a preference for parity among statutory licensees. *Id.* at 15. SoundExchange also draws attention to that fact that, aside from the statutory license context, it is a general principle of law that grandfathering provisions should be construed strictly and narrowly. *Id.* In support of those principles, SoundExchange reminds the Copyright Office of a precedent in which it adhered to those principles of narrowly and strictly construing grandfathering provisions. *Id.* at 17, citing *Compulsory License for Cable Systems*, 49 Fed. Reg. 14,944 (April 16, 1984).

Third Party Transfer of Statutory Licenses. SoundExchange also argued that statutory licenses are subject to the same restrictions that generally apply against transferability of non-exclusive copyright licenses, citing authorities in support of that principle. *Id.* at 19. SoundExchange also cites *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1333 (9th Cir. 1984) in which, SoundExchange alleges, the United States Court of Appeals for the Ninth Circuit established that the same principles apply to statutory licenses as to voluntary licenses. *Id.*

Based on the foregoing considerations, SoundExchange alleges that Sirius and DMX are not eligible for a statutory license as preexisting subscription services since they are not entities that were in existence and making digital audio transmissions on or before July 31, 1998. SoundExchange asserts that neither one is identified in the legislative history naming entities that are preexisting subscription services. SoundExchange maintains that Sirius is a completely different company than Muzak, the entity identified as a preexisting subscription service. SoundExchange also rejects DMX's claim to eligibility for a statutory license for preexisting services on the basis that, following bankruptcy proceedings for the previous entity operating the DMX preexisting subscription service, THP Capstar did not acquire sufficient assets to be a party in interest that is eligible for the statutory license. SoundExchange concedes that a company does not lose its eligibility for a statutory license merely because it changes its name. *Id.*, at n. 6.

b. Sirius

Statutory Language. Sirius argues that it is eligible for a statutory license as a preexisting subscription services because it is performing sound recordings by digital audio transmission for the DiSH Network which is the preexisting subscription service that was in existence on July 31, 1998. Sirius bases its eligibility on the reference in the legislative history to the DiSH Network as a preexisting subscription service and contends "that Congress intended status as a [preexisting subscription service] to flow directly from the fact that the programming is transmitted over the DiSH Network." *Memorandum of Sirius Satellite Radio Inc. Concerning Eligibility for Status as a "Preexisting Subscription Service,"* at 4. Sirius maintains that, as long as the preexisting subscription service has continued to be DiSH Network, any business entity that provides transmission consistent with the statutory requirements is eligible for the license. Sirius alleges that the definition of preexisting subscription service only requires that the service, not the business entity, be in existence and operating at that time. Sirius points out that to constrain the DiSH Network to rely solely on Muzak is illogical since that ignores the fact that DiSH Network has no control over Muzak's business and would be unable to control important aspects of its service, such as the quality or nature of the content. Sirius maintains that there is nothing in the statute or legislative history to indicate that DiSH Network was not free to substitute a different transmitting entity. That would be commercially unreasonable and unfair to DiSH Network.

Legislative History. Sirius further argues that the legislative history is not pertinent since the

statute is clear on its face and there is no need to resort to legislative history to interpret the plain meaning of the statute. Nevertheless, Sirius also argues that the legislative history does not support SoundExchange's interpretation but, rather, emphasizes that the beneficiary of the grandfathering provision is the service, not the business entity.

Principle of Narrow Construction. Sirius rejects as irrelevant SoundExchange's reliance on statutory canons regarding the interpretation of grandfather clauses, arguing that the concept of a grandfather clause is irrelevant here since Congress has identified the eligible entities. Sirius states that Congress' goal is to protect the status of preexisting subscription services. Also, in rebuttal, Sirius cites instances in which courts have rejected the canons cited by SoundExchange and instances in which courts have decided that such clauses must be broadly construed, contrary to SoundExchange's assertion that they must be narrowly construed. *Reply Memorandum of Sirius Satellite Radio Inc. Concerning Eligibility for Status as A "Preexisting Subscription Service,"* ("Sirius Reply"), at 7-8.

Sirius states that SoundExchange's reliance on the Register's 1984 cable compulsory license decision is irrelevant. In support of that position, Sirius argues that what was at issue in that cable compulsory licensing proceeding was a question of which rate to apply when a distant signal equivalent that was not grandfathered was substituted for a signal that was grandfathered, for which the Copyright Office relied on a determination previously made by the Copyright Royalty Tribunal, an organization that became defunct in 1993 and was replaced with the CARP system. Sirius states that the issue stands rather for the proposition that, in matters where the Tribunal had authority to regulate, the Register must give effect to the unambiguously expressed intent of the Tribunal.

Sirius dismisses SoundExchange's assertion that it is a fundamental principle that statutory licenses, as derogations of the rights of copyright owners, must be construed as narrowly as possible. Sirius rebuts that statement by pointing out that the statutory license for preexisting statutory licenses is, itself, a narrowly carved out performance right which is subject to many exceptions and limitations. Therefore, copyright owners, themselves, have very narrow and limited rights with regard to the statutory license to public performances of sound recordings. Therefore, Sirius reasons, it is the sound recording right itself that should be narrowly construed, not the restrictions in 17 U.S.C. § 114.

Past Practices. Sirius asserts that SoundExchange has acquiesced, by accepting royalty payments since 2004, in Sirius' having a statutory license for preexisting subscription services. Sirius maintains that, if it did not qualify for that statutory license, it was not obligated to pay any royalties since there is no fee established for new subscription services that provide audio programming bundled with cable or satellite services. Sirius also points out that SoundExchange received adequate notice to object to Sirius' eligibility prior to these proceedings because, in addition to receiving royalty payments, Sirius filed an Amended Notice of Use of Sound Recordings Under Statutory License, on May 18, 2004.

c. DMX

Statutory Construction. DMX argues in response that it is eligible for a statutory license for preexisting subscription services based on the plain language of the statute. It rejects SoundExchange's "conflation of a service and the legal entity that operates it." *DMX Memorandum of Law on Novel, Material Question of Substantive Law Concerning the Preexisting Subscription Service Compulsory License ("DMX Memorandum")*, at 9. DMX points out that there are no requirements in the statute regarding ownership or restrictions on changes of control.

DMX states that § 114(d)(2)(B) is drafted to identify specific services that were in existence and operating on July 31, 1998, not to identify particular business entities that control those services. DMX cites several principles of statutory construction in support of its argument that the terms “entity” and “entities” should be interpreted as having separate meanings from the terms “service” and “services” where they appear in the statutory text. To illustrate this point, DMX cites examples that include: (a) § 114(d)(2)(C)(iv) (“the transmitting entity does not knowingly perform the sound recording, as part of a service that offers ... or a particular product or service advertised by the transmitting entity”), (b) § 114(d)(2)(C)(ix) (“the transmitting entity identifies in textual data the sound recording during, but not before, the time it is performed, including the title ... in a manner to permit it to be displayed to the transmission recipient by the device or technology intended for receiving the service provided by the transmitting entity”), (c) § 114(h)(1) (“If the copyright owner of a sound recording licenses an affiliated entity the right to publicly perform a sound recording by means of a digital audio transmission under § 106(6), the copyright owner shall make [it] available ... to all bona fide entities that offer similar services”), (d) § 114(j)(6) (referring to transmissions made as “part of a service”) and (e) § 114(j)(7) (“If an entity offers both interactive and noninteractive services”). *Id.* at 8.

In support of its interpretation that, if Congress had meant to limit the statutory license available under § 114(d)(2)(B) to specific business entities, rather than to subscription services, it could and would have drafted the statute accordingly. DMX cites well established principles of statutory construction in both its initial and reply briefs:

SoundExchange’s proffered interpretation of Section 114 thus violates the fundamental precept of statutory construction that requires interpretation of each provision in a section in such a way as to produce a harmonious whole. *See, e.g., Hammonree v. NLRB*, 925 F.2d 1486, 1496 (D.C. Cir. 1991) (“Established and familiar principles of statutory construction favor this latter interpretation ... for courts are obligated to construe statutes harmoniously whenever possible.”) (citation omitted). [SoundExchange’s argument] also contravenes the equally fundamental interpretive principle that when a statute uses two different terms, Congress must have intended that two different meanings attach thereto. *See, e.g., American Portland Cement Alliance v. EPA*, 101 F.3d 772, 775 (D.C. Cir. 1996).

DMX Memorandum, at 8-9.

The Supreme Court repeatedly has rejected arguments such as the one advanced by SoundExchange here that different terms used in the same statute should be presumed to have the same meaning. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n. 9 (2004) (“[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.”) (citation omitted); *Russello v. United States*, 464 U.S. 16, 23 (1983) (“We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.”). ... The distinct language used by Congress is presumed to have been purposeful and is to be accorded appropriate deference. *See, e.g., Barnhart v. Sigmon Coal Co.*,

534 U.S. 438, 452 (2002) (“[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (internal quotation omitted); *see also United States v. Labonte*, 520 U.S. 751, 757 (1997) (“We do not start from the premise that this language is imprecise. Instead, we assume that in drafting this legislation, Congress said what it meant.”)

DMX, Inc.’s Reply Memorandum of Law on Novel, Material Question of Substantive Law Concerning the Preexisting Subscription Service Compulsory License (“DMX Reply Brief”), at 4.

Legislative History. DMX argues that there is no need to rely on the legislative history when the plain meaning of the statute is clear on its face. It rejects SoundExchange’s interpretation of the legislative history, arguing instead for its own interpretation that, because the DMX subscription service is repeatedly named in the grandfathering provisions, it is the beneficiary of the exemption. DMX states that, like the statute, the legislative history treats a service as something offered or operated by an entity, rather than as a service being a particular business entity, citing H.R. Conf. Rep. No. 105-796, at 89.

Principle of Narrow Construction. DMX rejects SoundExchange’s reliance on a Copyright Office interpretation of the compulsory copyright license for cable systems that involved a grandfathering issue. DMX states that, “Just as the grandfathering provision at issue in the cable compulsory license regulation applied to signals rather than to [cable] systems, the grandfathering provision at issue here applies to services, not to the companies that operate them.” *Id.*

Past Practices & Bankruptcy Proceedings. DMX points out that SoundExchange did not object to the reorganized business entities that held a preexisting subscription service statutory license to operate as DMX until recently, after DMX went through bankruptcy proceedings. DMX argues that SoundExchange is now acting contrary to its own past practice of acquiescing to the repeated, historical changes in ownership of the DMX preexisting subscription service. DMX alleges that SoundExchange is challenging DMX’s right to a preexisting subscription service license to retaliate because the business currently controlling DMX did not take on the liability for royalty payments owed SoundExchange prior to the bankruptcy proceedings. DMX rejects SoundExchange’s contention that DMX is not eligible for the preexisting subscription service statutory license because DMX did not acquire a statutory license from the former DMX in the bankruptcy proceedings. DMX points out that the CRB previously recognized that its eligibility for that license derives directly from the Copyright Act, referencing *Procedural Regulations for the Copyright Royalty Board*, 70 Fed. Reg. 30,901 (May 31, 2005) (“Statutory licenses ... enable a person to use copyrighted materials unilaterally, without contractual permission of the owners of the materials; so long as the user complies with applicable reporting and royalty payment obligations, such uses are not infringements of the owners’ copyright.”). *Id.* at 10. DMX rebutted SoundExchange assertions that DMX is not eligible for the preexisting subscription service statutory license as a result of the bankruptcy proceedings. *Id.* at 9-11. *DMX Reply Brief*, at 7.

III. LEGAL ANALYSIS

Statutory Language. Section 114 provides a statutory license to perform a sound recording publicly by means of a digital audio transmission. A major function of the language of § 114 is to identify the types of transmissions that fall within the scope of the license and the limitations on those transmissions, and to distinguish between the services that may utilize the license. To clarify the meaning of the terms used to identify these transmissions and the services, § 114 includes a number of definitions, including the definition for a “preexisting subscription service,” at § 114(j)(11).

The definition of a preexisting service specifies that in order for a service to qualify as a preexisting subscription service, the service must have been in existence and making transmissions of noninteractive audio-only subscription digital audio transmissions to the public for a fee on or before July 31, 1998. The current controversy surrounding the definition of a “preexisting subscription service” hinges on whether the service is a business entity which was offering music on a subscription basis on or before July 31, 1998, or whether the term merely refers to the use being made of the sound recordings during this time period.

DMX maintains that the term “service,” as used throughout § 114, does not extend to the business entity operating the preexisting subscription service but rather is a reference to the use of the music offered by DMX on or before July 31, 1998. Sirius takes a similar position, maintaining that the service, not the business entity, must have been in existence and operating at that time. SoundExchange, on the other hand, infers that the term “service” must refer to a specific business entity operating a digital music service because a service defined only by its use of sound recordings could not satisfy the requirement that the service was making transmissions on or before July 31, 1998.

In disputing SoundExchange’s interpretation, DMX examines other provisions in § 114 to determine how these terms are used, citing, for example, §§ 114(d)(2)(C)(iv) and (d)(2)(C)(ix), which uses the terms “transmitting entity” and “service” in the same paragraph. It also notes that the statute makes clear that an entity can offer more than one type of service, citing to the definition of an “interactive service,” at § 114(j)(7) (noting that an entity can offer both an interactive and a noninteractive service) and to the section on licensing to affiliates at § 114(h). DMX maintains that under the rules of statutory construction use of these words in the same paragraph would necessarily mean that they are not one and the same.

However, § 114 is not a model of clarity or consistency and it is instructive to look closer at the use of the terms and examine further usages in § 114. For example, § 114(d)(2)(c) discusses the limitations on the transmissions made by two types of services, a new subscription service and a preexisting subscription service using a new medium for transmissions. In describing these limitations, the statute arguably uses the term “transmitting entity” as a generic term applicable to both types of services when discussing what these services cannot do when making the transmissions. But this interpretation is tenuous, especially in light of § 114(d)(2)(C)(iv), without further support in the statute of the dual nature of the term “service.”

A more compelling argument for an interpretation that “service” means the “business entity” making the subscription transmissions can be made based upon an analysis of the sections that set forth the procedures for establishing rates and terms for the subscription transmissions. Section 114(e) specifically authorizes copyright owners of sound recordings and the entities performing the sound

recordings to negotiate the rates and terms for use of the sound recordings under § 114. Again, use of the term “entity” appears to be used to encompass all entities that may operate under the statutory license and as DMX points out there is nothing in this section that would equate an “entity” with a “service.” However, § 114(e) must be read in conjunction with §§ 114(f)(1) and (2), where it is necessary to distinguish among the “entities” for purposes of setting rates and terms because different standards are used to set rates for different “services.”

Section 114(f)(1) sets forth the procedures for setting rates and terms for the preexisting subscription services and preexisting satellite digital audio radio services. It provides a negotiation period to allow the copyright owners of the sound recordings and the licensees to reach an agreement on the rates and terms rather than engage in a more formal hearing process. Moreover, it specifically names in the last sentence of this section the preexisting services and the preexisting satellite digital audio radio services as the entities authorized under §114(e) to participate in this process. It reads as follows: “Any copyright owners of sound recordings, preexisting subscription services, or preexisting satellite digital audio radio services may submit to the Copyright Royalty Judges licenses covering such subscription transmissions with respect to such sound recordings.” The identification of the preexisting subscription services as entities authorized to engage in the negotiations of the rates for the transmissions made by these services supports an interpretation in this context that the use of the term preexisting subscription service refers to the business entity that operates under the license and pays the royalty fees for the transmissions it makes.

Section 114(c)(3) also supports the interpretation. It discusses the circumstances under which an interactive service shall be granted an exclusive license for the public performance of a sound recording by means of a digital audio transmission. If the term “interactive service” as used in this context was limited only to the use of the sound recordings in such a way as to deliver the work on request to a recipient, then the sentence would have no meaning, since it is a business entity and not the service itself that must secure the license in order to offer the service.

At the end of this analysis, we recognize that both DMX and Sound Exchange offer plausible interpretations of the term “preexisting subscription service,” and each finds support to some extent for its interpretation in the statutory language. Since a clear meaning for the term “preexisting subscription service” cannot be discerned by analyzing the use of the term in the statute, it is necessary to turn to the legislative history to inform the decision.

Legislative History. The legislative history is pertinent because it specifically identifies the entities upon which Congress confers the status, and because it explains the rationale for making this distinction among the services. As previously quoted, the Conference Report identifies DMX (operated by TCI Music), Music Choice (operated by Digital Cable Radio Associates and the DiSH Network (operated by Muzak), as the only three preexisting subscription services. Conf. Report at 81. While this information is helpful, it goes no farther than to name the entities that were in existence and making transmissions on or before July 31, 1998.

A more fruitful line of inquiry focuses on the reason why Congress chose to grandfather these three services as preexisting subscription services. On this point, the conference report states that:

In grandfathering these services, the conferees’ [*sic*] objective was to limit the grandfather to their existing services in the same transmission medium

and to any new services in a new transmission medium where only transmissions similar to their existing service are provided.

Id. at 89.

While it would appear from this excerpt that Congress's purpose in grandfathering these services was to preserve a particular program offering, it was not its only purpose or even necessarily its major goal.

The Conference Report also makes clear that Congress distinguished between preexisting subscription services and new subscription services as a way to prevent disruption of the existing operations of the services that were in existence and operating before July 31, 1998. *Id.* at 81. It understood that the entities so designated as preexisting had invested a great deal of resources into developing their services under the terms established in 1995 as part of the Digital Performance Right in Sound Recording Act of 1995, and that those services deserved to develop their businesses accordingly. While DMX and Sirius would like to interpret the reference to "existing operations" as meaning only the offerings made by these named services before the cut-off date, the legislative history does not support that interpretation when these statements are read in context with the explanations for why Congress also grandfathered two other entities as preexisting satellite digital audio services, identified as CD Radio and American Mobile Radio Corporation.

First, the legislative history makes it clear that the two named preexisting satellite digital audio services are the business entities that purchased the FCC licenses to develop the satellite systems which they used to offer their subscription services. And second, the existing operations that Congress meant to protect included the development of the satellite systems over which these services were to operate and not just the day-to-day operations involved in making the music available to the subscriber. Had Congress been interested in only protecting the use of the music, then it would have not expressed its concerns about disrupting business plans to build facilities over which these services were to be offered.¹¹

In construing the statutory language together with the legislative history, the logical conclusion is that Congress did use the term "service" to mean both the program offerings made on a subscription basis to the public and the business entity that secures the license to make the subscription transmissions. Although DMX contends that it would be difficult to determine whether a specific use of the term "preexisting subscription service" relates to the business entity or the use of the sound recordings by that entity, DMX Reply Brief at 6, that is not a reason to reject the conclusion. While usage of the term "preexisting subscription service" is ambiguous in some instances, its use to identify who receives the benefits of the designation and has the authority to operate under the statutory license and enter into negotiations to set rates and terms can only be read as referring to the business entity identified as the preexisting subscription service. To do otherwise would be to create confusion as to what entity had the right to participate in the rate setting process. Moreover, this approach closely adheres to the principles that support the adoption of a grandfather provision as explained more fully below.

¹¹ See *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 63 Fed. Reg. 25,394 (May 8, 1998). In that proceeding, the CARP ultimately concluded that, at that time in the development of those types of services, it set a low rate favoring the license holders "because a rate set toward the high end would thwart the statutory objectives under current market conditions."

Principle of Narrow Construction. Grandfathering provisions are frequently included in statutes to ensure continuity and to reward the investment and efforts of those who were the first to take on the struggles and risks of novel enterprises or methods. Moreover, as was stated in the arguments, it is a well established canon of statutory interpretation that grandfather provisions are to be narrowly interpreted. See *United States v. Allan Drug Corporation*, 357 F.2d 713 (10th Cir. 1966) (noting that grandfather clause exemption must be construed strictly against one who invokes it).

Thus, based upon these principles of statutory construction and the explanations offered in the legislative history for the adoption of the grandfathered services, the better reading of the statute is that the preexisting services must be limited to the three named entities in the Conference Report, *i.e.*, DMX (operated by TCI Music), Music Choice (operated by Digital Cable Radio Associates), and the DiSH Network (operated by Muzak) that were in existence and making transmissions of sound recordings by means of noninteractive audio-only subscription digital transmissions on or before July 31, 1998.

The question remains, however, whether the designation applies to the type of offerings made by the service or the business entity operating at the relevant time. As discussed previously, we conclude that the beneficiary of the grandfather provision should be the business entity that was providing the service at the time. While there is a debate among the parties as to whether DMX today is the same business entity as it was in 1998, the Office declines to reach this question because it would involve the interpretation of facts that go beyond the scope of this inquiry.

On the other hand, it is appropriate for the Office to consider whether for purposes of § 114 Sirius can provide the same type of music service that Muzak offered in 1998 through DiSH Network. The answer to this inquiry hinges on the status of DiSH Network and whether it or the music service content provider offered over its network is the beneficiary of the grandfather provision. On this point, Sirius concedes that DiSH Network is a satellite television service which, in 1998, sought out a music service provider to supply the audio music channels. It also notes that the §114 statutory license covers only audio services and that the royalty fees are calculated based on the revenues associated with the provision of the sound recordings and not the revenues generated by DiSH Network. We also note that DiSH Network is the apparent beneficiary of the exemption in § 114(d)(1)(C)(iii) which allows a direct broadcast satellite service provider to retransmit to the listener noninteractive music programming provided by a licensed source. Yet in spite of these facts, Sirius maintains that DiSH Network is the preexisting subscription service because it was specifically named in the legislative history, or alternatively, that Sirius itself is the beneficiary of the designation as a preexisting service through DiSH, because it is the provider of music services over the DiSH Network.

While it is clear that DiSH is identified in the legislative history as the preexisting service, often without any reference to Muzak as the provider of the audio channels carried over the DiSH network, the DiSH Network standing alone cannot be viewed as the preexisting service, nor does it have a need to be designated as such because of the exemption it enjoys under § 114(d)(1)(C)(iii). Section 114 involves the licensing of the public performance right to make digital transmissions of sound recordings. In 1998, the service making these transmissions over the DiSH Network was Muzak. Thus, it was Muzak that made the transmissions under the §114 statutory license and it was Muzak that incurred the obligation to pay the royalties. Because DiSH itself did not operate under the §114 statutory license, it makes no sense for it alone to be considered the preexisting service. Thus, the reference to DiSH Network in the legislative history is best interpreted as including the actual music service that did offer subscription transmissions of sound recordings over the DiSH Network at that time, *i.e.*, Muzak.

Moreover, to allow Sirius to step into the shoes of Muzak and offer the same type of subscription transmissions is inconsistent with a narrow construction of the grandfather provision. As stated earlier, the purpose of the grandfather provision was to prevent the disruption of existing operations which, in this case, was the offering of music channels supplied by Muzak. Muzak was the pioneer music service that incurred both the benefits and risks that came with its investment, and one such benefit was its status as a preexisting subscription service so long as it provided its music offerings over the DiSH Network. Sirius, however, cannot assume the benefits of the preexisting subscription service designation when it did not offer a subscription service during the industry's nascent years.

Third Party Transfer of Statutory Licenses. SoundExchange's arguments that Sirius and DMX are not entitled to assume the benefits of the statutory licenses held by Muzak and the previous business entity known as DMX is based, in part, on its theory that those previous business entities were barred from transferring their licenses due to restrictions similar to those against the transferability of non-exclusive copyright licenses. In support, SoundExchange cites *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1333 (9th Cir. 1984). That authority is not persuasive on this point because the U.S. Court of Appeals for the Ninth Circuit stated that it did not reach the issue of whether the license at issue was compulsory. *Id.* at 1333.

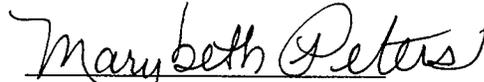
Statutory licenses are freely available to all potential users without consent from copyright owners or other licensees, provided that the user adheres to the regulations governing the statutory license, including all reporting requirements and royalty payment obligations.

Past Practices and Bankruptcy. Issues relating to whether the parties had sufficient notice to be deemed to have acquiesced in matters now being challenged are beyond the question referred and are for the CRB's determination. The same is true with regard to the impact that bankruptcy proceedings may have on the outcome of its proceedings.

Conclusion. The Copyright Royalty Board referred a novel question of law to the Register which asked: "Is the universe of preexisting subscription services, [as defined by § 114(j)(11)], limited by law to only Muzak (provided over the DiSH Network), Music Choice, and DMX?" Before answering this question, the Office contemplated what Congress meant by the term "preexisting subscription service," because there was a controversy over whether the term applied to the use of the sound recording, or the business entity that operated under the § 114 statutory license. Ultimately, the Office discerned that the term is used in the statute in both manners. A preexisting subscription service is used in § 114 sometimes to refer to the aggregate of the subscription transmissions that were made by the entities identified in the legislative history, and sometimes to identify the business entities operating under the statutory license on or before July 31, 1998, and that have the authority to negotiate rates and terms for use of the license. Whether Congress intended this outcome is unclear, but the Office's interpretation offers a workable reading of the statute and the legislative intent.

Nevertheless, for purposes of the question posed by the Board, the determination that the term refers to the business entities in existence and making subscription transmissions on or before July 31, 1998, appears to be the more appropriate reading of the term “preexisting subscription service” for purposes of determining whether an entity can operate under the statutory license as a preexisting subscription service and participate in the rate setting process. Moreover, in light of Congress’s decision to identify specific entities as being preexisting subscription services, it appears Congress meant to limit preexisting subscription service status to the three entities identified by the Board.

October 20, 2006


Marybeth Peters,
Register of Copyrights

MC 3

License Agreement made this 21st day of JANUARY, 1993 by and between **DIGITAL CABLE RADIO ASSOCIATES, L.P. ("DCR")**, a Delaware Limited Partnership with offices at 2200 Byberry Road, Hatboro, Pennsylvania 19040 and **SONY MUSIC ENTERTAINMENT INC. ("SONY")**, a Delaware Corporation with offices at 550 Madison Avenue, New York, NY 10022.

WHEREAS DCR is engaged in the business of providing a subscription, satellite and after-satellite delivered, non-broadcast, multi-channel, digital, audio programming service for cable television subscribers (the "Service");

WHEREAS, on the date hereof, Sony Digital Radio Inc., an Affiliate of SONY, as a joint venture partner with Warner Music DCR Inc., a subsidiary of Warner Music Group (such joint venture is referred to herein as "S/W") has purchased from Jerrold DC Radio, Inc. ("Jerrold"), one of the general partners of the General Partner (as defined below) of DCR, 26-1/3 Class A Units and 104.2754 Class B Units of Digital Cable Radio Associates, the sole general partner of DCR (the "General Partner") (the "Transaction");

WHEREAS, but for the parties' agreement to enter into this License Agreement, S/W would not be willing to purchase and Jerrold would not be willing to sell, the partnership interests in the General Partner referred to in the preceding WHEREAS clause; and

WHEREAS, DCR desires to publicly perform the sound recordings Controlled by SONY and its affiliated record companies via the Service;

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein and for good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties hereto, intending to be legally bound, agree as follows:

1. Definitions

(a) "SONY Recording" means a sound recording that (i) embodies a single musical composition, (ii) at the time DCR desires to publicly perform it, has been commercially released and (iii) is Controlled by SONY or an Affiliate. DCR will use commercially reasonable efforts to cooperate with SONY so as not to interfere with SONY's marketing and release plans, of which DCR is aware, for any SONY Recordings.

(b) "Affiliate" means, with respect to any individual or entity, another individual or entity Controlled by, Controlling, or under common Control with such individual or entity. Promptly following the execution of this agreement, SONY will furnish to DCR a list of SONY's record company Affiliates and will update such list as appropriate. Any inadvertent failure or inadvertent inaccuracy in connection with the preceding sentence shall not be a breach of this agreement by SONY.

(c) "Control" means the ability (i) to direct or materially affect the management and policies of an entity, whether through ownership of voting securities, by contract or otherwise, or (ii) with respect to sound recordings, to direct their uses or dispositions.

(d) "Territory" means those areas which can receive the satellite transmission of the Service. Outside United States of America, its territories and possessions, DCR must, to the extent required by law, obtain and pay for public performance licenses for SONY Recordings in addition to its obligations hereunder.

(e) "Term" of this agreement shall commence and become effective as of the date hereof and continue until March 1, 2016, and, thereafter, shall continue for two successive ten-year periods unless (i) either party notifies the other to the contrary at least six months prior to the end of the then current period of the Term, or (ii) if prior to the end of the then current period of the Term DCR shall be liquidated and its operations terminated as a going concern. Notwithstanding the foregoing, at the sole option of DCR, the Term shall terminate prior to the expiration of the then current period of the Term if any of the following shall occur: (i) S/W or its Affiliates, as the case may be, shall either (x) fail to fund the full amount of its pro-rata share of the \$20,000,000.00 "Additional Capital Contribution" required pursuant to Section 3.4(a) of the General Partnership Agreement under the Transaction as amended by the Second Amendment thereto (the "General Partnership Agreement") or (y) breach the provisions of Section 7.4(a) of the General Partnership Agreement and, as a result thereof, after the expiration of all applicable cure periods, the partners of the "General Partner" shall purchase all of S/W's interest in the General Partner pursuant to Section 9.5 of the General Partnership Agreement or (ii) there shall have been commenced any involuntary or voluntary proceedings by or against SONY, S/W, any assignee of S/W, or either of the general partners of S/W, whether by filing a petition or otherwise, seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future federal or state law, and such proceedings have not been dismissed or stayed within ninety (90) days or (iii) SONY shall breach the first sentence of Paragraph 13 or (iv) SONY shall have exercised its "put" right and the "Closing" pursuant thereto shall have

occurred pursuant to the letter agreement dated January __, 1993, between Jerrold DC Radio, Inc. and Sony Digital Radio Inc. If a failure or breach as described in clause (x) or (y) above occurs, and S/W shall not have theretofore distributed to its general partners or their Affiliates S/W's general partnership interest in the General Partner, then, if Sony Digital Radio Inc. or an Affiliate of SONY (as specifically defined in Section 7.4(a) of the General Partnership Agreement) is not the S/W general partner or its Affiliate which caused such failure or breach then the Term of this Agreement shall not terminate. If prior to the date of any such failure or breach S/W shall have distributed to its general partners or their respective Affiliates the general partnership interest of S/W in the General Partner, then notwithstanding the foregoing, if Sony Digital Radio Inc. or an Affiliate of SONY (as specifically defined in Section 7.4(a) of the General Partnership Agreement) is not the S/W general partner or its Affiliate which caused such failure or breach, then the Term of this Agreement shall not terminate.

(f) "Pay-Per-Listen/Record Transaction" means a transaction in which a subscriber of the Service receives an electronic transmission for which a separate charge is made, directly or indirectly, for the reception or delivery of one or more sound recordings.

(g) "Audio-on-Demand Transaction" means a transaction in which a subscriber of the Service receives an electronic transmission for which a separate charge is made, directly or indirectly, for the reception or delivery of one or more sound recordings of the subscriber's choosing, at a time chosen by the subscriber.

(h) "Simulcast Transmission" means the use of a Service channel to simultaneously transmit the audio portion of a video program where a separate charge is or is not made to view and/or record such video program but no separate charge is made to receive the audio portion of such transmission.

2. Rights

(a) SONY grants to DCR the non-exclusive right to publicly perform SONY Recordings, via the Service only, in the Territory during the Term. Should SONY Control a SONY Recording for less than the entire Territory or less than the entire Term, this grant shall only apply to that portion of the Territory and/or Term for which such rights are Controlled and the compensation payable pursuant to Paragraph 3 shall be adjusted accordingly.

(b) None of the parties hereto, nor any of their Affiliates makes any warranties, representations or indemnities with respect to the rights granted hereunder, except as otherwise expressly provided in this Agreement.



(c) All rights not specifically granted to DCR by SONY are reserved to SONY, except for those rights which DCR may have by common law or by statute, provided that any rights subject to the foregoing exception shall be and remain subject to any and all provisions and restrictions of this Agreement.

(d) The rights granted hereunder include only the right specified in subparagraph 2(a) and, without limiting the generality of the foregoing, do not include the grant of a right to:

- (i) publicly perform musical compositions;
- (ii) transmit any SONY Recording for a Pay-Per-Listen/Record Transaction, except that the foregoing shall not preclude a Simulcast Transmission, ; and
- (iii) transmit any SONY Recording for an Audio-on-Demand Transaction.

(e) Except to the extent necessary to allow DCR's customers to retransmit the Service to their subscribers, and to the extent set forth in Paragraph 13, below, DCR shall not have the right to sublicense the rights granted hereunder.

3. Compensation

DCR will calculate and make payment to SONY as follows:

(a) (i) Within thirty (30) days after the end of each calendar quarter or part thereof ("Quarter") during the Term, DCR shall compute the total "Service Revenue" earned by DCR during such period from the Service in the Territory. Service Revenue shall include all revenue earned by DCR from the Service during such period, whether or not collected (net of trade discounts, allowances and other similar items) less amounts which DCR is required by law to pay, and does in fact pay, in respect of the public performance of SONY Recordings outside the United States, its territories and possessions.

(ii) A calculation of the total "Music License Fee" shall be made as follows:

$$\frac{(X-K)}{(Y-K-N)} \text{ times } (Z-W) \text{ times } (2\%)$$

where (A) X equals the number of channels on the Service which transmit music (including, but not limited to, Simulcast Transmissions), (B) Y equals the total number of Service channels, (C) K equals the number of channels on the Service which solely make Simulcast Transmissions, (D) Z equals the total Service Revenue, (E) W equals the Service Revenue attributable solely to a separate charge required for a particular Non-Music Channel (i.e., a channel which carries no music sound recordings) or a group of channels comprised solely of Non-Music Channels, provided that the purchase of such Non-Music Channels is not, directly or indirectly, a prerequisite to or otherwise tied (by pricing or otherwise) to the purchase of any music channel (provided that, it is understood that to obtain any Non-Music Channels, purchase of the so-called "Primary Channels" may be required), and (F) N equals the total number of the Non-Music Channels that give rise to Service Revenue included in "W".

(iii) For the period beginning on the commencement of the Term and ending at the conclusion of the first full calendar quarter of the Term, and for each subsequent Quarter during the Term ("Sample Period"), DCR will calculate (A) the number of sound recordings transmitted on all channels of the Service (other than "Non-Subject Channels" as defined in the Channel Allocation Agreement under the Transaction, and any channels contributed by DCR and which are programmed by the Advertising Joint Venture under the Transaction) during two (2) randomly selected periods of five consecutive days each, during each Sample Period (the "Sample") and (B) the percentage of the Sample represented by SONY Recordings (the "SONY Share"). No such five-day period shall be within four weeks of another such five-day period.

(iv) Such determination shall be made by referring to actual logs which DCR shall maintain. At any time during the Term of this Agreement, if a party reasonably believes and so-notifies the other that the foregoing method of calculating the SONY Share does not accurately reflect the SONY Share, the Sample and the SONY Share shall be based upon an additional number of randomly selected days during each Quarter ending after such notice (such additional number to be agreed upon in good faith by the parties but not to exceed one additional week during any such Quarter).

(b) With respect to the Term, SONY will be paid a license fee equal to the SONY Share of the Music License Fee within forty-five (45) days following the end of the Quarter concerned, provided, however, that such license fee shall accrue (without interest) and shall not be payable by DCR to SONY until forty-five (45) days following the end of the calendar quarter in which the Service has reached "break-even" at which point the accrued license fees shall be paid by DCR to SONY in six equal monthly payments. "Break-even" shall be deemed to have occurred at such time as DCR has generated revenues from the Service, for a period of three consecutive months, in excess of all costs and expenses attributable to the Service for such three-month period, under generally accepted accounting principles including, but not limited to, third-party interest payments and interest on partner loans. After break-even, the SONY Share of the Music License Fee shall thereafter be payable on a current basis with respect to the remainder of the Term.

(c) The statement rendered by DCR to SONY shall clearly document, in detail, the calculations referred to above, including, without limitation, any adjustments made pursuant to the last sentence of subparagraph 2(a).

4. Restrictions

(a) DCR will not create programming, market the Service or disseminate information on programming in a manner that actively encourages recording of sound recordings transmitted on the Service, without the express, prior, written consent of the holder(s) of the rights in such sound recordings. The parties acknowledge, however, that even absent encouragement by DCR, isolated instances of recording may occur, and nothing herein contained is intended to or shall cause DCR to be liable to SONY for any such instance of recording.

(b) Without the prior consent of SONY and the owner of the sound recordings concerned:

(i) DCR shall not play consecutively and without interruption a substantial portion (either playing time or tracks) of the sound recordings on any record (whether or not played in the order on such record); provided, however, this restriction shall not apply to any album which is composed of a small number of sound recordings and where the entire record, or the substantial portion concerned, can be deemed to be a single composition.

(ii) Except as may be permitted pursuant to the proviso of subparagraph 4(b)(i), DCR shall not play consecutively and without a substantial

interruption (A) more than six (6) tracks by an individual recording artist or group or
(B) more than three tracks from an individual record.

(c) Any information encoded in a SONY Recording by SONY or an Affiliate of SONY shall be transmitted by DCR without alteration. No information will be added to such transmission of a SONY Recording by DCR without the prior consent of SONY, which consent will not unreasonably be withheld or delayed. SONY consents to the inclusion of the following information by DCR in connection with a transmission via the Service: Composition title, Artist(s) name(s), album title, if any, the record label, catalog number, DCR Service channel name and number, and lyrics. SONY will co-operate reasonably with DCR concerning the technical aspects of enabling such encoded information to be transmitted via the Service. DCR shall not be required to expend sums which are not commercially reasonable in order to comply with this subparagraph 4(c).

(d) DCR will play each SONY Recording (i) in its entirety without alteration and (ii) in compliance with any rights of the creators of SONY Recordings to the extent they have such rights by law in the Territory.

5. Security

(a) DCR shall reasonably cooperate in the transmission, without alteration, of digital or other security systems incorporated into a SONY Recording in compact disc or other formats used as an original source for transmission.

(b) DCR will use commercially reasonable efforts to cooperate with any industry effort that seeks to establish a security system which, like the Serial Copy Management System, limits rerecording of sound recordings delivered by digital or other transmissions.

6. Most Favored Nations

Should DCR at any time during the Term agree with any owner, manufacturer or distributor of sound recordings other than SONY or an Affiliate of SONY to pay a license fee in respect of the public performance of sound recordings or a payment otherwise computed in a manner similar to SONY's license fee hereunder, which fee is more favorable to such other person or entity than the fee payable to SONY hereunder, then DCR shall immediately notify SONY thereof and such more favorable terms shall, at SONY's option, be deemed included in this Agreement. Should SONY at any time agree with any owner of a digital- or satellite- based audio programming service similar to the Service to accept a license fee in respect of the public performance of sound recordings during the



Term or a payment otherwise computed in a manner similar to SONY's license fee hereunder during the Term, which fee is more favorable to such other person or entity than the fee payable to DCR hereunder, then SONY shall immediately notify DCR thereof and such more favorable license fee shall, at DCR's option, be deemed included in this Agreement.

7. Product

During the Term, SONY will furnish to DCR, concurrently with its distribution to broadcast media generally, one promotional copy of each newly commercially released SONY Recording which is appropriate to the Service's programming formats.

8. Audit

DCR shall keep true and accurate books and records relating to this Agreement for a period commencing at the beginning of the Term until one year after breakeven has been achieved and thereafter for a period of not less than three (3) years, in accordance with generally accepted accounting principles. During the Term and for a period of one year thereafter, at SONY's expense, SONY or its designated representative may, on at least twenty days written notice, not more often than once in any twelve month period, at DCR's office and at reasonable times within regular business hours, inspect and make extracts and copies of any such books and records in order to determine the accuracy of any or all of DCR's statements rendered under this agreement. SONY may not audit records further back in time than three (3) years prior to the end of the latest Quarter with respect to which SONY is conducting the audit concerned. Notwithstanding the preceding sentence, during the first audit conducted by SONY after DCR has achieved break-even SONY may examine all records going back to the beginning of the Term. SONY will complete any such audit within ninety (90) days of commencement of the audit. In the event any audit undertaken by SONY discloses an underpayment by DCR, DCR shall promptly pay such understated amount with interest calculated at the prime rate in effect at Chemical Bank from time to time plus two percentage points, and if such underpayment is fifteen percent (15%) or more with respect to the amounts set forth on any of DCR's statement(s), DCR shall also reimburse SONY for the reasonable costs incurred by SONY in connection with the audit. SONY will make any claim against DCR within sixty days of the completion of the audit. No audit shall be deemed to have been completed until SONY has received a final report from its auditors with respect to such audit. SONY agrees, on behalf of itself and the SONY Affiliates, to maintain in confidence and not to disclose any and all information furnished to it or learned by it in connection with the foregoing examination and audit of DCR's books and records, except with respect to information that (a) becomes generally available to the public other than as a result of a disclosure in violation of this Agreement, (b) was available to SONY on a non-confidential basis prior to its disclosure by SONY

or subsequently becomes so available, (c) becomes available to SONY on a non-confidential basis from a source other than DCR, unless SONY knows that such source is bound by a confidentiality agreement or is otherwise prohibited from transmitting such information by a contractual obligation, (d) is developed independently by SONY without reference to confidential information received by SONY from DCR (e) is disclosed to SONY's accountants, attorneys or employees in the regular course of their employment by SONY, (f) SONY may be required to disclose to its Affiliates or other third parties pursuant to agreements with such third parties or (g) is required to be disclosed by law or in the course of a legal or administrative proceeding. SONY will advise any person, firm or entity to whom it discloses such confidential information that it is confidential and subject to the terms of the preceding sentence, but any inadvertent failure to do so shall not be a breach hereof.

9. Copyright Law Amendment

In the event that during the Term an amendment to the United States Code establishing a copyright or similar right with respect to the public performance of sound recordings becomes effective and such amendment provides for a mechanism for the payment of fees for such public performances:

(a) DCR shall not be obligated to pay SONY its license fee as provided in Paragraph 3 for public performances of SONY Recordings covered by such amendment which occur on and after the date with respect to which such fees become payable and are actually paid to or on behalf of SONY for the public performance of SONY Recordings as a result of such statute or mechanism, and

(b) The parties hereto shall, in addition to any payment or other obligations imposed by said statute or industry practices arising therefrom, continue to be bound by all warranties, indemnities, restrictions and covenants contained herein until the expiration of the Term or, if they survive the expiration of the Term, for the period of such survival.

10. Notices

All notices given hereunder shall be duly and properly given if hand-delivered, on the next business day if sent by a nationally recognized overnight delivery service, or on the third succeeding business day if mailed by regular first-class United States mail to the addressee set forth in the caption to this Agreement or as otherwise designated by each party hereto in writing for such purpose.



11. Warranties and Indemnities

(a) DCR warrants and represents as follows:

(i) It has obtained all corporate, partnership and other authorizations necessary for it to enter into this agreement; and

(ii) It will obtain all rights and licenses necessary for it to publicly perform sound recordings on the Service, including, without limitation, the right to publicly perform the musical compositions embodied therein.

(b) SONY warrants and represents that it has obtained all corporate, partnership and other authorizations necessary for it to enter into this agreement and has all necessary authority from its Affiliates and that it has all rights necessary to commercially release each SONY Recording it commercially releases in the Territory.

(c) For the purposes of this subparagraph 11(c) the party indemnifying the other party is referred to as the Indemnitor and the indemnified party is referred to as the Indemnitee. Indemnitor agrees to and does hereby indemnify, save and hold Indemnitee harmless from any and all loss and damage (including court costs and reasonable attorneys' fees) arising out of, connected with or as a result of any inconsistency with, failure of, or breach or threatened breach by Indemnitor of any warranty, representation, agreement, undertaking or covenant contained in this Agreement including, without limitation, any claim by any third party in connection with the foregoing. In addition to any other rights or remedies Indemnitee may have by reason of any such inconsistency, failure, breach, threatened breach or claim, Indemnitor shall reimburse Indemnitee, on demand, for any payment made by Indemnitee at any time after the date hereof with respect to any loss, damage or liability resulting therefrom. Indemnitee shall not settle any such claim without the Indemnitor's consent, not to be unreasonably withheld. Indemnitee shall give Indemnitor notice of any third party claim to which the foregoing indemnity applies and Indemnitor shall promptly thereafter retain competent counsel to defend such claim on behalf of Indemnitee. Indemnitee shall have the right to participate in the defense of any such claim through counsel of Indemnitee's own choice and at Indemnitee's expense.

12. Equitable Relief

DCR expressly acknowledges that the SONY Recordings are of a special, unique and intellectual character which gives them peculiar value, and that in the event of a breach or threatened breach by DCR of any term, condition or covenant hereof, SONY will be caused immediate irreparable injury. DCR expressly agrees that SONY shall be entitled to injunctive and other equitable relief, as permitted by law, to prevent a breach or threatened breach of this Agreement, or any portion

thereof, by DCR which relief shall be in addition to any other rights or remedies, for damages or otherwise, available to SONY.

13. Assignment

Except as provided in this Paragraph 13, this Agreement may not be assigned by operation of law or otherwise without the prior written consent of the other party. SONY may assign all or any portion of its rights hereunder to one or more Affiliates of Sony USA Inc. and/or Sony Music Entertainment Inc. DCR may assign all or any portion of its rights hereunder to any successor to DCR, whether through the merger, consolidation or other combination of DCR with another entity, or by the sale, transfer or exchange of all or substantially all of DCR's assets, including, but not limited to, the incorporation of DCR. In connection with any such assignment, appropriate adjustment shall be made to this Agreement to take into account such assignment.

14. Amendments

This Agreement cannot be waived or added to or modified orally and no waiver, addition or modification shall be valid unless in writing and signed by all of the parties. This Agreement, together with the other Transaction Agreements, contains the entire agreement among the parties with respect to the subject matter hereof, and supersedes all prior agreements, written or oral, with respect thereto.

15. Governing Law

This Agreement, its validity, construction and effect, shall be governed by the laws of the State of New York, without regard to conflicts of laws principles. The fact that any provisions herein are found by a court of competent jurisdiction to be unenforceable shall not affect the validity or enforceability of any other provisions.

16. Effect of this Agreement

Neither DCR's execution of this agreement nor any provision hereof is an acknowledgment or agreement by DCR, Continental, Comcast, Cox or Time Warner Cable, that United States law, as of the date of this agreement, requires the obtaining of a license or the payment of a fee or royalty to perform sound recordings publicly. Notwithstanding the foregoing, DCR is entering into this Agreement as one part of a complex commercial transaction, evidenced by the Transaction Documents (as defined in Section 17).



17. Transaction Agreements

The parties hereto agree that they and/or their respective affiliates will enter into the following instruments (together, the "Transaction Agreements"): (a) this Agreement, (b) the Second Amendment to the General Partnership Agreement, (c) a Channel Allocation Agreement between DCR and S/W, (d) an Advertising Joint Venture Agreement between DCR and S/W, (e) a Subscription Agreement between DCR and the cable operating division of Time Warner Entertainment Company, L.P. (f) a Purchase Agreement between Jerrold and S/W and the Guaranty of GI Corporation related thereto, (g) an Affiliation Agreement between DCR and the cable operating division of Time Warner Entertainment Company, L.P. (h) the Marketing Joint Venture Agreement between DCR and S/W, (i) a License Agreement between DCR and Warner Music Group Inc., (j) an Amendment of a Manufacturing and License Agreement between the General Partner and the Jerrold division of GI Corporation and (k) an Amendment to the Limited Partnership Agreement of DCR. None of the Transaction Agreements, including, without limitation, this Agreement, shall be effective until the execution and delivery of all the Transaction Agreements by all parties thereto.



18. Blackout Period

Section 11.4 of the Second Amendment to the General Partnership Agreement of the General Partner is hereby incorporated herein in its entirety and shall be binding upon the parties hereto as if fully set forth herein.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

DIGITAL CABLE RADIO ASSOCIATES, L.P.

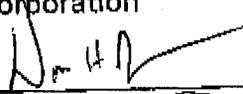
a Delaware limited partnership

By: DIGITAL CABLE RADIO ASSOCIATES, a Pennsylvania
general partnership

By: JERROLD DC RADIO, INC., a general partner

By: _____
Name:
Title:

SONY MUSIC ENTERTAINMENT INC.
a Delaware corporation

By: 
 Name: David H. Johnson
Title: Senior Vice President
and General Counsel



MC 4

License Agreement made this 8th day of April, 1994 by and between DIGITAL CABLE RADIO ASSOCIATES, L.P. ("DCR"), a Delaware Limited Partnership with offices at 300 Welsh Road, Building 1, Suite 220, Horsham, Pennsylvania 19044 and EMI Music, Inc. ("EMI"), a Delaware Corporation with offices at Carnegie Hall Tower, 152 West 57th Street, New York, NY 10019.

WHEREAS DCR is engaged in the business of providing a subscription, satellite and after-satellite delivered, non-broadcast, multi-channel, digital, audio programming service for cable television subscribers (the "Service");

WHEREAS, on the date hereof, EMI Top Twenty, Inc., an Affiliate of EMI, as a joint venture partner with Warner Music DCR Inc., a subsidiary of Warner Music Group Inc., and Sony Digital Radio Inc., a subsidiary of Sony Music Entertainment Inc., in SWE Cable Radio Company (such joint venture is referred to herein as "SWE") has subscribed (the "Transaction") for 134.300002 Class A Units and 52.1377 Class B Units of Digital Cable Radio Associates, the sole general partner of DCR (the "General Partner");

WHEREAS, but for the parties' agreement to enter into this License Agreement, SWE would not be willing to purchase the partnership interests in the General Partner referred to in the preceding WHEREAS clause; and

WHEREAS, DCR desires to publicly perform the sound recordings Controlled by EMI and its affiliated record companies via the Service;

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein and for good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties hereto, intending to be legally bound, agree as follows:

1. Definitions

(a) "EMI Recording" means a sound recording that (i) embodies a single musical composition, (ii) at the time DCR desires to publicly perform it, has been commercially released and (iii) is Controlled by EMI or an Affiliate of EMI. DCR will use commercially reasonable efforts to cooperate with EMI so as not to interfere with EMI's marketing and release plans, of which DCR is aware, for any EMI Recordings.

(b) "Affiliate" means, with respect to any individual or entity, another individual or entity Controlled by, Controlling, or under common Control with such individual or entity. Promptly following the execution of this Agreement, EMI

will furnish to DCR a list of EMI's record company Affiliates and will update such list as appropriate. Any inadvertent failure or inadvertent inaccuracy in connection with the preceding sentence shall not be a breach of this Agreement by EMI.

(c) "Control" means the ability (i) to direct or materially affect the management and policies of an entity, whether through ownership of voting securities, by contract or otherwise, or (ii) with respect to sound recordings, to direct their uses or dispositions.

(d) "Territory" means those areas which can receive the satellite transmission of the Service. Outside United States of America, its territories and possessions, DCR must, to the extent required by law, obtain and pay for public performance licenses for EMI Recordings in addition to its obligations hereunder.

(e) "Term" of this Agreement shall commence and become effective as of the date hereof and continue until March 1, 2016, and, thereafter, shall continue for two successive ten-year periods unless (i) either party notifies the other to the contrary at least six months prior to the end of the then current period of the Term, or (ii) if prior to the end of the then current period of the Term DCR shall be liquidated and its operations terminated as a going concern. Notwithstanding the foregoing, at the sole option of DCR, the Term shall terminate prior to the expiration of the then current period of the Term if any of the following shall occur: (i) SWE or its Affiliates, as the case may be, shall breach the provisions of Section 7.4(a) of the General Partnership Agreement and, as a result thereof, after the expiration of all applicable cure periods, the partners of the General Partner shall purchase all of SWE's interest in the General Partner pursuant to Section 9.5 of the General Partnership Agreement or (ii) there shall have been commenced any involuntary or voluntary proceedings by or against EMI, SWE, any assignee of SWE, or any of the general partners of SWE, whether by filing a petition or otherwise, seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future federal or state law, and such proceedings have not been dismissed or stayed within ninety (90) days or (iii) EMI shall breach the first sentence of Paragraph 13. If a failure or breach as described in clause (i) of the preceding sentence occurs, and SWE shall not have theretofore distributed to its general partners or their Affiliates SWE's general partnership interest in the General Partner, then, if EMI Top Twenty, Inc. or an Affiliate of EMI (as

specifically defined in Section 7.4(a) of the General Partnership Agreement) is not the SWE general partner or its Affiliate which caused such failure or breach then the Term of this Agreement shall not terminate. If prior to the date of any such failure or breach SWE shall have distributed to its general partners or their respective Affiliates the general partnership interest of SWE in the General Partner, then notwithstanding the foregoing, if EMI Top Twenty, Inc. or an Affiliate of EMI (as specifically defined in Section 7.4(a) of the General Partnership Agreement) is not the SWE general partner or its Affiliate which caused such failure or breach, then the Term of this Agreement shall not terminate.

(f) "Pay-Per-Listen/Record Transaction" means a transaction in which a subscriber of the Service receives an electronic transmission for which a separate charge is made, directly or indirectly, for the reception or delivery of one or more sound recordings.

(g) "Audio-on-Demand Transaction" means a transaction in which a subscriber of the Service receives an electronic transmission for which a separate charge is made, directly or indirectly, for the reception or delivery of one or more sound recordings of the subscriber's choosing, at a time chosen by the subscriber.

(h) "Simulcast Transmission" means the use of a Service Channel to simultaneously transmit the audio portion of a video program where a separate charge is or is not made to view and/or record such video program but no separate charge is made to receive the audio portion of such transmission.

2. Rights

(a) EMI grants to DCR the non-exclusive right to publicly perform EMI Recordings, via the Service only, in the Territory during the Term. Should EMI Control an EMI Recording for less than the entire Territory or less than the entire Term, this grant shall only apply to that portion of the Territory and/or Term for which such rights are Controlled and the compensation payable pursuant to Paragraph 3 shall be adjusted accordingly.

(b) None of the parties hereto, nor any of their Affiliates makes any warranties, representations or indemnities with respect to the rights granted hereunder, except as otherwise expressly provided in this Agreement.

(c) All rights not specifically granted to DCR by EMI are reserved to EMI, except for those rights which DCR may have by common law or by statute, provided that any rights subject to the foregoing exception shall be and remain subject to any and all provisions and restrictions of this Agreement.

(d) The rights granted hereunder include only the right specified in subparagraph 2(a) and, without limiting the generality of the foregoing, do not include the grant of a right to:

(i) publicly perform musical compositions;

(ii) transmit any EMI Recording for a Pay-Per-Listen/Record Transaction, except that the foregoing shall not preclude a Simulcast Transmission; and

(iii) transmit any EMI Recording for an Audio-on-Demand Transaction.

(e) Except to the extent necessary to allow DCR's customers to retransmit the Service to their subscribers, and to the extent set forth in Paragraph 13 below, DCR shall not have the right to sublicense the rights granted hereunder.

3. Compensation

DCR will calculate and make payment to EMI as follows:

(a) (i) Within thirty (30) days after the end of each calendar quarter or part thereof ("Quarter") during the Term, DCR shall compute the total "Service Revenue" earned by DCR during such period from the Service in the Territory. Service Revenue shall include all revenue earned by DCR from the Service during such period, whether or not collected (net of trade discounts, allowances and other similar items) less amounts which DCR is required by law to pay, and does in fact pay, in respect of the public performance of EMI Recordings outside the United States, its territories and possessions.

(ii) A calculation of the total "Music License Fee" shall be made as follows:

$\frac{(X-K)}{(Y-K-N)}$ times (Z-W) times (2%)

where (A) X equals the number of channels on the Service which transmit music (including, but not limited to, Simulcast Transmissions), (B) Y equals the total number of Service channels, (C) K equals the number of channels on the Service which solely make Simulcast Transmissions, (D) Z equals the total Service Revenue, (E) W equals the Service Revenue attributable solely to a separate charge required for a particular Non-Music Channel (i.e., a channel which carries no music sound recordings) or a group of channels comprised solely of Non-Music Channels, provided that the purchase of such Non-Music Channels is not, directly or indirectly, a prerequisite to or otherwise tied (by pricing or otherwise) to the purchase of any music channel (provided that, it is understood that to obtain any Non-Music Channels, purchase of the so-called "Primary Channels" may be required), and (F) N equals the total number of the Non-Music Channels that give rise to Service Revenue included in "W".

(iii) For the period beginning on the commencement of the Term and ending at the conclusion of the first full calendar quarter of the Term, and for each subsequent Quarter during the Term ("Sample Period"), DCR will calculate (A) the number of sound recordings transmitted on all channels of the Service (other than "Non-Subject Channels" as defined in the Channel Allocation Agreement between DCR and SWE, and any channels contributed by DCR and which are programmed by the Advertising Joint Venture between DCR and SWE) during two (2) randomly selected periods of five consecutive days each, during each Sample Period (the "Sample") and (B) the percentage of the Sample represented by EMI Recordings (the "EMI Share"). No such five-day period shall be within four weeks of another such five-day period.

(iv) Such determination shall be made by referring to actual logs which DCR shall maintain. At any time during the Term of this Agreement, if a party reasonably believes and so-notifies the other that the foregoing method of calculating the EMI Share does not accurately reflect the EMI Share, the Sample and the EMI Share shall be based upon an additional number of randomly selected days during each Quarter ending after such notice (such additional number to be agreed upon in good faith by the parties but not to exceed one additional week during any such Quarter).

(b) With respect to the Term, EMI will be paid a license fee equal to the EMI Share of the Music License Fee within forty-five (45) days following the end of the Quarter concerned, provided, however, that such license fee shall accrue

(without interest) and shall not be payable by DCR to EMI until forty-five (45) days following the end of the calendar quarter in which the Service has reached "break-even" at which point the accrued license fees shall be paid by DCR to EMI in six equal monthly payments. "Break-even" shall be deemed to have occurred at such time as DCR has generated revenues from the Service, for a period of three consecutive months, in excess of all costs and expenses attributable to the Service for such three-month period, under generally accepted accounting principles including, but not limited to, third-party interest payments and interest on partner loans. After break-even, the EMI Share of the Music License Fee shall thereafter be payable on a current basis with respect to the remainder of the Term.

(c) The statement rendered by DCR to EMI shall clearly document, in detail, the calculations referred to above, including, without limitation, any adjustments made pursuant to the last sentence of subparagraph 2(a).

4. Restrictions

(a) DCR will not create programming, market the Service or disseminate information on programming in a manner that actively encourages recording of sound recordings transmitted on the Service, without the express, prior, written consent of the holder(s) of the rights in such sound recordings. The parties acknowledge, however, that even absent encouragement by DCR, isolated instances of recording may occur, and nothing herein contained is intended to or shall cause DCR to be liable to EMI for any such instance of recording.

(b) Without the prior consent of EMI and the owner of the sound recordings concerned:

(i) DCR shall not play consecutively and without interruption a substantial portion (either playing time or tracks) of the sound recordings on any record (whether or not played in the order on such record); provided, however, this restriction shall not apply to any album which is composed of a small number of sound recordings and where the entire record, or the substantial portion concerned, can be deemed to be a single composition.

(ii) Except as may be permitted pursuant to the proviso of subparagraph 4(b)(i), DCR shall not play consecutively and without a substantial interruption (A) more

than six (6) tracks by an individual recording artist or group or (B) more than three tracks from an individual record.

(c) Any information encoded in an EMI Recording by EMI or an Affiliate of EMI shall be transmitted by DCR without alteration. No information will be added to such transmission of an EMI Recording by DCR without the prior consent of EMI, which consent will not unreasonably be withheld or delayed. EMI consents to the inclusion of the following information by DCR in connection with a transmission via the Service: Composition title, Artist(s) name(s), album title, if any, the record label, catalog number, DCR Service channel name and number, and lyrics. EMI will co-operate reasonably with DCR concerning the technical aspects of enabling such encoded information to be transmitted via the Service. DCR shall not be required to expend sums which are not commercially reasonable in order to comply with this subparagraph 4(c).

(d) DCR will play each EMI Recording (i) in its entirety without alteration and (ii) in compliance with any rights of the creators of EMI Recordings to the extent they have such rights by law in the Territory.

5. Security

(a) DCR shall reasonably cooperate in the transmission, without alteration, of digital or other security systems incorporated into an EMI Recording in compact disc or other formats used as an original source for transmission.

(b) DCR will use commercially reasonable efforts to cooperate with any industry effort that seeks to establish a security system which, like the Serial Copy Management System, limits rerecording of sound recordings delivered by digital or other transmissions.

6. Most Favored Nations

Should DCR at any time during the Term agree with any owner, manufacturer or distributor of sound recordings other than EMI or an Affiliate of EMI to pay a license fee in respect of the public performance of sound recordings or a payment otherwise computed in a manner similar to EMI's license fee hereunder, which fee is more favorable to such other person or entity than the fee payable to EMI hereunder, then DCR shall immediately notify EMI thereof and such more favorable terms shall, at EMI's option, be deemed included in this Agreement. Should EMI at any

time agree with any owner of a digital- or satellite-based audio programming service similar to the Service to accept a license fee in respect of the public performance of sound recordings during the Term or a payment otherwise computed in a manner similar to EMI's license fee hereunder during the Term, which fee is more favorable to such other person or entity than the fee payable by DCR hereunder, then EMI shall immediately notify DCR thereof and such more favorable license fee shall, at DCR's option, be deemed included in this Agreement.

7. Product

During the Term, EMI will furnish to DCR, concurrently with its distribution to broadcast media generally, one promotional copy of each newly commercially released EMI Recording which is appropriate to the Service's programming formats.

8. Audit

DCR shall keep true and accurate books and records relating to this Agreement for a period commencing at the beginning of the Term until one year after breakeven has been achieved and thereafter for a period of not less than three (3) years, in accordance with generally accepted accounting principles. During the Term and for a period of one year thereafter, at EMI's expense, EMI or its designated representative may, on at least twenty days written notice, not more often than once in any twelve month period, at DCR's office and at reasonable times within regular business hours, inspect and make extracts and copies of any such books and records in order to determine the accuracy of any or all of DCR's statements rendered under this Agreement. EMI may not audit records further back in time than three (3) years prior to the end of the latest Quarter with respect to which EMI is conducting the audit concerned. Notwithstanding the preceding sentence, during the first audit conducted by EMI after DCR has achieved break-even EMI may examine all records going back to the beginning of the Term. EMI will complete any such audit within ninety (90) days of commencement of the audit. In the event any audit undertaken by EMI discloses an underpayment by DCR, DCR shall promptly pay such understated amount with interest calculated at the prime rate in effect at Chemical Bank from time to time plus two percentage points, and if such underpayment is fifteen percent (15%) or more with respect to the amounts set forth on any of DCR's statements(s), DCR shall also reimburse EMI for the reasonable costs incurred by EMI in connection with the audit.

EMI will make any claim against DCR within sixty days of the completion of the audit. No audit shall be deemed to have been completed until EMI has received a final report from its auditors with respect to such audit. EMI agrees, on behalf of itself and the EMI Affiliates, to maintain in confidence and not to disclose any and all information furnished to it or learned by it in connection with the foregoing examination and audit of DCR's books and records, except with respect to information that (a) becomes generally available to the public other than as a result of a disclosure in violation of this Agreement, (b) was available to EMI on a non-confidential basis prior to its disclosure by EMI or subsequently becomes so available, (c) becomes available to EMI on a non-confidential basis from a source other than DCR, unless EMI knows that such source is bound by a confidentiality agreement or is otherwise prohibited from transmitting such information by a contractual obligation, (d) is developed independently by EMI without reference to confidential information received by EMI from DCR, (e) is disclosed to EMI's accountants, attorneys or employees in the regular course of their employment by EMI, (f) EMI may be required to disclose to its Affiliates or other third parties pursuant to agreements with such third parties or (g) is required to be disclosed by law or in the course of a legal or administrative proceeding. EMI will advise any person, firm or entity to whom it discloses such confidential information that it is confidential and subject to the terms of the preceding sentence, but any inadvertent failure to do so shall not be a breach hereof.

9. Copyright Law Amendment

In the event that during the Term an amendment to the United States Code establishing a copyright or similar right with respect to the public performance of sound recordings becomes effective and such amendment provides for a mechanism for the payment of fees for such public performances:

(a) DCR shall not be obligated to pay EMI its license fee as provided in Paragraph 3 for public performances of EMI Recordings covered by such amendment which occur on and after the date with respect to which such fees become payable and are actually paid to or on behalf of EMI for the public performance of EMI Recordings as a result of such statute or mechanism, and

(b) The parties hereto shall, in addition to any payment or other obligations imposed by said statute or industry practices arising therefrom, continue to be bound by all warranties, indemnities, restrictions and covenants contained

herein until the expiration of the Term or, if they survive the expiration of the Term, for the period of such survival.

10. Notices

All notices given hereunder shall be duly and properly given if hand-delivered, on the next business day if sent by a nationally recognized overnight delivery service, or on the third succeeding business day if mailed by regular first-class United States mail to the addressee set forth in the caption to this Agreement or as otherwise designated by each party hereto in writing for such purpose.

11. Warranties and Indemnities

(a) DCR warrants and represents as follows:

(i) It has obtained all corporate, partnership and other authorizations necessary for it to enter into this Agreement; and

(ii) It will obtain all rights and licenses necessary for it to publicly perform sound recordings on the Service, including, without limitation, the right to publicly perform the musical compositions embodied therein.

(b) EMI warrants and represents that it has obtained all corporate, partnership and other authorizations necessary for it to enter into this Agreement and has all necessary authority from its Affiliates and that it has all rights necessary to commercially release each EMI Recording it commercially releases in the Territory.

(c) For the purposes of this subparagraph 11(c) the party indemnifying the other party is referred to as the Indemnitor and the indemnified party is referred to as the Indemnitee. Indemnitor agrees to and does hereby indemnify, save and hold Indemnitee harmless from any and all loss and damage (including court costs and reasonable attorneys' fees) arising out of, connected with or as a result of any inconsistency with, failure of, or breach or threatened breach by Indemnitor of any warranty, representation, agreement, undertaking or covenant contained in this Agreement including, without limitation, any claim by any third party in connection with the foregoing. In addition to any other rights or remedies Indemnitee may have by reason of any such inconsistency, failure, breach, threatened breach or claim, Indemnitor shall reimburse Indemnitee, on

demand, for any payment made by Indemnatee at any time after the date hereof with respect to any loss, damage or liability resulting therefrom. Indemnatee shall not settle any such claim without the Indemnitor's consent, not to be unreasonably withheld. Indemnatee shall give Indemnitor notice of any third party claim to which the foregoing indemnity applies and Indemnitor shall promptly thereafter retain competent counsel to defend such claim on behalf of Indemnatee. Indemnatee shall have the right to participate in the defense of any such claim through counsel of Indemnatee's own choice and at Indemnatee's expense.

12. Equitable Relief

DCR expressly acknowledges that the EMI Recordings are of a special, unique and intellectual character which gives them peculiar value, and that in the event of a breach or threatened breach by DCR of any term, condition or covenant hereof, EMI will be caused immediate irreparable injury. DCR expressly agrees that EMI shall be entitled to injunctive and other equitable relief, as permitted by law, to prevent a breach or threatened breach of this Agreement, or any portion thereof, by DCR which relief shall be in addition to any other rights or remedies, for damages or otherwise, available to EMI.

13. Assignment

Except as provided in this Paragraph 13, this Agreement may not be assigned by operation of law or otherwise without the prior written consent of the other party. EMI may assign all or any portion of its rights hereunder to one or more of its Affiliates. DCR may assign all or any portion of its rights hereunder to any successor to DCR, whether through the merger, consolidation or other combination of DCR with another entity, or by the sale, transfer or exchange of all or substantially all of DCR's assets, including, but not limited to, the incorporation of DCR. In connection with any such assignment, appropriate adjustment shall be made to this Agreement to take into account such assignment.

14. Amendments

This Agreement cannot be waived or added to or modified orally and no waiver, addition or modification shall be valid unless in writing and signed by all of the parties. This Agreement, together with the other Transaction Agreements, contains the entire agreement among the parties with respect to

the subject matter hereof, and supersedes all prior agreements, written or oral, with respect thereto.

15. Governing Law

This Agreement, its validity, construction and effect, shall be governed by the laws of the State of New York, without regard to conflicts of laws principles. The fact that any provisions herein are found by a court of competent jurisdiction to be unenforceable shall not affect the validity or enforceability of any other provisions.

16. Effect of this Agreement

Neither DCR's execution of this Agreement nor any provision hereof is an acknowledgment by DCR, Continental Cablevision, Inc., Comcast Cable Communications, Inc., Cox Communications, Inc. or the cable operating division of Time Warner Entertainment Company, L.P., that United States law, as of the date of this Agreement, requires the obtaining of a license or the payment of a fee or royalty to perform sound recordings publicly. Notwithstanding the foregoing, DCR is entering into this Agreement as one part of a complex commercial transaction, evidenced by the Transaction Agreements (as defined in paragraph 17).

17. Transaction Agreements

The parties hereto agree that they and/or their respective affiliates will enter into the following instruments (together, the "Transaction Agreements"): (a) this Agreement, (b) the Third Amendment to the General Partnership Agreement of the General Partner, (c) a letter regarding the Channel Allocation Agreement, Advertising Joint Venture Agreement and Marketing Joint Venture Agreement among DCR, the General Partner and SWE, (d) a letter from DCR to EMI Top Twenty, Inc. regarding certain representations and (e) a Subscription Agreement between DCR and SWE. None of the Transaction Agreements, including, without limitation, this Agreement, shall be effective until the execution and delivery of all the Transaction Agreements by all parties thereto.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first above written.

DIGITAL CABLE RADIO ASSOCIATES, L.P.
a Delaware limited partnership

By: DIGITAL CABLE RADIO ASSOCIATES, a
Pennsylvania general partnership

By: JERROLD DC RADIO INC., a
general partner

By: _____
Name: Hal Krysbergh
Title: President

EMI Music, Inc.
a Delaware corporation

By: _____
Name:
Title:

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first above written.

DIGITAL CABLE RADIO ASSOCIATES, L.P.
a Delaware limited partnership

By: DIGITAL CABLE RADIO ASSOCIATES, a
Pennsylvania general partnership

By: JERROLD DC RADIO INC., a
general partner

By: _____
Name: _____
Title: _____

EMI Music, Inc.
a Delaware corporation

By: *G.C. Marriott*
Name: _____
Title: G.C. MARRIOTT
S.V.P.

Documents sponsored by W. Barry McCarthy, Jr.

1. DCR Audited Financials
2. July 1996 Financial Results
3. Music License Agreements
4. Letter from John A. LoFrumento, ASCAP, dated February 28, 1995

MC 5

MSM/BLH0046 (9-A-39020)

License Agreement made this ^{21st} ~~20th~~ day of January, 1993 by and between DIGITAL CABLE RADIO ASSOCIATES, L.P. ("DCR"), a Delaware Limited Partnership with offices at 2200 Byberry Road, Hatboro, Pennsylvania 19040 and WARNER MUSIC GROUP INC. ("WMG"), a Delaware Corporation with offices at 75 Rockefeller Plaza, New York, NY 10019.

WHEREAS DCR is engaged in the business of providing a subscription, satellite and after-satellite delivered, non-broadcast, multi-channel, digital, audio programming service for cable television subscribers (the "Service");

WHEREAS, on the date hereof, Warner Music DCR Inc., a subsidiary of WMG, as a joint venture partner with Sony Digital Radio Inc. ("SONY"), a subsidiary of Sony Music Entertainment (such joint venture is referred to herein as "S/W") has purchased from Jerrold DC Radio, Inc. ("Jerrold"), one of the general partners of the General Partner (as defined below) of DCR, 26-1/3 Class A Units and 104.2754 Class B Units of Digital Cable Radio Associates, the sole general partner of DCR (the "General Partner") (the "Transaction");

WHEREAS, but for the parties' agreement to enter into this License Agreement, S/W would not be willing to purchase and Jerrold would not be willing to sell, the partnership interests in the General Partner referred to in the preceding WHEREAS clause; and

WHEREAS, DCR desires to publicly perform the sound recordings Controlled by WMG and its affiliated record companies via the Service;

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein and for good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties hereto, intending to be legally bound, agree as follows:

1. Definitions

(a) "WMG Recording" means a sound recording that (i) embodies a single musical composition, (ii) at the time DCR desires to publicly perform it, has been commercially released and (iii) is Controlled by WMG or an Affiliate. DCR will use commercially reasonable efforts to cooperate with WMG so as not to interfere with WMG's marketing and release plans, of which DCR is aware, for any WMG Recordings.

(b) "Affiliate" means, with respect to any individual or entity, another individual or entity Controlled by, Controlling, or under common Control with such individual or entity. Promptly following the execution of this agreement, WMG will furnish to DCR a list of WMG's record company Affiliates and will update such list as appropriate. Any inadvertent failure or inadvertent inaccuracy in connection with the preceding sentence shall not be a breach of this agreement by WMG.

(c) "Control" means the ability (i) to direct or materially affect the management and policies of an entity, whether through ownership of voting securities, by contract or otherwise, or (ii) with respect to sound recordings, to direct their uses or dispositions.

(d) "Territory" means those areas which can receive the satellite transmission of the Service. Outside United States of America, its territories and possessions, DCR must, to the extent required by law, obtain and pay for public performance licenses for WMG Recordings in addition to its obligations hereunder.

(e) "Term" of this agreement shall commence and become effective as of the date hereof and continue until March 1, 2016, and, thereafter, shall continue for two successive ten-year periods unless (i) either party notifies the other to the contrary at least six months prior to the end of the then current period of the Term, or (ii) if prior to the end of the then current period of the Term DCR shall be liquidated and its operations terminated as a going concern. Notwithstanding the foregoing, at the sole option of DCR, the Term shall terminate prior to the expiration of the then current period of the Term if any of the following shall occur: (i) S/W or its Affiliates, as the case may be, shall either (x) fail to fund the full amount of its pro-rata share of the \$20,000,000.00 "Additional Capital Contribution" required pursuant to Section 3.4(a) of the General Partnership Agreement under the Transaction as amended by the Second Amendment thereto (the "General Partnership Agreement") or (y) breach the provisions of Section 7.4(a) of the General Partnership Agreement and, as a result thereof, after the expiration of all applicable cure periods, the partners of the "General Partner" shall purchase all of S/W's interest in the General Partner pursuant to Section 9.5 of the General Partnership Agreement or (ii) there shall have been commenced any involuntary or voluntary proceedings by or against WMG, S/W, any assignee of S/W, or either of the general partners of S/W, whether by filing a petition or otherwise, seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future federal or state law, and such proceedings have not been dismissed or stayed within ninety (90) days or (iii) WMG shall breach the first sentence of Paragraph 13. If a failure or breach as described in clause (x) or (y) above occurs, and S/W shall not have theretofore distributed to its general partners or their Affiliates S/W's general partnership interest in the General Partner, then, if Warner Music DCR Inc. or an Affiliate of WMG (as specifically defined in Section 7.4(a) of the General Partnership Agreement) is not the S/W general partner or its Affiliate which caused such failure or breach then the Term of this Agreement shall not terminate. If prior to the date of any such failure or breach S/W shall have distributed to its general partners or their respective Affiliates the general partnership interest of S/W in the General Partner, then notwithstanding the foregoing, if Warner Music DCR Inc. or an Affiliate of WMG (as specifically defined in Section 7.4(a) of the General Partnership Agreement) is not the S/W general partner or its Affiliate which caused such failure or breach, then the Term of this Agreement shall not terminate.

(f) "Pay-Per-Listen/Record Transaction" means a transaction in which a subscriber of the Service receives an electronic transmission for which a separate charge is made, directly or indirectly, for the reception or delivery of one or more sound recordings.

(g) "Audio-on-Demand Transaction" means a transaction in which a subscriber of the Service receives an electronic transmission for which a separate charge is made, directly or indirectly, for the reception or delivery of one or more sound recordings of the subscriber's choosing, at a time chosen by the subscriber.

(h) "Simulcast Transmission" means the use of a Service channel to simultaneously transmit the audio portion of a video program where a separate charge is or is not made to view and/or record such video program but no separate charge is made to receive the audio portion of such transmission.

2. Rights

(a) WMG grants to DCR the non-exclusive right to publicly perform WMG Recordings, via the Service only, in the Territory during the Term. Should WMG Control a WMG Recording for less than the entire Territory or less than the entire Term, this grant shall only apply to that portion of the Territory and/or Term for which such rights are Controlled and the compensation payable pursuant to Paragraph 3 shall be adjusted accordingly.

(b) None of the parties hereto, nor any of their Affiliates makes any warranties, representations or indemnities with respect to the rights granted hereunder, except as otherwise expressly provided in this Agreement.

(c) All rights not specifically granted to DCR by WMG are reserved to WMG, except for those rights which DCR may have by common law or by statute, provided that any rights subject to the foregoing exception shall be and remain subject to any and all provisions and restrictions of this Agreement.

(d) The rights granted hereunder include only the right specified in subparagraph 2(a) and, without limiting the generality of the foregoing, do not include the grant of a right to:

(i) publicly perform musical compositions;

(ii) transmit any WMG Recording for a Pay-Per-Listen/Record Transaction, except that the foregoing shall not preclude a Simulcast Transmission, ; and

(iii) transmit any WMG Recording for an Audio-on-Demand Transaction.

(e) Except to the extent necessary to allow DCR's customers to retransmit the Service to their subscribers, and to the extent set forth in Paragraph 13, below, DCR shall not have the right to sublicense the rights granted hereunder.

3. Compensation

DCR will calculate and make payment to WMG as follows:

(a) (i) Within thirty (30) days after the end of each calendar quarter or part thereof ("Quarter") during the Term, DCR shall compute the total "Service Revenue" earned by DCR during such period from the Service in the Territory. Service Revenue shall include all revenue earned by DCR from the Service during such period, whether or not collected (net of trade discounts, allowances and other similar items) less amounts which DCR is required by law to pay, and does in fact pay, in respect of the public performance of WMG Recordings outside the United States, its territories and possessions.

(ii) A calculation of the total "Music License Fee" shall be made as follows:

$$\frac{(X-K)}{(Y-K-N)} \text{ times } (Z-W) \text{ times } (2\%)$$

where (A) X equals the number of channels on the Service which transmit music (including, but not limited to, Simulcast Transmissions), (B) Y equals the total number of Service channels, (C) K equals the number of channels on the Service which solely make Simulcast Transmissions, (D) Z equals the total Service Revenue, (E) W equals the Service Revenue attributable solely to a separate charge required for a particular Non-Music Channel (i.e., a channel which carries no music sound recordings) or a group of channels comprised solely of Non-Music Channels, provided that the purchase of such Non-Music Channels is not, directly or indirectly, a prerequisite to or otherwise tied (by pricing or otherwise) to the purchase of any music channel (provided that, it is understood that to obtain any Non-Music Channels, purchase of the so-called "Primary Channels" may be required), and (F) N equals the total number of the Non-Music Channels that give rise to Service Revenue included in "W".

(iii) For the period beginning on the commencement of the Term and ending at the conclusion of the first full calendar quarter of the Term, and for each subsequent Quarter during the Term ("Sample Period"), DCR will calculate (A) the number of sound recordings transmitted on all channels of the Service (other than "Non-Subject Channels" as defined in the Channel Allocation Agreement under the Transaction, and any channels contributed by DCR and which are programmed by the Advertising Joint Venture under the Transaction) during two (2) randomly selected periods of five consecutive days each, during each Sample Period (the "Sample") and (B) the percentage of the

Sample represented by WMG Recordings (the "WMG Share"). No such five-day period shall be within four weeks of another such five-day period.

(iv) Such determination shall be made by referring to actual logs which DCR shall maintain. At any time during the Term of this Agreement, if a party reasonably believes and so-notifies the other that the foregoing method of calculating the WMG Share does not accurately reflect the WMG Share, the Sample and the WMG Share shall be based upon an additional number of randomly selected days during each Quarter ending after such notice (such additional number to be agreed upon in good faith by the parties but not to exceed one additional week during any such Quarter).

(b) With respect to the Term, WMG will be paid a license fee equal to the WMG Share of the Music License Fee within forty-five (45) days following the end of the Quarter concerned, provided, however, that such license fee shall accrue (without interest) and shall not be payable by DCR to WMG until forty-five (45) days following the end of the calendar quarter in which the Service has reached "break-even" at which point the accrued license fees shall be paid by DCR to WMG in six equal monthly payments. "Break-even" shall be deemed to have occurred at such time as DCR has generated revenues from the Service, for a period of three consecutive months, in excess of all costs and expenses attributable to the Service for such three-month period, under generally accepted accounting principles including, but not limited to, third-party interest payments and interest on partner loans. After break-even, the WMG Share of the Music License Fee shall thereafter be payable on a current basis with respect to the remainder of the Term.

(c) The statement rendered by DCR to WMG shall clearly document, in detail, the calculations referred to above, including, without limitation, any adjustments made pursuant to the last sentence of subparagraph 2(a).

4. Restrictions

(a) DCR will not create programming, market the Service or disseminate information on programming in a manner that actively encourages recording of sound recordings transmitted on the Service, without the express, prior, written consent of the holder(s) of the rights in such sound recordings. The parties acknowledge, however, that even absent encouragement by DCR, isolated instances of recording may occur, and nothing herein contained is intended to or shall cause DCR to be liable to WMG for any such instance of recording.

(b) Without the prior consent of WMG and the owner of the sound recordings concerned:

(i) DCR shall not play consecutively and without interruption a substantial portion (either playing time or tracks) of the sound recordings on any record (whether or not played in the order on such record); provided, however, this restriction shall not apply to any album which is composed of a small number of sound recordings and

where the entire record, or the substantial portion concerned, can be deemed to be a single composition.

(ii) Except as may be permitted pursuant to the proviso of subparagraph 4(b)(i), DCR shall not play consecutively and without a substantial interruption (A) more than six (6) tracks by an individual recording artist or group or (B) more than three tracks from an individual record.

(c) Any information encoded in a WMG Recording by WMG or an Affiliate of WMG shall be transmitted by DCR without alteration. No information will be added to such transmission of a WMG Recording by DCR without the prior consent of WMG, which consent will not unreasonably be withheld or delayed. WMG consents to the inclusion of the following information by DCR in connection with a transmission via the Service: Composition title, Artist(s) name(s), album title, if any, the record label, catalog number, DCR Service channel name and number, and lyrics. WMG will co-operate reasonably with DCR concerning the technical aspects of enabling such encoded information to be transmitted via the Service. DCR shall not be required to expend sums which are not commercially reasonable in order to comply with this subparagraph 4(c).

(d) DCR will play each WMG Recording (i) in its entirety without alteration and (ii) in compliance with any rights of the creators of WMG Recordings to the extent they have such rights by law in the Territory.

5. Security

(a) DCR shall reasonably cooperate in the transmission, without alteration, of digital or other security systems incorporated into a WMG Recording in compact disc or other formats used as an original source for transmission.

(b) DCR will use commercially reasonable efforts to cooperate with any industry effort that seeks to establish a security system which, like the Serial Copy Management System, limits rerecording of sound recordings delivered by digital or other transmissions.

6. Most Favored Nations

Should DCR at any time during the Term agree with any owner, manufacturer or distributor of sound recordings other than WMG or an Affiliate of WMG to pay a license fee in respect of the public performance of sound recordings or a payment otherwise computed in a manner similar to WMG's license fee hereunder, which fee is more favorable to such other person or entity than the fee payable to WMG hereunder, then DCR shall immediately notify WMG thereof and such more favorable terms shall, at WMG's option, be deemed included in this Agreement. Should WMG at any time agree with any owner of a digital- or satellite- based audio programming service similar to the Service to

accept a license fee in respect of the public performance of sound recordings during the Term or a payment otherwise computed in a manner similar to WMG's license fee hereunder during the Term, which fee is more favorable to such other person or entity than the fee payable to DCR hereunder, then WMG shall immediately notify DCR thereof and such more favorable license fee shall, at DCR's option, be deemed included in this Agreement.

7. Product

During the Term, WMG will furnish to DCR, concurrently with its distribution to broadcast media generally, one promotional copy of each newly commercially released WMG Recording which is appropriate to the Service's programming formats.

8. Audit

DCR shall keep true and accurate books and records relating to this Agreement for a period commencing at the beginning of the Term until one year after breakeven has been achieved and thereafter for a period of not less than three (3) years, in accordance with generally accepted accounting principles. During the Term and for a period of one year thereafter, at WMG's expense, WMG or its designated representative may, on at least twenty days written notice, not more often than once in any twelve month period, at DCR's office and at reasonable times within regular business hours, inspect and make extracts and copies of any such books and records in order to determine the accuracy of any or all of DCR's statements rendered under this agreement. WMG may not audit records further back in time than three (3) years prior to the end of the latest Quarter with respect to which WMG is conducting the audit concerned. Notwithstanding the preceding sentence, during the first audit conducted by WMG after DCR has achieved break-even WMG may examine all records going back to the beginning of the Term. WMG will complete any such audit within ninety (90) days of commencement of the audit. In the event any audit undertaken by WMG discloses an underpayment by DCR, DCR shall promptly pay such understated amount with interest calculated at the prime rate in effect at Chemical Bank from time to time plus two percentage points, and if such underpayment is fifteen percent (15%) or more with respect to the amounts set forth on any of DCR's statement(s), DCR shall also reimburse WMG for the reasonable costs incurred by WMG in connection with the audit. WMG will make any claim against DCR within sixty days of the completion of the audit. No audit shall be deemed to have been completed until WMG has received a final report from its auditors with respect to such audit. WMG agrees, on behalf of itself and the WMG Affiliates, to maintain in confidence and not to disclose any and all information furnished to it or learned by it in connection with the foregoing examination and audit of DCR's books and records, except with respect to information that (a) becomes generally available to the public other than as a result of a disclosure in violation of this Agreement, (b) was available to WMG on a non-confidential basis prior to its disclosure by WMG or subsequently becomes so available, (c) becomes available to WMG on a non-confidential basis from a source

other than DCR, unless WMG knows that such source is bound by a confidentiality agreement or is otherwise prohibited from transmitting such information by a contractual obligation, (d) is developed independently by WMG without reference to confidential information received by WMG from DCR (e) is disclosed to WMG's accountants, attorneys or employees in the regular course of their employment by WMG, (f) WMG may be required to disclose to its Affiliates or other third parties pursuant to agreements with such third parties or (g) is required to be disclosed by law or in the course of a legal or administrative proceeding. WMG will advise any person, firm or entity to whom it discloses such confidential information that it is confidential and subject to the terms of the preceding sentence, but any inadvertent failure to do so shall not be a breach hereof.

9. Copyright Law Amendment

In the event that during the Term an amendment to the United States Code establishing a copyright or similar right with respect to the public performance of sound recordings becomes effective and such amendment provides for a mechanism for the payment of fees for such public performances:

(a) DCR shall not be obligated to pay WMG its license fee as provided in Paragraph 3 for public performances of WMG Recordings covered by such amendment which occur on and after the date with respect to which such fees become payable and are actually paid to or on behalf of WMG for the public performance of WMG Recordings as a result of such statute or mechanism, and

(b) The parties hereto shall, in addition to any payment or other obligations imposed by said statute or industry practices arising therefrom, continue to be bound by all warranties, indemnities, restrictions and covenants contained herein until the expiration of the Term or, if they survive the expiration of the Term, for the period of such survival.

10. Notices

All notices given hereunder shall be duly and properly given if hand-delivered, on the next business day if sent by a nationally recognized overnight delivery service, or on the third succeeding business day if mailed by regular first-class United States mail to the addressee set forth in the caption to this Agreement or as otherwise designated by each party hereto in writing for such purpose.

11. Warranties and Indemnities

(a) DCR warrants and represents as follows:

(i) It has obtained all corporate, partnership and other authorizations necessary for it to enter into this agreement; and

(ii) It will obtain all rights and licenses necessary for it to publicly perform sound recordings on the Service, including, without limitation, the right to publicly perform the musical compositions embodied therein.

(b) WMG warrants and represents that it has obtained all corporate, partnership and other authorizations necessary for it to enter into this agreement and has all necessary authority from its Affiliates and that it has all rights necessary to commercially release each WMG Recording it commercially releases in the Territory.

(c) For the purposes of this subparagraph 11(c) the party indemnifying the other party is referred to as the Indemnitor and the indemnified party is referred to as the Indemnitee. Indemnitor agrees to and does hereby indemnify, save and hold Indemnitee harmless from any and all loss and damage (including court costs and reasonable attorneys' fees) arising out of, connected with or as a result of any inconsistency with, failure of, or breach or threatened breach by Indemnitor of any warranty, representation, agreement, undertaking or covenant contained in this Agreement including, without limitation, any claim by any third party in connection with the foregoing. In addition to any other rights or remedies Indemnitee may have by reason of any such inconsistency, failure, breach, threatened breach or claim, Indemnitor shall reimburse Indemnitee, on demand, for any payment made by Indemnitee at any time after the date hereof with respect to any loss, damage or liability resulting therefrom. Indemnitee shall not settle any such claim without the Indemnitor's consent, not to be unreasonably withheld. Indemnitee shall give Indemnitor notice of any third party claim to which the foregoing indemnity applies and Indemnitor shall promptly thereafter retain competent counsel to defend such claim on behalf of Indemnitee. Indemnitee shall have the right to participate in the defense of any such claim through counsel of Indemnitee's own choice and at Indemnitee's expense.

12. Equitable Relief

DCR expressly acknowledges that the WMG Recordings are of a special, unique and intellectual character which gives them peculiar value, and that in the event of a breach or threatened breach by DCR of any term, condition or covenant hereof, WMG will be caused immediate irreparable injury. DCR expressly agrees that WMG shall be entitled to injunctive and other equitable relief, as permitted by law, to prevent a breach or threatened breach of this Agreement, or any portion thereof, by DCR which relief shall be in addition to any other rights or remedies, for damages or otherwise, available to WMG.

13. Assignment

Except as provided in this Paragraph 13, this Agreement may not be assigned by operation of law or otherwise without the prior written consent of the other party. WMG may assign all or any portion of its rights hereunder to one or more Affiliates of Time Warner Inc. and/or

Warner Music Group Inc. DCR may assign all or any portion of its rights hereunder to any successor to DCR, whether through the merger, consolidation or other combination of DCR with another entity, or by the sale, transfer or exchange of all or substantially all of DCR's assets, including, but not limited to, the incorporation of DCR. In connection with any such assignment, appropriate adjustment shall be made to this Agreement to take into account such assignment.

14. Amendments

This Agreement cannot be waived or added to or modified orally and no waiver, addition or modification shall be valid unless in writing and signed by all of the parties. This Agreement, together with the other Transaction Agreements, contains the entire agreement among the parties with respect to the subject matter hereof, and supersedes all prior agreements, written or oral, with respect thereto.

15. Governing Law

This Agreement, its validity, construction and effect, shall be governed by the laws of the State of New York, without regard to conflicts of laws principles. The fact that any provisions herein are found by a court of competent jurisdiction to be unenforceable shall not affect the validity or enforceability of any other provisions.

16. Effect of this Agreement

Neither DCR's execution of this Agreement nor any provision hereof is an acknowledgement or agreement by DCR, Continental Cablevision, Inc., Comcast Cable Communications, Inc., Cox Communications, Inc. or the cable operating division of Time Warner Entertainment Company, L.P. that United States law, as of the date of this Agreement, requires the obtaining of a license or the payment of a fee or royalty to perform sound recordings publicly. Notwithstanding the foregoing, DCR is entering into this Agreement as one part of a complex commercial transaction, evidenced by the Transaction Agreements (as defined in Paragraph 17).

17. Transaction Agreements

The parties hereto agree that they and/or their respective affiliates will enter into the following instruments (together, the "Transaction Agreements"): (a) this Agreement, (b) the Second Amendment to the General Partnership Agreement, (c) a Channel Allocation Agreement between DCR and S/W, (d) an Advertising Joint Venture Agreement between DCR and S/W, (e) a Subscription Agreement between DCR and the cable operating division of Time Warner Entertainment Company, L.P. (f) a Purchase Agreement between Jerrold and S/W and the Guaranty of GI Corporation related thereto, (g) an Affiliation Agreement between DCR and the cable operating division of Time Warner Entertainment Company, L.P. (h) the Marketing Joint Venture Agreement between DCR and S/W, (i) a License Agreement between DCR and Sony Music Entertainment Inc., (j) an Amendment of a Manufacturing and License Agreement between

the General Partner and the Jerrold division of GI Corporation and (k) an Amendment to the Limited Partnership Agreement of DCR. None of the Transaction Agreements, including, without limitation, this Agreement, shall be effective until the execution and delivery of all the Transaction Agreements by all parties thereto.

18. Blackout Period

Section 11.4 of the Second Amendment to the General Partnership Agreement of the General Partner is hereby incorporated herein in its entirety and shall be binding upon the parties hereto as if fully set forth herein.

19. SONY "Put"

Without limitation, SONY's exercise of its "put" right pursuant to the letter agreement between Jerrold and SONY dated as of the date hereof and the "Closing" pursuant thereto, if any, shall have no effect on this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

DIGITAL CABLE RADIO ASSOCIATES, L.P.
a Delaware limited partnership

By: DIGITAL CABLE RADIO ASSOCIATES, a
Pennsylvania general partnership

By: JERROLD DC RADIO, INC., a general
partner

By: _____

Name: *Hal Krissbergh*
Title: *President*

WARNER MUSIC GROUP, INC.
a Delaware corporation

By: _____

Name:
Title:

the General Partner and the Jerrold division of GI Corporation and (k) an Amendment to the Limited Partnership Agreement of DCR. None of the Transaction Agreements, including, without limitation, this Agreement, shall be effective until the execution and delivery of all the Transaction Agreements by all parties thereto.

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IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

DIGITAL CABLE RADIO ASSOCIATES, L.P.
a Delaware limited partnership

By: DIGITAL CABLE RADIO ASSOCIATES, a
Pennsylvania general partnership

By: JERROLD DC RADIO, INC., a general
partner

By: _____
Name:
Title:

WARNER MUSIC GROUP, INC.
a Delaware corporation

By: 
Name: Fred Wistow
Title: Senior Vice President

MC 6

Copyright Board
Canada



Commission du droit d'auteur
Canada

**FILE: Public Performance of Sound
Recordings 1998-2002**

Public Performance of Sound Recordings

Copyright Act, section 68(3)

STATEMENT OF ROYALTIES TO BE
COLLECTED BY NRCC FOR THE PUBLIC
PERFORMANCE OR THE COMMUNICATION
TO THE PUBLIC BY TELECOMMUNICATION,
IN CANADA, OF PUBLISHED SOUND
RECORDINGS EMBODYING MUSICAL WORKS
AND PERFORMER'S PERFORMANCES OF
SUCH WORKS

[TARIFF 1.A – COMMERCIAL RADIO IN 1998,
1999, 2000, 2001 AND 2002]

DECISION OF THE BOARD

Reasons delivered by:

Michel Héту, Q.C.
Mrs. Adrian Burns
Mr. Andrew E. Fenus

Date of the Decision

August 13, 1999

**DOSSIER : Exécution publique
d'enregistrements sonores 1998-2002**

Exécution publique d'enregistrements sonores

Loi sur le droit d'auteur, article 68(3)

TARIF DES REDEVANCES À PERCEVOIR PAR
LA SCGDV POUR L'EXÉCUTION EN PUBLIC
OU LA COMMUNICATION AU PUBLIC PAR
TÉLÉCOMMUNICATION, AU CANADA,
D'ENREGISTREMENTS SONORES PUBLIÉS
CONSTITUÉS D'ŒUVRES MUSICALES ET DE
LA PRESTATION DE TELLES ŒUVRES

[TARIF 1.A – RADIO COMMERCIALE EN 1998,
1999, 2000, 2001 ET 2002]

DÉCISION DE LA COMMISSION

Motifs exprimés par :

Michel Héту, c.r.
M^{me} Adrian Burns
M. Andrew E. Fenus

Date de la décision

Le 13 août 1999

Ottawa, August 13, 1999

Ottawa, le 13 août 1999

**File: Public Performance of Sound Recordings
1998-2002**

**Dossier : Exécution publique d'enregistrements
sonores 1998-2002**

Public Performance of Sound Recordings

Exécution publique d'enregistrements sonores

**Reasons for the decision certifying NRCC
Tariff 1.A (Commercial Radio) for the years
1998 to 2002**

**Motifs de la décision homologuant le tarif 1.A
(Radio commerciale) de la SCGDV pour les
années 1998 à 2002**

I. INTRODUCTION

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Pursuant to section 67 of the *Copyright Act* [the *Act*] and section 53.1 of the *Act to amend the Copyright Act* [S.C. 1997, ch. 24], the Neighbouring Rights Collective of Canada (NRCC) and the *Société de gestion des droits des artistes-musiciens* (SOGEDAM) filed with the Board on or before September 1, 1997, statements of proposed royalties for the public performance, or the communication to the public by telecommunication in Canada, of performer's performances of musical works, or of sound recordings embodying such performer's performances, with an effective date of January 1, 1998. The statements were published in the *Canada Gazette* on October 18, 1997. At the same time, the Board gave notice to users of their right to file objections to the proposed tariffs.

Au 1^{er} septembre 1997, conformément à l'article 67 de la *Loi sur le droit d'auteur* [la *Loi*] et à l'article 53.1 de la *Loi modifiant la Loi sur le droit d'auteur* [L.C. 1997, ch. 24], la Société canadienne de gestion des droits voisins (SCGDV) et la Société de gestion des droits des artistes-musiciens (SOGEDAM) déposaient auprès de la Commission des projets de tarifs pour l'exécution publique ou la communication au public par télécommunication au Canada de prestations d'œuvres musicales ou d'enregistrements sonores constitués de ces prestations, tarifs qu'elles entendaient percevoir à partir du 1^{er} janvier 1998. Ces projets ont été publiés dans la *Gazette du Canada* le 18 octobre 1997. Par la même occasion, la Commission avisait les utilisateurs de leur droit de s'opposer aux projets de tarifs.

The following are the Board's reasons dealing with Tariff 1.A (Commercial Radio). Other tariffs will be disposed of later.

Les présents motifs traitent du tarif 1.A (Radio commerciale). Les autres tarifs feront l'objet de décisions ultérieures.

The Canadian Association of Broadcasters (CAB), Shaw Radio Limited and Radiomutuel Inc. filed timely objections to Tariff 1.A. Shaw eventually withdrew its objection whereas Radiomutuel informed the Board it would be represented by CAB. Hearings took place over 16 days in June, July and August 1998. Participants filed their final arguments on November 16, 1998.

L'Association canadienne des radiodiffuseurs (ACR), *Shaw Radio Limited* et Radiomutuel inc. se sont opposées dans les délais prescrits. Shaw a éventuellement retiré son opposition alors que Radiomutuel informait la Commission qu'elle serait représentée par l'ACR. Les audiences, qui ont duré 16 jours, ont été tenues en juin, juillet et août 1998. Le dépôt de l'argumentation finale a pris fin le 16 novembre 1998.

II. LEGISLATIVE FRAMEWORK

This is the first time the Board is called upon to deal with the so-called neighbouring rights regime set up in 1997, when Bill C-32 [now S.C. 1997, ch. 24] came into force. Consequently, it would be appropriate to outline the legislative evolution of the protection afforded to performers and makers of sound recordings under Canadian copyright legislation as well as some of the essential elements of the new regime.

Makers of sound recordings have long enjoyed the exclusive right to authorize their reproduction. They also enjoyed the right to authorize their public performance until 1971. They lost that right shortly after the Copyright Appeal Board certified a number of tariffs for such performances. In 1994, as a result of the North American Free Trade Agreement, makers were granted the exclusive right to rent their sound recordings.

Performers have until recently enjoyed little, if any rights under Canadian copyright legislation. Only in 1994 did legislation implementing some of Canada's obligations resulting from its adhesion to the World Trade Organization grant performers certain exclusive rights over their live performances.

The adoption of Bill C-32 allowed Canada to become a party to the *Rome Convention of 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*. On June 4, 1998, Canada joined 56 other countries. The United States is not a party to the Rome Convention.

New and pre-existing rights of performers, makers of sound recordings and broadcasters are all addressed in Part II of the *Act*. Sections 15, 18, 21 and 26 now describe the exclusive rights they enjoy, all of which are included in the definition of "copyright" which is introduced in the *Act* for the first time. Section 19 also grants to

II. LE CADRE LÉGISLATIF

C'est la première fois que la Commission se penche sur le régime dit des droits voisins, mis en place en 1997 par l'entrée en vigueur du projet de loi C-32 [L.C. 1997, ch. 24]. Il paraît donc utile de faire un survol de l'évolution de la protection que le droit d'auteur canadien accordait jusque-là aux artistes-interprètes et aux producteurs d'enregistrements sonores et de décrire les éléments essentiels du nouveau régime.

Les producteurs d'enregistrements sonores ont acquis depuis longtemps le droit exclusif d'autoriser la reproduction de ces enregistrements. Jusqu'en 1971, ils jouissaient aussi du droit d'autoriser leur exécution publique, droit qu'ils ont perdu peu après que la Commission d'appel du droit d'auteur ait homologué des tarifs à cet effet. En 1994, dans le cadre de la mise en application de l'Accord de libre-échange nord-américain, les producteurs d'enregistrements obtenaient le droit exclusif de les louer.

Jusqu'à tout récemment, la législation canadienne en matière de droit d'auteur accordait peu ou pas de droits aux artistes-interprètes. Ce n'est qu'en 1994 que la loi de mise en application de certaines obligations du Canada découlant de son adhésion à l'Organisation mondiale du commerce leur a octroyé certains droits exclusifs sur leurs prestations en direct.

L'adoption du projet de loi C-32 a permis au Canada d'adhérer à la *Convention de Rome de 1961 pour la protection des artistes-interprètes, des producteurs de phonogrammes et des organismes de radiodiffusion*. Le 4 juin 1998, le Canada rejoignait 56 autres pays. Les États-Unis n'ont pas adhéré à cette Convention.

Tous les droits dont jouissent les artistes-interprètes, producteurs d'enregistrements sonores et radiodiffuseurs se retrouvent maintenant à la Partie II de la *Loi*. Les articles 15, 18, 21 et 26 prévoient divers droits exclusifs, tous qualifiés de droit d'auteur selon la définition de l'expression nouvellement ajoutée à la *Loi*. L'article 19

makers and performers a right of equitable remuneration for the public performance and communication to the public by telecommunication of eligible published sound recordings. This new right has several characteristics, some of which have a direct effect on this decision.

First, the right benefits jointly makers and performers of eligible sound recordings. [s. 19(1)]

Second, a recording is eligible not only if the maker was, at the date of the first fixation, a citizen or permanent resident of Canada or a Rome Convention country, but also if all the fixations done for the sound recording occurred in Canada or a Rome Convention country. [s. 20(1)] As a result, performers and makers who are not citizens or permanent residents of Canada or a Rome Convention country may be entitled to remuneration.

Third, the manner in which royalties are collected varies according to the nature of the underlying work. In the case of recorded music, users pay royalties to the collective society authorized under Part VII to collect them. In the case of recorded literary or dramatic works, users pay royalties to either the maker or the performer. [s. 19(2)]

Fourth, once they have been paid, royalties are always divided equally between the maker or makers and the performer or performers, irrespective of who received the payment. [s. 19(3)]

Fifth, even though performers and makers are entitled to an equal share of the remuneration, what triggers the remuneration is the performance or telecommunication of the maker's recording. [s. 19(1) *in limine*]

accorde par ailleurs aux producteurs et artistes-interprètes un droit à rémunération équitable pour l'exécution en public ou la communication au public par télécommunication d'enregistrements sonores admissibles publiés. Certaines des nombreuses caractéristiques de ce droit ont un impact direct sur la présente décision.

Premièrement, le droit bénéficie conjointement aux producteurs et artistes-interprètes d'enregistrements admissibles. [a. 19(1)]

Deuxièmement, l'enregistrement est admissible non seulement si le producteur, à la date de la première fixation, était citoyen canadien ou résident permanent du Canada ou d'un pays partie à la Convention de Rome, mais aussi si toutes les fixations réalisées en vue de la confection de l'enregistrement sonore ont eu lieu dans l'un de ces pays. [a. 20(1)] Il s'ensuit que les artistes-interprètes et producteurs qui ne sont pas citoyens ou résidents permanents d'un de ces pays peuvent avoir droit à la rémunération.

Troisièmement, la façon dont les redevances sont perçues varie en fonction de la nature de l'œuvre enregistrée. Pour les enregistrements d'œuvres musicales, le paiement se fait à la société de gestion chargée, en vertu de la partie VII, de les percevoir. Pour les enregistrements d'œuvres littéraires ou dramatiques, le versement se fait soit au producteur, soit à l'artiste-interprète. [a. 19(2)]

Quatrièmement, les redevances, une fois versées, sont partagées par moitié entre le producteur et l'artiste-interprète, sans égard à celui qui a reçu le paiement. [a. 19(3)]

Cinquièmement, bien que les artistes-interprètes et les producteurs aient droit à une part égale de la rémunération, c'est l'exécution ou la télécommunication de l'enregistrement appartenant au producteur qui donne lieu à cette rémunération. [a. 19(1)]

Finally, in the case of sound recordings of musical works, the right to remuneration must be exercised through a collective society.

[ss. 19(2)(a), 67.1(1), 67.1(4)(b)] Societies are subject to the rate regulation regime already in place for the performance or telecommunication of musical works. All must answer information requests about their repertoire. All must file proposed tariffs or lose their right to sue for payment of royalties without the written consent of the Minister. All tariffs are subject to essentially the same examination and certification process.

A few differences exist. The *Act* sets out three limits on the Board's power to decide the amount and terms of the royalties to be paid on account of the remuneration right.¹ The tariff must apply only in respect of eligible recordings. It must not put certain users that are subject to different linguistic and content requirements as a result of Canada's broadcasting policy at a financial disadvantage. Finally, it must provide for the payment of royalties in a single payment.

The *Act* also sets out special conditions that apply to radio stations or "wireless transmission systems" notwithstanding the tariffs approved by the Board. Community systems pay only \$100 a year. Systems other than community systems and public transmission systems pay only \$100 on their first 1.25 million dollars of annual advertising revenues. All other royalties are to be phased in, with systems paying one-third of the royalties set out in the approved tariff in 1998, two-thirds in 1999 and the full amount in 2000 and thereafter. [s. 68.1(1)]

Finally, the *Act* provides for the adoption of a number of regulatory definitions. The Board can

Enfin, l'exercice du droit à rémunération pour les enregistrements d'œuvres musicales s'exerce nécessairement par le truchement d'une société de gestion. [aa. 19(2)(a), 67.1(1), 67.1(4)(b)] Ces sociétés sont assujetties au régime de réglementation tarifaire déjà en place pour les sociétés qui gèrent le droit d'exécution et de télécommunication d'œuvres musicales. Toutes doivent répondre aux demandes de renseignements concernant leurs répertoires. Toutes doivent déposer des projets de tarifs ou voir leur recours en recouvrement des redevances dépendre de la permission écrite du ministre. Enfin, le même processus d'examen et d'homologation s'applique pour l'essentiel à tous ces tarifs.

Certaines différences subsistent. Dans le cas du droit à rémunération, le pouvoir de la Commission d'établir le montant des redevances et leurs modalités s'accompagne de trois conditions.¹ Le tarif homologué ne doit s'appliquer qu'aux enregistrements admissibles. Il ne doit pas désavantager sur le plan financier certains utilisateurs en raison d'exigences différentes concernant la langue et le contenu imposées par le cadre de la politique canadienne de radiodiffusion. Enfin, il doit prévoir que le paiement des redevances soit fait en un versement unique.

La *Loi* prévoit par ailleurs certaines conditions spéciales s'appliquant par dérogation aux tarifs homologués par la Commission aux «systèmes de transmission par ondes radioélectriques» (les stations de radio). Les systèmes communautaires ne payent que 100 \$ par année. Les systèmes autres que les systèmes communautaires ou les systèmes de transmission publics ne payent que 100 \$ sur la partie de leurs recettes publicitaires annuelles qui ne dépasse pas 1,25 million de dollars. Autrement, les redevances sont soumises à un régime transitoire au cours des trois premières années, aux termes duquel un tiers est payable en 1998, les deux tiers en 1999 et la totalité par la suite. [a. 68.1(1)]

La *Loi* prévoit enfin l'adoption de définitions réglementaires. La Commission peut définir

define “advertising revenues”,² while the Governor in Council may define “community system”, “public transmission system” and “wireless transmission system”.³

Other characteristics of the remuneration right which do not have a direct impact on this decision include the following. First, the remuneration right is not a copyright as defined in the *Act*. Consequently, a person who violates the right does not infringe copyright. Second, the Minister may limit the scope and duration of the protection granted to sound recordings of Rome Convention countries who do not grant rights similar to those afforded in section 19 of the *Act*. This was done on March 23, 1999.⁴ However, the practical impact of the statement on the size of the repertoire actually used by commercial radio stations is negligible. Third, the Minister may also grant the right to remuneration to the performers and makers of sound recordings of a country other than a Rome Convention country if that country grants Canadian performers and makers of sound recordings rights substantially equivalent to those conferred by Canadian legislation. [s. 22] However, this has not been done yet.

III. THE PARTICIPANTS’ CONCLUSIONS

The details of the participants’ arguments are outlined in the relevant parts of the decision. In a nutshell, their conclusions are as follows.

NRCC is asking for a five-year tariff, to be phased in over five years instead of the three mandated by the *Act*. In the fifth year, stations would pay from 4.68 per cent for advertising revenues between 1.25 and 1.5 million dollars, to 9.78 per cent on revenues in excess of five million dollars. NRCC agreed to account for low-use stations in the final tariff. It also asked that it be the collective designated for the purposes of collecting all royalties, including royalties for rights holders it may not represent.

l’expression «recettes publicitaires»,² et le gouverneur en conseil, les expressions «système communautaire», «système de transmission par ondes radioélectriques» et «système de transmission public». ³

Le droit à rémunération comporte d’autres caractéristiques qui n’ont pas d’impact sur la présente décision. Premièrement, il ne s’agit pas d’un droit d’auteur au sens où la *Loi* l’entend. Par conséquent, y contrevenir ne viole pas le droit d’auteur. Deuxièmement, le ministre peut limiter l’étendue et la durée de la protection accordée aux enregistrements confectionnés dans les pays parties à la Convention de Rome qui n’accordent pas de droits semblables à ceux prévus à l’article 19 de la *Loi*. Une déclaration à cet effet a été émise le 23 mars 1999.⁴ En pratique, cette déclaration ne diminue en rien l’étendue du répertoire admissible qu’utilisent les stations de radio commerciale. Troisièmement, le ministre peut aussi accorder le droit à rémunération aux artistes-interprètes et producteurs d’un pays autre qu’un pays partie à la Convention de Rome qui accorde aux artistes-interprètes et producteurs canadiens essentiellement les mêmes avantages que ceux conférés par la législation canadienne. [a. 22] À ce jour, le ministre n’a pas émis de déclaration à cet effet.

III. LES CONCLUSIONS RECHERCHÉES

Les prétentions des participants sont reprises en détail lorsque nécessaire dans le reste de la décision. Les conclusions qu’ils recherchent peuvent se résumer comme suit.

La SCGDV demande un tarif valide pour cinq années, entrant en vigueur progressivement sur toute cette période plutôt que celle de trois ans prévue par la *Loi*. La dernière année, les stations verseraient 4,68 pour cent de leurs recettes publicitaires entre 1,25 et 1,5 million de dollars, et 9,78 pour cent de leurs recettes au-delà de cinq millions de dollars. La SCGDV accepte que les stations utilisant peu de musique paient à un taux moindre que les autres. Enfin, elle demande à être la société de gestion chargée de percevoir toutes les redevances, y compris celles revenant à des titulaires qu’elle pourrait ne pas représenter.

SOGEDAM asked for a three-year tariff set at five per cent of advertising revenues. It argued that phasing-in provisions in the tariff are unnecessary, since the *Act* already provides for this. It also asked that it be granted 2.88 per cent of total royalties payable under the tariff as compensation for the repertoire it represents.

CAB asked for a three-year tariff of 0.7 per cent of advertising revenues, a low-use tariff of 0.3 per cent and a flat royalty of \$1,000 per year for all-talk stations. It also found no need to add to the statutory phasing-in provisions.

IV. GUIDING PRINCIPLES FOR FIXING THE ROYALTIES

The Board finds it useful to outline at the outset the principles that it intends to keep in mind in reaching its decision. Some have already been stated elsewhere; others flow from the terms of the *Act*. They will be fleshed out as required in the rest of the decision.

The *Act* requires that the Board take into account the following principles. First, the royalties must satisfy the performers' and makers' right to equitable remuneration as set out in subsection 19(1) of the *Act*. Second, the tariff must address only the use of the properly represented eligible repertoire. Third, the tariff must not place some users at a greater financial disadvantage than others because of different linguistic and content requirements of the *Broadcasting Act*. Finally, the tariff must provide that the payment of royalties by users is made in a single payment.

The Board also intends to rely on other principles already expressed in previous decisions. Thus, the tariff should reflect Canadian circumstances. It should be simple to administer, transparent and comprehensible. It should be based on a set of statistics for a test period.

La SOGEDAM demande que le tarif soit établi à cinq pour cent des recettes publicitaires pour trois ans. Elle soutient qu'il n'est pas nécessaire d'inclure dans le tarif des dispositions transitoires additionnelles à celles que prévoit la *Loi*. Elle demande enfin de recevoir 2,88 pour cent des redevances pour la rémunération du répertoire qu'elle représente.

L'ACR demande un tarif d'une durée de trois ans. Elle propose 0,7 pour cent des recettes publicitaires, 0,3 pour cent pour les stations utilisant peu de musique et 1 000 \$ l'an pour les stations de radio parlée. Elle ne voit pas non plus la nécessité d'ajouter aux dispositions transitoires de la *Loi*.

IV. PRINCIPES DIRECTEURS

La Commission croit utile d'énoncer dès le départ les principes dont elle entend s'inspirer pour rendre sa décision. Certains sont déjà connus; d'autres s'imposent à la lecture de la *Loi*. Lorsque nécessaire, ils feront l'objet de commentaires additionnels dans le reste de la présente décision.

La *Loi* exige que la Commission tienne compte des principes suivants. Les redevances doivent représenter la rémunération à laquelle les artistes-interprètes et producteurs ont droit en vertu du paragraphe 19(1) de la *Loi*. Le tarif doit compenser uniquement l'utilisation du répertoire admissible dûment représenté. Il ne doit pas désavantager sur le plan financier certains utilisateurs en raison d'exigences différentes découlant de la *Loi sur la radiodiffusion* en matière de langue ou de contenu. Il doit prévoir que le paiement des redevances soit fait en un versement unique.

La Commission entend aussi se fonder sur certains principes énoncés dans ses décisions antérieures. Par conséquent, le tarif devrait refléter la situation canadienne, être facile à appliquer, à administrer et à comprendre, et être fondé sur un ensemble de données pour une période témoin.

The Board adds that by its nature, the tariff is prospective. Only by looking at the past can the Board determine the extent of the eligible repertoire or the use made of it by commercial radio stations. Should major changes occur during the life of the tariff, collectives and users are free to ask that the tariff be varied pursuant to section 66.52 of the *Act*.

V. THE ISSUES

The major issues the Board needs to address in order to reach a decision in this matter can be reduced to the following:

- C What is meant by “equitable remuneration”?
- C What is the properly represented eligible repertoire and what use do commercial radio stations make of it?
- C What account should be taken of the Canadian broadcasting policy?
- C How much should radio stations pay for their use of the properly represented eligible repertoire?
- C How should royalties be allocated?

A. What is meant by “equitable” remuneration?

Participants attempted to interpret the notion of equitable remuneration in various ways. For NRCC, the level of remuneration should be determined by focussing solely on the entitlements of rights holders. For its part, CAB insists that equitable remuneration ought to also take into account fairness to users as well as a number of other factors including certainty as to the remunerated repertoire and the benefits rights holders derive from the use of eligible sound recordings. In the end, the Board’s task is no different here than it is, and has always been, in other rate regulation regimes. Therefore, setting

La Commission ajoute que, de par sa nature, le tarif est prospectif. Par conséquent, c’est en jetant un regard sur le passé qu’elle peut établir l’étendue du répertoire admissible ou l’usage qu’en font les stations de radio commerciale. Si des changements significatifs devaient survenir pendant la durée du tarif, l’article 66.52 de la *Loi* permet aux sociétés ou aux utilisateurs de demander la modification du tarif.

V. LES QUESTIONS EN LITIGE

Les principales questions auxquelles la Commission doit répondre afin de rendre sa décision dans la présente affaire se résument comme suit :

- C Qu’entend-on par «rémunération équitable»?
- C En quoi consiste le répertoire admissible dûment représenté et quel usage les stations de radio commerciale en font-elles?
- C Comment faut-il tenir compte de la politique canadienne en matière de radiodiffusion?
- C Combien les stations de radio devraient-elles payer pour l’usage qu’elles font du répertoire admissible dûment représenté?
- C Comment les redevances devraient-elles être réparties?

A. Qu’entend-on par «rémunération équitable»?

Les participants abordent le concept de rémunération équitable de diverses façons. La SCGDV soutient qu’il faut l’établir uniquement en fonction des droits des titulaires. L’ACR prétend que cette rémunération doit aussi être équitable à l’endroit des utilisateurs, en plus de refléter d’autres éléments, tels l’identification précise du répertoire rémunéré et le bénéfice que tirent les titulaires de l’utilisation même des enregistrements. En bout de piste, la tâche qui incombe à la Commission demeure celle qui a toujours été la sienne en matière de réglementation des tarifs, à savoir : établir un tarif qui soit juste

an equitable remuneration requires a tariff that is fair and equitable to both rights holders and users, given all the circumstances of the case.

B. What is the properly represented eligible repertoire and what use do commercial radio stations make of it?

The right to remuneration attaching to sound recordings of musical works is contingent on the recording being eligible. Essentially, this requires that the recording be published, qualify under section 20 of the *Act* and be less than 50 years old. That right is also contingent on eligible recordings being part of the repertoire of a collective society that has filed for a tariff.

As a result, it is incumbent on the collectives who claim royalties for the use of sound recordings to show that they do represent the repertoire they claim. The need to establish which recordings are eligible and which are not is made all the more important by the fact that almost all American recordings, which represent an important proportion of music played on radio, are not eligible. This does not mean that collectives actually bear the burden of making a case for each and every title they claim: they are clearly entitled to remuneration once they have established that they do represent those they say they do.

The determination of which recordings are before the Board requires an answer to two questions. Are NRCC and SOGEDAM collective societies? Do they represent those they say they represent? It will then be necessary to determine the extent to which commercial radio stations use the eligible repertoire.

1. Are NRCC and SOGEDAM collective societies?

NRCC is a collective of collectives. Its membership is limited to organisations and

et équitable tant pour les titulaires de droits que pour les utilisateurs, compte tenu de toutes les circonstances de l'espèce.

B. En quoi consiste le répertoire admissible dûment représenté et quel usage les stations de radio commerciale en font-elles?

Seul l'enregistrement admissible emporte le droit à rémunération. Pour l'essentiel, cela veut dire qu'il doit avoir été publié, remplir les conditions énumérées à l'article 20 de la *Loi* et remonter à moins de 50 ans. Le droit à rémunération de l'enregistrement d'une œuvre musicale suppose par ailleurs que l'enregistrement admissible fasse partie du répertoire d'une société de gestion ayant déposé un projet de tarif.

Par conséquent, il incombe aux sociétés qui réclament des redevances pour l'utilisation de tels enregistrements de démontrer qu'elles représentent effectivement le répertoire dont elles se réclament. Le fait que les enregistrements sonores américains, si répandus à la radio, ne soient pas admissibles, ne fait qu'ajouter à l'importance de bien distinguer ce qui est admissible de ce qui ne l'est pas. Cela ne veut pas dire pour autant que les sociétés aient le fardeau d'établir la titularité de chacun des titres faisant partie de leurs répertoires : leur droit à rémunération est établi dès lors qu'elles représentent dûment les titulaires dont elles se réclament.

Établir quels enregistrements se retrouvent devant la Commission exige de répondre à deux questions. La SCGDV et la SOGEDAM sont-elles des sociétés de gestion? Représentent-elles les titulaires dont elles se réclament? Il faudra ensuite déterminer l'usage que les stations de radio commerciale font du répertoire admissible.

1. La SCGDV et la SOGEDAM sont-elles des sociétés de gestion?

La SCGDV est une société de gestion qui en regroupe d'autres. Peuvent en devenir membre

collectives that represent a significant number of holders of remuneration rights. It was constituted to collect the monies owing to those entitled to neighbouring rights payments. It acts on behalf of five sub-collectives: ACTRA Performers' Rights Society (APRS), the American Federation of Musicians (AFM), the *Société de gestion collective de l'Union des artistes* (ArtistI), AVLA Audio-Video Licensing Agency Inc. (AVLA) and the *Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec* (SOPROQ).

SOGEDAM is a more traditional collective whose repertoire flows from two sources. It represents a small number of Canadian recording musicians who have authorized it to act for them by way of assignment. Most importantly, SOGEDAM has signed a reciprocal representation agreement with SPEDIDAM, the collective society empowered under French law to represent the rights of all performers whose names do not appear in the credits accompanying a sound recording.⁵

There is no doubt that NRCC and SOGEDAM are collective societies. Their objects are clearly those outlined in the definition of this term as set out in the *Act*. Moreover, and contrary to what CAB seemed to assert, the fact that some of NRCC's sub-collectives may not be corporate entities is a non issue. The *Act* clearly contemplates the possibility of an unincorporated association acting as a collective. Such an association can, through agency rules, secure remuneration rights and pass them on to another person to collect them, as long as the conditions imposed by statutes or private law for such transfers are met.

The real issue is the extent, if any, to which NRCC and SOGEDAM represent the eligible repertoire. This in turn requires looking at the status of NRCC's own "sub-collectives".

uniquement les organisations et sociétés représentant un nombre important de titulaires du droit à rémunération. Créée pour percevoir les redevances auxquelles les titulaires de droits voisins ont droit, elle agit pour le compte de cinq sociétés membres : l'*ACTRA Performers' Rights Society* (APRS), l'*American Federation of Musicians* (AFM), la Société de gestion collective de l'Union des artistes (ArtistI), l'*AVLA Audio-Video Licensing Agency Inc.* (AVLA) et la Société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec (SOPROQ).

La SOGEDAM est une société de type plus traditionnel, dont le répertoire provient de deux sources. Elle représente un petit nombre de musiciens canadiens qui l'ont autorisée par voie de cession. Elle a surtout signé une entente de réciprocité avec la SPEDIDAM, société de gestion à laquelle la loi française confie la gestion des droits de tous les artistes-interprètes dont le nom n'est pas mentionné dans la documentation accompagnant l'enregistrement sonore.⁵

Il ne fait aucun doute que la SCGDV et la SOGEDAM sont des sociétés de gestion. Leurs objets sont clairement ceux qu'énonce la *Loi*. Qui plus est, et contrairement à ce que semble prétendre l'ACR, le fait que certaines des sociétés membres de la SCGDV ne soient pas des personnes morales n'est aucunement pertinent. La *Loi* permet clairement qu'une association non constituée en corporation agisse à titre de société de gestion. Les règles du mandat permettent à une telle association d'obtenir la gestion du droit à rémunération et d'en confier la perception à d'autres personnes, pour autant que l'instrument par lequel le mandat est accordé respecte les conditions prévues par la législation ou le droit privé.

La vraie difficulté est d'établir l'étendue du répertoire admissible que représentent la SCGDV et la SOGEDAM. Cela exige d'examiner le statut des sociétés membres de la SCGDV.

2. Do NRCC and SOGEDAM represent the rights holders they claim to represent?

As stated earlier, it is incumbent on the collectives who claim royalties for the use of sound recordings to show that they do represent the repertoire they claim. CAB argues that both collectives have fallen short in this respect. It maintains that NRCC failed to establish that it represents any Canadian performers as well as any non-Canadian rights holders. It also argues that SOGEDAM failed to demonstrate the extent to which it represents any repertoire actually played by Canadian commercial radio stations. Consequently, CAB claims that the repertoire properly before the Board, consisting only of the Canadian makers' share of the remuneration right, represents only 15 per cent of all sound recordings played by radio stations, or half the 30 per cent Canadian content requirement currently imposed by the CRTC on commercial radio stations.

CAB's challenge focussed on NRCC's entitlement to represent Canadian as well as foreign performers: the former, because of the instrument used by AFM and APRS to acquire the rights, and the latter, because NRCC (through ArtistI) had not yet entered into reciprocal agreements with foreign societies.

There is little doubt that SOGEDAM administers the repertoire it says it does. The problem was more with NRCC and the way it claimed to have secured rights.

a. *Makers' rights and NRCC*

According to the uncontradicted testimony of Mrs. Lucie Beauchemin, AVLA and SOPROQ represent virtually all Canadian producers. Members of AVLA have signed non-exclusive agency agreements, while members of SOPROQ have authorized it to act for them by way of assignment. In turn, NRCC holds its rights as a result of AVLA and SOPROQ having become members of NRCC.

2. La SCGDV et la SOGEDAM représentent-elles les titulaires dont elles se réclament?

Comme on l'a dit précédemment, il incombe aux sociétés qui demandent à recevoir des redevances au titre du droit voisin de démontrer qu'elles représentent effectivement le répertoire dont elles se réclament. L'ACR soutient que ni la SCGDV, ni la SOGEDAM ne se sont acquittées de cette obligation. Elle prétend que la première n'a pu établir sa titularité à l'égard des artistes-interprètes canadiens ou des titulaires de droits étrangers. Elle ajoute que la seconde n'a pu établir l'usage que les stations de radio commerciale font effectivement du répertoire qu'elle représente. L'ACR en conclut que le seul répertoire dont la Commission soit réellement saisie est la part du droit à rémunération revenant aux producteurs canadiens, qui ne représente que 15 pour cent des enregistrements utilisés par les stations de radio commerciale, compte tenu du quota de 30 pour cent de contenu canadien imposé par le CRTC.

Ce que l'ACR conteste d'abord et avant tout, c'est le droit de la SCGDV d'agir au nom des artistes-interprètes canadiens et étrangers : pour les premiers, elle met en cause les moyens utilisés par l'AFM et l'APRS pour obtenir les droits, et pour les seconds, elle invoque le fait que la SCGDV (par le biais d'ArtistI) n'a toujours pas conclu d'accords de réciprocité avec les sociétés étrangères agissant pour leur compte.

Il ne fait aucun doute que la SOGEDAM représente le répertoire dont elle se réclame. C'est plutôt la façon dont la SCGDV prétend avoir acquis certains droits qui pose problème.

a. *Les droits des producteurs et la SCGDV*

Le témoignage non contredit de madame Lucie Beauchemin démontre que l'AVLA et la SOPROQ représentent à toutes fins pratiques l'ensemble des producteurs canadiens. Les membres de l'AVLA lui ont confié des mandats non exclusifs, alors que ceux de la SOPROQ l'ont autorisée par voie de cession. À son tour, la SCGDV détient les droits dont l'AVLA et la SOPROQ ont fait apport en devenant membres de celle-ci.

The uncontradicted testimony of several witnesses also establishes that Canadian producers bring to their collectives not only the rights to their own recordings, but also those to most foreign recordings. Most, if not all foreign masters reach the Canadian market through Canadian producers, who exploit these records in Canada. Canadian independent producers enter into licencing agreements with foreign producers, while the repertoire of the six “majors” is represented in Canada through intercorporate agreements between Canadian and foreign affiliates. There may be a few foreign producers who are not represented according to either model. In their case, NRCC or its members must enter into agreements with foreign collective societies if they intend to represent them in Canada. However, the evidence in these proceedings, and especially NRCC’s music use study (NRCC-21), confirms that the unrepresented repertoire represents no more than five per cent (and probably less) of the eligible repertoire.

It is safe to assume, therefore, that NRCC brings with it to these proceedings almost all of the makers’ rights pursuant to section 19 of the *Act*. The situation is far from that simple, however, with respect to performers’ rights.

b. *Performers’ rights and NRCC*

NRCC has in its repertoire what its members and affiliates have authorized it to manage by way of assignment, grant of licence, appointment as agent or otherwise. Its members and affiliates must themselves have secured the rights from the makers or performers through similar means. Put another way, AFM, APRS and ArtistI can bring to NRCC the rights of their members only if they have secured from them valid authorizations within the meaning of the *Act*. Therefore, it is necessary to look at how they claim to have brought these rights into their repertoires.

Le témoignage non contredit de plusieurs témoins permet aussi de conclure que les producteurs canadiens font apport non seulement des droits qu’ils détiennent sur leurs propres enregistrements, mais aussi de ceux qu’ils détiennent sur la plupart des enregistrements étrangers. Ce sont eux qui acquièrent la totalité ou presque des bandes-maîtresses étrangères pour le marché canadien et qui les exploitent dans ce marché. Les producteurs indépendants canadiens détiennent des licences que leur octroient les producteurs étrangers. Quant au répertoire des six sociétés les plus importantes (les *majors*), il fait l’objet d’ententes inter-corporatives entre filiales canadiennes et étrangères. Il reste sans doute certains producteurs étrangers qui ne sont pas représentés au Canada ni d’une façon, ni de l’autre. En ce qui les concerne, la SCGDV ou ses membres devront s’entendre avec des sociétés de gestion étrangères avant de représenter ces producteurs au Canada. La preuve, particulièrement l’étude déposée sous la cote NRCC-21, permet toutefois de conclure que cette portion du répertoire représente tout au plus cinq pour cent du répertoire admissible.

Pour les fins de la présente affaire, on peut donc tenir pour acquis sans risque de se tromper que la SCGDV détient la quasi-totalité des droits dont jouissent les producteurs en vertu de l’article 19 de la *Loi*. La situation est loin d’être aussi simple à l’égard des droits des artistes-interprètes.

b. *Les droits des artistes-interprètes et la SCGDV*

La SCGDV gère ce que ses sociétés membres et associées l’ont autorisée à gérer «notamment par voie de cession, licence ou mandat». Ces dernières doivent elles-mêmes avoir obtenu des droits des producteurs et artistes-interprètes de la même façon. Autrement dit, l’AFM, l’APRS et ArtistI peuvent faire apport à la SCGDV des droits de leurs membres uniquement si elles-mêmes ont obtenu des autorisations valides au sens où l’entend la *Loi*. Il faut donc se pencher sur la façon dont elles prétendent avoir obtenu ces droits pour leurs répertoires respectifs.

ArtistI was set up by the *Union des artistes* (UDA), which represents mostly French speaking performers, with a view to managing the rights of its singer members. Only it has systematically secured assignments of the remuneration right from the performers it represents.

AFM can claim as members a very large share of Canadian performing musicians. It purports to bring its members' remuneration rights as a result of amendments to its by-laws, intended to give it the power to manage the remuneration right and to acquire such rights from its members.

Article 12, which deals with the rights and duties of members, now provides in its paragraph 20(c), that "The Federation is authorized to act as the representative of musicians for the purpose of collecting and distributing government mandated or other compulsory royalties or remuneration payable to musicians under the laws of the United States, Canada and other countries." Everyone who applies for membership agrees to be bound by the by-laws as they may exist from time to time. AFM argues that this commitment constitutes sufficient authority for it to manage the remuneration right, without having to secure individual contracts of assignment or agency.

ACTRA is an association representing English speaking actors and performers. Its "affiliate", APRS, relies on three amendments to its "parent's" by-laws as foundation for its right to claim status as a collective. The ACTRA membership application form now contains a provision similar to that found in the AFM membership application, whereby the applicant agrees to comply with the by-laws and membership agreements as they may read from time to time. The form also contains a clause purporting to irrevocably assign the remuneration right to ACTRA Performers Guild (APG) and to its collective society, APRS. Finally, the amending by-law states that "Every current Guild member, as a condition of continued membership,

ArtistI a été créée par l'Union des artistes (UDA), qui représente surtout des artistes-interprètes francophones, dans le but de gérer les droits de ses membres qui sont des chanteurs. Elle seule a obtenu systématiquement des cessions du droit à rémunération de la part des artistes-interprètes qu'elle représente.

Sont membres de l'AFM la presque totalité des musiciens canadiens. L'AFM soutient que des modifications apportées à ses règlements administratifs visant l'acquisition et la gestion du droit à rémunération de ses membres lui permettent de faire apport de ces droits. L'article 12, qui traite des droits et obligations des membres, prévoit maintenant à son paragraphe 20(c), que [TRADUCTION] «La fédération est autorisée à agir à titre de représentante des musiciens aux fins de percevoir et de distribuer les redevances et droits à rémunération obligatoires, y compris ceux qui sont imposés par un gouvernement, que détiennent les musiciens en vertu des lois des États-Unis, du Canada ou d'autres pays.» Quiconque demande à en devenir membre consent par ailleurs à se conformer aux règlements administratifs tels que libellés ou tels qu'ils pourraient l'être à l'avenir. L'AFM prétend que cet engagement lui permet de faire apport du droit à rémunération sans qu'elle ait besoin de conclure des ententes individuelles de mandat ou de cession avec ses membres.

L'ACTRA représente les artistes-interprètes de langue anglaise. Sa «filiale», l'APRS, dit fonder son statut de société de gestion sur trois modifications aux règlements administratifs de sa «société mère». Le formulaire d'adhésion à l'ACTRA contient désormais une disposition semblable à celle qu'on retrouve dans celui de l'AFM en ce qui concerne l'obligation de se conformer aux règlements administratifs tels que libellés ou tels qu'ils pourraient l'être à l'avenir. Le formulaire comporte par ailleurs une disposition qui vise à céder à titre irrévocable le droit à rémunération à l'ACTRA Performers Guild (APG) et à sa société de gestion, l'APRS. Enfin, les règlements administratifs modifiés stipulent que [TRADUCTION] «Tout membre actuel de la

shall be deemed to have executed the Application form as amended ... or as otherwise amended from time to time.” Contrary to AFM, APRS has sought (and in some cases, obtained) exclusive and irrevocable five-year agency contracts from its members.⁶

For the following reasons, NRCC’s title is deficient with respect to most of the purported repertoires of APRS and AFM.

Purported acquisition of performers’ rights through by-laws does not constitute authorization by way of assignment or grant of licence, given that some of the conditions set out by the *Act*, notably at paragraph 13(4), have not been met.

On the other hand, the *Act* sets out no conditions for authorization by way of appointment as one’s agent. Therefore, the general conditions of common law and *droit civil* apply and the validity of the appointment will be assessed according to general rules of private law. Having looked at those rules, the Board concludes that purported acquisition of performers’ rights through by-laws does not constitute authorization by way of appointment as one’s agent.⁷

The forms of agency that could apply under the circumstances are agency by contract or by ratification. Agency by contract can be express, implied, usual or customary. There is no express agency where title is claimed through a simple amendment to by-laws. Whether there may be an implied contractual agency will depend on whether managing remuneration rights is necessary for, and ordinarily incidental to carrying out APG’s or AFM’s express authority according to the usual way in which such authority is executed. This is doubtful, at least as far as those members who have not signed the new application forms: the previous forms contained no allusion to management of performing rights. Finally, there is no usual or customary agency here, since these concepts refer to special rules dealing with either agents in a specific trade,

guilde qui entend le demeurer est réputé avoir signé le formulaire d’adhésion tel qu’il a été modifié par le présent règlement, ou tel qu’il pourrait être libellé à l’avenir.» Contrairement à l’AFM, l’APRS a demandé et dans certains cas, obtenu des mandats exclusifs et irrévocables de cinq ans de la part de ses membres.⁶

Pour les raisons qui suivent, la Commission conclut que la SCGDV ne représente pas la plus grande partie du répertoire dont se réclament l’APRS et l’AFM.

La prétendue acquisition des droits des artistes-interprètes par le biais de règlements administratifs ne constitue pas une autorisation par voie de cession ou licence, certaines des conditions prévues par la *Loi*, entre autres au paragraphe 13(4), n’ayant pas été remplies.

Par contre, la *Loi* ne prévoit pas de conditions en ce qui concerne l’autorisation accordée par voie de mandat. Il faut donc s’en remettre aux règles générales de droit privé pour établir s’il y a bien mandat. Après avoir examiné ces règles, la Commission en vient à la conclusion que la prétendue acquisition des droits des artistes-interprètes par le biais de règlements administratifs ne constitue pas davantage une autorisation par voie de mandat.⁷

Les formes de mandat qui pourraient s’appliquer à l’espèce sont le mandat contractuel et le mandat par voie de ratification. Le mandat contractuel peut être exprès, implicite, habituel ou coutumier. Comme les sociétés se réclament uniquement d’une modification à leurs règlements administratifs, il ne peut s’agir d’un mandat exprès. Il y aura mandat contractuel implicite si la gestion du droit à rémunération constitue un accessoire nécessaire aux pouvoirs exprès des sociétés, compte tenu de la façon dont les accords de ce type sont habituellement formulés. Cela est peu probable dans le cas présent, à tout le moins à l’égard des membres qui n’ont pas signé le nouveau formulaire d’adhésion, les formulaires antérieurs ne faisant aucune allusion à la gestion des droits d’exécution. Enfin, il ne peut s’agir de mandat usuel ou coutumier, qui vise le cas où une

profession or business or agency flowing from special rules in a specific market.

Agency by ratification requires two conditions. First, before ratification occurs, the principal must be aware of all the material facts; assuming that AFM and APRS may have notified their members of their actions through various bulletins, this is hardly satisfactory. Second, the agent must purport to act on behalf of an identified, or identifiable principal and only that principal can ratify the act. NRCC offered no evidence that performers were beating a path to ratify the decision of AFM or APRS to “secure” their members’ remuneration rights and to ask NRCC to administer them.

APRS and AFM may also have been authorized by their members to administer their neighbouring rights through other means. This is an obvious reference to all other ways in which common law and *droit civil* allow a person to transfer rights. These would include subrogation, gift, transfer through wills, etc. None of these apply here.

The issue of whether an association can, through its by-laws, appropriate its members’ neighbouring rights will be determined according to applicable rules governing associations.⁸ NRCC stated that it was not aware of any principle in the law of agency preventing an association from obtaining, through a change in its by-laws, and without consulting its members individually, the agency for all its members’ remuneration rights. In the Board’s view, NRCC is approaching the issue from the wrong end. When one is dealing with a right to income flowing from statute, the redirection of that income requires express consent of the interested party or, at least, a clear principle of law. NRCC pointed to none.

personne agit à titre de mandataire dans des domaines commerciaux ou professionnels bien précis ou encore, de mandats découlant de règles spéciales gouvernant certains marchés.

Deux conditions sont nécessaires pour qu’il y ait mandat par voie de ratification. Le mandant doit d’abord être au courant de tous les faits pertinents avant que la ratification intervienne; en supposant même que l’AFM et l’APRS aient avisé leurs membres par voie de communiqué des mesures qu’elles entendaient prendre, cela pourrait difficilement suffire. Le mandataire doit ensuite déclarer agir pour le bénéfice d’un tiers identifié ou identifiable qui, seul, peut ratifier les gestes que le mandataire a posés. Rien dans la preuve présentée par la SCGDV ne permet de croire que les artistes-interprètes se pressent pour endosser la décision de l’AFM ou de l’APRS visant à s’approprier leur droit à rémunération et à demander à la SCGDV de les gérer.

L’APRS et l’AFM pourraient aussi prétendre avoir été autorisées à administrer les droits voisins de leurs membres par d’autres moyens. Le «notamment» dans la définition pertinente renvoie de toute évidence aux autres modes de transmission des droits prévus par le droit privé : subrogation, don, succession et ainsi de suite. Rien de cela n’est applicable ici.

Pour savoir si une association peut s’approprier les droits voisins de ses membres par le biais de ses règlements administratifs, il faut s’en remettre au droit des associations.⁸ La SCGDV soutient ne connaître aucun principe du droit des mandats empêchant une association de procéder comme elle l’a fait sans consulter chacun de ses membres. La Commission est d’avis que la SCGDV aborde le problème sous le mauvais angle. On ne peut prétendre s’approprier le droit à un revenu découlant de la loi sans le consentement exprès de l’intéressé ou, à tout le moins, sans s’appuyer sur un principe de droit clair. Or, la SCGDV n’en a cité aucun.

By-laws normally deal with the pursuit of the association's common goals. What may be acceptable when dealing with payments (such as residuals) which have accrued as a matter of contract through the efforts of the association in the pursuit of its goals is not acceptable when dealing with the management or acquisition of specific entitlements in the nature of property rights accrued by the effect of law to an association's members. AFM and APRS can no more take possession of the remuneration right in the way they purport to have done than they can in the same manner declare that they own other property of their members.

It may be possible to secure administration of performers' rights through a specifically worded clause in an association's membership contract. This can be distinguished from a mere statement that members are bound by the association's by-laws, which is not specific enough to allow the association to secure such administration. By contrast, provisions that clearly put potential members on notice that their neighbouring rights will be managed by the association ought to be acceptable under the *Act*, although they may very well constitute a questionable practice under competition legislation. This APRS and AFM have done with respect to some, but not most, of their members.

In these matters, it is important to understand the distinction between the powers ACTRA and AFM enjoy as a bargaining agent and those they have as simple associations of persons. Bargaining agents are not automatically collective societies. Moreover, when before the Board, collective societies do not bring with them the powers and privileges they may enjoy as bargaining agents pursuant to labour or status of the artist legislation. There may be some crossover points. Thus, ACTRA or AFM may be able to sanction members who refuse to let them manage their rights or who have already authorized others to act on their behalf. In doing so, they would be acting as bargaining agents, not as collective societies. In the end, the fact remains that they have not successfully secured the necessary authorizations in the first place.

Normalement, les règlements administratifs d'une association traitent de la poursuite de buts communs. Ce qui peut être acceptable à l'égard de versements de nature contractuelle obtenus grâce aux efforts de l'association dans le cadre de la poursuite de ses objets (par exemple, les droits de suite) ne l'est pas lorsqu'il s'agit de la gestion ou de l'acquisition de bénéfices des membres de l'association assimilables à des droits de propriété et qui découlent de la loi. L'AFM et l'APRS ne peuvent pas plus s'approprier le droit à rémunération de la façon dont elles prétendent l'avoir fait qu'elles pourraient de la même manière s'approprier d'autres biens appartenant à leurs membres.

Une simple déclaration portant que les membres sont liés par les règlements administratifs de l'association n'est pas suffisamment précise pour lui permettre de s'approprier la gestion de leurs droits voisins. Par contre, une association peut sans doute y arriver en incluant dans son contrat d'adhésion une disposition expresse à cet effet. Une disposition avertissant clairement un postulant que ses droits voisins seront administrés par l'association devrait suffire aux fins de la *Loi*, bien qu'elle puisse représenter une pratique commerciale douteuse aux fins du droit de la concurrence. L'APRS et l'AFM n'ont obtenu des autorisations de ce genre que d'une minorité de leurs membres.

Lorsqu'on se penche sur cette question, il faut bien faire la distinction entre les pouvoirs dont l'ACTRA et l'AFM jouissent à titre d'agents négociateurs et ceux dont elles disposent à titre de simples associations de personnes. Être agent négociateur ne suffit pas pour prétendre au rôle de société de gestion. Qui plus est, la société de gestion qui traite avec la Commission ne dispose pas des pouvoirs et privilèges dont elle jouit par ailleurs à titre d'agent négociateur en vertu des législations du droit du travail ou du statut de l'artiste. Des recoupements sont toujours possibles. L'ACTRA ou l'AFM pourraient imposer des sanctions aux membres qui refusent de leur confier la gestion de leurs droits ou qui l'ont déjà confiée à d'autres. Dans un tel cas, c'est l'agent négociateur et non la société de gestion qui agirait. Cela ne change toutefois rien au fait qu'elles ne détiennent tout simplement pas les autorisations qui s'imposent.

Given what has been said, there is no need to go into the various arguments CAB raised with respect to incorporation by reference of unsigned documents into a contract and other related issues. Neither is there any need to discuss the obvious proposition that SOGEDAM does properly represent those AFM members who have authorized it to act on their behalf by way of assignment.

Consequently, the Board finds that the only performers' rights that NRCC has secured through APRS and AFM are those of persons who have executed an instrument (be it an assignment or a membership form) which expressly deals with the remuneration right.

This does not, however, dispose of the issue of what is included in NRCC's repertoire.

- c. *Is NRCC nevertheless authorized to manage the remuneration rights of performers who have not chosen it as their collective society?*

To determine which performers' performances are in NRCC's repertoire requires an examination of the nature of the rights granted to makers and performers pursuant to section 19 of the *Act*. Two persons (or groups of persons) are granted a remuneration right on account of a single act, the performance or telecommunication of a sound recording. In all cases, the remuneration is paid to one person, and one person only. Once paid, royalties are always split equally between the performers and makers. These are all the markings of a legal relationship involving a single debt owned by two groups of joint and several creditors.⁹ Knowing this, it becomes easier to determine what happens when not all those who are entitled to share in the remuneration right in a sound recording are properly represented by a collective society that has filed a proposed tariff.

Compte tenu de ce qui précède, il n'y a pas lieu de traiter des prétentions de l'ACR portant sur l'incorporation par renvoi de documents et autres questions du genre qu'elle a soulevées. De même, il est évident que la SOGEDAM est bien-fondée à représenter les membres de l'AFM qui l'ont autorisée par voie de cession.

Par conséquent, les seuls droits des artistes-interprètes que la SCGDV détient par le biais de l'APRS et de l'AFM sont ceux de personnes ayant signé une cession, un contrat d'adhésion ou autre document qui aborde expressément la question du droit à rémunération.

Cela ne dispose pas pour autant de la question de savoir ce qui fait partie du répertoire de la SCGDV.

- c. *La SCGDV est-elle néanmoins autorisée à gérer le droit à rémunération des artistes-interprètes qui n'ont pas retenu ses services en tant que société de gestion?*

Pour décider quelles prestations font partie du répertoire de la SCGDV, il faut d'abord établir la nature des droits que l'article 19 de la *Loi* accorde aux producteurs et aux artistes-interprètes. Deux personnes ou groupes de personnes se voient accorder un droit à rémunération découlant d'une utilisation unique, soit l'exécution ou la télécommunication d'un enregistrement sonore. La rémunération est toujours versée à une seule personne et ensuite partagée par moitié entre artistes-interprètes et producteurs. Voilà bien les caractéristiques essentielles d'un rapport juridique impliquant une seule dette due à deux groupes de créanciers solidaires.⁹ Cela étant, il devient plus aisé de déterminer ce qu'il advient lorsque certains titulaires du droit à rémunération à l'égard d'un enregistrement donné ne sont pas représentés directement par une société de gestion ayant déposé un projet de tarif.

CAB argues that users should pay only on account of performers and makers who have duly authorized a collective society that has filed a proposed tariff. As a result, where the maker is duly represented but the performer is not, only half the appropriate royalty would be payable. This approach is incompatible with the notion that we are dealing with joint and several creditors. It also creates a conundrum in the application of subsection 19(3) of the *Act*, which provides for the division of any payment once it has been made.

At the other end of the spectrum, one finds the approach favoured by NRCC. According to this, all qualifying sound recordings could be the object of a tariff, even those for which all of the underlying remuneration rights were outside the repertoire of a collective that has filed a tariff. This solution can be discarded because it makes subsection 67.1(4) of the *Act* and the statutory imposition of collective administration of performing rights in sound recordings nugatory. Only represented recordings are entitled to remuneration.

The correct interpretation is that a sound recording is properly before the Board as long as a collective society that has filed a proposed tariff represents at least one person entitled to share in the remuneration for the performance or telecommunication of that recording. This interpretation is based on the proposition that a joint and several creditor normally enjoys three complementary rights: the right to seek payment of the debt in its entirety, the right to keep his share of the proceeds and to hold that of his co-creditors if he obtains payment of the debt, and the right to claim his share of the proceeds, where the debt has been paid to his co-creditors. This interpretation clearly meets all the requirements set out in the *Act*. It also conforms to usual notions involved with joint and several creditors.

First, it gives meaning to the statutory imposition of collective administration of performing rights in sound recordings. It requires that a tariff be filed by one of the joint creditors in order for a recording to be properly before the Board.

L'ACR soutient que l'obligation de verser des redevances ne vise que les artistes-interprètes et producteurs ayant dûment autorisé une société de gestion qui a déposé un projet de tarif. Lorsque seul le producteur est dûment représenté, c'est la moitié de la redevance qui devrait être versée. Or, cette prétention ne peut tenir si nous avons affaire à des créanciers solidaires. En outre, elle donne un sens absurde au paragraphe 19(3) de la *Loi*, qui exige le partage de tout versement après qu'il a été fait.

À l'opposé, on retrouve l'interprétation que défend la SCGDV. Selon elle, tous les enregistrements sonores admissibles peuvent faire l'objet du tarif, même si les droits à rémunération afférents ne font pas partie du répertoire d'une société ayant déposé un projet de tarif. Il faut écarter cette solution. Elle rend inopérants le paragraphe 67.1(4) de la *Loi* et l'exigence que les droits d'exécution sur les enregistrements sonores soient gérés collectivement. Seuls les enregistrements représentés ont droit à une rémunération.

L'interprétation qu'il faut retenir est que la Commission est saisie d'un enregistrement sonore dès lors qu'une société de gestion ayant déposé un projet de tarif représente au moins un des titulaires du droit à rémunération pour l'exécution ou la télécommunication de l'enregistrement en question. Cette interprétation découle des droits complémentaires que détient tout créancier solidaire : celui de se faire payer la totalité de la dette, celui d'en garder la part qui lui revient tout en détenant celle de ses co-crédanciers s'il a reçu le paiement, et celui de réclamer sa quote-part si c'est un autre co-crédancier qui a reçu le paiement. Cette interprétation répond clairement aux exigences de la *Loi*. Elle est aussi conforme aux principes généralement applicables aux créances solidaires.

Premièrement, elle respecte l'exigence que les droits d'exécution sur les enregistrements sonores soient gérés collectivement. Le dépôt d'un projet de tarif par l'un ou l'autre des co-crédanciers opère saisine de la Commission.

Second, it allows one of the joint creditors to act as a sort of agent of the other. Joint and several creditors commonly act in this way for one another.

Third, this interpretation explains in part the wording of subparagraph 68(2)(a)(iii) of the *Act*, which imposes the single payment obligation when “examining a proposed tariff for the [performance or communication] of performer’s performances of musical works, or of sound recordings embodying such performer’s performances”. If one accepts that a society administering performers’ rights acquires the right to collect the makers’ share of the royalties, the society that files a tariff for the performer’s right also files a tariff for the right to collect the maker’s share, subject to the duty to remit that share to the maker, and vice versa.

Consequently, a sound recording is properly before the Board in these proceedings as long as either the maker or the performer is duly represented by NRCC or SOGEDAM. Timely filing of a proposed tariff on account of either of the joint creditors is sufficient to trigger liability for the whole of the debt, irrespective of what the other creditor did. Consequently, NRCC can claim the entire remuneration for the use of a sound recording whose maker it represents even if the performers are not represented, either because of some defect in the appointment (e.g. AFM) or simply because agreements with foreign societies are still being negotiated (e.g. ADAMI). The very nature of the rights vesting in makers and performers as a result of section 19 of the *Act* makes it possible that a recording be entitled to remuneration even though some of the persons entitled to share in the remuneration may not themselves have authorized a collective to represent them.¹⁰

Deuxièmement, elle permet à l’un des co-créanciers d’agir en quelque sorte pour le compte des autres. Il est courant que des créanciers solidaires agissent ainsi pour le bénéfice de leurs co-créanciers.

Troisièmement, elle explique en partie le libellé du sous-alinéa 68(2)(a)(iii) de la *Loi*, qui exige le versement unique «aux fins d’examen des projets de tarifs déposés pour [l’exécution ou la télécommunication] de prestations d’œuvres musicales ou d’enregistrements sonores constitués de ces prestations». Si, comme la Commission le croit, la société qui gère le droit à rémunération d’un artiste-interprète acquiert celui de percevoir la quote-part du producteur, le dépôt par celle-ci d’un projet de tarif pour le compte de l’artiste-interprète vaut également pour le compte du producteur, sujet à l’obligation de partage, et vice-versa.

La Commission est donc saisie d’un enregistrement sonore dans la présente affaire dès lors que la SCGDV ou la SOGEDAM représente soit le producteur, soit l’artiste-interprète. Le dépôt en temps voulu d’un projet de tarif pour le compte de l’un ou l’autre des co-créanciers vaut pour la totalité de la créance, sans égard au comportement de l’autre créancier. Par conséquent, la SCGDV peut demander à recevoir toute la rémunération à l’égard de chaque enregistrement dont elle représente le producteur même si elle ne représente pas les artistes-interprètes qui y figurent, soit parce qu’il n’y a pas eu autorisation valable aux yeux de la *Loi*, comme c’est le cas, par exemple, pour les membres de l’AFM, soit tout simplement parce que les ententes nécessaires n’ont toujours pas été conclues avec les sociétés étrangères, comme c’est le cas notamment pour les membres de l’ADAMI. La nature même des droits que l’article 19 de la *Loi* confère aux producteurs et aux artistes-interprètes fait en sorte qu’un enregistrement emporte le droit à rémunération même si certains co-titulaires n’ont pas eux-mêmes autorisé une société à les représenter.¹⁰

Given the Board's earlier finding that NRCC brings with it the makers' share of virtually all the eligible recordings, it can safely be stated that the performers' share of this repertoire is equally properly before the Board in these proceedings.

3. To what extent do commercial radio stations use the eligible repertoire?

In order to help the Board establish the importance of the use made by radio stations of the eligible repertoire, NRCC filed a music use study on which it relies for its conclusion that eligible sound recordings account for 49.3 per cent of all use of sound recordings by commercial radio stations. The study involved identifying the sound recordings used by a weighted, stratified sample of radio stations over a test period. The music use data provided with the report identifies, with respect to each recording, the station on which it was aired, the name of the artist(s), the title of the song, the number of plays and the source (name of label). It also indicates whether, according to NRCC, the recording is eligible or not.

Producer members of AVLA and SOPROQ carried out most of the task of identifying titles, although in some cases, labels and independent artists were asked to help. In this respect, the study is not as complete as one might have hoped. It does not indicate the country of origin or the age of the recording. Neither does it allow the reader to establish whether a sound recording was determined to be eligible because of the nationality of the maker or because of the country in which it was made. Finally, the eligibility status of some 4.9 per cent of titles could not be ascertained. These include so-called "imports" from non-Rome countries, but also some recordings that appeared to have been made in Rome countries and were therefore probably eligible, but whose status could not be defined. These titles were attributed to each category in the same proportion that was observed among classified titles. On the whole, however, the

Compte tenu que la Commission a déjà conclu que la SCGDV gère la quote-part des producteurs de pratiquement tous les enregistrements admissibles, on peut dire sans crainte de se tromper que la Commission est également saisie de la quote-part revenant aux artistes-interprètes de ces enregistrements.

3. Quel usage les stations de radio commerciale font-elles du répertoire admissible?

Afin d'aider la Commission à déterminer quel usage les stations de radio font du répertoire admissible, la SCGDV a déposé une étude tendant à démontrer que le répertoire admissible représente 49,3 pour cent de l'ensemble des enregistrements sonores utilisés par les stations de radio commerciale. Pour réaliser cette étude, on a analysé les enregistrements utilisés durant une période témoin par plusieurs stations de radio, choisies selon un échantillonnage pondéré et stratifié. Les données d'utilisation de musique identifient, pour chaque enregistrement, la station qui l'a diffusé, le nom du ou des artistes-interprètes, le titre de la chanson, le nombre de diffusions et la maison de disque. On indique également si, selon la SCGDV, l'enregistrement est ou non admissible.

Pour l'essentiel, ce sont les producteurs membres de l'AVLA et de la SOPROQ qui ont identifié les enregistrements. Dans certains cas, les maisons de disque et les artistes-interprètes indépendants ont été mis à contribution. Sous ce rapport, l'étude n'est pas aussi exhaustive qu'on aurait pu l'espérer. Elle ne précise pas le pays d'origine ou la date de l'enregistrement. Elle ne permet pas non plus au lecteur d'établir si l'admissibilité de l'enregistrement découle de la nationalité du producteur ou de l'endroit où il a été confectionné. Enfin, dans 4,9 pour cent des cas, on ne sait pas si les enregistrements sont admissibles ou non. Cela comprend non seulement les disques importés directement de pays non-signataires de la Convention de Rome, mais aussi certains titres provenant apparemment de pays signataires et donc probablement admissibles, mais qu'on n'a pas pu identifier avec certitude. On a donc réparti ces enregistrements dans les

identification process appears to have been done seriously and conservatively.

CAB did not conduct its own music use study, and opted instead to review and critique NRCC's study. The critique addressed such issues as the choice of stratification system and the weighting of stations in the determination of the random sample. CAB did not succeed in discrediting NRCC's methodology and findings. Furthermore, its own analysis proved to be flawed in several respects which were correctly identified in NRCC's argument and need not be repeated here. Consequently, CAB's analysis was of little use.

For its part, in an attempt to identify the importance of the French repertoire on radio stations, SOGEDAM used a number of sets of data to determine, first, the percentage of airtime dedicated to non-Canadian, French selections, and then the proportion of those recordings that are part of its repertoire.¹¹ For reasons that will become clear later, there is no need to analyse in detail SOGEDAM's claim. Suffice it to say that SOGEDAM's analysis is not very reliable, and involves some miscalculations. As a result, it cannot be used to determine the percentage of sound recordings used on Canadian commercial radio stations that are part of the French repertoire.

The Board accepts NRCC's conclusion that qualifying sound recordings account for 49.3 per cent of all use of sound recordings by commercial radio stations. The Board also accepts NRCC's evidence that it represents the makers' share of at least 95 per cent of these recordings. Given NRCC's willingness to accept a ruling according to which NRCC's repertoire accounts for 45 per cent of all use of sound recordings by commercial radio stations, the Board so finds.

mêmes proportions que ce qui avait été constaté à l'égard des enregistrements identifiés. Cela dit, dans l'ensemble, il semble que l'analyse ait été effectuée de façon sérieuse et conservatrice.

L'ACR n'a pas effectué d'étude distincte, se contentant de revoir et de critiquer celle de la SCGDV. Ses critiques ont porté sur des sujets tels le choix de la stratification et de la pondération utilisées lors de l'échantillonnage des stations. L'ACR n'a pas réussi à discréditer la méthodologie et les conclusions de la SCGDV. Qui plus est, sa propre analyse s'est avérée mal fondée à plusieurs égards, tel que la SCGDV l'a relevé dans son argumentation écrite, et qu'il n'y a pas lieu de reprendre ici. L'analyse de l'ACR est donc peu utile.

Quant à elle, dans le but d'établir l'utilisation du répertoire français sur les ondes canadiennes, la SOGEDAM a analysé, à partir de plusieurs ensembles de données, le pourcentage de temps d'antenne consacré aux enregistrements étrangers de langue française, puis la part qui lui revient de ces enregistrements.¹¹ Pour des motifs qui deviendront clairs par la suite, il n'est pas nécessaire de se livrer à une analyse détaillée de ces prétentions. On se contentera de dire que l'analyse semble peu fiable et comporte certaines erreurs de calcul. Elle ne peut donc servir à établir l'étendue du répertoire de la SOGEDAM utilisé par les stations de radio commerciale canadiennes.

La Commission accepte la conclusion de la SCGDV selon laquelle le répertoire admissible représente 49,3 pour cent de l'usage d'enregistrements sonores par les stations de radio commerciale. Elle accepte aussi la preuve de la SCGDV démontrant qu'elle représente les producteurs d'au moins 95 pour cent de ces enregistrements. Puisque la SCGDV se dit prête à accepter un tarif fondé sur un répertoire représentant 45 pour cent de l'utilisation d'enregistrements sonores par les stations de radio commerciale, c'est ce chiffre qui sera utilisé pour établir le tarif.

C. What account should be taken of the Canadian broadcasting policy?

Subparagraph 68(2)(a)(ii) of the *Act* requires that “the tariff does not, because of linguistic and content requirements of Canada’s broadcasting policy set out in section 3 of the *Broadcasting Act*, place some users that are subject to that Act at a greater financial disadvantage than others”. Based on the record of these proceedings, it appears that French language radio stations use the eligible repertoire for more than three-quarters of their airtime, while their English counterparts do so for less than half of the time. Absent this statutory requirement, a case could be made for a tariff that is significantly higher for the first stations than for the second. The issue is how to apply this requirement in a manner that is fair to both users and rights owners.

The relevant parts of section 3 of the *Broadcasting Act* read as follows:

3. (1) It is hereby declared as the broadcasting policy for Canada that

...

(b) the Canadian broadcasting system, operating primarily in the English and French languages ... provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;

(c) English and French language broadcasting, while sharing common aspects, operate under different conditions and may have different requirements;

...

(k) a range of broadcasting services in English and in French shall be extended to all Canadians as resources become available;

C. Comment faut-il tenir compte de la politique canadienne en matière de radiodiffusion?

Le sous-alinéa 68(2)(a)(ii) de la *Loi* stipule que le tarif ne peut avoir «pour effet, en raison d’exigences différentes concernant la langue et le contenu imposées par le cadre de la politique canadienne de radiodiffusion établi à l’article 3 de la *Loi sur la radiodiffusion*, de désavantager sur le plan financier certains utilisateurs assujettis à cette loi». Le dossier de la présente affaire révèle que le répertoire admissible représente environ les trois quarts du temps d’antenne des stations de langue française, par opposition à la moitié pour les stations de langue anglaise. N’eût été l’exigence du sous-alinéa 68(2)(a)(ii), on aurait pu soutenir que les premières stations devraient verser des redevances passablement plus élevées que les secondes. Reste à déterminer comment cette exigence peut être satisfaite d’une façon qui soit équitable tant pour les utilisateurs que pour les titulaires de droits.

Les passages pertinents de l’article 3 de la *Loi sur la radiodiffusion* prévoient ce qui suit :

3. (1) Il est déclaré que, dans le cadre de la politique canadienne de radiodiffusion :

...

b) le système canadien de radiodiffusion, ... offre, par sa programmation essentiellement en français et en anglais, un service public essentiel pour le maintien et la valorisation de l’identité nationale et de la souveraineté culturelle;

c) les radiodiffusions de langues française et anglaise, malgré certains points communs, diffèrent quant à leurs conditions d’exploitation et, éventuellement, quant à leurs besoins;

...

k) une gamme de services de radiodiffusion en français et en anglais doit être progressivement offerte à tous les Canadiens, au fur et à mesure de la disponibilité des moyens;

...

(2) It is further declared that the Canadian broadcasting system constitutes a single system...

CAB argued that the only way to address subparagraph 68(2)(a)(ii) of the *Act* is to discount any incremental use of the eligible repertoire due to the different application of Canadian broadcasting policy to French- and English-language stations. Put another way, CAB would have the Board letting stations use the eligible repertoire for free when they use more than other stations in order to comply with that policy. For this, CAB relies on two propositions. First, French-language broadcasters cannot suffer financial disadvantage simply because of the linguistic requirements of the *Broadcasting Act*. Second, the solution cannot lie in all stations paying at the same rate based on the whole industry's use of the eligible repertoire, as this would result in English-language stations paying a tariff which reflects a level of use higher than theirs.

CAB's interpretation is incorrect. The *Act* does not require that the Board ignore or discount the impact of the regulatory environment on use patterns. Instead, it mandates that users not be put at a *greater* financial disadvantage *than others* because of requirements of Canada's broadcasting policy. This is achieved if all users in a given group share equally the financial burden imposed as a result of the policy, as long as imposing that burden is fair. The cost of the equalization exercise required by this provision can be imposed on the industry, especially where the very policy that the Board is asked to consider treats all members of that industry as part of a "single system".

CAB's interpretation is also dangerous. Subparagraph 68(2)(a)(ii) of the *Act* speaks not only of linguistic, but also of content requirements. Pushed to its logical conclusion,

...

(2) Il est déclaré en outre que le système canadien de radiodiffusion constitue un système unique...

L'ACR soutient que la seule façon d'aborder le sous-alinéa 68(2)(a)(ii) de la *Loi* est de ne pas tenir compte de la part d'utilisation du répertoire admissible découlant de l'application différente de la politique canadienne en matière de radiodiffusion aux stations de langue française et de langue anglaise. Autrement dit, l'ACR voudrait que la Commission permette aux stations tenues d'utiliser une partie plus grande du répertoire admissible pour se conformer à cette politique, de le faire gratuitement. Cette prétention se fonde sur deux propositions. La première veut que les radiodiffuseurs de langue française ne puissent être désavantagés sur le plan financier uniquement à cause des exigences de la *Loi sur la radiodiffusion* en matière de langue. La seconde est que le taux des redevances ne saurait être fondé sur l'utilisation du répertoire admissible par l'ensemble de l'industrie, car les stations de langue anglaise se trouveraient à payer plus que leur niveau propre d'utilisation.

L'ACR se trompe. La *Loi* n'exige pas que la Commission ignore ou ne tienne pas compte de l'impact du contexte réglementaire sur le niveau d'utilisation. Elle exige plutôt que certains utilisateurs ne soient pas désavantagés *par rapport à d'autres* à cause des exigences de la politique canadienne en matière de radiodiffusion. On y arrive si tous les utilisateurs faisant partie d'un groupe donné supportent également le fardeau découlant de cette politique, en autant que le fardeau soit équitable. Le coût attribuable à cet exercice d'égalisation peut être imposé à l'ensemble de l'industrie, d'autant plus que la politique même dont la Commission doit tenir compte déclare que tous ses membres constituent un «système unique».

L'interprétation mise de l'avant par l'ACR comporte par ailleurs des risques évidents. Le sous-alinéa 68(2)(a)(ii) de la *Loi* traite non seulement de langue, mais aussi de contenu. La

CAB's approach would require that the Board provide commercial radio stations with a rebate on account of that part of the eligible repertoire they play not as a matter of choice, but to comply with Canadian content requirements. The regime does not require that rights owners subsidize the radio industry on account of regulatory requirements; in fact, to do so would be unfair, especially given the provisions made in the *Act* to cushion the impact of the new royalties.

Consequently, the appropriate way to take into account the Canadian broadcasting policy in this instance is to charge all radio stations the same price, irrespective of the amount of eligible sound recordings used by each individual station, except for two exceptions which will be outlined later.

D. How much should radio stations pay for their use of the properly represented eligible repertoire?

The *Act* requires the Board to fix an "equitable remuneration" for the use of recorded music by radio stations, for the benefit of makers and performers. If, as stated earlier, the tariff is to be fair and equitable to both rights holders and users, fixing the tariff calls for an examination of the value rights holders provide and the benefit users derive from it.

SOGEDAM did not offer any particular rationale for its proposed rate of five per cent. In its final argument, it also supported NRCC's approach and conclusions. Consequently, the following analysis deals only with the arguments put forward by NRCC and by CAB.

1. The approach favoured by NRCC

In developing the models which it offers as support for its proposals, NRCC relied on a number of assumptions. First, the price for neighbouring rights should be that to which a

démarche de l'ACR pourrait mener à l'octroi de rabais pour tenir compte de la part du répertoire admissible que les stations utilisent non pas volontairement, mais pour se conformer aux exigences de contenu canadien. Le régime n'exige pas que les titulaires de droits subventionnent l'industrie de la radio au motif que cette dernière doit répondre à certaines exigences de nature réglementaire; il serait plutôt injuste d'agir ainsi, surtout si l'on tient compte des mesures que la *Loi* prévoit déjà pour réduire l'impact des nouvelles redevances.

Par conséquent, la façon de tenir compte de la politique canadienne en matière de radiodiffusion dans l'espèce est de faire payer le même prix à toutes les stations de radio, sans égard aux niveaux individuels d'utilisation d'enregistrements admissibles, sous réserve de deux exceptions sur lesquelles nous reviendrons plus tard.

D. Combien les stations de radio devraient-elles payer pour l'usage qu'elles font du répertoire admissible dûment représenté?

La *Loi* exige que la Commission établisse «une rémunération équitable» pour l'utilisation de musique enregistrée par les stations de radio, pour le bénéfice des producteurs et artistes-interprètes. Pour établir un tarif qui, comme on l'a déjà annoncé, soit juste et équitable tant pour les titulaires de droits que pour les utilisateurs, il faut se pencher sur la valeur de l'apport des titulaires de droits et sur l'avantage que les utilisateurs en tirent.

La SOGEDAM n'a rien avancé à l'appui du taux de cinq pour cent qu'elle propose. Dans son argumentation finale, elle a soutenu la démarche et les conclusions de la SCGDV. L'analyse qui suit porte donc uniquement sur les prétentions mises de l'avant par la SCGDV et par l'ACR.

1. La démarche que propose la SCGDV

Pour mettre au point les modèles qu'elle offre au soutien de ses propositions, la SCGDV a retenu un certain nombre de postulats. Premièrement, le prix payé pour les droits voisins devrait être celui

willing seller and a willing buyer would agree. Second, commercial stations make little use of live music or public domain recordings. Third, royalties should account for the rights of both makers and performers. Fourth, equitable remuneration should provide a fair return to rights holders for their investment of talent and financial resources, and should reflect the value that broadcasters, as commercial enterprises, derive from making use of sound recordings to earn revenue.

With respect to rights holders' financial commitments, NRCC insisted especially on the costs incurred in producing and promoting an album and on the risks involved in developing a recording artist. NRCC's witnesses also testified that the industry's primary business is to earn revenue from its copyrights, not only to generate record sales.

On the issue of the value radio stations derive from their use of sound recordings, NRCC relied on a number of assertions which it says support the view that advertising revenues of radio stations are dependent on those recordings. This, it says, provides an indication of the essential value of the use of sound recordings to the industry. The "facts" NRCC relied upon include the following. First, music format stations account for the vast majority of radio listening in Canada. Second, music is the engine that drives most commercial radio stations; a majority of people give music as the main reason for listening to radio; most say they would listen less if radio did not play sound recordings. Third, advertisers pay for audiences, and music draws audiences. Fourth, performers provide stations with more value than composers do; stations are star driven and want to be associated with known artists. Fifth, music represents 78.4 per cent of total broadcast time and 88.2 per cent of total program time. Sixth, the royalties of the Society of Composers,

qui serait autrement établi de gré à gré. Deuxièmement, les stations de radio commerciale diffusent peu ou pas de musique en direct ou d'enregistrements faisant partie du domaine public. Troisièmement, les redevances devraient tenir compte tant des droits des producteurs que de ceux des artistes-interprètes. Quatrièmement, une rémunération équitable devrait offrir aux titulaires de droits un rendement équitable pour leur apport en talent et en ressources financières et devrait refléter le bénéfice que les radiodiffuseurs, en tant qu'entités commerciales, tirent de l'utilisation d'enregistrements sonores pour gagner des revenus.

Lorsqu'elle parle des engagements financiers des titulaires de droits, la SCGDV insiste avant tout sur les coûts de production et de promotion d'un album et les risques qu'implique le développement des artistes. Ses témoins ont aussi souligné que l'industrie du disque cherche avant tout à dériver des bénéfices de ses droits d'auteur, et non seulement à générer des ventes d'albums.

Quant aux avantages que les stations de radio tirent de l'utilisation d'enregistrements sonores, la SCGDV s'est fondée sur certaines affirmations qui, selon elle, tendent à prouver que les recettes publicitaires des stations sont directement fonction de cette utilisation. Selon elle, cela indique à quel point l'industrie a besoin de ces enregistrements. À l'appui, elle invoque, entre autres, les «faits» suivants. Premièrement, les Canadiens écoutent avant tout les stations de format musical. Deuxièmement, la musique est le moteur de la plupart des stations de radio commerciale; la majorité des personnes interrogées disent écouter la radio avant tout pour la musique et la plupart affirment qu'elles réduiraient leur écoute s'il y avait moins d'enregistrements sonores. Troisièmement, les annonceurs achètent des auditoires, et c'est la musique qui les attire. Quatrièmement, l'apport des artistes-interprètes a plus de valeur pour les stations que celui des compositeurs; les stations dépendent des vedettes et cherchent à être identifiées à des artistes-

Authors and Music Publishers of Canada (SOCAN) represent about 10 per cent of program expenses.

NRCC then examined a number of pricing models to support the assertion that authors, performers and makers should receive between 18 and 23 per cent of commercial radio stations' advertising revenues, and that the combined value of rights in sound recordings is, at a minimum, 12 per cent. NRCC concluded that, after adjustments to account for the use of non eligible sound recordings and the blanket character of the regime, radio stations should pay 6.06 per cent of their advertising revenues for their use of sound recordings of musical works.

NRCC looked at a number of possible approaches to determine the appropriate royalties. Congruent with its starting proposition on valuation, it offered proxies that all refer to situations where the level of payment for the use of sound recordings is based on mutual agreement between a willing seller and a willing buyer. Each of them is commented upon in turn.

NRCC first noted that music stations spend 29 per cent of their revenues on programming, compared to 49 per cent for low music use stations. Based on this comparison, NRCC argued that suppliers of sound recordings should be able to claim 20 per cent of music stations' revenues. CAB objected to the use of this comparison. Scarcity creates value; talk programming is almost always acquired on an exclusive basis, while music is available to all stations. Moreover, the approach relies on two false assumptions. The first is that the value of an input can be determined by the value of possible, but more costly, substitutes. The second is that all inputs make an equal

interprètes connus. Cinquièmement, la musique représente 78,4 pour cent du temps d'antenne total et 88,2 pour cent du temps de programmation. Sixièmement, les redevances versées à la Société canadienne des auteurs, compositeurs et éditeurs de musique (SOCAN) représentent approximativement 10 pour cent des dépenses de programmation.

La SCGDV a ensuite examiné un certain nombre de méthodes d'évaluation qui, selon elle, tendent à soutenir la proposition voulant qu'ensemble, les auteurs, artistes-interprètes et producteurs devraient recevoir entre 18 et 23 pour cent des recettes publicitaires des stations de radio commerciale, et que la valeur combinée des droits voisins est d'au moins 12 pour cent. Après avoir ajusté cette valeur pour tenir compte des enregistrements non admissibles et du caractère général du régime, la SCGDV en vient à la conclusion que les stations devraient verser 6,06 pour cent de leurs recettes publicitaires pour l'utilisation qu'elles font des enregistrements sonores d'œuvres musicales.

La SCGDV a examiné plusieurs façons d'établir un montant approprié de redevances. Conformément à sa position de départ concernant l'évaluation des droits, les analogies qu'elle a mises de l'avant portent sur des marchés dans lesquels le prix payé pour l'utilisation de l'enregistrement sonore est établi de gré à gré. Chacun de ces modèles fera maintenant l'objet de commentaires.

La SCGDV souligne d'abord que les stations de format musical dépensent 29 pour cent de leurs revenus pour la programmation, par rapport au 49 pour cent dépensé par les stations qui utilisent peu de musique. La SCGDV emploie cette comparaison pour soutenir que les fournisseurs d'enregistrements sonores devraient pouvoir réclamer 20 pour cent des revenus des stations de format musical. L'ACR s'oppose à l'emploi de cette comparaison. La rareté d'un bien en augmente la valeur; la programmation verbale s'achète presque toujours sur une base exclusive alors que toutes les stations ont accès à la même musique. Qui plus est, cette démarche repose sur

contribution to the generation of revenue. The Board agrees with CAB, if only because the notion that the value of non-exclusive recorded music would be close to the value of talk and information programming, if negotiated in a market situation, is unsustainable. Any comparison with television programming costs must also be set aside for the same reason.

NRCC then offered two approaches which yield similar results. Performers and makers receive 15 per cent or more of the retail price of compilation CDs or cassettes on account of the use of pre-recorded performances, while those who supply recorded music to disc jockeys, restaurants and others pay 15 per cent of their gross revenues for a blanket licence to reproduce AVLA's repertoire. NRCC believes that these are particularly relevant comparisons, because they are examples of a commercial exploitation of recorded performances, in a market where there is a willing seller and a willing buyer. CAB objected to these approaches for reasons which need not be repeated here. The Board rejects these proxies; its task is to value the right to broadcast, not the right to reproduce.

Subsidiarily, and even though it did not support using SOCAN's Tariff 1.A as a proxy, NRCC commented on the relative value of neighbouring rights and authors' rights, coming to the conclusion that, all other things being equal, NRCC's royalties should be higher than SOCAN's. In support of this proposition, NRCC provided evidence tending to show that making a sound recording costs approximately 4.5 times what it costs to make a song. The Board agrees with CAB that the cost of making a recording is of little help in establishing the value of a right to play it. Furthermore, the Board is far from convinced that such cost can be established or that

deux prémisses également fausses. La première est que la valeur d'un intrant peut être établie à partir de substituts possibles mais plus coûteux. La seconde veut que tous les intrants contribuent également à générer des revenus. La Commission partage le point de vue de l'ACR, ne serait-ce que parce que l'on ne peut prétendre sérieusement que dans un marché libre, la musique enregistrée accessible à tous se vendrait plus ou moins au même prix que la programmation parlée ou l'information. Pour les mêmes motifs, il faut rejeter toute comparaison avec les coûts de la programmation télévisuelle.

La SCGDV a ensuite mis de l'avant deux méthodes donnant des résultats similaires. Les artistes-interprètes et les producteurs perçoivent 15 pour cent ou plus du prix de vente au détail des disques CD et cassettes représentant des compilations de chansons pré-enregistrées. Quant à ceux qui fournissent de la musique enregistrée aux *disc-jockeys*, aux restaurateurs et à d'autres, ils versent 15 pour cent de leurs recettes brutes pour la licence générale leur permettant de reproduire le répertoire de l'AVLA. La SCGDV croit qu'il s'agit là de comparaisons particulièrement pertinentes, s'agissant d'exemples de l'exploitation commerciale de prestations enregistrées, dans un marché où les transactions se font de gré à gré. L'ACR s'y oppose pour des motifs qu'il n'y a pas lieu de commenter. Pour sa part, la Commission rejette ces comparaisons au motif qu'elles concernent le droit de reproduire et non celui de diffuser.

Subsidièrement, et bien qu'elle s'oppose à l'établissement d'un lien entre le tarif de droits voisins et celui de la SOCAN, la SCGDV s'est livrée à une comparaison à l'égard de la valeur relative des deux droits dans le marché du disque pour conclure que toutes choses égales, la SCGDV devrait recevoir davantage que la SOCAN dans le marché de la radiodiffusion. Elle fonde cette prétention sur une preuve tendant à établir qu'il en coûte environ 4,5 fois plus pour produire un enregistrement sonore que pour écrire une chanson. Tout comme l'ACR, la Commission croit qu'on ne peut établir la valeur à accorder pour la diffusion d'un enregistrement sonore à

the methodology NRCC used in this case was the right one. Finally, SOCAN's own tariff has never been based on the cost of creating a song.

NRCC also filed evidence tending to establish that royalties paid to performers and makers of sound recordings in free market transactions are approximately 2.5 times higher than royalties paid to authors. This issue is discussed later in these reasons.

2. The approach favoured by CAB

CAB supports the view that SOCAN's tariff represents the most useful starting point. In both cases, royalties are payable on account of the same rights flowing from the use of the same input. Although separate and distinct, the fact situations are as close as the Board will ever find. Finally, authors' rights were also originally decided by this Board and recently extended as the result of an agreement.

Having said this, CAB would reduce the rate to 0.7 per cent for several reasons, all of which ought to be rejected.

The importance of the represented repertoire

CAB claims that not all of the eligible repertoire is properly before the Board in these proceedings. This has already been addressed and rejected.

Neighbouring rights are intrinsically less valuable than copyright

This argument is based on two assumptions, both of which the Board rejects.

Thus, CAB relies on the fact that the Rome Convention and the *Act* protect neighbouring rights less than authors' rights, even though some experts, including its own, recognize that there is

partir de ce qu'il en coûte pour le produire. Qui plus est, la Commission n'est pas du tout convaincue qu'il soit possible d'établir ce coût ou encore, que la façon dont la SCGDV s'y est prise soit la bonne. Enfin, le tarif de la SOCAN n'a jamais été fonction de ce qu'il en coûte pour écrire une chanson.

La SCGDV a aussi cherché à établir que les redevances versées aux artistes-interprètes et producteurs d'enregistrements sonores dans des transactions libres étaient environ 2,5 fois plus élevées que celles versées aux auteurs. Nous revenons sur cette question un peu plus loin.

2. La démarche que propose l'ACR

Pour sa part, l'ACR soutient que le tarif de la SOCAN représente le point de départ le plus utile. Dans les deux cas, les redevances sont versées pour les mêmes droits suite à l'utilisation du même produit. Même s'il s'agit de situations différentes, la Commission ne peut espérer trouver meilleure comparaison. Enfin, c'est la Commission qui a évalué les droits d'auteur à l'origine, et ces derniers ont été récemment reconduits suite à une entente.

Cela dit, l'ACR réduirait le taux à 0,7 pour cent, invoquant divers motifs que la Commission rejette.

L'utilisation du répertoire représenté

L'ACR prétend qu'une partie du répertoire admissible n'est pas dûment représentée dans la présente affaire. Cet argument a déjà été examiné et rejeté.

De par leur nature, les droits voisins valent moins que les droits d'auteur

L'argument se fonde sur deux prémisses que la Commission rejette.

Ainsi, l'ACR se fonde sur le fait que la Convention de Rome et la *Loi* accordent moins de droits aux titulaires des droits voisins qu'aux titulaires des droits d'auteur. Pourtant, certains

no formal hierarchy between them. The argument ignores a number of realities. First, the *Act* does not prioritize traditional copyright rights over neighbouring rights. To the contrary, the *Act* includes in its definition of copyright all exclusive rights granted to performers, makers of sound recordings and broadcasters. Second, section 19 rights do not differ substantially from those enjoyed by SOCAN: in both cases, there is no right to prohibit use, and the price for use is set by the Board. Third, the fact that authors enjoy more rights than performers, makers and broadcasters does not mean that their rights are more valuable; each right should be valued on its own merits, using proper valuation methodologies. Fourth, the fact that a performer retains the right to prevent certain uses of his or her performance even where the author consents to the use of the work is incompatible with the prioritization of authors' rights over those of performers.

CAB also argues that quite apart from any formal hierarchy, neighbouring rights are generally valued at a lower level than authors' rights. Both CAB and NRCC presented expert evidence on the relative rates being paid in other countries. CAB's expert concluded that commercial and public broadcasters paid, in aggregate, less for neighbouring rights than for authors' rights, although the picture is significantly altered in favour of neighbouring rights if one only looks at commercial stations. NRCC's expert witness, for his part, tended to conclude that commercial radio stations pay more for the neighbouring rights. The evidence in this respect was disappointing. The Board was unable to determine the relative extent of the eligible repertoire or the relative level of use covered by these tariffs. Given the great difficulty of making meaningful comparisons with the Canadian situation, it would be inappropriate to rely on them in setting the Canadian rate. More importantly, any such comparisons are necessarily influenced by local market considerations and must be treated with great caution.

experts, dont le sien, admettent qu'il n'existe pas de hiérarchie formelle entre les deux catégories de droits. L'ACR méconnaît trop facilement un certain nombre de réalités. Premièrement, la *Loi* n'établit pas d'ordre de priorité entre le droit d'auteur et les droits voisins. Au contraire, la définition de droit d'auteur inclut tous les droits exclusifs des artistes-interprètes, producteurs d'enregistrements sonores et radiodiffuseurs. Deuxièmement, les droits énumérés à l'article 19 de la *Loi* ressemblent fortement à ceux dont jouit la SOCAN : dans un cas comme dans l'autre, on ne peut interdire l'usage et le prix est établi par la Commission. Troisièmement, ce n'est pas parce que les auteurs ont plus de droits que les artistes-interprètes, producteurs ou radiodiffuseurs que la valeur des uns est supérieure à la valeur des autres; chacun devrait être évalué à sa juste valeur et selon une méthode d'évaluation appropriée. Quatrièmement, le fait que l'artiste-interprète puisse interdire qu'on utilise sa prestation lorsque l'auteur consent à l'utilisation de son œuvre est incompatible avec la notion même de hiérarchie.

L'ACR soutient par ailleurs que, mis à part toute hiérarchie formelle, les droits voisins valent généralement moins que les droits d'auteur. Tant l'ACR que la SCGDV ont offert le témoignage d'experts sur les prix payés à l'étranger pour ces droits. L'expert de l'ACR affirme que les radiodiffuseurs commerciaux et publics confondus paient moins pour les droits voisins, bien que le rapport soit plutôt en faveur de ces derniers si l'on tient compte uniquement des stations commerciales. Pour sa part, l'expert de la SCGDV soutient que les stations de radio commerciale paient davantage pour les droits voisins. Cela dit, la preuve sur cette question a été décevante. Ainsi, il n'a pas été possible d'établir l'importance relative des répertoires admissibles ni de l'usage qui en est fait. Compte tenu qu'il est pratiquement impossible d'établir des comparaisons valables avec le marché canadien, il n'y a pas lieu d'utiliser ces données dans l'établissement du taux canadien. De toute façon, les comparaisons de ce genre doivent être traitées avec beaucoup de précaution, car elles sont nécessairement affectées par les conditions locales des marchés en cause.

Performers and makers derive greater value than copyright owners from air play

CAB argued at length that a fair and equitable tariff should take into account the numerous benefits performers and makers derive from the air play their sound recordings receive. This is not a novel argument.

Radio does contribute to the sale of records. It has been and remains a very important vehicle for the promotion of records sales. This being said, radio does not play records to promote their sale, but to support its business, which is to attract listeners and sell advertising spots. As the Board stated in the past with respect to performing rights for musical works, this is but one case of a symbiotic relationship between different industries with no direct bearing on the price.

Radio stations contribute to the record industry in several other ways

As in the past with respect to performing rights for musical works, CAB also asked the Board to take into account the various contributions, both direct and indirect, made by radio stations to the record industry. These include on-air promotion of performers, monetary contributions to local talent development, as well as CRTC's imposed talent development requirements and "significant benefit" payments required in connection with station ownership transfers.

These arguments remain unconvincing. If anything, Parliament's decision to introduce neighbouring rights may be a reason for reassessing those practices. As for CRTC policies, they serve a different purpose. Copyright protection is granted as a means of ensuring remuneration for the use of all qualifying recordings, while CRTC policies are in response to objectives of the *Broadcasting Act* and concern the creation of new material by Canadians. To discount the remuneration of rights holders because of them would be both improper and unfair.

Artistes-interprètes et producteurs bénéficient davantage du temps d'antenne que les titulaires de droits d'auteur

L'ACR a soutenu avec insistance qu'un tarif juste et équitable doit tenir compte des nombreux avantages que les artistes-interprètes et producteurs tirent du temps d'antenne consacré à leurs enregistrements sonores. Cette prétention n'a rien de nouveau.

Certes, la radio contribue à la vente de disques. Elle a été et demeure un véhicule promotionnel important. Cela dit, l'industrie ne diffuse pas les disques dans ce but, mais afin d'exploiter son entreprise, qui consiste à vendre des auditoires aux annonceurs. Comme la Commission l'a dit par le passé dans le contexte de l'exécution publique d'œuvres musicales, il s'agit là d'un cas parmi d'autres de rapport symbiotique entre deux industries, sans lien direct avec le prix.

Les stations de radio contribuent à l'industrie du disque de plusieurs autres façons

Comme elle l'a fait par le passé à l'égard des droits d'exécution publique d'œuvres musicales, l'ACR a aussi demandé à la Commission de tenir compte des diverses contributions directes et indirectes des stations de radio à l'industrie du disque. Cela comprend la promotion en ondes des artistes-interprètes, les contributions financières au développement du talent local, ainsi que celles découlant des exigences imposées par le CRTC en matière de développement des talents canadiens et du «critère relatif aux avantages» lorsqu'il y a transfert de propriété.

Ces arguments demeurent peu convaincants. On pourrait même prétendre que l'introduction des droits voisins devrait motiver un réexamen de ces pratiques. Quant aux politiques du CRTC, leur objet est différent. La protection du droit d'auteur vise la rémunération pour l'utilisation de tous les enregistrements admissibles; les politiques du CRTC répondent aux objets de la *Loi sur la radiodiffusion* et visent avant tout la création d'œuvres et d'enregistrements canadiens. Réduire la rémunération des titulaires de droits en raison de celles-ci serait à la fois inopportun et injuste.

3. The approach favoured by the Board

Several reasons lead the Board to conclude that the best starting point is SOCAN's present tariff.

First, SOCAN's tariff applies, more often than not, to the use of recorded musical works, while neighbouring rights tariffs apply to the use of recorded performances of the same works. Therefore, they involve a similar use and a similar right in a similar market.

Second, SOCAN's tariff has been in place for a long time; even though it constitutes a regulated price, it is one that the Board simply cannot ignore. As the Board stated in another, similar context:

... there is less need to use a proxy when an existing price, even an administered price, can be used as a starting point. This is especially true where information is available to determine whether or not the existing price is appropriate, and whether or not any adjustments ought to be made to account for changes in circumstances.¹²

Third, even though SOCAN still maintains that the current rate is too low while CAB still argues that it is too high, they have agreed to maintain the *status quo* for five years. For whatever the reasons, the 3.2 per cent rate remains the going rate, and we need not speculate as to its correctness for our purposes.

Fourth, all other proxies offered by NRCC are deficient in some ways, and certainly much weaker than SOCAN's tariff.

Fifth, SOCAN'S licence is a blanket licence. Therefore, using SOCAN's rate as a starting point avoids the difficulty of having to determine which value, if any, ought to be attributed to the blanket character of the regime.

3. La démarche que retient la Commission

Pour plusieurs motifs, la Commission croit que le tarif de la SOCAN constitue le meilleur point de départ.

Premièrement, le tarif de la SOCAN vise principalement l'utilisation d'œuvres musicales enregistrées, et les droits voisins portent sur l'utilisation de prestations enregistrées de ces mêmes œuvres. On traite donc d'un usage similaire dans un marché similaire.

Deuxièmement, ce tarif est en place depuis un bon moment. Il s'agit d'un prix réglementé, mais que la Commission ne peut tout de même pas ignorer. Comme elle l'a déjà dit, dans un contexte différent mais similaire :

... le besoin de recourir à un prix analogue se fait moins sentir s'il existe un prix, même réglementé, pouvant servir de point de départ. Ceci est d'autant plus vrai si l'on dispose de renseignements permettant de déterminer si ce prix convient toujours et s'il doit être rajusté pour tenir compte de l'évolution de la situation.¹²

Troisièmement, le tarif actuel vaut pour cinq ans, suite à une entente, malgré le fait que la SOCAN continue de soutenir qu'il est trop bas et que l'ACR prétende le contraire. Peu importe leurs motifs, le taux de 3,2 pour cent est le taux en vigueur, et il n'est pas nécessaire pour nos fins de mettre en doute son bien-fondé.

Quatrièmement, les comparaisons effectuées par la SCGDV comportent toutes certaines faiblesses, et sont de toute manière beaucoup moins valables que la comparaison avec le tarif de la SOCAN.

Cinquièmement, la licence de la SOCAN est une licence générale. En utilisant le taux de la SOCAN comme point de départ, on évite d'avoir à attribuer une valeur distincte, si valeur il y a, au caractère général du régime.

The only issue remaining, therefore, is whether 3.2 per cent is too much, enough or not enough to compensate fairly and equitably performers and makers of sound recordings. As stated earlier, the case put forward by CAB in favour of a reduced rate is not sustainable. Consequently, the only options left are to maintain a one-on-one relationship between the neighbouring rights and the authors' rights or to adjust the rate upwards.

NRCC filed evidence tending to establish that royalties paid to performers and makers of sound recordings in free market transactions are approximately 2.5 times higher than royalties paid to authors.¹³ Establishing this sort of comparison requires making the assumption that if performers do better than composers in a free market, they should be able to do as well in the other, regulated market. That assumption is not supported by the record of these proceedings. The evidence that performers may provide radio stations with more value than authors is far from conclusive. What the Board was offered in this respect was a series of anecdotal, impressionistic statements that often pulled either way.

For example, Ms. Smith and Ms. Kondruk, who are experienced advertising executives, testified to the effect that music is very personal to people, that radio is a niche medium, that advertisers pay for audiences, who in turn are drawn by music format. Such statements, in so far as they establish anything useful, are hardly helpful to NRCC, who wishes to show the importance of individual performers by contrast to the overall music format. In the same vein, their assertion that stations advertise themselves using the music format and the artist's image does not mean that the artist's image has higher promotional value than the music format; the image is but a tool to help identify the format.

Cela étant, reste à déterminer si le taux de 3,2 pour cent suffit à compenser de façon juste et équitable les artistes-interprètes et les producteurs ou s'il faut ajuster ce taux à la hausse ou à la baisse. Comme on a déjà conclu que la preuve et l'argumentation mises de l'avant par l'ACR ne sauraient justifier une réduction, les seules possibilités qui s'offrent sont de maintenir la parité entre les deux tarifs ou d'ajuster le taux à la hausse.

Par sa preuve, la SCGDV a cherché à établir que les redevances versées de gré à gré aux artistes-interprètes et producteurs dans le marché de la production des enregistrements sonores sont environ 2,5 fois plus élevées que celles versées aux auteurs.¹³ Ce genre de comparaison se fonde sur la prémisse que les artistes-interprètes, gagnant davantage que les compositeurs dans un marché libre, devraient pouvoir faire aussi bien dans un marché réglementé. Or, le dossier de la présente affaire ne permet pas de tirer une telle conclusion. La preuve voulant que l'apport des artistes-interprètes aux stations de radio est plus important que celui des auteurs est loin d'être concluante. Les témoignages offerts à ce sujet constituent tout au plus des anecdotes ou des impressions et pourraient dans certains cas servir tout aussi bien à établir le contraire.

Ainsi, selon mesdames Smith et Kondruk, deux agents de publicité d'expérience, la musique est quelque chose de personnel et la radio est un organe de diffusion spécialisé; les annonceurs paient pour un auditoire attiré par le format musical. De telles affirmations, pour autant qu'elles prouvent quoi que ce soit, n'aident en rien la SCGDV, qui tente de démontrer l'importance des artistes-interprètes et non du format musical. Dans le même ordre d'idées, l'affirmation selon laquelle les stations utilisent le format musical et l'image des artistes-interprètes pour faire leur propre promotion ne signifie pas que les artistes-interprètes ont une valeur promotionnelle plus grande que le format musical; de fait, l'image sert également à identifier le format.

For their part, Messrs. Lefebvre and Stein-Sack, who have long worked in the area of records sales and distribution, offered the view that while a record starts with a song, the magic (in the form of a symbiosis between the song, the performance and the production) must be there for the record to sell, adding that the songwriter is the most fragile, least visible and least compensated contributor in the whole process of production and sales of records. Again, such impressionist statements, which in any event go to the relative contributions of participants in the records market, are of little help in determining the relative value of recordings to radio stations.

In the end, it was probably Mr. Reynolds, president of Universal Music Canada, who best stated the conundrum, when he expressed the view that establishing the relative value of the authors' and performers' contribution in a successful recording "is the classic chicken and egg situation. I don't think you can extricate the two and say, this is more important than that."¹⁴

The Board prefers deciding on the basis that there is no reason to believe that the use of sound recordings on radio stations has any greater value than the use of the underlying works. Several reasons point to this solution. First, nothing requires the Board to look to the market (and especially a different market) for guidance; it is within its discretion to decide that this approach is reasonable.¹⁵ Second, these are similar uses of the same recordings by the same broadcasters. Third, it can be readily argued that a pre-recorded performance is worth no more to broadcasters than a pre-recorded work: in both cases, one is dealing with something that has already been fixed. Fourth, it matters not that one party was paid more than the other for making the fixation in the first place; we are dealing with two different markets and two different rights: the right to make the recording and the right to communicate it.

Pour leur part, messieurs Lefebvre et Stein-Sack, qui travaillent depuis longtemps dans le domaine de la vente et de la distribution d'enregistrements sonores affirment que, s'il est vrai de dire que sans chansons, il n'y a pas d'enregistrement qui vaille, la magie (cette symbiose entre la chanson, la prestation et la production) doit être là pour que le disque se vende. Et ils ajoutent que le compositeur est, de tous les collaborateurs dans le processus de production et de vente d'un enregistrement, le plus fragile, le moins visible et le moins bien rémunéré. Encore ici, ce genre d'affirmations, qui portent en outre sur la contribution relative des participants dans le marché du disque, ne sont guère utiles pour établir la valeur relative des enregistrements sonores dans le marché de la radiodiffusion.

En définitive, c'est sans doute M. Reynolds, président d'*Universal Music Canada*, qui a le mieux formulé le dilemme. À son avis, tenter de déterminer l'importance relative des compositeurs et des artistes-interprètes au succès d'un enregistrement, [TRADUCTION] «c'est s'engager dans le débat classique de la poule et de l'oeuf. Je ne crois pas qu'on puisse les isoler et pouvoir dire : celui-ci est plus important que celui-là.»¹⁴

La Commission estime qu'il n'y a pas de raison de croire qu'à la radio les enregistrements sonores ont une valeur supérieure aux œuvres enregistrées, et ce pour plusieurs motifs. D'abord, rien n'oblige la Commission à se guider sur les prix du marché, surtout s'il s'agit d'un marché différent; son pouvoir d'appréciation lui permet d'adopter toute autre démarche raisonnable.¹⁵

Deuxièmement, il s'agit des mêmes utilisations, des mêmes enregistrements et des mêmes radiodiffuseurs. Troisièmement, on peut facilement soutenir qu'une prestation pré-enregistrée n'apporte ni plus, ni moins au radiodiffuseur qu'une œuvre pré-enregistrée : dans un cas comme dans l'autre, il s'agit de quelque chose qui a déjà été fixé. Quatrièmement, il importe peu qu'un des participants ait reçu davantage qu'un autre pour la fixation de l'enregistrement; nous sommes en présence de marchés distincts et de droits différents à savoir, le droit de faire l'enregistrement et celui de le communiquer.

4. The tariff rate

For the foregoing reasons, the Board concludes that most commercial radio stations should pay 45 per cent of what they pay to SOCAN, or 1.44 per cent of their advertising revenues, for the neighbouring rights.

All participants agree that stations that qualify as low music use stations for the purposes of the SOCAN tariff should pay 43.75 per cent of the royalties payable by other stations. Consequently, the rate for low music use stations (as defined by the participants) is set at 0.63 per cent.

On the other hand, participants disagree on the need for an even lower rate for all-talk stations. NRCC opposes the concept on the basis that SOCAN's tariff does not allow for it, that CAB has offered no evidence as to the number of stations that might be in this category and that the concept lacks sufficient clarity to be workable. For the following reasons, the Board grants CAB's request. First, the Board is satisfied that stations which do not use any eligible sound recordings other than production music should pay little neighbouring right royalties, if any. Second, this approach makes sense in this context, while it may not in SOCAN's tariff, given the nature of the respective repertoires. Third, the number of stations that will fall in that category is probably very small. Consequently, there is little risk involved in trying the formula. Having said this, the rate is set on a monthly, rather than yearly basis so as to better harmonize with the structure of the tariff, as will be outlined later.

5. The ability of the industry to pay the tariff

The tariff as certified by the Board would yield royalties of 11.29 million dollars per year¹⁶ over the period of the tariff (1998 to 2002), if the 1997 figures on advertising revenues (the only

4. Le taux

La Commission en vient donc à la conclusion que le taux payable par la plupart des stations de radio commerciale pour les droits voisins devrait être fixé à 1,44 pour cent de leurs recettes publicitaires, soit 45 pour cent du taux de la SOCAN.

Tous s'entendent pour dire que les stations ayant droit au statut de petit utilisateur pour les fins du tarif de la SOCAN devraient payer 43,75 pour cent de ce que versent les autres stations. Le taux pour ces stations, tel que les parties l'ont défini, est donc fixé à 0,63 pour cent.

Par contre, les participants ne s'entendent pas sur le besoin d'accorder un taux encore plus avantageux pour les stations de radio parlée. La SCGDV s'y oppose pour plusieurs motifs. Le tarif de la SOCAN ne prévoit pas de mesure semblable; l'ACR n'a pas établi le nombre de stations qui pourraient bénéficier de la mesure; enfin le concept est trop vague pour être fonctionnel. La Commission fait droit à la demande de l'ACR pour les motifs suivants. Premièrement, la Commission est convaincue que les stations n'utilisant pas d'enregistrements sonores admissibles à part la musique de production devraient verser peu ou pas de redevances. Deuxièmement, vu la composition des répertoires concernés, la mesure se justifie en matière de droits voisins même si elle n'est pas nécessairement indiquée dans le cas de la SOCAN. Troisièmement, comme très peu de stations pourront vraisemblablement s'en prévaloir, le fait d'expérimenter la formule comporte peu de risques. Cela dit, afin d'harmoniser davantage la mesure avec la structure tarifaire dont il sera question plus loin, ces stations seront assujetties à une redevance mensuelle et non annuelle.

5. La capacité de l'industrie de payer le tarif

Le tarif que la Commission homologue entraînerait le versement de 11,29 millions de dollars par année,¹⁶ pendant la durée du tarif (1998 à 2002), en utilisant et tenant constantes les

figures available at the time of the hearing) were used and remained constant over that period. Yet, the application of subparagraph 68.1(1)(a)(i) of the *Act*, stipulating that commercial radio stations shall only pay \$100 on their first 1.25 million dollars of annual advertising revenues, would reduce that amount to 5.68 million dollars. In addition, the phasing in of the regime over three years, would further reduce that amount to 1.89 million dollars in 1998 and to 3.78 million dollars in 1999.

The evidence provided by NRCC, and especially Exhibit NRCC-29, clearly established that the industry could have absorbed the full tariff, absent any special statutory provisions. Indeed, neither CAB nor its witnesses took issue with the validity or quality of NRCC's evidence on this point. Instead, CAB argued that NRCC's tariff as filed would deprive the industry of its recent hard-won profit margins, and would thereby deny it the investment capital needed to convert to digital technology and meet the competitive challenge posed by other major media.

The industry as a whole has come out of difficult years. Profit margins have grown and would have allowed the industry to absorb all of the tariff. Only small stations would have been put in difficulty; since Parliament has already addressed the issue, there is no need for the Board to do so. In the end, the fact that all stations will pay only \$100 on account of their first 1.25 million dollars in advertising revenues, the level of the rate as set by the Board and the fact that there will not be a graduated tariff all combine to confirm that commercial radio stations will be able to afford the price they now have to pay for the neighbouring rights.

recettes publicitaires réalisées par l'industrie en 1997 (seules données disponibles lors de l'audience). Toutefois, l'application du sous-alinéa 68.1(1)(a)(i), qui prévoit le paiement de seulement 100 \$ par les stations de radio commerciale sur la partie de leurs recettes publicitaires ne dépassant pas 1,25 million de dollars, réduit ces redevances à 5,68 millions de dollars et les mesures transitoires prévues à la *Loi* les ramènent à 1,89 million de dollars en 1998 et à 3,78 millions de dollars en 1999

La preuve déposée par la SCGDV, et tout particulièrement la pièce NRCC-29, démontre clairement que l'industrie aurait eu les moyens d'acquitter le plein tarif sans égard aux dispositions spéciales de la *Loi*. D'ailleurs, ni l'ACR ni ses témoins n'ont remis en question la validité ou la qualité de la preuve de la SCGDV à cet égard. L'ACR a plutôt soutenu que le projet tel qu'il a été déposé annulerait les récentes marges bénéficiaires de l'industrie, gagnées de haute lutte, la privant ainsi du capital de placement dont elle a besoin pour passer à la technologie numérique et pour faire face aux défis concurrentiels posés par les autres médias d'importance.

L'industrie a connu récemment des années difficiles. Toutefois, ses marges bénéficiaires ont augmenté et lui auraient permis d'acquitter le plein tarif. Seules les petites stations auraient connu des difficultés; or, comme le Parlement a déjà prévu des mesures à cet égard, la Commission n'a pas à s'en préoccuper. En bout de piste, le fait que toutes les stations ne versent que 100 \$ sur la partie de leurs recettes publicitaires ne dépassant pas 1,25 million de dollars et que le tarif homologué ne soit pas un tarif gradué ne font que confirmer que les stations de radio commerciale auront bel et bien les moyens d'acquitter les redevances qu'elle devront payer à l'avenir pour les droits voisins.

VI. ISSUES RELATED TO THE COLLECTION AND STRUCTURE OF THE TARIFF

A. Who should collect the royalties?

NRCC wishes to collect all royalties payable under the tariff. SOGEDAM asks to receive the share attributable to its repertoire. Dealing with the issue of allocation raises two issues. What is the meaning of the single payment requirement set out in subparagraph 68(2)(a)(iii) of the *Act*? Can the Board direct users to pay SOGEDAM its share of the remuneration right?

1. The single payment requirement

In the Board's view, the arguments in favour of interpreting the single payment requirement as directing the Board to identify a single entity that will collect royalties on account of all the repertoire entitled to remuneration are overwhelming.

Thus, the requirement exists first and foremost for the benefit of users. Interpreting the single payment requirement in this way is congruent with this benefit.

Second, this interpretation gives meaning to subparagraph 68(2)(a)(iii) of the *Act*. If the single payment requirement were to mean anything less, then subsection 19(2) of the *Act*, which already limits to one the payment to be made on account of any given recording, would have been sufficient.

Requiring that users make only one payment for the whole repertoire does not contradict the right of collectives to each file tariff proposals. The ability to ask for a tariff can readily be distinguished from the ability to act as collecting agent, as the home taping regime clearly demonstrates. Neither is it incompatible with a tariff that creates different structures for different parts of the repertoire. The Board could easily certify a tariff which has, say, a different price

VI. QUESTIONS LIÉES À LA PERCEPTION DES REDEVANCES ET À LA STRUCTURE TARIFAIRE

A. Qui devrait percevoir les redevances?

La SCGDV désire percevoir toutes les redevances exigibles en vertu du tarif. La SOGEDAM demande de percevoir la part qui revient à ses membres. Pour décider de la répartition, il faut trancher deux questions. Qu'entend-on par versement unique au sous-alinéa 68(2)(a)(iii) de la *Loi*? La Commission peut-elle ordonner aux utilisateurs de verser à la SOGEDAM sa part du droit à rémunération?

1. L'exigence du versement unique

La Commission croit que l'exigence du versement unique l'oblige à désigner une seule entité responsable de la perception des redevances pour l'ensemble du répertoire ayant droit à rémunération et trouve les arguments au soutien de cette interprétation particulièrement convaincants.

Ainsi, si cette exigence existe, c'est d'abord et avant tout pour le bénéfice des utilisateurs. L'interprétation retenue par la Commission confirme cet avantage.

Deuxièmement, cette interprétation donne un sens au sous-alinéa 68(2)(a)(iii) de la *Loi*. Le paragraphe 19(2) de la *Loi*, en limitant à un seul le versement devant être effectué à l'égard de toute utilisation donnée d'un enregistrement donné, aurait suffi si l'obligation du versement unique devait signifier moins.

Permettre aux utilisateurs d'effectuer un seul paiement pour tout le répertoire ne prive pas chaque société du droit de déposer un projet de tarif. Comme le régime de la copie privée le démontre clairement, on peut facilement établir une distinction entre le droit de proposer un tarif et celui d'agir à titre de société de perception. Cette interprétation n'écarte pas non plus la possibilité d'établir des structures tarifaires différentes pour différentes parties du répertoire.

formula for SOGEDAM's repertoire than for NRCC's and still require that radio stations only pay at one designated place.

Consequently, the Board concludes that the single payment requirement entitles users to pay to a single collecting agent. Given that NRCC brings with it, through the makers it represents, all of the eligible repertoire that is properly before this Board, it is only logical to have it act as that collecting agent.

There are also practical reasons for selecting NRCC as the sole collecting agent for all royalties. First, NRCC controls all of the makers' rights in the repertoire entitled to remuneration. Second, this is the most efficient and practical way of dealing with the situation. NRCC is better placed than SOGEDAM to distribute royalties to all interested rights holders. Third, even in so far as French rights holders are concerned, SOGEDAM (who represents only some of the performers) has less at stake than NRCC, who represents all makers. Fourth, NRCC is likely to be better organized to manage the tariff for all concerned, including the monitoring of stations across the country, and the creation of appropriate databases for distribution purposes.

The Board is conscious that NRCC may be in a position to use its status as the only authorized collective in an attempt to force SOGEDAM to accept certain distribution practices which are the very reason why SOGEDAM was created in the first place. Unfortunately, the Board is there, first and foremost, to regulate the balance of market power between users and rights owners, and not, unless the *Act* says otherwise, between rights owners. SOGEDAM should direct any complaints it may have in this respect to the Commissioner of Competition.

Ainsi, la Commission pourrait fort bien homologuer une formule tarifaire pour le répertoire de la SOGEDAM et une autre pour celui de la SCGDV tout en ordonnant aux stations de radio de verser la totalité des redevances à une seule personne.

La Commission en vient donc à la conclusion que l'exigence du versement unique donne aux utilisateurs le droit de verser les redevances à un seul agent de perception. Compte tenu que la SCGDV, grâce aux producteurs qu'elle représente, fait apport de tout le répertoire admissible dont la Commission est saisie, il est tout à fait logique de la désigner pour agir à ce titre.

Des motifs pratiques amènent aussi la Commission à désigner la SCGDV comme agent de perception unique. Premièrement, elle fait apport des droits de tous les producteurs ayant droit à la rémunération. Deuxièmement, il s'agit de la façon la plus efficace et la plus pratique de régler la situation. La SCGDV est plus en mesure que la SOGEDAM de répartir les redevances parmi tous les intéressés. Troisièmement, même à l'égard des titulaires français, l'enjeu pour la SOGEDAM, qui ne représente qu'une partie des artistes-interprètes, est moindre que pour la SCGDV, qui représente tous les producteurs. Quatrièmement, la SCGDV paraît mieux équipée pour gérer le tarif pour le bénéfice de tous les intéressés, qu'il s'agisse de la vérification des stations à travers le Canada ou de la mise sur pied de bases de données pour fins de distribution.

La Commission est consciente du fait que la SCGDV pourrait utiliser son statut d'unique agent de perception pour tenter d'amener la SOGEDAM à accepter certaines règles de distribution qui sont à l'origine même de la création de cette dernière. La Commission existe d'abord et avant tout pour maintenir l'équilibre économique entre utilisateurs et titulaires de droits; à moins que la *Loi* ne prévoit le contraire, elle ne se mêle pas des différends entre titulaires. Si la SOGEDAM devait se sentir lésée à cet égard, elle devra s'adresser au Commissaire de la concurrence.

2. Can the Board direct users to pay SOGEDAM its share of the remuneration right?

Given the interpretation the Board makes of the single payment requirement, it is obviously impossible for it to direct users to pay SOGEDAM its share of the remuneration right in the recordings onto which its members' performances are embedded.

This interpretation is supported by subsection 19(3), according to which the division of royalties between performers and makers takes place once the royalties have been paid. The need for such a division, and the fact that it occurs after collection, applies to all equitable remuneration, whether or not it is subject to the SOCAN regime and whether or not the Board is involved in setting a tariff. If the division of royalties must occur after the payment is made, that division cannot occur before.

This interpretation means that SOGEDAM's members cannot collect their remuneration right directly from the users through their society of choice. This is merely a facet of the economy of the statute, and is no worse than requiring the maker of a sound recording of a dramatic work to claim his share of the royalties from the performer if they were paid to the performer, or vice versa.

B. Can the Board determine the share SOGEDAM should receive?

SOGEDAM also would like that the Board set its share of the royalties. The Board is of the view that it cannot decide how co-creditors are to apportion the royalties among themselves.

Generally speaking, when the *Act* requires that the Board apportion royalties between collectives representing different groups of right owners, this is done expressly.¹⁷ This is not the case here.

2. La Commission peut-elle ordonner aux utilisateurs de verser à la SOGEDAM sa part du droit à rémunération?

L'interprétation que la Commission retient du principe du versement unique rend impossible d'exiger que les utilisateurs versent à la SOGEDAM sa quote-part du droit à rémunération.

Cette conclusion est soutenue par la version anglaise du paragraphe 19(3), qui prévoit la répartition des redevances entre artistes-interprètes et producteurs après qu'elles aient été versées. L'exigence de partage et le fait qu'il intervienne après la perception sont des conditions s'appliquant à toute rémunération équitable, assujettie ou non au régime de la SOCAN et sans égard au fait que la Commission soit appelée à établir le tarif. Si le partage survient après la perception, il ne peut intervenir avant.

Par conséquent, les membres de la SOGEDAM ne peuvent percevoir leur droit à rémunération directement des utilisateurs par le truchement de la société qu'ils ont choisie. Il s'agit là tout simplement d'une conséquence logique de l'économie du régime, qui n'est en rien plus choquante que l'exigence imposée au producteur de l'enregistrement sonore d'une œuvre dramatique de réclamer sa part des redevances auprès de l'artiste-interprète lorsque ce dernier les a perçues, et vice-versa.

B. La Commission peut-elle établir la quote-part de la SOGEDAM?

La SOGEDAM demande aussi à la Commission d'établir sa quote-part des redevances. La Commission croit qu'elle ne peut décider à la place des co-créanciers la façon dont ils entendent répartir le produit des redevances entre eux.

Règle générale, lorsque la *Loi* exige que la Commission répartisse les redevances entre sociétés représentant différents groupes d'ayants droit, elle le prévoit de façon expresse.¹⁷ Elle ne

Furthermore, in regimes such as private copying, where such an apportionment is required, the *Act* does not establish in advance the shares attributable to the various colleges of rights owners; each group is entitled to claim the full value of its contribution, however established. By contrast, the neighbouring rights regime expressly provides for a single remuneration to be shared equally between performers and makers.

Moreover, nothing in the *Act* would allow the reader to infer a power of the Board to determine SOGEDAM's share of royalties as a necessary incident to setting the neighbouring rights tariff. As the regime is structured, the Board sets the royalties to be paid for the use of all sound recordings that are entitled to remuneration. Once this is done, the *Act* mandates equal sharing of the royalties between performers and makers. It is only once that split has occurred that the Board would come in if it were to determine SOGEDAM's share, that is, to determine how, as between those sharing in the performer's share, the entitlement to half the royalties should be divided. This is one step too far removed.

Finally, the Federal Court of Appeal has already ruled that the Board should not get involved in the allocation of liability between co-debtors:¹⁸

the apportionment of the sums *payable ... between those who are, by law, ... obliged to pay them* does not involve the determination of a royalty or of a term or condition relating to a royalty. *The sums that the various participants ... may owe to each other* are not royalties even though they are payable as a consequence of the payment of the royalties by one of them. The Board, therefore, was right in deciding that it lacked the jurisdiction to make that apportionment. [our emphasis]

One need only to substitute the word "share" for "pay" to make this statement applicable to the issue at hand. That decision precludes the Board from getting into any division exercise that is not essential to the operation of the regime.

l'a pas fait dans ce cas-ci. Par ailleurs, les régimes, tel celui de la copie privée, qui prévoient ce genre de répartition, ne fixent pas à l'avance les parts attribuables aux divers collèges d'ayants droit, chacun étant autorisé à réclamer la pleine valeur de son apport, peu importe la façon dont cette valeur est déterminée. Par contre, le régime des droits voisins prévoit expressément la répartition par moitié de la rémunération unique entre artistes-interprètes et producteurs.

Qui plus est, rien dans la *Loi* ne permet de conclure que la Commission a le pouvoir de fixer la quote-part de la SOGEDAM en tant qu'accessoire nécessaire à l'établissement du tarif des droits voisins. Tel que structuré, le régime exige que la Commission détermine les redevances qui seront versées pour l'utilisation de tous les enregistrements sonores ayant droit à rémunération. Une fois cette étape franchie, la *Loi* stipule le partage par moitié des redevances. C'est donc après ce partage que la Commission interviendrait si elle était appelée à établir la quote-part de la SOGEDAM, autrement dit pour répartir entre les artistes-interprètes la moitié des redevances qui leur revient. À ce stade, le mandat de la Commission est déjà épuisé.

Enfin, la Cour d'appel fédérale a déjà exhorté la Commission de ne pas se mêler de la répartition de la responsabilité entre co-débiteurs :¹⁸

la répartition des sommes *payables... entre les personnes qui sont, en droit, solidairement tenues de les payer* ne comporte pas la détermination d'un droit ou d'une modalité y afférente. *Les sommes que les différentes personnes intéressées... peuvent se devoir mutuellement* ne sont pas des droits même si elles sont payables en raison du paiement des droits par l'une d'elles. La Commission a donc eu raison de statuer qu'elle n'avait pas compétence pour faire cette répartition. [l'italique est de nous]

Qu'on parle de répartition de créances ou de répartition de dettes, le principe reste le même. Cette décision empêche la Commission de s'engager dans tout exercice de répartition non essentiel au fonctionnement du régime.

Consequently, it will be for SOGEDAM to claim its members' share from NRCC, as co-creditors of the royalties collected by NRCC.

C. Tariff Structure

The following comments may help in understanding the tariff wording.

1. Phasing in

Given the nature of the tariff approved by the Board, there is no need to examine NRCC's proposal that the tariff be phased-in over five years instead of three.

2. A graduated tariff

NRCC put forward several arguments in favour of a graduated tariff. Profit margins tend to increase rapidly with advertising revenues, so the structure is more sensitive to the financial circumstances of stations at various levels of revenue. Conversely, a flat rate would create an unnecessary burden to smaller, less profitable stations. Ability to pay is reflected in the entire tariff; all stations pay at the same rate for the same level of revenues.

CAB is opposed to the proposal on a number of grounds. First, if, as NRCC seems to accept, the value of sound recordings as a percentage of revenue is constant for all stations regardless of size, a graduated tariff imposes on certain stations tariff obligations which exceed the value of the repertoire. Second, a flat rate tariff is the only way that equity can be assured to all participants, and is consistent with SOCAN's Tariff 1.A. Third, all CAB stations support a flat rate tariff.

The Board agrees with CAB's reasons for rejecting a graduated tariff, and adds the following.

Par conséquent, il faudra que la SOGEDAM s'adresse à la SCGDV pour réclamer la part qui revient à ses membres à titre de co-crédanciers des redevances que cette dernière aura perçues.

C. La structure tarifaire

Les commentaires qui suivent permettront de mieux comprendre le libellé du tarif.

1. Durée de la période de transition

La nature du tarif que la Commission homologue fait en sorte qu'il n'est pas nécessaire de débattre de la proposition visant à prolonger la période de transition à cinq ans.

2. Un tarif graduel

La SCGDV a mis de l'avant plusieurs arguments au soutien d'un tarif graduel. Généralement parlant, les marges bénéficiaires des stations augmentent rapidement en fonction de leurs recettes publicitaires; cette structure répondrait donc davantage aux besoins financiers des stations selon leur taille. Réciproquement, un taux fixe imposerait aux stations plus petites, et moins profitables, un fardeau excessif. Un tarif graduel tient compte de la capacité de payer et chaque station paie le même taux pour une tranche donnée de revenus.

L'ACR s'oppose à cette proposition pour plusieurs motifs. Premièrement, si, comme la SCGDV semble convenir, la valeur de l'enregistrement sonore, mesurée en pourcentage des recettes, est constante sans égard à la taille de la station, un tarif graduel impose à certaines d'entre elles des obligations tarifaires dépassant la valeur du répertoire pour celles-ci. Deuxièmement, un taux fixe est le seul qui soit équitable pour tous les participants et s'harmonise avec le tarif 1.A de la SOCAN. Troisièmement, toutes les stations membres de l'ACR demandent un tarif à taux fixe.

La Commission est d'accord avec les motifs mis de l'avant par l'ACR pour rejeter une structure tarifaire graduelle. Elle ajoute ce qui suit.

First, cross-subsidization may be justified to avoid the predictable negative response to a tariff by those who have to pay it and the undesirable impact that this may have on well established public policies. Such was the case with the retransmission of distant radio and television signals, where the risk of signal dropping and the need to ensure the provision of similar television services in all regions of the country were significant factors in requiring all systems to pay the same price irrespective of the number of distant signals carried. It is not the case here.

Second, cross-subsidization may also be justified to ease the financial burden of less profitable entities. However, if smaller stations truly require a break, it need not be at the expense of larger stations. More importantly, in the present instance, Parliament has already taken care of the problem for stations with revenues below 1.25 million dollars.

Third, NRCC's proposed cross-subsidization is justified only because of the high price demanded for its repertoire. With the lower tariff that the Board certifies, the need to find ways to reduce the burden on smaller stations is simply not there.

Fourth, adopting similar tariff structures for musical works and sound recordings will facilitate comparisons between the two tariffs.

CAB is also correct in saying that NRCC's proposal, as filed, runs contrary to Parliament's intent that all stations pay only \$100 on their first 1.25 million dollars of advertising revenues. NRCC applied its proposed average rate to all revenues, including those covered by the special rate, and then devised a grid that would generate the same total royalties. As a result, the industry ends up paying more than the average rate on revenues not covered by the special rate, which

Premièrement, l'inter-financement se justifie lorsqu'il sert à prévenir les réactions négatives prévisibles de la part de ceux qui sont appelés à payer un tarif ou encore, à éviter les conséquences néfastes qu'il peut avoir sur des politiques publiques existantes. C'est pourquoi la Commission a agi comme elle l'a fait en matière de retransmission de signaux éloignés de radio et de télévision; le risque d'abandon de certains signaux et le besoin de s'assurer que toutes les régions du pays bénéficient d'un service télévisuel similaire ont été des facteurs importants dans la décision d'exiger que tous les systèmes paient le même prix sans égard au nombre de signaux éloignés offerts. Ces risques n'existent pas dans la présente affaire.

Deuxièmement, l'inter-financement peut aussi servir à alléger le fardeau financier incombant à des entreprises moins profitables. Cela dit, si les stations plus petites ont véritablement besoin d'un rabais, cela ne veut pas dire que les stations de plus grande envergure devraient en faire les frais. Et surtout, dans l'espèce, le Parlement a déjà réglé le problème pour les stations dont les recettes n'excèdent pas 1,25 million de dollars.

Troisièmement, l'inter-financement que propose la SCGDV est rendu nécessaire uniquement par le prix qu'elle demande pour l'utilisation de son répertoire. Le tarif que la Commission homologue élimine tout besoin de réduire le fardeau des stations plus petites.

Quatrièmement, l'adoption de structures similaires pour les tarifs applicables aux œuvres musicales et aux enregistrements sonores rendra plus faciles les comparaisons entre les deux tarifs.

L'ACR a aussi raison de prétendre que la proposition de la SCGDV, telle qu'elle est formulée, va à l'encontre de la mesure législative permettant à toutes les stations de verser uniquement 100 \$ sur la partie de leurs recettes publicitaires ne dépassant pas 1,25 million de dollars. Pour dériver sa grille tarifaire, la SCGDV s'est servie du taux moyen qu'elle propose pour ensuite l'appliquer à l'ensemble des recettes de l'industrie, plutôt qu'à la partie excédant les 1,25

alone ought to be used in establishing the return offered by the tariff irrespective of the formula used.

3. Duration of the tariff

For many reasons, the Board concludes that the tariff should be set for five years instead of three. First, given the relationship the Board establishes with SOCAN's rate of 3.2 per cent, and the fact that CAB and SOCAN have agreed to maintain that rate for the next five years, there would be no point in reopening the neighbouring rights tariffs before then. Second, a five-year tariff keeps open the possibility of a joint hearing when the two tariffs expire in 2002. Third, five years should allow the market to adjust to the new reality; it would also allow the Board to make more useful observations on its real impact before embarking on a revision; better databases could also be put in place during that time. No one's interest would be served by putting this tariff back on the front burner after only a few months of its approval.

4. General structure of the tariff

The proposed statement NRCC filed was largely based on the Retransmission tariff. The Board has preferred following the model set out in SOCAN's Tariff 17 (Transmission of Pay, Specialty and Other Cable Services). In some cases, however, provisions are closer to the Retransmission tariff (ss. 12 and 13) or are added to deal with needs that are specific to the neighbouring rights regime (s. 4).

5. Qualifying for a lower rate

The definitions used are those proposed by participants. Thus, qualifying for the low-use rate

million de dollars par station. Cela fait en sorte que l'industrie dans son ensemble se trouve à verser davantage que le taux moyen sur les recettes non visées par le tarif spécial. Seules ces dernières devraient servir à établir le rendement du tarif, et cela qu'il s'agisse d'un tarif à taux fixe ou d'un tarif graduel.

3. La durée du tarif

Pour plusieurs motifs, la Commission croit que le tarif devrait être homologué pour cinq années plutôt que trois. Premièrement, vu le rapport que la Commission établit entre le tarif de la SOCAN et celui des droits voisins, il n'y a pas lieu de rouvrir ce dernier avant l'expiration du premier. Or, l'ACR et la SOCAN ont convenu d'une période de cinq ans. Deuxièmement, un tarif de cette durée permet, si la Commission le juge nécessaire, d'entendre en même temps les deux tarifs lorsqu'ils viendront à échéance en l'an 2002. Troisièmement, cette période de temps devrait permettre au marché de s'ajuster à la mesure, tout en permettant à la Commission de se livrer à des observations plus utiles sur son impact réel avant de procéder à un réexamen; elle pourra aussi servir à mettre au point de meilleures bases de données. Enfin, personne n'a intérêt à réactiver le débat sur ce tarif quelques mois à peine après son homologation.

4. La structure générale du tarif

Le projet de tarif de la SCGDV reflétait dans une large mesure la structure du tarif de la retransmission. La Commission a préféré s'inspirer du tarif 17 de la SOCAN (Transmission de services par câble, y compris les services de télévision payante et les services spécialisés). Toutefois, quelques dispositions se rapprochent davantage du premier tarif (aa. 12 et 13) ou traitent de questions se soulevant uniquement dans le cadre du régime des droits voisins (a. 4).

5. Comment établir si on se qualifie pour un taux plus bas

Les définitions retenues sont celles mises de l'avant par les participants. Par conséquent, le

is entirely a function of so qualifying for the purposes of SOCAN's tariff, and all-talk stations are defined using language proposed by CAB.

As in SOCAN's tariff, a station must, as a condition of the tariff, keep and make available complete recordings of its last 90 broadcast days in order to qualify for a lower rate. The importance of the benefit stations derive from these measures justify making it such a requirement.

6. A monthly tariff

As indicated in section 3 and other provisions of the tariff, royalties are to be calculated and paid monthly. This presents several advantages. First, it means that all calculations can be made on the basis of the reference month, the definition of which reflects SOCAN's tariff structure. Second, it avoids the need to estimate royalties and make corrections. Third, this allows a station to move from one format to another without having to take into account considerations that may be linked to the fact that the tariff is partly on a monthly basis, and partly on a yearly one.

For the same reasons, the rate for all-talk stations is set at \$100 per month.

7. Taking into account the special provisions of subsection 68.1(1) of the Act

The tariff structure takes no account of the special provisions contained in subsection 68.1(1) of the Act. Instead, reference is made to it in section 4 of the tariff. These provisions apply "notwithstanding the tariffs approved by the Board". It is therefore appropriate that the tariff reflect what the Board would have considered fair and equitable absent those provisions.

It is also not necessary to specify how the stations are to take advantage of subparagraph 68.1(1)(a)(i) of the Act. Stations pay \$100 on

statut de station à faible utilisation est relié directement à celui qui prévaut aux fins du tarif de la SOCAN, et la définition de station de radio parlée reprend la formulation mise de l'avant par l'ACR.

Comme c'est le cas pour la SOCAN, la station se réclamant d'un taux plus bas est tenue, comme condition du tarif, de conserver et de mettre à la disposition de la SCGDV l'enregistrement complet de ses 90 dernières journées de radiodiffusion. L'avantage que tirent les stations qui se prévalent de ce tarif justifie cette mesure.

6. Un tarif mensuel

L'article 3 et certaines autres dispositions du tarif établissent que les redevances sont calculées et versées à chaque mois sans égard au taux applicable. Cette façon de procéder comporte plusieurs avantages. Tous les calculs peuvent être effectués en utilisant le même mois de référence qui sert au tarif de la SOCAN. On n'a pas ainsi à estimer les redevances ou à procéder à des ajustements. Enfin, la station qui changerait sa formule de programmation en cours d'année n'aura pas à tenir compte des incidences découlant d'un tarif fondé partiellement sur une base mensuelle, et partiellement sur une base annuelle.

Pour ces mêmes motifs, le taux pour les stations de radio parlée est établi à 100 \$ par mois.

7. La prise en compte des dispositions spéciales du paragraphe 68.1(1) de la Loi

La structure tarifaire ne tient aucun compte des dispositions spéciales du paragraphe 68.1(1) de la Loi. On s'est contenté d'y référer dans l'article 4 du tarif. Ces dispositions s'appliquent «par dérogation aux tarifs homologués par la Commission». Il convient donc que le tarif reflète ce que la Commission aurait considéré être juste et équitable n'eût été de ces dispositions.

Il n'est pas non plus nécessaire de spécifier la façon dont les stations peuvent se prévaloir du sous-alinéa 68.1(1)(a)(i) de la Loi. Le texte

their *first* 1.25 million dollars of advertising revenues. In the Board's view, this means that the payment obligations imposed in the tariff only come into operation once a station's revenues exceed that sum. Moreover, trying to build in the exception into the tariff would have made it unduly complicated. By contrast, if the exception is applied the way the Board thinks it ought to be, the structure is simple, as are the rules. Stations will simply have to take note of the point in the year where they cross the revenue threshold and conduct themselves accordingly. The fact that this will mean that NRCC will receive little during the first few months of the year is a direct result of clearly expressed parliamentary intent.

8. Reporting requirements

The reporting requirements are more or less on line with what the participants agreed to. The following issues are worth mentioning.

A) The requirement to provide play lists is included in the tariff, even though this is done voluntarily in the case of SOCAN. The difficulties NRCC experienced in getting information from some stations (who may not be members of CAB) amply justify making this a compulsory aspect of the regime.

The number of days for which stations must provide the information is set at 14, as is customary with SOCAN, rather than the 21 asked by NRCC. The provision is drafted so as to allow NRCC to select individual days (rather than one or more blocks of days) if it so wishes. The Board strongly expects that NRCC will cooperate with SOCAN so as to minimize the reporting burden of radio stations, and will entertain a request for a more formal form of cooperation if needed.

stipule que les stations ne versent que 100 \$ sur la partie de leurs recettes publicitaires n'excédant pas 1,25 million de dollars. La Commission est d'avis que l'obligation de paiement imposée par le tarif entre en jeu uniquement lorsque les recettes d'une station dépassent ce seuil. Par ailleurs, tenter de prévoir un mécanisme qui prenne en compte cette disposition aurait rendu le tarif inutilement compliqué. Si l'exception opère ainsi que la Commission le croit, la structure tarifaire est simple, tout comme ses règles d'application. Les stations n'ont qu'à surveiller le moment à partir duquel elles dépassent le seuil et à se gouverner en conséquence. Le fait que les revenus de la SCGDV seront conséquemment très faibles durant les premiers mois de l'année découle directement de choix clairement exprimés par le législateur.

8. Les exigences de rapport

Les exigences de rapport reflètent, pour l'essentiel, l'accord des parties. Il y a lieu de traiter des points suivants.

A) L'obligation de fournir les listes de diffusion est incorporée au tarif bien que la mesure soit volontaire dans le cas de la SOCAN. Les difficultés auxquelles la SCGDV a eu à faire face dans sa cueillette d'information auprès de certaines stations (qui ne sont pas nécessairement membres de l'ACR) justifient amplement la décision de rendre cet aspect du régime obligatoire.

La SCGDV pourra exiger de chaque station des renseignements à l'égard de 14 jours, comme c'est la pratique à la SOCAN, plutôt que les 21 demandés. Le libellé permet à la SCGDV, si elle le désire, d'opter pour des journées individuelles plutôt que pour un ou plusieurs blocs de journées. La Commission s'attend fortement à ce que la SCGDV collabore avec la SOCAN afin de faciliter la tâche des stations, et prendra en considération toute demande visant à rendre plus formelle cette exigence de collaboration si le besoin s'en faisait sentir.

There is no need to deal with CAB's request that the tariff reflect the value to NRCC of being provided with play lists. Given the blanket nature of the regime, collecting this sort of information is necessary. As stations derive benefits from such regime, it is only normal that they should carry part of the burden of its efficient operation.

B) The tariff does not specify the number of audits NRCC can conduct in a given year. Such a limit has never been imposed on SOCAN, who appears not to have abused of this right. The Board is confident that NRCC will behave in the same fashion.

C) Stations will be required to pay for an audit if royalties are under-reported by 10 per cent of any audited month. NRCC was proposing five per cent and CAB 20 per cent. Ten per cent seems a reasonable compromise.

D) The Board was surprised by the amount of controversy surrounding the confidentiality provisions. CAB expressed misgivings about allowing access to station financial information to persons other than NRCC, such as royalty claimants or other collectives for the purposes of establishing entitlements to payment. It asked that as much as possible, aggregate figures, as opposed to station specific data, be used for those purposes. The Board trusts that the provision included in the tariff will address the reasonable concerns of CAB in this respect.

CAB also stated that play list information was sensitive competitive information for broadcasters. NRCC ended up conceding that point. The provision included in the tariff draws no distinction between the two types of information.

Il n'est pas nécessaire de traiter de la demande de l'ACR voulant que le tarif tienne compte de la valeur monétaire que la fourniture des listes de diffusion représente pour la SCGDV. Ce genre de renseignements est essentiel au bon fonctionnement d'un régime qui s'apparente à une licence générale. Les stations tirent des bénéfices d'un tel régime; il est donc normal qu'elles supportent une partie du fardeau nécessaire à son bon fonctionnement.

B) Le tarif n'impose pas de limite au nombre de vérifications auxquelles la SCGDV peut se livrer dans une année donnée. La Commission n'a jamais imposé de limite de ce genre à la SOCAN, qui ne semble pas avoir abusé de ce droit. La Commission est confiante que la SCGDV agira de même.

C) Les stations devront payer les coûts de vérification si les redevances ont été sous-estimées de plus de 10 pour cent pour un mois quelconque. La SCGDV demandait cinq pour cent et l'ACR, 20. Dix pour cent nous semble un compromis raisonnable.

D) La Commission s'étonne que les dispositions portant sur le traitement confidentiel aient soulevé autant de controverse. L'ACR s'est dite inquiète de devoir permettre l'accès aux données financières des stations à des personnes autres que la SCGDV, notamment aux titulaires de droits et aux autres sociétés de gestion collective, pour effectuer la distribution. Elle a demandé que seules les données concernant l'ensemble des stations soient fournies à ces fins. La Commission est convaincue que la disposition incorporée au tarif suffit à répondre aux préoccupations raisonnables de l'ACR à cet égard.

L'ACR a aussi demandé que les radiodiffuseurs traitent les listes de diffusion comme renseignements concurrentiels de nature délicate. La SCGDV a finalement concédé ce point. Le tarif ne fait pas de distinction entre les deux types de renseignements.

E) All stations, including those whose royalty payment will only be \$100 per year, will be required to comply with the tariff's reporting requirement. Only in this way can NRCC and, through it, the Board keep abreast of the use being made of the eligible repertoire by all of the industry.

9. Interest on late payments

The Board used the (simpler) formulation found in SOCAN's Tariff 17 instead of the one used in the retransmission tariff. Given that the tariff as structured does not require interim payments and adjustments, there is no need to be more specific.

10. Transitional provisions

The tariff contains, as did the 1990-1992 Retransmission tariff and SOCAN's Tariff 17 for 1990 to 1995, certain transitional provisions made necessary because the tariff takes effect on January 1, 1998 even though they were approved much later. A table sets out interest factors or multipliers to be used on sums owed in a given month. These were derived by using the Bank of Canada rates. Interest is not compounded. The amount owed for any given month is the amount calculated in accordance with the tariff multiplied by the factor set out for that month. The Board hopes that this will greatly simplify the stations' calculations and NRCC's verifications.

E) Toutes les stations, y compris celles qui ne versent que 100 \$ par année, sont tenues aux exigences de rapport du tarif. Cette mesure est nécessaire afin de renseigner la SCGDV et éventuellement la Commission sur l'utilisation que l'ensemble de l'industrie fait du répertoire admissible.

9. Intérêts sur paiements tardifs

La Commission a retenu la formule simplifiée qu'on retrouve dans le tarif 17 de la SOCAN plutôt que celle utilisée dans le tarif de la retransmission. Il n'est pas nécessaire d'être plus précis, compte tenu que la structure tarifaire évite les versements intérimaires et les ajustements.

10. Dispositions transitoires

Tout comme le tarif pour la retransmission de 1990-1992 et le tarif 17 de la SOCAN de 1990 à 1995, le présent tarif comporte des dispositions transitoires qui sont nécessaires parce qu'il prend effet le 1^{er} janvier 1998 et ce, même s'il a été homologué beaucoup plus tard. Un tableau fournit les facteurs d'intérêts qui seront appliqués aux sommes dues pour les usages effectués durant un mois donné. Ces facteurs ont été établis en utilisant le taux d'escompte de la Banque du Canada. L'intérêt n'a pas été composé. Le montant dû par rapport aux usages effectués dans un mois donné est le montant des redevances établi conformément au tarif, multiplié par le facteur fourni pour le mois en question. La Commission est d'avis que ces mesures simplifieront de beaucoup les calculs et vérifications auxquels les stations et la SCGDV devront se livrer.

Le secrétaire de la Commission,

Claude Majeau
Secretary to the Board

ENDNOTES

1. Paragraph 68(2)(a). Paragraph 68(2)(b), which provides that the Board may also “take into account any factor that it considers appropriate”, adds nothing to the Board’s already wide discretionary powers. See, for example, *SOCAN v. Canadian Association of Broadcasters* (C.A.), [1999] F.C.J. 389; *Réseaux Premier Choix Inc. v. Canadian Cable Television Assn.* [1997], 80 C.P.R. (3d) 208 (F.C.A.); *FWS Joint Sports Claimant v. Canada (Copyright Board)* (C.A.) [1992] 1 F.C. 487.
2. Subsection 68.1(3). See *Regulations Defining “Advertising Revenues”*, SOR/98-447, *Canada Gazette* Part II, Vol. 132, No.19, p. 2589.
3. Subsection 68.1(5). Only the last expression has been defined. See *Definition of “Wireless Transmission System” Regulations*, SOR/98-307, *Canada Gazette* Part II, Vol. 132, No. 12, p. 1817.
4. Section 20(2). See *Limitation of the Right to Remuneration of Certain Rome Convention Countries Statement*, SOR/99-143, *Canada Gazette* Part II, Vol. 133, No. 8, p. 1020.
5. “Named” performers are represented in France by ADAMI, with which NRCC was negotiating a reciprocal agreement at the time of the hearing.
6. Mention should be made here of three issues which are of great importance to the participants but of little relevance, if any, to these proceedings. First, makers have agreed not to claw back royalties paid to performers through contract terms or otherwise. Second, AFM, ArtistI and APRS have agreed that non-members will be allowed to use the services of one of the societies by signing an agency agreement (in the case of AFM or

NOTES

1. Alinéa 68(2)(a). L’alinéa 68(2)(b), qui stipule que la Commission peut aussi «tenir compte de tout facteur qu’elle estime indiqué» n’ajoute rien au pouvoir d’appréciation, déjà fort large, dont la Commission dispose. Voir, par exemple, les arrêts *SOCAN c. Association canadienne des radiodiffuseurs* (C.A.), [1999] A.C.F. 389; *Réseaux Premier Choix Inc. c. Association canadienne de télévision par câble*, [1997] A.C.F. 78; *FWS Joint Sports Claimant c. Canada (Commission du droit d’auteur)* (C.A.), [1992] 1 C.F. 487.
2. Paragraphe 68.1(3). Voir le *Règlement sur la définition de recettes publicitaires*, DORS/98-447, *Gazette du Canada* Partie II, vol. 132, n° 19, p. 2589.
3. Paragraphe 68.1(5). Seule la dernière expression a été définie. Voir le *Règlement sur la définition de «système de transmission par ondes radioélectriques»*, DORS/98-307, *Gazette du Canada* Partie II, vol. 132, n° 12, p. 1817.
4. Article 20(2). Voir la *Déclaration limitant le droit à rémunération équitable pour certains pays parties à la Convention de Rome*, DORS/99-143, *Gazette du Canada* Partie II, vol. 133, n° 8, p. 1020.
5. C’est l’ADAMI qui agit en France pour le compte des autres artistes-interprètes. À l’époque où se sont tenues les audiences, la SCGDV était à négocier un accord de réciprocité avec cette société.
6. Il faudrait mentionner en passant trois questions qui sont d’une importance capitale pour les participants mais sans grand rapport avec la présente affaire. Premièrement, les producteurs ont accepté de ne pas chercher à s’approprier les redevances versées aux artistes-interprètes, que ce soit par contrat ou autrement. Deuxièmement, l’AFM, ArtistI et l’APRS ont convenu que d’autres personnes que leurs membres pourront avoir recours à

APRS) or an assignment agreement (in the case of ArtistI) without having to become members of the “parent union”. Third, members of AFM and ACTRA can be represented by another of the performers’ collectives that are members of NRCC, thereby allowing them to be represented by one entity for the purposes of collective bargaining while asking another to administer their performing rights. The relationship between ArtistI and UDA is such that the issue does not arise for members of UDA.

7. On issues of agency, see generally GHL Fridman, *The Law of Agency* (7th ed.) 1996 Butterworths.
8. The rules applicable in Quebec may be different, since article 2186 of the *Civil Code of Quebec* provides that “A contract of association is a contract by which the parties agree to pursue a common goal other than the making of pecuniary profits to be shared between the members of the association.”
9. See J.-L. Baudouin, *Les Obligations*, (4^e éd), paragraphe 864; GHL Fridman, *The Law of Contracts* (2d ed.) pp. 168-170.
10. Persons whose rights are represented here through a joint creditor are not “orphans” as this word is sometimes used in the context of section 76 of the *Act*, since their rights are indeed represented. The only true orphans are persons having rights in sound recordings for which neither the maker nor the performer is represented and in that case, no royalties are payable.
11. SOGEDAM’s claim was limited to the French repertoire; it did not attempt to demonstrate the use made of sound recordings embedding performances of its 31 or so Canadian members.

leurs services de gestion de droits, soit par mandat (pour l’AFM ou l’APRS), soit par cession (pour ArtistI) sans qu’il soit nécessaire d’adhérer au «syndicat» affilié.

Troisièmement, les membres de l’AFM et de l’ACTRA pourront demander à une autre société membre de la SCGDV qui gère les droits d’artistes-interprètes de gérer leur droit à rémunération; de la sorte, un membre pourra appartenir à une société pour les fins de négociations collectives et à une autre pour la gestion de ses droits voisins. La nature des liens existant entre ArtistI et l’UDA fait en sorte que la question ne se soulève pas par rapport à cette dernière.

7. Sur les règles du mandat en *common law*, on peut consulter GHL Fridman, *The Law of Agency* (7th ed.) 1996 Butterworths.
8. Le droit québécois pourrait être différent à cet égard. L’article 2186 du *Code civil du Québec* prévoit en effet que «Le contrat d’association est celui par lequel les parties conviennent de poursuivre un but commun autre que la réalisation de bénéfices pécuniaires à partager entre les membres de l’association.»
9. Voir J.-L. Baudouin, *Les Obligations*, (4^e éd), paragraphe 864; GHL Fridman, *The Law of Contracts* (2d ed.) p. 168-170.
10. Le titulaire représenté par un co-créancier n’est pas un «orphelin» au sens où on l’entend habituellement lorsqu’on se réfère à l’article 76 de la *Loi*, puisque ses droits sont en fait représentés. Les seuls véritables orphelins sont les titulaires de droit dans un enregistrement sonore pour lequel ni le producteur, ni l’artiste-interprète n’est représenté et pour lequel aucune redevance n’est exigible.
11. La SOGEDAM s’est limitée à réclamer une quote-part à l’égard du répertoire français; elle n’a pas tenté d’établir l’usage fait des enregistrements sonores constitués de prestations de ses quelque 31 membres canadiens.

12. *Retransmission of Distant Radio and Television Signals, 1992-1994*, (1990-1994) Copyright Board Reports, 135, 159.
13. The ratio, were it to be used, would have to be reduced to account for two factors. First, so-called "producers'" royalties should be excluded from the equation. Those royalties are paid to artistic directors who do not share in the remuneration right. Second, it is reasonable to assume that composers' reproduction royalties would be higher if they did not derive revenues from SOCAN.
14. Tr. p. 673.
15. *Canadian Association of Broadcasters v. SOCAN* [1994], 58 C.P.R. (3d) 190 (F.C.A.). Interestingly enough, even American courts now seem to draw a distinction between market rates and reasonable rates: see *Recording Industry Association of America v. Librarian of Congress*, No. 98-1263, May 21, 1999 (U.S.C.A., D.C.)
16. The calculation was made using Statistics Canada data for 1997 advertising revenues filed into the record of these proceedings as Exhibit Board-3. [The total of 1.44% of \$735.8M plus 0.63% of \$109.9M]
17. See sections 73(1)(b), 83(8)(c) and (d) and 84.
18. *Canadian Cable Television Association v. Society of Composers, Authors and Music Publishers of Canada* [1997], 75 C.P.R. (3d) 376 .
12. *Retransmission de signaux éloignés de radio et télévision, 1992-1994*, (1990-1994) Recueil des décisions de la Commission du droit d'auteur, 135, 159.
13. Ce rapport, s'il devait servir, devrait être réduit à deux titres. Premièrement, l'apport des «producteurs» doit être escompté : ces redevances sont versées aux directeurs artistiques, qui n'ont pas de droit à rémunération. Deuxièmement, il est raisonnable de penser que les droits de reproduction des compositeurs seraient plus élevés s'ils ne recevaient pas de redevances de la SOCAN.
14. Tr. p. 673.
15. *Canadian Association of Broadcasters c. SOCAN* [1994], 58 C.P.R. (3d) 190 (C.A.F.). Il est intéressant de noter que même les tribunaux américains commencent à établir une distinction entre prix de marché et prix raisonnable : *Recording Industry Association of America v. Librarian of Congress*, n° 98-1263, 21 mai 1999 (U.S.C.A., D.C.)
16. Montants dérivés à partir des données de Statistique Canada des recettes publicitaires de 1997 déposées sous la cote Board-3. [Le total de 1,44 % de 735,8 M\$ plus 0,63% de 109,9 M\$]
17. Voir les articles 73(1)(b), 83(8)(c) et (d) et 84.
18. *Association canadienne de télévision par câble c. Société canadienne des compositeurs, auteurs et éditeurs de musique*, [1997] A.C.F. n° 78.

MC 7

Copyright Board
Canada



Commission du droit d'auteur
Canada

**FILES: Public Performance of Musical
Works 1997, 1998, 1999, 2000, 2001, 2002**

**DOSSIERS : Exécution publique d'œuvres
musicales 1997, 1998, 1999, 2000, 2001, 2002**

**FILE: Public Performance of Sound
Recordings 1998-2002**

**DOSSIER : Exécution publique
d'enregistrements sonores 1998-2002**

Public Performance of Music

Exécution publique de la musique

Copyright Act, subsection 68(3)

Loi sur le droit d'auteur, paragraphe 68(3)

STATEMENT OF ROYALTIES TO BE
COLLECTED BY SOCAN AND BY NRCC
FOR PAY AUDIO SERVICES

TARIF DES REDEVANCES À PERCEVOIR
PAR LA SOCAN ET PAR LA SCGDV POUR
LES SERVICES SONORES PAYANTS

[1997 TO 2002 FOR SOCAN AND 1998 TO
2002 FOR NRCC]

[1997 À 2002 POUR LA SOCAN ET 1998 À
2002 POUR LA SCGDV]

DECISION OF THE BOARD

DÉCISION DE LA COMMISSION

Reasons delivered by:

Motifs exprimés par :

Mr. Justice John H. Gomery
Mr. Stephen J. Callary
Mrs. Sylvie Charron

M. le juge John H. Gomery
M. Stephen J. Callary
M^{re} Sylvie Charron

Date of the Decision

Date de la décision

March 15, 2002

Le 15 mars 2002

Ottawa, March 15, 2002

Ottawa, le 15 mars 2002

**Files: Public Performance of Musical Works
1997, 1998, 1999, 2000, 2001, 2002**

**Dossiers : Exécution publique d'œuvres
musicales 1997, 1998, 1999, 2000, 2001, 2002**

**File: Public Performance of Sound
Recordings 1998-2002**

**Dossier : Exécution publique
d'enregistrements sonores 1998-2002**

Public Performance of Music

Exécution publique de la musique

**Reasons for the decision certifying the tariff
for pay audio services for the years 1997 to
2002**

**Motifs de la décision homologuant le tarif
pour les services sonores payants pour les
années 1997 à 2002**

I. INTRODUCTION

I. INTRODUCTION

These reasons deal with the proposed Tariff 17.B of the Society of Composers, Authors and Music Publishers of Canada (SOCAN) for the years 1997 to 2002, and the proposed Tariff 17 of the Neighbouring Rights Collective of Canada (NRCC) for the years 1998 to 2002. Proposed statements of royalties were published in the *Canada Gazette*, as were notices outlining the right to object pursuant to subsection 67.1(5) of the *Copyright Act* [the "Act"]. Both target primarily digital pay audio ("DPA") services.¹

Ces motifs ont trait au projet de tarif 17.B de la Société canadienne des auteurs, compositeurs et éditeurs de musique (SOCAN) pour les années 1997 à 2002 ainsi qu'au projet de tarif 17 de la Société canadienne de gestion des droits voisins (SCGDV) pour les années 1998 à 2002. Les projets de tarifs ont été publiés dans la *Gazette du Canada* de même que des avis soulignant le droit de s'opposer conformément au paragraphe 67.1(5) de la *Loi sur le droit d'auteur* [la «Loi»]. Les deux concernent avant tout les services sonores payants numériques (les «SSPN»)¹.

The hearings into these tariffs took place over 13 days ending in May 2001. The collective societies (SOCAN and NRCC) as well as the two Canadian DPA service providers, DMX Canada ("DMX") and Galaxie, participated in the hearings, as did two groups of distribution undertakings²: the direct-to-home satellite companies, Bell ExpressVu and Star Choice (hereafter "DTH"), as well as the Canadian Cable Television Association (CCTA) and Shaw Communications, representing the interests of cable system operators.³

Les audiences concernant ces services se sont déroulées pendant 13 jours et ont pris fin en mai 2001. Les sociétés de gestion (la SOCAN et la SCGDV) ainsi que les deux fournisseurs de SSPN canadiens, DMX Canada («DMX») et Galaxie, ont participé aux audiences de même que deux groupes d'entreprises de distribution² : les compagnies de services de radiodiffusion directe par satellite, Bell ExpressVu et *Star Choice* (ci-après «SRD») de même que l'Association canadienne de télévision par câble (ACTC) et *Shaw Communications*, représentant les intérêts des entreprises de câblodistribution.³

A. DPA: its origins and nature

The birth of DPA in Canada was long and painful. First, two service providers were licensed in 1993. However, after Cabinet directed it to reconsider the decision, the Canadian Radio-television and Telecommunications Commission (CRTC) denied both applications. Then, after a further round of hearings, four licences were issued in 1995. Again, Cabinet directed a reconsideration; this time, the CRTC confirmed its decision in August 1996. A further appeal to Cabinet failed. Subsequently, only two of the four licensees began operations, both in 1997: DMX and Galaxie.

At first, the licensees adopted very different marketing strategies. DMX strove to be a standalone, fully discretionary service available only on request. Galaxie wanted to become a low-priced, high penetration service. Galaxie's approach has prevailed. At present, DPA services are offered at no extra cost to digital cable subscribers, and as part of the basic package to all DTH subscribers.⁴ To date, the success of DPA has been largely dependent on DTH penetration, as digital packages are only purchased by 10 per cent or so of cable subscribers.

DPA offers unique, premium music services, unprecedented in sound quality. It comes in a vast variety of highly specific programming formats.⁵ This is attractive not so much because subscribers wish to tune in to all of them, but because each listener is able to find one or two signals that closely match his or her specific preferences. Still, the evidence indicates that video signals, not DPA, are what drive purchasing decisions. DTH uses DPA to distinguish itself from cable, while cable offers it to its digital subscribers to match the DTH offering.

A. Origines et nature des SSPN

La naissance des SSPN au Canada a été longue et ardue. Deux fournisseurs ont d'abord obtenu une licence en 1993. Mais après que le Cabinet lui eut ordonné de reconsidérer sa décision, le Conseil de la radiodiffusion et des télécommunications canadiennes (CRTC) a rejeté les deux demandes. Puis, après d'autres audiences, quatre licences ont été octroyées en 1995. Le Cabinet a encore une fois enjoint au CRTC de reconsidérer sa décision, qu'il a confirmée en août 1996. Un autre appel au Cabinet a échoué. Par la suite, seulement deux des quatre titulaires de licence sont entrés en service, les deux en 1997 : DMX et Galaxie.

Au début, les titulaires ont adopté des stratégies de commercialisation très différentes. DMX a cherché à s'implanter comme un service autonome et entièrement facultatif, disponible sur demande seulement. Galaxie souhaitait devenir un service à bas prix et à forte pénétration. C'est l'approche de Galaxie qui a prévalu. Actuellement, les SSPN sont offerts sans frais supplémentaires aux abonnés au câble numérique et font partie du volet de base pour tous les abonnés du SRD.⁴ Jusqu'à présent, le succès des SSPN dépend largement de la pénétration du SRD; seulement dix pour cent environ des abonnés au câble s'abonnent au service numérique.

Les SSPN sont des services de musique uniques et de qualité supérieure; le son est de qualité incomparable. Ils offrent un large éventail de formules de programmation très particulières.⁵ L'attrait vient non pas tant de ce que les abonnés souhaitent écouter tous les canaux, mais que chacun peut trouver un ou deux signaux correspondant exactement à ses préférences. Néanmoins, il semble que ce soit les signaux vidéos et non les SSPN qui motivent les décisions d'achat. Les SRD utilisent les SSPN de façon à se distinguer du câble, alors que les câblodistributeurs les incluent dans leur service numérique afin de faire pendant à l'offre des SRD.

Basically, two creative inputs are used in producing a DPA signal: published sound recordings and the programmers' skills.⁶ Other expenses include signal delivery, marketing and regulatory costs. DPA is a capital intensive industry; costs increase little, if at all, as the number of subscribers increases. Reliance on ready-made music allows service providers to keep programming costs very low. Because of the extensive use of computer technology, operations require minimal plant and staff.

The explosive growth in the penetration of DTH in this country has meant that Canadian DPA has not experienced the difficulties that apparently continue to plague its American counterparts. Though launched much earlier than in Canada, DPA south of the border is still perceived by many as a startup industry with an uncertain financial future. Canadian DPA, by contrast, enjoys substantial profit margins which, because of its cost structure, are predicted to grow significantly over the next few years.⁷

B. The parties' positions

NRCC suggests that equitable remuneration necessarily reflects the price that a willing seller and a willing buyer would come to in a competitive market. To derive this, it proposes four approaches. First, assess the proportion of the total value of DPA accounted for by recorded music; in this regard, NRCC points to DPA's almost total reliance on such recordings. Second, examine how much other subscription broadcasting services, and especially pay and pay-per-view, spend for program content. Third, set the royalties so that DPA's rate of return is similar to commercial radio and other subscription broadcasting services. Fourth, as an alternative, set the royalties at how much a service provider would be willing to pay to

Deux intrants créatifs servent à produire un signal sonore payant numérique : les enregistrements sonores publiés et le talent des programmeurs.⁶ Les coûts d'acheminement, de commercialisation et de réglementation sont d'autres dépenses. Les SSPN constituent une industrie à forte intensité de capital; les coûts augmentent peu, ou pas, en fonction du nombre d'abonnés. Les coûts de programmation des fournisseurs de services restent très faibles parce qu'ils utilisent de la musique déjà enregistrée. Compte tenu de la très grande utilisation de la technologie informatique, le personnel et les installations nécessaires aux opérations sont minimes.

La croissance explosive du SRD dans notre pays fait en sorte que les SSPN canadiens ne connaissent pas les difficultés qui semblent toujours frapper leurs homologues américains. Bien que lancés beaucoup plus tôt qu'au Canada, ces derniers sont encore souvent perçus comme une nouvelle industrie dont l'avenir financier est incertain. Pour leur part, les SSPN canadiens bénéficient d'une marge de profit considérable qui, en raison de leur structure de coûts, devrait augmenter sensiblement au cours des prochaines années.⁷

B. Les positions des parties

La SCGDV affirme que la rémunération équitable reflète nécessairement le prix qu'un vendeur et un acheteur sérieux seraient prêts à payer dans un marché concurrentiel. Pour faire ce calcul, elle propose quatre méthodes. Premièrement, évaluer la proportion de la valeur totale du signal sonore payant que représente la musique enregistrée. À cet égard, la SCGDV souligne que les SSPN dépendent presque entièrement de ces enregistrements. Deuxièmement, examiner ce que d'autres services de radiodiffusion par abonnement, et plus particulièrement les services payants et à la carte, consacrent au contenu de programmation. Troisièmement, fixer les redevances de façon à ce que le taux de rendement des SSPN

acquire a monopoly. NRCC then relies on the private copying tariff to ask that performers, makers and authors/composers each get a third of the royalties before any eligible repertoire adjustment.

SOCAN generally adopts NRCC's submissions except on the issue of the relative value of the repertoires. SOCAN argues that authors and composers should get the same as performers and makers. The approaches put forward by the collectives would result in a rate of between 30 and 40 per cent of a distribution undertaking's affiliation payments.

The objectors maintain that the commercial radio tariff should serve as starting point. They perceive striking similarities between commercial radio and DPA, such as their "almost identical" reliance on music. They argue that DPA services are of accessory value in the world of digital offerings. They also ask that the tariff reflect the advantages conferred by statute to commercial radio with respect to so-called neighbouring rights royalties. This would result in a rate in the order of between 3 and 5 per cent.

C. The evidence

The evidence that is on the record of these proceedings is both abundant and varied. SOCAN's witnesses offered background information on DPA as well as their view of the user's perspective. Others provided a detailed overview of the development and characteristics of Canada's broadcasting industry, with a special insistence on the emergence of DPA.

équivalence à celui de la radio commerciale et d'autres services de radiodiffusion par abonnement. Quatrièmement, comme solution de rechange, fixer les redevances au niveau qu'un fournisseur de services serait prêt à payer pour acquérir un monopole. La SCGDV se fonde ensuite sur le tarif de la copie privée pour demander que les interprètes, les producteurs et les auteurs-compositeurs reçoivent chacun le tiers des redevances avant le rajustement pour tenir compte des répertoires admissibles.

Dans l'ensemble, la SOCAN fait sienne l'argumentation de la SCGDV, sauf pour ce qui est de la valeur relative des répertoires. À son avis, les auteurs et les compositeurs devraient obtenir le même montant que les interprètes et les producteurs. Les solutions avancées par les sociétés de gestion produiraient un taux représentant entre 30 et 40 pour cent des paiements d'affiliation d'une entreprise de distribution.

Les opposants soutiennent que le tarif de la radio commerciale devrait servir de point de départ. Ils voient des similitudes frappantes entre celle-ci et les SSPN, comme leur dépendance «presque identique» à l'égard de la musique. Ils font valoir que les SSPN ont un caractère accessoire par rapport à l'ensemble de l'offre numérique. Ils demandent également qu'on tienne compte dans le tarif des avantages conférés par la loi à la radio commerciale en ce qui concerne les redevances au titre des droits dits voisins. Tout cela se traduirait par un tarif se situant entre 3 et 5 pour cent.

C. Les éléments de preuve

Les éléments de preuve produits lors de cette instance sont à la fois abondants et divers. Les témoins de la SOCAN ont présenté de l'information sur les SSPN et ont fait part de leur opinion sur la perspective de l'utilisateur. D'autres ont décrit en détail le développement et les caractéristiques de l'industrie canadienne de la radiodiffusion, en insistant surtout sur

NRCC's witnesses provided a detailed overview of DPA's profile in the media and in advertising. NRCC also filed the results of a consumer survey dealing with the place of DPA in Canadian homes and its potential impact on CD-purchasing and radio-listening habits. This and other evidence were used as backdrop in developing the collectives' proposed model for valuating the relevant repertoires.

Objectors offered evidence from experts and others, including survey evidence, that tended to cast doubts on NRCC's approach and to favour a valuation based on royalties paid by commercial radio. They also offered a significant amount of background, financial and historical industry information that helped put DPA, its emergence, its relevance and relative importance to distribution undertakings in context.

Both sides provided extensive evidence and comment on the financial situation of DPA service providers. Given the small number of participants in the industry, most of this had to be heard in camera. This explains to some extent why references to financial data in the rest of this decision are only as specific as absolutely required for the purposes of the decision.

The extensive evidence of the economists retained by participants helped to highlight the complexity of the issues involved in this file, and the diversity of ways in which they could be tackled. The analysis of this evidence represented a difficult, but necessary and helpful step in allowing the Board to reach its decision. The Board especially appreciated the considerable efforts these witnesses made to be helpful and to provide open-minded perspectives. In the end, however, the analysis that underscores the Board's conclusions must be the Board's own.

l'émergence des SSPN. Les témoins de la SCGDV ont minutieusement décrit l'image des SSPN dans les médias et dans la publicité. La SCGDV a également déposé les résultats d'une enquête auprès des consommateurs portant sur la place des SSPN dans les foyers canadiens et leur incidence possible sur les habitudes d'achat de CD et d'écoute de la radio. Ces éléments de preuve et d'autres ont servi de base au modèle d'évaluation des répertoires pertinents proposé par les sociétés de gestion.

En plus de faire appel à des experts et à d'autres témoins, les opposants ont présenté des éléments de preuve, notamment des enquêtes, visant à remettre en question la solution proposée par la SCGDV et à favoriser une évaluation fondée sur les redevances payées par la radio commerciale. Ils ont également fourni une foule de données contextuelles, financières et historiques qui ont permis de replacer les SSPN dans leur contexte, leur émergence, leur pertinence et leur importance relative pour les entreprises de distribution.

Tous ont produit un grand nombre d'éléments de preuve et de commentaires sur la situation financière des fournisseurs de SSPN. Vu le faible nombre de participants dans l'industrie, il a fallu entendre une bonne partie de ces témoignages à huis clos. Cela explique en partie pourquoi les références aux données financières dans le reste de cette décision sont limitées à ce qui est absolument nécessaire.

L'abondante preuve fournie par les économistes retenus par les participants a contribué à faire ressortir la complexité des questions soulevées dans ce dossier de même que la diversité des façons dont on pouvait en traiter. Cette analyse a constitué une étape difficile, mais nécessaire et utile, pour que la Commission en vienne à une décision. La Commission a particulièrement apprécié les efforts considérables déployés par ces témoins pour être utiles et pour éviter les opinions arrêtées. Mais en bout de piste, la Commission doit prendre une décision en s'appuyant sur ses propres analyses.

As informative as the evidence provided may have been, and for reasons stated below, the analytical framework and the approach used by the Board to derive the tariff rate make it unnecessary to review this evidence in detail.

II. ANALYSIS

A. The "price" subscribers pay for DPA

Throughout the hearings, DPA was often referred to as being free to the subscriber. It should be stated at the outset that this is simply incorrect. No programming that is offered as part of a set package, including the basic package, is free to subscribers. Subscribers pay for what is included in any package, whether or not they know it, and even if they are unaware that they are getting it.

B. The proposed starting points

In essence, collectives and objectors proposed two types of starting points.⁸ The first are the prices paid or rates of return achieved in a number of real or theoretical free markets. The second are the prices set by the Board for what arguably are similar uses or uses in similar (or competing) industries.

In the Board's view, none of the comparisons offered is clearly preferable to the others. All of them are sufficiently weak, or in need of sufficiently large corrections, to make the use of one or a combination of them highly problematic. Proposed free-market comparators are dramatically different from telecommunication rights for music and sound recordings. The tariffs put forward as starting points target industries that do not compete with DPA and whose business models are so far

Tout éclairants qu'aient pu être les éléments de preuve présentés, et pour les raisons énoncées ci-dessous, le cadre analytique et la méthode utilisés par la Commission pour en arriver à un taux rendent inutile l'examen détaillé de ces éléments.

II. ANALYSE

A. Le «prix» que les abonnés paient pour les SSPN

Tout au long des audiences, on a souvent dit que les SSPN étaient gratuits pour les abonnés. D'entrée de jeu, il faut préciser que cela n'est tout simplement pas exact. Aucune programmation faisant partie d'un volet pré-établi, y compris le volet de base, n'est gratuite pour les abonnés. Ceux-ci paient pour tout ce que comprend le volet, qu'ils le sachent ou non, et même s'ils ne sont pas au courant qu'ils le reçoivent.

B. Les points de départ proposés

Essentiellement, les sociétés de gestion et les opposants ont proposé deux types de points de départ.⁸ Le premier est le prix payé ou le rendement réalisé dans un certain nombre de marchés libres réels ou hypothétiques. Le deuxième est le prix fixé par la Commission pour des utilisations semblables ou des utilisations dans des industries semblables (ou concurrentes).

La Commission estime qu'aucune des solutions proposées n'est nettement préférable aux autres. Comme toutes comportent suffisamment de lacunes ou nécessitent des corrections suffisamment importantes, le recours à une seule solution ou à une combinaison de solutions entraînerait de sérieuses difficultés. Les comparateurs proposés sur le marché libre sont très différents des droits de télécommunication pour la musique et les enregistrements sonores. Les tarifs offerts comme points de départ ciblent

removed from that of DPA as to make comparisons difficult, if not irrelevant.

The price that would be arrived at by a willing buyer and a willing seller in a real or hypothetical free market is useful as a starting point only when it offers some basis for comparison with the industry under examination. This is why the Board was able to use the price of the A&E signal in developing the retransmission tariff.⁹ Even with all the adjustments the Board has applied, the similarities between the pre-recorded CD and private copying markets are striking. Nothing of the sort exists in this instance.

Thus, it would not be appropriate to set the tariff by looking at what television pay and pay-per-view services spend on movie rights, even though these services do present certain similarities with DPA. Both depend on a single, externally sourced category of content: music and movies. Neither produces content; they package someone else's intellectual property. Both operate on similar, extremely lean infrastructures. Both compete for available bandwidth. However, contrary to music rights, movie rights are sold in a competitive market, with some level of exclusivity. This alone is significant enough to discard the comparison. Even if the comparison were used, it would require a rate correction of 50 per cent or even more.

Neither would it be appropriate to set the tariff by trying to match DPA's rate of return to that of commercial radio or other subscription broadcasting services. Subject to later comments on the structure of the information economy, the Board's function is not to regulate users' profitability. Profitability may be used to assess whether an industry is able to afford an

des industries qui ne font pas concurrence aux SSPN et dont les modèles d'entreprise en sont tellement éloignés qu'ils rendent toute comparaison difficile, voire non pertinente.

Le prix dont conviendraient un acheteur et un vendeur dans un marché libre réel ou hypothétique est un point de départ utile uniquement lorsqu'il offre une certaine base de comparaison avec l'industrie à l'étude. Voilà pourquoi la Commission a pu utiliser le prix du signal de A&E pour établir le tarif de la retransmission.⁹ Même avec les modifications que la Commission y a apportées, les ressemblances entre les marchés des CD pré-enregistrés et de la copie privée sont frappantes. Rien de ce genre n'existe dans ce cas-ci.

Par conséquent, il ne conviendrait pas d'établir le tarif en se fondant sur ce que les services de télévision payants ou à la carte consacrent aux droits cinématographiques, même si ces services présentent des ressemblances avec les SSPN. Les deux utilisent une catégorie de contenu unique et acheté de tiers : la musique et les films. Aucun ne produit du contenu; ils assemblent la propriété intellectuelle de tiers. Les deux utilisent des infrastructures semblables et extrêmement limitées. Les deux se font concurrence au chapitre de l'utilisation de la largeur de bande disponible. Mais contrairement aux droits musicaux, les droits cinématographiques se transigent dans un marché concurrentiel et comportent une certaine mesure d'exclusivité. Cela est en soi suffisant pour écarter toute comparaison. Même si la comparaison était utilisée, il faudrait corriger le taux de moitié ou même plus.

Il ne conviendrait pas non plus d'établir le tarif en essayant de faire correspondre le taux de rendement des SSPN avec celui de la radio commerciale ou d'autres services de radiodiffusion par abonnement. Sous réserve d'observations ultérieures sur la structure de l'économie de l'information, la Commission n'a pas pour fonction de régler la rentabilité

otherwise fair tariff; it should be used only rarely to assess whether the tariff is fair and reasonable in the first place.¹⁰

It is not necessary to scrutinize the other two approaches put forward by NRCC: it rightly concedes that they cannot be used to derive the rate. Nevertheless, the Board finds it useful to comment on the "simulated auction" approach which was discussed at the hearing. This scenario calls for setting the price of music at what one would be willing to pay to acquire a monopoly over DPA. That approach must be set aside because it focuses again on profitability at the expense of all else.¹¹ This being said, the exercise is not without merit, if only because it highlights the important notion that in information industries, pricing tends to be based on the value to the buyer, not on cost to produce.

The absence of a usable free-market starting point is not in itself problematic. While free market transactions are both important and relevant, they are not the only factor to look at. Thus, using another tariff set by the Board as a starting point will be helpful where industries can readily be compared. Participants looked at several other tariffs either as possible starting points or as reality checks.

Foremost among those was the commercial radio tariff. Those who favour this comparison rely on several arguments. DPA and radio are both audio services. DPA has been said to view itself as "radio, only better". Both use similar playlists and rotations. The principles governing selection and ordering of music are the same for both.¹² Close to 80 per cent of the average radio station's content consists of music. Music format stations account for the vast majority of

des utilisateurs. On peut utiliser la rentabilité pour évaluer si une industrie est en mesure de payer un tarif juste par ailleurs. Il faudrait rarement employer la rentabilité pour évaluer si d'emblée le tarif est juste et raisonnable.¹⁰

Il est inutile d'examiner en détail les deux autres méthodes présentées par la SCGDV. Elle admet elle-même que l'on ne peut pas les utiliser pour calculer le tarif. Néanmoins, la Commission estime utile de faire des observations sur la méthode «des enchères simulées» dont il a été question à l'audience. Ce scénario prévoit l'établissement du prix de la musique en fonction de ce que l'on serait prêt à payer pour acquérir un monopole sur les SSPN. Il faut rejeter cette méthode, car encore une fois, elle insiste sur la rentabilité aux dépens de tout le reste.¹¹ Cela dit, l'exercice demeure utile, ne serait-ce que parce qu'il fait ressortir l'importante notion selon laquelle dans les industries de l'information, le prix tend à refléter la valeur pour l'acheteur et non le coût de production.

On ne peut donc utiliser un prix de marché pour établir le taux; cela n'est pas en soi problématique. Les transactions sur le marché libre, si importantes et pertinentes soient-elles, ne sont pas le seul facteur à envisager. Ainsi, on peut utiliser un autre tarif fixé par la Commission comme point de départ lorsque les industries sont facilement comparables. Les participants en ont examiné plusieurs comme points de départ possibles ou comme moyens de confronter la réalité.

Celui sur lequel on a insisté le plus a été le tarif de la radio commerciale. Ceux qui sont en faveur de cette comparaison s'appuient sur plusieurs arguments. Les SSPN et la radio sont des services sonores. On a dit que les SSPN se considèrent comme de la «radio, mais en mieux». Les deux utilisent des listes de diffusion et un système de rotation semblables. Les principes qui régissent la sélection et la séquence des œuvres musicales sont les

radio listening in Canada, and most commercial stations emphasize music or music format as what drives them. A majority of people give music as the main reason for listening to radio, and most say that they would listen less if radio did not play sound recordings. Supporters of this approach also point to the fact that CRTC conditions of licence are often similar for radio and for DPA.¹³

Still, the Board concludes that what DPA provides is neither in competition with, nor a substitute for commercial radio.

Even though part of a "music continuum", DPA is not on the whole an economic substitute for most products within that continuum.¹⁴ Two products are not substitutes for one another simply because they cannot be used at the same time or are competing for a person's time. A pre-recorded CD is not a substitute for radio, even though most would rather not listen to both at the same time: functional interchangeability should not be confused with substitutability. One true test of what is a substitute is cross-price elasticity: does an increase in the price of one result in an increase in the sales of the other? There are no signs of cross-price elasticity between commercial radio and DPA.

As demands on available bandwidth increase, DPA and distant radio signals available for retransmission may become substitutes for one another. The appropriate comparator would then be the radio retransmission tariff, which has always been set by consent at a seemingly very low amount.¹⁵ Using an untested tariff as a starting point would not be useful or equitable.

mêmes.¹² La radio présente en moyenne près de 80 pour cent de musique. Les stations ayant une formule musicale obtiennent la grande majorité de l'écoute radiophonique au Canada, et la plupart des stations commerciales insistent sur la musique ou la formule musicale en tant que moteur de leurs activités. La majorité des auditeurs écoutent la radio essentiellement pour entendre de la musique et la plupart disent qu'ils écouterait moins la radio si elle ne diffusait pas d'enregistrements sonores. Les personnes qui favorisent cette approche font également remarquer que les conditions de licence du CRTC sont souvent les mêmes pour la radio et les SSPN.¹³

Malgré cela, la Commission conclut que les SSPN ne sont pas en concurrence avec la radio commerciale et ne la remplacent pas.

Même s'ils font partie du «continuum musical», les SSPN ne peuvent habituellement servir de succédané économique à la plupart des produits qui appartiennent à ce continuum.¹⁴ Deux produits ne peuvent pas se substituer simplement parce qu'on ne peut les utiliser en même temps ou encore parce qu'ils se disputent l'emploi du temps d'une personne. Un CD pré-enregistré ne remplace pas la radio, même si la plupart des gens ne vont pas écouter les deux en même temps : l'interchangeabilité fonctionnelle ne doit pas être confondue avec la substitutabilité. Un véritable critère du substitut est l'élasticité croisée des prix : l'augmentation du prix de l'un entraîne-t-elle l'augmentation des ventes de l'autre? Il n'y a aucune indication d'élasticité croisée des prix entre la radio commerciale et les SSPN.

À mesure que la demande pour la largeur de bande disponible augmentera, les SSPN et les signaux de radio éloignés disponibles pour la retransmission pourraient devenir des substituts les uns des autres. Le comparateur qui conviendrait serait alors le tarif de retransmission radiophonique, qui a toujours été établi de consentement à un prix apparemment très bas.¹⁵ À quoi servirait d'utiliser comme point de départ un tarif qui n'a pas fait ses preuves?

The Board also believes that DPA does not compete with radio.

First, although music may be what radio mostly provides, that does not mean that it is radio's most important input. The most important part of programming is not necessarily what consumes the most airtime: sports are crucially important to a television station's profitability, but generally represent a fairly small share of overall programming. Radio may be designed around the use of music and musical genres but as a cost, and (probably) as a drawing card, on-air talent is far more important. Commercial radio could reduce its expenses significantly by dispensing with on-air talent and making greater use of SOCAN's and NRCC's repertoires. If it does not, it must be because radio broadcasters consider that the lost advertising revenues would be greater than the cost savings. On-air talent creates the crucial identity link between station and audience. DPA has no on-air talent.

Second, DPA and radio are not in the same marketplace. Commercial radio sells "ears" to advertisers who want to promote a product in a local market. DPA sells national programming to distribution undertakings. DPA has no advertising.

Even from the listener's perspective, commercial radio and DPA do not compete. With DPA, the focus is aesthetic: its selling point is that it consists entirely of music.¹⁶ Commercial radio's output is a package of information, chat, comment, advertising, other creative inputs and music. "Survival" programming (news, weather, traffic), local interest stories and the selection of on-air personalities are pivotal in a commercial radio

La Commission croit également que les SSPN ne font pas concurrence à la radio.

Premièrement, même si la radio offre surtout de la musique, cela ne veut pas dire que c'est son principal intrant. La programmation la plus importante n'est pas toujours celle qui consomme le plus de temps d'antenne : les sports sont essentiels à la rentabilité d'une station de télévision, mais ne représentent généralement qu'un faible pourcentage de la programmation générale. La radio peut être conçue autour de la musique et des genres musicaux, mais sur le plan des coûts, et (probablement) de l'attraction, les talents en ondes sont beaucoup plus importants. La radio commerciale pourrait réduire considérablement ses dépenses en éliminant ces derniers et en utilisant davantage les répertoires de la SOCAN et de la SCGDV. Si elle ne le fait pas, ce doit être parce que les radiodiffuseurs considèrent que les pertes de recettes publicitaires dépasseraient les économies réalisées. Ce sont les talents en ondes qui créent le lien identitaire, si crucial, entre la station et son auditoire. Les SSPN n'utilisent pas ces talents.

Deuxièmement, les SSPN et la radio n'appartiennent pas au même marché. La radio commerciale vend «des oreilles» aux annonceurs qui souhaitent promouvoir un produit sur un marché local. Les SSPN vendent une programmation nationale aux entreprises de distribution. Les SSPN ne contiennent pas de messages publicitaires.

Même du point de vue de l'auditeur, la radio commerciale et les SSPN ne se font pas concurrence. Pour les SSPN, l'esthétique passe avant tout : le principal argument de vente est qu'on n'offre que de la musique.¹⁶ La programmation radiophonique commerciale se compose d'information, de causerie, de commentaire, de publicité, d'autres intrants créatifs et de musique. La programmation «de survie» (nouvelles, météo, circulation), les

station's operations, especially during peak listening hours.

Eventually, services will compete for bandwidth, and competition will emerge between DPA services and all other signals available to distribution undertakings, including distant radio signals available for retransmission. To date, however, the amount of digital content available to distribution undertakings to distinguish digital and analog offerings has been limited. Whether the recent introduction of new video digital services changes this remains to be seen. Meanwhile, distribution undertakings continue to purchase DPA and incur additional copyright liability in doing so, even though they could substitute distant radio signals for DPA at little or no cost. Under the circumstances, it is difficult to see how it may be argued that radio signals currently compete with DPA.

Other differences exist. For reasons explained below, some, such as the differences in business models, are important. Others are less so, such as the fact that radio produces its own content, while DPA does not, or that each radio station offers one programming format, while DPA offers a broad choice of very focussed formats.¹⁷

Objectors argued that since the Board used the price of music to conventional television as a starting point for calculating the price of music for pay and specialty services, it should set the price of music for DPA as a function of that price to commercial radio. The decision reached for television was based on the proposition that copyright users operating in similar industries, competing in the same marketplace to acquire similar inputs so as to deliver similar products

sujets d'intérêt local et la sélection des personnalités en ondes sont des éléments-charnières des stations de radio commerciale, en particulier aux heures de grande écoute.

Les services finiront par se faire concurrence pour la largeur de bande, et les SSPN et tous les autres signaux accessibles aux entreprises de distribution, incluant notamment les signaux éloignés de radio susceptibles d'être retransmis, se livreront concurrence. Mais jusqu'à présent, la quantité de contenu numérique que les entreprises de distribution peuvent utiliser pour différencier les volets numériques de l'offre analogique est limitée. Il reste à voir si le récent lancement de nouveaux services numériques vidéo changera cette situation. En attendant, les entreprises de distribution continuent d'acheter les SSPN et d'avoir ainsi à payer des droits d'auteur supplémentaires, même si elles peuvent utiliser à la place des signaux éloignés de radio qui ne leur coûtent rien ou presque. Dans ces conditions, il est difficile de voir comment on peut affirmer que les signaux de radio font concurrence aux SSPN.

Il y a également d'autres différences. Pour les raisons expliquées ci-dessous, certaines, comme les différences dans les modèles d'entreprise, sont importantes. D'autres le sont moins, par exemple le fait que la radio produit son propre contenu alors que les SSPN ne le font pas, ou que chaque station de radio offre une seule formule de programmation, alors que les SSPN offrent un vaste choix de formules très pointues.¹⁷

Les opposants ont fait valoir que puisque la Commission a utilisé le prix de la musique pour la télévision conventionnelle comme point de départ pour calculer le prix de la musique pour les services payants et spécialisés, elle devrait fixer le prix de la musique pour les SSPN en fonction de ce prix pour la radio commerciale. La décision prise à l'égard de la télévision se fonde sur la prémisse que les utilisateurs de droits d'auteur exerçant leurs activités dans les

ought to pay the same price for their non-competitive inputs, to avoid creating a competitive imbalance. This reasoning does not apply to this case.

First, for the reasons already stated, commercial radio and DPA are not similar industries and do not deliver similar products.

Second, the reason for linking the price of music between two sectors of the television industry was the existence of competition over inputs (especially creative inputs) other than music. DPA and radio do not compete for inputs. The right to play recorded music, the "thing" which both use most, is not something over which radio stations have to compete amongst each other or against DPA, because it is "sold" without any level of exclusivity.

Third, the rights which television stations purchase in a competitive market cost considerably more than music. Setting a different rate for DPA than for commercial radio will not create a competitive imbalance in the acquisition of competitive inputs, as the share of revenues DPA uses to pay for competitive creative inputs is, relatively speaking, much lower than that of commercial radio.

Using commercial radio as a starting point also raises problems if, as the record of these proceedings seems to indicate, radio now uses and emphasizes music much more than it did when the Board last examined that industry. If that is so, it could be argued that the commercial radio tariff may be too low, which would weaken its usefulness as a starting point.

mêmes industries, se livrant concurrence sur le même marché pour acquérir des intrants semblables afin de fournir des produits semblables, devraient payer le même prix pour leurs intrants non concurrentiels, de façon à ne pas créer un déséquilibre concurrentiel. Ce raisonnement ne s'applique pas dans le cas présent.

Premièrement, pour les raisons déjà énoncées, la radio commerciale et les SSPN ne sont pas des industries semblables et ne fournissent pas des produits semblables.

Deuxièmement, le lien qui a été établi entre le prix de la musique dans les deux secteurs de l'industrie de la télévision s'explique par l'existence d'une concurrence sur le plan des intrants (en particulier des intrants créatifs) autres que la musique. Les SSPN et la radio ne se font pas concurrence à ce chapitre. Le droit de jouer de la musique enregistrée, ce que les deux utilisent le plus, n'est pas une source de concurrence pour les stations de radio, ni entre elles ni contre les SSPN, car il est «vendu» sans aucune exclusivité.

Troisièmement, les droits que les stations de télévision achètent dans un marché concurrentiel coûtent beaucoup plus cher que la musique. Le fait d'établir un tarif différent pour les SSPN et la radio commerciale ne va pas créer un déséquilibre concurrentiel pour l'acquisition d'intrants concurrentiels, car la part des recettes qu'utilisent les SSPN pour acheter des intrants créatifs concurrentiels est, relativement parlant, bien plus faible que celle de la radio commerciale.

L'utilisation de la radio commerciale comme point de départ soulève également un problème, si, comme les audiences semblent l'indiquer, la radio accorde une place beaucoup plus grande à la musique qu'elle ne le faisait lorsque la Commission a examiné cette industrie la dernière fois. Dans ce cas, on pourrait avancer que le tarif de la radio commerciale est trop bas, ce qui le rendrait moins utile comme point de départ.

Comparisons with SOCAN Tariffs 15 and 16 (background music) are not helpful either, if only because these target the use of music in commercial establishments, not the playing of music at home. In any case, it can safely be said that, given equivalent rate bases, the price paid for playing background music in shopping centres should be lower than the price paid to deliver foreground music to domestic subscribers.

This is a case where there are no useful proxies available to the Board. At most, there are a variety of marginally relevant indicators, all of which nevertheless serve to establish a "comfort zone" within which the Board, given all the circumstances, is able to exercise its discretion in setting the tariff. As counsel to the cable system operators put it, this is a case where tariff making involves looking at the characteristics of the industry and trying to figure out what makes sense at the time. In doing so, the Board will keep in mind its *raison d'être* which, contrary to what counsel to the DPA service providers stated, is not so much to supervise the rates charged by SOCAN's members as to balance the competing interests of copyright owners and users.¹⁸

III. VALUING THE RIGHTS

Under the circumstances, the Board intends to set the tariff in four steps. First, it decides on the relative value of the repertoires. This is necessary to the second step, which establishes the range within which a reasonable rate might be found, using the tools made available in the proceedings. Third, the Board will identify the factors which, in its view, tend to push the rate higher or lower within that range. Fourth, it will select a figure, to be adjusted to account for the eligible repertoires.

Les comparaisons avec les tarifs 15 et 16 de la SOCAN (musique de fond) ne sont pas utiles non plus, ne serait-ce que parce que ces tarifs visent l'utilisation de musique dans les établissements commerciaux et non la diffusion de musique à la maison. De toute façon, on peut avancer sans trop se tromper, qu'à bases tarifaires équivalentes, le prix payé pour jouer de la musique de fond dans les centres commerciaux devrait être inférieur au prix payé pour communiquer de la musique de premier plan aux abonnés chez eux.

Voici donc un cas où la Commission ne dispose d'aucun indicateur utile. Elle dispose tout au plus d'indicateurs marginalement pertinents, mais qui servent tous à établir une «zone de sécurité» à l'intérieur de laquelle la Commission, compte tenu de toutes les circonstances, peut exercer sa discrétion pour établir le tarif. Comme l'avocat représentant les câblodistributeurs l'a fait remarquer, voilà un cas où le calcul du tarif exige que l'on examine les caractéristiques de l'industrie et que l'on essaie de savoir ce qui a du bon sens maintenant. Ce faisant, la Commission gardera à l'esprit sa raison d'être qui, contrairement à ce qu'a soutenu l'avocat des SSPN, n'est pas tant de superviser les tarifs imposés par les membres de la SOCAN que de concilier les intérêts concurrents des titulaires de droits et des utilisateurs.¹⁸

III. ÉVALUATION DES DROITS

Dans les conditions actuelles, la Commission a l'intention d'établir le tarif en quatre étapes. Premièrement, elle décide de la valeur relative des répertoires. Cette étape est nécessaire à la suivante, qui consiste à fixer l'intervalle dans lequel trouver un tarif raisonnable, à l'aide des outils présentés aux audiences. Troisièmement, la Commission déterminera les facteurs qui, à son avis, tendent à faire augmenter ou diminuer le tarif dans cet intervalle. Quatrièmement, elle choisira un chiffre, qui sera rajusté pour tenir compte des répertoires admissibles.

A. The relative value of the repertoires

For reasons outlined in earlier decisions, the Board finds that all things being equal, authors and composers should get the same as performers and makers.¹⁹ Furthermore, the private copying tariff, being paid on account of the reproduction right, should not be used in the context of pricing the telecommunication right.²⁰ This being said, the non-exclusive character of remuneration rights is not a reason for discounting the remuneration. By denying to rights holders who are entitled to remuneration the ability to withhold the use of their property, Parliament only wished to guarantee access to the repertoire. Nothing indicates that Parliament thought the price should be less as a result.

B. The range

The bottom of the range can be established by doubling SOCAN's commercial radio tariff, or 6.4 per cent of gross revenues before adjustments to account for the ineligible repertoire. That rate would need to be increased to account for greater music use and differences in business models.

Adjusting for greater use does not run contrary to the notion of a blanket licence. The blanket character of the licence makes variations in use irrelevant after the price has been set, not before. There are numerous tariffs which account for different use patterns within that tariff or between tariffs. The Federal Court of Appeal has criticized the Board on one occasion for refusing to account for such differences.²¹

The objectors assert that different business models should not result in different prices, or that different purchasers should not pay different prices for the same input. This is simply incorrect as regards information in general and

A. La valeur relative des répertoires

Pour les raisons indiquées dans des décisions antérieures, la Commission estime que toute chose étant égale, les auteurs et les compositeurs doivent obtenir la même chose que les interprètes et les producteurs.¹⁹ De plus, le tarif de la copie privée, payé au titre du droit de reproduction, ne devrait pas servir à établir le prix du droit de télécommunication.²⁰ Cela dit, le caractère non exclusif des droits à rémunération ne justifie pas qu'on escompte cette rémunération. En refusant aux détenteurs d'un droit à rémunération la capacité d'empêcher qu'on utilise leur bien, le Parlement souhaitait uniquement garantir l'accès au répertoire. Rien n'indique que le Parlement pensait que le prix devrait être inférieur.

B. L'intervalle

La tranche inférieure de l'intervalle peut être établie en utilisant le double du tarif de la radio commerciale de la SOCAN ou 6,4 pour cent des recettes brutes, avant rajustement pour tenir compte du répertoire non admissible. Ce taux devrait être augmenté pour tenir compte d'une utilisation accrue de la musique ainsi que des différences dans les modèles d'entreprise.

Le rajustement apporté pour tenir compte d'une utilisation accrue n'est pas incompatible avec la notion de licence générale. Le caractère général de la licence enlève toute importance aux variations d'utilisation une fois que le prix est fixé et non avant. Il existe de nombreux tarifs qui tiennent compte de différents niveaux d'utilisation du répertoire dans le cadre de ce tarif ou entre différents tarifs. La Cour d'appel fédérale a déjà critiqué la Commission pour avoir refusé de tenir compte de ces différences.²¹

Les opposants affirment que les différents modèles d'entreprise ne devraient pas donner lieu à des différences de prix ou que des acheteurs différents ne devraient pas payer des prix différents pour le même produit. Cela n'est

intellectual property in particular. The whole movie market is premised on the ability to price discriminate. The same is true of performing rights, whose price often is related in part to the importance of music to the activity being carried out. Finally, because of differences in revenue and cost structures, an equivalent price for one type of users may require a higher rate. As commercial radio stations like to point out, an important share of their revenues flow from programming which is not music; this hardly can be said to be an irrelevant circumstance.

The application of these factors would increase the rate at the bottom of the range from 6.4 per cent to somewhere between 15 and 20 per cent.

The top of the range can be set by performing a similar exercise with some of the higher figures (in the order of 60 per cent) put forward by the collectives and discounting them for factors such as the non-exclusive and non-competitive character of music telecommunication rights. This would set the rate at slightly higher than 30 per cent.

C. Factors that would tend to favour a higher royalty rate

In the Board's view, several factors tend to favour a rate that is in the higher part of the range.

First, distribution undertakings find DPA valuable. Objectors insist that DPA is relatively unimportant to them. Yet, DTH uses DPA signals to combat grey marketing and develop a competitive edge over cable, while cable operators offer them to match their digital offering to that of DTH. Anything that is perceived as giving a competitive edge or

pas exact, que ce soit pour l'information en général ou la propriété intellectuelle en particulier. Tout le marché cinématographique est fondé sur la capacité de discriminer par les prix. Il en est de même des droits d'exécution, dont le prix est souvent fonction, entre autres, de l'importance de la musique pour l'activité en cause. Finalement, en raison des différences de revenus et de structure des coûts, il est possible qu'un prix équivalent pour un type d'utilisateurs commande un tarif plus élevé. Comme les stations de radio commerciales aiment le souligner, la part de programmation autre que la musique représente un pourcentage important de leurs recettes. On peut difficilement dire que ce n'est pas une circonstance pertinente.

L'application de ces facteurs aurait pour effet d'augmenter le taux au bas de l'intervalle de 6,4 pour cent à entre 15 et 20 pour cent.

Il serait possible de fixer la tranche supérieure de l'intervalle en procédant au même exercice en utilisant certains des chiffres supérieurs (de l'ordre de 60 pour cent) avancés par les sociétés de gestion et en les réduisant pour tenir compte de facteurs comme le caractère non exclusif et non concurrentiel des droits de télécommunication musicale. Le taux serait ainsi légèrement supérieur à 30 pour cent.

C. Facteurs susceptibles de favoriser un taux de redevance plus élevé

De l'avis de la Commission, plusieurs facteurs sont susceptibles de favoriser un taux qui s'inscrirait dans la partie supérieure de l'intervalle.

Premièrement, les entreprises de distribution attachent une valeur certaine aux SSPN même si les opposants insistent pour dire qu'ils ne sont pas particulièrement importants pour eux. Les SRD y ont recours pour lutter contre le «marché gris» et obtenir un avantage concurrentiel par rapport aux câblodistributeurs, qui y font appel de leur côté dans le but d'offrir des services

preventing a competitor from gaining such an edge has value. After all, why pay for something unimportant when additional distant radio signals can be retransmitted at no extra cost?

Second, rights holders are entitled to receive additional benefits from new uses of the repertoire. When someone creates new value by using a pre-existing asset, part of the value so created should flow to the owner of the asset. Where that value (which in information industries may sometimes be measured in part by looking at profit margins)²² is substantial, that flow will tend to be greater. This proposition will come as no surprise to the service providers. In 1995, before the CRTC, Galaxie suggested that as DPA could exist on the leanest of infrastructures because it could rely almost entirely on the pre-existing music repertoire, a substantially higher portion of its gross revenue should flow to rights holders.

Objectors note that the Board once found "... some difficulty in conceding that ... repertoires acquire greater value because a more specialized use is being made of them".²³ This statement is quoted out of context; it was a response to an argument by SOCAN to the effect that niche programming increases the value of music to individual operators. In the present case, what increases the value of the repertoire is not that it is being used in a more specialized way; it is the fact that by its very existence, the repertoire allows a new and profitable use.

Third, the availability of the repertoires helps DPA to achieve efficiencies. Where an increase in productivity directly depends on using a

numériques à la hauteur de ceux que les SRD proposent. Tout ce qui est perçu comme susceptible de conférer un avantage concurrentiel ou d'empêcher un concurrent de profiter d'un tel avantage comporte une valeur. À quoi bon, en effet, payer pour quelque chose qui n'a pas d'importance alors que l'on peut retransmettre plus de signaux radiophoniques éloignés sans payer rien de plus?

Deuxièmement, les titulaires de droits ont le droit de tirer des bénéfices supplémentaires des nouvelles applications des répertoires. Lorsque l'on crée une nouvelle valeur à partir d'un bien existant, une partie de la valeur ainsi générée devrait être dévolue au propriétaire du bien. Plus cette valeur (que dans les industries de l'information, on a parfois tendance à mesurer en partie en fonction des marges bénéficiaires)²² est grande, plus cette dévolution sera importante. Ces propos n'étonneront nullement les fournisseurs de services. En 1995, Galaxie a proposé au CRTC que, puisque les SSPN ne requièrent qu'un minimum d'infrastructure pour subsister précisément parce qu'ils utilisent presque exclusivement le répertoire musical existant, une part beaucoup plus importante de leur revenu brut devrait être dévolue aux titulaires des droits.

Les opposants rappellent qu'il fut un temps où la Commission avait «... du mal à admettre que [les] répertoires acquièrent plus de valeur parce qu'il en est fait un usage plus spécialisé». ²³ Cette affirmation est citée hors contexte; elle a été énoncée en réponse à un argument de la SOCAN voulant que la programmation par créneaux augmente la valeur de la musique pour chacun des exploitants. Dans le cas qui nous occupe, ce qui augmente la valeur du répertoire n'est pas le fait d'en faire un usage plus spécialisé, mais le fait que par son existence même, le répertoire permet une nouvelle utilisation rentable.

Troisièmement, la disponibilité des répertoires aide les SSPN à réaliser des économies. Là où l'augmentation de la productivité dépend

répertoire, rights owners should share in the resulting gains. The remarkable efficiencies achieved by DPA are not solely the result of the judicious use of technology. DPA operations as they stand depend on unimpeded access to the complete repertoire of sound recordings and musical works. These services could not exist if the repertoires were not available.

Fourth, if DPA is a startup industry, it will not remain so for very long. Circumstances have made it so that in Canada, DPA launched more successfully and grew more rapidly than in the United States.

Finally, insofar as this may be relevant, DPA provides foreground services. Some of the distinctions participants attempt to make between background and foreground music are rather tenuous. Factors such as the amount of concentration or attention required to listen to a television signal may be intuitively attractive, but many among us "watch" television while eating or preparing food or doing other activities.

D. Factors that would tend to favour a lower royalty rate

Some factors tend to favour a rate that is in the lower part of the range.

First, this is a new business. While it may not face economic difficulties, DPA remains in a state of flux. Uncertainty surrounds the future structure of the industry. The nature of the offering also is in a state of flux. The emergence of new competitors remains a possibility. Uncertainty has a price. As collectives share in the productivity gains achieved by DPA, they should expect to share in the price of the

directement du recours à un répertoire, les titulaires de droits devraient toucher une part des bénéfices qui en résultent. L'efficacité remarquable des SSPN n'est pas attribuable exclusivement à l'utilisation judicieuse de la technologie. Leur fonctionnement actuel repose sur le libre accès au répertoire complet des enregistrements sonores et des œuvres musicales. Ils ne sauraient exister sans ces répertoires.

Quatrièmement, s'il est vrai que les SSPN sont une industrie qui démarre, il n'en sera pas ainsi pendant bien longtemps. Les circonstances ont voulu que leur lancement ait été plus réussi et ait connu une croissance plus rapide qu'aux États-Unis.

Enfin, et dans la mesure où ce détail est pertinent, les SSPN fournissent des services de premier plan. Les distinctions que certains participants tentent de faire entre la musique de fond et la musique de premier plan sont plutôt minces. Des facteurs comme la concentration ou l'attention qu'il faut pour regarder la télévision peuvent paraître intéressants sur le plan intuitif, mais beaucoup d'entre nous «regardons» la télévision en mangeant, en préparant le repas ou en faisant autre chose.

D. Facteurs susceptibles de favoriser un taux de redevance moins élevé

Certains facteurs sont susceptibles de favoriser un taux qui s'inscrit dans la tranche inférieure de l'intervalle.

Premièrement, il s'agit d'un nouveau secteur d'activité. Bien qu'ils ne connaissent pas de difficultés économiques, les SSPN demeurent dans un état de transition. La structure future de l'industrie reste incertaine. La nature de l'offre se trouve également en état de transition. L'émergence de nouveaux concurrents demeure une possibilité. L'incertitude a un prix. Si les sociétés de gestion obtiennent une partie des

uncertainties faced by those who achieve those gains.

Second, collectives are not entitled to appropriate all of the efficiencies achieved by using their repertoires. Even if the availability of the repertoire were the sole reason for the DPA's success (which it is not), the service providers and the distribution undertakings would be entitled to some measure of profit. Service providers, not the collectives, seized the opportunity, took the risks (including the costs of applying to the CRTC) and provided the infrastructure, marketing, etc.

Third, some room must be left for other elements of copyright. Given the nature of copyright, the Board is unable in these proceedings to set a single price for everything that DPA service providers require to make use of sound recordings of music. The Board must assume that those elements, the price of which remains to be determined, such as the reproduction right, have value.

E. Factors that do not influence the rate

Participants alluded to a number of factors which, in the Board's view, are not relevant to these proceedings.

Mention was made of possible changes in the regulatory environment, of the emergence of American providers offering a range of services from all music to all talk, and of the impending availability of DPA in cars. It would be premature to take these matters into account. The tariff is being set only until the end of 2002. While imminent or predictable changes may be relevant, the focus should remain on the state of

gains de productivité réalisés par les SSPN, elles doivent s'attendre à partager le prix des incertitudes auxquelles sont confrontés ceux qui réalisent ces gains.

Deuxièmement, les sociétés de gestion ne peuvent espérer s'approprier toutes les économies réalisées grâce à leurs répertoires. Même si le succès des SSPN dépendait exclusivement de la disponibilité du répertoire (ce qui n'est pas le cas), les fournisseurs de services et les entreprises de distribution doivent toucher une partie des bénéfices. Ce sont les fournisseurs de services et non les sociétés de gestion collective, qui ont saisi l'occasion, pris des risques (y compris les coûts de présentation d'une demande au CRTC) et fourni l'infrastructure, la commercialisation, etc.

Troisièmement, il faut laisser une place à d'autres éléments du droit d'auteur. Vu la nature du droit d'auteur, la Commission ne peut pas, dans le cadre de ces audiences, fixer un prix unique pour tout ce dont les SSPN ont besoin pour utiliser les enregistrements sonores musicaux. La Commission doit supposer que ces éléments, dont il reste à déterminer le prix, notamment les droits de reproduction, ont une valeur.

E. Facteurs n'ayant pas d'incidence sur le taux

Les participants ont fait allusion à un certain nombre de facteurs qui, de l'avis de la Commission, n'ont rien à voir avec le cas qui nous occupe.

Il a été question des changements qui pourraient se produire dans l'encadrement réglementaire, de l'émergence de fournisseurs américains qui offrent toute une gamme d'émissions – de celles qui sont entièrement consacrées à la musique à celles qui s'articulent autour de la parole – ainsi que de déploiement rapide des SSPN dans les automobiles. Il serait prématuré de s'attarder sur ces questions. Le tarif qu'il s'agit d'établir sera

the industry as it stands at the time of the hearing. In any event, account has already been taken of the relative youth and state of flux of the industry.

Neither should any account be taken of the so-called accessory value of DPA in the world of digital offerings. The amount of royalties is a function of the price paid for these signals; presumably, distribution undertakings consider the relative importance of DPA to their business before deciding whether to buy them, and at what price.²⁴

F. The pre-discount royalty rate and the final royalty rate

As stated earlier, before accounting for the non-eligible repertoire, the lower end of the range within which the Board intends to set the rate is somewhat less than 20 per cent, while the higher end of that range is somewhat more than 30. In the Board's view, the factors that tend to increase the rate are more important than those that tend to decrease it. Under the circumstances, the Board has chosen a starting point of 26 per cent.

DPA is entitled to use public domain music and non-eligible recordings at no cost. Participants agree that five per cent of musical works used on DPA are in the public domain and that only 45 per cent of sound recordings used on DPA are eligible to share in the remuneration. The rate is discounted accordingly.

The application of these principles yields a rate of 18.2 per cent, i.e.:

$$[(26 \div 2) \times 0.95] + [(26 \div 2) \times 0.45]$$

uniquement valable jusqu'à la fin de 2002. Les changements imminents et prévisibles sont parfois pertinents. Il faut néanmoins porter attention d'abord et avant tout à la situation de l'industrie au moment où on se penche sur le dossier. De toute façon, la décision tient déjà compte de la jeunesse relative du secteur, ainsi que de l'état de transition dans lequel se trouve l'industrie.

Il ne faut pas non plus tenir compte de la valeur soi-disant accessoire des SSPN dans un monde de produits numériques. Le montant des redevances est fonction du prix versé pour ces signaux; les entreprises de distribution prennent précisément en considération l'importance relative des SSPN pour leurs affaires avant de décider où se les procurer, et à quel prix.²⁴

F. La redevance avant réduction et le taux de redevance final

Comme il en a déjà été question, avant de tenir compte du répertoire non admissible, la tranche inférieure de l'intervalle selon lequel la Commission entend fixer le taux est légèrement inférieure à 20 pour cent, alors que la tranche supérieure dépasse quelque peu les 30 pour cent. De l'avis de la Commission, les facteurs susceptibles d'augmenter le taux l'emportent sur ceux qui ont tendance à le diminuer. Dans ces conditions, la Commission a opté pour 26 pour cent comme point de départ.

Les SSPN ont accès gratuitement à la musique du domaine public et aux enregistrements non admissibles. Les participants conviennent que cinq pour cent des œuvres musicales utilisées par les SSPN proviennent du domaine public et que seuls 45 pour cent des enregistrements sonores utilisés par ces services sont admissibles à la rémunération. L'escompte à appliquer s'établit en conséquence.

L'application de ces principes aboutit à un taux de 18,2 pour cent, soit :

$$[(26 \div 2) \times 0,95] + [(26 \div 2) \times 0,45]$$

Let us recognize that this is the first tariff to apply to this industry. As stated earlier, while DPA has been successful in establishing itself rapidly, these are early days. It is a well-known practice, when valuating companies, to account for the newness of an operation through a "risk" discount. DTH has invested heavily to attract customers by subsidizing hardware; all of this has been done at no cost to rights holders. Given the important share of revenues that rights holders will now receive from these users, it is normal that they share in the risk factor associated with this new industry. Accordingly, a discount of 10 per cent seems appropriate to account for this "newness" factor, bringing the final rate to 16.38 per cent (i.e., 11.115 per cent for SOCAN and 5.265 per cent for NRCC). This discounted rate will apply only for the life of the tariff in this initial phase.

G. The rate base

For reasons outlined in earlier decisions, the appropriate tariff base is the price paid by distribution undertakings and not the "price" paid by subscribers.²⁵

IV. ABILITY TO PAY AND THE RISK OF DROP OFF

In the Board's view, those who are liable for the tariff can afford to pay it.

Ability to pay should be assessed by looking at those who are liable to pay royalties collectively, not individually. Since the Board cannot apportion the burden of the tariff,²⁶ then those who share in that burden ought not to be able to debate ability to pay based on the assumption that one of them may be required to shoulder all of that burden. It is up to DPA service providers and distribution undertakings

Qu'il nous soit permis de reconnaître qu'il s'agit là du premier tarif visant cette industrie. Comme nous l'avons déjà indiqué, les SSPN ont beau avoir réussi à s'établir rapidement, ils n'en sont encore qu'à leur tout début. Quand on procède à l'évaluation d'une entreprise, il est normal d'avoir recours à un escompte pour «risque», en raison de la jeunesse de l'entreprise. Les SRD ont énormément investi pour attirer les clients en payant pour le matériel; tout cela a été fait sans qu'il n'en coûte rien aux titulaires de droits. Au vu de la fraction non négligeable de revenus que ces derniers vont désormais recevoir de ces utilisateurs, il est normal qu'ils partagent aussi le coût du facteur risque de cette nouvelle industrie. Ainsi, un escompte de 10 pour cent semble approprié pour faire contreponds au facteur «nouveau», ce qui rabaisse le taux final à 16,38 pour cent, soit 11,115 pour cent pour la SOCAN et 5,265 pour cent pour la SCGDV. Ce taux réduit s'appliquera uniquement le temps que ce tarif sera en vigueur dans cette phase initiale.

G. L'assiette tarifaire

Pour les motifs qui ont déjà été précisés dans des décisions antérieures, l'assiette tarifaire appropriée est le prix payé par les entreprises de distribution et non pas le «prix» payé par les abonnés.²⁵

IV. CAPACITÉ DE PAYER ET RISQUE D'ABANDON

De l'avis de la Commission, ceux qui sont assujettis au tarif ont les moyens de le verser.

Pour évaluer la capacité de payer, il faut analyser les personnes qui sont responsables de verser les redevances de manière collective, et non pas individuelle. Puisque la Commission ne peut répartir le fardeau du tarif,²⁶ ceux à qui il incombe de le porter ne devraient pas être en mesure de contester la capacité de payer en invoquant que l'un d'eux pourrait être forcé d'en prendre tout le fardeau à lui seul. Il

to decide among themselves how the burden of the tariff can be distributed in a way that makes it affordable to both. The fact that affiliation contracts apportion liability for the tariff in a variety of ways serves to confirm that they are able to do this.

In any event, this is not at issue here. DPA service providers make substantial profits, as do most distribution undertakings. The tariff represents a significant but not unreasonable share of DPA's profits. Even if it were to pay the tariff alone, Galaxie (for example) would be left with more revenues per subscriber than it projected when it applied for a licence; furthermore, providers have far more subscribers than expected. The tariff represents less than one-half of one per cent of what typical subscribers to DPA pay for the audio and video package they receive.

DTH are by far the largest purchasers of DPA services. They currently incur deficits. This is the result of an aggressive marketing strategy that involves subsidizing hardware. Rights holders should not have to support the cost of that business choice except to the extent of the rate reduction from 18.2 to 16.38 per cent for the life of this tariff.

The Board does not anticipate any significant drop off as a result of the tariff, even if that were an issue in this case. Signal drop-off matters mostly when it results in a reduction in the basic service. DPA is not part of the basic service that the CRTC requires any distribution undertaking to provide. In these circumstances, users and their clients should be expected to pay for the copyrights they use.

incombe aux SSPN et aux entreprises de distribution de décider parmi eux la manière dont il faut distribuer le fardeau du tarif, de sorte qu'il soit abordable pour les deux. Le fait que les contrats d'affiliation répartissent la responsabilité du tarif de toute une multitude de façons vient confirmer qu'ils sont en mesure d'y arriver.

D'une manière ou d'une autre, cette question n'est pas pertinente ici. Les SSPN réalisent d'importants bénéfices, tout comme la plupart des entreprises de distribution. Le tarif représente une partie importante, sans être démesurée, des profits des SSPN. Aussi, même si elle devait verser le tarif à elle seule, Galaxie (à titre d'exemple) se retrouverait avec plus de revenus par abonné qu'elle ne l'avait espéré au moment de demander sa licence; par ailleurs, les fournisseurs ont beaucoup plus d'abonnés qu'ils ne l'avaient escompté. Le tarif représente moins d'un demi-point de pourcentage de ce que l'abonné moyen aux SSPN verse pour l'assemblage de services sonores et vidéo qu'il reçoit.

Les SRD sont de loin les principaux acheteurs de SSPN. Elles sont déficitaires en ce moment. C'est le résultat d'une stratégie de commercialisation agressive qui comprend le subventionnement du matériel. Comme il s'agit d'une décision d'affaire, les titulaires de droits ne devraient pas en faire les frais, sauf par la diminution du tarif de 18,2 à 16,38 pour cent au cours du présent cycle tarifaire.

La Commission ne prévoit pas un niveau d'abandon significatif attribuable à ce tarif, en supposant même qu'il s'agit d'un enjeu pertinent dans le cas qui nous occupe. L'abandon de signaux n'a d'importance véritable que s'il se traduit par une diminution du service de base. Les SSPN ne font pas partie du service de base que les entreprises de distribution sont tenues de fournir conformément aux exigences du CRTC. Dans ces conditions, les utilisateurs et leurs clients doivent s'attendre à payer pour les droits qu'ils utilisent.

Many participants in the market seem to have already discounted the impact of the tariff. The issue has been the subject of one-on-one negotiations; agreements filed with the Board deal with the final burden of royalties in every manner conceivable. Significantly, many provide for one of the parties to shoulder the payment of the tariff alone, up to an amount that is higher than the one set by the Board.

Past experience shows that distribution undertakings rarely drop a signal once it has been offered to their customers. Furthermore, distribution undertakings no longer have a monopoly over a service area, and any drop-off could be viewed by competing distribution undertakings as an opportunity to differentiate their signal offering. In the long run, bandwidth availability may lead to different results, but this is simply not the case at this point in time.

Changes in the offering of digital signals may result in DPA being repackaged. Currently, DPA is financed solely through affiliation payments that are invisible to the consumer. A higher overall price might result in the price becoming visible. That may or may not be a disadvantage. What is more important, the industry is not there yet.

Finally, contrary to what some of the participants intimated, a rate of this magnitude is not unprecedented. Importers of CD-Rs pay considerably more as a percentage of the wholesale or retail price of such a CD due to the private copying tariff.

V. PHASING-IN AND OTHER PREFERENTIAL TREATMENTS

There is no reason to extend to DPA the advantages afforded by law to commercial radio

De nombreux participants dans ce marché semblent avoir déjà pris en compte l'impact du tarif. La question a fait l'objet de négociations individuelles; les ententes déposées à la Commission traitent de la répartition du fardeau des redevances d'une multitude de façons. Ce qui est significatif, c'est que nombre d'entre elles prévoient qu'une partie ait seule à assumer le paiement du tarif jusqu'à un montant supérieur à celui qui a été fixé par la Commission.

L'expérience a montré qu'il est rare que les entreprises de distribution renoncent à un signal une fois qu'elles l'ont offert à leurs clients. Par ailleurs, ces entreprises ne détiennent plus le monopole d'une zone de desserte, et leurs concurrents pourraient interpréter tout abandon comme une occasion de distinguer leur offre de signaux. À long terme, la disponibilité de la largeur de bande pourrait entraîner des résultats différents, mais cela n'est tout simplement pas le cas pour le moment.

Les changements sur le plan de l'offre de signaux numériques pourraient bien se traduire par un remaniement dans l'offre des SSPN. En ce moment, les SSPN sont financés uniquement par les paiements de leurs affiliées, qui sont invisibles au consommateur. Un prix global plus élevé pourrait faire en sorte que ce prix devienne visible. Cela pourrait ou non être un inconvénient. Mais ce qui compte, c'est que l'industrie n'en est pas encore là.

Enfin, et contrairement à ce que certains participants ont fait valoir, ce n'est pas la première fois que l'on a affaire à un tarif de cette ampleur. Les importateurs de CD-R versent bien davantage en pourcentage du prix de gros ou de détail au titre de la copie privée.

V. INTRODUCTION PROGRESSIVE ET AUTRES TRAITEMENTS PRÉFÉRENTIELS

Il n'y a pas de raison d'offrir aux SSPN les avantages offerts par la loi aux stations de radio

with respect to the remuneration right of performers and makers. No evidence suggests that a phasing-in of the tariff is necessary, even though NRCC appears prepared to accept one. Parliament afforded radio a preferential treatment to the exclusion of others. The extension of preferential measures always is at the expense of rights holders. Such measures should not be extended further than what Parliament intended unless a solid case is made in favour of such an extension.

VI. THE TARIFF

A. Ambit of the tariff

The proposed tariffs target "non broadcast radio services" or "pay audio radio services". During the hearings, some participants focussed on the digital or analog nature of the signals, as well as on whether the signals subject to the tariff should broadcast music exclusively or almost exclusively. Finally, some discussions related to whether the tariff should apply only to licensed services, as opposed to authorized services.

The evidence in these proceedings dealt almost exclusively with digital services. A few distribution undertakings convert the signals into an (analog) FM signal before transmitting them to their customers. These instances must be addressed. Consequently, the tariff targets all pay audio services.

The tariff also applies to all DPA signals, irrespective of their musical content or of their relative use of the repertoire. The rate already accounts for the fact that some signals use the repertoires far less than others.

The tariff should also apply to all signals, including those that are not specifically licensed by the CRTC. Some signals may be authorized

commerciales en ce qui a trait au droit à rémunération des interprètes et producteurs. Rien ne permet de croire qu'il soit nécessaire d'introduire le tarif progressivement, même si la SCGDV semble prête à l'accepter. Le Parlement a accordé un traitement de faveur aux radiodiffuseurs, à l'exclusion des autres secteurs. Les mesures préférentielles sont toujours prises aux dépens des titulaires de droits. De telles mesures ne doivent pas être adoptées au-delà des intentions du Parlement, à moins d'en prouver la nécessité de façon irréfutable.

VI. LE TARIF

A. Portée du tarif

Les tarifs proposés visent les «services de radio autres que de radiodiffusion» ou les «services de radio audio payante». Au cours des audiences, certains participants ont insisté sur la nature numérique ou analogique des signaux et se sont demandés si les signaux assujettis au tarif doivent diffuser de la musique exclusivement ou presque. Enfin, on s'est demandé si le tarif devait s'appliquer uniquement aux services détenteurs d'une licence du CRTC, par opposition aux services autorisés.

La preuve au dossier traite presque uniquement de services numériques. Quelques entreprises de distribution convertissent ces signaux en signaux FM (analogiques) avant de les transmettre à leurs abonnés. Il faut traiter de ces situations. Par conséquent, le tarif s'applique à tous les services sonores payants.

Le tarif s'applique également à tous les SSPN, quel que soit leur contenu musical ou l'usage relatif qu'ils font du répertoire. Le taux tient déjà compte du fait que certains signaux utilisent les répertoires beaucoup moins que d'autres.

Le tarif doit également s'appliquer à tous les signaux, y compris à ceux qui ne détiennent pas de licence du CRTC. Certains signaux peuvent

without being licensed; it would not serve any purpose to allow for a debate over whether or not they are subject to the tariff. Furthermore, it would be unfair to let potential unlicensed operators gain access to the repertoire for free, while properly licensed operators have to pay royalties for that same access.

It is not the Board's intention that the tariff apply to non-broadcast audio services such as CHCR in Montreal, which distribution undertakings obtain for free. This explains the references to "pay" audio signals in the tariff.

The tariff does not apply to the use of DPA in commercial settings. As was explained in the context of SOCAN Tariff 16, what is important under those circumstances is not the communication *to* the store but the performance *in* the store.²⁷ Commercial premises that use DPA services must pay pursuant to some other relevant tariff, such as Tariff 15 or 16.

B. A single tariff, but not a single collecting agent

From a legal perspective, when a published sound recording of a musical work is communicated to the public by telecommunication, the rights administered by SOCAN are quite different from those administered by NRCC. When acting individually,²⁸ authors and composers can control or even prohibit that telecommunication. Performers and makers are only entitled to receive equitable remuneration through a collective society. Still, when the rights over musical works are administered collectively, and for so long as users pay royalties set by the Board, SOCAN and NRCC are, for all practical purposes, in the same situation. Indeed, a single set of provisions sets out how both collectives obtain a certified tariff.²⁹

être autorisés sans détenir une licence; il ne serait pas très utile de permettre que s'engage un débat pour savoir s'ils sont ou non être assujettis au tarif. Qui plus est, il serait injuste de permettre à d'éventuels exploitants non autorisés de se servir du répertoire sans rien payer pendant que ceux qui détiennent des licences doivent verser des redevances.

La Commission n'entend pas que le tarif s'applique aux services sonores non conventionnels tel que CHCR à Montréal, que les entreprises de distribution captent gratuitement. Cela explique les références aux services sonores «payants» dans le texte du tarif.

Le tarif ne s'applique pas à l'utilisation des SSPN dans les locaux commerciaux. Comme nous l'avons indiqué lors de l'examen du tarif 16 de la SOCAN, ce qui compte dans ces cas, ce n'est pas la communication *au* magasin, mais ce qui s'entend *dans* le magasin.²⁷ Les locaux commerciaux qui utilisent les SSPN devront se prévaloir d'un autre tarif pertinent, tel le tarif 15 ou 16.

B. Un tarif unique, mais pas un seul agent de perception

D'un point de vue juridique, lorsqu'un enregistrement sonore publié d'une œuvre musicale est communiqué au public par télécommunication, les droits administrés par la SOCAN diffèrent de beaucoup de ceux administrés par la SCGDV. Lorsqu'ils agissent individuellement,²⁸ les auteurs et les compositeurs peuvent contrôler ou même interdire cette télécommunication. Les interprètes et les producteurs ont uniquement droit à une rémunération équitable par l'entremise d'une société de gestion collective. Néanmoins, lorsque les droits pour les œuvres musicales sont administrés collectivement, et pour autant que les utilisateurs paient les redevances établies par la Commission, la SOCAN et la SCGDV sont, à toutes fins utiles, dans la même situation. D'ailleurs, un seul ensemble de dispositions établit la manière dont ces deux sociétés obtiennent un tarif homologué.²⁹

The objectors ask for a single tariff, or at least for a mechanism that allows them to settle all relevant royalties through a single payment. The collectives argue that the Board is legally required to certify separate tariffs.

Users face an increasing number of demands from rights holders. A greater proportion of those whose rights existed before 1997 have started to assert them: requests for tariffs dealing with the reproduction of musical works are a case in point. New rights have also emerged. As a result, users require multiple authorizations or must make multiple payments even where only one "product" (such as recorded music) is used. As well, in the digital environment, the need to licence multiple types of works, each type requiring multiple authorizations, increases.

The Board is concerned with the burden which could result from the multiplication of tariffs. Understandably, users look for one-stop shopping. It makes sense to allow them, where appropriate and where the law allows it, to acquire what is for them a single product through a single payment. Parliament seemed to recognize this when it required that the remuneration to performers and makers be combined in a single payment. Knowing in advance how much "music" costs without the need for complicated calculations encourages transparency.³⁰ At a minimum, when rights are administered collectively, stating in a single tariff how much each collective society is entitled to get makes it easier for the user to make business decisions.

There are two issues to be addressed: whether to have a single tariff, and whether to collect royalties through a single collecting agent. The

Les opposants demandent un tarif unique, ou tout au moins un mécanisme qui leur permette de régler toutes les redevances pertinentes en un seul paiement. Les sociétés de gestion rétorquent que la Commission est légalement tenue d'homologuer des tarifs distincts.

Les utilisateurs doivent composer avec des demandes de plus en plus nombreuses de la part des titulaires de droits. Ceux qui détenaient des droits avant 1997 et qui les affirment sont plus nombreux; les demandes visant des tarifs pour la reproduction d'œuvres musicales en sont un exemple concret. De nouveaux droits ont émergé de leur côté. Résultat : les utilisateurs doivent solliciter une pléthore d'autorisations ou effectuer des paiements multiples même quand il s'agit d'un seul «produit» (par exemple, un enregistrement sonore). Qui plus est, dans l'environnement numérique, il faut de plus en plus obtenir des licences pour une multiplicité d'œuvres, chacune d'elles exigeant à son tour toute une série d'autorisations.

La Commission s'inquiète du fardeau que la prolifération des tarifs pourrait créer. On peut comprendre pourquoi les utilisateurs préfèrent la formule du guichet unique. C'est une mesure de bon sens que de leur permettre, chaque fois que c'est possible et que la loi le permet, d'acquiescer ce qui représente pour eux un produit unique au moyen d'un paiement unique. Le Parlement semble avoir reconnu ce fait quand il a décidé que la rémunération aux interprètes et producteurs devrait être combinée en un seul paiement. Le fait de savoir à l'avance combien coûte la «musique» sans avoir recours à des calculs compliqués encourage la transparence.³⁰ À tout le moins, lorsque des droits sont administrés collectivement, le fait d'établir en un seul tarif ce à quoi chacune des sociétés a droit facilite les décisions commerciales des utilisateurs.

Deux questions méritent notre attention : savoir s'il faut un tarif unique et s'il faut percevoir les redevances par l'entremise d'un agent unique. Il

Board finds it appropriate to do the first but not, for the time being, the second.

Dealing with both sets of rights in a single tariff raises no particular practical or legal difficulties. Both proposed tariffs are filed pursuant to the same legal regime. The provisions are identical in all relevant respects to those in the retransmission regime, where the Board, originally confronted with several proposed tariffs, certified only one. The retransmission tariff deals in a single document with the remuneration rights for one type of use (retransmission) on all types of works. Here, a single tariff will deal with the remuneration rights of one type of use (public telecommunication of music) over two types of subject matter.

NRCC submits that since each collective is required to file *a* proposed tariff, the Board must certify each proposed tariff submitted to it. That argument raises doubts about the Board's current practice of dealing with each tariff item separately. If *the* tariff a collective files possesses such integrity, then the Board might be required to hold a single hearing for all the tariff items. This interpretation might also mean that the Board cannot create new tariff items of its own motion, by carving out uses covered by parts of existing tariffs, as was done with SOCAN Tariffs 3.C and 21. Finally, the argument would cast serious doubts on the otherwise solidly established legality of the retransmission tariff which the Board has certified for over a decade. These propositions run contrary to the general economy of the regime.

The matter of consolidating payments raises different issues. In this respect, the objectors all advocate some form of collection system but the collectives have been unable to agree.

convient de procéder dans le premier cas, mais de laisser le second en suspens pour le moment.

S'occuper des deux ensembles de droits en un seul tarif ne pose pas de difficulté particulière sur le plan pratique ou juridique. Les deux tarifs proposés sont assujettis au même cadre juridique. Les dispositions pertinentes sont identiques en tout point au régime de la retransmission, où la Commission, qui avait été confrontée à l'origine par plusieurs projets de tarifs, a fini par en homologuer un seul. Le tarif de la retransmission traite en un seul document des droits à rémunération pour un type d'utilisation (retransmission) quel que soit le type d'œuvre. En l'occurrence, un tarif unique traitera des droits à rémunération pour un type d'utilisation (télécommunication publique de musique) à l'égard de deux types d'objets de droits.

La SCGDV soutient que puisque chaque société doit présenter séparément *un* projet de tarifs, la Commission est tenue d'homologuer chacun des projets qui lui sont soumis. Cet argument suscite des doutes quant à la pratique courante qui consiste à traiter séparément chaque élément du tarif. Si *le* tarif déposé par une société possède une telle intégrité, la Commission doit alors tenir une seule audience pour tous les éléments de tarif. Cette interprétation peut également vouloir dire que la Commission ne peut pas créer de nouveaux éléments de tarif de sa propre initiative, en retranchant des usages de tarifs existants, comme elle l'avait fait pour les tarifs 3.C et 21 de la SOCAN. Enfin, l'argument mettrait sérieusement en doute la validité, par ailleurs fermement établie, des tarifs pour la retransmission que la Commission a homologués depuis plus de dix ans. Toutes ces propositions sont contraires à l'économie générale du régime.

La question des paiements regroupés soulève des questions distinctes. À cet égard, les opposants préconisent un système quelconque de perception unique, alors que les sociétés de gestion n'ont pas pu en venir à une entente.

From a legal perspective, the issue is not clear cut. If a collective dealing with joint and several debtors cannot be forced to collect royalties from one of them, then it could be argued that no collective can force that choice on the other.

Under the circumstances, the Board chooses not to designate a single collecting agent for both collectives. The tariff will state what each collective is owed, and will leave open the matter of collection. However, the Board finds the practical arguments in favour of designating a single collecting agent compelling. Apparently, NRCC and SOCAN already have some common dealings with respect to commercial radio stations. A decision on the part of the collectives to voluntarily set up an integrated payment system would be constructive.

C. Targeting

There is considerable disagreement as to whom the tariff should target for the purposes of payment. The services do not wish to be targeted. DTH offer themselves as target. Cable operators are willing to act as they do with respect to non-broadcast television services. All ask that the same target be identified in respect of both collectives. NRCC wishes to target DPA, while SOCAN wishes to target distribution undertakings.

Collecting royalties from either the distribution undertakings or the service providers presents advantages and difficulties in either case. In the end, however, there is no need to review them or to decide the issue. Each collective has the right to seek payment from either the distribution undertaking or the DPA, whether or not the tariff targets one or the other. Each would be perfectly free to seek payment from the distribution undertaking in one instance, and from the service provider in another. Under the

La question est moins évidente sur le plan juridique. Si une société de gestion traitant avec des débiteurs solidaires ne peut être obligée de s'adresser à l'un d'eux, alors il se peut qu'aucune ne puisse en obliger une autre du fait de son propre choix.

Dans ces conditions, la Commission opte pour ne pas désigner un agent de perception unique pour les deux sociétés de gestion. Le tarif stipulera ce à quoi chacune a droit sans traiter de perception. Néanmoins, la Commission estime que les arguments pratiques en faveur de désigner un agent de perception unique sont très convaincants. Il semblerait que la SCGDV et la SOCAN aient déjà établi certains rapports communs à l'égard des stations de radio commerciales. Il serait constructif que les sociétés décident d'elles-mêmes d'établir un système de paiement intégré.

C. Cibles

On constate un profond désaccord en ce qui a trait à qui doit être ciblé pour le paiement du tarif. Les services ne veulent pas l'être. Les SRD se proposent comme cibles. Les câblodistributeurs sont prêts à agir de la même manière qu'ils le font à l'égard des services spécialisés. Ils s'accordent tous pour demander que l'on identifie une même cible pour les deux sociétés de gestion. La SCGDV désire cibler les SSPN, alors que la SOCAN vise les entreprises de distribution.

La perception des redevances auprès des entreprises de distribution ou des fournisseurs de services présente des avantages et des difficultés dans les deux cas. Au bout du compte, cependant, il n'est pas nécessaire de revoir ou de trancher la question. Chacune des sociétés a le droit de chercher à obtenir le paiement, soit des entreprises de distribution ou des SSPN, sans égard au fait que le tarif cible les uns ou les autres. Chacune d'elles serait parfaitement libre de chercher à obtenir le paiement des entreprises

circumstances, the only reasonable approach is to say nothing.

This does not mean that the industry is helpless when it comes to deciding who should be the payee of choice. No collective can require that payment be made from anyone before payment is due. That being the case, the debtors would be free to decide who will pay a collective. As long as payment is made on time, then the collective probably has no other choice but to accept it.³¹

From a practical perspective, distribution undertakings already pay retransmission royalties and Tariff 17.A royalties to SOCAN. Under the circumstances, it may be easier for SOCAN to collect all royalties on account of the provision of DPA services from the distribution undertakings. This would offer the further advantage that a distribution undertaking can readily set-off the service provider's share of the royalties against affiliation payments. NRCC's share could then be forwarded to it.

D. Discount

The retransmission and 17.A tariffs expressly provide for a discount when services are provided to certain institutional premises (e.g., hospitals) and to hotels. Owners of these premises pay less for their cable service. That lower price is not automatically reflected in a tariff that is set at a fixed amount per premises served. In this instance, the tariff is set as a percentage of what distribution undertakings pay for DPA. Distribution undertakings are quite capable to account for the lower price they get from institutional premises in their

de distribution dans un cas, et des fournisseurs de services dans l'autre. Dans ces circonstances, la seule approche raisonnable, c'est de ne rien dire.

L'industrie n'en est pas pour autant incapable d'agir sur l'identité de celui qui verse les redevances. Une société de gestion ne peut exiger de quiconque d'être payée avant que la dette soit échue. Il en découle que les débiteurs solidaires sont libres de convenir entre eux de celui qui s'acquitte de la dette. Tant et aussi longtemps que le paiement respecte l'échéance, la société de gestion n'a probablement d'autre choix que de l'accepter.³¹

Sur le plan pratique, les entreprises de distribution versent déjà à la SOCAN les redevances de la retransmission et celles du tarif 17.A. Dans ces conditions, le plus facile serait que la SOCAN perçoive des entreprises de distribution toutes les redevances liées aux SSPN. Cette formule est d'autant plus avantageuse qu'une entreprise de distribution peut systématiquement opérer compensation entre le montant de la redevance du fournisseur de services et les paiements d'affiliation. La part de la SCGDV pourrait ensuite lui être acheminée.

D. Escomptes

Le tarif pour la retransmission et le tarif 17.A prévoient expressément un escompte lorsque les services sont fournis à certains établissements institutionnels (par exemple, les hôpitaux) et aux hôtels. Les propriétaires de ces établissements paient moins pour leur service de câblodistribution. Ce prix moins élevé n'est pas automatiquement reflété dans un tarif qui est établi à un montant fixe par local desservi. Cette fois-ci, par contre, le tarif représente un pourcentage de ce que les entreprises de distribution paient pour les SSPN. Les

negotiations with DPA service providers. Therefore, it can be assumed that the rate is self-adjusting and does not require discounting.

E. Small systems

Subsection 68.1(4) of the *Act* provides that small cable transmission systems are entitled to a preferential rate. That rate was set at \$10 per year per system in SOCAN Tariff 17.A.

Previous preferential rates were set at a fixed amount partly because the main rates were themselves set at so many cents per month per premises served. In a tariff that is set at a percentage of a rate base, it seems simpler and fairer to afford the preference required by statute by providing a discount to what would otherwise be payable. For one thing, a preferential rate that is set at a fixed amount necessarily means that the preference afforded gets less important as the system has fewer subscribers.

Small systems shall pay at half the rate of other systems (i.e., 5.56 per cent to SOCAN and 2.63 per cent to NRCC). Anything less may not be sufficient to satisfy the requirement set out in the *Act*. Anything more is unnecessary given the discretionary nature of the services offered. At the collectives' request, small systems will pay royalties only once a year.

The wording of the definition of "small cable transmission system" was adjusted to take into account the recent *Exemption Order for Small Cable Undertakings* (Appendix I, Public Notice CRTC 2001-121, December 7, 2001).

entreprises de distribution sont parfaitement en mesure de refléter le prix moins élevé qu'elles obtiennent des établissements institutionnels dans leurs négociations auprès des fournisseurs de SSPN. Par conséquent, on peut considérer que le tarif se rajuste à lui seul et qu'il n'a donc pas besoin d'un escompte.

E. Petits systèmes

Le paragraphe 68.1(4) de la *Loi* prévoit que les petits systèmes de transmission par fil ont droit à un taux préférentiel. Ce taux a été fixé à 10 \$ par an par système dans le tarif 17.A de la SOCAN.

Les taux préférentiels antérieurs avaient été établis à un montant fixe en partie parce que les taux principaux avaient été en eux-mêmes fixés à «x» cents par mois par local desservi. Dans un tarif qui est fixé à un pourcentage de l'assiette tarifaire, il semble plus simple et plus juste d'accorder la préférence exigée par la loi au moyen d'un escompte sur ce qu'il faudrait autrement payer. D'autant plus qu'un taux préférentiel ayant un montant fixe veut nécessairement dire que la préférence accordée s'amointrit en fonction du nombre d'abonnés.

Les petits systèmes paieront la moitié du taux versé par d'autres systèmes, soit 5,56 pour cent à la SOCAN et 2,63 pour cent à la SCGDV. Un escompte moins important pourrait ne pas satisfaire aux exigences de la *Loi*. Il n'est pas nécessaire d'accorder davantage non plus, compte tenu de la nature discrétionnaire des services offerts. Comme les sociétés de gestion l'ont demandé, les petits systèmes ne verseront des redevances qu'une fois l'an.

Le libellé de la définition de «petit système de transmission par fil» a été modifié de façon à tenir compte de la récente Ordonnance d'exemption pour les petites entreprises de câblodistribution (annexe I, avis public CRTC 2001-12, du 7 décembre 2001).

F. Sound recording use information

At first, the Board intended to ask DPA suppliers to provide the collectives with whatever information they maintain pursuant to CRTC requirements. It then appeared that the content of playlists maintained for the purpose of the CRTC was not at all clear. Participants agreed on setting out the specific information that should be maintained for the purposes of the tariff.

There then remained the matter of how much information should be supplied. DPA suppliers argued that requesting anything more than one week six times a year would be cumbersome. The collectives asked for one week per month. The Board remains uncertain as to why the information that is displayed on the subscriber's screen when a musical work is played cannot be systematically supplied to the collectives. Issues of server programming may be involved, which will have to be explored more fully at a later date. In the meantime, DPA suppliers will be required to report for one week each month.

G. Finalization of tariff wording

The Board made considerable changes to the wording of the tariff in order to reflect the many and various conclusions reached in the decision. In this respect, cooperation from counsel for the parties was solicited repeatedly. The participants' assistance at this stage of the process helped considerably in arriving at a text that reflected the Board's intentions without raising unforeseen difficulties in its day-to-day application. The Board is grateful for that assistance.

F. Obligations de rapport : enregistrements sonores

Au départ, la Commission avait l'intention de demander aux fournisseurs de SSPN de remettre aux sociétés de gestion les renseignements qu'ils sont tenus de détenir pour se conformer aux exigences du CRTC. Par la suite, il est apparu que le contenu des listes séquentielles préparées à ce titre demeure pour le moins incertain. Les participants se sont entendus pour énumérer spécifiquement les renseignements qui doivent être compilés pour les fins du tarif.

Restait alors la question de la quantité de renseignements qu'il faudrait remettre. Les fournisseurs de SSPN ont soutenu que la fourniture de données à l'égard de plus d'une semaine six fois par année serait trop exigeante. Les sociétés de gestion cherchaient à obtenir les données d'une semaine par mois. La Commission comprend toujours mal pourquoi il est difficile de fournir systématiquement aux sociétés de gestion les renseignements qui sont affichés au moment de la diffusion de l'œuvre. Il se peut que cela mette en cause la programmation des serveurs; c'est une question sur laquelle il faudra se pencher davantage dans un avenir rapproché. Pour l'instant, les fournisseurs de SSPN seront tenus de faire rapport une semaine par mois.

G. Finalisation du libellé du tarif

La Commission a profondément modifié le libellé du tarif, de façon à refléter les conclusions nombreuses et diverses auxquelles elle en est arrivée. À cet égard, on a demandé à maintes reprises aux procureurs des parties de coopérer. La contribution des participants à ce stade du processus a aidé considérablement à élaborer un texte qui reflète les objectifs de la Commission tout en évitant de soulever des difficultés dans son application pratique. La Commission les remercie de leur aide.

H. Transitional Provisions

The tariff contains certain transitional provisions made necessary because the tariff takes effect on January 1, 1997 for SOCAN and January 1, 1998 for NRCC, even though it was approved much later. A table sets out interest factors or multipliers to be used on sums owed in a given month. The multiplying factors were derived using previous month-end Bank Rates covering the period January 1997 to March 2002 as published by the Bank of Canada (rates for March, April and May 2002 were set equal to the current rate). The Board considers that a penalty over and above the interest factor should not be imposed on retroactive payments in this matter, as there was no way for DPA services to estimate the amounts payable until the tariff was approved. Interest is not compounded. The amount owed for any given month is the monthly amount of the approved tariff multiplied by the factor set out for that month. The Board hopes that this will greatly simplify the users' calculations and the collectives' verifications.

H. Dispositions transitoires

Le présent tarif comporte des dispositions transitoires qui sont nécessaires parce qu'il prend effet le 1^{er} janvier 1997 pour la SOCAN et le 1^{er} janvier 1998 pour la SCGDV et ce, même s'il a été homologué beaucoup plus tard. Un tableau fournit les facteurs d'intérêts qui seront appliqués aux sommes dues pour les usages effectués durant un mois donné. Les facteurs de multiplication ont été établis en utilisant le taux d'escompte de la Banque du Canada en vigueur le dernier jour du mois précédent pour la période allant de janvier 1997 à mars 2002 tel qu'il a été publié par la Banque du Canada (les taux pour les mois de mars, avril et mai 2002 ont été établis en fonction du taux actuellement en vigueur). La Commission estime que cette affaire ne nécessite pas l'imposition d'une pénalité en sus du facteur d'intérêt pour les paiements rétroactifs puisque les SSPN n'étaient pas en mesure d'estimer le montant éventuel du tarif homologué par la Commission. L'intérêt n'est pas composé. Le montant dû pour un mois donné est le montant des redevances établi conformément au tarif, multiplié par le facteur fourni pour le mois en question. On peut espérer que ces mesures simplifieront de beaucoup les calculs et vérifications auxquels les utilisateurs et les sociétés de gestion devront se livrer.

Le secrétaire général,

Claude Majeau
Secretary General

ENDNOTES

1. The CRTC speaks of pay audio services and pay audio programming undertakings. During these proceedings, objectors referred to non-broadcast radio services. Proposed statements of royalties target pay audio radio services or non-broadcast radio services.

2. The *Broadcasting Act* defines distribution undertaking as "an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking".

3. The DPA service provider and the distribution undertaking are jointly and severally liable for the public telecommunication that occurs when a work is transmitted through a distribution undertaking on a DPA signal: paragraph 2.4(1)(c) of the *Act*.

The Digital Media Association objected to the SOCAN tariff but did not participate in the proceedings. Objections from background music service providers, a cable radio station and others were eventually withdrawn.

4. A few small systems offer DPAs in a FM format.

5. DMX and Galaxie each provide 30 channels covering a variety of highly specific genres. Pop Classics, Baroque, Classics Masters and Chamber Music each have their own channel; so do music from the '70s and music from the '80s.

NOTES

1. Le CRTC parle de services sonores payants et d'entreprises de programmation sonore payante. Au cours de ces instances, les opposants ont parlé de services de radio autres que de radiodiffusion. Les projets de tarifs visent les services de radio audio payante ou les services de radio autres que de radiodiffusion.

2. La *Loi sur la radiodiffusion* définit une entreprise de distribution comme une «entreprise de réception de radiodiffusion pour retransmission, à l'aide d'ondes radioélectriques ou d'un autre moyen de télécommunication, en vue de sa réception dans plusieurs résidences permanentes ou temporaires ou locaux d'habitation, ou en vue de sa réception par une autre entreprise semblable».

3. Le fournisseur de SSPN et l'entreprise de distribution sont solidairement responsables de la télécommunication publique qui se produit lorsqu'une œuvre est transmise par une entreprise de distribution sur un signal sonore payant numérique : alinéa 2.4(1)c) de la *Loi*.

La *Digital Media Association* s'est opposée au tarif de la SOCAN, mais n'a pas participé aux audiences. Les oppositions des fournisseurs de services de musique de fond, d'une station de radio par câble et d'autres ont finalement été abandonnées.

4. Quelques petits systèmes offrent des SSPN dans une formule FM.

5. DMX et Galaxie offrent chacune 30 canaux présentant un éventail de genres très spécifiques. Classique pop, baroque, grands classiques et musique de chambre ont toutes leur propre canal, de même que la musique des années 70 et des années 80.

DPA offering may change substantially in the near future. Already, there is talk of a joint management agreement between DMX and Galaxie, which would result in distribution undertakings being offered a single bundle of 40 signals. At the time of the hearings, however, the future of this proposal remained uncertain. It is therefore unnecessary to take it into account in this decision.

6. Other "products" that could be used in the future, but that are mostly absent at present, include live spoken word, unpublished sound recordings, live music and sound recordings of non-musical works.
7. The profitability of DMX is reduced because of an agreement with its American parent, though not to such extent that the general assessment made here is affected.
8. Participants also referred to them as proxies or even methodologies. Given the conclusion the Board reaches as to their usefulness, nothing would be served by engaging in that debate.
9. *Statements of Royalties to Be Paid for the Retransmission of Distant Radio and Television Signals in 1990 and 1991*, (1990-1994) C.B.R. 3; 32 C.P.R. (3^d) 97, <http://www.cb-cda.gc.ca/decisions/r02101990-b.pdf>.
10. Some participants argued that profitability should be analysed by looking only at the most profitable operations, and not every operator in the market. Were this true, every venture capitalist and anyone involved in an industry that depends heavily on research and development would rapidly run out of money.

L'offre de SSPN pourrait changer considérablement très bientôt. Il est déjà question d'un accord de gestion commune entre DMX et Galaxie, par lequel les entreprises de distribution se verraient offrir un seul ensemble de 40 signaux. Mais au moment des audiences, l'avenir de cette proposition restait incertain. Il n'est donc pas nécessaire de la prendre en compte dans cette décision.

6. Les autres «produits» susceptibles d'être utilisés ultérieurement, mais qui ne le sont pratiquement pas actuellement, comprennent les créations orales en direct, les enregistrements sonores non publiés, la musique en direct et les enregistrements sonores d'œuvres non musicales.
7. La rentabilité de DMX est moindre à cause d'un accord avec sa société mère américaine, mais pas au point d'influer sur l'évaluation générale faite ici.
8. Les participants ont parlé de substituts ou même de méthodologies. Compte tenu de la conclusion à laquelle en est arrivée la Commission au sujet de leur utilité, il ne servirait à rien de s'engager dans ce débat.
9. *Tarifs des droits à payer pour la retransmission de signaux éloignés de radio et de télévision en 1990 et 1991*, (1990-1994) R.D.C.D.A. 3; 32 C.P.R. (3^e) 97, <http://www.cb-cda.gc.ca/decisions/r02101990-b.pdf>.
10. Certains participants ont fait valoir que la rentabilité devrait être analysée en examinant uniquement les entreprises les plus rentables et non tous les exploitants sur le marché. Si cela était vrai, chaque investisseur en capital de risque et toute industrie qui dépend largement de la recherche et du développement verrait rapidement ses fonds se tarir.

11. Similarly, this decision will not deal with the question of whether the provision of DPA services is a natural monopoly. It is difficult to believe that natural monopolies have all but vanished, given that network effects present in the information economy and elsewhere do seem to favour the creation of monopolies, natural and otherwise.
 12. This seems to run counter to Mr. Giunta's testimony, who found that working for Galaxie allowed him to "worry about ... things that commercial radio had long since forgotten about." Tr. p. 2087.
 13. This is something to be expected in any event, as both provide an audio output.
 14. Indeed, as can be inferred from what follows, most products within that continuum are not on the whole substitutes for each other.
 15. Retransmitters pay 5¢ per year per subscriber for distant radio signals; that is less than one per cent of what they pay for distant television signals.
 16. With the possible exception of a few spoken word programs on signals targeted at children.
 17. The Board gives little weight to the fact that DPA markets itself as being different from conventional radio. Those who offer a new product always try to distinguish it from the existing product that people, rightly or wrongly, are most readily going to associate it with.
 18. "[T]he Board properly understood its function when it stated that it had to regulate the balance of market power between copyright owners and users":
11. De même, cette décision ne traitera pas de la question de savoir si l'offre de SSPN est un monopole naturel. Il est difficile de croire que les monopoles naturels ont disparu, étant donné que les effets de réseau que l'on retrouve dans l'économie de l'information et ailleurs semblent favoriser la création de monopoles, naturels ou autres.
 12. Cela semble aller à l'encontre du témoignage de M. Giunta, qui a constaté que le fait de travailler pour Galaxie lui a permis de [TRADUCTION] «se préoccuper de choses ... que la radio commerciale a oubliées depuis longtemps». Tr. p. 2087.
 13. Il faut s'y attendre de toute façon puisque les deux produisent un signal sonore.
 14. En fait, comme on pourra en conclure de ce qui suit, la majorité des produits appartenant à ce continuum ne peuvent pas se remplacer mutuellement.
 15. Un retransmetteur paie cinq cents par année par abonné pour les signaux éloignés de radio; cela représente moins de un pour cent de ce qu'il verse pour les signaux éloignés de télévision.
 16. À l'exception éventuelle de quelques émissions orales destinées aux enfants.
 17. La Commission accorde peu d'importance au fait que les SSPN aient tenté de se «vendre» en se disant différent de la radio traditionnelle. Ceux qui offrent un nouveau produit essaient toujours de se démarquer du produit existant auquel on va, à juste titre ou non, le plus facilement l'associer.
 18. «[L]a Commission a bien compris sa mission lorsqu'elle a déclaré qu'elle devait assurer un certain équilibre au sein du marché entre les titulaires de droit d'auteur

- Canadian Association of Broadcasters v. SOCAN* (1994), 58 C.P.R. (3^d) 190, 196g (F.C.A.).
19. *Statement of royalties to be collected by NRCC for the public performance or communication to the public by telecommunication, in Canada, of published sound recordings embodying musical works and performers' performances of such works [Tariff 1.A - Commercial radio in 1998, 1999, 2000, 2001 and 2002]*, August 13, 1999, <http://www.cb-cda.gc.ca/decisions/m13081999-b.pdf>, pp. 30-32; (1999) 3 C.P.R. (4th) 350, 376-378.
20. *Id.*, 27 (C.B.), 373 (C.P.R.).
21. *Canadian Broadcasting Corp. c. (Canada) Copyright Appeal Board* (1990), 109 N.R. 216, 30 C.P.R. (3^d) 269 (F.C.A.).
22. As stated earlier, pricing in information industries tends to be based on value to the purchaser, not cost to produce.
23. Final Report to the Minister of Consumer and Corporate Affairs for 1987, (1987) 15 C.P.R. (3^d) 129, 138.
24. Other issues or factors that are irrelevant to setting this tariff include: the impact of DPA on the sale of sound recordings; the argument that DPA uses a less valuable part of the repertoire; the value of DPA's efforts in "compiling" the repertoire into the various signals; the "rate is not a price" argument.
- et les utilisateurs» : *Association canadienne des radiodiffuseurs c. SOCAN* (1994), 58 C.P.R. (3^e) 190, 196g (C.A.F.).
19. *Tarif des redevances à percevoir par la SCGDV pour l'exécution en public ou la communication au public par télécommunication, au Canada, d'enregistrements sonores publiés constitués d'œuvres musicales et de la prestation de telles œuvres [Tarif 1.A - Radio commerciale en 1998, 1999, 2000, 2001 et 2002]*, décision du 13 août 1999, <http://www.cb-cda.gc.ca/decisions/m13081999-b.pdf>, pp. 30-32; (1999) 3 C.P.R. (4^e) 350, 376-378.
20. *Id.*, 27 (C.D.A.), 373 (C.P.R.).
21. *Société Radio-Canada c. Commission d'appel du droit d'auteur (Canada)* (1990), 109 N.R. 216, 30 C.P.R. (3^e) 269 (C.A.F.).
22. Comme il en a déjà été question, dans les industries de l'information les prix sont habituellement établis en fonction de la valeur que l'acheteur lui accorde, et non pas en fonction du coût de production.
23. Rapport final au ministre de la Consommation et des corporations pour l'année 1987, (1987) 15 C.P.R. (3^e) 129, 138.
24. Parmi d'autres questions ou facteurs non pertinents à l'heure de fixer ce tarif, on retrouve : l'incidence des SSPN sur la vente d'enregistrements sonores; l'argument selon lequel les SSPN utilisent une partie moins importante du répertoire; la valeur de l'apport des SSPN pour ce qui est de «compiler» le répertoire dans les divers signaux; l'argument voulant que «le taux n'est pas un prix».

25. *Statement of royalties to be collected for the performance or communication by telecommunication in Canada of musical or dramatico-musical works in 1990, 1991, 1992, 1993, 1994 and 1995*, April 19, 1996, <http://www.cb-cda.gc.ca/decisions/m19041996-b.pdf>, pp. 17-18; (1996) 70 C.P.R. (3^d) 501, 517-518.
26. *Id.* pp. 37-38 (C.B.); 531-533 (C.P.R.); *Canadian Cable Television Association. v. Society of Composers, Authors and Music Publishers of Canada* (F.C.A.) (1997), 75 C.P.R. (3^d) 376.
27. *Statement of royalties to be collected for the performance or communication by telecommunication in Canada of musical or dramatico-musical works in 1994, 1995, 1996 and 1997*, September 20, 1996, <http://www.cb-cda.gc.ca/decisions/m20091996-b.pdf> pp. 26-28; (1996) 71 C.P.R. (3^d) 196, 217-218.
28. Authors and composers can decide not to administer their rights collectively; that option is not open to performers and makers.
29. Sections 67 to 68.2 of the *Act*.
30. A similar preoccupation with transparency may have led the Copyright Appeal Board to deal with the then two performing rights societies through consolidated hearings and to issue tariffs that were identical in all relevant respects.
31. Indeed, it may well be that a creditor always must accept payment in full from either joint and several debtor, even once the debt is due.
25. *Tarif des droits à percevoir pour l'exécution ou la communication par télécommunication au Canada d'œuvres musicales ou dramatico-musicales en 1990, 1991, 1992, 1993, 1994 et 1995*, décision du 19 avril 1996, <http://www.cb-cda.gc.ca/decisions/m19041996-b.pdf>, pp. 17-18; (1996) 70 C.P.R. (3^e) 501, 517-518.
26. *Id.* pp. 37-38 (C.D.A.); 531-533 (C.P.R.); *Association canadienne de télévision par câble c. Société canadienne des auteurs, compositeurs et éditeurs de musique* (C.A.F.) (1997), 75 C.P.R. (3^e) 376.
27. *Tarif des droits à percevoir pour l'exécution ou la communication par télécommunication au Canada d'œuvres musicales ou dramatico-musicales en 1994, 1995, 1996 et 1997*, décision du 20 septembre 1996, <http://www.cb-cda.gc.ca/decisions/m20091996-b.pdf> pp. 26-28; (1996) 71 C.P.R. (3^e) 196, 217-218.
28. Les auteurs et compositeurs peuvent renoncer à administrer leurs droits collectivement; les interprètes et les producteurs n'ont pas cette option.
29. Articles 67 à 68.2 de la *Loi*.
30. Une préoccupation analogue à propos de la transparence peut avoir amené la Commission d'appel du droit d'auteur à organiser des audiences regroupées pour les deux sociétés de droits d'exécution de l'époque, et à établir des tarifs identiques dans tous les aspects pertinents.
31. On pourrait même vouloir soutenir que le créancier doit toujours accepter un paiement pour la totalité de la dette provenant de l'un ou l'autre des débiteurs solidaires et ce, même après échéance.

MC 8

Copyright Board
Canada



Commission du droit d'auteur
Canada

**Collective Administration of Performing
Rights and of Communication Rights**

**Gestion collective du droit d'exécution et de
communication**

**Collective Administration in Relation to
Rights Under Sections 3, 15, 18 and 21**

**Gestion collective relative aux droits visés aux
articles 3, 15, 18 et 21**

Copyright Act, subsections 68(3) and 70.15(1)

*Loi sur le droit d'auteur, paragraphes 68(3)
et 70.15(1)*

Files: Public Performance of Musical Works;
Public Performance of Sound Recordings;
Reproduction of Musical Works

Dossiers : Exécution publique d'œuvres
musicales; Exécution publique d'enregistrements
sonores; Reproduction d'œuvres musicales

STATEMENT OF ROYALTIES TO BE
COLLECTED BY SOCAN, NRCC AND CSI IN
RESPECT OF MULTI-CHANNEL
SUBSCRIPTION SATELLITE RADIO SERVICES

TARIF DES REDEVANCES À PERCEVOIR PAR
LA SOCAN, LA SCGDV ET CSI À L'ÉGARD DES
SERVICES DE RADIO SATELLITAIRE À
CANAUX MULTIPLES PAR ABONNEMENT

SOCAN (2005-2009), NRCC (2007-2010),
CSI (2006-2009)

SOCAN (2005-2009), SCGDV (2007-2010),
CSI (2006-2009)

DECISION OF THE BOARD

DÉCISION DE LA COMMISSION

Reasons delivered by:

Motifs exprimés par :

Mr. Justice William J. Vancise
Mr. Stephen J. Callary
Mrs. Jacinthe Théberge

M. le juge William J. Vancise
M. Stephen J. Callary
M^e Jacinthe Théberge

Date of Decision

Date de la décision

April 8, 2009

Le 8 avril 2009

Corrected Version

Version corrigée

May 6, 2009

Le 6 mai 2009

Ottawa, April 8, 2009

Ottawa, le 8 avril, 2009

**Files: Public Performance of Musical Works;
Public Performance of Sound Recordings;
Reproduction of Musical Works**

**Dossiers : Exécution publique d'œuvres
musicales; Exécution publique
d'enregistrements sonores; Reproduction
d'œuvres musicales**

Reasons for the decision certifying the tariff to be collected by SOCAN (2005-2009), NRCC (2007-2010) and CSI (2006-2009) in respect of Multi-Channel Subscription Satellite Radio Services

Motifs de la décision homologuant le tarif des redevances à percevoir par la SOCAN (2005-2009), la SCGDV (2007-2010) et CSI (2006-2009) à l'égard des services de radio satellitaire à canaux multiples par abonnement

I. INTRODUCTION

I. INTRODUCTION

[1] The Society of Composers, Authors and Music Publishers of Canada (SOCAN), the Neighbouring Rights Collective of Canada (NRCC) and CMRRA/SODRAC Inc. (CSI) filed tariffs for the use of their repertoire by Multi-Channel Subscription Satellite Radio Services. The proposed statements of royalties were filed pursuant to subsection 67.1(1) and 70.13(1) of the *Copyright Act* (the "Act").

[1] La Société canadienne des auteurs, compositeurs et éditeurs de musique (SOCAN), la Société canadienne de gestion des droits voisins (SCGDV) et CMRRA/SODRAC inc. (CSI) ont déposé des tarifs pour l'utilisation de leur répertoire par les services de radio satellitaire à canaux multiples par abonnement. Les projets de tarifs ont été déposés en vertu des paragraphes 67.1(1) et 70.13(1) de la *Loi sur le droit d'auteur* (la « Loi »).

[2] SOCAN's proposed statements for 2005, 2006, 2007, 2008 and 2009 were published in the *Canada Gazette* on May 1, 2004, May 14, 2005, May 20, 2006, June 23, 2007 and June 14, 2008. NRCC's statement for the years 2007 to 2010 was published on May 6, 2006. CSI's statements for 2006 to 2009 and for 2008-2009 were published on April 30, 2005 and May 19, 2007.¹ Potential users and their representatives were advised of their right to object. Sirius Satellite Radio (Sirius) and Canadian Satellite Radio Inc. (CSR), collectively the "Satellite Radio Services" did so.

[2] Les projets de la SOCAN pour 2005, 2006 et 2007, 2008 et 2009 ont été publiés dans la *Gazette du Canada* le 1^{er} mai 2004, le 14 mai 2005, le 20 mai 2006, le 23 juin 2007 et le 14 juin 2008. Celui de la SCGDV pour les années 2007 à 2010 a été publié le 6 mai 2006. Les tarifs de CSI pour 2006 à 2009 et pour 2008-2009 ont été publiés le 30 avril 2005 et le 19 mai 2007.¹ Les utilisateurs éventuels et leurs représentants ont été avisés de leur droit de s'opposer. Sirius Radio Satellite (Sirius) et *Canadian Satellite Radio Inc.* (CSR), collectivement désignées les « services de radio par satellite » ou « services de radio satellitaire », l'ont fait.

[3] The examination of these three matters was consolidated at the request of the Satellite Radio Services, for the reasons set out in the Board's order of July 21, 2006. The hearings took place over eleven days, from November 26 to

[3] Pour les motifs exprimés dans une ordonnance de la Commission du 21 juillet 2006, l'examen des trois affaires a été réuni à la demande des services de radio par satellite. Les audiences ont été tenues pendant onze jours, du

December 11, 2007. The record of the proceedings was closed on February 13, 2008 with the parties' last filing of supplementary materials.

1. Position of Parties

[4] SOCAN initially proposed a rate of 25 per cent of total gross income. That proposal was however revised downward substantially at close to 15 per cent, and then to about 13 per cent following the parties' replies.

[5] NRCC initially proposed a rate of 17 per cent of gross income, with a minimum fee of \$1.50 per subscriber per month. NRCC later revised its rate proposal to 4.4 per cent and then 4 per cent, without specifying any minimum fees.

[6] CSI initially proposed a rate of 5 per cent of gross income, with a minimum fee of \$0.50 per subscriber per month. CSI's new proposed tariff for 2008 and 2009 included rates of 5 per cent with a minimum fee of \$0.50 per subscriber per month for a service that does not authorize subscribers to reproduce musical works, and 10 per cent with a minimum fee of \$1 for a service that does. These rates were revised to 2.9 per cent (\$0.29) and 5.8 per cent (\$0.58).

[7] CSR did not propose any specific rates, although it was of the opinion that it should be lower than the rate paid by commercial radio stations. Sirius proposed SOCAN rates of between 2.0 and 2.6 per cent of income, NRCC rates of between 0.5 per cent and 0.7 per cent, and CSI rates of between 0.48 per cent and 1.14 per cent.

2. Description of the Multi-Channel Subscription Satellite Radio Services

[8] The satellite radio services industry originated in the United States. XM Satellite Radio (XM)

26 novembre au 11 décembre 2007. Le dossier de l'instance a été clos le 13 février 2008 avec le dépôt final de documentation additionnelle par les parties.

1. Position des parties

[4] La SOCAN a d'abord proposé un tarif de 25 pour cent du revenu brut total. Cette proposition a toutefois été révisée considérablement à la baisse, passant à près de 15 pour cent, pour ensuite s'établir à 13 pour cent après les réponses des parties.

[5] La SCGDV a d'abord proposé un tarif de 17 pour cent du revenu brut, avec une redevance minimale de 1,50 \$ par mois par abonné. La SCGDV a ultérieurement révisé sa proposition de taux à 4,4 puis à 4 pour cent, sans aborder la question des redevances minimales.

[6] CSI a d'abord proposé un tarif de 5 pour cent du revenu brut, avec une redevance minimale de 0,50 \$ par mois par abonné. Le nouveau tarif de CSI pour 2008 et 2009 comprend un taux de 5 pour cent du revenu brut total avec une redevance minimale de 0,50 \$ par mois par abonné pour un service qui n'autorise pas la reproduction d'œuvres musicales par les abonnés, et de 10 pour cent avec une redevance minimale de 1 \$ pour un service qui les autorise. Ces taux ont été révisés pour s'établir à 2,9 pour cent (0,29 \$) et 5,8 pour cent (0,58 \$).

[7] CSR n'a proposé aucun tarif particulier quoiqu'elle soit d'avis qu'il devrait être inférieur à celui payé par les stations de radio commerciales. Sirius a proposé des taux pour la SOCAN se situant entre 2,0 et 2,6 pour cent du revenu, entre 0,5 et 0,7 pour cent pour la SCGDV et entre 0,48 et 1,14 pour cent pour CSI.

2. Description des services de radio satellitaire à canaux multiples par abonnement

[8] L'industrie des services de radio par satellite a pris naissance aux États-Unis. XM Satellite

launched its operation on September 25, 2001 and Sirius Satellite Radio (Sirius U.S.) launched its operation on July 1, 2002. They were the first and remain the largest operators in the world.

[9] XM uses two high-powered geostationary satellites that rotate in synchronization with the earth and provide blanket coverage of the entire U.S. mainland and southern Canada.

[10] Sirius uses three satellites that move around the earth in an elliptical orbit. These satellites are called geosynchronous and orbit above the equator for 16 hours a day and below the equator for 8 hours permitting the satellite to sleep and conserve energy.

[11] The multiplex signal sent by satellite to the mobile receivers is encrypted so that only those receivers equipped with a decryption key which permits the unscrambling of the signal can receive and play the signal.

[12] The American services were able to expand into Canada by forming exclusive partnerships with Canadian corporations. On June 16, 2005, the Canadian Radio-television and Telecommunications Commission (CRTC) issued broadcasting licences to CSR and Sirius to offer satellite radio services across Canada. CSR (XM Canada) launched its operation on November 22, 2005 and Sirius on December 1, 2005.

[13] At the end of 2004, XM reported over 3.2 million subscribers, and Sirius U.S. had reached the one million subscriber level. At the time of the hearing, Sirius and CSR had 200,000 and 120,000 subscribers respectively. By the summer of 2008, those numbers had increased to 750,000 and 440,000.² Satellite radio services quickly penetrated the market. It took Sirius U.S.

Radio (XM) a commencé ses opérations le 25 septembre 2001 et Sirius Satellite Radio (Sirius U.S.), le 1^{er} juillet 2002. Ces entreprises ont été les premières et demeurent les plus importantes du monde dans ce domaine.

[9] XM utilise deux satellites géostationnaires de grande puissance dont l'orbite autour de la terre est en phase et qui procurent une couverture englobant toute la partie continentale des États-Unis et le sud du Canada.

[10] Sirius utilise trois satellites qui circulent autour de la terre selon une orbite elliptique. Ces satellites sont appelés géosynchrones et sont placés en orbite au-dessus de l'équateur durant 16 heures par jour et sous celui-ci, pour les autres 8 heures, permettant ainsi au satellite d'entrer en état de veille et de conserver de l'énergie.

[11] Le signal multiplex transmis par satellite aux récepteurs mobiles est codé de telle sorte que seuls les récepteurs munis d'une clé de déchiffrement permettant de débrouiller le signal peuvent le recevoir et le jouer.

[12] L'expansion des services américains chez nous a été rendue possible par la formation de coentreprises exclusives avec des sociétés canadiennes. Le 16 juin 2005, le Conseil de la radiodiffusion et des télécommunications canadiennes (CRTC) a délivré à CSR et Sirius des licences de radiodiffusion pour offrir des services de radio par satellite partout au Canada. CSR (XM Canada) a commencé ses opérations le 22 novembre 2005 et Sirius, le 1^{er} décembre 2005.

[13] À la fin de 2004, XM déclarait plus de 3,2 millions d'abonnés, et Sirius U.S. avait atteint le plateau du million d'abonnés. Lors de l'audience, Sirius et CSR avaient respectivement 200 000 et 120 000 abonnés. À l'été 2008, ces chiffres avaient augmenté à 750 000 et 440 000.² Les services de radio satellitaire ont connu une pénétration rapide du marché. Il aura fallu

3.6 years to have 5,000,000 units in the hands of American customers, while DVDs took 2.5 years to reach the same amount, MP3 players 4.8 years, cellular phones 10 years and satellite television 10.6 years.

3,6 années à Sirius U.S. pour placer 5 000 000 d'unités entre les mains de clients américains, alors que le DVD a atteint le même nombre en 2,5 années, le lecteur MP3 en 4,8 années, le téléphone cellulaire en 10 années et la télévision par satellite en 10,6 années.

[14] For our purposes, the infrastructure and operations of the two American services, on which the Canadian services rely, are fairly similar. In order to provide an uninterrupted radio broadcast service, the U.S. satellite services augment their satellite signal through the use of a network of ground transmitters. This technique, which is said to create "space diversity", prevents signal dropouts. With this combined infrastructure, the satellite services are able to deliver all of their programming to all subscribers, regardless of their location in North America at the time of reception.

[14] Pour les besoins de l'espèce, l'infrastructure et l'exploitation des deux services américains, sur lesquels les services canadiens reposent, sont assez semblables. De façon à fournir un service radio ininterrompu, les services américains augmentent leur signal satellitaire en utilisant un réseau d'émetteurs terrestres. La technique qui, dit-on, crée de la « diversité d'espace » évite les interruptions de signal. Avec cette infrastructure mixte, les services sont en mesure de livrer toute leur programmation à tous leurs abonnés, peu importe où ils se trouvent en Amérique du Nord lors de la réception.

[15] In terms of programming content, although each satellite service has developed its own micro-niche programming, both offer a large selection of commercial-free music channels covering a wide range of genres as well as channels of news, children's programs, sports, comedy, talk and traffic. Additionally, a subscription to the satellite services offers the following innovative features: text display providing artists' name, songs' title, scores, stock quotations, a tagging mechanism alerting listeners when a song or an artist is playing on another channel, temporary and permanent recording options, pause and replay of live radio content, Internet service delivery of some audio channels over the Web as a streaming service as well as allowing the receiver to be used as a MP3 player.

[15] Sur le plan du contenu de la programmation, même si chaque service a conçu ses propres micro-créneaux de programmation, les deux offrent un vaste choix de canaux de musique sans message publicitaire dans un large éventail de genres, de même que des canaux d'actualités, d'émissions pour enfants, de sports, de comédie, d'infovariété et de circulation. De plus, l'abonnement aux services par satellite offre les innovations suivantes : affichage texte du nom des artistes, du titre des chansons, des résultats sportifs et des cotes de la bourse, une fonction de repérage avertissant l'auditeur qu'une chanson ou un artiste tourne sur un autre canal, la possibilité de faire un enregistrement temporaire ou permanent, l'arrêt-reprise de contenu audio en direct, le service Internet de transmission sur demande de certains canaux audio par le Web ainsi que l'utilisation du récepteur comme lecteur MP3.

[16] Programming of the U.S. services is created and delivered using a content management system (CMS) located at their main broadcast studio. The objective of this system is to store once and deliver many times.

[16] La programmation des services américains est créée et livrée au moyen d'un système de gestion de contenu (SGC) situé à leur studio principal de radiodiffusion. L'objectif de ce système est de mettre en mémoire une fois et de livrer plusieurs fois.

[17] CSR uses a CMS provided by Delat Digital Media System. CSR produces and delivers 12 channels originating in Canada at studios located in Toronto and Montreal. Music directors at these two sites select the music to be used which is then injected in the system using functions of the Delat workstations located in these two cities. These workstations are directly connected to the main Delat CMS located in Washington, D.C. by a fibre optic line (OC3 line).

[18] Sirius uses a CMS called Nex Gen but does not produce any programming in Canada. All Sirius' content in Canada is produced by Canadian third-party content providers. These providers generate and deliver the content to the Sirius master control centre located in New York City.

[19] XM has a complex of 82 studios in Washington as well as studios in New York, Nashville and Chicago. Sirius U.S. is based out of New York and has other studios in Los Angeles and Memphis. Programming is not typically delivered live, with the obvious exception of live sporting events. Essentially, before programming can be uplinked to the satellites for delivery, programming directors must store a copy of all music and audio files required onto the main server. These files are compressed, encoded and combined to complete the process commonly referred to as "multiplexing". Selection and scheduling of programming content are done using specialized software that instructs the main server when and in what order it must play the various music or audio files. The server also serves the alternative delivery channels, including Internet and cellular phone streaming services.

[20] Although the Canadian satellite services rely heavily on their U.S. partner's programming, the terms of their CRTC licence require them to

[17] CSR utilise un SGC fourni par Delat Digital Media System. CSR produit et livre 12 canaux en provenance du Canada de studios situés à Toronto et à Montréal. Les directeurs musicaux à ces deux sites sélectionnent les pièces qui sont par la suite injectées dans le système par des fonctions des postes de travail Delat situés dans ces deux villes. Ces postes sont reliés directement au SGC principal situé à Washington, D.C. par un lien de fibre optique (lien OC3).

[18] Sirius utilise un SGC connu sous le nom de Nex Gen mais ne produit aucune programmation au Canada. Tout son contenu canadien est produit par des tiers canadiens fournisseurs de contenu. Ces derniers génèrent et livrent le contenu au centre de contrôle principal de Sirius, situé à New York.

[19] XM dispose d'un ensemble de 82 studios à Washington ainsi que des studios à New York, Nashville et Chicago. La principale place d'affaires de Sirius U.S. est à New York et elle a d'autres studios à Los Angeles et Memphis. La programmation n'est habituellement pas livrée en direct, sauf bien sûr les événements sportifs en direct. Essentially, avant que la programmation ne soit transmise au satellite en vue de sa livraison, les directeurs de programmation doivent mettre en mémoire dans le serveur principal une copie de tous les fichiers de musique et audio. Les fichiers sont comprimés, encodés et compilés afin de réaliser le processus communément appelé « multiplexage ». Le choix et la programmation du contenu se font au moyen de logiciels spécialisés qui commandent au serveur principal le moment et l'ordre dans lesquels celui-ci doit faire entendre les divers fichiers de musique ou audio. Le serveur dessert également les canaux alternatifs de livraison, dont les services de transmission sur demande sur Internet et aux cellulaires.

[20] Bien que les services par satellite canadiens utilisent abondamment la programmation de leurs partenaires américains, les conditions de leur

include in their subscription package a minimum of content produced in Canada. Accordingly, out of the 130 channels CSR offers, 13 are produced in Canada while out of the 110 channels Sirius offers, 11 are produced in Canada. The Satellite Radio Services differ slightly in the way they create and deliver their Canadian content. It is useful, in light of the legal issues raised, to highlight the distinctive features of each Service.

[21] CSR creates its own programming. A digital communication link from the Canadian offices to the U.S. infrastructure allows the work stations in Canada to send instructions directly to the servers and the scheduling software sitting in U.S. headquarters in Washington. Thus, CSR programming is conceived and controlled in Canada but produced from Washington.

[22] CSR receives audio content in the form of CDs or through DMDS-Musicrypt³ service provided by the sound recording industry. When dealing with a new CD, the production team makes a copy directly on the server in the U.S. using the digital connection, without making any back up or archival copies. New music obtained through DMDS-Musicrypt is received as digital audio files from a server that sits in Canada. In this case, an intermediary copy of the file is stored on a work station located in Canada. If the Canadian production team selects the song, then that file is “transferred” onto the main server in Washington via the digital communication link.

[23] When it comes time to scheduling program content, the programming director instructs the U.S. scheduling software to play specific songs and recorded voice elements in a certain order and at the appropriate time; the Washington server plays them off its local hard drives, combining the Canadian channels with the

licence du CRTC les obligent à inclure dans leur bouquet d’abonnement un minimum de contenu produit au Canada. En conséquence, des 130 canaux offerts par CSR, 13 sont produits au Canada, alors que des 110 offerts par Sirius, 11 le sont. Les services de radio par satellite créent et livrent leur contenu canadien de façon quelque peu différente. Compte tenu des questions de droit soulevées, il est utile de souligner les caractéristiques qui différencient chaque service.

[21] CSR crée sa propre programmation. Un lien de communication numérique reliant les bureaux canadiens à l’infrastructure américaine permet aux stations de travail de transmettre des instructions directement du Canada aux serveurs et au logiciel d’ordonnancement situés dans les quartiers généraux de Washington. La programmation de CSR est donc conçue et contrôlée au Canada, mais produite de Washington.

[22] CSR reçoit le contenu audio sous forme de CD ou par l’intermédiaire d’un service SDMN-Musicrypt³ fourni par l’industrie de l’enregistrement sonore. À la réception d’un nouveau CD, l’équipe de production en fait une copie directement sur le serveur aux États-Unis au moyen du lien numérique, sans en faire de copies de sauvegarde ou d’archivage. La nouvelle musique obtenue grâce au SDMN-Musicrypt est reçue sous forme de fichiers audionumériques d’un serveur situé au Canada. Dans ce cas, une copie intermédiaire du fichier est mémorisée dans une station de travail située au Canada. Si l’équipe de production canadienne choisit la chanson, ce fichier est alors « transféré » dans le serveur principal à Washington par le lien de communication numérique.

[23] Le moment venu de programmer le signal, le directeur de la programmation donne des instructions aux logiciels de répartition américains de jouer des chansons et des enregistrements vocaux donnés, dans un certain ordre et au moment opportun; le serveur situé à Washington les fait alors jouer à même ses

American ones into the common multiplex signal that is sent up to the satellite.

[24] Unlike CSR, Sirius does not produce any programming itself; it acquires all of its Canadian content from Canadian third-party content providers. Standard Radio Inc. provides Sirius with a Canadian rock music channel called Iceberg 95 created in studios located in Toronto. The content is available in CD and DMDS-Musicrypt. The music is scheduled from Toronto, loaded onto the Sirius master server where it is encoded and digitized for delivery to the server's master control centre in New York City. Astral Media provides Sirius with two Canadian rock music channels, *Rock Velours* and *Énergie*, pursuant to a subcontract with Standard Radio. The programming is created in Montreal using the same technology used by Standard Radio. The music is scheduled from Montreal on a six-hour loop for broadcast each day by a program called Music Master. Content providers store the music files and create the programming on a server located in their respective broadcast studio. Again, if musical works are provided on a CD, a digital copy is made on the content provider's server. If musical works are provided through DMDS-Musicrypt, a digital link to that service is used to copy that file onto the Canadian server. Sirius' Canadian content providers do not make archival copies of musical works.

[25] Sirius' content providers use a specialized scheduling software that is part of their server complex to determine which songs and other recorded voice elements will be played and when. When it is time for a show to air, the scheduling system automatically plays it off the copies on the Canadian servers. That output is linked by communication lines to the U.S. facility, combined with the other American channels and

propres disques durs en mixant les canaux canadiens et américains en un signal multiplex commun qui est transmis au satellite.

[24] Contrairement à CSR, Sirius ne produit pas elle-même de programmation; elle acquiert la totalité de son contenu canadien de tiers canadiens fournisseurs de contenu. Standard Radio Inc. fournit à Sirius un canal de musique rock canadienne connu sous le nom de Iceberg 95, produit dans des studios situés à Toronto. Le contenu est disponible sur CD et SDMN-Musicrypt. La musique est répartie de Toronto, stockée dans le serveur principal de Sirius où elle est encodée et numérisée pour sa livraison au serveur du centre de contrôle principal à New York. Astral Media fournit à Sirius deux canaux de musique rock canadienne, *Rock Velours* et *Énergie*, en vertu d'un contrat de sous-traitance avec Standard Radio. La programmation est créée à Montréal avec la même technologie que celle utilisée par Standard Radio. La musique est répartie de Montréal en boucle de six heures pour radiodiffusion quotidienne au moyen d'un logiciel appelé *Music Master*. Les fournisseurs de contenu compilent les fichiers de musique et créent la programmation sur un serveur situé dans leur studio de radiodiffusion respectif. Encore une fois, si des œuvres musicales sont fournies sur CD, une copie numérisée en est faite sur le serveur du fournisseur de contenu. Si des œuvres musicales sont fournies par SDMN-Musicrypt, un lien numérique auquel ce service est branché est utilisé pour reproduire ce fichier dans le serveur canadien. Les fournisseurs canadiens de contenu de Sirius ne font pas de copie d'archives des œuvres musicales.

[25] Les fournisseurs de contenu de Sirius utilisent un logiciel de répartition spécialisé intégré à leur ensemble de serveurs pour déterminer les chansons et autres enregistrements vocaux qui seront joués ainsi que le moment où ils le seront. Lorsque vient le temps de diffuser une émission, le système de répartition la transmet à partir des copies dans les serveurs canadiens. Ces sorties de données sont intégrées

uplinked to the satellites. The content used on the Canadian originated signals is never actually stored on the Sirius U.S. server.

[26] In both cases, once the programming has been multiplexed and uplinked to the satellites, programming is delivered to the subscribers' respective receivers in Canada and the U.S. The Satellite Services' management system tells the Canadian receivers which channels a subscriber is entitled to receive and the U.S. satellite services' management system does the same for its American subscribers. Although the signal that Canadian subscribers receive holds all the channels offered by both the U.S. and Canadian Satellite Services, because the signal is encrypted, they will only have access to a subset of channels.

II. THE EVIDENCE

1. Joint Evidence of Parties

[27] The parties jointly commissioned Erin Research to document the amount of music on all-music channels and the amount of music on selected channels on Sirius and CSR to measure the total amount of music on channels that the parties identified as relevant, that is on "talk channels"; to report on the amount of music used in, for example, commercials; and to report on the amount of music used by each network and each channel. The results accepted by all parties are that for Sirius the amount of music for non-music channels is 31.7 to 33 per cent, and for CSR, 25.3 per cent. They also agree that the music channels use music 94 per cent of programming time.

aux installations américaines par des lignes de communication, mixées aux autres canaux américains et transmises aux satellites par liaison ascendante. Le contenu utilisé dans les signaux provenant du Canada n'est jamais vraiment stocké dans le serveur de Sirius U.S.

[26] Dans les deux cas, une fois que la programmation a été multiplexée et transmise aux satellites par liaison ascendante, elle est livrée aux récepteurs respectifs des abonnés au Canada et aux États-Unis. Les systèmes de gestion des services par satellite indiquent aux récepteurs canadiens les canaux qu'un abonné est en droit de capter; ceux des systèmes américains font de même pour les abonnés américains. Bien que le signal reçu par les abonnés canadiens contienne tous les canaux offerts par les services américain et canadien, parce que le signal est chiffré, les abonnés n'auront accès qu'à un sous-ensemble de canaux.

II. LA PREUVE

1. La preuve commune des parties

[27] Les parties ont conjointement confié à la firme Erin Research le mandat d'établir la quantité de musique sur les canaux entièrement musicaux et celle sur certains canaux de Sirius et de CSR afin d'y mesurer la quantité totale de musique sur des canaux que les parties ont décrit comme pertinents, soit les canaux à prépondérance verbale, de faire rapport sur la quantité de musique utilisée, par exemple dans les messages publicitaires et de faire rapport sur la quantité de musique utilisée par réseau et par canal. Les résultats acceptés par toutes les parties indiquent que la quantité de musique utilisée par Sirius pour les canaux non musicaux se situe entre 31,7 et 33 pour cent, et pour CSR, elle est de 25,3 pour cent. Les parties ont aussi admis que les canaux musicaux utilisent la musique pour 94 pour cent de leur temps de programmation.

2. The Collectives

[28] CSI and NRCC commissioned the services of Paul Audley and Associates in consultation with Mr. Benoît Gauthier of Circum Network Inc. to develop a methodology and common database to analyze the use of their repertoire by the Satellite Services.

[29] CSI analyzed a sample of 6,147 plays to determine the percentage of plays of sound recordings used that are eligible for remuneration. It matched the titles in the sample to their existing database and contacted their members to confirm the ownership or eligibility of additional titles.

[30] Mr. Audley contends that ideally, the adjustment to the satellite services rate for CSI should take into account the number of times subscribers listened to musical works as part of the repertoire. However, Mr. Audley was unable to apply this method by reason that he did not have access to the necessary data. Instead, he relied on a 2006 Canadian Listening Study provided by Sirius Canada, ranking subscribers' preferred genres of music and channels, to conclude that 72 per cent of songs played by Sirius Canada are part of CSI's repertoire. When weighted for songs listened to, the ratio increased to 78.6 per cent. Applying the same adjustments to CSR, Mr. Audley found that 67.9 per cent of songs played were part of the CSI repertoire and that the compensable rate increased to 74.1 per cent when the ratio of songs played to songs listened to is accounted for. Overall, he estimated a repertoire share of 76.9 per cent for both Satellite Services.

[31] Ms. Nancy Smith of NextMedia was commissioned by the Collectives to prepare a

2. Les sociétés de gestion

[28] CSI et la SCGDV ont retenu les services de la firme Paul Audley and Associates, en collaboration avec M. Benoît Gauthier, Réseau Circum inc., afin de concevoir une méthodologie et une base de données commune pour l'analyse de l'utilisation de leur répertoire par les services par satellite.

[29] CSI a analysé un échantillon de 6147 diffusions d'œuvres musicales pour calculer le pourcentage de diffusion d'enregistrements sonores utilisés admissibles à une rémunération. Elle a jumelé les titres de l'échantillon à ceux de leur base de données et a contacté ses membres pour valider la titularité et l'admissibilité de titres additionnels.

[30] M. Audley soutient qu'idéalement, l'ajustement au tarif des services par satellite pour CSI devrait prendre en compte le nombre de fois que des abonnés ont écouté des œuvres musicales comprises dans le répertoire. Cependant, M. Audley a été incapable d'appliquer cette méthode parce qu'il n'a pas eu accès aux données nécessaires. Il s'est plutôt appuyé sur une étude de l'écoute au Canada de 2006 déposée par Sirius Canada, classant les genres musicaux et les canaux par ordre de préférence des abonnés pour conclure que 72 pour cent des chansons diffusées par Sirius Canada font partie du répertoire de CSI. Après avoir pris en considération les chansons écoutées, le ratio a augmenté à 78,6 pour cent. En appliquant les mêmes ajustements à CSR, M. Audley a conclu que 67,9 pour cent des chansons diffusées faisaient partie du répertoire de CSI et que l'utilisation du répertoire passe à 74,1 pour cent lorsqu'on tient compte du ratio des chansons diffusées par rapport à celles écoutées. Dans l'ensemble, il a évalué la part du répertoire à 76,9 pour cent pour les deux services.

[31] M^{me} Nancy Smith de NextMedia a été mandatée par les sociétés de gestion pour

report on the methods used by the Satellite Services to market their receivers, their subscriber services and programming content. She concluded that without music, there would be no viable business strategy for satellite radio. Although talk, news and sports are used to differentiate the CSR and Sirius brands, i.e., *Shock Jock Howard Stern* for Sirius and the NHL for XM, the main attraction for satellite radio remains commercial-free music.

[32] Mr. Benoît Gauthier conducted a survey on behalf of the Collectives to determine the relative importance of various programming and non-programming features of satellite radio on a consumer's decision to subscribe or not to a satellite radio service. Since the Collectives did not have access to the Satellite Services' subscriber lists, a sample of subscribers was obtained by placing computer-generated automated calls to a random sample of households to identify those who were satellite subscribers. Of the 4,201 persons identified as such, 1,000 personal interviews were conducted and 302 individuals completed a web-based questionnaire. Even though it is the best information that the Collectives could obtain in the circumstances, Mr. Gauthier concedes the sample is skewed towards Western Canada, is predominantly male and under-represents French speaking Canadians.

[33] Sixty-five per cent of respondents stated that they made the decision to subscribe to satellite radio, while 34 per cent received the service as a gift or as part of a promotion. Eighty per cent of those questioned were paying for the subscription, 16 per cent were receiving the service as part of a promotion, but were considering whether they would continue with the service, and 3 per cent had purchased a lifetime subscription.

préparer un rapport sur les méthodes utilisées par les services par satellite pour commercialiser leurs récepteurs, leurs services aux abonnés et leurs contenus de programmation. Elle a conclu que sans musique, il n'y aurait pas de plan d'affaire viable pour la radio par satellite. Même si on a recours au contenu parlé, aux actualités et aux sports pour différencier les marques CSR et Sirius (*Shock Jock Howard Stern* pour Sirius, la LNH pour XM), l'attrait principal pour la radio satellitaire demeure la musique sans annonce publicitaire.

[32] M. Benoît Gauthier a mené une enquête pour le compte des sociétés de gestion afin d'évaluer l'importance relative, pour la radio par satellite, de la disponibilité de diverses fonctions liées ou non à la programmation sur la décision d'un consommateur de s'abonner ou non à un service de radio satellitaire. Étant donné que les sociétés de gestion n'avaient pas accès aux listes d'abonnés des services, un échantillon d'abonnés a été constitué en faisant des appels automatiques établis par ordinateur à un échantillon aléatoire de ménages pour déterminer lesquels étaient abonnés au satellite. Des 4201 personnes appartenant à cette catégorie, 1000 ont été interviewées personnellement et 302 autres ont répondu à un questionnaire en ligne. Même si ce sont les meilleurs renseignements que les sociétés de gestion ont pu obtenir dans les circonstances, M. Gauthier reconnaît que l'échantillon surreprésente l'Ouest canadien et les hommes et sous-représente les francophones.

[33] Soixante-cinq pour cent des personnes interrogées ont déclaré qu'elles ont elles-mêmes pris la décision de s'abonner à la radio par satellite, alors que 34 pour cent ont reçu ce service en cadeau ou dans le cadre d'une promotion. Quatre-vingts pour cent des personnes interrogées payaient leur abonnement, 16 pour cent recevaient le service dans le cadre d'une promotion, mais se demandaient si elles continueraient à le recevoir, et 3 pour cent avaient opté pour un abonnement à vie.

[34] The most frequently cited reasons for subscribing to satellite radio were, in order of preference: geographic coverage by satellite radio (36 per cent); variety of programming (20 per cent); and music programming (15 per cent). The factors which were most critical to the decision of consumers to subscribe or continue to subscribe were: music programming (66 per cent); sports programming (18 per cent); and talk & entertainment (17 per cent).

[35] Eighty-six per cent of respondents stated that they would not have subscribed to satellite radio in the absence of music programming. The second most important reason for subscribing was talk & entertainment at 34 per cent.

[36] The respondents were asked how or if subscribing to satellite radio had modified their behaviour. The responses showed a 37 per cent decrease in the purchase of prerecorded CDs, a 65 per cent reduction in the purchase of music downloads, a 57 per cent reduction in the listening to conventional radio, and a 13 per cent reduction in watching news on television.

[37] The respondents also indicated a willingness-to-pay for recording capabilities on satellite radio receivers such as the ability to record music and to be able to rewind current programs. However, the study concluded that more advanced recording features increased the number of customers drawn to the recording product but not the amount such customers were willing to pay for the more sophisticated features.

[38] The Collectives engaged Dr. Ajay K. Agrawal, Professor of Economics at the University of Toronto and Dr. John McHale, Professor of Economics at Queens University to develop a methodology to value music as an

[34] Par ordre de préférence, les raisons qui ont été le plus souvent évoquées pour s'abonner à la radio par satellite sont : la couverture géographique de la radio par satellite (36 pour cent); la variété de la programmation (20 pour cent); la programmation musicale (15 pour cent). Les facteurs les plus déterminants dans la décision prise par les consommateurs de s'abonner ou de prolonger leur abonnement sont : la programmation musicale (66 pour cent); la programmation sportive (18 pour cent); le contenu parlé et les variétés (17 pour cent).

[35] Quatre-vingt-six pour cent des répondants indiquaient qu'ils ne se seraient pas abonnés à la radio par satellite en l'absence de programmation musicale. Avec 34 pour cent, le contenu parlé et les variétés s'est révélé la deuxième plus importante raison pour s'abonner.

[36] On a demandé aux personnes interrogées si, et de quelle façon, l'abonnement à la radio par satellite avait modifié leur comportement. Les réponses ont indiqué une baisse de 37 pour cent des achats de CD préenregistrés, de 65 pour cent des achats de téléchargements de musique, de 57 pour cent de l'écoute de la radio conventionnelle et de 13 pour cent de l'écoute des bulletins de nouvelles télévisés.

[37] Les personnes interrogées ont aussi signifié leur assentiment à payer pour des fonctions d'enregistrement sur les récepteurs de radio satellitaire telles que la possibilité d'enregistrer de la musique et celle de rembobiner les émissions en cours. Toutefois, l'étude a conclu que des fonctions d'enregistrement plus performantes faisaient croître le nombre de clients attirés par l'enregistrement, mais non le montant que de tels clients accepteraient de payer pour les fonctions plus perfectionnées.

[38] Les sociétés de gestion ont retenu les services de M. Ajay K. Agrawal, professeur d'économie à l'Université de Toronto et de M. John McHale, professeur d'économie à l'Université Queens, pour élaborer une méthode

input to satellite radio's subscription services. Dr. Agrawal signed the initial economic report filed as Exhibit Collectives-4 and both Drs. Agrawal and McHale signed the reply to the objectors' experts, Dr. David Reitman, Exhibit Collectives-5; both of them testified and defended the economic theories and approaches referred to in the various reports. We will therefore refer to both of them when discussing their evidence and the reports. With regard to the choice of the appropriate proxy, they favour digital pay audio (DPA) services. They propose however three other economic approaches based on fairness, efficiency and consistency, which are described later. All four approaches arrived at similar results, which the authors contend leads to greater confidence in the tariff they proposed.

3. CSI

[39] CSI, in addition to accepting the reports prepared by Drs. Agrawal and McHale, commissioned Mr. Paul Audley and Dr. Douglas Hyatt, to prepare a report determining the amount that should be paid by the Satellite Services for the right to reproduce and authorize the reproduction of musical works in CSI's repertoire. Messrs. Audley and Hyatt agree with Drs. Agrawal and McHale's proposal of a 37.5 per cent rate as the overall value of music use (including both the communication and the reproduction rights of authors, performers and makers of sound recordings). With respect to the appropriate proxy, Messrs. Audley and Hyatt are of the opinion that the tariff for limited downloads, subject to certain adjustments, is the closest proxy to satellite radio.

4. The Satellite Radio Services

[40] Dr. David Reitman, Principal, Charles River Associates International, was commissioned by

d'évaluation de la musique en tant qu'intrant pour les services d'abonnement de la radio par satellite. M. Agrawal a signé le premier rapport économique déposé comme pièce Collectives-4, et MM. Agrawal et McHale ont tous deux signé la réponse à l'expert des opposants, M. David Reitman, comme pièce Collectives-5; les deux ont témoigné et soutenu les théories et les approches auxquelles renvoient les divers rapports. Nous référerons donc aux deux lors de notre examen de leur témoignage et des rapports. À l'égard du choix d'un point de référence approprié, ils privilégient les services sonores payants numériques (SSPN). Ils proposent toutefois trois autres approches économiques fondées sur l'équité, l'efficacité et l'uniformité, décrites plus loin. Les quatre approches donnent des résultats similaires, ce qui, selon les auteurs, augmente la confiance à l'égard du tarif qu'ils ont proposé.

3. CSI

[39] En plus d'accepter les rapports préparés par MM. Agrawal et McHale, CSI a retenu les services de M. Paul Audley et de M. Douglas Hyatt pour préparer un rapport établissant les sommes que les services par satellite devraient déboursier pour le droit de reproduire des œuvres musicales du répertoire de CSI et d'en autoriser la reproduction. MM. Audley et Hyatt sont d'accord avec la proposition de MM. Agrawal et McHale d'un tarif de 37,5 pour cent comme valeur globale de la musique utilisée (incluant les droits de communication et de reproduction des auteurs, artistes-interprètes et producteurs d'enregistrements sonores). En ce qui concerne le point de référence approprié, MM. Audley et Hyatt estiment que le tarif pour les téléchargements limités, sous réserve de certains ajustements, est celui se rapprochant le plus de la radio par satellite.

4. Les services de radio par satellite

[40] Les services par satellite ont demandé à M. David Reitman, directeur principal de la

the Satellite Services to review and critique the economic report prepared by Drs. Agrawal and McHale. He criticized their work for relying too much on theoretical models (for both the Shapley Value and the Efficiency Approaches) and for placing too little emphasis on the traditional methods using relevant market information. In his opinion, it is more economically sound to start with a market rate for alternative music services that already exists and then adjust for the differences between those services and satellite radio services.

[41] The Satellite Services also commissioned Mr. Kenneth Goldstein, media consultant, to propose a methodology for establishing the tariffs. Having compared DPA to satellite radio and commercial radio, he concluded that commercial radio is the more appropriate proxy. He also criticized Circum Network's attempt to value music as a retail experience rather than valuing the repertoire at the wholesale level. His analysis will also be considered in greater detail.

5. Sirius

[42] Sirius commissioned Angus Reid to do a survey of its subscribers to compare the results obtained by Circum Network. That survey used the actual list of Sirius subscribers. Angus Reid conducted a total of 400 telephone interviews of a representative sample of urban and rural as well as regional subscribers. The survey identified the benefits to consumers as:

- Programming packaging – the presentation and breadth of that content;
- Programming content – music, talk, etc.;
- Reception (geographic); and
- Commercial-free.

firme Charles River Associates International, de revoir et de critiquer le rapport économique préparé par MM. Agrawal et McHale. Il reproche à leur travail de trop s'en remettre à des modèles théoriques (dans le cas de l'approche de l'évaluation selon Shapley et celle fondée sur l'efficacité) et de ne pas mettre suffisamment l'accent sur les méthodes traditionnelles utilisant des renseignements pertinents sur le marché. À son avis, il est plus logique sur le plan économique de se fonder sur un taux du marché qui existe déjà pour d'autres services de musique et de s'ajuster par la suite aux différences entre ces services et la radio satellitaire.

[41] Les services par satellite ont également retenu les services de M. Kenneth Goldstein, conseiller-médias, pour proposer une méthodologie en vue d'établir les tarifs. Après avoir comparé les SSPN à la radio par satellite et à la radio commerciale, il a conclu que cette dernière s'avère un indicateur plus approprié. Il a aussi reproché au Réseau Circum sa tentative d'évaluer la musique comme une opération de commerce de détail plutôt que d'en évaluer le répertoire au niveau du gros. Son analyse sera également examinée plus en détail.

5. Sirius

[42] Sirius a retenu les services d'Angus Reid pour réaliser un sondage de ses abonnés afin d'établir une comparaison avec les résultats obtenus par le Réseau Circum. La liste à jour des abonnés de Sirius a été utilisée pour ce sondage. Angus Reid a effectué en tout 400 entrevues téléphoniques auprès d'un échantillonnage représentatif, tant des milieux urbains et ruraux que des régions. Voici les avantages pour les consommateurs que le sondage a révélés :

- Assemblage d'émissions – présentation et étendue de ce contenu;
- Contenu des émissions – musique, contenu parlé, etc.;
- Réception (géographie);
- Absence de message publicitaire.

[43] Mr. Reid concluded that there was no one specific benefit that drove the consumer to subscribe. At best, 50 per cent of subscribers made their decision to subscribe based on the commercial-free music channels. Accordingly, Mr. Reid concluded that the Circum Network study exaggerated the value of music. Mr. Gauthier examined the Angus Reid Survey and concluded that the questions asked were either biased or unclear and for that reason, in his opinion, the survey results are misleading and flawed.

III. LEGAL ISSUES

[44] All parties agree that SOCAN and NRCC are entitled to a royalty, with the result that there are no legal issues to be resolved with respect to them.

[45] The same cannot be said with respect to CSI. Its claim with respect to the right to reproduce music in its repertoire raises four legal issues. First, can CSI claim royalties in respect of reproductions made directly on a server located in the U.S.? Second, does the 4 to 6 second buffer constitute a reproduction of a substantial part of a work within the meaning of subsection 3(1) of the *Act*?⁴ Third, does the Internet-based streaming of the satellite services' signals involve such a reproduction? Fourth, do the extended buffer, radio replay, pause and rewind feature and sampling of programming content for promotional purposes by retail outlets involve such reproductions?

1. Reproductions Made in the U.S.

[46] The issue is whether the reproductions made in the U.S. by American third-parties for both Sirius and CSR as well as those made by CSR itself are subject to Canadian copyright law.

[43] M. Reid a conclu qu'aucun de ces avantages en particulier n'incitait les consommateurs à s'abonner. Tout au plus, la moitié des abonnés décidaient de s'abonner à cause des canaux musicaux sans annonces publicitaires. Ainsi, M. Reid a-t-il conclu que la valeur de la musique était exagérée dans l'étude du Réseau Circum. M. Gauthier a pris connaissance du sondage de la firme Angus Reid et a conclu que les questions étaient soit vagues, soit empreintes de partialité et qu'à son avis, et pour cette raison, les résultats du sondage étaient trompeurs et erronés.

III. LES QUESTIONS DE DROIT

[44] Toutes les parties ayant convenu que la SOCAN et la SCGDV ont droit à des redevances, il s'ensuit qu'il n'y a aucune question de droit à trancher en ce qui les concerne.

[45] Tel n'est pas le cas en ce qui concerne CSI, dont la revendication à l'égard du droit de reproduction de musique provenant de son répertoire soulève quatre questions de droit. Premièrement, CSI peut-elle réclamer des redevances pour des reproductions réalisées directement sur un serveur situé aux États-Unis? Deuxièmement, le tampon d'une durée de 4 à 6 secondes constitue-t-il la reproduction d'une partie importante de l'œuvre au sens du paragraphe 3(1) de la *Loi*?⁴ Troisièmement, la transmission sur demande sur Internet des signaux des services par satellite entraîne-t-elle une reproduction? Quatrièmement, le tampon prolongé, l'écoute en différé, les fonctions d'arrêt et de rembobinage ainsi que l'échantillonnage du contenu d'émission à des fins promotionnelles dans des points de vente engagent-ils de telles reproductions?

1. Reproductions réalisées aux États-Unis

[46] La question est de savoir si les reproductions faites aux États-Unis soit par des tiers américains tant pour Sirius que pour CSR, soit par cette dernière, sont assujetties à la législation canadienne sur le droit d'auteur.

[47] The parties generally agree that the programming copies are reproductions within the meaning of subsection 3(1) of the *Act*. The parties also agree that Sirius authorizes the reproduction made by Canadian third-parties for the reproduction of its Canadian channels which are delivered directly to its U.S. partner.

[48] The Satellite Services agree that they are liable for programming reproductions made in Canada. Such copies are limited to those made by Sirius' Canadian content providers who store the programming copies on their respective servers and to the temporary copies CSR makes of musical works received through DMDS-Musicrypt. Thus, the issue is restricted to whether the Satellite Services are liable for copies made by CSR in the U.S. (from Canada) and by American third-party suppliers.

[49] Programming is an essential and critical part of this application for a tariff. The issue of where the programming takes place is critical to the right to be granted a tariff for the reproduction right.

[50] The Satellite Services contend that they are not liable for copies made in the U.S. because the *Act* is not intended to and does not have extraterritorial effect. They cite and rely on an earlier decision of the Board in support of their position that a tariff for reproduction could not extend to acts occurring abroad. The Board stated that it "does not understand how the act of reproduction, when performed abroad, could trigger liability under the Canadian legislation on copyright."⁵ They rely on a number of cases to support their argument on the applicability of the territorial principle to the *Act*, including *Def Lepp Music v. Stuart-Brown*⁶ where the English Court stated:

[47] De façon générale, les parties s'entendent pour dire que les copies de programmation sont des reproductions au sens du paragraphe 3(1) de la *Loi*. Les parties s'entendent également pour dire que Sirius autorise la reproduction réalisée par des tiers canadiens pour la reproduction de ses canaux canadiens qui sont livrés directement à son partenaire américain.

[48] Les services par satellite reconnaissent leur responsabilité à l'égard des copies de programmation faites au Canada. Ces copies se limitent à celles réalisées par les fournisseurs canadiens de contenu de Sirius qui les mettent en mémoire sur leurs serveurs respectifs et aux copies temporaires d'œuvres musicales reçues par SDMN-Musicrypt que fait CSR. En conséquence, la question se limite à savoir si les services sont responsables des copies faites aux États-Unis soit par CSR (à partir du Canada), soit par les tiers fournisseurs américains.

[49] La programmation constitue une partie essentielle et importante de la présente demande de tarif. La question de savoir où se fait la programmation est déterminante à l'égard du droit de se voir octroyer un tarif visant le droit de reproduction.

[50] Les services par satellite soutiennent qu'ils ne sont pas responsables des copies faites aux États-Unis parce que la *Loi* n'est pas conçue pour avoir une portée extraterritoriale et qu'elle n'en a pas. Ils citent et s'appuient sur une décision antérieure de la Commission pour soutenir la thèse selon laquelle un tarif pour la reproduction ne peut viser les gestes posés à l'étranger. La Commission a indiqué ne pas comprendre « comment l'acte de reproduction effectué à l'étranger pourrait entraîner une responsabilité en vertu de la législation canadienne sur le droit d'auteur. »⁵ Les services invoquent plusieurs arrêts à l'appui de leur prétention portant sur l'application à la *Loi* du principe de la territorialité, dont l'affaire *Def Lepp Music c. Stuart-Brown*⁶ dans laquelle la Cour anglaise s'est ainsi exprimée :

It is therefore clear that copyright under the English *Act* is strictly defined in terms of territory. The intangible right which is copyright is merely a right to do certain acts exclusively in the United Kingdom: only acts in the United Kingdom constitute infringement either direct or indirect of such a right [...]⁷

[51] They also rely on the decision of *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*⁸ where the Supreme Court, citing as authority Professor Vaver, stated:

Copyright law respects the territorial principle, reflecting the implementation of a “web of interlinking international treaties” based on the principle of national treatment.⁹

[52] The Satellite Services also argue they have not authorized any foreign entities to make programming copies for use as part of the Canadian satellite radio services and even if they did, such authorization would escape the application of the *Act* by reason that the reproduction itself does not occur in Canada. In their submission, the *situs* of the primary infringing act determines whether or not liability under the *Act* for authorizing the infringing act occurs. The *situs* of the authorization is irrelevant. They rely on *ABKCO Music and Records Inc. v. Music Collection International Ltd.*¹⁰ as authority for the argument that: “the requirements of territoriality are satisfied by the need for the act authorized to have been done within the United Kingdom.”¹¹ It bears noting that the facts at bar are the reverse to those surrounding that case; CSI is looking to engage the Satellite Services’ liability under the *Act* for authorizing in Canada, infringement abroad.

[TRANSCRIPTION] Il est donc manifeste que le droit d’auteur protégé par la loi anglaise reçoit une définition stricte par rapport à la territorialité. Le droit d’auteur, intangible, est simplement le droit de poser certains actes exclusifs au Royaume-Uni : seuls les actes qui y sont posés constituent une violation directe ou indirecte d’un tel droit [...]⁷

[51] Ils invoquent également l’arrêt *Société canadienne des auteurs, compositeurs et éditeurs de musique c. Assoc. canadienne des fournisseurs Internet*⁸ dans lequel la Cour suprême, se fondant sur le professeur Vaver, s’est ainsi exprimée :

Les dispositions législatives sur le droit d’auteur respectent le principe de la territorialité, reflétant la mise en œuvre d’un [TRANSCRIPTION] « réseau de traités internationaux interreliés » compte tenu du principe du traitement national.⁹

[52] Les services par satellite soutiennent également qu’ils n’ont autorisé aucune entité étrangère à faire des copies de programmation pour leur utilisation dans les services canadiens de radio satellitaire et que même s’il en avait été ainsi, les dispositions de la *Loi* ne s’appliqueraient pas à une telle autorisation parce que la reproduction comme telle ne s’est pas produite au Canada. Selon eux, le *situs* du principal fait de contrefaçon détermine si l’autorisation d’un tel acte entraîne une responsabilité en vertu de la *Loi*. Le *situs* de l’autorisation, n’est pas pertinent. Ils invoquent *ABKCO Music and Records Inc. c. Music Collection International Ltd.*¹⁰ pour étayer l’argument selon lequel : « [TRANSCRIPTION] pour répondre aux exigences de la territorialité, l’acte autorisé doit s’être produit au Royaume-Uni. »¹¹ Il convient de signaler que les faits en l’espèce sont à l’opposé de ceux entourant cette affaire; CSI cherche à établir la responsabilité des services par satellite en vertu de la *Loi* pour avoir autorisé, au Canada, une contrefaçon à l’étranger.

[53] In Laddie's *The Modern Law of Copyright and Designs*,¹² the leading U.K. textbook on copyright, the authors state:

[A] person who "authorizes" another to do an "act restricted by the copyright" may himself be liable; and in this case the territorial exclusion does not apply, in that it is possible to infringe copyright by authorizing abroad, although of course the act which is authorized to be done must itself be a restricted act, i.e., an act to be performed in the UK.¹³

[54] The Satellite Services rely on American authorities including *Subafilms v. MGM-Pathe Communications*¹⁴ wherein the Ninth Circuit Court of Appeal held that a person could not be held responsible under the U.S. *Copyright Act* for primary acts that occur entirely overseas.

[55] The Satellite Services reject the application of the real and substantial test to reproductions that are made wholly within the U.S. or to acts that authorize such reproductions because unlike a communication, a reproduction does not occur concurrently "here and there" and there is therefore no need to localize the acts of infringement. They also contend that the "connecting factors" discussed in *SOCAN v. CAIP (SCC)*¹⁵ are not relevant.

[56] The Satellite Services contend it is not an infringement to authorize or cause a person to do something the person has a right to do.¹⁶ They argue that CSI provided no evidence that Sirius U.S. or XM U.S. breached any copyright law in the U.S. Even if there was evidence that the reproductions by their U.S. counterparts

[53] Dans *The Modern Law of Copyright and Design*¹² de Laddie, ouvrage qui fait école au Royaume-Uni en matière de droit d'auteur, les auteurs se sont exprimés en ces termes :

[TRADUCTION] Une personne qui en « autorise » une autre à poser un « acte protégé par le droit d'auteur » peut engager sa responsabilité personnelle; en l'espèce, l'exclusion territoriale ne s'applique pas car il est possible de violer le droit d'auteur en autorisant un acte à l'étranger, à la condition bien sûr que l'acte dont l'accomplissement a été autorisé soit lui-même protégé, c.-à-d. un acte devant être posé au Royaume-Uni.¹³

[54] Les services par satellite invoquent la jurisprudence américaine, notamment l'affaire *Subafilms c. MGM-Pathe Communications*¹⁴ dans laquelle la Cour d'appel du neuvième circuit a statué qu'on ne pouvait être tenu pour responsable en vertu de la loi américaine sur le droit d'auteur pour des gestes posés en totalité outre-mer.

[55] Les services par satellite rejettent l'application du critère du lien réel et substantiel aux reproductions qui sont totalement réalisées sur le territoire des États-Unis ou aux actes qui autorisent de telles reproductions parce que, contrairement à une communication, une reproduction ne peut se produire simultanément « ici et là », et il n'y a donc pas lieu de situer les actes illicites. Ils soutiennent aussi que les « facteurs de rattachement » analysés par la Cour suprême dans l'arrêt *SOCAN c. ACFI (CSC)*¹⁵ ne sont pas pertinents.

[56] Selon les services par satellite, le fait de permettre ou de faire en sorte qu'une personne accomplisse quelque chose, que celle-ci a par ailleurs le droit de faire, ne constitue pas une violation.¹⁶ Ils soutiennent que CSI n'a présenté aucune preuve de violation du droit d'auteur aux États-Unis par Sirius U.S. ou par XM U.S.

infringed copyright it would be a violation of the U.S. *Copyright Act* and not the Canadian *Act*.

[57] They also rely on *Théberge v. Galerie d'Art du Petit Champlain Inc.*¹⁷ to support their contention that it is neither contrary to subsections 30.8(4) or (5) nor 30.9(4) or (5) of the *Act*, to store digital copies of a work on a server; simply using or possessing a work without any associated copying is not an infringement.¹⁸

[58] Finally, the Satellite Services claim that CSI abandoned its right to make any claim for copies of music made in the U.S. in the Responses to Interrogatories.¹⁹

[59] CSI contends that the Satellite Services authorize in Canada the reproduction of programming both in Canada and the U.S. It also argues that XM U.S. reproduces work that was previously reproduced by CSR to create Canadian programming.

[60] CSI argues that the Satellite Services authorize American reproductions because the restricted act of authorizing occurs in Canada with the result that a licence is required to provide the authorization. In its submission, implicit authorization is established by the fact that the Satellite Services could not operate their service without contracting with American third-parties to produce and program American content on their behalf in lieu of taking the necessary technical and practical steps to assemble and deliver the musical works to Canadian subscribers themselves.²⁰

[61] The Satellite Services pay a fee to use the American programming in their own services. CSI assumes that the fee takes into account the programming reproductions, because they are essential to the operation of the Satellite Services.

Même si la preuve avait révélé que les reproductions réalisées par leurs homologues américains violaient le droit d'auteur, cette violation enfreindrait les dispositions de la loi américaine et non celles de la *Loi* canadienne.

[57] Ceux-ci invoquent aussi l'arrêt *Théberge c. Galerie d'Art du Petit Champlain Inc.*¹⁷ au soutien de leur argument selon lequel il n'est pas contraire aux paragraphes 30.8(4) ou (5) ni aux paragraphes 30.9(4) ou (5) de la *Loi* de stocker sur un serveur des copies numérisées d'une œuvre; la simple possession ou utilisation d'une œuvre sans la copier n'est pas une violation.¹⁸

[58] Enfin, les services par satellite affirment que CSI avait abandonné son droit à toute revendication à l'égard de copies d'œuvres musicales faites aux États-Unis dans ses réponses aux demandes de renseignements.¹⁹

[59] CSI fait valoir que les services par satellite autorisent au Canada la reproduction d'émissions tant au Canada qu'aux États-Unis. Elle soutient également que XM U.S. reproduit des œuvres qui avaient été antérieurement reproduites par CSR pour créer de la programmation canadienne.

[60] CSI soutient que les services par satellite autorisent les reproductions américaines parce que le droit d'autoriser est exercé au Canada, d'où la nécessité d'une licence pour fournir l'autorisation. Selon elle, l'autorisation implicite est établie du fait que les services ne pourraient être exploités sans transiger avec des tiers américains pour la production et la programmation de contenu américain plutôt que de prendre les mesures techniques et pratiques nécessaires pour réunir et livrer eux-mêmes les œuvres musicales aux abonnés canadiens.²⁰

[61] Les services par satellite paient des redevances pour utiliser la programmation américaine dans leurs propres services. CSI suppose que ces redevances prennent en compte les reproductions de programmation, essentielles

In its submission, there is no difference between the authorization the Satellite Services give to their American partners to make reproductions in the U.S. and the authorization Sirius gives to its Canadian subcontractors (for which the Satellite Services concede they are liable). CSI relies on the decision of the Federal Court of Appeal in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*²¹ to argue that authorization can be inferred from a party's conduct.²²

[62] CSI also contends that the location of a third party to whom authorization is granted is not relevant. In its submission, the *situs* of the authorization is essential, and *SOCAN v. CAIP (FCA)* stands for the proposition that the location of the authorization may be the determining factor when liability is engaged for having authorized infringement.²³ CSI also emphasizes that the right to authorize a reproduction and the act of making the reproduction are separate rights reserved to the copyright owner with the result that the Board's comments in *SODRAC Video-copies*²⁴ are not pertinent.

[63] CSI further contends that the "real and substantial connection" test should be used to determine the choice of law with respect to the act of authorization. In its submission, there is no reason that the test applied in *SOCAN v. CAIP (FCA)* in the context of a communication right could not also apply to a reproduction right.²⁵

[64] For the reasons that follow, we agree with the Satellite Services that the Canadian *Copyright Act* does not extend to the acts of reproduction made in the U.S. with the result that we do not have jurisdiction to grant a tariff for such acts.

[65] The actual location of the copies is not in issue. All parties agree that except for the copies

à l'exploitation des services par satellite. Elle soutient qu'il n'y a aucune différence entre l'autorisation de reproduire aux États-Unis donnée par les services par satellite à leurs partenaires américains et celle que Sirius donne à ses sous-traitants canadiens (à l'égard de laquelle les services reconnaissent leur responsabilité). CSI invoque la décision de la Cour d'appel fédérale dans l'arrêt *Société canadienne des auteurs, compositeurs et éditeurs de musique c. Assoc. canadienne des fournisseurs Internet*²¹ pour soutenir qu'une autorisation peut être induite de la conduite d'une partie.²²

[62] CSI fait aussi valoir que le lieu où se trouve le tiers à qui l'autorisation est accordée n'est pas pertinent. Selon elle, c'est le *situs* de l'autorisation qui compte, et l'arrêt *SOCAN c. ACFI (CAF)* milite en faveur de la proposition selon laquelle le lieu de l'autorisation peut s'avérer le facteur déterminant lorsqu'est engagée la responsabilité pour avoir autorisé la contrefaçon.²³ CSI souligne également que le droit d'autoriser une reproduction et d'en faire une sont des droits distincts réservés au titulaire de droit et qu'en conséquence, les commentaires de la Commission dans *SODRAC vidéocopies*²⁴ ne sont pas pertinents.

[63] CSI soutient de plus que le critère du « lien réel et substantiel » devrait servir au choix de la loi applicable en ce qui concerne l'acte d'autorisation. Selon elle, il n'y a aucune raison pour que le test appliqué dans *SOCAN c. ACFI (CAF)* en marge du droit de communication ne puisse être appliqué au droit de reproduction.²⁵

[64] Pour les motifs exposés ci-dessous, nous sommes d'accord avec les services par satellite que la *Loi sur le droit d'auteur* canadienne ne s'applique pas aux actes de reproduction faits aux États-Unis; par conséquent, l'octroi d'un tarif pour de tels actes ne relève pas de notre compétence.

[65] Le lieu où se trouvent réellement les copies n'est pas contesté. Tous conviennent que les

made by Sirius Canadian content providers and the ones temporarily made by CSR at the content selection stages, the programming copies are located and made on the master servers in New York or Washington. What the parties do not agree on is the reach of the Canadian *Act*. In other words, can the Board certify a tariff extending to acts that occur outside Canadian borders. Factually, some reproductions are initiated in Canada by CSR but they are actually created directly on the master servers in the U.S. Other reproductions are made by the American content providers directly onto the American master server from which they are broadcasted to both American and Canadian subscribers.

[66] There are two different and distinct legal issues that arise from this factual situation:

- CSR copies initiated in Canada but made in the U.S.;
- copies initiated and made in the U.S. by American third-parties.

We will deal with these in order.

2. CSR copies initiated in Canada but made in the U.S.

[67] The issue of which law applies is different from the issue of jurisdiction. The B.C. Court of Appeal stated in *Tolofson v. Jensen*,²⁶ the “[c]hoice of law refers to the conflicts rules which have developed, through legislation or jurisprudence, in order to determine which system of substantive law the forum court will apply in respect of a legal matter having connection with other jurisdictions. There are different choices of law rules for different areas of law.”²⁷

[68] Walker, in his text on *Canadian Conflict of Laws*²⁸ states that Canadian laws dealing with

copies de programmation se trouvent dans les serveurs principaux à New York ou Washington et y sont faites, à l’exception de celles réalisées par les fournisseurs canadiens de contenu de Sirius et de celles temporairement faites par CSR aux stades du choix du contenu. Les parties ne s’entendent toutefois pas sur la portée territoriale de la *Loi* canadienne. En d’autres termes, la Commission peut-elle homologuer un tarif qui s’applique aux actes posés à l’extérieur des frontières canadiennes? Dans les faits, certaines des reproductions sont initiées au Canada par CSR mais, en réalité, elles sont créées directement sur les serveurs principaux aux États-Unis. D’autres reproductions sont faites par les fournisseurs américains de contenu directement sur le serveur principal aux États-Unis, d’où elles sont diffusées tant aux abonnés américains que canadiens.

[66] Cette situation de fait soulève deux questions juridiques différentes et distinctes :

- les copies de CSR entreprises au Canada, mais faites aux États-Unis;
- les copies entreprises et faites aux États-Unis par des tiers américains.

Nous en traiterons dans cet ordre.

2. Les copies de CSR faites aux États-Unis à partir du Canada

[67] Décider du droit applicable et de la juridiction compétente sont deux choses différentes. Dans *Tolofson c. Jensen*,²⁶ la Cour d’appel de la C.-B. a énoncé que le « [TRADUCTION] choix de la loi renvoie aux règles de conflit qui ont été élaborées, dans la loi et la jurisprudence, pour décider à quel système de droit substantif le tribunal saisi doit recourir pour trancher une affaire qui touche d’autres ressorts. Le choix de règles de droit diffère en fonction des différents domaines de droit. »²⁷

[68] Walker, dans son texte intitulé *Canadian Conflict of Laws*,²⁸ déclare que les lois

intellectual property are territorial²⁹ and are limited to the national territory.³⁰ Canada is also bound by certain international conventions that provide for, among other things, national treatment.³¹

[69] Jurisdiction on the other hand is the power of the court to hear a particular matter. The test for jurisdiction in Canada is whether there is a real and substantial connection between the forum and the litigation. A court may have jurisdiction to hear a matter because of the presence of one of the parties to the dispute in the jurisdiction but the real question is whether the court will “exercise” that jurisdiction. The choice of law, while not determinative, may influence the court’s discretion to exercise its jurisdiction.

[70] In the context of copyright law, there are two rules that apply to the choice of law conflict: (a) territoriality; and (b) the real and substantial connection test.

[71] In our opinion, the rule of territoriality applies to the reproductions at issue and consequentially it is the American *Copyright Act* that applies. Rightholders abroad rely on equivalent legislation to protect their copyrights. The *Berne Convention* and other international agreements impose minimal standards to which countries generally adhere.³² The reproductions here lack the characteristics common to those actions which have been found to occur “here and there” under the real and substantial connection test, including such indicia as international communication, international transactions, or torts based on negligence. All of these “actions” are the product of discrete elements that can occur across national borders and all require more than one participant. Those characteristics are generally not associated with the act of reproduction.

canadiennes traitant de propriété intellectuelle sont territoriales²⁹ et limitées au territoire national.³⁰ Le Canada est aussi lié par certaines conventions internationales qui prévoient notamment le traitement national.³¹

[69] Par ailleurs, la compétence est le pouvoir qu’a la cour d’instruire une affaire précise. Le critère servant à établir la compétence au Canada consiste à déterminer s’il existe un lien réel et substantiel entre le forum et le litige. La compétence d’un tribunal d’instruire une affaire peut découler de la présence d’une des parties au litige sur le territoire, mais la vraie question qui se pose est celle de savoir si le tribunal « exercera » cette compétence. Bien qu’il ne soit pas déterminant, le choix de la loi influera possiblement sur le pouvoir discrétionnaire d’exercer la compétence dont le tribunal dispose.

[70] Dans le contexte du droit d’auteur, deux règles s’appliquent au conflit du choix de loi : a) la territorialité; et b) le critère du lien réel et substantiel.

[71] À notre avis, la règle de la territorialité s’applique aux reproductions en cause et, en conséquence, le droit américain s’applique. Les titulaires à l’étranger se fondent sur des dispositions législatives équivalentes pour la protection de leurs droits d’auteur. La *Convention de Berne* et d’autres ententes internationales imposent des normes minimales auxquelles les États adhèrent généralement.³² Les reproductions en l’espèce ne comportent pas les caractéristiques communes à ces actes à l’égard desquels il a été conclu qu’ils se produisent « ici et là » au sens du critère du lien réel et substantiel, comme des communications ou transactions internationales, ou des délits dont la négligence est le fondement. Chacun de ces « actes » résulte d’éléments distincts qui peuvent se produire au-delà des frontières nationales et qui requièrent tous plus d’un participant. Ces caractéristiques ne sont généralement pas associées à l’acte de reproduction.

[72] The act of reproduction occurs when a copy is created. In this case, the reproduction occurs when a digital copy of a work is put on the server located in the U.S. This occurs when the electronic mechanism activated by the production team in Canada creates the file on the American master server. Without the stored copy, there is no reproduction. In our opinion, the fact that the location of the output is different from that of the person pressing the button to create the copy is not important.

[73] The situation is not unlike what would occur if an Ottawa resident went to an Internet café while in New York to change the settings of the programmable thermostat located in his residence to activate the furnace to change the temperature of the house. The furnace would be turned on in Ottawa, irrespective of where the “enter” key that is used to turn on the furnace is located. Similarly, one can envision a situation where the director of production of a radio station with its head office in Windsor, Ontario calls his production manager working in the broadcast studio in Detroit and instructs him to copy a new single of a certain artist on the U.S. server in order to incorporate it into the upcoming program. In that case, even though the instructions were given from Canada, the copies were clearly made in the U.S. and the U.S. *Copyright Act* would govern the reproduction of the musical work.

[74] In light of our finding that the territoriality principle applies, it is not necessary to consider the substantial connection test. The territoriality principle dictates that the U.S. *Copyright Act* applies in this instance. Therefore, as the Copyright Board of Canada only has jurisdiction to set tariffs under the Canadian *Act*, the Board has no jurisdiction to set a tariff with respect to these copies.

[72] La reproduction se produit lorsqu’une copie est créée. En l’espèce, la reproduction a lieu lorsqu’une copie numérisée d’une œuvre est introduite dans un serveur situé aux États-Unis. Cela se produit lorsque le mécanisme électronique activé par l’équipe de production au Canada crée le fichier dans le serveur principal américain. Sans la copie stockée, il n’y a pas de reproduction. À notre avis, le fait que le lieu de sortie des données soit différent de celui de la personne qui a appuyé sur le bouton pour créer la copie n’a aucune importance.

[73] La situation n’est pas sans rappeler ce qui surviendrait si un résident d’Ottawa se présentait à un café Internet lors d’un passage à New York pour modifier les paramètres d’un thermostat programmable situé dans sa demeure en vue de changer la température de la maison par l’activation de la fournaise. Celle-ci serait activée à Ottawa, peu importe où se trouve la touche « Entrée » utilisée pour l’actionner. De même, d’aucuns pourraient s’imaginer la situation où le directeur de la production d’une station de radio dont le siège social est situé à Windsor, en Ontario, communique avec son gérant de production œuvrant dans un studio de radiodiffusion à Détroit et lui donne instruction de copier le nouvel enregistrement d’un certain artiste dans le serveur américain pour qu’il fasse partie de la prochaine émission. Dans ce cas, même si les instructions émanent du Canada, les copies ont clairement été faites aux États-Unis et la loi américaine s’appliquerait à la reproduction de l’œuvre musicale.

[74] Nous avons conclu que le principe de la territorialité s’applique; il n’est donc pas nécessaire de prendre en compte le critère du lien substantiel. En l’espèce, le principe de la territorialité impose l’application de la loi américaine sur le droit d’auteur. En conséquence, comme la compétence de la Commission du droit d’auteur du Canada se limite à fixer des tarifs en application de la *Loi* canadienne, la Commission n’a pas compétence pour fixer un tarif à l’égard des présentes copies.

3. Copies initiated and made in the U.S. by American third-parties

[75] The copies in question are those made in American broadcast studios for the programming of American channels, a number of which are included in the Canadian subscription package. The U.S. originated channels received by Canadian subscribers are prepared and programmed from studios in New York and Washington that are owned and operated by the Satellite Services respective American counterparts. These American third-parties make the reproductions for the purposes of programming the American channels.

[76] The evidence is unequivocal that the Satellite Services benefit and depend on the reproductions made by third-parties in the U.S. but have no involvement in their making. Liability of the Satellite Services for these copies can only occur if we find both: that authorizing from Canada an act that occurs abroad is an authorization “in Canada”; and that, in the absence of express authorization, authorization can be inferred by either the degree of control exercised by the Satellite Services or the nature of their relationship with their respective American counterparts.

[77] Once again we must choose which law applies to the authorization of an “infringing” act that occurs in the U.S. when the authorization is given in Canada. In our opinion, it is the American statute that applies for the following reasons.

[78] Briefly stated, the choice of law is determined by territoriality and cannot be based upon the “substantial connection test” when dealing with programming copies initiated in the U.S. by American third-parties. The evidence does not establish that these copies occur “here and there” or across borders. Thus, the reproductions lack the characteristics common to

3. Les copies entreprises et faites aux États-Unis par des tierces parties américaines

[75] Les copies dont il est question sont celles faites dans les studios de production américains pour la programmation des canaux américains, dont certains se retrouvent dans les forfaits d’abonnement canadiens. Les canaux en provenance des États-Unis qui sont captés par les abonnés canadiens sont préparés et programmés dans des studios situés à New York et à Washington qui appartiennent et sont exploités par les homologues américains respectifs des services par satellite. Ces tiers américains font les reproductions pour la programmation des canaux américains.

[76] La preuve indique sans équivoque que les services par satellite tirent profit et dépendent des reproductions réalisées par des tiers aux États-Unis, mais aussi qu’ils ne participent en rien à leur fabrication. La responsabilité des services par satellite à l’égard de ces copies ne peut être établie que si nous concluons à la fois : qu’une autorisation venant du Canada de poser un acte à l’étranger est une autorisation donnée « au Canada » et, qu’en l’absence d’autorisation expresse, l’autorisation peut s’inférer du degré de contrôle exercé par les services par satellite ou de la nature de leur relation avec leurs homologues américains respectifs.

[77] Nous devons là encore choisir la loi qui s’applique à l’autorisation d’un acte « illicite » posé aux États-Unis alors que l’autorisation provient du Canada. À notre avis, pour les motifs qui sont énoncés ci-dessous, c’est le droit américain qui s’applique.

[78] En résumé, lorsqu’il est question de copies de programmation faites aux États-Unis par des tiers américains, le choix de la loi se décide en fonction de la territorialité et ne peut se fonder sur le « critère du lien substantiel ». Rien n’indique dans la preuve que les copies ont été réalisées « ici et là » ou au-delà des frontières. En conséquence, les reproductions ne présentent pas

those actions which have been found to occur “here and there” in the jurisprudence cited by CSI.

[79] The making of the reproductions does not involve any action taken in Canada with the result that there can be no “injury” sustained under Canadian legislation. Therefore, the comments of the Supreme Court in *Moran*³³ that the wrongful act of the tortfeasor must have occurred where the injury took place are of no assistance to CSI. Equally, the comments in *Tolofson (SCC)* regarding the fact that “people expect their activities to be governed by the law of the place where [these activities] happen”³⁴ are not helpful. All of the activity involved in making the copies takes place in the U.S. and is therefore governed by U.S. legislation. The act of authorizing infringement abroad is covered by the act governing the primary infringement.

[80] CSI rightly points out that the act of authorizing is distinct from the act of doing. That being said, the Board has previously explained the interrelationship that exists between the two acts:

It is generally accepted that all acts protected in subsection 3(1), including the Authorization Right, are distinct. Even though it exists separately, the Authorization Right is, in the Board’s view, of a different nature since it is directly linked to the act being authorized. For one thing, the Authorization Right exists only if the act being authorized is itself protected by copyright. For example, the Public Performance Right can exist without the Communication Right being protected, but the right to authorize a communication cannot exist if the Communication Right is not protected.³⁵

[81] If making a copy in the U.S. on instructions from Canada is subject to U.S. law, then, a

les caractéristiques propres au type d’actes à l’égard desquels la jurisprudence citée par CSI a conclu qu’ils sont survenus « ici et là ».

[79] La réalisation des reproductions ne s’accompagne de l’accomplissement d’aucun acte au Canada et, par conséquent, il ne peut en résulter aucun « préjudice » sous le régime de la législation canadienne. Ainsi, les commentaires de la Cour suprême dans l’arrêt *Moran*³³ selon lesquels l’acte préjudiciable de l’auteur du délit doit avoir été accompli là où le dommage a été subi ne sont d’aucune utilité à CSI. De la même manière, nous ne trouvons aucune utilité aux commentaires formulés par la Cour suprême dans l’arrêt *Tolofson (CSC)* en ce qui concerne le fait que « [L]es gens s’attendent habituellement à ce que leurs activités soient régies par la loi du lieu où ils se trouvent ». ³⁴ Tous les gestes associés à la réalisation des copies sont survenus aux États-Unis et sont, en conséquence, régis par le droit américain. L’acte autorisant la contrefaçon à l’étranger est assujéti à la loi régissant cette contrefaçon.

[80] CSI souligne à juste titre que l’acte d’autoriser diffère de celui de faire. Ceci étant dit, la Commission a déjà expliqué l’interrelation qui existe entre les deux actes :

Il est généralement reconnu que tous les actes protégés au paragraphe 3(1) sont distincts, y compris le droit d’autoriser. Bien qu’il ait sa propre existence, le droit d’autoriser est, selon la Commission, de nature différente puisqu’il est directement lié à l’acte qui est autorisé. En effet, le droit d’autorisation existe uniquement si l’acte qu’on autorise est lui-même un acte protégé. Par exemple, le droit d’exécution publique peut exister sans que le droit de communication soit protégé, mais le droit d’autoriser une communication ne peut exister si le droit de communication ne l’est pas.³⁵

[81] Si la copie faite aux États-Unis sur instructions émanant du Canada est régie par la

fortiori, any authorization of the making of a copy in the U.S. from the U.S. is subject to U.S. law.

[82] It follows that the mere act of authorizing in Canada is not actionable under the Canadian *Copyright Act* where the primary infringement occurs abroad. There is therefore no need to consider whether or not the Satellite Services have in effect authorized the programming copies of the American channels. In any event, they have not.

4. The 4 to 6 Second Buffer

[83] Every satellite radio receiver stores 4 to 6 seconds of the Satellite Services' multiplex signal at all times in its random access memory (RAM). The principle of first in first out is used to describe buffering – that is, the first byte of information received is the first byte out after 4 to 6 seconds. According to Mr. Greg Nease, Sirius' technical expert, the information contained in the buffer is in a "native signal transmission", which he described as "byte soup" containing "a lot of slicing, interleaving, coding for transmission so that they're totally unrecognizable in terms of audio files".³⁶ In his opinion, the information is inaccessible and completely invisible to users.

[84] Mr. Paul Marko, an expert called by CSR, explained that in the technology used by CSR the information is transmitted from the satellites to the CSR receivers' by a process that spreads the signal out over 4 to 6 seconds and once received by the receivers' RAM, the receivers perform a despreading function rendering it audible.

[85] The issue is whether the 4 to 6 second buffer – which stores in the temporary memory of the satellite radio user's receiver a "rolling" four seconds of the signal received from the satellite or repeater which provides time diversity – is a

loi américaine, alors, *a fortiori*, l'autorisation émanant des États-Unis d'y faire une copie l'est aussi.

[82] Il s'ensuit que le simple acte d'autoriser ne confère pas de droit d'action en vertu de la *Loi sur le droit d'auteur* canadienne lorsque la contrefaçon survient à l'étranger. Nul besoin, donc, d'examiner si les services par satellite ont réellement autorisé les copies de programmation des canaux américains. De toute façon, ils ne l'ont pas fait.

4. Le tampon d'une durée de 4 à 6 secondes

[83] Chaque récepteur de radio satellitaire stocke en tout temps dans sa mémoire vive (MEV) de 4 à 6 secondes du signal multiplex des services par satellite. Le principe du premier entré, premier sorti sert à décrire la mise en mémoire tampon : le premier octet de données reçu sera le premier octet à sortir, après un intervalle de 4 à 6 secondes. Selon M. Greg Nease, l'expert technique de Sirius, les renseignements contenus dans le tampon y sont dans un [TRADUCTION] « format de signal de transmission natif », décrit comme une « soupe d'octets » contenant « beaucoup de découpage, d'entrelacement et de codage pour transmission et est totalement indéchiffrable en terme de fichiers audios ». ³⁶ À son avis, les renseignements ne sont pas accessibles aux usagers et ils leur sont complètement invisibles.

[84] M. Paul Marko, un expert appelé par CSR, a expliqué qu'en raison de la technologie utilisée par CSR, les données sont transmises des satellites aux récepteurs de CSR au moyen d'un processus étalant le signal sur une période de 4 à 6 secondes et que, dès sa réception par la MEV des récepteurs, ceux-ci le rendent audible grâce à l'activation d'une fonction de désétalement.

[85] La question est de savoir si le tampon de 4 à 6 secondes, lequel stocke par défilement vertical dans une mémoire temporaire du récepteur de l'auditeur de radio satellitaire quatre secondes du signal reçu du satellite ou du répéteur produisant ainsi de la

reproduction of a substantial part of a work. To so conclude, we must find that: (1) buffers are in effect a copy of the protected work; (2) the copying is substantial; and (3) the resulting copy is in a material form.

[86] The Satellite Services contend that the buffers are not reproductions within subsection 3(1) of the *Act* because no new copy of a work in a material form is created. They also contend that the sequential transitory storage of small fragments of a musical work that is transmitted to facilitate time diversity fails to meet the substantiality requirement of a reproduction. In the U.S., the transient buffer is considered to be *de minimis* and therefore not infringing.³⁷ They cite as authority *Australian Video Retailers Association Ltd. v. Warner Home Video Pty Ltd.*³⁸ and *Stevens v. Kabushiki Kaisha Sony Computer Entertainment.*³⁹ They argue, as well, that the 4 to 6 second buffer does not meet the material form requirement that is defined by the case law that is “fixed in some concrete or non-evanescent form, having a more or less permanent endurance”.⁴⁰

[87] Alternatively, the Satellite Services submit that the 4 to 6 second buffer benefits from the protection of paragraph 64.1(1)(d) of the *Act*, as it is essentially a method or principle of manufacture and therefore, should not be actionable under Canadian law. In support of this contention, the Satellite Services merely refer to *SOCAN v. CAIP (SCC)*⁴¹ and *Euro-Excellence Inc. v. Kraft Canada Inc.*⁴²

[88] CSI argues that all buffer copies are reproductions and attract copyright liability because aggregating the sequential content of the buffer will generate a copy of the whole work. The 4 to 6 second buffer is in a form that is sufficiently palpable, tangible and perceptible as to be fixed in a

diversité dans le temps, est la reproduction d’une partie importante d’une œuvre. Pour conclure en ce sens, nous devons établir que : (1) le tampon constitue réellement une copie de l’œuvre protégée; (2) la copie est importante; (3) la copie qui en découle est sous une forme matérielle.

[86] Les services par satellite soutiennent que les tampons ne sont pas des reproductions au sens du paragraphe 3(1) de la *Loi* car aucune nouvelle copie de l’œuvre n’est créée sous une forme matérielle. Ils font aussi valoir que le stockage transitoire séquentiel de petites portions d’une œuvre musicale transmises pour permettre la diversité dans le temps n’est pas suffisamment important pour engager le droit de l’auteur. Aux États-Unis, le tampon transitoire est considéré comme n’ayant qu’une incidence minimale et, en conséquence, il ne constitue pas une contrefaçon.³⁷ Les services par satellite invoquent comme jurisprudence *Australian Video Retailers Association Ltd. c. Warner Home Video Pty Ltd.*³⁸ et *Stevens c. Kabushiki Kaisha Sony Computer Entertainment.*³⁹ Ils font aussi valoir que le tampon de 4 à 6 secondes ne répond pas à l’exigence de la forme matérielle que la jurisprudence a développée, c’est-à-dire « qu’elle soit exprimée [...] sous une certaine forme matérielle susceptible d’identification et dotée d’une durabilité plus ou moins grande ». ⁴⁰

[87] Subsidiairement, les services par satellite font valoir que le tampon de 4 à 6 secondes bénéficie de la protection conférée par l’alinéa 64.1(1)(d) de la *Loi*, en ce qu’il n’est qu’une méthode ou un processus de fabrication et qu’en conséquence il ne devrait pas donner ouverture à un recours judiciaire en vertu du droit canadien. À l’appui de cet argument, les services par satellite font simplement mention de *SOCAN c. ACFI (CSC)*⁴¹ et d’*Euro-Excellence Inc. c. Kraft Canada Inc.*⁴²

[88] CSI soutient que toutes les copies tampons sont des reproductions et emportent l’obligation de payer la redevance parce que le cumul du contenu séquentiel du tampon produira une copie de l’œuvre complète. Le tampon de 4 à 6 secondes revêt une forme qui est suffisamment palpable, tangible et

medium from which the works can be reproduced or otherwise communicated.⁴³ It relies on *Twentieth Century Fox Film Corp. v. Cablevision Systems Corp.*⁴⁴ which found, among other things, that buffer copies are capable of being reproduced and that the buffer copies in the aggregate comprise the whole of the plaintiff's programming.

[89] CSI adds that the buffer copy is similar to a streaming copy which, according to the Board, contains all the constituent elements of copying, substantiality and material form.⁴⁵ CSI also submits that the 4 to 6 second buffer cannot be equated with the cache copy in *SOCAN v. CAIP (SCC)*⁴⁶ because the exception provided for in paragraph 2.4(1)(b) of the *Act* only concerns the communication right, not the reproduction right.

[90] We conclude that the 4 to 6 second buffer is not a protected reproduction within the meaning of the *Act* because it does not meet all of the three requirements we set out above.

[91] The 4 to 6 second buffer is a reproduction of the protected work, just as downloads and streams targeted in the *CSI – Online Music Services Tariff*⁴⁷ are copies. The buffer stores information, if temporarily, before it can be used. Thus, buffering like streaming involves an act of copying, which in our view satisfies the first requirement.

[92] The next issue is whether the 4 to 6 second buffer is a "substantial" part of a work copied. The Satellite Services rely on *Copinger and Skone James* to conclude that it does not: in commenting on a film being copied in the RAM of a machine as it was being played, the authors conclude that "each fragment is so small that at any one time there cannot be said to be a 'copy' of the film or a substantial part of the film in RAM and so no copying of the film will have taken place for the purposes of the *Act*. [...] in the case of the

perceptible pour être gravé dans un support à partir duquel les œuvres peuvent être reproduites ou communiquées de quelque autre façon.⁴³ Elle s'appuie sur *Twentieth Century Fox Film Corp. c. Cablevision Systems Corp.*⁴⁴ qui a conclu notamment que la reproduction des copies tampons est possible et que mises ensemble, elles constituent la totalité de la programmation de la requérante.

[89] CSI ajoute que la copie tampon est semblable à une copie faite lors d'une transmission sur demande qui, selon la Commission, est à la fois une reproduction, importante et dans une forme matérielle.⁴⁵ CSI soutient également que le tampon de 4 à 6 secondes ne peut être assimilé à la « copie antémémoire » dans *SOCAN c. ACFI (CSC)*⁴⁶ parce que l'exception prévue à l'alinéa 2.4(1)(b) de la *Loi* ne vise que le droit de communication et non celui de reproduction.

[90] Nous concluons que le tampon de 4 à 6 secondes n'est pas une reproduction protégée au sens de la *Loi* parce qu'il ne répond pas aux trois exigences que nous avons établies précédemment.

[91] Le tampon de 4 à 6 secondes est une reproduction d'une œuvre protégée, tout comme les téléchargements et les transmissions sur demande visés dans le *Tarif CSI pour les services de musique en ligne*.⁴⁷ Le tampon stocke des renseignements, ne serait-ce que temporairement, avant leur utilisation. En conséquence, la mise en tampon comme la transmission sur demande entraîne un acte de reproduction qui, selon nous, répond à la première exigence.

[92] La question suivante est de savoir si le tampon de 4 à 6 secondes constitue une partie « importante » de l'œuvre reproduite. Les services par satellite concluent par la négative en s'appuyant sur *Copinger and Skone James* : commentant la reproduction d'un film en MEV d'une machine au moment de sa projection, les auteurs concluent que « [TRADUCTION] chaque fragment est si petit qu'à n'importe quel moment on ne peut prétendre qu'il existe une "copie" du film ou d'une partie importante du film dans la MEV et, ainsi, aucune

fragmentary copy into RAM at no point does there exist anything which can realistically be said to be a copy.”⁴⁸ The Satellite Services fail to point out that the authors concede that the “restricted act” is the “copying” of the work, not the making of a copy such that this streaming process “could be a situation in which the principle of little and often could be adopted.” The authors do however conclude that if a copy is not produced at some stage of the process it seems unrealistic to say that copying has taken place.⁴⁹

[93] The Satellite Radio Services also turn to Professor Paul Goldstein and argue that in the U.S. transient data buffer is considered to be *de minimis* and that copyright law sets the *de minimis* hurdle to infringement relatively low.⁵⁰ The Satellite Services rely on the two Australian cases, *AVRA v. Warner* and *Stevens v. Kabushiki* in support of their argument that sequential fragments do not amount to a substantial part of a musical work. It should be noted, however, that there are substantial differences between the Australian legislation and subsection 3(1) of the *Act* and that consequently, the cases are of limited assistance.

[94] CSI argues that by aggregating the sequential content of the buffer there will be a copy of the entire work. It relies on the decision of the Board in *SOCAN 22.A* which dealt with a communication right and not a reproduction right. CSI also relies on U.S. Copyright Office’s *DMCA Section 106 Report*. This report, in our opinion, is non-binding and, more importantly, it is inconclusive.

[95] Finally, CSI refers to *Cablevision*. There is no need to address this aspect of the argument, by reason that the decision has since been reversed, vacated and remanded by the United States Court of Appeal for the Second Circuit.

reproduction du film n’a été faite aux fins de la *Loi*. [...] en ce qui concerne la copie fragmentaire dans la MEV, en aucun temps n’existe-t-il quelque chose qui de façon réaliste s’apparente à une copie. »⁴⁸ Les services par satellite omettent de souligner que les auteurs reconnaissent que l’acte protégé est la « reproduction » de l’œuvre, et non la réalisation d’une copie de manière telle que ce processus de transit « [TRADUCTION] pourrait être un cas possible d’application du principe “peu mais souvent”. » Les auteurs concluent cependant que si une copie n’est pas produite à un moment ou l’autre du processus, il semble irréaliste d’affirmer qu’une reproduction a été faite.⁴⁹

[93] Les services de radio par satellite s’appuient également sur le professeur Paul Goldstein et soutiennent qu’aux États-Unis, le tampon transitoire de données est considéré comme n’ayant qu’une incidence minimale et que la législation sur le droit d’auteur établit que le test à respecter en matière de contrefaçon n’est pas très exigeant.⁵⁰ Les services par satellite invoquent les deux précédents australiens, *AVRA c. Warner* et *Stevens c. Kabushiki* au soutien de leur thèse selon laquelle des fragments séquentiels ne constituent pas une partie importante d’une œuvre musicale. Il convient toutefois de souligner qu’il existe des différences importantes entre la législation australienne et le paragraphe 3(1) de la *Loi* et que conséquemment, les précédents ne sont pas d’un grand secours.

[94] CSI fait valoir qu’une copie de l’œuvre entière peut se faire en regroupant le contenu séquentiel du tampon. Elle invoque la décision de la Commission dans *SOCAN 22.A* qui traitait du droit de communication et non de celui de reproduction. CSI invoque également le *DMCA Section 106 Report* du Bureau du droit d’auteur des États-Unis. À notre avis, nous ne sommes pas liés par ce rapport et, qui plus est, il n’est pas concluant.

[95] Enfin, CSI renvoie à *Cablevision*. Il n’est pas nécessaire de se pencher sur ce volet de l’argumentation parce que depuis lors la décision a été infirmée, annulée et a fait l’objet d’un renvoi par la Cour d’appel des États-Unis pour le deuxième circuit.

[96] The leading authority on how to assess substantiality remains *U & R Tax Services Ltd. v. H & R Block Canada Inc.*,⁵¹ in which Richard J. (as he then was) decided, among other things, that substantiality must be assessed by placing “more emphasis on the quality of what was taken from the original work rather than the quantity”.⁵² Whether there has been a reproduction of a substantial part of a work is a question of fact which must be determined in light of all the circumstances in each case.

[97] Thus, the question is reduced to whether the 4 to 6 second buffer is a substantial part of an entire work. The rolling 4 to 6 seconds of a musical work is not an aggregate of an entire work. At no time does a subscriber possess a series of 4 to 6 second clips which when taken together would constitute a substantial part of the work. It matters not that over time the totality of all works transmitted are reproduced. We are dealing with a rolling buffer and at no time can we line up all of the fragmented copies amounting to one complete copy of a musical work. At no point in time can one extract from the RAM of the receiver more than 4 to 6 seconds of a song (or more accurately of a signal). More importantly, at no time is there a choice as to what goes in there or when it comes out.

[98] In our opinion, the 4 to 6 second buffer fails to satisfy the substantiality requirement. It is not a substantial part of the protected work. It is not, therefore, strictly necessary for us to deal with whether or not the buffer is stored in a material form. We will do so, however, to provide guidance in future cases.

[99] The Satellite Services contend that it is not in a material form because it is a fleeting copy and not perceptible to subscribers. It is byte soup stored in a “native signal transmission format”. They rely on U.S. and Australian case law which as we have noted is, because of differences in the respective copyright acts, of limited use.

[96] L’arrêt qui fait autorité sur la façon d’évaluer le caractère important demeure *U & R Tax Services Ltd. c. H & R Block Canada Inc.*,⁵¹ dans lequel le juge Richard, alors juge à la Cour fédérale, a notamment statué que le caractère important devait s’évaluer en donnant « plus d’importance à la qualité des parties plagiées qu’à leur quantité ». ⁵² La question de savoir si une partie importante d’une œuvre a été reproduite est une question de fait qui doit être tranchée en fonction de toutes les circonstances de chaque espèce.

[97] En conséquence, la question se résume à savoir si le tampon de 4 à 6 secondes constitue une partie importante d’une œuvre complète. Le déroulement par tranches de 4 à 6 secondes d’une œuvre musicale n’offre jamais l’œuvre dans son ensemble. Un abonné ne dispose en aucun temps d’une série de clips qui, réunis ensemble, constitueraient une partie importante de l’œuvre. Il importe peu qu’au bout du compte la totalité des œuvres transmises soit reproduite. Il s’agit d’un tampon en défilement et en aucun temps pouvons-nous accoler toutes les portions de copies pour en arriver à une copie complète d’une œuvre musicale. À quelque moment que ce soit, personne ne peut extraire de façon efficace de la MEV du récepteur plus de 4 à 6 secondes d’une chanson (ou plus précisément, d’un signal). Plus important encore, jamais il n’est possible de choisir ce qui y entre ou quand il sort.

[98] À notre avis, le tampon de 4 à 6 secondes ne répond pas à l’exigence d’importance. Ce n’est pas une partie importante d’une œuvre protégée. Il ne nous est donc pas strictement nécessaire de traiter de la question de savoir si le tampon est stocké sous forme matérielle. Nous le ferons cependant afin de fournir des repères pour les affaires à venir.

[99] Les services par satellite soutiennent que le tampon n’a pas de forme matérielle parce qu’il est une copie fugace, non perceptible pour les abonnés. C’est une soupe d’octets mémorisée dans un « format de signal de transmission natif ». Ils invoquent des précédents américains et australiens qui sont peu utiles, comme nous l’avons souligné, en raison de différences entre les législations respectives sur le droit d’auteur.

[100] There is no definition of “material form” in the *Act*. In Canada, the case cited to determine whether a work is in “material form” is *Canadian Admiral* which stands for the proposition that “for a work to be protected by the Canadian *Copyright Act*, a work must be expressed in some material form capable of identification and having a more or less permanent endurance”.⁵³

[101] In *EROS-Équipe*, the Federal Court defined “material form” based on its ordinary meaning of something that was palpable, tangible and perceptible.⁵⁴ The Court concluded that the use of software which showed forms owned by the plaintiff on computer screens infringed copyright because they were not ephemeral and they reproduced the plaintiff’s work in a material form within the meaning of the section. The Court relied on *Bookmakers’ Afternoon Greyhound Services Ltd. et al v. Wilf Gilbert (Staffordshire) Ltd.*⁵⁵ that found mere posting on a television screen constitutes material reproduction. The Court further added that the generation of a printed version of the on-screen version was also an infringing reproduction.

[102] The Board has recognized various ephemeral copies including streaming, caching, and permanent and temporary downloads as being in material form. In our opinion, RAM copies created by digital technology meet the requirement of material form.⁵⁶ It would be contrary to the case law to find that in order to be in a material form, the copy must be capable of being seen or retrieved. Even if it were so, similarly to the circumstances in *EROS-Équipe*,⁵⁷ the user who owns a receiver equipped with the extended buffer or recording features could potentially retrieve a more permanent ephemeral copy.

[103] In our opinion, the 4 to 6 second buffer does meet the third requirement. Having said that, it matters not given our conclusion on substantiality.

[100] La *Loi* ne contient aucune définition de « forme matérielle ». Au Canada, la cause citée pour décider si une œuvre revêt une « forme matérielle » est *Canadian Admiral*, laquelle consacre le principe portant que « [TRADUCTION] pour que le droit d’auteur s’attache à une “œuvre”, il faut qu’elle soit exprimée dans une certaine mesure du moins, sous une certaine forme matérielle susceptible d’identification et dotée d’une durabilité plus ou moins grande ». ⁵³

[101] Dans *EROS-Équipe*, la Cour fédérale a défini « forme matérielle » en s’appuyant sur le sens ordinaire des mots soit quelque chose de palpable, tangible et perceptible.⁵⁴ La Cour a conclu que l’utilisation de logiciel affichant sur des écrans d’ordinateur des formulaires appartenant à la requérante violait le droit d’auteur parce que ceux-ci n’étaient pas éphémères et reproduisaient son œuvre sous une forme matérielle au sens de la disposition. La Cour a renvoyé à la décision *Bookmakers’ Afternoon Greyhound Services Ltd. et al c. Wilf Gilbert (Staffordshire) Ltd.*⁵⁵ selon laquelle le simple affichage sur un écran de télévision constituait une reproduction matérielle. De plus, la Cour a ajouté que la génération d’une version imprimée de celle apparaissant à l’écran constituait aussi une violation du droit d’auteur.

[102] La Commission a reconnu la forme matérielle de diverses copies éphémères, dont celles émanant de la transmission sur demande, de la mise en cache, et des téléchargements permanents et temporaires. À notre avis, les copies MEV issues de la technologie numérique répondent aux exigences de la forme matérielle.⁵⁶ Il serait contraire à la jurisprudence de conclure que pour apparaître sous une forme matérielle, la copie doit être visible ou récupérable. Même si c’était le cas, tout comme les circonstances dans *EROS-Équipe*,⁵⁷ l’utilisateur qui possède un récepteur muni du tampon prolongé ou de fonctions d’enregistrement pourrait extraire une copie éphémère plus permanente.

[103] À notre avis, le tampon de 4 à 6 secondes répond à la troisième exigence. Ceci étant dit, cela importe peu compte tenu de notre conclusion portant sur le caractère important.

5. Internet Streaming

[104] The Satellite Services offer, as an additional feature, a free online service of a subset of satellite radio channels through an Internet-based streaming service using a specially designed media player. The content for the media player is delivered at virtually the same time as it is uplifted to the satellite. The streamed content is extracted from the same process by which radio satellite services are programmed and delivered. The stream is copied temporarily in the buffer of a computer to make it play without interruption. The buffer, which according to Dr. Michael J. Murphy never exceeds ten seconds, delays the playback just long enough to ensure smooth playback to the listener.

[105] A number of cellular phone service providers have entered into agreements with the Satellite Services to permit their subscribers to connect to the streamed service. The streaming technology used to deliver this service is identical to the one used on the Internet. The Satellite Services contend that apart from the “so-called copy” resulting from the buffering process, no other reproductions are created by this service.⁵⁸

[106] The Satellite Services contend the Board has not yet decided whether the reception of a pure stream on a computer or other device involves the reproduction right. Any comments made by the Board to date are, in the submission of the Satellite Services, *obiter* and more importantly contradict recent decisions of the Supreme Court of Canada.⁵⁹ The Satellite Services contend this is the first time the Board is squarely faced with making a decision as to whether the transmission of information to a device in the course of a streaming service involves the making of a reproduction.

[107] CSI, on the other hand, argues that streams are reproductions within the meaning of subsection

5. La transmission Internet sur demande

[104] Les services par satellite offrent, comme fonction additionnelle, un service en ligne gratuit d'un sous-ensemble des canaux de radio par satellite au moyen d'un service de transmission par Internet utilisant un diffuseur de médias spécialement conçu. Le contenu pour le diffuseur de médias est livré pratiquement en même temps que sa transmission vers le satellite. Le contenu transmis est extrait du même processus en vertu duquel les services de radio par satellite sont programmés et livrés. La transmission est temporairement copiée dans le tampon d'un ordinateur pour une lecture sans interruption. Le tampon, qui selon M. Michael J. Murphy n'excède jamais dix secondes, retarde la lecture juste assez longtemps pour assurer une écoute en douceur.

[105] Un certain nombre de fournisseurs de service de téléphonie cellulaire ont conclu des ententes avec les services par satellite pour permettre à leurs abonnés de se brancher au service de transmission sur demande. La technologie de transmission utilisée pour la livraison de ce service est identique à celle utilisée sur Internet. Les services par satellite soutiennent qu'à l'exception de la « soi-disant copie » résultant du processus de mise en tampon, aucune autre reproduction n'est créée par ce service.⁵⁸

[106] Les services par satellite soutiennent que la Commission n'a pas encore décidé si la réception d'une transmission sur demande à l'état pur sur un ordinateur ou un autre dispositif met en cause le droit de reproduction. Selon les services par satellite, les commentaires formulés par la Commission à ce jour sont des *obiter* et, ce qui est plus important encore, contredisent des arrêts récents de la Cour suprême du Canada.⁵⁹ Les services font valoir que la Commission est directement tenue pour la première fois de décider si la transmission de données à un dispositif dans le cadre d'un service de transmission sur demande comprend la réalisation d'une reproduction.

[107] À l'opposé, CSI soutient que les transmissions sont des reproductions au sens du

3(1) of the *Act* and relies on the Board's comments in *CSI – Online Music Services for the Years 2005 to 2007*.⁶⁰ In CSI's submission, the evidence before the Board is that there is no difference between a stream in the context of the delivery of a satellite radio service and a stream in the context of a delivery of an online music service. It also relies on the comments made by the Board in *SOCAN 22.A*.⁶¹ The Board did not decide whether or not the temporarily stored copy was a reproduction within the meaning of the *Act* in *SOCAN 22.A*.

[108] The Board decided in *CSI – Online Music Services*,⁶² as we do here, that the Internet cellular phone streaming of the objectors' services require the making of copies. The issue here, however, is whether or not these copies are sufficiently substantial to attract liability. In our opinion, they are not. The uncontradicted evidence of Dr. Murphy is that the buffer never stores more than 10 seconds of information. Based on our earlier comments with respect to the 4 to 6 second buffer, the same finding must be made, that is, they are not sufficiently "substantial" and therefore do not constitute a protected reproduction within the meaning of subsection 3(1) of the *Act*.

6. Extended Buffers

[109] A small percentage of receivers contain an extended buffer feature. This enables the subscriber to block record programming, to pause and replay, to radio replay which once enabled permits subscribers to record programming content for subsequent enjoyment, and to pause and rewind. All these features are user selectable: any decision to employ them is made by the user, not by the Satellite Services.

[110] The parties agree that these copies are reproductions within the meaning of the *Act* and that

paragraphe 3(1) de la *Loi* et s'appuie sur les commentaires de la Commission dans *CSI – Services de musique en ligne pour les années 2005 à 2007*.⁶⁰ Selon CSI, la preuve présentée à la Commission établit qu'il n'y a pas de différence entre la transmission dans le cadre de la livraison d'un service de radio par satellite et celle dans le cadre de la livraison d'un service de musique en ligne. Elle s'appuie également sur les commentaires formulés par la Commission dans *SOCAN 22.A*.⁶¹ La Commission n'a pas décidé si la copie stockée temporairement était une reproduction au sens de la *Loi* dans *SOCAN 22.A*.

[108] Tout comme la Commission l'a fait dans *CSI – Services de musique en ligne*,⁶² nous décidons que la transmission par téléphonie cellulaire des services des opposantes exige la réalisation de copies. Toutefois, en l'espèce, la question en litige est de savoir si ces copies sont importantes au point de constituer un acte protégé. À notre avis, elles ne le sont pas. Selon le témoignage non contredit de M. Murphy, le tampon ne stocke jamais plus de 10 secondes de données. Nous fondant sur nos commentaires déjà formulés à l'égard du tampon de 4 à 6 secondes, nous devons conclure dans le même sens, c'est-à-dire que ces copies ne sont pas suffisamment « importantes » et, en conséquence, qu'elles ne constituent pas des reproductions protégées visées par le paragraphe 3(1) de la *Loi*.

6. Les tampons prolongés

[109] Un faible pourcentage de récepteurs offrent la fonction dite de tampon prolongé. Celle-ci permet à l'abonné d'enregistrer en vrac la programmation, de faire une pause et de reprendre l'écoute, de réentendre une émission, fonction qui une fois activée permet à l'utilisateur d'enregistrer le contenu d'une émission pour en profiter ultérieurement et de suspendre et rembobiner. Toutes ces fonctions sont activées par l'utilisateur : la décision d'y recourir lui appartient, et non pas aux services par satellite.

[110] Les parties conviennent que ces copies sont des reproductions au sens de la *Loi* et qu'elles sont

users, not the Satellite Services, make them. What is not agreed is whether the Satellite Services authorize their subscribers to make the copies in question.

[111] The Satellite Services note that all these features are used and initiated by the user, who alone determines what, if anything, is stored. In their submission, the services do not authorize or purport to grant the right to make copies. They rely on *Muzak Corp. v. Composers, Authors and Publishers Association of Canada Ltd.*,⁶³ *Vigneux v. Canadian Performing Rights Society Ltd.*⁶⁴ and *CBS Songs Ltd. v. Amstrad Consumer Electronics Plc.*⁶⁵ Succinctly stated, their argument is that they do not have or exercise the necessary control to be deemed to have authorized or purported to authorize the reproductions. In their submission, based upon *De Tervagne v. Beloeil*⁶⁶ “an act is not authorised by somebody who merely enables or possibly assists or even encourages another to do an act, but does not purport to have any authority which he can grant to justify the doing of the act.”⁶⁷ They also rely on *Muzak*,⁶⁸ *CCH*⁶⁹ and *SOCAN v. CAIP (SCC)*⁷⁰ to argue that they are entitled to presume that the means they provide will be used in accordance with the law.

[112] CSI contends that on the evidence the Satellite Services “sanction, approve and countenance” the programming activities of their subscribers. In its submission, the Satellite Services exercise a sufficient level of control to infer authorization.⁷¹

[113] In our opinion, the Satellite Services have authorized a reproduction in the present circumstances. All the recording options contained in the “Stiletto” and similar receivers sold by CSR are dependent on the subscriber’s decision to use those features. The Satellite Services’ contention that they authorize the mere use of equipment that may or may not be used to infringe copyright which entitles them to presume that subscribers use the device in accordance with the law is not in accord with the evidence in this case. Here the Satellite

faites par les utilisateurs et non par les services par satellite. Les parties ne s’entendent pas sur la question de savoir si les services par satellite autorisent leurs abonnés à faire les copies en cause.

[111] Les services par satellite soulignent que c’est l’usager qui utilise et fait démarrer toutes ces fonctions, et que lui seul décide ce qui est stocké, le cas échéant. Selon eux, les services n’autorisent ni ne prétendent donner le droit de faire des copies. Ils citent *Muzak Corp. c. Composers, Authors and Publishers Association of Canada Ltd.*,⁶³ *Vigneux c. Canadian Performing Rights Society Ltd.*⁶⁴ et *CBS Songs Ltd. c. Amstrad Consumer Electronics Plc.*⁶⁵ En résumé, ils soutiennent qu’ils n’ont pas le contrôle nécessaire, ni ne l’exercent, pour être réputés avoir autorisé ou prétendu autoriser les reproductions. Selon eux, en s’appuyant sur *De Tervagne c. Beloeil*,⁶⁶ « un acte n’est pas autorisé par quelqu’un qui ne fait que permettre à un autre d’accomplir un acte ou probablement l’aider ou même l’encourager à le faire, mais qui ne prétend pas avoir une autorisation qu’il peut octroyer pour justifier l’accomplissement de l’acte. »⁶⁷ Ils citent aussi *Muzak*,⁶⁸ *CCH*⁶⁹ et *SOCAN c. ACFI (CSC)*⁷⁰ au soutien de l’argument selon lequel ils sont en droit de supposer que les moyens qu’ils fournissent seront utilisés dans le respect de la loi.

[112] Compte tenu de la preuve, CSI soutient que les services par satellite « autorisent, approuvent ou tolèrent » les activités de programmation de leurs abonnés. Selon elle, les services par satellite exercent un niveau de contrôle suffisant pour en inférer une autorisation.⁷¹

[113] À notre avis, les services par satellite ont autorisé une reproduction dans les présentes circonstances. Toutes les fonctions d’enregistrement dont sont dotés le « Stiletto » et les récepteurs semblables vendus par CSR sont tributaires de la décision de l’abonné de les utiliser. L’argument des services par satellite selon lequel ceux-ci ne font que permettre l’utilisation d’équipement, laquelle peut s’avérer illicite ou non, et s’autorisant de ce fait pour supposer que les abonnés se servent des appareils dans le respect de

Services are not passive. They control the programming sent to the subscribers by encrypting the signal, and by decrypting it they grant to their subscriber the right to access the full programming including the right to use all of those services. The Satellite Services can program their receivers to permit or prevent copying. With respect to block copying, pause and replay and other features, access to the content copied in the extended buffers is controlled by the Satellite Services. Subscribers who stop paying for the service no longer have access to the content stored in their receivers. In addition, some end-user licence agreements contemplate the possibility that subscribers will use the receiver software to copy content programming or even individual songs based on which a subscriber could presume that the Satellite Services purport to have the authority to allow private copying.

[114] Finally, the Satellite Services commercial interests are tied to the ability of subscribers to use the extended buffers. While to date the number of subscribers using the more sophisticated devices is quite small, the fact is that the Satellite Services rely on these features to promote themselves as a better alternative to other substitute services. For example, they market themselves as an alternative to iPods or MP3 players. They prominently advertise the reproduction features of their radio receivers. For example, CSR describes one of its receivers as a substitute for the iPod-iTunes combination proclaiming “another Pod? Hardly. This is the mother ship.”

[115] In *SOCAN v. CAIP (SCC)* the Supreme Court, in deciding whether or not Internet Service Providers could be deemed to authorize the communication of protected works, pointed out “that copyright liability may well attach if the activities of the Internet Service Provider cease to be content neutral, e.g. if it has notice that a content

la loi, n’est pas conforme à la preuve versée au présent dossier. Les services par satellite ne sont pas passifs. Ils contrôlent la programmation transmise aux abonnés en chiffrant le signal; en le décryptant, ils leur accordent le droit d’accéder à toute la programmation, y compris le droit d’utiliser tous ces services. Les services par satellite peuvent programmer leurs récepteurs pour autoriser ou empêcher la copie. En ce qui concerne la copie de bloc, la pause, l’écoute différée et autres fonctions, l’accès au contenu reproduit dans le tampon prolongé est contrôlé par les services par satellite. L’abonné qui cesse de payer pour le service n’a alors plus accès au contenu stocké dans son récepteur. De plus, certains contrats de licence d’utilisation prévoient la possibilité pour les abonnés d’utiliser le logiciel du récepteur pour copier du contenu de programmation ou même des chansons ce qui autoriserait un abonné à supposer que les services par satellite sont censés disposer du pouvoir d’autoriser les copies privées.

[114] Enfin, les intérêts commerciaux des services par satellite sont liés à la capacité d’utilisation des tampons prolongés par les abonnés. Bien qu’à ce jour le nombre d’abonnés utilisant les appareils plus perfectionnés soit relativement faible, il n’en demeure pas moins que les services par satellite misent sur ces fonctions pour se faire connaître comme offrant des services de qualité supérieure aux produits substitués. Par exemple, ils se mettent en valeur en se présentant comme la solution de rechange aux lecteurs iPod et MP3. Ils mènent une campagne publicitaire agressive sur la fonction de reproduction de leurs récepteurs de radio. Par exemple, CSR décrit l’un de ses récepteurs comme remplaçant le tandem iPod-iTunes en proclamant « [TRADUCTION] un autre Pod? Pas du tout. Nous sommes le vaisseau mère. »

[115] Dans *SOCAN c. ACFI (CSC)* la Cour suprême, en déterminant si les fournisseurs de services Internet pouvaient être réputés autoriser la communication d’œuvres protégées, a souligné que « le fournisseur de services Internet pourrait violer le droit d’auteur si ses activités avaient une incidence sur le contenu, c’est-à-dire s’il savait

provider has posted infringing material on its system and fails to take remedial action.”⁷² Based on the evidence before us, the Satellite Services’ activities are not content neutral. This finding is consistent with the decision of the Federal Court of Appeal in *CCTA* where the Board found the cable television services were liable for the transmitters’ public performances of music over their network on the grounds that they either authorized the performances or were joint performers. The Court stated:

However, if one wants to lay with the subscriber the ultimate responsibility for the materialization of the public performance and therefore the infringement of the copyrights, there is no doubt that, upon a plain or a constructive meaning of the word “authorization”, the appellant authorizes such materialization by its customers. I think the learned Trial Division judge correctly summarized the state of the law with regard to the appellant’s actions when he wrote:

I believe a cable television system which provides electromagnetic signals to a subscriber, under a contract which clearly contemplates that the sole use of the cable company’s service is to be the production of audible and visual messages from the subscriber’s television set connected to that cable, must be taken to have authorized that ultimate performance.⁷³

[116] In our opinion, those comments apply with equal force to the present case.

[117] That brings us to the final issue and that is whether or not the Satellite Services can rely on the fair dealing right to escape liability for authorizing their affiliated retailers to reproduce a sample of programming content. We note that initially the Satellite Services sought to invoke the private copying regime to evade liability but appear to have

qu’un fournisseur de contenu rend du matériel illicite disponible grâce à son système et ne prenait pas de mesures pour y remédier. »⁷² Selon la preuve qui nous a été présentée, les activités des services par satellite ont une incidence sur le contenu. Cette conclusion est conforme à l’arrêt *ACTC* de la Cour d’appel fédérale, dans lequel la Commission a conclu que les services de télévision par câble étaient responsables des exécutions publiques de musique des transmetteurs sur leur réseau au motif soit qu’ils ont autorisé les prestations, soit qu’ils sont des co-exécutants. La Cour s’est ainsi exprimée :

Cependant, même si l’abonné est l’ultime responsable de la réalisation de l’exécution publique et, par conséquent, de la violation du droit d’auteur, il ne fait aucun doute, suivant le sens littéral du terme « autorisation » ou suivant l’interprétation qu’on en fait, que l’appelante autorise ses clients à faire en sorte que l’exécution se matérialise. J’estime que le juge de première instance a bien résumé le droit applicable aux actes de l’appelante en disant ce qui suit :

[L]orsqu’une société exploitant un système de télévision par câble fournit à un abonné des signaux électromagnétiques, aux termes d’un contrat qui prévoit clairement que la prestation de la compagnie consiste uniquement à faire produire par le téléviseur de l’abonné, téléviseur relié au câble, des messages sonores et visuels, cette société est censé[e] avoir autorisé cette dernière exécution.⁷³

[116] À notre avis, ces commentaires s’appliquent avec autant de force en l’espèce.

[117] Cela nous amène à la dernière question en litige qui est de savoir si les services par satellite peuvent s’en remettre au droit à l’utilisation équitable pour échapper à la responsabilité d’avoir autorisé leurs détaillants affiliés à reproduire un échantillon du contenu d’émissions. Nous constatons que les services par satellite ont

resiled from that position. The Satellite Services now rely on the concept of fair dealing with respect to the programming content recorded for retail purposes. The Satellite Services further contend that even if the Board concludes that they authorized the copies, they cannot be liable for such reproductions by virtue of the fair dealing exception for research or private study purposes. In our opinion, that argument is a long reach and one which, as will be seen, is easily rejected. The Satellite Services contend that the samples recorded on the devices provided to affiliated retailers should come within the fair dealing right because the purpose is to facilitate private research of potential subscribers.

[118] The fair dealing right for the purposes of research or private study is governed by section 29 of the *Act* which states:

29. Fair dealing for the purpose of research or private study does not infringe copyright.

[119] The Supreme Court of Canada examined the issue at some length in *CCH*.⁷⁴ Chief Justice McLachlin, writing for the Court, stated that fair dealing is not an exception (as has previously been thought) but a right. In order to show that the dealing was fair, the defendant must prove on a balance of probabilities that the dealing was for research or private study and that it was fair. The Chief Justice described what is required to prove fair dealing in the following terms:

[60] To conclude, the purpose of the dealing, the character of the dealing, the amount of the dealing, the nature of the work, available alternatives to the dealing and the effect of the dealing on the work are all factors that could

initialement cherché à invoquer le régime de copie privée afin d'échapper à leur responsabilité, mais qu'ils semblent avoir abandonné cet argument. Ceux-ci font maintenant appel au concept de l'utilisation équitable à l'égard de la programmation enregistrée aux fins de vente au détail. Les services par satellite soutiennent de plus que même si la Commission tirait la conclusion qu'ils ont autorisé les copies, ils ne violeraient pas le droit d'auteur à l'égard de ces reproductions en raison de l'exception découlant de l'utilisation équitable aux fins de recherche ou d'étude privée. À notre avis, cet argument est forcé et, comme nous le verrons, est aisément rejeté. Les services par satellite soutiennent que les échantillons enregistrés sur les appareils fournis aux détaillants affiliés devraient être visés par le droit à l'utilisation équitable parce que l'objectif consiste à faciliter la recherche privée d'abonnés potentiels.

[118] Le droit à l'utilisation équitable aux fins de recherche ou d'étude privée est régi par l'article 29 de la *Loi* dont voici les dispositions :

29. L'utilisation équitable d'une œuvre ou de tout autre objet du droit d'auteur aux fins d'étude privée ou de recherche ne constitue pas une violation du droit d'auteur.

[119] La Cour suprême du Canada a examiné la question assez en détail dans l'arrêt *CCH*.⁷⁴ Le Juge en chef McLachlin, rédigeant l'arrêt de la Cour, a indiqué que l'utilisation équitable n'était pas une exception (comme on l'avait jusque-là pensé), mais un droit. Pour établir qu'une utilisation est équitable, le défendeur doit prouver, selon la prépondérance des probabilités, qu'il s'agit d'une utilisation aux fins d'étude privée ou de recherche et qu'elle est équitable. Le Juge en chef s'est ainsi exprimée sur les éléments nécessaires pour prouver l'utilisation équitable :

[60] En conclusion, le but de l'utilisation, la nature de l'utilisation, l'ampleur de l'utilisation, la nature de l'œuvre, les solutions de rechange à l'utilisation et l'effet de l'utilisation sur l'œuvre sont tous des facteurs qui peuvent contribuer à la

help determine whether or not a dealing is fair. These factors may be more or less relevant to assessing the fairness of a dealing depending on the factual context of the allegedly infringing dealing. In some contexts, there may be factors other than those listed here that may help a court decide whether the dealing was fair.

[120] In *CCH*, the Supreme Court recognized that the right equally applies to facilitators of research and private study. The Court stated unequivocally that the onus of establishing fair dealing lies with the person seeking to invoke it. In this regard, the Court stated:

[48] [...] Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver, *supra*, has explained, at p. 171: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation."

[121] The Satellite Services argue that in the context of a proceeding before the Board the burden of proof is shifted to the Collectives because they have the burden of establishing the reasonableness of their proposed tariff. This submission is untenable. The information respecting the intentional purpose is strictly within the control of the user. The onus of establishing fair dealing should remain, as the Supreme Court stated, with

détermination du caractère équitable ou inéquitable de l'utilisation. Ces facteurs peuvent être plus ou moins pertinents selon le contexte factuel de la violation alléguée du droit d'auteur. Dans certains cas, d'autres facteurs que ceux énumérés peuvent aider le tribunal à statuer sur le caractère équitable de l'utilisation.

[120] Dans l'arrêt *CCH*, la Cour suprême a reconnu que ce droit s'applique tout autant à ceux qui facilitent la recherche et l'étude privée. La Cour a clairement indiqué que le fardeau de prouver l'utilisation équitable incombe à la personne qui l'invoque. À cet égard, voici comment la Cour s'est exprimée :

[48] [...] Sur le plan procédural, le défendeur doit prouver que son utilisation de l'œuvre était équitable; cependant, il est peut-être plus juste de considérer cette exception comme une partie intégrante de la *Loi sur le droit d'auteur* plutôt que comme un simple moyen de défense. Un acte visé par l'exception relative à l'utilisation équitable ne viole pas le droit d'auteur. À l'instar des autres exceptions que prévoit la *Loi sur le droit d'auteur*, cette exception correspond à un droit des utilisateurs. Pour maintenir un juste équilibre entre les droits des titulaires du droit d'auteur et les intérêts des utilisateurs, il ne faut pas l'interpréter restrictivement. Comme le professeur Vaver, *op. cit.*, l'a expliqué, à la p. 171, [TRADUCTION] « [L]es droits des utilisateurs ne sont pas de simples échappatoires. Les droits du titulaire et ceux de l'utilisateur doivent donc recevoir l'interprétation juste et équilibrée que commande une mesure législative visant à remédier à un état de fait. »

[121] Les services par satellite soutiennent que dans le cadre de procédures intentées devant la Commission, le fardeau de la preuve est renversé car il incombe aux sociétés de gestion d'établir la raisonnablement du tarif proposé. Cet argument est indéfendable. Les renseignements concernant l'intention et l'objectif reposent strictement entre les mains de l'utilisateur. Comme l'a exprimé la Cour suprême, le fardeau de prouver que l'utilisation est

the person asserting the right. The Satellite Services have not provided any evidence to establish that the subscribers using the extended buffer were doing so for the purposes of research or private study. There is no aspect of the recording features that suggests that potential purchasers use the prerecorded messages for research or private study. Quite the contrary, the evidence demonstrates that retailers use this feature to promote the sale of the service.

[122] A sample of the content contained on devices for retail purposes and for the benefit of on-site sampling is distinguishable from the previews described in *SOCAN 22.A*.⁷⁵ The receivers sold in retail stores hold a prerecorded sample of the various channels in their memory. When the device is turned on by a potential buyer, it will play the prerecorded channel. The potential consumer has no choice in selecting channels other than what is offered by the Satellite Services. After the device is purchased, the subscriber must contact the satellite service and pay the subscription fee before the Satellite Services' respective management systems will send a signal informing the receiver that the subscriber is entitled to the full subscription and to playback the recorded content.⁷⁶

[123] Contrary to the facts in *SOCAN 22.A*,⁷⁷ here the consumer does not request a sample from the Satellite Services. On the contrary, it is the Satellite Services who initiate and make the copy. In our opinion, the Satellite Services cannot be considered facilitators of research. The prerecorded content offers a sample of the channels offered to incite customers to purchase their services.

[124] The Satellite Services have not provided sufficient evidence to discharge the onus of proof that this activity is fair dealing within section 29 of the *Act*. Thus, the Satellite Services cannot rely on

équitable devrait demeurer sur les épaules de la personne qui invoque ce droit. Rien n'indique dans la preuve présentée par les services par satellite que les abonnés utilisant les tampons prolongés l'ont fait à des fins de recherche ou d'étude privée. Les fonctions d'enregistrement ne présentent aucun attribut pouvant laisser croire que d'éventuels acheteurs utilisent les messages préenregistrés à des fins de recherche ou d'étude privée. Bien au contraire, la preuve établit que les détaillants utilisent cette fonction pour promouvoir la vente du service.

[122] Un échantillon du contenu emmagasiné dans les appareils destinés à la vente au détail et pour les besoins d'échantillonnage sur place se différencie de l'écoute préalable décrite dans *SOCAN 22.A*.⁷⁵ Les récepteurs vendus dans les magasins de détail contiennent en mémoire un échantillon préenregistré des divers canaux. Lorsque l'appareil est activé par un acheteur potentiel, il jouera le canal préenregistré. Le consommateur potentiel n'a pas le choix de sélectionner des canaux autres que ceux offerts par les services par satellite. Suite à l'achat du récepteur, l'abonné doit communiquer avec le service par satellite et payer les frais d'abonnement avant que les systèmes de gestion respectifs des services par satellite n'envoient un signal informant le récepteur que l'abonné a droit à l'abonnement complet et de jouer le contenu enregistré.⁷⁶

[123] Contrairement aux faits dans *SOCAN 22.A*,⁷⁷ le consommateur en l'espèce ne demande pas d'échantillon des services par satellite. Au contraire, la copie est entreprise et produite par les services par satellite. À notre avis, ils ne peuvent être assimilés à une personne facilitant une recherche. Le contenu préenregistré offre un échantillon des canaux proposés dans le but d'inciter les consommateurs à se procurer leurs services.

[124] Les services par satellite n'ont pas présenté les éléments de preuve suffisants pour se décharger du fardeau qui leur incombe de prouver que cette activité constitue une utilisation équitable au sens de

fair dealing to escape liability for the reproduction of the sample programming.

IV. ECONOMIC ANALYSIS

[125] In the narration of the facts we described briefly the approaches advocated by the economic experts called by the various parties.

Mr. Glen Bloom, when arguing the Collectives' case, stressed that there is a problem with the Board continuing to use the benchmark approach by reason that it builds upon prior proxies. In his submission, a newer and more innovative approach is necessary to ensure that the certified tariff is a reflection of the true value of music to the industry. We have examined the alternative approaches developed by Drs. Agrawal and McHale and while we find them interesting and believe that they could become useful as the market matures, we are not persuaded to use them at the present time.

[126] We essentially agree with Dr. Reitman that the benchmark approach, even with the specific adjustments that are required, permits the Board to certify rates that are fair and equitable for satellite radio. Once a tariff has been established by the benchmark, it is not a simple reflection of the initial proxy, but rather a tariff arrived at as the result of an independent analysis of the specific sector to which the tariff applies.

[127] We will therefore use the benchmark approach to determine the fair and equitable tariff. However, we will briefly describe the alternative approaches proposed by Drs. Agrawal and McHale and will provide reasons why we cannot rely on them at this time. We offer these comments in the hope that they will provide guidance for the parties in developing new economic models in the future. In our opinion the development and presentation to the Board of such alternative economic models can, in

l'article 29 de la *Loi*. En conséquence, les services par satellite ne peuvent se fonder sur l'utilisation équitable pour échapper à leur responsabilité à l'égard de la reproduction d'échantillon d'émissions.

IV. ANALYSE ÉCONOMIQUE

[125] Dans l'exposé des faits, nous avons décrit brièvement les approches proposées par les experts économiques appelés par les différentes parties. Dans sa défense de la position des sociétés de gestion, M^c Glen Bloom a souligné que le fait que la Commission continue d'utiliser l'approche privilégiant un point de référence posait problème, parce que celle-ci s'appuie sur les indicateurs antérieurs. Selon lui, il faut une approche novatrice qui fera en sorte que le tarif homologué reflète la valeur réelle de la musique pour l'industrie. Nous avons étudié les différentes approches élaborées par MM. Agrawal et McHale, et bien que nous les trouvions intéressantes et que nous croyions qu'elles pourraient devenir utiles lorsque le marché sera bien développé, nous ne sommes pas convaincus de leur pertinence à l'heure actuelle.

[126] Nous sommes essentiellement d'accord avec l'argument de M. Reitman selon lequel l'approche privilégiant un point de référence, malgré les ajustements particuliers qu'elle nécessite, permet à la Commission d'homologuer des taux qui soient justes et équitables pour la radio par satellite. Une fois qu'un tarif a été établi au moyen de cette méthode, il n'est pas la simple reproduction de l'indicateur initial, mais le résultat d'une analyse indépendante du secteur particulier auquel s'applique ce tarif.

[127] Nous nous servirons donc d'un point de référence pour déterminer le tarif juste et équitable. Néanmoins, nous décrirons brièvement les différentes approches proposées par MM. Agrawal et McHale et nous expliquerons pourquoi nous ne pouvons y recourir à l'heure actuelle. Ces commentaires ont pour but d'aider les parties à élaborer de nouveaux modèles économiques dans l'avenir. À notre avis, l'élaboration de nouveaux modèles et leur présentation devant la Commission

the long term, play a crucial role in the determination of fair and equitable tariffs.

[128] We begin by examining the economic models proposed by Drs. Agrawal and McHale based on fairness, efficiency and consistency.

1. Industry's Willingness-to-Pay

[129] Drs. Agrawal and McHale propose to use sample agreements to estimate the share of revenues the Satellite Services are willing to pay to the automobile industry to obtain subscribers, and apply this share to the subscribers that are attracted to the service because of the music. They claim this leads to a fair tariff since the Satellite Services should be willing to pay the same share of their revenues for all the subscribers, whether attracted by music or otherwise.

[130] Drs. Agrawal and McHale include every financial transfer between the Satellite Services and the car manufacturer. They find that the Satellite Services incur two costs from their agreements with the automobile industry: a hardware subsidy and a share of subscription revenues. In exchange, the car manufacturer pays for a trial subscription for a brief period when the car is sold. They also consider the percentage of the consumers that will retain the service once the trial period paid for by the car manufacturer is over.

[131] The authors conclude that, when including the trial subscription and other amounts, the Satellite Services are willing to pay approximately 45 per cent of revenues earned from automotive subscribers to car manufacturers.

[132] Drs. Agrawal and McHale also note that, according to the Circum Network survey, 86 per cent of current subscribers would not continue to subscribe to the satellite radio service if music was

peuvent, à long terme, jouer un rôle essentiel dans l'établissement de tarifs justes et équitables.

[128] Nous commencerons par étudier les modèles économiques proposés par MM. Agrawal et McHale en se fondant sur les critères d'équité, d'efficacité et d'uniformité.

1. Volonté de payer de l'industrie

[129] MM. Agrawal et McHale proposent de se fonder sur un échantillon d'ententes pour calculer la part de revenus que les services par satellite sont disposés à verser à l'industrie de l'automobile pour vendre des abonnements, pour ensuite appliquer cette proportion à ceux qui s'abonnent au service à cause de la musique. À leur avis, cela permet d'établir un tarif équitable, puisque les services devraient être disposés à verser la même part de revenus pour tous les abonnés, que ce soit la musique ou autre chose qui les attire vers le service.

[130] MM. Agrawal et McHale tiennent compte de tous les transferts financiers entre les services par satellite et le constructeur d'automobiles. Ils notent que les ententes conclues avec l'industrie de l'automobile engendrent deux types de coûts pour les services par satellite : une subvention de matériel et une part des revenus d'abonnement. En contrepartie, le constructeur d'automobiles souscrit un abonnement d'essai pour une courte période lorsque le véhicule est vendu. MM. Agrawal et McHale prennent aussi en considération le pourcentage de consommateurs qui renouvelleront l'abonnement une fois la période d'essai terminée.

[131] Les auteurs concluent, en incluant les montants d'abonnement d'essai et d'autres montants, que les services par satellite sont disposés à verser environ 45 pour cent des revenus d'abonnement provenant du secteur de l'automobile aux constructeurs d'automobiles.

[132] MM. Agrawal et McHale observent en outre que, selon l'enquête du Réseau Circum, 86 pour cent des abonnés actuels mettraient fin à leur abonnement à la radio par satellite si le volet

removed from the programming. Applying this to the proportion of 45 per cent leads the authors to conclude that the Satellite Services should be willing to pay 39 per cent of their revenues for music.

[133] The authors recognize, however, that music rights owners might not be able to capture all of the Satellite Services' willingness-to-pay. On the other hand, they also recognize that the Satellite Services might be "willing to pay" even more to car manufacturers. They conclude that it may be unsustainable for the Satellite Services to pay at the maximum they are willing to pay for each input.

[134] Dr. Reitman disagrees with the calculation with respect to the subscription fee for trial months paid for by the car manufacturer. Rather than include trial months paid by car manufacturers in the revenues of the Satellite Services, he suggests they should net out the payments the Satellite Services make to car manufacturers to subsidize the equipment and share subscription revenues. He argues that although this treatment of trial months should make no difference in terms of business decisions for the Satellite Services and car manufacturers, it has an important impact on the cost-benefit ratio. Dr. Reitman also proposes certain changes to the exchange rate calculation.

[135] The result is that he calculates an estimated willingness-to-pay of approximately 10 per cent, much lower than the 39 per cent estimated by Drs. Agrawal and McHale. Moreover, in Dr. Reitman's opinion the willingness-to-pay corresponds to payments for all music costs including music programming and only a proportion of it should constitute the tariff.

[136] In addition, Dr. Reitman notes that the Satellite Services would pay out more than their revenues if every input was remunerated at the maximum willingness-to-pay rate.

musical était supprimé. En multipliant ce chiffre par la proportion de 45 pour cent, les auteurs en viennent à la conclusion que les services par satellite seraient prêts à déboursier 39 pour cent de leurs revenus pour la musique.

[133] Les auteurs reconnaissent toutefois que les titulaires de droits sur la musique pourraient ne pas être en mesure de profiter pleinement de la volonté de payer des services par satellite. Ils reconnaissent par ailleurs que ces derniers pourraient être disposés à verser encore plus d'argent aux constructeurs d'automobiles. Ils concluent qu'il pourrait être peu viable pour les services par satellite de verser pour chaque intrant le montant maximal qu'ils sont prêts à payer.

[134] M. Reitman n'est pas d'accord avec la manière dont est fait le calcul pour ce qui est du tarif d'abonnement pour les mois d'essai que paie le constructeur d'automobiles. Au lieu d'inclure le produit des mois d'essai dans les revenus des services par satellite, M. Reitman propose plutôt de le déduire du montant qu'ils versent aux constructeurs d'automobiles au titre de la subvention de matériel et du partage des revenus d'abonnement. Bien que, selon lui, cette façon de traiter les mois d'essai ne modifie pas les décisions d'affaires des services par satellite et des constructeurs d'automobiles, elle a une incidence notable sur le ratio coûts-avantages. M. Reitman propose en outre certaines modifications au calcul du taux de change.

[135] Par conséquent, il estime la volonté de payer à environ 10 pour cent, ce qui est beaucoup moins que le 39 pour cent calculé par MM. Agrawal et McHale. M. Reitman croit en outre que la volonté de payer correspond aux paiements couvrant tous les coûts associés à la musique, y compris la programmation musicale, et que le tarif ne devrait représenter qu'une partie de ce montant.

[136] De plus, M. Reitman fait remarquer que les services par satellite déboursieraient un montant supérieur à leurs revenus si chaque intrant était rémunéré au taux maximum que ces services sont prêts à payer.

[137] Finally, Dr. Reitman calculates that, using the retail channel from which 75 per cent of customers originate, the Satellite Services are only paying 2-3 per cent of their revenues for a new subscriber-month. He argues that the Satellite Services are willing to pay more when it comes to car manufacturers because it provides brand equity to the service.

[138] The willingness-to-pay approach proposed by Drs. Agrawal and McHale is based on the assumption that the Satellite Services should be willing to pay the same amount for a new subscriber-month, whether it is attracted by the music offerings of the service or from an agreement with a car manufacturer. In our opinion, the evidence does not support this assumption. On the contrary, the evidence dealing with the retail channel is that willingness-to-pay can differ substantially between various inputs. Even the two car manufacturers do not obtain the same share of revenues from their agreements with the Satellite Services. Thus, the willingness-to-pay for a particular input does not appear to be a reliable proxy for the willingness-to-pay of another.

[139] When they began the negotiations with the car manufacturers, the Satellite Services had already incurred many of the costs required for providing the service and as a result, they were willing to pay a high rate to attract new customers, as long as the benefit exceeded the incremental cost. Drs. Agrawal and McHale recognize that one reason the car manufacturers might have been able to negotiate such a high share of revenues is because they arrived later in the development of the business. When negotiating with content providers, the Satellite Services were able to demonstrate they had to incur important start-up costs to deliver the service and as a result did not have a high profit margin to share. Once the service is in place and certain costs are unavoidable, the bargaining positions change. In theory, if a car manufacturer requested 99 per cent of revenues from every new

[137] Enfin, encore selon les calculs de M. Reitman, si l'on considère le réseau de détail d'où provient 75 pour cent de la clientèle, les services par satellite ne paient que l'équivalent de 2 ou 3 pour cent de leurs revenus pour un nouvel abonné-mois. Il affirme que les services par satellite sont prêts à déboursier plus lorsqu'ils traitent avec les constructeurs d'automobiles, parce que cela leur procure un capital de marque.

[138] L'approche fondée sur la volonté de payer que proposent MM. Agrawal et McHale repose sur l'hypothèse que les services par satellite seraient disposés à payer le même montant pour un nouvel abonné-mois, peu importe que celui-ci soit attiré par la programmation musicale ou d'une entente avec un constructeur d'automobiles. À notre avis, les faits ne vont pas dans le sens de cette hypothèse. Au contraire, les informations ayant trait au réseau de détail indiquent que la volonté de payer peut varier sensiblement selon les intrants; qui plus est, les deux constructeurs d'automobiles qui ont conclu une entente avec un service n'obtiennent pas la même part de revenus. En conséquence, la volonté de payer pour un intrant particulier ne semble pas être un indicateur fiable de la volonté de payer pour un autre.

[139] Lorsqu'ils ont entamé les négociations avec les constructeurs d'automobiles, les services par satellite avaient déjà engagé une bonne partie des dépenses nécessaires à la prestation du service et étaient donc disposés à payer un fort taux pour attirer de nouveaux clients, pourvu que le gain soit supérieur au coût marginal. MM. Agrawal et McHale reconnaissent que si les constructeurs d'automobiles sont parvenus à négocier une part des revenus aussi élevée, c'est peut-être parce qu'on les a approchés plus tard dans la mise en place du plan d'affaires. Lorsqu'ils ont négocié avec les fournisseurs de contenu, les services par satellite ont pu démontrer qu'ils devaient engager d'importants frais de démarrage pour assurer le service et que, par conséquent, leur marge bénéficiaire n'était pas très élevée. Une fois que le service est assuré et que certains coûts sont inévitables, les positions de

subscriber they sign up, it could still be accepted by the Satellite Services.

[140] For these reasons, the willingness-to-pay model is, in our opinion, fundamentally unsuited for the setting of a tariff. In general, the order of arrival of a particular input in a business should not make a difference to the tariff.

2. Shapley Value

[141] To address the problem of the order of arrival of a particular input, Drs. Agrawal and McHale propose to use the Shapley value approach, a methodology that models the Satellite Services as the result of an agreement between five members of a potential coalition: the Satellite Services and four content providers (music, news, sports and talk & entertainment).

[142] Drs. Agrawal and McHale examine the value of the five members of the coalition using data from Circum Network about the share of current subscribers that would unsubscribe if one or more members of the coalition were to withdraw from the agreement. They start with the proposition that nobody would subscribe to satellite radio if the Satellite Services were not part of the coalition, because there would be no service to provide the content; or if the Satellite Services were the only members of the coalition, they would have no content to offer subscribers. The survey asked respondents about the 32 possible coalitions, ranging from all the members in the coalition joining (where all of the current subscribers would subscribe) to no members joining (where none of the current subscribers would subscribe).

[143] Based on the 120 different ordering scenarios of the five members of the coalition, the authors determined the marginal value of each member, or

négociation changent. En théorie, si un constructeur d'automobiles exigeait 99 pour cent des revenus pour chaque nouvel abonné qu'il ajoute, il pourrait encore s'entendre avec les services par satellite.

[140] C'est pourquoi nous sommes d'avis que le modèle fondé sur la volonté de payer est fondamentalement inadéquat pour l'établissement d'un tarif. En règle générale, l'ordre d'arrivée d'un intrant particulier au cours du processus de développement d'une entreprise ne doit pas influencer sur le tarif.

2. Valeur de Shapley

[141] Pour résoudre le problème de l'ordre d'arrivée d'un intrant particulier, MM. Agrawal et McHale proposent de recourir à la méthode d'évaluation Shapley, qui permet de modéliser les services par satellite comme le résultat d'une entente conclue entre les cinq membres d'une coalition théorique : les services par satellite et quatre fournisseurs de contenu (musique, nouvelles, sports et contenu parlé-divertissement).

[142] MM. Agrawal et McHale examinent la valeur des cinq membres de la coalition en se servant de données du Réseau Circum portant sur la proportion d'abonnés qui résilieraient leur abonnement si un ou plusieurs membres de la coalition s'en retireraient. Ils posent au départ que personne ne s'abonnerait à la radio satellitaire si les services n'étaient pas membres de la coalition, car il n'y aurait alors personne pour diffuser le contenu; à l'inverse, si les services étaient seuls dans la coalition, ils n'auraient aucun contenu à offrir aux abonnés. Dans son enquête, le Réseau Circum a sondé l'opinion des répondants sur 32 coalitions possibles, allant de la participation de tous (où tous les abonnés conserveraient leur abonnement) à l'absence de participation (où personne ne conserverait son abonnement).

[143] S'appuyant sur les 120 scénarios de classement des cinq membres de la coalition, les auteurs ont calculé la valeur marginale de chaque

what they also call the Shapley value of the Satellite Services and the four content providers. This approach led Drs. Agrawal and McHale to estimate that music should receive 34 per cent of revenues, compared with 44 per cent for the Services, 5 per cent for news content, 7 per cent for sports content and 9 per cent for talk & entertainment content.

[144] In Dr. Reitman's opinion this approach should be adjusted to take into account the operating costs of the Satellite Services, since they reflect their own spending to attract and retain customers. Using projections of future Satellite Services costs, he estimates that operating costs constitute 84.2 per cent of revenues. Therefore, the Shapley approach is used to share the remaining 15.8 per cent of revenues between the five members of the coalition.

[145] Based on the data on listening time and on the reasons for the decision to subscribe, he obtains a value for music ranging from 5.5 to 6 per cent of revenues, using Sirius and XM data respectively. His results also show that the Services should be getting between 88 to 90 per cent, news content about 1 per cent, sports content between 1.1 and 1.3 per cent and talk & entertainment content between 3.1 and 4 per cent. Subtracting music programming costs (3.6 and 5.5 per cent for Sirius and XM, respectively), Dr. Reitman obtains a tariff proposal of 0.5 to 1.9 per cent.

[146] In our opinion, the Shapley approach is interesting by reason that it provides information on the fundamental value of music for Satellite Services. However, it relies heavily on data from a survey where respondents were questioned on hypothetical scenarios. Unfortunately, we do not have enough information to be able to test the variations and the stability of this model. Under these circumstances, we cannot use this approach. The parties could eventually further develop and better utilize it if they agreed on the model and the data collection methodology. This would permit the Board to analyse and validate the numbers.

membre, ou ce qu'ils appellent la valeur de Shapley des services par satellite et des quatre fournisseurs de contenu. Ils ont ainsi déterminé que les revenus devraient être répartis comme suit : 34 pour cent pour le contenu musical, 44 pour cent pour les services, 5 pour cent pour les nouvelles, 7 pour cent pour les sports et 9 pour cent pour le contenu parlé-divertissement.

[144] Selon M. Reitman, il faudrait modifier cette méthode pour qu'elle tienne compte des coûts d'exploitation des services par satellite, puisque ces coûts incluent les frais engagés par les services pour attirer et retenir la clientèle. En se fondant sur les prévisions budgétaires des services, M. Reitman a établi que les coûts d'exploitation égalent 84,2 pour cent des revenus. Il répartit ensuite les 15,8 pour cent restants entre les cinq membres de la coalition au moyen de la méthode Shapley.

[145] En se fondant sur les données sur les heures d'écoute et les motifs d'abonnement, il obtient pour le contenu musical une valeur entre 5,5 et 6 pour cent des revenus, en utilisant respectivement les données de Sirius et de XM. Ses résultats montrent également que les services devraient obtenir entre 88 et 90 pour cent, les nouvelles environ 1 pour cent, les sports entre 1,1 et 1,3 pour cent et le contenu parlé et le divertissement entre 3,1 et 4 pour cent. En soustrayant les coûts de la programmation musicale (3,6 et 5,5 pour cent des revenus pour Sirius et XM, respectivement), M. Reitman arrive à un tarif oscillant entre 0,5 et 1,9 pour cent.

[146] À notre avis, la méthode Shapley est intéressante parce qu'elle fournit de l'information sur la valeur fondamentale de la musique pour les services par satellite. Cependant, elle repose largement sur les données d'une enquête où les répondants sont questionnés sur des scénarios hypothétiques. Malheureusement, l'insuffisance des données ne nous permet pas de tester la variabilité et la stabilité de ce modèle. C'est pourquoi nous ne pouvons utiliser cette approche dans le cas présent. Les parties pourraient éventuellement la perfectionner et mieux l'utiliser si elles se mettaient d'accord sur le modèle et la méthodologie de collecte des données. La Commission serait alors en mesure d'analyser et de valider les résultats.

Cannibalization

[147] Drs. Agrawal and McHale argue that the presence of music on satellite radio has consequences on music revenues in other markets, notably CD sales and music downloads. In their opinion, if it were not for the compulsory licence, the Collectives would not accept to licence the use of music if the revenues resulting from the Satellite Services were inferior to the loss of revenues in other markets. Thus, the minimum tariff the Collectives would accept without the compulsory licence is a rate that would offset lost revenues in other markets.

[148] Using data that Circum Network obtained from current subscribers of the Satellite Services about the impact of their subscription on their purchase of CDs and music downloads, Drs. Agrawal and McHale estimate that the equivalent of \$2.58 per subscriber-month is lost as a result of the Satellite Services.

[149] Dr. Reitman opines that the surveys do not provide accurate answers in this case. In his opinion, to add a cannibalization effect to the tariff constitutes a surcharge, and a fair and equitable tariff does not require such an adjustment.

[150] Dr. Reitman also states that the results from Drs. Agrawal and McHale are substantially higher than other evidence. Using U.S. data and applying the same method as Drs. Agrawal and McHale leads to a cannibalization effect of \$1.10 per subscriber-month.

[151] In our opinion, the cannibalization effect is not a useful measure. If it is possible that the Collectives would refuse to be part of the Satellite Services if the revenues were inferior to the resulting losses in other markets, it is also possible that they would accept to be part of it if, for instance, they expected satellite radio to grow

Cannibalisation

[147] MM. Agrawal et McHale soutiennent que la diffusion de musique sur la radio satellitaire a des répercussions sur les revenus tirés de la musique dans d'autres marchés, notamment ceux du CD et du téléchargement. Selon eux, si ce n'était de la licence obligatoire, les sociétés de gestion n'accepteraient pas d'autoriser l'utilisation de musique si les revenus provenant des services par satellite ne compensaient pas le manque à gagner dans les autres marchés. Par conséquent, le tarif minimum qu'accepteraient les sociétés de gestion en l'absence de licence obligatoire est le taux par lequel on pourra compenser le manque à gagner dans les autres marchés.

[148] En se servant des données obtenues par le Réseau Circum lorsqu'ils ont demandé aux abonnés des services par satellite si le fait d'être abonné avait une incidence sur leurs achats de CD et de téléchargements, MM. Agrawal et McHale ont calculé un manque à gagner de 2,58 \$ par abonné-mois causé par les services par satellite.

[149] M. Reitman est d'avis que les enquêtes n'apportent pas de réponse précise dans ce cas. Selon lui, le fait de hausser le tarif pour tenir compte de l'effet de cannibalisation revient à appliquer une surcharge, et un tel ajustement n'est pas nécessaire lorsqu'il s'agit de fixer un tarif juste et équitable.

[150] M. Reitman souligne en outre que les chiffres de MM. Agrawal et McHale sont beaucoup plus élevés que d'autres. En utilisant des données des États-Unis et en appliquant la même méthode que MM. Agrawal et McHale, on calcule un effet de cannibalisation de 1,10 \$ par abonné-mois.

[151] Nous croyons que l'effet de cannibalisation n'est pas une mesure utile. S'il est possible que les sociétés de gestion refusent d'être partie prenante aux services par satellite si les revenus étaient inférieurs au manque à gagner dans les autres marchés, il se peut également qu'elles acceptent d'être partie prenante si, par exemple, elles

stronger in the future. The cannibalization effect, even if we could obtain a reliable measure, should not be added to the tariff, and should not be used as an indication of a minimum value either.

3. Efficiency Approach

[152] In this approach, the tariff is determined as the rate that maximizes the value of music for society. Drs. Agrawal and McHale believe that the establishment of a tariff implies a trade-off between the loss of subscribers arising from higher subscription costs and the increase of music production resulting from increased revenues for the industry. Therefore, the “optimal tariff” is determined by the rate where the incremental dynamic efficiency gain from additional music content offsets the incremental static efficiency loss from a reduced number of subscribers.

[153] In order to evaluate the static efficiency loss, the authors need to obtain an estimate of the elasticity of demand of subscribers. They used data from the Circum Network survey and found that subscribers would collectively accept an average increase of \$1.44 and that 73 per cent of them would retain their subscription if the price was increased by one dollar. They also found that, as economic theory predicts, there is a bigger sensitivity to the price of the firm people subscribe to, than to the price of the competing firm.

[154] Drs. Agrawal and McHale need to estimate how music revenue gain is translated into increased music content and how increased music content increases social surplus for society to evaluate the dynamic efficiency gain.

[155] Drs. Agrawal and McHale use data from a 2006 Canadian Heritage publication about annual revenues for the music industry and on production

prévoient que la radio satellitaire pourrait gagner en vigueur dans les années à venir. Même si nous pouvions obtenir une mesure fiable de l'effet de cannibalisation, celui-ci ne devrait pas entrer en ligne de compte dans l'établissement du tarif, ni servir d'indicateur de la valeur minimale.

3. Approche fondée sur l'efficacité

[152] Dans cette approche, le tarif est établi au taux qui maximise la valeur de la musique pour la société. MM. Agrawal et McHale croient que le calcul d'un tarif suppose que l'on fasse l'arbitrage entre la perte d'abonnés imputable à une hausse des tarifs d'abonnement et l'accroissement de la production musicale résultant de la hausse des revenus de l'industrie. Par conséquent, le « tarif optimal » correspond au taux auquel le gain d'efficacité dynamique résultant de l'enrichissement du contenu musical compense la perte d'efficacité statique résultant de la diminution du nombre d'abonnés.

[153] Afin d'évaluer la perte d'efficacité statique, les auteurs doivent calculer l'élasticité de la demande émanant des abonnés. En se servant des données de l'enquête du Réseau Circum, ils observent que les abonnés seraient prêts à payer, en moyenne, 1,44 \$ de plus pour le service et que 73 pour cent d'entre eux conserveraient leur abonnement si le tarif était haussé d'un dollar. Ils observent en outre que, comme le prévoit la théorie économique, le consommateur est plus sensible au tarif pratiqué par leur fournisseur qu'au tarif pratiqué par la concurrence.

[154] Pour évaluer le gain d'efficacité dynamique, MM. Agrawal et McHale doivent déterminer comment la hausse des revenus tirés de la musique se traduit par l'enrichissement du contenu musical et comment cet enrichissement se traduit à son tour par une augmentation du surplus social pour l'ensemble de la société.

[155] Les auteurs utilisent des données tirées d'une publication de Patrimoine canadien de 2006 portant sur les revenus annuels de l'industrie de la musique

of musical works. Using data from 2001 to 2004, for French and English music, Drs. Agrawal and McHale find that it costs about \$55,000 to generate an album. They argue this result is validated by Sellaband, a music corporation that collects money from consumers and holds these “micro-investments” in escrow until an artist raises \$50,000 allowing Sellaband to produce an album for that artist.

[156] In addition, they use data from Canadian Heritage to estimate that the average lifetime revenue of a new album is \$109,827. Applying basic economic theory, the authors calculate that half of that amount, or \$54,914, corresponds to the social surplus. Therefore, every additional dollar of revenue for the music industry generates approximately one additional dollar of dynamic efficiency gain (or social surplus).

[157] Drs. Agrawal and McHale are then able to resolve their model, since they have estimated how a tariff would induce the loss of subscribers and how that same tariff would induce additional music revenues from music sales. The maximization of these two contrasting effects leads them to an optimal tariff of 38 per cent of revenues (\$6.47 per month per subscriber). Drs. Agrawal and McHale state that this rate is optimal because it balances the costs and benefits from a tariff and maximizes the social welfare of Canadians.

[158] In Dr. Reitman’s opinion, the model proposed by Drs. Agrawal and McHale is not appropriate since it does not take into account the dynamic loss incurred by an increased tariff. In his opinion, as music becomes a higher cost input, potential new channels or new music services are dissuaded from entering the market.

[159] Dr. Reitman also criticizes Drs. Agrawal and McHale for not including subscriber acquisition

et la production d’œuvres musicales. Au moyen des données de la période 2001-2004, pour la musique française et anglaise, MM. Agrawal et McHale estiment à 55 000 \$ environ le coût de production d’un album. Ils affirment que ce chiffre est confirmé par Sellaband, une société de production musicale qui lève des fonds auprès des consommateurs et conserve ces « microinvestissements » en mains tierces jusqu’à ce qu’un artiste parvienne à mobiliser 50 000 \$, somme qui permet à Sellaband de produire un album pour cet artiste.

[156] En outre, les auteurs utilisent des données du Patrimoine canadien pour établir que les revenus que peut générer un nouvel album pour sa durée de vie s’élèvent à 109 827 \$. En appliquant des principes économiques de base, ils calculent que la moitié de cette somme, soit 54 914 \$, correspond au surplus social. Par conséquent, chaque dollar additionnel de revenu pour l’industrie de la musique engendre environ un dollar de gain d’efficience dynamique (ou de surplus social).

[157] MM. Agrawal et McHale sont donc maintenant en mesure de résoudre leur modèle, puisqu’ils ont déterminé de quelle manière un tarif peut influencer à la baisse sur le nombre d’abonnés et de quelle manière il peut aussi influencer à la hausse sur les revenus provenant des ventes de musique. En maximisant ces deux effets contraires, les auteurs arrivent à un tarif optimal de 38 pour cent des revenus (soit 6,47 \$ par mois par abonné). Ils affirment que ce taux est optimal, parce qu’il établit un juste équilibre entre les coûts et les avantages rattachés à un tarif et qu’il maximise le bien-être collectif des Canadiens.

[158] M. Reitman estime que le modèle proposé par MM. Agrawal et McHale n’est pas approprié, car il fait abstraction de la perte dynamique qui résulte de la hausse des tarifs. À son avis, si la musique devient un intrant de plus en plus coûteux, on sera de moins en moins tenté d’entrer sur ce marché.

[159] M. Reitman déplore en outre que MM. Agrawal et McHale n’aient pas inclus les

costs as a variable cost of operating the satellite services. This unique but important adjustment to the methodology leads Dr. Reitman to an optimal tariff of 5.2 per cent of revenues, compared with 38 per cent for Drs. Agrawal and McHale.

[160] Finally, Dr. Reitman notes that the model does not include language as a variable. He argues that this is a problem since revenues of the English music industry appear to be much higher than the French music industry.

[161] Dr. Reitman also finds that adding a language variable leads the model to predict that it would take a much higher level of additional revenue for the industry to lead to a new album, than the \$55,000 obtained by Drs. Agrawal and McHale. This would result in an optimal tariff of \$0.

[162] The relation between industry revenues and album production is essential to the model since it measures the dynamic efficiency gain resulting from the tariff. In our opinion, having only six observations and not being able to control for relevant variables like language is problematic for such an important component of the model. This problem with the methodology makes the approach very difficult to adopt.

[163] Once again, while we find the conceptual approach interesting, it is essential that it be based on high quality data, leading to results that are reliable and stable. That is not the case in this instance but, as noted, we think there are possibilities for such an approach in the future if there is reliable underlying data.

4. Benchmark Approach

[164] Having rejected the conceptual approaches proposed by the Collectives, we will now turn to how the parties propose to use the benchmark

coûts d'acquisition de la clientèle dans les coûts variables d'exploitation des services par satellite. Par cette seule mais importante correction méthodologique, M. Reitman calcule un tarif optimal de 5,2 pour cent des revenus, comparativement à 38 pour cent chez MM. Agrawal et McHale.

[160] Enfin, M. Reitman note que le modèle fait abstraction de la langue comme variable. Cela pose problème selon lui, car les revenus de l'industrie de la musique anglaise semblent beaucoup plus élevés que ceux de l'industrie de la musique française.

[161] M. Reitman a en outre constaté que si l'on ajoute la variable langue, le modèle estimera à un montant beaucoup plus élevé que le montant de 55 000 \$ obtenu par MM. Agrawal et McHale, les revenus additionnels qu'il faudra à l'industrie pour produire un nouvel album. Le tarif optimal serait donc de 0 \$.

[162] Le rapport entre les revenus de l'industrie et la production d'album est essentiel au modèle, car il permet de mesurer le gain d'efficacité dynamique qui résulte du tarif. À notre avis, le fait qu'on dispose de six observations seulement et qu'on ne soit pas en mesure de tenir compte de variables telles que la langue pose problème pour une composante aussi importante du modèle, d'où la très grande difficulté d'adopter cette approche.

[163] Ici encore, même si nous trouvons cette approche intéressante, il est essentiel qu'elle repose sur des données de qualité, garantissant la fiabilité et la stabilité des résultats. Or, ce n'est pas le cas ici, mais comme nous l'avons déjà mentionné, nous croyons que cette méthode offre des possibilités d'application dans l'avenir, pourvu qu'elle repose sur des données fiables.

4. Approche privilégiant un point de référence

[164] Ayant écarté les approches théoriques qu'ont proposées les sociétés de gestion, nous allons maintenant examiner comment les parties proposent

approach to establish the tariffs and then describe our approach to set the tariffs in this case.

Collectives

[165] Drs. Agrawal and McHale propose a benchmark methodology that establishes the total royalties that should be paid by Satellite Radio Services, and then proposes rules to divide the total among the three Collectives.

[166] Drs. Agrawal and McHale consider that DPA services are similar in nature to satellite radio services since both are subscription-based models and both focus on narrowly defined musical preferences. As the starting point, they use the rate of 26 per cent the Board used for DPA, before an adjustment for repertoire. A ratio of 1 to 3.2 (reproduction to communication ratio for commercial radio) is then applied to the 26 per cent rate to account for the value of the reproduction rate of both musical works and sound recordings. This leads to a total reproduction rate of about 8.1 per cent, and a total royalty rate of 34.1 per cent.

[167] After having initially applied a further correction to reflect higher value arising from portability offered by satellite radio, which DPA does not offer, Drs. Agrawal and McHale subsequently agreed with Dr. Reitman that the higher value from portability is already reflected in the subscription prices, and that a percentage tariff takes this higher value into consideration.

[168] Drs. Agrawal and McHale then examine possible adjustments that take into account the non-music content of satellite radio. They argue that contrary to DPA, not all satellite channels are music; about 60 per cent are. This in itself would

d'utiliser l'approche privilégiant un point de référence pour établir les tarifs, puis décrivons notre propre façon de fixer les tarifs dans les circonstances.

Les sociétés de gestion

[165] MM. Agrawal et McHale proposent une méthode impliquant de trouver d'abord un point de référence pour calculer le montant total des redevances que doivent verser les services de radio par satellite et proposent ensuite des règles pour répartir ce montant entre les trois sociétés de gestion.

[166] MM. Agrawal et McHale considèrent que les SSPN sont de même nature que les services de radio par satellite, puisqu'il s'agit dans les deux cas de services par abonnement et que ces deux types de services cherchent avant tout à répondre à des goûts musicaux ciblés. Les auteurs utilisent comme point de départ le taux de 26 pour cent dont s'est servie la Commission dans sa décision relative aux SSPN, avant un ajustement en fonction du répertoire. Ils multiplient ce taux par un rapport de 1 à 3,2 (le ratio reproduction - communication pour la radio commerciale) pour rendre compte de la valeur du taux de reproduction des œuvres musicales et des enregistrements sonores, ce qui donne un taux de reproduction global d'environ 8,1 pour cent et un taux de redevances global de 34,1 pour cent.

[167] Après avoir introduit initialement une autre correction pour tenir compte de la valeur additionnelle que représente la portabilité offerte par la radio satellitaire, ce que n'offre pas les SSPN, MM. Agrawal et McHale ont par la suite partagé l'avis de M. Reitman selon lequel les coûts d'abonnement reflètent déjà cette valeur additionnelle, et qu'un tarif exprimé en pourcentage en tient compte.

[168] MM. Agrawal et McHale se penchent ensuite sur les corrections qui pourraient être introduites pour tenir compte du contenu non musical de la radio satellitaire. Ils affirment que contrairement aux SSPN, tous les canaux par satellite ne sont pas

justify a downward adjustment. However, it is compensated by the fact that satellite radio offers more music channels than DPA. To resolve this, they propose an adjustment to reflect the fact that not all subscribers to satellite radio subscribe to the service for music. Drs. Agrawal and McHale use the percentage of subscribers that would stop subscribing if music was removed from satellite radio, i.e., 86 per cent to make the last adjustment which results in an overall royalty rate of 29 per cent.

[169] SOCAN and NRCC argue that based on past decisions of the Board, they should get equal value, and CSI should get about one-third of SOCAN's rate. If one applies this calculation to the 29 per cent rate calculated by Drs. Agrawal and McHale, it results in a SOCAN (or NRCC) rate of 12.5 per cent and a CSI rate of 4.0 per cent. By adjusting the 12.5 per cent rate to account for the repertoire use (91.19 per cent and 27 per cent of programming time for SOCAN and NRCC, respectively) results in final rates of 11.4 per cent for SOCAN and 3.4 per cent for NRCC.

[170] CSI contends there are two types of reproduction activities involved in satellite radio. First, the reproduction right is used in the operation of the service, which includes reproductions as part of programming activities, the 4 to 6 second buffer, the pause and replay feature and the Internet streaming services. Second, reproductions are also initiated by the subscribers (and authorized by the service).

[171] Mr. Audley and Dr. Hyatt argue on behalf of CSI that neither the commercial radio nor the DPA tariff can be used as a proxy for the tariff, because neither of them includes a value for the authorization right. They argue the best proxy is the rate certified by the Board on limited downloads of

dédiés à la musique; environ 60 pour cent le sont. Cette proportion justifierait en soi une correction à la baisse. Cependant, il faut aussi prendre en considération le fait que la radio satellitaire offre un plus grand nombre de canaux musicaux que les SSPN. Pour résoudre ce dilemme, les auteurs proposent une correction qui tienne compte du fait que certains clients de la radio satellitaire s'abonnent pour autre chose que la musique. Ils introduisent cette dernière correction en se servant du pourcentage d'abonnés qui résilieraient leur abonnement si le volet musical était supprimé, soit 86 pour cent, ce qui donne un taux de redevances global de 29 pour cent.

[169] S'appuyant sur des décisions antérieures de la Commission, la SOCAN et la SCGDV prétendent qu'elles ont droit à des redevances d'égale valeur et que CSI a droit à environ un tiers du taux de la SOCAN. Si l'on applique ces principes au taux de 29 pour cent calculé par MM. Agrawal et McHale, on arrive à un taux de 12,5 pour cent pour la SOCAN (ou la SCGDV) et un taux de 4,0 pour cent pour CSI. En corrigeant le taux de 12,5 pour cent en fonction de l'utilisation du répertoire (soit 91,19 pour cent du temps d'antenne pour la SOCAN et 27 pour cent pour la SCGDV), on obtient finalement un taux de 11,4 pour cent pour la SOCAN et de 3,4 pour cent pour la SCGDV.

[170] CSI prétend que la radio satellitaire suppose deux types d'activités de reproduction. Premièrement, le droit de reproduction est utilisé dans le cadre des opérations normales du service (programmation, tampon de 4 à 6 secondes, fonction pause-reprise, et services en lecture continue sur Internet). Deuxièmement, des reproductions sont également faites par les abonnés (et autorisées par le service).

[171] MM. Audley et Hyatt, témoignant pour CSI, affirment que ni le tarif de la radio commerciale ni celui des SSPN ne peuvent servir d'indicateur pour le présent tarif parce qu'aucun d'eux ne renferme une valeur pour le droit d'autorisation. Ils soutiennent que le meilleur indicateur est le taux

online music services because of the recording features on some receivers. Even though these recording features are not currently used to a significant degree, what is important is that subscribers have the option of buying receivers with these features and have the option of making these reproductions.

Satellite Radio Services

[172] Dr. Reitman agrees with Drs. Agrawal and McHale regarding the adjustment to include the reproduction right in the tariff. He disagrees, however, with the adjustment used by Drs. Agrawal and McHale concerning non-music content, which is based on the percentage of subscribers that would cancel their subscription if music was subtracted from the programming. Dr. Reitman believes that, because the sum of these percentages for all the various content providers is much higher than 100 per cent (172 per cent), the adjustment should be closer to 50 per cent or 40 per cent.

[173] In addition, Dr. Reitman argues that Drs. Agrawal and McHale omitted an important adjustment. DPA services are provided at the wholesale level and if one applies the unadjusted DPA rate to satellite radio services, which are provided at the retail level, this results in royalties far higher than would otherwise be the case by using the DPA benchmark. After applying the appropriate adjustments, Dr. Reitman suggests the appropriate rate should be in the range of 1.6 to 6.5 per cent.

[174] Mr. Goldstein, Sirius' expert, argues that commercial radio, rather than DPA, should be used as the benchmark. He contends that commercial and satellite radios are close markets by reason that they are competitive substitutes, listeners use both types of radio in similar ways, and the use of music is similar between the two (and more so than between satellite and pay audio). He thus uses the rates of 4.4 per cent (music stations) and 1.5 per cent (low-use stations) as starting points.

homologué par la Commission pour les téléchargements limités de musique en ligne parce que certains récepteurs sont munis d'une fonction d'enregistrement. Même si cette fonction est encore relativement peu utilisée, ce qui importe est que les abonnés ont la possibilité d'acheter ces récepteurs et de faire des reproductions.

Les services de radio par satellite

[172] M. Reitman est d'accord avec MM. Agrawal et McHale pour ce qui est de la correction à introduire pour que le tarif rende compte du droit de reproduction. Il réfute toutefois la proposition de MM. Agrawal et McHale concernant l'ajustement portant sur le contenu non musical, qui repose sur la proportion d'abonnés qui résilieraient leur contrat si le volet musical était supprimé. Selon M. Reitman, étant donné que la somme des pourcentages associés aux divers fournisseurs de contenu excède de beaucoup 100 pour cent (172 pour cent), le facteur d'ajustement devrait être plus près de 40 ou 50 pour cent.

[173] M. Reitman affirme en outre que MM. Agrawal et McHale ont omis une correction importante. Les SSPN sont offerts au niveau du gros et si l'on applique le taux SSPN non corrigé aux services de la radio par satellite, qui, eux, sont offerts au niveau du détail, on obtient un montant de redevances beaucoup plus élevé qu'il ne le serait autrement. Après avoir apporté les ajustements nécessaires, M. Reitman pense qu'un taux se situant entre 1,6 et 6,5 pour cent serait approprié.

[174] Selon le témoin expert de Sirius, M. Goldstein, on devrait utiliser la radio commerciale, plutôt que les SSPN, comme point de référence. Il soutient que la radio commerciale et satellitaire constituent des marchés similaires pour trois raisons : ce sont des substituts concurrentiels, les auditeurs en font un usage semblable, et l'utilisation de musique est similaire dans l'une et l'autre (bien plus qu'entre la radio satellitaire et les SSPN). Il utilise donc comme valeurs initiales les taux de 4,4 pour cent (stations de musique) et de 1,5 pour cent (stations à faible utilisation de musique).

[175] Mr. Goldstein makes a first adjustment to account for the higher use of music by the music satellite radio channels. He starts from the music use rate of 94 per cent for music channels, as agreed among the parties. He then revises this rate by including from the list of non-music channels, six additional ones that, according to the percentage of sound recordings in programming time, should be classified as music channels. He obtains a revised estimate of music use by music channels of 90.2 per cent of the programming time. Comparing this percentage to the percentage of music use by commercial radio, 76.1 per cent, leads to an adjusted rate of 5.2 per cent ($= 4.4 \times 90.2 \div 76.1$).

[176] Using this rate of 5.2 per cent for the 71 music channels that are part of Sirius offerings, and the rate of 1.5 per cent for the 38 non-music channels, Mr. Goldstein obtains a weighted average rate of 3.9 per cent. A further correction is made to account for the use of SOCAN's repertoire, at 0.9119. This brings the final SOCAN rate to 3.57 per cent.

[177] The rate for NRCC is obtained by adjusting the 3.9 per cent rate to take into account NRCC's repertoire use of 0.27. This leads to a NRCC rate of 1.06 per cent. Finally, for CSI, Mr. Goldstein first takes a proportion of 1 to 3.2 of the SOCAN rate of 3.9 per cent and then applies a repertoire adjustment of 0.705. This leads to a final CSI rate of 0.86 per cent.

[178] Mr. Goldstein argues that these rates should be applied to revenues from programming activities and that operations similar to broadcast distribution undertakings should not generate royalties to rights owners. While he first estimated that BDU-like activities constituted about 50 per cent of all satellite radio activities, additional analysis brought him to

[175] M. Goldstein introduit une première correction pour tenir compte de la place relativement plus importante qu'occupe la musique dans les canaux musicaux de radio satellitaire. Il part du taux d'utilisation de musique de 94 pour cent sur lequel se sont mises d'accord les parties en ce qui concerne les canaux musicaux. Il corrige ensuite ce taux en ajoutant de la liste des canaux non dédiés à la musique six canaux qui, suivant le pourcentage d'enregistrements sonores sur le temps d'antenne, devraient être classés comme des canaux musicaux. Il arrive ainsi à un taux d'utilisation de musique corrigé de 90,2 pour cent pour les canaux musicaux. En mettant en rapport ce taux et le taux d'utilisation de musique par la radio commerciale, soit 76,1 pour cent, il obtient un taux rajusté de 5,2 pour cent (soit $4,4 \times 90,2 \div 76,1$).

[176] En utilisant le taux ainsi calculé pour les 71 canaux musicaux qui font partie de l'offre de Sirius et le taux de 1,5 pour cent pour les 38 canaux non musicaux, M. Goldstein obtient un taux moyen pondéré de 3,9 pour cent. Une autre correction est introduite pour tenir compte du taux d'utilisation du répertoire de la SOCAN, soit 0,9119, ce qui donne finalement un taux de 3,57 pour cent pour cette société de gestion.

[177] Le taux auquel a droit la SCGDV est obtenu en corrigeant le taux de 3,9 pour cent par un facteur de 0,27, qui tient compte de l'utilisation de son répertoire. Cette correction mène à un taux de 1,06 pour cent. Enfin, pour CSI, M. Goldstein multiplie le taux de la SOCAN de 3,9 pour cent par le ratio de 1 à 3,2, et applique un ajustement de répertoire de 0,705. Le taux final obtenu pour CSI est de 0,86 pour cent.

[178] M. Goldstein fait valoir que ces taux devraient être appliqués aux revenus de programmation et que les activités assimilables à de la distribution de radiodiffusion ne devraient pas générer des redevances pour les titulaires de droits. S'il a évalué au départ que les activités assimilables à de la radiodiffusion constituaient environ la moitié

conclude that programming activities represented only 30 per cent of all revenues.

[179] Finally, Ms. Sherry Kerr, Vice-President and General Counsel of Sirius Canada Inc., filed a report that proposes a benchmark approach to set the CSI rate for the reproduction right. Ms. Kerr analysed the various types of reproduction activities that satellite radio undertakes.

[180] With regard to reproductions in the programming of the service, Ms. Kerr assumes that Canadian satellite radio and commercial radio stations make a similar use. Thus, the proxy to apply to this type of reproduction is the CSI rate for commercial radio. She proposes to adjust this rate to take into account the higher music use of the music channels. She applies a further reduction of 50 per cent to account for the wholesale/retail difference. This leads to a rate of 0.47 per cent on gross income above the first \$1.25 million (0.16 and 0.31 per cent of the first two tranches of \$625,000). In addition, she proposes that the rate apply only to Canadian produced channels and that the revenue base consist of gross income of the satellite operator multiplied by the listening share of the channel.

[181] For extended buffer and radio replay functions, Ms. Kerr starts from the 5.2 per cent rate obtained by Mr. Goldstein. She also uses Mr. Goldstein's initial assumption that only 50 per cent of the rate base should be subjected to royalties. Hence, her starting point is a rate of 2.6 per cent. Ms. Kerr uses the rates certified by the Board for Internet streaming as an indication of the ratio to use to obtain a reproduction rate. The rate certified for reproduction is 4.6, which represents 38 per cent of the total (of communication and

de toute l'activité de la radio satellitaire, il en est venu à conclure grâce à une analyse plus approfondie que la programmation n'expliquait que 30 pour cent du total des revenus.

[179] En dernier lieu, M^{me} Sherry Kerr, vice-présidente et directrice des affaires juridiques de Sirius Canada inc., a déposé un rapport dans lequel elle propose d'établir le taux de CSI pour le droit de reproduction au moyen d'une approche privilégiant un point de référence. M^{me} Kerr a analysé les divers types d'activités de reproduction qu'exerce la radio satellitaire.

[180] En ce qui concerne les reproductions faites dans le cadre de la programmation, M^{me} Kerr suppose que les radios par satellite et les stations de radio commerciales au Canada ont des pratiques semblables. Par conséquent, l'indicateur à considérer pour ce type de reproduction est le taux de CSI pour la radio commerciale. M^{me} Kerr propose de rajuster ce taux pour tenir compte de la place plus importante qu'occupe la musique dans les canaux musicaux. Elle introduit ensuite une réduction de 50 pour cent pour tenir compte de la différence entre le gros et le détail. Elle obtient ainsi un taux de 0,47 pour cent, applicable au montant excédant le premier 1,25 million de dollars de revenus bruts (0,16 et 0,31 pour cent sur les deux premières tranches de 625 000 \$). Elle propose en outre que seuls les canaux de production canadienne soient assujettis à ce taux et que l'assiette de revenus soit définie comme le produit du revenu brut de l'exploitant de satellite par la part d'écoute du canal.

[181] En ce qui concerne les fonctions de tampon prolongé et d'écoute en différé, M^{me} Kerr utilise comme point de départ le taux de 5,2 pour cent calculé par M. Goldstein. Elle reprend aussi l'hypothèse de départ de ce dernier, selon laquelle seulement la moitié de l'assiette tarifaire devrait être assujettie à une redevance. Elle s'appuie donc au départ sur un taux de 2,6 pour cent. Enfin, elle se sert des taux homologués par la Commission pour la transmission sur demande sur Internet comme indicateur du ratio à utiliser pour calculer un taux

reproduction rate) of 12.2 per cent. The adjusted rate is thus 0.988 (= 2.6 per cent \times 0.38).

[182] Ms. Kerr makes two further adjustments to take into account the share of music in the total value, estimated by Dr. Reitman to be 55 per cent, and the use of CSI's repertoire. For the latter, she adjusts for the difference between the use of the repertoire by satellite radio (70 per cent) and commercial radio (80 per cent). The final rate is 0.4755 per cent (= $0.988 \times 0.55 \times (70 \div 80)$).

[183] For reproductions initiated by subscribers, Ms. Kerr argues that the appropriate proxy is limited downloads rather than streaming. The rates certified by the Board for limited downloads are 6.3 per cent for communication and 5.9 per cent for reproduction. The adjusted rate is thus 1.3 per cent (= $2.6 \times 5.9 \div 12.2$).

[184] Ms. Kerr further distinguishes between two types of reproductions initiated by subscribers: the storing of blocks of programming, and of individual songs. For the former, Ms. Kerr suggests making the same adjustments as before, resulting in a final rate of 0.626 per cent (= $1.3 \text{ per cent} \times 0.55 \times 70 \div 80$). For the latter, Ms. Kerr suggests that no downward adjustment be applied since subscribers may only store individual songs. However, she adds that given the uncertainty as to how many reproductions are being made, the Board might still consider a discount. Thus, for individual songs, she suggests a rate of 1.14 per cent (= $1.3 \times 70 \div 80$).

Approach Used⁷⁸

[185] We agree with the Collectives' use of DPA as the proxy subject to certain adjustments. The mix of

de reproduction. Le taux homologué pour la reproduction est de 4,6, ce qui équivaut à 38 pour cent du taux global (communication et reproduction combinées) de 12,2 pour cent. Le taux corrigé est donc de 0,988 (soit 2,6 pour cent \times 0,38).

[182] M^{me} Kerr introduit deux nouvelles corrections pour tenir compte de la part de la musique dans la valeur totale, que M. Reitman estime à 55 pour cent, et de l'utilisation du répertoire de CSI. Dans le second cas, elle tient compte de la différence entre le taux d'utilisation du répertoire de la radio satellitaire (70 pour cent) et de la radio commerciale (80 pour cent). Elle arrive finalement à un taux de 0,4755 pour cent (soit $0,988 \times 0,55 \times (70 \div 80)$).

[183] Pour les reproductions faites par les abonnés, M^{me} Kerr soutient que l'indicateur approprié est le taux pour les téléchargements limités plutôt que celui pour les transmissions sur demande. Les taux homologués par la Commission pour les téléchargements limités sont de 6,3 pour cent pour la communication et de 5,9 pour cent pour la reproduction. Le taux corrigé est donc de 1,3 pour cent (soit $2,6 \times 5,9 \div 12,2$).

[184] M^{me} Kerr fait en outre la distinction entre deux types de reproductions effectuées par les abonnés : le stockage de blocs d'émissions et le stockage de chansons individuelles. Dans le premier cas, M^{me} Kerr propose d'effectuer les mêmes corrections que précédemment, ce qui donne en définitive un taux de 0,626 pour cent (soit $1,3 \text{ pour cent} \times 0,55 \times 70 \div 80$). Dans le second cas, elle propose qu'aucune correction à la baisse ne soit apportée puisque les abonnés ne peuvent stocker que des chansons individuelles. Elle ajoute toutefois que comme on ignore le nombre exact de reproductions qui sont faites, la Commission pourrait toujours envisager d'introduire une correction à la baisse. En conséquence, elle propose un taux de 1,14 pour cent pour les chansons individuelles (soit $1,3 \times 70 \div 80$).

Approche retenue⁷⁸

[185] Nous souscrivons à la proposition des sociétés de gestion d'utiliser le taux pour les SSPN

satellite radio programming that brings together “music” and “non-music” channels has some similarity to the programming offered by commercial radio, but the music channel component of the satellite radio service is much closer to DPA in terms of the prevalence, importance and use of music. Satellite music channels are based on strong genre segmentation, a feature that is very similar to DPA. And finally, both business models are subscriber-based, even though DPA services are not directly “observable” by the consumers. Therefore, we will use DPA as the proxy for the rates to be established for the various collectives.

SOCAN

[186] Our starting point for SOCAN is the rate established by the Board for DPA, that is, 13 per cent – with a number of adjustments. First, we must adjust for the fact that the DPA rate was set at the “wholesale” level, while the rate for satellite radio is at the “retail” level.

[187] Dr. Reitman proposes to use the payments made to content providers to calculate the appropriate tariff. In our opinion, these payments underestimate the true “wholesale value” of the music programming. The affiliation revenues DPA services receive from cable operators pay for a variety of expenses of which programming is only one. DPA services incur other expenses: technical resources, sales, promotion and administration services. The equivalent expenses incurred by the Services are higher than just the payment for content. In addition, the main business of the content providers is not selling programming to the Services. In our opinion, this is a reason to find that the prices negotiated with the Services are less than their true competitive value.

comme indicateur, moyennant certains ajustements. La gamme des émissions de radio satellitaire qui combine canaux « musicaux » et « non musicaux » ressemble à certains égards à la programmation offerte par la radio commerciale, mais les canaux de musique qu’offre la radio satellitaire se rapprochent beaucoup plus des SSPN en ce qui a trait à l’importance, la prépondérance et l’utilisation de la musique. Les canaux musicaux par satellite reposent sur une forte segmentation des genres, une caractéristique très proche des SSPN. Enfin, les deux modèles d’affaires reposent sur le principe de l’abonnement, même si les SSPN ne sont pas directement « observables » du point de vue du consommateur. Nous nous servons donc des taux applicables aux SSPN pour nous guider dans l’établissement des taux applicables aux sociétés de gestion collective.

SOCAN

[186] Pour la SOCAN, notre point de départ est le taux qu’a établi la Commission pour les SSPN, soit 13 pour cent, avec plusieurs ajustements. Premièrement, nous devons tenir compte du fait que le taux pour les SSPN a été fixé au niveau du gros, tandis que le taux pour la radio satellitaire s’applique au niveau du détail.

[187] Pour calculer le tarif approprié, M. Reitman propose de se fonder sur les montants versés à des fournisseurs de contenu. À notre avis, ces montants sous-estiment la vraie « valeur de gros » de la programmation musicale. Les paiements d’affiliation que les SSPN reçoivent des câblodistributeurs servent à couvrir des dépenses autres que celles liées à la programmation. Ces fournisseurs ont d’autres dépenses à supporter : ressources techniques, ventes, promotion et services administratifs. Le montant des dépenses correspondantes que doivent supporter les Services est plus élevé que le seul montant à verser pour le contenu. De plus, la principale activité des fournisseurs de contenu n’est pas de vendre des émissions aux Services. C’est pourquoi nous croyons que les tarifs négociés avec les Services sont inférieurs à leur valeur réelle sur le marché concurrentiel.

[188] Mr. Goldstein examined the various activities performed by Satellite Radio Services and concluded that there are essentially two functions: the first is programming; the second is all other, non-programming activities such as the cost of using the satellite, the cost of subsidizing the receivers and the cost of providing customer services.

[189] Mr. Goldstein equates these latter functions to a broadcast distribution undertaking (BDU). He argues that several indicators point to these functions being shared equally in total expenses. He assumes, therefore, that the BDU function represents about 50 per cent of all activities of satellite radio.

[190] Mr. Goldstein later revised his estimate of this proportion to something between 21 and 30 per cent, depending on whether satellite radio is being compared to DPA or to commercial radio. This revision was based on a detailed analysis of the cost structure of satellite radio. Ms. Colette Matteau's cross-examination of Mr. Goldstein on this issue made it clear that his analysis of similarities between cost categories of satellite radio and DPA or commercial radio is at best very imprecise, and mostly reflected personal judgment. We therefore prefer to rely on Mr. Goldstein's initial estimate of 50 per cent.

[191] The adjusted rate, after deducting the percentage attributable to the BDU function of the satellite radio service is 6.5 per cent.

[192] Next the proxy must be further adjusted to account for the difference in music use. The parties agree the music channels use music 94 per cent of programming time. The Erin Research study found that non-music channels use music 22.7 per cent of programming time. However, as pointed out by Mr. Goldstein, many of the "non-music" channels

[188] M. Goldstein a examiné les diverses activités des services de radio par satellite et a conclu que la radio par satellite accomplit essentiellement deux fonctions : la programmation et l'ensemble des autres activités, notamment celles liées à l'exploitation du satellite, à la subvention de l'achat de récepteurs, et aux services à la clientèle.

[189] M. Goldstein assimile la seconde fonction à celle d'une entreprise de distribution de radiodiffusion (EDR). Il affirme que plusieurs indications portent à croire que chacune de ces activités représente une part égale des dépenses totales. Il suppose donc que la fonction EDR englobe environ 50 pour cent des activités de la radio satellitaire.

[190] M. Goldstein a par la suite révisé son estimation, établissant cette proportion entre 21 et 30 pour cent, selon que la radio satellitaire est comparée aux SSPN ou à la radio commerciale. Cette révision s'appuyait sur une analyse détaillée de la structure des coûts de la radio satellitaire. Le contre-interrogatoire de M. Goldstein par M^e Colette Matteau sur cette question a démontré clairement que l'analyse faite des points de ressemblance entre les catégories de coûts de la radio satellitaire et des SSPN ou de la radio commerciale était au mieux très approximative et largement influencée par le jugement personnel de l'auteur. Par conséquent, nous nous fonderons plutôt sur l'estimation initiale de M. Goldstein, à savoir 50 pour cent.

[191] Le taux corrigé est donc de 6,5 pour cent, déduction faite du pourcentage que représente la fonction EDR dans la radio satellitaire.

[192] Il faut ensuite corriger l'indicateur pour tenir compte de la différence dans l'utilisation de musique. Les parties conviennent que la musique occupe 94 pour cent du temps d'antenne des canaux musicaux. Selon l'étude d'Erin Research, les canaux non musicaux consacrent 22,7 pour cent de leur temps d'antenne à la musique. Or, comme l'a

use music more than 20 per cent of programming time, the Board's usual definition of low use.

[193] We use the Erin Research results to include as low-use channels, the ones that use music less than 20 per cent of their programming time. Of the "non-music" channels identified by Erin Research, 31 used music more than 20 per cent of program time. The average use was 36.5 per cent. This affects the average use of music for music channels. The result is that the average rate of music use for music channels is 83.2 per cent. The remaining non-music channels used music an average of 10.7 per cent. This results in increasing the percentage of music channels to 72 per cent of the total. The remainder, 28 per cent, represents the non-music channels.

[194] Since DPA services use music 100 per cent of program time, the 6.5 per cent rate obtained before must be adjusted by taking a proportion of 0.832. This results in a rate of 5.41 per cent.

[195] Finally, we must account for the amount of music used by the Satellite Radio Services that is in SOCAN's repertoire. In its statement of case, SOCAN assumed that the equivalent of 4 out of 134 music channels used music in the public domain. This translates into 97 per cent of music that is part of SOCAN's repertoire. The Satellite Radio Services do not contest this number and use it in their proposed rate calculations. The rate to apply to the music channels, adjusted for SOCAN's repertoire, is thus 5.25 per cent.

[196] We now deal with low-use channels, which have no equivalent in DPA services programming.

souligné M. Goldstein, bon nombre des canaux dits « non musicaux » consacrent plus de 20 pour cent de leur temps d'antenne à la musique, pourcentage que la Commission utilise normalement pour établir le seuil de faible utilisation de musique.

[193] Nous nous servons des résultats de l'étude d'Erin Research pour identifier comme canaux à faible utilisation de musique ceux qui y consacrent moins de 20 pour cent de leur temps d'antenne. Parmi les canaux « non musicaux » repérés par Erin Research, 31 réservaient plus de 20 pour cent de leur temps d'antenne à la musique, la moyenne étant de 36,5 pour cent. Cette proportion influe sur le taux moyen d'utilisation de musique pour les canaux musicaux. En effet, le taux moyen d'utilisation de musique pour les canaux musicaux est de 83,2 pour cent, tandis que le taux correspondant pour les canaux non musicaux est de 10,7 pour cent. Ceci porte à 72 pour cent du total la proportion des canaux musicaux, le reste (28 pour cent) étant constitué des canaux non musicaux.

[194] Les SSPN consacrent 100 pour cent de leur temps d'antenne à la musique; en conséquence, le taux de 6,5 pour cent obtenu précédemment doit être ajusté par une proportion de 0,832, ce qui mène à un taux de 5,41 pour cent.

[195] Enfin, nous devons tenir compte de la quantité de musique utilisée par les services de radio par satellite qui provient du répertoire de la SOCAN. Dans son énoncé de cause, la SOCAN a supposé que l'équivalent de 4 des 134 canaux musicaux faisaient usage de musique dans le domaine public, ce qui revient à dire que 97 pour cent de la musique appartient au répertoire de la SOCAN. Les services de radio par satellite ne contestent pas ce pourcentage et l'utilisent dans leur proposition de calcul des taux. Par conséquent, le taux applicable aux canaux musicaux, après correction en fonction du répertoire de la SOCAN, est de 5,25 pour cent.

[196] Nous examinons maintenant le cas des canaux à faible utilisation de musique, qui n'ont pas

We will use commercial radio as the proxy, where the rate for low-use stations is 1.5 per cent. This rate needs to be adjusted to reflect the higher value of music that was used for the main rate. The use of DPA as the proxy for the main rate results in an overall value of music that is higher than for commercial radio (i.e., 5.25 per cent as opposed to an effective rate of 4.2 per cent). This higher value is the result of two factors: a higher value for music, and a higher use of music. Only the former must be applied to the low use rate.

[197] If we apply a rate of music use of 76.1 per cent (rather than 83.2 per cent) to adjust for music use, the final rate for SOCAN would be 4.8 per cent for music channels. The difference between 4.8 per cent and 4.2 per cent, is 14 per cent and reflects the difference in the value of music. If we apply this calculation to the low-use rate of 1.5 per cent, the adjusted rate is 1.71 per cent.

[198] There is no evidence that the Satellite Radio Services have the capability to allocate portions of their total revenues to music or non-music channels. These services are sold as a package for a single subscription fee. Thus, we certify a single rate of 4.26 per cent, which constitutes the weighted average of the rate set above for music channels, 5.25 per cent, and the rate set for low-use channels, 1.71 per cent.

NRCC

[199] The parties agree that 27 per cent of the music used by the satellite music channels consists of NRCC's repertoire. The SOCAN blended rate of 4.26 per cent was adjusted to take into account the small percentage of the music that is not part of SOCAN's repertoire. The uncorrected rate is 4.39 per cent ($= 4.26 \div 0.97$) which, when multiplied by

d'équivalent chez les SSPN. Nous retenons comme indicateur la radio commerciale, où le taux pour les stations à faible utilisation de musique est de 1,5 pour cent. Ce taux doit être rajusté pour tenir compte de la valeur supérieure de la musique qui a servi à l'établissement du taux principal. Si l'on retient les SSPN comme indicateur pour le taux principal, on arrive à une valeur globale de la musique plus élevée que pour la radio commerciale (soit 5,25 pour cent contre un taux effectif de 4,2 pour cent). Cette différence est le résultat de deux facteurs : une valeur plus grande pour la musique, et une utilisation plus grande de la musique. Seul le premier doit être appliqué au taux de faible utilisation.

[197] Si on appliquait un taux d'utilisation de 76,1 pour cent (plutôt que 83,2 pour cent) pour tenir compte de l'utilisation relative de musique, le taux final pour la SOCAN serait de 4,8 pour cent pour les canaux musicaux. L'écart entre ce pourcentage et 4,2 pour cent, soit 14 pour cent, reflète la différence dans la valeur de la musique. Si on applique cette différence au taux de 1,5 pour cent, on obtient un taux corrigé de 1,71 pour cent.

[198] Rien n'indique que les services de radio par satellite soient en mesure de répartir leurs revenus totaux entre les canaux musicaux et non musicaux. Ces services sont offerts par bloc moyennant un tarif d'abonnement unique. Nous homologuons donc un taux unique de 4,26 pour cent, qui est égal à la moyenne pondérée du taux établi plus tôt pour les canaux musicaux, soit 5,25 pour cent, et du taux fixé pour les canaux à faible utilisation, soit 1,71 pour cent.

SCGDV

[199] Les parties conviennent que 27 pour cent de la musique utilisée par les canaux musicaux par satellite provient du répertoire de la SCGDV. On a corrigé le taux pondéré de 4,26 pour cent calculé pour la SOCAN pour tenir compte du faible pourcentage de la musique qui ne provient pas du répertoire de cette société. À partir d'un taux non

27 per cent produces a blended rate of 1.18 per cent, which is the rate we certify for NRCC.

CSI

[200] The approach proposed by Mr. Goldstein with respect to the CSI rate is not acceptable. Mr. Goldstein uses a ratio of 1 to 3.2 derived from the rates prevailing for commercial radio when the evidence demonstrates that the reproduction activities are much more important to the Satellite Radio Services than they are for commercial radio. Commercial radio does not have buffers, radio replays or reproductions initiated by users. These additional functions of the Satellite Services have to be taken into account in calculating the rate for CSI. The commercial radio proxy is simply inadequate.

[201] We also reject the proposal by Mr. Audley and Dr. Hyatt to use the rate set for CSI for limited downloads by online music services. The “limited downloads” services offered by the Satellite Services are available to about 3 per cent of all satellite subscribers. Mr. Audley and Dr. Hyatt contend that the tariff rate should reflect the value of this option, and every subscriber has the option of using this service. We do not agree. The percentage use must be part of the equation when setting a rate. For instance, a blanket licence provides broadcasters with the option of using music 100 per cent of program time, yet we adjust the rate to take into account the actual amount of music use. The same principle must apply to the limited download services of the Satellite Services.

[202] The overall approach proposed by Ms. Kerr is useful and reasonable, with some adjustments. For example, we agree that subscribers who use a more sophisticated receiver should attract higher

corrigé de 4,39 pour cent (soit $4,26 \div 0,97$) que nous multiplions par 27 pour cent, nous obtenons un taux pondéré de 1,18 pour cent que nous homologuons pour la SCGDV.

CSI

[200] L’approche proposée par M. Goldstein en ce qui concerne le taux pour CSI est inacceptable. M. Goldstein utilise un ratio de 1 à 3,2, qu’il a établi à partir des taux applicables à la radio commerciale; or, l’information dont nous disposons montre que les activités de reproduction sont beaucoup plus importantes dans le cas des services de radio par satellite que dans celui de la radio commerciale. Celle-ci n’est pas assortie des fonctions de tampon, d’écoute différée ou de reproduction par l’utilisateur. Ces fonctions propres aux services par satellite doivent être prises en compte dans le calcul du taux pour CSI. La radio commerciale est un indicateur tout simplement inadéquat.

[201] Nous rejetons également la proposition de MM. Audley et Hyatt d’utiliser le taux établi dans le cas de CSI pour les téléchargements limités effectués par les services de musique en ligne. Environ 3 pour cent des abonnés aux services par satellite ont accès au service des « téléchargements limités ». MM. Audley et Hyatt prétendent que le taux tarifaire doit refléter la valeur de cette option et que chaque abonné a la possibilité d’utiliser ce service. Nous ne sommes pas d’accord. Le pourcentage d’utilisation doit faire partie de l’équation lorsqu’on fixe un taux. À titre d’exemple, la licence générale donne aux radiodiffuseurs l’option d’utiliser de la musique pendant tout le temps d’antenne; pourtant, on corrige le taux en fonction de l’utilisation réelle de musique. Le même principe doit s’appliquer aux services de téléchargement limité offerts par les services par satellite.

[202] L’approche globale proposée par M^{me} Kerr est utile et raisonnable une fois ajustée. Par exemple, nous croyons nous aussi qu’il faut verser davantage de redevances à l’égard de l’abonné

royalties. However, we would limit the number of categories to three instead of the proposed four. Satellite Services will pay only for programming copies if a subscriber's receiver cannot make copies. Receivers equipped with extended buffer and replay functions will trigger an additional royalty and those that can store blocks of programming or individual tracks yet another one. This approach establishes a direct correlation between the rate and the receiver's functionality (something the services already know), rather than with the actual use made of each receiver (something the services cannot know).

[203] We agree with Ms. Kerr that the reproductions involved in the programming operations are similar to those made by commercial radio stations. For these specific reproductions, we could then simply apply the ratio of the reproduction to the communication right of commercial radio ($1 \div 3.2$, or 0.3125) to the SOCAN uncorrected blended rate of 4.39 per cent. This produces a rate of 1.33 per cent. However, the rate must reflect the fact that most programming copies are made outside the country and are not subject to the *Act*. Ten per cent of the channels each service offers are programmed in or from Canada. Therefore, a first adjustment for programming copies yields a rate of 0.13 per cent ($= 1.33 \text{ per cent} \times 0.10$).

[204] A further adjustment is required. There are two types of Canadian programming copies: assessment copies that Canadian programmers make when they upload a DMDS file onto their server, and "play" copies that Canadian programmers make onto a server to be played when the software so instructs the server. The adjusted rate of 0.14 per cent accounts for both types of copies. CSR never makes "play" copies in Canada; consequently, it should pay less for its programming copies. Nothing on the record would

utilisant un appareil plus sophistiqué. Par contre, nous limiterions à trois, plutôt qu'aux quatre qu'elle propose, le nombre de catégories. Un service par satellite paiera uniquement pour les copies de programmation si l'appareil de l'abonné ne peut faire de copies. L'appareil permettant la mise en tampon prolongé et l'écoute différée entraînera le paiement d'une redevance supplémentaire et celui qui peut stocker des blocs de programmation ou des pistes individuelles une autre encore. Cette façon de faire établit un lien direct entre le taux et la fonctionnalité de l'appareil (que les services connaissent déjà), plutôt que l'usage réel fait de chaque appareil (que les services ne peuvent savoir).

[203] Nous sommes d'accord avec M^{me} Kerr lorsqu'elle affirme que les reproductions faites dans le cadre des activités de programmation sont comparables à celles effectuées par les stations de radio commerciales. Pour ce type particulier de reproductions, nous pourrions simplement multiplier le ratio entre les taux pour la reproduction et la communication pour la radio commerciale (soit $1 \div 3,2$ ou 0,3125) par le taux pondéré non corrigé pour la SOCAN de 4,39 pour cent, ce qui donne un taux de 1,37 pour cent. Cependant, le taux doit tenir compte du fait que la plupart des copies de programmation sont faites à l'extérieur du pays et ne sont pas assujetties à la *Loi*. Dix pour cent des canaux qu'offre chaque service sont programmés au Canada ou à partir du Canada. Par conséquent, un premier ajustement à l'égard des copies de programmation donne un taux de 0,13 pour cent (soit $1,33 \text{ pour cent} \times 0,10$).

[204] Il faut procéder à un ajustement supplémentaire. Il se fait deux types de copies de programmation au Canada : la copie d'évaluation, effectuée lorsque le programmeur canadien télécharge un fichier SDMN sur son serveur, et la copie pour diffusion, que le programmeur canadien met sur un serveur pour qu'elle soit jouée lorsque le logiciel ordonne au serveur de le faire. Le taux corrigé de 0,14 pour cent tient compte des deux types de copies. CSR ne fait jamais au Canada de copies pour diffusion; par conséquent,

allow us to assess precisely the relative value of both types of programming copies. Yet it is clear that assessment copies are much less valuable than play copies, since assessment copies are temporary and concern only a fraction of all songs that programmers assess (no assessment copies are made of songs delivered on CD). Under the circumstances, we set at 95 per cent the discount for a service when no work is transmitted to subscribers using copies on a server located in Canada.

[205] For the extended buffer and the replay functions, Ms. Kerr suggests that the relative value of the reproduction and the communication right should be the same as the value the Board set for on-demand streaming by online music services. We agree since in both cases, the reproduction activities that are taking place are similar in nature. The rates set by the Board for on-demand streaming by online music services are 4.6 per cent for reproduction and 7.6 per cent for communication, a ratio of 0.61.⁷⁹ Applying this ratio to the uncorrected, 4.39 per cent SOCAN rate results in a rate of 2.66 per cent. In our opinion, this rate provides fair remuneration for the type of reproductions under discussion. This rate will apply only if a subscriber's receiver offers at least one of the relevant features. At the time of the hearings, that proportion was about 30 per cent.

[206] Finally, there is the rate for the reproductions initiated by the subscribers. These can either take the form of storage of blocks of programming or of individual songs. We will follow the same approach used above but rely on the rates certified for reproduction and communication of limited downloads by online music services (5.9 per cent and 6.3 per cent, respectively) to establish the relevant rate for these reproduction activities. By applying a ratio of 0.94 (= 5.9 ÷ 6.3) to the

elle devrait payer moins pour ses copies de programmation. Rien au dossier ne nous permet de mesurer précisément la valeur relative des deux types de copies de programmation. Il est néanmoins clair que la copie d'évaluation vaut beaucoup moins que la copie pour diffusion, puisque la copie d'évaluation est temporaire et existe uniquement à l'égard d'une fraction de ce qui est évalué (on ne fait pas de copie d'évaluation des chansons livrées sur CD). Dans les circonstances, nous établissons à 95 pour cent l'escompte pour le service qui ne transmet aucune œuvre à ses abonnés en utilisant des copies sur un serveur situé au Canada.

[205] Pour le tampon prolongé et l'écoute différée, M^{me} Kerr pense que la valeur relative des droits de reproduction et de communication devrait être égale à celle qu'a établie la Commission pour la transmission sur demande par les services de musique en ligne. Nous sommes d'accord avec M^{me} Kerr sur ce point, puisque dans les deux cas les activités de reproduction accomplies sont de même nature. Les taux établis par la Commission pour la transmission sur demande par les services de musique en ligne sont de 4,6 pour cent pour la reproduction et de 7,6 pour cent pour la communication, soit un ratio de 0,61.⁷⁹ En multipliant ce ratio par le taux non corrigé de 4,39 pour cent pour la SOCAN, nous obtenons un taux de 2,66 pour cent. À notre avis, ce taux représente une juste rémunération pour le type de reproductions considérées ici. Le taux s'appliquera seulement si l'appareil de l'abonné offre au moins une des fonctions pertinentes. Au moment de la tenue des audiences, cette proportion était d'environ 30 pour cent.

[206] Enfin, il y a le taux pour les reproductions faites par les abonnés eux-mêmes. Ces reproductions peuvent consister dans le stockage de blocs d'émissions ou de chansons individuelles. Nous empruntons la même approche que celle utilisée ci-dessus, mais utilisons des taux homologués pour la reproduction et la communication des téléchargements limités effectués par les services de musique en ligne (5,9 pour cent et 6,3 pour cent respectivement) pour

SOCAN rate of 4.39 per cent, we arrive at a reproduction rate of 4.11 per cent. Again, this rate will apply only if a subscriber is able to make such reproductions. At the time of the hearing, about 3 per cent of subscribers could.

[207] A final adjustment is needed to account for the use of CSI's repertoire by the Satellite Services. The use of the repertoire can be calculated using the number of copies on the server, the number of plays or listening patterns. The objectors propose the number of plays; the parties agree that this corresponds to a repertoire use of 70.5 per cent. CSI, relying on Mr. Audley and Dr. Hyatt, would rather base their calculations on listening patterns and proposes 76.9 per cent. In our opinion, listening patterns should not in general be used in the calculation of music use. Doing so attributes to music use some measure of value derived from the subscribers' preferences. The number of plays is the relevant measure in this instance. Other measures that relate to value or the subscribers' preferences should, at least implicitly, be reflected in the calculation of the value of the music, from which the rate is obtained. Adjusting this rate by a measure of repertoire use, itself at least partly based on value, would amount to some form of double counting.

[208] We do not have reliable evidence on the music use differences by types of reproduction and will therefore assume that the average music use of 70.5 per cent applies to all types of reproductions. This leads to final rates of 0.10 (or 0.005 when no work is transmitted to subscribers using copies on a server located in Canada), 1.87 and 2.90 per cent.

V. RATE BASE

[209] The Services want to pay royalties only on the share of subscription fees they actually receive and

établir le taux approprié pour ces activités de reproduction. Ainsi, en multipliant le taux de 4,39 pour cent de la SOCAN par un rapport de 0,94 (soit $5,9 \div 6,3$), nous arrivons à un taux de reproduction de 4,11 pour cent. Ici encore, le taux s'appliquera seulement si l'abonné est en mesure de faire de telles copies. Au moment de la tenue des audiences, environ 3 pour cent des abonnés pouvaient le faire.

[207] Une dernière correction doit être introduite pour tenir compte de l'utilisation du répertoire de CSI par les services par satellite. L'utilisation du répertoire peut être établie en fonction du nombre de copies sur le serveur, du nombre de pistes jouées ou des données d'écoute. Les opposantes proposent d'utiliser le nombre de pistes jouées; les parties conviennent que ce nombre est de 70,5 pour cent. CSI, à l'instar de MM. Audley et Hyatt, utiliserait plutôt les données d'écoute et propose un taux de 76,9 pour cent. À notre avis, les données d'écoute ne devraient pas en général être utilisées dans le calcul du taux d'utilisation de musique. Ce faisant, on attribue à l'utilisation de musique une valeur dérivée des préférences des abonnés. Le nombre de pistes jouées est la donnée pertinente en l'espèce. Toute autre mesure liée à la valeur ou aux préférences des abonnés devrait déjà être prise en compte dans le calcul de la valeur de la musique, de laquelle est dérivé le taux. Ajuster ce taux en utilisant une mesure d'utilisation de répertoire qui reflèterait elle-même une valeur constituerait une forme de double comptage.

[208] Comme nous ne disposons pas de données fiables sur les différences de taux d'utilisation de musique entre les divers types de reproductions, nous supposons qu'un taux d'utilisation moyen de 70,5 pour cent s'applique à tous les types de reproductions. Cela donne des taux finaux de 0,10 (ou de 0,005 lorsque aucune œuvre n'est transmise aux abonnés en utilisant des copies sur un serveur situé au Canada), 1,87 et 2,90 pour cent.

V. ASSIETTE TARIFAIRE

[209] Les Services souhaitent verser des redevances uniquement sur la part des recettes d'abonnement

not on advertising revenues, receiver sales, paid commissions or activation and termination fees. They would exclude from the rate base any form of revenues that they do not currently collect such as membership, product placement, commissions and the like. They would allow the deduction of subscriber acquisition costs.

[210] The Collectives would include in the rate base anything that is paid for the service, irrespective of who pays or collects it, as well as all other possible sources of income. In their view, excluding revenues encourages the Services to inflate those revenues so as to reduce royalty payments.

[211] The Board is of the view that the rate base should include almost all forms of revenues generated by the service. We have already applied a deduction of 50 per cent to the rate to account for the fact that the DPA rate which is used as the proxy was set at the wholesale level while the rate being set here is at the retail level. In other words, this deduction amounts to a reduction of 50 per cent of all “retail income” to obtain an equivalent “wholesale income”. Applying an additional reduction to the rate base to deduct some forms of revenue, including advertising revenues, could amount to a double deduction.

[212] Consequently, the rate base shall include everything that is paid for the service. This includes activation, termination and access fees, which are often used to artificially lower the monthly subscription cost. It also includes most other potential forms of income, as long as it is reasonably possible that these might emerge in the market. The base will not exclude subscriber acquisition costs as those simply are costs of doing business, but will exclude revenues from the sale of receivers (since no other group of users pay royalties on the hardware subscribers require to receive the service) and agency commissions.

qu’ils perçoivent vraiment. Ils excluraient de l’assiette tarifaire les recettes publicitaires, les ventes d’appareils, les commissions versées, les frais de mise en service et de résiliation ainsi que les formes de recettes qu’ils ne perçoivent pas en ce moment : adhésion, placement de produit, commissions et le reste. Ils permettraient la déduction des frais d’acquisition des abonnés.

[210] Les sociétés de gestion incluraient dans l’assiette tarifaire tout ce qui est payé pour le service, peu importe qui le paye ou le perçoit, de même que toutes les autres formes possibles de recettes. À leur avis, l’exclusion de recettes encourage les Services à les exagérer de façon à réduire le montant de redevances.

[211] La Commission est d’avis que l’assiette tarifaire devrait inclure presque toutes les formes de recettes produites par le service. Nous avons déjà abaissé le taux de 50 pour cent pour tenir compte du fait que le taux applicable aux SSPN, qui sert de référence, a été fixé au niveau du gros, tandis que le taux qui est fixé ici s’applique au niveau du détail. C’est comme si on réduisait de 50 pour cent tous les « revenus de détail » pour obtenir l’équivalent en « revenus de gros ». Réduire de nouveau l’assiette tarifaire en excluant les revenus de publicité peut équivaloir à une double déduction.

[212] Par conséquent, l’assiette tarifaire inclut tout ce qui est payé pour le service. Cela comprend les frais de mise en service, de résiliation et d’accès, qui servent souvent à réduire artificiellement le coût de l’abonnement mensuel. Cela comprend aussi la plupart des autres formes de recettes, dans la mesure où il est raisonnable de penser qu’elles pourraient émerger dans le marché. L’assiette n’exclut pas les frais d’acquisition des abonnés puisqu’il s’agit d’un coût d’exploitation parmi d’autres, mais exclut les recettes provenant de la vente d’appareils (aucun autre groupe d’utilisateurs ne verse des redevances sur le matériel dont l’abonné a besoin pour recevoir le service) et les commissions d’agence.

[213] It would appear however that the issue of defining the rate base is, at this time, largely theoretical. Advertising and other income currently represent a very small share of overall revenues.

VI. MINIMUM FEES

[214] While SOCAN did not request a minimum fee, both NRCC and CSI did in their proposed tariffs. NRCC proposed a minimum fee of \$1.50 per subscriber per month while CSI proposed \$0.50 per subscriber per month for services that do not authorize subscribers to reproduce musical works and \$1 per subscriber per month for services that provide such authorization to subscribers.

[215] NRCC did not propose a minimum fee in its statement of case. CSI was the only collective society that presented evidence supporting minimum fees for this tariff. CSI based its proposed minimum on two-thirds of the \$15 per month price of a subscription. Applying its proposed rate of 2.9 per cent for 2006-2007 and of 5.8 per cent for 2008 and 2009 yielded proposed minimums of \$0.29 and \$0.58 per subscriber per month, respectively.

[216] While the Objectors argued that this tariff did not justify any minimum fees because there are only two services and that no exemption at a lower revenue threshold is proposed, CSI stated that its request for a minimum payment is both reasonable and necessary to ensure fairness to the right holders it represents because there is evidence in the record of the use of promotional subscriptions, as well as evidence of so-called lifetime subscriptions, which, unless a minimum payment is specified, could continue for a lengthy period without payments for music.

[217] We agree with CSI and certify minimum fees per subscriber per month. Using the methodology

[213] Il semble toutefois que la question de la définition de l'assiette tarifaire soit essentiellement théorique pour l'instant. Les revenus de publicité et autres représentent une très faible part des revenus totaux.

VI. REDEVANCES MINIMALES

[214] La SOCAN n'a pas demandé de redevances minimales; la SCGDV et CSI l'ont fait dans leurs projets de tarifs. La SCGDV a proposé une redevance minimale de 1,50 \$ par abonné par mois, tandis que CSI a proposé 0,50 \$ par abonné par mois pour des services qui excluent la possibilité de reproduction d'œuvres musicales par les abonnés, et 1 \$ par abonné par mois pour des services qui l'incluent.

[215] La SCGDV n'a pas proposé de redevance minimale dans son énoncé de cause. CSI est la seule société de gestion à avoir présenté une preuve à l'appui de redevances minimales pour ce tarif. Le minimum proposé par CSI a pour base les deux tiers du tarif d'abonnement mensuel de 15 \$. En prenant les taux proposés par CSI pour 2006-2007 et 2008-2009 (soit 2,9 pour cent et 5,8 pour cent respectivement), on arrive à des redevances minimales proposées de 0,29 \$ et de 0,58 \$ par abonné par mois respectivement.

[216] Si les opposantes ont fait valoir que ce tarif ne justifiait pas l'application de redevances minimales, parce qu'il n'y a que deux services offerts et qu'on ne propose aucune franchise pour les entreprises dont les revenus s'établissent en deçà d'un certain seuil, CSI a affirmé que sa demande de redevances minimales était à la fois raisonnable et nécessaire pour garantir un traitement équitable aux détenteurs de droits qu'elle représente, parce que le dossier établit que les entreprises offrent des abonnements promotionnels et même des abonnements « à vie », auquel cas il peut s'écouler une longue période sans que des redevances soient versées, à moins que ne soit spécifiée une redevance minimale.

[217] Nous partageons l'avis de CSI et homologuons des redevances minimales mensuelles

proposed by CSI results in minimums of \$0.43 for SOCAN, \$0.12 for NRCC and \$0.01 (or \$0.0005 when no work is transmitted to subscribers using copies on a server located in Canada), \$0.19 or \$0.29 for CSI, depending on the type of reproductions a subscriber's receiver does.

[218] SOCAN did not ask for a minimum. This does not prevent us from setting one. The Board can alter a tariff's terms and conditions in any reasonable fashion. Moreover, the tariff we certify is much less than what SOCAN asked for; consequently, there is little risk that adding a minimum will result in any service being required to pay more than if we had certified SOCAN's proposal without alterations.

VII. TOTAL ROYALTIES AND ABILITY TO PAY

[219] The Satellite Services have not yet made a profit from their operations. This is not unexpected in an industry which is in a start-up phase, and has large upfront fixed costs. However, the evidence clearly indicates a financial situation that is more difficult than for many other industries. The Satellite Services have incurred heavy losses since the beginning of their operations. The upfront fixed costs, which are estimated to be about 85 per cent of total operating costs, contribute to these difficulties in the short term. In addition, the Satellite Services are incurring very large subscriber acquisition costs. As a result, losses by both services at this time are many times higher than subscription revenues.

[220] As the number of satellite radio subscribers increases, the financial situation of the industry is expected to improve significantly. Indeed, the Satellite Services expect to be profitable by about 2010. That is however beyond the period of the tariffs being certified here.

par abonné. En utilisant la méthode que CSI propose, on obtient 0,43 \$ pour la SOCAN, 0,12 \$ pour la SCGDV et 0,01 \$ (ou de 0,0005 \$ lorsque aucune œuvre n'est transmise aux abonnés en utilisant des copies sur un serveur situé au Canada), 0,19 \$ ou 0,29 \$ pour CSI, selon le type de reproductions que peut faire un appareil appartenant à l'abonné.

[218] La SOCAN n'a pas demandé de redevance minimale. Cela ne nous empêche pas d'en établir une. La Commission peut apporter n'importe quelle modification raisonnable à un tarif. Qui plus est, ce que nous homologuons est bien en deçà de ce que la SOCAN demandait; par conséquent, il est peu probable que l'addition d'une redevance minimale amène un service à verser davantage que si nous avons homologué tel quel le projet de la SOCAN.

VII. REDEVANCES TOTALES ET CAPACITÉ DE PAYER

[219] Les services par satellite n'ont pas encore rentabilisé leurs activités. Cela n'est pas surprenant dans un secteur qui est dans une phase de développement initial et qui doit supporter des coûts fixes élevés. Toutefois, les informations disponibles montrent clairement que ce secteur est dans une situation financière plus précaire que beaucoup d'autres. Les services par satellite ont enregistré des pertes importantes depuis qu'ils ont lancé leurs activités. Les coûts fixes initiaux, qui constituent environ 85 pour cent du total des coûts d'exploitation, expliquent en partie ces difficultés sur le court terme. En outre, les services de radio par satellite doivent supporter des coûts d'acquisition de la clientèle très élevés. C'est pourquoi les deux services affichent à l'heure actuelle des pertes qui excèdent très largement leurs revenus d'abonnement.

[220] La situation financière de l'industrie devrait s'améliorer considérablement à mesure qu'augmentera le nombre d'abonnés à la radio satellitaire. De fait, les services par satellite prévoient franchir le seuil de rentabilité vers 2010. Cet horizon excède toutefois la période pour laquelle les taux faisant l'objet de la présente décision sont homologués.

[221] We believe that, as we have done in the past for other tariffs, an initial discount should be applied to these tariffs. However, for the reasons just mentioned, we believe that a larger discount than usual should be applied. We will thus apply a 25 per cent discount from 2005 to 2007, the latter being the first year where the three tariffs apply together. A discount of 10 per cent will apply for 2008 and 2009, after which we believe no discounts should be applied. Hence, we certify the full NRCC rate for 2010.

[222] The [attached table](#) shows the full rates and the rates we certify, reflecting the phase-in discounts for each of the Collectives. This table takes into account the different years for which individual Collectives' tariffs are being certified.

[223] The rates we certify in this decision will generate about \$1 million in royalties for all three Collectives in 2006, the first year for which data on revenues were available. However, at the time of the hearing, the Satellite Radio Services were expecting rapid growth such that in 2009, revenues could be multiplied by a factor of 10 compared to 2006, leading to a similar increase in royalties.

[224] The total rate that will apply when the full tariff is in effect will vary between 5.54 and 10.31 per cent. Were the proportion of receivers having the advanced reproduction functionalities to remain the same as in 2006, the effective total rate would be 6.2 per cent. For comparison purposes, it is useful to note that commercial radio stations pay 7.1 per cent for similar rights; in addition, satellite radio clears all rights associated with the functionality that makes it so different. The services U.S. counterparts currently pay 6.5 per cent only for the right to broadcast sound recordings; that rate is set to increase to 8 per cent in 2012.⁸⁰

[221] Nous croyons qu'un escompte initial devrait être appliqué à ces tarifs, comme cela s'est déjà fait dans le passé pour d'autres tarifs. Toutefois, pour les raisons que nous venons d'exposer, nous pensons que cet escompte devrait être plus élevé que d'habitude. Nous appliquerons donc un escompte de 25 pour cent de 2005 à 2007, cette dernière étant la première année où les trois tarifs seront en vigueur simultanément et de 10 pour cent en 2008 et 2009, dernière année pour laquelle nous croyons qu'un escompte devrait s'appliquer. Nous homologuons donc le plein taux de la SCGDV pour 2010.

[222] Le [tableau en annexe](#) présente les pleins taux et les taux homologués, qui reflètent les escomptes temporaires, pour chaque société de gestion et chaque année visée par la décision.

[223] Les taux que nous homologuons dans la présente décision se traduisent par des redevances d'environ 1 million de dollars pour les trois sociétés de gestion en 2006, première année pour laquelle les données sur les revenus sont disponibles. Cela dit, au moment de l'audience, les services de radio par satellite s'attendaient à connaître une croissance rapide dans les années à venir, de telle sorte qu'en 2009, leurs revenus pourraient décupler par rapport à 2006, générant une augmentation de redevances du même ordre.

[224] Le taux cumulatif applicable lorsque le plein taux sera en place se situe entre 5,54 et 10,31 pour cent. Si la proportion des appareils possédant les fonctionnalités avancées de reproduction restait la même qu'en 2006, le taux effectif cumulatif serait de 6,2 pour cent. À titre de comparaison, il est utile de souligner que les stations de radio commerciales versent 7,1 pour cent pour des droits similaires; en plus, la radio satellitaire libère les droits associés à la fonctionnalité qui la rend si différente. Les vis-à-vis américains des services versent quant à eux en ce moment 6,5 pour cent uniquement pour le droit de diffuser des enregistrements sonores; ce taux passera à 8 pour cent en 2012.⁸⁰

IX. TARIFF WORDING

[225] The following comments may help the reader to better understand the wording of the tariff. As is now the rule with any tariff of first impression, we consulted the parties on this matter before reaching a final decision.

1. Application Periods

[226] SOCAN filed five proposed tariffs for 2005 to 2009, NRCC one for 2007 to 2010 and CSI two for 2006 to 2009. We cannot certify a tariff for years in respect of which nothing was filed. Smaller collectives have clearly stated in the past that they can only afford to file proposed tariffs for periods of several years and that other collectives should not be allowed to dictate how long certified tariffs last by filing for shorter periods of time. Anything that helps to reduce the costs associated with getting a tariff certified should be encouraged. Consequently, the tariff will deal with all the years for which the Board was seized at the time of issuing the decision. The fact that this results in staggered application periods should not raise any significant difficulties.

2. Dealing With Subscribers Who Receive the Service For Free

[227] Does the notion of subscription imply that a payment is made for what is the object of the subscription⁸¹ or do users commonly “subscribe” to a variety of services for free in the virtual and material worlds?⁸² We are being asked to deal with this apparent contradiction.

[228] The Collectives do not want the notion of subscriber to be limited to those who provide valuable consideration. According to CSI, the Board’s statement in *CSI – Online Music Services* that subscription implies payment has created enforcement difficulties, with some arguing that free trial subscriptions do not attract royalties. The Collectives ask that free subscriptions trigger

IX. LIBELLÉ DU TARIF

[225] Les commentaires suivants devraient aider le lecteur à comprendre le libellé du tarif. Comme c’est désormais la règle avec tout premier tarif, nous avons consulté les parties à ce sujet avant de prendre une décision finale.

1. Périodes d’effet

[226] La SOCAN a déposé cinq projets de tarifs pour les années 2005 à 2009, la SCGDV, un pour 2007 à 2010 et CSI, deux pour 2006 à 2009. Nous ne pouvons homologuer un tarif à l’égard d’années pour lesquelles rien n’a été déposé. Les sociétés de gestion de taille plus modeste nous ont clairement dit dans le passé qu’elle peuvent uniquement se permettre de déposer des projets de tarifs visant plusieurs années et que les autres sociétés ne devraient pas pouvoir dicter la période d’effet des tarifs homologués en déposant pour des durées plus courtes. Nous entendons encourager tout ce qui contribue à réduire les coûts afférents à l’homologation d’un tarif. Par conséquent, le tarif dispose de toutes les années dont la Commission était saisie au moment de rendre la décision. Le fait que cela entraîne des périodes d’effet décalées ne devrait pas créer de difficultés importantes.

2. Traitement des abonnés qui reçoivent le service gratuitement

[227] La notion d’abonnement implique-t-elle d’effectuer un paiement pour ce à quoi on s’abonne⁸¹ ou s’« abonne »-t-on souvent à une gamme de services gratuits dans le monde virtuel ou réel?⁸² Il nous faut traiter de cette apparente contradiction.

[228] Les sociétés de gestion ne veulent pas qu’on limite le concept d’abonné à ceux qui offrent contrepartie. Au dire de CSI, le fait que la Commission a énoncé dans *CSI – Services de musique en ligne* qu’il n’y a pas abonnement sans débours crée des difficultés d’application, certains soutenant qu’un abonnement d’essai gratuit n’entraîne pas de redevances. Les sociétés

minimum royalties. The Services, on the other hand, maintain that a definition is no more needed than in *CSI – Online Music Services* and that if the term is defined, it should apply only to paying customers.

[229] Free subscriptions should attract the minimum royalties. Any promotional element involved is overridden by the fact that such a subscription involves a protected use. In this respect, the parallel with permanent downloads is interesting. Previews do not attract royalties, but free downloads attract the minimum fee. In order to avoid any confusion, the tariff so provides explicitly.

[230] CSI's definition of subscriber requires that valuable consideration be received. This does not prevent us from applying the minimum fee to subscribers who get the service for free. Again, given that the tariff we certify is much less than what CSI asked, there is little risk that adding a minimum fee will result in any service being required to pay more royalties than if we had certified CSI's proposal without alterations.

3. Counting Subscribers For the Purposes of the Tariff

[231] The manner in which the number of subscribers is determined in Board tariffs is not uniform. In some cases, the issue is not addressed. In others, subscribers are counted on the last day of the month. CSR asked that the number be the average in any given month. The Collectives countered that using averages is unnecessarily complex, adding that a subscriber that joins at the end of the month benefits from the tariff and should trigger the full amount of royalties.

[232] In the long run, this probably is a non-issue. A subscriber's monthly payment is accounted for only once, irrespective of when it is paid. Therefore, in a stable market, the choice of date for counting

demandent qu'on verse les redevances minimales pour les abonnements gratuits. Les Services soutiennent au contraire qu'une définition est tout aussi inutile que dans *CSI – Services de musique en ligne* et que si on en adopte une, elle ne devrait viser que les abonnés payants.

[229] Un abonnement gratuit devrait être assujéti aux redevances minimales. L'aspect promotionnel qu'il implique est largement compensé par le fait qu'un tel abonnement entraîne une utilisation protégée. À cet égard, la comparaison avec les téléchargements permanents est intéressante. On ne verse pas de redevances pour l'écoute préalable, mais le téléchargement gratuit est assujéti à la redevance minimale. Afin d'éviter tout malentendu, le tarif le précise.

[230] La définition d'abonné que proposait CSI suppose une contrepartie. Cela ne nous empêche pas d'assujéti l'abonnement gratuit aux redevances minimales. Ici encore, puisque le tarif homologué est bien en deçà de ce que CSI demandait, il est peu probable que l'addition d'une redevance minimale amène un service à verser davantage de redevances que si nous avons homologué tel quel le projet de CSI.

3. Nombre d'abonnés pour les fins du tarif

[231] Les tarifs de la Commission ne comptabilisent pas toujours les abonnés de la même façon. Parfois, on ne traite pas de la question. Parfois, on se sert du nombre d'abonnés le dernier jour du mois. CSR demande qu'on utilise la moyenne des abonnés du mois. Les sociétés de gestion répondent qu'utiliser une moyenne complique inutilement les choses, en ajoutant que la personne qui s'abonne à la fin du mois tire avantage du tarif et devrait entraîner le plein paiement de redevances.

[232] À long terme, il s'agit sans doute d'un faux problème. L'abonnement mensuel est comptabilisé une seule fois, peu importe quand on le verse. Dans un marché stable, le choix du jour où l'on compte

subscribers probably matters little, if at all. This, however, is a tariff of first instance in a market where the number of subscribers changes significantly, even month-to-month. Consequently, for the purposes of this first tariff, the number of subscribers used to calculate royalties for any given month shall be the average number of subscribers in the reference month.

4. Use of Services by Commercial Subscribers

[233] CSI asked that the tariff target only direct reception by subscribers for private use and not commercial subscribers or subsequent protected uses of music in a signal, for example as background music in a public place. The assignments that CSI secures from its member publishers do not include the delivery of satellite radio to commercial subscribers. CSR agreed with this proposition. NRCC submitted that unless the tariff targets communications to commercial subscribers, it will not be entitled to collect royalties on account of those communications (as opposed to subsequent uses, to which other tariffs, such as NRCC Tariff 3, would apply). Neither SOCAN nor Sirius expressed any view on the matter.

[234] SOCAN's proposed tariffs are not limited to private use. Those of CSI are; in any event, we cannot licence uses that a collective does not administer. NRCC's proposed tariff also is limited to "direct reception by subscribers for their private use". We cannot expand the ambit of the proposed tariff; by acting as it did, NRCC abandoned, for 2007 to 2010, its remuneration right with respect to the communication of the Satellite Services' signals to subscribers who clearly receive a signal for non-private uses.

[235] Consequently, the tariff shall licence the Services' uses of the repertoires only to the extent that it is for the subscriber's private use.

les abonnés devrait donc avoir peu ou pas d'impact. Cela dit, il s'agit d'un premier tarif dans un marché où le nombre d'abonnés connaît d'importantes fluctuations, même mensuelles. Par conséquent, aux fins de ce premier tarif, le nombre d'abonnés servant à établir les redevances pour un mois donné sera le nombre moyen d'abonnés durant le mois de référence.

4. Utilisation des services par les abonnés commerciaux

[233] CSI demande que le tarif vise uniquement la réception directe par des abonnés pour leur usage privé et non les abonnés commerciaux ou l'utilisation protégée ultérieure de la musique incorporée au signal, notamment comme musique de fond dans un endroit public. La cession que CSI obtient de ses membres éditeurs n'inclut pas la livraison de la radio par satellite à des abonnés commerciaux. CSR abonde dans le même sens. La SCGDV souligne que si le tarif ne vise pas les communications à des abonnés commerciaux, elle ne pourra percevoir de redevances à l'égard de ces communications (par opposition aux utilisations ultérieures, assujetties à d'autres tarifs, notamment le tarif 3 de la SCGDV). La SOCAN et Sirius n'ont pas commenté la question.

[234] Les projets de tarifs de la SOCAN ne se limitent pas aux usages privés. Ceux de CSI le sont; de toute façon, nous ne pouvons autoriser une utilisation qu'une société de gestion n'administre pas. De même, les projets de tarifs de la SCGDV visent uniquement ce « qui est reçu directement par des abonnés pour leur usage privé ». Nous ne pouvons étendre la portée d'un projet de tarif; en agissant comme elle l'a fait, la SCGDV a renoncé pour les années 2007 à 2010 à son droit à rémunération à l'égard de la communication des signaux des services par satellite aux abonnés qui reçoivent clairement le signal pour un usage non privé.

[235] Par conséquent, le tarif autorise l'utilisation des répertoires par les services uniquement dans le but de permettre l'usage privé des abonnés. Le tarif

Furthermore, the tariff specifies that commercial subscribers are not to be included in the calculation of royalties: Services should not pay for what they do not get.

[236] This measure should not inconvenience the Services. They probably are free to avail themselves of SOCAN Tariff 16 and NRCC Tariff 3 with respect to commercial subscribers who use their signals as background music. The Services also need to licence separately the programming reproductions of musical works with respect to commercial subscribers.

5. Sound Recording and Musical Work Use Information

[237] The parties agree that music use information should be provided for seven days each month. They make a number of representations on other issues.

[238] CSI wishes to be informed of all music use, not only of sound recording use, so as to pay royalties to rights holders whose music is broadcast live or during live events. It disagrees that the Services should provide information only if available. Providing music use information is part of doing business in the music industry in Canada. The Board should apply its standing principle that if information is essential, users ought to provide it even if it means getting it from someone else.

[239] The Services ask that they provide only what is available to them; monitoring the use of live music is not possible and would not increase the reliability of the data.

[240] NRCC asks that the Services provide the running time of each sound recording. The Services counter that they do not always get that information.

précise aussi qu'on ne tient pas compte des abonnés commerciaux dans le calcul des redevances : les services ne devraient pas payer pour ce qu'on ne leur offre pas.

[236] Cette mesure ne devrait pas créer de difficultés pour les services. Ils peuvent sans doute se prévaloir du tarif 16 de la SOCAN et du tarif 3 de la SCGDV à l'égard des abonnés commerciaux qui utilisent leur signal comme musique de fond. Les services doivent également obtenir une licence distincte pour les reproductions de programmation d'œuvres musicales en ce qui concerne les abonnés commerciaux.

5. Renseignements sur l'utilisation d'œuvres musicales et d'enregistrements sonores

[237] Les parties s'entendent pour fournir des renseignements sur l'utilisation de musique sept jours par mois. Elles avancent un certain nombre de prétentions sur d'autres points.

[238] CSI souhaite être renseignée sur l'utilisation de toutes les œuvres musicales, pas seulement des enregistrements sonores, afin de verser des redevances aux titulaires dont la musique est diffusée en direct ou durant des événements en direct. Elle ne veut pas que les services fournissent uniquement ce qu'ils ont en mains. Si on veut faire affaires dans le domaine de la musique au Canada, il faut fournir des renseignements sur son utilisation. La Commission devrait appliquer le principe établi voulant que si un renseignement est essentiel, l'utilisateur le fournit même s'il doit se le procurer ailleurs.

[239] Les services voudraient fournir uniquement ce dont ils disposent; surveiller l'utilisation de musique en direct n'est pas possible et ne rendrait pas les données plus fiables.

[240] La SCGDV demande que les services indiquent le temps d'exécution de chaque enregistrement sonore. Les services répondent qu'ils n'obtiennent pas toujours ce renseignement.

[241] In *CSI – Online Music Services*, the Board stated that users must supply essential information even if it means getting it from someone else, but added that information would have to be supplied only if available during the application period of the first tariff.⁸³ In this instance, information will need to be supplied only if available to the Service or to a third party from whom the Service is entitled to get the information. Since only available information will have to be provided, adding a requirement to report on live music or to supply the running time will not add unduly to the Services' reporting burden. Indeed, it will allow the Board and the Collectives to find out precisely how much information is available.

[242] The Services should expect to be required to supply all of the information that the Collectives need to effect distributions starting with the next tariffs. They should therefore adjust their data collecting practices as soon as possible, and require their programming partners to do the same.

[243] The Services are required to provide music use information for seven consecutive days every month. Other tariffs leave the choice of days to the Collectives. In this instance, the Services ask that the tariff provide that the information is supplied for the last seven days of each month. We grant this request.

[244] The tariff will provide that music use information must be filed in electronic format.

6. Audits

[245] The Services asked that audits be limited to one per year. We will not do so. No other tariff so limits audits. Collectives must be able to re-audit a user if a first audit shows that the user is not complying with the tariff.

[241] Dans l'affaire *CSI – Services de musique en ligne*, la Commission a en effet conclu que l'utilisateur doit fournir un renseignement essentiel même s'il doit se le procurer ailleurs, tout en ajoutant que pour le premier tarif, les renseignements ne devraient être fournis que s'ils étaient disponibles.⁸³ En l'espèce, un service devra fournir un renseignement uniquement s'il le détient ou s'il a droit de l'obtenir d'un tiers. Puisqu'on ne devra fournir que ce dont on dispose, exiger qu'on fasse rapport de la musique en direct ou du temps d'exécution n'ajoutera pas beaucoup au fardeau administratif des services. Cela permettra d'ailleurs à la Commission et aux sociétés de gestion d'apprendre précisément quels renseignements sont disponibles.

[242] Les services devraient s'attendre à devoir fournir tout ce dont une société de gestion a besoin pour distribuer les redevances dès les prochains tarifs. Ils devraient donc modifier leurs pratiques de cueillette de données le plus tôt possible, et exiger que leurs partenaires en programmation en fassent autant.

[243] Les services doivent fournir des renseignements sur leur utilisation de musique sept jours consécutifs par mois. D'autres tarifs laissent le choix des journées à la société de gestion. Cette fois-ci, les services demandent que le tarif prescrive de fournir l'information pour les sept derniers jours de chaque mois. Nous faisons droit à cette demande.

[244] Le tarif prévoit que les renseignements sur l'utilisation de musique sont transmis électroniquement.

6. Vérifications

[245] Les services demandent de limiter les vérifications à une par an. Nous ne le ferons pas. Aucun autre tarif n'impose une telle limite. Les sociétés de gestion doivent être en mesure de vérifier à nouveau un utilisateur si une première vérification démontre qu'il ne se conforme pas au tarif.

[246] A limit of sorts is imposed in joint tariffs by requiring collectives to share audit information. NRCC argued that it may sometimes be inappropriate to do so. We can think of no such scenario.

7. Confidentiality

[247] Until recently, tariffs provided that a collective could share confidential information “if ordered by law or by a court of law”. In this tariff, as in the most recent retransmission tariffs, these words have been changed to “if required by law”. The previous language was unclear. Courts order but the law does not. “Required by law” is more usual English usage and includes a court order.

8. Transitional Provisions

[248] The Services ask for six months to provide the information pertaining to the period from January, 2005 to the publication of the tariff, to allow them to adapt their computer systems. This is a new tariff with significant retrospective effect, targeting only two companies, both of which must get the information from third parties. Data gathering will take time, especially with respect to the number of each receiver model. Sirius adds that it may not have the receiver activation information for the whole tariff application period.

[249] The 60 to 90 day period the Collectives are proposing is too short. The Services will have roughly four months from the certification of the tariff to report information and pay royalties relating to past periods.

[250] We are as surprised as CSI to hear that Sirius might find it difficult to specify the type of receiver used by each subscriber, given that this formula was advanced in the testimony of its own General

[246] Une sorte de limite existe dans les tarifs conjoints, qui exigent que les sociétés de gestion partagent les renseignements obtenus lors d’une vérification. La SCGDV soutient qu’il pourrait parfois être déplacé de le faire. Nous ne pouvons concevoir une telle éventualité.

7. Traitement confidentiel

[247] Jusqu’à tout récemment, les tarifs prévoyaient qu’une société de gestion pouvait faire part de renseignements confidentiels « si la loi ou une ordonnance d’un tribunal l’y oblige ». Dans le présent tarif, tout comme dans les derniers tarifs pour la retransmission, on a substitué à ces mots l’expression « si la loi l’y oblige ». L’expression antérieure comportait une redondance. C’est la loi qui oblige une personne à se conformer à l’ordonnance d’un tribunal.

8. Dispositions transitoires

[248] Les services demandent six mois pour fournir les renseignements pour la période allant de janvier 2005 à la publication du tarif, de façon à pouvoir adapter leurs systèmes informatiques. Il s’agit d’un nouveau tarif dont l’effet rétrospectif est important, visant uniquement deux sociétés commerciales qui, toutes deux, doivent obtenir les renseignements de tiers. La cueillette de données prendra du temps, surtout en ce qui concerne le nombre de chaque type d’appareil récepteur. Sirius ajoute qu’elle pourrait ne pas disposer des données d’activation des appareils pour toute la période d’application du tarif.

[249] Les 60 à 90 jours que les sociétés de gestion proposent d’accorder sont trop peu. Les services disposeront d’environ quatre mois à partir de l’homologation du tarif pour fournir les renseignements et payer les redevances visant les périodes antérieures à l’homologation.

[250] Tout comme CSI, nous sommes surpris d’apprendre que Sirius pourrait avoir de la difficulté à préciser le type d’appareil utilisé par chaque abonné : c’est leur avocate générale qui a

Counsel, and given the assurances that Sirius had the data to make the distinction. Still, we have to account for that possibility by providing for the use of alternative information where actual data is unavailable. CSI's proposal that the highest rate apply is unreasonable, given that the more sophisticated models occupied only a modest share of the market at the time of the hearings. Instead, the tariff will provide that if the number of subscribers using a particular model is not available for a month, royalties are calculated using the same information for the next following month for which the information is available. Receivers get more sophisticated with time, thereby attracting higher royalties. A later number necessarily will overestimate the number of more sophisticated receivers for a previous month. That should be encouragement enough for the Services to find and provide the relevant information.

[251] As has become our common practice for new tariffs, a table sets out multiplying factors to be used on sums owed, derived using the previous month-end Bank Rate. Interest is not compounded. The amount owed for a month is the amount of the approved tariff multiplied by the factor set out for that period.

proposé la formule lors de son témoignage, et Sirius nous a assuré qu'elle disposait des données requises pour établir les distinctions. Cela dit, il nous faut tenir compte de cette éventualité en prévoyant l'utilisation d'autres renseignements si les véritables données ne sont pas disponibles. Il serait déraisonnable d'appliquer le taux le plus élevé, comme CSI le demande. Les modèles plus performants étaient très peu répandus au moment des audiences. Le tarif prévoit plutôt que si le nombre d'abonnés utilisant un modèle n'est pas disponible pour un mois, les redevances sont établies en fonction du nombre équivalent le premier mois suivant pour lequel ce nombre est disponible. Les appareils sont de plus en plus performants; ce faisant, ils attirent des redevances plus élevées. Un nombre pour une période postérieure surestime nécessairement la quantité d'appareils plus performants pour un mois antérieur. Cela devrait inciter suffisamment les services à trouver et à fournir les renseignements pertinents.

[251] Comme c'est devenu notre pratique courante pour des nouveaux tarifs, un tableau fournit les facteurs de multiplication qui seront appliqués aux sommes dues, établis en utilisant le taux officiel d'escompte de la Banque du Canada en vigueur le dernier jour du mois précédent. L'intérêt n'est pas composé. Le montant dû pour un mois donné est le montant des redevances établi conformément au tarif, multiplié par le facteur fourni pour cette période.

Le secrétaire général,



Claude Majeau
Secretary General

ENDNOTES

1. CSI's second filing purported to replace the earlier one. This raises legal and procedural issues which we need not address. The objectors, who represent all potential users under the tariff, did not challenge the second filing.
2. Grant Robertson, "XM Canada set to go at it alone, CEO says", *Globe and Mail*, (29 July 2008) B1.
3. Digital Media Distribution System.
4. Subsection 3(1) reads as follows:

For the purpose of this Act, "copyright", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

(a) to produce, reproduce, perform or publish any translation of the work,

(b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,

(c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,

(d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,

(e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt

NOTES

1. Le second dépôt de CSI visait à remplacer le précédent. Ceci soulève des questions juridiques et de procédure que nous n'avons pas à trancher. Les opposantes, qui représentent tous les utilisateurs éventuels visés par le tarif, n'ont pas contesté le second dépôt.
2. Grant Robertson, "XM Canada set to go at it alone, CEO says", *Le Globe and Mail*, (29 juillet 2008) B1.
3. Système de distribution de médias numériques.
4. Le paragraphe 3(1) se lit comme suit :

Le droit d'auteur sur l'œuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'œuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'œuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :

a) de produire, reproduire, représenter ou publier une traduction de l'œuvre;

b) s'il s'agit d'une œuvre dramatique, de la transformer en un roman ou en une autre œuvre non dramatique;

c) s'il s'agit d'un roman ou d'une autre œuvre non dramatique, ou d'une œuvre artistique, de transformer cette œuvre en une œuvre dramatique, par voie de représentation publique ou autrement;

d) s'il s'agit d'une œuvre littéraire, dramatique ou musicale, d'en faire un enregistrement sonore, film cinématographique ou autre support, à l'aide desquels l'œuvre peut être reproduite, représentée ou exécutée mécaniquement;

and publicly present the work as a cinematographic work,

(f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

(g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,

(h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, and

(i) in the case of a musical work, to rent out a sound recording in which the work is embodied,

and to authorize any such acts.

5. *SODRAC Tariff 5 (Video-copies) for the Years 2004 to 2008*, [Board decision of June 24, 2005](#) at 7 [*SODRAC Video-copies*].
6. [1986] R.P.C. 273 (Ch. D.).
7. *Ibid.* at 275.
8. [2004] 2 S.C.R. 427 [*SOCAN v. CAIP (SCC)*].
9. *Ibid.* at para. 56; for cases supporting the general proposition that Canadian Courts, cognizant of international public law jurisprudence, are reluctant to take jurisdiction over matters that occur abroad, see also *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 [*Tolofson (SCC)*]; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 at 1095; *Unifund Assurance Co. v. Insurance Corp. of*

e) s'il s'agit d'une œuvre littéraire, dramatique, musicale ou artistique, de reproduire, d'adapter et de présenter publiquement l'œuvre en tant qu'œuvre cinématographique;

f) de communiquer au public, par télécommunication, une œuvre littéraire, dramatique, musicale ou artistique;

g) de présenter au public lors d'une exposition, à des fins autres que la vente ou la location, une œuvre artistique – autre qu'une carte géographique ou marine, un plan ou un graphique – créée après le 7 juin 1988;

h) de louer un programme d'ordinateur qui peut être reproduit dans le cadre normal de son utilisation, sauf la reproduction effectuée pendant son exécution avec un ordinateur ou autre machine ou appareil;

i) s'il s'agit d'une œuvre musicale, d'en louer tout enregistrement sonore.

Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.

5. *Tarif 5 de la SODRAC (Vidéocopies) pour les années 2004 à 2008*, [décision de la Commission du 24 juin 2005](#) à la p. 7 [*SODRAC vidéocopies*].
6. [1986] R.P.C. 273 (Ch. D.).
7. *Ibid.* à la p. 275.
8. [2004] 2 R.C.S. 427 [*SOCAN c. ACFI (CSC)*].
9. *Ibid.* au para. 56; à l'appui de l'affirmation générale selon laquelle les tribunaux canadiens, conscients de la jurisprudence en droit international, sont réticents à exercer leur compétence sur ce qui se produit à l'étranger, voir aussi les arrêts *Tolofson c. Jensen*, [1994] 3 R.C.S. 1022 [*Tolofson (SCC)*]; *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077 à la p. 1095; *Unifund Assurance*

- British Columbia*, [2003] 2 S.C.R. 63 at paras. 59-61.
10. [1995] R.P.C. 657.
11. *Ibid.* at 660.
12. H. Laddie et al., *The Modern Law of Copyright and Designs*, 3rd ed. (London: Butterworths, 2000), vol. 2.
13. *Ibid.* at para. 34A.18.
14. 24 F. 3d 1088 (9th Circ. 1994).
15. *Supra* note 8 at para. 61.
16. *CAPAC v. CTV Television Network Ltd.*, [1968] S.C.R. 676 at paras. 6, 16.
17. [2002] 2 S.C.R. 336 at paras. 42-50 [*Théberge*].
18. This argument will not be addressed in the analysis, as it is not in the least pertinent to the contentious issues surrounding the programming copies.
19. This argument will not be addressed in the legal analysis, as it is not pertinent to the contentious issues surrounding the programming copies. However, a position taken at the stage of Interrogatories should not preclude a person from pursuing a legal issue that remains relevant.
20. In further support, CSI points to the fact that under the CRTC licence, the Satellite Services have undertaken to exercise control over the programming content delivered to Canadian customers; their undertaking does not extend to the creation of programming content however.
21. [2002] 4 F.C. 3 (C.A.) [*SOCAN v. CAIP (FCA)*].
- Co. c. Insurance Corp. of British Columbia*, [2003] 2 R.C.S. 63 aux paras. 59-61.
10. [1995] R.P.C. 657.
11. *Ibid.* à la p. 660.
12. H. Laddie et al., *The Modern Law of Copyright and Designs*, 3^e éd., London, Butterworths, 2000, vol. 2.
13. *Ibid.* au para. 34A.18.
14. 24 F. 3d 1088 (9^e Circ. 1994).
15. *Supra* note 8 au para. 61.
16. *CAPAC c. CTV Television Network Ltd.*, [1968] R.C.S. 676 aux paras. 6, 16.
17. [2002] 2 R.C.S. 336 aux paras. 42-50 [*Théberge*].
18. Cet argument ne sera pas examiné dans l'analyse, car il n'est pas pertinent aux questions en litige visant les copies de programmation.
19. Cet argument ne sera pas examiné dans l'analyse, car il n'est pas pertinent à l'égard des questions en litige visant les copies de programmation. Cela dit, personne ne devrait être empêché de développer une question juridique qui demeure pertinente à la suite d'une thèse établie au stade des demandes de renseignements.
20. Pour étayer davantage sa thèse, CSI souligne qu'en vertu de leur licence du CRTC, les services par satellite se sont engagés à contrôler le contenu de la programmation livrée aux clients canadiens; leur engagement ne s'étend pas toutefois à la création du contenu de la programmation.
21. [2002] 4 C.F. 3 (C.A.) [*SOCAN c. ACFI (CAF)*].

22. *Ibid.* at paras. 160-62; see also *Compo Co. Ltd. v. Blue Crest Music et al.*, [1980] 1 S.C.R. 357.
 23. *SOCAN v. CAIP (FCA)*, *ibid.* at para. 163.
 24. *Supra* note 5.
 25. *Supra* note 21; see also *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 [*Moran*]; *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (Ont. C.A.); *Disney Enterprises Inc. v. Click Enterprises Inc.* (2006), 267 D.L.R. (4th) 291 (Ont. Sup. Ct.); *Tolofson (SCC)*, *supra* note 9; *Libman v. The Queen*, [1985] 2 S.C.R. 178.
 26. (1992), 89 D.L.R. (4th) 129 (B.C.C.A.) [reversed in part by the Supreme Court of Canada but not on this point, *supra* note 9].
 27. *Ibid.* at 133.
 28. J. Walker. ed., Castel & Walker: *Canadian Conflict of Laws*, looseleaf, 6th ed. (Markham, Ont.: LexisNexis Canada, 2005).
 29. *Ibid.* at 24-2.
 30. *Ibid.*
 31. *Ibid.*
 32. D. Vaver, *Intellectual Property Law: Copyright, Patents, Trademarks* (Essentials of Canadian Law Series) (Concord, Ont.: Irwin Law, 1997) at 13.
 33. *Supra* note 25 at 404.
 34. *Tolofson (SCC)*, *supra* note 9 at 1050-51.
 35. *SOCAN - Tarif 4 (Concerts) [Jurisdictional Issue]*, [Board decision of March 26, 2004](#) at 8-9.
22. *Ibid.* aux paras. 160-62; voir aussi *Compo Co. Ltd. c. Blue Crest Music et al.*, [1980] 1 R.C.S. 357.
 23. *SOCAN c. ACFI (CAF)*, *ibid.* au para. 163.
 24. *Supra* note 5.
 25. *Supra* note 21; voir aussi *Moran c. Pyle National (Canada) Ltd.*, [1975] 1 R.C.S. 393 [*Moran*]; *Muscutt c. Courcelles* (2002), 60 O.R. (3^e) 20 (C.A. Ont.); *Disney Enterprises Inc. c. Click Enterprises Inc.* (2006), 267 D.L.R. (4^e) 291 (C.S. Ont.); *Tolofson (CSC)*, *supra* note 9; *Libman c. La Reine*, [1985] 2 R.C.S. 178.
 26. (1992), 89 D.L.R. (4^e) 129, (C.A.C.B.) [infirmé en partie par la Cour suprême du Canada, mais sur un autre point, *supra* note 9].
 27. *Ibid.* à la p. 133.
 28. J. Walker. dir., Castel & Walker: *Canadian Conflict of Laws*, feuilles mobiles, 6^e éd., Markham (Ont.), LexisNexis Canada, 2005.
 29. *Ibid.* à la p. 24-2.
 30. *Ibid.*
 31. *Ibid.*
 32. D. Vaver, *Intellectual Property Law: Copyright, Patents, Trademarks* (Essentials of Canadian Law Series), Concord (Ont.), Irwin Law, 1997 à la p. 13.
 33. *Supra* note 25 à la p. 404.
 34. *Tolofson (SCC)*, *supra* note 9 aux pp. 1050-51.
 35. *SOCAN - Tarif 4 (Concerts) [Question de compétence]*, [décision de la Commission du 26 mars 2004](#) aux pp. 8-9.

36. See Confidential Transcripts of December 7, 2007, Vol. 10 at 1774.
37. Kevin Garnett, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James on Copyright*, 15th ed. (London: Sweet & Maxwell, 2005) [*Copinger and Skone James*].
38. [2001] FCA 1719 [*AVRA v. Warner*].
39. [2005] HCA 58 [*Stevens v. Kabushiki*].
40. Among other cases cited, see *Canadian Admiral Corp. Ltd. v. Rediffusion Inc.*, [1954] Ex. C.R. 382 at paras. 19, 28 [*Canadian Admiral*]; *Théberge, supra* note 17 at para. 25; *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 at para. 8 [*CCH*]; *Warner Brothers-seven Arts Inc. v. CESM-TV Ltd.* (1971), 65 C.P.R. 215 at 225 (Ex. Ct.).
41. *Supra* note 8 at paras. 115-16.
42. [2007] S.C.R. 21 at paras. 79-81 [*Euro-Excellence*].
43. *EROS - Équipe de Recherche Opérationnelle en Santé inc. v. Conseillers en Gestion et Informatique C.G.I. inc.* (2004), 35 C.P.R. (4th) 105 at para. 113. (F.C.T.D.) [*EROS-Équipe*].
44. 478 F.Supp. 2d 607 at 621-22 (S.D.N.Y. 2007) [*Cablevision*].
45. *SOCAN - Tariff 22.A (Internet - Online Music Services) for the Years 1996 to 2006*, [Board decision of October 18, 2007](#) at para. 95 [*SOCAN 22.A*].
46. *Supra* note 8 at paras. 113-19.
47. [Tariff certified by the Copyright Board](#), published in the *Canada Gazette*, March 31, 2007.
36. Voir transcriptions confidentielles du 7 décembre 2007, Vol. 10 à la p. 1774.
37. Kevin Garnett, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James on Copyright*, 15^e éd., Londres, Sweet & Maxwell, 2005 [*Copinger and Skone James*].
38. [2001] FCA 1719 [*AVRA v. Warner*].
39. [2005] H.C. Austr. 58 [*Stevens v. Kabushiki*].
40. Ils citent entre autres *Canadian Admiral Corp. Ltd. c. Rediffusion Inc.*, [1954] R.C.É. 382, aux paras. 19, 28 [*Canadian Admiral*]; *Théberge, supra* note 17 au para. 25; *CCH Canadienne Ltée c. Barreau du Haut-Canada*, [2004] 1 R.C.S. 339, au para. 8 [*CCH*]; *Warner Brothers-seven Arts Inc. c. CESM-TV Ltd.* (1971), 65 C.P.R. 215 à la p. 225 (C. Éch.).
41. *Supra* note 8 aux paras. 115-16.
42. [2007] R.C.S. 21 aux paras. 79-81 [*Euro-Excellence*].
43. *EROS - Équipe de recherche opérationnelle en santé inc. c. Conseillers en gestion et informatique C.G.I. inc.* (2004), 35 C.P.R. (4^e) 105 au para. 113 (C.F. 1^{re} Ins.) [*EROS-Équipe*].
44. 478 F.Supp. 2d 607 aux pp. 621-22 (S.D.N.Y. 2007) [*Cablevision*].
45. *SOCAN - Tarif 22.A (Internet - Services de musique en ligne) pour les années 1996 à 2006*, [décision de la Commission du 18 octobre 2007](#) au para. 95 [*SOCAN 22.A*].
46. *Supra* note 8 aux paras. 113-19.
47. [Tarif homologué par la Commission du droit d'auteur](#), publié dans la *Gazette du Canada*, 31 mars 2007.

48. *Supra* note 37 at para. 7-19.
49. *Ibid.*
50. Paul Goldstein, *Goldstein on Copyright*, 3rd ed. (New York: Kluwer Law, 2006) (2007 Supplement) at 7:9 ¶ 7.02.
51. (1995), 62 C.P.R. (3d) 257 (F.C.T.D.).
52. *Ibid.* at 268.
53. *Canadian Admiral*, *supra* note 40 at 394; see also J.S. McKeown, *Fox on Copyright and Industrial Designs*, looseleaf, 4th ed. (Toronto: Thomson Carswell, 2007) at 9-3; Copinger and Skone James, *supra* note 37 at para. 3-79.
54. *Supra* note 43.
55. [1994] F.S.R. 723 (H.C.J.-C.H.).
56. *Supra* note 45.
57. *Supra* note 43.
58. There are some more sophisticated receiver models that provide wireless Internet delivery. The Stiletto unit, which is equipped with a WiFi receiver, is such an example. In this case, a small temporary copy is stored to allow the actual stream to be delivered on that device and on the computer as well. With that same receiver, subscribers are able to purchase musical works online to upload them onto the device. Basically, certain models are hybrids; in addition to being satellite radio receivers, they also serve as MP3s. The evidence suggests that it is a very small minority of subscribers who own the more sophisticated models. This service, or its resulting copies, was not discussed by the parties in their legal arguments.
59. Including *Théberge*, *supra* note 17; *Robertson v. Thomson Corp.*, [2006] 2 S.C.R. 363;
48. *Supra* note 37 au para. 7-19.
49. *Ibid.*
50. Paul Goldstein, *Goldstein on Copyright*, 3^e éd., (New York, Kluwer Law, 2006) (supplément 2007) à la p. 7:9 ¶ 7.02.
51. (1995), 62 C.P.R. (3^e) 257 (C.F. 1^{re} Ins.).
52. *Ibid.* à la p. 268.
53. *Canadian Admiral*, *supra* note 40 à la p. 394; voir aussi J.S. McKeown, *Fox on Copyright and Industrial Designs*, feuilles mobiles, 4^e éd., Toronto, Thomson Carswell, 2007 à la p. 9-3; Copinger and Skone James, *supra* note 37 au para. 3-79.
54. *Supra* note 43.
55. [1994] F.S.R. 723 (H.C.J.-C.H.).
56. *Supra* note 45.
57. *Supra* note 43.
58. Des modèles disponibles de récepteurs plus perfectionnés procurent une livraison Internet sans fil. L'unité Stiletto, équipée d'un récepteur WiFi, en est un exemple. Dans ce cas, une petite copie temporaire est stockée pour permettre à la diffusion réelle d'être livrée dans l'appareil et dans l'ordinateur aussi. Avec ce même récepteur, les abonnés peuvent acheter des œuvres musicales en ligne pour les télécharger en amont dans l'appareil. Essentiellement, certains modèles sont hybrides; en plus d'être des récepteurs de radio satellitaire, ils servent aussi de lecteurs MP3. La preuve semble indiquer qu'une infime minorité d'abonnés possède les modèles les plus perfectionnés. Ce service, ou les copies qui en résultent, n'a pas été examiné par les parties dans leur argument juridique.
59. Dont *Théberge*, *supra* note 17; *Robertson c. Thomson Corp.*, [2006] 2 R.C.S. 363;

- SOCAN v. CAIP (SCC)*, *supra* note 8; and *Euro-Excellence*, *supra* note 42.
60. [Board decision of March 16 2007](#) at para. 103 [*CSI – Online Music Services*].
61. *Supra* note 45.
62. *Supra* note 60.
63. [1953] 2 S.C.R. 182 [*Muzak*].
64. [1945] 1 A.C. 108 (P.C.).
65. [1988] 2 All E.R. 484 (H.L.).
66. [1993] 3 F.C. 227 (T.D.).
67. *Ibid.* at 239, citing *CBS v. Ames Records and Tapes Ltd.*, [1981] 2 All E.R. 812 at 821 (Ch. D.).
68. *Supra* note 63 at paras. 36-38.
69. *CCH*, *supra* note 40 at para. 38.
70. *Supra* note 8 at para. 122.
71. *Canadian Cable Television Association v. Canada (Copyright Board) (CA)*, [1993] 2 F.C. 138 at 154-56 (C.A.) [*CCTA*].
72. *Supra* note 8 at para. 124.
73. *Supra* note 71 at 155-56.
74. *CCH*, *supra* note 40 at paras. 48-60.
75. *Supra* note 45 at paras. 101-16.
76. Potential subscribers can also sample satellite radio services by the following means: first non-subscribers can sample programming online for a limited one-time listening trial; second, prizes offered at special events that are accompanied by a free three-month
- SOCAN c. ACFI (CSC)*, *supra* note 8; et *Euro-Excellence*, *supra* note 42.
60. [Décision de la Commission du 16 mars 2007](#) au para. 103 [*CSI – Services de musique en ligne*].
61. *Supra* note 45.
62. *Supra* note 60.
63. [1953] 2 R.C.S. 182 [*Muzak*].
64. [1945] 1 A.C. 108 (P.C.).
65. [1988] 2 All E.R. 484 (H.L.).
66. [1993] 3 C.F. 227 (1^{re} Ins.).
67. *Ibid.* à la p. 239, citant *CBS c. Ames Records and Tapes Ltd.*, [1981] 2 All E.R. 812 à la p. 821 (Ch. D.).
68. *Supra* note 63 aux paras. 36-38.
69. *CCH*, *supra* note 40 au para. 38.
70. *Supra* note 8 au para. 122.
71. *Association canadienne de télévision par câble c. Canada (Commission du droit d'auteur) (CA)*, [1993] 2 C.F. 138 aux pp. 154-56. (C.A.) [*ACTC*].
72. *Supra* note 8 au para. 124.
73. *Supra* note 71 aux pp. 155-56.
74. *CCH*, *supra* note 40 aux paras. 48-60.
75. *Supra* note 45 aux paras. 101-16.
76. Les abonnés potentiels peuvent aussi échantillonner des services de radio par satellite de la façon suivante : premièrement, les non-abonnés peuvent échantillonner des émissions en ligne pendant l'essai d'une seule période limitée de temps d'écoute; deuxièmement, par

- subscription; third, on-site sampling opportunities for the duration of certain special events.
77. *Supra* note 45 at paras. 101-16.
78. The rates we certify have two decimals. Calculations that are indicated could however lead to slightly different results, because of rounding effect.
79. This ratio was not set as such in either *SOCAN 22.A*, *supra* note 45 or in *CSI – Online Music Services*, *supra* note 60. Rather, it results from the decision to keep constant the total rate payable to CSI and SOCAN. Furthermore, in *CSI – Online Music Services*, the Board expressed reservations about the validity of the approach it used to set the rate: see para. 98. That being said, the rates and the attending ratios now exist. The Board’s reservations do not mean that the ratios are *per se* unreliable. The fact that the resulting ratios are near those that the International Confederation of Societies of Authors and Composers (CISAC) recommends only serves to confirm that they are probably fair: see *SOCAN 22.A* at para. 165.
80. Final Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, [Docket No. 2006-1 CRB DSTR], June 10, 2008.
81. *Supra* note 60 at para. 138.
82. *Supra* note 45 at para. 118.
83. *Supra* note 60 at paras. 148-49.
- des prix offerts lors d’événements spéciaux, lesquels sont jumelés à un abonnement gratuit de trois mois; troisièmement, par des occasions d’échantillonnage sur place pendant la durée de certains événements spéciaux.
77. *Supra* note 45 aux paras. 101-16.
78. Les taux que nous homologuons comportent deux décimales. Les calculs indiqués pourraient toutefois ne pas correspondre exactement aux résultats à cause des effets d’arrondissement.
79. Ce ratio n’a pas été établi en tant que tel ni dans *SOCAN 22.A*, *supra* note 45, ni dans *CSI – Services de musique en ligne*, *supra* note 60. Il découle plutôt de la décision de tenir constant le total des taux payables à CSI et à la SOCAN. D’ailleurs, dans l’affaire *CSI – Services de musique en ligne*, la Commission avait exprimé des réserves par rapport à la façon dont le taux avait été établi : voir para. 98. Cela dit, les taux et les ratios qui en découlent existent désormais. Les réserves que la Commission a formulées ne font pas en sorte que les ratios sont intrinsèquement peu fiables. Le fait qu’ils se rapprochent de ceux que recommande la Confédération internationale des sociétés d’auteurs et de compositeurs (CISAC) soutient l’hypothèse selon laquelle ces ratios sont sans doute équitables : voir *SOCAN 22.A* au para. 165.
80. *Final Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, [Docket No. 2006-1 CRB DSTR], décision du 10 juin 2008.
81. *Supra* note 60 au para. 138.
82. *Supra* note 45 au para. 118.
83. *Supra* note 60 aux paras. 148-49.

TABLE / TABLEAU

**Full and Certified Rates (as a Percentage of Total Revenues)
Pleins taux et taux homologués (en pourcentage des revenus totaux)**

	Full rates/ Pleins taux	Certified rates/Taux homologués					
		2005	2006	2007	2008	2009	2010
SOCAN	4.26%	3.19%	3.19%	3.19%	3.83%	3.83%	
NRCC/SCGDV	1.18%	-	-	0.89%	1.07%	1.07%	1.18%
CSI							
. Programming (with play copies)/Programmation (avec copies de diffusion)*	0.10%	-	0.07%	0.07%	0.09%	0.09%	
. Extended buffer and replay/Tampon prolongé et écoute différée	1.87%	-	1.40%	1.40%	1.69%	1.69%	
. Storing individual songs and block programming/Stockage de pistes individuelles et de blocs de programmation	2.90%	-	2.17%	2.17%	2.61%	2.61%	
TOTAL							
. Receiver with no copying functionality (with play copies)/Appareil ne pouvant copier (avec copies de diffusion)	5.54%	3.19%	3.26%	4.15%	4.99%	4.99%	
. Receiver with extended buffer and replay/Appareil avec tampon prolongé et écoute différée	7.41%	3.19%	4.66%	5.55%	6.68%	6.68%	
. MP3-like receiver/Appareil de type MP3 **	10.31%	3.19%	6.83%	7.72%	9.29%	9.29%	
TOTAL (Average/Moyen) ***	6.19%	3.19%	3.75%	4.64%	5.58%	5.58%	

* A 95% discount applies to this rate when no play copies are being made/Un escompte de 95 % s'applique à ce taux lorsque aucune copie de diffusion n'est effectuée.

** Assuming that the receiver is also enabled for extended buffer and replay/Si l'appareil possède aussi les fonctions de tampon prolongé et d'écoute différée.

*** Assuming that 30% of subscribers have receivers with buffer and replay functions, and 3% have MP3-like receivers/Si 30 % des abonnés possèdent un appareil équipé des fonctions tampon et écoute différée, et 3 % possèdent un appareil de type MP3.

MC 9



**Collective Administration of Performing
Rights and of Communication Rights**

**Gestion collective du droit d'exécution et du droit
de communication**

Copyright Act, subsection 68(3)

Loi sur le droit d'auteur, paragraphe 68(3)

Files: Public Performance of Musical Works:
Public Performance of Sound Recordings

Dossiers : Exécution publique d'œuvres musicales:
Exécution publique d'enregistrements sonores

STATEMENT OF ROYALTIES TO BE
COLLECTED FOR THE COMMUNICATION TO
THE PUBLIC BY TELECOMMUNICATION, IN
CANADA, OF MUSICAL WORKS AND OF
PUBLISHED SOUND RECORDINGS
EMBODYING MUSICAL WORKS AND
PERFORMERS' PERFORMANCES OF SUCH
WORKS

TARIF DES REDEVANCES À PERCEVOIR POUR LA
COMMUNICATION AU PUBLIC PAR
TÉLÉCOMMUNICATION, AU CANADA,
D'ŒUVRES MUSICALES ET
D'ENREGISTREMENTS SONORES PUBLIÉS
CONSTITUÉS D'ŒUVRES MUSICALES ET DE
PRESTATIONS DE TELLES ŒUVRES

[SOCAN AND RE:SOUND TARIFFS 1.C (CBC-
RADIO) 2006-2011]

[TARIFS 1.C (RADIO DE LA SRC) DE LA SOCAN ET
DE RÉ:SONNE, 2006-2011]

DECISION OF THE BOARD

DÉCISION DE LA COMMISSION

Reasons delivered by:

Motifs exprimés par :

Mr. Justice William J. Vancise
Mr. Claude Majeau
Mrs. Jacinthe Théberge

M. le juge William J. Vancise
M^e Claude Majeau
M^e Jacinthe Théberge

Date of the Decision

Date de la décision

July 8, 2011

Le 8 juillet 2011

Ottawa, July 8, 2011

Ottawa, le 8 juillet 2011

**File: Public Performance of Musical Works;
Public Performance of Sound Recordings**

**Dossiers : Exécution publique d'œuvres
musicales: Exécution publique d'enregistrements
sonores**

Reasons for the decision

Motifs de la décision

I. INTRODUCTION

I. INTRODUCTION

[1] The issue in this matter is simple. Should the royalties paid by the Canadian Broadcasting Corporation (CBC) for the music it uses on its radio services continue to be linked to the amount of royalties paid by commercial radio stations? The answer is not so simple. The content as well as the technologies used to deliver it have evolved considerably in the last 20 years, both for CBC and commercial radio. We thus need to reexamine whether the link between the CBC and commercial radio is still appropriate today.

[1] La question en litige dans la présente affaire est simple. Les redevances que la Société Radio-Canada (SRC) verse pour jouer de la musique sur les ondes de ses chaînes radio devraient-elles continuer d'être liées à celles payées par les stations de radio commerciales? La réponse, elle, n'est pas aussi simple. Le contenu et les technologies utilisées pour le livrer ont beaucoup évolué en vingt ans, tant à la SRC qu'à la radio commerciale. Il faut donc examiner à nouveau si le lien établi entre la première et la seconde a toujours lieu d'être.

[2] The following are the Board's reasons dealing with Tariffs 1.C (CBC – Radio) of the Society of Composers, Authors and Music Publishers of Canada (SOCAN) and of Re:Sound Music Licensing Company (Re:Sound)¹ for the years 2006 to 2011. Proposed statements of royalties were filed pursuant to subsection 67.1(1) of the *Copyright Act*.²

[2] Ce qui suit expose les motifs de la Commission au regard du Tarif 1.C (Radio de la SRC) de la Société canadienne des auteurs, compositeurs et éditeurs de musique (SOCAN) et de Ré:Somme Société de Gestion de la Musique (Ré:Somme)¹ pour les années 2006 à 2011. Les sociétés ont déposé leurs projets de tarifs conformément au paragraphe 67.1(1) de la *Loi sur le droit d'auteur*.²

[3] On March 31, 2005, March 31, 2006, March 30, 2007, March 31, 2008, March 27, 2009 and March 31, 2010, SOCAN filed proposed statements of royalties for the communication to the public by telecommunication of musical and dramatico-musical works in 2006 to 2011.

[3] Le 31 mars 2005, le 31 mars 2006, le 30 mars 2007, le 31 mars 2008, le 27 mars 2009 et le 31 mars 2010, la SOCAN a déposé ses projets de tarifs des redevances à percevoir pour la communication au public par télécommunication d'œuvres musicales ou dramatico-musicales pour les années 2006 à 2011.

[4] On April 2, 2002,³ March 27, 2007, March 28, 2008 and March 31, 2009, Re:Sound filed proposed statements of royalties for the communication to the public by telecommunication of published sound recordings embodying musical works and performers' performances of such works in 2003 to 2007, in 2008, in 2009 and in 2010 to 2011.

[4] Le 2 avril 2002,³ le 30 mars 2007, le 28 mars 2008 et le 31 mars 2009, Ré:Somme a déposé ses projets de tarifs des redevances à percevoir pour la communication au public par télécommunication d'enregistrements sonores publiés d'œuvres musicales et de prestations d'artistes-interprètes de ces œuvres pour les années 2003 à 2007, 2008, 2009 et 2010 à 2011.

[5] Statements of proposed royalties were published in the *Canada Gazette* with a notice informing potential users and their representatives of their right to object to the statements. CBC filed a timely objection to each tariff proposal.

[6] On February 17, 2004, Re:Sound informed the Board that it had reached an agreement with CBC for the period 2003 to 2005. On October 7, 2004, CBC confirmed that if the Board agreed to certify Re:Sound Tariff 1.C for 2003 to 2005 according to the agreement reached between the parties, CBC would withdraw its objection for these years. For 2006 and 2007, since Re:Sound proposed that its tariff proposal remain as before, CBC maintained its initial objection.

[7] In December 2004, SOCAN reached an agreement with CBC for the years 2002 to 2005. On the following January 21, SOCAN informed the Board of that agreement. CBC confirmed this on January 27.

[8] Pursuant to the agreements, the Board certified Re:Sound Tariff 1.C (2003-2005) on January 14, 2005, and SOCAN Tariff 1.C (2002-2005) on March 20, 2008.

[9] The examination of the CBC tariffs for the remaining years was held in abeyance pending the decision of the Board in the re-determination of the commercial radio tariff. That decision was issued on February 22, 2008.⁴

[10] On September 25, 2009, the Board consolidated the examination of Re:Sound Tariff 1.C for 2010-2011 and SOCAN Tariff 1.C for 2010 with the examination of the same tariffs for 2006-2009. SOCAN and CBC agreed to a later request by the Board to include the SOCAN tariff for 2011 in the present hearing.

[11] Hearings were held over three days, in December, 2009 and the record of the proceedings was perfected on December 16, when CBC

[5] Les tarifs proposés ont été publiés dans la *Gazette du Canada*, accompagnés d'une note informant les utilisateurs éventuels et leurs représentants de leur droit de s'opposer aux projets. La SRC s'est opposée en temps opportun à chacun des projets.

[6] Le 17 février 2004, Ré:Somme informait la Commission qu'elle avait conclu une entente avec la SRC pour les années 2003 à 2005. Le 7 octobre 2004, la SRC a avisé la Commission que si celle-ci acceptait d'homologuer le Tarif 1.C de Ré:Somme pour la période 2003-2005 conformément à l'entente convenue entre les parties, la SRC retirerait son opposition pour ces années. Pour 2006 et 2007, Ré:Somme maintenait son projet de tarif et la SRC, son opposition.

[7] En décembre 2004, la SOCAN concluait une entente avec la SRC pour les années 2002 à 2005. Le 21 janvier suivant, la SOCAN informait la Commission de cette entente. Le 27 janvier, la SRC la confirmait.

[8] Conformément aux ententes prises, la Commission homologuait le Tarif 1.C de Ré:Somme pour les années 2003 à 2005 le 14 janvier 2005, et le Tarif 1.C de la SOCAN pour les années 2002 à 2005 le 20 mars 2008.

[9] L'examen des tarifs de la SRC visant les autres années a été suspendu jusqu'à ce que la Commission tranche sur le réexamen du tarif applicable à la radio commerciale, le 22 février 2008.⁴

[10] Le 25 septembre 2009, la Commission a combiné l'examen du Tarif 1.C de Ré:Somme pour 2010-2011 et du Tarif 1.C de la SOCAN pour 2010 et celui des mêmes tarifs pour 2006-2009. La SOCAN et la SRC ont accédé par la suite à la demande de la Commission d'inclure le tarif de 2011 de la SOCAN dans l'objet de l'audience.

[11] Les audiences se sont déroulées en décembre 2009 et ont duré trois jours. Le dossier de l'affaire a été fermé le 16 décembre, lorsque la SRC s'est

complied with undertakings made during the hearings.

II. THE POSITION OF THE PARTIES AND THEIR PROPOSED RATES

A. Collectives

[12] The Board last certified SOCAN Tariff 1.C on March 20, 2008. The annual fees, as agreed upon by the parties, increased from \$1,380,675 for 2002 to \$1,486,836 for 2005.

[13] Initially, SOCAN sought royalties of \$2,750,000 for 2006 to 2009 and \$3,750,000 for 2010 and 2011. After final data became available, SOCAN increased its request to \$3,254,561 for 2006, \$3,736,542 for 2007 and \$4,027,525 for 2008 to 2010.⁵

[14] SOCAN requests that the formula used in 1991 to determine CBC radio royalties⁶ be reinstated. The formula is composed of three elements: royalties commercial radio stations pay to SOCAN; CBC radio's use of the SOCAN repertoire as compared to commercial radio; and CBC radio's audience share as compared to commercial radio. The significant increases SOCAN proposed reflected, in part, proportional increases in music use and audience share.

[15] In support of this submission, SOCAN advanced three arguments. First, the reasons that resulted in an increase to the commercial radio rate apply with equal force to CBC. Second, the Federal Court of Appeal has found commercial broadcasters' income to be "extremely relevant" in the determination of the CBC rate.⁷ Finally, the magnitude of the proposed increase over the current tariff is irrelevant so long as the amounts proposed and ultimately certified are fair and equitable.

conformée aux engagements pris durant les audiences.

II. THÈSE DES PARTIES ET TAUX PROPOSÉS

A. Sociétés de gestion

[12] La dernière homologation du Tarif 1.C de la SOCAN par la Commission remonte au 20 mars 2008. Ainsi qu'en ont convenu les parties, les redevances annuelles sont passées de 1 380 675 \$ en 2002 à 1 486 836 \$ en 2005.

[13] Au départ, la SOCAN demandait des redevances de 2 750 000 \$ de 2006 à 2009 et de 3 750 000 \$ en 2010 et 2011. Lorsque les dernières données sont devenues disponibles, la SOCAN a majoré les montants demandés à 3 254 561 \$ pour 2006, 3 736 542 \$ pour 2007 et 4 027 525 \$ pour 2008, 2009 et 2010.⁵

[14] La SOCAN demande que la formule utilisée en 1991 pour calculer les redevances applicables à la radio de la SRC⁶ soit rétablie. La formule fait intervenir trois éléments : les redevances que les stations de radio commerciales versent à la SOCAN, l'utilisation que la radio de la SRC fait du répertoire de la SOCAN par rapport celle qu'en fait la radio commerciale, et la part d'auditoire de la radio de la SRC par rapport à celle de la radio commerciale. Les augmentations importantes que propose la SOCAN découlent en partie d'augmentations proportionnelles de l'utilisation de musique et de la part d'auditoire.

[15] Pour étayer sa demande, la SOCAN a avancé trois arguments. D'abord, les motifs justifiant la majoration du tarif pour la radio commerciale sont tout aussi valables dans le cas de la SRC. Ensuite, la Cour d'appel fédérale a déterminé que les revenus des radiodiffuseurs commerciaux étaient « très utiles » pour établir le tarif applicable à la SRC.⁷ Enfin, l'ampleur de la majoration proposée n'a pas d'importance, du moment que les montants proposés, et ultimement homologués, soient justes et équitables.

[16] The Board has certified a CBC radio tariff for Re:Sound twice since the inception of the tariff in 1998. The first time followed a hearing; the second decision reflected an agreement between the parties.³ In each case, the rate was set at \$30,000 per month.

[17] In its proposed tariffs, Re:Sound sought royalties of 6 per cent of operating costs⁹ multiplied by 0.6139.¹⁰ This would have resulted in royalties of \$14,603,830 in 2008. In its statement of case, Re:Sound asked that the Board continue to set its royalties as a proportion of SOCAN's, resulting in proposed amounts of at least \$2,929,105 for 2006, \$3,362,888 for 2007 and \$3,624,773 for 2008 to 2011.¹¹

[18] In support of its position, Re:Sound quoted judicial declarations according to which "[w]hen acting as a broadcaster, CBC is acting in its private aspect, its rights, obligations, powers and liabilities are the same as a private broadcaster and not those of a public body."¹² Re:Sound contends that the 1991 formula is fair in part because it takes into account the amount of music CBC chooses to use: setting royalties as a percentage of operating expenses, as CBC proposes, does not. Should the Board favour CBC's suggested approach, Re:Sound submits the proposed rate is too low, given that the SOCAN rate for non-commercial radio, which have considerably more modest operating budgets than CBC's, is 1.9 per cent. Re:Sound also requests more stringent reporting obligations: CBC's consistently inadequate reports hamper efficient and accurate distribution of royalties and impose a considerable administrative burden on Re:Sound.

B. CBC

[19] CBC submits that its SOCAN royalties should be calculated as a percentage of its radio operating expenses and proposes that this

[16] Depuis l'adoption du tarif en 1998, la Commission a homologué à deux reprises un tarif Ré:Somme pour la radio de la SRC : d'abord à l'issue d'une audience, puis à la suite d'une entente conclue entre les parties.³ Chaque fois, le tarif a été fixé à 80 000 \$ par mois.

[17] Dans ses projets de tarifs, Ré:Somme demandait des redevances de 6 pour cent des frais d'exploitation.⁹ multipliées par 0.6139;¹⁰ les redevances se seraient élevées à 14 603 830 \$ en 2008. Dans son énoncé de cause, Ré:Somme a demandé que la Commission continue d'établir les redevances en fonction de celles de la SOCAN, ce qui entraînerait des redevances d'au moins 2 929 105 \$ pour 2006, 3 362 888 \$ pour 2007 et 3 624 773 \$ pour les années 2008 à 2011.¹¹

[18] Pour étayer sa demande, Ré:Somme a cité des déclarations judiciaires portant que [TRADUCTION] « en tant que radiodiffuseur, c'est la personnalité privée de la SRC qui entre en jeu, et ses droits, obligations, pouvoirs et responsabilités sont les mêmes que ceux d'un radiodiffuseur privé, non d'un organisme public. »¹² Ré:Somme prétend que la formule de 1991 est juste entre autres parce qu'elle tient compte de la quantité de musique que la SRC choisit de diffuser, ce qui n'est pas le cas si les redevances sont établies à un pourcentage des frais d'exploitation, comme le propose la SRC. Ré:Somme affirme que si la Commission devait opter pour la méthode que propose la SRC, le tarif proposé serait trop bas, étant donné que le tarif SOCAN pour les stations de radio non commerciales, dont les budgets de fonctionnement sont beaucoup plus modestes que celui de la SRC, est de 1,9 pour cent. Ré:Somme demande l'imposition d'obligations de rapport plus rigoureuses: la SRC fournit souvent des données qui laissent à désirer, ce qui entrave la distribution efficace et exacte des redevances et impose à Ré:Somme un lourd fardeau administratif.

B. SRC

[19] La SRC voudrait que les redevances à la SOCAN soient calculées comme un pourcentage des frais d'exploitation de ses stations de radio, soit

percentage be 0.44 per cent. This is approximately the average fraction of these expenses CBC radio paid to SOCAN pursuant to agreements from 1992 to 2005. This would entail a payment to SOCAN of \$1,531,200 for 2006 and lower payments for the subsequent years, as expenses related to radio declined. CBC strongly opposed the use of the Board's 1991 formula for determining royalties payable to SOCAN. Counsel for CBC summarized the position of CBC neatly in his opening argument:

[TRANSLATION] In fact, this hearing really turns on determining if the CBC should be subject for all time to the tariff formula of 1991, which links the annual royalties paid by CBC to SOCAN to the amount of royalties paid by commercial radio stations.¹³

[20] Counsel for CBC argued more forcefully in his closing argument that "[the] proposals [by SOCAN and Re:Sound] blindly adhere to the Board's 1991 tariff formula."¹⁴

[21] CBC's opposition to the use of the 1991 methodology is based primarily on the argument that it is unfair to tie its royalty obligations to the income of a third party, which operates under a completely different mandate and business model. In addition, CBC contends that the formula is inadequate for a number of reasons and is leading to excessive royalties that bear no relationship either to the value derived by CBC for the use of music or to its financial resource and cannot provide the stability CBC seeks.

[22] In CBC's submission, the 1991 formula also exaggerates the importance of the collectives' repertoire by reason that it treats variations in music use on all four CBC services equally, without regard to each service's audience share. Finally, the factors the Board used to justify the recent rate increase for commercial radio do not

0.44 pour cent, ce qui correspondrait approximativement à la part moyenne de ces frais qu'elle a versée à la SOCAN entre 1992 et 2005 conformément aux ententes. Cela représenterait un paiement à la SOCAN de 1 531 200 \$ pour 2006 et des paiements moindres pour les années subséquentes, étant donné que les frais liés à la radio ont diminué. La SRC s'est vivement opposée à l'utilisation de la formule définie en 1991 par la Commission aux fins du calcul des redevances payables à la SOCAN. L'avocat de la SRC a très bien résumé la position de la SRC dans les observations qu'il a présentées au début de l'audience :

En fait, cette audience en revient vraiment à déterminer si la SRC devrait être assujettie à tout jamais à la formule tarifaire de 1991, qui lie le montant annuel des redevances versées par SRC à la SOCAN au montant des redevances versées par les stations de radio commerciales canadiennes.¹³

[20] Dans son argumentation finale, l'avocat de la SRC a soutenu avec vigueur que [TRADUCTION] « dans leurs propositions, la SOCAN et Ré:Somme s'en remettent aveuglément à la formule tarifaire établie en 1991 par la Commission. »¹⁴

[21] L'opposition de la SRC à la formule de 1991 se fonde principalement sur l'argument qu'il est injuste de lier le montant des redevances à verser au revenu d'un tiers dont le mandat et le modèle d'affaires sont complètement différents. En outre, la SRC affirme que la formule ne convient pas pour plusieurs raisons, qu'elle donne lieu à des redevances excessivement élevées qui n'ont rien à voir avec la valeur que retire la SRC de l'utilisation de musique ou avec ses ressources financières et qu'elle ne lui offre pas la stabilité recherchée.

[22] La SRC soutient également que la formule de 1991 surestime l'importance du répertoire des sociétés de gestion du fait qu'elle tient également compte des variations dans l'utilisation de musique par chacun des quatre services radio de la SRC, sans égard à la part d'auditoire de chacun. Enfin, les facteurs évoqués par la Commission pour justifier la

apply to CBC. Alternatively, if the Board uses its 1991 formula, CBC contends the calculations should be weighted according to the relative audience share of the four services.

[23] In addition, CBC submits that simulcasting of its over-the-air signals should be included in Tariff 1.C. In its most recent decision on the matter, the Board did not set a tariff for the simulcasting of CBC signals reasoning that CBC royalty payments already included the right to use SOCAN music on the Internet and declared that it would deal with the issue in the context of Tariff 1.C.¹⁵

[24] CBC agrees that royalty payments to Re:Sound should be the same as to SOCAN, adjusted for the use of the repertoire.

III. EVIDENCE

[25] The following summarizes the most relevant exhibits and oral testimony.

[26] All parties jointly filed a report prepared by Erin Research, a Canadian media research company, on music use by CBC radio in 2009. The report measures music broadcast between 6:00 a.m. and midnight on CBC's flagship stations: Radio One and Radio 2 in Toronto, la Première Chaîne and Espace Musique in Montreal. Using recordings provided by CBC, Erin Research verified the accuracy of the log sheets also provided by CBC, added music played but not logged and removed music that was logged but not played. To assess the relative use of music in local programming compared to flagship stations, Erin Research sampled three additional radio stations for each of Radio One and Première Chaîne.¹⁶

récente hausse du tarif pour la radio commerciale ne s'appliquent pas à la SRC. Subsidiairement, la SRC soutient que si la Commission utilise la formule de 1991, les calculs devraient être pondérés en fonction de la part d'auditoire de chacun des services.

[23] En outre, la SRC propose que le Tarif 1.C s'applique aussi à la diffusion simultanée de ses signaux hertziens. Dans sa plus récente décision sur la question, la Commission n'a pas fixé de tarif pour la diffusion simultanée des signaux de la SRC au motif que les redevances versées par cette dernière prévoient déjà le droit de diffuser la musique de la SOCAN sur Internet, ajoutant qu'elle examinerait la question lorsque viendrait le temps de réviser le Tarif 1.C.¹⁵

[24] La SRC convient que les redevances versées à Ré:Sound devraient être les mêmes que celles payées à la SOCAN, rajustées en fonction de l'utilisation du répertoire.

III. ÉLÉMENTS DE PREUVE

[25] Voici la synthèse des éléments de preuve et témoignages les plus pertinents.

[26] Les parties ont déposé conjointement un rapport préparé par Erin Research, une société canadienne de recherche sur les médias, sur l'utilisation de musique par la radio de la SRC en 2009. On y mesure la musique diffusée entre 6 h et minuit par les quatre stations mères de la SRC : Radio One et Radio 2 à Toronto, la Première Chaîne et Espace Musique à Montréal. À l'aide des enregistrements fournis par la SRC, Erin Research a vérifié l'exactitude des registres eux aussi fournis par la SRC, y a ajouté les œuvres diffusées mais non consignées et a retiré les œuvres consignées mais non diffusées. Pour évaluer l'utilisation de musique dans les stations locales par rapport aux stations mères, Erin Research a retenu trois autres stations de Radio One et trois de la Première Chaîne.¹⁶

A. Collectives

[27] The collectives provided other Erin Research reports on the use of music on CBC Radio in 2000 and 2005 and on commercial radio in 2008¹⁷ prepared for the purposes of earlier proceedings before the Board. The confidence intervals provided with each report confirmed a high degree of reliability of the analysis,¹⁸ except possibly for the 2000 report: in that instance, some broadcast time was missing, leading Erin Research to first perform its analysis using the raw data and then redo it using an interpolative method. Collectively, the Erin Research reports paint a picture of the evolution of the use of music on CBC radio. Arguments about the changing nature and quantity of the use of music over time were based on these reports.

[28] Each collective filed a further Erin Research report documenting CBC's use of its repertoire. Each performed the required music coding. How this was done was explained by Mr. Michael Lewin for SOCAN and Ms. Doris Tay for Re:Sound. First, each collective correlated CBC logs, as corrected by Erin Research, to its databases and other sources¹⁹ to determine what it "owned". Second, each collective classified music according to its own scheme. SOCAN coded music as in repertoire (protected and registered), public domain (referred to as "not in SOCAN repertoire" by Erin Research) or not yet registered (identified, probably protected but not reported to a collective society). Re:Sound coded music as "yes" (eligibility verified and confirmed), "no" (ineligible recording, live-to-tape and live music), "potential repertoire" (probably published sound recording with eligibility undetermined) and "N/A" (entries that did not appear to be music). Third, using the information supplied by the collectives, Erin Research calculated repertoire use separately for each radio service. For SOCAN, this was done first by using its three categories and second by ignoring music that was "not yet registered" (NYR). For Re:Sound, this was done

A. Sociétés de gestion

[27] Les sociétés de gestion ont remis d'autres rapports d'Erin Research sur l'utilisation de musique par la radio de la SRC en 2000 et en 2005 et par la radio commerciale en 2008,¹⁷ préparés pour les besoins d'instances antérieures devant la Commission. Les intervalles de confiance associés à chacun des rapports témoignent d'un haut degré de fiabilité des résultats de l'analyse,¹⁸ sauf peut-être dans le cas du rapport de 2000, où les données couvrant une certaine période de diffusion manquaient. Erin Research a donc d'abord effectué l'analyse à l'aide des données brutes, puis l'a reprise au moyen d'une méthode de mesure par interpolation. Combinés, les rapports produits par Erin Research dressent un portrait de l'évolution de l'utilisation de musique par la radio de la SRC. Les arguments ayant trait aux variations dans la nature et la quantité de l'utilisation de musique au fil du temps prennent appui sur ces rapports.

[28] Chaque société de gestion a déposé un autre rapport d'Erin Research documentant l'utilisation de son répertoire par la SRC. Chacune a procédé au codage requis de la musique. M. Michael Lewin de la SOCAN et M^{me} Doris Tay de Ré:Somme ont expliqué la démarche. D'abord, chaque société a mis en relation les registres de la SRC, corrigés par Erin Research, et ses bases de données et autres sources¹⁹ pour déterminer ce qui lui « appartenait ». Ensuite, chacune a classé la musique selon son propre système. La SOCAN l'a identifiée comme faisant partie du répertoire (protégée et enregistrée), appartenant au domaine public (étiquetée comme ne faisant pas partie du répertoire de la SOCAN par Erin Research) et à enregistrer (identifiée, probablement protégée mais non déclarée auprès d'une société de gestion). Ré:Somme classifiait la musique selon quatre catégories : oui (admissibilité vérifiée et confirmée), non (enregistrement non admissible, faux direct et musique en direct), admissibilité possible (enregistrement probablement publié, admissibilité indéterminée) et S.O. (inscription qui ne semble pas être de la musique). Enfin, au moyen de l'information reçue des sociétés de gestion, Erin Research a mesuré l'utilisation du répertoire pour chaque service radio de la SRC. Pour

using the first three of its categories and then by ignoring both the "potential repertoire" and "N/A" categories.

[29] Both collectives raised concerns about the reliability of CBC radio logs. Ms. Tay testified that they are not as detailed as commercial radio logs, making the process of determining both eligibility and distribution more difficult and excessively time consuming. In a witness statement filed by SOCAN, Mr. Richard Kimshooye also complained about lack of reliability and insisted on the need to report for a sufficient number of broadcast days per year to adequately reflect the diversity of music played on CBC radio in the distribution of royalties.

B. CBC

[30] CBC called as witnesses Ms. Christiane Leblanc, Director of Espace Musique and Chair, Multimedia Music Committee, French services; Mr. Mark Steinmetz, Director of Music, English Radio Services; Mr. Stan Staple, Senior Director of Research and Strategic Analysis; and Mr. Michael Mooney, Senior Director, Corporate Finance and Administration.

[31] Ms. Leblanc and Mr. Steinmetz discussed CBC's special obligations under section 3 of the *Broadcasting Act*²⁰ and its mandate: to incorporate a wide range of programming that informs, enlightens and entertains, to be predominantly and distinctively Canadian, and to contribute actively to the flow and exchange of cultural expression. Both emphasized the non-commercial, national nature of CBC's radio services and how this differentiates them from commercial radio. Music is used differently. Formats are not predictable, because musical choices can be made by hosts or interviewees. This is not an accident: CBC radio's operations

la SOCAN, on l'a fait d'abord en tenant compte de ses trois catégories, puis en faisant abstraction de la musique non encore déclarée (NED). Pour Ré:Somme, on l'a fait d'abord en tenant compte de ses trois premières catégories, puis en excluant les catégories « admissibilité possible » et « S.O. »

[29] Les deux sociétés de gestion ont exprimé des réserves quant à la fiabilité des registres radio de la SRC. M^{me} Tay a déclaré qu'ils ne sont pas aussi détaillés que ceux des stations commerciales, et qu'il est donc plus ardu et très long d'établir tant l'admissibilité des enregistrements que la répartition des redevances. Dans une déclaration écrite déposée par la SOCAN, M. Richard Kimshooye s'est plaint également du manque de fiabilité et a insisté sur la nécessité de produire des rapports portant sur un nombre suffisant de journées de diffusion afin que la répartition des redevances reflète adéquatement la diversité de la musique diffusée par la radio de la SRC.

B. SRC

[30] La SRC a appelé comme témoins M^{me} Christiane Leblanc, directrice d'Espace Musique et présidente du comité sur le multimédia et la musique, Services français, M. Mark Steinmetz, directeur, Musique, Services anglais – Radio, M. Stan Staple, directeur principal, Recherche et analyse stratégique, et M. Michael Mooney, directeur principal, Finances et administration nationales.

[31] M^{me} Leblanc et M. Steinmetz ont parlé des obligations particulières de la SRC en vertu de l'article 3 de la *Loi sur la radiodiffusion*²⁰ et de son mandat : offrir des services comportant une programmation très diversifiée qui renseigne, éclaire et divertit; être principalement et typiquement canadienne; contribuer activement à l'expression et à l'échange culturels. Tous deux ont insisté sur la nature nationale et non commerciale de la radio de la SRC et sur la façon dont cela la distingue de la radio commerciale. La musique est utilisée différemment. Les formats ne sont pas prévisibles, car les choix musicaux relèvent des animateurs ou des invités. Et ce n'est pas un hasard : la radio de la SRC se veut

are intended to be an alternative to commercial radio, although Mr. Steinmetz conceded that CBC radio competes with commercial radio for listeners.

[32] Both witnesses emphasized what they consider to be a key difference between commercial broadcasters and CBC radio. Commercial radio uses automatic players to select music to be aired, whereas CBC radio hosts select the music they play. Attempts to use automatic players on both English and French services have failed, since the hosts override the selections by the computers about 80 per cent of the time.

[33] The testimony and evidence of Mr. Staple focussed on the relationship between music use and audience share on each of the four services. The audience data he provided was much more detailed than the collectives', and covered a considerably longer period of time. He critiqued the use of unweighted averages as proposed by the collectives as meaningless. Using a variety of tables, he sought to demonstrate the existence of an inverse relationship²¹ between music use and audience share on CBC radio, both at the service level and broken down for individual programs. Mr. Staple also relied on the decision of CBC to move music to its secondary services (Radio 2 and Espace Musique) and away from its primary services (Radio One and Première Chaîne) as further evidence that music has a lower value for CBC now than it did in 1990.

[34] Mr. Mooney offered evidence concerning CBC's financial situation. He emphasized the substantial unpredictability in CBC's revenues, since they come largely from the federal budget. He also noted that, to the extent CBC's revenues remain constant, they are failing to keep pace with inflation. One solution to this problem, Mr. Mooney argued, is to set CBC's royalty payments as a percentage of its expenditures. This would make payments far more predictable.

une solution de rechange à la radio commerciale, quoique M. Steinmetz ait concédé que l'une et l'autre se concurrencent pour leurs parts d'auditoire.

[32] Les deux témoins ont insisté sur ce qu'ils considèrent être une différence majeure entre la radio commerciale et celle de la SRC. La première recourt à des lecteurs automatiques qui sélectionnent la musique à diffuser, tandis qu'à la SRC, le choix est laissé aux animateurs. Les tentatives de recourir à un lecteur automatique ont échoué, tant pour les services anglais que pour les services français, car dans 80 pour cent des cas, les animateurs ne tiennent pas compte des sélections faites par le système.

[33] Le témoignage et la preuve présentés par M. Staple portent sur le lien entre l'utilisation de musique et la part d'auditoire pour chacun des quatre services. Les données sur l'auditoire fournies par M. Staple sont beaucoup plus détaillées que celles des sociétés de gestion, et couvrent une période beaucoup plus longue. Le témoin a affirmé qu'il était insensé d'utiliser des moyennes non pondérées, comme l'ont proposé les sociétés de gestion. Au moyen d'une variété de tableaux, il a cherché à montrer l'existence d'une relation inverse²¹ entre l'utilisation de musique et la part d'auditoire pour la radio de la SRC tant pour les services que pour les émissions individuelles. M. Staple a également invoqué la décision de la SRC de confier toute la programmation musicale à ses services secondaires (Radio 2 et Espace Musique) plutôt qu'à ses chaînes principales (Radio One et Première Chaîne) comme une preuve additionnelle que la valeur que la musique représente pour la SRC est moindre aujourd'hui qu'elle ne l'était en 1990.

[34] M. Mooney a présenté la situation financière de la SRC. Il a insisté sur l'imprévisibilité considérable des revenus de la SRC, car ils sont issus en grande partie du budget fédéral. Il a également fait observer que, dans la mesure où les revenus de la SRC demeurent constants, ils ne suivent pas l'inflation. D'après M. Mooney, une solution à ce problème serait d'établir les redevances à un pourcentage des dépenses. Les versements seraient ainsi bien plus prévisibles.

IV. HISTORY OF THE TARIFFS

[35] Since the parties are asking the Board to set the royalties on the basis of very different methodologies, it is useful to examine the history of the tariffs in order to contextualize them.

[36] From 1937 to 1946, CBC paid 8 cents per licensed radio receiving set to the Canadian Performing Right Society (CPRS).²² From 1941 to 1946, CBC also paid 1 cent per set to BMI Canada.²³

[37] In 1947, BMI and CBC agreed to a lump-sum tariff. The Copyright Appeal Board rejected the agreement. Thereafter and until 1967, BMI and then PROCAN tariffs had no provision applicable to CBC.

[38] From 1947 to 1951, the Appeal Board set CAPAC's Domestic Broadcasting Tariff at 14 cents per radio receiving set, 7 cents to be paid by private radio stations and the other 7 cents to be paid by CBC. In 1950, royalties were supplemented to account for the entrance of Newfoundland into Confederation, with CBC paying the lion's share of the additional royalties.

[39] In 1952, the Appeal Board changed CAPAC's tariff methodology and established a CBC radio tariff rate of 1 cent per inhabitant of Canada, plus an amount of 1.75 per cent of the gross income of CBC.²⁴ This tariff methodology was in effect until 1956.

[40] In 1957, the Board approved a single CAPAC tariff for CBC radio and television at 1.6 cents per capita. The formula remained the same until 1985, with the rate growing progressively to 8.159 cents. The same methodology was used in BMI's tariffs from 1967 to 1985.

IV. HISTORIQUE DES TARIFS

[35] Comme les parties demandent à la Commission d'établir les redevances selon des méthodes très différentes, il est utile d'examiner ici l'historique des tarifs afin de les remettre en contexte.

[36] Entre 1937 et 1946, la SRC versait à la *Canadian Performing Right Society (CPRS)*.²² 8 cents par poste récepteur autorisé. Entre 1941 et 1946, la SRC versait également 1 cent par poste à BMI Canada.²³

[37] En 1947, BMI et la SRC ont convenu d'un montant forfaitaire. La Commission d'appel du droit d'auteur rejetait l'entente. À partir de ce moment, et jusqu'en 1967, les tarifs de BMI, puis de la SDE ne se sont plus appliqués à la SRC.

[38] Entre 1947 et 1951, la Commission d'appel homologuait le tarif de diffusion intérieure de la CAPAC, établissant les redevances pour la radiodiffusion à 14 cents par poste récepteur, réparti également entre les stations privées et la SRC. En 1950, les redevances étaient majorées pour tenir compte de la venue de Terre-Neuve dans la Confédération, la SRC recevant la plus grande part de l'augmentation.

[39] En 1952, la Commission d'appel modifiait la méthode de calcul du tarif de la CAPAC et fixait le tarif applicable à la SRC à 1 cent par habitant du Canada, plus 1,75 pour cent du revenu brut de la SRC.²⁴ Cette méthode de calcul est demeurée en vigueur jusqu'en 1956.

[40] En 1957, la Commission approuvait un tarif CAPAC unique pour la radio et la télévision de la SRC, soit 1,6 cent par habitant. La formule est demeurée la même jusqu'en 1985, le taux augmentant progressivement jusqu'à 8,159 cents. La même méthode a été utilisée de 1967 à 1985 pour les tarifs de BMI.

[41] In 1978, CAPAC requested that separate CBC tariffs be set at 2 per cent of program costs for radio and 1.6 per cent of commercial revenues for television. The Board rejected the proposal, stating that the adoption of an expense or revenue rate base would have no rational foundation with respect to CBC.²⁵ The fact that CBC was essentially conceived and carried out as a non-profit national operation and that collectives could achieve their objective of increasing their members' income within the existing framework weighed heavily in the decision.

[42] In 1984, PROCAN requested that the CBC radio royalties be calculated as a percentage of expenditures. CBC countered that this would result in paying royalties based on expenditures that had nothing to do with music use.²⁶ The Board agreed that CBC should pay the same basic price for music as private broadcasters since "music is no different than any other property or commodity used in broadcasting."²⁷ It also supported CBC's opinion that audience was an important factor in any comparison between it and private radio.²⁸ In the end, the Board rejected the proposed formula primarily for its failure "to recognize the exceptional nature of many of the costs associated with CBC broadcasting as well as the questions of audience share and the use of public domain music [...]"²⁹

[43] On judicial review, the Federal Court of Appeal concluded that the Board was "required to consider the dramatic difference between the return to [PROCAN] from the [CBC] on the one hand and the return to the applicant from private broadcasters on the other."³⁰ For reasons not relevant to this decision, the court remitted the matter to the Board for further consideration. In its reconsideration, the Board reaffirmed its prior

[41] En 1978, la CAPAC demandait que deux tarifs distincts soient adoptés pour la SRC : 2 pour cent des coûts de programmation pour la radio et 1,6 pour cent des revenus commerciaux pour la télévision. La Commission rejetait la proposition, affirmant qu'il n'était pas logique de fixer le tarif en fonction des dépenses ou des revenus dans le cas de la SRC.²⁵ Le fait que la SRC se voulait essentiellement une institution nationale à but non lucratif et que le cadre en vigueur permettait aux sociétés de gestion d'atteindre leur objectif – accroître les revenus de leurs membres – a beaucoup pesé dans la décision.

[42] En 1984, la SDE demandait que les redevances pour la radio de la SRC soient calculées comme un pourcentage des dépenses. La SRC s'y est opposée, répliquant que cette façon de faire donnerait lieu à des redevances fondées sur des dépenses qui n'ont rien à voir avec l'utilisation de musique.²⁶ La Commission a convenu que la SRC devrait payer le même prix de base que les radiodiffuseurs privés car « la musique ne se distingue pas de tous les autres biens ou articles qui servent à la radiodiffusion. »²⁷ Elle a également appuyé l'opinion de la SRC selon laquelle l'auditoire est un facteur qu'il importe de prendre en considération dans toute comparaison entre la radio de la SRC et la radio commerciale.²⁸ En définitive, la Commission a rejeté la formule proposée principalement parce qu'elle ne tenait « pas suffisamment compte du caractère exceptionnel de bon nombre des frais inhérents à la radiodiffusion de la société d'État ainsi que des problèmes que représentent le volume de l'auditoire et l'utilisation de la musique appartenant au domaine public. »²⁹

[43] La Cour d'appel fédérale siégeant en révision judiciaire a conclu que la Commission devait « prendre en considération la différence spectaculaire existant entre, d'une part, les sommes versées à [la SDE] par [la SRC], et d'autre part, les sommes versées à la requérante par les radiodiffuseurs privés. »³⁰ Pour des raisons qu'il n'est pas pertinent de mentionner ici, la Cour a renvoyé l'affaire devant la Commission aux fins d'un réexamen. La

decision. "repeating" that:

the tariff it fixed and the formula it selected to determine the amount of the fee were based on its assessment of the adduced evidence with regard to (1) the use by the CBC of the works of composers, authors and publishers represented by PROCAN; (2) the differences in audience size between private broadcasters and CBC; and (3) certain fundamental differences between the activities of the CBC and those of private broadcasters.³¹

[44] A further attempt to set separate CBC tariffs for television and radio for 1985 was rejected.³²

[45] For 1986, PROCAN renewed its request to split the CBC tariff, with the radio tariff being set on a per capita formula. One of the objectors, the *Société professionnelle des auteurs et des compositeurs du Québec* (SPACQ), suggested 3.86 per cent of operating expenditures attributable to radio services.³³ For the first time, CBC did not oppose the introduction of a formula other than a per capita formula.

[46] Though the Board concluded, for a variety of reasons, that the per capita formula had outlived its usefulness, it still set a per capita formula determined according to CBC's relative audience share:

The rationale for this comparison is that if, instead of assuming operating costs for its radio services without offsetting them through commercial revenues, the CBC were to capitalize on these services by selling advertising, it would calculate the price of this advertising on the basis of the number of potential listeners likely to hear the advertisement. This is a universally recognized principle applied in the field of communications and thus requires no further explanation.³⁴

Commission a alors réitéré sa décision antérieure :

[...] le tarif qu'elle a fixé de même que la formule qu'elle a choisie de mettre en vigueur pour en déterminer le quantum ont été basés sur son appréciation de la preuve soumise : 1) quant à l'utilisation par Radio-Canada des œuvres des compositeurs, auteurs et éditeurs représentés par la SDE; 2) quant à la comparaison qu'il y a lieu de faire entre le nombre d'auditeurs des postes privés et celui de Radio-Canada; 3) quant à certaines différences essentielles entre les activités de Radio-Canada et celles des postes privés.³¹

[44] Une autre demande visant à scinder les tarifs télévision et radio de la SRC a été rejetée en 1985.³²

[45] En 1986, la SDE a réitéré sa demande de fragmentation du tarif de la SRC, souhaitant que le tarif radio soit fondé sur le nombre d'habitants. Un des opposants, la Société professionnelle des auteurs et des compositeurs du Québec (SPACQ), proposait d'établir les redevances à 3,86 pour cent des dépenses d'exploitation attribuables à la radio.³³ Pour la première fois, la SRC ne s'est pas opposée à l'adoption d'autre formule que celle fondée sur le nombre d'habitants.

[46] Même si la Commission est parvenue à la conclusion que, pour diverses raisons, la formule par habitant ne convenait plus, elle a tout de même établi une formule par habitant en fonction de la part d'auditoire relative de la SRC :

Le raisonnement à la base de cette comparaison est que, si au lieu d'assumer sans compensation d'origine commerciale le coût de son service de radio, la SRC le monnayait sous forme de recettes publicitaires, le prix de la publicité qu'elle vendrait serait déterminé par le nombre d'auditeurs susceptibles d'écouter ses postes de radio et, partant, de prendre connaissance de la publicité qu'ils véhiculent. C'est là un principe d'application universellement reconnu dans le domaine des communications et sur lequel il n'est pas besoin d'élaborer.³⁴

[47] The radio and television tariffs were split. CBC payments for its radio services doubled. An application for judicial review of the decision was dismissed.³⁵

[48] For 1987, the collectives requested a 4 per cent increase in the per capita amount for CBC radio. CBC objected to the structure and amount. CBC requested a lump sum payment to "reflect its use of the societies' repertoires and the general growth index in its Canadian context."³⁶ SPACQ renewed its 1986 proposal. CBC argued that a tariff based on programming costs would be arbitrary, since such costs "are affected by a significant number of factors, most of which have nothing to do with music [...]"³⁷

[49] The Board acknowledged the unique nature of CBC and recognized that any analogy to commercial radio should take this into account. It also restated its obligation to determine a reasonable compensation for creators and the fundamental principle that subject to necessary qualifications, comparisons could and should be made among the various users of the societies' repertoires.³⁸ The Board declined to use programming costs as the rate base. It found CBC's proposal of a lump sum of some interest, but concluded that the amount proposed was unrealistic. As a result, the Board accepted the collectives' proposal to increase royalties by 4 per cent.³⁹

[50] The Federal Court of Appeal set aside the decision, essentially finding that the Board had dismissed CBC's counter-proposal without properly considering its merit:

I think the board ought to have squarely addressed the question whether, as the applicant contended, it ought to be treated differently [...] because the value of that music to it is less than it is to private

[47] On a établi des tarifs distincts pour la radio et la télévision. Les versements au titre des services radiophoniques ont doublé. Une demande de révision judiciaire de la décision a échoué.³⁵

[48] En 1987, les sociétés de gestion demandaient une augmentation de 4 pour cent de la redevance par habitant pour la radio de la SRC. Cette dernière s'est opposée à la structure et au montant. Elle souhaitait verser une somme forfaitaire qui permettrait de « tenir compte de l'usage qu'elle fait des répertoires des sociétés et de l'indice de croissance général dans son contexte canadien. »³⁶ La SPACQ a réitéré sa proposition de 1986. La SRC a affirmé qu'un tarif fondé sur les coûts de programmation serait une solution arbitraire car ces coûts sont influencés par « un nombre important de facteurs, dont l'immense majorité n'ont rien à voir avec la musique [...] »³⁷

[49] La Commission a reconnu le caractère unique de la SRC et admis qu'il fallait en tenir compte dans toute analogie entre celle-ci et la radio commerciale. Elle a également rappelé son obligation de fixer une indemnisation raisonnable pour les créateurs ainsi que le principe fondamental selon lequel des comparaisons peuvent et doivent être faites entre les différents utilisateurs des répertoires des sociétés de gestion en veillant à faire les nuances qui s'imposent.³⁸ La Commission a refusé d'utiliser les coûts de programmation comme assiette tarifaire. Elle a jugé intéressante la proposition de versement forfaitaire présentée par la SRC, mais a conclu que la somme proposée n'était pas réaliste. En conséquence, la Commission a accepté la proposition des sociétés de gestion de majorer les redevances de 4 pour cent.³⁹

[50] La Cour d'appel fédérale a annulé la décision, jugeant essentiellement que la Commission avait rejeté la contre-proposition de la SRC sans en avoir adéquatement considéré le bien-fondé :

Je pense que la Commission aurait dû carrément se pencher sur la question de savoir si, comme le soutient la requérante, elle devait recevoir un traitement différent [...] étant donné que ces œuvres ont moins de

broadcasters, the volume of actual use of protected music in its radio programming being lower.⁴⁰

[51] On reconsideration, the Board first examined the audience share of CBC relative to commercial radio and determined the royalties payable by CBC as a proportion of commercial radio royalties. The Board next determined that CBC used 60 per cent less protected music than commercial radio. However, it discounted the royalties computed by means of relative audience share by only 30 per cent, arguing that "audience share is and must remain the primary factor in establishing any comparison between the CBC and the private sector."⁴¹ Finally, it converted the lump sum to a per-capita figure.

[52] The tariff formula for 1988, 1989 and 1990 was the same as for 1987.

[53] In *SOCAN 1991*,⁴² the Board refined the general approach used in *CBC (1987 - Reconsideration)* by setting the radio tariff at an amount calculated by multiplying the royalties commercial radio stations pay to SOCAN by CBC's use of the SOCAN repertoire as compared to commercial radio and CBC's audience share as compared to commercial radio. There were two important differences in this new approach. First, the relative repertoire use became an undiscounted factor in the formula. Second, the per-capita formula was abandoned in favour of a specified lump sum to be paid in equal monthly instalments.

[54] In 1992, the tariff was certified in accordance with an agreement between SOCAN and CBC. In doing so, the Board indicated that it was not abandoning the 1991 formula.⁴³

valeur pour elle que pour les diffuseurs privés, compte tenu du fait que le volume d'utilisation réelle dans sa programmation radiophonique en est moindre.⁴⁰

[51] Lors du réexamen, la Commission a d'abord pris en compte la part d'auditoire de la SRC par rapport à celle de la radio commerciale et établi les redevances à payer à une proportion de celles que versent les stations commerciales. La Commission a ensuite établi que la SRC utilisait 60 pour cent moins de musique protégée que la radio commerciale. Toutefois, elle a réduit de seulement 30 pour cent les redevances calculées d'après la part d'auditoire relative, soutenant que « dans toute comparaison à établir avec le secteur privé, la cote d'écoute est et doit demeurer le facteur prépondérant. »⁴¹ Enfin, elle a converti la somme forfaitaire en un montant par habitant.

[52] La formule de calcul du tarif pour 1988, 1989 et 1990 était la même qu'en 1987.

[53] Dans *SOCAN 1991*,⁴² la Commission a raffiné la méthode utilisée dans *SRC (1987 - Réexamen)*: elle a fixé le tarif radio à un montant correspondant au produit de trois éléments : les redevances versées par les stations de radio commerciales à la SOCAN, le taux relatif d'utilisation du répertoire de la SOCAN par la SRC comparativement à celui de la radio commerciale et la part d'auditoire relative de la SRC par rapport aux stations commerciales. Cette nouvelle approche comportait deux différences importantes. Premièrement, la Commission a pleinement tenu compte de l'utilisation relative du répertoire dans sa formule. En outre, elle a abandonné la formule par habitant et fixé une somme forfaitaire à payer en versements mensuels égaux.

[54] En 1992, le tarif a été homologué conformément à l'entente intervenue entre la SOCAN et la SRC. La Commission a toutefois précisé qu'elle ne mettait pas de côté la formule de 1991.⁴³

[55] From 1993 to 2001 SOCAN did not file any CBC tariff for radio or television. As indicated earlier, the radio tariffs the Board certified for 2002 to 2005 reflected an agreement between SOCAN and CBC.

[56] The Board has certified Re:Sound tariffs for CBC twice, both times at \$80,000 per month. The tariff for 1998 to 2002 was set "based on the amount of royalties that CBC pays to SOCAN, adjusted to reflect CBC's relative use of the repertoires of these two collectives."⁴⁴ The tariff for 2003 to 2005 was set at the same rate as a result of an agreement between Re:Sound and CBC.

V. ANALYSIS

[57] According to CBC, technology may have changed substantially but the mandate and core activity of CBC radio remains the same: "putting [...] content through a Canadian lens for Canadians, about Canadians."⁴⁵ While CBC competes with private radio stations for audiences, it also has a special public mandate including: to make all programming quintessentially Canadian; to reflect national and regional realities to national and regional audiences; and, to contribute to the flow and exchange of cultural information. Moreover, the French-language services play an important role in connecting francophone communities across Canada to one another.

[58] CBC argues that its unique mandate and nature require that it be treated differently than any other broadcaster. Commercial radio sells niche markets to advertisers: typically, private broadcasters specialize in a genre of music. Doing so is lucrative, since broadcasters can more easily sell their advertising time to marketers because they are able to deliver targeted audiences to marketers. CBC is operated differently, or, as Mr. Steinmetz put it, "[w]hat CBC does is totally in a way anti-radio, it's the opposite of how the medium is supposed to be used."⁴⁶ The CBC has a distinct mandate under the *Broadcasting Act*. "It

[55] De 1993 à 2001, la SOCAN n'a pas déposé de tarif pour la radio ou la télévision de la SRC. Comme on l'a déjà mentionné, les tarifs applicables à la radio homologués par la Commission pour les années 2002 à 2005 découlent d'une entente conclue entre la SOCAN et la SRC.

[56] La Commission a homologué à deux reprises le tarif SRC de Ré:Sonne, toujours à 80 000 \$ par mois. Le tarif pour les années 1998 à 2002 a été fixé en fonction « du montant des redevances [que la SRC] verse à la SOCAN, ajusté pour tenir compte de l'utilisation relative que la SRC fait des répertoires de ces deux sociétés de gestion. »⁴⁴ Le tarif pour les années 2003 à 2005 prévoit le même taux et découle d'une entente.

V. ANALYSE

[57] D'après la SRC, si la technologie a évolué considérablement, le mandat et l'activité de base de la radio de la SRC demeurent les mêmes : [TRADUCTION] « livrer aux Canadiens un point de vue canadien sur des réalités canadiennes. »⁴⁵ Si la SRC fait concurrence aux radiodiffuseurs privés pour sa part d'auditoire, elle a également un mandat spécial de service public, soit celui de proposer une programmation typiquement canadienne, de refléter, tant à l'échelle nationale que régionale, les réalités du Canada et de ses régions, et de favoriser la transmission et la communication de l'information culturelle. En outre, les services français contribuent grandement aux échanges entre les collectivités francophones du Canada.

[58] La SRC soutient que, du fait de son mandat et de ses caractéristiques uniques, elle ne devrait pas être traitée comme les autres radiodiffuseurs. La radio commerciale offre des créneaux aux annonceurs: en règle générale, les radiodiffuseurs privés se spécialisent dans un genre particulier de musique. Cette façon de faire est lucrative: les radiodiffuseurs peuvent vendre plus facilement leur temps d'antenne aux annonceurs car ils leur livrent des auditoires ciblés. La SRC suit un modèle d'affaires différent. Comme M. Steinmetz le souligne: [TRADUCTION] « Ce que la SRC fait est en quelque sorte complètement anti-radio, c'est tout le

creates a mosaic of programs for Canadians of all ages and cultural groups rather than programming for a specific format. It does not repeat music or have a readily identifiable sound with which to market itself to listeners.”⁴⁷ CBC seeks to attract as diverse an audience as possible. Its music services do not repeat programming or use rotational playlists. Repeat plays are rare, and used only to promote unknown Canadian talent.

[59] From the collectives’ perspective, however, CBC is no different than commercial radio. Counsel for SOCAN expressed this point in opening argument:

... [A]t the end of the day [CBC is] still a member of the radio broadcasting industry in Canada and [it] clearly competes with private radio for audiences. [It has] been very successful in doing so and that’s to their credit. [Its] audience share has risen considerably over time. One of the reasons [it has] been successful in this way is that they have used the Collectives’ music to broaden their audience base. In that respect [CBC is] no different at all from the private broadcasters.⁴⁸

[60] Counsel for Re:Sound focused on some of the similarities between the CBC and commercial radio stations in his closing argument. “[T]he rights, obligations, powers and liabilities, and that would include liabilities to the Collectives, are the same as a private broadcaster and not those of a public body.”⁴⁹ Counsel for Re:Sound also explained that CBC radio is similar to commercial radio in its programming strategies. “Like commercial radio, which has embarked on branding through niche programming, CBC has

contraire de ce que le médium est censé faire. »⁴⁶ En vertu de la *Loi sur la radiodiffusion*, la SRC remplit un mandat bien distinct : [TRADUCTION] « Elle offre un bouquet d’émissions destinées aux Canadiens de tous les âges et de tous les groupes culturels plutôt qu’une programmation très spécialisée. Les œuvres musicales ne sont pas répétées, et le genre de musique et d’émissions n’est pas associable à un auditoire particulier. »⁴⁷ La SRC souhaite attirer un auditoire aussi diversifié que possible. Ses services musicaux ne diffusent pas d’émissions en reprise et ne recourent pas à des listes de diffusion à répétition. On passe rarement le même enregistrement; quand on le fait, c’est uniquement pour faire connaître les talents canadiens.

[59] Du point de vue des sociétés de gestion cependant, la radio de la SRC n’est pas différente des stations commerciales. Voici ce qu’a déclaré l’avocat de la SOCAN dans les observations qu’il a présentées au début de l’audience :

[TRADUCTION] Au final, la SRC demeure un membre de l’industrie canadienne de la radiodiffusion et elle fait manifestement concurrence aux stations privées pour accroître sa part d’auditoire, ce qu’elle a très bien réussi à faire, et c’est tout à son honneur. Sa part d’auditoire s’est accrue considérablement au fil du temps. Une des raisons qui expliquent ces excellents résultats est qu’elle a eu recours à la musique des sociétés de gestion pour élargir son bassin d’auditeurs. En ce sens, donc, la SRC ne se distingue aucunement des radiodiffuseurs privés.⁴⁸

[60] Dans son argumentation finale, l’avocat de Ré:Somme s’est attardé à certaines similarités entre la radio de la SRC et les stations commerciales : [TRADUCTION] « Les droits, obligations, pouvoirs et responsabilités, y compris ses engagements envers les sociétés de gestion, sont les mêmes que ceux d’un radiodiffuseur privé et non ceux d’un organisme public. »⁴⁹ L’avocat de Ré:Somme a également expliqué que la radio de la SRC ressemble à la radio commerciale du point de vue des stratégies de programmation employées : [TRADUCTION] « La

also pursued branding its services. Its brand is diversity.”⁵⁰

[61] We agree with the parties, in part, and disagree, in part. CBC *does have* a unique mandate. Having a unique mandate does not necessarily entitle CBC to be treated differently than commercial radio. The proposition that CBC should not be treated differently than commercial radio does not imply, however, that CBC should pay royalties using a formula based on what commercial radio pays. The judicial pronouncements the collectives quote to validate comparisons between commercial broadcasters and CBC are not helpful in this regard. To state, as in the decisions referred to in note 12, that CBC should be treated the same as a private broadcaster does not settle whether this can be best achieved by using what the latter pay to set the royalties for the former. As for *CBC TV (1993)*, it clearly states that payments made by private broadcasters are “of course not conclusive.”⁵¹

A. SOCAN

[62] Since all parties agree that the SOCAN rate should be used to derive the Re:Sound rate, we first set the royalties for SOCAN.

[63] In *SOCAN (1991)*,⁵² the royalties for CBC radio were set as the product of commercial radio royalties to SOCAN, the relative audience share of CBC compared to commercial radio, and the relative use of SOCAN repertoire by CBC compared to commercial radio. Commercial radio royalties are, in turn, the product of commercial radio revenues and the commercial radio rate.

[64] In its statement of case, SOCAN updates the Board’s 1991 formula with 2008 figures. In 2008,

radio commerciale se démarque par sa programmation ciblée. La SRC a elle aussi une stratégie pour valoriser sa marque. Cette marque, c’est sa diversité.»⁵⁰

[61] Nous sommes en partie d’accord et en partie en désaccord avec chacune des parties. La SRC remplit *effectivement* un mandat unique en soi, mais cela ne lui confère pas nécessairement le droit d’être traitée différemment de la radio commerciale. Par contre, la proposition selon laquelle la SRC n’a pas un caractère unique et devrait être traitée sur le même pied que la radio commerciale n’implique pas pour autant que ses redevances devraient être calculées à l’aide d’une formule fondée sur les redevances des stations commerciales. À cet égard, les énoncés judiciaires que citent les sociétés de gestion pour valider les comparaisons entre les diffuseurs privés et la radio de la SRC ne sont pas utiles. Dire, comme on le fait dans les décisions citées à la note 12, que la SRC devrait être traitée comme les diffuseurs privés n’aide pas à décider si la meilleure façon d’y arriver est en établissant les redevances de la première en fonction de celles des seconds. Quant à l’arrêt *SRC TV (1993)*, il énonce clairement que les paiements effectués par les diffuseurs privés « ne sont évidemment pas concluants. »⁵¹

A. SOCAN

[62] Puisque toutes les parties s’entendent sur le fait que le tarif SOCAN devrait servir de point de référence au tarif Ré:Sonne, nous établissons d’abord les redevances à percevoir par la SOCAN.

[63] Dans *SOCAN (1991)*,⁵² la Commission a établi les redevances radio de la SRC au produit de trois éléments : les redevances versées par la radio commerciale à la SOCAN, la part d’auditoire de la SRC par rapport à celle des stations commerciales et le taux d’utilisation du répertoire de la SOCAN par la SRC comparativement aux stations commerciales. Les redevances pour la radio commerciale sont, quant à elles, équivalentes au produit de leurs revenus et du taux applicable à ces stations.

[64] Dans son énoncé de cause, la SOCAN actualise la formule de 1991 de la Commission en y

royalties paid by commercial radio stations were \$54,432,346. The audience share of CBC was 12.63 per cent while the audience share of Canadian private radio stations was 80.92 per cent.⁵³ The relative audience share of the CBC is 15.61 per cent ($= 12.63 \div 0.8092$). According to SOCAN, CBC uses its repertoire during 31.1 per cent of its airtime; Canadian private radio stations use SOCAN repertoire during 65.6 per cent of their airtime. The relative use of SOCAN repertoire by the CBC is thus 47.4 per cent ($= 31.1 \div 0.656$). Application of the 1991 formula yields royalties of \$4,027,525 ($= \$54,432,346 \times 0.1561 \times 0.474$). The formula has not been revised since 1991. Agreements between CBC and the collective societies have formed the basis for the certified tariffs.

[65] We do not take issue with the raw data SOCAN proposed to use with the 1991 formula, although they were subject to considerable discussion during the hearing. Nor do we take issue with the concept that CBC radio royalties should reflect its audience share and use of music: quite the contrary, these two figures are at the core of any equitable tariff for CBC Radio.

[66] Still we must consider the relevance of the 1991 formula to today's realities. Commercial radio royalties are calculated at a rate and on a rate base that were selected for specific reasons. These reasons have changed over time. The 1991 formula relies on commercial radio royalties: that reliance is based on certain assumptions that must remain true for the formula to be useful. We conclude that most of the assumptions that underpin the 1991 formula have become either questionable or simply wrong.

[67] The 1991 formula implicitly relies on the rate the Board set for commercial radio. In 1991, that rate was 3.2 per cent. Starting in 2003, that rate increased to 4.2 per cent, for three reasons.⁵⁴ First, music is worth more for commercial radio than the Board previously thought. Second, commercial

appliquant les données de 2008. Cette année-là, la radio commerciale lui a versé 54 432 346 \$. La part d'auditoire de la SRC était 12.63 pour cent, celle des radiodiffuseurs canadiens privés 80.92 pour cent.⁵³ La part d'auditoire relative de la SRC est donc 15.61 pour cent ($= 12,63 \div 0,8092$). Selon la SOCAN, la SRC consacre 31.1 pour cent de son temps d'antenne aux œuvres faisant partie de son répertoire: pour les radiodiffuseurs canadiens privés, c'est 65,6 pour cent. L'utilisation relative du répertoire de la SOCAN par la SRC est donc 47,4 pour cent ($= 31,1 \div 0,656$). Si on applique la formule de 1991, les redevances s'élèvent à 4 027 525 \$ ($= 54 432 346 \$ \times 0,1561 \times 0,474$). La formule n'a pas été révisée depuis 1991. Les tarifs homologués prenaient appui sur des ententes conclues entre la SRC et les sociétés de gestion.

[65] Nous ne remettons pas en question les données brutes que la SOCAN propose d'intégrer à la formule de 1991, même si elles ont fait l'objet d'importantes discussions durant les audiences. Nous ne contestons pas non plus le fait que les redevances radio de la SRC devraient tenir compte de sa part d'auditoire et de son utilisation de musique. Au contraire, ces deux données sont déterminantes dans l'établissement d'un tarif équitable pour la radio de la SRC.

[66] Nous devons tout de même évaluer la pertinence de la formule de 1991 dans le contexte actuel. Les redevances pour la radio commerciale sont calculées d'après un taux et une assiette tarifaire choisis pour des raisons bien précises. Ces raisons ont changé au fil du temps. La formule de 1991 repose sur les redevances versées par la radio commerciale: ce choix s'appuie sur des hypothèses qui doivent demeurer valables pour que la formule reste utile. À notre avis, la plupart des assertions qui sous-tendent la formule de 1991 sont désormais critiquables ou tout simplement fausses.

[67] La formule de 1991 prend implicitement appui sur le taux fixé par la Commission pour la radio commerciale. En 1991, ce taux était de 3,2 pour cent. En 2003, le taux passait à 4,2 pour cent, et ce, pour trois raisons.⁵⁴ D'abord, la musique a une plus grande valeur pour la radio commerciale que ne le

radio now uses more music than in the past. Third, commercial radio now uses music more efficiently. Using the increased rate in calculating CBC radio royalties assumes that all these factors are as relevant for CBC radio as for private broadcasters. This is not so.

[68] The applicability to CBC of the first factor, music's increased value, is impossible to assess without reliable evidence. We do not have such evidence. Moreover, the fact that the value of music is higher to commercial radio does not imply that the value of music is higher to CBC radio. The value of music is not an abstraction that can be measured without regard to time and place. Context is essential.

[69] The second factor is relevant to CBC radio. The royalties it pays should fluctuate with its use of the protected repertoire just as they do for commercial radio. The 1991 formula is one way to account for this factor: it is however not the only one.

[70] With respect to the third factor, the efficiencies that putatively accrued to commercial radio did not accrue to CBC. Commercial radio uses branding and niche marketing to deliver specific listeners to advertisers. This, in turn, allows radio stations to charge higher advertising rates. Two comments are relevant here. First, because CBC radio does not sell advertising, it could not possibly obtain efficiencies associated with branding and niche marketing. Second, even if CBC could possibly obtain these efficiencies, CBC has actually moved in the opposite direction. CBC's music stations have become more diverse over the past several years.

[71] To summarize, using the 1991 formula to set CBC radio royalties today would imply applying the three factors of *Commercial Radio (2005)*. The first is not plainly relevant. The second is

pensait la Commission jusque-là. Ensuite, la radio commerciale diffuse plus de musique que dans le passé. Enfin, la radio commerciale utilise aujourd'hui la musique de manière plus efficiente. Pour pouvoir utiliser le taux majoré aux fins du calcul des redevances de la SRC, ces facteurs doivent tous être pertinents, et ce, autant pour la radio de la SRC que pour les radiodiffuseurs privés, ce qui n'est pas le cas.

[68] Sans données fiables, il est impossible d'évaluer si le premier facteur – la valeur accrue de la musique – s'applique à la SRC. Nous ne disposons pas de telles données. En outre, le fait que la valeur de la musique soit plus grande pour les stations commerciales ne signifie pas qu'elle l'est aussi pour la radio de la SRC. La valeur de la musique n'est pas un concept abstrait qui se mesure sans égard au contexte.

[69] Le deuxième facteur est pertinent dans le cas de la radio de la SRC. Les redevances qu'elle verse devraient être fonction de son utilisation du répertoire protégé, comme c'est le cas pour les stations commerciales. La formule de 1991 permet de tenir compte de ce facteur, mais on peut y arriver autrement.

[70] À l'égard du troisième facteur, la radio de la SRC n'a pas fait les mêmes gains d'efficience présumés que la radio commerciale. Cette dernière recourt à des stratégies de marque et de marketing ciblé afin de livrer aux annonceurs des groupes d'auditeurs particuliers. Cela leur permet de pratiquer des tarifs de publicité plus élevés. Il y a lieu de formuler ici deux observations. D'abord, puisque la SRC ne vend pas de publicité, elle ne peut obtenir les gains d'efficience associés à une stratégie de marque ou au marketing ciblé. Ensuite, même si la SRC pouvait obtenir ces gains d'efficience, ses activités ont en fait pris une orientation opposée. Les stations musicales de la SRC offrent une plus grande diversité depuis quelques années.

[71] En résumé, si on veut recourir à la formule de 1991 pour établir les redevances radio de la SRC, il faut que les trois facteurs énoncés dans *Radio commerciale (2005)* soient pertinents. Le premier ne

relevant but can be accounted for through other means. The third is not relevant. Consequently, the rate the Board set for commercial radio in 2005 cannot be used.

[72] Another assumption of the 1991 formula is that changes in the commercial stations' revenues, whatever their cause, should be reflected in the royalties payable by CBC radio. Put another way, the 1991 formula posits that CBC radio royalties can reliably be derived by looking at how much private radio succeeds in getting paid to deliver audiences to advertisers, whether or not music played any part in that success. We disagree. It would be inappropriate to reflect in CBC royalties any increase in radio advertising revenues attributable to factors other than music. Yet clearly, such factors do exist. A significant increase in the number of stations is one such factor. Increased concentration in the Canadian commercial radio industry has led to increased advertising revenues through sales of national advertising and through offering a portfolio of stations that allow publicity to be better targeted to a variety of desirable audiences.

[73] Furthermore, linking what CBC radio *pays* for music and what commercial radio *earns* from the sale of airtime relies on the further assumption that commercial radio listeners are all worth more or less the same. This is not correct, if it ever was. Niche programming allows radio stations not only to increase the price per listener, but also to price-discriminate according to the targeted listener's ability and propensity to spend, among other factors.⁵⁵ The implications of such price-discrimination are stark. The value of music varies by listener, making it difficult to determine the appropriate comparator.

l'est pas clairement. Le deuxième l'est, mais on peut en tenir compte autrement. Le troisième ne s'applique pas. Par conséquent, le taux établi en 2005 par la Commission pour la radio commerciale ne peut être utilisé.

[72] La formule de 1991 repose également sur l'assertion selon laquelle les redevances de la radio de la SRC devraient fluctuer en fonction de tout changement dans les revenus des stations commerciales, sans égard à la cause. Autrement dit, la formule de 1991 s'appuie sur le postulat qu'on peut établir de manière fiable les redevances de la radio de la SRC en examinant la mesure dans laquelle la radio privée réussit à se faire payer pour livrer un auditoire à des publicitaires et ce, que la musique joue ou non un rôle dans l'obtention de ces revenus. Nous ne sommes pas d'accord sur ce point. Il serait inconvenant de tenir compte, dans le calcul des redevances de la SRC, de toute hausse des recettes publicitaires attribuable à des facteurs autres que la musique. Or, ces facteurs existent bel et bien. L'un étant l'augmentation importante du nombre de stations. La concentration accrue observée dans l'industrie canadienne de la radio commerciale a permis de gonfler les recettes publicitaires, entre autres par la vente de campagnes pancanadiennes et par l'offre de bouquets de stations permettant de mieux adapter la publicité aux publics recherchés.

[73] Par ailleurs, le lien établi entre le montant que la radio de la SRC *verse* au titre de la musique et ce que les stations commerciales *tirent* de la vente de temps d'antenne prend appui sur une autre hypothèse, selon laquelle pour la radio commerciale, tous les auditeurs se valent plus ou moins. Cette hypothèse, si elle a pu être valide par le passé, ne l'est plus aujourd'hui. La programmation spécialisée permet aux stations de radio non seulement d'augmenter leurs tarifs publicitaires par auditeur, mais aussi d'appliquer des tarifs qui discriminent entre autres selon le pouvoir d'achat de l'auditeur cible et sa propension à dépenser.⁵⁵ Cette discrimination a d'importantes répercussions. La valeur de la musique varie selon les auditeurs, ce qui complique la tâche de déterminer le bon comparateur.

[74] The situation which led the Board to conclude in 1991 that the amount of royalties commercial radio pays to SOCAN could be used as a starting point to set CBC radio royalties has evolved considerably, making the use of the 1991 formula inappropriate. The disconnect between commercial radio and CBC radio is simply too great today.

B. CBC's Proposal

[75] CBC requests that its radio tariff be set at 0.44 per cent of its radio operating expenses. CBC notes that the amount the Board certified for the years 2002 to 2005 is about 0.44 per cent of CBC's radio operating expenses at the time and argues that this may serve as useful precedent. We disagree.

[76] There are several conceptual difficulties with CBC's proposed approach. First, it bears no relation to audience share or music use. CBC could increase or decrease one or the other at will and still pay the same amount to SOCAN. Second, just as commercial radio royalties are unrelated to the business of CBC, CBC expenses are unrelated to the value of music.

[77] Third, much of CBC's argument for its proposed formula and rate is a thinly veiled plea related to ability to pay. Ability to pay is relevant, but only once an otherwise fair rate and formula have been determined. We cannot say it better than counsel for SOCAN did when she stated, "[...] what this case is really about, of course the ability to play, not the ability to pay."⁵⁶

[78] Fourth, these amounts were agreed upon by SOCAN and CBC. When it certified the tariff, the Board did not comment on the agreement, or how it was arrived at. Many factors other than value influence prices that become part of agreements. Some of these factors include: the bargaining skills of the parties, the time and trouble of not coming to an agreement, and the expectation that

[74] Le contexte ayant incité la Commission à conclure, en 1991, que le montant des redevances que la radio commerciale verse à la SOCAN pouvait servir de point de départ pour fixer les redevances de la radio de la SRC a évolué considérablement depuis, faisant en sorte que la formule de 1991 n'est désormais plus valable. L'écart entre la radio commerciale et la radio de la SRC est devenu tout simplement trop grand.

B. Proposition de la SRC

[75] La SRC demande un tarif radio de 0.44 pour cent des frais d'exploitation de ses services radio. La SRC fait observer que le montant homologué par la Commission pour les années 2002 à 2005 équivaut à environ 0.44 pour cent des frais d'exploitation de la radio à cette époque et qu'il pourrait donc constituer un précédent utile. Nous ne sommes pas d'accord.

[76] La proposition de la SRC présente plusieurs difficultés conceptuelles. D'abord, elle ne tient aucun compte de sa part d'auditoire ou de son utilisation de musique. L'un ou l'autre pourrait augmenter ou diminuer, la SRC verserait toujours les mêmes redevances à la SOCAN. Ensuite, tout comme les redevances de la radio commerciale ne sont pas liées aux activités de la SRC, les dépenses de la SRC ne sont pas liées à la valeur de la musique.

[77] Troisièmement, la majeure partie de l'argumentation de la SRC à l'appui de la formule et du tarif qu'elle propose est un discours à peine déguisé sur la capacité de payer. Cette capacité n'est pertinente qu'après qu'une formule et qu'un tarif justes ont été arrêtés. L'avocate de la SOCAN a très bien résumé la question : [TRADUCTION] « Cette affaire a vraiment trait à la capacité de jouer, et non à la capacité de payer. »⁵⁶

[78] Enfin, les montants sont le fruit d'une entente entre la SOCAN et la SRC. Lorsque la Commission a homologué le tarif, elle n'a pas commenté l'entente ou la démarche qui y a donné lieu. De nombreux facteurs autres que la valeur influent sur les montants fixés par entente, notamment les compétences des parties en matière de négociation, la perte de temps et les désagréments associés au fait

coming to an easy agreement on one issue may make it easier to come to an agreement on a second, possibly unrelated, issue between the same parties. Each agreement must be analysed to determine whether it is useful in helping us fix royalties: these are not, if only because we do not know whether factors we consider important, including audience share and music use, were taken into account.

C. The Tariff

[79] The tariff formulae proposed by each of the parties are unacceptable. As a result, we must use our own approach which requires selecting a starting point and making several further adjustments. The methodology we use only contains parameters, other than inflation, that are specific to CBC radio. Thus, only changes in its behaviour will influence the amount of royalties it pays.

1. Starting Point

[80] In 1991, the Board certified a SOCAN tariff of \$1,117,323 for CBC radio. This decision reflected a variety of considerations, including earlier certified tariffs, admonitions from the Federal Court of Appeal, audience share and music use. The significant changes mentioned earlier make it inappropriate, for the reasons already stated, to use the 1991 formula today. That being said, we see no reason to conclude that the application of the formula in 1991 yielded an unfair result. As such, the amount can be used as the starting point for our analysis.

[81] This amount must however be adjusted to account for three principal factors: inflation, audience and music use. Since data is available for music use and audience for 2008, we use 2008 as the base year for comparison with 1991. Royalties

de ne pas en arriver à une entente ainsi que la présomption que la conclusion aisée d'une entente sur un point facilitera une entente sur un autre point, même s'il n'est pas lié au premier. Chaque entente doit être analysée afin de déterminer si elle nous est utile aux fins de l'établissement des redevances. Celles dont il est question ici ne le sont pas, ne serait-ce que parce que nous ne savons pas si les facteurs que nous jugeons importants, notamment la part d'auditoire et l'utilisation de musique, ont été pris en considération.

C. Tarif

[79] Les formules tarifaires proposées par chacune des parties sont inadmissibles. Par conséquent, nous devons recourir à notre propre méthode, laquelle exige de fixer un point de départ et d'apporter plusieurs rajustements. La méthodologie que nous utilisons pour calculer les redevances radio de la SRC n'intègre que des paramètres qui lui sont spécifiques, exception faite de l'inflation. Seuls des changements dans ses pratiques pourront donc avoir une influence sur le montant des redevances qu'elle devra verser.

1. Point de départ

[80] En 1991, la Commission a homologué un tarif SOCAN de 1 117 323 \$ pour la radio de la SRC. Cette décision tenait compte de divers éléments, dont les tarifs homologués antérieurement, les mises en garde de la Cour d'appel fédérale, la part d'auditoire et l'utilisation de la musique. À cause des changements significatifs que nous avons mentionnés, la formule de 1991 n'est désormais plus appropriée, pour les raisons évoquées précédemment. Cela dit, rien ne nous porte à croire que l'application de la formule lorsqu'on l'a utilisée a entraîné un résultat injuste. Le montant qu'elle a généré peut donc servir de point de départ pour notre analyse.

[81] Ce montant doit toutefois tenir compte de trois facteurs principaux : l'inflation, l'auditoire et l'utilisation de la musique. Puisque les données à l'égard de l'utilisation de la musique et de l'auditoire sont disponibles pour 2008, nous utilisons cette

are calculated for 2008 and then interpolated or extrapolated to the other years of the tariff.

2. Accounting for Inflation

[82] The witness statement of Mr. Mooney⁵⁷ contained several references to inflation and constant dollars. First, he noted that parliamentary appropriations to CBC have fallen significantly in constant dollars. Second, expenses for CBC radio have also fallen in constant dollars. In tables submitted with Mr. Mooney's witness statement,⁵⁸ CBC computed constant dollar measures of expenditures and revenues using the Consumer Price Index (CPI). CBC proposes a tariff based on a percentage of expenditures. Tariffs of this type automatically adjust for inflation. By making inflation a part of its case, CBC effectively asked two questions. First, should the CBC radio tariffs grow with inflation? Second, what measure of inflation should be used?

[83] The answer to the first question is yes. The purchasing power of a dollar in 1991 was substantially higher than it is today. To the extent that the royalty payments in 1991 reflected the value of music, failing to adjust those payments for inflation would allow inflation to erode the value of music.

[84] The answer to the second question is more complicated. Between January 1991 and December 2008, total inflation was 38.17 per cent, as measured by the percentage change between the CPI⁵⁹ for the two months in question. In order to calculate the percentage change, it is more accurate to use the monthly figures than the annual averages.⁶⁰ Using annual averages would in effect ignore two time periods – the period in the first year where inflation has not yet exceeded its average for that year and the period in the second year where inflation has already exceeded its

année comme référence pour établir la comparaison avec 1991. Les redevances sont calculées pour 2008 et sont interpolées ou extrapolées aux autres années du tarif.

2. Rajustement en fonction de l'inflation

[82] Dans le témoignage de M. Mooney,⁵⁷ il a fréquemment été question d'inflation et de dollars constants. D'abord, le témoin a mentionné que les crédits parlementaires accordés à la SRC ont diminué considérablement en dollars constants. Les dépenses de la SRC attribuables à la radio ont également subi une baisse en dollars constants. Dans les tableaux qui accompagnaient la déclaration de M. Mooney,⁵⁸ la SRC a calculé les dépenses et les revenus en dollars constants au moyen de l'indice des prix à la consommation (IPC). La SRC propose que le tarif soit établi en proportion des dépenses. Les tarifs de ce type sont automatiquement rajustés pour l'inflation. En amenant la question de l'inflation, la SRC soulève en fait deux interrogations. En premier lieu, les tarifs applicables à la SRC devraient-ils être indexés sur l'inflation? En deuxième lieu, quelle mesure de l'inflation devrait-on utiliser?

[83] Il faut répondre à la première question par l'affirmative. En 1991, le pouvoir d'achat du dollar était nettement plus grand qu'aujourd'hui. Comme les redevances versées en 1991 correspondaient à la valeur de la musique à l'époque, le fait de ne pas rajuster le montant en fonction de l'inflation entraînerait une érosion de cette valeur.

[84] La réponse à la deuxième question est plus complexe. L'inflation totale s'est chiffrée à 38,17 pour cent entre janvier 1991 et décembre 2008, ainsi que l'indique la variation en pourcentage de l'IPC⁵⁹ pour les deux mois en question. Pour calculer cette variation, il est plus précis d'utiliser les indices pour ces mois plutôt que d'utiliser les moyennes annuelles des deux années.⁶⁰ En effet, recourir à deux moyennes annuelles revient à « retrancher » deux périodes – la période de la première année où l'inflation n'a pas encore atteint la moyenne annuelle et la période de la deuxième année où l'inflation a

average for that year. The 1991 starting point will be adjusted accordingly.

[85] Over the years, the Board has adjusted tariffs fixed in dollar terms for inflation by using the Industrial Product Price Index (IPPI), the CPI and various transformations of these indexes. The last time the Board addressed the issue was in 2004.⁶¹ The Board then adjusted fixed amount royalties based on the average annual variation in the CPI less one per cent. Two reasons justified the subtraction:

First, the tariff inflation adjustment rule must ensure some balance between music users and copyright owners represented by SOCAN. Since this rule allows some tariff increases without any other change in market conditions, it seems fair to ensure that the gains are not necessarily attributed in full to the owners. In the economy as a whole, an individual's compensation seldom increases automatically with inflation. When there is an automatic adjustment, it is usually a partial one.

Second, although SOCAN's tariffs account for only a very small share of the overall CPI, the tariff adjustment rule should not itself be a source of increase or maintenance of inflation in a particular sector of the economy. If, for example, the inflation adjustment brings about a general increase in fees in a particular year, this increase could be entirely passed on to the costs of halls or ticket prices, which would soon be translated into a general increase in prices in that economic sector. The risks of such a situation occurring can be reduced by subtracting a percentage from the CPI.⁶²

déjà dépassé la moyenne annuelle. Le point de départ (le montant de 1991) sera rajusté en conséquence.

[85] Au fil des années, la Commission a rajusté les tarifs en dollars en fonction du taux d'inflation à l'aide de l'Indice des prix des produits industriels (IPPI), de l'IPC et de différentes variantes de ces indices. La dernière fois que la Commission a abordé la question remonte à 2004.⁶¹ Elle avait alors rajusté le montant fixe des redevances en fonction de la variation annuelle moyenne de l'IPC, moins un pour cent. Deux raisons justifiaient cette soustraction :

Premièrement, la règle de rajustement des tarifs pour l'inflation doit assurer un équilibre entre les utilisateurs de musique et les ayants droit représentés par la SOCAN. Puisque cette règle permet des hausses de tarifs sans qu'aucune autre condition de marché soit modifiée, il apparaît équitable de s'assurer que les gains ne soient pas nécessairement entièrement attribués aux ayants droit. Rarement dans l'ensemble de l'économie, la rémunération d'un individu augmente de manière automatique au rythme de l'inflation. Quand il y a rajustement automatique, il s'agit la plupart du temps d'un rajustement partiel.

Deuxièmement, bien que les tarifs de la SOCAN ne contribuent que très faiblement à l'IPC d'ensemble, il ne faudrait pas que la règle de rajustement des tarifs soit elle-même une source d'accroissement ou de maintien de l'inflation dans un secteur particulier de l'économie. Si par exemple, le rajustement pour l'inflation provoque pour une année particulière une hausse générale des redevances, il se pourrait que cette hausse soit entièrement transmise aux coûts des salles ou aux prix des billets de spectacle, ce qui se traduirait rapidement en une hausse générale des prix dans ce secteur économique. Le fait de soustraire un pourcentage de l'IPC permet d'atténuer les risques qu'une telle situation se produise.⁶²

[86] Both considerations have become less relevant, for a number of reasons.

[87] First, the possible disincentive effects that full indexation may have on collectives are largely counterbalanced by the fact that real value has been eroded by inflation, however slowly. Failing to take into account the decreased purchasing power that comes with inflation leads to certifying tariffs whose fairness and equity themselves erodes over time.

[88] Second, the analogy between compensation in the labour market and payments made through a collective to individual rights holders is arguably a poor one. While an individual whose compensation in the labour market fails to keep pace with inflation is free to seek alternative employment, a rights holder whose collective is unable to preserve the real purchasing power of his royalties has no such alternative.

[89] Third, the fear of an inflationary spiral in Canada is lower today than it was in 2004. The inflation targeting regime by the Bank of Canada has weathered several expansions and one recent contraction in the Canadian economy, without evidence of being strained. To the extent that the cultural sector might want to pass on price increases to its customers, it is restrained by the law of demand: as the price of a good rises, customers demand fewer units of that good. The desire to maximize profits makes the likelihood of an inflationary spiral essentially non-existent.

[90] Fourth, subtracting any amount from measured inflation is inconsistent with the principle of replicating competitive markets: in competitive markets, prices are set in relative or real terms, and all nominal prices adjust in lockstep.

[91] In summary, neither reason advanced by the Board in 2004 for using less than the CPI to

[86] Les deux arguments invoqués sont aujourd'hui moins pertinents, pour plusieurs raisons.

[87] En premier lieu, l'effet potentiel de dissuasion que l'indexation intégrale peut avoir sur les sociétés de gestion est largement neutralisé par le fait que l'inflation gruge la valeur réelle, quoique lentement. Si on ne prend pas en considération le pouvoir d'achat affaibli par l'inflation, le caractère juste et équitable des tarifs homologués s'amenuise au fil du temps.

[88] En deuxième lieu, on pourrait soutenir que l'analogie entre les salaires offerts sur le marché du travail et les sommes remises par les sociétés de gestion aux titulaires de droits est boiteuse. Un travailleur dont le salaire ne suit pas l'inflation a la possibilité de chercher un nouvel emploi; le titulaire dont la société de gestion ne parvient pas à préserver le pouvoir d'achat réel de ses redevances n'a quant à lui pas de solution de rechange.

[89] En troisième lieu, la crainte d'une spirale inflationniste au Canada est moins grande aujourd'hui qu'elle ne l'était en 2004. Le régime de la Banque du Canada fondé sur une cible de maîtrise de l'inflation a su résister à plusieurs phases d'expansion et à une récente contraction de l'économie canadienne, sans qu'on ait observé de signes de tension. Si le secteur culturel souhaite que ce soient les clients qui assument les hausses de prix, il se heurtera à la loi de la demande : si le prix d'un bien augmente, la quantité demandée par les consommateurs sera plus faible. Comme les entreprises souhaitent maximiser leurs profits, la probabilité que jaillisse une spirale inflationniste est essentiellement nulle.

[90] Enfin, soustraire n'importe quelle valeur de la mesure de l'inflation n'est pas une démarche qui cadre avec le principe voulant qu'on reproduise le contexte des marchés concurrentiels : dans ce type de marché, les prix sont établis en termes relatifs ou réels, et les prix nominaux s'ajustent en conséquence.

[91] En résumé, aucune des raisons mises de l'avant par la Commission en 2004 pour justifier

account for inflation has much currency, and several reasons favour using the CPI without correction. The CPI remains the best measure of inflation to preserve purchasing power, since it reflects the prices of the basket of goods and services purchased by Canadians on average. We will use the CPI from January 1991 to December 2008, without further adjustment.

3. Accounting for Variations in Audience and Music Use

[92] The CBC Radio Tariff should reflect variations in listenership and music use. The 1991 formula achieved this by comparing these variables for CBC and for Canadian commercial radio. For the reasons already stated, we no longer wish to use this comparison.

[93] We have already stated that the 1991 formula, while no longer helpful, yielded a result that is *prima facie* fair. If the overall amount of royalties is fair, so is the amount of royalties per unit of music. Furthermore, since we use the 1991 royalties as the starting point, then all things being equal, CBC should pay the same amount per unit in 2008 as in 1991. Therefore, if we can compare the number of units of music for CBC radio in 1991 and in 2008, we can use these figures and the 1991 royalties to calculate the overall amount of royalties that CBC radio should pay in 2008, before adjusting for inflation.

[94] The number of units of music for CBC radio is a function of protected music use and audience.⁶³ We know to the minute how much protected music each service uses. We also know the number of hours tuned to each service. The product of both, which we term "music impressions", gives us the precise amount of time Canadians listened to protected music on each service. The sum of the music impressions for each service, in turn, yields the total number of impressions used by CBC radio. The totals for

l'utilisation d'un taux inférieur à l'IPC pour tenir compte de l'inflation ne s'applique réellement au contexte actuel. Plusieurs raisons favorisent l'IPC sans correction. L'IPC demeure la meilleure mesure de l'inflation pour préserver le pouvoir d'achat, car il est le reflet des prix des biens et services que se procure un ménage canadien moyen. Nous convenons donc de recourir à l'IPC de janvier 1991 à décembre 2008, sans correction supplémentaire.

3. Prise en compte des variations de la part d'auditoire et de l'utilisation de musique

[92] Le tarif radio de la SRC devrait tenir compte des variations d'écoute et d'utilisation de musique. La formule de 1991 y arrivait en comparant ces variables pour la SRC et la radio commerciale. Pour les raisons évoquées précédemment, nous ne souhaitons plus faire cette comparaison.

[93] Nous avons déjà dit que la formule de 1991, si elle n'est plus utile, a donné un résultat qui, de prime abord, est équitable. Si le montant total des redevances est équitable, le montant par unité de musique l'est aussi. De plus, toutes choses égales, la SRC devrait payer le même prix par unité en 2008 qu'en 1991, puisque les redevances de 1991 nous servent de point de départ. Par conséquent, si nous arrivons à comparer le nombre d'unités de musique pour la radio de la SRC en 1991 et en 2008, nous pouvons utiliser ces données et les redevances de 1991 pour calculer le montant de redevances que la radio de la SRC devrait payer en 2008, avant correction pour l'inflation.

[94] Le nombre d'unités de musique pour la radio de la SRC est fonction de son utilisation de musique protégée et de l'écoute.⁶³ Nous connaissons à la minute près la quantité de musique protégée que chaque service utilise et le nombre d'heures d'écoute qu'il obtient. Le produit de l'un et l'autre, que nous appelons « impressions musicales », nous donne le temps précis que les Canadiens ont passé à écouter la musique protégée diffusée par chaque service. Subséquemment, le total des impressions musicales pour chacun des services établit combien

1991 and 2008 can be compared, and the amount of royalties adjusted accordingly.

[95] There is a strong analogy to be drawn between music impressions and distant signal viewing impressions, as that term was used in the second retransmission decision.⁶⁴ In that decision, the Board was counting the number of minutes viewers watched distant signals. Here, we are counting the number of hours listeners hear protected music on CBC radio. There is, however, one important difference. In the retransmission decision, viewing impressions were converted to shares, since impressions were used to allocate royalties. Here, there is no need to do so. It is sufficient to compare the number of music impressions in 1991 and 2008 to derive the amount of royalties for 2008 using the 1991 royalties.

[96] The approach we use offers three significant advantages. First, it avoids having to decide whether each service should weigh equally in the calculations (as SOCAN proposed), or whether its importance should reflect its listenership (as CBC proposed). Second, it reflects variations in the amount of music listened to on CBC radio, whatever the cause might be. If CBC programmers choose to include more music, the number of music impressions rises, holding the audience constant. Conversely, if the number of hours tuned increases (because of increased audience share, increased population or increased average number of hours tuned), the number of music impressions rises. Furthermore, the concept of music impressions is ideally suited for taking into account any inverse relationship between music and audience at the service level, as argued by CBC witnesses.

[97] The first step in calculating music impressions is to obtain an estimate of the number of minutes of SOCAN music used.

[98] Column D of Table 1 shows NYR music as a percentage of airtime, pro-rated on the conservative assumption that the use of SOCAN

d'impressions ont été utilisées par la radio de la SRC. On peut alors comparer ces totaux pour 1991 et 2008 et ajuster les redevances à l'avenant.

[95] Il existe une forte analogie entre l'impression musicale et l'impression de signal éloigné dont parle la décision de 1993 sur la retransmission.⁶⁴ À l'époque, la Commission comptait le nombre de minutes passées à visionner les signaux éloignés. Cette fois-ci, nous comptons le nombre d'heures passées à écouter de la musique protégée sur les ondes de la radio de la SRC. Cela dit, une différence importante existe. En retransmission, les impressions étaient converties en parts, puisque les impressions servaient à répartir les redevances. Cette fois-ci, nous n'avons pas à procéder ainsi. Il suffit de comparer le nombre d'impressions musicales en 1991 et en 2008 pour dériver le montant des redevances pour 2008 à partir de celles de 1991.

[96] La démarche que nous retenons présente trois avantages importants. D'abord, elle évite d'avoir à décider si chaque service devrait compter également dans les calculs (ce que propose la SOCAN) ou si son importance devrait refléter son écoute (ce que propose la SRC). Ensuite, elle reflète les variations d'écoute de la musique que diffuse la radio de la SRC peu importe ce qui les cause. Si les programmeurs de la SRC incorporent davantage de musique, le nombre d'impressions musicales augmente pour un auditoire constant. Réciproquement, si les heures d'écoute augmentent (que ce soit la part d'écoute, la population ou le nombre moyen d'heures où l'on sintonise la radio qui augmente), le nombre d'impressions augmente. Enfin, ce concept permet parfaitement de tenir compte de la relation inverse qui pourrait exister entre l'utilisation de musique et l'écoute de chaque service, comme l'ont soutenu les témoins de la SRC.

[97] Pour calculer les impressions musicales, il nous faut d'abord obtenir une estimation du nombre de minutes de musique de la SOCAN utilisées.

[98] La colonne D du tableau 1 donne la quantité de musique NED en pourcentage du temps d'antenne, rajustée d'après l'assertion prudente selon laquelle

music in the registered repertoire is no more frequent than in the NYR repertoire. Column E shows the final figure of SOCAN music in minutes that includes a pro-rated adjustment for the NYR music.⁶⁵

l'utilisation de la musique de la SOCAN du répertoire déclaré n'est pas plus fréquente que celle du répertoire NED. La colonne E indique la quantité de musique SOCAN en minutes, tenant compte du rajustement fait au titre des œuvres NED.⁶⁵

Table 1: Calculation of SOCAN Music with NYR Adjustment, 2008 Tableau 1 : Calcul de la musique SOCAN avec ajustement NED, 2008					
Service	Registered Music Musique déclarée	NYR Music Musique NED	Registered Music over Total Programming Time Musique déclarée par rapport au temps d'antenne total	NYR Music Adjusted to Percentage of Registered Music Musique NED rajustée au pourcentage de la musique déclarée	SOCAN Music with NYR Adjustment Musique de la SOCAN avec rajustement NED
	(A)	(B)	(C)	(D) = (B) × (C)	(E) = (A) + (D)
Radio One	968.3	93.2	100.00%	93.2	1061.5
Radio 2	3367.7	815.5	69.10%	563.5	3931.2
Première Chaîne	997.7	146.7	96.60%	141.7	1139.4
Espace Musique	4057.1	685.9	74.40%	510.3	4567.4

[99] The calculation of music impressions, detailed in Table 2, shows that even though both the total hours tuned to CBC and the total minutes of music played have increased substantially, the number of music impressions has only increased modestly from 108 million to 113 million. This only serves to confirm CBC's argument that an inverse relationship exists between music use and listenership. Whether that relationship is linked to the service or to the program is irrelevant, since all music impressions on all services receive equal treatment.

[99] Le calcul des impressions musicales, détaillé au tableau 2, démontre que même si, au total, tant les heures d'écoute que les minutes de musique protégée diffusée ont augmenté considérablement, le nombre d'impressions musicales n'a augmenté que légèrement de 108 millions à 113 millions. Cela vient renforcer la prétention de la SRC portant qu'il existe une relation inverse entre l'utilisation de musique et l'écoute. Il importe peu que cette relation soit fonction du service ou de l'émission, puisque toutes les impressions musicales de tous les services ont une valeur égale.

Table 2: Calculation of 2008 Royalties based on Music Impressions Tableau 2 : Calcul des redevances pour 2008 à partir des impressions musicales								
Service	Music Use (Minutes) ¹ Utilisation de la musique (minutes) ²		Hours Tuned ('000s) Heures d'écoute (milliers)		Music Impressions Impressions musicales		Total Royalties Redevances totales	
	(A)	(A)	(B)	(B)	= (C) = (A) × (B)		(D)	$\frac{(E)}{(C)^{1991}} \times (C)^{2008} + (C)^{1991}$
	1991	2008	1991	2008	1991	2008		
Radio One	1,920.24	1,061.50	33,173	39,505	63,700,122	41,934,558		
Radio 2	2,903.04	3,931.21	9,668	9,165	28,066,591	36,029,544		
Première Chaîne	2,094.12	1,139.41	5,974	14,059	12,510,273	16,018,996		
Espace Musique	1,837.08	4,567.41	2,149	4,262	3,947,885	19,466,300		
Total	8,754.48	10,699.53	50,964	66,991	108,224,870	113,449,398	\$1,117,323	\$1,171,261

¹ The data for music use in minutes for the year 1991 was not filed in these proceedings. They are derived from Exhibit CBC/SRC-2 as filed in the 1991 proceedings, where we can find that Radio One, Radio 2, Première Chaîne and Espace Musique used music respectively 25.4%, 38.4%, 27.7% and 24.3% of total airtime. Multiplying these proportions by the 7560 minutes in a week consisting of 18-hour days, we obtain the minutes of music use. Even though this exhibit was not filed in these proceedings, we see no problem in using it, since all it contains is the data SOCAN used in the instant proceedings to calculate the total amount of music used by CBC in 1991.

² Les données relatives à l'utilisation de musique en minutes pour l'année 1991 ne sont pas au dossier de la présente affaire. On les dérive à partir de la pièce CBC/SRC-2 déposée dans l'affaire de 1991, dans laquelle on peut trouver que Radio One, Radio 2, Première Chaîne et Espace Musique utilisent la musique dans des proportions respectives de 25,4%, 38,4%, 27,7% et 24,3% du temps de diffusion. En multipliant ces proportions par les 7560 minutes comprises dans une semaine constituée de journées de 18 heures, nous obtenons les minutes d'utilisation de musique. Même si la pièce n'est pas au dossier de la présente affaire, nous n'avons pas de réserve à l'utiliser : elle contient uniquement des données dont la SOCAN s'est servie dans la présente affaire pour calculer le montant total de musique utilisée par la SRC en 1991.

[100] Total royalties in 2008 are \$1,171,261. As discussed above, this figure requires an adjustment for inflation. Between January 1991 and December 2008, the cumulative rate of inflation was 38.17 per cent. Adjusting the royalties for inflation yields royalties of \$1,618,322.

[100] Les redevances totales de 2008 se chiffrent à 1 171 261 \$. Comme il en a été question précédemment, ce résultat doit être corrigé en fonction de l'inflation. Entre janvier 1991 et décembre 2008, le taux d'inflation cumulatif se situait à 38,17 pour cent. En corrigeant les redevances pour l'inflation, nous obtenons des redevances de 1 618 322 \$.

[101] The logical way to extend the tariff calculated for 2008 to the years 2006, 2007 and 2009 through 2011 is through the use of inflation and deflation. Table 3 shows the relevant calculations. Since we do not have inflation data for 2011, we use the Bank of Canada's inflation target of 2 per cent.⁶⁶

[101] La façon logique d'étendre le tarif obtenu pour 2008 aux années 2006 et 2007 et 2009 à 2011 consiste à appliquer les taux d'inflation et de déflation, comme le montre le tableau 3. Comme nous ne connaissons pas les données sur l'inflation pour 2011, nous avons utilisé la cible d'inflation de la Banque du Canada, soit 2 pour cent.⁶⁶

Table 3: Adjusting the 2008 Royalties for Inflation and Deflation Tableau 3 : Correction des redevances de 2008 en fonction de l'inflation et de la déflation		
Year Année	Jan/Dec CPI Growth (per cent) Croissance de l'IPC de janv. à déc. (pour cent)	SOCAN Royalties Redevances SOCAN
2006	1.11	\$1,563,358
2007	2.38	\$1,580,711
2008	1.30	\$1,618,332
2009	1.59	\$1,644,063
2010	2.09	\$1,678,424
2011	2.00	\$1,711,993

[102] In the absence of annual data for both music use and audience for 2006, 2007 and 2009 to 2011, we can only adjust for inflation. But even if we had annual data for both, it is not evident that we would make annual adjustments on this basis. The Board makes adjustments to royalties based on permanent trends, not temporary fluctuations. Discerning which of the two is at play in any given set of data is the difficult task we would have before us, if we had annual data for both variables.

[102] À défaut de données annuelles s'appliquant à la fois à l'utilisation de musique et à l'auditoire pour les années 2006, 2007 et 2009 à 2011, nous ne pouvons apporter des corrections qu'au titre de l'inflation. Quoi qu'il en soit, si nous disposions des données annuelles relatives aux deux, il n'est pas sûr que nous nous en servirions pour faire les rajustements annuels. La Commission rajuste les redevances en fonction de tendances durables, et non de fluctuations temporaires. Si nous disposions des données annuelles sur les deux variables, il nous aurait fallu nous attaquer à la difficile tâche de discerner lequel des deux est en cause dans ces séries de données.

VII. THE RE:SOUND RATE

[103] For the years 1998 to 2002, the Board set the royalties CBC radio paid to Re:Sound equal to what it pays to SOCAN, discounted to reflect the relative airplay of the respective repertoires.

VII. TARIF DE RÉ:SONNE

[103] Pour les années 1998 à 2002, la Commission a établi les redevances que la SRC devait verser à Ré:Somme en fonction de celles versées à la SOCAN, multipliées par le taux d'utilisation relatif du

Re:Sound proposes that this formula be used once again. CBC agrees. We use this formula once again.

[104] First, we compare the relative use of each repertoire to derive the rate. Throughout, the parties used numbers expressed as percentages. This approach is invalid, since the total minutes of music on each station are not the same in the SOCAN and Re:Sound music use reports.⁶⁷

[105] This point is perhaps best clarified by use of an example. For Radio One, Erin Research documents 1,060.5 minutes of music played relevant for SOCAN and 1,467.7 minutes of music played relevant for Re:Sound. The difference between these two is more than 400 minutes. Where the Erin Research reports contain percentages of music used on Radio One, the percentages for SOCAN would be relative to the 1,060.5 minutes, whereas the percentages for Re:Sound would be relative to the 1,467.7 minutes.

[106] Using percentages to compare CBC radio's use of the two collectives' repertoire is not essential. More simply, we can compare the number of observed minutes of each repertoire's use weighted by each service's audience share. For SOCAN, we use the number of minutes adjusted to account for SOCAN's share of NYR titles. The issue is then whether a similar adjustment should be performed with respect to Re:Sound.

[107] Re:Sound identified three categories of music in computing its repertoire use:⁶⁸ that which clearly is in its repertoire (eligible, published sound recordings), that which clearly is not (non-eligible recordings, live-to-tape, live music) and a "potential repertoire" consisting of recordings which Re:Sound could not determine whether they were in Re:Sound's repertoire or not. The potential repertoire can be excluded altogether.

répertoire. Ré:Somme propose que cette formule soit maintenue. La SRC abonde dans le même sens. Nous utilisons donc cette formule de nouveau.

[104] Nous comparons d'abord l'utilisation relative de chacun des répertoires dans le but d'établir le taux. Tout au long des procédures, les parties ont utilisé des données exprimées sous forme de pourcentage. Cette façon de faire n'est pas valable, car le nombre total de minutes consacrées à la musique par chaque station n'est pas le même dans le rapport de la SOCAN sur l'utilisation de la musique et dans celui de Ré:Somme.⁶⁷

[105] Citons un exemple pour clarifier la question. Dans le cas de Radio One, Erin Research fait état de 1060,5 minutes de musique diffusée pertinente pour la SOCAN et 1467,7 minutes de musique diffusée pertinente pour Ré:Somme. L'écart est de plus de 400 minutes. Les pourcentages contenus dans les rapports d'Erin Research au regard de l'utilisation de musique sur les ondes de Radio One sont donc établis par rapport au nombre de 1060,5 minutes dans le cas de la SOCAN et de 1467,7 minutes dans le cas de Ré:Somme.

[106] Il n'est pas essentiel de recourir à des données en pourcentage pour comparer l'utilisation que fait la SRC de chacun des répertoires. Nous pouvons simplement comparer le nombre de minutes d'utilisation des répertoires pondéré d'après la part d'auditoire de chaque service. Dans le cas de la SOCAN, nous utilisons le nombre de minutes rajusté pour tenir compte de la part des titres NED revenant à la SOCAN. La prochaine question consiste à savoir s'il faut procéder à un rajustement similaire dans le cas de Ré:Somme.

[107] Ré:Somme a défini trois catégories de musique aux fins du calcul de l'utilisation de son repertoire :⁶⁸ ce qui fait sans équivoque partie de son repertoire (enregistrements sonores publiés admissibles), ce qui ne l'est manifestement pas (enregistrements non admissibles, faux direct et musique en direct) et la catégorie « admissibilité possible » (enregistrements pour lesquels Ré:Somme n'a pu déterminer s'ils faisaient ou non partie de son repertoire). La dernière

included altogether or included for part, using some reasonable mechanism for determining how much should be. At first, Re:Sound merely expressed the opinion that its repertoire is at least equal to all the repertoire definitely identified, plus some or all of the potential repertoire. Mr. Staple argued that allocating the potential repertoire proportionately would be fairer. In closing argument, Re:Sound agreed.

[108] We apply a proportional adjustment. This warrants two comments.

[109] Apparently, Re:Sound considers that all eligible published sound recordings, whether or not copyright is owned by one of its member collectives, are within its repertoire. An argument can certainly be made that Re:Sound only "owns" what is in its repertoire and that this occurs when either the performer or the maker asks one of Re:Sound's member collectives (or any foreign collective with which Re:Sound may have an arrangement) to administer the section 19 remuneration right on his or her behalf.

[110] There is no need to deal with it in this instance, for two reasons. First, the share of *eligible* repertoire that CBC uses and that Re:Sound does not represent probably is very small. Second, Re:Sound determines eligibility based on declarations by AVLA, SOPROQ or their members: it is highly improbable that a music label will file eligibility declarations on account of recordings that it does not own.

[111] For the same reasons, it also appears probable that the potential repertoire category contains a smaller proportion of Re:Sound repertoire than the known repertoire category. Again, it is not possible for us to calculate the difference, which is probably small and which we decide to ignore for the purposes of this decision.

catégorie peut être exclue en totalité, incluse en totalité ou, incluse en partie en utilisant une méthode de calcul raisonnable pour déterminer la quantité à inclure. Au départ, Ré:Somme avait simplement affirmé que son répertoire était au moins équivalent à l'ensemble des enregistrements admissibles, plus une partie ou la totalité des enregistrements possiblement admissibles. M. Staple a déclaré qu'il serait plus juste de répartir les œuvres de cette catégorie de manière proportionnelle. Dans son argumentation finale, Ré:Somme s'est dite d'accord avec M. Staple.

[108] Nous procédons à un rajustement proportionnel, lequel commande deux observations.

[109] Apparemment, Ré:Somme considère que tous les enregistrements sonores publiés admissibles font partie de son répertoire, peu importe si une de ses sociétés membres les détient ou non. On peut certainement défendre la thèse que Ré:Somme ne « possède » que ce qui fait partie de son répertoire et que, pour ce faire, il faut que l'artiste-interprète ou le producteur fasse apport de son droit à rémunération de l'article 19 à une des sociétés membres de Ré:Somme (ou à une société de gestion étrangère avec laquelle Ré:Somme a conclu un accord).

[110] Nul besoin de traiter de cette question en l'instance, et ce, pour deux raisons. En premier lieu, la part des œuvres *admissibles* que la SRC diffuse et qui ne se trouvent pas dans le répertoire de Ré:Somme est probablement très faible. En deuxième lieu, Ré:Somme détermine l'admissibilité des œuvres d'après les déclarations faites par l'AVLA, la SOPROQ ou leurs membres: il est très peu probable qu'une maison de disques remplisse une déclaration d'admissibilité à l'égard d'enregistrements dont elle ne détient pas les droits.

[111] Pour les mêmes raisons, il paraît aussi probable qu'une plus faible part du répertoire potentiellement admissible fasse partie du répertoire de Ré:Somme que pour le répertoire connu. Il ne nous est pas possible de calculer la différence, mais elle est probablement minime et nous avons choisi de l'ignorer dans la présente décision.

[112] To compute the Re:Sound rate, we first created a proportional adjustment for potential repertoire and then made a correction to account for the use of public domain recordings that were incorrectly reported.

[113] We then compute the musical impressions of Re:Sound repertoire on CBC. The ratio of the musical impressions of Re:Sound repertoire relative to SOCAN's repertoire is 77.32 per cent, as shown in Table 4. The result is that CBC will pay royalties to Re:Sound that are 77.32 per cent of what it pays to SOCAN.

[112] Pour calculer le taux des redevances que percevra Ré:Somme, nous avons premièrement procédé à un rajustement proportionnel au titre du répertoire potentiellement admissible puis apporté une correction pour tenir compte des enregistrements appartenant au domaine public qui avaient été classés dans la mauvaise catégorie.

[113] Nous calculons par la suite les impressions musicales du répertoire de Ré:Somme sur les ondes de la SRC. Tel qu'indiqué au tableau 4, le ratio des impressions musicales du répertoire de Ré:Somme à celles de la SOCAN est de 77,32 pour cent. La SRC devra donc verser à Ré:Somme 77,32 pour cent de ce qu'elle verse à SOCAN.

Table 4: Re:Sound Music Impressions Relative to those of SOCAN
Tableau 4 : Impressions musicales de Ré:Somme relatives à celles de la SOCAN

	Observed Minutes, Re:Sound Repertoire ¹	Observed Minutes, Potential Repertoire (PR) ¹	% Repertoire of Known Music ¹	% Repertoire Applied to PR	Potential Public Domain Minutes Deduction ²	Adjusted Observed Minutes, Re:Sound	Hours Tuned	Music Impressions
	Minutes observées, répertoire de Ré:Somme ¹	Minutes observées, admissibilité éventuelle (AE) ¹	Musique connue, en % du répertoire ¹	% musique connue appliqué à AE	Déduction au titre du domaine public potentiel (minutes) ²	Minutes observées rajustées, Ré:Somme	Heures d'écoute	Impressions musicales
	(A)	(B)	(C)	(D) =(B×C)	(E)	(F) =(A+D-E)	(G)	(H) =(F×G)
Radio One	576.1	265.9	47.9	127.4	17.1	686.4	39,505	27,114,893
Radio 2	2985.8	372.1	52.8	196.5	5.0	3177.3	9165	29,119,669
Première Chaîne	904.6	100.6	82.6	83.1	0	987.7	14,059	13,886,012
Espace Musique	3993.9	259.3	67.7	175.5	40.7	4128.7	4262	17,596,716
Total impressions, Re:Sound								87,717,290
Total Impressions, SOCAN								113,449,398
Re:Sound repertoire share								77.32%

¹ Exhibit Re:Sound-4 at pp. 4-7. / Pièce Ré:Somme-4 aux pp. 4-7.

² Testimony of Ms. Tay, *Transcripts* at p. 42. / Témoignage de M^{me} Tay, *transcriptions*, p. 42.

[114] Table 5 shows the royalties payable to SOCAN and Re:Sound.

[114] Le tableau 5 indique les redevances payables à la SOCAN et à Ré:Somme.

Table 5: SOCAN and Re:Sound Royalties
Tableau 5 : Redevances payables à la SOCAN et à Ré:Somme

Year Année	SOCAN Royalties SOCAN	Re:Sound Royalties Ré:Somme
2006	\$1,563,358	\$1,208,764
2007	\$1,580,711	\$1,222,181
2008	\$1,618,332	\$1,251,269
2009	\$1,644,063	\$1,271,164
2010	\$1,678,424	\$1,297,731
2011	\$1,711,933	\$1,323,686

[115] The relative use of Re:Sound’s repertoire as compared to SOCAN’s is much higher than on commercial radio. There are several reasons which contribute to this putative anomaly. First, CBC plays a considerable amount of “Canadian content,” far in excess of the statutory minimum. Since many commercial radio stations play Canadian content in amounts at or just above the statutory minimum, this means that CBC plays more Re:Sound repertoire than commercial radio stations. Second, classical music is generally in Re:Sound’s repertoire (since most recordings are less than 50 years old, they are protected) but not in SOCAN’s repertoire (since most composers of classical music died more than 50 years ago, their works are no longer protected). To the extent CBC radio plays classical music, it plays less SOCAN repertoire and more Re:Sound repertoire, thus increasing the fraction of relative use.

VIII. SIMULCASTING

[116] All the proposed tariffs under examination, with the possible exception of Re:Sound’s proposed tariff for 2006 and 2007, target only CBC’s conventional, over-the-air radio broadcasting services. Nevertheless, CBC asked that the Board expand the scope of the tariff to include simulcasting. The collectives object to CBC’s request. Alternatively, Re:Sound contends

[115] Le taux d’utilisation du répertoire de Ré:Somme par rapport à celui de la SOCAN est beaucoup plus élevé à la SRC qu’à la radio commerciale. Plusieurs raisons expliquent cette apparente anomalie. Ainsi, la SRC diffuse beaucoup plus de contenu canadien que le minimum obligatoire. Comme de nombreuses stations commerciales diffusent tout juste ce qu’il faut de contenu canadien, la SRC diffuse donc plus d’œuvres appartenant au répertoire de Ré:Somme que les stations commerciales. Par ailleurs, la musique classique fait généralement partie du répertoire de Ré:Somme (la plupart des enregistrements ayant moins de 50 ans, ils sont protégés), mais non de la SOCAN (la plupart des compositeurs classiques étant morts il y a plus de 50 ans, leurs œuvres ne sont pas protégées). Comme la SRC diffuse de la musique classique, elle a moins recours au répertoire de la SOCAN et davantage à celui de Ré:Somme, ce qui tire le taux d’utilisation relatif vers le haut.

VIII. DIFFUSION SIMULTANÉE

[116] Tous les tarifs proposés à l’étude, à l’exception peut-être du projet de tarif Ré:Somme pour 2006 et 2007, visent uniquement les services radio conventionnels de la SRC. Néanmoins, celle-ci a demandé à la Commission d’élargir le champ d’application du tarif de manière à inclure la diffusion simultanée. Les sociétés de gestion s’y sont opposées. Si la Commission devait accepter la

that in the event the Board wished to include it, the tariff base for simulcasting should include Internet advertising revenues.

[117] In *SOCAN 22.B-G*, the Board stated: "When the time comes to revise SOCAN Tariff 1.C, the Board will be able to reestablish a link between CBC payments and its audience, including that derived from the Internet [...]"⁶⁹ It stated that some payment should be made to SOCAN for CBC's Internet, simulcasting and those payments should, as much as possible, be derived from the income arising from these Internet simulcasting activities. However, as it noted in its reasons, the Board had no data on advertising or other revenues or additional audience on which to base an increase in SOCAN royalties.⁷⁰

[118] We agree with CBC that the simulcasting of its radio services should be addressed in its main tariff. While separate uses, over-the-air broadcasting and simulcasting involve basically the same product for the same purposes: we see no reason at this time to deal with them in separate tariffs.

[119] Again, the record on which to base the simulcasting tariff is very thin. We do not know what CBC's simulcasting income is. We are willing this time to accept that these are low enough now not to be of significant help in the matter. We are also willing to accept that segregating simulcasting income from all other Internet revenue may prove difficult. Therefore, we will not attempt to set simulcasting royalties as a function of simulcasting income for the time being.

[120] CBC's assertion that BBM audience data may already account for the simulcast audience is based on no evidence whatsoever. The only shred

demande de la SRC, Ré:Some est d'avis que l'assiette tarifaire de la diffusion simultanée devrait tenir compte des recettes publicitaires attribuables à Internet.

[117] Dans *SOCAN 22.B-G*, la Commission a déclaré ce qui suit : « Quand viendra le temps de réviser le tarif 1.C de la SOCAN, la Commission sera en mesure d'établir de nouveau un lien entre les redevances versées par la SRC et son audience, y compris celle attribuable à Internet [...] »⁶⁹ La Commission a conclu que la SRC devrait rémunérer dans une certaine mesure la SOCAN pour la diffusion simultanée de son signal sur Internet et que cette rémunération devrait autant que possible être fonction des revenus de ces activités. Toutefois, elle a ajouté qu'elle ne disposait pas de données sur les revenus publicitaires ou autres ni sur l'accroissement de l'audience sur lesquelles fonder une augmentation des redevances à verser à la SOCAN.⁷⁰

[118] Nous sommes d'accord avec la SRC sur le fait de traiter de la diffusion simultanée de ses signaux radio dans le tarif principal. Bien qu'il s'agisse de deux activités distinctes, la radiodiffusion en direct et la diffusion simultanée se rapportent essentiellement au même produit et ont le même objet: nous estimons donc inutile pour l'instant de traiter de la diffusion simultanée dans un tarif distinct.

[119] Par ailleurs, nous disposons de bien peu de données sur lesquelles fonder un tarif pour la diffusion simultanée. Nous ne connaissons pas les revenus de diffusion simultanée de la SRC. Nous sommes prêts à accepter cette fois-ci qu'ils sont suffisamment bas pour ne pas être d'une grande utilité en l'espèce. Nous sommes aussi prêts à tenir pour acquis qu'il serait difficile de ventiler les revenus de diffusion simultanée des autres revenus provenant d'Internet. Nous ne tenterons donc pas pour l'instant d'établir les redevances pour la diffusion simultanée en fonction des revenus qu'elle génère.

[120] L'assertion de la SRC selon laquelle les données de BBM tiendraient déjà compte de l'écoute en diffusion simultanée n'est étayée par aucun

of evidence available was provided by Mr. Steinmetz and Ms. Leblanc. Mr. Steinmetz testified that the daily peak simulcast audience is around 10,000 listeners while the combined peak over-the-air audience of the English services is around 1,080,000 listeners – a ratio of 0.93 per cent. Ms Leblanc testified that peak simulcast audience for the French services is about 2 per cent of their peak over-the-air audience. The average of the two numbers, weighted according to audience share, is 1.22 per cent. We increase the royalties accordingly for the right to simulcast the four CBC radio stations at issue in this decision.

[121] The collectives may wish to argue that since their proposals did not deal with simulcasting, the tariff we certify cannot address the issue. This would be incorrect. Both collectives have filed proposed tariffs for CBC's simulcast of its radio services. The Board is free to deal with the proposed CBC simulcast tariff as it wishes, as long as it acts fairly with CBC and both collectives. CBC is a single user: as a result, everyone interested in the simulcast issue was present before us. CBC asked the Board to address the issue. The collectives knew of this. Fairness is satisfied.

IX. ROYALTIES

[122] Table 6 below sets out the total royalties CBC will pay.

élément de preuve. La seule parcelle de justification a été fournie par M. Steinmetz et M^{me} Leblanc. Le premier a déclaré que, pour les stations en anglais et en période de pointe, le nombre d'auditeurs en diffusion simultanée est d'environ 10 000, tandis que celui pour la radio en direct est d'environ 1 080 000, ce qui correspond à un ratio de 0.93 pour cent. M^{me} Leblanc affirme quant à elle que, pour les stations en français, l'auditoire de la diffusion simultanée en période de pointe correspond à environ 2 pour cent du nombre d'auditeurs de la radio en direct. La moyenne des deux taux, pondérée en fonction de la part d'auditoire, est de 1.22 pour cent. Nous augmentons les redevances en conséquence au titre du droit de diffuser simultanément les émissions des quatre services radio de la SRC concernés par la présente décision.

[121] Les sociétés de gestion pourraient vouloir répliquer que, comme les projets de tarifs ne visent pas de diffusion simultanée, celui qu'homologuerait la Commission ne pourrait s'y rapporter. Ceci serait incorrect. Les deux sociétés ont déposé des projets de tarifs pour la diffusion simultanée de ses services radio par la SRC. La Commission peut examiner à sa guise le tarif que propose la SRC pour la diffusion simultanée, pour autant qu'elle agisse de manière juste envers la SRC et les deux sociétés de gestion. La SRC est un utilisateur unique: par conséquent, toutes les entités concernées par la diffusion simultanée étaient présentes devant la Commission. La SRC a demandé à la Commission de se pencher sur la question. Les sociétés de gestion étaient au courant. Le principe d'équité a été respecté.

IX. REDEVANCES

[122] Les redevances totales que doit verser la SRC sont données au tableau 6.

Table 6: Royalty Payments by Collective and Year Tableau 6 : Redevances à verser selon la société de gestion et l'année			
Year Année	SOCAN Royalties Including Simulcasting Redevances à la SOCAN, y compris au titre de la diffusion simultanée	Re:Sound Royalties Including Simulcasting Redevances à Ré:Somme, y compris au titre de la diffusion simultanée	Total Royalties Redevances totales
2006	\$1,582,430.75	\$1,223,510.57	\$2,805,941.32
2007	\$1,599,995.74	\$1,237,091.54	\$2,837,087.27
2008	\$1,638,075.63	\$1,266,534.31	\$2,904,609.95
2009	\$1,664,121.04	\$1,286,672.21	\$2,950,793.25
2010	\$1,698,901.17	\$1,313,563.66	\$3,012,464.83
2011	\$1,732,879.19	\$1,339,834.93	\$3,072,714.12

[123] As a result of our decision, CBC radio will pay in 2006 to SOCAN and Re:Sound royalties that are respectively 5.3 per cent and 26.4 per cent higher than in 2005, excluding simulcasting royalties. While the increase for Re:Sound is much larger than for SOCAN, it rectifies what we view as an imbalance. Put simply, Re:Sound has some catching up to do.

[123] Par suite de notre décision, la SRC versera pour 2006 à la SOCAN et à Ré:Somme des redevances qui seront respectivement de 5,3 pour cent et de 26,4 pour cent supérieures à celles de 2005, excluant les redevances provenant de la diffusion simultanée. Même si la hausse du tarif de Ré:Somme est beaucoup plus importante que celle du tarif de la SOCAN, elle corrige ce que nous considérons comme un déséquilibre. En d'autres mots, Ré:Somme a du retard à rattraper.

[124] In 2008, CBC radio will pay to SOCAN 0.5 per cent of CBC's radio operating expenses, including simulcasting royalties. We note, without reiterating our observations concerning CBC's proposed formula, that this is close to the 0.44 per cent proposed by CBC and the implicit rate of 0.475 certified by the Board in 1991. The percentage is much lower than what applies to non-commercial radios, which is 1.9 per cent. We see no problem in this. There is no evidence that the music use patterns or business models of non-commercial broadcasters and CBC are similar.

[124] Pour 2008, la SRC versera à la SOCAN des redevances équivalentes à 0,5 pour cent des frais d'exploitation de ses services de radio, incluant les redevances provenant de la diffusion simultanée. Nous faisons remarquer, sans réitérer ici nos observations au sujet de la formule proposée par la SRC, que ce taux se rapproche du taux de 0,44 pour cent proposé par la SRC et du taux implicite homologué par la Commission en 1991 (0,475 pour cent). Le pourcentage est de beaucoup inférieur à celui de 1,9 pour cent qui s'applique aux stations de radio non commerciales. Nous ne considérons pas que cela pose problème. Rien n'indique que les modèles de gestion ou les habitudes des radiodiffuseurs non commerciaux en matière

d'utilisation de la musique sont semblables à ceux de la SRC.

X. TARIFF WORDING

[125] Historically, CBC tariffs have not specified the music use information to be supplied to the collectives. The information CBC supplies to SOCAN has always been based on an informal agreement and does not appear in the record of the present case. Re:Sound tariffs have always provided that CBC provides it with the music use information that it supplies to SOCAN.

[126] The nature and extent of CBC's reporting obligations was at issue in these proceedings. In a letter to the Board dated January 12, 2011, counsel for Re:Sound conveyed the agreement of the parties on this issue. We made a certain number of comments on the agreement, all of which received satisfactory responses from the parties.

[127] As a result, CBC shall provide each month, in electronic form, broadcast logs containing detailed information about the use of musical works and sound recordings by each of its stations. These reporting requirements are much closer to what we would like all radio broadcasters to supply to the collectives.

[128] Some provisions that are normally included in other tariffs are omitted here, given the special character of the CBC and the fact that this tariff targets a single user. These include the provisions dealing with confidentiality and notices.

XI. TRANSITIONAL PROVISIONS

[129] The tariff contains transitional provisions made necessary because the tariff takes effect on January 1, 2006, while it is being certified much later. A table sets out interest factors or multipliers to be used on sums owed in a given month and not already payable on an interim basis

X. LIBELLÉ DU TARIF

[125] Historiquement, les tarifs pour la SRC n'ont jamais précisé les renseignements qu'elle doit fournir aux sociétés de gestion au sujet de son utilisation de musique. Les données fournies à la SOCAN ont toujours fait l'objet d'ententes informelles ne figurant pas au dossier de la présente affaire. Les tarifs de Ré:Somme ont toujours prévu que la SRC lui transmet ce qu'elle fournit à la SOCAN.

[126] La nature et la portée de l'obligation de rapport de la SRC étaient en cause dans la présente affaire. Dans une lettre datée du 12 janvier 2011, l'avocat de Ré:Somme a fait part à la Commission des modalités d'une entente intervenue entre les parties sur la question. Nous avons formulé certains commentaires sur l'entente: les parties ont fourni des explications satisfaisantes à tous égards.

[127] La SRC fournira donc chaque mois, en format numérique, des registres de diffusion contenant des renseignements détaillés sur l'utilisation d'œuvres musicales et d'enregistrements sonores par chacune de ses stations. Ces obligations de rapport correspondent beaucoup plus à ce que nous voudrions que tous les radiodiffuseurs fournissent aux sociétés de gestion.

[128] Nous n'avons pas inclus certaines dispositions (ex., traitement confidentiel, avis) qu'on retrouve habituellement dans les autres tarifs, compte tenu de la spécificité de la SRC et de ce que le présent tarif vise un seul utilisateur.

XI. DISPOSITIONS TRANSITOIRES

[129] Le tarif contient certaines dispositions transitoires qui sont nécessaires parce que le tarif prend effet le 1^{er} janvier 2006 bien qu'il soit homologué beaucoup plus tard. Un tableau fournit les facteurs d'intérêts qui seront appliqués aux sommes dues à l'égard d'un mois donné et qui

starting on January 1, 2006 pursuant to the relevant CBC radio tariff.

[130] In the past, the Board did not apply interest factors to an increase in a pre-existing tariff: such factors were set only in tariffs of first impression.

[131] In our opinion, the practice of using interest factors should be generalized. This tariff is being certified more than four years after it takes effect. It increases the royalties payable. Collectives cannot distribute funds they have not collected. Rights holders cannot spend or invest royalties they have not received. These are opportunity costs: their loss must be accounted for. This reasoning applies equally to tariffs of first impression and to variations to existing tariffs.

[132] Of course, if collectives are to benefit from an interest factor every time royalties are retroactively increased, they should expect the same when royalties are retroactively decreased.

[133] Interest factors were derived as in the past, using month-end Bank Rates, simple interest, and no further penalties. Other interest rates could be used for this purpose. The fact that none of the parties could borrow at the Bank Rate is a reason to suspect that it may be inappropriate to use for interest factors. However, since no party has requested that a different interest rate be used to construct the interest factors, we will not disturb this convention for the time being.

XII. CONCLUSION

[134] Finally, we wish to point out a number of issues that may exist in the design and assumptions of the music logs and the Erin music use study.

[135] Music that should have been counted in may have been left out, and vice versa. Erin Research

n'étaient pas par ailleurs payables à titre provisoire à partir du 1^{er} janvier 2006 en vertu des tarifs pertinents de la SRC.

[130] Jusqu'ici, la Commission n'a pas appliqué de facteurs d'intérêts aux augmentations de tarifs préexistants: leur usage se limitait aux tarifs inédits.

[131] À notre avis, il faut étendre l'utilisation des facteurs d'intérêts. Le présent tarif prend effet plus de quatre années avant qu'il soit homologué. Il augmente les redevances. Une société de gestion ne peut répartir les sommes qu'elle n'a pas perçues. Un titulaire de droits ne peut dépenser ou investir les redevances qu'il n'a pas reçues. Il s'agit de coûts d'opportunité: leur perte doit être prise en compte. Cette logique est tout autant applicable au changement apporté à un tarif existant qu'à un tarif inédit.

[132] Évidemment, si les sociétés de gestion pourront désormais bénéficier d'un facteur d'intérêts à l'égard de toute augmentation tarifaire rétroactive, elles doivent s'attendre à une mesure similaire en cas de diminution rétroactive.

[133] Comme par le passé, les facteurs d'intérêts sont établis en utilisant le taux officiel d'escompte de la Banque du Canada en vigueur le dernier jour du mois précédent. L'intérêt est simple, sans pénalité additionnelle. On pourrait utiliser d'autres taux à cette même fin. Le fait que les parties ne puissent emprunter au taux d'escompte pourrait suffire à conclure qu'il ne faudrait pas se servir de ce taux pour établir les facteurs d'intérêts. Cela dit, comme personne n'a demandé qu'on utilise un autre taux à cette fin, nous ne reviendrons pas sur la question pour l'instant.

XII. CONCLUSION

[134] Enfin, nous tenons à signaler certaines questions et prémisses que pourraient comporter la structure des registres de musique et les rapports d'Erin Research sur l'utilisation de musique.

[135] Certaines œuvres qui auraient dû être prises en considération pourraient avoir été ignorées, et vice-

calculations appear based only on what was considered to be "relevant music"⁷¹ but no indication was provided of what constitutes irrelevant music. Some music that Re:Sound treated as irrelevant (news themes) clearly is relevant to SOCAN, making comparisons between the two collectives unnecessarily complicated.

[136] The classification of music into the various categories used in the Erin Research reports also raised some concerns. Mr. Steinmetz testified that a "demo" is "either something we have commissioned and that we own or it can be something that was sent to us [electronically] without any deep information" and that "custom" are "vanity records" and self-released CDs.⁷² CBC reported all these recordings as unpublished: Re:Sound treated them as such. Yet some "demo" recordings are indeed published and as such, potentially eligible for remuneration rights royalties. This would tend to understate the royalties. In the absence of data relating to this subject, we chose to leave well enough alone.

[137] Such ambiguities are not new.⁷³ In the future, parties may wish to seek Board input before defining the parameters of certain studies and surveys so as to ensure that the results are as reliable and as useful as possible.

versa. Les calculs d'Erin Research semblent uniquement fondés sur la musique jugée « pertinente », ⁷¹ mais rien n'indique en quoi une musique peut ne pas être pertinente. Certains des enregistrements considérés comme non pertinents par Ré:Somme (indicatif d'un bulletin de nouvelles) sont manifestement pertinents pour la SOCAN, ce qui complique inutilement les comparaisons entre les deux sociétés de gestion.

[136] La classification de musique utilisée par Erin Research soulève également certaines préoccupations. M. Steinmetz a expliqué qu'une maquette est [TRADUCTION] « quelque chose que nous avons commandé et qui nous appartient ou qu'on nous a transmis en format électronique et sans renseignements détaillés », et que les « œuvres personnalisées » sont les disques à compte d'auteur et les disques produits sans recours à une maison de disque.⁷² La SRC a classé tous ces enregistrements comme étant non publiés: Ré:Somme les a traités comme tels. Pourtant, certaines maquettes sont en fait publiées et, à ce titre, pourraient faire l'objet de redevances au titre du droit à rémunération. Ainsi, les redevances pourraient être sous-estimées. En l'absence de données sur la question, nous avons choisi de ne pas réveiller le chat qui dort.

[137] Ces ambiguïtés ne sont pas nouvelles.⁷³ À l'avenir, les parties voudront sans doute consulter la Commission avant de définir les paramètres de certaines études et enquêtes, de manière à ce que les résultats soient les plus fiables et les plus utiles possible.

Le secrétaire général.



Gilles McDougall
Secretary General

ENDNOTES

1. Previously the Neighbouring Rights Collective of Canada (NRCC). In these reasons, all references are to Re:Sound, even when the events referred to took place before NRCC changed name.
2. R.S.C, 1985, c. C-42 (the "Act").
3. April 2 was the last date for filing proposed tariffs that year, because of the Easter statutory holidays.
4. *SOCAN-NRCC Tariff 1.A (Commercial Radio) for the years 2003 to 2007 [Re-determination]* (22 February 2008) Copyright Board Decision. [*Commercial Radio (2008)*]
5. Since the examination of the 2011 SOCAN tariff was consolidated with this matter after the end of the hearings, SOCAN did not propose a further figure for 2011.
6. *SOCAN – Various Tariffs for the Year 1991* (31 July 1991) Copyright Board Decision. (1990-1994) Copyright Board Reports 284 at 309-312. [*SOCAN 1991*]
7. *Canadian Broadcasting Corporation v. Canada (Copyright Board)* (1993), 47 C.P.R. (3d) 426 at 429h (F.C.A.). [*CBC TV (1993)*]
8. *NRCC – Tariff 1.C (CBC – Radio) for the Years 1998 to 2002* (29 September 2000) Copyright Board Decision. [*NRCC 1.C (2000)*]; *NRCC – Tariff 1.C (CBC – Radio) for the Years 2003 to 2005* (14 January 2005) Copyright Board Decision.
9. The proposed tariff defines "CBC radio revenue" as "that portion of the total revenues of the CBC, including its parliamentary appropriation for operating expenditures and its revenues from

NOTES

1. Auparavant la Société canadienne de gestion des droits voisins (SCGDV). Dans ce qui suit, on parle toujours de Ré:Somme et ce même si les événements en question sont intervenus avant que la SCGDV ait changé de nom.
2. L.R.C. (1985), ch. C-42 (la « Loi »).
3. La date limite de présentation des projets de tarifs était reportée au 2 avril en raison du congé de Pâques.
4. *SOCAN-SCGDV – Tarif 1.A (Radio commerciale) pour les années 2003 à 2007 [Réexamen]* (22 février 2008) décision de la Commission du droit d'auteur. [*Radio commerciale (2008)*]
5. Comme l'examen du tarif SOCAN pour 2011 a été ajouté à la présente affaire après la fin des audiences, la SOCAN n'a pas proposé de nouveau montant pour cette année.
6. *SOCAN – Divers tarifs pour l'année 1991* (31 juillet 1991), décision de la Commission du droit d'auteur. (1990-1994) Recueil des décisions de la Commission du droit d'auteur 284 aux pp. 309-312. [*SOCAN 1991*]
7. *Société Radio-Canada c. Canada (Commission du droit d'auteur)*, [1993] A.C.F. n° 227 au para. 8 (C.A.F.). [*SRC – Télévision (1993)*]
8. *SCGDV – Tarif 1.C (SRC – Radio) pour les années 1998 à 2002* (29 septembre 2000) décision de la Commission du droit d'auteur. [*SCGDV 1.C (2000)*]; *SCGDV – Tarif 1.C (SRC – Radio) pour les années 2003 à 2005* (14 janvier 2005) décision de la Commission du droit d'auteur.
9. D'après la définition donnée dans le projet de tarif, le revenu radio de la SRC s'entend de la « portion des revenus totaux de la SRC, incluant son crédit parlementaire d'exploitation et ses revenus provenant d'activités

commercial activities or any other source, that is used to finance the operation of the CBC's radio stations as reported in the annual financial accounts of the CBC.”
[our underlining]

commerciales ou de toute autre source, utilisée pour financer l'exploitation des stations de radio de la SRC et telle qu'elle est rapportée dans les rapports financiers annuels de la SRC. » [non souligné dans le texte original]

10. The multiplier is intended to represent the relative use of Re:Sound's repertoire by CBC and commercial radio stations.
 11. These amounts do not account for certain sound recordings broadcast by CBC, which, for various reasons that will be discussed later, Re:Sound was unable to determine as being or not part of its repertoire: see below at para. 107.
 12. *Elliot v. Canadian Broadcasting Corporation* (1993), 52 C.P.R (3d) 145 at 161 (Ont. S.C.). See also *CBC and Co. v. R.* [1983] 1 S.C.R. 339 at 341.
 13. Transcripts at 103.
 14. *Ibid.* at 390.
 15. *SOCAN – Tariffs 22.B to 22.G (1996-2006) Internet – Other Uses of Music* (24 October 2008) Copyright Board Decision at paras. 69-70. [SOCAN 22.B-G]
 16. Since all programming on Radio 2 and Espace Musique is broadcast nationally, this additional information is not required in respect of those services.
 17. As already mentioned, the 1991 formula relies in part on the relative music uses and audience shares of CBC and commercial radio.
 18. Data reliability is another matter. See below at paras. 104-105.
10. Le coefficient de multiplication représente l'utilisation relative du répertoire de Ré:Sonme par la SRC par rapport à celle des stations de radio commerciales.
 11. Ces montants ne tiennent pas compte de certains enregistrements sonores diffusés par la SRC pour lesquels Ré:Sonme n'est pas parvenue à déterminer s'ils faisaient partie de son répertoire, pour diverses raisons qui seront abordées ci-dessous: voir au para. 107.
 12. *Elliot c. Canadian Broadcasting Corporation* (1993), 52 C.P.R (3d) 145 à la p. 161 (Cour supérieure de l'Ontario). Voir aussi *Société Radio-Canada et al. c. R.*, [1983] 1 R.C.S. 339 à la p. 341.
 13. Transcriptions à la p. 103.
 14. *Ibid.* à la p. 390.
 15. *SOCAN – Tarifs 22.B to 22.G (1996-2006) Internet – Autres utilisations de musique* (24 octobre 2008), décision de la Commission du droit d'auteur aux paras. 69-70. [SOCAN 22.B-G]
 16. Toute la programmation de Radio 2 et d'Espace Musique est diffusée à l'échelle nationale: il n'était donc pas nécessaire de recueillir cette information additionnelle pour ces deux services.
 17. Tel que déjà mentionné, la formule de 1991 tient compte entre autres de l'utilisation relative de musique et des parts d'audiences de la SRC et de la radio commerciale.
 18. La fiabilité des données est abordée ci-dessous: voir aux paras. 104-105.

19. For example, American collectives' databases and additional searches for SOCAN: Internet and member collectives for Re:Sound.
 20. *Statutes of Canada*, 1991, c. 11.
 21. An inverse relationship between music use and audience share implies that stations that use more music have a smaller audience share and stations that use less music have a larger audience share.
 22. CPRS later became the Composers, Authors and Publishers Association of Canada, or CAPAC.
 23. BMI Canada later became the Performing Rights Organization of Canada, or PROCAN.
 24. The commercial radio tariff was 1.75 per cent of gross revenues with no per capita amount.
 25. *Report of the Copyright Appeal Board to the Minister of Consumer and Corporate Affairs*, May 16, 1978 at 5.
 26. *Final Report of the Copyright Appeal Board to the Minister of Consumer and Corporate Affairs for the 1984 Calendar Year*, April 18, 1984 at 6.
 27. *Ibid.* at 9.
 28. *Ibid.* at 10.
 29. *Ibid.* at 11.
 30. *Performing Rights Organization of Canada Ltd. v. Canadian Broadcasting Corporation* (1986), 7 C.P.R. (3d) 433 at 444 (F.C.A.).
 31. *Revised Report of the Copyright Appeal Board to the Minister of Consumer and*
19. Par exemple, les bases de données des sociétés de gestion américaines et d'autres sources dans le cas de la SOCAN: Internet et les sociétés membres dans le cas de Ré:Somme.
 20. *Lois du Canada*, 1991, ch. 11.
 21. Une relation inverse entre l'utilisation de musique et la part d'auditoire suppose que les stations diffusant plus de musique accaparent une plus petite part d'auditoire, et vice-versa.
 22. La CPRS est devenue plus tard l'Association des compositeurs, auteurs et éditeurs du Canada, ou CAPAC.
 23. BMI Canada est devenue plus tard la Société de droits d'exécution du Canada, ou SDE.
 24. Le tarif pour la radio commerciale était de 1,75 pour cent des revenus bruts, sans montant additionnel par habitant.
 25. *Rapport de la Commission d'appel du droit d'auteur au Ministre de la Consommation et des Corporations*, 16 mai 1978 à la p. 5.
 26. *Rapport final de la Commission d'appel du droit d'auteur au Ministre de la Consommation et des Corporations pour l'année 1984*, 18 avril 1984 à la p. 6.
 27. *Ibid.* à la p. 9.
 28. *Ibid.* à la p. 10.
 29. *Ibid.* à la p. 11.
 30. *Société de droits d'exécution du Canada Limitée c. Société Radio-Canada*, décision rendue le 7 janvier 1986, n° du greffe A-593-84 à p. 16 (C.A.F.).
 31. *Rapport révisé de la Commission d'appel du droit d'auteur au Ministre de la*

Corporate Affairs for the 1984 Calendar Year, July 15, 1986 at 9.

Consommation et des Corporations pour l'année 1984, 15 juillet 1986 à p. 9.

32. *Final Report of the Copyright Appeal Board to the Minister of Consumer & Corporate Affairs for 1985* (1985), 7 C.P.R. (3d) 20 at 64-5 (Cop.Ap.Bd.).

32. *Rapport final au Ministre de la Consommation et des Corporations pour l'année 1985* (1985), 7 C.P.R. (3d) 20 aux pp. 64-65 (Commission d'appel du droit d'auteur). [en anglais seulement]

33. *Final Report to the Minister of Consumer & Corporate Affairs for 1986* (1986), 11 C.P.R. (3d) 1 at 14 (Cop.Ap.Bd.).

33. *Rapport final au Ministre de la Consommation et des Corporations pour l'année 1986* (1986), 11 C.P.R. (3d) 1 à la p. 14 (Commission d'appel du droit d'auteur). [en anglais seulement]

34. *Ibid.* at 20.

34. *Ibid.* à la p. 20.

35. *Canadian Broadcasting Corporation v. Copyright Appeal Board* (1987), 17 C.P.R. (3d) 460 (F.C.A.).

35. *Radio-Canada c. Commission d'appel du droit d'auteur*, décision rendue le 19 octobre 1987, n° du greffe A-483-86 (C.A.F.).

36. *Final Report to the Minister of Consumer and Corporate Affairs for 1987* (1987), 15 C.P.R. (3d) 129 at 152 (Cop.Ap.Bd.).

36. *Rapport final au Ministre de la Consommation et des Corporations pour l'année 1987* (1987), 15 C.P.R. (3d) 129 à la p. 152 (Commission d'appel du droit d'auteur). [en anglais seulement]

37. *Ibid.* at 155.

37. *Ibid.* à la p. 155.

38. *Ibid.* at 160-1.

38. *Ibid.* aux pp. 160-161.

39. *Ibid.* at 162-3.

39. *Ibid.* aux pp. 162-163.

40. *Canadian Broadcasting Corporation v. Copyright Appeal Board* (1990), 30 C.P.R. (3d) 269 at 277b-c (F.C.A.).

40. *Société Radio-Canada c. Canada (Commission d'appel du droit d'auteur)*, [1990] A.C.F. n° 500 au para. 16 (C.A.F.).

41. *Revised Report of the Copyright Appeal Board to the Minister of Consumer and Corporate Affairs for the year 1987*, December 7, 1990 at 6. [CBC (1987 - Reconsideration)]

41. *Rapport révisé de la Commission d'appel du droit d'auteur au Ministre de la Consommation et des Corporations pour l'année 1987*, 7 décembre 1990 à la p. 6. [SRC (1987 - Réexamen)]

42. *Supra* note 6 at 309-12.

42. *Supra* note 6 aux pp. 309-312.

43. *SOCAN – Tariffs 1.A, 1.B, 1.C, 2.D, 5.A and 13.A for the Year 1992* (30 June 1992) Copyright Board Decision, (1990-1994)

43. *SOCAN – Tarifs 1.A, 1.B, 1.C, 2.D, 5.A et 13.A pour l'année 1992* (30 juin 1992) décision de la Commission du droit d'auteur

Copyright Board Reports 324 at 328.

(1990-1994) Recueil des décisions de la Commission du droit d'auteur 324 à la p. 328.

44. *NRCC 1.C (2000)*, *supra* note 8 at 4.
45. Testimony of Mr. Steimmetz. transcripts at 112.
46. *Ibid.*
47. Argument of counsel for CBC. transcripts at 391.
48. Transcripts at 10.
49. Transcripts at 368.
50. Transcripts at 362.
51. *Supra* note 7 at 429h.
52. *Supra* note 6.
53. These two figures total 93.55 per cent. They exclude American radio stations and non-commercial Canadian radio stations.
54. *SOCAN-NRCC Tariff 1.A (Commercial Radio) for the Years 2003 to 2007 (14 October 2005)* Copyright Board Decision at 19-25. [*Commercial Radio (2005)*]: *Commercial Radio (2008)*, *supra* note 4 at para. 10.
55. This explains why, for a given audience share, television broadcasters are willing to pay several times more for sports programming than for a children show.
56. Transcripts at 445.
57. Exhibit CBC-7.
58. Exhibit CBC-8.
59. The version of the CPI we use comes from Statistics Canada and uses 2002 as a base
44. *SCGDV 1.C (2000)*, *supra* note 8 à la p. 4.
45. Témoignage de M. Steinmetz. transcriptions à la p. 112.
46. *Ibid.*
47. Argumentation de l'avocat de la SRC. transcriptions à la p. 391.
48. Transcriptions à la p. 10.
49. Transcriptions à la p. 368.
50. Transcriptions à la p. 362.
51. *Supra* note 7 au para. 8.
52. *Supra* note 6.
53. Ces deux données totalisent 93.55 pour cent. Les stations de radio américaines et les stations de radio canadiennes non commerciales ne sont pas prises en considération.
54. *SOCAN-SCGDV – Tarif 1.A (Radio commerciale) pour les années 2003 à 2007 (14 octobre 2005)* décision de la Commission du droit d'auteur aux pp. 19-25. [*Radio commerciale (2005)*]: *Radio commerciale (2008)*, *supra* note 4 au para. 10.
55. C'est ce qui explique pourquoi, pour une part d'auditoire donnée, les télédiffuseurs sont disposés à payer beaucoup plus cher les émissions de sport que les émissions pour enfants.
56. Transcriptions à la p. 445.
57. Pièce CBC-7.
58. Pièce CBC-8.
59. Nous avons recours à l'IPC de Statistique Canada: 2002 est l'année de référence définie.

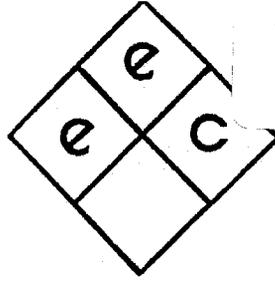
year for the index. The series has identification number v41690973 and can be found at: <http://www.statcan.gc.ca/pub/62-001-x/2010012/t040-eng.htm>.

Le tableau de données porte le numéro v41690973 et peut être consulté à l'adresse : <http://www.statcan.gc.ca/pub/62-001-x/2010012/t040-fra.htm>.

60. Were we to use annual averages, the corresponding measure of inflation would be 37.8 per cent, or a difference of 0.37 percentage points.
61. *SOCAN – Various Tariffs* (19 March 2004) Copyright Board Decision at 16-21.
62. *Ibid.* at 19.
63. There are many CBC radio stations across the country, all of which have some local programming. The analysis by Erin Research in 1991 examines only the music played in the stations in Toronto and Montreal. The analysis for 2008 uses mainly the Toronto and Montreal data, somewhat augmented by some data pertaining to local stations. We thus use these data as an approximation for all of CBC.
64. *Statement of royalties to be paid for the retransmission of distant radio and television signals in 1992, 1993 and 1994* (January 14, 1993) Copyright Board Decision at 195. Though this decision was the first to use the expression, the concept underpinned the first retransmission decision: see the tables at pages 81 to 83 of that decision.
65. The minutes of music use for 2008 are adjusted conservatively to account for titles designated by Erin Research as “not yet registered.” Since those titles are almost certainly part of SOCAN’s repertoire, including them in a *pro rata* way is likely an underestimate. This adjustment was not available for the 1991 data.
60. Si nous avons opté pour les moyennes annuelles, la mesure de l’inflation aurait été de 37,8 pour cent, soit un écart de 0.37 point de pourcentage.
61. *SOCAN – Divers Tarifs* (19 mars 2004) décision de la Commission du droit d’auteur aux pp. 16-21.
62. *Ibid.* à la p. 19.
63. La SRC exploite de nombreuses stations de radio dans tout le pays, certaines diffusant du contenu local. L’analyse effectuée par Erin Research en 1991 ne porte que sur les œuvres musicales diffusées par les stations de Toronto et de Montréal. L’analyse de 2008 utilise essentiellement des données concernant Toronto et Montréal, complétées par quelques données relatives à des stations locales. Nous utilisons donc ces données comme approximation du total de la SRC.
64. *Tarif des droits à payer pour la retransmission de signaux éloignés de radio et de télévision en 1992, 1993 et 1994* (14 janvier 1993) décision de la Commission du droit d’auteur à la p. 195. C’était la première fois qu’une décision utilisait l’expression, mais le concept sous-tendait la première décision en retransmission : voir les tableaux aux pages 81 à 83 de ladite décision.
65. Le nombre de minutes s’appliquant à 2008 est corrigé de façon prudente pour tenir compte des titres désignés par Erin Research comme « non encore déclarés. » Comme ces titres font quasi certainement partie du répertoire de la SOCAN, les intégrer au *pro rata* donnerait probablement lieu à une sous-estimation. Cette correction n’a pu être effectuée à l’égard des données de 1991.

66. Since the target has been stable at 2 per cent since 1995, and the Bank of Canada has rarely allowed inflation to wander outside the 1 to 3 per cent target bands, inflation expectations of Canadian market participants have been anchored at 2 per cent.
67. Exhibits SOCAN-3 and Re:Sound-4, respectively.
68. A fourth, N/A, was ignored as irrelevant.
69. *Supra* note 15 at para. 70.
70. *Ibid.* at para. 69.
71. Exhibit Re:Sound-4 at 3: "Music that is not relevant to NRCC is omitted from the results."
72. Transcripts at 167-69.
73. *NRCC 1.C (2000)*, *supra* note 8 at 11.
66. Puisque la cible est stable à 2 pour cent depuis 1995, et que la Banque du Canada a rarement permis que l'inflation se situe à l'extérieur de la fourchette cible de 1 à 3 pour cent, les anticipations inflationnistes des participants au marché canadien sont ancrées au taux de 2 pour cent.
67. Pièce SOCAN-3 et pièce Re:Sound-4 respectivement.
68. La quatrième (S.O.), non pertinente, a été ignorée.
69. *Supra* note 15 au para. 70.
70. *Ibid.* au para. 69.
71. Pièce Re:Sound-4 à la p. 3 : [TRADUCTION] « Les résultats ne tiennent pas compte de la musique qui n'est pas pertinente pour la SCGDV. »
72. Transcriptions aux pp. 167-169.
73. *SCGDV 1.C (2000)*, *supra* note 8 à la p. 11.

MC 10



European Entertainment Consultants

MUSIC CHOICE EUROPE

BROADCAST ROYALTY PAYMENTS IN EUROPE

eec/bb may 1995

MUSIC CHOICE EUROPE

BROADCAST ROYALTY PAYMENTS IN EUROPE

MCE is developing its services throughout Europe, providing multiple channels of thematic music programming distributed principally to subscribers in-home by cable. MCE's services are different in nature from traditional over-the-air radio broadcasts, as they are available exclusively to subscribers and derive no revenues from advertising or licence fees.

In the absence of direct precedents for the licensing of services such as those provided by MCE, we were asked to assist MCE in preparing for negotiations with licensing bodies acting on behalf of composers/publishers and performing artists/record producers by examining the royalties payable by commercial radio broadcasters in Europe and comparing them with those that might be paid by MCE on an equivalent basis.

In particular, we examined:

- The volume of radio and other advertising in Europe.
- Royalty arrangements applicable to radio broadcasters in European countries.
- The royalty payments and yield in the three principal European countries (France, Germany and the United Kingdom) which together account for over 50% of the adult population of the European Union and nearly 60% of advertising and radio revenues.
- The royalty payments made by leading music radio stations in principal countries.
- The relationship between the royalties payable by radio stations and MCE revenues, in particular the amounts that would be payable by MCE were the rates charged to radio stations to be applied to MCE and the rates that MCE should pay in order to deliver an equivalent royalty yield.

Where possible, information has been gathered from official and published sources - notes to the detailed workings appended indicate the sources used. In certain cases, estimates or hypotheses have had to be used. These are based on the best information available to us, utilising our knowledge and experience of the sectors concerned and information from un-attributable sources. As a result, absolute reliance should not be placed on numbers involving estimations even though sometimes expressed to the level of decimal places. However, the real significance of the analysis is in the general level of applicable rates and royalties paid. We are confident that the analysis and computations presented accurately reflect the orders of magnitude and the relationship between the rates and royalties paid.

1. SUMMARY

The principal findings from our analysis were:

- 1993 advertising revenues in Europe amounted to £ 41 billion, of which radio accounted for £ 1.8 billion (4.4%).
- Nominal or headline royalty rates vary considerably, ranging from 3-9% of net advertising revenue (NAR) for payments to composers and 1.5 to over 12% for performers/producers.
- Headline rates do not show the real effect of royalties. The "effective" rates, taking account of deductions from the royalty base and other allowable factors, average around 4-5% of NAR for composers and 3-5% for performers/producers.
- The weighted average rates for 100% music use in Europe were 4.6% of NAR for composers and 3.1% for performers/producers.
- France, Germany and the UK together account for over half of the adult population of the EU and nearly 60% of both total and radio advertising revenues.
- Differences in market structure (reach and share of commercial radio, availability and volume of radio advertising) make comparisons on the basis of numbers of listeners (whether potential or actual) inconsistent.
- Comparison of revenues and royalty payments on the basis of time spent listening (measured per thousand hours listened) provides the most consistent guide.
- On average, private commercial stations in France, Germany and the UK derived revenues of £ 10.75 per thousand hours listened and paid royalties of £0.44 per thousand hours to composers and £0.41 to performers/producers.
- From an average subscription price in Europe of £98.58 per household annum, the fees paid to MCE (MCE gross receipts) amount to an average of £24.35 (24.9%), the difference being sums not received by MCE covering cable operators' costs and margin, equipment costs, etc.
- The most appropriate base for the calculation of MCE royalties would be MCE's gross receipts. If subscription prices (or subscriptions with an allowance for equipment or other costs) were adopted as a base, royalty rates would need to be correspondingly reduced.
- The transposition to MCE of royalty rates effectively paid by radio stations would result in MCE paying substantially greater royalties per thousand hours of listening, unless MCE's gross receipts were used as a basis for calculation.
- In order to yield equivalent royalty payments per thousand hours as radio stations, MCE would need to pay on average 5.5% of its gross receipts to composers and 4.7% of gross receipts to performing artists/record producers.

2. RADIO ADVERTISING IN EUROPE

Display advertising in the European Union in 1993, the last year for which full figures are published for all countries, amounted to £ 39.3 billion of which radio accounted for £ 1.7 billion - 4.3%. In Europe, total advertising amounted to £ 41.1 billion - radio £ 1.8 billion (4.4%).

Unless otherwise specified, Europe in this report has been taken to mean the European Union (EU), as presently constituted, together with Norway and Switzerland.

However, there is significant disparity amongst countries when the relationship between population, advertising revenues and radio advertising is examined. These differences essentially reflect the extent to which media, notably television and radio, are developed and open to commercial services and the balance between media.

For example, in France, Germany and Spain the share of total EU advertising revenues exceeds the share of adult population (over 15) - the share of radio advertising is even greater. In each of these countries there is a substantial and growing commercial television sector, but it is probably significant that commercial radio pre-dates commercial television. In Italy the share of total advertising is lower than the population and radio advertising is even lower; whilst in the UK, the share of advertising exceeds the population share but radio advertising remains proportionately weak. Countries, such as Greece, Portugal and Sweden, with relatively under-developed commercial media show significantly lower shares proportionate to their adult population.

Advertising	Advertising Revenues			Population			
	£ Millions		%	15-Plus	E.U. - %		
	Total	Radio	Radio	E.U. - %	Total	Radio	Diff%
Austria	938	90	9.6	2.2	2.4	5.2	+ 2.8
Belgium/Lux	836	63	7.5	2.8	2.1	3.6	+ 1.5
Denmark	645	11	1.6	1.4	1.6	0.6	- 1.0
Finland	463	19	4.1	1.4	1.2	1.1	- 0.1
France	5311	408	7.7	15.2	13.5	23.6	+10.1
Germany	10949	436	4.0	22.3	27.9	25.5	- 2.7
Greece	469	25	5.3	2.8	1.2	1.4	+ 0.2
Ireland	315	22	7.0	0.9	0.8	1.3	+ 0.5
Italy	3713	48	1.3	15.9	9.4	2.8	- 6.7
Netherlands	1920	63	3.3	4.1	4.9	3.7	- 1.2
Portugal	384	24	6.1	2.6	1.0	1.4	+ 0.4
Spain	5740	357	6.2	10.6	14.6	20.6	+ 6.0
Sweden	852	3	0.3	2.3	2.2	0.2	- 2.0
U.K.	6763	162	2.4	15.5	17.2	9.4	- 7.8
E.U.	39299	1730	4.4	100.0	100.0	100.0	

The three principal countries, France, Germany and the UK, account for 53% of the adult population of the EU, 59% of all advertising revenues and 58% of radio advertising. These countries are examined in greater detail in this report in relation to the royalties that might be paid by MCE.

As European countries emerge from the early-nineties recession, advertising revenues have been growing significantly. In 1994, UK radio revenues grew by 23% from £162 million to £219 million. Examination of listening figures suggests that around 16% may be accounted for by improved revenues at existing stations, the remainder going to recently established new stations, principally Classic FM and Virgin.

Appendix 1 : Advertising Revenues in Europe

3. BROADCAST ROYALTY RATES IN EUROPE

In almost every country, royalty payments by radio broadcasters to both composers and performers/producers are calculated as a percentage of stations' net advertising and sponsorship revenues (NAR). For the purposes of our examination, we have consistently taken NAR as gross invoiced advertising and sponsorship revenues, less commissions to advertising agencies.

An exception is Denmark, where royalties continue to be based on an amount per minute of music use, the basis historically used in all the Scandinavian countries for calculation of royalties payable by the public service broadcasting corporations. The substantial growth of commercial radio in Sweden in the last 18 months has led to a move to a percent-of-revenue basis. Commercial radio in Denmark and Norway is considerably less developed, but it seems reasonable to assume that a change to revenue-based royalties will similarly occur as commercial broadcasting expands.

We have unfortunately been unable to date to obtain details of tariffs applied in Greece and Norway. As Greece accounts for less than 3% of the EU adult population, we do not believe this omission has any significant effect. Similarly, TV and radio advertising did not begin in Norway until 1988 and its weighted effect would be insignificant. Following the EU Directive on broadcast rights, Belgium, the Netherlands and Portugal have now enacted legislation providing for broadcast rights in sound recordings. Negotiations are taking place in these countries, but tariffs for commercial broadcasters have yet to be set. Although Belgium and the Netherlands are significant markets for MCE due to the high cable penetration, we do not believe the omission of these countries significantly affects our analysis.

Nominal or headline rates for composers' royalties range from around 3% to 9% and 1.5% to over 12% for producers. However, nominal rates are deceptive and take no account of the other factors which affect the calculation of the royalties payable.

To assess the real cost of royalties as a proportion of revenues and to permit comparison of the "effective" rates between countries it is necessary to take account of all of the relevant factors that make up the royalty equation. The range of factors is considerable, reflecting local negotiations and business conditions. Commissions paid to advertising agencies are effectively excluded from all revenue-based calculations, either by way of explicit deduction (frequently capped) or by adopting net invoiced amounts as a royalty base. Other factors include:

- Deductions to reflect sales costs - either external agents (sales houses) or integrated sales forces; sometimes both.
- Incremental rates linked to revenue bands.
- Adjustments for music use, either proportionate to broadcast output or in usage bands.
- Deductions for members of specified trade associations, etc.
- Reductions for prompt reporting/payment.

Appendix 2 sets out, in tabular form, the main features of the royalty arrangements for music applicable to radio broadcasters in each of the EU countries, indicating the revenue base, allowed deductions, royalty rates and other applicable factors such as revenue bands or music-use.

We estimated for each country the "effective" royalty rate, expressed as a percentage of net advertising revenue, based on the terms of the applicable agreements where capable of computation. In some cases where the effective rate cannot be calculated on an industry-wide basis (for example where revenue bands apply per station), it has been estimated from the best information available to us, generally from industry bodies or radio stations. As MCE's programmes consist entirely of music, with no speech links, commercials, etc, the effective rates have been estimated on the basis of 100% music usage, to facilitate comparison.

The result is more homogenous than the range of nominal rates might suggest at first. Effective rates for composers range from 3-7.5%, with the majority clustered between 4-5%. The range for producers is 2-7.5%, mainly between 3-5%.

Finally, we estimated the European average effective royalty rates for composers' and producers' rights respectively, weighting each country according to its population of adults aged 15-plus:

- Composers : 4.6% (EU 4.7%)
- Performers/Producers : 3.1% (EU 3.2%)

EUROPE - AVERAGE EFFECTIVE ROYALTY RATES		
Base 100% Music Use - Rates % Net Advertising Revenue		
	Composers Rights	Producers Rights
Belgium/Lux	4.2%	n/a
Finland	7.0%	7.0%
France	3.6%	3.8%
Germany	4.8%	3.1%
Ireland	4.8%	4.6%
Italy	3.6%	2.1%
Netherlands	7.2%	n/a
Portugal	3.0%	n/a
Spain	4.5%	2.2%
Sweden	4.5%	n/a
Switzerland	4.2%	1.1%
U.K	6.2%	4.2%
EUROPE AVERAGE	4.6%	3.1%

In summary:

- Nominal or marginal rates are of little comparative assistance. What counts for payees and for comparative purposes is the effective royalty paid.
- Although headline royalty rates are generally based on net advertising revenues, a range of adjusting factors, including some cost-related elements, are applied reducing the amount of effective royalty paid.
- The effective "going rates" can broadly be said to be 4-5% of NAR for composers and 3-5% for performers/producers.
- The average effective rates in Europe are 4.6% of NAR for composers and 3.1% for performers/producers (Europe 4.7% and 3.2%).

Appendix 2 : Composers & Producers Royalty Summary; Average Effective Rates

4. ROYALTY PAYMENTS IN PRINCIPAL COUNTRIES

Having collated information regarding the royalty arrangements in almost all European countries, we examined the application of these agreements in the three principal territories - France, Germany and the United Kingdom. In our view, these countries are not only representative in that they benefit from developed advertising and commercial media markets, including significant commercial broadcasting sectors, they also collectively account for over 50% of the adult population, advertising and radio advertising in the EU.

PRINCIPAL COUNTRIES ADVERTISING REVENUES			
E.U = 100%			
	Population 15-plus	Advertising revenues	Radio revenues
France	15.2	13.5	23.6
Germany	22.3	27.9	25.2
United Kingdom	15.5	17.2	9.4
Total	53.0	58.6	58.2

For each country, we have taken the reported revenues for radio advertising, the listening data from official ratings surveys and the applicable terms of the royalty tariffs in order to estimate and compare revenues and royalties. In addition, for France and the U.K, we have conducted a similar exercise for the leading music radio station - NRJ in France and Capital Radio in the U.K. The detailed workings are set out in Appendix 3.

Revenues and royalties are shown (in £ sterling) in relation to:

- Potential listeners - The number of adults aged 15-plus covered for the purposes of ratings research (T.S.A or Total Survey Area)
- Actual Listeners - The number of individual listeners to a station per day from official ratings reports (Reach).
- Per Thousand Hours Listened - Based on total listening, or computed from reach and average listening, from official ratings research.

The following table provides a summary for the three countries examined of the revenues and the royalties paid by private commercial radio stations. Further details are considered below in relation to each country.

REVENUE & ROYALTIES - 1993 (£)									
	Revenues			Composers			Producers		
	FR	D	UK	FR	D	UK	FR	D	UK
Per Potential Listener	9.09	2.84	3.59	0.11	0.11	0.18	0.12	0.10	0.15
Per Actual Listener	14.95	6.35	7.43	0.19	0.24	0.37	0.19	0.23	0.32
Per 1000 Hours	14.92	13.35	9.29	0.36	0.51	0.47	0.23	0.48	0.39

Each country is distinctive in the structure as well as the historical and other factors which have shaped the development of its broadcast market. However, there is considerable similarity between the effective royalty yields. For the purposes of this exercise, exchange rates applicable at the end of 1993 were used, to coincide with the revenue year examined.

The similarity is most apparent when comparisons are made on the basis of radio listening rather than numbers of listeners. It is the time spent listening which affects costs-per-thousand and rate-card prices and which drives radio revenues, indirectly determining the effective yield of copyright rates based on revenues.

Comparison of advertising revenues on the basis of coverage or potential listeners has less significance. Revenues examined in this manner are heavily affected by the reach and share achieved by commercial compared with non-commercial radio and by the volume of radio advertising.

Thus, in France revenues per potential listener are relatively high due to the high reach and share of commercial radio and the near absence of advertising on public service stations. In Germany and the UK public service radio achieves a much greater share of listening. But, ARD (public service) stations in Germany carry a substantial amount of advertising, accounting for around 55% of total expenditure, whereas BBC stations have none.

(a) France

Commercial radio in France substantially pre-dates television, starting in the 1930's with broadcasts by RTL and Europe-1 from across the borders in Luxembourg and Germany respectively. These stations, together with RMC originating from Monte Carlo and Sud Radio (Andorra) are known as the "périphériques" and continue to dominate the radio market with generalist formats, attracting a dis-proportionately large share of advertising revenues - whilst the périphériques account for around one-third of listening they draw around two-thirds of advertising revenues.

Locally-based private radio was introduced in 1982 on FM, with commercial advertising authorised from 1984. Local stations generally provide music-based or community-interest programmes. Today, there are more than 1000 local stations, of which over half are affiliated with national networks (including the périphérique stations).

In addition, Radio France offers a range of public service programmes: 4 national networks and 42 local/regional stations. Radio France services do not carry advertising, although some limited sponsorship and institutional advertising of a collective or general-interest nature is permitted. (Revenues from these sources are insignificant and have been ignored in our analysis - insofar as there may be any effect, it is slightly to overstate royalties paid by commercial broadcasters rendering any comparisons less favourable to MCE than might otherwise be the case).

Commercial radio attracts around 72% of total listening and Radio France 21%, the balance being community service stations (2.5%) and "other" listening.

Composers rights are licensed by authors' society SACEM, whose basic conditions provide for a nominal royalty rate of 6% of net advertising revenue (NAR), with a deduction of up to 40% in respect of actual sales costs incurred on external sales houses or in-house sales teams. In practice almost all stations are believed to reach the maximum. The royalty rate is reduced by half for stations broadcasting less than 30% music as a proportion of total broadcast output (it is believed that this level was set to accommodate the périphérique stations and this level of music use has been used for the purposes of our calculations).

In addition, further deductions may apply for "news" stations, which have not been taken into account for the purposes of this analysis. Again, the application of any such further deductions would reduce the calculation of royalties payable, making comparisons more rather than less favourable for MCE.

The net effective rate of royalty payable to SACEM has therefore been estimated at 3.6% of NAR, representing the maximum that a station broadcasting solely music would pay.

SPRE licenses rights on behalf of record producers and performing artists. The chart in Annex 2 summarises the arrangements set in 1994 and presently applicable - a royalty rate of 4.25% of NAR applicable to all stations broadcasting 85% or more music, with a proportionate reduction for lower music use, and a 10% reduction for stations that report and pay in a timely manner. Special deductions apply to "news" stations or to stations with a minimum proportion of non-music local programming.

For a station broadcasting only music, the maximum effective SPRE rate has therefore been taken as 3.8%, assuming benefit is made of the reduction for timely payment. This figure has been used in assessing the current European average rates.

Previously, the SPRE tariff was somewhat different, although its net effect was almost identical. Briefly, the nominal royalty rate was 6%, with a maximum deduction of 23.25% for sales costs and a minimum deduction of 15% for music use (or higher if actual music use is less than 85% of broadcast output). The net effective rate was therefore estimated as 3.9% for a station broadcasting entirely music. As the revenues analysed relate to 1993/4, the provisions of the then applicable royalty arrangements have been used for consistency. Any difference is in fact minimal and, again, conservative for the purposes of comparison.

Commercial radio has existed for a considerable period in France - it achieves a high listening share and substantial proportion of total advertising revenues, resulting in greater revenues per listener (potential or actual) than elsewhere. The generalist "périphérique" stations have a lower proportion of music programming and take a disproportionate share of advertising.

As a result, revenue per thousand hours for all stations is high, whereas royalties paid to music licensing bodies are lower when compared with the averages for the commercial FM music networks and local stations. NRJ, the leading music-based network, generates proportionately higher revenues and, as a result of its greater music content, higher royalties.

The summary below shows our calculation of the royalties paid per thousand hours for both commercial radio as a whole and for the FM music networks and local stations (i.e. excluding the "périphérique" stations). In our view, the royalties paid by the music-based networks and local stations provides a more appropriate basis for comparison with MCE's music service and these have been used in our examination below (although comparison with figures for all commercial stations would be more favourable for MCE).

FRANCE - REVENUE & ROYALTY PAYMENTS (£)						
	Commercial Radio			NRJ		
	Rev	Sacem	SPRE	Rev	Sacem	SPRE
Per Potential Listener	9.09	0.11	0.12	1.14	0.04	0.04
Per Actual Listener	14.95	0.19	0.19	8.80	0.32	0.34
Per 1000 Hours						
All Commercial	14.92	0.36	0.23			
National Music & Local	8.36	0.30	0.31	12.22	0.44	0.48

(b) Germany

The radio market in Germany is characterised by its regional (Land) organisation and the continued dominance of the public service ARD stations, operating principally on a regional basis with some more-localised "opt-outs". Most ARD stations carry advertising, with limits on commercial output set by the authorities in each Land. ARD commercial stations account for around 62% of radio listening (total ARD, including non-commercial services, 73%) and around 55% of advertising revenues.

ARD stations are also partly funded from licence fees, which are included in the revenue base used for the calculation of broadcast royalties. We have ignored these sums for the purposes of our calculations as they do not affect the calculation of fees paid by private commercial stations. However, their exclusion does mean that the royalty fees paid by ARD services are underestimated and are not valid for comparison.

Private commercial stations are entirely supported by advertising and are licensed by each Land, the number and scale of stations varying with regional policies. There are presently around 150 private commercial stations, attracting some 27% of listening and 45% of commercial advertising, distributed unequally between the different Länder.

Composers' society GEMA charges a nominal royalty rate of 7% of NAR, reduced by external sales agents' commissions (not in-house sales forces) and a banded music use factor (80%, 60%, 40%, 20%, 5%). Further pro-rata reduction is allowed if a station broadcasts less than 24-hours a day (this remains the case for a number of German stations).

An additional reduction of 20% is afforded to members of a recognised industry trade association, VPRT in the case of commercial radio stations - almost all stations are members. The estimated effective rate for a station playing 100% music is therefore 4.76%.

Producers and performers rights are licensed by GVL. The terms and structure of the arrangements are similar to those applied by GEMA, save that the headline royalty rates are 4.5% for stations with over 50% music use, 2.25% for those using between 25-50% and 1.125% for those under 25%. A 20% deduction is also given to VPRT members. The estimated effective rate, again for 100% music use, is 3.6% of NAR.

The table below summarises our calculation of the effective royalties paid in Germany by private commercial stations. In our view, this provides a more appropriate basis for comparison with MCE than equivalent figures including public service stations - inclusion of ARD stations serves to reduce the average royalties paid. Full details are set out in Appendix 3.

	GERMANY - ROYALTY PAYMENTS (£)		
		Private Commercial Stations	
	Revenue	GEMA	GVL
Per Potential Listener	2.84	0.11	0.10
Per Actual Listener	6.35	0.24	0.23
Per 1000 Hours	13.35	0.51	0.48

As with France and the UK, we had hoped to compare royalty payments for the industry as a whole with those of a leading music station. Unfortunately, sufficiently detailed financial and audience figures have not been available to enable this to be done satisfactorily.

(c) U.K

Commercial radio in the UK is relatively recent, explaining in part its lower share of total advertising. Starting with two stations in London in 1973, LBC and Capital, the UK now comprises 173 local/regional radio services and, recently, three national commercial stations - Classic FM, Virgin and Talk Radio.

As a result of the introduction of national commercial radio and expansion of the number of local/regional stations, commercial radio's share of total advertising has been growing in recent years. From a historical average of around 2%, radio's share of advertising is now estimated at around 3.5%. Most projections indicate further proportionate growth, attaining around 4-5% by the end of the century.

Although Classic FM broadcasts entirely classical music (therefore mostly non-copyright for PRS purposes, although recordings would still be in copyright for PPL), its revenues in the 1993 year analysed in detail were not significant and do not, in our view, materially affect our calculations.

An additional commercial station, Atlantic 252, covers around two-thirds of the UK from its base in Ireland. Atlantic's listening is included in UK RAJAR results and its revenues are reported in the UK Advertising Association figures - they have therefore been included in our analysis for the UK. Atlantic actually pays royalties in Ireland in accordance with the UK rates and agreements.

Radio programmes in the UK are completed by the BBC's public service stations, none of which carry advertising: 5 national networks, 3 regional services, 37 local stations.

BBC services presently account for 49% of total listening, national commercial services 10% and local commercial services 39%.

Composers royalties in the UK are licensed and collected by PRS, who charge a sliding scale of rates ranging from 5% to 9% linked to bands of revenue (bands are updated annually according to RPI changes) - details of rates/bands are contained in the appendix to this report. Reduced rates apply to new stations in their start-up years - consistent with our policy throughout this analysis, we have ignored the effect of such concessions with the result that our calculations can only be over rather than under-estimations of the royalties paid.

Based on our analysis and other information received, the average payment for the industry as a whole amounted in the 1993 year analysed to 5.4%. The PRS arrangements provide for a "surcharge" of 115% if music use exceeds 75% - we have estimated the effective rate based on 100% music use to be 6.2%.

The substantial rise in radio revenues in the UK in 1994 (around 23%) automatically means that many stations paid royalties in that year in higher revenue bands than previously, raising the industry average payment. For consistency, we have used the same 1993 year in our comparisons of payments in the 3 principal countries examined.

It should be noted that the royalty agreement between PRS and AIRC (industry body representing almost all UK commercial radio stations) formally expired on 30 September 1992.

The PRS agreement has been extended on several occasions, last until 31 May 1995, pending negotiations for its renewal. Basically, PRS seek to maintain the current arrangements; AIRC seek a reduction. Given that PRS rates are higher than those previously applied by PPL and that AIRC obtained an overall reduction in PPL rates in the Copyright Tribunal, our view is that the present PRS rates may be viewed as a maximum and may well be subject to reduction in the near future.

PPL's rates for the broadcast of sound recordings were recently fixed by the Copyright Tribunal, after several years dispute with the radio industry. Music stations (broadcasting over 15% music) pay between 2 and 5% of net advertising revenue, linked to the amount of revenue, less a flat deduction of 15% for sales costs and sales house commissions. The revenue "thresholds" are adjusted annually in line with inflation.

The 5% rate presently applies to stations earning over £772,000. Although many new and smaller stations earn under this amount, we have assumed for the purposes of our calculations that all stations pay at the maximum 5% rate, again over rather than under-estimating royalties paid.

UNITED KINGDOM - REVENUE & ROYALTY PAYMENTS (£)						
	Commercial Radio			Capital Radio		
	Rev	PRS	PPL	Rev	PRS	PPL
Per Potential Listener	3.59	0.18	0.15	2.90	0.21	0.12
Per Actual Listener	7.43	0.37	0.32	7.34	0.53	0.31
Per 1000 Hours	9.29	0.47	0.39	10.86	0.78	0.46

Capital is the largest independent station, operating in the 10-million London market, and generates the highest revenues and profits. Capital is able to charge advertisers a premium cost per thousand, reflected in the above average revenue per thousand hours. It is the only station to which the upper PRS revenue bands apply, accounting for the difference between Capital and the sector as a whole - Capital's PRS payments amount to around 7.2% of NAR compared with around 5.4% for the industry as a whole.

Almost all stations, including Capital, pay PPL the flat 5% rate. As a result, payments by Capital to PPL are close to average, the difference again reflecting the price premium and sales efficiency.

(d) Summary - France, Germany & U.I.

REVENUES & ROYALTIES PER THOUSAND HOURS			
£ sterling	Royalties		
	Revenues	Composers	Producers
France FM nat/local	8.36	0.30	0.31
Germany Private commercial	13.35	0.51	0.48
U.K All ILR	9.29	0.47	0.39
Average	10.75	0.44	0.41

Appendix 3 : Estimated Royalty Payments - France, Germany & U.K

5. MCE REVENUES & LISTENING

(a) MCE Revenues

MCE offers a service consisting in a wide range of thematic music channels, which it provides to cable operators and other distributors for their sale to consumers. MCE programmes do not carry advertising and all revenue is derived from subscribers' payments.

In general, subscription levels are set by the cable operator responsible for the retail marketing and distribution of the programme services to its customers, not by MCE. In the 8 countries where MCE's programmes are currently distributed, subscription prices average £98.58 per year (£8.21 per month).

Cable operators must install the equipment necessary to receive MCE's programme services and distribute them on their cable networks. Operators also supply consumers with the equipment for in-home reception - decoders, handsets, etc. This practice differs from some direct-to-home "premium" services, such as Sky Television, where consumers are required to purchase reception equipment.

At present, we understand that charges are not made or specified separately for the supply/rental of equipment and for the programme service as such. Of course this would be an option for MCE, or its cable affiliates who supply the service to subscribers, were it to be material for royalty purposes. Based on information from MCE, we have made allowance for equipment costs at the rate of 50% of gross subscription prices.

In addition, other third party costs are incurred by cable operators in respect of marketing, distribution, processing, etc, which are deducted from the net subscriptions actually received by MCE.

The balance is the fee which the cable operator pays to MCE, which constitutes MCE's gross income. From its gross receipts MCE must cover its programming costs, the satellite and other expenses of distribution to cable operators and, in common with other suppliers of "premium" programme services, the copyright costs. The gross receipts paid to MCE average £ 24 per household/year (24.9% of subscriber price).

To establish the bases which might be used for the calculation of royalty payments by MCE, we examined subscription revenues at three levels: gross subscriptions, subscriptions less the cost of equipment (decoder box, digital handset, etc) and MCE's gross receipts. Prices and costs have been supplied to us by MCE - exchange rates are those applicable on 3 April 1995.

MCE - ANNUAL PRICES/RECEIPTS		
£ - ex VAT		
	Avg/Year	Avg/Month
Subscriber Price	98.58	8.22
Price Ex Equipment	49.29	4.11
MCE Gross Receipts	24.35	2.03

(b) Royalty Bases

As indicated above, the royalty base for on-air radio stations starts with their net advertising revenue. The manner in which this is described or defined differs slightly, but, effectively, it relates to the stations' receipts (exclusive of VAT or equivalent taxes) net of commissions to advertising agencies. Ancilliary revenues from non-broadcast sources (such as merchandising, premium telephone/data services, etc) are not included in the revenue base for royalty calculations. For the purposes of comparison in this report, net advertising and sponsorship revenue (NAR) has therefore been adopted as a common starting point.

In our view, logic suggests that royalty payments should be calculated with reference to the music use and programme service provided. As with television and radio services, reception equipment or other services should not enter into the royalty base. Similarly, it is long established in calculating record royalties paid to composers and recording artists that a deduction is made from the price of a record to reflect the costs of packaging (inlays, CD/MC jewel cases, etc).

We believe the most logical and appropriate base for the calculation of royalty payments would be MCE's gross receipts.

Again by way of analogy, the IFPI/BIEM agreement covering payments by record producers to composers for the sale of records is based on wholesale prices set by the record company (not retail prices outside its control) and makes allowance for further deductions to take account of discounts granted to retailers. Although the agreement does not go to the logical conclusion of basing royalties on the producer's actual receipts, this recognises that "list" prices do not reflect the real value derived by the programme supplier.

However, as our examination below shows, if another base were to be adopted or imposed this would imply the necessity of correspondingly lower royalty rates. In the final analysis, the method of calculation is of lesser importance than the overall amount of royalties effectively paid.

The recent revision of the rates charged in France by SACEM is indicative of this approach at work - headline royalty rates have been reduced substantially whilst deductions from the royalty base have been eliminated. The overall result leaves the effective royalties paid largely unchanged.

(c) Listener Comparisons

We first compared the effective royalties yielded on the basis of the number of listeners - potential listeners within a broadcaster's coverage area (TSA) and the actual number of listeners reached.

Whilst interesting, we do not believe these measures provide the best means of consistent comparison as they are heavily influenced by differences in market structure. In particular, both revenues and royalties vary substantially as a result of the reach and market share achieved by commercial as opposed to non-commercial radio and the availability or not of advertising on public service stations. These differences are evident in our examination of the principal radio markets above.

Further, "potential listeners" in the sense of a radio station's TSA has little meaning in the case of MCE. MCE's services could technically be received in all homes which are "passed" by cable. But this takes no account of the penetration rate of cable connections, nor whether MCE's services are made available on a given cable network.

In reality, MCE's services are only available to those who subscribe to cable and who choose to subscribe to MCE. It is reasonable to assume that subscribers will then listen, or cancel their subscriptions. In the case of MCE, we therefore believe that "potential" and "actual" listeners should be taken as the same.

In any event, comparisons based on technical coverage or reach fail to take account of the other critical factor, volume of listening. The combination of the number of listeners (reach) and the time they spend listening (on average or in total) determines listening share. Listening share and the total hours listened have the most direct relationship to revenues and provide a consistent basis for comparison, both between radio stations and stations in different markets.

(d) Time Spent Listening (000's Hours)

In our view, comparison on the basis of hours listened therefore provides the best and most consistent guide. We have based on our analysis on the commonly used measure of thousands of hours listened.

Ratings data in France and Germany is based on daily listening, whereas UK data (RAJAR) is published on a weekly basis. For the purposes of comparison, UK figures have been adjusted to the daily basis using information supplied by RSL/RAJAR.

To ensure comparability, we therefore sought to establish equivalent listening for MCE households, taking account of two factors:

- The average number of people per household. Although unlikely, we have assumed that all household members would listen to MCE, again adopting a cautious basis less favourable to MCE for the purposes of comparison.
- The duration of listening. This has been derived from surveys of listening conducted on behalf of MCE among subscribers in Belgium and the Netherlands, the markets with the highest penetration of cable and where MCE has the largest subscriber base at present.

Our analysis showed 2955 hours average annual listening per household - representing 1373 hours per primary subscriber and 1061 hours for other household members. Details of the analysis are appended. As a result, comparison can be made on the basis of a subscriber household and does not depend on purely hypothetical estimates of future cable connections or levels of MCE subscription, churn, etc.

Appendix 4 : MCE Subscription Prices & Listening Hours

6. MCE ROYALTY COMPARISONS

We sought to compare the royalties paid by radio broadcasters with amounts that would be paid by MCE on a similar basis. To ensure comparability, the average effective rates paid by radio stations have been estimated to reflect 100% music use. The actual amounts and effective rates paid by an individual station will of course be lower according to its output and, in many cases, earnings.

(a) Application of Broadcast Rates

As a starting point, we examined the effect of applying the effective rates paid by radio stations to the revenues generated from MCE's programme services - gross subscriptions, subscriptions less an equipment allowance and MCE's gross receipts. We examined the consequences of three hypotheses for royalty rates:

- The same effective rate as we found would apply in each national territory to on-air broadcasters.
- The European average rate applied in each territory - 4.6% for composers and 3.1% for record producers/performing artists.
- The CISAC 10% "guideline" rate - 9% after making allowance for the non-copyright element in MCE's classical channels.

In each case we found that the resulting royalty payments by MCE would be far greater than those paid by radio broadcasters for equivalent music use on a comparable basis. Details of the comparison are set out in Appendix 5.

For the reasons explained previously, we have based our detailed comparisons on the level of royalties paid per thousand hours listened.

The differential factors are so great that they cannot be explained by any margins of error in our calculations or assumptions. As stated on several occasions in this report, we have consistently used estimates that would over-value the payments made by radio broadcasters and made assumptions unfavourable to MCE.

The most extreme case results from applying the CISAC 10% "guideline" rate to the gross subscription price - such a hypothesis would result in MCE paying on average 6.7 times as much as radio stations on the basis of hours listened. Even were such a rate to be applied to the lower base of MCE's gross receipts, the resulting payments would be nearly twice those of radio broadcasters.

As our analysis shows, the "guideline" rate applies nowhere. But, if one examines the effect of applying either the existing national rates or the European average rates a similar "overpayment" would occur, unless MCE's gross receipts were taken as a basis for royalty calculations. CISAC (Confédération des Sociétés d'Auteurs et Compositeurs) relates only to composers' rights - we have not applied the "guidelines" to producers, although the result would be substantially the same.

Applying such rates to the subscription prices would result in royalties around 3.5 times those paid by radio stations - nearly twice as much if a 50% allowance were made for equipment costs.

Only if existing rates applicable to radio stations are applied to MCE's gross receipts does one obtain an equivalent level of royalty payments. This is confirmed by our examination below of the rates that would need to be set in order to yield equivalent payments.

MCE - COMPARISON OF EQUIVALENT ROYALTY PAYMENTS					
France, Germany, UK Average					
Royalty per 000 hours listened - £					
	Composers			Producers	
RADIO STATIONS					
Effective Royalty	0.44			0.41	
Ratio	1.0			1.0	
MCE					
	Nat	Eur	Cisac	Nat	Eur
	Rates	Avg	Guide	Rates	Avg
Base - Subscriber Price					
Royalty	4.52	4.44	8.60	3.41	3.00
Ratio	3.5	3.4	6.7	3.4	3.0
Subscriber Price ex Equip					
Royalty	2.26	2.22	4.30	1.70	1.50
Ratio	1.8	1.7	3.3	1.7	1.5
MCE Gross Receipts					
Royalty	1.21	1.15	2.23	0.89	0.78
Ratio	0.9	0.9	1.7	0.9	0.8

In our view, it would only be appropriate to transpose existing royalty arrangements from radio broadcasters to MCE, provided MCE's gross receipts were used as a basis for calculation in order to recognise the significantly higher royalty yield that would otherwise result.

(b) Equivalent Royalty Rates

We also examined the royalty rates that would need to be applied to MCE in order to generate comparable royalty payments to composers and record producers, based on our detailed analysis of the three principal countries - France, Germany and the U.K.

We examined royalties on the basis of potential and actual listeners, as well as in relation to listening (per thousand hours). For the reasons given previously, we believe hours listened provides the most consistent and helpful comparison.

The table below provides a summary of our findings - full details are appended. This shows that on average MCE should pay:

- 5.5% of its gross receipts to composers organisations - the range in the three countries being from 4.8% to 5.7%.
- 4.7% of gross receipts to record producers - the range being 3.1% to 5.3%.

MCE - ROYALTY RATES FOR EQUIVALENT EFFECTIVE YIELD								
Per Thousand Hours Listened - %								
Base	Composers				Producers			
	F	D	UK	Avg	F	D	UK	Avg
Gross Subscription	1.0%	1.5%	1.8%	1.4%	0.7%	1.4%	1.5%	1.2%
Ex Equipment	2.1%	2.9%	3.6%	2.7%	1.3%	2.7%	3.1%	2.3%
Gross Receipts	4.8%	5.6%	5.7%	5.5%	3.1%	5.3%	4.9%	4.7%

If MCE's gross subscriptions or subscription price less an equipment allowance were to be adopted as the royalty base, the applicable rates would need to be adjusted downwards accordingly as the table demonstrates.

Our calculations and analysis contain many assumptions, based on the best information we have been able to obtain. We do not suggest that 5.5% and 4.7% should be taken as absolute figures. However, we are confident that they accurately show the level of appropriate royalty rates for MCE.

Appendix 5 : Royalty Comparisons & Equivalent Royalty Rates

7. CONCLUSION

In conclusion, we believe the study shows that royalty rates should be set as follows:

- **Composers** : Around 5-6% of MCE's gross receipts - reducing to around 1.5% if the gross subscription price is used as a base, or 2-3% in the case of subscriptions less a 50% equipment "allowance".
- **Performers/Producers**: Around 4-5% of MCE's gross receipts - reducing to around 1% of gross subscriptions, or 2.5% with the equipment allowance.

eec/bb may 1995

APPENDIX 1

MUSIC CHOICE EUROPE

RADIO ADVERTISING REVENUES - 1993

	Population 000's 15 +	LC Millions Total Radio	Radio %	Radio %	2 Millions Total Radio	Total Rev capita (£)	Radio Revenue capita (£)	EU = 100	Weighting - E.U. Pop 15+ Tot Ad Rev	Radio	Diff +/-
AUSTRIA	6,533	16,059	1,542	9.6%	937.8	143.56	13.78	242	2.2%	2.4%	2.82
BELGIUM/LUX	8,594	44,735	3,350	7.5%	836.5	97.34	7.29	128	2.8%	2.1%	1.49
DENMARK	4,298	6,446	106	1.6%	644.6	149.98	2.47	43	1.4%	1.6%	-1.03
FINLAND	4,107	3,954	163	4.1%	462.6	112.64	4.64	81	1.4%	1.2%	-0.07
FRANCE	46,064	46,260	3,558	7.7%	5,310.6	145.29	8.87	155	15.2%	13.5%	10.10
GERMANY	67,733	28,074	1,117	4.0%	10,948.9	161.65	6.43	113	22.3%	27.9%	-2.67
GREECE	8,517	172,512	9,060	5.3%	489.2	55.09	2.89	51	2.8%	1.2%	0.23
IRELAND	2,645	330	23	7.0%	375.3	119.21	8.31	146	0.9%	0.8%	0.47
ITALY	48,113	9,401,000	122,000	1.3%	3,773.4	77.18	1.00	18	15.9%	9.4%	-6.66
NETHERLANDS	12,448	5,503	181	3.3%	1,920.5	154.29	5.07	89	4.1%	4.9%	-1.23
PORTUGAL	8,000	100,366	6,146	6.1%	394.4	48.05	2.94	52	2.6%	1.0%	0.38
SPAIN	32,028	1,208,536	75,180	6.2%	5,740.5	179.25	11.15	195	10.6%	14.6%	6.04
SWEDEN	7,110	10,491	32	0.3%	851.9	119.81	0.37	6	2.3%	2.2%	-0.2%
UNITED KINGDOM	46,896	6,763	162	2.4%	6,763.0	144.24	3.46	61	15.5%	17.2%	-7.84
NORWAY	3,474	5,525	200	3.6%	497.3	143.13	5.18	91			
SWITZERLAND	5,745	2,977	78	2.6%	1,360.5	236.81	6.20	109			
TOTAL EUROPEAN UNION	312,293	303,074		4.3%	41,157.2	131.79	5.71	100	100.0%	100.0%	100.0%
				4.4%	39,299.4	129.67	5.71				

Notes
 Population - National statistics/NTC 1995
 Advertising revenues - National Associations/NTC 1995
 Exchange rates - 31 Dec 1993

APPENDIX 2

BROADCAST ROYALTIES IN EUROPE

COMPOSERS RIGHTS

Society	Royalty Base			Deductions			Basic Rate	Revenue Bands (1995)	Music Use	Net Effective Rate % NAR -100% music	
	NAR	Sponsor	Contra	Agency Commissions	Sales Costs	Other					
AUSTRIA											
	No commercial radio - no rates yet (except "overspill" from Slovakia)			First commercial stations start approx Sept 1995							
BELGIUM/LUX	SABAM	Yes	Yes		Agency & Sales costs to combined 45% max		6%	No	Pro-rata to total broadcast hours	4.2%	
DENMARK	KODA										
FINLAND	TEOSTO	Yes	Yes				4.5 - 8.5%	Yes	Half royalty rate 00h-06h	7.0%	
FRANCE	SACEM	Yes	Yes	Yes	Yes	Actual to 40% max - internal & external	5% reduction in royalty paid for "news" stations	6% Year1 - 4% Year2 - 5%	No music limit - Half basic royalty rate if music less than 30% output	3.8%	
GERMANY	GEMA	Yes	Yes	Yes	Yes	Actual commissions to external agents only - 15% max	20% if radio association member (VPR)	7.0%	No	Proportionate reduction if broadcasts less than 24h/day No music limit - proportionate reduction if music 60,80,40,20, 5%	4.76%
GREECE	AEPI										
IRELAND	IMRO	Yes	Yes	Yes		Agency commissions to No max 17% (20% inc IRTC)	IRTC levy - 3%	4.0% 5.5% 8.25% 7.5% 9.0%	First IE 750,000 IE 750k-1,250k IE 1,250-3,250k IE 3,250-7,250k Over IE 7,250,000	4.8% avg	
ITALY	SIAE	Yes	Yes		Yes	Flat 35% sales costs	12% "special" deduction 10% if radio association member	7.0% 5.0% 2.0%	No	Over 70% music use 25-70% music use Under 25% music use Music use calculated 06h-24h	3.6%
NETHERLANDS	BUMA	Yes	Yes	No		Agency & Sales costs to combined max 25%		8.0%	No	Proportionate to music output	7.2%
PORTUGAL	SPA	Yes	Yes	Yes		(Group 1 & 2 stations only - Group 3 stations pay fixed sums)		3%	No	Group 1 = Lisbon/Porto Group 2 = Other cities	3.0%
SPAIN	SGAE	Yes	Yes	No		Agency & sales agents to combined max 25%		5.0% 4.0% 1.25%	No	Over 70% music output 30-70% music output Under 30% music output	4.5%
SWEDEN	STIM	Yes	Yes		Yes	Minimum annual payments by audience (TSA) A - TSA >800,000 Skr 275,000 B - TSA 300/600,000 Skr 220,000 C - TSA 150/300,000 Skr 160,000 D - TSA <150,000 Skr 100,000		2.8 - 4.5%	No	Yes - per annual music output 2.8% <2000 hrs 3.1% 2/4000 hrs 3.8% 4/8000 hrs 4.5% >6000 hrs	4.5%
UNITED KINGDOM	PRS	Yes	Yes - music No related	No	Yes	No	Reduced rates Yrs 1-4	5.0% 5.5% 6.0% 6.5% 8.0% 8.0%	First £1.360m £1.360m/£2.721m £2.721m/£4.081m £4.081m/£8.163m £8.163m/£10.883m Over £10.883m	Basic rates cover 25-75% music use Over 75% use - royalties 115%	5.4% avg 6.2%
NORWAY							Prompt payment - 2/3 Natwest base rate (min 2.5% max 6%)			Flat royalty rate 2% under 25% music Cap 7.8% overall	7.8% cap
SWITZERLAND	SUISA	Yes	Yes	Yes		Actual agents costs to max 40%		1.0% 2.0% 3.0% 5.0% 7.0%		Less than 10% music output 10-29% music 30-49% music 50-79% music 80% and over music	4.2%

BROADCAST ROYALTIES IN EUROPE

PERFORMERS RIGHTS

Society	Royalty Base			Deductions			Basic Rate	Revenue Bands (1995)	Music Use	Net Effective Rate Est % -100% music	
	NAR	Sponsor	Contra	Agency Commissions	Sales Costs	Other					
AUSTRIA	LSG	State radio only - royalty base advertising revenue & licence fees			Yes			1.483%	No		1.48%
BELGIUM	Belgramex	Rates not yet set - fixed payments by size of city/TSA							No		
DENMARK	GRAMEX	Flat fees per minute							No	National - Dkr 78/min Copenhagen - Dkr 62/min Smal stations - Dkr 30/min Half royalty rate 00h-05h	
FINLAND	GRAMEX	Yes	Yes		Yes			4.5 - 8.5%	Yes		7.0%
FRANCE	SPRE	Yes	Yes	Yes	Yes	No	22% if min 5 hrs/day local non-music prog 22% (non cumulative) if min 5 hrs/day progs by pro journalists 10% for timely reporting and on a/c payments	4.25%	No	No limit - All stations get 15% min deduction from base - deduction proportionate if music use under 85%	3.8%
GERMANY	GVL	Yes	Yes	Yes	Yes	Actual commissions to external agents only max 15%	20% if radio association member (VPRT)	4.5% 2.25% 1.125%	No	50% or more music 25-49% music Less than 25% music	3.6%
GREECE	IFPI	Rates not yet set									
IRELAND	PPI	Yes	Yes	Yes	Agency discounts & sales commissions to 23% max		Reduced rates during first 5 years Yr 1 - 50% Yr 2 - 25% Yr 3 - 25% Yr 4 - 12.5% Yr 5 - 7.5%	1.3-12.35% 1.3% 1.95% 2.6% 3.25% 3.9% 4.55% 5.2% 5.85% 6.5% 7.15% 7.8% 8.45% 9.1% 9.75% 10.4% 11.05% 11.7% 12.35%	Yes - RPI adjusted Under IE 56,000 IE 56-113,000 IE 113-169,000 IE 169-281,000 IE 281-447,000 IE 447-669,000 IE 669-908,000 IE 908-1,114,000 IE 1,114-1,393,000 IE 1,393-1,672,000 IE 1,672-1,951,000 IE 1,951-2,229,000 IE 2,229-2,508,000 IE 2,508-2,787,000 IE 2,787-3,345,000 IE 3,345-4,458,000 IE 4,458-5,571,000 Over IE 5,571,000	Basic rates apply to 65% music use Use calculated 7h30 to 22h (music hours/14.5*100) Payments adjusted proportionately to actual use (Use%/65)	3.0% avg (est avg 4.5% if all were paying) 4.6%
ITALY	AFI/FIMI (80/20%)	Yes	Yes		Yes	Sales costs hal 35%	12% "special" deduction 10% if radio association member	4.0% 2.0% 1.5%		Over 80% music output 60-80% music output Under 60% music output	2.1%
LUXEMBOURG		No rights RTL pays in France, Belgium, etc									
NETHERLANDS	SENA	Rights recently introduced			Rates under negotiation						
PORTUGAL	Audigest	Rights recently introduced			Rates under discussion/negotiation						
SPAIN	AGEDI	Yes	Yes	No	Agency & sales agents to 25% max			2.2% 1.6% 0.6%	No	Over 70% music output 30-70% music output Under 30% music output	2.2%
SWEDEN	IFPI	No agreement at present			Stations make on account minimum payments Tribunal hearing anticipated						
UNITED KINGDOM	PPL	Yes	Yes - net of Yes OB costs etc		Yes	Flat 15% sales costs	External O/B costs etc of sponsored events	5% 3% 2% 1%	Over £772,451 Under £772,451 Under £386,225 No	Music stations Music stations Music stations Non-music (under 15% output)	4.25% 2.55% 1.70%
NORWAY											
SWITZERLAND	Swiss-perform	Yes	Yes	Yes	Actual agents costs to max 40%			1.0% 2.0% 3.0% 5.0% 7.0%		Less than 10% music output 10-29% music 30-49% music 50-79% music 80% and over music	1.05%

EUROPEAN AVERAGE EFFECTIVE ROYALTY RATES

Base 100% Music Use - % Net Advertising Revenue

	Adults 15-plus	COMPOSERS			PRODUCERS		
		Effective Rate	Weighted E.U.	Weighted Europe	Effective Rate	Weighted E.U.	Weighted Europe
AUSTRIA	6,533		0.00	0.00		0.00	0.00
BELGIUM	8,594	4.20	0.13	0.12		0.00	0.00
DENMARK	4,298		0.00	0.00		0.00	0.00
FINLAND	4,107	7.00	0.10	0.10	7.00	0.12	0.11
FRANCE	46,064	3.60	0.58	0.57	3.80	0.71	0.69
GERMANY	67,733	4.76	1.14	1.11	3.06	0.84	0.82
GREECE	8,517		0.00	0.00		0.00	0.00
IRELAND	2,645	4.80	0.04	0.04	4.60	0.05	0.05
ITALY	48,113	3.60	0.61	0.60	2.10	0.41	0.40
NETHERLANDS	12,448	7.20	0.32	0.31		0.00	0.00
PORTUGAL	8,000	3.00	0.08	0.08		0.00	0.00
SPAIN	32,026	4.50	0.51	0.50	2.20	0.28	0.28
SWEDEN	7,110	4.50	0.11	0.11		0.00	0.00
UNITED KINGDOM	46,886	6.20	1.02	1.00	4.25	0.80	0.79
NORWAY	3,474			0.00			0.00
SWITZERLAND	5,745	4.20		0.08	1.05		0.02
EUROPEAN UNION	312,293		4.65			3.21	
TOTAL	303,074		4.64			3.13	

APPENDIX 3

RADIO ROYALTY PAYMENTS - FRANCE

ADVERTISING/ROYALTIES DATA

1993

Gross Advertising Revenue (FF 000's)			3,558,000		
Exchange Rate	0.1148				
Gross Advertising Revenue (£000's)			408,458		
National/Local Split	75.00%	25.00%		306,344	102,115
Agency Commissions (15%)				45,952	n/a
Net Advertising Revenue (NAR)			362,507	260,392	102,115
Sponsorship (net) 15%			54,376		
Gross Broadcast Revenue (GBR)			416,883		
Advertising share FM	35.00%		145,909		
Advertising share Peripheriques	65.00%		270,974		
Sales Cost Deduction (SPRE)	23.25%				
Usage adjustment FM	15.00%		21,886		
Usage adjustment Peripheriques	70.00%		189,682		
NBR - SPRE - FM			90,099		
NBR - SPRE - PERIPH			18,291		
Sales Cost Deduction (SACEM)	40.00%				
NBR - SACEM - FM			87,545		
NBR - SACEM - PERIPH			162,584		
Royalties Payable (£ 000's)					
SPRE FM	6.00%			5,406	
Peripherique	6.00%			1,097	
Total SPRE			6,503		
SACEM FM	6.00%			5,253	
Peripherique	3.00%			4,878	
Total SACEM			10,130		

RATINGS DATA

1993

1993-Q1 1993-Q2 1993-Q3 1993-Q4

TSA Commercial Radio (000's)	45,860	45,860	45,860	45,860	45,860
Daily Reach (M-F 5h-24h)					
Reach % All Radio	78.5%	77.7%	78.5%	79.1%	78.8%
Reach % - Commercial Radio	60.8%	61.9%	60.4%	60.7%	60.4%
Reach % - Public Service	25.3%	25.9%	25.0%	25.3%	24.9%
Reach % - Radios Associatives (Community)	2.7%	2.6%	2.9%	2.4%	2.9%
Reach (000's) - Commercial Radio	27,883	28,387	27,699	27,837	27,699
Reach (000's) All Radio	36,015	35,833	36,015	36,275	36,138
Weekly reach increment	1.21				
Est Weekly Reach (000's) - Commercial radio	33,774	34,385	33,551	33,718	33,551
Hours					
Share % - Commercial radio	70.6%	70.4%	71.6%	69.9%	70.6%
Share % - Public service	21.8%	22.2%	20.8%	22.3%	21.6%
Share % - Associatives	2.1%	2.0%	2.3%	1.8%	2.2%
Average Hours/Day - Total Radio		2.70	3.02	3.13	3.22
Total Hours/Day (000's)	434,882	96,210	108,765	113,662	116,243
Total Hours/Year (000's)	39,574,218	8,755,082	9,897,749	10,343,286	10,578,101
Hours Commercial Radio	27,948,462	6,163,578	7,086,788	7,229,957	7,468,139
Share Music & Local Commercial		45.3%	44.2%	43.2%	44.0%
Hours Music stations	17,460,222	3,966,052	4,371,506	4,468,299	4,654,365

REVENUE RATIOS

GBR SACEM SPRE
Composers Producers

ALL COMMERCIAL STATIONS			
Revenue per potential listener - TSA (£)	9.09	0.11	0.12
Revenue per actual listener - Reach (£)			
Daily Reach	14.95	0.19	0.19
Weekly Reach	12.34	0.16	0.16
Revenue per 000 hours listened (£)			
All Commercial Stations	14.92	0.36	0.23
National Music & Local Commercial Stations	8.36	0.30	0.31

NOTES

Gross Advertising (includes agency commissions) - IREP/NTC
 Exchange rate - National Accounts 31 Dec 1993
 National/local advertising split - AACC
 Agency commissions - industry standard
 Sponsorship - estimate
 Public service radios may carry general interest commercials for state/institutions - de minimis
 Advertising share FM/Peripheriques - AACC
 SPRE & SACEM per industry agreements/tariffs
 SPRE tariff applicable in 1993 - New tariff applicable from 1 Jan 1994 (new effective rate 3.8% - previously 3.9%)
 Ratings data - Mediametrie 75,000 Radio

NRJ - FRANCE

	Total	NRJ	Cherie	R&C Paris
Radio Revenue (FF 000's)	516,475			
Exchange Rate	0.1148			
Radio Revenue (£ 000's)	59,291			
Agency commissions (15% on est 80% sales)	7,115			
Gross Broadcast Revenue (GBR)	52,176	39,654	10,435	2,087
GBR - Split (est)				
SPRE Royalties		9,220	2,426	485
Sales Cost Deduction 23.25%		30,434	8,009	1,602
Adjusted Revenue				
Music Use Factor (Est) 85.00%		85.00%	85.00%	75.00%
NBR - Royalty Base (SPRE)		25,869	6,808	1,201
SPRE Royalty Payable 6.00%	2,036	1,552	408	72
SACEM Royalties		15,862	4,174	835
Sales Cost Deduction 40.00%		23,792	6,261	1,252
Royalty Base - SACEM				
SACEM Royalty Payable 6.00%	1,878	1,428	376	75

NRJ RATINGS

	Top Line	NRJ	Cherie	R&C Paris
TSA (000's)	45,860	45,860	45,860	8,571
Reach				
Reach (%)	Q1 12.6%	10.0%	2.3%	4.0%
	Q2 13.4%	10.8%	2.3%	3.9%
	Q3 12.9%	10.1%	2.5%	n/a
	Q4 12.8%	10.0%	2.5%	3.9%
Average Daily Reach (000's)	5,927	4,689	1,101	337
Weekly increment (est)	1.21	1.21	1.21	1.21
Estimated weekly reach	7,180	5,680	1,333	408
Hours				
Average Hours/Day	Q1 2.1	2.0	2.3	1.6
	Q2 2.0	1.9	2.4	1.6
	Q3 2.0	1.9	2.0	n/a
	Q4 1.9	1.8	2.1	1.6
Total Hours (000's)	Q1 1,077,953	820,741	223,965	50,363
	Q2 1,137,074	856,353	233,563	49,104
	Q3 1,058,756	793,824	212,141	
	Q4 997,131	744,231	215,618	48,887
Total Hours/Year (000's)	4,270,914	3,215,149	885,288	197,806
	100.00%	75.28%	20.73%	4.63%

REVENUE RATIOS

Revenue per potential listener - TSA				
GBR	1.14	0.86	0.23	0.24
SACEM Composers	0.04	0.03	0.01	0.01
SPRE Producers	0.04	0.03	0.01	0.01
Revenue per listener - Daily Reach				
GBR	8.80	8.46	9.48	6.19
SACEM Composers	0.32	0.30	0.34	0.22
SPRE Producers	0.34	0.33	0.37	0.21
Revenue per 000 hours listened				
GBR	12.22	12.33	11.79	10.55
SACEM Composers	0.44	0.44	0.42	0.38
SPRE Producers	0.48	0.48	0.46	0.36

NOTES

Revenue - NRJ 1993/4 (excludes FF 43.9 mil other income - concerts, telematique, merchandising, etc)
 Top Line - Joint sales/audiences of NRJ, Cherie, Rires & Chansons
 NRJ & Cherie are national networks - Rires & Chansons Paris region only
 NRJ Group derives additional income from local sales by subsidiary network affiliates
 National ratings - Mediametrie 75000 (published 4 times/year)
 Paris/Ile de France ratings - Mediametrie (3 times/year - Q3 averaged from other quarters)
 Top Line data published as such in ratings - Hours for individual stations do not tally exactly
 SACEM/SPRE 1993 tariffs

RADIO ROYALTY PAYMENTS - GERMANY

ADVERTISING/ROYALTIES DATA

1993

Gross Advertising Revenue (DM 000's)		1,117,000
Exchange Rate	0.39	
Gross Advertising Revenue (£000's)		436,630
Agency Commissions (15%)		65,345
Net Advertising Revenue (NAR)		370,286
Sponsorship (net) 15%		55,543
Gross Broadcast Revenue (GBR)		425,828
Advertising share Public Service (ARD)	55.00%	234,206
Advertising share Private Commercial	45.00%	191,623

Royalties Payable (£ 000's)

GEMA (80% music use)	3.8%	
Public Service Commercial		8,919
Private Commercial		7,297
Total GEMA		16,216
GVL	3.6%	
Public Service Commercial		8,431
Private Commercial		6,898
Total GVL		15,330

RATINGS DATA

Adults 15-plus	67,733	
Technical penetration	99.6%	
TSA Radio (000's)		67,462
Reach	%	000's
Daily		
All Radio	78.0%	52,620
ARD (Public Service)	55.3%	37,307
Private Commercial	44.7%	30,156
Hours		
Average Hours/Day		2.8
Total Hours/Year (000's)		53,949,955
Listening share - ARD Commercial	61.7%	33,287,123
Listening share - ARD Non-commercial	11.7%	6,312,145
Listening share - Private Commercial	26.6%	14,350,688
Total Hours - Commercial Services		47,637,811

REVENUE RATIOS

	GBR	GEMA Composers	GVL Producers
Revenue per potential listener - TSA (£)			
All Radio	6.31	0.24	0.23
ARD Public Service	3.47	0.13	0.12
Private Commercial	2.84	0.11	0.10
Revenue per actual listener - Daily Reach (£)			
All Radio	8.09	0.31	0.29
ARD Public Service	6.28	0.24	0.23
Private Commercial	6.35	0.24	0.23
Revenue per 000 hours listened (£)			
All Radio	8.94	0.34	0.32
ARD Public Service	7.04	0.27	0.25
Private Commercial	13.35	0.61	0.48

NOTES

Gross Advertising (includes agency commissions) - ZAW/NTC
 Exchange rate - National Accounts 31 Dec 1993
 Agency commissions - industry standard
 Sponsorship - estimate
 35 out of 51 ARD stations take advertising
 ARD Advertising limited - set by Lander (range 180 mins/day to 60 mins/day)
 Private commercial stations - advertising max 15% broadcast time (20% inc sponsorship)
 Advertising share Public/Private - ARD Media/Kagan
 GEMA & GVL per industry agreements/tariffs - assumed 80% music use
 GEMA & GVL also receive fees from ARD stations based on licence fee revenues
 Assumes 20% deduction for membership of Industry Association (VPRT)
 Ratings data - Media Analyse 1992/4

RADIO ROYALTIES - UNITED KINGDOM

ADVERTISING/ROYALTIES DATA

1993

Gross Advertising Revenue (£000)				162,000
National/Local Split	68.00%	32.00%		110,160 51,840
Agency Commissions (15%)				16,524 n/a
Net Advertising Revenue (NAR)				145,476 93,636 51,840
Music sponsorship (est 7.5%)	7.50%			10,911
PRS Royalty Base				156,387
Sponsorship (net) 15%	15.00%			21,821
Gross Broadcast Revenue (GBR)				167,297
Sales Cost Deduction (PPL)	15.00%			25,095
Net Broadcast Revenue (NBR)				142,203
Royalties Payable (£ 000's)				
PPL Base - NBR	5.00%			7,110
PRS Base - PRS	5.37%			8,391

RATINGS DATA

1993

1993-Q1 1993-Q2 1993-Q3 1993-Q4

TSA Commercial Radio (000's)		46,616	46,478	46,662	46,662	46,662
Reach (%)		55%	55.00	53.00	56.00	57.00
Weekly Reach (000's)		25,689	25,380	24,901	25,993	26,460
Daily Reach Factor	0.88					
Est Daily Reach (000's)		22,517	22,247	21,827	22,784	23,211
Average Hours/Week			12.80	13.60	13.80	13.80
Total Hours/Week (000's)			324,434	3288	358,042	364,645
Total Hours/Year (000's)		18,003,817				

REVENUE RATIOS

GBR PRS PPL
Composers Producers

Revenue per potential listener - TSA (£)	3.59	0.18	0.15
Revenue per actual listener - Reach (£)			
Weekly Reach	6.51	0.33	0.28
Daily Reach	7.43	0.37	0.32
Revenue per 000 hours listened (£)	9.29	0.47	0.39

NOTES

Gross Advertising Revenues - Advertising Association (include agency commission)
 National/local split - Radad/Meal
 Industry standard agency commission 15%
 Commission on local sales through agencies ignored (overstates royalties slightly)
 Sponsorship - Estimated industry average
 GBR - NAR plus sponsorship
 Flat rate per PPL decision
 No account taken of talk stations - overstates royalty slightly
 PPL royalty - Assumes all stations pay top 5% rate. Overstates royalty.
 PRS royalty - Estimated industry average effective rate (Capital 7.2% - others 5%)
 PRS - No adjustment for Classic FM non-copyright element
 Ratings data - RAJAR 1993 Quarters 1-4
 Daily Reach - RSL (Rajar) all radio
 Yearly hours listened - each quarter's weekly listening times 13.
 Revenues/Hours include Atlantic 252 (Royalties paid in Ireland)

EEC/1995

RADIO ROYALTIES - UNITED KINGDOM

ADVERTISING/ROYALTIES DATA

		1994			
Gross Advertising Revenue (£000)		219,000			
National/Local Split	68/32%		148,920	70,080	
Agency Commissions (15%)			22,338	n/a	
Net Advertising Revenue (NAR)		196,662		126,582	70,080
Music sponsorship (7.5%)	7.50%		14,750		
PRS Royalty Base		211,412			
Sponsorship (net) 15%	15.00%		29,499		
Gross Broadcast Revenue (GBR)		226,161			
Sales Cost Deduction (PPL)	15.00%		33,924		
Net Broadcast Revenue (NBR)		192,237			
Royalties Payable (£ 000's)					
PPL	Base - NBR	5.00%	9,612		
PRS	Base - NAR	5.65%	11,954		

RATINGS DATA

		1993	1994-Q1	1994-Q2	1994-Q3	1994-Q4
TSA Commercial Radio (000's)		46,883	46,662	46,957	46,957	46,957
Reach (%)		59%	59.00	59.00	59.00	60.00
Reach (000's)		27,723	27,301	27,838	27,718	28,034
Daily reach factor	0.88					
Daily Reach (000's)		24,300	23,931	24,401	24,296	24,573
Average Hours/Week			13.90	14.40	15.00	14.70
Total Hours/Week (000's)			379,993	402,159	415,157	412,830
Total Hours/Year (000's)		20,931,807				

REVENUE RATIOS

	GBR	PRS	PPL
Revenue per potential listener - TSA (£)	4.82	0.25	0.21
Revenue per actual listener - Reach (£)	8.16	0.43	0.35
Revenue per 000 hours listened (£)	10.80	0.57	0.46

NOTES

Gross Advertising Revenues - Advertising Association (include agency commission)
 National/local split - Radad/Meal
 Industry standard agency commission 15%
 Commission on local sales through agencies ignored (overstates royalties slightly)
 Sponsorship - Estimated industry average
 GBR - NAR plus sponsorship
 Flat rate per PPL decision
 No account taken of talk stations - overstates royalty slightly
 PPL royalty - Assumes all stations pay top 5% rate. Overstates royalty.
 PRS royalty - Estimated industry average effective rate (Capital 7.2% - others 5.4%)
 PRS - No adjustment for Classic FM non-copyright element
 Ratings data - RAJAR 1994 Quarters 1-4
 Daily Reach - RSL (Rajar) all radio
 Yearly hours listened - each quarter's weekly listening times 13.
 Revenues/Hours include Atlantic 252 (Royalties paid in Ireland)

MUSIC CHOICE EUROPE

HOUSEHOLD DATA

000's	Belgium	Finland	France	Germany	NL	Norway	Switz	U.K	Total
Population	10,100	5,078	57,527	80,975	15,239	4,299	6,969	58,191	238,378
Adults 15 plus	8,269	4,107	46,064	67,733	12,448	3,474	5,745	46,886	194,726
Adults 15 plus (%)	81.9%	80.9%	80.1%	83.6%	81.7%	80.8%	82.4%	80.6%	81.7%
Total Households	3,969	2,120	22,230	35,700	6,206	1,751	2,842	23,097	97,915
Population/Household	2.54	2.40	2.59	2.27	2.46	2.46	2.45	2.52	2.43
TV Households	3,882	2,078	21,119	35,343	6,082	1,733	2,671	22,404	95,312
Country Weight (Adults 15+)	4.2%	2.1%	23.7%	34.8%	6.4%	1.8%	3.0%	24.1%	100.0%

MCE - PRICES & RECEIPTS

	Belgium	Finland	France	Germany	NL	Norway	Switz	U.K	Weighted Average
Local Currency (LC)	BEF	FIM	FF	DM	DFL	NKR	SF	GBP	
Exchange rate/£	0.0218	0.1437	0.1283	0.4503	0.4018	0.1004	0.5494	1.0000	GBP
MONTHLY									
Monthly Subscriber price (LC)	495.00	80.00	80.00	22.00	25.00	110.00	24.00	7.45	
VAT/Sales tax rate	20.5%	28.0%	18.6%	15.0%	17.5%	22.0%	6.5%	17.5%	
Subscriber price (LC ex Tax)	410.79	62.50	67.45	19.13	21.28	90.16	22.54	6.34	
Monthly Subscriber price (£)	10.81	11.50	10.27	9.91	10.05	11.05	13.19	7.45	9.60
Monthly Subscriber price (£ ex Tax)	8.97	8.98	8.68	8.61	8.55	9.05	12.38	6.34	8.21
Equipment cost (%)	50.0%	50.0%	50.0%	50.0%	50.0%	50.0%	50.0%	50.0%	
Equipment cost (£)	4.48	4.49	4.33	4.31	4.27	4.53	6.19	3.17	
Subscriber price - ex equip (£)	4.48	4.49	4.33	4.31	4.27	4.53	6.19	3.17	4.11
Other Third Party Costs (£)	2.63	2.84	2.47	2.06	2.27	2.92	4.33	1.17	2.08
Other Third Party Costs (%)	29.3%	31.6%	28.6%	23.9%	26.5%	32.3%	35.0%	18.5%	25.3%
MCE - Monthly Net Receipt (£)	1.88	1.85	1.88	2.26	2.01	1.61	1.86	2.00	2.03
MCE - Monthly Net Receipt (LC)	85.00	11.50	14.46	5.00	5.00	16.00	3.38	2.00	

ANNUAL PRICES/RECEIPTS (£)

Subscriber price (ex tax)	107.63	107.77	103.89	103.38	102.60	108.66	148.57	76.09	98.58
Subscriber price (ex equip)	53.82	63.89	51.94	51.69	51.30	54.33	74.28	38.04	49.29
MCE Net Receipt	22.27	19.83	22.27	27.02	24.11	19.28	22.27	24.00	24.35

NOTES

Population/household data - National sources/NTC 1995

Exchange rates - Interbank Rates 3 April 1995

Cable data UK - ITC Jan 1995

Prices, costs, receipts - MCE 1995

MCE ANNUAL LISTENING PER SUBSCRIBER HOUSEHOLD

Hours/day	Avg	Belgium		NL		Belgium - Others In Family	
		Respondents		Hours Listened		Responses	Hours
Under 1	0.50	0	20	0.00	10.00	2	1.00
1-2	1.50	48	44	72.00	66.00	57	85.50
2-3	2.50	46	34	115.00	85.00	48	120.00
3-4	3.50	36	20	126.00	70.00	23	80.50
4-5	4.50	15		67.50	0.00	9	40.50
5-6	5.50	17	128	93.50	704.00	13	71.50
6-7	6.50	4		26.00	0.00	2	13.00
7-8	7.50	5		37.50	0.00	2	15.00
8-9	8.50	11		93.50	0.00	5	42.50
9-10	9.50	1		9.50	0.00	0	0.00
Over 10	10.50	5	1	52.50	10.50	0	0.00
Total		188	247	693	945.50	161	469.50
Average hours/day/respondent				3.7	3.8		2.9
Average hours/week/respondent				25.8	26.8		20.4
Average hours/year/respondent				1341.8	1393.4		1061.5
Country Weight (Adults 15+)		8,269	12,448				
		39.9%	60.1%				
Weighted Average hours/year/respondent				1372.8			1061.48
Other listeners/subscriber listening (%)							77.3%
Population in household	2.54	2.46	2.49				
Average hours/year/subscriber (household)				2956.57			

Notes

Source - MCE Subscriber Surveys in B/NL 1995
 Belgian survey scaled responses from 0 to over 10 hours/day
 NL Survey scaled from less than 1 to over 4 hours (128 responses)
 NL responses over 4 hours assumed to average 5-6 hours
 Belgian survey assessed listening by other household members
 B & NL - Countries with highest cable penetration and the most MCE subscribers

APPENDIX 5

MCE ROYALTY HYPOTHESES

Annual Payments (£)

Belgium	Finland	France	Germany	NL	Norway	Switz	U.K
---------	---------	--------	---------	----	--------	-------	-----

Weighted
Average

CASE 1 - SAME NATIONAL RATES AS RADIO STATIONS

Assumes 100% Music Use

Composers

Estimated Effective National Rates	4.2%	7.0%	3.6%	4.8%	7.2%	0.0%	4.2%	6.2%
Base - Subscriber Price ex tax (£)	4.52	7.54	3.74	4.92	7.39	0.00	6.24	4.72
Base Subscriber Price ex equipment (£)	2.26	3.77	1.87	2.46	3.69	0.00	3.12	2.36
Base - MCE Net Receipts (£)	0.94	1.39	0.80	1.29	1.74	0.00	0.94	1.49

4.9%
4.74
2.37
1.20

Producers :

Estimated Effective National Rates	0.00	7.0%	3.8%	3.1%	0.0%	0.0%	1.1%	4.3%
Base - Subscriber Price ex tax (£)	0.00	7.54	3.95	3.16	0.00	0.00	1.56	3.23
Base Subscriber Price ex equipment (£)	0.00	3.77	1.97	1.58	0.00	0.00	0.78	1.62
Base - MCE Net Receipts (£)	0.00	1.39	0.85	0.83	0.00	0.00	0.23	1.02

3.2%
3.02
1.51
0.77

CASE 2 - RADIO STATION EUROPEAN AVERAGE RATE

Assumes 100% Music Use

Composers

European Average Rate	4.64	4.6%	4.6%	4.6%	4.6%	4.6%	4.6%	4.6%
Base - Subscriber Price ex tax (£)	5.00	5.00	4.82	4.80	4.76	5.04	6.90	3.53
Base Subscriber Price ex equipment (£)	2.50	2.50	2.41	2.40	2.38	2.52	3.45	1.77
Base - MCE Net Receipts (£)	1.03	0.92	1.03	1.25	1.12	0.89	1.03	1.11

4.6%
4.58
2.29
1.13

Producers :

European Average Rate	3.13	3.1%	3.1%	3.1%	3.1%	3.1%	3.1%	3.1%
Base - Subscriber Price ex tax (£)	3.37	3.38	3.26	3.24	3.22	3.41	4.66	2.38
Base Subscriber Price ex equipment (£)	1.69	1.69	1.63	1.62	1.61	1.70	2.33	1.19
Base - MCE Net Receipts (£)	0.70	0.62	0.70	0.85	0.76	0.60	0.70	0.75

3.1%
3.09
1.64
0.76

CASE 3 - CISAC 10% GUIDELINE

Guideline Rate 10.0%
Adjusted Rate 9.0%
(12.5% of MCE channels are classical
of which est 80% non-copyright)

Guideline Rate	10.0%	9.0%	9.0%	9.0%	9.0%	9.0%	9.0%	9.0%
Adjusted Rate	9.0%	9.0%	9.0%	9.0%	9.0%	9.0%	9.0%	9.0%
Base - Subscriber Price ex tax (£)	9.69	9.70	9.35	9.30	9.23	9.78	13.37	6.85
Base Subscriber Price ex equipment (£)	4.84	4.85	4.67	4.65	4.62	4.89	6.69	3.42
Base - MCE Net Receipts (£)	2.00	1.78	2.00	2.43	2.17	1.74	2.00	2.16

9.0%
8.87
4.44
2.19

MCE - COMPARISON OF EQUIVALENT ROYALTY PAYMENTS

ROYALTY PER THOUSAND HOURS LISTENED - E

COMPOSERS			
France	Germany	U.K	Average

PRODUCERS			
France	Germany	U.K	Average

EFFECTIVE BROADCAST PAYMENTS

	France	Germany	U.K	Average
Effective Broadcast Royalty Index	0.30	0.51	0.47	0.44
	1.0	1.0	1.0	1.0
000's Hours per Household	2.96	2.96	2.96	2.96
Equivalent Royalty Per Household	0.89	1.50	1.38	1.29

	France	Germany	U.K	Average
Effective Broadcast Royalty Index	0.31	0.48	0.39	0.41
	1.0	1.0	1.0	1.0
000's Hours per Household	2.59	2.27	2.52	2.43
Equivalent Royalty Per Household	0.80	1.09	0.99	0.99

CASE 1 - NATIONAL BROADCAST RATES

	France	Germany	U.K	Average
MCE Royalty - Subscriber Price Ratio	3.74	4.92	4.72	4.52
	4.2	3.3	3.4	3.5
MCE Royalty - Ex Equipment Ratio	1.87	2.46	2.36	2.26
	2.1	1.6	1.7	1.8
MCE Royalty - Net Receipts Ratio	0.80	1.29	1.49	1.21
	0.9	0.9	1.1	0.9

	France	Germany	U.K	Average
MCE Royalty - Subscriber Price Ratio	3.95	3.16	3.23	3.41
	4.9	2.9	3.2	3.4
MCE Royalty - Ex Equipment Ratio	1.97	1.58	1.62	1.70
	2.5	1.5	1.6	1.7
MCE Royalty - Net Receipts Ratio	0.85	0.83	1.02	0.89
	1.1	0.8	1.0	0.9

CASE 2 - EUROPEAN AVERAGE RATE

	France	Germany	U.K	Average
MCE Royalty - Subscriber Price Ratio	4.82	4.80	3.53	4.44
	5.4	3.2	2.6	3.4
MCE Royalty - Ex Equipment Ratio	2.41	2.40	1.77	2.22
	2.7	1.6	1.3	1.7
MCE Royalty - Net Receipts Ratio	1.03	1.25	1.11	1.15
	1.2	0.8	0.8	0.9

	France	Germany	U.K	Average
MCE Royalty - Subscriber Price Ratio	3.26	3.24	2.38	3.00
	4.1	3.0	2.4	3.0
MCE Royalty - Ex Equipment Ratio	1.63	1.62	1.19	1.50
	2.0	1.5	1.2	1.5
MCE Royalty - Net Receipts Ratio	0.70	0.85	0.75	0.78
	0.9	0.8	0.8	0.8

CASE 3 - CISAC GUIDELINE RATE

	France	Germany	U.K	Average
MCE Royalty - Subscriber Price Ratio	9.35	9.30	6.85	8.60
	10.5	6.2	5.0	6.7
MCE Royalty - Ex Equipment Ratio	4.67	4.65	3.42	4.30
	5.3	3.1	2.5	3.3
MCE Royalty - Net Receipts Ratio	2.00	2.43	2.16	2.23
	2.3	1.6	1.6	1.7

MCE - COMPARABLE ROYALTY YIELD AS PRINCIPAL EUROPEAN COUNTRIES

	France	Germany	U.K	Weighted Average
Adults 15 plus	46,064	67,733	46,886	160,683
Country Weight	28.7%	42.2%	29.2%	100.0%
Population/Household	2.59	2.27	2.52	2.43

ROYALTY PER POTENTIAL LISTENER

Composers (£)	0.11	0.11	0.18	0.13
Equivalent/Household	0.30	0.25	0.45	0.32
MCE Subscriber Price (%)	0.3%	0.2%	0.6%	0.3%
Subscriber Price ex equipment (%)	0.6%	0.5%	1.2%	0.7%
MCE Net Receipts (%)	1.3%	0.9%	1.9%	1.3%

Producers (£)	0.12	0.10	0.15	0.12
Equivalent/Household	0.31	0.23	0.38	0.30
MCE Subscriber Price (%)	0.3%	0.2%	0.5%	0.3%
Subscriber Price ex equipment (%)	0.6%	0.4%	1.0%	0.6%
MCE Net Receipts (%)	1.4%	0.9%	1.6%	1.2%

ROYALTY PER ACTUAL LISTENER

Composers (£)	0.19	0.24	0.37	0.28
Equivalent/Household	0.49	0.55	0.94	0.65
MCE Subscriber Price (%)	0.5%	0.5%	1.2%	0.7%
Subscriber Price ex equipment (%)	0.9%	1.1%	2.5%	1.3%
MCE Net Receipts (%)	2.2%	2.0%	3.9%	2.6%

Producers (£)	0.19	0.23	0.32	0.24
Equivalent/Household	0.50	0.52	0.80	0.59
MCE Subscriber Price (%)	0.5%	0.5%	1.0%	0.6%
Subscriber Price ex equipment (%)	1.0%	1.0%	2.1%	1.2%
MCE Net Receipts (%)	2.3%	1.9%	3.3%	2.4%

ROYALTY PER 000 HOURS LISTENED

Annual Hours/MCE Household (000's)				2.96
------------------------------------	--	--	--	------

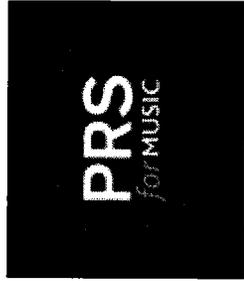
Composers (£)	0.30	0.51	0.47	0.44
Equivalent/Household	0.89	1.50	1.38	1.29
MCE Subscriber Price (%)	0.9%	1.5%	1.8%	1.3%
Subscriber Price ex equipment (%)	1.7%	2.9%	3.6%	2.6%
MCE Net Receipts (%)	4.0%	5.6%	5.7%	5.3%

Producers (£)	0.31	0.46	0.39	0.41
Equivalent/Household	0.92	1.42	1.17	1.20
MCE Subscriber Price (%)	0.9%	1.4%	1.5%	1.2%
Subscriber Price ex equipment (%)	1.8%	2.7%	3.1%	2.4%
MCE Net Receipts (%)	4.1%	5.3%	4.9%	4.9%



MC 11

MC 11



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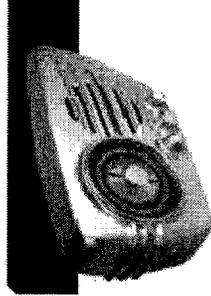
Commercial radio licence

Community radio licence

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Music licences for online and mobile

Already familiar with broadcast and online licensing?



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This licence covers commercial radio on AM/FM, any DAB and any satellite radio services

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- DAB radio station
- Satellite radio stations
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Contact radio licensin

Radio Licensing
Broadcast & Online Licens
PRS for Music
Copyright House
29-33 Berners Street Lon
W1T 3AB
[Email us](#)

- [Satellite and cable stations](#)

PRS licence fees for commercial analogue radio stations

PRS Licence Fee (1 October 2011 – 30 September 2012)

Annual NBR	Royalty Rate
Less than £627,540	3%
Between £627,541 and £1,255,080	4%
or more £1,255,081	5.25%

Subject to the annual minimum fee, where the total music use is less than 15% of total broadcast time, and regardless of the NBR level, the percentage rate will be 1%

The NBR bands and minimum royalty are adjusted yearly, from 1 October, by reference to inflation (RPI).

All fees quoted are subject to VAT.

PRS licence fees for DAB, satellite and cable stations

PRS Licence Fee (1 October 2011 – 30 September 2012)

Annual NBR	Royalty Rate
Less than £22,238	£667 Non-returnable Minimum Fee
Between £22,238 and £627,540	3%
Between £627,541 and £1,255,080	4%

or more **£1,255,081**

5.25%

Subject to the annual minimum fee, where the total music use is less than 15% of the total broadcast time, and regardless of the level of the NBR level, the percentage rate will be

1%

The licence fee will be based on a percentage of Net Broadcasting Revenue (NBR), subject to a minimum royalty fee.

The NBR bands and minimum royalty are adjusted yearly, from 1 October, by reference to inflation (RPI).

All fees quoted are subject to VAT.

Important information for all commercial radio stations

MCPS licence fee

All radio stations that are members of the RadioCentre (previously CRCA) are covered by the MCPS/RadioCentre agreement.

Non-RadioCentre radio stations will require clearance from MCPS directly. However, this clearance scheme is under review and details will be provided in due course. For more information, please contact radiolicensing@grsformusic.com

How to make payment

All licensees must pay by direct debit.

If your licence fee is based on a percentage of revenue, direct debit collection will happen monthly.

If your licence fee is based on the annual minimum royalty of £667, direct debit collection will happen quarterly. This also applies to the MCPS fee.

Radio stations must submit an **NBR** report at the end of the licence year, detailing the relevant revenue earned in the period. If the actual **NBR** submitted at the end of

the licence year is greater than the estimated NBR given at the start of the year, the radio station could be eligible to pay a higher royalty fee and would need to settle the balance. Likewise, if the actual NBR is less than previously estimated, we will refund the difference. Please note this does not apply to those stations paying the minimum royalty fee.

Test transmissions

Test transmissions are not covered by your Commercial Radio Licence. For this you will need an additional licence. Please email radiolicensing@prsformusic.com for more details.

Music returns

During the sample dates or census periods, all commercial radio licensees need to report the following music usages:

- Music
- Idents (including beds, jingles, FX, promos)
- Adverts

Reporting should be supplied to us within 35 days of each sample date or census period and should include: song title, composer, publisher, artist and duration.

Licensees should use the following reporting formats - Format 5, Format 303, Selector, Radio Generic (Excel based), and preferred delivery methods include email and FTP. We offer extensive help and guidance on these issues. Please contact musicreporting@prsformusic.com for more information.

If you have any further questions, please email radiolicensing@prsformusic.com



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TRADITIONAL RADIO LICENCE FEES

STATIONS QUALIFYING FOR PPL'S TRADITIONAL RADIO LICENCE WILL BE CHARGED ON A QUARTERLY BASIS.

The calculation of licence fees for the Traditional Radio Licence is based on the greater of a Minimum Annual Fee for each broadcast platform or the royalty band that a radio station or network falls within, dependent on the Net Broadcasting Revenue that they report.

Net Broadcasting Revenue is calculated as 85% of the gross revenues generated by a radio station or network.

For a detailed explanation of Minimum Annual Fees, contact PPL, but in basic terms, they are calculated for each broadcast platform on a station as:

If the station is broadcast in AM and/or FM format, £590

If the station is broadcast in Digital Audio Broadcasting (DAB) format, £108 per local DAB multiplex. However, if a DAB service is not also broadcast in AM and/or FM format, £590

If the station is broadcast on a national DAB multiplex, £1,075

If the station is included in a satellite simulcast service, £1,075

If the station is included in a local cable simulcast service, £108. If the station is included in a national cable service, £1,075

If the station is broadcast via Digital Terrestrial Television (DTT), such as Freeview, £1,075

If the station is included in a UK Internet simulcast service, £1,075

The current Net Broadcasting Revenue royalty bands for the Licence Year 1st October 2010 to 30th September 2011, are:

Less than £628,878 = 2%

£628,878 - £1,257,755 = 3%

More than £1,257,755 = 5%

However, where 15% or less of a station's broadcast output consists of PPL members' repertoire, the amount payable will be 1% of the station's total Net Broadcasting Revenue.

IN THIS SECTION

REPORTING YOUR MUSIC USAGE

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APPLICATION FORM

Please click to download the

[PPL application form](#)

MC 12



**IN THE MATTER OF A REFERENCE UNDER THE
COPYRIGHT, DESIGNS AND PATENTS ACT 1988 (as amended)**

**Before: His Honour Judge Fysh QC, SC (Chairman)
Rear-Admiral James Carine and
Colonel Roderick Arnold**

BETWEEN:

- (1) THE BRITISH PHONOGRAPHIC INDUSTRY LIMITED
- (2) MUSICNET (UK) LIMITED
- (3) YAHOO ! UK LIMITED
- (4) AOL (UK) LIMITED
- (5) REALNETWORKS LIMITED
- (6) NAPSTER LLC
- (7) SONY UNITED KINGDOM LIMITED
- (8) iTUNES S.a.r.l.
- (9) O2 (UK) LIMITED
- (10) T-MOBILE INTERNATIONAL (UK) LIMITED
- (11) VODAFONE UK CONTENT SERVICES LIMITED
- (12) ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED

Applicants and Interveners

and

- (1) MECHANICAL-COPYRIGHT PROTECTION SOCIETY LIMITED
- (2) PERFORMING RIGHT SOCIETY LIMITED
- (3) BRITISH ACADEMY OF COMPOSERS AND SONGWRITERS

Respondents and Intervener

INTERIM DECISION

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Representation:

Applicants and Interveners

28 September 2006 [ie prior to the partial settlement]

Ian Mill QC and *Mark Vinall* (instructed by *Olswang*) appeared on behalf of the British Phonographic Industry Limited.

Kenneth Steinthal (New York Bar), *Joe Salvo* (New York Bar) and *Kambiz Larizadeh* of *Weil, Gotshal & Manges* appeared on behalf of MusicNet UK Limited, Yahoo! UK Limited, AOL (UK) Limited, RealNetworks Ltd, Napster LLC and Sony United Kingdom Limited.

Tom Weisselberg (instructed by *Davenport Lyons*) appeared on behalf of iTunes S.a.r.l. (Interveners)

Henry Carr QC (instructed by Baker & Mackenzie) and *Ben Allgrove* of *Baker & McKenzie* appeared on behalf of O2 (UK) Limited, T-Mobile International (UK) Limited, Vodafone UK Content Services Limited and Orange Personal Communications Services Limited.

Respondents and Intervener

Lawrence Rabinowitz QC, *Robert Howe* and *Ben Jaffey* (instructed by *Denton Wilde Sapte*) appeared on behalf of the Mechanical-Copyright Protection Society Limited and the Performing Right Society Limited.

Charles Aldous QC and *Edmund Cullen* (instructed by *Denton Wilde Sapte*) appeared on behalf of the British Academy of Composers & Songwriters (Interveners).

15 November 2006 to 17 January 2007

Applicants and Interveners

Kenneth Steinthal (of the New York Bar), *Joe Salvo* (of the New York Bar) and *Kambiz Larizadeh* of *Weil, Gotshal & Manges*) appeared on behalf of Yahoo! UK Limited, AOL (UK) Limited and RealNetworks Ltd.

Tom Weisselberg (instructed by *Davenport Lyons*) appeared on behalf of iTunes S.a.r.l.(Interveners)

Henry Carr QC (instructed by Baker & Mackenzie)and *Ben Allgrove* of *Baker & McKenzie*) appeared on behalf of O2 (UK)

Limited, T-Mobile International (UK) Limited, Vodafone UK Content Services Limited and Orange Personal Communications Services Limited.

Respondents and Intervener

Laurence Rabinowitz QC, Robert Howe and Ben Jaffey (instructed by *Denton Wilde Sapte*) appeared on behalf of the Mechanical-Copyright Protection Society Limited and the Performing Right Society Limited.

Charles Aldous QC and Edmund Cullen (instructed by *Denton Wilde Sapte*) appeared on behalf of the British Academy of Composers & Songwriters (Intervenors).

A Glossary¹

The Academy or BACS : British Academy of Composers and Songwriters. Members of the Academy are generally also members of **PRS** and/or **MCPS**.

The Act: The Copyright, Designs and Patents Act 1988 (as amended), otherwise 'CDPA '88'.

The Alliance: PRS and MCPS. These are two collecting societies. Though separate legal entities, PRS and MCPS merged their operations in 1997. In order for any exploitation of music to take place online it is necessary both to make copies of musical works (see **MCPS** below) and to communicate them in public over the Internet or in the case of the MNOs, wirelessly over a mobile network (see **PRS** below). Hence the presence of the combination of the two in these Applications has been called 'the Alliance'.

The Applicants: Collectively (and in context), iTunes, the **MNOs** and the **Remaining MSPs**.

BPI: The British Phonographic Industry Limited. This is the UK record industry trade association and represents the interests of more than 300 record companies based in the UK.

CRCA: Commercial Radio Companies Association. The CRCA Agreement contains the Alliance's licence terms for commercial radio

DRM: Digital Rights Management. A technology applicable to downloads which requires the authorised user to obtain a licence to make use of protected material which he possesses.

FTD: Full track download. Approximately equivalent to a permanent download.

iTunes: iTunes s.a.r.l

JOL: A Joint Online Licence promulgated by **the Alliance**. There have been a number of these all of which have been proposed on an annual basis, the first having been promulgated in 2002. All of them have now been superseded.

¹ A glossary of technical and industry terms is to be found at Annex B to the Alliance's closing written submissions. By the time of writing this Decision, this glossary had been largely (but not completely) agreed between the parties.

- The New JOL:** The New Joint Online Licence. That is, the **JOL** as substantially amended as a result of a settlement with **BPI** (and others) on 28 September 2006 and which is in issue in these proceedings.
- LD/ODS:** Limited download/on - demand streaming
- MCPS:** Mechanical-Copyright Protection Society Limited. **MCPS** licences the mechanical right (i.e. the right to authorise or prohibit the making of copies of musical works)² on behalf of its members who are authors, composers and publishers.
- MNO:** Mobile Network Operator, being the following four³ parties:
O2: O2 (UK) Limited
T-Mobile: T-Mobile International (UK) Limited
Vodafone: Vodafone UK Content Services Limited
Orange: Orange Personal Communications Services Limited.
- The interest of the MNOs in these proceedings is both as retailers of online music (and who therefore require a licence from the Alliance) and also as mobile internet service providers for third party retailers of online music.
- MSP:** Music Service Provider. The MSPs in these Applications are referred to as ‘**The Remaining MSPs**’, also referred to as ‘**The Webcasters**’:
Yahoo !: Yahoo ! UK Ltd ,
AOL: AOL (UK) Ltd, and
RealNetworks : RealNetworks Limited .
- PPL:** Phonographic Performance Ltd. PPL was formed by EMI and Decca in 1934.
- PRS:** Performing Right Society Limited. PRS licences the communication of works to the public together with the performing right for the benefit of a membership similar to that of MCPS⁴. Both PRS and MCPS are collecting societies and licensing bodies within the meaning of the Act, s 116(2)
- PRT:** Performing Right Tribunal. The predecessor to the **Copyright Tribunal**.

Authorities cited in the Decision:

AIRC v PPL [1993] EMLR 181
AIRC v PPL 16 January 1986 (unrep. Harman J)
AEI v PPL [1998] EMLR 240, [1998] RPC 335
APRA v ABC (1985) 5 IPR 449
BPI v MCPS (no 2) [1993] EMLR 86
BSkyB v PRS [1998] EMLR 193 *BACTA v PPL* [1992] RPC 149
Cala Homes v McAlpine Ltd [1995] FSR 818
ITCA v PRS (PRT 38/81, unrep. October 19 1983)
Manx Radio v PPL (unrep) PRT 18/64 29 May 1965
PRS v BSKyB [1998] EMLR 193
PRS v BEDA (PRT unrep, 1 August 1989), and Hoffmann J [1993] EMLR 325.

² The Act, ss. 17 and 18.

³ Of the five mobile network operators in the UK

⁴ The Act, ss 19 and 20.

R v Chen [2006] EWCA Crim. 2526
Rockwater v Technip France SA [2004] RPC 919
SBC v PRS [1991] FSR 573
The Ikarian Reefer [1993] FSR 563
Universities UK Ltd v CLA [2002] RPC 693
Working Men's Club & Institute Union Ltd v PRS [1992] RPC 227

Dates of hearing:

28 September, 14-17, 20-24 and 28 November,
5-8 December 2006, 15-17 January 2007 and 16- 17 July 2007.

Documentary citations in the Decision

Trial bundles will be referred to by binder number, tab and where appropriate, page number: e.g. A3/2/18.

Witness statements and Expert reports will be referred to by the surname of the witness or expert followed by the number of his/her statement/report and the paragraph number: e.g. Ferguson 1/ §6

Transcript evidence: will be referred to by day, page and where appropriate, line number: e.g. D11/187/5

Terminology: 'online' and 'offline', 'downloads' and 'streams'.

Since these terms are used throughout this Decision and in spite of the fact that many readers of it will be well aware of what they mean, we have nevertheless thought it best to record the ambit and context of our usage of these terms. This case is concerned only with digital recordings of music. It is possible to access and to download a digital music file via the Internet. It is also possible to access digital music using mobile telephone handsets, the latter being served via mobile telephone networks which in turn are operated by **MNOs**. Both possibilities are collectively referred to as **'online'** music access. On the other hand, the delivery of music via a physical medium, typically a CD, a DVD, a tape or a vinyl (or other) record, *or* via a radio or television broadcast *or* by cable, has been collectively included within the term **'offline'** music. A **download** means a file of recorded music intended to be copied onto a consumer's local storage device from a remote source such as a website server. On the other hand, a **stream** is a file of continuous music which may be listened to through a consumer's receiving computer or device but only to the extent required to allow listening to the file at substantially the same time as the file is transmitted i.e. no playable copy of the music remains.

I INTRODUCTION

Prologue

1. This Decision concerns a number of references to the Copyright Tribunal ('the Tribunal') relating to the terms of licences issued by two collecting societies, PRS and MCPS (collectively called 'the Alliance'), which enable music legitimately to be made available online to members of the public.
2. More than twenty years ago music first became available in digital form; the CD began to replace tapes and vinyl records as the standard carrier of music. The next major development in the music industry has already proved to be considerably more radical than the digital revolution. Everywhere one now sees people of all ages wired into MP3⁵ players such as iPods. They are enjoying the ubiquitous benefits of music downloaded from the Internet. Perhaps even more members of the public enjoy such music by being in possession of mobile telephones with Internet access and of course, of personal computers.
3. Those disputing the terms of the Alliance's licences are most of the powerful protagonists of the online music industry. We are aware that much is at stake in these proceedings. Though there has been a measure of compromise among the parties, the issues remaining have proved difficult to resolve largely as a result of the complex and changing nature of the online music offerings involved. There are in fact three very broad types of such offerings: permanent downloads, limited downloads and on-demand streaming/webcasting. However, as we shall show, what is actually happening in the music industry is more complex.
4. Among the references to the Tribunal, this group of applications⁶ must be unique.
 - In the first place, this has been the first reference which is concerned with valuing the use of copyright material (in this case, the work of composers, writers and publishers of music), which is available *online* for sourcing and consumption.
 - Secondly, these Applications originally involved more parties than any other before it of which we are aware, all of the parties being major players in various aspects of the online entertainment, communications and music industries.
 - Thirdly, this Application is concerned with what one expert called 'new phenomena'. The means by which online music is made available to users and the manner in which it can be manipulated for consumption is complex and sophisticated and seemed to grow as the case went on. This appears to be the

⁵ MPEG-1 Audio Layer 3. A digital audio encoding and compression format.

⁶ These were in fact both references and interventions (see Copyright Tribunal Rules 1989 ('CTR') rr. 3 and 7). For convenience we have used the word '**Applications**' to describe them collectively.

result of both rapidly advancing technology and innovative business models. Not surprisingly, this development has proved to be a lucrative forum for establishing all manner of advertising and subscription, thereby generating new revenue streams within the industry. The Tribunal is not therefore dealing with the traditional music exploitation such as by the sale of a physical product (such as a CD), by broadcasting or by making music available within a particular environment, say, a night club. We are now concerned with the availability of music embedded as it were, in a variety of electronic vehicles ('business models') devised by highly intelligent and motivated innovators for an increasingly sophisticated, user-led consumption⁷.

- Before the hearing, a settlement of a major portion of the dispute occurred. The status of this very recent settlement as a relevant comparator for what remains to be adjudicated has been an important ongoing issue in the case.
 - Finally, we believe that this reference must have been about the most costly ever to have been litigated in the Tribunal, the parties having spent (so we understand) some £12 million in costs by the date of the conclusion of the hearing⁸. We shall have more to say about this at the end of this Decision.
5. At the Tribunal's request, an agreed *dramatis personae* has been prepared (as **Annex 1** hereto⁹) which identifies (*inter alia*) the parties and epitomises their relevant commercial interests.
 6. It is important at the outset to have an overview of the events leading to the Applications. We shall first identify the participants as they originally were when the Applications were initiated and then see how the position has changed. As may be seen from the title page of this Decision, the original Applicants were twelve in all. All were actively involved in one way or another in *inter alia* the online and mobile music industry¹⁰. They fell into three broad groups: the BPI, the MNOs and the MSPs.
 7. Shortly before the hearing, a degree of settlement (both complete and qualified) reduced the number of Applicants - and also the number of contentious issues. The terms of the licensing schemes originally proposed by the Alliance for the use of online music which triggered these Applications ('the JOLs') were amended as a result of this settlement and became a new scheme, '**the New JOL.**'¹¹ This New JOL generated substantially amended (or supplemental) Statements of Case, all of which are to be found in Volume A6. We would add that all the licensing proposals which have been in issue have been 'schemes' within the meaning of the Act, s 116 (1).

⁷ Not all forms of online exploitation of the Alliance repertoire are covered by existing and proposed licences. Ringtones for example (though mentioned from time to time) are without the present terms of reference.

⁸ According to a statement which was posted on the Alliance's website in December 2006.

⁹ **Annex 1** is actually a combined *dramatis personae*, witness list (containing abbreviated details of both witnesses of fact and expert witnesses) and a chronology. There was partial disagreement in the detail of one item of this document and in addition, some suggestion that such detail was confidential. We have considered these suggestions and do not believe either to be sustainable.

¹⁰ The Academy was a late intervener – a *respondent* intervener.

¹¹ H/1/13.

8. **The Alliance** were represented by Mr Rabinowitz QC, Mr Robert Howe and Mr Jaffey. In the Glossary, we referred to why a Joint Online Licensing agreement is needed. There is in fact a technical reason (see '*Dubbing*' below) why online exploiters of music need licences from both the PRS and the MCPS in order to make their services available to the public online.
9. Prior to trial, on 10 November 2006, the Alliance and the MNOs agreed certain facts which have been included in (inter alia) the MNOs' Revised Opening Skeleton Argument as Annex 1. The record of the agreement is referred to as '**the Agreed Facts**', the idea having been to reduce the scope of the evidence and argument to be advanced at trial. In correspondence with the Tribunal, iTunes also agreed facts 5 and 12. In what follows, we have made use of this document.
10. The **BPI** is the trade association of the principal record companies in this country and is responsible for over 90% of commercial sound and audio-visual recordings. The Agreed Facts (11) records the following:

'The BPI's members are most commonly content suppliers to music retailers, like the MNOs and the MSPs rather than music retailers themselves. In their capacity as content suppliers to music retailers, the BPI's members would not be licensed under the JOL, as they are not Music Service Providers.'
11. Shortly before the hearing (so shortly in fact, as to require an adjournment), a settlement was reached between BPI, iTunes and the MNO's on the one hand and the Alliance and the Academy on the other ('**the Settlement Agreements**'). Attached to the Settlement Agreements was the New JOL. BPI's settlement was comprehensive and it thereupon withdrew from *any* further participation in the proceedings. The settlement with iTunes and the MNOs however was conditional upon the resolution of an important item relating to the definition of 'Gross Revenue'. These were their so-called '**Disputed Contentions**' (see below).
12. Other parties¹² also settled but on the basis of a different definition of Gross Revenue ('**the Home Page Concession**'- see below) and with the benefit of any gains made by iTunes on the issue of Gross Revenue.
13. The **MNOs** offer a variety of items to the public via their content portals. This includes a broad mix of commercial products: games, audio and audio-visual downloads and streaming (music and non-music), news, sports, ringtones, 'wallpapers', audio-books mobile TV and probably by now, other services as well. Most of these have nothing at all to do with music or activities licensed under the New JOL and thus, what is essentially at stake in these Applications.
14. The New JOL provides for the payment of royalty to the Alliance in respect of identified revenue streams, being based on what is defined as '**Gross Revenue**'. The Disputed Contentions of the **MNOs** and **iTunes** were related and concerned the definition of Gross Revenue when music was offered (respectively) for free

¹² Napster, MusicNet and Sony

or at a subsidised rate, in either case as a result of advertising, sponsorship etc. The Home Page Concession on the other hand was part of a comprehensive settlement with the Alliance and hence there has been no further argument from the parties involved in that aspect of the definition.

15. That left the three ‘**Remaining MSPs**¹³’, sometimes called ‘**The Webcasters**’, whose online musical offerings primarily consist of webcasting services. They were represented by Mr Steinthal and did not participate in the Settlement Agreements¹⁴. Their submissions differed slightly from those of iTunes and the MNOs on the issue of Gross Revenue –and generally.
16. Mr Steinthal tended to distance the Remaining MSPs from most of the terms of the New JOL – in particular, those relating to webcasting. Looking ahead for a moment, the New JOL was not, he argued, a useful ‘comparator’ for the Tribunal principally because, so he submitted, those licensed thereunder had no present, practical interest in webcasting. Their core commercial interests were elsewhere. As far as its signatories were concerned, its webcasting terms had merely been part of a package – and, said Mr Steinthal, an unimportant part at that. Nonetheless, by the time of the hearing, Mr Steinthal did accept the propriety of some of its terms, including terms which prior to the Settlement Agreements, had been universally in contention.

*Miscellaneous preliminary matters*¹⁵

17. **The PRS** The PRS was incorporated in 1914 as a non-profit company limited by guarantee. The members of the PRS comprise:
 - (a) composers of music
 - (b) authors of lyrics
 - (c) publishers of such music and lyrics, and
 - (d) successors in title of deceased composers and authors.
18. The PRS exists to administer the rights of public performance, broadcasting and diffusion by cable given by the copyright in those works. Virtually all composers, lyricists and music publishers in the UK have assigned their relevant public performance copyrights to the PRS which thus has an effective *de facto* monopoly on the grant of licences for copyright music in the UK. The PRS’ income derives principally from its licensing activities. It deducts administration costs and then passes on royalties to its members in accordance with its own rules of distribution.
19. The PRS has reciprocal arrangements with similar collecting societies all in other countries.

¹³ That is Yahoo !, AOL and RealNetworks

¹⁴ Though Mr Steinthal had been involved in settlement discussions with other MSPs and the Alliance.

¹⁵ In no particular order of importance.

20. The PRS' repertoire, which we refer to simply as 'the repertoire', comprises an enormous *corpus* of music and lyrics representing the collected output of many, many composers and lyricists over a very considerable time. There is of course some small amount of music which is not within the repertoire and in this case (as in numerous others), this fact has been raised to bolster arguments from would be licensees. In view however of the preponderance of material within the repertoire, we have taken no account of it. In doing so we have followed a long tradition of the Tribunal and of its predecessor.
21. **The Academy** The Academy entered these proceedings as late interveners and also participated in the Settlement Agreements. They instructed the same firm of solicitors as the Alliance (albeit using a different in-house team) and were separately represented by Mr Charles Aldous QC and Mr Edmund Cullen. Mr Aldous explained that many members of the Academy were self-employed freelance composers and writers who were also members of the Alliance. However, their interests, he said, were not always the same as those of the corporate members of the PRS - such as its influential publisher members. The Academy had therefore decided to intervene so as to ensure that the interests of writers and composers (whose works are after all, at the heart of these proceedings), were properly represented. Needless to say, the Academy endorsed the New JOL. We felt however that overall, the contribution of the Academy was inevitably a recapitulation of the Alliance's case. And where Mr Aldous made a submission which the Alliance had not made *expressis verbis*, it was endorsed by the Alliance. In fact (and despite the eloquence of Mr Aldous' presentation), we discerned no difference of substance between the Alliance's and the Academy's cases. Henceforth, when we refer (for example) to the submissions of the Alliance we intend to include those of the Academy – and *vice versa*.
22. **Piracy** This is a topic which we felt was more debated at the beginning of the proceedings than at the end. It is not in dispute (indeed it is notorious) that there is now a very high level of piracy in the music industry, online and offline¹⁶. There was a certain amount of evidence about how serious this is¹⁷ and how it occurs. There was evidence (for example) of the use of filesharing technology to promote the distribution of music and of the unauthorised downloading of files containing music in the Alliance's repertoire via the Internet. We learnt of the practical problems associated with online liability and immunity and of the difficulty of pursuing the huge numbers of people who practice illegal filesharing and downloading.
23. We record that this is a matter which we (like many others) take most seriously; it is undoubtedly a huge problem for the music industry. Its relevance to these proceedings was twofold. First, it was said to be enough, to justify a '*New Format Discount*' which is still of concern to the remaining MSPs. This will be considered towards the end of the Decision. Secondly, iTunes (who have been pioneers in the downloading sector) regard piracy and the purchase of CDs (in that order) as their main competitors. In order to compete therefore, iTunes has

¹⁶ For a recent example, see *R v Chen* [2006] EWCA Crim. 2526.

¹⁷ See for example, the Alliance's expert Ms Enders, D11/117 and 122, the Applicants' second expert Mr Ridyard (Ridyard 1, §88) and the Alliance's second expert Mr Biro (Biro 2/61ff)

had to set up an attractive, easy to use, and *reasonably priced* online service in order to provide an alternative to piracy – which, said Mr Weisselberg, is ultimately to the benefit of the Alliance’s members. It has thus had to shoulder *risks which the Alliance has not borne* and that the gravity of these risks was uncertain because of the uncertainty of the impact of piracy in the future - and thus upon its ability to offer attractive pricing in the future. As we shall show, whether there has been risk-sharing is indeed a relevant issue and piracy is (so it was argued) a factor for the Tribunal to take into account in what follows. Though we have much sympathy for the emotive argument that the Applicants are in truth the ‘good guys’ of the music industry and should be in a measure rewarded for being so, this is an appeal *ad hominem* which is rather more difficult to factor into the general principles within which our decision must be reached. Our conclusions have thus tended to be ‘pirate neutral’.

24. **Confidentiality of documents.** A good deal of time was taken at the interlocutory stages of these Applications to devise means to prevent the disclosure, inadvertent or otherwise, of a considerable amount of disclosure material which the parties (particularly the Alliance) considered to be both relevant and confidential. The quality of such confidential information was categorised and its legitimate recipients were identified.
25. The principal order relating to confidentiality on disclosure is dated 10 February 2006 and was made by Mr Simon Thorley QC sitting as a Deputy Chairman of the Tribunal. First, two degrees of confidentiality were envisaged: Class 1 and Class 2 documents. The former was less sensitive, its disclosure being limited to the Tribunal, external legal advisers, experts and named individuals from the receiving party. Disclosure of Class 2 material was limited to the above persons except that there was to be a maximum of one recipient in the receiving party (if the receiving party elected to nominate a recipient at all)¹⁸. With the concurrence of the Tribunal, a ‘confidentiality club’ was therefore set up.
26. This régime seems to have worked well at trial. Nonetheless, the proliferation of confidential material during the course of this case has created for all those concerned a potential minefield. We have taken steps to exclude such material from this Decision though the narrative may have intermittently suffered as a result. We would add that Mr Rabinowitz sought to justify much of the lengthy evidence given by the Alliance’s industry expert Ms Enders on the basis that without her synthesis of the mass of confidential and semi-confidential material filed, the Tribunal might never be able to form a reasonable picture of how the industry operated.
27. **Factual Evidence** As noted, the BPI withdrew all its factual evidence. Following the settlement, the Alliance has also withdrawn all its factual evidence, leaving only exhibited documents. The Academy has also withdrawn all its factual evidence. The MSPs on the other hand were busy filing supplementary evidence, factual and expert, right up to the time of the hearing – all of which has been admitted.

¹⁸ The somewhat complex detail is to be found at A5/84.

28. **Unanswered Evidence** The evidence filed by the parties in this reference can with understatement be described as being voluminous – though it is fair to say that some of it pre-dates the Settlement Agreements. Not surprisingly therefore, there have been submissions by all the remaining parties that a number of items of written evidence remain ‘unanswered’ or ‘unchallenged’. Whilst we have noted these matters, we have also taken into account part of an interlocutory order made on 9 November 2005 by Mr Thorley, QC which reads as follows:

‘15. It shall not be necessary for a witness to be cross-examined in order to challenge his evidence. This provision also applies to part of the statement of a witness who is cross-examined but not on those parts.’

29. Similar provisions are often to be found in interlocutory orders made by the Tribunal with a view to discouraging prolonged (and too often unprofitable) bouts of cross-examination at the hearing.

30. **Demonstrations** Another difficulty in preparing this Decision has been adequately to describe the many online services in issue. Sensing perhaps some unfamiliarity on the part of members of the Tribunal with the panoply of online services in question, the parties kindly arranged for a number of demonstrations to take place where the services could be demonstrated to us and more importantly, where we could access and use the services for ourselves. There were two principal demonstrations, the second having been arranged by the time the hearing was about mid-way. The demonstrations took place at the London offices of Mr Steinthal’s firm, Messrs Weil, Gotshal & Manges in the City and there exists among the documents a short programme recording what we were shown. We record that we found these demonstrations to have been of immense assistance in the adjudication of this matter. They have however reinforced our view that no amount of prose can do justice to what we saw and heard and that for a proper appreciation of the issues in these Applications, there is no substitute for actually using the services for oneself.

31. **Shifting positions.** During the course of the hearing, much play was made by Messrs. Carr, Weisselberg and Steinthal on the fact that since the Applications had been made, the Alliance had substantially to moderate its demands on a number of major issues and continued to do so down to the time of closing speeches and even after¹⁹. In a word, it was said that they had been shifting their case from an outright attempt to obtain what Mr Weisselberg termed ‘an unprincipled windfall’, trying that is, to capture revenue streams to which they had no conceivable right, to demands of more modest proportion²⁰. There may be some truth in this but we do not regard that as necessarily a bad thing –or indeed anything unusual in cases such as this. With technology and business models such as we are dealing with here, there must, we feel, be room for early ranging shots to be fired. The narrowing of issues in litigation is always to be

¹⁹ After the conclusion of the evidence, the Alliance sent the parties a letter dated 4 December 2006 (**‘the 4 Dec. Letter’**) purporting to elucidate certain issues in the light of the evidence and the observations of the Tribunal. The Alliance was given leave to make short post-hearing submissions in writing. This resulted in inter partes correspondence which concluded on 23 January 2007.

²⁰ In fact, Mr Carr argued that in some respects their most recent demands were subtly more covetous by being dressed in woolly language. Mr Weisselberg was also of the view that the Alliance’s case had become more ‘hardline’ during the course of the hearing.

welcomed and is not necessarily symptomatic of (for example), a ‘try on’. We would mention that many of the Applicants also modified their cases as proceedings progressed –as may be seen from the settlements. In other words, these manoeuvres have had no impact on our Decision.

32. **Mr Kenneth Steinthal** Mr Kenneth Steinthal (of the New York Bar) is a member of the law firm Weil, Gotshal & Manges whose London office instructs him on behalf of the Remaining MSPs as their trial lawyer. At a procedural stage before the hearing began, Mr Steinthal, together with his colleague from the same firm, Mr Joe Salvo, sought leave to address the Tribunal. There was no opposition to the application and audience was accordingly given to both gentlemen.
33. By the time of closing speeches however, both the Alliance and the Academy had launched a personal attack on Mr Steinthal on the basis that he had misled the Tribunal in a material respect. The matter was almost entirely argued by Mr Charles Aldous QC, but what he submitted was (as we understood it) endorsed by Mr Rabinowitz QC on behalf of the Alliance.
34. The attack arose in relation to a substantive argument on the relevance of proper comparators which Mr Steinthal had advanced in apparently similar proceedings before The US Copyright Royalty Board (‘the Board’) in Washington DC in December 2006. There he was representing the Digital Media Association and its member companies America On Line Inc and Yahoo! Inc, to which he referred as ‘webcasters’. As we understand it, the latter companies are closely related to two of the three remaining MSPs for whom Mr Steinthal has appeared in London. Copies of the US webcasters’ written Preliminary Statement and Conclusions of Law were produced by Mr Aldous to support the complaint that one of the arguments proposed by the Remaining MSPs before the Tribunal was precisely the opposite to that espoused by Mr Steinthal in Washington before the Board. He also suggested that had it not been for some astute research on behalf of the Alliance in Washington, the matter might never have come to light. The point essentially concerned the historic licensing for public performance on radio in the US of musical works and the suitability of such licensing arrangements as a comparator or ‘benchmark’ for the purposes of the assessment with which the Board was then concerned.
35. Mr Steinthal, who it should be said had no warning of this attack, spent over an hour of his closing speech explaining what in fact he had been arguing before the Board. He first said that the US proceedings, the existence of which the Alliance had at all material times been well aware, were conducted in open court; there was thus never any question of covert manoeuvre on his part. He next referred at length to various issues and details arising in the US proceedings, to relevant US copyright law on the public performance of sound recordings and to other matters as well. In this way he sought to explain and justify the allegedly contradictory position into which he was said to have fallen.
36. In view of the way Mr Steinthal met this accusation and to the manner in which we have reached our own conclusions, we do not find it either profitable or necessary to revisit the detail of this incident. We were certainly not misled.

37. *Unfair Exclusion of the Remaining MSPs from negotiations?* It was more than once suggested by Mr Steinthal that the remaining MSPs were somehow deliberately excluded from the negotiations which led to the settlements²¹. Since these Applicants were offered the same terms as those who did negotiate and moreover are major players in the online music world with impressive legal advice to hand, this appeal for sympathy rings hollow – particularly as Mr Steinthal represented certain MSPs who did settle.
38. Some account nevertheless needs to be taken of the fact that the Remaining MSPs were indeed absent from the Settlement Agreement. They were of course very important players in the business. The effect of their absence on the levels of royalty eventually reached for webcasting services by those who did settle, is we believe, a legitimate matter for consideration by the Tribunal.

II THE TRIBUNAL’S APPROACH: GENERAL PRINCIPLES

The Statutory framework

39. Chapter VII CDPA '88 is entitled ‘Copyright Licensing’. Section 116(1) and (3) provide as follows:

- ‘(1) In this Part, a “licensing scheme” means a scheme setting out –
- (a) the classes of case in which the operator of the scheme or the person on whose behalf he acts, is willing to grant copyright licences, and
 - (b) the terms on which the licences would be granted in those classes of case; and for this purpose a “scheme” includes anything in the nature of a scheme, whether described as a scheme or as a tariff or by any other name
- (2)
- (3) In this section “copyright licences” means licences to do or authorise the doing of any of the acts restricted by copyright.’

40. We highlight this section because a major issue raised by the Applicants is that ‘Gross Revenue’ as defined in the New JOL covers activities for which no copyright licence can conceivably be required at law; the classic ‘copyright language’ of sub-section (3) has, they say, been conveniently overlooked by the Alliance.
41. The Applications have been brought under ss. 119, 121 and 126 of the Act. The terms of these and other relevant sections of the Act are so well known as to make it unnecessary to set them out fully and they are therefore incorporated into this Decision by reference. The group of sections in the Act which touch upon the power of the Tribunal to make orders after a reference has been made, all end with the phrase ‘*as the Tribunal may determine to be reasonable in the*

²¹ This was said upon the evidence of e.g. Mr Gabriel Levy, General Manager of Label Relations at RealNetworks: see Levy 3, § 8.2.

circumstances'- or variants of it. In the exercise of its powers, the Tribunal therefore has a discretion of the '*widest and most general form*'²². It has also been said that it is a determination which is '*notoriously difficult*' to arrive at²³, being at the end of the day 'a judgment call' taking into account a wide variety of factors.

42. Sections 129 and 135 offer some statutory guidance on the matters to be taken into account in the exercise of the discretion. Section 129 ('*General considerations Unreasonable Discrimination*') requires the Tribunal in coming to its decision, to have regard to the existence of 'other schemes or licences', a topic commonly referred to in this jurisdiction as 'comparators'. The section provides as follows:

'In determining what is reasonable in a reference or application under this Chapter relating to a licensing scheme or licence, the Copyright Tribunal shall have regard to –

a) the availability of other schemes or the granting of other licences, to other persons in similar circumstances, and

(b) the terms of those schemes or licences,

and shall exercise its powers so as to secure that there is no unreasonable discrimination between licensees, or prospective licensees, under the scheme or licence to which the reference or application relates and licensees under other schemes operated by, or other licences granted by, the same person.'

43. Section 135 is in more general terms and confirms the breadth of the discretion:

'The mention in sections 129-134 of specific matters to which the Copyright Tribunal is to have regard in certain classes of case does not affect the Tribunal's general obligation in any case to have regard to all relevant considerations'.

General approach

44. Before considering the relevant principles to be derived from past decisions, we should record that we are mindful of this general fact: that copyright (and thus the régime under which collecting societies operate), exists for the benefit of right holders – in this case, authors, musicians, performers etc. That benefit to the right holder is the primary policy of copyright has been present from the beginnings of modern copyright law²⁴. Statutory 'users' rights' as such are quite limited: see for example, the Act, Chapter III ('*Acts permitted in Relation to Copyright Works*')²⁵.

²² Per Harman J, *AIRC v PPL* (unreported) 16 January 1986.

²³ *AEI v PPL* [1998] EMLR 240 at 250.

²⁴ See for example, the Preamble to the Berne Convention ('BC') 1886, Art 9(1) and the use in the original of the phrase '*droit d'auteur*'. See also the WIPO Copyright Treaty Arts. 6-8 and the Infosoc Directive (2001/29/EC), recitals 9 and 10 and Art. 5(5).

²⁵ See also BC Art. 9(2) ('*Certain Special Cases*').

45. We mention this in the light of Mr Steinthal's broadest submission on behalf of the Remaining MSPs that certain of the terms (which he termed 'demands') proposed by the Alliance were 'outrageous' and that in the circumstances, his clients' response had had to be over-generous to a fault. The Alliance was, he suggested, exploiting a serendipitous right to participate in developments in information technology in which it had played no part and in which it had taken no risks. Moreover, he seemed disinclined even to acknowledge the practical (and mutual) benefits of collective licensing, benefits which have long been given universal statutory recognition. We consider this to be an unbalanced approach. The position is essentially this: the collecting societies have been accorded statutory (and indeed international) recognition in order to advance the proprietary (that is basically, the financial²⁶) interests of the right holders who comprise their membership. But the effects of that responsibility may sometimes have to be tempered. An important purpose of the Tribunal (and indeed of its counterparts elsewhere) is therefore to curb any tendency to *unwarranted* gain as a result of the *de facto* monopoly position in which the collecting societies find themselves²⁷. Overall however, the Tribunal's job as we see it is to favour neither side. It is to maintain a balance between copyright owners and users.
46. There is no presumption in favour of the referred scheme nor is there a presumption that a referred scheme should be varied²⁸. As to the burden of proof this hardly featured in argument. On an application to the Tribunal, the burden of proof is on the applicant to show that the *particular* licence offered to him is *unreasonable*; but he does not have to show that the proposals of the licensing body are unreasonable on any footing²⁹.

Tribunal decisions considered

47. A number of decisions of the Tribunal and of its predecessor³⁰ (and appeals to the High Court) were cited in argument. Save perhaps on the issue of Gross Revenue, there was no significant disagreement between the parties as to the general principles to be applied or as to the relevant law. The parties did however differ in the emphasis they laid on the relevance of certain of these decisions to the present case, particularly the relevance of some older decisions which were given at a time before the existence (let alone the availability) of online musical offerings. We have taken this into account and further record that we have not felt ourselves to be *bound* by any earlier decision of this Tribunal (or of the PRT). We record that three authorities assumed particular importance: BPI v MCPS (no 2), BSkyB v PRS and AIRC v PPL. We therefore turn to the guidance which is to be found from previous decisions taking these in no particular order.

²⁶ "What counts is money in the end." The oft quoted words of Mr Nicholas Lowe a solicitor and former Director of Broadcasting at the PRS.

²⁷ BSkyB v PRS [1998] EMLR 193 at 214-215.

²⁸ BPI v MCPS (No 2) [1993] EMLR 556.

²⁹ Manx Radio Case (18/64) PRT unrep. 29 May 1965.

³⁰ The Performing Right Tribunal ('PRT').

48. **Fairness.** In the exercise of its discretion and in the light of the evidence, the Tribunal must determine whether the *legitimate financial expectations* of (in this case) the Alliance, acting on behalf of its right holders, are *reasonable* in all the relevant circumstances. The Tribunal performs a discretionary, balancing exercise wherein the result must be

“ both fair to the licensee in terms of the value to the licensee of having access to the copyright sound recordings, and also fair to the licensee in giving him a proper reward for the effort put into the exploitation of the licensees’ intellectual property rights”³¹

49. **The willing buyer/willing seller test.** This is a classic test in this jurisdiction whose present applicability has been expressly endorsed by all concerned. In assessing a reasonable tariff, the Tribunal has frequently addressed the matter on the basis that the proper rate is that which would be negotiated between a willing licensee and a willing licensee of the copyright repertoire³². Before examination of the relevant circumstances to be taken into account in this notional exercise, it is however common practice to identify an existing tariff as a starting point. If such a licence exists (and particularly, if it is recent) and addresses comparable subject matter - and even better, if it was freely negotiated (rather than being as it were, ‘imposed’ by the Tribunal), that may be particularly relevant and helpful in determining the right tariff (and other terms) of a licence. Such an agreement it has been said, is the best record of the market value of the relevant rights at the time (see below ‘*Comparators*’). The Alliance submitted that this approach, though certainly not wrong, is simplistic since it often does not take into account the benefits to the licensee of collective bargaining. Nonetheless, our assessment of the centrality of this consideration and its relevance to this case, is undiminished.

50. **Comparators**³³ As noted above, s. 129 of the Act *requires* the Tribunal to take into account schemes and licences ‘to other persons in similar circumstances.’ Mr Richard Boulton, the Applicants’ principal expert, put the position with admirable clarity in his first Report, thus³⁴:

“ The comparable royalties approach is often regarded as the best approach to use in circumstances where the parties do not agree on the level of royalty. Negotiations between a willing licensor and a willing licensee, in the circumstances, will provide, in theory, the best available information about the level of a reasonable royalty.”

51. In AIRC v PPL³⁵, the Tribunal stressed the importance of comparators:

‘It is for the Tribunal in assessing the transactions cited as comparable to decide to what extent the rights licensed are of the same *or a similar kind*, whether the transactions were concluded at arm’s length with neither side affected by stress, and whether they were affected by legal factors which do

³¹ AEI v PPL [1998] RPC 335 at 343.

³² See for example, Working Men’s Club & Institute Union Ltd v PRS [1992] RPC 227 at 232.

³³ Also called ‘a readily available or appropriate proxy’ in some jurisdictions.

³⁴ B7/33/1442.

³⁵ [1993]EMLR 181 at 218.

not apply in this case. It is then for the Tribunal to adapt any relevant comparators to the case under review.’[*Emphasis added*]

Thus, starting with a cited comparator, it is open to the Tribunal to take notice of it (or of parts of it) and to use it (or reject it entirely) as the case may require. The authorities show that whilst the utility of comparators has frequently occupied the Tribunal’s time, in practice they appear to have been more of a legitimate quarry (or template) for particular terms and figures rather than as full precedents for a particular licence. In a few cases, comparators, particularly comparators from overseas, have proved to possess very little probative value whatever.

52. On the issue of royalty rates, comparators have featured strongly in the arguments of both the Alliance and of the Remaining MSPs, reliance being placed (by the Alliance) upon the licensing of the same rights (i.e. in the New JOL) and (by the Remaining MSPs) other rights alleged to be of a similar kind. Not surprisingly the Alliance characterised the New JOL as being ‘a compelling comparator’ in all respects – a contention robustly challenged by Mr Steinthal. Rival comparators emerged during the course of the evidence and we shall have to consider them in due course.
53. When one is dealing with the licensing of ‘similar’ rights, some comparators may be more relevant than others. For example, in cases where the exploitation of music requires licences both from the owners of the rights in the composition (i.e. the Alliance representing composers and publishers of music) and that of the owners of the rights in the sound recordings (i.e. the record companies or the PPL), the Tribunal has held that (a) these two types of rights are legitimate comparators, and (b) there is no reason to treat one as being qualitatively superior to the other³⁶. Therefore said the Alliance, since such licences do exist, it is relevant to compare the present proposals with what the record companies (or PPL) receive for exploitation of their rights.
54. Where there are sufficiently comparable licences, the Tribunal should adopt a similar rate “*absent any special circumstances*”: AEI v PPL *supra* at 256.
55. What one usually finds in the authorities is evidence of a *degree* of comparability, ranging from the superficial to the more realistic. iTunes submitted that even where the comparability was rather inexact, one could nonetheless take the comparables into account “*but scale them down because of the differences.*”³⁷
56. Finally, this must be said of comparables: though the Tribunal may impose different rates upon different parties in respect of essentially the same rights, it

³⁶ The Manx Radio case (*supra*); BEDA v PRS (1 August 1989); AIRC v PPL (16 January 1986). There is no reason to assert, a priori, that either of the two forms of copyright has a higher or lower value than the other: see AIRC v PPL [1993] EMLR 181 where the Tribunal decided that the PRS and the PPL tariffs should be “*in the same general range*”

³⁷Cf BPI v MCPS (no 2) *supra* at 116.

must not thereby discriminate between licensees (see above § 41) unless there is “a logical reason for it”³⁸

57. **A simple and workable tariff** The tariff should be simple and workable having regard to the service being licensed – “*with a straightforward rate structure based on straightforward definitions*”. Most tariffs can be shown to produce anomalies in certain circumstances but a complex rate structure will be more likely to produce anomalies (and thus problems) particularly at the margins of its rates: AIRC v PPL [1993] EMLR 181 at 229. Simplicity of operation and clarity of expression should always be a *desideratum*. In Universities UK v CLA [2002] RPC 693, the Tribunal said:

“ Overall we have been seeking to achieve a simple, economic, universal system promoting good education for the benefit of staff and students whilst at the same time achieving fair and reasonable remuneration for the owners of the rights.” (at p726)

58. In these Applications, the desiderata of simplicity and practicality present formidable problems in relation to the definition of ‘Gross Revenue’: see Part VII below. The difficulty arises partly as a result of an inherently changing and complex technology and partly because of the sudden viability of upgraded business models and new modes of delivery of the products to be licensed. We were told of additions to the business models available as the case went on. For example, a US downloading service called Spiral Frog® made its appearance during the hearing in this context. In fact, in our judgment, ‘Gross Revenue’ is more or less incapable of technically succinct definition without invoking a broad (and thus according to the Applicants, unacceptable) simplification favoured by the Alliance. Nonetheless, in reaching our decision on this aspect of the Applications, we have chosen what we believe to be reasonably simple and workable solutions to the problem of definition.

59. **The revenue-based approach to royalty.** The decision of the Tribunal in AIRC v PPL [1993] EMLR 181 at 229 *et seq* endorsed the use of a revenue-based approach to royalty. We say ‘endorsed’ because a revenue-based tariff had already been *agreed* between the parties. The Tribunal had been called upon to rule on what a reasonable royalty was for licensing sound recordings for use in commercial radio in the UK. The applicants had in fact proposed a royalty of 3.5% of net advertising revenue (subject to certain qualifications) whilst the PPL had proposed a royalty of 15% of ‘relevant revenue’ calculated by reference to usage. We note in particular the following observation of the Tribunal (at 229):

“The revenue-based approach ...proceeds on the reasonable assumption that the stations will seek to maximise their revenue for sound commercial reasons. It is *an imperfect measure* of value because the revenue on which it is based is created by the station’s entire broadcast output, its promotion of itself and its image as an advertising medium. PPL’s music is only part of this.... Under the revenue-based system, the licensing body has the disadvantage that its royalty may become adversely affected by economic recession or by commercial misjudgements of the licensee. On the other hand

³⁸ BSkyB v PRS at 208.

there is no direct connection between revenue and profit and under this system the licensing body shares in revenue whether or not the management skills of the station turn it into profit. While both sides accept the limitations of a revenue based system, they accept that there is a logic to it and that it should remain the basis upon which royalty should be assessed” [Emphasis added]

60. That, we believe, has relevance in these Applications where a revenue-based approach to royalty was also *agreed* at an early stage. Such agreement obviously makes practical sense. However, like the Tribunal in AIRC v PPL (and in BSkyB v PRS), we have been alive to the fact that this enquiry is at heart concerned with the licensing of copyright and not merely with the endorsement of sensible commercial arrangements³⁹. The Tribunal said⁴⁰:

“ However, although a revenue-based tariff is urged by both sides and has been adopted by us in the Decision, it is an over-simplification to see a *direct causal connection* between the use of the PPL repertoire and the achievement of advertising revenue. The playing of PPL repertoire would not result in the level of advertising revenue which the stations obtain without the stations’ programming mix, their sales strategy and their marketing and promotional efforts.” [Emphasis added]

61. Therefore within such *inter partes* consensus on a royalty-based approach there must be more; there must also be a *nexus* (or ‘*direct causal connection*’) between use of the Alliance’s repertoire and revenues earned by the Applicants-however ‘imperfect’ a measure that may appear.

62. **Free music and ‘faute de mieux’.** We shall deal with this requirement in the paragraphs which follow but before doing so we must highlight an argument based on the AIRC v PPL which was at the forefront of Mr Carr’s case on the MNO’s Disputed Contention⁴¹: that in that case (unlike this) there was in truth *no other source of revenue on which to levy a royalty*. From the outset, commercial radio stations were fully funded by commercial advertising. AIRC v PPL was therefore, he said (borrowing words from the decision of the Tribunal in BSkyB), a ‘*faute de mieux*’ situation; AIRC v PPL was not applicable when a consumer has fully paid for e.g. a permanent download or a stream of music – as in the normal case he would do here in the present case. It does not therefore arise *unless the music is offered free as a result of advertising*⁴².

63. **‘Adequate Nexus’ or ‘Sufficient Connection’** The need for ‘direct causal connection’ was stated in AIRC v PPL (supra). This was a topic common to all the remaining parties after the Settlement Agreements; and in connection with the ‘Disputed Contentions’, it was in effect, the *only* issue.

64. In the past, the Tribunal and its predecessor have undoubtedly rejected as unreasonable a royalty based on a percentage of revenue. The several authorities cited under this head demonstrate the requirement that there must indeed be a

³⁹ What the Tribunal called ‘*a pleasing agreement*’ in BSkyB v PRS (supra) at 218.

⁴⁰ At 207.

⁴¹ And to a degree, Mr Weisselberg’s as well on iTunes’ Disputed Contention.

⁴² Or logically, at a rate subsidised by. advertising.

sufficiency of connection between the licensee's revenue and the use of the Alliance's repertoire so as to make that revenue source 'commissionable'. Put another way, the Tribunal must always look for a 'sufficient connection' or 'close, direct relationship' between revenue and repertoire so as to make it *reasonable* to relate the royalty for use of the repertoire directly to that revenue. In the recent past, the Tribunal's attitude to revenue-based royalty has been palpably hostile:⁴³

“ The Tribunal is unable to accept that there is any adequate correlation between the use of music from the PRS repertoire by the Companies and the [revenue] of those Companies.... The question is...whether the fact that the music is -or may be to a greater or lesser extent- part of the package which attracts the television audiences and accordingly generates [revenue], establishes or helps to establish a sufficient connection between music and revenue, to make it reasonable to relate the royalty for the music use directly to [revenue]. We are satisfied that it does not... First, the television programme or commercial is the product of a wide variety of artistic and technical skills of which music is only a part. and not we think, in general, the predominant part; the smaller the significance of the contribution of a part to the whole, the less certain can any attribution of a generative effect be. The contrast with sound radio and, say, grand opera, is we think, illuminating”

65. The principle has been re-stated in a number of Tribunal decisions⁴⁴ all of which, *on the facts*, reject the existence of a close correlation between the repertoire and the revenue of the users. For example, in PRS v BEDA (PRT, unrep. 1 August 1989) in order for royalty to accrue, the Tribunal required

‘a close direct relationship between the value of the input and the value of the output⁴⁵.

66. The Tribunal's decision in BSkyB [1998] EMLR 193 affords particular assistance on this point even though in that case the Tribunal again *rejected* the submission of the PRS that the royalty should be calculated as a percentage of BSkyB's net revenue receipts⁴⁶.

“What offends one's common sense is that a single component of a complex final product such as a television programme should be remunerated on a basis which rises and falls with the revenues obtained from the final product, when that component may have had nothing at all to do with those changes in revenue.”

Nonetheless, the *possibility* of excise on revenue was, perhaps for the first time, positively acknowledged⁴⁷

⁴³ ITCA v PRS ,(October 19 1983 PRT 38/81, pp 68-69). The Tribunal went on to give reasons which were specific to factors in that case.

⁴⁴ PRS v BEDA, BPI v MCPS, AIRC v PPL and BSkyB v PRS (supra).

⁴⁵ p. 6. The Tribunal held that there was no close connection between PRS' music and the total receipts of a discotheque. There was no risk-sharing and no incentive to perform in a mutually advantageous way. Symbiosis is not enough.

⁴⁶ At 217.

⁴⁷ At 219.

“What the decided cases show is that, before one can ever use revenue as a measure of the value of the music to a broadcaster, one must be satisfied that there is an adequate nexus between the use of the music and revenues earned.”

and:

“ We do not consider it correct to approach the issue before us as one of whether the revenue basis ... is correct ‘in principle’: if one adopted that approach one would be in danger of losing sight of the overall objective. What we are to endeavour to do is to determine what approach is most ‘reasonable in the circumstances’ i.e. the circumstances of this case.”

“The role music plays in a company’s output can vary widely. At one extreme was an example discussed in argument of the music played in the lift of the offices of a bank....At the other extreme might be the sale of records or sheet music, where the music is the whole or at least a vast proportion of what the consumer pays for. At some point on this ‘spectrum’ it could become appropriate to adopt a revenue-based approach: the question we have to decide is whether it is appropriate to do so in the present case.”⁴⁸

67. The requirement for ‘close causal connection’ has also been considered in another offline case. In BPI v MCPS [1993] EMLR 86, under their CD licence, the MCPS does not get a share of any other revenue which might simply ‘result from’ or ‘arise in relation to the provision of or be ‘driven by’ or even be ‘derived from’ music content. The royalty rate was expressed as a percentage of published price to dealers (PPD) even though the ‘profits available’ were a relevant consideration ‘but should by no means be regarded as determinative.’
68. As noted, in this case it has been agreed that, with appropriate qualification, a revenue - based royalty *is* appropriate, the qualification being a matter of degree over which there is a dispute. This consensus was reached, it seems, on the basis that it has an established precedent in relation to offline music (physical product and radio – see above) which we were told, has worked well enough over many years. So much for the principle. What the authorities warn against however is the illegitimacy of over-broadening that revenue base; in the ‘spectrum’ referred to in BSkyB, there must be a defined *ne plus ultra*. If there were not, one runs the risk of undermining the legal justification for the ‘royalty to revenue link’ altogether.
69. We should record here that our attention was drawn to the fact that revenue - based royalty is a fact of life in collective licensing practice in overseas jurisdictions, even in those having a regime like our own: see: APRA v ABC (1985) 5 IPR 449 (Australia) and SBC v PRS [1991] FSR 573 (Singapore).
70. **Risk sharing** We shall next raise ‘risk sharing’ since it is quite clear (if it is not actually accepted) that the Alliance has borne no risk in delivering to the public any of the musical offerings with which we are here concerned.

⁴⁸ At 221.

71. The question of risk sharing has been a relevant issue in numerous cases before the Tribunal. In the extreme case where there is no risk-sharing, the Tribunal in BSkyB considered that the revenue basis was actually a poor approach to remuneration for the use of music.

“But where revenues may be rising or falling rapidly for reasons connected with the introduction of new technology and entrepreneurial risk-taking and unconnected with music, we think the revenue basis may be less appropriate.”⁴⁹

So risk sharing is an issue we have to factor into our decision on what is ‘reasonable in the circumstances’.

72. In addressing the relevance of this consideration, Tribunals have referred to the analogy with revenue sharing arrangements and partnerships where revenue *and* risk are usually shared. On the other hand, in situations in which the issue is the use of the repertoire by a licensee, the norm is that PRS does not share in the commercial risk associated with the viability of the delivery means in question. This is a factor which the Tribunal will take into account in striking a tariff. In ITCA v PRS⁵⁰ for example, the Tribunal said:

“We make one general point at this stage which we think of importance. The point is that it is not...right to regard those whom the PRS represents as co-adventurers in the business of television with the Companies. They are not.”

III THE NEW JOL

The eve of trial settlements: An overview

73. We shall now consider the pre-trial settlements in more detail.

74. On 28 September 2006, the **BPI**, the Alliance and the Academy resolved their differences, the outcome being recorded in the Settlement Agreement. The Settlement Agreement has appended to it (as Schedule 1) the New JOL. As a result of the settlement, BPI agreed to withdraw its reference, its written submissions and its witnesses of fact evidence, the only evidence remaining being that of the experts Mr Richard Boulton and Mr Derek Ridyard who now gave evidence on behalf of all the Applicants. The New JOL has been drafted to cover all the online music services in which the Applicants are likely to be interested.

75. On the same date, **iTunes and the MNOs** also settled all their differences with the Alliance on the basis of the same terms and conditions *save for*:

⁴⁹ At 216 and 219.

⁵⁰ Supra at § 6.4.

- (a) in respect of iTunes, ‘the iTunes **Disputed Contention**’, and
- (b) in respect of the MNOs , ‘the MNOs’ **Disputed Contention**’.

As a result of the settlements, both iTunes and the MNOs no longer rely upon a good deal of their evidence. Both however rely upon parts of Mr Boulton’s reports. The MNOs also rely upon Mr Bill’s first witness statement. iTunes also relied on some of the existing evidence including sections of Mr Eddy Cue’s first and second witness statements. iTunes was formerly a member of the MSP consortium but since partial settlement, it parted company with them and is now of course, separately represented

76. These Disputed Contentions (which are not identical) are defined⁵¹ in the Settlement Agreement and relate to the definition of ‘**Gross Revenue**’. The Disputed Contentions have this in common however: both address a situation where the full price of the music consumed is not paid, the difference having been made up by ‘advertising revenue’⁵². Gross Revenue is considered *in extenso* in Part VII of this decision,
77. The *MNOs Disputed Contention* allows them to continue as Applicants solely for the purpose of contending that:

*“revenue derived from advertising, sponsorship and commissions on or in connection with a **Mobile Licensed Service** should only be included within Gross Revenue [as defined] where that revenue is earned as a result of an advertisement, sponsorship or a click-through link located on a page of a Licensed Service from which the **Mobile Licensed Service** is actually offered (subject to apportionment where other services not requiring a licence are offered from the same page) and only where that Mobile Licensed Service is offered to the User **for free.**”*

78. The *iTunes Disputed Contention* allows them to continue as Applicants solely for the purpose of contending that

*“ revenue derived from advertising, sponsorship and commissions on or in connection with a Licensed Service should only be included within Gross Revenue [as defined] where that revenue is earned as a result of an advertisement, sponsorship or a click-through link located on a page of a Licensed Service from which the Licensed Service is actually offered (subject to apportionment where other services not requiring a licence are offered from the same page) and only where the Licensed Service is offered to the User **at a price which has been artificially depressed to reflect such revenue.**”*

79. The difference in wording between the two Disputed Contentions has been emboldened and will require separate consideration.

⁵¹ H/1/3.

⁵² Hereafter, advertising, sponsorship and commission revenue is most often collectively referred to as ‘**advertising revenue**’.

80. It is to be observed that:

- (i) In both of the Disputed Contentions, the entrée for royalty to arise is advertising revenue generated from a page (that is, any page including the home page) from which a Licensed Service is ‘actually offered’. The implications of music being ‘actually offered’ are discussed below under ‘Gross Revenue’.
- (ii) The possible need to apportion in order to calculate the revenue due is envisaged in both Disputed Contentions.
- (iii) Neither of these Disputed Contentions formed part of the cases of either iTunes or the MNOs as originally pleaded.
- (iv) iTunes and the MNOs agree that the approach to Gross Revenue adopted by the Alliance in the New JOL is both unreasonable and unacceptable.
- (v) However, subject to these Disputed Contentions, iTunes and the MNO’s fully endorse the New JOL. Thus, paragraph 12(d) of the Settlement Agreement reads:

[subject to the two Disputed Contentions]

- (vi) *the Settlement Agreement including the [New JOL] is a package deal and taken in its entirety, its terms are fair and reasonable; and*
 - (vii) *MCPS, PRS the Academy the BPI the MNOs and iTunes shall advance and defend the position in the Copyright Tribunal (or any appeal)...and shall contend that the [New JOL] represents the terms that should apply to all licensees for online and mobile music services within the scope of the Scheme for the purposes of the References”,*
- (iv) Thus, iTunes and the MNOs now accept (subject to their Disputed Contentions) that when viewed as a whole, the New JOL is ‘fair and reasonable as applied to all licensees’ (our emphasis). Looking ahead, this acknowledgement therefore puts considerable space between these Applicants and the Remaining MSPs who at any rate at the start of the hearing, seemed to be contesting just about everything of importance except rates and minima for *permanent and limited downloads* (see below).

81. **Napster and MusicNet** settled their dispute with the Alliance on 6 October 2006 (the **Napster Settlement**⁵³) and on 10 October 2006, **Sony**⁵⁴ also settled

⁵³ H/6/82.

with the Alliance (the **Sony Settlement**). By these settlements, the parties withdrew their Applications and evidence and agreed to be bound by the Tribunal's decision on all webcasting issues and on the outcome of iTunes' Disputed Contention.

82. The Napster and Sony Settlements imported a significant limitation into the definition of 'Gross Revenue' contained in the New JOL. This limitation, which has been referred to as the Home Page Concession, relates *only* to advertising on the 'home page'. It has been endorsed by iTunes and the MNOs as a step in the right direction – but, so they argue, it still does not go far enough. We shall return to the Home Page Concession under 'Gross Revenue' below.
83. We have mentioned that the Napster/MusicNet and Sony Settlements were all expressly made subject to the outcome of the *iTunes* Disputed Contention. For this reason, Mr Weisselberg contends (in our view reasonably) that the iTunes Disputed Contention appears to have 'a degree of support' from Napster, MusicNet and Sony.
84. The **Remaining MSPs** have not reached any settlement with the Alliance. They began by pursuing their cases on a broad range of pleaded issues⁵⁵: royalty rates, revenue base and minima for everything except permanent downloads, Gross Revenue, audio-visual deductions, new format discounts, proper licensee and non-alliance repertoire. By the close of the hearing however, we concluded that at any rate, *some* of these matters were no longer in contention.
85. All the parties' settlement documents have been conveniently collected in Court Bundle H. The New JOL governs the licensing of the signatories' online services for three years only, that is, from 1 July 2006. However, as it appears to be a groundbreaking event, its effect may be felt well beyond its expiry date.
86. We would observe that in terms of market share, the Alliance has now largely settled its differences with the majority of the online music industry in this country. Looked at another way, out of twelve original Applicants, only three of the MSPs (hence 'the Remaining MSPs') have failed to come to any sort of settlement. There is no need to elaborate on the facts leading to these settlements other than to say that the parties involved are major players in the online music industry (both national and international) who (as it appears to us), were driven by commercial considerations to strike a mutually beneficial bargain. In so doing, in addition to their extensive in-house expertise, they were assisted by an abundance of specialist lawyers and also by experts in the industry.
87. The importance of the New JOL to this case can hardly be exaggerated. Not surprisingly, it is the Alliance's 'compelling' comparator upon which their case largely turns. We have already considered the Tribunal's jurisprudence in relation to comparators but Mr Rabinowitz submitted (rightly in our view) that in this Application, the following observation of the Tribunal was particularly apposite:

⁵⁴ H/8/133.

⁵⁵ A6/1.

“It is for the Tribunal in assessing transactions cited as comparable to decide to what extent the rights licensed are of the same or a similar kind, whether the transactions were concluded at arm’s length with neither side affected by stress, and whether they were affected by legal factors which do not apply in this case. It is then for the Tribunal to adopt any relevant comparators to the case under review.”⁵⁶

88. As for ‘stress’, in spite of a suggestion by Mr Steinthal⁵⁷ that the negotiations were conducted under pressure to achieve a deal quickly⁵⁸ and *were* therefore conducted under ‘stress’, we have found no evidence to justify that submission. According to Mr Geoff Taylor⁵⁹, a major factor which led to the settlement was in fact a commendable desire to save money by not undergoing a trial.

89. In the light of this and the circumstances leading to the New JOL, Mr Steinthal evidently had an uphill task in trying to persuade us to adopt other (for instance, offline) comparators as being more relevant. We shall assess the relevance of the New JOL and these other comparators later in this decision.

The New JOL⁶⁰: The Royalty Table

90. For the purposes of the hearing, the Alliance and the Academy made use of a synoptic summary of what had been agreed in the settlements regarding royalties for the services in issue. iTunes and the MNOs were also able to make use of this table without difficulty. We have referred to this as ‘**the Royalty Table**’ and it is reproduced below.

⁵⁶ AIRC v PPL [1993] EMLR 181 at 218.

⁵⁷ And at one stage by the Applicants’ expert Mr Boulton.

⁵⁸ “Necessity” said Mr Steinthal, “*never makes a good bargain.*”

⁵⁹ Formerly General Counsel to the BPI

⁶⁰ H/1/13.

<i>Service</i>	<i>Rate</i>	<i>Minimum</i>
Permanent Download	8%	<p>£0.04 per download</p> <ul style="list-style-type: none"> - reducing by degrees for larger bundles of tracks, or certain older tracks, to £0.02 (in respect of a bundle of thirty or more)
Limited Download or On Demand Service	8%	<ul style="list-style-type: none"> - Mobile Subscription: £0.60 per subscriber per month - PC Subscription: £0.40 per subscriber per month - Limited Subscription: £0.20 per subscriber per month - All others: £0.0022 per Musical Work communicated to the public
Special Webcasting (which means a premium or interactive service where more than 50% of the content is by a single artist or band)	8%	<ul style="list-style-type: none"> - £0.0022 per Musical Work played (if not subscription) - if the service is subscription, minimum is to be negotiated in good faith
Premium or Interactive Webcasting	6.5%	<ul style="list-style-type: none"> - Subscription: £0.22 per subscriber per month - Otherwise, £0.00085 per musical work communicated to the public
Pure Webcasting	6.5%	<ul style="list-style-type: none"> - Subscription: £0.22 per subscriber per month - Otherwise, £0.0006 per musical work communicated to the public
Mobile Permanent Downloads and other Mobile services		<p>Rates and minima as for the services above, except that:</p> <p>For Mobile Permanent Downloads, the applicable revenue is reduced by 15%</p> <p>For all other Mobile Services, the applicable revenue is reduced by 7.5%</p> <p>The above reductions apply until prices converge with non-mobile prices</p>

91. The categories of licensed services identified in the Royalty Table correspond with those identified in the definition schedule (Schedule 1) to the New JOL⁶¹. The Remaining MSPs took issue primarily with the webcasting items in the Royalty Table but in our view made no important submissions regarding the other parts of it. They had no comment on the *rate* for the On Demand Service but they did object to the existence of a minimum in relation to that service. With regard to the remainder, they took issue with the way the webcasting services were identified with the webcasting rates, with the need for minima and with the rates thereof.

92. We shall next consider these services in more detail.

Permanent downloads.

93. The Tribunal has often been concerned with determining rates for a spectrum of services and this case is no exception. In this case our task has been made easier since the settlements to which we have referred have at least yielded a highest rate (8%) which is not in dispute and which is undoubtedly relevant to what the appropriate level should be for other services⁶². This ceiling rate relates first to what are termed **Permanent Downloads**⁶³, that is, to transfers of music from a website to for example, a computer or mobile telephone for permanent retention and use whenever the purchaser wishes. We have regarded permanent downloads as the online analogue of a CD. A classic case of permanent download will be the purchase by a subscriber of an item offered for sale by say, iTunes' Store for use on an iPod⁶⁴. Neither the need for a minimum royalty in this category of service nor its value have been questioned⁶⁵.

Limited downloads and on demand services

94. A **Limited Download** (also referred to as an LD) is similar to a permanent download and the royalty rate for it was agreed to be the same. Limited downloads differ from permanent downloads in that the consumer's use of the copy is in some way restricted by associated technology. A limited download may be intentionally ephemeral in nature commonly, by means of a technology called 'digital rights management' or DRM. This makes a file unusable when a subscription ends. The minima here are however different to those for a permanent download. In the same category are **on demand services** (or **on demand streaming**)⁶⁶ where an offering is streamed to the listener to enable him to listen once, twice or a number of times during the period he subscribes to the service. 'On Demand Streaming' does not permit an offering to be downloaded for copying but the user has in many respects

⁶¹ See 'Music Service' in H/1/35

⁶² Mr Boulton D4/164

⁶³ As far as we can tell, this was said by counsel to be synonymous with an FTD.

⁶⁴ In fact, the iTunes service is funded through retail sales revenue and not at present as a result of advertising. But, said Mr Cue, Global Vice-President of iTunes, iTunes may well carry advertising in future - hence their interest in these Applications.

⁶⁵ Which will be of significance when we examine the Remaining MSPs' reluctance even to contemplate the propriety of minima as such in relation to other services.

⁶⁶ 'Streaming' is a technique for transferring music in a continuous stream for use once and without retention of a copy. ODS is thus very similar to an LD and the two are often associated.

the same access to and ability to enjoy a piece of music as the owner of a digital copy.

95. In either case, the user simply initiates the more limited service but does not realistically interact with what he gets, once he gets it. We need say little more about either permanent or limited downloads since the Remaining MSPs did not take issue with the New JOL in relation to these categories of service. A disagreement arose regarding minima (and only minima) with on demand streaming
96. LD/ODSs are offered by a number of the MSPs. Regarding on demand streaming, Napster, a signatory to the Settlements, offers a subscription-funded limited download and on demand streaming service.
97. The rates for permanent downloads and LD/ODS' were established as the result of classic negotiation and compromise: the Alliance came *down* (12% to 8%) whilst the Applicants went *up*, both as to the rate applicable to the service itself and to the presence of relevant minimum rates⁶⁷.
98. The present significance of the position of permanent and limited downloads in the Royalty Table is that it fixes one end of a spectrum of services which involves an incremental degree of control or interactivity by the user on the delivery (i.e. form, duration and timing) of the music. The points on this spectrum are to some degree, interrelated.

Pure webcasting

99. At the other end of the spectrum is **Pure Webcasting**. Here the user receives a stream of back to back music, the stream consisting of pre-programmed music chosen *by the MSP*. It is in fact non-interactive and any potential for interactivity (including even pausing the stream of music or skipping and rating of tracks) is prohibited.
100. Mr Steinthal suggests that this is the online equivalent of a terrestrial commercial radio station broadcasting mainly music. Radio @ AOL, which has over a hundred channels available, is he says, an example of this kind of service. We were told that AOL's channels are largely 'genre specific'. Also in this category, RealNetworks apparently has an even larger mood -specific repertoire. In addition, with pure webcasting, there is no intrusion of the human voice. Since webcasting (or as he called it 'General Webcasting') formed the major part of Mr Steinthal's case, we shall return to it later in detail.
101. In between lie **Premium and Interactive Webcasting** - the so-called 'intermediate services'⁶⁸. This is webcasting which does not satisfy the pure webcasting prohibitions and includes such personalised services as LAUNCHcast and Pandora.

⁶⁷ Minima had hitherto been opposed as such.

⁶⁸ Also in Mr Steinthal's parlance, 'General Webcasting'.

Special webcasting

102. This is a service where the user can choose a stream of music, the majority of which comprises works from one source – an artist, a group/ensemble or the record of a particular concert, for example. This enables a listener to enjoy an entire album of a particular artist or event. Though we have no recollection of it being demonstrated to us, it seems to be very similar to on demand streaming and attracts a royalty of 8%. In fact, there was little evidence about special webcasting. Mr Steinthal said⁶⁹:

“ Put aside Special Webcasting...it is not something you should worry about. We do not know of anybody doing it right now in this market.”

Though he promised to return the special webcasting ‘later’, we cannot find relevant further reference to it. Evidently it is not yet an important offering and we need say no more about it.

IV THE WITNESSES

103. The names of those who gave evidence at the hearing together with a summary of their employment details are set out in **Annex I** to this Decision. The bulk of the evidence given at trial was expert evidence.

Witnesses of fact

104. We have already identified some of the witnesses of fact in the foregoing narrative. We have no particular comment to make on the quality of any of them as witnesses; they were we believe, all trying to assist the Tribunal and in addition, no serious attack was made upon any of them. The evidence of some was no doubt of more relevance than that of others but there is no need separately to dwell upon the relative contribution made by each. Evidence was offered on behalf of each of the three Remaining MSPs. Also, three witnesses, Mr Geoff Taylor (ex-BPI and General Counsel), Mr Mark Mooradian (MusicNet Inc.) and Mr Andrew Lee (T-Mobile) were called by Mr Steinthal by means of witness summonses. Mr Taylor’s evidence was, we felt, particularly fair, helpful and clear. Mr Jonathan Bill, the former head of advertising and industry at Vodafone Ltd gave evidence which we found most useful on a number of aspects of the case. Another witness, Mr Eddy Cue, Vice-President of Apple’s iTunes gave evidence from the USA by video link, which was in fact hardly challenged. He had been responsible for the development and implementation of the iTunes Store. The latter offers millions of tracks of music, audio-books, videos, movies, and no doubt other things too.

105. We found the evidence of fact relating to the range of online music services which are (and may soon become) available to have been particularly illuminating – and largely uncontroversial. This evidence confirmed our initial impression that in these Applications we are concerned with a rapidly developing and commercially

⁶⁹ D1/23

exciting area of business . We consider that this must have been well in the minds of all the signatories to the New JOL – whatever might have been their commercial interests at the time. We say this in response to Mr Steinthal’s frequent assertion⁷⁰ that the settling parties had no immediate commercial interest in the terms of the New JOL in so far as they related to webcasting, that such terms were part of a ‘package’ and that they were therefore unreliable as comparators. We consider it unrealistic to regard the music industry as being blinkered and compartmentalised as Mr Steinthal (and to some extent Mr Boulton) suggested. Quite apart from the evidence relating to the extant interests of Vodafone in webcasting (see below), these terms were, we consider, given adequate commercial consideration by the signatories who in truth had at least *an* interest in these matters⁷¹.

Expert witnesses.

106. Our assessment of the expert witnesses⁷² cannot be summarised as we have done with the ‘lay’ witnesses - as Mr Rabinowitz has called them. In the first place, there was serious conflict as to how the Tribunal should treat some of the expert evidence, of what value it was (if any), and whether it was materially wrong. In essence:

- (a) the Alliance devoted most of the cross-examination of Mr Boulton, the Applicants’ main expert, to attacking his qualifications as a ‘licensing expert’, his credibility, his independence and the admissibility of some of his evidence - rather than going to his ‘raw’ evidence as such. With an expert of the calibre of Mr Boulton, this was a risky tactic.
- (b) Ms Enders, one of the Alliance’s experts, was said by Mr Carr to have misunderstood her role and to have spent inordinate time giving evidence which was in fact of little or no use to the Tribunal. Mr Weisselberg’s criticism was that she was a ‘poor and unimpressive witness’. Mr Steinthal’s criticism of Ms Enders was even more radical.

We shall therefore have to go into the matter of the experts’ evidence at some length.

107. **The expert’s role** We shall first identify our approach to assessing the parties’ contentions regarding the expert evidence. The general role of the expert is epitomised in CPR, r. 35 and the notes thereon. In the light of the massive quantity of expert evidence filed by both sides, we first reproduce the following words of CPR, Part 35.1⁷³:

‘Expert evidence shall be *restricted* to what is reasonably required to resolve the proceedings.’[Emphasis added].

108. In addition to the well-known observations of Creswell J in The Ikarian Reefer [1993] FSR 563, there are numerous other authorities relating to the role of expert

⁷⁰ See for example, his opening speech: D1/8.

⁷¹ This was actually confirmed by Mr Taylor of BPI: D6/71.

⁷² Whose names and provenance are also set out in **Annex I**.

⁷³ See also The Chancery Guide 2005 (“ Expert Evidence”) §§ 4.6-4.9 and 8.16-8.18.

witnesses. Though stated in relation to a patent action, we believe that in a case like this there is good sense in the further characterisation of the court expert given by Jacob LJ in Rockwater Ltd v Technip France SA and another [2004] RPC 919. He said:

“...they come as teachers...What matters is how good they are at explaining things.”

In Cala Homes (South) Ltd v McAlpine Ltd [1995] FSR 818 at 843, Laddie J said:

“But in the case of an expert witness the court is likely to lower its guard. Of course the court will be aware that a party is likely to choose as its expert someone whose view is most sympathetic to its position. Subject to that caveat, the court is likely to assume that the expert witness is more interested in being honest and right than in ensuring that one side or another wins. An expert should not consider that it is his job to stand shoulder to shoulder through thick and thin with the side which is paying his bill.”

In AEI v PPL (supra) at 357, the Tribunal said:

“It is obviously difficult to draw a line between what is relevant evidence and what is either legal argument and comment on facts as to which the witnesses have no real relevant experience or expertise. Nevertheless for the future, we would suggest that it is a waste of time and money for the parties to file argument under the guise of accounting evidence.”

109. Before considering the expert witnesses, we would record that:

- (a) all such witnesses possessed both academic and professional qualifications appropriate to issues in these Applications. These are to be found in their witness statements and need not be set out here.
- (b) most of the written evidence had been served before the time of the settlements and the relevance of much of it was in our view diminished if not overtaken by the appearance of the New JOL; and
- (c) one of the Applicants' witnesses, a Mr Derek Ridyard of RBB, an economist, made two reports, largely dealing with permanent downloads. Since he was neither cross-examined nor hardly even mentioned at the hearing, we need say no more about him.

110. **The Experts' Fees** The principal expert witnesses were Ms Claire Enders of Enders Analysis for the Alliance and Mr Richard Boulton of LECG Ltd for the Applicants. Towards the end of the hearing, we became concerned with the value of much of the evidence of these experts and invited the parties to state in round figures the professional fees charged for preparing their reports (that is, excluding VAT and their charges for attendance at the hearing). Ms Enders informed us that her firm had charged the Alliance about £ 750,000⁷⁴ whereas Mr Boulton said that his firm had charged the Applicants a little less, some £685,000⁷⁵. Mr MacGregor,

⁷⁴ D11/198.

⁷⁵ D12/85.

another expert called by the Alliance, booked fees of £810,000⁷⁶. Add to these the fees of one other expert and the cost of their attendance at the hearing, one arrives at a very substantial sum of money.

111. Incurring expert fees of this order of magnitude (and even taking into account the existence of the Settlement and the substantial sums of money at stake), was in our view, seriously disproportionate. The blame for this, we feel, must fall on all the parties.
112. Finally mention was made by the Alliance of the need to disregard expert evidence which is directed to a question in issue for the court, since this may usurp the role of the court or tribunal. We detect however some slight change in the attitude of the courts to an expert opining on an ‘ultimate question’ which is not one of law (see for example, Rockwater, *supra*). However whilst such an opinion may now be admissible, the court need not of course accept it. It may nonetheless consider the underlying reasons for any relevant opinion to assess its cogency.
113. **Ms Claire Enders** Ms Enders is an ‘industry expert’ and is Chief Executive of Enders Analysis which analyses industry facts and compiles assessments on strategic issues facing the media and telecommunications industries⁷⁷. She is thus (as Mr Carr said) a commentator or a ‘highly-paid industry observer’ (as Mr Steinthal said), rather than being a lively participant in any relevant field – such as for example, Mr Cue of iTunes. We do not however regard this as a damaging criticism of this witness; one hardly needs to be a member of a football team to have an informed view about its performance. Ms Enders told us that she had never before appeared in court as an expert witness. She was cross-examined, vigorously and at length, by Messrs Carr, Steinthal and Weisselberg during which she made it clear on a number of occasions (rightly, in Mr Rabinowitz’s view) that unlike Mr Boulton, she was not a ‘licensing expert’. This statement was characterised by the Applicants merely as an unhelpful avoidance tactic.
114. With an eye no doubt on comparables, Ms Enders gave evidence about trade practices in a large number of media businesses and in particular in the online, offline and telecoms industries - and indeed in certain satellite industries (such as the place of music in the commercial radio and entertainment industries). She also gave evidence on potentially comparable markets, products and services on which licences had been granted by collecting societies. In particular, she gave evidence to refute the suggestion that webcasting and commercial broadcast music should be regarded as comparable products.
115. The MNOs made no personal criticism of Ms Enders but said that she had misunderstood her role and thus that her evidence was of little assistance to the Tribunal. It was said by all the Applicants that her evidence was unreliable (because it had been largely collated from third party sources) and in relation to comparables, was of little assistance to the Tribunal.

⁷⁶ D12/83

⁷⁷ Her CV is to be found at E7/17/1770.

116. Even taking into account Ms Enders' inexperience in this jurisdiction, her performance as an expert was, we thought, rather uninspiring. Her reports (which comprised a fulsome lever arch file of evidence together with numerous lever arch volumes of exhibits thereto) consisted to a large extent of data which had indeed been sourced by others, sometimes by a team which she herself led and the reliability of whose work she (often unquestioningly) relied on - only to find it wanting on closer examination. We certainly sympathise with the impossibility of mastering everything within so large a corpus of material. Nonetheless, on a number of key issues she seemed confused, occasionally inaccurate⁷⁸ and, more importantly, sometimes unable to provide reasons for the assumptions upon which her evidence was based. Surprisingly, she had not actually read the New JOL but relied on a summary thereof. We do not wish to give the impression however that Ms Enders' evidence was misleading; it was not. But we were not greatly assisted by it.

117. **Mr Richard Boulton** is a director of LECG Ltd ('LECG') and had been an accountant with Arthur Anderson for some 20 years⁷⁹. LECG is a global expert services firm which provides courts, lawyers, regulators and governments with independent advice and analysis on matters of economics, finance and strategy. Mr Boulton gave evidence as a forensic accountant and in addition (and to a greater extent), as what he called a 'licensing expert'. He had in fact a double advantage over Ms Enders: he has given evidence before the Tribunal (and to the courts) on the licensing of IP rights (and on other issues) on *many* previous occasions - and he is also a practising barrister. Generally speaking, he was a knowledgeable witness in the field of licensing IP rights and had ready answers to what was put to him. Moreover, he gave a polished and confident performance as an expert.

118. As will be seen, his status as a 'licensing expert' was nonetheless subject of particular criticism by the Alliance and a number of attacks were made on Mr Boulton personally⁸⁰ - all of which in our view, failed.

119. In his first report, Mr Boulton said that his instructions were to make a report⁸¹:

" based upon [his] experience in licensing negotiations, on the structure and level of a reasonable royalty for the supply of music content online."

120. Our attention was however drawn by Mr Rabinowitz to the order of the Tribunal regarding experts (which is always made on such occasions)⁸² and in particular to the fact that his role as expert on 'licensing' as such was neither suggested nor sanctioned therein. Both Mr Rabinowitz and Mr Aldous further submitted that this emerging yet unapproved expert *persona* enabled Mr Boulton to stray into impermissible territory in that (in particular) it was inappropriate for him to express opinions about what royalty rates or minima should prevail for particular services - or indeed what general terms should be present in a licensing agreement of the sort under consideration. The Alliance in fact recorded their objection to Mr

⁷⁸ For example in relation to Ofcom Reports

⁷⁹ His CV is at B7/33/1612-1619.

⁸⁰ Such as suggesting, that his present evidence was inconsistent with evidence given in other cases.

⁸¹ B7/1383.

⁸² A5/82/2.

Boulton's role at an early stage. In the result, said the Alliance, the parts of Mr Boulton's reports most relied on by the Applicants were little short of extended submissions, rephrased later by counsel as submissions. The confusion of roles on Mr Boulton's part demonstrated a serious lack of objectivity, so they submitted.

121. We have found the demarcation of expertise in this jurisdiction to be a rather grey area and have noted that other Tribunals have found likewise. As a forensic accountant, Mr Boulton was of course free to give evidence on matters such as costs, investments, revenue streams and their relevance etc and to provide comment and criticism of industry reports on topics such as statistics, revenue sources and similar technical matters. Indeed he did so. In our view he was also entitled to express an opinion about which comparable licence agreements (or parts thereof) might (or might not) be relevant comparables (see above). But in our view it was not helpful in this case for him to opine on what rates of royalty (or minima) were reasonable for a particular service, what deductions should apply and so on. Such evidence tends to become "*a mere bit of empty rhetoric*" Wigmore, *Evidence*, (Chadbourn rev) § 1920. These are core matters for the decision of the Tribunal in the light of the evidence. The Tribunal's function on terms and rates must not be usurped by the views of a 'licensing expert', however experienced. In reaching our decisions, we have in fact borne well in mind both Mr Boulton's considerable experience as an expert and our essential tasks as a Tribunal. We have not allowed his views as to the 'ultimate questions' to cloud our judgment – but neither have we as it were, struck them out. We have made frequent use of Mr Boulton's general expertise in the field of IP licensing, as will be seen.

122. Two other experts gave evidence for the Alliance, a forensic accountant, **Mr Gervase MacGregor** and an economist, **Mr Zoltan Biro**. Mr MacGregor was a practicing chartered accountant with the firm BDO Stoy Hayward LLP⁸³. Mr MacGregor's evidence was largely directed to challenging Mr Boulton's facts and figures. He disagreed with Mr Boulton on a number of accountancy matters and complained (with justification in our view) of the limited extent of the Applicants' disclosure which he said, he needed in order to prepare his response. He said that he had no material adequately to challenge Mr Boulton's raw inputs. However, as many of these issues were of more significance before the Settlement Agreements, we need not now analyse these debates or their outcome. We were however to some extent assisted by his evidence.

123. **Mr Biro** leads a consultancy specialising in economic analysis: Frontier Economics Ltd⁸⁴. Mr Biro gave evidence as to how different technologies might lead to different values being attributed to the music content of offerings to the public. He also considered that the Tribunal might gain assistance on royalty rates from consideration of the agreements made between the MSPs and the record companies/PPL. We found Mr Biro to be a most helpful witness, having a clear manner of delivery and explanation combined with confidence in what he said.

⁸³ His CV is at E6/15/1386

⁸⁴ His CV is at E6/13/1325

V COMPARATORS

Is the New JOL a proper ‘comparator’?

124. We shall next consider whether the New JOL may be regarded as the nearest ‘comparator’ in enabling us to reach a view on the statutory test of ‘reasonableness’. We have already set out the terms of s. 129 of the Act⁸⁵ which *inter alia* requires⁸⁶ consideration of comparators in reaching a conclusion as to whether the terms of a licensing scheme are ‘reasonable in the circumstances’. This issue concerned only the Remaining MSPs’ licence, on whose behalf, Mr Steinthal submitted that the New JOL was not at all suitable in this respect⁸⁷.

125. **The Alliance’s case.** This aspect of the case, said the Alliance, was clear. The New JOL was a classic example of the outcome of a balanced compromise between a willing licensor and a willing licensee; it is indeed a ‘compelling’ comparable. Moreover, it is recent, has involved most of the major players in the industry and was concluded after protracted negotiation with the benefit of ample legal and technical back up. As against the Remaining MSPs’ proposals, it could hardly be more relevant, said both Mr Rabinowitz and Mr Aldous. In its entirety it articulates the proper ‘going terms’ and the Tribunal should have no qualms about applying them to the Remaining MSPs’ licence. Moreover, the Remaining MSPs’ did not even attempt to try and work out a compromise with the Alliance when they had the opportunity to do so.

126. **The Remaining MSPs’ case.** The comparator pleaded by the MSPs was traditional commercial radio:

‘The Webcasters maintain that the most appropriate comparator for determining a reasonable rate for General Webcasting⁸⁸ is traditional radio broadcasting.’⁸⁹

127. Mr Steinthal was initially dismissive of even the general *relevance* of the New JOL. His submission was that as webcasting is “functionally identical to” terrestrial radio, the main agreement relating to the latter (an agreement referred to as ‘the CRCA Agreement’) was the best comparator. Furthermore, he submitted that those subscribing to the New JOL were not in reality commercially concerned with any form of webcasting. Thus, he said, those parts of the New JOL which were concerned with webcasting (in particular) were quite unreliable as comparators and should be disregarded: “*Plainly, no entity with a meaningful interest in webcasting was at the table*”⁹⁰. Referring to the services available in the New JOL, his invitation to us was to disregard not only most of the categories of service identified

⁸⁵ Para 42 above

⁸⁶ ‘shall have regard’.

⁸⁷ The definition of ‘Gross Revenue’ in the New JOL (in either the BPI version or with the Home Page Concession) cannot of course be used as a comparator against iTunes and the MNOs as they deliberately excepted themselves from it.

⁸⁸ According to Mr Steinthal’s submissions, this means all webcasting except perhaps, special webcasting.

⁸⁹ A6/1/11.5.5

⁹⁰ D1/28

but also the rates for anything ‘below’ that of on-demand streaming. The position of the Remaining MSPs was epitomised by Mr Gabriel Levy of RealNetworks⁹¹:

“ ..the New JOL from our perspective, is nothing more than the Alliance’s unilateral imposition of webcasting terms and conditions upon the Webcasters....I simply fail to see how a document negotiated by parties with little or no commercial interest in webcasting can purport to bind webcasters to its terms and conditions or be proffered as ‘the result of arm’s length negotiations between sophisticated commercial parties.’ ”

Ms Shannon Ferguson, Managing Director of Yahoo Music Europe Ltd, was of a like view:

*“..plainly there was no ‘side’ representing the interests of Webcasters in the negotiations leading to these settlements.”*⁹².

128. In our view, in adopting this approach, Mr Steinthal has had to overlook a number of important primary facts.

129. First, the parties’ experts *all* regarded the New JOL as being a *relevant* comparator as a whole⁹³. We do not regard this view as being conclusive since the assessment of comparables must be one for the Tribunal in the light of the evidence, particularly that touching Vodafone’s Radio DJ Service - which is next considered; but it is certainly persuasive.

130. **Vodafone’s Radio DJ Service** Secondly, a company within the Vodafone Group related to one of the MNOs (hereafter ‘Vodafone’), has already actually launched a subscription-funded service called the Vodafone Radio DJ service. This is indisputably a webcasting service since it enables the user to influence the playlist. In addition, it runs an on demand music video streaming service. Evidence about these services was given by Mr Jonathan Bill, the former head of advertising and industry development at Vodafone Ltd both in his witness statement and in cross-examination⁹⁴. Vodafone currently charges £7.50 per month for its Vodafone Radio DJ webcasting service. This supports § 8 of the MNOs’ pre-Settlement Agreement written submissions, where Mr Carr QC wrote⁹⁵:

“ It should be noted , though, that one MNO, Vodafone, does presently offer a webcasting product charged for on a subscription basis.....and so Vodafone and the MNOs generally, do have an interest in the treatment of webcasting under the 2006 Scheme”[Emphasis added]

131. Furthermore, according to the evidence, Vodafone (and other MNOs) are already trialling advertising on various services.

⁹¹ Levy 3, §§ 8.2, 8.4

⁹² Ferguson 3, § 5.2

⁹³ Mr Boulton at first being cautious in so doing: Boulton 5, §§ 8,10 but later agreeing in answers to questions from the Tribunal, that the New JOL *as between the parties there present*, fulfilled the ‘willing buyer, willing seller test’: see B7/33/1385 quoted in § 133 below and D4/161-162.

⁹⁴ Bill 1, § 13 and D5/14-15. We would add that we found Mr Bill to be a good witness.

⁹⁵ X1/5/4.

132. Thirdly, we do not believe that the interests of the record companies and the BPI must be seen as being *confined* to permanent or limited downloads; the Royalty Table covers services which are part of what has been called '*the music value chain*'. Mr Taylor gave helpful evidence in this connection. He had been General Counsel to BPI and was at the time he gave his evidence to us, General Counsel and Executive vice-president of IFPI. In our assessment, he was also a reliable witness. Though we accept that BPI had no current direct interest in webcasting in September 2006, in our view BPI (who represent over 300 record companies) had at least enough of *an* interest in webcasting to agree to parts of the New JOL which concerned webcasting. As a matter of common sense, a major player like BPI would we think, be most unlikely to have agreed to theoretical or let alone otiose terms in so important an agreement. Vodafone's position is of course even stronger. Their settlement with the Alliance was subject of a separate agreement; they were not, as Mr Steinthal would have us believe, swept into settlement by a tsunami created by BPI.

133. Before considering the Remaining MSPs' case, we were reminded that Mr Boulton correctly and succinctly epitomised the characteristics of a reasonable royalty when he said that it was an agreement⁹⁶ :

" between a willing licensor and a willing licensee acting at arm's length in a competitive market."

He then went on to identify the most common approaches used to determine a reasonable royalty one of which, the comparables approach, is that which has been used in this case.

134. Finally, we have several times drawn attention to the developing and shifting nature of the online music industry. In the light of this, when it came to negotiation, it seems to us inconceivable that the numerous signatories to the Settlement Agreement (and the New JOL), every one of them major players in the industry, were somehow blind or worse, unconcerned as to what developments might lie ahead. Existing business opportunities and substantial sums of money were involved. And judging from the witnesses we have seen, those involved were shrewd and experienced men of business.

135. In our view, as against the Remaining MSPs, the New JOL is indeed the most relevant comparator. It is not even the record of an agreement relating to some 'proxy' activity (such as an offline music service). Neither is it a record of say, an overseas experience, neither is it a commercially or technologically outdated agreement. Nor was it entered into under 'stress'. It was for the Remaining MSPs effectively to challenge the relevance of its terms. They have failed to do so; it is the nearest comparator.

The need for minima.

136. This short topic may conveniently be addressed at this juncture. It has two limbs. First, there is a general issue: whether minima are appropriate in respect of

⁹⁶ Boulton 1[B7/33/1385.]

any category of webcasting (and on demand streaming). Secondly, if provision for minima is considered reasonable, the minimum royalty rates themselves will need to be determined.

137. In our view, the presence of minima in the New JOL provides a strong indication that in this field of licensing, the application of minima to each category of service is generally reasonable in the circumstances. Our view is strengthened by the fact that, as we shall show, minima provide a practical way of compensating the Alliance for any underpricing of music by licensees. Underpricing will assume particular importance in the second part of this Decision under the topic ‘*Gross Revenue*’.

138. The Alliance’s statement of purpose in insisting on minima was one of the Agreed Facts (12):

‘The Alliance’s stated purpose for including minima in the JOL is to ensure the Alliance’s members receive a minimum level of compensation for the exploitation of their rights, to protect the Alliance’s members against extreme underpricing and to assist in resolving difficult unbundling issues.’

139. In their post-hearing written submissions⁹⁷, the Alliance elaborated their intentions thus:

(a) The Alliance minima were agreed as part of the New JOL. That is where they ‘came from’.- they are apparent on the face of the document, the outcome of the negotiations between the negotiations between the settling parties.

(b) The minima are, further, closely comparable to the record company and PPL charges. They lie between the per stream sum in the PPL Webcasting scheme, and the charges which one principal webcaster has agreed to pay certain of the record companies.

140. The Remaining MSPs have continued to oppose the inclusion of minima (whether on a per stream or per subscriber basis) in relation to all forms of webcasting and in addition, in relation to on-demand streaming. It was Mr Steinthal’s opening case that there was no need for minima in relation to any such category of service - save a minimum that was intended to cover the costs of licensing⁹⁸. So minimalist a gesture, as Mr Rabinovitch pointed out, would be cold comfort to songwriters and composers. By the time of his closing address however, we detected a more flexible tone in Mr Steinthal’s approach; it seemed that he now accepted the propriety of the presence of minima in the licence *in principle* but challenged some of the levels stipulated in the New JOL quantum.

141. It was not in dispute that minimum royalties are frequently provided for in agreements relating to the licensing of intellectual property – as may be seen (for example) in the numerous reports of compulsory licence cases in the patent and design fields. Minima are required for the protection of the licensor in the event of say, an adventitious market change, in the event of giveaways by the licensee so as

⁹⁷ 19/1/07 §15.

⁹⁸ See D11/175-176.

to make neighbouring services more attractive, as a result of a deliberate policy of underpricing by the licensee, by the manoeuvres of an unscrupulous licensee - or for whatever reason.

142. In the present case, minima have been proposed to meet a variety of possible situations: they may be required for example, if for some commercial reason (e.g. the presence of advertising), the licensee underprices a service. Minima may also be required where the business model of the licensee is not structured so as to maximise revenues from exploitation of the repertoire; in which event, the provision of minima may have more bite than a 'best endeavours' clause. Minima may also be required to address the complex unbundling problems which arise where, as in this case, music content is sold bundled with other services and it is not possible easily to ascribe particular prices for separate elements in the bundle.

143. In our judgment, the New JOL provides a compelling comparable for the presence of minima in a licence of the kind presently under consideration. Originally all the Applicants opposed the introduction of minima on principle. The settling parties have, however, agreed that it is reasonable to make provision for the payment of minima, albeit at levels significantly below those originally proposed by the Alliance. This, in our view, amply demonstrates the reasonableness of the inclusion of minima in all categories of service.

144. Moreover, since the Remaining MSPs do not seem to oppose the provision of minima for *permanent* or *limited downloads* (or even the rates for such services), it seems illogical for them to oppose minima *in principle* in relation to the other online services.

145. We have no doubt that the provision of minima for all online services must be a feature of any licence from the Alliance and our findings on the definition of Gross Revenue in the latter part of this Decision require it. We also consider that (as with headline rates for permanent and limited downloads) the rates provided in the New JOL must be benchmark rates for such minima.

146. We shall next consider minimum rates for the several webcasting services in question but before doing so we must consider the nature of the services themselves.

VI THE MUSICAL OFFERINGS

147. The Royalty Table provides a convenient summary of the musical offerings with which the New JOL is concerned. We should say at once that so far as the Remaining MSPs are concerned, the webcasting categories within the Royalty Table are in their view, improperly defined. As noted, the presentation in the Royalty Table is in the form of a spectrum, determined by the degree of control which the consumer has in relation to the music he receives. At one end are permanent downloads whilst at the other, is pure webcasting, the latter being the Remaining MSP's particular interest.

Back to back music: Pure Webcasting

148. Though prior to this case, we were rather unfamiliar with the *arcana* of the online music world, as listeners we were familiar with commercial radio programmes. When Mr Steinthal first made submissions relating to the equivalence of the webcasters' service and that of commercial radio, we were frankly puzzled and, it must be said, at the end of the day we remain so. Though no doubt involving a degree of subjective impression, the two services strike us as being *quite different*. However in deference to the time (and evidence) devoted to the point, we shall shortly revisit what was urged. We shall do so in two parts, the first being to examine what was argued regarding the suggested comparability of online and offline services as such. We shall then consider Mr Steinthal's submissions regarding the allegedly comparable CRCA Agreement and reach an interim conclusion on such comparability.

149. Before doing so however we should briefly mention '**simulcasting**'. Simulcasting is the simultaneous re-transmission by a licensed radio (or television) station over the Internet (or via an MNO) of broadcast material. The person receiving the simulcast normally makes no permanent copy of it. It is like listening to the radio and is an offline service even though available via the Internet. In what follows, we shall place simulcasting in the offline category of services. Nevertheless, in recent times, traditional terrestrial broadcasters have begun to offer what Mr Steinthal described as 'side channels'. There was evidence for example of the opportunity to listen (or listen again) to programmes first broadcast earlier in the day, the opportunity to 'pause' a broadcast while answering the telephone and so on. We do not regard these activities as the equivalent to online offerings; they are qualitatively different.

150. The existence of 'nothing but music' services has in fact exercised the Tribunal on previous occasions in relation to offline references. In AEI Rediffusion v PPL [1998] RPC 335⁹⁹, for example, the Tribunal was of the view that independent commercial radio offered quite a different service to a 'music, music, music'¹⁰⁰ service and that different terms were necessary to reflect the increased use of music. A similar attitude to increased use of music in broadcasting has been adopted by PPL (see below). Mr Rabinowitz submitted that this philosophy is equally applicable to a webcasters' services.

151. The following struck us being the more relevant matters raised in evidence and argument relating to the differences between online and offline services – taken in no particular order:

- (a) first and most importantly, in relation to pure webcasting, we have already referred to both the uninterrupted stream of musical output available online and to the large number of truly genre-specific offerings available. Though there may be broad differences in bias between commercial radio stations (jazz, classical, indie, 'golden oldies', easy

⁹⁹ See in particular at p 348

¹⁰⁰ See the Chairman's remarks: D7/13

listening, ethnic etc), these are simply not of the same order as the mood-specific channels offered by say, Radio@AOL¹⁰¹

- (b) in pure webcasting therefore the music in an online ‘music’ service makes a *far* greater impact on the listener and thus has a greater connection with the revenues it generates.
- (c) a terrestrial broadcaster in this country must have a licence from Ofcom and such a licence compels it to broadcast a substantial quantity of non-music material. In this connection, Mr Boulton has estimated that in a commercial broadcast from a ‘music’ station, a fair average music/speech mix is 70% music¹⁰². The webcaster does not add value to the output in the way a commercial radio station does – for example, through the voice of a popular disc jockey, the programme contents, the format etc.
- (d) though Mr Steinthal made a number of observations about increased listener interactivity which commercial radio stations now make available and encourage (e.g. by phone-in or the e-mailing of requests), none in our view even approach the degree of interactivity which may be achieved through premium and interactive webcasting
- (e) there was conflicting expert evidence concerning the costs of setting up and operating a webcasting service in comparison with that of even a modest terrestrial broadcasting service. We shall not go into this since the evidence was unnecessarily detailed and the upshot self-evident. The webcasters’ music output is derived from a virtually automatic source¹⁰³. Yahoo! for example, employs just two music programmers for this purpose and¹⁰⁴
- (f) some of the new options available to listeners of commercial radio in fact have nothing to do with the broadcasters at all: the pause and rewind facility availability on the latest Roberts® DAB Portable Radio is an example of this.

In this connection, it is well to bear in mind what the Tribunal had to say about commercial radio stations in AIRC v PPL [1993] EMLR 181 at 206-207:

“It has been suggested to us that these stations are merely ‘jukeboxes of the air’. Such a description ignores the contribution which the presentation and selection of the music makes to the success of a station and the considerable attraction of its talk and features.”

¹⁰¹ Calling a service ‘Radio@AOL’ or ‘Vodafone Radio DJ’ does not of course make them a radio station.

¹⁰² Boulton 1 § 12.34 [B7/33/1540]

¹⁰³ D729-30.

¹⁰⁴ Fergusson 2§16.8 [C1/11/210]

Is the CRCA¹⁰⁵ Agreement a proper comparator?

152. The fragility of Mr Steinthal's 'comparison' becomes even more apparent when one considers the agreement upon which he principally relies: the CRCA Agreement with PRS¹⁰⁶. Under this agreement, independent commercial radio broadcasters were charged a sliding scale of rates ranging from 3% to 25% for both broadcasts and simulcasts. Nevertheless, it was said by Mr Steinthal to cover activities 'functionally equivalent' to (at least) pure webcasting in the New JOL and thus, that the financial terms of the former could justifiably be extrapolated to the latter. We would add that though this view was espoused by Mr Boulton in the early stages of his evidence, by the time of his cross-examination we were far from sure that he still adhered to this view.
153. In answer, the first point made by Mr Rabinowitz is that the CRCA Agreement does not cover a number of the activities upon which Mr Steinthal relied. It grants a licensee to '*broadcast as part of its licence from the Radio Authority or to perform in public the PRS repertoire or any part thereof.*' Thus, the transmission in question has to be '*a broadcast*' within the definition in the Act¹⁰⁷ and must therefore be made simultaneously to members of the public or transmitted at a time solely determined by the broadcaster. Internet transmissions are actually excluded unless they fall within one of the exceptions in s 6(1)A of the Act: see also s. 19(2) of the Act. In our view, the only *online* activity which is unarguably licensed under the CRCA Agreement is simulcasting.
154. The Alliance also pointed out that there is an additional difference between what is licensed under the CRCA Agreement and the online music presently under discussion: the CRCA Agreement does not licence the MCPS' mechanical right, the exploitation of which ('dubbing') is important to the way in which webcasters (but not broadcasters) make their music available to users. In our view this is an important point which justifies a higher rate of royalty.
155. **'Dubbing' and the ephemeral right.** 'Dubbing' as we understand it, means simply making a copy of a track. Traditional radio broadcasters do not need a dubbing licence if ab to the extent that they can rely upon the 'ephemeral right' provisions under s 68 of the Act. Webcasters are however in a different position as they rely upon the use of a permanent (and enormous) database of tracks in order to provide their services through instant user selection, streaming etc. We believe that the Alliance is right when it submits that the Remaining MSPs must also pay the MCPS for the right to maintain millions of tracks of music in their immense databases.

¹⁰⁵ Commercial Radio Companies Association

¹⁰⁶ E3/8/755.

¹⁰⁷ I.e. '*transmitted for simultaneous reception*'.

156. At this point, we were also referred to current PPL policy on such matters. If a ‘music,music,music’ service wishes to be licensed by PPL, it would *not* be so licensed under the PPL/CRCA Agreement but rather, would seek to grant a licence under new terms recently published by PPL which require a *much higher* (20%) headline rate¹⁰⁸.
157. Our conclusion in the light of the foregoing is that neither terrestrial commercial radio broadcasts nor the CRCA Agreement to which it relates, are fit comparators when it comes to assessing the royalty rate for pure (or indeed any other sort of) webcasting. In our view, the CRCA Agreement is not the closest comparable. Moreover, our conclusion is for the same reasons, equally applicable to answer Mr Steinthal’s suggestion that such a finding would result in ‘*unreasonable discrimination between licensees or prospective licensees*’¹⁰⁹. In spite of Mr Steinthal’s forceful submissions, in our view, the outstanding comparable in this part of the case, remains the New JOL.
158. Turning to royalty rates, Mr Boulton’s initial view was that since the CRCA Agreement was the closest comparable, on that basis, he could justify a rate for pure webcasting of no more than 5%. In the light of the conclusion to which we have come, we need not go into the evidence by which he reached this figure nor his cross-examination on it¹¹⁰. In relation to a comparison with commercial radio alone, the reasonable royalty rate for pure webcasting *must* at least be greater than Mr Steinthal’s 5%. In fact the mark-up must be even greater than that when one also takes ‘dubbing’ into account.
159. **Mr Boulton on comparables** Before leaving this section we should turn to some evidence from the cross-examination of Mr Boulton since it shows, we believe, an important qualification to the evidence he originally gave in relation to this issue of comparables. He agreed that

：“...what is in the New JOL is agreed between a willing licensor and a licensee; they are at arm’s length. It is a competitive market...As I look at the New JOL, Sir, the places where I draw back from saying that [it] provides the right answer are where it does not appear that those with an economic interest [in] the outcome are part of the New JOL”¹¹¹

And later, in answer to questions from Mr Steinthal¹¹²:

“ That is where I do not see the New JOL as being a reasonable royalty agreed between willing licensor and willing licensee, because it does not appear to me that the webcasters themselves were represented in the negotiation. It is not an agreement between a webcaster and the Alliance as to a webcasting rate.

THE CHAIRMAN: Because they were not there.

¹⁰⁸ See G2/23/557

¹⁰⁹ cf s.129 of the Act

¹¹⁰ See for example D10/95-96

¹¹¹ D4/161

¹¹² D4/163.

A, Yes. And because the parties had agreed to it. Sir, if this was 'five webcasters were there and two were not', you would look at it and say: of course it is a relevant comparable because webcasters signed up to it and it becomes a product of willing licensor and licensee negotiations. If it is agreed by parties who do not webcast, it seems to me Sir, it cannot in itself be a comparable for webcasting

THE CHAIRMAN: At all?

A. I do not think it can, Sir. If webcasters are not represented in the negotiations they have had no say in what the rates could be. The rate might have been agreed at 50% if no webcasters were there...The fact that 8% has been agreed for downloads would of course be relevant to what the webcasting rate should be...It appears to be accepted that webcasting is a lower value product in terms of music use and it would be a lower royalty..”
[Emphasis added]

We accept that had more webcasters been present at the negotiations, that fact might well have led to a more favourable result from their point of view. But a webcaster of substance was of course present at the settlement negotiations: Vodafone.

Other online comparators

160. The Alliance drew our attention to two online licence agreements with *recording companies* and submitted that they would be of far more assistance to the Tribunal as comparators than the CRCA Agreement. We agree. There are two aspects to the submission. First, on authority¹¹³, the licences granted by the owner of the recording right are usually regarded as being relevant comparators for the licences granted by the owner of the publishing right. Secondly such licences must be doubly relevant if they are licences for an online activity.

161. The first such agreement was the PPL agreement for pure webcasting which may be found at G2/12/415. The second was in fact a group of agreements entered into by Yahoo! with certain record companies, the details of which remain confidential. Both agreements were the result of recent arm's length negotiation. We consider that Mr Biro's evidence in this area was particularly important. He thought that it would be 'interesting' first to compare the relative treatment of the sound recording copyrights in the offline environment with those in the online environment and did so: see D12/43ff. In the *offline* world the comparison revealed levels of PPL royalty comparable with that which the PPL receives in the CRCA Agreement which we have already considered. On the other hand in the *online* world, the licence fees were considerably greater. In fact, the per play rates in the New JOL and the PPL agreement for pure webcasting are approximately six times those which Mr Steinthal submitted could be derived from the royalties paid under the CRCA Agreement. As to that, Mr Biro had this to say¹¹⁴:

¹¹³ See §66 above.

¹¹⁴ D12/29.

“One would need to ask oneself why the same would not apply [for the Alliance] in a commercial negotiation in a competitive market.”

And later:

” What I can say is that the record companies are producing a sound recording, the composers are producing the composed work and as a matter of logic that same 1:6 ratio should apply equally. I cannot see a reason why it should not...The absolute levels that people could earn could differ because people make different contributions. But that ratio from commercial to webcasting if it applies to the record companies, I cannot see why it should not apply equally to the composers when they are in competitive negotiations.”

162. The upshot of this evidence is that subject to argument regarding the valuation of the categories of webcasting services, it confirms that the general royalty figures and minima reached in the New JOL Agreement may safely be taken as being approximately at the right level.

The categorisation of the licensed services.

163. The Remaining MSPs also took issue with several of the *categories* of webcasting services provided for in the Royalty Table¹¹⁵. As they saw it, there should be but one category of webcasting : ‘*General Webcasting*’. Within that, so they submitted, all forms of webcasting could legitimately be subsumed. The core issue then is whether, considering the tariff for webcasting, one may ignore the categories of service provided for in the Royalty Table and replace them simply with ‘General Webcasting’.

164. In addressing this issue, we must again consider comparators. Mr Rabinowitz, submitted that the categorisation of webcasting services established in the Royalty Table makes practical sense and *must* have been the subject of consideration and careful drafting by those who subscribed to it, all of whom were among the most knowledgeable about such matters in the Kingdom – and one of whom was in any event, a webcaster at the time. In addition, Mr Aldous argued that one may take into account the fact that the Remaining MSPs have not (for some reason) quibbled about the first four categories in the Royalty Table, so why should they do so over those remaining?

165. To buttress his submission on General Webcasting, Mr Steinthal had to import a notion from US copyright law: ‘**DMCA Compliance**’. ‘DCMA’ stands for the Digital Millennium Copyright Act of 1998 - which is of course, a US statute relating so we were told, to inter alia compulsory statutory webcasting licensing matters and the terms thereof. Mr Steinthal said that a webcasting service *in this country* should properly be so called only if it qualified the webcaster for a compulsory licence to webcast sound recordings under the US Copyright Act 1976 s. 114(d)(2)(C)(i) to (x) as amended by the DMCA. In other words, he was suggesting that it was reasonable (and likely) that negotiations in this country

¹¹⁵ Save for special webcasting-see above.

for a licence in respect of any webcasting would be concluded on the basis of a definition of subject matter imported from a US statute. This was desirable he suggested on the basis of international understanding in relation to this novel and international area of economic activity. For reasons which are given below, we have not thought it necessary to go into the workings of the DMCA in any detail.

166. In response, the Alliance described these submissions as being hopeless. Whilst it was true that the DMCA definition included a number of interactive services, there was no compelling reason why parties negotiating for an online licence in this jurisdiction would ever want to invoke the rather complicated (and apparently controversial) provisions of a foreign statute to settle the important question of what exactly was being licensed in the UK. No doubt out of an abundance of caution, the Remaining MSPs also led some evidence, none of it conclusive, about the DMCA¹¹⁶ and its effects. At a certain stage we felt that this sub-enquiry had become so off target that we indicated to counsel at the time that we were not impressed with it. Perhaps as a result, interest in the DMCA subsided - on both sides. We therefore need make no findings on the matter other than to re-iterate our belief that invoking the DMCA does not assist us in the resolution of the dispute on the identification of webcasting services. The best (and in truth, the only) comparator in the UK remains the New JOL and we shall therefore work to the categories of service set out in the Royalty Table

Conclusions on comparators and royalty

167. In the light of the foregoing, our conclusions on this part of the case are as follows

- The categorisation of online services set out in the Royalty Table has been recognised by the relevant commercial interests in the UK, is apparently workable and should therefore remain unamended.
- We believe that the royalty rate and the minimum agreed by the parties in respect of premium or interactive webcasting (i.e. a royalty of 6.5%) are reasonable in the circumstances and should be carried over unamended into the licence with the Remaining MSPs.
- With regard to the pure webcasting service, the level must (as we have said) be higher than the offline PRS figure of 5.25 % but should not we think, be as high as the 6.5 % provided for in the New JOL. We feel that had the Remaining MSPs been present at the Settlement Negotiations, their collective bargaining power would have achieved a *slightly* more favourable outcome from their point of view within this category of service. We should say that this is not some notional adjustment driven more by charity than by fact; neither has it a mathematical basis. It is a value judgment based upon our

¹¹⁶ Including evidence of extant litigation in the USA touching inter alia the scope of its definition of webcasting.

overall assessment of the evidence and the commercial circumstances. In addition, we have taken into account the fact that commercially speaking, more favourable results were achieved by the physical presence at the negotiations of iTunes and the MNOs (with their insistence on the Disputed Contentions) and Napster, MusicNet and Sony (with the Home Page Concession).

- We shall therefore fix the royalty figure for Pure Webcasting at **5.75%**.
- With regard to corresponding minima, we would reduce the subscription rate to **£0.20 per subscriber** per month and otherwise, to **£0.00055 per musical work** communicated to the public.

VII GROSS REVENUE

The New JOL: 'Gross Revenue' defined

168. In the New JOL, the parties are agreed that royalty should be based on a *percentage of revenue*. But what revenue? There are of course a number of possible revenue streams, in particular, revenue arising from the purchase of music together with revenue arising from advertising, subscription and in other ways. In this part of the Decision we address which revenue streams are in our view suitable for royalty excise in the light of authority and the evidence. With regard to revenue arising from the actual sale of music (at full price), only the Remaining MSPs have a problem, and that is an issue of wording rather than one of principle. As for the rest, we have found it to be a particularly difficult task adequately, simply and fairly to identify the revenue streams which should reasonably attract royalty.

169. The Alliance has invited us at this stage simply to identify the relevant revenue streams, to establish the 'general principles' to be applied and not to attempt to re-draft the definition of 'Gross Revenue'; that, they suggested, will come later.

“Once the Tribunal has given its decision, formulating suitable expert determination clauses should not be controversial.”¹¹⁷

170. The invitation is indeed tempting in the light of past events. There are two definitions of Gross Revenue in the New JOLs¹¹⁸. Then there are the two formulae proposed in the Disputed Contentions and another espoused by the Remaining MSPs. Finally, since the Settlement, the Alliance has come up with arguably, three further modifications¹¹⁹. Ironically perhaps, there seems to be no dispute about 'general legal principles', at least a broad level of generalisation.

¹¹⁷ 4 December 2006 letter, final paragraph.

¹¹⁸ Not to mention other definitions in antecedent JOLs

¹¹⁹ Though this has been characterised by the Alliance as 'drafting improvements'.

The devil, it seems, is as ever, in the detail. We will accept the Alliance's suggestion and in what follows, avoid any attempts at drafting. Rather, the parties should collaborate in drafting a definition in the light of our interim decision. The outcome will then be reflected in our final Decision.

171. In the online world, revenue from music usage may be generated in several ways. First, it will most commonly arise from the direct purchase of music from a page by the consumer – usually by activating a tab, image, photograph or icon or by selection from a list which includes (for example) the word 'music'. As we understand it, such revenue is as yet hardly affected by the presence of advertising on a page or within a service. But this may soon change. A familiar site for such a transaction is iTunes' Store. Music and music-related services may also be paid for by means of customer subscription. Lastly, it is the Alliance's case that revenue relevant to these Applications will now increasingly arise from advertising and sponsorship *at or near* the point of access to and/or consumption of music. It is the definition of this last stream that is at the heart of the second principal aspect of these Applications.
172. Revenue streams likely to arise from advertising, sponsorship and commissions are recognised in the New JOL. The royalty base against which headline rates are to be applied is called the '**Gross Revenue**' and is defined in Schedule 3 of the New JOL as follows¹²⁰:

“Gross Revenue’ means, subject to the provisions of the Schedule :

(a) all revenue received (or receivable) by the Licensee from Users in relation to the provision of the Licensed Services:

and

(b) all revenue received (or receivable) by the Licensee as a result of the placement of advertising on or within the Licensed Services.

and

(c) all revenue received (or receivable) by the Licensee as sponsorship fees in relation to the provision of the Licensed Services:

and

(d) all revenue received (or receivable) in the form of commissions from third parties as a result of the Users accessing and/or purchasing from a service of a third party via the Licensed Services:

and

¹²⁰ H/1/44.

(e) any other revenue received or receivable by the Licensee arising in relation to the provision to Users of the Licensed Services (including without limitation, such revenue received in relation to donations, barter or contra deals, such deals to be valued for these purposes);

and in each of the above cases such revenue shall, for the avoidance of doubt, include any such revenue whether received or receivable by the Licensee or any associate, affiliate, agent or representative of such a party.

Subject to the remainder of this Schedule 3, there shall be no other deduction or set-off from the above revenues other than refunds to Users for services that they were unable to use due to technical faults in the licensed services. ”

173. After the Settlement Agreement, the Alliance, the MNOs and iTunes agreed to amend the definition of Gross Revenue in relation to the home page (the so-called ‘**Home Page Concession**’) in the light of the Alliance’s settlement with Napster, Sony and MusicNet – see below.

174. ‘**Licensed Services**’ is defined to mean ‘*the Music Services set out in Schedule 6*’: New JOL, Appendix 1§1 ‘*Definitions*’. Schedule 6¹²¹ contains ‘boxes’ to be filled in by the licensee, none of which actually refers to the ‘Music Services’. There is however a box entitled ‘Licensed Services’. Schedule 6 therefore seems to be tailor-made for each ‘User’. Concerning Schedule 6, the Alliance hoped to clear up any confusion concerning the phrase ‘Licensed Service’ with the following explanation:

‘rarely had any disputes with licensees over this in the five years or so that the JOL has been operating...The Alliance appreciates that the details of the Licensed Service are important to licensees as they are in effect key to the extent of the revenue base. The Alliance also appreciates that this mechanism might not be apparent to licensees on the face of the New JOL because it will actually involve a discussion with each potential licensee on a case-by-case basis. The Alliance does not believe it is possible to create hard and fast rules for this definition ’.

We record that have not been much assisted by that explanation.

175. ‘**Music Service**’, which more or less corresponds to the items in the Royalty Table, is defined in Schedule 1¹²² as being

‘a service or the relevant part of a service which is:

- (a) a Permanent Download Service
- (b) an LD/ODS Service
- (c) a Premium and [*sic*] Interactive Webcasting Service
- (d) a Pure Webcasting Service; or
- (e) a combination of (a) to (d) above’

Items (a)-(d) are further defined in that Schedule.

¹²¹ ‘*Licence Details*’ see H/1/48

¹²² H/1/35 ‘*Definition of Music Service*’

176. We have mentioned above the MNOs' **'Home Page Concession'**. This affects home pages (only) where the music content of a home page is *'insubstantial'*. An example of a Yahoo! home page where music is said to be only an insubstantial part of the suite of services offered, is appended to the Alliance's Answer to the MNO's Supplemental Statement of Case as **Exhibit B**. The only relevant item in Exhibit B appears to be the word 'music' which occurs in a list of online offerings providing links to other (presently irrelevant) services. If actuated, the music service provides a sub-page from which it can actually be downloaded.

177. Paragraph 3.1.2 of the same pleading records the following 'common ground':

" (a) The parties are agreed that revenue from advertising on a home page is not within the scope of Gross Revenue where the home page offers a variety of services , of which music is only one, no music is actually offered from the home page and music is only an insubstantial part of the suite of services offered....

(b) However, if music is actually offered from a home page,or if music is not an insubstantial part of the page, the Alliance should receive a royalty based on an appropriate proportion of the advertising revenue from that page.

(c) Importantly, the Alliance does not and has never contended that it should receive a royalty based on all the advertising revenue, only a fair apportionment..."

178. *A propos* the foregoing, we would mention that:

(a) in the light of authority, sub-paragraph 3.1.2 (a) above seems more a statement of the obvious than a 'concession';

(b) the words *'music...actually offered'* assume importance in relation to the conclusion we have reached later in this decision, and

(c) the practical determination of what constitutes an 'insubstantial part' of music on the home pages of a number of parties whose home pages are in flux, changing perhaps at an hourly rate, struck us as having an element of unreality about it.

179. We have noted that the fact that the parties have agreed that royalty should be based on revenue has given rise to no great difficulty in relation to sub-paragraph (a) in the definition of Gross Revenue. This sub-paragraph may be thought of as covering FTDs and is akin to the sale of a digital CD recording. We would record here however that in sub-paragraph (a), we favour the use of the words 'consideration for' rather than 'relation to'¹²³. The problems arise

¹²³ The phrase suggested by iTunes and the Alliance.

whenever advertising etc revenue crops up in the context of sub-paragraphs (b), (c) and (d) of the definition.

180. Sub-paragraph (e) was evidently intended to be a broad, unspecific omnibus clause and no doubt for this reason alone it was the subject of sustained objection by the Applicants. This did not surprise us. In our view, clause (e) should have no place in a licence of this character. Apart from classic legal objection on the basis of ‘lack of nexus’, the clause seems to us on its face to lack certainty and thus to be a recipe for contention in the future. In our view, it must go; it is simply too vague.

181. Schedule 3 para 1 (*‘General’*) contains some explanatory exclusions. For example revenue from non-music voice content, non-music products and text services are excluded.

182. Paragraph 2 (a), (b) and (c) of Schedule 3 of the New JOL (*‘Advertising and Sponsorship Revenue’*) is also relevant to the Applicants’ cases. These paragraphs read as follows:

(a) Gross Revenue obtained in the form of advertising or sponsorship revenue shall be reduced by 5% to reflect the costs of obtaining it.

(b) By way of clarification, advertising and sponsorship revenue shall be included in the definition of Gross Revenue if it is derived in relation to pages within the Licensed Service, including music related pages which do not contain or enable *direct access* to Repertoire Works (e.g. content consisting of concert or music reviews).

(c) Where advertising or sponsorship revenue is derived from pages which include both music and non-music related services (e.g. on a home page or sub-home page of a service), then a reasonable proportion of such revenue shall be included in the Gross Revenue (such proportion to reflect the relative dominance of the music and non-music content).’ [Emphasis added]

Mr Steinthal took issue with the propriety of all three paragraphs¹²⁴ whilst iTunes and the MNOs took issue with paragraphs (b) and (c) only.

Various forms of advertising

183. We should next say something about the more common forms which online advertising may take. During the demonstrations, we were in fact shown a number of examples of online advertising.

184. The only advertising with which the definition of Gross Revenue is concerned is third party advertising. This should be spelt out in the definition.

¹²⁴ In relation to sub-paragraph (a), Mr Steinthal sought a deduction in the Gross Revenue base of 15%. We shall deal with this later in Part IX: *‘A deduction for advertising costs’*

185. We shall first consider website pages and pages of MNO ‘phone content portals’ where advertising (if any) is at present mainly of two types¹²⁵. First and most common is **banner advertising** which is a basic graphical Internet advertisement occurring on *any* page. This takes the form of rectangles (or sometimes squares or ovals) which contain advertising material (usually in colour) having both a literary and pictorial content. There may also be links to other web pages (or web sites) which have been selected *by the advertiser*. Such links are common examples of a ‘click-through’ – of which more later. ‘Clicking’ on the image may also lead to expansion of the advertisement itself. The examples of banner advertising which we saw featured some well known trade marks for goods and services. Banner advertising may be placed in different positions on a page and (as we also saw for ourselves) may be of different sizes thus striking the viewer with unequal degrees of prominence. In the same category is **skyscraper advertising** which also takes a tall rectangular form and runs vertically to the side of the main content of the page. Some advertisements may also have an audio content.

186. **In-stream advertising** (also referred to as ‘in-download’ advertising) is of considerable importance to this part of the Applications since it is the only mode of advertising which the parties all agree should fall within the definition of Gross Revenue. It may be visual, audio or audio-visual in form and as we understand it, it always occurs *after the consumer has initiated the downloading or streaming* operation. It is perhaps analogous to the advertising material which is sometimes added to a purchased DVD, trailing a forthcoming film for example, and which the purchaser has to view. The nature of in-stream advertising was epitomised in the Alliance/MNOs’ Agreed Facts (2(b))¹²⁶. This states that (in relation of course to the provision of music) in-stream advertising is:

‘...advertising included within a webcasting stream or advertising immediately preceding or immediately after a particular content download or on-demand content stream so as to be part of the same content delivery.’

The MSPs provided the following definition¹²⁷:

“ Audio or audio-visual advertising played before, during or between music tracks or streams and which either interrupts the music service or is played while a file is downloaded.”

Mr Cue of iTunes put it in a similar way¹²⁸:

“The placement of third party advertising at the start, end or during actual delivery of a Repertoire Work to a customer by way of a permanent download.”

¹²⁵ Pictures in colour of an MNO’s **possible** ‘phone content portal’ which well illustrate banner advertising are to be found in Annex B of the Agreed Facts (see Annex 1 to the MNOs’ Revised Opening Skeleton).

¹²⁶ It is similarly defined in the Alliance’s Answer to the MNOs’ Supplemental Statement of Case; A6/5/109A where a simple example of it is annexed to the pleading as **Exhibit A**

¹²⁷ Annex B (‘*Draft Glossary*’) to the Alliance’s closing skeleton of argument

¹²⁸ Cue 3: I/9/24.

187. Though there could be subtle differences between these records of what ‘in-stream’ advertising actually is (or may be), we felt that there was sufficient consensus of understanding for us safely to use the expression as a ‘term of art’ – and we shall henceforth do so.
188. We should also mention **sponsored search advertising** and **click-through commissions** which will be considered below. Revenue arising from these are essentially derivatives of advertising revenue and can arise at the same time as banner and in-stream advertising.
189. In view of the ingenuity which we have seen deployed in this area of the advertising business, there may well be other forms of advertising which we have not mentioned.

Music ‘actually offered’

190. We need next to consider some further threshold concepts in order to understand what follows. In this part of the case, much use was made by the parties, particularly by the Applicants, of the phrase ‘**music actually offered**’ in relation to website pages. In our view, it is indeed a key phrase in the context of the definition of Gross Revenue and we have adopted it; it is the trigger for the operation of ‘in-stream’ advertising and also, of both the Disputed Contentions. It is important therefore to understand the concept of music being ‘actually offered’ from a page.
191. In what follows, by music ‘**actually offered**’, we refer to music which is enabled or is made directly available to the consumer for downloading or streaming from *any* page on an online service. In the language of the New JOL, it is where the Licensed Service can actually be consumed by a User and in most cases, where the music is purchased. Pages which identify music ‘actually offered’ may of course also carry advertising, and/or music-related material or indeed, other material as well.
192. The Alliance did not favour the use of the phrase music ‘actually offered’ in excepting advertising revenue from Gross Revenue; it was, they said, unfairly prescriptive –though it did make use of it from time to time. Two paragraphs from their Answer to the MNOs’ Supplemental Statement of Case¹²⁹, under the rubric ‘*Actually Offered*’, sufficiently epitomise their position:

‘4.4 No good reason has been advanced for the contention that music must be actually and immediately accessible on a page in order for composers and songwriters to receive a fair share of advertising revenue. The mere fact that there is an intermediate page between identifying music and making the purchase is a matter of form, not substance, and not a good reason for depriving composers ...of any share in advertising revenue. Where the music content provided by the Alliance’s members is driving advertising revenues, it is fair and proper that composers....should share in that income.

¹²⁹ Though essentially the same point arises against the other Applicants as well.

4.5 The MNOs' proposal also provides an unhealthy incentive to the MNOs to structure their services so that Users have to pass through pages of adverts before making a final choice to download music. The MNOs would receive revenue from these adverts. Users would be watching the adverts solely because they wished to use the Licensed Services, yet composers would receive nothing.'

'Non-music' and 'Music-related' pages

193. By contrast, there are pages which 'actually offer' no music but which mention 'music' or are concerned with music-related items - and which may of course also carry advertising¹³⁰. We have already mentioned the MNOs' home pages as being examples of this. Such pages are unarguably without the scope of the Gross Revenue definition – even when they contain 'music-related' items. In this category we have in mind:

(a) **'Non-music' items or pages:** pages offering items such as news, sport, games, mobile TV, audio books, travel, horoscopes, 'chat and community' and so on; and,

(b) **'Music-related' items or pages;** These will include such downloadable material as music and concert reviews¹³¹, singers' biographies, ringtones, posters, T-shirts and other pop group paraphernalia, audio-books and suchlike, being material which falls outside the scope of the New JOL.

Music 'actually offered' may be found together with 'non-music' and 'music related' items on 'mixed pages' (see below) and such mixed pages are at the heart of the disagreement between the Applicants and the Alliance.

'Gross Revenue' further considered

194. Put broadly, iTunes, the MNOs and the Remaining MSPs have a shared (but not a coincident¹³²) interest in opposing what they believe to be an overly broad and unclear definition of Gross Revenue in the New JOL. They object to this definition as having the propensity to capture 'advertising revenue'¹³³ generated when there is no (or no sufficient) 'causal nexus' between the contribution of the Alliance's repertoire and the revenues of the licensee. Were the present definition of Gross Revenue (including the Home Page Concession) to be sanctioned, it would (they say), be in serious derogation of the standards laid

¹³⁰ See for example, Annex B (i) to the Agreed Facts.

¹³¹ Even if such reviews contain illustrative excerpts of the music in question.

¹³² It was suggested that the differences between the Applicants in the definition of Gross Revenue reflected their differing forecasts of how advertising was to feature in their products.

¹³³ In fact, revenues derived by licensees from advertising, sponsorship and commissions which are all referred to (as before) simply as 'advertising revenue'.

down and applied by previous decisions of this Tribunal and those of its predecessor – particularly in BSkyB (supra).

195. On several occasions, we have referred to the core requirement (which derives from the Act itself) that in cases such as this, the relevant base revenues must be ‘*directly attributable*’ to a licensee’s use of the Alliance’s repertoire -and that it is for the Alliance to show that this condition is met. In these Applications, the problem arises in relation to the Alliance’s proposed imposition of royalty upon ‘*all revenue received ...in relation to the Provision of Licensed Services*’ and was, we think, exacerbated by their reliance upon a construct of Mr Rabinowitz’s which he called ‘*the Music Site*’. The Alliance based their submissions upon the ‘draw’ that the repertoire possessed; this they said resulted in a close connection between advertising revenue and accompanying music. The two were in a way, symbiotic. The Alliance’s position was succinctly stated in their opening written submissions where¹³⁴ they asserted that Gross Revenue should include:

(a) All advertising, sponsorship and commissions revenue generated by a page which is ‘*within the Licensed/Music Service*’, and

(b) an *apportionment* of revenue generated by pages ‘*outside the Licensed/Music Service*’, if music is ‘actually offered’ from that page, unless the music content of the page is an *insubstantial* part of it¹³⁵.

196. iTunes and the MNOs have identified some practical examples where, it was said, the Gross Revenue definition in the New JOL is unduly overreaching and should not conceivably attract royalty – which they do (so *they* say¹³⁶) under the present definition of ‘Gross Revenue’. In this category, the more important examples seemed to be:

- (i) Outstandingly, banner advertising on ‘mixed’ pages
- (ii) Sponsored search and click-through’ advertising, and
- (iii) Advertising which enables or permits a ‘double recovery’, otherwise known as ‘double dipping’.

The Remaining MSPs agreed with the MNOs’ and iTunes’ submissions and, if anything, were more radical in their objections. In support of their cases, the MNOs and iTunes also gave examples from the *offline* world of the limits of legitimate (and of illegitimate) royalty tribute to collecting societies and in particular, drew attention to the working of the CD licences which are promulgated by MCPS.

197. The Alliance, particularly in their 4 December 2006 letter, tried to allay the Applicants’ fears of excessive royalty being demanded. This did not however satisfy the Applicants who saw it as a further example of ‘creeping concession’ on the part of the Alliance, of an even greater uncertainty in character and

¹³⁴ §§ 8.30.1 and 8.30.2

¹³⁵ The words in italics identify points of difficulty for the Applicants.

¹³⁶ The Alliance disagree in part at any rate with *their* construction of the definition.

generally, of the still unsatisfactory definition of ‘Gross Revenue’. The ongoing concern of the Alliance was stated as follows in that letter:

‘Encapsulating [the exploitation of their repertoire] in drafting a definition is far from easy, particularly because no two online and mobile services are the same. Furthermore, the Alliance does not know what business models are around the corner. Therefore, precise drafting is difficult. The Alliance has learned from experience as a licensing body that any attempt to draft the definition of Gross Revenue in too prescriptive a manner may lead to evasion of royalty payments and can result in inadvertent discrimination between licensees operating varying business models.’

The general problem facing all the parties (and indeed the Tribunal) was also well characterised by Mr Weisselberg in his opening address¹³⁷:

“What the MNOs and the MSPs offer is a range of services; the services are provided in a number of ways. There are often multiple revenue streams, they are not always linked in a straightforward manner to any particular service.”

198. **Evidence** In our view, the Alliance’s case on the scope of ‘Gross Revenue’ is built more on submission than on evidence. They *believe* that it is the presence of the music that so strongly draws consumers and subscribers to avail themselves of pages and that this is so whether the page is devoted entirely to music ‘actually offered’ or whether the page has non-music or music-related content as well i.e. within mixed pages. We are not in doubt about the sincerity of their belief, particularly in the light of evidence from a number of witnesses of the importance (sometimes, the centrality) of music offered within the mix of services. In the case of mixed pages however, the assessment must, they agree, be a question of degree when apportionment should yield a fair result. At trial, this was called the ‘spillover effect’.

199. Nevertheless, the apparently unchallenged evidence of Yahoo!¹³⁸ and AOL¹³⁹ is distinctly less enthusiastic about the power of music. Moreover, discussing the impact of music on online advertising, Mr Bill¹⁴⁰ of Vodafone drew our attention to the actual experience of Vodafone Live! He was of the view that whilst music was certainly an ‘important component’ in their mix of products and services, it was not at all a ‘driver of traffic’.

“ Of the mix of products and servicesin respect of Vodafone Live! Music is certainly an important component. However, I would say that the addition of advertising to the music elements of the Vodafone Live ! service has a downside in the sense that advertisements may distract customers from the purchase of music content which remains our core business in respect of music The inclusion of advertising on music pages is therefore something that Vodafone is approaching with caution.”

¹³⁷ D2/73

¹³⁸ Ferguson I, C1/10/179-180.

¹³⁹ Wolffe I C1/1/10-13.

¹⁴⁰ I/8/19.

200. Mr Lee of T-Mobile said that the greater part of their revenue from music related services was actually from ringtones (which are not within the scope of the present enquiry) and not from FTDs¹⁴¹.

201. We accept this evidence but note that these are early days. Like a number of other matters covered by evidence in these Applications, the witnesses were to a degree speculating as to the likely turn of events during the term of the licence.

202. In addition, having viewed for ourselves these mixed pages and assessed their impact overall, we are not persuaded that in many cases the availability of music (still less, music-related items) has the immediate, compulsive effect for which Mr Rabinowitz contends. In our view the placing of a few music ‘buttons’ (even if music is thereby ‘actually offered’) on a mixed page does not *ipso facto* come near to establishing the required ‘nexus’ with the Alliance’s repertoire. The matter is, we feel, to be judged as being one of degree. Considered as the Tribunal did in BSkyB, there will exist a ‘spectrum’ of factual connection with the repertoire upon which the Tribunal must come to a value judgment in the manner of a jury¹⁴². If (as often happens) the sole or predominant part of a website page (excluding any advertising) is devoted to music ‘actually offered’, then it is obvious that the ‘driver of traffic’ on that page is likely to be the Alliance’s repertoire. On the other hand, a page with say, a single ‘button’ for music downloading cannot be regarded as the *raison d’être* of the page from either the point of view of the proprietor or the consumer.

203. In the form of progressive questions, the basic issues appear to us to be these:

- (a) Should Gross Revenue *ever* cover more than what consumers actually pay to purchase or use the Alliance’s music in an online service and if (as seems to be agreed) should it cover more,
- (b) Can it legitimately include associated advertising revenue and if (as also seems to be agreed) it can,
- (c) Where in the kaleidoscopic world of online services does one ‘draw the line’ on legitimate royalty-attracting advertising revenue. As Mr Rabinowitz put it in the post-hearing written submissions:

“ The debate is as to where the nexus ceases to be sufficient.”

Then there is the ‘wild card’ which so vexes the MNOs and iTunes,

- (d) What should happen if the music service is paid for (in whole or in part) as a result of advertising revenue i.e. it is offered to the consumer, free or at a subsidised rate? Are these the unique cases where one is justified in looking ‘outside in-stream advertising’ ?

And overall

¹⁴¹ D5/163.

¹⁴² See § 65 above.

(e) How may the result be articulated in a simple yet practical manner?

204. Our chief problem in devising a fair, working definition of ‘Gross Revenue’ has of course been in the context of webcasting. We were invited to consider many actual examples of how advertising might appear when a consumer downloads music on a webcasting service. During the demonstration sessions, representatives of the Applicants put their clients’ offerings through their paces. Similar illustrations were also provided at the hearing itself by means of an overhead projector, particularly by Mr Carr. On these occasions we were invited to view selected (and often, we suspect, selectively problematic) material to illustrate and bolster particular arguments of Counsel. A number of photographs of web pages were also put to the Alliance in correspondence accompanied by the question: “*Please tell us, is this ‘in’?*” The Alliance’s refusal to answer until a later stage (characterised by Mr Weisselberg as ‘coyness’) was the subject of sustained comment. In this connection, we have also been shown how for example, the home page of the iTunes Store is frequently changed.

205. To further complicate matters, there was evidence that the content on Vodafone’s home page changes on a daily or even possibly on an hourly basis¹⁴³. On some webcasting services, customers can actually ‘personalise’ their content; one consumer can choose pure music offerings for his homepage, whilst another may prefer news, sport or say, music videos.

206. *The Alliance’s Position.* As a practical matter, said Mr Rabinowitz, one should avoid formulae which are tailor-made for a particular music service. To do so might even require the definition to be construed before its *possible* application - in the manner of words in say, a contract or a patent claim. This would be most unsatisfactory. It would be unfair to composers and songwriters and would moreover be a recipe for future dispute and wasted money. That, said Mr Rabinowitz, was why a simply-worded formula for Gross Revenue had been chosen for the New JOL. Moreover, so he argues, unduly restrictive wording would encourage avoidance and become a temptation to ‘game the system’¹⁴⁴. It is all too easy, say the Alliance, to use music to sell advertising and to do so in such a way that the advertisement does not actually appear on the same page or at the same time as the music offered. We shall therefore consider the question of ‘gaming the system’ below.

207. *The Applicants’ positions.* The response of the Applicants was simple and predictable: the Alliance, they submitted, had no unqualified right to impose so broad a definition under the guise of simplicity so as to capture streams of revenue to which they were not entitled. They had no right to demand licences to make use of material in respect of which they do not own (or control) the copyright. This said Mr Weisselberg, would be an ‘unprincipled windfall’. Only in the limited cases envisaged by the Disputed Contentions (and by in-stream

¹⁴³ 21/11/51 and 84

¹⁴⁴ See the example given in the Alliance’s Answer to the Remaining MSPs’ Statement of Case : A6/2/88 §6.15 – and see below.

advertising –see below) could a royalty possibly be justified. Difficult cases would undoubtedly arise (for example with ‘bundled’ material¹⁴⁵) but these could be assessed *ad hoc* and if necessary, apportioned for liability by an **independent online assessor**. The present definition of Gross Revenue may indeed look simple, they said, but it was also open to so broad a construction as to enable the Alliance to benefit beyond their legal entitlement.

208. In a separate argument, the Applicants pointed out that the Alliance had contributed nothing to developing, implementing and launching either the music services in question or a fortiori, the mix of services in which it was embedded. It had no input into the basic technology and neither did it share in the considerable business risks involved in getting user-friendly and commercial online products to the public – and indeed, in promoting them once they were there.

“Significant to the success of Vodafone generating advertising revenue is its ability to secure subscribers to its network. This will be determined by the range of products and services offered by Vodafone including its voice and text services and pricing plans, its customer service, its content offerings (both music and non-music), the handsets that it offers consumers, its marketing, its network coverage and its reliability.”¹⁴⁶

An overgenerous definition of Gross Revenue would be manifestly unjust, they argued, in the light of the *rationale* of e.g. BSkyB .

209. The importance of **minima** to this discussion was stressed¹⁴⁷. In the New JOL, minima had been agreed for the very purpose of addressing a suggestion by the Alliance of a possible policy of deliberate underpricing by a licensee in the future. Mr Weisselberg also reminded us that in cross-examination by Mr Carr, Mr Biro had agreed that the application of appropriate minima and not an extension of the definition of revenue base, was the appropriate answer to the possibility of underpricing: D12/8-9. He also regarded the use of minima for this purpose as being both fair and non-discriminatory. So, it was argued, the Alliance was in any event protected by the minima to which it had agreed.

210. We are impressed with Mr Biro’s evidence on minima. We have therefore taken the view that the function of minima is indeed to provide a safety net to protect the Alliance from inter alia the vagaries of underpricing. Music could for instance be substantially subsidised (or given away) as a result of (for example) the availability of healthy advertising revenues. We shall return to the question of underpricing in the practical context of iTunes and the MNOs’ Disputed Contentions below.

211. In connection with the Applicants’ cases on Gross Revenue, we found helpful a synoptic chart of the parties’ positions on the New JOL (as amended by the Home Page Concession), the original New JOL having been marked-up in different colours. This New JOL as ‘amended’ forms Annex 2 to iTunes’ written

¹⁴⁵ See Kershaw I, §§26-30

¹⁴⁶ Bill I, I/8/§18

¹⁴⁷ See §§136-148 supra.

closing submissions and also incorporates the relevant parts of Mr Steinthal's proposed New JOL as 'amended'. The Alliance, so we were told, had declined to collaborate in the preparation of this document.

A pervading mutual mistrust: 'Gaming the System'

212. Ms Enders explained what 'gaming the system' means¹⁴⁸.

"It is not cheating....Gaming the system is using whatever loophole there is in order to avoid doing something or other which involves paying copyright [royalty]. ...Gaming the system means using whatever advantage there is in order to do that and that can be creating a website that has infinite inventory or does various things. It is very easy to do with software. It is very hard to do in the offline world but it is very ,very easy to do with software."

213. Whilst we have noted Ms Enders' opinion, there is no evidence of licensees actually indulging in gaming the system and in the context of the present Applications, we are unable to assess the potential magnitude of this activity. Moreover, we also believe that it would be in the commercial interest of users of the repertoire to maximise their additional revenues¹⁴⁹. If music is the powerful draw the Alliance says it is, gaming the system might run counter to it. Lest it be thought otherwise, we record that we have not regarded 'gaming the system' as being in some way a dishonest activity.

214. We sensed on the part of the Alliance a near certitude that given the chance, the Applicants *would* 'game the system' whenever they could. The Applicants on the other hand, felt that with so broad a formula for Gross Revenue, the monopolistic opportunism of the Alliance would know no bounds and in addition, that the present formula would be a prescription for dispute – and that it would be likely also to be discriminatory. In other words, on the issue of Gross Revenue, a palpable degree of mutual mistrust suffused the parties' cases.

215. We record that as matters stand, we remain of the view that gaming the system is more a hypothetical problem than a real one. Time will no doubt tell.

Borderline cases

216. In determining what is 'reasonable in the circumstances', the Tribunal has been faced with an unusually difficult task of fairly balancing the parties' interests. The existence of troublesome, borderline cases is not a new problem in this jurisdiction. We are aware that perfection in devising an acceptable definition of Gross Revenue even if desirable, will seldom if ever, be achieved. We are aware too that the experience of licensed use during the short period of operation of this licence may throw up unforeseen difficulties which may require subsequent cure. In the competition between the problems posed by

¹⁴⁸ D10/67-68.

¹⁴⁹ See Mr Cue 3,§29 , I/9.

borderline cases on the one hand and the danger of over generosity to the Alliance on the other, the need for a workable and simple outcome must we think be our foremost consideration

“ We approach this decision with a preference that the tariff should be as simple as possible with a straightforward rate structure based on straightforward definitions. Any tariff will produce anomalies. Whatever tariff is adopted, some situations will fare better than others; but in our view, a complex rate structure is more likely to produce anomalies, especially at the margins of its rates.”¹⁵⁰

Though expressed in terms of the tariff in the AIRC case, the principle is germane to the operative aspects of many a copyright licence. We therefore regard the need for clarity of expression and simplicity of operation in the formulation of the definition of Gross Revenue as being general *desiderata*, even if there may be some degree of quantitative inequity or anomaly at its limits. In the end, we have come to recognise that probably no definition of Gross Revenue will perfectly balance the interests of all concerned.

217. Before turning to the core aspects of this part of the Applications, we are fortunately in a position at this juncture to make two general findings: the first relates to the need for an independent online adjudicator and the other to in-stream advertising. Both issues seem to us to be clear cut – and by the conclusion of the hearing, both seemed to be common ground between the parties. We should nonetheless set them out.

An independent online adjudicator

218. Our first proposal in attempting to resolve the problem of possible disputes as to the interpretation of the terms of the New JOL, arose out of what struck us as an obvious operational *lacuna*. We suggested to the parties during the course of the hearing that the New JOL should be amended to provide for a dispute resolution mechanism via the appointment of an online adjudicator, being a suitably qualified and independent person who would be the first port of call in the event of dispute on the interpretation of *any* clauses in the New JOL. A decision as to whether or not a particular offering fell within the definition of Gross Revenue in the New JOL would of course be well within his terms of reference.

219. At the time, this suggestion drew remarkably little interest from the Alliance, though it should be said that both iTunes and the MNOs proposed an independent adjudicator in their Statements of Case¹⁵¹. By the conclusion of the hearing however, the Alliance seemed to have accepted the sense of such a proposal. In the event of our insisting upon provision being made for the adjudicator, Mr Rabinowitz undertook to try to define his qualifications and role with his colleagues in a draft amendment to the New JOL. On 16 January 2007

¹⁵⁰ AIRC v PPL (supra) at 229.

¹⁵¹ MNOs' Statement of Case A6/4/ii(b) and 16(c) and iTunes' Statement of Case A6/6/17. The independent adjudicator was also advocated by Mr Carr in his opening submissions.

Mr Rabinowitz handed up the Alliance's proposed drafting, which he informed us was agreed by the other parties. We *do* insist on provision being made for an adjudicator and we would now invite the parties to settle an appropriate form of wording to meet this requirement for incorporation in our final Decision.

220. We would expect the parties to summon the adjudicator only if negotiations between the parties failed. A period of say 14 days should be allowed for this

In-stream advertising with music fully paid for

221. By the time of the hearing, a cautious compromise had been reached on the liability of at least one stream of advertising revenue to royalty. All the Applicants were agreed that revenue arising as a result of 'in-stream' (or in-download) advertising is sufficiently linked to the delivery of the Alliance's repertoire as *arguably* to warrant the payment of royalty. The Alliance were not however satisfied with the inclusion merely of in-stream advertising; they argued that this 'concession' did not sufficiently compensate their members for the use of the repertoire online in either present or future offerings and in addition, was inconsistent with other features of their cases.

222. We have noted the word 'arguably' in the compromise but accept it as a *fait accompli*. For example, this is what Mr Bill of Vodafone said about this development:¹⁵²

"While as a matter of principle, Vodafone thinks that in-stream advertising should not be included in the revenue base where consumers pay for a music service, it has, in a spirit of compromise, accepted the inclusion of revenue earned from such advertising in the revenue base. This is intended to give the Alliance and its members some comfort that they will benefit if any shift from paid music services to advertising funded music services materialises, without those music services going all the way to being offered for free."

We have also assumed for present purposes that the compromise proceeds on the basis that the consumer has **fully paid** for the content he has downloaded for 'in-stream' consumption. On that basis, we accept this consensus as a practical and sensible way of dealing with the liability of at least one *locus* for online advertising royalty and we also consider that there exists here a sufficient nexus between the music and its consumption to justify a royalty. We shall also consider the position if a consumer has *not* paid (or has only partly paid) for what he has consumed because of the presence of advertising, when we come to consider the two Disputed Contentions.

223. We have already recorded our understanding of what in-stream advertising means: see § 183. It is understood to occur

immediately before,
during (such as in between tracks) or
immediately after

¹⁵² I/8/16

a download – which has already been initiated by the consumer¹⁵³. Advertising ‘*immediately before*’ a download would not however qualify for ‘in-stream’ status if it occurs on what is called a ‘music home page¹⁵⁴’ – such as one sees for example in iTunes’ Store – even though music is ‘actually offered’ there; that would be outside ‘in-stream’ advertising as we understand it – a topic dealt with in the following section.

224. As we understand it, such advertising could in principle arise as a result of the activation of most of the services identified in the Royalty Table -but it must always be part of the same ‘content delivery’. The MNOs provided schematic ‘photograb’ illustrations of possible in-stream advertising as Annex C to the Agreed Facts.

225. The Alliance suggested however that this ‘concession’ (as they called it) substantially eroded iTunes’ and the MNOs’ arguments on their Disputed Contentions since it disclosed

‘No principled reason ... as to why this type of advertising alone should be exempted from the revenue-narrowing proposals of the MNOs’ Disputed Contention.’.

226. We disagree. Under in-stream conditions, it is our view that the ‘close nexus’ is clearly present. Music *is* actually being consumed as a result of selection of an offer from a web page and moreover, in visual and audio-visual terms the music and advertising are symbiotic. It therefore appears logical to treat these three potential locations for advertising equally *a propos* advertising revenue for inclusion in the definition of Gross Revenue. In BSkyB terms, this revenue is at the top end of the ‘spectrum’ of association with the repertoire.

227. In addition, since in-stream advertising is inextricably connected with the actual consumption of the music purchased, such consumption has to be recorded and accounted for by users in any event. So in practice, there should be no problems.

228. So much for ‘in-stream’ advertising as such. This is a justifiable revenue stream for royalty purposes and in our view, it must be spelt out in the definition of Gross Revenue. iTunes and the MNOs have proposed slightly different versions of wording on this point for inclusion in the revised Gross Revenue definition¹⁵⁵. The Remaining MSPs cover this in different wording as follows:

“..provided that such advertisement ...appears at the same time as a Repertoire Work is being utilised by or served from the Licensed Service.”

229. We prefer the MNOs’ version which reads as follows:

¹⁵³ We have been shown relevant advertising immediately before and during download. We have not however seen advertising immediately *after* download.

¹⁵⁴ Or perhaps a music sub-home page.

¹⁵⁵ Annex 2 to iTunes’ closing written submissions.

(b) all revenue, including by way of sponsorship and commissions, received (or receivable) by the Licensee as a result of the inclusion of third party advertising “in-stream) as part of the Licensed Service, being advertising placed immediately at the start, end or during the actual delivery of a Repertoire Work to a User, ...“

Outside ‘in-stream’ advertising: ‘Music only’ pages and mixed pages

230. The consensus on in-stream advertising assists us somewhat in establishing whether a nexus exists between music and advertising in outside in-stream situations and if it does, where the ‘line of sufficient connection’ should be drawn. The enquiry arises of course, only when music is ‘actually offered’ online
231. The MNOs’ and iTunes’ positions were that in such circumstances, revenue can arise *only* in the circumstances envisaged by their respective Disputed Contentions i.e. full payment for the music downloaded exhausts all further tribute.
232. The Remaining MSPs (as we understood it) contended that in-stream advertising was the only revenue stream which the Alliance could legitimately lay claim to.
233. In our view however, there are three categories of pages which are outside ‘in-stream’ pages, all of which *ex hypothesi* may carry advertising. First, there are those pages which have no music or music-related content. These have already been considered and no further mention need be made of them.
234. Secondly there are pages where (the advertisement apart) the **entire operative content** of the page comprises ‘music actually offered’. Choice of any item on such a page will lead to a music download and for this reason, such pages were sometimes referred to as ‘**music only pages**’ or as ‘**music home pages**’. It seems to us that the association of such pages with the Alliance’s repertoire must in real terms be about as close as it is with ‘in-stream advertising’ and may logically be considered to be part of it. All advertising revenue from such pages should therefore in our view, also be subject to royalty being paid – for the same reason. ‘Music only pages’ must now be specifically mentioned in the new definition of Gross Revenue.
235. Of greater importance to this case is the third category, the so-called ‘**mixed pages**’. By ‘mixed pages’ we mean web pages where non-music (and/or music-related¹⁵⁶) services are simultaneously offered with music for direct downloading. As we understand it, mixed pages may occur virtually anywhere online but for the purposes of illustration, a home page was often cited for this purpose. In such cases, as both the Disputed Contentions and the Home Page Concession recognise, the relative ‘contributions’ of the music and non-music

¹⁵⁶ See § 190.

parts (again disregarding the advertising itself) may vary between the ‘insubstantial’ and the predominant.

236. Whereas the discussion at trial (and before it) focussed more upon the effect of the ‘music offered’ being *insubstantial* in relation to the whole, we consider it to be both realistic, more practical and in line with principle to look at the situation the other way around. The relevant question therefore is: Does the character of the **predominant part** of the page (disregarding the advertisement itself for this purpose) make it a royalty attracting page when advertising is present?
237. In our view, if ‘music actually offered’ comprises the predominant part of the entire content displayed on a web page (which *ex hypothesi* also carries advertising –which may be ignored for present purposes), then advertising revenue arising from it may legitimately be included in the definition of Gross Revenue. In practical terms, this conclusion thus disposes of the Disputed Contentions.
238. **Apportionment.** This is a strategy which has been proposed on several occasions to tackle the revenue calculation on mixed pages in hopefully, a fair way. Both the Disputed Contentions, the Home Page Concession and the arguments of counsel on other related issues, have from time to time raised the spectre of trying to separate on a mixed page, services not requiring a licence from those that do, followed by an exercise in some sort of apportionment. It stands accepted that precision is unlikely ever to be achieved in practice and that once again, the assistance of the adjudicator is likely to be sought. In the light of what we saw at the demonstrations, we find the likelihood of repeated, detailed apportionment exercises as being something to be avoided if at all possible. Subject therefore to the paragraph following, we wish to avoid detailed apportionment exercises.
239. We would therefore add the following regarding our view of what the ‘**predominant part**’ of the content of a mixed page should be. Here, the assessment must primarily be visual¹⁵⁷. It will be the result of examining the *area* of a page actually occupied by the mixed offerings and establishing the ‘relative dominance’ of the music and non-music elements – the advertisement itself being disregarded for this purpose. For the avoidance of doubt, we record that by the ‘**predominant part**’ of the entire content of a mixed page, we envisage the page to contain 75% or over of ‘music actually offered’. Though this is another value judgement, we feel that this apportionment is relatively easy to carry out whilst at the same time serving the need for a close connection between the music and the revenue generated from advertising on that page.
240. Should there be difficulty about either what is to be regarded as being ‘in-stream advertising’ or whether the ‘predominant part’ of a mixed page is indeed related to ‘music actually offered’, this could, we feel, conveniently be left for the adjudicator’s determination.

¹⁵⁷ We were not addressed at any length on how to deal with the assessment of ‘audio only’ advertising.

The Alliance’s ‘Music Site’

241. Prior to trial, the Alliance often used the phrase ‘*within/outside the Licensed/Music Service*’¹⁵⁸ to identify the royalty-attracting ‘zone’: see for example § 192 above. However, during the trial, Mr Rabinowitz began to identify the Alliance’s principal royalty-attracting revenue streams as arising at (and around) what he called a ‘**Music Site**’. The notion of the Music Site seemed to us to come to a head in the Alliance’s 4 December 2006 letter (p. 3) where it was identified thus:

‘What constitutes a ‘music site’ should *in most cases* be obvious to the casual observer. The music site will be that part of the MSPs’ or the MNOs’ offering which is *built around* the offering of the music licensed under the New JOL.’
[*Emphasis added*]

242. We learned this much more about Music Sites (principally again, from the 4 December letter):

(a) Music Sites are separately branded and have their own ‘look and feel’.

(b) They are in some way broader than a Music Service¹⁵⁹ since

“ it is not limited to the Music Services as defined in Schedule 1 of the Scheme. If it were, Advertising Revenue qualifying as Gross Revenue would on Mr Carr’s construction, only be generated from pages from which music is’ actually offered’.” ,

(c) Music Sites are “*generally.. identified with the word ‘music’ or some related description*”.

(d) “*Of course, under the New JOL it may be necessary to have a discussion with a potential licensee about the extent of its Music Site.*”

243. The Alliance’s position concerning their proposed ‘Music Site’ was this: Mr Rabinowitz said that all revenues earned thereabouts should ‘in general’ be within the royalty base. Nevertheless, the Alliance also laid claim to undefined territory outside the Music Site. Here however, Mr Rabinowitz recognised that a more complex situation prevailed and in fairness, an apportionment of revenues based on subjective assessment might be required – if necessary, with the intervention of the adjudicator. Since the foregoing still left us unenlightened as to where the line was to be drawn, we must evidently look more closely into the limits of the Alliance’s ‘Music Site’.

244. First, according to the Alliance, as the Music Site royalty-attracting advertising is evidently intended to include at least

(a) ‘in-stream’ advertising, and

¹⁵⁸ Or simply ‘the music service’.

¹⁵⁹ Defined: see § 168.

(b) advertising which is present where there is provision for downloading music (i.e. ‘music actually offered’).

245. However we view the Alliance’s idea of a Music Site with suspicion in so far as it lays claim to more than this. Like the Applicants, we question the use of the phrase ‘*built around*’ the offering of the licensed repertoire; this is a relative term and if questioned, may inherently be prone to debate and misunderstanding. As we observed at trial: Where does the perimeter to what has been ‘built around’ lie? Mr Carr’s response was in effect, that the perimeter was elastic¹⁶⁰:

“*There are not any limits because it is all in their discretion.*”

246. This is obviously unsatisfactory. If (as it appears in view of the foregoing) the meaning of ‘Music Site’ is to a significant degree, indeterminate (or its application is capricious), its use in the definition of Gross Revenue would be likely to give rise to problems. It should not be used in our view.

Music fully paid for: Conclusions

247. *When music is fully paid for* there are three situations where in our judgment, advertising revenue should attract royalty:

- when the advertising is ‘in-stream’,
- when the ‘music actually offered’ forms the sole content of a page on which advertising is also present (ie a ‘music only’ page), and
- when the ‘music actually offered’ forms the ‘predominant’ part of a page on which advertising is also present (i.e. a ‘mixed page’)

In the second and third cases, the part of the page in question occupied by the advertising itself will be disregarded for the purposes of estimation. In the third case, ‘predominant’ will be understood to mean that the music actually offered forms 75% or over of a mixed page. Mathematical precision is not envisaged and disagreement on any of the foregoing matters can be referred to the adjudicator. If music is not ‘actually offered’ on a page, the issue of royalty on advertising revenue does not of course arise.

Music not fully paid for: The ‘Disputed Contentions’ and minima

248. So far, we have assumed that the consumer will be paying the *full price* for music downloads. But the full price may not always be required and in such a case, two possibilities will arise, both of which underpin the Disputed Contentions. First, there is the MNOs’ Disputed Contention which envisages downloaded music being offered *free*, its cost having been entirely defrayed by

¹⁶⁰ D2/38.

concomitant advertising¹⁶¹. Secondly, there is iTunes' Disputed Contention where music is offered at an '*artificially depressed*' price, that is, by *subsidy* from concomitant advertising. The music for consumption must of course be 'actually offered'. In either situation, subject to the comfort of minima (see above), the Alliance considered that their members might lose out on royalty from the sale or use of the music – all because of the presence of the advertising associated in some way with it. That said the Alliance, would be unfair.

249. The Alliance's argument is however flawed in that it completely ignores the presence and negotiated purpose of minima: see §§ 138-139, supra. . Nonetheless, we shall examine the arguments.

250. The iTunes' proposal was, said Mr Weisselberg, a more 'nuanced' position than that taken by the MNOs. Indeed, iTunes' 'concession' was acknowledged by Mr Rabinowitz to represent the 'middle ground' and was thus more reasonable from the Alliance's point of view. However, it was one which still did not go far enough for the Alliance.

251. Whenever the full price *is* paid for music, the Applicants submit that ('in-stream advertising' apart), the Alliance's members will have been sufficiently rewarded for the use of the repertoire. No royalty is therefore due on advertising. On the other hand, the MNOs and iTunes *are* prepared to pay royalty when the music is free or is subsidised by advertising. When this occurs, royalty for use of the music can *only* be levied on the advertising revenue with which it is associated since there is nothing else to go on. In justifying this approach, Mr Carr drew support from the *faute de mieux* basis upon which the Tribunal had to act in the commercial radio case, AIRC v PPL [1993] EMLR 181 (supra). There, it will be recalled, there was also no alternative to a royalty based on advertising revenue, commercial radio being free to the consumer.

252. We have in effect rejected the word 'only' in the phrase '*should only be included within Gross Revenue*' which is to be found in both Disputed Contentions. We have thus rejected the premise on which the Disputed Contentions are based because, we believe, that even when the music is fully paid for, there are circumstances where royalty on advertising revenue should still be available to the Alliance; see the previous **Conclusions**. The situations envisaged in the Disputed Contentions are merely, *a fortiori*.

253. Pointing to an apparent illogicality in the positions of iTunes and the MNOs on this point, Mr Rabinowitz said that if free or subsidised music apparently creates a 'sufficient nexus', how could it be said that music offered at full price in the same situation did not? We understand that argument. We are not however sure that the *faute de mieux* order for royalty in AIRC is expressed to be based on the need for a 'sufficient nexus' between broadcasting of the music and its associated advertising. The award arose because compensation based on advertising royalty was the *only* solution which the Tribunal found 'reasonable in the circumstances'.

¹⁶¹ Actually, in both cases, 'advertising, sponsorship and commissions'.

254. We shall certainly follow the AIRC approach in this part of our own decision without analyzing its *ratio*. We believe however that there is further justification for doing so. When music is free or subsidised, that very fact must also fuel an increased draw to the page whence the music is actually offered. For that reason, there, is a separate ‘close connection’ between music and advertising. Consumers are obviously attracted to free (and subsidised) offers; ask any pirate.

255. *iTunes’ calculations*. For all its engaging ‘nuance’, iTunes’ proposal has an uncomfortable pinch about it. When online music is offered free there is, of course, unlikely to be a problem. But that is not the case when any degree of subsidy is present.

256. In our view, the iTunes Disputed Contention suffers from the seriously unattractive feature that it would be difficult to operate in practice. Part of the difficulty may be appreciated merely by looking at para (c) of the iTunes’ proposals for amending the New JOL which are incorporated in the synoptic marked up version which is Annex 2 to their written closing submissions. Royalty revenue due on artificially depressed pricing is expressed in terms of a formula which requires an assessment of inter alia the number of underpriced Musical Works sold. The artificial depression could be determined as follows:

$$A \times \frac{UMV}{NUMW}, \quad \text{where}$$

A=Applicable royalty revenue received in respect of the period when an underpriced musical work is offered for sale

UMW = Number of underpriced Musical Works sold, and

NUMW = number of Musical Works sold

257. The above formula presupposes however that there will be antecedent agreement about when a Musical Work is ‘underpriced’. But this appears to be no easy matter. For example, the evidence of Mr Bill of Vodafone, gives two real illustrations of disputes over whether the price for FTD was in truth ‘underpriced’¹⁶². On this point, Mr Bill also described the iTunes proposal as being “*subjective and difficult*”¹⁶³. We accept this evidence. In cross-examination, he also said¹⁶⁴:

“..I am not suggesting that it would be impossible. I am saying it is convoluted and perhaps less black and white than the proposal that we put forward.”

¹⁶² I/8/§25.

¹⁶³ I/8/§25.

¹⁶⁴ D5/79-80.

258. iTunes tried to meet this difficulty in two ways. First, it proposed a practical mechanism whereby underpricing shall be *deemed* to have arisen¹⁶⁵. The proposal reads as follows:

“ The price payable by the user shall be deemed to have been artificially depressed ...where 8% of the ex-VAT price to be paid to by the user for a Musical Work would have produced a royalty of less than half the applicable minimum payment”.

259. Secondly, Mr Weisselberg having accepted that in practice it might not be easy to decide when the price paid by the User has in fact been subsidised by advertising revenue (and if so, to what degree), was therefore compelled to put forward the hard-pressed online adjudicator to resolve any dispute on the issue.

260. For the foregoing reasons, we have come to the conclusion that the iTunes Disputed Contention is in any event unacceptable. It would, we think, be a prescription for serious practical difficulty in the future. The *degree of subsidy* (which is its *raison d'être*) cannot be ignored. Other parties submitted that what was needed was a relatively simple, workable definition which on the authorities is always a *desideratum*. That, says Mr Carr, is a reason why the MNOs' proposal should be accepted.

261. We believe first that when *any* element of subsidy or underpricing is present in the sale or use of the repertoire online, that state of affairs should be presumed to be due to concomitant advertising. We further believe that the degree of subsidy should be ignored; free music and subsidised music should be treated in the same way.

262. Mr Steinthal's submission on this part of the case was again based on the criterion that for royalty to accrue, advertising must in all circumstances be '*directly attributable*' to the repertoire. That is of course correct. The Remaining MSPs' formula for triggering the operation of royalty accrual in respect of online advertising is, as we understand it, remarkably similar to the conclusion we have reached in relation to the downloading of fully paid music outside 'in stream' advertising. It reads thus¹⁶⁶:

“(b) All revenue received (or receivable) by the licensee in the Territory as a result of the placement of third party advertising on or within the Licensed Services, provided that such advertisement appears on the same webpage adjoining or immediately proximate to the use of Repertoire Works, or [in-stream – see above]”

Overall conclusions

263. In summary, we accept on authority, that the Alliance is entitled to participate by royalty in some of the advertising revenue in limited circumstances outside

¹⁶⁵ Again from the 'marked-up' New JOL, being Annex 2 to iTunes closing submissions. We have assumed that this proposal will be workable within the industry.

¹⁶⁶ All three proposals for amendment of the New JOL definition of Gross Revenue at this juncture introduce the concept of 'the Territory'. We see no harm in retaining this.

in-stream advertising. We are minded to treat all the cases basically on an equal footing, that is, whether the music is fully paid for or whether it is either free or it is artificially depressed by advertising. When the sole or predominant part of a page relates to 'music actually offered', royalty is due. Furthermore, in relation to the 'sole or predominant' requirement, our view is that it should also be understood in the same way in all cases.

264. It is of course true that when music is not fully paid for, the Alliance may to some degree 'lose out' on the sale. But that is surely why minima are present in the Tariff.

Sponsored search advertising and 'click through' sales

265. These days, various sorts of sponsored search are a common (and useful) feature of web pages. Sponsored search advertising is the return of links to advertisers on a search results page where the user uses a search facility on say, an MNO's content portal. Such advertising is akin to the 'sponsored links' that are often returned on an Internet search engine's results page. In Annex D to his closing written submissions, Mr Carr provided an illustration of sponsored search advertising by showing the results page of a Google search on 'Robbie Williams'. This showed 10 results, two of which (entitled 'Sponsored Links') enabled one to download Robbie Williams songs *via a third party website*. The remainder of the results page related to stories and articles of various kinds concerning the singer.

266. In our view, a search facility is a distinct non-music service offered to consumers who, in the case of customers of the MNOs, expect to search content wherever they are within the service. It may be regarded in the same way as the music button on a home page. It may be music-related or it may not be. More importantly, this form of advertising has in our view, only a tenuous a link with the use of the repertoire *by the MNO (or by iTunes) and* in our judgment sponsored search advertising cannot qualify for inclusion in the definition of Gross Revenue. The final licence should therefore explicitly spell out this exclusion.

267. Third party sales are in any event excluded from the Gross Revenue by the New JOL: H/1/44-45 § 1 (b)(ii).

Rearrangement of page content

268. We have already mentioned this recent phenomenon but were not addressed on the topic at any length. In theory, rearrangement could possibly lead to advertisements being moved by the consumer into new positions relevant to this enquiry. Such re-arrangement is in our view, out of the hands of the MNOs or MSPs and is thus without the scope of the Gross Revenue provision. In addition, a general direction to the customer referring to the provision of a facility for rearranging the content of an offering is, we consider, also without the scope of the present enquiry. This is so on the basis of the narrow meaning given by the

courts to ‘authorisation’ in copyright cases: see for example CBS Songs Ltd v Amstrad Consumer Electronics plc [1988] AC 1013 at 1054¹⁶⁷.

VIII ‘DOUBLE DIPPING’

269. This was another ‘quia timet’ topic if we may so call it. The Alliance was from time to time accused of a desire to collect royalty on the same revenue stream twice and examples of this possibility were put forward. In response, the Alliance vehemently denied any wish (or indeed entitlement) to do so and sought to clarify their position in their letter of 4 December 2006. Double dipping is obviously objectionable in the present context but it is to be contrasted with two separate revenue streams generated from two separate acts of exploitation of music. That is not the same thing. We have considered the evidence regarding the possibility of double dipping and do not believe that the likelihood of its happening to be sufficient to require it to be addressed specifically in the definition of Gross Revenue.

IX A DEDUCTION FOR ADVERTISING COSTS

270. The Remaining MSPs seek a deduction from the Gross Revenue base of 15% for the costs of securing advertising revenues. All the other parties have settled with the Alliance on the basis that there should merely be a 5% deduction under this head.

271. The basis for the Remaining MSPs’ contention seems again to hark back to the position of the commercial radio broadcasters. In the case in question, AIRC v PPL [1993] EMLR 181 at [217], the Tribunal found as a fact that the cost of obtaining direct advertising was “*in many cases ...probably greater than 15% of sales revenue. In some cases it is as much as 30%*”. Nevertheless the Tribunal applied a 15% deduction.

272. Two points which are presently relevant may be gleaned from this decision. First, that these figures were based on actual evidence of advertising rates and costs. Secondly that the Tribunal applied a deduction which was intended to cover only a *proportion* of the costs of obtaining advertising.

273. In this case, the most important factor for us to take into account is undoubtedly the existence of the New JOL as a comparator. For the reasons upon which we have already elaborated, we are of the view that in this aspect of the case, the New JOL must indeed be regarded as a compelling comparator. We should therefore require cogent evidence to be persuaded that the settlement figure of 5% was *not* fair and reasonable in the circumstances.

274. In addition, the evidence touching the actual costs of advertising in this case falls far short of that standard in our view. Some relevant *estimates* were provided by Yahoo! and calculations were made by Mr Boulton on behalf of

¹⁶⁷ Not referred to by counsel.

AOL. The outcome struck us as derivative in character and in addition, was criticised by Mr MacGregor. On the other hand, the evidence of Mr Bill on behalf of the MNOs suggests that at the time of the settlement, they indeed had an ongoing commercial interest on this question of advertising costs.¹⁶⁸. This also supports our view that the New JOL is the best comparator in this matter

275. We have reviewed the material under this head and find that the Remaining MSPs have failed to justify a deduction beyond that already agreed by the settling parties to the New JOL

X A DEDUCTION FOR AUDIO VISUAL MATERIALS

276. A reduction in the *royalty rate* (but no reduction for *minima*) in respect of audio-visual materials of 15% was agreed between the Alliance and all the other settling parties (iTunes and the MNOs included) in the New JOL. However, the Remaining MSPs have argued for a 25% reduction in both the royalty rate and minima on the basis that the music provided by the Alliance only forms a relatively small part of a more valuable product.

277. Mr Boulton stated that the New JOL has “*some merit as a comparable*” on this point¹⁶⁹. For the reasons already given, we regard the New JOL as being the best comparator under this head as well. This is an area where iTunes had a real interest, Mr Cue stating that audio-visual materials had a “*huge potential*” as far as his company was concerned. In fact his company is already offering audiovisual downloads (of various kinds) in a number of markets. He also confirmed in cross-examination that in September last year, his company’s interest was as great as it is today in this business area¹⁷⁰. Evidence on this topic was also given by Mr Bill and Mr Lee. These parties evidently well knew what they were doing when they signed the Settlement Agreements.

278. We have reviewed the material before us on this topic and have unhesitatingly reached the view that the position agreed by the settling parties in the New JOL is fair and reasonable – and should apply to all new licences. The Remaining MSPs case on this point is therefore rejected.

XI A ‘NEW FORMAT’ DISCOUNT?

279. The Remaining MSPs were also seeking a ‘new format’ discount. Their proposal was that only one third of the rates determined by the Tribunal should apply to the ‘nascent webcasting services market’ for a period of at least 5 years: Supplemental Statement of Case § 18.1. It was said that ‘the webcasting industry when compared to the commercial radio industry is ‘underdeveloped and still in its infancy’. Relying on precedent (BPI v MCPS [1993] EMLR 86 at 115) it was submitted that in situations such as this, a ‘new format’ deduction

¹⁶⁸ I/8/10

¹⁶⁹ G1/6/32

¹⁷⁰ D7/99-101

was amply justified. Needless to say, this submission was strongly opposed by the Alliance.

280. There is no provision for a 'new format' discount in the New JOL. Moreover, though the Remaining MSPs' position on this issue was never abandoned, we gained the impression that this was a topic which by the time of the closing speeches, Mr Steinthal was not pressing as strongly as he was in opening.

281. The evidence on this point comes first from Mr Boulton upon which he notably disagreed with the Remaining MSPs. Confirming our own view (and for the reasons previously given) he agreed that the New JOL was a valid comparator on this issue. Ms Enders firmly rejected the suggestion that webcasting was a 'nascent' industry. We accept this evidence. In addition, the Remaining MSPs' argument has a hollow ring when one considers that they themselves were the first to launch on the UK market and take licences from the Alliance¹⁷¹ For these reasons, we are of the view that the Remaining MSPs have failed to establish their case that there should be provision for a 'new format' discount.

XII COSTS IN THE COPYRIGHT TRIBUNAL

282. References to the Tribunal have become more frequent and so too has been the criticism by users and potential users (many of them of modest means) about the heavy cost of resolving disputes with the collecting societies. Invoking the assistance of the Tribunal to resolve disputes must not become the preserve of the powerful and the wealthy by reason of costs. It is, so we consider, the duty of users of the Tribunal, particularly the collecting societies, to ensure that these references are conducted in a thoroughly proportionate and economic manner, and overall, in accordance with the requirements of CPR, Rules 1.1-1.4, that is, the **Overriding Objective**.

283. In Universities UK v Copyright Licensing Agency Ltd [2002] RPC 36, the Tribunal said this¹⁷²:

"The written evidence is extensive and extremely detailed. No point, however irrelevant, is allowed to go unanswered with the result that the second round witness statements turned out in some cases to be longer than the original ones.....

"To do its job effectively, the Copyright Tribunal must be accessible at reasonable cost. It exists at least in part, to prevent unreasonable terms being imposed on licensees who have little choice but to take a licence. Yet in the present case, we heard evidence from both sides that a reference to the Copyright Tribunal was regarded as a last resort: a failure of a most serious kind. The reason for this view is the perception that the proceedings are necessarily extremely costly, intolerably lengthy and highly complex. The danger that lurks in such a state of affairs is that the cost of a reference to the

¹⁷¹ RealNetworks was licensed from July 2002 for example and Yahoo! and AOL a year later.

¹⁷² § 16.

Annex 1

**DRAMATIS PERSONAE and
CHRONOLOGY**

PARTIES

Current Parties

Yahoo! UK Limited

UK-subsiary of Yahoo! Inc., a global internet company trading.

Yahoo! UK provides a range of internet-content services in the UK. Its online music services consist of:

1. "LAUNCHcast", a free advertising-supported webcasting service comprising:

(a) about 80 pre-programmed channels programmed by Yahoo! by way of genre, artist, era etc., and

(b) a user-customised channel which can be made available by the user to other users.

Each of these channels allows the user to rate artists, albums, songs and genres and, thus to influence the playlist generated by Yahoo! for the channel.

Each channel also allows the user to pause the stream, to skip forward through an unlimited number of tracks, to turn off explicit lyrics and to see a list of recently listened to songs.

2. "LAUNCHcast Plus", an additional webcasting service comprising 11 extra channels made available only to subscribers to the BT Yahoo! Broadband service.

3. Free on-demand music video streams which will be followed by pre-

Webcasters' position

Each of these channels allows the user to rate artists, albums, songs and genres and thereby have some influence over the playlist generated by Yahoo! for the channel. Each channel also allows the user to pause the stream, to skip forward to the next (unidentified) song in the stream, to turn off explicit lyrics and to see a list of recently listened to songs. Channels within the LAUNCHcast service allow only 5 skips forward per hour.

3. Free on-demand music video streams which will be followed by pre-programmed streams of further music videos selected by Yahoo! At any time, the User may choose

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programmed streams of further music videos selected by Yahoo! If the User wishes, he may select another on-demand video at any time.

to restart this process by selecting another video on demand. Formatted: Font: Arial, 10 pt

AOL (UK) Limited

UK-subsiidiary of TimeWarner Inc (formerly AOL TimeWarner Inc.), a global media and entertainment company trading.

UK-subsiidiary of TimeWarner Inc (formerly AOL TimeWarner Inc.), a global media and entertainment trading company.

AOL (UK) provides a range of internet-content services and a broadband internet access subscription service (which is currently being sold to CarphoneWarehouse subject to regulatory approval). Its online music services consist of:

1. "Radio@AOL", a webcasting service comprising about 120 in-stream advertising-free channels currently made available only to AOL broadband internet subscribers. AOL (UK) intends to make this a free advertising-supported service available via its web portal in the near future.
2. "Sessions@AOL", free advertising-supported on-demand video streaming service comprising specially recorded sessions/concerts by selected artists.
3. Free advertising-supported on-demand music video streams.
4. "Listening Post", a free advertising-supported on-demand streaming service of a limited number of audio-only tracks.

1. "Radio@AOL", a webcasting service comprising about 120 channels currently made available only to AOL broadband internet subscribers. These channels currently do not contain in-stream audio advertisements; but banner ads are sold on web pages associated with AOL's radio service. AOL (UK) intends to make this a fully free-to-the-consumer, advertising-supported service available via its web portal in the near future.

2. "Sessions@AOL", a free-to-the-consumer advertising-supported on-demand video streaming service comprising specially recorded sessions/concerts by selected artists.

3. Free-to-the-consumer advertising-supported on-demand music video streams.

4. "Listening Post", a free-to-the-consumer advertising-supported on-demand streaming service of a limited number of audio-only tracks.

RealNetworks Ltd

UK-subsiidiary of RealNetworks Inc., a multi-national software and internet company.

RealNetworks Ltd provides media player software to internet users and its online

music services consist of:

1. RealMusic, a subscription webcasting service offering a selection of advertising-free webcasting and simulcasting channels and on-demand music video streams.
2. SuperPass, a subscription video service which includes music videos.

iTunes SARL

Luxembourg-incorporated subsidiary of Apple Inc. (formerly Apple Computer, Inc.), a global computer software and hardware company. Apple Inc. manufactures the personal music player, the iPod.

iTunes operates an online store for permanent downloads. It has music and non-music content. Its music content consists of both audio-only music downloads and music videos. Its non-music content currently includes audio book downloads, games and short animated films. It also provides a directory of podcasts available from third-party providers.

It is the largest provider of permanent music downloads in the UK.

O2 (UK) Limited

UK mobile network operator which is ultimately wholly-owned by Spanish telecommunication company, Telefonica SA.

O2 provides a range of mobile network access and content services in the UK. Its music service comprises offering its mobile network users a permanent download music service. In the past O2 has also, on a few occasions, streamed content from live music concerts.

T-Mobile
International UK
Limited

UK mobile network operator which is wholly owned by T-Mobile International AG & Co KG whose ultimate parent company is the German telecommunications company, Deutsche Telekom AG.

The T-Mobile group provides a range of mobile network access services in the

UK. Its music service comprises offering its mobile network users permanent music download services.

Vodafone UK
Content Services
Limited

Content subsidiary of UK mobile network operator which is part of Vodafone Group plc.

Vodafone provides a range of mobile network access and content services in the UK. Its music service comprises offering its mobile network users permanent full track music downloads, music video streams and music video downloads and Vodafone Radio DJ, a subscription webcasting service.

Orange Personal
Communications
Services Limited

UK mobile network operator which is ultimately wholly-owned by French telecommunication company, France Telecom SA.

Orange provides a range of mobile network access and content services in the UK. Its music service comprises offering its mobile network users a permanent download music service. Its affiliate, Orange Home UK plc, offers a permanent download music service via the Internet.

Mechanical Copyright
Protection Society

UK collecting society for the licensing of mechanical rights in musical works. It has approximately 14,000 individual composer and songwriter members and approximately 5,000 music publisher members. It distributed over £210m to its members in 2005.

Performing Rights
Society

UK collecting society for the licensing of performing rights in musical works. It has approximately 38,000 individual composer and songwriter members and approximately 3,400 music publisher members. It distributed over £270m to its members in 2005.

British Academy for
Composers and
Songwriters

UK trade body for composers and songwriters. It has approximately 2,500 members.

Former Parties

British Phonographic Industry Limited	UK trade association for producers and licensees of audio and audio-visual recordings of music. Over 300 members (including all the 4 major record companies, Universal, SonyBMG, EMI and Warner) together responsible for over 90% of commercial sound recordings.	
MusicNet UK Limited	UK-subsiary of MusicNet Inc., a US-based "white-label" business-to-business, online music service provider which offers permanent download, on-demand and webcasting services to third parties. MusicNet UK provides permanent download and on-demand music services to Virgin Digital and HMV Digital.	UK-subsiary of MusicNet Inc., a US-based "white-label" business-to-business, online music service provider which offers permanent download and on-demand services to third parties.
Napster LLC	A multi-national online music service provider. In the UK, Napster SARL, a wholly-owned subsidiary of Napster LLC, offers consumers subscription limited download and on-demand streaming services. These services can be PC-based only (Napster PC Music Service) or for portable music players as well (Napster to Go). It also offers UK users a permanent download music service (Napster Light).	
Sony United Kingdom Limited	UK-subsiary of Sony Corporation, a global computer hardware, communications and entertainment company. In the UK, SonyConnect offers users a permanent download music service.	

FACTUAL WITNESSES (who gave oral evidence at trial)

For the MSPs

Gabriel Levy General Manager Label Relations

	(and formerly Head of Music, Europe) at RealNetworks	
Andrew Lee	Head of Legal Department at T-Mobile International UK Limited. Gave evidence under a witness summons.	
Paul Brown	<p>European Managing Director of Pandora Media Inc. Pandora Inc. is a US-based free advertising-supported webcasting service which plans to launch its service in the UK.</p> <p>Pandora's service allows the user to create his own personalised channel, to select an artist for the first track to be streamed, to pause the stream, to skip forward through up to 6 tracks per hour and to rate tracks, albums and artists thus influencing the playlist generated by Pandora for the channel.</p>	<p>European Managing Director of Pandora Media Inc. Pandora Inc. is a US-based free-to-the-consumer advertising-supported webcasting service which plans to launch its service in the UK.</p> <p>Pandora's service allows the user to create his own personalised channel, to select an artist for the first track to be streamed and to rate tracks, albums and artists, and thereby to influence the playlist generated by Pandora for the channel. Pandora's service also allows the consumer to pause the stream and skip forward to the next (unidentified) song in the channel playlist up to six tracks per hour.</p>
Geoff Taylor	General Counsel and Executive Vice-President of the International Federation of the Phonographic Industry (IFPI), the trade association of the international recording industry (and formerly General Counsel to the BPI). Gave evidence under a witness summons.	
Mark Mooradian	Vice-President Strategic Planning and Business Development for MusicNet Inc. Gave evidence under a witness summons.	
Christopher Johnstone	Head of Legal at Music Choice Ltd. Music Choice is a provider of digital music broadcasting services via TV and intends in the future to operate a video on-demand service. It operates a permanent download online music store and video on-demand service in the UK.	

David Wolffe	Chief Financial Officer and Senior Vice President of AOL (Europe) (and formerly CFO and Senior VP of AOL (UK)).
Christopher Hicks	Interim Manager and Director of Finance for UK Audience Business at AOL (UK).
Shannon Ferguson	Managing Director of Yahoo! Music Europe.

For iTunes

Eddy Cue	Global Vice-President of iTunes.
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For the MNOs

Jonathan Bill	Former Head of Advertising and Industry Development at Vodafone Limited.
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EXPERT WITNESSES

For the Applicants/Interveners

Richard Boulton	LECG.
Derek Ridyard	RBB (did not give oral evidence).

For the Alliance/BACS

Claire Enders	Enders Analysis.
Gervase MacGregor	BDO Stoy Hayward.
Zoltan Biro	Frontier Economics Ltd.

Chronology

- /10/1995 MCPS trial licence of Cerberus – the first online MCPS licence: Porter 1 para 16 (E1/6)
- 09/08/1996 MCPS licence of Cerberus for music downloads service: E2/178
- /--/1997 RealNetworks UK operation incorporated: Levy 1 para 9 (C1/121)
- 01/01/2002 Commencement date for the first online scheme promulgated by the Alliance: E2/216
- 01/07/2002 RealNetworks' music service launched: E2/520
- 24/03/2003 Orange launched 7-week video trial: E3/578
- 14/04/2003 O2 launched audio download trial service: Porter 1 para 35(h) (E1/16)
- 06/05/2003 Orange retrospectively agreed licence terms for its 7 week video trial: E3/581
- 19/05/2003 O2 agreed online licence with the Alliance for its trial service: E3/585
- /06/2003 Yahoo!'s UK music services launched: Ferguson 1 para 12 (C1/176)
- 25/06/2003 AOL agreed online licence with the Alliance: E2/468. This agreement was subsequently extended on 24/10/03 (E2/472), 9/12/03 (E2/475) and 29/01/04 (E2/477)
- /08/2003 AOL Sessions music service launched: Wolffe 1 para 23 (C1/9)
- 09/09/2003 Hutchinson 3G UK launched mobile music service: Porter 1 para 36 (E1/17)
- /10/2003 Radio@AOL music service launched: Wolffe 1 para 23 (C1/9)
- 19/11/2003 O2's permanent download music service launched: E3/589
- /--/2004 Vodafone permanent download music service launched: Kershaw 1 para 9 (D1/3)
- /03/2004 MusicNet UK formed: Mooradian 1 para 12 (C1/58)
- 18/03/2004 New AOL online music licence with the Alliance: E2/479. This agreement was subsequently extended on 14/12/04, 21/03/05 and 31/05/05: E2/486
- /05/2004 Napster launched UK music services: McAuliffe 1 para 12 (C1/91)
- /06/2004 T-Mobile launched the Mobile Mix "jukebox" permanent download music service, which offered short remixes of audio tracks: Porter 1 para 40(a)

(E1/18)

- 07/06/2004 Hutchinson 3G UK agreed online music licence with the Alliance with retrospective effect to 9/9/03: E3/595
- 11/06/2004 Napster agreed online music licence with the Alliance: E2/489. This agreement was subsequently extended on 11/08/04, 17/09/04, 19/11/04, 21/01/05, 23/03/05, 01/06/05 and 02/11/05 (E2/492-505)
- 14/06/2004 iTunes agreed online music licence with the Alliance: E2/441
- 28/06/2004 iTunes Music Store launched in the UK: Cue 1 para 8 (C1/30); Enders 1 para 93 (E7/1639)
- 30/06/2004 DVD1 licence settlement agreement between BPI and MCPS: B5/1089
- 05/07/2004 Sony launched online music service: Ashcroft 1 para 9 (C1/158)
- 07/07/2004 Sony agreed online music licence with the Alliance expiring on 31/12/04: E3/539. From then until its settlement agreement in these references, Sony's download service was unlicensed.
- 01/10/2004 Orange launched audio music download service Musicplayer and video service: Porter 1 para 35(g) (E1/16)
- 08/10/2004 O2 agreed (under protest) online music licence with the Alliance for 2004 with retrospective effect to 19/11/03: E3/587 and 590
- 10/12/2004 Yahoo! agreed online music licence with the Alliance: E2/506. This agreement was subsequently extended on 31/10/05: E2/516
- 14/12/2004 RealNetworks agreed online licence with the Alliance (with retrospective effect to the launch of its service): E2/520. This agreement was subsequently extended on 31/10/05: E2/527
- /03/2005 Vodafone launched music video download and music video streaming services.
- 28/06/2005 BPI referred the Alliance's 2005 JOL (Joint Online Licence) to the Copyright Tribunal under section 119 of the CDPA
Napster, RealNetworks, AOL and Yahoo! served references under section 126 of the CDPA
MusicNet and Sony served references under section 119 of the CDPA
See Statements of Case at A1 tabs 1 and 3 to 8
- 28/06/2005 iTunes served notice of intervention in each of the references and a Statement of Interest: A1 tab 2
- 05/08/2005 MNOs served notices of intervention in each of the references

26/08/2005 MNOs' Statement of Case served: A1 tab 11

02/09/2005 MusicNet's Amended Statement of Case served: A1 tab 7

--/09/2005 MusicNet UK concluded distribution agreements with HMV Digital and Virgin Digital for their UK permanent download and on-demand streaming services: Mooradian 1 para 12 (C1/58)

03/11/2005 Alliance served Requests for Information in relation to each of the Applicants'/Interveners' Statements of Case: A3 tabs 32-40

08/11/2005 BACS served notice of intervention in each of the references

09/11/2005 Directions hearing before Mr Simon Thorley QC. For copies of the transcript of hearing and the order made see A5 tabs 81 & 82 respectively

02/12/2005 Alliance's Answers served: A2 tab 13 and A3 tabs 14-22

02/12/2005 BPI, the MNOs, Napster, Sony, Yahoo!, AOL and RealNetworks served Preliminary Replies to the Alliance's Requests for Information: A3 tabs 41-42; A4 tabs 44-47 and 49

05/12/2005 MusicNet and iTunes served Preliminary Replies to the Alliance's Requests for Information: A3 tab 43; A4 tab 48

09/12/2005 BACS' Statement of Case served: A3 tab 22

02/02/2006 Replies of the BPI, MSPs and MNOs served: A3 tabs 23-31

02/02/2006 BPI, MSPs and MNOs served Replies to the Alliance's Requests for Information in relation to their Statements of Case: A4 tabs 50-58A

02/02/2006 BPI served Requests for Information in relation the Alliance's Answer: A4 tab 59

03/02/2006 MSPs served Requests for Information in relation the Alliance's Answer: A4 tab 60

09/02/2006 & 10/02/2006 Directions hearing before Mr Simon Thorley QC. For copies of the transcript of hearing and the order made see A5 tabs 83 & 84 respectively

23/02/2006 Alliance served Preliminary Replies to the BPI's and the MSPs' Requests for Information: A4 tabs 61-62

--/03/2006 T-Mobile launched its full track download "jukebox" service.

09/03/2006 Alliance served Requests for Information in relation to each of the Applicants'/Interveners' Replies: A4 tabs 63-71

22/03/2006 Directions hearing before Mr Simon Thorley QC. For copies of the transcript of hearing and the order made see A5 tabs 85 & 86 respectively

29/03/2006 Alliance served Replies to the BPI's and the MSPs' Requests for Information in relation to their Answers: A4 tabs 62A and 62B

10/04/2006 BPI, MSPs' and MNOs' served Replies to the Alliance's Requests for Information in relation to their Replies: A4 tabs 72-80

13/04/2006 Alliance's Amended Answer to BPI Statement of Case served: A2 tab 13A

28/04/2006 Mutual Non-Disclosure Agreement concluded between all parties to the References for certain information to be classified as Class 1 and Class 2 Confidential Information and for each party to nominate Recipients of such information.

26/05/2006 1st round exchange of witness evidence (factual and expert) and disclosure

26/05/2006 MNOs' Amended Statement of Case served: A1 tab 11A

14/06/2006 Directions hearing before HHJ Fysh. For copies of the transcript of hearing and the order made see A5 tabs 87 & 88 respectively

28/06/2006 and following few days Following an Order by the Tribunal made 14 June 2006, the Applicants/Interveners provided further disclosure relating to their sound recording licensing agreements with the record companies and certain financial information.

01/07/2006 Vodafone launched Vodafone Radio DJ subscription webcasting service in the UK.

14/07/2006 MSPs' served their Answer to the Alliance's case in relation to podcasting services: A3 tab 30A

19/07/2006 Without prejudice expert meeting took place between Mr Boulton (for the Applicants/Interveners) and Mr MacGregor (for the Respondents).

26/07/2006 2nd round exchange of witness evidence (factual and expert) and further disclosure

25/08/2006 BPI's Amended Statement of Case served: A1 tab 1

12/09/2006 Mr Boulton wrote a letter ("Boulton 3") to his instructing solicitors regarding the without prejudice meeting with Mr MacGregor held on 19 July 2006. This letter was sent to the Tribunal and the Respondents on 14 September 2006: B8 tab 34A. On the same date, the Respondents asked the Tribunal not to look at the letter: inter-solicitor correspondence bundle 2, page 614.

12/09/2006 Alliance served Claire Enders' third expert report: E7 tab 19

13/09/2006 Directions hearing before HHJ Fysh. For copies of the transcript of hearing

and the order made see A5 tabs 89 & 90 respectively

- 14/09/2006 BPI's Re-Amended Statement of Case served: A1 tab 1
- 20/09/2006 Mr Boulton served his fourth report ("Boulton 4"): G tab 6
- 28/09/2006 Mr MacGregor wrote a letter to his instructing solicitors (sent later that day to the Tribunal and other parties) in response to Mr Boulton's letter of 12 September 2006 regarding the without prejudice meeting between them on 19 July 2006: G tab 10 pages 164-169. This letter (plus the letter from Mr Boulton to which it referred) was attached to Mr MacGregor's third report served by the Respondents on 3 November 2006.
- 28/09/2006 Settlement agreement concluded between Alliance, BACS, BPI, MNOs and iTunes: H tab 1. From this point iTunes was represented separately from the other MSPs in relation to the References.
- 28/09/2006 Substantive hearing before HHJ Fysh, Colonel Arnold and Rear Admiral Carine starts and is adjourned. For a copy of the transcript of hearing see A5 tab 91
- 06/10/2006 Settlement agreement concluded between Alliance, BACS, MusicNet and Napster: H tab 6
- 10/10/2006 Settlement agreement concluded between Alliance, BACS and Sony: H tab 8
- 16/10/2006 MNOs' and iTunes' Supplemental Statements of Case served: A6 tabs 4 and 6
- 20/10/2006 AOL, Yahoo! and RealNetworks served their Supplemental Statement of Case: A6 tab 1
- 27/10/2006 Alliance's Answers to the MNOs' and iTunes' Supplemental Statements of Case served: A6 tabs 5 and 7
- 30/10/2006 Alliance's Answer to the Supplement Statement of Case of AOL, Yahoo! and RealNetworks served: A6 tab 2
- 03/11/2006 3rd round exchange of witness evidence
- 15/11/2006 1st day of hearing

MC 13



Part I: Online Radio Frequently Asked Questions

All terms in Italics are defined in more detail in the attached Glossary.

1. What is PPL and what does it do?

Phonographic Performance Ltd is the UK licensing and collecting society for record companies and performers. As well as licensing pubs, clubs and any sites where *Sound Recordings* are performed publicly, *PPL* licenses radio stations, TV stations and other broadcasters that use *Sound Recordings* in their programmes. The licence fees that are collected are then distributed to the rightful owners of the *Sound Recording* copyright (usually the record company responsible for creating the recording) and also all of the artists and musicians featured on the recording.

2. Why do I need a PPL Webcasting licence?

If an *Online Radio Service* utilises any *Sound Recordings*, whether full tracks or short clips, then you need permission from those people that hold the copyright of each individual *Sound Recording*. Given the sheer number of record companies in the UK alone, it would be an enormous administrative burden if you had to approach each and every record company for a licence every time you wanted to use a *Sound Recording*. *PPL* therefore administers the rights for *Online Radio Services* on behalf of virtually all record companies in the UK. As such, it is able to grant 'blanket' *Webcasting* licences to *Online Radio Services* for the use of *Sound Recordings*.

3. I've heard that I may also need a 'PRS For Music' licence. What is 'PRS For Music' and why would I need a separate licence from them?

PRS For Music license and administer the rights of songs (i.e. the music and lyrics) on behalf of music publishers and composers. If you are broadcasting a song that is in copyright, you will need a *PRS For Music* licence. The monies collected are accounted back to the publishers and writers of the song. This licence is required in addition to a *PPL* licence.

The difference between the two licences is more clearly illustrated when the writer is a different person from the artist. For example, if you were to broadcast the Jimi Hendrix recording of the Bob Dylan song All Along the Watchtower, then the respective *Webcasting* licences would relate to the following rights:

PPL: This licence would be on behalf of the UK record company that controls the rights to the Jimi Hendrix recording of the song.

PRS For Music: This licence would be on behalf of the UK publisher that controls the rights to the Bob Dylan song.

Even if the writer and artist are one and the same, the rights contained within the song itself and the recording of the song remain separate, so you will still require each type of licence.

For more information on the PRS For Music Webcasting licence, please contact their Online Licensing Team on 020 7306 4991 or e-mail: online@prsformusic.com



4. What rights will the PPL Webcasting licence grant my Online Radio Service?

Under the licence you will be granted the right to include any *Sound Recording* in the *PPL* repertoire in your *Online Radio Service*. The *Online Radio Service* must be streamed, non-interactive and non-downloadable.

For an additional fee you will also be granted the right to *dub Sound Recordings* onto a *Central Database* and to retain copies of those *Sound Recordings* on the *Central Database* for the purpose of *Webcasting*.

5. What won't the PPL Webcasting licence cover?

The *PPL Small Webcaster* and *PPL Standard Webcaster* licences do not cover the following services or activities:

- (a) Interactive services such as those where users can rate tracks or artists to influence the frequency or order in which they are performed.
- (b) Services that allow users to skip, pause or move forwards / backwards during a programme.
- ~~(c) Transmission of the Service on closed networks or to mobile phone networks.~~
- (d) Services offering *Archive Programmes* that the user may playback on demand.
- (e) Services that offer the download of programmes or files containing any part of any *Sound Recordings*. This includes Podcasting.
- (f) The use of *Sound Recordings* in Services to advertise or endorse products.
- (g) The transmission of *Sound Recordings* edited or synched to visuals.
- (h) The public performance of *Sound Recordings* in bars, clubs, shops etc.

A more extensive list of restrictions and other important provisions is provided in the *Webcasting* licence itself. If you require a licence for any of the above rights or services, please contact *PPL* to discuss your needs and we will be happy to advise you as to how you should proceed.

If you are proposing to offer an Online Radio service similar to that described in (a), (b) or (c) above, please contact PPL regarding the Customised Webcasters licence.

6. Are there any restrictions on the use of Sound Recordings in an Online Radio Service?

The following basic operating terms and conditions apply to all *Online Radio Services*:

- (a) Distinct programmes or pre-programmed content (such as sound recordings being provided by a playout server) cannot be repeated or 'looped' within a 3 hour time period.



- (b) No advance information shall be given (either via the website or announced through the service) as to the specific songs that will be played in the future. Non-specific details of artists being played in the future can be provided as well as general information on playlists.
- (c) No 'shuffle' function allowing random playback of music may be offered.
- (d) In any given 3 hour period of Webcasting there shall be:
 - (i) No more than 3 songs from a particular album
 - (ii) No more than 2 songs from a particular album consecutively
 - (iii) No more than 4 songs by one particular artist
 - (iv) No more than 3 songs by one particular artist consecutively
- (e) No unauthorised recordings (inc. bootlegs) shall be knowingly transmitted.
- (f) The licensee may not edit, re-mix or change any Sound Recordings.

A more extensive list of restrictions and other important provisions is provided in the PPL licence itself.

7. How much does a PPL Webcasting licence cost?

~~All Online Radio Services are required to pay royalties for all of the music that they stream to their users. The cost of a licence is therefore dependent on the amount of music you play, the amount of users you have and the length of time that each user streams the Service. The royalty rates payable are the same for all Services no matter how large or small and regardless of whether they are generating any income or not.~~

The cost of streaming a single *Sound Recording* to a single user in the UK is currently £0.00058 (0.058 pence). So if you were to stream 14 *Sound Recordings* per hour to one user you would expect to pay a royalty fee of £0.00812 (0.812 pence). PPL licences require *Online Radio Services* to pay an advance against the likely royalties they will generate. The level of this advance will be based upon the exact nature of your service and the anticipated royalties it will generate.

If during the production or broadcasting of your *Online Radio Service* you *dub Sound Recordings* onto a *Central Database*, then you will also need to license *dubbing* rights from PPL. For example, these rights would be required for copying CDs or MP3s onto any kind of digital storage device, such as a server or a PC. PPL can incorporate the necessary *dubbing* rights into a *Webcasting* licence. An additional fee will be levied for these rights, which will be calculated as an additional 15% of the total royalty fees generated.

For more detailed information on specific licence costs and tariffs please refer to Part II of this document.

8. What are mechanical rights and do I need a licence for them?

PRS For Music are in a position to licence you the separate right to make 'mechanical' copies of the underlying songs contained within a *Sound Recording*. You will need both of these licences in place before any kind of digital copies can be made. Please contact PRS For Music for further information on their licence.



9. Which territories can I stream my service to under the Webcasting licence?

Given that most UK Online Radio stations are accessible internationally, *PPL* has entered into a number of *Webcasting* Reciprocal Agreements with the collection societies in other countries that represent record companies and performers locally. Amongst other things this means that *PPL* is able to license the streaming of *Sound Recordings* to those territories that have signed up to these agreements. The current list of countries that we are able to license on behalf of are as follows:

Argentina	Estonia	Italy	Poland
Australia	Finland	Jamaica	Portugal
Austria	France	Latvia	Singapore
Belgium	Germany	Malaysia	Slovenia
Bulgaria	Guatemala	Mexico	Spain
Costa Rica	Greece	Netherlands	Sweden
Czech Republic	Hong Kong	New Zealand	Thailand
Denmark	Hungary	Norway	Uruguay
Dominican Rep	Iceland	Panama	
Ecuador	Ireland	Paraguay	
	Israel	Peru	

Further countries are expected to sign up these agreements in the future and as and when they do our licence will be extended to cover them as well. An up-to-date list of countries can be found on the PPL website (www.ppluk.com).

Should your *Service* stream to users in any of the above territories, *PPL* will have to account the necessary royalties back to the collection societies in those territories, who will then pass the monies on to the relevant record companies and performers locally. Should your *Service* be streamed beyond the UK, *PPL* will have to levy an *administration fee* to allow for the international accounting of these royalties.

10. What are the administrative requirements for a Webcasting licence?

If PPL is in a position to offer you a Webcasting licence for your *Service* you will be required to comply with a number of accounting and reporting procedures.

In order to calculate the royalties that your *Service* has generated, we will need you to provide us with details of the total amount of streaming that has taken place. We will also require details of the territories to which these streams have been made (i.e. the country where the user is resident). You will be required to submit this information on a quarterly basis.

You will also be required on occasion to provide details of the *Sound Recordings* used within your *Service*. This information must be submitted to PPL in the form of a *Programme Report* Similarly, if you are granted *dubbing* rights, you will need to keep a detailed log of all *Sound Recordings* that have been *dubbed* onto a *Central Database* in the form of a *Dubbing Report*.



Part II: PPL Online Radio Licence Fees & Reporting Requirements

Streaming Royalties

All Online Radio services are required to pay royalties for all of the music that they stream to their users. The royalty rates payable are the same for all services no matter how large or small and regardless of whether they are generating any income or not.

The applicable royalty rate will vary according to the territory in which the end user is based. For all streaming to users in the UK, the UK streaming rate of £0.00058 per track streamed is payable. For the royalty rates applicable for streaming to other territories covered by the PPL Online Radio licence please refer to Part III of this document.

Where a service streams mainly to users in the UK and streaming to any of the other territories covered by the licence constitutes less than 5% of the total streaming as a whole, then the UK streaming rate will applied to calculate the royalties payable.

In order to estimate the likely streaming royalties that a service streaming mainly to users in the UK will generate, the following calculation should be used:

<i>A</i>	UK Rate-Per-Track-Per-Stream	£0.00058	
<i>B</i>	Average Number of Tracks Broadcast Per Hour	14	
<i>C</i>	Average Rate per Listener Hour	£0.00812	<i>A x B</i>
<i>D</i>	Estimated Listener Hours Per Day	500	
<i>E</i>	Estimated Streaming Royalties Per Day	£4.06	<i>C x D</i>
<i>F</i>	Estimated Streaming Royalties Per Month	£121.80	<i>E x 30</i>
<i>G</i>	Estimated Streaming Royalties Per Year	£1481.90	<i>E x 365</i>

In the above example, the service is a back to back music service playing an average of 14 sound recordings per hour and generating around 500 listener hours per day.

Where a service is streaming to large numbers of users outside of the UK the royalty calculation can be more complex as it will need to account for the different Online Radio tariffs in the various territories covered by the licence. Upon request, PPL will be happy to help potential licensees to estimate potential royalty costs for such services.

Dubbing Fees

Where Sound Recordings are dubbed (i.e. copied) onto a PC or server for the purposes of broadcasting an Online Radio service, then an additional fee will be due as this is a separate licensing right to the main Online Radio broadcast.

The dubbing fees are based upon the amount of streaming taking place and are calculated as an additional 15% of the total streaming royalties. So in the example given above, where the estimated streaming royalties for the month are £121.80, the additional dubbing fee payable will be £18.27.



Administration Fees

In addition to the streaming royalties and dubbing fees, there is an administration fee payable to cover the accounting of royalties by PPL back to the collecting societies in other territories covered by the licence, where streaming takes place in these territories.

If a service is restricted to UK users only, through technical measures such as a 'geo-locking' system, then the above administration fees are not applicable.

Advance Fees

The PPL Standard Webcaster Licence is for Online Radio services that stream more than 270,000 Performances each year, and/or generate annual revenues (advertising, sponsorship, subscription etc) of more than £5,000. Online Radio services financed or branded by a commercial parent company will also be subject to these terms.

This licence requires a non-refundable advance payment to be made against the likely streaming and dubbing royalties that will be generated by the service. This payment will be calculated for the term of the licence and will be due in addition to the administration fee upon signature of the agreement.

Advance Against Streaming Royalties (£50.00 per month)	£600.00
Advance Against Dubbing Fees (£7.50 per month)	£90.00
Annual Administration Fee	£100.00
Total	£790.00
+ VAT	£948.00

Streaming Reporting

All Licensees will need to provide PPL with the following information at the end of every quarter in order to calculate the streaming royalties and dubbing fees due:

- a) The average number of sound recordings used per hour.

This is an estimate of the number of tracks played by the service in an average hour of broadcasting. For back to back music services, this is likely to be 14 or 15 tracks per hour, for a talk based service it may only be 4 or 5 tracks per hour.

- b) The total amount of streaming hours for the service during the quarter.

This figure is the total number of combined streaming hours for the service across three months. If during the three months 200 users stream the service for 2 hours each, this will equate to 400 streaming hours. The hosting provider for the service should be able to provide this information.

- c) A report of the different territories where streams have been made.



This will be a breakdown of the relative amount of streaming to the different territories covered by the licence. The hosting provider for the service should be able to provide this breakdown based on the IP addresses of the individual users.

If a service generates streaming royalties and dubbing fees greater than the advance payment it has made then PPL will invoice for the additional fees due.

The reporting and any subsequent payments will be due on the following dates:

Quarter Starts	Quarter Ends	Reporting due	Additional Payments Due
1 October	31 December	+ 20 Working Days	+ 40 Working Days
1 January	31 March	+ 20 Working Days	+ 40 Working Days
1 April	30 June	+ 20 Working Days	+ 40 Working Days
1 July	30 September	+ 20 Working Days	+ 40 Working Days



**Part III: Schedule of Territories Covered by
PPL Online Radio Licence & Webcasting Tariffs**

The following territories are, as of May 2007, signatories to the IFPI reciprocal webcasting scheme and therefore form the *Extended Territory* referred to in most PPL webcasting licences.

If the streams delivered to any of these territories during a given quarter constitute less than 5% of the total streams delivered by a service as a whole, then such streams will be charged on the PPL tariff for the UK (currently £0.000578 per track per stream).

If more than 5% of the total streams delivered by a service during a given quarter are made to any of these territories, then such streams will be charged based on the local tariffs listed.

Where a local tariff is to be applied and such tariff is a flat fee (*), the tariff will be pro-rated based on the amount of streams delivered to that territory as a percentage of the total amount of streams delivered by the service as a whole. For example, if during a given quarter 10% of the total streams for a service are delivered to users in Sweden, the royalty fee levied for these streams will be calculated as 10% of the Swedish flat fee for the period.

TERRITORY	APPLICABLE TARIFF FOR WEBCASTING	
ARGENTINA	£0.000578 per track per stream	
AUSTRALIA	£0.000578 per track per stream	
AUSTRIA*	Up to 50 concurrent streams	€150 per quarter per channel
	Up to 100 concurrent streams	€300 per quarter per channel
	Up to 250 concurrent streams	€750 per quarter per channel
	Up to 500 concurrent streams	€1,200 per quarter per channel
	Up to 1000 concurrent streams	€2,400 per quarter per channel
	Up to 10000 concurrent streams	€5,100 per quarter per channel
	BELGIUM	£0.000578 per track per stream
BULGARIA	Up to 50 concurrent streams	BGN 225 per quarter per channel
	Up to 100 concurrent streams	BGN 270 per quarter per channel
	Up to 200 concurrent streams	BGN 360 per quarter per channel
	Up to 300 concurrent streams	BGN 450 per quarter per channel
	Up to 400 concurrent streams	BGN 540 per quarter per channel
	Up to 500 concurrent streams	BGN 630 per quarter per channel
	Up to 1000 concurrent streams	BGN 1125 per quarter per channel



COSTA RICA	£0.000578 per track per stream	
CZECH REPUBLIC*	1-5 channels	27,000 CZK per quarter
	6-10 channels	54,000 CZK per quarter
	11-20 channels	81,000 CZK per quarter
	21-50 channels	108,000 CZK per quarter
	51 + channels	162,000 CZK per quarter
DENMARK*	15,000 DKR per quarter per channel (where the maximum capacity is 500 simultaneous users).	
DOMINICAN REPUBLIC	£0.000578 per track per stream	
ECUADOR	£0.000578 per track per stream	
ESTONIA	£0.000578 per track per stream	
FRANCE*	1 - 10 channels	€6097.96 per year
	11 - 50 channels	€6097.96 per year + €402.47 per additional channel above 10
	> 50 channels	€20733.07 + €304.90 per additional channel above 50
FINLAND*	1-49 concurrent streams	€480 per quarter per channel
	50-99 concurrent streams	€960 per quarter per channel
	100-199 concurrent streams	€1,920 per quarter per channel
	200-299 concurrent streams	€3,792 per quarter per channel
	300-499 concurrent streams	€5,670 per quarter per channel
	500-999 concurrent streams	€9,450 per quarter per channel
	1000-1499 concurrent streams	€18,900 per quarter per channel
	1500-1999 concurrent streams	€28,350 per quarter per channel
2000-2499 concurrent streams	€37,800 per quarter per channel	
GERMANY	€0.000333 per track per stream	
GREECE	£0.000578 per track per stream	
GUATEMALA	£0.000578 per track per stream	
HONG KONG	£0.000578 per track per stream	
HUNGARY	£0.000578 per track per stream	
ICELAND	£0.000578 per track per stream	
IRELAND	€0.001 per track per stream	
ITALY	€0.001 per track per stream	
JAMAICA	£0.000578 per track per stream	
MALAYSIA	£0.000578 per track per stream	
MEXICO	£0.000578 per track per stream	



NETHERLANDS	€ 0.00089 per track per stream	
NEW ZEALAND	£0.000578 per track per stream	
NORWAY	£0.000578 per track per stream	
PANAMA	£0.000578 per track per stream	
PARAGUAY	£0.000578 per track per stream	
PERU	£0.000578 per track per stream	
PORTUGAL	£0.000578 per track per stream	
POLAND	£0.000578 per track per stream	
SINGAPORE	£0.000578 per track per stream	
SLOVENIA	£0.000578 per track per stream	
SPAIN	£0.000578 per track per stream	
SWEDEN*		
	0-1,000 concurrent streams	4,500 sek per quarter per channel
	1,001-3,000 concurrent streams	7,500 sek per quarter per channel
	3,001-6,000 concurrent streams	12,000 sek per quarter per channel
THAILAND	£0.000578 per track per stream	
URUGUAY	£0.000578 per track per stream	



Part IV: Glossary

***Administration
Fee***

A fee levied to cover the cost of accounting royalties internationally to foreign collecting societies signed up to the international Webcasting and Simulcasting Reciprocal Agreements. This fee is only applied if your *Service* is streamed outside of the UK to users resident in these territories.

***Archived
Programme***

A predetermined programme that is available repeatedly on the demand of a user but must be performed in the same order from the beginning to end (as per a Continuous Programme).

***Central
Database***

A collection of one or more *Sound Recordings* in digital form that are stored solely on a single central processing unit.

***Continuous
Programme***

A predetermined programme that is continuously performed in the same order and that is accessed at a point beyond the control of the transmission recipient. In other words, if a listener logs onto a station in the middle of a broadcast, they do not have the facility to 'pause', 'rewind', and 'fast forward' or 'skip' to another part of the same programme.

Dubbing

The re-recording, reproduction or duplication of *Sound Recordings* by any means. This includes editing music into pre-recorded programmes, copying music digitally to a server or other hard drive. This is a separate right and requires an additional licence and fee to be paid.

***Dubbing
Report***

A comprehensive report detailing all *Sound Recordings Dubbed* onto a *Central Database*. The following information is required:

- The duration of each *Sound Recording dubbed*.
- The title of each *Sound Recording* including, where available, the title of the version or mix.
- The record label and catalogue number of the physical product including sound recordings.
- Where identifiable the identity of the performers whose performances are contained in the Track.
- The International Standard Recording Code (ISRC) if included in the sub codes accompanying the *Sound Recording*.



**Online Radio
(The Service)**

The digital transmission of audio programmes via the Internet to *Players* in licensed territories. For the purposes of licensing in the UK, *Online Radio* services are classified as either *Simulcasts* or *Webcasts*.

PRS For Music

A company that represents music publishers and composers and operates as a totally separate entity to PPL.

Performance

Each instance in which any portion of a *Sound Recording* in the *Service* is delivered to a single *Player*.

Player

An apparatus or device capable of playing a transmission of a *Sound Recording*, such as Windows Media Player.

PPL

Phonographic Performance Limited. The UK licensing and collecting society for record companies and performers.

**Programme
Report**

A comprehensive report detailing in chronological order a list of all *Sound Recordings* included in the *Service*. This information is required in order that PPL may account the correct royalties through to record labels and performers for use of their works. The following information is required:

-
- The title of the programme.
 - The date and time of transmission of the programme.
 - The duration of each *Sound Recording* used.
 - The title of each *Sound Recording* used including, where available, the title of the version or mix.
 - The record label and catalogue number of the physical product including sound recordings.
 - Where identifiable the identity of the performers whose performances are contained in the Track.
 - The International Standard Recording Code (ISRC) if included in the sub codes accompanying the *Sound Recording*.

Simulcast

A process whereby a radio programme is transmitted unaltered via the Internet at exactly the same time as it is transmitted via its primary platform. For example, you can listen to BBC Radio 1 via the Internet at the same time as it is broadcast on the FM band. In such instances, the broadcaster must have a PPL licence in place that provides for transmission over both platforms.

**Sound
Recording**

A commercially released recording on CD / Vinyl / Tape / MP3 or any other device or medium. PPL administers certain rights to virtually all the *Sound Recordings* available in the UK.

Streaming

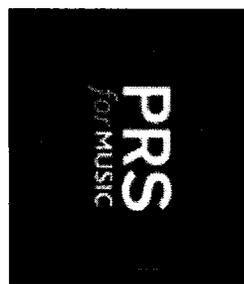
The continuous delivery via the Internet of an audio or audiovisual transmission(s) that enables the contemporaneous performance of the transmitted sound recording(s) by a *Player*.



Webcast

A process whereby a programme is transmitted via the Internet only and not via any other platform (i.e. there is no simultaneous over-the-air broadcast of the streamed service).

MC 14



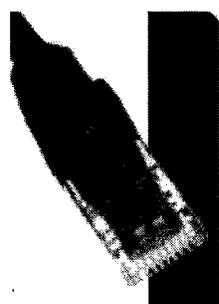
Home For creators For music users About us

Broadcast and online Businesses and live events Production music Recorded media

TV broadcasting
Radio broadcasting

Music licences for online and mobile

- Online Music Licence
- Limited Online Music Licence
- Multi-territory Licensing
- Podcast Licence
- Ringtone Licence
- Ringback Licence
- Online Advertising
- General Entertainment Online Licence
- Performing Right Online licence
- Already familiar with broadcast and online licensing?



Online Music Licences

Online Music Licences are suitable for medium to large music and mobile music services in the UK. [APPLY HERE](#)

What rights are covered by these licences?

The performing and mechanical rights in musical works for most types of online and mobile music services offering music to the UK public are covered by the Online Music Licences. This includes download services, music streaming sites and subscription music services. A summary of service types covered and fees can be found below:

Licence Fees	Royalty Rate	Minimum Rate	Number of musical works in bundle	Royalty per musical work downloaded
Music Download	8%	(Applicable if greater than the Royalty rate)		

LOGIN Email Password

[sign up](#) [forgotten password?](#)

Search

Music On Demand (Subscription)	10.5%	1-7 8-12 13-17 18-29 30+	4p 3.5p 3p 2.5p 2p
Music On Demand (Subscription)	8%	Type of access	Per subscriber per month
		Dual platform	60p
		Single platform	40p
		Limited service (<20,000 tracks)	20p
Interactive Webcast	8%	0.065p per work streamed.	
Interactive Webcast (Subscription)	6.5%	22p per subscriber per month.	
Webcast (Subscription)	6.5%	0.05p per work streamed.	
Webcast (Subscription)	5.75%	20p per subscriber per month.	
Single Artist Webcast	10.5%	0.085p per work streamed.	
Single Artist Webcast (Subscription)	8%	Subscription minimum to be negotiated in good faith.	

All rates are valid from 1 July 2009 to 30 June 2012. For licence fee summaries see www.prsformusic.com/onlinemusicalicences

How do you apply for a licence?

Complete the [Application Form](#) or call a licensing consultant on 020 7306 4991 to discuss your requirements – you will need to provide details about your service and return a hard-copy to us.

All OML Licensees are allocated a specific *PRS for Music* account manager to advise you and answer any queries you may have before, during or after the licensing process.

Licences for smaller services

If your music service generates less than £12,500 a year in gross revenue or uses a limited amount of music you may wish to apply for the [Limited Online Music Licence \(LOML\)](#).

Contact us

Contact the Broadcast & Online Licensing Team on 020 7306 4991 or onlineLICensing@prsfornmusic.com

Terms & Conditions

View the [full terms and conditions](#) for the above licences

Repertoire summary for Online Music Licences

PRS for Music repertoire may vary from time-to-time and from licence-to-licence, learn more on the [repertoire summary page](#).

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LECG

**Mechanical and Digital Phonorecord Delivery Rate
Adjustment Proceeding before the U.S. Copyright
Royalty Board**

28 November 2006

Richard Boulton

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1 Introduction and scope of work

Background

- 1.1 I have been instructed by the Record Industry Association of America ("RIAA") to prepare an expert report in connection with the Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding before the U.S. Copyright Royalty Board ("the US Proceedings").

My instructions

- 1.2 I have been asked to explain certain aspects of the recent settlement of the reference to the UK Copyright Tribunal under sections 119, 121 and 126 of the Copyright and Designs and Patents Act 1988 regarding the licence terms for the supply of musical compositions online ("the UK online music dispute").

- 1.3 Specifically, I have been asked to consider:

- the UK online music dispute;
- the MCPS-PRS Alliance's new joint online licence scheme ("the New JOL"), which reflects the settlement between the Alliance and certain of the applicants;
- the effective royalty rates in the New JOL at current UK market prices; and
- a conversion of the royalty rates in the New JOL to the equivalent rates that would apply if the royalty was paid on wholesale prices in the UK.

My background

- 1.4 My full name is Richard Edward Stanley Boulton. I am a part time director of LECG Ltd, which specialises in the provision of expert economic and financial services. I am a Fellow of the Institute of Chartered Accountants in England and Wales, and a Fellow of the Academy of Experts. I am also a qualified barrister, practising from One Essex Court, Temple, London, having been called to the Bar in 2003.
- 1.5 Before joining LECG, I spent 20 years at Arthur Andersen, the last 11 years as a partner. My experience at Arthur Andersen included several global management positions, including number two executive worldwide (1997-2000), and over 15 years' client work as a consultant on strategic, financial and economic issues.

1.6 My experience in licensing matters includes:

- expert reports and oral evidence to the UK Copyright Tribunal in the matter: *BPI and others v MCPS and others (2006)*, concerning licence terms for the supply of musical compositions online;
- expert reports and oral evidence to the UK Copyright Tribunal in the matters: *BSkyB v PRS (1997)*, *AIRC v PPL (1992)* and *TV Listings (1990)*;
- advice to the British Broadcasting Corporation ("BBC"), the Association of Independent Radio Companies ("AIRC") and other UK broadcasters on their negotiations with collective licensing bodies over the last twenty years;
- advice to Radio Telefis Éireann ("RTE") on its 2003 negotiations with the Irish Music Rights Organisation ("IMRO") relating to the appropriate level of the tariff for broadcasting of IMRO's repertoire. This work included the provision of an expert report on behalf of RTE;
- advice to the Monopolies and Mergers Commission ("MMC") in connection with the MMC's 1988 investigation into Collective Licensing;
- expert evidence to the EC Commission Competition Directorate on the level of a reasonable royalty for video airplay in connection with a complaint made by Music Television Europe ("MTVE") under Article 82 (ex Article 86) of the Treaty of Rome;
- assisting licensors and licensees in licensing negotiations and advising on the level of a reasonable royalty in various other industries including manufacturing, pharmaceuticals, consumer goods, publishing and software;
- the valuation of patents, copyrights, trademarks, brands and other intangible assets; and
- author of articles and reports on IP matters, and co-author of a business book on creating wealth from intangible assets.

1.7 My broader professional experience includes:

- quantification of damages in approximately 100 litigations, including many of the UK's largest commercial disputes;

- expert evidence on damages for patent infringement (including written and oral evidence in the *Gerber Garments Technologies Inc v Lectra Systems Ltd* damages enquiry and the *Hoechst Celanese v BP Chemicals* account of profits enquiry);
- leading a team of 40 people responsible for the fraud investigation into the management of Bank of Credit and Commerce International (“BCCI”) on behalf of the majority shareholders;
- board level responsibility for various “eBusiness” start-ups involving both business-to-consumer (B2C) and business-to-business (B2B) commerce. These new ventures included an online community for intellectual property professionals, and a company providing internet-based training; and
- advising numerous companies on strategy and business planning, with particular emphasis on media clients and new business models.

1.8 Full details of my qualifications and experience are contained in Appendix 1.

1.9 In preparing this report, I have been assisted by Greg Harman, a director of LECG, and by Andrew Wynn, a managing consultant at LECG. I have supervised all the work performed and the opinions expressed herein are my own. My views should not be regarded as representative of any other person within LECG.

Sources of Information

1.10 In the course of preparing this report, I have relied on the following documents:

- the New JOL (attached as RIAA Ex. N-101-DP);
- transcripts from the proceedings of the UK Copyright Tribunal hearing concerning licence terms for the supply of musical compositions online, Days 1 and 2 (attached as RIAA Ex. N-102-DP and RIAA Ex. N-103-DP);
- BPI Market Information No. 275 (attached as RIAA Ex. N-104-DP);
- UK album PPD data provided by OCC and compiled by Millward Brown (attached as RIAA Ex. N-105-DP);
- UK album retail price data provided by AudioTrak (attached as RIAA Ex. N-106-DP);

- the BPI press release of 28 September 2006, "Companies agree digital royalties deal", available at www.bpi.co.uk (attached as RIAA Ex. N-107-DP);
- MCPS-PRS Alliance's press release of 28 September 2006, "*Companies agree digital royalties deal*", available at www.mcps-prs-alliance.co.uk/press/ (attached as RIAA Ex. N-108-DP);
- MCPS-PRS Alliance's press release of 9 October 2006, "*More companies agree digital royalties deal*", available at www.mcps-prs-alliance.co.uk/press/ (attached as RIAA Ex. N-109-DP);
- MCPS-PRS Alliance's press release of 11 October 2006, "*Another company agrees digital royalties deal*", available at www.mcps-prs-alliance.co.uk/press/ (attached as RIAA Ex. N-110-DP);
- the MCPS Ringtone Licence available at www.mcps-prs-alliance.co.uk (attached as RIAA Ex. N-111-DP);
- the PRS Ringtone Licence available at www.mcps-prs-alliance.co.uk (attached as RIAA Ex. N-112-DP);
- information on how the MCPS-PRS Alliance splits revenue available under "*Joint Online Distribution - General Questions*" at www.mcps-prs-alliance.co.uk (attached as RIAA Ex. N-113-DP);
- Apple press release of 7 September 2005, "iTunes Music Store Number One in the UK with 80% Market Share", available at <http://www.apple.com/pr/library/2005/sep/07itms.html> (attached as RIAA Ex. N-114-DP);
- Extracts from iTunes, Napster, and Virgin Digital web-sites (attached as RIAA Ex. N-115-DP); and
- "MCPS Licensing Scheme Summaries", extract relating to the AP1, AP2 and AP2A schemes, available at www.mcps-prs-alliance.co.uk (attached as RIAA Ex. N-116-DP).

Confidentiality

- 1.11 Much of the information currently before the UK Copyright Tribunal hearing concerning licence terms for the supply of musical compositions online is confidential. I have relied solely upon information in the public domain. The

publicly available information includes transcripts of the proceedings and the New JOL.

Structure of my report

- 1.12 In Section 2, I set out the relevant background to the UK online music dispute. I provide a summary of the parties to the dispute and the products and services covered by the dispute. I also provide a brief summary of licence terms that were in dispute, to the extent they are relevant to the royalty on products considered in the US Proceedings.
- 1.13 In Section 3, I discuss the principal terms of the New JOL that are relevant to the US Proceedings, being those relating to the royalty on permanent downloads and/or limited downloads and on-demand streaming.
- 1.14 In Section 4, I determine the effective royalty rates in the New JOL at current UK market prices. I then convert the royalty rates in the New JOL to equivalent rates based on current wholesale prices in the UK.
- 1.15 Section 5 contains my expert declaration.

2 The UK online music dispute

Introduction

- 2.1 This section explains my involvement in the UK online music dispute, the services covered by the disputed licence scheme, the primary services offered by each of the licensees that were parties to the dispute, and the role of the BPI. I also discuss the licence terms that have been disputed to the extent they are potentially relevant to the US Proceedings.

My involvement in the UK online music dispute

- 2.2 In January 2006 I was instructed by the following parties to the UK online music dispute:

- MusicNet (UK) Limited ("MusicNet"), Yahoo! UK Limited ("Yahoo"), AOL (UK) Limited ("AOL"), RealNetworks Limited ("RealNetworks"), Napster LLC ("Napster"), Sony United Kingdom Limited ("Sony") and iTunes S.à.r.l. ("iTunes"). Together these parties are referred to as the Music Service Providers ("MSPs");
- O2 (UK) Limited ("O2"), T-Mobile International (UK) Limited ("T-Mobile"), Vodafone UK Content Services Limited ("Vodafone") and Orange Personal Communication Services Limited ("Orange"). Together these parties are referred to as the Mobile Network Operators ("MNOs"); and
- the British Phonographic Industry Limited ("BPI"), a music industry association, which I understand is broadly comparable to the RIAA.

- 2.3 Henceforth, I refer to all the above-mentioned parties as "the Applicants".

- 2.4 I was instructed by the Applicants to provide expert evidence on (i) the structure and level of a reasonable royalty for the supply of music content online and (ii) a number of specific accounting issues relating to industry profitability and revenue unbundling. During the course of the proceedings, I produced four expert reports, plus a letter to my Instructing Solicitors, and gave oral evidence to the Copyright Tribunal ("the Tribunal").

The disputed licence scheme

- 2.5 The mechanical and performing rights involved in the supply of music content online in the UK are licensed collectively by the Mechanical-Copyright Protection

Society Limited ("MCPS") and Performing Right Society Limited ("PRS") (together "the Alliance"). The Alliance's licence scheme for online music was referred to the Copyright Tribunal by the BPI and certain of the MSPs. The scheme grants rights with respect of mechanical and communication to the public rights.

- 2.6 Physical audio products are licensed under a separate set of schemes through the MCPS. Under the MCPS licensing schemes (AP1, AP2, AP2A) for the use of musical compositions in the manufacture of physical audio products, the record companies are the licensees. Under the terms of those schemes, a mechanical royalty of 8.5% is levied on the Published Price to Dealer ("PPD") unless no PPD exists, in which case a royalty of 6.5% is applied to the retail price.¹ The PPD is not the equivalent of a wholesale price, as it does not take into account any other discounts offline retailers receive. It is best thought of as a wholesale list price.
- 2.7 In contrast, under the Alliance's licence scheme for online music, the licensees are the retailers of online music products (i.e. the MSPs and MNOs) and the royalty for online music is levied on the retail price.

Services covered by the New JOL

- 2.8 The settlement agreements between the Alliance and the BPI, MNOs and certain of the MSPs are confidential. However, the principal terms on which their references were settled are set out in the New JOL. The following categories of products are covered by the New JOL²:
- **Permanent Downloads Services** are a service by which a musical composition is communicated to the public in the form of a download and where such download may be retained by the user on a permanent basis. There are no limits on how often users can listen to their downloaded music files. Depending on the licensing conditions applicable, a user may also be permitted to transfer music files to a portable music player or to "burn" (i.e. copy) a limited number of times to CDs.
 - **Limited Download / On-Demand Streaming Services** are a service whereby a user may receive a musical composition by streaming on-demand and/or may download a musical composition but where such download may not be retained by the user on a permanent basis. On-

¹ Source: RIAA Ex. N-116-DP.

² These descriptions are based on the definitions in the New JOL.

demand streaming services enable users to pay a periodic subscription or a per-use fee for the right to listen to a portfolio of sound recordings on an "on-demand" basis. Limited downloads grant users access to sound recordings as long as the user continues to pay the subscription fee. Users can download music files to their computer (and in some cases transfer the files to a portable music player), but if the user's subscription lapses DRM software renders the files unplayable. On-demand streaming allows users to listen to tracks using streaming technology. Unlike limited downloads, a user must be connected, either by wired or wireless technology, to the service provider. Payment for on-demand streaming can be on a per stream basis, or more typically via monthly subscription.

- **Webcasting Services³** are a service by which musical compositions are communicated to the public over the internet and no permanent or temporary copy of any Musical Work is retained by the User; and such service is neither a Permanent Download Service, a Limited Download/On-Demand Streaming Service nor a Simulcast Service⁴.

Limited Download/On-Demand Streaming sub-categories

2.9 The following sub-categories of Limited Download/On-Demand Streaming services are specified in the New JOL:

- **Limited Subscription Services** are where the user pays to the licensee a regular fee in order to access the service, and gains access, only while such fee continues to be paid, to 20,000 musical compositions or less;
- **PC Subscription Services** are where the user pays to the licensee a regular fee in order to access the service, and gains access, only while such fee continues to be paid, to in excess of 20,000 musical compositions. In addition, the user can store and listen to musical compositions accessed through the service on a personal computer, but is unable to store and

³ The New JOL includes a set of sub-categories within Webcasting Services. The sub-categories are not discussed in this report since the royalty rates for webcasting services are not under review in the US Proceedings. The definition of the sub-categories within webcasting is disputed by certain parties to the UK online music dispute.

⁴ Simulcast Service means the broadcast of a programme via the internet where such broadcast is simultaneous with the broadcast of such programme via a traditional terrestrial, satellite or cable television or radio service; and is made from the website or other service of the originating broadcaster.

listen to musical compositions accessed through the service on a portable device.

- **Portable Subscription Services** are as for PC Subscription Service, but the user can store and listen to musical compositions accessed through the service on a portable device.
- **Other Limited Download/On-Demand Streaming Services** relate to Limited Download/On-Demand Streaming services that are not covered by the above three sub-categories.

Online music services offered by the applicants

2.10 The table below indicates the primary online music service offered by each of the MSPs and MNOs:

Table 1: Primary online music service offered by each MSP / MNO

Primary online music service offered	MSP / MNO
Permanent Download Service	Sony, iTunes, O2, T-Mobile, Vodafone, Orange
Limited Download Service / On-Demand Streaming Service	MusicNet, Napster
Webcasting Service	Yahoo, AOL, RealNetworks

Source: LECG analysis.

Role of the BPI

2.11 The British Phonographic Industry Limited ("BPI") is a British record industry trade association, which represents producers and licensors of audio and audio-visual recordings of music and other data. The BPI represents hundreds of UK record companies, who together issue approximately 95% of commercial sound recordings in the UK. The members include the four "majors", EMI, Sony BMG, Universal and Warner.

Potentially relevant online music licence terms in dispute

2.12 I have listed below the licence terms that were in dispute as part of the Copyright Tribunal proceedings in the UK that may be relevant to the US Proceedings. I have excluded terms relating solely to webcasting services since the royalty rates for webcasting services are not under review in the US Proceedings:

- royalty rate for Permanent Download Services;
- royalty rate for Limited Download Services/On-Demand Streaming Services;
- minima for Permanent Download Services;
- minima for Limited Download Services/On-Demand Streaming Services; and
- definition of gross revenue (i.e. the revenue base to which the royalty rate is applied).

2.13 I discuss each licence term in more detail in the next section.

3 The settlement of the UK online music dispute

Introduction

- 3.1 In this section I consider the terms in the New JOL that are potentially relevant to the US Proceedings and a number of issues that are in my view relevant to the use of the New JOL as a comparable for other services or in other jurisdictions.

The settlements

- 3.2 In September 2006, the BPI settled their dispute with the Alliance by a settlement agreement valid for three years ("the BPI Settlement Agreement"). By the same settlement agreement, the MNOs and iTunes also settled their respective disputes with the Alliance, except for the definition of the revenue base. The BPI Settlement Agreement appended and incorporated an agreed licence scheme for online music ("the New JOL").
- 3.3 Whilst the BPI has entirely withdrawn its reference to the Tribunal, there remain disputes between iTunes, the MNOs and the Alliance concerning the extent, if at all, to which advertising revenues should be included within the revenue base in the New JOL (the so-called "disputed contentions" in the continuing Tribunal reference).
- 3.4 In October 2006, Napster and MusicNet agreed to withdraw their references to the Copyright Tribunal after coming to a settlement with the Alliance based in part upon the BPI Settlement Agreement and incorporating the New JOL ("the ODS Settlement"). A few days later, the Alliance came to a settlement with Sony Connect ("the Sony Settlement"). Despite withdrawing their references, Napster, MusicNet and Sony ensured that they benefit from any gains made by iTunes with respect to iTunes' disputed contention.
- 3.5 The remaining MSPs, AOL, Yahoo and RealNetworks, all of whom are involved principally in the provision of webcasting services as far as online music is concerned, have not settled their references. At the date of this expert report, the Tribunal hearing is continuing with reference to the definition of the revenue base and the reasonableness of the New JOL as it applies to Webcasting Services.

Use of the New JOL as a comparable

- 3.6 The New JOL includes terms negotiated and agreed between online music licensees and the Alliance for each term of the scheme. It is in my view relevant to note the following points about the settlements.
- 3.7 Firstly, the settlement agreements are the product of negotiations between a licensor and licensees in the context of litigation. The costs and risks inherent in such litigation mean that the terms agreed may not be the same as those that would result from free market negotiations (absent such litigation) or that would have been imposed by a Tribunal decision. For example, each party may agree to terms that are above or below what they consider to be reasonable in order to avoid the costs and uncertainties of a Tribunal decision. This does not mean to say that the agreements are not relevant as comparables; indeed, it should be noted that many comparable agreements are similarly the product of settled proceedings.
- 3.8 Second, it is important to recognise that the New JOL has been agreed as a package. The fact that the parties have agreed to the overall terms of the New JOL says little about their views on individual terms. For example, certain of the Applicants may have been prepared to make concessions with regard to the definition of gross revenues in return for agreement on the royalty rate. It is therefore necessary to be cautious in treating specific terms of the New JOL as though they were separately negotiated comparables.
- 3.9 Finally, the settlements contain agreements on every term of the online music licence save for the disputed contentions. When reviewing specific terms of these agreements, it is appropriate to consider the relevance and relative importance of the particular term under review to the parties that agreed it. For example, iTunes is the market leader for permanent download sales, but it does not currently operate any webcasting services. Other things being equal, the agreement by iTunes to commercial terms in respect of downloads is likely to be more relevant and reliable evidence as to the product of an open market negotiation than its agreement to terms that relate solely to webcasting.

Royalty rates and minima

- 3.10 Those licence terms in the New JOL that are most directly relevant to the US Proceedings, namely the royalty rates for permanent downloads, limited downloads and on-demand streaming services, have been agreed by the BPI and

all the MSPs/MNOs that offer these services without any disputed contentions. This is also true of the relevant minima. The table below sets out the relevant royalty rates and minima from the New JOL:

Table 2: Royalty rates and minima agreed in the New JOL

Music service	Royalty rate	Minima
Permanent Download Service	8%	£0.04 per download
Limited Download/On-Demand Streaming Service: Portable Subscription	8%	£0.60 per subscriber per month
Limited Download/On-Demand Streaming Service: PC Subscription	8%	£0.40 per subscriber per month
Limited Download/On-Demand Streaming Service: Limited Subscription	8%	£0.20 per subscriber per month
Limited Download/On-Demand Streaming Service: Other	8%	£0.0022 per musical composition played

Source: New JOL.

Use of percentage royalties in the New JOL

- 3.11 All the parties in the UK online music dispute proposed a revenue-based royalty. This is consistent with the AP1, AP2, and AP2A licences for physical audio products, which are also revenue-based royalties. In my opinion, a revenue-based royalty is appropriate for permanent downloads, limited downloads and on-demand streaming because there is a clear link between the contribution of the licensor and the revenues generated by the licensee. In these circumstances, the revenue share incentivises the licensor to increase the value of its inputs.
- 3.12 A revenue-based royalty requires less frequent review since it responds to changes in price and volumes whereas a quantity-based royalty responds only to changes in volumes. This is important in the nascent online music market where there is significant potential for changes in licensees' business models that may result in substantially different pricing structures to those observed currently.

Definition of the revenue base

- 3.13 Royalties payable under the New JOL are calculated as the product of the royalty rate and revenue base for each music service. As noted above, there are still disputed contentions relating to the revenue base currently before the Tribunal. The disputed contentions concern the extent to which advertising revenue should be included in the revenue base. I have not taken account of advertising revenue in my calculations in Section 4. I have therefore assumed that the revenue base is determined only by the revenue from sales of permanent downloads and limited downloads / on-demand streaming subscriptions received from the various music services. I do not believe that this is likely have a material effect on my conclusions, since advertising revenue is not a significant revenue stream for those MSPs that are not webcasters.

The split between royalties for mechanical and communication to the public rights

- 3.14 I understand that the US Proceedings relate solely to the mechanical right whereas the New JOL covers both mechanical and communication to the public rights. The New JOL does not give any information as to how the royalty should be split between the mechanical and communication to the public rights. I discuss how the royalty may be split in paragraphs 4.22 to 4.24 below.

4 Calculation of equivalent royalty rates for wholesale prices

Introduction

- 4.1 In Section 4, I determine whether the effective royalty rates in the New JOL at current UK market prices are determined by the royalty rate applied to the revenue base, or the minima. I then convert the royalty rates in the New JOL to equivalent wholesale rates based on current UK wholesale prices.

Effective royalty rates at current market prices

- 4.2 In this sub-section, I discuss the market prices for online music products based on publicly available data. I have used the prices advertised by the largest MSPs. I have not been able to create a weighted average price based on the selling price of all of the MSPs. The prices listed are the current market prices and the prices that persisted throughout 2006.
- 4.3 The online music market is relatively new and is growing quickly. Therefore, the prices of the services discussed below may change, which would change the calculations in this section. However, my calculations reflect the market conditions at the time of the settlement. Arguably, they are more relevant than results from future market prices, which in any case cannot be predicted with any confidence.
- 4.4 The current market price for permanent downloads within the UK market is £0.79. iTunes, the UK market leader with an estimated 80% market share, sells all of its permanent downloads for £0.79. Most other MSPs, including Napster, sell permanent downloads at this price.
- 4.5 In terms of subscription services, the UK market is nascent with few existing price points. Napster, the UK market leader, charges £9.95 per month for its PC Subscription Service and £14.95 per month for its Napster-to-go Portable Subscription Service. Two other MSPs currently offering subscription services are Virgin Digital and HMV, who charge £9.99 and £14.99 for PC and Portable Subscription Services respectively.⁵

⁵ See RIAA Ex. N-115-DP for current UK online music prices.

- 4.6 I am not aware of any services that meet the definition of a Limited Subscription service contained in the New JOL or of the pricing of any non-subscription-based limited download or on-demand streaming services.
- 4.7 It is important to bear in mind that while the VAT rate in the UK is 17.5%, EU legislation stipulates that for e-commerce businesses, such as the MSPs, VAT need only be paid in the country in which the MSP is registered. For example, iTunes is registered in Luxembourg where the standard rate of VAT is 15% with reduced rates for some specific products. The result of this is that the actual deduction of VAT from the retail price will vary from MSP to MSP.
- 4.8 The table below summarises current market prices for permanent downloads and limited download/on-demand streaming services. I have used a standard UK VAT rate of 17.5% in my calculations, although, as I noted above, the actual rate paid by individual MSPs may vary.

Table 3: Average UK retail prices for online music products

Music product	Market price including VAT	Market price excluding VAT at 17.5%
Permanent Download Service	£0.79 per download	£0.67 per download
Limited Download/On-Demand Streaming Service: Portable Subscription	£14.95 per subscriber per month	£12.72 per subscriber per month
Limited Download/On-Demand Streaming Service: PC Subscription	£9.95 per subscriber per month	£8.47 per subscriber per month
Limited Download/On-Demand Streaming Service: Limited Subscription	N/A	N/A
Limited Download/On-Demand Streaming Service: Other	N/A	N/A

Source: LECG analysis.

- 4.9 The royalty payable for online music in its various forms depends on the royalty rate, the revenue base and, where applicable, the minima. For all the services discussed below, the revenue base is defined as the sales price less VAT (at 17.5%).

- 4.10 The New JOL states that where the royalty calculated with reference to the royalty rate and base is less than the specified minimum, the minimum should apply. The following table compares the royalty calculated from the royalty rate applied to the revenue base and the minima.

Table 4: Effective royalty rates for online music products in the UK

Music product	Calculated Royalty	Minima	Effective royalty
Permanent Download Service	£0.054 per download	£0.04 per download	Calculated royalty
Limited Download/On-Demand Streaming Service: Portable Subscription	£1.018 per subscriber per month	£0.60 per subscriber per month	Calculated royalty
Limited Download/On-Demand Streaming Service: PC Subscription	£0.677 per subscriber per month	£0.40 per subscriber per month	Calculated royalty
Limited Download/On-Demand Streaming Service: Limited Subscription	N/A	£0.20 per subscriber per month	N/A
Limited Download/On-Demand Streaming Service: Other	N/A	£0.0022 per musical composition played	N/A

Source: LECG analysis and the New JOL.

- 4.11 For all the online music products listed above, the current market prices are sufficiently high to ensure that the royalty payable, calculated as the royalty rate multiplied by the revenue base, is in excess of the minima prescribed by the New JOL. Consequently, when performing a conversion of the UK royalty rates to wholesale equivalent rates in the UK, the effective rate is in all cases the royalty rate of 8% multiplied by the retail price excluding VAT.

The role of minima in the New JOL

- 4.12 In my evidence in the UK proceedings, I concluded that there is no need for minima where the Alliance receives a revenue-based royalty. However, I noted that it may be appropriate to set minima if it is thought necessary either (i) to protect the Alliance's members from the risk that their products are given away or

packaged in a way that is not monetised; and/or (ii) to reflect the fact that the copyright use has a value even where it is not monetised. I suggested that if the Tribunal were minded to set minimum charges, they should be set at no more than half the calculated royalty.

- 4.13 The minima originally proposed by the Alliance did not meet these criteria: they approximated to (and in some cases exceeded) the royalty payable based on the royalty rate multiplied by the revenue base at current market prices. As the analysis in Table 5 indicates, the minima in the New JOL for permanent downloads, limited downloads and on-demand streaming are between 59% and 74% of the calculated royalty.

Equivalent royalty rates for wholesale prices

- 4.14 I understand that the RIAA will propose mechanical royalties based on wholesale prices. In order to convert the royalties payable for online music in the UK to a wholesale equivalent, two adjustments are necessary: (i) in the UK the royalty rate is applied to retail revenue (excluding VAT), while the rate I am calculating would be applied to wholesale revenue; and (ii) in the UK the royalty is paid by the MSP concerned, whereas, under the RIAA's proposal, the royalty would be paid out of the record companies' wholesale revenue.
- 4.15 In this report, I have only calculated the equivalent wholesale rate for permanent downloads. I do not have access to publicly available data on UK wholesale prices for limited downloads.

Calculation steps

- 4.16 The steps necessary to convert the UK retail rates into a wholesale rate equivalent are as follows⁶.
- 4.17 First, as the royalty for online music in the UK is paid on retail revenue excluding VAT, I have removed VAT from the retail price.
- 4.18 Second, I have calculated the royalty payable by multiplying the royalty rate of 8% times revenue excluding VAT.

⁶ Distributions to members of the MCPS and PRS are subject to commissions. This may not reflect the situation in the US and therefore may warrant an additional adjustment.

- 4.19 Third, I have increased the UK record companies' wholesale price by the royalty payable. Effectively, I have assumed that the question as to who bears the royalty will not affect the split of profits between the record companies and the MSPs.
- 4.20 Fourth, I have calculated the royalty as a percentage of the wholesale price plus the royalty.
- 4.21 Finally, I have adjusted the royalty to reflect the fact that the UK royalty covers both mechanical and communication to the public right, whereas the US royalty is for the mechanical right only.

Adjustment to reflect the two rights covered by the UK royalty

- 4.22 The New JOL is a joint licensing scheme that covers both mechanical and communication to the public rights. It does not explain how the royalties are split between the MCPS, with respect to the mechanical right, and the PRS, with respect to the communication to the public right.
- 4.23 However, the MCPS-PRS Alliance provides guidance as to how the revenues should be split between the two collecting societies. The Alliance states:

"MCPS and PRS Boards have agreed that income from Joint Online Licences should be split as follows:

- *Download services - 75% to MCPS and 25% to PRS*
- *On demand streaming services - 50% to each society*
- *Internet radio and webcasts - 25% to MCPS and 75% to PRS*

In the case of licensees providing more than one type of service, if the revenue cannot be separately identified, the 50/50 split applies."

- 4.24 I have therefore, for illustrative purposes, reduced the adjusted rates in my calculations by 25% to exclude my estimate of the royalty relating to the communication to the public right.⁸

Calculation of an adjusted rate

4.25 The adjusted rate for permanent downloads is shown in the table below:

Table 5: UK permanent download royalties on a wholesale price basis

Music service	Value	Calculation guide	Source
Retail price (incl. VAT)	£0.79	[A]	iTunes and Napster ⁹
Retail price (excl. VAT)	£0.67	$[B] = [A] / 1.175$	LECG calculation
Musical composition royalty at 8%	£0.0537	$[C] = [B] \times 8\%$	LECG calculation
Expressing this as a percentage of the wholesale price of a permanent download:			
Wholesale price (excl VAT)	£0.47 ¹⁰	[D]	BPI Market Information
Wholesale price plus royalty	£0.52	$[E] = [C] + [D]$	LECG calculation
Royalty as % of wholesale price plus royalty	10.3%	$[F] = [C] / [E]$	LECG calculation
Estimate of the mechanical royalty as % of wholesale price plus royalty ¹¹	7.7%	$[G] = [F] \times [3/4]$	LECG calculation

Source: LECG analysis.

4.26 Based on taking three quarters of the royalty as a percentage of the wholesale price (including the musical composition royalty), the UK rate of 8% of retail price

⁷ Source: www.mcps-prs-alliance.co.uk

⁸ Ringtones are a music-related online product that is covered by separate licences for the mechanical right and the communication to public right. Whilst I do not believe the overall rate in these agreements is a reliable comparable for the licences at issue in the US Proceedings they do provide some evidence of the split between the two rights for online services. The licence fee payable to the MCPS with respect to the mechanical right is the greater of 10% of the retail price or £0.10 per ringtone. The licence fee payable to PRS with respect to the communication to the public right is the greater of 5% of the retail price or £0.05 per ringtone payable to PRS. This would suggest a split of 66.7% to the MCPS and 33.3% to the PRS.

⁹ I have assumed an average retail price of £0.79. iTunes sells all permanent downloads for £0.79 and is clearly established as the UK market leader with an estimated 80% market share. Napster also sells all its permanent downloads at £0.79.

¹⁰ I understand that the BPI use an assumption of £0.47 per permanent download when calculating trade revenue from permanent downloads. An example of the use of this assumption can be seen in BPI Market Information No. 275 (attached as RIAA Ex. N-104-DP).

¹¹ This calculation assumes that the record companies pay a performance royalty equal to 25% of the musical composition royalty shown.

less VAT for permanent downloads suggests the mechanical royalty would be 7.7% of the UK wholesale price (including the musical composition royalty).

Conclusion on adjusted rates

- 4.27 In the table below, I present a summary of the current market prices, royalties expressed in pounds sterling and mechanical royalty payments expressed as a percentage of the UK wholesale price (including the musical composition royalty) for permanent downloads.

Table 6: Summary of calculations for permanent downloads

Music service	Retail price	UK royalty	Mechanical royalty as % of wholesale price plus royalty
Permanent Download Service	£0.79	£0.0537	7.7%

Source: LECG analysis.

- 4.29 I would not expect a royalty rate set as a percentage of the wholesale price for limited downloads and on-demand streaming to be higher than the rate for permanent downloads.

5 Expert declaration

5.1 I set out below the standard declaration signed by expert witnesses appearing before the English courts under the Civil Procedure Rules.

5.2 I, Richard Boulton, declare that:

- I consider that my duty in providing written reports and giving evidence is to help the US Copyright Royalty Judges and that this duty overrides any obligation to the parties who have engaged me. I confirm that I have complied with that duty;
- I believe that the facts I have stated in this report are true and that the opinions I have expressed are correct;
- I have endeavoured to include in my report those matters, which I have knowledge of or of which I have been made aware, that might adversely affect the validity of my opinion;
- I have indicated the sources of all information I have used;
- I have not, without forming an independent view, included or excluded anything which has been suggested to me by others;
- I will notify my instructing attorneys immediately and confirm in writing if for any reason this report requires any correction or qualification;
- I understand that: my report, subject to any corrections before swearing as to its correctness, will form the evidence to be given under oath or affirmation; I may be cross examined on my report; and
- I have not entered into any arrangement where the amount or payment of my fees is in any way dependent on the outcome.



Richard Boulton

Appendices

LECG

Appendix 1 – Curriculum Vitae

LECG

Richard Boulton, Director, LECG



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BIO

Richard is a director of LECG and also a barrister at One Essex Court.

Richard advises LECG clients on strategic, regulatory, economic, and valuation issues. He has been instructed in over 100 litigations, including many of the UK's largest commercial disputes, and has led several major fraud investigations. He has given oral evidence in the High Court, Copyright Tribunal and before the European Commission (Competition Directorate). Richard has co-written a best selling business book on intangible assets.

Richard spent 20 years with Arthur Andersen (11 as a partner). He left Arthur Andersen in June 2001. His experience at Arthur Andersen included several global management positions, including number two executive worldwide; 15 years' client work as a consultant on financial and economic issues, particularly in the media and energy sectors; and, substantial experience as an expert in major commercial litigation.

His management experience covers strategy, technology, marketing, operations and finance. He played a major role in building Arthur Andersen's \$2bn consulting business with leadership positions in the UK and globally. He was for three years the firm's managing partner of strategy, with responsibility for both long term direction setting and day to day operations.

QUALIFICATIONS

MA in Modern History, Oriel College, Oxford University, 1978-1981
Postgraduate Diploma in Law (Distinction), College of Law, 2002
Bar Vocational Course (Outstanding), BPP Law School, 2003

PROFESSIONAL MEMBERSHIPS

Fellow of the Institute of Chartered Accountants of England and Wales (ACA 1984, FCA 1996)
Fellow of the Academy of Experts, 1994

PRESENT POSITIONS

LECG, Director, 2002 – present
One Essex Court, Barrister, 2004 - present

LECG

PREVIOUS POSITIONS

Arthur Andersen 1981 – 2001

Management positions:

- Global Managing Partner - Business Consulting (2000-2001), responsible for a business with revenues of \$2 billion and 11,000 people.
- Chief Information Officer (2000-2001), responsible for 2,000 technology personnel worldwide.
- Global Managing Partner – Strategy (1997-2000), responsible for the firm's four service categories (assurance, business consulting, corporate finance and tax)
- UK Head of Business Consulting (1995-1997)
- UK Head of Economic and Financial Consulting (1994-1997)
- European Head of Litigation Services (1994-1997)

PROFESSIONAL EXPERIENCE

Intellectual property

Expert reports and oral evidence to the UK Copyright Tribunal in the matter: BPI and others v MCPS and others (2006), concerning licence terms for the supply of musical compositions online

Advising a European manufacturing firm in relation to the acquisition of a portfolio of intellectual property (including leading the negotiations as to the monetary value of those rights).

Valuation of a disputed net profit participation agreement in the music industry.

Advising a UK pharmaceutical company in relation to damages arising out of abuse of a dominant position.

Currently advising a large global pharmaceutical company in relation to a UK patent infringement.

Advisor to an international business in the oil industry in relation to damages for patent infringement.

Advising a global manufacturer on the level of a reasonable royalty for 17 different patents.

Advisor to a global European manufacturer on a major patent infringement claim.

Valuation of all the intellectual property owned by a global European manufacturer, including several major brands and over 5,000 patents.

Expert report and oral evidence to the EC Commission DGIII and DGIV on the level of a reasonable royalty for video airplay in connection with a complaint under Article 86 of the Treaty of Rome.

Expert report and oral evidence in the High Court (Patents Court) in the Hoechst Celanese v BP account of profits enquiry (1998).

Expert report and oral evidence in the High Court (Patents Court) in the Gerber Garments Technologies Inc v Lectra Systems Ltd damages enquiry (1995).

Expert report and oral evidence to the UK Comptroller General of Patents in connection with the level of a reasonable royalty for a licence of right.

Expert report and oral evidence to the EC Commission DGIII and DGIV on the level of a reasonable royalty in connection with a complaint under Article 86 of the Treaty of Rome.

Expert reports and oral evidence to the UK Copyright Tribunal relating to the level of a reasonable royalty on three occasions (BSkyB v PRS (1997), AIRC v PPL (1992), TV Listings (1990)).

Expert report and evidence in a major confidential arbitration relating to damages arising from patent infringement (manufacturing industry).

Quantification of damages and expert advice on the level of a reasonable royalty in a number of other cases relating to copyright and patent infringements and licence of right registrations.

Assistance in licensing negotiations and advice on the level of a reasonable royalty in various industries, including consumer products, manufacturing, pharmaceuticals, performing rights and other copyright (music, video, publishing, software) and brand names.

Advice on arm's length royalty rates in the context of tax structuring and intercompany transfer pricing agreements (including expert advice on the UK's largest transfer pricing dispute).

Valuation of brands, trademarks, patents and publishing rights.

Competition and regulatory experience

Economic advisor to the Office of the Rail Regulator (ORR) on economic aspects of the restructuring of the rail network. Significant work on track access charges and the facilitation of competition between train operators.

Expert reports on two cases under the Restrictive Trade Practices Act.

Advisor to the BBC on the MMC enquiry into collective licensing.

Prepared submissions to OFTEL on behalf of the ITV Association re the pricing of access to the telecoms network.

Advisor to regulated companies in the gas, electricity, media, and telecoms industries.

Authored "Tuning in: Making the BBC more Accountable", a response to the Government's Green Paper on the future of the BBC.

Damages analysis

Quantification of damages in approximately 100 litigations, including many of the UK's largest commercial disputes (e.g. Argyll v Guinness, Ferranti litigation, and several large claims involving investment banks, accounting firms and other professional advisers).

Quantification of lost profits in the context of several insurance claims arising out of fire, flood, and other causes of business interruption. Specific cases include the quantification of the impact on production and profits of an explosion at a copper smelting plant in Utah; and the assessment of lost profits due to fires at various manufacturing plants in England

Expert report submitted to the Office of Fair Trading on the methodology for computation of lost profits on the termination of a photocopier supply agreement.

Expert evidence includes Senate v Alcatel (the leading authority on post acquisition warranty disputes).

LECG

Analysis of the causes and quantification of delays and cost overruns on several major construction projects.

Other client experience

Assisted the Scott Inquiry into the sale of arms to Iraq.

Led a major fraud investigation into BCCI on behalf of the majority shareholders (leading a team of 40 people).

Led the investigation into the Bombay stock market scam on behalf of a major international bank.

Expert reports for the underwriters on the Ikarian Reefer.

Advised clients in many industries on strategic and valuation issues.

PUBLICATIONS

"The use of intellectual property as security for debt finance", produced on behalf of the Intellectual Property Institute, March 1997.

"The calculation of damages for patent infringement", *Managing Intellectual Property*, June 1995.

"Trends in intellectual property damages in the US and UK", *International Commercial Litigation*, December 1995.

"Financial Remedies for patent infringement", *International Commercial Litigation*, November 1996.

"Cracking the Value Code: How Successful Businesses are Creating Wealth in the New Economy", published by Harper Business in April 2000 (translated into 15 languages).

ADDITIONAL PROFESSIONAL ACTIVITIES

Frequent speaker at international conferences on management and business issues (e.g. Keynote speaker at the IFAC Conference, 2000).

Regularly quoted by leading media outlets including *Fortune*, *Forbes*, *Business Week*, *Financial Times*, *Wall Street Journal*, *Times*, *Bloomberg* and *CNN*.

Chairman of IBC's conference on "Patent and Technology Licensing – Creating a Successful Profit Centre for the 21st Century" (October 1996).

Keynote speaker at various conferences on Intellectual Asset Management.

MC 16

TESTIMONY OF

GEOFFREY MICHAEL TAYLOR

General Counsel and Executive Vice-President

IFPI

London, England

Before the
COPYRIGHT ROYALTY BOARD
Washington, D.C.

INTRODUCTION

I am General Counsel and Executive Vice President of the International Federation of the Phonographic Industry ("IFPI"). IFPI is an association that represents the recording industry worldwide. In my current position, I am responsible for legal affairs at IFPI, including all issues relating to litigation, licensing, and regulatory matters.

In the last twenty-five years, the United States has gone from having one of the lowest mechanical royalty rates in the world to having one of the highest. The United States is also one of the only countries in the world not to use a percentage royalty structure for mechanical licensing. In my testimony, I will discuss these and other important international trends that are useful benchmarks in considering changes to the U.S. mechanical royalty rates. I will also explain why countries worldwide view a percentage rate system as a critical element to their mechanical royalty schemes.

My testimony will also highlight the important similarities between the U.S. recording industry and the recording industries in the U.K. and, to a lesser extent, Japan. These three countries represent the world's most developed music markets, having the world's highest levels of record sales and releases. The U.S. and U.K. record industries also have a distinct international focus, distributing more music than any other countries. Additionally, I will discuss how all three countries' recording industries have undergone similar changes in recent years, with online sales and online music piracy changing the marketplace.

Given the parallels between the recording industries in the U.S., U.K., and Japan, and the market forces affecting each of them, the mechanical royalty rate schemes in the U.K. and Japan provide useful guidance in reassessing the direction of U.S. mechanical royalty rates. As I will discuss in more detail, the U.K. mechanical royalty rates for online music have recently been the

subject of a UK Copyright Tribunal reference which resulted in a settlement in September 2006 between the British Phonographic Industry (“BPI”), various online and mobile service providers, and the Mechanical-Copyright Protection Society (“MCPS”) and Performing Right Society (“PRS”), which administer mechanical and performance rights on behalf of music publishers and songwriters in the U.K. For reasons that I will discuss, the U.K. settlement for online mechanical royalty rates, together with the rates set by the U.K. Copyright Tribunal in 1991 for physical copies of music (which still apply today), suggest that mechanical royalty rates even lower than those in the U.K. would be appropriate in the U.S. for the next five years.

BACKGROUND

I. Personal Background

I first joined IFPI in 1997, from the Brussels office of Wilmer, Cutler & Pickering (now WilmerHale). I worked at IFPI as a legal adviser, senior legal adviser, and then Deputy General Counsel. One of my responsibilities at IFPI during this time was to advise recording associations and record companies around the world on issues related to mechanical royalties, including providing advice when they were negotiating for, or involved in proceedings related to, revised mechanical royalty rates. In order to perform this function, it was important that I have an understanding of what the rates and terms were around the world, as well as keeping current on mechanical royalty-related changes and proceedings.

In 2004, I left IFPI to become General Counsel of the BPI, the recording industry association in the U.K. whose counterpart in the U.S. is RIAA. I was at BPI when a proceeding before the U.K. Copyright Tribunal was initiated to set the mechanical and performance royalty

rates for online music.¹ I was involved in formulating BPI's rate proposal and evidence. I was also responsible for liaising between the member record companies and our attorneys.

I returned to IFPI and assumed my current position in December 2005. In changing jobs, it was agreed that I would continue to play an active role in the running of BPI's case before the Copyright Tribunal. I was also closely involved in the negotiations that eventually led to a settlement; I will discuss the elements of that settlement later in my testimony.

In my current position as General Counsel, I am still involved in advising member companies and associations on issues related to mechanical royalties. I am also responsible for IFPI's internet anti-piracy strategy and all other regulatory and litigation matters affecting IFPI.

II. IFPI Background

IFPI represents the recording industry worldwide, with more than 1,450 member record companies in 75 countries, and affiliated industry associations in 48 countries. IFPI's Secretariat is based in London, and it has regional offices in Brussels, Hong Kong, Miami, and Moscow. IFPI represents its members at the international, regional, and national levels, and acts as an umbrella for its national groups and affiliated industry associations. IFPI is closely affiliated with RIAA, and approximately 30 of its members are U.S. record companies.

One of IFPI's main activities is guiding international strategy in key areas, including anti-piracy enforcement, technology, lobbying of governments, representation in international organizations, legal strategies, litigation, and public relations. An important objective of this international strategy is the establishment of fair and reasonable mechanical royalty rates around

¹ The U.K. Copyright Tribunal is comprised of a Chairman and two deputy Chairmen appointed by the Lord Chancellor, as well as two to eight ordinary members appointed by the Secretary of State for Trade and Industry. The Tribunal operates on a panel basis and its main function is to determine the terms and conditions of licensing schemes offered by, or licensing schemes operated by, collective licensing bodies in the copyright area.

the world, so that record companies are able to maximize the availability of new recordings and have the freedom to exploit new markets while still fairly compensating songwriters and publishers.

IFPI's current priorities include promoting fair market access and adequate copyright laws, helping to develop the legal conditions and technologies for the record industry to prosper in the digital area, fighting music piracy, and promoting the value of music in the development of economies.

DISCUSSION

I. The Majority of Mechanical Royalty Schemes Around the World Are Percentage Rate Systems.

From my work with IFPI, I have become familiar with many mechanical royalty structures and rates around the world. Based upon my knowledge of worldwide mechanical royalty schemes (as illustrated in RIAA Ex. D-101-DP, a "Quick Reference Tariff Table Relating to Downloads and On-demand Streaming"), I can attest to the fact that almost every country in the world has recognized the advantages of using a percentage rate of either wholesale or retail prices in setting mechanical royalty rates.

Percentage rate structures are prevalent around the world because they provide a flexible and sensible method for determining appropriate mechanical royalties in changing and diverse marketplaces. A percentage rate, unlike a flat cents rate, accommodates changes in price, technology, business model, and other marketplace characteristics by preserving the balance between mechanical rates and record industry revenues. The same rate can be applied to new and different formats, without having to specifically address variations in pricing among different types of products and services. Percentage royalties also accommodate flexible pricing so as to maximize sales, such as marketing older catalog recordings at reduced prices, which

creates incentives for record companies to continue distribution of recordings that otherwise might not generate mechanical income for their writers and publishers. Finally, a percentage rate ensures that mechanical royalties respond to the evolution of music prices overall, protecting record companies against unfairly high mechanical royalties if prices fall, while at the same time allowing songwriters to benefit from higher prices.

II. U.S. Mechanical Royalty Rates Should be Consistent with Those of Other Major Developed Music Markets.

The music industry in the U.S. is similar to the music industries in both the U.K. and Japan in many important respects. These three countries have the most developed music markets in the world, and I would expect that the similarities between these markets would lead to somewhat similar mechanical royalty rates and structures. All three countries have extremely significant record markets. For example, the U.K. is second only to the U.S. in the number of albums released per year.² Japan generates the second highest total retail revenue from music in the world, after the U.S., and the U.K. is third.³ These three countries are also the world leaders in developing the online marketplace. In 2005, the U.S., Japan, and U.K. were the top three countries for digital music sales.⁴

Another feature that the U.K. and U.S. have in common is that their record companies invest particularly heavily in the areas of A&R and marketing and promotion of records; much

² In 2005, 31,291 new albums were released in the U.K.. See BPI Statistical Handbook 2006, at p. 33. Excerpts attached as RIAA Ex. D-102-DP.

³ See IFPI 2006 Global Recording Industry in Numbers, at p. 3. Excerpts attached as RIAA Ex. D-103-DP.

⁴ See *id.*

more so than is typically done in other countries.⁵ Record companies in both countries are also investing in developing a legitimate online music market, while at the same time facing and fighting similar significant online piracy problems. In the U.K., as throughout the world, there is a large disparity between the investments made and risks faced by record companies as compared to music publishers. Record companies in the U.K. incur tremendous expenses in A&R and promoting records that they often never recoup. Publishers start making royalties on the first album sold without having to undertake investment risks on a similar scale. Also, music publishers have not incurred the costs that record companies have in developing the online market, through tasks such as encoding whole catalogs, supplying new metadata, developing new accounting systems, and fighting internet piracy.

Another similarity between the U.K. and U.S. music industries (but not with Japan) is that they are both very international in focus. The U.K. recording industry is behind only the U.S. in number of records distributed or licensed abroad. U.K. artists accounted for 8% of all artist album sales in the U.S. in 2004.⁶

The recording industries in the U.S., U.K. and Japan have also experienced similar damaging changes in recent years. Retail spending on recorded music in the U.K. has been declining since 2001, and album retail prices fell 11% between 2000 and 2005.⁷ In Japan, the number of physical units shipped annually declined approximately 14% between 2001 and 2005.⁸ Although online sales have been greatly increasing in the U.K. and Japan in recent years,

⁵ For example, U.K. record companies spent approximately £206 million (or approximately \$390.5 million) on A&R in 2004. See BPI Press Release, "Record industry reinvests 17% of turnover in new music," April 19, 2006, RIAA Ex. D-104-DP.

⁶ See *id.*

⁷ See BPI Statistical Handbook 2006, at p. 29, RIAA Ex. D-102-DP.

⁸ See IFPI 2006 Global Recording Industry in Numbers, at p. 73, RIAA Ex. D-103-DP.

as in the U.S., and online is the fastest growing delivery channel for music, the online market still represents only a small portion of overall music sales – three percent of overall music sales in the U.K. and seven percent in Japan in 2005.⁹ In all three countries, growth in online sales has thus far been insufficient to compensate for the drop in sales of physical products, and record companies have experienced a decline in revenue in recent years. Annual trade revenue for recorded music decreased by approximately 6% between 2001 and 2005 in the U.K., and approximately 15% in Japan.¹⁰

Finally, it is also significant that in the U.K. and Japan, as in the U.S., there is a mechanism in place to set reasonable royalty rates when parties cannot agree on the rate. As already noted, a Copyright Tribunal is established by statute to resolve license fee disputes. A similar arbitration mechanism exists in Japan, although in practice disputes have been resolved through mediation facilitated by the Japanese Agency of Cultural Affairs.

III. The Mechanical Royalty Rate Structures in the U.K. and Japan.

For all of the reasons articulated above, the U.S., U.K. and Japanese recording industries are alike in many important respects, and it therefore follows that the mechanical royalty schemes in the U.K. and Japan provide useful comparables in examining the U.S. system. Below I provide a brief overview of the mechanical royalty structure in Japan, which I am familiar with from my many years advising on international mechanical royalty rates. I will also describe in some detail the separate mechanical royalty rate structures in place in the U.K. for physical and online formats, which I am very familiar with from my position at the BPI, as well as my involvement in the recent setting of the rates for online formats.

⁹ See *id.*, pp. 67 and 73.

¹⁰ See IFPI 2006 Global Recording Industry in Numbers, at pp. 67, 73, RIAA Ex. D-103-DP.

A. Mechanical Royalties In Japan

The current effective mechanical royalty rate for physical formats in Japan is 4.53% of retail price. This rate, which has been in place since 1995, is achieved after packaging and shipping discounts are applied to the base rate of 6%.

The rate for online music in Japan was set by voluntary agreement between the Recording Industry Association of Japan (“RIAJ”) and the Japanese Society for Rights of Authors, Composers and Publishers (“JASRAC”) in 2005. The royalty system for online music in Japan is a joint royalty rate scheme, which combines royalties owed for both mechanical and performance rights. The net joint royalty rate for permanent downloads is 6.54% of retail price, after discounts of up to 15% that most providers qualify for are applied to the 7.7% base rate.¹¹ For on-demand streaming services the joint mechanical/performance royalty rate in Japan is 4.5%, and for webcasting it is 3.5%. A 10% discount is available for on-demand streaming and webcasting when conditions similar to those imposed for downloads are met. There are also minimum royalties that apply to each of these categories.

B. U.K. Mechanical Royalties for Physical Formats

The current mechanical royalty rate for physical products in the U.K. was set in 1991 by the U.K. Copyright Tribunal at 8.5% of PPD (“Published Price to Dealer,” which is the published list wholesale price before discounts are applied). Prior to the Copyright Tribunal decision in 1991, the rate was previously 6.25% of retail price. Both the record companies and the music publishers agreed before the 1991 proceeding that the rate should be based on PPD,

¹¹ The conditions that must be met for the discount to apply are: 1) application of technical measures to prevent illegal reproduction of copyrighted works; 2) use of copyright management information through electronic watermarks or comparable means; and 3) provision of royalty reporting through electronic means. Each condition warrants a 5% discount, for a total available discount of 15%.

rather than retail. The Tribunal, in setting the rate at 8.5% PPD, found that the recording industry had “thrived” internationally during the sixty-year period that the previous rate had been in place and that it should not disturb the existing position unless there was good cause,¹² and therefore set a rate that was only a slight increase over the PPD equivalent of the previous rate. Following the Copyright Tribunal’s decision, the parties separately agreed that in cases where there is no PPD, the rate would be 6.5% of retail price.

There are no minimum mechanical royalties imposed on physical products in the U.K. The Copyright Tribunal in 1991 stated that including a minimum royalty would result in special treatment for composers at the expense of record companies, for which there was no commercial justification.¹³ The Tribunal also noted that imposing a minimum royalty would make it difficult or impossible for record companies to sell older works at the discounted prices necessary to attract sales.

Finally, the U.K. Copyright Tribunal decided that there should be no limit on the number of promotional copies that record companies can provide royalty-free.¹⁴ It determined that because there is a sufficiently common interest between record companies and composers in their desire to maximize profits from record sales, it was not necessary to establish a limit on

¹² See Copyright Tribunal Decision in *The Matter Between The British Phonographic Industry Ltd. and Mechanical-Copyright Protection Society Ltd. and Composers’ Joint Council*, Nov. 1, 1991, at 45. Attached as RIAA Ex. D-105-DP.

¹³ *Id.* at 19.

¹⁴ All “bona fide” promotional copies are royalty free in the U.K. if certain reporting requirements are satisfied, but BPI and MCPS have agreed as an alternative that 1,500 promotional copies (3000 singles) will be allowed with less detailed reporting/evidential requirements.

promotional exemptions.¹⁵ The Tribunal noted that record companies lose just as much money as composers if too many promotional copies are given away, and left it to the commercial judgment of the record companies to determine the proper amount.

C. U.K. Mechanical Royalties for Online Formats

As mentioned above, the royalty rates for online music in the U.K. have recently been the subject of a U.K. Copyright Tribunal reference. In September 2006, the BPI, certain music service providers and mobile network operators entered into a settlement with the MCPS and PRS in respect of the majority of issues that were before the Copyright Tribunal (iTunes and a number of mobile network operators are continuing to pursue a number of specific issues before the Copyright Tribunal). The original reference to the Copyright Tribunal was initiated by BPI and music service providers to challenge the royalty rate scheme instituted by “MCPS-PRS Alliance” (the “Alliance”), a collaboration between the UK mechanical rights and performing rights collection societies. The royalty system that the Alliance sought to impose was a joint royalty rate scheme, which combined royalties owed for both mechanical and performance rights for a range of services. The parties, however, were able to reach a settlement on the royalty rates and terms just as the proceeding was set to begin. That settlement applies retroactively for royalties due beginning July 1, 2006, and will continue until June 30, 2009. The agreed terms apply specifically to the parties to it but the firm expectation is that when the remaining issues before the Copyright Tribunal are resolved early next year, that the MCPS and PRS will issue an online scheme which, in all but the issues still before the Tribunal, mirrors the settlement.

¹⁵ Copyright Tribunal Decision in *The Matter Between The British Phonographic Industry Ltd. and Mechanical-Copyright Protection Society Ltd. and Composers' Joint Council*, Nov. 1, 1991, at 16. Attached as RIAA Ex. D-105-DP.

In the U.K., the Alliance has insisted on licensing only music service providers and has refused to license record companies where they are not the last link in the transmission of music to the user. Therefore, it is the music service providers that have generally obtained mechanical and performance right licenses and paid the relevant royalties. I understand that in the U.S., record companies, rather than music service providers, generally obtain mechanical licenses and pay mechanical royalties for downloads.

The rate structure under the agreement is divided by online service types. For permanent downloads, the rate is set at eight percent of the retail price, less VAT. The royalty rate is also eight percent of the retail price, less VAT, for limited downloads and on-demand streaming services, as well as for special webcasting. Limited downloads are when users are able to download recordings of their choosing but retain them only for a limited time (e.g., the duration of a subscription), and with on-demand services, users can stream specific recordings on-demand, but cannot retain the recordings for subsequent listening. Special webcasting services are defined as those where more than 50% of the songs played are by a single artist or band. Finally, for premium and interactive webcasting, as well as pure webcasting, the joint royalty rate is set at 6.5%, less VAT. Services are categorized as premium or interactive webcasting when they do not fit into any of the other categories and no permanent or temporary copy of a work is retained by the user. Pure webcasting services are those in which, among other criteria, there is no interactive functionality, personalizing of the service, or advance notice of tracks to be played. The agreement also grants a license to reproduce musical works on servers for the purpose of transmitting those recordings to users.

In addition to the base royalty rates, there are also various minimum royalties applicable for each type of service. U.K. record companies did not wish to agree minimum royalties, but

accepted them as part of the give and take in reaching an overall settlement. Their inclusion allowed BPI to reach agreement on other features that were very important to BPI members, and we accepted the agreed upon minimums because they are flexible, detailed, and part of a larger package deal with rates that we could accept. For permanent downloads, the agreement provides for reduced minima on bundles of multiple tracks. Details on the agreed mechanical royalty rates and minima for online formats are provided in the chart below:¹⁶

Service	Rate	Minimum Royalties
Permanent Downloads	8% gross revenue (less VAT)	<p>£0.04 for single track downloads (or bundles of 7 tracks or less) (approx. 8¢ U.S.)</p> <p>£0.035 for each track in bundles of 8-12 tracks</p> <p>£0.03 for each track in bundles of 13-17 tracks</p> <p>£0.025 for each track in bundles of 18-29 tracks</p> <p>£0.02 for each track in bundles of 30+ tracks</p> <p>£0.03 per track if track was originally released 2+ years previously and is sold for a price of 49 pence or less (same rate for bundles of 13+ tracks when entire bundle or all tracks in bundle were originally released 2+ years ago)</p>
Limited Download/On-demand Service	8% gross revenue (less VAT)	<p>£0.60 per subscriber/mo. for portable subscription services (approx. \$1.13 U.S.)</p> <p>£0.40 per subscriber/mo. for PC subscription services (approx. \$0.75 U.S.)</p> <p>£0.20 per subscriber/mo. for limited subscription services (approx. \$0.38 U.S.)</p> <p>£0.0022 per musical work played for all other LD/ODS services (approx. \$0.004 U.S.)</p>
Special Webcasting	8% gross revenue (less VAT)	£0.0022 per musical work communicated per user, unless service is subscription service, in which case parties shall negotiate a minimum (approx. \$0.004 U.S.)
Premium & Interactive Webcasting	6.5% gross revenue (less VAT)	£0.22 per subscriber/mo. for webcasting subscription services (approx. \$0.41 U.S.)

¹⁶ See U.K. Settlement Agreement, dated September 28, 2006, at Schedule 2. Attached as RIAA Ex. D-106-DP.

		£0.00085 per musical work communicated per user (approx. \$0.0016 U.S.)
Pure Webcasting	6.5% gross revenue (less VAT)	£0.22 per subscriber/mo. for webcasting subscription services (approx. \$0.41 U.S.) £0.0006 per musical work communicated per user (approx. \$0.0011 U.S.)

Although the agreement provides for minimum royalties, it is expected that the percentage rate will be the operative rate in most situations. As an example, the price of a permanent download from iTunes U.K. is £0.79, which, after excluding the 17.5% VAT, amounts to £0.672. The 8% mechanical royalty due on this download would be £0.0537, rather than the minimum of £0.04.

Additionally, the agreement also contains various promotional exemptions, under which the minimum royalties will not apply. For instance, services are permitted to use clips of up to 30 seconds to promote a song without the payment of a minimum royalty, so long as the clip is used solely for promotional purposes. There are also provisions for royalty-free introductory trial periods for webcasting subscribers, as well as a limited number of special royalty-free downloads for non-subscription services. Additionally, only one royalty is payable for “dual downloads,” so that even if a song is downloaded to both a mobile device and a computer, only one royalty is due.

The agreement also includes provisions for certain important discounts. For example, gross revenue obtained in the form of advertising or sponsorship will be reduced by five percent to reflect the costs in obtaining it. There is also a 15% discount for all audio-visual material until the “date of convergence” (which is defined as when unit sales of permanent video downloads become the same or greater than the unit sales of audio-only permanent downloads). Finally, there is also a 15% discount for mobile permanent downloads and a 7.5% discount for other mobile music services (which also will only apply until a certain date of convergence).

D. Comparing Mechanical Royalty Rates in the U.K. and Japan to those in the U.S.

Due to the similarities between the U.S., U.K., and Japanese music industries, the rate structures in the U.K. and Japan are appropriate considerations when determining the U.S. mechanical royalty rate. However, there are a number of factors that must be taken into account when comparing the rates. Based on my experience with international mechanical royalty rates, I would expect these factors to result in the U.S. having a lower royalty rate than the U.K. and Japan.

The first difference is that the online royalty rates in the U.K. and Japan are joint mechanical and performance right royalties. To translate the rate to something that could be applied in the U.S., one must deduct the value of the performance royalty from the joint royalty rate. Based on my knowledge of how the collecting societies divide the joint royalties between mechanical and performance rights, they apportion the mechanical royalty and performance royalties 3:1 in favor of mechanical royalties for downloads (75% mechanicals, 25% communication to public right).¹⁷ This suggests that the “value” of the mechanical right for permanent downloads in the U.K. is 6% (75% of 8%) of retail price. Therefore, the mechanical royalty rate in the U.S. should be lower than the joint rate of the U.K. and Japan to account for the fact that performance rights in the U.S. are not being addressed in this proceeding.

Also, the mechanical royalty rate in the United States should take into account the high level of international marketing that U.S. record companies undertake. Although the U.K. is second in the world for music exports, the gap between it and the U.S. is still significant. The U.S. is responsible for 34% of the global value of music, whereas the U.K. produces 10% of the

¹⁷ See <http://www.mcps-prs-alliance.co.uk/>.

global value.¹⁸ Because U.S. record companies invest in creating the world's most successful international repertoire, music publishers and songwriters in the U.S. receive a greater benefit from U.S. record companies than do publishers and songwriters in other countries, including the U.K. and Japan, from their record companies. Therefore, it would be appropriate for the royalty rates in the United States would be lower than those in the U.K. and Japan.

IV. Factors Contributing to The Different Mechanical Royalty Rates in Other Countries.

When comparing the mechanical royalty rates in different countries, it is very important to understand the various legal and industry factors that influenced the setting of the rate. Over the years I have worked at IFPI, assisting various countries with mechanical royalty rate issues, I have observed how these various aspects impact the rate of mechanical royalties. I believe that examining some of these factors clarifies why the mechanical royalty rates are higher in a number of countries, most notably continental European countries, than the rates are in the U.K. and Japan, and the rates should be in the U.S.

First, most countries do not have independent bodies that determine royalty rates or to which disputes regarding the reasonableness of rates can be brought. Without such independent bodies, such as the Copyright Royalty Judges and the U.K. Copyright Tribunal, the rates in many countries have been unilaterally promulgated by the collecting societies, often despite the objections of licensees.

The nature of the recording industry in the country also has a significant impact on the mechanical royalty rates. The substantial investment made by record companies in the U.S., U.K., and Japan provides music publishers and writers with a great deal more benefit than they

¹⁸ See IFPI 2006 Global Recording Industry in Numbers, at pp. 26, 67, RIAA Ex. D-103-DP.

obtain in other countries. For instance, because U.S. and U.K. record companies are international in focus, writers and publishers receive mechanical and performance royalty payments around the world from recordings produced in the U.S. and U.K. They also profit in increased sales from the large sums invested by record companies in A&R and promotion.¹⁹ Also, record companies in continental Europe typically spend less on recording albums and pay lower advances to artists than do companies in the U.K. and U.S.

Furthermore, record companies in many other countries have reduced risk because the majority of internationally successful repertoire originates in the U.S. and U.K. The songs that do not succeed in the U.S. and U.K. are weeded out before being released in other countries, with the losses sitting with the U.S. or U.K. record company concerned. On the other hand, the songs that are proven hits in the U.S. or U.K. can then be released in other countries without additional production cost. For licensees of the major record companies, the records are available free of advances and recording and video expenses, and with considerable market research already completed. As a result, the risk profile of U.S. and U.K. record companies is much higher than that of record companies in most territories. Because record companies in other countries have less investment and risk than record companies in the U.S. and U.K., and because they provide less benefit to music publishers and writers, it is logical that their mechanical royalty rates should be higher than those in the U.S. and U.K.

Finally, the mechanical royalty rates in continental Europe appear higher at face value than they actually are because a number of discounts are applied to the set rate. For example, the

¹⁹ These points were noted in the U.K. Copyright Tribunal's 1991 decision as reasons that the mechanical royalty rate in the U.K. should be lower than the BIEM/IFPI rate that applied to most of continental Europe. *See* Copyright Tribunal Decision in The Matter Between The British Phonographic Industry Ltd. and Mechanical-Copyright Protection Society Ltd. and Composers' Joint Council, Nov. 1, 1991, at 35-37, RIAA Ex. D-105-DP.

official rate for physical formats under BIEM/IFPI contract, which set the mechanical royalty rate across continental Europe and has now expired but is still followed by many countries today, is 11% PPD. But after discounts are applied, the net rate is only 9.009% PPD. My understanding is that this rate may be further reduced by central licensing rebates and other considerations.

All of these considerations explain why many countries, continental European countries in particular, are not suitable comparables to the U.S. as are the U.K. and Japan when looking at mechanical royalty rates.

V. The U.S. Mechanical Rates Are Among the Highest in the World.

The United States has one of the highest mechanical royalty rates in the world for physical music formats, and its rate for online formats is higher than other countries with independently set or agreed rates. The fact that the rates in the U.S. are higher, despite the numerous reasons discussed above why the U.S. should have one of the lowest mechanical royalty rates in the world, shows that the current U.S. rates are higher than they should be.

A. Comparison of Rates for Physical Formats.

Over the past 25 years, the United States has gone from having among the lowest mechanical royalty rates in the world for physical music formats to having among the highest rates today. The chart below shows the mechanical royalty rates in place in various countries in 1981, after the statutory rate in the U.S. was increased by the Copyright Royalty Tribunal, and the rates for physical products in the same countries in 2005.

Country	1981	2005
United States	4¢ - approximately equivalent to 5% retail or 8.6% wholesale	9.1¢ - approximately equivalent to 12.93% wholesale (14.15% in 2006)
Austria	8% retail	Net rate of 9.009% PPD (11% PPD before deductions)

France	8% retail	Net rate of 9.009% PPD (11% PPD before deductions)
Italy	8% retail	9.009% PPD for physical formats
Japan	5.4% retail (and 4.8% for singles)	Net rate of 4.53% retail (6% before deductions)
Netherlands	8% retail	Net rate of 9.009% PPD (11% PPD before deductions)
U.K.	6.25% retail	8.5% PPD or 6.5% retail

As this chart indicates, after the U.S. Copyright Royalty Tribunal adjusted the mechanical royalty rate in 1981, the rate was four cents per song, which translates to approximately 5% of retail price or approximately 8.6% of wholesale price at the time. At that rate, the United States had one of the lower royalty rates in the world. In 2006, however, with a rate of 9.1 cents per song, which is equivalent to approximately 14.15% of wholesale prices, the United States now has one of the highest mechanical royalty rates in the world.

As explained above, in light of various recording industry and legal factors, it appears appropriate that the United States should have a lower mechanical royalty rate than other countries, in particular the continental European countries. The fact that the U.S. instead has one of the highest rates for physical formats in the world today demonstrates that automatic increases to the U.S. mechanical royalty rate have taken it far out of line with rates in other countries.

B. Comparison of Rates for Online Formats.

The mechanical royalty rates currently applied in most countries to online music formats have been unilaterally set by collecting societies and have not been either agreed to by music service providers and record companies or found reasonable by an independent tribunal.

Therefore, comparing the rates in those countries to the rates in the U.S. is not useful.

Comparing the rates in the U.S. with those countries in which the online rates set by collecting

societies were challenged and resulted in rates independently found reasonable or mutually agreed to, however, supports the proposition that the rates in the U.S. are comparatively high. Those countries with agreed upon online rates – the U.K. and Japan – are also the other countries with the most developed music markets, and as discussed above, I would therefore expect the U.S. to have mechanical royalty rates in line with or lower than those countries. However, when the current U.S. rate of 9.1 cents is applied to a download with a retail price of \$.99 and a wholesale price of \$.70, it represents 13% of the wholesale price or 9.2% of the retail price. When the current U.S. rate is applied to a download of a 13-track album with a retail price of \$9.99 and a wholesale price of \$7.00, it represents 16.9% of the wholesale price or 11.8% of the retail price. This is higher than the 8% of retail rate in the U.K. for a permanent download, and considerably higher than the rates in Japan after the discounts are applied. Therefore, even in the emerging area of online music, the U.S. currently has mechanical royalty rates that are higher than the rates for both mechanical and performance rights in other countries where rates have been agreed upon.

CONCLUSION

As my testimony has explained, the United States is one of the only countries in the world that does not have a percentage-based mechanical royalty rate structure, and therefore the U.S. lacks the important flexibility that other countries' mechanical royalty rate systems have in responding to various formats and new markets. A fixed cents rate in the U.S. is likely to undermine the ability of U.S. record companies to price back catalog recordings at the most efficient level to maximize sales. Even in continental Europe, where there are minimum royalties on physical sales, these are reduced minimum royalties for budget releases to ensure that sales of back catalogs are maximized. The United States has gone from having one of the

lowest mechanical royalty rates in the world to having one of the highest, despite the numerous reasons why the U.S. should have a lower mechanical royalty rate than other countries.

As I also explained, there are numerous reasons that the mechanical royalty structures in the U.K. and Japan are sound comparables for the United States. Those reasons include that all three countries have internationally prominent and leading recording industries, and all face similar issues with declining retail sales of physical products and an emerging online marketplace that is currently undermined by internet piracy. Although the markets are similar in important respects, it is necessary to bear in mind that the online royalty rates in the U.K. and Japan are for both mechanical and performance rights, and that the record market in the U.S. is more prominent internationally than that in the U.K. and Japan. For these reasons, and other reasons discussed above, it is my opinion that the mechanical royalty rate should be lower in the U.S. than in the U.K. and Japan.

I declare, under penalty of perjury, that the foregoing testimony is true and correct to the best of my knowledge.



Geoffrey Michael Taylor

Date: 21/11/06

Exhibits Sponsored by Geoffrey Michael Taylor (Public)

Exhibit Number	Description
D-101-DP	"Quick Reference Tariff Table Relating to Downloads and On-demand Streaming"
D-102-DP	BPI Statistical Handbook 2006
D-103-DP	IFPI 2006 Global Recording Industry in Numbers
D-104-DP	BPI Press Release, "Record industry reinvests 17% of turnover in new music," April 19, 2006
D-105-DP	Copyright Tribunal Decision in The Matter Between The British Phonographic Industry Ltd. and Mechanical-Copyright Protection Society Ltd. and Composers' Joint Council, Nov. 1, 1991
D-106-DP	U.K. Settlement Agreement dated September 28, 2006

MC 17



ASCAP

Legal Department
RICHARD H. REIMER
Senior Vice President
Legal Services

December 22, 2010

Paula T. Calhoun, Esq.
Senior Vice President
& General Counsel
Music Choice
110 Gibraltar Road, Suite 200
Horsham, PA 19044

Re: United States v. ASCAP -- Application
of Music Choice for a License for the
Music Choice Residential Music Service

Dear Paula:

This is to confirm that Music Choice has applied to ASCAP for an ASCAP license for the Music Choice Residential Music Service ("the Service") for the term commencing January 1, 2011, in accordance with the provisions of Section IX of the Second Amended Final Judgment entered in United States v. ASCAP ("AFJ2").

This letter also confirms our agreement to extend, on a month-to-month basis subject to termination on 30 days' written notice by either party, the negotiating period prescribed by Section IX(A) of AFJ2 on condition that Music Choice agrees to report and pay to ASCAP interim license fees for the Service, for the period commencing as of January 1, 2011, on the same basis as provided for in the Blanket License Agreement executed between ASCAP and Music Choice, dated as of January 1, 2006, subject to retroactive adjustment to January 1, 2011, on the basis of the terms and conditions ultimately arrived at by agreement between the parties or proceedings under Section IX of AFJ2.

Our agreement with respect to payment of interim fees may be modified by further agreement of the parties or by court order, and is without prejudice to either party's positions which

Paula T. Calhoun, Esq.
December 22, 2010

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may be taken in negotiations or court proceedings in conjunction with Music Choice's application for an ASCAP license.

Please confirm our agreement by dating, signing and returning to me the enclosed copy of this letter.

Very truly yours,

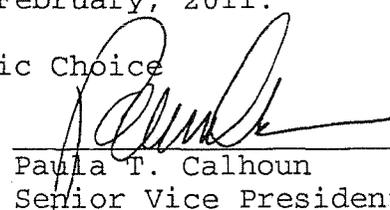


Richard H. Reimer

RHR:s

Accepted and Agreed to this 9th day
of February, 2011.

Music Choice

By: 

Paula T. Calhoun
Senior Vice President and General Counsel

MC 18



Pamela R.K. Williams
Assistant Vice President
Business Affairs
Licensing

December 21, 2010

VIA FEDERAL EXPRESS OVERNIGHT

Paula T. Calhoun, Esq.
Senior Vice President & General Counsel
Music Choice
110 Gibraltar Road, Suite 200
Horsham, PA 19044

Re: BMI/Music Choice Residential Audio Service License Agreement

Dear Paula:

This letter serves as a response to your letter to BMI dated September 29, 2010 in which you request a license authorizing the public performance of BMI music on Music Choice's residential digital audio service (the "MC Residential Audio Service"). In your letter you request that the license granted by BMI cover all "existing or future mediums, platforms and devices without restriction including, without limitation, cable, satellite, fiber optic, IPTV, broadband, wireless and Internet". Pursuant to Article XIV of the BMI Consent Decree, Music Choice is authorized to publicly perform BMI affiliated music on the MC Residential Audio Service commencing October 1, 2010.

In response to Music Choice's license request, BMI proposes a final blanket license fee of 5% of gross revenue attributable to the MC Residential Audio Service for a grant of rights consistent with the grant contained in the recently expired license agreement between BMI and Music Choice, dated January 6, 2006, covering the MC Residential Audio Service (the "2006 Agreement"). To the extent that Music Choice would like the license to cover other and future "mediums, platforms and devices", as contemplated in your letter, BMI will require more information as to how the MC Residential Audio Service is being distributed in order to make a final fee quote for those services.

Until such time as BMI and Music Choice finalize negotiations for a final license fee for the MC Residential Audio Service, or a final determination is made in the BMI Rate Court, BMI proposes that Music Choice pay interim license fees at the rate of 2.5%.

Please feel free to contact me if you have any questions.

Sincerely,

cc: Michael O'Neill
Michael Steinberg, Esq.



MC 19

Exhibit 19

**RESTRICTED – Subject to Protective Order in
Docket No. 2011-1 CRB PSS/Satellite II**

MC 20

MUSIC CHOICE BLANKET LICENSE AGREEMENT

AGREEMENT effective as of January 1, 2006 (the "Effective Date"), between the AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ("ASCAP") and MUSIC CHOICE (formerly known as Digital Cable Radio Associates) ("Music Choice"), as follows:

I. DEFINITIONS

A. "Dramatic Performance"/"Non-Dramatic Performance."

(1) "Dramatic Performance" as used in this Agreement shall mean a performance of a musical composition in which there is a definite plot depicted by action and where the performance of the musical composition is woven into and carries forward the plot and its accompanying action, including, but not limited to, any opera, operetta, musical comedy, play or like production, as such, in whole or in part, or the performance of any composition from any opera, operetta, musical comedy, play or like production in a manner which recreates the performance of such composition with substantially such distinctive scenery or costume as was used in the presentation of such opera, operetta, musical comedy, play or like production (whether or not such opera, operetta, musical comedy, play or like production was presented on the stage or in motion picture form). The use of dialogue to establish a mere program format or the use of any non-dramatic device merely to introduce a performance of a composition shall not be deemed to make such performance dramatic.

(2) "Non-Dramatic Performance" as used in this Agreement shall mean any performance of a separate musical composition which is not a dramatic performance as defined herein.

(3) The definitions of the terms "Dramatic Performance" and "Non-Dramatic Performance" contained in this paragraph are for purposes of this Agreement only and for the term hereof, and shall not be binding upon or prejudicial to any position taken by either of the parties subsequent to the expiration of this Agreement, or used or cited for any purpose other than as contained herein.

B. "Distribution System"

As used in this Agreement, "Distribution System" shall mean and include a cable television system, MMDS, SMATV, IPTV, telco, satellite direct to home system, direct broadcast satellite system, Internet, broad band or any other means or method now known or hereafter invented which is used to transmit or receive a Programming Service, except that Distribution System shall not include free over-the-air broadcast television or pay-per-view television or any transmission or reception of music videos via video-on-demand or near video-on-demand or the transmission or reception of a commercial background or foreground music service.

C. "Programming Service"

As used in this Agreement, "Programming Service" shall mean the daily, twenty-four (24) hour digital audio service programmed or supplied by Music Choice currently known as the "MUSIC CHOICE[®] Service" which encompasses a wide variety of musical and non-musical formats, and the "MY MUSIC CHOICE" service enhancement which allows subscribers to customize channels based upon format, genre and similar criteria, but not by specific song or artist, and any other music content produced, transmitted or distributed by Music Choice from time to time, but does not include a commercial background or foreground music service.

D. "Music Choice Distribution Systems"

As used in this Agreement, "Music Choice Distribution Systems" shall mean each and every Distribution System which is authorized to transmit any Programming Service supplied by Music Choice.

E. "Through-To-The-Viewer License"

As used in this Agreement, "Through-To-The-Viewer License" shall mean, in reference to the scope of the rights granted herein, a license which authorizes the transmission or retransmission of the Programming Services to Music Choice Distribution Systems and the simultaneous retransmission of the Programming Services by any Music Choice Distribution Systems by whatever means to subscribers or viewers. Notwithstanding the foregoing, nothing herein shall grant a license to any transmission or retransmission subject to the provisions of 17 U.S.C. § § 111, 119 or 122 or any other compulsory license under the United States Copyright Act.

F. "United States"

As used in this Agreement, the "United States" shall be deemed to include the United States of America — its commonwealths, territories, trust territories, dependencies, and possessions during the term hereof, including but not limited to Guam, Puerto Rico, and the United States Virgin Islands.

G. "Year"

As used in this Agreement, "Year" shall mean a calendar year.

II. LICENSE

ASCAP grants to Music Choice and Music Choice accepts, for the period commencing as of January 1, 2006 and ending December 31, 2010 (the "License Period"), a non-exclusive license to transmit as part of the Programming Service in the United States, over any

and all of Music Choice's Distribution Systems, nondramatic public performances of musical compositions now or hereafter during the term hereof in the ASCAP repertory, or as to which ASCAP has or shall have the right to grant such license during the term hereof. The license granted hereunder shall be a Through-To-The-Viewer License, as defined in Section I.E. herein. The License granted hereunder does not contemplate the public performance of music videos. The parties will enter into good faith negotiations to either amend this Agreement or enter into a separate Blanket License Agreement to cover Music Choice's transmission of music videos.

III. LIMITATIONS

A. Foreign Distribution

Nothing herein contained shall be deemed to grant to any Distribution System outside the United States the right to perform publicly the compositions licensed hereunder, it being understood that any such foreign Distribution System must obtain licenses from the owners of the performing rights in the compositions or the relevant performing rights society in the country in which such foreign Distribution System transmits or is received.

B. Dramatic Performances

This license does not extend to or include dramatic performances of compositions in the ASCAP repertory; provided, however, that the rights granted to Music Choice under this license shall be deemed to include a grant of the right to make non-dramatic public performances of compositions licensed hereunder by the transmission of a motion picture containing such compositions if the rights in such motion picture other than those licensed under this license have been obtained from the parties in interest. Nothing herein contained shall be deemed to license the public performance by television broadcasting or otherwise of dramatic performances.

C. Scope

Except as herein expressly provided, nothing herein contained shall be construed as authorizing Music Choice to grant to others any right to reproduce or perform publicly, by any means, method or process whatsoever, any of the musical compositions licensed hereunder or as authorizing any recipient of any Music Choice Programming Service to publicly perform, further transmit or reproduce the same, by any means, method or process whatsoever, except that nothing in this paragraph shall limit or curtail the effect of this Through-to-the-Viewer License.

D. Locally Originated or Inserted Programs

Nothing herein shall be deemed to grant a license to any Music Choice Distribution System to perform publicly musical compositions in the ASCAP repertory in programs transmitted by such Distribution System that are not part of the Programming Service, including, without limitation, any program inserted or originated by a Distribution System. For the avoidance of doubt, a Distribution System's use of all or part of the Programming Service as background music behind any menu, guide (including visual interactive guides), or similar visual content (e.g., playing all or part of the Programming Service behind school lunch menus, real estate listing or other community announcements) is covered by the license under this Agreement.

IV. FEES**A. Final License Fees**

(1) In consideration for the license granted herein, Music Choice agrees to pay to ASCAP final license fees, retroactive to January 1, 2006, equal to two and one half percent (2.5%) of Music Choice's gross revenues.

(2) For purposes of Paragraph IV.A.(1), "gross revenues" shall mean all monies derived from the operation of Music Choice's Programming Service and shall be

comprised of the following: (a) monies received by Music Choice from Music Choice's distributors and directly from Subscribers for Music Choice's Programming Service; (b) advertising revenues received by Music Choice, or other monies received from sponsors, if any, in connection with the Programming Service (less advertising agency commissions not to exceed fifteen percent (15%) of those fees actually incurred to a recognized advertising agency not owned or controlled by Music Choice; (c) monies received for the sale of time on the Programming Service to any third party; (d) monies received from the sale of time to providers of paid programming such as infomercials on the Programming Service; (e) where merchandise or any thing or service of value is received by Music Choice in lieu of cash consideration for the use of Music Choice's Programming Service (i.e. "trade and barter" or "tradeouts"), the fair market value thereof or Music Choice's prevailing published rate, whichever is less; (f) monies or other consideration received by Music Choice from Music Choice's distributors, but not including monies received by Music Choice's distributors from others and not accounted for and paid by Music Choice's distributors to Music Choice, for the provision of hardware by anyone and used in connection with the receipt of the Programming Service; (g) monies or other consideration received for any references to or inclusion of any product or service on the Programming Service; and (h) bad debts recovered regarding (a) - (g) above. Gross revenues shall include such payments as set forth above to which Music Choice is entitled but which are paid to a parent, subsidiary, division, or affiliate of Music Choice, in lieu of payment to Music Choice, but not including payments to Music Choice's distributors for the Programming Service. Music Choice shall be allowed a deduction from Gross Revenues as defined above for (a) affiliate revenue returned during the reporting period; (b) bad debts actually written off and discounts allowed or rebates paid during reporting period and which are related to billings previously reported to ASCAP; (c) any sums received from political radio programs and

announcements, net of agency commissions; and (d) rate card discounts, cash, quantity and/or frequency actually allowed.

(3) Within 30 days of the execution of this License, Music Choice and ASCAP will agree on the Make Good Sum, representing the difference between the final fees due under this Agreement and interim fees paid by Music Choice to ASCAP for the period January 1, 2006 through the last day of the last month for which Music Choice has paid interim fees to ASCAP, and Music Choice shall pay the Make Good Sum within five (5) days thereafter.

(4) Commencing with the payment due for the month of September 2006, Music Choice shall pay the license fees hereunder on a monthly basis. License fees owed for any month will be due within thirty (30) days after the end of such month.

(5) After each calendar year hereof, Music Choice shall submit to ASCAP on or before the following March 1, a statement certified by an Officer as to its gross annual revenues hereunder for the Programming Service for the previous year. If said statement reflects that Music Choice's total license fee for said year has been underpaid, Music Choice agrees to pay ASCAP, at the time the statement is rendered, the difference between the fee due and the fee actually paid. If said statement reflects that the total fee for said year has been overpaid, ASCAP agrees to credit the excess to the account of Music Choice, and if such excess shall occur in the last year of the term hereof, ASCAP agrees to return same promptly.

(6) In the event that Music Choice shall be delinquent in payment of license fees due hereunder by thirty (30) days or more, Music Choice shall pay a late payment charge on the license fees due of one percent (1%) (simple interest) per month from the date(s) such license fees should have been paid.

B. Audits

ASCAP reserves the right to require such data or information as necessary to ascertain the license fee hereunder. ASCAP shall have the right by its authorized representatives, at any time during customary business hours and upon sixty (60) days advance written notice, to examine the books and records of accounts in the custody or control of Music Choice necessary to verify any and all statements rendered and accountings made hereunder. ASCAP shall not perform more than one audit per any twelve month period and shall not audit records further back in time than the prior calendar year except in the event of a greater than ten percent (10%) underpayment for such audit period in which event ASCAP may audit records not previously audited two (2) years back in time.

ASCAP shall consider all data and information coming to its attention as the result of any such examination of books and records as confidential. In the event ASCAP conducts an audit and such audit reveals that Music Choice underpaid license fees to ASCAP to the extent of ten percent (10%) or more for the audit period, then Music Choice shall pay a late payment charge on the additional license fees due as a result of the audit(s) of one percent (1%) (simple interest) per month, from the date(s) the license fees should have been paid pursuant to this agreement.

V. DELIVERY OF MATERIALS

Within forty-five days after the end of each month during the License Period, Music Choice shall submit to ASCAP reports in a mutually agreed electronic format listing the songs performed on the MUSIC CHOICE[®] Service during the preceding month. Such reports shall be submitted on one or more discs and shall include, without limitation, the following information: service name, channel name, song title, artist, album title, label name, schedule date, air time, and available publishing information. ASCAP will, upon reasonable request, advise Music

Choice whether particular musical works are available for performance as part of ASCAP's repertory.

VI. INDEMNIFICATION, REPRESENTATIONS AND WARRANTIES

A. Indemnification

ASCAP agrees to indemnify, save and hold harmless and defend Music Choice, its parents, subsidiaries, successors, assigns, and agents, sponsors, advertisers, advertising agencies, distributors, and its and their officers, directors, employees, and artists, from and against any claims, demands or suits that may be made or brought against them or any of them with respect to the nondramatic public performances licensed under this Agreement of any compositions in ASCAP's repertory which are written or copyrighted by members of ASCAP or as to which ASCAP has or shall have rights to grant performance licenses during the term hereof.

B. Notice and Cooperative Defense of Claims

Music Choice agrees to give ASCAP prompt notice of any claim, demand or suit of the type specified in subparagraph A above, and agrees promptly to deliver to ASCAP all papers it has received pertaining thereto. ASCAP at its own expense shall have full charge of the defense of any such claim, demand or suit, and Music Choice shall cooperate fully with ASCAP in such defense. Music Choice, however, shall have the right to engage counsel of its own, at its own expense, who may participate in the defense of any such action and with whom counsel for ASCAP shall cooperate.

C. Representations

Each of the parties represents and warrants that it has taken all necessary action and has secured the consents of all persons necessary to authorize the execution of this

Agreement and performance of all its obligations hereunder. Each party represents that the person executing this Agreement on its behalf is duly authorized to do so, and that this Agreement is and shall be during its term a binding obligation of the party on whose behalf it is executed. Each party represents to the other that the execution and performance of this Agreement is not barred, prohibited or impaired by any existing law, rule, regulation, court or administrative order or decree of which it is aware, or contract or agreement to which it is now a party, or by which it is bound.

VII. BREACH AND DEFAULT

Upon any breach or default by Music Choice of the terms herein contained, ASCAP shall give Music Choice thirty (30) days' notice in writing to cure such breach or default. In the event that any such breach or default has not been cured within said thirty (30) days, ASCAP may then promptly terminate this Agreement by giving notice of such termination to Music Choice, in writing.

VIII. NOTICES

All notices, statements and other documents required to be given hereunder shall be mailed or sent by a nationally recognized courier service with guaranteed overnight delivery, service charges prepaid, or by registered or certified mail, postage prepaid, return receipt requested, or facsimile, or hand delivered to the parties at the following addresses, or such other individuals or addresses as the parties may by written notice designate:

If to ASCAP:

ASCAP
One Lincoln Plaza
New York, N.Y. 10023

Attention: Director of Broadcast Licensing
Facsimile: (212) 621-6446

Copy to: Richard H. Reimer, Senior Vice President - Legal Services

Facsimile: (212) 787-1381

If to Music Choice:

Music Choice
110 Gibraltar Road - Suite 200
Horsham, PA 19044

Attention: David J. Del Beccaro, President
Facsimile: (215) 784-5870

Copy to: General Counsel
Facsimile: (215) 784-5886

Notices shall be deemed to have been given as of the date received, in the case of personal delivery, or on the date shown on the receipt or confirmation therefor in all other cases.

IX. SUCCESSORS AND ASSIGNS

This Agreement shall inure to the benefit of and shall be binding upon the parties hereto and their respective successors and assigns, but no assignment shall relieve the parties hereto of their respective obligations hereunder as to performances transmitted, acts done, and obligations incurred prior to the effective date of the assignment.

X. EXECUTION

This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which together shall constitute one and the same instrument.

XI. ENTIRE AGREEMENT

This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof. It may not be amended, modified, or terminated except by a written instrument signed by both of the parties.

XII. APPLICABLE LAW

Music Choice and ASCAP agree that this Agreement shall be governed by and construed in accordance with the laws of the State of New York pertaining to contracts made and fully prepared therein.

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

Oct. 25, 2006
Date

By: Ray Schwand
Ray Schwand, Vice President and
Director of Broadcast Licensing

MUSIC CHOICE

10/26/06
Date

By: Paula T. Calhoun
Paula T. Calhoun
Senior Vice President & General
Counsel

MC 21

**MUSIC CHOICE RESIDENTIAL MUSIC SERVICE
BLANKET LICENSE AGREEMENT**

Agreement made on January 6, 2006, between BROADCAST MUSIC, INC. ("BMI"), a New York corporation with principal offices at 320 West 57th Street, New York, New York 10019 and MUSIC CHOICE, a Pennsylvania general partnership with offices at 110 Gibraltar Road, Suite 200, Horsham, Pennsylvania ("LICENSEE") (hereinafter "License Agreement").

1. Term. The "Term" of this License Agreement shall mean the period commencing on October 1, 2004, through and including September 30, 2010.

2. Definitions. As used in this Agreement, the following terms shall have the following respective meanings:

(a) "BMI Repertory" shall mean all musical compositions which BMI has the right to license for public performance now or hereafter during the Term of this License Agreement.

(b) "Contract Year" as used in this Agreement shall mean October 1, 2004 through September 30, 2005, and each succeeding 12 month period until the end of the Term.

(c) "Distributor" shall mean any distributor of a subscription multi-channel video programming service via cable, satellite, telco, wireline or other private network distribution system (including, without limitation, MMDS, SMATV, and IPTV) that offers the Programming Service in connection with such multi-channel video programming service, either on a "basic", "premium pay" or "digital tier" package or other basis, pursuant to written authorization with LICENSEE. Distributors shall not include distribution by the Internet or "cable modem" service or by cellular networks.

(d) "Gross Revenues" received by LICENSEE shall mean all monies derived from the operation of the Programming Service and shall be comprised of the following: (1) monies received by LICENSEE from Distributors and directly from Subscribers for the Programming Service; (2) LICENSEE's advertising revenues (as billed), or other monies received from sponsors, if any, in connection with the Programming Service (less advertising agency commissions not to exceed 15% actually incurred to a recognized advertising agency not owned or controlled by LICENSEE); (3) monies received for the provision of time on the Programming Service to any third party; (4) monies received from the sale of time to providers of paid programming such as infomercials on the Programming Service; (5) where merchandise or any thing or service of value is received by LICENSEE in lieu of cash consideration for the use of the Programming Service (i.e. "trade and barter" or "tradeouts"), the fair market value thereof or LICENSEE's prevailing published rate, whichever is less; (6) monies or other consideration received by LICENSEE from Distributors (but not including monies received by Distributors from others and not accounted for and paid by Distributors to LICENSEE) for the provision of hardware by anyone and used in connection with the receipt of the Programming Service; (7) monies or other consideration received for any references to or inclusion of any product or service on the Programming Service; and (8) bad debts recovered regarding (1)-(7) above. Gross Revenues shall include such payments as set

forth above to which LICENSEE is entitled but which are paid to a parent, subsidiary, division, or affiliate of LICENSEE, in lieu of payment to LICENSEE, but not including payments made by Subscribers to Distributors for the Programming Service. LICENSEE shall be allowed a deduction from Gross Revenues for (i) bad debts actually written off and rate card discounts allowed or rebates paid during the reporting period and which are related to billings previously reported to BMI; (ii) affiliate revenue returned during the reporting period; and (iii) any sums received from political programs and announcements, net of agency commissions.

(e) "Mobile Entertainment Service" shall mean the audio, visual, and/or audio-visual content (e.g., samples and full length digital audio files, Ring-Tones, Ring-Backs, games, screen savers, icons) made available for transmission to Mobile Entertainment Devices over cellular networks, including: (1) Ring-Backs for Mobile Entertainment Service customers, even though such transmissions may be transmitted over wired networks to callers of such customers; and (2) a Customer Interface, even though such transmissions may be received by a device other than a Mobile Entertainment Device (e.g. personal computer). A "Mobile Entertainment Device" shall mean a cellular or other mobile telephone, personal data assistant or similar hardware device which is capable of accessing and receiving transmissions over cellular networks.

(f) "Programming Service" shall mean any residential digital audio music Subscription Service produced, packaged, distributed or supplied by LICENSEE and transmitted by Distributors to their Subscribers, including the current "MUSIC CHOICE®" service and "MY MUSIC CHOICE" service enhancement which allows Subscribers to customize channels based upon format, genre and similar criteria, but not by specific song or artist. Programming Service shall not include any interactive service (e.g., digital jukebox service).

(g) "Subscription Service" is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or package of transmissions including the transmission.

(h) "Subscribers" shall mean all persons, firms and corporations that subscribe to the Programming Service from Distributors other than those persons, firms and corporations that subscribe to the service in the manner of a "background/foreground commercial music service." "Subscribers" shall not include the use of the Programming Service by commercial establishments (e.g., bars, restaurants, retail establishments, and offices) where the commercial establishment is using the Programming Service in a manner such that performances of music are intended to be heard by customers, employees, clients, patients and patrons, including, but not limited to, as background or foreground music or music-on-hold.

(i) "Territory" shall mean the United States and its territories, commonwealths and possessions.

3. Grant of Rights

(a) BMI hereby grants to LICENSEE, for the Term of this Agreement, a non-exclusive, through to the listener license to use and publicly perform in and as part of the Programming Service to Subscribers within the Territory by and through Distributors, all musical works, the rights to grant public performance licenses of which BMI may during the Term hereof control. This license shall not include dramatic rights or the right to perform dramatico-musical works in whole or in substantial part. In no event shall this license include transmission by LICENSEE or by Distributors to any commercial premises where the Programming Service is used as a "background/foreground commercial music service" (as that term is currently understood in the industry) or transmission of a Mobile Entertainment Service. Such performances of BMI music shall be subject to separate BMI licenses.

(b) This grant of rights does not authorize the public performance or transmission of musical compositions in the BMI Repertory from a Distributor to Subscribers by Internet, mobile, on-line service or other similar means of transmission such as webcasting or on websites operated or maintained by LICENSEE or any other party.

(c) Except as set forth in Paragraph 3(a), this grant of rights does not authorize LICENSEE to grant to others any performance or other rights in any of the musical compositions licensed under this License Agreement, or authorize any recipient of the Programming Service, including without limitation, commercial establishments, to publicly perform, transmit or further transmit any of the musical compositions licensed hereunder.

4. License Fee

In consideration of the license granted herein, LICENSEE agrees to pay to BMI blanket license fees for the Term at the rate of 2.5% of Gross Revenues for the Programming Service.

5. Reports and Payments

(a) For the period from October 1, 2004 through October 31, 2005, LICENSEE shall pay all license fees due in accordance with the terms of the Settlement Agreement (as defined in Section 14(c)). For each month commencing November 1, 2005, LICENSEE shall pay license fees on or before the thirtieth (30th) day after the end of such month.

(b) LICENSEE shall submit to BMI monthly statements as to LICENSEE's Gross Revenues as follows:

(i) For the period from November 1, 2005, and thereafter during the Term, monthly statements in the form attached hereto as Exhibit A certified by an authorized representative of LICENSEE as accurate to the best of LICENSEE's knowledge and belief, shall be due at the same time as monthly license fees are due hereunder (i.e., on or before the thirtieth (30th) day after the end of the month to which the fees and report apply).

(ii) For every Contract Year in which this Agreement is in effect, on or before the January 15th following such Contract Year, an authorized representative of LICENSEE shall submit a statement in the form attached hereto as Exhibit B concerning LICENSEE's Gross Revenues and Subscribers information for the Contract Year, certified as accurate to the best of LICENSEE's knowledge and belief, with respect to such Contract Year; and

(iii) Should the certification by LICENSEE's authorized representative pursuant to subparagraph (b) (ii) reveal underpayment of license fees by LICENSEE during such Contract Year, the deficit amount will be paid to BMI together with said certification. Should the statement indicate overpayment of license fees, BMI will credit or repay LICENSEE the excess within thirty (30) days of the delivery of said certification, or shall (at LICENSEE's option) credit LICENSEE's account with the balance due for the ensuing Contract Year.

(c) BMI shall have the right by its authorized representatives, at any time during customary business hours and upon thirty (30) days advance written notice, to examine the books and records of account of LICENSEE as necessary to verify LICENSEE's annual and monthly statements and payment of fees hereunder. BMI may only conduct such an examination once in each calendar year, and such an examination shall be limited to the prior three year period's statements and accountings. In no event will any Contract Year be subject to audit more than once unless LICENSEE submits a revised or changed report for a year that previously has been audited, and in that case, any subsequent audit shall be limited to verifying the revision or change. BMI shall consider all data and information contained in LICENSEE's monthly statements or coming to its attention as the result of any such examination of books and records as confidential.

(d) In the event BMI conducts an audit and such audit reveals that LICENSEE underpaid license fees to BMI to the extent of ten percent (10%) or more for any Contract Year, then LICENSEE shall pay a late payment charge on the additional license fees due as a result of the audit(s) of one percent (1 %) per month, from the date(s) the license fees should have been paid pursuant to this License Agreement.

(e) LICENSEE may dispute all or part of BMI's audit claim. If LICENSEE does so, LICENSEE must, within thirty (30) days from the date that BMI bills the additional fees, (A) advise BMI, in writing, of the basis for LICENSEE's dispute and (B) pay BMI any fees indisputably owed together with any applicable late fees owed under Par. 5(d). No late fees will be billed with respect to the disputed fees pending the resolution of such dispute. In the event, the dispute is valid (i.e., the disputed amount was not actually due BMI), no late fees will be owed with respect to the period under dispute. However, if it is determined that the dispute was not valid (i.e., the disputed amount was actually due BMI), LICENSEE shall pay any late fees due under Par. 5(d) back to the date such disputed fees were first due.

6. Late Fees and Taxes

(a) BMI may impose a late payment charge of one (1 %) per month from the date payment was due on any payment that is received by BMI more than thirty (30) days after the due date.

(b) In the event that LICENSEE's payment of fees under this License Agreement causes BMI to incur a liability to pay a gross receipts, sales, use, business use, or other tax which is based on the amount of BMI's receipts from LICENSEE, and BMI is permitted by law to pass through the tax to BMI's licensees, LICENSEE will pay BMI the full amount of the tax directly related to LICENSEE's payments hereunder; provided, that under no circumstance shall LICENSEE be responsible for any tax on BMI's net income.

7. Music Reports

Within forty-five (45) days after the end of each month of the Term, LICENSEE shall use commercially reasonable efforts to furnish to BMI, in machine-readable form, reports of all musical compositions performed by means of the Programming Service on channels programmed by LICENSEE during the month. Such reports shall state the (i) title; (ii) the record label, if reasonably available in LICENSEE's automatic reporting system; (iii) a chronological list by channel of the compositions performed; (iv) either (a) the recording artist or (b) composer and author of each composition; and (v) for musical compositions contained in commercial, public service or other announcements, the name of the product or service promoted and the name of the advertising agency. BMI reserves the right to require LICENSEE to submit such reports within thirty (30) days after the end of each month if BMI's payment distribution system to its affiliates requires such earlier reporting.

8. Indemnity

BMI will indemnify, save and hold harmless and defend LICENSEE, LICENSEE's parents, subsidiaries, successors, assigns, Distributors, advertisers and their advertising agencies, sponsors, and LICENSEE and their respective officers, directors, employees and artists, from and against all claims, demands and suits that may be made or brought against LICENSEE or them with respect to the public performance licensed under this License Agreement of any compositions in the BMI Repertory. LICENSEE must give BMI prompt notice of any such claim, demand or suit and will simultaneously deliver to BMI all papers it has received pertaining thereto and will promptly deliver any papers it receives thereafter. BMI at its expense will have full charge of the defense of any such claim, demand or suit and LICENSEE agrees to cooperate fully with BMI in such defense. LICENSEE may however engage LICENSEE's own counsel at LICENSEE's own expense who may participate in the defense of any such action. BMI will, upon reasonable request, advise LICENSEE whether particular musical works are available for performance as part of BMI's Repertory.

9. Breach or Default

(a) If LICENSEE fails to perform any of the terms or conditions of this License Agreement relating to the reports, accountings or payments required to be made by LICENSEE, BMI shall give LICENSEE thirty (30) days notice in writing to cure such breach or default. If LICENSEE does not cure its breach or default within thirty (30) days after such written notice,

BMI shall have the right to terminate this License Agreement. This right of termination is in addition to all other legal or equitable remedies BMI may have pursuant to this License Agreement. Failure by BMI to give such written notice of breach does not relieve LICENSEE of the obligation to make full performance hereunder, but BMI shall not be entitled to terminate this License Agreement absent such notice and failure to cure.

(b) BMI shall have the right to terminate this License Agreement on thirty (30) days' notice if there is any major adverse interference with BMI's operation as a result of any law of the state, territory, dependency, possession or political subdivision in which LICENSEE is located or otherwise conducts business which is applicable to the licensing of performing rights; provided, however, that BMI shall only terminate the provisions of this License Agreement to the extent affected by such law.

10. Notices

All notices required or permitted to be given under this License Agreement shall be in writing and will be duly and properly given upon receipt if addressed to the party at its place of business set forth above and:

(a) mailed to the other party by certified United States mail; or

(b) sent by facsimile, electronic transmission (provided that a copy of such electronically transmitted notice is also sent by mail); or

(c) sent by generally recognized same-day or overnight delivery service.

Notices to LICENSEE shall be sent to the attention of the General Counsel, facsimile: (215) 784-5886 and to BMI to the attention of the Senior Vice President of Licensing, facsimile: (212) 830-2368 and to the General Counsel, facsimile: (212) 397-0789. Each party agrees to notify the other of any change of address.

11. Successors and Assignees

This License Agreement will inure to the benefit of and be binding upon LICENSEE and BMI and upon LICENSEE's and BMI's respective successors and assignees, but no assignment will relieve either party of its respective obligations under this License Agreement arising prior to assignment.

12. Applicable Law

This License Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to its conflict of laws principles.

13. Arbitration

All disputes of any kind, nature or description arising in connection with the terms and conditions of this License Agreement, other than those matters that may be subject to the jurisdiction of the BMI Rate Court, shall be submitted to arbitration in the City, County and State

of New York under the then prevailing rules of the American Arbitration Association by an arbitrator or arbitrators to be selected as follows: Each of the parties shall, by written notice to the other, have the right to appoint one arbitrator. If, within ten (10) days following the giving of such notice by one party the other shall not, by written notice, appoint another arbitrator, the first arbitrator shall be the sole arbitrator. If two arbitrators are so appointed, they shall appoint a third arbitrator. If ten (10) days elapse after the appointment of the second arbitrator and the two arbitrators are unable to agree upon the third arbitrator, then either party may in writing request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on the parties and judgment may be, but need not be, entered in any court having jurisdiction. Such award shall include the fixing of costs, expenses, and attorneys' fees of arbitration, which shall be borne by the unsuccessful party.

14. Miscellaneous

(a) No waiver by either party of full performance of this License Agreement by the other in any one or more instances shall be deemed a waiver of the right to require full and complete performance of this License Agreement thereafter and all waivers must be in writing to be effective. If any provisions herein are found by a court to be void or unenforceable it shall not affect the validity or enforceability of the remainder of this License Agreement. This License Agreement may be executed in counterparts, each of which shall be an original, but which together shall constitute one agreement.

(b) This License Agreement together with the Settlement Agreement contains the full and complete understanding between the parties with respect to the subject matter hereof, supersedes all prior agreements and understandings, whether written or oral, pertaining hereto, and cannot be modified except by a written instrument signed by each party hereto. The descriptive headings of the sections of this License Agreement are for convenience only and do not constitute a part of this License Agreement.

(c) Concurrently with the execution of this License Agreement, the parties are entering into a settlement agreement with respect to the period October 1, 1994 through September 30, 2004 (the "Settlement Agreement"). This License Agreement shall not be effective until the

execution and delivery of this License Agreement and the Settlement Agreement by each party and as provided in Section 7 of Settlement Agreement.

IN WITNESS WHEREOF, this License Agreement has been duly executed by BMI and LICENSEE below.

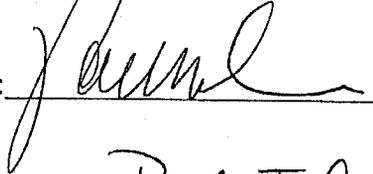
BROADCAST MUSIC, INC.

By: 

Print name: Morris L. Berenson

Title: Sr VP/Gen. Counsel

MUSIC CHOICE

By: 

Print name: Paula T. Cahoon

Title: Senior Vice President +
General Counsel

"EXHIBIT A"

BMI

RESIDENTIAL MUSIC SERVICE MONTHLY LICENSE FEE REPORT

Report for the Month of _____, 20____

Name of Service _____

Address _____

Telephone# (____) _____
area code

Line 1(a) Gross Advertising Revenue.....

Line 1(b) Advertising Agency Commissions *.....

Line 1(c) Subtract 1(b) from 1(a).....

Line 2 Program Sales.....

Line 3 Distributor Revenue.....

Line 4 Trade & Barter.....

Line 5 Bad Debts Recovered.....

Line 6 Other.....

Line 7 Total Gross Revenues
(add Lines 1(c) through 6).....

Line 8 Deduction for Affiliate
Revenue Returned.....

Line 9 Deduction for Bad Debts **.....

Line 10 Deduction for Rate Card Discounts
Or Rebates Paid.....

Line 11 Deduction for Political
Programs.....

Line 12 Adjustment to Revenue
(total of Lines 8 through 11).....

Line 13 Revenue Subject to License Fee
(subtract Line 12 from Line 7).....

Line 14 License Rate Fee.....

Line 15 License Fee Due BMI (Line 13 times Line 14).....

\$

\$

\$

\$
x .025
\$

* Advertising agency commissions permitted pursuant to license agreement.
**Debts actually written off during the reporting period and which are related to billings previously reported.

Line 16 Licensee Fiscal Year End Date / /

I certify that this report is accurate to the best of LICENSEE's knowledge and belief.

By: _____ Date: _____

Title: _____

THANK YOU

Report and payment should be submitted to:
BMI Cable and New Media.
P.O. Box 402974
Atlanta, GA 30384-2974

MC 22

Current Channel Lineup 2011 (46 Channels)

Channel Name	New descriptions
Hit List	Music Choice is bringing you nothing but the best of today's hottest mainstream, pop and crossover hits, ripped straight from the charts! <i>Rihanna, Justin Bieber, Usher & Lady Gaga.</i>
Hip-Hop and R&B	Music Choice blasts the hottest joints. Whether it's an exclusive mix or remix, experience the perfect blend of today's hottest hip-hop and R&B music right here on Music Choice. <i>Drake, Beyoncé, Trey Songz, Usher</i>
MC MixTape	Music Choice wants you to get the party started with a perfectly blended mix of your favorite popular music, beats and more. <i>Usher, David Guetta, Lady GaGa, Beyoncé</i>
Dance/Electronica	It's time to dance with the best in house, club, electro, alternative hip-hop, trance tracks and more right here on Music Choice. <i>David Guetta, DJ Shadow, Paul Oakenfold, Chemical Brothers</i>
Rap (TV-MA)	Music Choice's serves up bangin' Hip Hop raw. From new music exclusives to the hottest hip-hop and uncensored rap of today, make Music Choice your choice for non-stop hip-hop. <i>Lil Wayne, Rick Ross, T.I., Young Jeezy</i>
Hip-Hop Classics	School is in session! Old school, that is. Music Choice is taking you back with your favorite hip-hop classics and old school rap music. <i>Run DMC, A Tribe Called Quest, 2Pac, Notorious B.I.G.</i>
Throwback Jamz	Can't stop reminiscing? Music Choice wants you to rediscover all of your favorite R&B and hip-hop jams from back-in-the-day through the '90s. <i>TLC, Bobby Brown, Heavy D, Jodeci</i>
R&B Classics	From R&B, funk and soul to the best of Motown, Music Choice rewinds the clock and catches you up on all your favorite R&B classics from the late '60s through the early '80s. <i>Marvin Gaye, Aretha Franklin, Stevie Wonder, The Temptations, Rick James</i>
R&B Soul	Music Choice's soul stirring love songs speaks to your soul. Set the mood and let your favorite sultry slow jams and R&B rhythms fill your soul with a mix of music strictly for the grown and sexy. <i>Mary J. Blige, Maxwell, Luther Vandross, Alicia Keys</i>
Gospel	Let Music Choice lift your spirit with the best in traditional and contemporary Gospel music. <i>Yolanda Adams, Donnie McClurkin, Kirk Franklin, Hezekiah Walker, CeCe Winans</i>
Reggae	Whether it's ska, soca or dancehall, let Music Choice put you in a Caribbean state of mind with a beautiful medley of your favorite feel good Reggae rhythms. <i>Bob Marley, Beres Hammond, Buju Banton, Sean Paul, Steel Pulse</i>
Classic Rock	Music Choice is bringing you the music that inspires every generation with hits and deep album tracks from the pioneers that helped define the genre itself. <i>The Rolling Stones, Led Zeppelin, The Doors, Jimi Hendrix</i>
Retro Rock	Music Choice is serving up the songs that not only shook arenas, but also controlled the airwaves! From the head-banging chart toppers of the '80s through the '90s, you'll find it all right here. <i>Motley Crue, Bon Jovi, Alice In Chains, Soundgarden</i>
Rock	Music Choice serves you rock straight up with no filler. <i>Nickelback, Foo Fighters, Avenged Sevenfold, Three Days Grace, Godsmack</i>
Metal (TV-MA)	Music Choice wants you to prepare yourself for an uncensored aural assault! <i>Killswitch Engage, Pantera, Slipknot, Slayer, Metallica</i>
Alternative (TV-MA)	Break away from the mainstream with Music Choice! Discover the bands that continue to redefine the sonic landscape. <i>30 Seconds To Mars, Muse, Weezer, Green Day, Silversun Pickups</i>
Classic Alternative (TV-MA)	What's better than Alternative? Classic Alternative! Music Choice wants you to experience the artists and songs that gave birth to the modern rock format, as we know it. <i>Sex Pistols, The Cure, Janes Addiction, Nirvana</i>
Adult Alternative (TV-MA)	Discover the cutting edge bands as well as the singers & songwriters who span both the electric and the acoustic worlds of rock and beyond, right here on Music Choice. <i>Ryan Adams, Jack Johnson, Sheryl Crow, Colbie Caillat</i>
Soft Rock	Music Choice has the perfect mix of the slow to mid-tempo rock hits of today and yesterday, whether you're entertaining or relaxing. <i>Lionel Richie, Celine Dion, Michael McDonald, and Mariah Carey</i>
Pop Hits	Music Choice has got you covered with your favorite non-stop pop hits plus a mix of today and yesterday's hits minus the rap. <i>Pink, Daughtry, Black Eyed Peas & Rob Thomas</i>
90's	Music Choice wants you to catch up on your favorite jams by bringing you the mega Pop, Rock, and Urban hits from the '90s. <i>Mariah Carey, Boyz II Men, Alanis Morissette, Nirvana, Janet Jackson</i>
80's	Whether you're an '80s baby or not, Music Choice brings you your fix of this totally awesome decade we know you love! <i>Michael Jackson, Prince, Madonna, Whitney Houston, George Michael</i>
70's	Get down and shake your groove thang with Music Choice as we bring you the best Pop, Rock, and Soul mixed exclusively for the inner disco lover in you! <i>Elton John, Stevie Wonder, Bee Gees, Cher, Jackson 5</i>
Solid Gold Oldies	From sock-hops to the songs that helped shape the changing times, Music Choice wants you to rock around the clock with the grooviest hits of the '50s and '60s. <i>Elvis, The Beatles, The Beach Boys, The Rolling Stones, Motown</i>
Party Favorites	Music Choice is bringing you a mix of the good time tunes and feel good music of yesterday and today! <i>"Twist and Shout," "I Love Rock & Roll," "The Macarena"</i>
Stage & Screen	From Broadway to the big screen, Music Choice presents an original mix of the music made famous in epic blockbuster film scores, television and the Broadway stage. Your adventure begins here. <i>Disney, Broadway, Rodgers and Hammerstein</i>
Kidz Only!	Music Choice has got something for the kids! We're mixing things up for your little ones and tweens with a wide variety of popular hits. <i>Jonas Brothers, Miley Cyrus, Naked Brothers Band, Miranda Cosgrove</i>
Toddler Tunes	Music Choice is all about the babies with a channel filled with your little one's favorite lullabies and sing-along songs. <i>Laurie Berkner Band, Baby Einstein, Kidz Bop Kids, Rockabye Baby</i>

Channel Name	New descriptions
Today's Country	It's not your momma's country; it's today's country! Enjoy your favorite Country hits by today's hottest Country stars right here on Music Choice. <i>Keith Urban, Brad Paisley, Carrie Underwood, Taylor Swift, Sugarland</i>
True Country	Music Choice is bringing you the non-stop ballads and Country hits we know you love from the '80s, '90s and beyond! <i>The Dixie Chicks, Tim McGraw, Shania Twain, and Alan Jackson</i>
Classic Country	Music Choice is taking you back! Reminisce with the songs you've always loved from the pioneers and legends of Country music. <i>Waylon Jennings, Merle Haggard, Dolly Parton, Crystal Gayle</i>
Contemporary Christian	Music Choice is mixing up a wide variety of the inspirational and uplifting Christian music of today and yesterday. <i>Phillips, Craig & Dean, Michael W. Smith, MercyMe, Steven Curtis Chapman, Third Day</i>
Sounds of The Seasons	From Christmas to Mardi Gras... there's always a reason to enjoy the season with Music Choice! Celebrate the holidays with songs that capture the spirit of each and every season. Christmas, St. Patrick's Day, Mardi Gras, Oktoberfest, Fourth of July
Soundscapes	Relax, relate, release and allow this uplifting Music Choice mix of new age, atmospheric, and world-positive music to soothe any mood. <i>Georgia Kelly, Steven Halpern, Jim Brickman, Eric Tingstad, Enya</i>
Smooth Jazz	Music Choice wants you to experience an eclectic blend of soulful and sultry grooves mixed with a myriad of pop and rock inspirations. <i>Lee Ritenour, David Benoit, The Rippingtons, Spyro Gyra, George Benson</i>
Jazz	Take a musical journey with Music Choice and experience the true essence of jazz with tracks that highlight its rich history and culture. <i>Miles Davis, West Montgomery, John Coltrane, Thelonious Monk, Stan Getz</i>
Blues	Music Choice is helping you get your mojo workin' with all things blues – with everything from the electrifying Chicago sound to the Mississippi Delta! <i>B.B. King, Buddy Guy, Little Milton, Muddy Waters, Eric Clapton</i>
Singers & Swing	Music Choice wants you to discover the Great American Songbook in a tasteful mix of the best recordings from the singers and bands that made these tunes famous and the current artists that keep the music alive.
Easy Listening	Let Music Choice help you relax with the easy sounds of great instrumental hits performed by string orchestras and soloists from around the world. <i>Mantovani, Ronnie Aldrich, Living Strings, Percy Faith, Frank Chacksfield</i>
Classical Masterpieces	Music Choice wants you to celebrate the very best in Classical music performed by the world's greatest composers spanning over 500 years. <i>Mozart, Beethoven, Bach, Haydn, Chopin</i>
Light Classical	From the Baroque era to the present, Music Choice offers a tasteful mix of the all-time Classics you know and love featuring a delicate styling of solo instrumentalists and chamber ensembles. <i>Vivaldi, Mozart, Bach, Beethoven, Haydn</i>
Musica Urbana	Music Choice is helping you feel the rhythm with the latest Reggaeton, Latin rap, and hip-hop hits! <i>Daddy Yankee, Wisin & Yandel, Ivy Queen, Don Omar, Pitbull</i>
Pop Latino	Muevelo (Move) with Music Choice and the non-stop chart topping hit music from today's hottest Latin artists. <i>Shakira, Juanes, Luis Fonsi, Mana, Alejandro Fernandez, Natalia Jimenez, Camila</i>
Tropicales	Caliente! Music Choice is bringing you the hottest Bachata, Salsa, Merengue, Cumbia, Mambo of today and yesterday from the biggest artists in the biz. <i>Romeo Santos, Prince Royce, Luis Enrique, Victor Manuelle, Gilberto Santa Rosa, India</i>
Mexicana	Whether it's Banda, Norteño, or Duranguense, capture the essence of Mexican music with Music Choice as we bring you a rich variety of traditional Mexicana styles. <i>Los Tigres del Norte, Banda El Recodo, Larry Hernandez, Jenni Rivera, Espinoza Paz, El Trono De Mexico</i>
Romances	Music Choice is bringing out the Latin lover in you with a spicy mix of your favorite Spanish love songs. <i>Olga Guillot, Luis Miguel, Julio Iglesias, Ana Gabriel, Alejandro Sanz, Marc Anthony</i>

The NEW New Extended Lineup 2012 (304 Channels)

Pop Channels Cluster (61)

MCU

Toddler Tunes

Lullabies

Sing-a-longs

Kidz Only!

Hit List

Breaking New Music: Hit List

Hot Bodies (Workout)

Brit Pop

Y2K

Y2K Rock

y2K Girl Power

Y2k Hip-Hop

Y2K Workout

Dance

Club

Trance

House

Electronica

Alternative Electronic

Indie Dance

Breakbeat

Techno

The Pulse

Chillout

Lounge

Party Favorites

60s & 70s Party Favorites

80s Party Favorites

90s & Today Party Favorites

Pop Hits

Pop Pull-ups (Workout)

90's

90s Hip-Pop

90s Happy Rock

90s Pop

90s Workout

Love Songs

60s & 70s Love Songs

80s Love Song

90s To Today Love Songs

Soft Rock

2000s Soft Rock

90s Soft Rock

80s Soft Rock

70s Soft Rock

80's

80s Party Rock

80s Power Ballads

80s Workout

70's

70s Soul

70s Workout

Disco

Pop Disco
Urban Disco
Solid Gold Oldies
Sock Hop
British Invasion
Doo Wop
Dance/Electronica

Urban Channels Cluster (78)

Kidz Only! Hip-Hop
Hip-Hop and R&B
Breaking New Music: Urban
Top 100 HHRB
Essentials HHRB
2000s HHRB
R&B
HHRB Club Hits
Hip-Hop
HHRB Workout
Rap
Top 100 Rap
Essential Rap
Dirty South/Crunk Rap
West Coast Rap
Rap Club Hits
Stripper Music/Pole Dancing
East Coast Rap
Rap Workout
Underground Hip-Hop
Top 100 Underground Hip-Hop
Essential Underground Hip-Hop
Backpack (Hip-Pop)
Hard Core (Rap/Rock)
Conscious & Backpack Rap
Dancehall
Top 100 Dancehall
Essential Dancehall
Soca
Caribbean Rhythms
Dancehall One Hitters
R&B Soul
Top 100 R&B Soul
Essential R&B Soul
Quiet Storm
Neo-Soul
House
Top 100 House
Essential House
Throwback Jamz
Throwback Jamz Essentials
Throwback Jamz Party Hits
80's Throwback Jamz
90's Throwback Jamz
Throwback Jamz One Hitters
Throwback Hip-Hop Jamz
Hip-Hop Classics
Essentials Hip-Hop Classics
80s Hip-Hop Classics

90s Hip-Hop Classics
West Coast Hip-Hop Classics
East Coast Hip-Hop Classics
Hip-Hop Classics One Hitters
Slow Jamz
Top 100 Slow Jamz
Essentials Slow Jamz
Slow Jamz One Hitters
Baby Maker
Slow Jamz Ballads
00's Slow Jamz
90's Slow Jamz
80's Slow Jamz
70's Slow Jamz
R&B Classics
Essential R&B Classics
Motown
Funk
Jammin' Oldies
60's R&B Classics
70s R&B Classics
80's R&B Classics
R&B Classics One Hit Wonders
TSOP
Reggae
Top 100 Reggae
Essential Reggae
Roots Reggae
Reggae One Hitters

Rock Channels Cluster (38)

Alternative
Alt. Pop
Alt Rock
Pop Punk
Edge/Counter Culture
In Concert: Alternative
Alternative Sweat
Adult Alternative
Adult Alternative Essentials
Coffee House
Indie Rock
Punk
Hardcore
90's Alternative
Grunge
Flannel Fitness
Retroactive
New Wave
80's Synth-Pop
Rock
Mainstream
Hard Rock
Rock Workout
Breaking New Music:Rock
In Concert: Rock
Metal
Extreme Metal

Metal Workout
In Concert: Metal
Retro Rock
90's Rock
Arena Rock
Hair Bands
Classic Metal
Thrash Metal
Classic Rock
Psychedelic Rock
In Concert: Classic Rock

Country Channels Cluster (15)

Kidz Only! Country
Todays Country
True Country
90s Country
2000s Country
Classic Country
80s Country
70s Country
50s & 60s Country
Bluegrass
Gospel Grass
Americana
Heartland Rock
Alt Country
Folk

Religious Channels Cluster (13)

Contemporary Christian
Christian Rock
Southern Gospel
Gospel
Top 100 Gospel
Essentials Gospel
Inspirational Gospel
Contemporary Gospel
Traditional Gospel
Gospel Quartets
Gospel Hip-Hop
Top 100 Gospel Hip-Hop
Essentials Gospel Hip-Hop

Latin Channels Cluster (30)

Kidz Only! Latino
Musica Urbana
Old-School Reggaeton
Hip-Hop Latino
Party & Perreo!
Pop Latino
Latin Divas!
Pop Hits De Ayer
Latin Pop Fusion
Breaking New Music: Latino

Rock Latino
Rock Clasicos
Latin Alternative
Tropicales
Salsa Dura
Salsa Romantica
Solamente Bachata!
Merengue Clasicos
Mexicana
Norteño
Banda
Rancheras
Romances
Baladas Del Momento
Romances Clasicos
Musica Cubana
Cuban Boleros
Latin Jazz
Afro-Cuban Jazz
Tejano

Variety Channels Cluster (69)

Christmas
Pop/Rock Christmas
Urban Christmas
Country Christmas
Latino Christmas
Easy Listening Christmas
Hawaii
Traditional Hawaiian
Sounds Of The Seasons
Mardi Gras
Valentine's Love Songs
Irish Music
Cinco De Mayo
Patriotic Music
Oktoberfest
Halloween
Traditional Christmas
Soundscapes
Acoustic Instrumentals
Electronic Ambience
Meditation
Ethnic Influence
Light Classical
Baroque Bonanza!
18th Century Classical
Romantic Light Clascal
Light Classical Crossover
Blues
Blues of Today
Blues Essentials
50s & 60s Blues
70s & 80s Blues
90s Blues
Singers & Standards
Singers & Standards Essentials
Jazz

Jazz of Today
Cool Jazz
Jazz Essentials
Smooth Jazz
Smooth Jazz of Today
Groove Jazz
Jazz Fusion
Classical Masterpieces
Baroque
Classical Era
Romantic
20th Century Masterpieces
Big Band/Swing
Big Band Essentials
Easy Listening
Easy Listening Essentials
50s Easy Listening
60s Easy Listening
70s Easy Listening
80s Easy Listening
Opera
Opera's Greatest Hits
Opera: Classical Art Song
Taste of Italy
Contemporary Instrumentals
Zen
Soundtracks
Soundtracks: Chills & Thrills
Video Games Soundtracks
Show Tunes
Movie Musicals
Singers & Swing
Stage & Screen

MC 23

Pop Phenomenon: Britney Spears was named the “Most Searched Person on the Internet” in Guinness World Records 2009

**Music
CHOICE®**

Hit List

Britney Spears
“Hold It Against Me”
Femme Fatale
2011



NEW MUSIC MONDAYS
Britney Spears
“3”

Music Choice On Demand ▶ Hit List



Lil Wayne received four Grammy wins for his multi-platinum selling album
The Carter III

MUSIC CHOICE | Hip-Hop and R&B

Lil Wayne
4. "6 Foot 7 Foot (Feat. Cory Gunz)"
Tha Carter IV
2011



Gucci Mane's family moved from Birmingham, AL to Atlanta, GA when he was in fourth grade

MUSIC CHOICE | Rap

Gucci Mane
"Mouth Full Of Golds"
Return of Mr Zone 6
2011



NEW ALBUM AVAILABLE
IN STORES AND ONLINE
9/28

GUCCI MANE

asylum
WB
BlackSub



Prior to forming Paramore, Hayley Williams and Jeremy Davis were part of the funk cover band, The Factory

**Music
CHOICE** | Hit List

Paramore
"Ignorance"
Brand New Eyes
2009

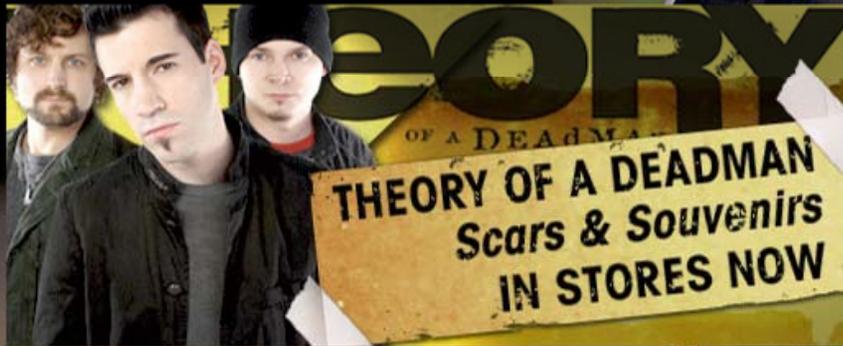
**NEW MUSIC
MONDAYS**
Paramore
"Ignorance" Video
Go to Music Choice On Demand ►
Hit List ► Just Added



Theory of a Deadman's "Bad Girlfriend" hit No. 1 on the Billboard Hot Mainstream Rock Tracks chart

Music CHOICE | Rock

Theory of a Deadman
"Sacrifice"
Scars and Souvenirs
2008



The town where Adam and Brad of Three Days Grace grew up had a population of only 1500

**Music
CHOICE** | Rock

Three Days Grace
"Break"
Life Starts Now
2009



Gospel Music Association's Dove Award and Stellar Award winner Trin-i-tee 5:7 has been the Best Selling Female Gospel Trio in music history.

MUSIC CHOICE | Gospel

Trin-i-tee 5:7
"Heaven Hear My Heart"
Angel & Chanelle
2011



MC 24

Exhibit 24

**RESTRICTED – Subject to Protective Order in
Docket No. 2011-1 CRB PSS/Satellite II**

MC 25



Powered by Clickability

2011 U.S. Album Sales Still Strong After Three Quarters

October 06, 2011

By Ed Christman (@edchristman), New York

As the year heads into its home stretch, things are looking up for the U.S. music industry - sales are on track to increase over the previous year, something that hasn't happened since 2004.

With nine months of 2011 down, album sales stand at 228.5 million, according to Nielsen SoundScan -- up 3.3% from the 221.1 million albums sold in the corresponding period of 2010. Overall U.S. unit sales, meanwhile, are up 7.2% to 1.18 billion, from 1.1 billion last year. And when albums including track equivalents are taken into account -- whereby 10 song downloads count as one album unit - albums have jumped 5.4%, to 323.7 million from 307.1 million.

The positive showing for album sales can primarily be attributed to the digital format, where the configuration's scans are up 19.7% to 74.1 million units, compared to 61.9 million units in 2010's first nine months.

The 2011 Music-Sales Boost, By The Numbers

But it's not only digital numbers that are encouraging. Though physical sales are down from last year, the dip isn't nearly as drastic as music executives had long grown used to. CD sales have decreased only 3.6% this year, after experiencing declines ranging between 18%-20% in each of the five previous years.

A banner year from Adele has helped across the board. Her album "21" has moved nearly 3.8 million units, while the best-selling title at the corresponding time last year -- Eminem's "Recovery" -- had garnered 2.7 million units by the end of the third quarter.

With 1.3 million units sold digitally, "21" is the best-selling album in the digital format since SoundScan began tracking such sales in 2003. Adele's song "Rolling In The Deep," with 5.2 million paid downloads, is likewise the best-selling title in the digital format.

Digital Album Sales Way Up in 2011

Where market share is concerned, Universal Music Group has finally pulled away from Sony Music Entertainment, which had been nipping close at its heels for the first six months of 2011. At the end of the nine-month period, UMG's market share tallied 30.3%, while Sony's stood at 28.9%. Meanwhile, the Warner Music Group's market share totaled 18.7% and EMI's came in at 9%. Independent labels' market share, as determined by distribution ownership, totaled 12.6%.

Billboard will present a more comprehensive article on third-quarter stats, including market share by label ownership, in the coming days.

TAGS: Record Labels , Retail
Subscribe to Billboard magazine today!

Links referenced within this article

The 2011 Music-Sales Boost, By The Numbers

<http://www.billboard.biz/bbbiz/industry/retail/the-2011-music-sales-boost-by-the-numbers-1005339412.story>

Digital Album Sales Way Up in 2011

<http://www.billboard.biz/bbbiz/industry/digital-and-mobile/business-matters-digital-album-sales-way-1005199492.story>

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<http://www.billboard.biz/bbbiz/industry/retail/2011-u-s-album-sales-still-strong-after-1005392822.story>

Uncheck the box to remove the list of links referenced in the article.

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Digital Rebound, Discounted Catalog CDs Push U.S. Music Sales Toward Annual Gain

October 14, 2011

By Ed Christman

After years of wrenching declines, the recording industry appears to be on the brink of achieving the first annual increase in U.S. album sales since 2004.

Getting to this point hasn't come without a price-or rather, low prices, as aggressive discounting of catalog titles at Walmart, Best Buy and other retailers have helped goose CD sales.

But the rebound in sales through the first nine months of 2011 has also been fueled by an encouraging recovery in digital sales. During the same period in 2010, digital track sales had slowed so sharply that they posted an alarming 0.7% decline from the prior-year period. But this year, track sales are up again, while digital album sales growth is accelerating.

To wind up in the black for 2011, U.S. music sales will have to overcome a challenging year-on-year comparison with fourth-quarter 2010, when the current recovery in digital sales got under way and sales were buoyed by a strong release schedule that included Lil Wayne's "I Am Not a Human Being," Kanye West's "My Beautiful Dark Twisted Fantasy," Taylor Swift's "Speak Now," Susan Boyle's "The Gift" and Jackie Evancho's "O Holy Night."

Another concern is how the economy will hold up, with some retail observers expressing concern that consumers will be conservative in their spending during the year-end holiday season.

New superstar titles expected out by the end of this year include Rihanna's "Talk That Talk," Justin Bieber's "Under the Mistletoe," the Lou Reed/Metallica project "Lulu" and Miranda Lambert's "Four the Record."

Even if those titles sell well, "the new release schedule is lighter in a number of ways, certainly on

the seasonal front," says Jeff Wyrick, senior category manager for music at Hastings Entertainment.

Similarly, Universal Music Group Distribution president/CEO Jim Urie says that "the industry's fourth-quarter schedule isn't as good as it's been for the last couple of years," but adds that music sales "will probably finish positive for the year."

Through the first nine months of 2011, U.S. sales of albums and track-equivalent albums (or TEA, where 10 digital tracks equal an album) totaled 323.7 million, up 5.4% from 307.1 million during the same period last year, punctuated by an eye-popping 13% sales increase recorded by Sony Music Entertainment, according to Nielsen SoundScan.

Album sales alone rose 3.4% to 228.5 million from 221.1 million for the prior year's corresponding period, fueled by a 19.8% jump in digital album sales to 74.1 million from 61.9 million units a year earlier, according to SoundScan.

CD sales declined 3.6% to 151.6 million from 157.2 million during the same period last year, when CD sales had plunged 20.6% from the prior year. The improvement in CD sales stemmed in part from Walmart's pricing of select catalog titles at \$5 each, with Best Buy soon following suit and other retailers offering their own pricing promotions.

Vinyl sales also continue to enjoy a resurgence, jumping 36.1% to 2.7 million units from 2 million a year earlier, although the format accounted for only 1.2% of total album sales during the first nine months of the year, according to SoundScan.

Five albums topped sales of 1 million units each through the end of the third quarter, down from eight albums a year earlier. Adele's "21," the year's top-selling album so far, has sold 3.8 million units, outpacing last year's top-selling album Eminem's "Recovery," which had sold 2.7 million units through the end of third-quarter 2010.

Digital track sales jumped 10.6% through the first nine months to 951.7 million from 860.4 million units a year earlier, according to SoundScan. Through the first nine months of 2011, 80 songs have reached the million-unit mark, versus 63 a year earlier. The top-selling digital track: Adele's "Rolling in the Deep," with 5.2 million downloads.

Current albums-titles released within the last 18 months, or older titles that remain in the top half of the Billboard 200 or are active at radio-slipped 1.2% during the first nine months of the year, while catalog album sales, helped by discounting at big-box retailers, rose 9.2%.

Country enjoyed the strongest sales gain among genres, rising 9% to 28.8 million units from 26.4 million a year earlier. Rock album sales posted a 1.4% increase to 76.4 million units, up from 75.4 million a year earlier.

After nearly losing its market-share lead over Sony Music in the first half of the year, Universal Music Group put a bit more distance between it and resurgent Sony, thanks to strong digital track sales. Through the first nine months of the year, UMG's market share stood at 30.3%, followed by Sony at 28.9%, Warner Music Group at 18.7% and EMI at 9%. Independent distributors held a collective 12.6% market share. If calculated by label ownership, indie market share would have been 31.9%.

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2010 Year-End Shipment Statistics

202-775-0101

Manufacturers' Unit Shipments and Retail Dollar Value

(In Millions, net after returns)

Digital

	2009	2010	% CHANGE 2009-2010
(Units Shipped)			
(Dollar Value)			
Download Single	1,138.3	1,162.4	2.1%
	1,220.3	1,366.8	12.0%
Download Album	76.4	83.1	8.8%
	763.4	828.8	8.6%
Kiosk¹	1.7	1.7	-3.4%
	6.3	6.4	1.2%
Music Video	20.4	18.1	-11.1%
	40.6	36.1	-11.1%
Total Units	1,236.8	1,265.4	2.3%
Total Value	2,030.7	2,238.1	10.2%
Mobile²	305.8	220.5	-27.9%
	728.8	526.7	-27.7%
Subscription³	1.2	1.5	29.9%
	213.1	200.9	-5.7%
Digital Performance Royalties⁴	155.5	249.2	60.3%

Physical

(Units Shipped)			
(Dollar Value)			
CD	292.9	225.8	-22.9%
	4,274.1	3,361.3	-21.4%
CD Single	0.9	1.2	31.2%
	3.1	3.3	7.2%
LP/EP	3.2	4.0	25.9%
	60.2	87.0	44.4%
Vinyl Single	0.3	0.3	-3.9%
	2.5	2.2	-9.4%
Music Video	11.8	9.1	-22.6%
	212.0	178.8	-15.7%
DVD Video⁵	11.2	8.7	-22.4%
	206.9	175.3	-15.3%
Total Units⁶	309.2	240.5	-22.2%
Total Value⁶	4,555.9	3,635.1	-20.2%
Total Retail Units	271.7	212.4	-21.8%
Total Retail Value	4,376.1	3,518.5	-19.6%

Total Digital & Physical

Total Units⁷	1,851.8	1,726.3	-6.8%
Total Value	7,683.9	6,850.1	-10.9%

% of Shipments	2009	2010
Physical	59%	53%
Digital	41%	47%

Retail value is value of shipments at recommended or estimated list price

Note: Historical digital data updated for 2007 and 2008

¹ Includes Singles and Albums

² Includes Master Ringtones, Ringbacks, Music Videos, Full Length Downloads, and Other Mobile

³ Weighted Annual Average

⁴ Estimated payments in dollars to performers and copyright holders distributed by SoundExchange

⁵ While broken out for this chart, DVD Video Product is included in the Music Video totals

⁶ Total includes Cassette Single, DVD Audio, and SACD shipments

⁷ Units total includes both albums and singles, and does not include subscriptions or royalties

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News and Notes on 2010 RIAA Music Shipment Data

Joshua P. Friedlander
RIAA Vice President, Research and Strategic Analysis

The U.S. total digital music market grew to \$3.2 billion in 2010, up 3% from the prior year. Digital downloads continued double digit annual growth reaching \$2.2 billion, a 10% increase over the 2009 total of \$2.0 billion. Although digital download unit growth was only 2%, stronger growth in albums and the first full year of variable pricing contributed to the larger growth in value. Digital albums and tracks grew by value at 9% and 12% rates, respectively. Overall, digital formats comprised a record 47% of total music shipments in the United States. For comparison, digital shipments only accounted for 9% of the market back in 2005.

Distributions for digital performance rights, which include payments to performers and copyright holders for webcasting, satellite radio, and other non-interactive digital music services, increased 60% to \$249 million in 2010. Performance revenues represent an increasingly important piece of the music industry landscape as fan interest grows in digital listening and access formats.

Overall shipments of recorded music in the United States fell 11% to \$6.9 billion. Growth in digital formats only partially offset a decline of 20% by value in physical formats. The decline in CD shipments accounted for the vast majority of the decline on the physical side, though vinyl albums continued to be a positive note, growing in 2010 by 44% to \$87 million – their highest level since 1990.

Mobile shipments (including ringtones, ringbacks, and full length content) declined 28% in 2010 to \$527 million. Ringtones experienced a steep decline of 41%, while ringbacks fell 26% in value. Full track mobile downloads were down 23% (full track purchases made on mobile devices through online stores, rather than mobile content stores, are counted as digital downloads). In 2010, ringtones accounted for about half of the mobile digital music market, with 49% share of the category by value. Ringbacks remained at 20% of the market, in-line with 2009, while full length tracks and music videos grew to 31% in 2010 versus 19% the prior year.

The RIAA presents the most up-to-date information available in its annual shipment reports and subscription-only online shipment statistics database (www.riaa.com/shipmentlogin.php). Based on additional market research, historical data for the music video category has been updated for 2008 and 2009.

For news media inquiries, please contact: Jonathan Lamy
Cara Duckworth
Liz Kennedy
202/775-0101

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SPEAKING ENGAGEMENTS

<u>DATE</u>	<u>FORUM</u>	<u>TOPIC</u>
March 28, 2008	Urban Network Conference	State of the business: where it's been, where we are and where we are going
October 21, 2008	CMJ Music Marathon & Film Festival	2009: CMJ Convention-The Best Ways To Discover The Best New Music
February 5-7, 2008	Concert Industry Consortium 2008 (?)	"Crossroads of Media & Technology: Version 2.0"
September 27, 2007	New Millenials Conference	The Power of Music: A Roundtable Discussion About Music & Millennials
February 2007	Concert Industry Consortium 2007	"Crossroads of Media & Technology: Version 2.0"

PRESS

<u>DATE</u>	<u>REFERENCED IN</u>	<u>LINK</u>
November 08, 2011	Heavy D dead at 44: Rap legend collapsed Tuesday	http://www.nydailynews.com/entertainment/music-arts/heavy-dead-44-rap-legend-collapsed-tuesday-beverly-hills-home-article-1.974691?print=1
August 26, 2011	Hottest Month Ever On Demand For Music Videos	http://ondemandweekly.com/blog/article/hottest_month_ever_on_demand_for_music_videos/
August 18, 2011	Music Choice Establishes New Mark With 136 Million VOD Views In July	http://www.multichannel.com/article/472545-Music_Choice_Establishes_New_Mark_With_136_Million_VOD_Views_In_July.php
August 16, 2011	Interactive TV News Round-Up (III): Fox, ABC, Google, Motorola Mobility, Music Choice	http://itvt.com/story/8249/interactive-tv-news-round-iii-fox-abc-google-motorola-mobility-music-choice
June 21, 2010	MJ Tribute Airs On Music Choice; Mike Herald Named Pop Manager	http://www.allaccess.com/net-news/archive/story/76953/mj-tribute-airson-music-choice-mike-herald-named
June 18, 2011	Nicki Minaj Reigns As Music Choice On Demand Queen With 'Super Bass'	http://www.multichannel.com/article/469941-Nicki_Minaj_Reigns_As_Music_Choice_On_Demand_Queen_With_Super_Bass.php

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TESTIMONIALS

Music Choice is probably the single most effective radio outlet for my artists to gain exposure, build name recognition and drive sales. Time and time again, when my artists say that someone heard their project, Music Choice almost exclusively comes back as being the source.
Adam Leibovitz, ASL Music Media & Promotion

Music Choice is instrumental in promoting our clients music. Tracking trends show a spike in sales at Amazon once Music Choice adds tracks.
Also, we receive wonderful feedback via email from listeners who discover our clients on Music Choice. Airplay and exposure from Music Choice make a positive impact for us in regards to sales and artist development. We cherish our working relationship with the programmers at Music Choice and look forward to another decade of bringing music to your listeners.
Karen Doran, Evolution Promotion

Music Choice is in households across the country, and that opportunity gives our records National exposure in markets that may not have an appropriate radio station.
Tyson Haller, Warner Music Group

There's nothing more rewarding than talking to someone at a show and finding out that they're there because they heard about the band from Music Choice. While the choices of places to find new music have increased dramatically in the last decade, Music Choice remains one of the most effective ways to give new and established bands guaranteed exposure.
Bram Teitelman, METALINSIDER.NET

Music Choice has done more to further the careers of independent artists than just about any other program. It seems all artists get an equal shot at airplay mostly based upon the quality of the music, not the notoriety behind the name, which is how it should be. We really appreciate what Music Choice has done for our clients.
Kevin Wood, New Vision Promotion/New Vision Music

Music Choice broadcast coverage IS practically everywhere in the country; it is simply the widest possible syndicated coverage you can get for your music. While its certainly great to get airplay on hi-watt stations in big markets, in my experience it is even better to reach a captive audience comprised of the people living in remote locations where there may (or more likely may not) be any jazz radio stations at all. Not only are these listeners on average more devoted fans and a committed and regular audience to the service but I believe they are more likely to actually follow through and spend their dollar to buy our product when they hear something they like.

Additionally, not only do you reach more people, on average you get more spins! In marketing classes they teach that no one buys anything until they have heard about it at least three times. Music Choice creates steady exposure for our products by consistently presenting a tastefully sensible and tight playlist with regular repetition of titles. Furthermore, the service's constant presentation of graphics and factoids also facilitates branding and increased listener awareness of the artist and the label's product. Lastly, unlike most radio stations nowadays, Music Choice

upholds high quality control standards on its service thanks to the solid professional communications and gatekeeping job performed by the music director and his associates. In closing, let me say unequivocally that all of us at Posi-Tone Records hold Music Choice in the highest regard professionally and consider the service to be an invaluable asset to our business in the continued marketing recognition, development of our brand and ultimately the sale of our musical products.

Marc Free, Posi-Tone Records

Plain and simple - i love Music Choice. I have been fortunate enough to have many of the bands at Atlantic receive their first exposure to the masses on Music Choice.

Brian Corona, Atlantic Records

MC has been great for my client-artists. The playlist is deep and unique. Will actually listens to the music he receives with his ears and not his eyes - meaning that he makes his adds based on the music itself and not just on whether it's from a "name" musician or not. That's refreshing and I'm sure stimulating for the listener. I learn a lot about what the good new sounds are when I tune in.

Michael Bloom, Michael Bloom Media Relations

Music Choice adds a big boost to both labels and artists because of the impact of hearing and seeing the music and product on TV. I know it helps artists in name recognition and also helps them find work because of that name recognition. The record labels also benefit by label name recognition and to some degree helps sales both hard copy and downloads.

Mark Elf, Jen Bay Jazz Radio Promotion

In the 11 plus years that we have been promoting artists to radio, internet, satellite, etc, time and time again, our artists tell us that Music Choice is where they want their music played because they get extremely strong fan response from their music being played on Music Choice. I'd like to say their greatest response, which I think is correct; but, I'd like to re-confirm with some of the artists.

Ed Bonk, Lazz Promotions

Music Choice/Smooth Jazz channel is one of the 'glamour' stations in our format for our clients. Several artists and labels commonly ask about airplay on Music Choice. The National scope of your programming, as well as keeping the name of the artist and CD on the TV screen for the duration of their songs, make your channel a valuable outlet for artists.

On a personal note, I watch/listen at home often, I really enjoy your programming!

Jason Gorov, Gorov Music Marketing

Music Choice has been a consistent friend to Jazzdog Promotions' artists. The airplay is extensive and the extra of being able to look and see the details on the television screen is a bonus we adore. Consistency is a beautiful thing and that is something we've come to expect from our friends at Music Choice.

Jane Dashow, Jazzdog promotions

Music Choice and the Easy Listening channel is an important and valuable benefit for Resort Music. In addition to broadcasting our albums (Ray Kelley Band) over many years, the exposure has generated numerous favorable comments and orders for our music from people nationwide! Resort Music is a small independent label with twenty-four (24) albums representing some of the most talented composers and arrangers in the Los Angeles recording industry. The exposure of our albums on Music Choice has been a major factor in helping our label gain popularity with a listening audience covering a wide demographic.

My wife and I travel frequently to Europe and Asia, in addition to crossing the USA visiting New York, Los Angeles, Chicago and many other cities in our own country. We are always thrilled to hear positive comments from friends and acquaintances who regularly listen to Music Choice, and how much they enjoy the music. And that certainly includes channels that do not feature our music!

Being involved in music education, I frequently speak and perform programs for children, teen agers and young adults, in addition to the senior generation. In giving these programs I have noticed a growing trend among young people who are becoming more familiar with artists from earlier times. They sincerely enjoy the music and even know the lyrics and melodies to many of the songs.

I feel that a good melody can touch the heart in a very human way. All music has a beneficial impact in some way, however, great lyrics and unforgettable love songs performed by the musical legends will always stand the true test of time.

One reason I feel strongly about melody is because of my background as a cellist in classical music. Earlier in my career I spent twelve years in symphony orchestras including the Utah and Dallas Symphony, and the Los Angeles Philharmonic before I became a full time Los Angeles recording musician (I am currently 1st cello on The Simpsons TV show, just renewed until its 25th anniversary season in 2014).

There is no question that the music of Beethoven, Mozart, Bach and Brahms that has lasted for several hundred years will be around for some time to come. Enduring the test of time always has a valid reason. In my opinion it is because with music with memorable melodies has always been the common denominator. Henry Wadsworth Longfellow said it best: "Music is the international language of mankind."

We appreciate and enjoy the extensive variety of music played on Music Choice, and in particular the Singers & Swing and Easy Listening channels. Our hope is that Resort Music will be heard on the system for many years to come. Thank you!

Sincerely,

Ray Kelley, Resort Music, Inc.

"I can always count on Music Choice's metal channel to put my records into heavy rotation, and to spotlight them in the weeks leading up to release, creating more awareness to the consumer that we are targeting. We also did a 'Declassified' program with them on Trivium's 'Ascendancy,' which was a great way to kick things off for a new band, with that kind of exposure." -- Amy Sciarretto, Director of Hard Rock Radio & Regional Video Promotion, Roadrunner Records.

"Over the years, Music Choice has played a key role in helping Island Def Jam expose our new and established artists to the marketplace. We always depend on Music Choice to be at the forefront of this exposure to let the marketplace decide what they want, while other media outlets

wait to see what other media outlets are doing (Crazy, isn't it!). Music Choice's programming philosophy is a refreshing change from the over-researched norm.

Long live Music Choice!" -- Thomas K. Lytle, Vice President of Urban Promotion, Island Def Jam Records.

"Music Choice is a dream jukebox for your home: loaded with songs you love and songs you ought to love. Music Choice is a true supporter of developing artists and their brand is fast becoming synonymous with great music of all genres." -- Maura Duval Griffin, Director of Marketing for Nettwerk Records.

"Music Choice offers an unmatched cross platform opportunity to extend the reach of our artist promotions to millions of homes. The MUSIC CHOICE Sounds of the Seasons channel is an excellent marketing vehicle for our national promotion of LeAnn Rimes' first ever Christmas album." -- Jeff Tuerff, VP Marketing at Curb Records.

"Music Choice Adult Alternative has been there at the beginning for many new artists for both Lost Highway and Island Records including Marc Broussard, Donavon Frankenreiter, Bernard

Fanning and Tift Merritt as well as the more established artists like Paul Westerberg, Ryan Adams, Elvis Costello, Melissa Etheridge, John Mellencamp, Willie Nelson, Lucinda Williams, The Jayhawks and many more. I wouldn't want to see what would happen if I didn't have the Music Choice Adult Alternative audience involved in our projects." -- Ray Di Pietro, VP Promotion & Artist Development, Lost Highway Records.

"Music Choice has been instrumental in exposing Starsailor to the masses. Their early support really helped set the stage for the record and most importantly impacted sales." -- Steve Nice, President, Nice Management and Consulting (management for band Starsailor).

"I'd like to tell you again what a great channel you have with your adult alternative format. It is a great mix of adult rock that is sadly missing from so many local radio markets. The music does the talking there and I know from connecting with other label folks, managers, artists, retail outlets and general music loving public.

Keep up the great work." -- Brian Corona, Vice President, Atlantic Records.

Please know how grateful I am that you keep beautiful music alive. All the artists that are on Music Choice, I so enjoy hearing. It's on in our home constantly. Without you, we would not have a venue for people to listen to our songs. Thank you for including me. I am deeply honored and ever so appreciative for all that you do for all of us.

Thank you, thank you.

Sue Raney, Musician

The MUSIC CHOICE SINGERS & SWING, EASY LISTENING, (also JAZZ & CLASSICAL) channels have been an oasis in the desert for me and so many people across this continent. Hardly a week goes by that I don't hear from people I know -- or even better, many people I

DON'T know -- excited about hearing recordings of mine on a regular basis asking for autographed CD - photos -all kinds of comments/questions about the songs
Sometimes at a live performance strangers will come over to me and enthuse "I see you on television all the time!" Cant' tell you what a kick that is for me! The photos and info you provide are really effective in connecting with the listeners all the more. Makes them feel like we're in the room with them. Friendly soothing company.

One time I heard from someone I hadn't thought about since Junior High School who happened to listen to Singers/ Standards and stopped in his tracks --swears he recognized my voice--even after 40 years...freaked out, hurried to look and saw it was me after all.

Frankly I'm amazed to learn that so many people just keep the channel on all day. And all ages. I know people in their 20s and 30s who listen alot. They say it's a lot nicer than the agitating talk radio and over load of TV pundits. They love the diversity of what's on the loop and tell me they enjoy playing games trying not to look and guess who the artist is.

Music choice seems be have become a sort of Facebook -like networking way of uniting like minded spirits. The advantage is that you have anonymity but can also communicate if you care to by emailing Music Choice or even an artist if you try their website. No one is obligated to respond. No one's feelings get hurt.

Keep doing what you're doing...in these tough times, we could use even more of this kind of music to nourish our souls, sensibilities and keep us sane! I'm so proud and thankful to be included in your rotation.

Most sincerely,
Daryl Sherman

I'd like to take this opportunity to say thank you for playing my recordings on Music Choice. Many people tell me how excited and happy they are when they recognize my voice or hear my name announced, and I am thrilled to be part of such an illustrious group of singers. I managed to track down a few emails, a facebook message, and a quote I remembered. Enjoy, and thanks again. With warm wishes, Dina Blade

"As I washed dishes the other day, I heard a new voice on Music Choice which was on behind me. I turned off the water and just listened, trying to place who it was. I have a pretty good ear for voices and soon realized that this was a new one, so I rushed into the living room to see who it was. It was you and within 10 minutes, I had four of your songs on my iPod. You're not just reading something from a typical listener, nosiree', I'm a professional listener. At the top of my list are Tierney Sutton, Calibria Foti and Roberta Gambarini. You have a great chance of getting up on my pedistal if you're a good little girl. I believe that any tune can be made right with the right voice and arrangement and so far, you have the voice I've been listening for for 69 years and someone is doing a great job with the charts. I kinda hope it's you.

Thanks for singing and this is my first fan eMail." Lon Turner (West Va.) PS : I sorta study WWII in my golden years.

"Hello. I dig your music ! Love the way you handle standards. I'm interested in getting the new album. So please send details about it. (FYI if it affects postage-- I live in CA). All the best." Ed Goodstein

"Hi Dina, listening to you on MUsic Choice CT. " It Might As Well Be Spring" Wonderful!!!!!" Best Jim Royle 8-)

“We hear you on Music Choice a lot. You are famous. We can’t even believe you are talking to us.” -Sandy from Burlington, Wa., to whom I was introduced at a campground in Weiser, Idaho

TO MUSIC CHOICE

Not a job goes by that someone, (most times three or four) doesn’t come up to me and says, “I heard you on Music Choice” or “that singers channel” It has been a boon for working singers and I thank the channel for the inclusion of my tracks. I treasure every play and it’s beyond an honor to be part of it. Please keep the channel and all it’s good programming on the cable network.

Marlene VerPlanck, www.marleneverplanck.com

We love MC and yes, it has done a lot for my record sales!

What I hear from the fans is that they like seeing the photographs and reading the information blurbs about not just me, but all the artists on the MC roster.

I can’t say enough good things about my exposure on MC and what it has done for my visibility and profile in the industry.

Thank you for playing Calabria Foti!

PS We have a new recording in the works and we hope you’ll be spinning those tracks as well!

All best to you and your family for Happy Holidays!

Love,

Calabria McChesney, Musician

I have traveled the world with my band and am always so pleasantly surprised by the range that MC reaches its global audience. Sometimes, I take it for granted that our recordings are featured on MC, but MC listeners are always impressed!

George Gee, Musician

Please let it be known that over the last four years our company has learned that the Easy Listening channel of Music Choice has proven to be a primary reference for people who enjoy the Easy Listening genre of music. Because of comments made through our web site, it has become well know by us that listeners can finally match the music they enjoy with a specific artist or orchestra.

Our primary library of music is instrumental. To a casual listener instrumental music has no “artist” associated with each song. Most folks who enjoy the music style are just happy to have a source for less intrusive and attention demanding music for their work or relaxation. However, when a favorite song is being searched for it is Music Choice that is referenced most often as the medium listened to and that has provided the name of the song and artist.

The result has been enough individual commercial interest in our recordings to warrant offering more CD’s and download opportunities of music from our library.

The folks who enjoy the Easy Listening heard on Music Choice let us know that they are true FANatics when it comes to the music. They appreciate having a single place to go to hear the style of music they enjoy and they delight in being able to match sounds they have come to appreciate over many years with artist names and titles.

Thank you to you and Music Choice for being one of the very few national resources for Easy Listening music.

Best wishes,
Jim Schlichting, President, Starborne Productions LLC

“MC has been great for my client-artists. The fact it’s on cable is a huge plus - I listen to several MC channels at home (through Time-Warner cable in Los Angeles). I’ve learned a lot about who the good new singers that way.”

Michael Bloom, Michael Bloom Media Relations

Dear Music Choice,

“Trish, Hans & Phil” and my solo music “Trish Hatley”, have been so blessed to be a part of your Singers and Standards station. We sell our CD’s on the internet almost exclusively to people who have heard us on Music Choice. When we perform, we have even had people come find us because they saw us on Music Choice and did the research to look us up. This is not only local, when people come to Seattle they looked at our Calendar and find us. One wonderful man from Washington DC that has come out twice and now is considered a friend. I have a hand full of email friends that took the time to let us know how much they enjoy our music and we just keep communicating.

I met Kurt Kolstad, a tremendously talented man who has retired from his promotional career of musicians. He has done outstanding work for me connecting me to radio stations, DJ’s etc! Kurt found me because of Music Choice. We have become very good friends and he is working on my behalf all the time. I have gotten lots of airplay because of Kurt and that is because of you! Due to our presence on Music Choice, we got booked on the Joey Reynolds Radio Show in New York City. This led to an engagement and a great review at The Metropolitan Room. To add to this great story, our bass player’s mother was having a drink in a bar and met a woman who asked what she was doing there? She told of her son playing at the Metropolitan Room and the group’s name was “Trish, Hans & Phil”. This woman Maria was so very excited because she hears us on Music Choice and loves us. She even leaves the TV Station on in the day time for her Parrot to hear us. Of course they brought Maria to our show. Maria was a lovely woman who just happened to be Diane Sawyer’s daily makeup artist (Famous Newscaster)!

People tell us they see us on Music Choice all the time! We have had a producer try and bring us out to Chicago two years in a row for his Show in May. Although we have not been available for that date, he is now looking to book us for a week in San Juan Puerto Rico for New Years 2012. I cannot tell you enough how thrilled we are about this.

Music Choice has helped our group career tremendously! It’s also great to see how many people listen to Music Choice SINGERS & SWING and EASY LISTENING channels, they are everywhere. I personally enjoy the music played on these stations. There is nowhere else that it is available in such a superb way, Thank you very much!

Best Regards,
Trish Hatley, Musician

Having my music played on MUSIC CHOICE has been incredibly important and meaningful to me as a recording artist.

I’ve received an abundance of enthusiastic emails, messages, and even posts on my Facebook fan page from fans and friends who have heard me on MUSIC CHOICE.

There's something about hearing music on the T.V. screen that seems to get people even more excited than when they listen to traditional radio, and I've certainly witnessed it in the countless positive reactions I've received.

I'm deeply grateful for the opportunity to be heard on MUSIC CHOICE, and thank you from the bottom of my heart for your support.

Warmly,

Stevie Holland, Musician

We've been delighted over the years to hear from friends and even from people we don't know about the tunes of ours that play on Singers & Swing.

This wonderful channel gives us national radio-like exposure that we wouldn't otherwise have, and we're incredibly grateful for it!

Hanna Richardson, Musician

I cannot tell you how many times someone (a friend, musical colleague, family member, or fan) has told me that they "heard me on TV." When they say this, I know exactly what they mean...that they heard me on Music Choice! I am always thrilled to know that my music is getting out there! I've even made new fans through Music Choice. On CD Baby (the on line music store), buyers are asked to let CD Baby know how they heard about an artist. Often the answer is Music Choice! I am grateful to Music Choice for exposing listeners to to fantastic music of the past as well as artists of today like myself!

Thanks,

Petra van Nuis, Musician

"I am always so pleased to hear people tell me that they have heard and enjoyed my recordings on MUSIC CHOICE. I'd have to say that my work has been promoted and listened to more on MUSIC CHOICE than almost anywhere else. The blend of graphics, photos, info and song is a wonderful way for audiences to get their fill of their favorite music"

Sarah Partridge, Musician

MC 29



Taylor Swift

**SPEAK NOW CERTIFIED
3X PLATINUM**

**TOP SELLING ARTIST OF THE YEAR FOR 2010
4,470,452 ALBUMS SOLD**

**BILLBOARD'S #1 MOST PLAYED ARTIST OF 2010
1,128,000 SPINS**

6,740
ALBUM SALES
HIGHEST DEBUT FOR A
ALBUM IN HISTORY



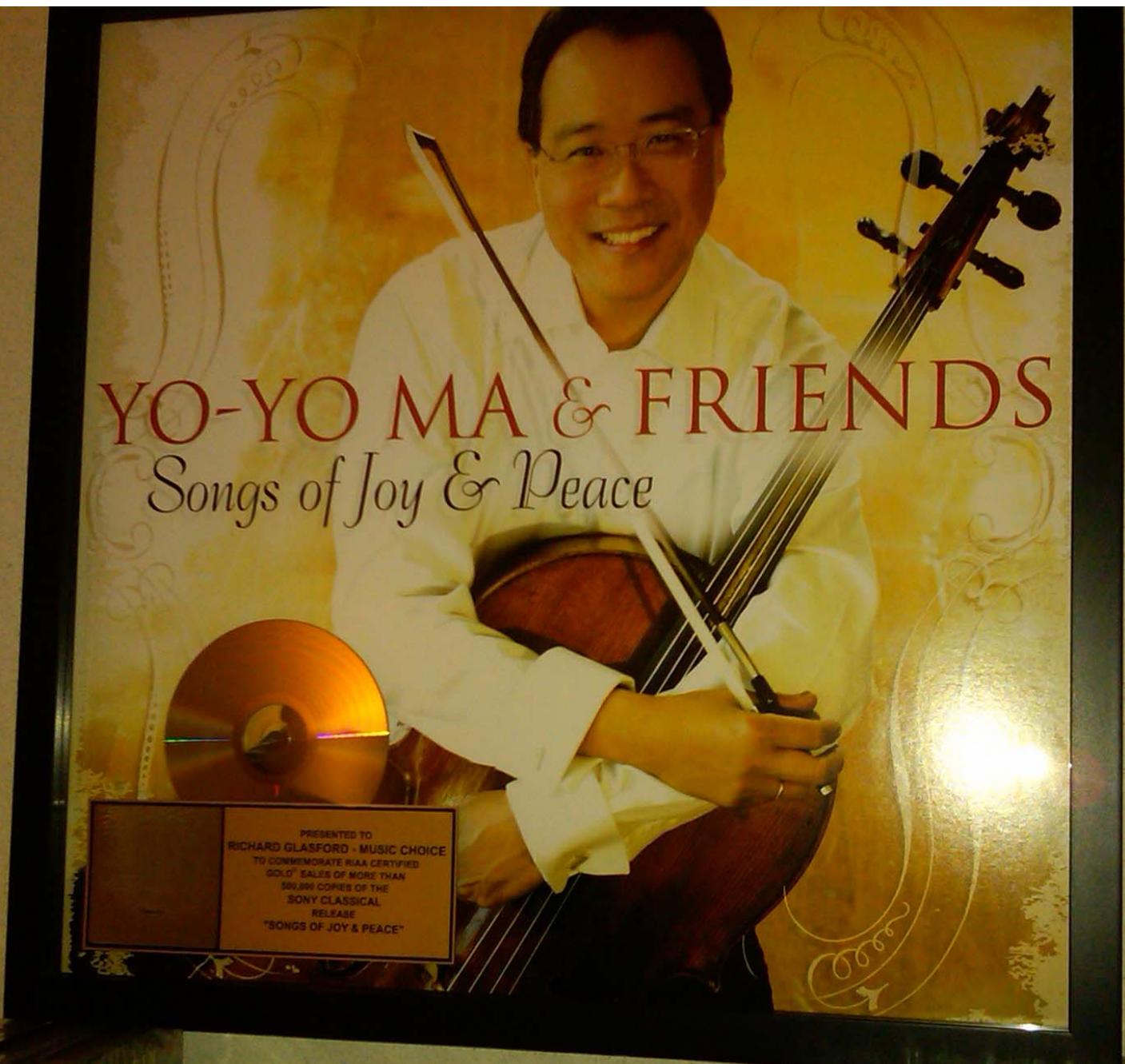
PRESENTED TO
TIFFANY SINDER
TO COMMEMORATE
TAYLOR SWIFT'S
INCREDIBLE 2010



1,610,200
DIGITAL DOWNLOADS
"MINE" PLATINUM DIGITAL



**PRESENTED TO
RICHARD GLASFORD - MUSIC CHOICE
TO COMMEMORATE RIAA CERTIFIED
GOLD[®] SALES OF MORE THAN
500,000 COPIES OF THE
SONY CLASSICAL
RELEASE
"SONGS OF JOY & PEACE"**

The album cover features a portrait of Yo-Yo Ma smiling and playing a cello. The background is a warm, golden-yellow color with faint, ornate scrollwork. A CD is shown in the lower-left corner of the cover.

YO-YO MA & FRIENDS

Songs of Joy & Peace

PRESENTED TO
RICHARD GLASFORD - MUSIC CHOICE
TO COMMEMORATE RIAA CERTIFIED
"GOLD" SALES OF MORE THAN
500,000 COPIES OF THE
SONY CLASSICAL
RELEASE
"SONGS OF JOY & PEACE"



PLAQUES

Music Choice (4)

- Presented to Music Choice for their general support of the 2007 Take Action! Tour
PICTURE INCLUDED
- Presented to Music Choice Metal to commemorate RIAA certified Gold sales of more than 50,000 [sic] copies of the Metal Blade Records DVD “Amon Amarth’s Wrath of the Norsemen”

PICTURES INCLUDED

- Presented to Music Choice to commemorate RIAA certified gold sales of more than 500,000 copies of the Rawkus Records album, cassette and CD MOS DEF “Black on Both Sides”
- To Music Choice! Thanks for Everything

PICTURE INCLUDED

Jennifer Churchill (2)

- John Mayer - Presented to Jennifer Churchill to commemorate RIAA certified multi-platinum sales of more than 3,000,000 copies of the Aware/Columbia cassette and CD album “Room For Squares”

PICTURE INCLUDED

- Columbia Records Various - Presented to Jennifer Churchill with sincere appreciation for your support of Columbia Records and our artists
 - a. The Union Underground “An Education In Rebellion”
 - b. System Of A Down “Toxicity”
 - c. Wyclef Jean “The Ecleffe”
 - d. Roger Waters “In The Flesh”
 - e. Bela Fleck And The Flecktones “Outbound”
 - f. Five For Fighting “America Town”
 - g. Train “Drops of Jupiter”
 - h. John Mayer “Room For Squares”

PICTURE INCLUDED

Richard Glasford (1)

- Presented to Richard Glasford – Music Choice to commemorate RIAA certified Gold sales of more than 500,000 copies of the Sony Classical Release “Songs of Joy and Peace”

PICTURES INCLUDED

Justin Prager (9)

- Presented to Justin Prager to commemorate RIAA certified Platinum sales of more than 1,000,000 copies of the Glassnote Records/ILG single “Fall for You” by Secondhand Serenade

PICTURE INCLUDED

- Presented to Justin Prager to commemorate RIAA certified Platinum sales of more than 1,000,000 copies of the Robbins Entertainment digital single “Evacuate the Dancefloor”

PICTURE INCLUDED

- Presented to Justin Prager to commemorate RIAA certified Platinum sales of more than 3,000,000 copies of the Roadrunner Records Release “The Long Road”
PICTURE INCLUDED
- Presented to Justin Prager to commemorate RIAA certified Gold sales of more than 500,000 copies of the Loyaute/Glassnote Records album “Wolfgang Amadeus Phoenix” and RIAA certified Platinum sales of more than 1,000,000 copies of Gentlemen of the Road/Glassnote Records album “Sigh No More”
PICTURE INCLUDED
- Presented to Justin Prager to commemorate RIAA certified Gold sales of more than 500,000 copies of the Hollywood Records compact disc “We Are Not Alone”
- Century Media Records presents to Justin Prager Music Choice in recognition of Shadows Fall’s “The War Within” exceeding 100,000 SoundScan sales
- Presented to Justin Prager to commemorate RIAA certified Gold sales of more than 500,000 copies of the Victory Records album Hawthorne Heights’ “The Silence in Black And White”
- Presented to Justin Prager to commemorate RIAA certified sales of more than 1,000,000 copies of the RoadRunner Records Compact Disc “Vol. 3: “(The Subliminal Verses)””
PICTURE INCLUDED
- Presented to Justin Prager to commemorate RIAA Certified Sales of more than 1,000,000 copies of the RoadRunner Records Release “The Long Road”
PICTURE INCLUDED

Tiffany Sinder (1)

- Presented to Tiffany Sinder to commemorate Taylor Swift’s incredible 2010
PICTURE INCLUDED

Jessica Siracusa (1)

- Century Media Records presents to Jessica Siracusa Music Choice in recognition of Shadows Fall’s “The War Within” exceeding 100000 SoundScan sales
PICTURE INCLUDED

Gary Susalis (6)

- Presented to Gary Susalis to commemorate RIAA certified Gold sales of more than 500,00 copies of the Loyaute/Glassnote Records album “Wolfgang Amadeus Phoenix” and RIAA certified Platinum sales of more than 1,000,000 copies of Gentlemen of the Road/Glassnote Records album “Sigh No More”
PICTURES INCLUDED
- Presented to Gary Susalis to commemorate RIAA certified Platinum sales of more than 1,000,000 copies of the Glassnote Records/ILG single “Fall for You” by Secondhand Serenade
PICTURES INCLUDED
- Presented to Gary Susalis Music Choice to commemorate RIAA certified sales of more than 500,000 copies of the Roadrunner Records compact disc “Come What(ever) May”
PICTURES INCLUDED
- Presented to Gary Susalis to commemorate RIAA certified Gold sales of more than 500,000 copies of the Victory Records album Hawthorne Heights’ “The Silence in Black And White”
- Century Media Records presents to Gary Susalis Music Choice in recognition of

Shadows Fall's "The War Within" exceeding 100,000 SoundScan sales

- Century Media Records presents this award to Gary Susalis Music Choice in recognition of Lacuna Coil's "Comalies" surpassing 100,000 SoundScan sales

Damon Williams (8)

- Presented to Damon Williams Music Choice the birthplace of every Loud Record. Thank you for being a part of our history and future

PICTURE INCLUDED

- Presented to Damon Williams to commemorate the sale of more than 1,000,000 copies each of the album "The Bachelor" and the single "Pony" both released on 550 Music
- Def Jam Recordings - Thank you for your committed support Damon Dee for breaking Def Jam Records in the streets
 - a. Foxy Brown "Broken Silence"
 - b. Redman "Malpractice"
 - c. Ludacris "Back From The First Time"
 - d. LL Cool J "The Greatest Of All Time"
 - e. Funk Master Flex "Big Kap"
 - f. X "And There Was..."
 - g. Method Man Redman "Black Out"
- Presented to Damon Williams to commemorate RIAA certified gold sales of more than 500,000 copies of TVT Records cassette and CD "Put Yo Hood Up"
- Presented to Music Choice RB Hip Hop to commemorate Mariah Carey's Sweet 16th #1 single, "We Belong Together" the highest one week Hot 100 audience total in the history of Billboard Magazine
- Presented to Damon Williams to commemorate RIAA certified Platinum sales of more than 1,000,000 copies of the Doggystyle/TVT Records cassette and CD Snoop Dogg Presents "Tha Eastsidaz"
- Presented to Damon Williams - Music Choice - Internet Radio - to commemorate RIAA certified combined sales of more than 9,000,000 copies of the MCA Records, albums, compact discs and cassettes

PICTURE INCLUDED

- Presented to Damon Williams in recognition of Jill Scott's #1 single "Whatever" at Urban Adult Radio

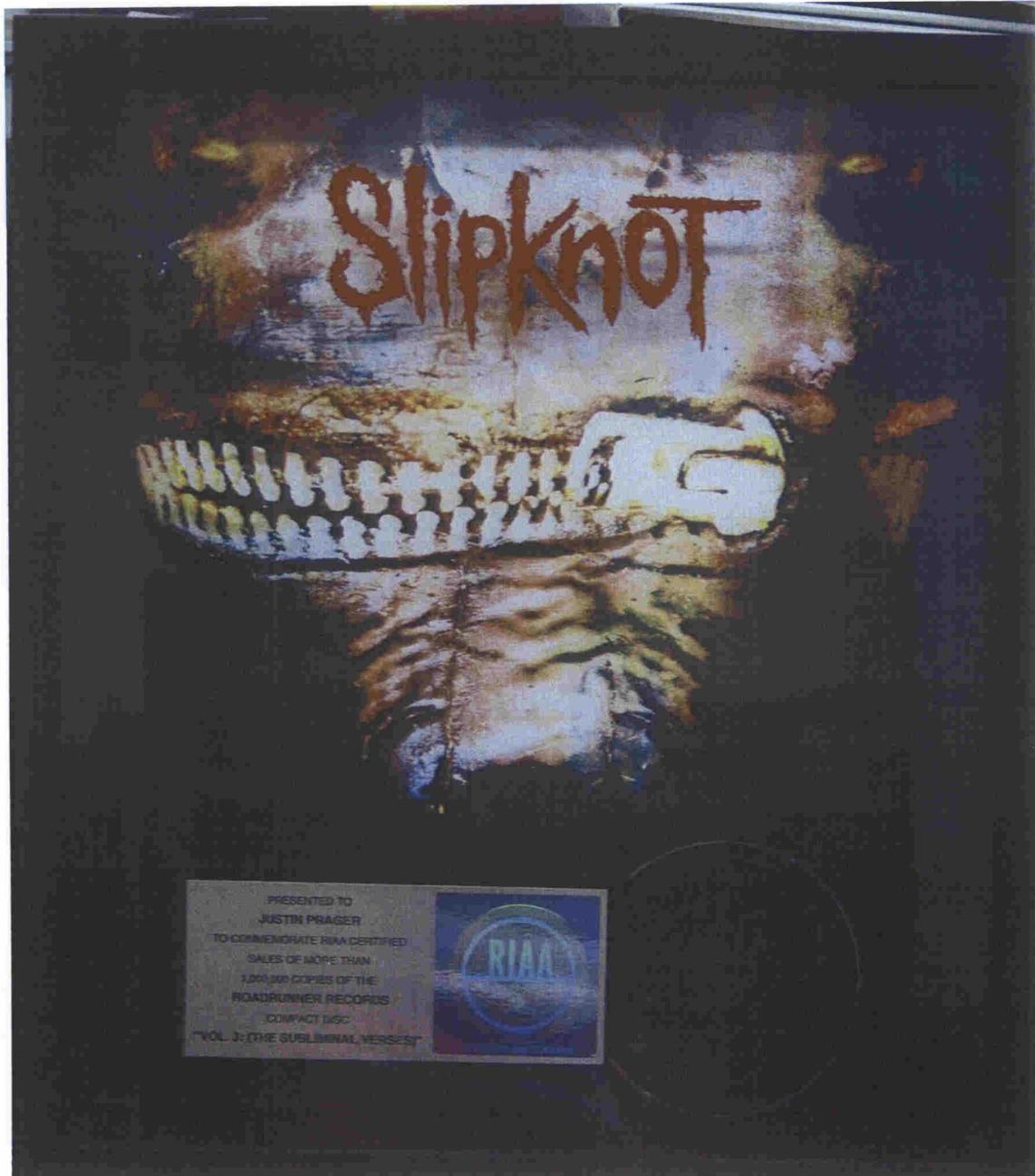


Century Media Records - Presents to Jessica Siracusa - Music Choice - in recognition of **Shadows Fall's "The War Within"** exceeding 100,000 SoundScan sales

RIAA Certified Plaques Presented to Music Choice and Staff

Justin Prager

- 1) **Slipknot** - Presented to Justin Prager To Commemorate RIAA Certified Sales of More Than 1,000,000 copies of the RoadRunner Records Compact Disc "Vol. 3: **“(The Subliminal Verses)”**”



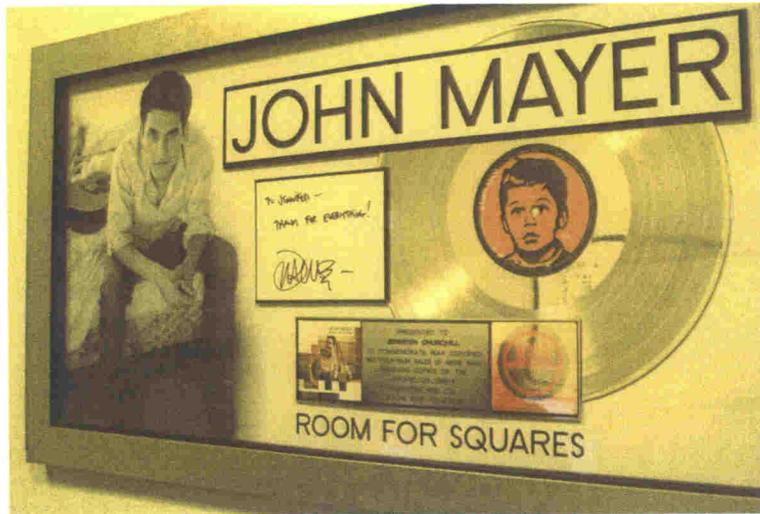
October 26, 2006

RIAA Certified Plaques Presented to Music Choice and Staff

Justin Prager

- 1) **Nickelback** - Presented to Justin Prager To Commemorate RIAA Certified Sales of More Than 1,000,000 copies of the RoadRunner Records Release "**The Long Road**"



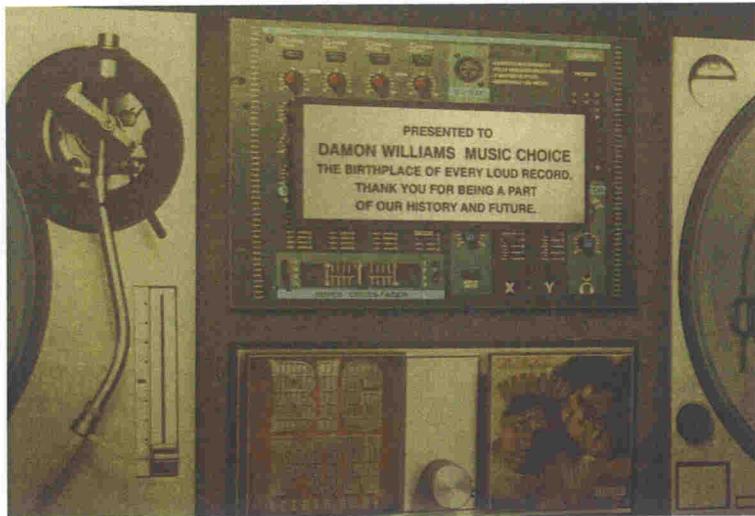


John Mayer - Presented to Jennifer Churchill to commemorate RIAA certified multi-platinum sales of more than 3,000,000 copies of the Aware/Columbia Cassette and C.D. album **"Room For Squares"**

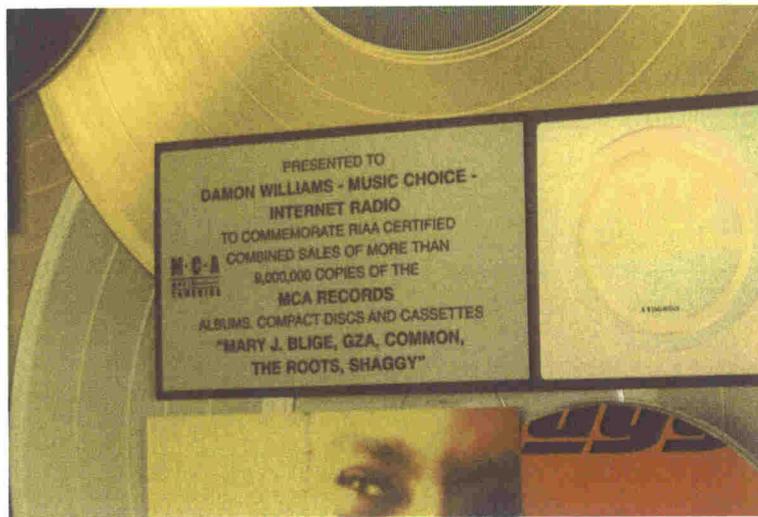


Columbia Records Various - Presented to Jennifer Churchill with sincere appreciation for your support of Columbia Records and our artists

- a. **The Union Underground "An Education In Rebellion"**
- b. **System Of A Down "Toxicity"**
- c. **Wyclef Jean "The Ecleffe"**
- d. **Roger Waters "In The Flesh"**
- e. **Bela Fleck And The Flecktones "Outbound"**
- f. **Five For Fighting "America Town"**
- g. **Train "Drops of Jupiter"**
- h. **John Mayer "Room For Squares"**



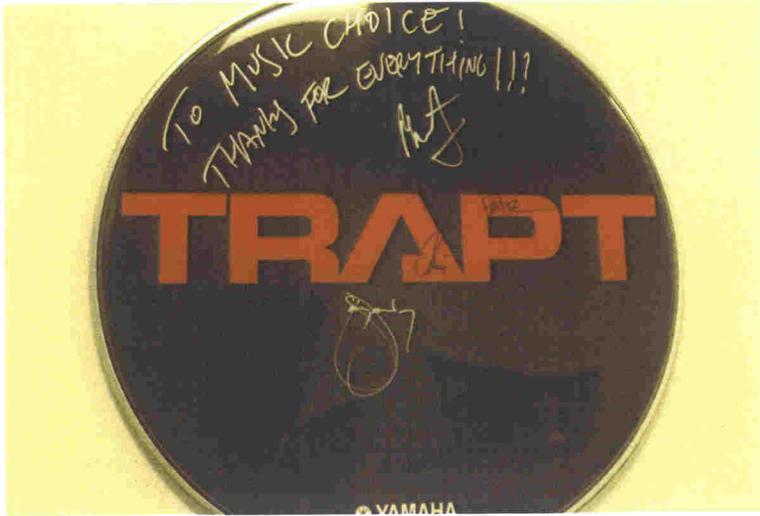
Loud Records - Presented to Damon Williams Music Choice the birthplace of every Loud Record. Thank you for being apart of our history and future.



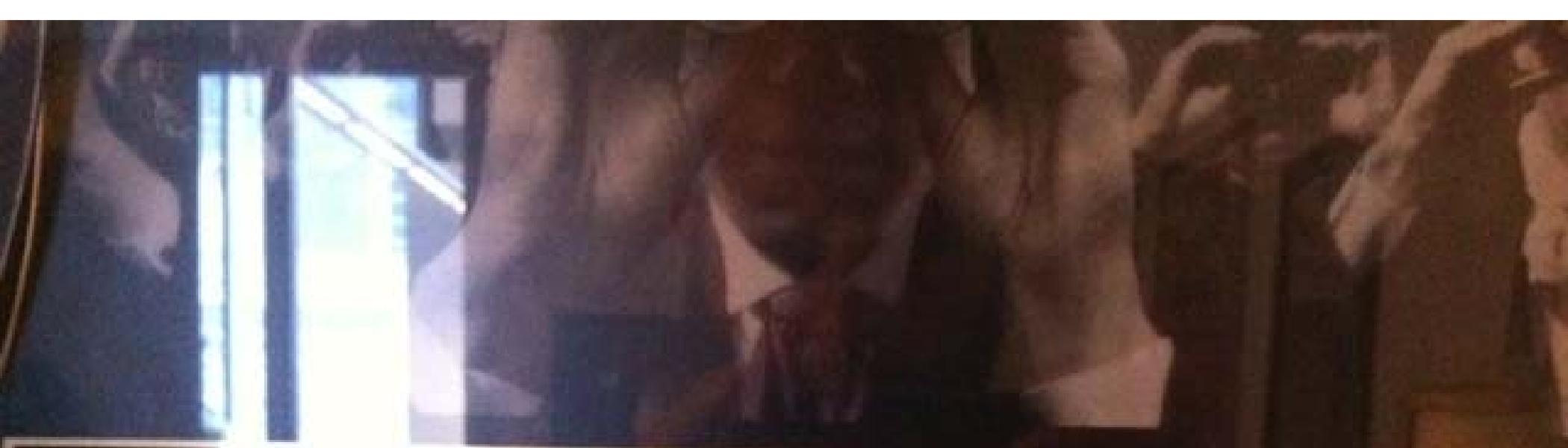
Presented to Damon Williams - Music Choice - Internet Radio

To commemorate RIAA certified combined sales of more than 9,000,000 copies of the MCA Records, albums, compact discs and cassettes.

"Mary J. Blige, GZA, Common, the Roots, Shaggy"



To Music Choice! Thanks for Everything!!!



**PRESENTED TO
GARY SUSALIS
MUSIC CHOICE
TO COMMEMORATE RIAA CERTIFIED
GOLD® SALES OF MORE THAN
500,000 COPIES OF THE
ROADRUNNER RECORDS
COMPACT DISC
"COME WHAT(EVER) MAY"**





MUSIC CHOICE[®]



certificate

of recognition

Ropeless / Sub City Records

and The Take Action! Tour recognize Music Choice

for their generous support of the 2007 Take Action! Tour



MUSIC CHOICE

**TAKE ACTION!
TOUR 2007**

M

GLASSNOTE

Glassnote

PRESENTED TO
GARY SUSALIS

TO COMMEMORATE

RIAA CERTIFIED GOLD® SALES
OF MORE THAN 500,000 COPIES OF THE

LOYAUTÉ/GLASSNOTE RECORDS
ALBUM

"WOLFGANG AMADEUS PHOENIX"
AND RIAA CERTIFIED PLATINUM® SALES
OF MORE THAN 1,000,000 COPIES OF THE

GENTLEMEN OF THE ROAD!
GLASSNOTE RECORDS
ALBUM

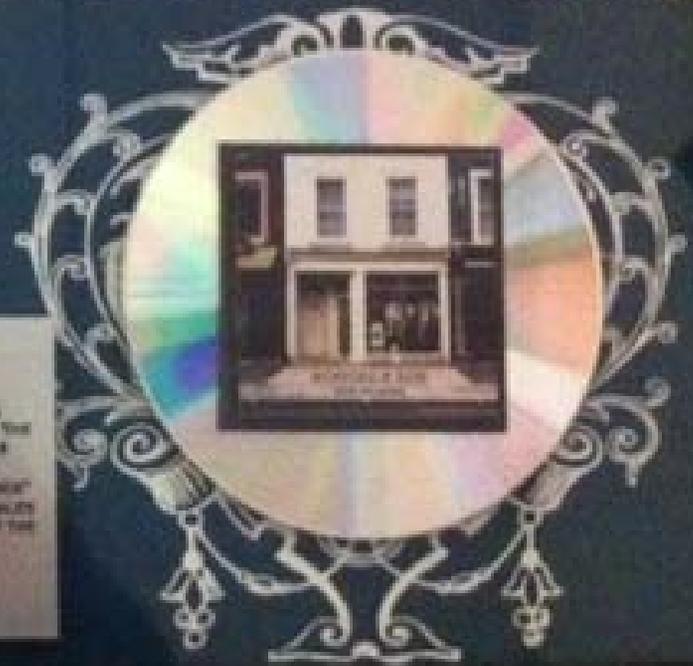
"SIGH NO MORE"



PHOENIX



MUMFORD & SONS



PRESENTED TO
GARY BUSALIS
TO COMMEND
HIS CERTIFIED GOLD™ SALES
OF MORE THAN 500,000 COPIES OF THE
ORIGINAL ALBUM THE PHOENIX
ALBUM
"WELL BEING AMBITIOUS PROMISE"
AND GOLD CERTIFIED PLATINUM™ SALES
OF MORE THAN 1,000,000 COPIES OF THE
LATEST ALBUM BY THE GROUP
ALBUM
"GREAT AND BEING"

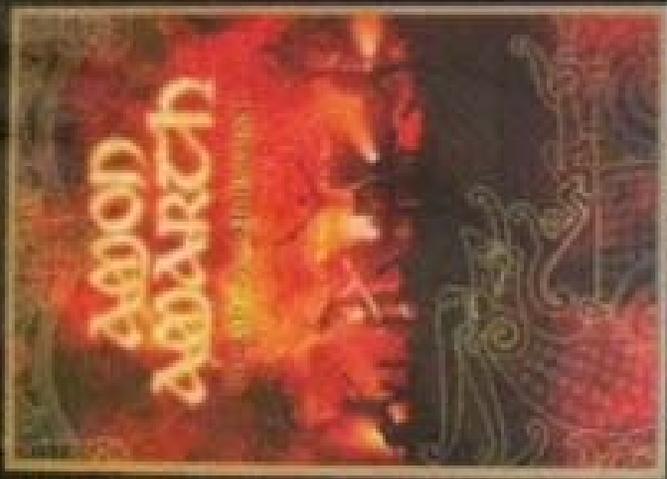


PRESENTED TO
MUSIC CHOICE METAL
TO COMMEMORATE RIAA CERTIFIED
GOLD® SALES OF MORE THAN
50,000 COPIES OF THE
METAL BLADE RECORDS

DVD

"AMON AMARTH'S WRATH OF THE NORSEMEN™"





PRODUCED BY
WILLIE CHANCEY BETHLE
IN COLLABORATION WITH
ARCHERY AND ARCHERY
WORLDWIDE LTD
ARCHERY WORLDWIDE LTD
ARCHERY WORLDWIDE LTD

Because tonight will be the night
that I will fall for you, over again,
don't make me change my mind,
Or I won't live to see another day,
Because a girl life is impossible to
fall for you is true.



**PRESENTED TO
GARY SUSALIS
TO COMMEMORATE RIAA CERTIFIED
PLATINUM® SALES OF MORE THAN
1,000,000 COPIES OF THE
GLASSNOTE RECORDS/ILG
SINGLE
"FALL FOR YOU"
BY
SECONDHAND SERENADE**

1106



Because tonight will be the night
that I will fall for you, over again,
don't make me change my mind,
Or I won't have to see another day.

Because



PRESENTED TO
GARY SUSALIS
TO COMMEMORATE RIMA CERTIFIED
PLATINUM SALES OF MORE THAN
1,000,000 COPIES OF THE
CLASSNOTE RECORDS
SINGLE
"FALL FOR YOU"
BY
SECCOMOND SERENADE

like you is impossible to find.
e impossible to find.

PRESENTED TO
JUSTIN PRAGER
TO COMMEMORATE RIAA CERTIFIED
PLATINUM® SALES OF MORE THAN
1,000,000 COPIES OF THE
GLASSNOTE RECORDS/ILG
SINGLE
"FALL FOR YOU"
BY
SECONDHAND SERENADE

PRESENTED TO
JUSTIN TYME PRAGER
TO COMMEMORATE RIAA CERTIFIED
PLATINUM® SALES OF MORE THAN
1,000,000 COPIES OF THE
ROBBINS ENTERTAINMENT
DIGITAL SINGLE
"EVACUATE THE DANCEFLOOR"



PRESENTED TO
JUSTIN PRAGER
TO COMMEMORATE RIAA CERTIFIED
MULTI-PLATINUM SALES OF MORE THAN
3,000,000 COPIES OF THE
ROADRUNNER RECORDS
RELEASE
"THE LONG ROAD"

Glassnote



PRESENTED TO
JUSTIN PRADER
TO COMMEMORATE
RIAA CERTIFIED GOLD[®] SALES
OF MORE THAN 500,000 COPIES OF THE
ESTIMATE GLASSNOTE RECORDS
ALBUM
"WOLFGANG AMADEUS PHOENIX"
AND RIAA CERTIFIED PLATINUM[®] SALES
OF MORE THAN 1,000,000 COPIES OF THE
GENTLEMEN OF THE ROAD
OR BLIND RECORDS
ALBUM
"SIGN NO MORE"

MC 30

Morano, Stephanie J.

Subject: RE: Capitol Latin Music Choice Opportunities

From: Davis, Warren [<mailto:Warren.Davis@EMICAP.COM>]

Sent: Tuesday, September 13, 2011 4:22 PM

To: Davis, Warren; Rivera, Luis (MC-EX)

Subject: Capitol Latin Music Choice Opportunities

Luis,

How are you? I hope all is well. I had a call with Capitol Latin today and they spoke highly of Music Choice and all the love you give them. They were looking for opportunities to market and promote their artists with Music Choice. I come to hoping you can lead me in that direction. The label is open to all opportunities including artist interviews and performances, to other programs that you offer. What are those opportunities? Let me know your thoughts and hopefully we can set up a meeting or call with you and your team.

Best Regards,

Warren Davis

Digital Sales

EMI

Warren.davis@emicap.com

201-876-6053

Music from EMI

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This email is from a unit or subsidiary of EMI Group Limited.

Registered Office: 27 Wrights Lane, London W8 5SW

Registered in England No 229231.

Morano, Stephanie J.

Subject: RE: Anchored & Drive A (Please Respond)

-----Original Message-----

From: Tim Binder [<mailto:tim@newoceanmedia.com>]
Sent: Monday, March 14, 2011 2:57 PM
To: Susalis, Gary (MC-EX)
Subject: Re: Anchored & Drive A (Please Respond)

Thanks Gary!

That ROCKS!

All The Best,
Timothy

On Mon, Mar 14, 2011 at 11:47 AM, Susalis, Gary (MC-EX)

<GSusalis@musicchoice.com> wrote:

> It's starting on Wed, so it will be an official add next week (drive a)

>

> Gary Susalis

>

> MUSIC CHOICE

> Senior Manager of Music Programming

>

> 328 West 34th Street

> New York, NY 10001

> Office: 646-459-3318

> Mobile: 917-647-9098

> Fax: 646-459-3309

> AIM: Etacov Das Lived

> Email: gsusalis@musicchoice.com

>

>

>

> Contains confidential and/or proprietary information. Please handle accordingly. If you received this transmission in error, do not use in any way and delete immediately.

>

> -----Original Message-----

> From: Tim Binder [<mailto:tim@newoceanmedia.com>]

> Sent: Monday, March 14, 2011 2:25 PM

> To: Susalis, Gary (MC-EX)

> Subject: Re: Anchored & Drive A (Please Respond)

>

> Hey Gary,

>

> Thanks for the email.

>

> Glad to hear the Drive A went in the system! Is this something that we

> are looking at an add on? If so, please give me the details. As for

> the Anchored, I don't know why there was an issue with the CD-PRO, but

> if you would like I can send you off another copy. I also have a "You

> Send It" link set up where you can download the WAVE file if you would

> like, the link is:

> <https://www.yousendit.com/download/eURDQmtXRStrYUN4dnc9PQ>.

>

> "Last Night" is a great track and this is our add week! Thus far I
> have about 8 stations confirmed or on board as of today and a lot more
> on the way. When you get a chance, please let me know what you think.

>

> I hope all is rocking!

>

> Best,

> Timothy

>

> On Mon, Mar 14, 2011 at 10:58 AM, Susalis, Gary (MC-EX)

> <GSusalis@musicchoice.com> wrote:

>> Hey man... sorry I've been MIA... too much going on to simply stay on
>> top of my calls... I haven't moved on Anchored just yet...as a matter of
>> fact the CD wouldn't rip into my computer... Drive A just went into the
>> system so you guys will see that soon.

>>

>>

>> Gary Susalis

>>

>> MUSIC CHOICE

>> Senior Manager of Music Programming

>>

>> 328 West 34th Street

>> New York, NY 10001

>> Office: 646-459-3318

>> Mobile: 917-647-9098

>> Fax: 646-459-3309

>> AIM: Etacov Das Lived

>> Email: gsusalis@musicchoice.com

>>

>>

>>

>> Contains confidential and/or proprietary information. Please handle
>> accordingly. If you received this transmission in error, do not use in
>> any way and delete immediately.

>>

>> -----Original Message-----

>> From: Tim Binder [<mailto:tim@newoceanmedia.com>]

>> Sent: Monday, March 14, 2011 1:52 PM

>> To: Susalis, Gary (MC-EX)

>> Subject: Anchored & Drive A (Please Respond)

>>

>> Hey Gary,

>>

>> How's it going? It has been too long. I have reach out a few times
>> during your call times, but just unfortunately have yet to connect.

>>

>> I have got two new singles Anchored's "Last Night" which is adding
>> this week and Drive A's "Let's Have A Wreck" which impacted last week.

>> Have you had a chance to listen to these? If so, what do you think? I
>> would love to have your support on them.

>>

>> I hope all is rockin'!

>>

>> Best,

>> Timothy

>>

>> --

>> Timothy Binder

>> New Ocean Media
>> (800) 871-5814 x.3
>> tim@newoceanmedia.com
>>
>
>
>
>
> --
> Timothy Binder
> New Ocean Media
> (800) 871-5814 x.3
> tim@newoceanmedia.com
>

--
Timothy Binder
New Ocean Media
(800) 871-5814 x.3
tim@newoceanmedia.com

Morano, Stephanie J.

Subject: RE: Anchored "Last Night" (Wave)

From: Tim Binder [mailto:tim@newoceanmedia.com]
Sent: Tuesday, May 10, 2011 4:48 PM
To: Susalis, Gary (MC-EX)
Subject: Re: Anchored "Last Night" (Wave)

Thanks so much Gary!

Will it be considered an Incubator add then?

I would love to include that on my report to the team.
I hope all is rocking on your end.

Best,
Timothy

On Tue, May 10, 2011 at 1:43 PM, Susalis, Gary (MC-EX) <GSusalis@musicchoice.com> wrote:

Thank you... I'll test it out as a flavor...

Hope all is well.

g

Gary Susalis

MUSIC CHOICE

Senior Manager of Music Programming

328 West 34th Street
New York, NY 10001
Office: 646-459-3318
Mobile: 917-647-9098
Fax: 646-459-3309
AIM: Etacov Das Lived
Email: gsusalis@musicchoice.com

Contains confidential and/or proprietary information. Please handle accordingly. If you received this transmission in error, do not use in any way and delete immediately.

From: Tim Binder [mailto:delivery@yousendit.com]
Sent: Tuesday, May 10, 2011 4:29 PM

To: Susalis, Gary (MC-EX)
Subject: Anchored "Last Night" (Wave)

Delivery provided by [YouSendIt](#)



tim@newoceanmedia.com
has sent you a file

Subject: Anchored "Last Night" (Wave)
Message: Hey Gary,

Here you go. Let me know if you have any issues downloading it. I certainly appreciate any support!

Best,
Timothy

 [01 Last Night.wav](#)
Size: 32.32 MB
Expires: May 17, 2011 13:29 PDT 

If the above link does not work, you can paste the following address into your browser:
<https://rcpt.yousendit.com/1117907119/3ea353356cf2c1ba79039209e335d47b>

Want to send files the fast and easy way?
Get your own YouSendIt account FREE.
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1919 S. Bascom Ave., Campbell, CA 95008

--
Timothy Binder
New Ocean Media
(800) 871-5814 x.3
tim@newoceanmedia.com

Morano, Stephanie J.

Subject: RE: Breathe Carolina "Blackout" Video added to Music Choice!

From: David Jacobs [<mailto:david@fearlessrecords.com>]

Sent: Thursday, October 06, 2011 2:24 PM

To: Prager, Justin (MC-EX); Herald, Michael (MC-EX); Susalis, Gary (MC-EX); 'Nate Matzelle'

Subject: Breathe Carolina "Blackout" Video added to Music Choice!

Hey Everyone,

Hope this email finds you well! I just got word that **Music Choice** has added the video for "Blackout" starting on 10/10! See attachment with adds for this week!

Breathe Carolina had another big week at radio and with sales, here are the highlights:

- 10 Adds this week! On 60 stations including: WKSC Chicago, WKQI Detroit, KDWB Minneapolis, KUDD Salt Lake City, KTCL Denver, KHHT Tulsa, KDND Sacramento, WNKS Charlotte, WKSE Buffalo, & more!
- #42 today on Mediabase Top 40 Chart! – Chart Bound in next two weeks!
- Sales: 5,524 units TW, +4% vs. LW, RTD on "Blackout" = 68,615 units!
- Music video in HEAVY Rotation at MTV, MTV2, MTVu, & MTV Hits!
- Music video at 1 million+ views in just over a week!
- HitPredictor "Sleeper Hit" feature in weekly HitPredictor Newsletter this week!
- Upcoming North American Headlining tour!

- WHO CARESS WHAT X+Y EQUALS WHEN WE KNOW BEYONCE'S "1+1" = #2!
- IYAZ PAYS HOMAGE TO ALL THE "PRETTY GIRLS" WITH A TOP 40 DEBUT!
- SHE'S SOARING HIGH! NICKI MINAJ DEBUTS "FLY" AT #4!
- LET'S MAKE A TOAST TO RIHANNA'S TOP 10 DEBUT FOR "CHEERS (DRINK TO THAT)"!

VIDEO ADDS – STARTING 10/10/11

URBAN

- J. Cole Can't Get Enough (Roc Nation/Columbia Records)
- Childish Gambino Freaks And Geeks (Glassnote Records)
- Big Sean Marvin & Chardonnay (G.O.O.D/Island Def Jam Records)
- Joel Gaines Take A Ride (Come On Baby) (JG Music Group)
- Wale That Way (MMG/Warner Bros. Records)
- Talib Kweli Uh Oh (Duck Down Records)

POP

- The Script Nothing (Epic Records)
- Destinee & Paris True Love (Interscope Records)
- Trav Up And Down (SRR/West Side Merrick Ent./B-Sharp)

ROCK

- Breathe Carolina Blackout (Fearless Records)
- Brett Dennen Comeback Kid (That's My Dog) (Dualtone Music Group)
- TV On The Radio Second Song (DGC Records)
- Dawes Time Spent In Los Angeles (ATO Records)
- Victorian Halls A Crush Is A Crush (Victory Records)
- Neo Geo Can't Catch Me (Hardline Entertainment)

LATIN

- N/A

COUNTRY

- N/A

ORIGINAL SHOWS ON DEMAND

AIRING NOW

Certified: Lady Gaga vs. Justin Bieber
Mindless Behavior: Get Up & Dance
The Cut: Selena Gomez
Icons: Shakira; Ricky Martin
New Rookie Smell: Big Sean; Oh Land; Sean Garrett; Mindless Behavior

Video Playlists

YMCMB: Young Money's Top Videos feat. Nicki Minaj & DJ Khaled
Fall In Love: feat. Beyonce and Lady Gaga
Boys Of Fall: feat. Kenny Chesney and Taylor Swift
Videos Del Ano: feat. Don Omar and Shakira
Rep Your Flag: feat. Daddy Yankee and Pitbull

COMING SOON

The Cut: DJ Khaled

last week	this week	originals	artist	title	label
Week Ending 9/25/2011					
1	1		Lil Wayne	How To Love	Cash Money
~	2	+	Beyonce	1+1	Parkwood/ Columbia
3	3	SO	Mindless Behavior Feat. Diggy	Mrs. Right	Streamline / Interscope
~	4	+	Nicki Minaj Feat. Rihanna	Fly	Young Money/ Cash Money
8	5		LMFAO	Party Rock Anthem	Interscope
5	6		Nicki Minaj	Super Bass	Young Money/ Cash Money
10	7		Beyonce	Best Thing I Never Had	Columbia
15	8		Ace Hood Feat. Chris Brown	Body 2 Body	Island Def Jam
~	9	+	Rihanna	Cheers (Drink To That)	Island Def Jam
22	10		DJ Khaled Feat. Drake & Lil...	I'm On One	Cash Money/ Universal Motown
17	11		Bad Meets Evil Feat. Bruno ...	Lighters	Shady/ Interscope
24	12		Jay-Z Feat. Kanye West	Otis	Roc-A-Fella/ Def Jam
31	13		Kelly Rowland Feat. Lil Wayne	Motivation	Universal Motown
36	14		Chris Brown Feat. Justin Bieber	Next 2 You	Jive
38	15		Diggy Simmons	Copy, Paste	Atlantic
44	16		Lil Wayne Feat. Rick Ross	John	Cash Money/ Universal Motown
50	17		Miguel	Quickie	Jive
42	18		Katy Perry	Last Friday Night (T.G.I.F.)	Capitol
69	19		Maroon 5 Feat. Christina Agui...	Moves Like Jagger	A&M / Octone
57	20		Wiz Khalifa	No Sleep	Atlantic
61	21		Rihanna	Man Down	Island Def Jam
89	22		DJ Drama Feat. Fabolous & ...	Oh My	E1 Music
76	23		Selena Gomez & The Scene	Love You Like A Love Song	Hollywood
98	24		Ace Hood	Go N' Get It	Island Def Jam
100	25		Big Sean	I Do It	Getting Out Our Dreams Inc./ Is...
79	26		Wiz Khalifa	On My Level	Atlantic
102	27		The Band Perry	If I Die Young	Republic Nashville
114	28		New Boyz Feat. Chris Brown	Better With The Lights Off	Warner Bros.
107	29		YC Feat. Future	Racks	Universal Motown Group
~	30	+	Iyaz Feat. Travie McCoy	Pretty Girls	Beluga Heights/ Reprise
129	31		Young Jeezy Feat. Lil Wayne	Ballin'	Island Def Jam
144	32		Avril Lavigne	Smile	RCA
127	33	C	Lady GaGa	You And I	Interscope
155	34		Lil Twist Feat. Mishon	New Money	Young Money/ Cash Money
185	35		Meek Mill Feat. Rick Ross	Tupac Back	MMG/ Warner Bros.
157	36		Hot Chelle Rae	Tonight Tonight	Jive
183	37		The Game Feat. Chris Brown	Pot Of Gold	DGC/ Interscope
195	38		Jawan Harris Feat. Tyga	Keisha	Jive
215	39		Waka Flocka Flame Feat. Ke...	Grove St. Party	Warner Bros.
213	40		Jason Derulo	It Girl	Warner Bros.

rank	originals	artist	title	label
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Week Ending 9/25/2011

Top 10 Urban Videos

1		Lil Wayne	How To Love	Cash Money
2	+	Beyonce	1+1	Parkwood/ Columbia
3		Ace Hood Feat. Chris Brown	Body 2 Body	Island Def Jam
4		DJ Khaled Feat. Drake & Lil W...	I'm On One	Cash Money/ Universal Motown
5		Jay-Z Feat. Kanye West	Otis	Roc-A-Fella/ Def Jam
6		Miguel	Quickie	Jive
7		Chris Brown	She Ain't You	Jive
8		Nicki Minaj	Did It On 'Em	Young Money/ Cash Money
9		W iz Khalifa	No Sleep	Atlantic
10		DJ Drama Feat. Fabolous & R...	Oh My	E1 Music

Top 10 Pop Videos

1		Mindless Behavior Feat. Diggy	Mrs. Right	Streamline / Interscope
2	+	Nicki M inaj Feat. Rihanna	Fly	Young Money/ Cash M oney
3		LMFAO	Party Rock Anthem	Interscope
4		Bruno Mars	The Lazy Song	Atlantic
5	+	Rihanna	Cheers (Drink To That)	Island Def Jam
6		Bad Meets Evil Feat. Bruno Mars	Lighters	Shady/ Interscope
7		Chris Brown Feat. Justin Bieber	Next 2 You	Jive
8		Diggy Simmons	Copy, Paste	Atlantic
9		Maroon 5 Feat. Christina Aguil...	Moves Like Jagger	A&M / Octone
10	+	lyaz Feat. Travie McCoy	Pretty Girls	Beluga Heights/ Reprise

Top 10 Rock Videos

1		Foster The People	Pumped Up Kicks	Columbia
2		Christina Perri	Jar Of Hearts	Atlantic
3		Avenged Sevenfold	So Far Away	Warner Bros.
4		Foster The People	Helena Beat	Columbia
5		Linkin Park	Waiting For The End	Warner Bros.
6		Red Hot Chili Peppers	The Adventures Of Rain Dance Mag...	Warner Bros.
7		Staind	Not Again	Atlantic
8		3 Doors Down	When You're Young	Universal Republic
9		All Time Low	I Feel Like Dancin'	DGC/ Interscope
10		Beastie Boys	Don't Play No Game That I Can't Win	Capitol

Top 5 Latin Videos

1		Pitbull Feat. Marc Anthony	Rain Over Me	Polo Grounds Music/ J
2		Don Omar	Taboo	Machete Music
3		Shakira Feat. Pitbull	Rabiosa	Epic
4		Prince Royce	El Amor Que Perdimos	Top Stop Music
5		Daddy Yankee Feat. Prince Ro...	Ven Conmigo	El Cartel

Top 5 Country Videos

1		The Band Perry	If I Die Young	Republic Nashville
2		Taylor Swift	Mean	Big Machine
3		Brad Paisley Feat. Carrie Und...	Remind Me	Arista Nashville
4		Jason Aldean	Dirt Road Anthem	Broken Bow
5		Scotty McCreery	I Love You This Big	19 Recordings

Morano, Stephanie J.

Subject: RE: Fair To Midland

From: Fair To Midland [<mailto:fairtomidland@gmail.com>]

Sent: Monday, September 26, 2011 1:29 AM

To: Susalis, Gary (MC-EX)

Subject: Re: Fair To Midland

Thanks so much Gary. I was looking at that one or Whiskey and Ritalin. I'll hit you up when I figure out an add date. Heh. First time to try this on my own, so I'm just hoping for a few guys to even reply to me. I appreciate it so much brother.

On Fri, Sep 23, 2011 at 11:27 AM, Susalis, Gary (MC-EX) <GSusalis@musicchoice.com> wrote:

Hey man... so I think #8 "Short-Haired Tornado" is a solid track to follow up with...

Gary Susalis

MUSIC CHOICE

Senior Manager of Music Programming

328 West 34th Street

New York, NY 10001

Office: [646-459-3318](tel:646-459-3318)

Mobile: [917-647-9098](tel:917-647-9098)

Fax: [646-459-3309](tel:646-459-3309)

AIM: Etacov Das Lived

Email: gsusalis@musicchoice.com

Contains confidential and/or proprietary information. Please handle accordingly. If you received this transmission in error, do not use in any way and delete immediately.

From: Fair To Midland [<mailto:fairtomidland@gmail.com>]

Sent: Wednesday, September 14, 2011 6:41 PM

To: Susalis, Gary (MC-EX)

Subject: Re: Fair To Midland

Much thanks brother. Looking forward to hearing back from you Gary.

Cliff

Morano, Stephanie J.

Subject: RE: Music Choice VOD Report 8/24/11

From: Zeller, Jennifer [<mailto:jennifer.zeller@umusic.com>]
Sent: Wednesday, August 24, 2011 6:33 PM
To: Prager, Justin (MC-EX); Breeze (MC-EX)
Subject: Fwd: Music Choice VOD Report 8/24/11

Mindless Behavior ft Diggy "Mrs. Right" #1 again (ahead of Beyonce...)!

900k+ orders this week, over 2.8 million orders in 3 weeks!

WOW!!!!

Begin forwarded message:

From: "demanded@musicchoice.com" <demanded@musicchoice.com>
Date: August 24, 2011 5:55:51 PM EDT
Subject: **Music Choice VOD Report 8/24/11**

Video Promo!

See what got added to VOD this week and how your video ranks on Music Choice Video On Demand. Plus check out overall video airplay on the network and other useful tid-bits that'll come in handy for your next nat'l call and marketing meeting ... it's all inside this week's **Music Choice Video On Demand** Report (attached).

***** Reminder: All video submissions **must be CC** *****

- TYGA DEBUTS "FAR AWAY" IN THE TOP 20! NOW THAT'S FAR FROM THE BOTTOM!
- ANOTHER HUSTLER'S ANTHEM! ACE HOOD DEBUTS "GO N' GET IT" AT #11!
- GET LIKE HIM! WIZ KHALIFA'S "ON MY LEVEL" DEBUTS IN THE TOP 10!
- RIHANNA'S "MAN DOWN" KEEPS RISING! THIS WEEK SHE'S #15!

VIDEO ADDS – STARTING 8/ 29/ 11

URBAN

- Diggy Simmons "Copy, Paste" (Atlantic Records)
- Swizz Beatz "International Party" (Swizz Beatz Productions)
- Maino "Let It Fly" (E1 Entertainment)
- DJ Drama "Oh My" (E1 Music)
- Hamilton Park "Thing Called Us" (Atlantic Records)
- Big Bad 40 "Welcome To California (Remix)" (Zoo Life Entertainment)
- The Game "Pot Of Gold" (DGC/ Interscope Records)

POP

- Maroon 5 "Moves Like Jagger" (A&M/ Octone Records)
- Pia Toscano "This Time" (19 Recordings)

ROCK

- VHS Or Beta "Breaking Bones" (Krian Music Group/ Chromosome Music)
- Set It Off "Breathe In, Breathe Out" (Equal Vision Records)
- TV On The Radio "Caffeinated Consciousness" (DGC/ Interscope Records)
- Foster The People "Helena Beat" (Columbia Records)
- Funeral Party "New York City Moves To The Sound Of LA" (RCA Records)
- Blue October "The Chills" (Up/ Down Records)

LATIN

- N/ A

COUNTRY

- Scotty McCreery "I Love You This Big" (19 Recordings)
- Joe Nichols "Take It Off" (Show Dog Universal Music)

ORIGINAL SHOWS ON DEMAND

AIRING NOW

Rick Ross: Speaking Of...
Joe Jonas: Speaking Of...
Certified: Comeback Champ (Chris Brown vs. Britney Spears)
Certified: Lady Gaga vs. Justin Bieber
Akon: The Cut
Big Sean: The Cut
NRS: Jacob Latimore, Mike Posner, Oh Land, Big Sean, Tinie Tempah

Video Playlists

Jay-Z vs. Kanye West: the top videos from Kanye & Jay-Z
Summer With Miami: feat. Rick Ross, Ace Hood
Indie In August: feat. Matt & Kim, Givers
J.Lo vs. Marc!!!: top videos from J. Lo and Marc Anthony
Vid Of The Year: feat. Bruno Mars, Adele
Country Collabos: feat. Zac Brown Band, Brad Paisley

COMING SOON

DJ Khaled: The Cut
Matthew Morrison: The Cut

last week	this week	originals	artist	title	label
WEEK ENDING 8/14/11					
1	1		Mindless Behavior feat. Diggy	Mrs. Right	Streamline / Interscope
3	2		Beyonce	Best Thing I Never Had	Columbia
5	3		Bruno Mars	The Lazy Song	Atlantic
11	4		DJ Khaled feat. Drake, Lil Wa...	I'm On One	Cash Money/ Universal Motown
8	5		Nicki Minaj	Super Bass	Young Money/ Cash Money
13	6		Kelly Rowland feat. Lil Wayne	Motivation	Universal Motown
16	7	C	Chris Brown feat. Busta Rhy...	Look At Me Now	Jive
18	8		LMFAO	Party Rock Anthem	Interscope
20	9	C	Chris Brown feat. Justin Bieber	Next 2 You	Jive
~	10	+	Wiz Khalifa	On My Level	Atlantic
~	11	+	Ace Hood	Go N' Get It	Island Def Jam
24	12		Katy Perry	Last Friday Night (T.G.I.F.)	Capitol
~	13	+	Young Jeezy feat. Lil Wayne	Ballin'	Island Def Jam
43	14		Lil Wayne feat. Rick Ross	John	Cash Money/ Universal Motown
37	15		Rihanna	Man Down	Island Def Jam
48	16		Selena Gomez & The Scene	Love You Like A Love Song	Hollywood
~	17	+	Lil Twist feat. Mishon	New Money	Young Money/ Cash Money
~	18	+	Tyga feat. Chris Richardson	Far Away	Young Money/ Cash Money
57	19		Lil Wayne feat. Cory Gunz	6 Foot, 7 Foot	Cash Money
~	20	+	The Band Perry	If I Die Young	Republic Nashville
55	21		Big Sean feat. Chris Brown	My Last	Island Def Jam
75	22		Selena Gomez & The Scene	Who Says	Hollywood
73	23		New Boyz feat. Chris Brown	Better With The Lights Off	Warner Bros.
71	24		YC feat. Future	Racks	Universal Motown Group
79	25		T-Pain feat. Chris Brown	Best Love Song	Jive
102	26		Adele	Rolling In The Deep	Columbia
81	27		Meek Mill feat. Rick Ross	Tupac Back	MMG/ Warner Bros.
127	28		Avril Lavigne	Smile	RCA
68	29		Jawan Harris feat. Tyga	Keisha	Jive
145	30	C	Britney Spears	I Wanna Go	Jive
174	31		Jennifer Lopez feat. Lil Wayne	I'm Into You	Island Def Jam
163	32		Waka Flocka Flame feat. Kebo...	Grove St. Party	Warner Bros.
172	33		Wiz Khalifa	Roll Up	Rostrum/ Atlantic
233	34	NRS	Jacob Latimore	Nothing On Me	Jive
212	35		Pitbull feat. Afrojack, Nayer &...	Give Me Everything	J
207	36		Jennifer Hudson	No One's Gonna Love You	RCA
214	37		Bad Meets Evil	Fast Lane	Shady/ Interscope
~	38	+	DJ Khaled feat. Fabolous, Ja...	It Ain't Over Til It's Over	We The Best/ Cash Money
~	39	+	Paramore	Monster	Atlantic
143	40		Lupe Fiasco feat. Trey Songz	Out Of My Head	Atlantic

rank	originals	artist	title	label
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WEEK ENDING 8/14/11

Top 10 Urban Videos

1		Beyonce	Best Thing I Never Had	Columbia
2		DJ Khaled feat. Drake, Lil Wayne	I'm On One	Cash Money/ Universal Motown
3		Nicki Minaj	Super Bass	Young Money/ Cash Money
4		Kelly Rowland feat. Lil Wayne	Motivation	Universal Motown
5	+	Wiz Khalifa	On My Level	Atlantic
6		Rej3ctz	Cat Daddy	Renaissance Music
7	+	Ace Hood	Go N' Get It	Island Def Jam
8	+	Young Jeezy feat. Lil Wayne	Ballin'	Island Def Jam
9	C	Chris Brown	She Ain't You	Jive
10		Tyga feat. Chris Richardson	Far Away	Young Money/ Cash Money

Top 10 Pop Videos

1		Mindless Behavior feat. Diggy	Mrs. Right	Streamline / Interscope
2		Bruno Mars	The Lazy Song	Atlantic
3		LMFAO	Party Rock Anthem	Interscope
4		Chris Brown feat. Justin Bieber	Next 2 You	Jive
5		Katy Perry	Last Friday Night (T.G.I.F.)	Capitol
6		Rihanna	Man Down	Island Def Jam
7		Selena Gomez & The Scene	Love You Like A Love Song	Hollywood
8	+	Lil Twist feat. M.Ishon	New Money	Young Money/ Cash Money
9		Avril Lavigne	Smile	RCA
10	C	Britney Spears	I Wanna Go	Jive

Top 10 Rock Videos

1		Avenged Sevenfold	So Far Away	Warner Bros.
2		Foster The People	Pumped Up Kicks	Columbia
3		Avenged Sevenfold	Nightmare	Warner Bros.
4		Linkin Park	Waiting For The End	Warner Bros.
5		3 Doors Down	When You're Young	Universal Republic
6		Black Veil Brides	Fallen Angels	Universal Republic
7		Attack Attack!	Smokahontas	Rise
8		Linkin Park	Iridescent	Warner Bros.
9		Rise Against	Make It Stop (September's Child)	Interscope
10		Hollywood Undead	Hear Me Now	A&M/ Octone

Top 5 Latin Videos

1		Prince Royce	El Amor Que Perdimos	Top Stop Music
2		Don Omar	Taboo	Machete Music
3		Plan B feat. Tony Dize, Zion & L...	Si No Le Contesto	Pina
4		Romeo Santos	You	Sony BMG Latin
5		La Arrolladora Banda El Limon...	Cuanto Me Cuesta	Disa

Top 5 Country Videos

1	+	The Band Perry	If I Die Young	Republic Nashville
2		Taylor Swift	Mean	Big Machine
3		Jason Aldean	Dirt Road Anthem	Broken Bow
4		Chris Young	Tomorrow	RCA Nashville
5		Zac Brown Band feat. Jimmy B...	Knee Deep	Atlantic

last week	this week	originals	artist	title	last week	this week	orders to date
WEEK ENDING 8/14/11							
1	1		Mindless Behavior feat. Di...	Mrs. Right	888,320	907,687	2,837,580
18	18		LMFAO	Party Rock Anthem	375,582	385,308	4,736,063
130	145		Keri Hilson feat. Chris Brown	One Night Stand	163,698	147,504	4,756,647
97	187		Jodeci	Freek'N You	176,815	124,964	339,515
205	212		50 Cent	P.I.M.P.	125,629	114,243	1,017,028
214	232		Bad Meets Evil	Fast Lane	118,637	105,680	536,263
275	276	C	Lady GaGa	The Edge Of Glory	106,592	96,192	787,278
277	289		Eminem	Lose Yourself	99,265	93,896	2,966,735
281	312		Enrique Iglesias feat. Lil W...	Dirty Dancer	97,447	83,938	334,176
322	330	C	Lady GaGa	Judas	85,381	76,995	1,450,792
344	336	C	Lady GaGa	Bad Romance	76,428	73,918	4,573,279
341	340		Nicole Scherzinger feat. 5...	Right There	78,713	73,886	805,721
332	348		Greyson Chance	Unfriend You	81,030	72,507	253,835
334	350		Eminem feat. Dr. Dre	Guilty Conscience	81,021	72,142	863,178
348	352		Black Eyed Peas	Don't Stop The Party	75,936	70,542	601,586
352	356		Keyshia Cole	Long Way Down	74,563	69,971	3,335,345
357	367		Diddy - Dirty Money feat. R...	Your Love	73,484	66,804	1,478,850
373	375		Keyshia Cole	Take Me Away	70,729	65,881	2,570,665
~	398	+	Lil Play feat. Matthew K...	BirthDay Dress	~	60,953	74,011
395	400		Diddy - Dirty Money feat. C...	Yesterday	64,710	60,411	2,651,937
491	507		Dr. Dre feat. Akon	Kush	45,004	40,928	2,505,932
550	559		Enrique Iglesias	Do You Know? (The Ping Po...	36,917	33,235	125,041
614	648		Blink-182	Dammit	30,916	26,168	67,107
625	717		Aerosmith	Janie's Got A Gun	29,359	22,604	59,141
703	746		Diddy - Dirty Money feat. U...	Looking For Love	24,081	21,469	296,667
690	811		Rye Rye feat. Robyn	Never Will Be Mine	24,480	18,275	47,815
858	824		Daddy Yankee	Ella Me Levanto	16,425	17,596	547,910
567	833		Skylar Grey	Dance Without You	34,790	17,334	56,832
819	837		Marilyn Manson	mOBSCENE	18,065	17,121	105,571
855	856		Escape the Fate	Issues	16,728	16,130	378,522
798	867		Weezer	Say It Ain't So	19,556	15,635	41,253
872	915		Beck	Loser	15,459	14,516	92,374
898	920		Toby Keith	Courtesy Of The Red, White...	14,751	14,336	100,397
911	926		Hollywood Undead	Hear Me Now	14,312	13,510	606,287
907	929		Rise Against	Make It Stop (September's C...	14,502	13,492	84,909
749	942		Blink-182	Down	22,169	13,108	216,487
947	990		Eminem	When I'm Gone	13,508	11,812	4,112,419
1,014	1,019		Weezer	Pork And Beans	11,374	10,981	135,416
1,019	1,043		Toby Keith	How Do You Like Me Now?!	11,287	10,340	73,656
988	1,066		Timbaland feat. OneRepublic	Apologize	12,207	9,361	21,570

last week	this week	originals	artist	title	last week	this week	orders to date
980	1,099		Natalia Kills feat. will.i.am	Free	12,355	8,208	23,044
1,099	1,146		Timbaland feat. Justin Tim...	Carry Out	8,467	6,201	257,803
1,113	1,176		50 Cent feat. Justin Timbe...	Ayo Technology	7,753	5,546	13,287
1,110	1,179		The Pussycat Dolls feat. Ti...	Wait A Minute	8,127	5,361	13,491
1,132	1,180		Timbaland feat. D.O.E., Ker...	The Way I Are	7,258	5,354	12,612
1,150	1,215		Timbaland feat. Drake	Say Something	6,383	4,794	3,783,192
1,231	1,221		Toby Keith	I Love This Bar	5,023	4,660	32,721
1,188	1,259		Timbaland feat. Katy Perry	If We Ever Meet Again	5,756	3,910	398,250
1,239	1,280		Timbaland feat. Nelly Furt...	Morning After Dark	4,719	3,445	274,091
1,295	1,329		Timbaland	Scream	3,362	2,236	5,598
~	1,366		Blink-182	I Miss You	~	1,076	5,780
1,354	1,367		Stars	We Don't Want Your Body	2,066	1,066	3,458
TOTAL					3,411,139	3,233,230	51,469,117



Hi:

We're on the road in Europe with Metallica and Guns N' Roses but wanted to take a moment to thank you for all your support. Hopefully, we'll have a chance to see each other when we are on Ozzfest this summer, or our headline tour this Fall.

We are very excited for you to see our video for Seize the Day which we just finished with Wayne Isham; it's completely different from anything we've done before. We hope you dig it.

Thanks again for supporting A7X.

See you soon.

Sincerely,

M. Shadows

Zacky Vengeance

Synyster Gates

Johnny Christ

The Rev

**AVENGED
SEVENFOLD**

Susalis, Gary (MC-EX)

From: justin.arcangel@gmail.com on behalf of Justin Arcangel [justin@darkangelmgmt.com]
Sent: Monday, September 11, 2006 3:14 PM
To: Gary Susalis
Subject: Cast No Shadow

I saw the add for cast No Shadow - kick ass.

FYI.....

We are planning two NYC shows in the upcoming weeks:

September 26th at Northsix

September 27th at CBGB's

More details to come.

- Justin

Dark Angel Management, LLC
P.O. Box 170423
Brooklyn, NY 11217
(p): (917) 374-5591
(f): (718) 243-0123

Susalis, Gary (MC-EX)

From: Carl Schultz [carl@action-pr.com]
Sent: Monday, September 18, 2006 5:58 PM
To: 'Susalis, Gary (MC-EX)'
Subject: RE: SEEMLESS

Gary,

I totally understand and thanks for considering. All of us really appreciate the support that you and MC have given the band. Thank you.

See you at CB's!

-Carl

From: Susalis, Gary (MC-EX) [mailto:GSusalis@musicchoice.com]
Sent: Monday, September 18, 2006 5:34 PM
To: 'Carl Schultz'
Subject: RE: SEEMLESS

hey bro... im sorry but we can't have them in next week... we're doing a lot of our year end production stuff right now...
sorry... sucks having to work so far in advance but it's just the way it is right now.
at least we were able to do the album premiere and put the video out there for peoples.
g

-----Original Message-----

From: Carl Schultz [mailto:carl@action-pr.com]
Sent: Friday, September 15, 2006 3:06 PM
To: 'Susalis, Gary (MC-EX)'
Subject: RE: SEEMLESS

you got it. +1?

-C

From: Susalis, Gary (MC-EX) [mailto:GSusalis@musicchoice.com]
Sent: Friday, September 15, 2006 3:10 PM
To: 'Carl Schultz'
Subject: RE: SEEMLESS

I def want to go to the CBs show please

-----Original Message-----

From: Carl Schultz [mailto:carl@action-pr.com]
Sent: Friday, September 15, 2006 3:05 PM
To: 'Susalis, Gary (MC-EX)'
Subject: RE: SEEMLESS

Susalis, Gary (MC-EX)

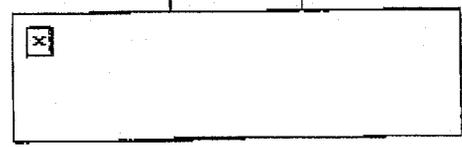
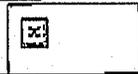
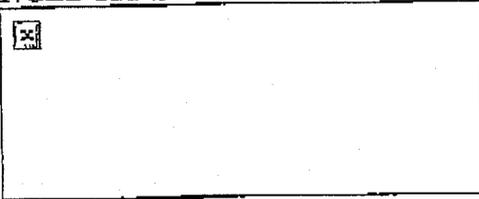
From: EJ Johantgen [ejj@prostheticrecords.com]
Sent: Tuesday, September 12, 2006 7:15 PM
To: 'Susalis, Gary (MC-EX)'
Subject: RE: music choice metal chart (again)

Hi Gary.
 Hope you are well. Thanks for all the support you give us.
 Any thoughts on Gojira? They are confirmed for the Children Of Bodom tour in Nov/Dec.
 E.J.

From: Susalis, Gary (MC-EX) [mailto:GSusalis@musicchoice.com]
Sent: Tuesday, September 12, 2006 12:47 PM
To: Susalis, Gary (MC-EX)
Subject: music choice metal chart (again)

we were having some tech issues yest... so in case you didnt get this, here ya go.

MUSIC CHOICE HAS CHANGED ITS LOOK!!! CHECK OUT OUR NEW ONSCREEN!!!!



NEW YORK, NY
MD GARY SUSALIS (646) 459-3318
PD JUSTIN PRAGER
CALL TIMES: TUESDAY 1-5PM

09.11.06

TW	ARTIST	TITLE	ALBUM	LABEL	TW	LW
1	UNEARTH	THIS GLORIOUS N	III: IN THE EYES	METAL BLA	34	32
2	MASTODON	THE WOLF IS LOO	BLOOD MOUNTAIN	WARNER BR	33	33
3	THREAT SIGNAL	ONE LAST BREATH	UNDER REPRISAL	NUCLEAR B	33	24
4	LAMB OF GOD	REDNECK	SACRAMENT	EPIC/PROS	33	33
5	STRAPPING YOU	YOU STUCK	THE NEW BLACK.	CENTURY M	33	33
6	STONE SOUR	HELL & CONSEQU	COME WHAT(EVER) M	ROADRUNNE	32	24
7	ALL THAT REMA	THIS CALLING	THE FALL OF IDEAL	PROSTHETI	32	33
8	HATEBREED	DEFEATIST	SUPREMACY	ROADRUNNE	32	30
9	SLAYER	CULT	CHRIST ILLUSION	AMERICAN	32	32
10	THE HUMAN ABS	CROSSING THE RU	NOCTURNE	HOPELESS	31	31
11	TOOL	JAMBI	10,000 DAYS	VOLCANO	29	31
12	BLACK LABEL S	CONCRETE JUNGLE	SHOT TO HELL	ROADRUNNE	23	19
13	GWAR	WAR IS ALL WE K	BEYOND HELL	DRT	21	19

Susalis, Gary (MC-EX)

From: George Vallee [George@centurymedia.com]
Sent: Tuesday, April 04, 2006 12:43 PM
To: Susalis, Gary (MC-EX)
Subject: Lacuna Coil

Hey bro I hope all is well and I just wanted to say thanks again for all you support with Lacuna Coil. It was great to hang with you all last week and hopefully we can do it again real soon. If you ever need anything always feel free to get in touch and Jessica and I will be getting together this week to work out the details for the Lacuna Coil and Music Choice specific press release so please keep me informed as to when your interview segment will hit. Talk to you soon

George Vallee/Publicity and Video Promotions
Century Media Records
2323 W. El Segundo Blvd.
Hawthorne, CA. 90250
323-418-1400 x133
www.centurymedia.com

out now...

GOD FORBID - IV: Constitution of Treason
EYES OF FIRE - Prisons
ARCH ENEMY - Doomsday Machine
MANNTIS - Sleep In Your Grave
BEHEMOTH - Slaves Shall Serve EP
WATCH THEM DIE - Bastard Son
DESPISED ICON - The Healing Process

April 4th

LACUNA COIL - Karmacode

April 18th

MAROON - When Worlds Collide

Coming Soon

SHADOWS FALL - Fallout From The War
STRAPPING YOUNG LAD - Untitled

MC 31

ON-SITE APPEARANCES

Date	Artist	Content	Label	Label Representative
1/18/2011	One Call	Interview/Photos, SWRV Promo, New Rookie Smell, Naked, SWRV Takeover, Promos/Drops	Jive	Shannah Miller
2/9/2011	Tinie Tempah	Photos/Interview, SWRV Promo, New Rookie Smell, Naked, Opinionation, SWRV Takeover, Promos/Drops	Capitol	Wanda Coriano
2/15/2011	David Banner	Photos/Interview, Decoded, SWRV Takeover, Naked, Vidication, Promos/Drops		
2/22/2011	Plain White T's	Photos/Interview, Naked, OpinoNation, Vidication, SWRV Takeover, Promos/Drops	Hollywood	Heather Davis
3/1/2011	2 AM Club (Mark & Tylor)	2AM Club: NRS, Naked, OpinioNation, SWRV Takeover, Vidication, Promos/Drops	RCA	Andrew Berkovitz
3/3/2011	All Star Weekend	Photos/Interview, SWRV Takeover, Naked, Promos/Drops	Hollywood Records	Heather Davis
3/6/2011	Lupe Fiasco	Photos/Interview, Naked, SWRV Takeover, We Love Hip Hop, Decoded, Promos/Drops	Atlantic	Tashana Ventura
3/7/2011	Avril Lavigne	Photos/Interview, Naked, Trendspotters, SWRV, Promos/Drops	RCA/J	Andrew Berkovitz
3/9/2011	New Boys	Photos/Interview, Nakek, SWRV Takeover, We Love Hip Hop, Promos/Drops	WB	Liz Lewis
3/9/2011	Yelawolf	Photos/Interview, Naked, SWRV Takeover, We Love Hip Hop, Decoded, Promos/Drops	Interscope	Jen Zeller
3/14/2011	Naughty By Nature	WLHH: Lyrical To Be or Not To Be?		
3/17/2011	Nick Cannon	The Cut	Universal Motown	Sujit Kundu
3/23/2011	Ace Hood	Photos, We Love Hip Hop, SWRV Takeover	Island Def Jam	Christine Moon
3/23/2011	Big Sean	Photos, We Love Hip Hop, New Rookie Smell, SWRV Takeover, Drops/Promos	Island Def Jam	Christine Moon
3/23/2011	Curren\$y	Photos, We Love Hip Hop, SWRV Takeover	WB	Liz Lewis
3/24/2011	Panic! At the Disco	Photos, Decoded, Naked, My 5, SWRV Takeover, Promos/Drops	Atlantic	Tashana Ventura
3/25/2011	E-40	Photos, We Love Hip Hop, SWRV Takeover, Promos/Drops	Interscope	Jen Zeller
3/30/2011	Mike Posner	New Rookie Smell, Naked, SWRV Takeover, My5, Prooms/Drops	RCA/J	Andrew Berkovitz
4/8/2011	Swizz Beatz	We Love Hip Hop, Naked, My 5, SWRV Takeover, Promos/Drops		Francase Blanchette
4/12/2011	Fabulous	WLHH: Lyrical To Be or Not To Be?, The Cut: My 5, Promos/Drops	Island Def Jam	Dana Kirk
4/13/2011	Ke\$ha	Photos/Interview, Trend Spotters, SWRV Takeover, Naked, Promos/Drops	RCA/J	Andrew Berkovitz
4/14/2011	Kool G Rap	Panelist: WLHH: Lyrical To Be or Not To Be?	N/A	Lulu Cohen (manager)
4/19/2011	Sean Garrett	Photos, WLHH: Lyrical To Be or Not To Be?	Columbia	Lou Smith
4/20/2011	Tristan Wilds	Photos/Interview, Naked, My 5 Best Actors, SWRV Takeover, Promos/Drops		

4/28/2011	Troop 41	Performance for Kids in the Large Studio, Quick Interview with Jim Larer	Universal Republic	David Nathan
4/29/2011	LMFAO	Photos, Interview, Naked, SWRV Takeover, The Cut: My 5 Best	Interscope	Jen Zeller
5/5/2011	Oh Land	Photos, New Rookie Smell	Columbia	Grace Lee
5/9/2011	The Cut: Akon	This footage is temporarily on Creative 17 (Fibre Jet)	Universal	Sujit Kundu
5/26/2011	Ryan Lutz	Speaking Of Performance: Ryan Lutz	Much/House PR	Alexandra Heller
6/8/2011	Big Sean	The Cut: Big Sean	Def Jam	Dana Kirk
6/13/2011	James Vincent McMarrow	James Vincent McMarrow performance		
6/13/2011	Jordan Knight	Photos, Interview, Naked, Trendspotters, SWRV Takeover, My 5 Best Voice, Promos/Drops	E1 Music	
6/22/2011	Keenan Cahill	SWRV, Certified	Krupp PR	Joann Mignano
6/23/2011	Owl City	(Roseland Ballroom) Interview, Naked, SWRV Takeover, Name Game, Vidication	Universal Republic	David Nathan
6/27/2011	David Cook	Photos, Speaking Of, My 5, Naked, SWRV Takeover, Vidication, Drops and Promos	RCA/J	Andrew Berkovitz
6/29/2011	Selena Gomez	The Cut: Selena Gomez	Hollywood Records	Heather Davis
7/14/2011	Joe Jonas	Photos, Interview, Naked, SWRV Takeover, Vidication, My 5- Tredsetter Videos, Verizon Lau, Hosted playlist for VOD, Rock Your Pink	Hollywood Records	Heather Davis
7/14/2011	City and Colour	Speaking Of Performance: John Hayes, Jim Larrer, Lisa Griffith	Vagrant	Jeremy
7/19/2011	DJ Khaled	The Cut: DJ Khaled/Niko Promo	Cash Money	Richelle Cross
7/21/2011	Simple Plan	Portraits, Interview, Speaking Of: Decoded, The Cut: My 5, SWRV Takeover, Naked, Drops/Promos	Atlantic	Tashana Ventura
7/25/2011	Hot Chelle Rae	Portraits, Interview, Naked, Name Game, Takeover: Beyonce "Single Ladies", Chris Brown "yeah 3x" Rihanna – Umbrella, HCR – Tonight Tonight, Vidication, My 5 Hot Bodies, VOD Playlist	RCA/J	Shannah Miller
7/26/2011	Melanie Fiona	Rock Your Pink PSA, Portraits	Roc Nation/Island Def Jam PR	Jana Fleishman
7/27/2011	We the Kings	Gramercy Ballroom SWRV Truck Promo with Josefa	S-Curve	Brad Davidson
7/28/2011	Mindless Behavior	Dance Promo, Interview, The Cut: My 5, Vidication, SWRV Ice Cream Truck Promo.	Interscope	Jen Zeller
8/2/2011	Mathew Morrison	The Cut, My 5, Naked, SWRV Takeover, Promos/Drops	Columbia	Grace Lee
8/3/2011	The Game	Portraits, The Cut, My 5, SWRV Takeover, Vidication, Naked, Promos/Drops	Interscope	Jen Zeller
8/4/2011	Kelly Rowland	Rock Your Pink PSA, walk on to the set of Speaking Of with Amanda Diva	Universal Republic	Patti Weber (publicist)
8/5/2011	Lil Playy	Portraits, Interview, New Rookie Smell, Naked, The Cut: My 5, SWRV Takeover, Vidication	Interscope	Jen Zeller
8/19/2011	Patrick Stump	Interview, Name Game, Naked, My 5: Best Cameos, SWRV Takeover, Vidication, Rock Your Pink PSA (3 cams)	Island	Christine Moon

9/1/2011	All Time Low	Portraits, Interview, Speaking Of... Decoded, My 5, Naked, SWRV Takeover, Vidication, Name Game, Promo	Hopeless	Jen Zeller
9/8/2011	Donald Glover: aka Childish Gambino	Photos, Interview, Name Game, Naked, My 5 Funniest Videos, SWRV Takeover, Vidication	Glassnote	Yepei Johnson
9/17/2011	Blink 182	Photos, Interview, Speaking Of... Decoded, My 5, SWRV Takeover, Nakeds, Vidication, Drops	Interscope	Jen Zeller
9/20/2011	Mateo	Studio 450 (450 31st Street bet. 9th and 10th , NY, NY 10001) featuring the works of David Kausek		
9/21/2011	Daddy Yankee	Photos, Interview, Vidication, My First BTS	EI Cartel/Sony Music Latin	Mayna Nevarez
9/21/2011	New Found Glory	Speaking Of Performance: John Hayes, Jim Larrer, David Kausek	Epitaph	Lisa Frank
9/27/2011	J. Cole	Live: Undefined Rooftop The Sidelines....	Columbia	Grace Lee
10/4/2011	Gavin DeGraw	Interview, Speaking Of..., Naked, Vidication, Photos	Jive	Shannah Miller
10/6/2011	JoJo	Portraits, Interview, Naked, My 5 Hottest Bodies, SWRV Takeover, Vid-ication, drops	Interscope	Jen Zeller
10/10/2011	Jack's Mannequin	The Performance Show	Warner Music Group	Liz Lewis
10/12/2011	Nicole Scherzinger	The Cut, SWRV Takeover, Naked, Promo	Interscope	Jen Zeller
11/2/2011	Miguel	Performance Show	RCA	Shannah Miller
11/4/2011	Skylar Grey	Live Undefined	Interscope	Jen Zeller
11/5/2011	Mary J. Blige	Speaking Of...	Interscope	Jen Zeller

OFF-SITE APPEARANCES

Date	Location	Artist	Content	Contact Organization	Representative
3/21/2011	Hard Rock Café	Cobra Starship	Filmed Performance, Interview, Naked	Paine PR	Christopher Gustafson
4/20/2011 - 5/1/2011	Tribeca Film Festival	We the Kings	Interview	Tribeca Film Festival PR	Tammi Rosen
4/20/2011 - 5/1/2011	Tribeca Film Festival	Jeremy Piven	Interview	Tribeca Film Festival PR	Tammi Rosen
4/20/2011 - 5/1/2011	Tribeca Film Festival	Will Ferrell	Interview	Tribeca Film Festival PR	Tammi Rosen
4/20/2011 - 5/1/2011	Tribeca Film Festival	Orlando Bloom	Interview	Tribeca Film Festival PR	Tammi Rosen
4/20/2011 - 5/1/2011	Tribeca Film Festival	Kings of Leon	Interview	Tribeca Film Festival PR	Tammi Rosen
7/2 - 7/4/2011	Essence Music Festival	Jill Scott	Interview	The Chamber Group	Tasha Stoute
7/2 - 7/4/2011	Essence Music Festival	New Edition	Interview	The Chamber Group	Tasha Stoute
7/2 - 7/4/2011	Essence Music Festival	Jennifer Hudson	Interview	The Chamber Group	Tasha Stoute
7/2 - 7/4/2011	Essence Music Festival	Usher	Interview	The Chamber Group	Tasha Stoute
10/20/2011	Perez Hilton's One Night in New York City	Mary J. Blige	Interview	BMF Media	Ed Starr

MC 32

DRIVE A

"THE WORLD IN SHAMBLES"



TOUR DATES

12/01 St. Louis, MO
 12/02 Dayton, OH
 12/03 Portage, IN
 12/05 New York, NY
 12/06 Amityville, NY
 12/07 Allston, MA
 12/08 Trenton, NJ

ADDED AT

WILL	WBUZ	KATT	KFR
WYBB	KHTQ	WJJO	WRZ
WRTT	WZBH	WKLC	KJM
KEYJ	KQYK	KCGQ	KBA



Morano, Stephanie J.

Subject: RE: NOEL & INCUBUS Chart Bound, THE PIERCES, LAURA MARLING & HH,

From: Ray Di Pietro [mailto:raybld99@gmail.com]

Sent: Wednesday, October 05, 2011 10:13 AM

Cc: Ray Di Pietro

Subject: VH1 Adds RYAN ADAMS, Snow Patrol #8*, FLORENCE "Shake It Out" ADDS, GIVERS "Saw You First" ADDS!
NOEL & INCUBUS Chart Bound, THE PIERCES, LAURA MARLING & HH, CHRIS CORNELL Video,

NOEL GALLAGHER "IF I HAD A GUN" (Sour Mash/Mercury/IDJMG) at AAA Now.

MEDIABASE AAA Monitored Chart: Chart Bound #36*

R&R AAA Monitored Chart: #4 New & Active

FMQB AAA Chart: DEBUT #41*

MEDIABASE Alternative Monitored Chart: #30*

ADDS THIS WEEK: WXPB, WOCM, KTAO, DMX Adult Alternative, Bham Mtn Radio

ALREADY ON: KGSR, KCSN, KCRW, WEXT, WJB, KCLC, WYEP, WFIV, WAPS, WNRN

SiriusXM Spectrum, KCMP, WFUV, WDST, WCOO, KTHX, KROK, KSPN, KFMU, KOHO, KDEC

[Music Choice Adult Alternative](#), WJCU, KMMS, KDBB, WUKY

"If I Had A Gun" Video:

<http://www.vevo.com/watch/noel-gallaghers-high-flying-birds/if-i-had-a-gun/GBDZH1100022>

LETTERMAN ON NOVEMBER 10.

"IF I HAD A GUN" WAV Download Link:

<http://www.mediafire.com/?dgt31k8rpm1eoc6>

Noel Gallagher's 'High Flying Birds' in stores on November 8, 2011

www.noelgallagher.com

LAURA MARLING "SOPHIA" (Ribbon Music) at AAA Now.

WXPB Artist To Watch for October!

FMQB Non-Comm Chart: #28*

ADDS THIS WEEK: WFIV, WMWV, WUKY, KDNK, KXCI, Acoustic Cafe

ALREADY ON: WXRT, SiriusXM Spectrum, KCMP, KCSN, WFUV, WDST, KUT, WFPK, KCRW, KEXP,

WNCW, WUIN,

WYCE, KOHO, WHRV, WVMP, KTBG, WYEP, WCNR, KNBA, KKCR, KSUT, WUMB, WHRV, WJCU,

WNRN, MPB,

SiriusXM The Loft, WCBE, [Music Choice Adult Alternative](#), WFIT, WUSM

KHUM, KRCL, WERU, WFHB, MSPR, WSYC, KCSN "All My Rage"

SPINS: KTCZ, WXPB, KGSR

Laura Marling "SOPHIA" WAV Download Link:

<http://www.mediafire.com/?4a10gsibm5z1v5e>

"SOPHIA" VIDEO HERE:

<http://www.ribbonmusic.com/label/2011/08/laura-marling-premiers-sophia-video/>

SUNDAY NY TIMES FEATURE & ALBUM STREAM:

http://www.nytimes.com/2011/09/04/arts/music/laura-marlings-british-folk-cd-creature-i-dont-know.html?_r=1&ref=music

Laura Marling 'A Creature I Don't Know' in stores now.

www.lauramarling.com

THE PIERCES "YOU'LL BE MINE" (Mercury/IDJMG) at AAA Now.

Produced by the Darktones (Guy Berryman of Coldplay & Rik Simpson)

EARLY ADDS THIS WEEK: KCSN, WJCU

ALREADY ON: WBJB, fm 106.9 the Lodge

The Pierces "You'll Be Mine" WAV Download Link:

<http://www.mediafire.com/?0t2cq4a77m3hhyj>

Most Played Single at Radio 2 UK in Q1 beating out Adele.

The Pierces "You'll Be Mine" Video Link:

<http://www.youtube.com/watch?v=0kFhx27OMdE>

NOVEMBER US TOUR DATES

The Pierces 'You & I' street date TBA.

www.thepiercesmusic.com

ELIZAVETA "DREAMER" (Universal Republic) At AAA Radio Now.

The single is in Play MPE with the hard copy on the way Now.

ALREADY ON: KCSN

Elizaveta "Dreamer" WAV Download Link:

<http://www.mediafire.com/?v13ahutmjf3pi>

"Dreamer" was the Free iTunes Single Download Last Week!

Elizaveta "Dreamer" Video Link:

http://www.youtube.com/watch?v=sFvzv1h3UHk&feature=player_embedded

The Elizaveta EP is available This Week!

<http://elizaveta.typepad.com/>

HONEYHONEY "TURN THAT FINGER AROUND" (Lost Highway/HoneyHoney/Fontana) at AAA Now.

ADDS THIS WEEK: WFIV

ALREADY ON: WTMD, KCLC, WKZE, WUKY, SiriusXM Outlaw Country, WCBE

HoneyHoney "Turn That Finger Around" WAV Download Link:

<http://www.mediafire.com/?e8ut87uk47po2d8>

SEPT/OCT/NOV TOUR DATES!

HoneyHoney 'Billy Jack' will be in stores on October 24, 2011.

www.honeyhoneyband.com

CHRIS CORNELL "THE KEEPER" at AAA Now.

NEW Video for "The Keeper":

http://www.youtube.com/watch?v=Oo_14hBIA5U&feature

ADDS THIS WEEK: WNRN, WHRV

ALREADY ON: WBJB, KOZT, KOHO, KCLC, KSPN, KFMU, KSMT, WUSM, KDEC

LETTERMAN Performance

http://www.cbs.com/late_night/late_show/video/?pid=6CIc2hw0WcYgTMB6S9TCJCTq3Pk_IuUQ

TAVIS SMILEY Last Week

Performing on KIMMEL 10/12.

Chris Cornell "The Keeper" AIFF Download File:

<http://www.mediafire.com/?e8cenpsekaq42sq>

From the movie 'MACHINE GUN PREACHER' Starring Gerard Butler.

Watch the trailer movie here:

www.machinegunpreacher.org/movie

'Machine Gun Preacher' Movie Soundtrack is in stores now.

www.chriscornell.com

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Morano, Stephanie J.

Subject: RE: Look who's joining Cults! Radio News, Press, On tour with Foster The People!

From: Lisa.Sonkin@sonymusic.com [mailto:Lisa.Sonkin@sonymusic.com]
Sent: Wednesday, October 05, 2011 3:09 PM
To: undisclosed-recipients
Subject: Look who's joining Cults! Radio News, Press, On tour with Foster The People!

CULTS "GO OUTSIDE"

New this week at Triple A and Alternative Radio: KINK Portland, KGSR Austin, KCLK Seattle, WFNX Boston WBRU Providence

Early followers: KCMP, KUT, WXPB, KEXP, KCSN, CD101, WFPK, WERS, WYMS, WEXT, WEQX, WEHM, WNRN, WFPK, WTMD, WFUV, KBAC, WMNF, KROK, [Music Choice](#), SiriusXM's Alt Nation & XMU. JOIN US!

Over 43k albums sold * On a sold out tour with Foster The People * Amazon names Cults #14 on 'Best Music of 2011 So Far...'
* Spin Magazine's 24 Summer Albums That Matter and 20 Best Summer Songs lists! * NPR's The Year's Best New Music (so far)
* NPR Listeners Pick the Best of the Year (So Far)

LA Times on the video for "Go Outside": "The clip was both galling and maybe the most punk-rock thing to happen in music videos this year."

"Cults' singer Madeline Follin is to today's crop of neo-soul divas what Rihanna is to Beyonce in R&B... her high reach brought some emotional drama to these gauzy, two-minutes-and-out tunes." - LA Times

NPR's The Year's Best Music (so far) Discussion: This is creepy and beautiful. Cults have a passion for people like Jim Jones and Charles Manson, and many of the creeps of our culture, the scariest people of our culture who often say beautiful things. These are very happy, shiny tunes, but just listen to what they're about. --Bob Boilen, NPR Music

- * "Cults..has a deceptively simple approach to indie-pop. It's all about the melody. And there are some doozies on their debut "Cults" " - Newsday
- * "(Cults Cults) executes what it sets out to do masterfully." 8.5 Best New Music - Pitchfork
- * "Completely fresh and utterly intoxicating" - Zink
- * "Making the best '60's girl group pop since the '60's" - Nylon
- * "Cults look to classic 1960s pop history for the 11 bite-sized pop nuggets of this impressive debut." - The Independent
- * "any anticipation for Cults was more than justified." - - Absolute Punk
- * "Go Outside" recently featured on Marie Claire's *Need To Download* playlist

<http://cultscultscults.com/us/home/>

"Go Outside" video link: <http://www.vevo.com/watch/cults/go-outside/GB1101100252>
Live performance for SPINhouse Live: <http://www.spin.com/articles/watch-cults-rock-spins-rooftop>

Big success at ACL!
Austin Statesman: Live Review

http://www.austin360.com/blogs/content/shared-gen/blogs/austin/music/entries/2011/09/16/acl_festival_review_cults.html?cxntfid=blogs_austin_music_source

"Less than a year later, though, Cults stepped onto the Honda stage — both appropriately and hilariously, to theme from "Twin Peaks — having grown almost immeasurably. A solid year of performing and living under the microscope after the release of their stellar self-titled debut has had a startling effect; Cults are now a remarkably effective unit live, wrapping pretty pop songs in a dreamlike haze of noise, that was more effective in the A.M. hours than one might expect.

A question has rarely answered itself so easily — between an album that's a strong contender for Record of the Summer 2011 and live chops that have developed at impressive speed, Cults probably made for one of the stronger 11 a.m.-hour sets the ACL Festival's yet seen. Worth ditching work/class for? That's no question at all."

Houston Press: Live Review + Photos

http://blogs.houstonpress.com/rocks/2011/09/acl_cults_semi-wows_to_start_o.php

<http://www.houstonpress.com/slideshow/acl-2011-fridays-lineup-of-coldplay-kanye-and-more-35171820/18/>

"Even though they were the first big band of the day, they had a great crowd curious to see how their self-titled album would sound live. "

Rolling Stone: Best Moments of ACL!

<http://www.rollingstone.com/music/photos/the-best-moments-from-the-2011-austin-city-limits-festival-20110919/cults-0288433>

Morano, Stephanie J.

Subject: RE: RYAN #2*! SNOW PATROL #5*, FLORENCE 105K Scanned 1st Week! FTP #23*, WXRT Adds CRANBERRIES, GIVERS! HIATT ADDS, NOEL on LETTERMAN Thurs Night and more

From: Ray Di Pietro [mailto:raybld99@gmail.com]

Sent: Wednesday, November 09, 2011 10:36 AM

Cc: Ray Di Pietro

Subject: RYAN #2*! SNOW PATROL #5*, FLORENCE 105K Scanned 1st Week! FTP #23*, WXRT Adds CRANBERRIES, GIVERS! HIATT ADDS, NOEL on LETTERMAN Thurs Night and more

RYAN ADAMS “LUCKY NOW” (PAX-AM/Capitol) #2* AT AAA. Thank You!

MEDIABASE AAA Monitored Chart: #2*

R&R AAA BDS Monitored Chart: #2*

R&R AAA Indicator Chart: #1 for the 4th week.

FMQB AAA Chart: #2*

FMQB Non-Comm Chart: #3*

AMERICANA Chart: #3

"Lucky Now" Video Link:

<http://www.youtube.com/watch?v=bp064T7rQSk&feature>

UPCOMING TV: LETTERMAN on December 5.

SOLD OUT December Solo Acoustic Tour Dates including Carnegie Hall..

RYAN ADAMS "NIGHT SWEATS" METAL TV SHOW:

<http://www.youtube.com/watch?v=ThzkcCfRq2Y&feature>

Ryan Adams 'Ashes & Fire' SALES: 6,576 scanned ranked #77 this week with 76,555 scanned in 4 weeks.

<http://www.facebook.com/ryanadams>

www.paxamrecords.com

SNOW PATROL “CALLED OUT IN THE DARK” (Island/IDJMG) TOP 5 AT AAA. Thank you!

MEDIABASE AAA Monitored Chart: #5*

R&R AAA BDS Monitored Chart: #5*

R&R AAA Indicator Chart: #3*

FMQB AAA Chart: #3*

MEDIABASE HOT AC Monitored Chart: #37*

Performing on LETTERMAN January 9.

"Called Out In The Dark" Video:

http://www.youtube.com/watch?v=GwTXwJg6_VE

Snow Patrol 'Fallen Empires' release date January 10, 2012.

www.snowpatrol.com

THE FRAY “HEARTBEAT” (Epic) HEADING TOP 10 AT AAA!

MEDIABASE AAA Monitored Chart: #12*

R&R AAA BDS Monitored Chart: #12*

FMQB AAA Chart: #24*

MEDIABASE HOT AC Monitored Chart: #16*

MEDIABASE ALTERNATIVE Chart: Chart Bound #46

ADDS THIS WEEK: Music Choice Adult Alternative

ALREADY ON: KBCO, KTCZ, KMTT, WTTS, KINK, WXPX, WNCS, KPRI, CIDR, WQKL, KCKC, WNWV, KGSR, KRVB, WMMM, WCOO, KTHX, WCLZ, WZEW, WCNR, KSPN, KFMU, KLRR, KRVO,

KPND, KCLC, WAPS, KDBB, KYSL, KSKI, KMTN, KTAO, KOHO, Bham Mtn Radio, fm 106.9 the Lodge
SPINS: KFOG, WXRT

THE FRAY "HEARTBEAT" WAV DOWNLOAD LINK:

<http://www.mediafire.com/?31bw8bmeyeb1y>

The Fray "Heartbeat" Single Available at iTunes Now.

The Fray 'Scars & Stories' release date February 2012.

<http://blog.thefray.net/us/news>

**FLORENCE & THE MACHINE "SHAKE IT OUT" (Universal Republic) HEADING TOP 10 AT AAA!
'CEREMONIALS' DEBUTS #6* SOUNDSCAN WITH 105,261 SCANNED 1ST WEEK!**

CBS SUNDAY MORNING FEATURE THIS PAST SUNDAY:

<http://www.cbsnews.com/video/watch/?id=7387302n>

MEDIABASE AAA Monitored Chart: #14*

R&R AAA BDS Monitored Chart: #14*

R&R AAA Indicator Chart: #22*

FMQB AAA Chart: #14*

FMQB Non-Comm Chart: #11*

MEDIABASE Alternative Monitored Chart: #23*

ADDS THIS WEEK: WNWV, KXT, KOHO

ALREADY ON: KGSR, WXRT, KBCO, KTCZ, KCMP, KFOG, KMTT, KINK, WXPB, WXPB, WERS,
WQKL, WFUV, WNCN, WTTS,

KCSN, SiriusXM Spectrum, WRNR, WRLT, KRVB, KTHX, KCKC, WCOO, KPND, WYMS, WCBE,
WMWV, DMX Folk Rock, WCLZ,

WTMD, WFPK, KUT, WEXT, WFIV, WCNR, WRNR, WAPS, WTYD, KBAC, KLRR, KSKI, KTAO,
WVOD, Bham Mtn Radio

FLORENCE & THE MACHINE "SHAKE IT OUT" WAV DOWNLOAD LINK:

<http://www.mediafire.com/?j4xv7v9lh97g9>

"SHAKE IT OUT" VIDEO:

<http://www.youtube.com/watch?v=WbN0nX61rIs&feature>

Florence & The Machine 'Ceremonials' will be in stores on November 1, 2011.

<http://florenceandthemachine.net>

**FOSTER THE PEOPLE "DON'T STOP (COLOR ON THE WALLS) IMPACTS AAA ON 11/21 &
HEADING TOP 20.**

MEDIABASE AAA Monitored Chart: #23*

R&R AAA BDS Monitored Chart: #25*

FMQB AAA Chart: #40*

MEDIABASE ALTERNATIVE Monitored Chart: Chart Bound #42*

ADDS THIS WEEK: WXRT, WXPB, WEHM, WQKL, WCLZ, WEXT, WAPS, WVOD, KCLC

ALREADY ON: KBCO, KFOG, KCMP, KGSR, WTTS, KTHX, WRLT, KRVB, WCOO, KTBG, KPND,
WZEW, WRNR, KTAO

FOSTER THE PEOPLE "DON'T STOP" WAV DOWNLOAD LINK:

<http://www.mediafire.com/?02245r1tru74yku>

FTP SALES: 'TORCHES': 21,000 scanned ranked #21 this week with 458,000 scanned to date.

"DON'T STOP" Single: 7,108 (+84%) this week with 56,962 sold to date.

Foster The People 'Torches' has been certified GOLD. Sold Out US Tour.

www.fosterthepeople.com

GIVERS "SAW YOU FIRST" (Glassnote) CHART BOUND AT AAA!

MEDIABASE AAA Monitored Chart: Chart Bound #31*

R&R AAA BDS Monitored Chart: #2 New & Active

FMQB AAA Chart: #35*

ADDS THIS WEEK: WZEW, Music Choice Adult Alternative

ALREADY ON: WXRT, KBCO, KCMP, WTMD, KGSR, WXPB, KCSN, WNCS, WXPB, WFUV, WCLZ, KRSH, WDST, WNRN, WAPS, WYMS, KTHX, KCLC, WEHM, KXT, KPND, WEXT, KSMT, KYSL, WQKL, WMMM, WCOO, WYEP, WFPK, WJCU, KTBG, DMX Adult Alternative, WUKY, WUSM
SPINS: KFOG, WTTS, KPRI

GIVERS "SAW YOU FIRST" RADIO EDIT WAV DOWNLOAD LINK:

<http://www.mediafire.com/?bo2p6e9c3slq7rx>

ON TOUR NOW.

GIVERS 'In Light' is in stores Now.

<http://giversmusic.com/>

www.myspace.com/giversmusic

THE CRANBERRIES "TOMORROW" (Cooking Vinyl/Downtown) IMPACTS AAA ON 11/21.

EARLY ADDS THIS WEEK: WXRT, KCSN, SiriusXM Spectrum, WERS, WYEP, WCLZ, KRSH, WEXT, WBJB, WCNR, WNRN, WFIV, WOCM, KCLC, KRVM, WHRV, fm 106.9 the Lodge, Bham Mtn Radio
ALREADY ON: KLLC

SPINS: KFOG, KINK, WNCS, WNWV, WQKL, KRVB, CIDR

THE CRANBERRIES "TOMORROW" WAV DOWNLOAD LINK:

<http://www.mediafire.com/?jysiv37d7fhl29m>

This first new record from The Cranberries in 10 Years!

The Cranberries "Roses" will be in stores on February 14, 2011

www.cranberries.com

NOEL GALLAGHER "IF I HAD A GUN" (Sour Mash/Mercury/IDJMG) Full CD In Stores This Week.

PERFORMING ON LETTERMAN TOMORROW NIGHT!

SEE NOEL PERFORMING "IF I HAD A GUN" IN DUBLIN ON 10/23. HUGE CROWD RESPONSE:

<http://www.youtube.com/watch?v=vfQPIyZ6GL8>

MEDIABASE AAA Monitored Chart: Chart Bound #38*

R&R AAA BDS Monitored Chart: #7 New & Active

R&R AAA Indicator Chart: #20

FMQB AAA Chart: #32*

FMQB Non-Comm Chart: #40

MEDIABASE Alternative Monitored Chart: #33

ALREADY ON: KGSR, KCSN, KCRW, SiriusXM Spectrum, KCMP, WFUV, WXPB, WEHM, WDST, WCOO, KTHX,

WBJB, KCLC, WYEP, WFIV, WAPS, WNRN, KROK, KSPN, KFMU, KOHO, **Music Choice Adult Alternative**, WJCU,

KMMS, KDBB, WUKY, KDEC, WOCM, KTAO, WWCT, WUSM, DMX Adult Alternative, Bham Mtn Radio, KSKI, WBSD,

KRSH, WVMP, KRVM, KMTN

SPINS: KTCZ, WXRT, WRNR, WMMM, WNWV, KPRI, CIDR, KFOG, WZEW

NOEL GALLAGHER "IF I HAD A GUN" WAV Download Link:

<http://www.mediafire.com/?dgt31k8rpm1eoc6>

"If I Had A Gun" Video:

<http://www.vevo.com/watch/noel-gallaghers-high-flying-birds/if-i-had-a-gun/GBDZH1100022>

Noel Gallagher's 'High Flying Birds' in stores on November 8, 2011

www.noelgallagher.com

JOHN HIATT “ADIOS TO CALIFORNIA” (New West) AT AAA NOW.

ADDS THIS WEEK: KBCO, KCSN, WEXT, WMVY, WKZE, KDBB, KSUT, KTAO

ALREADY ON: WZEW, WFIV, KYSL, WOCM, WFUV, WFPK, KPND, KRSH, WDST, WBJB, WNRN, WYCE, KSPN, KFMU, KOHO, KNBA, **Music Choice Adult Alternative**, DMX Folk Rock, KRVM SPINS: KINK, WTTS, KRSH, WCOO

John Hiatt ‘Dirty Jeans and Mudslide Hymns’ is in stores Now.

www.johnhiatt.com

THE ROLLING STONES “NO SPARE PARTS” (Universal Republic) AT AAA NOW.

From the Stones classic SOME GIRLS Re-Mastered!

ADDS THIS WEEK: WXPB, SiriusXM Spectrum, KPND, WMWV, KMTN, WUKY

ALREADY ON: WEHM, WBJB

SPINS: KMTT, WMMM, KGSR, WQKL

THE ROLLING STONES “NO SPARE PARTS” WAV DOWNLOAD LINK:

<http://www.mediafire.com/?r58akelne2v5249>

The Rolling Stones ‘Some Girls’ Re-Mastered will be in stores on November 21, 2011.

www.rollingstones.com

INCUBUS “PROMISES, PROMISES” (Epic) Chart Bound at AAA Radio with Major Market Airplay.

MEDIABASE AAA Monitored Chart: Chart Bound #34

MEDIABASE ALT Monitored Chart: #18

ALREADY ON: KBCO, WTTS, KPRI, KTCZ, WXPB, KRVB, WNWV, KMTT

SPINS: KFOG

INCUBUS “PROMISES, PROMISES” WAV DOWNLOAD LINK:

<http://www.mediafire.com/?jphkyww2cywvlrs>

ON TOUR NOW!

Incubus ‘If Not Now, When?’ is in stores now.

<http://incubushq.com>

THE HOURS “I WANNA BE HAPPY” (Adeline Records/ILG) AT AAA NOW.

ADDS THIS WEEK: KRSH, WNRN

ALREADY ON: WOCM, KROK, WFIV

THE HOURS “I WANNA BE HAPPY” WAV DOWNLOAD LINK:

<http://www.mediafire.com/?rhngd14k96pbm8h>

ON TOUR NOW OPENING FOR NOEL GALLAGHER.

The Hours got their start when singer-songwriter-guitarist Antony Genn (Pulp and Elastica) and multi-instrumentalist Martin Slattery (Shaun Ryder's Black Grape) formed The Mescaleros with Joe Strummer in 1999.

Genn co-wrote and co-produced Rock Art & the X-Ray Style, the highly-acclaimed Mescaleros album that marked

Strummer's long-awaited return to music.

The Hours 'I Want More' EP is available digitally Now.

www.thehours.co.uk/

THE PIERCES “YOU’LL BE MINE” (Mercury/IDJMG) AT AAA NOW.

Produced by the Darktones (Guy Berryman of Coldplay & Rik Simpson)

ALREADY ON: KCSN, KRSH, WZEW, WJCU, WBJB, DMX Adult Alternative, KSPN, KFMU, WFIV, WNRN, KTAO, WOCM, Bham Mtn Radio, fm 106.9 the Lodge

THE PIERCES “YOU'LL BE MINE” WAV DOWNLOAD LINK:

<http://www.mediafire.com/?0t2cq4a77m3hhvj>

Most Played Single at Radio 2 UK in Q1 beating out Adele.

The Pierces "You'll Be Mine" Video Link:

<http://www.youtube.com/watch?v=0kFhx27OMdE>

NOVEMBER US TOUR DATES

The Pierces 'You & I' street date TBA.

www.thepiercesmusic.com

ELIZAVETA "MEANT" (Universal Republic) NEW! Please give a listen!

ELIZAVETA "MEANT" WAV DOWNLOAD LINK:

<http://www.mediafire.com/?mw7215jp4b7a0t7>

Elizaveta EP which is available at iTunes NOW.

<http://elizaveta.typepad.com/>

ray di pietro

bitter little dutchboy

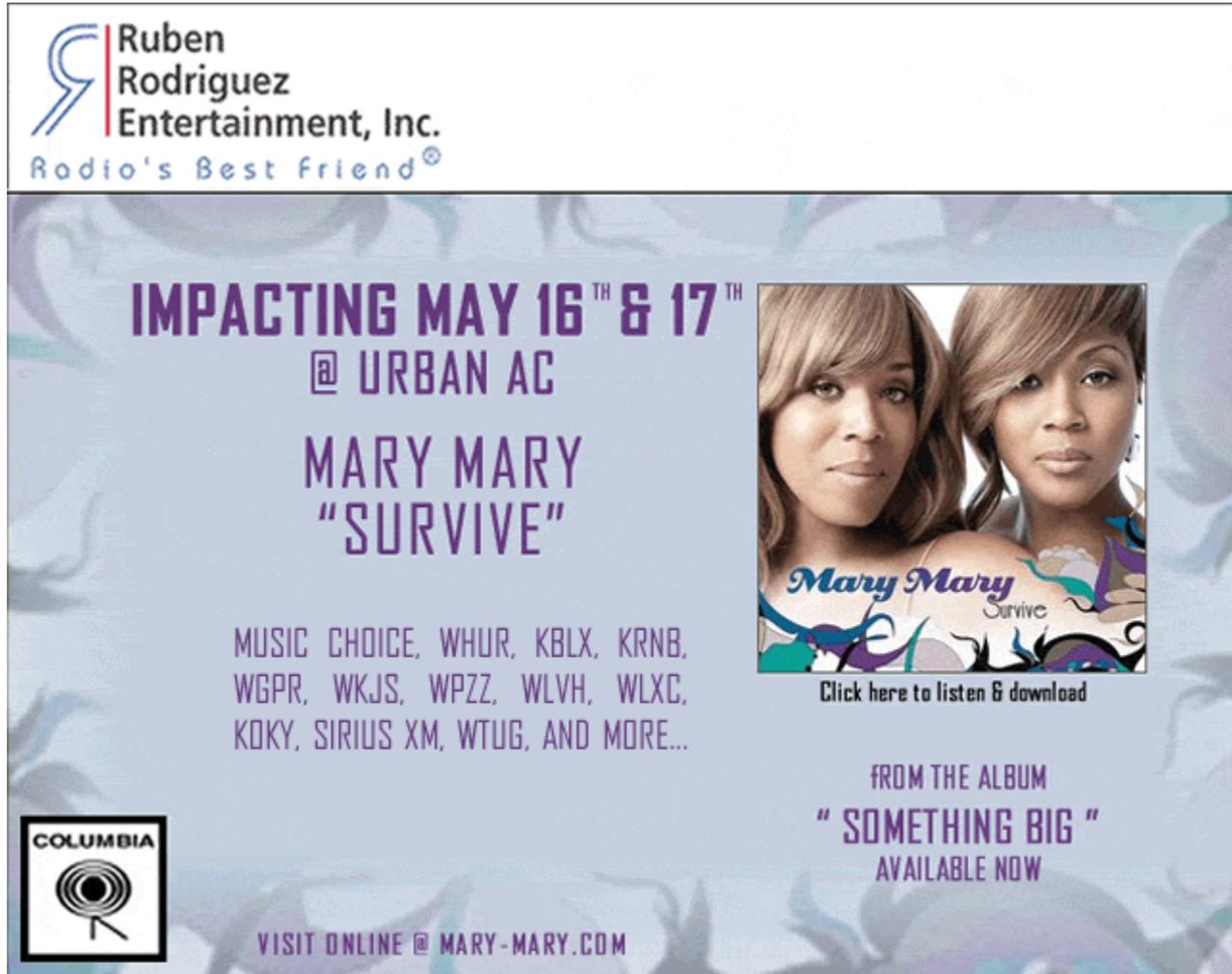
promotion & apparel

917-572-7666 cell

bitterlittledutchboy.com

Morano, Stephanie J.

From: Ruben@rubenrodriguezentertainment.net [mailto:Ruben@rubenrodriguezentertainment.net]
Sent: Monday, May 16, 2011 12:53 PM
To: XAVIER@rubenrodriguezentertainment.net
Subject: MARY MARY Impacting Now May 16 & 17 @ UAC " SURVIVE " (Columbia)



Ruben Rodriguez Entertainment, Inc.
Radio's Best Friend®

IMPACTING MAY 16TH & 17TH
@ URBAN AC
MARY MARY
"SURVIVE"

MUSIC CHOICE, WHUR, KBLX, KRNB,
WGPR, WKJS, WPZZ, WLVH, WLXC,
KOKY, SIRIUS XM, WTUG, AND MORE...



Click here to listen & download

FROM THE ALBUM
" SOMETHING BIG "
AVAILABLE NOW



VISIT ONLINE @ MARY-MARY.COM

Warm Regards,

Ruben

Ruben Rodriguez Entertainment, Inc.

4ever Michael Jackson

Radio's Best Friend ®

CEO & Founder, Ruben Rodriguez

96 Linwood Plaza #354

Fort Lee, NJ 07024

Tel: 201-363-1461 X 201

Fax: 201-592-7970

Email: ruben@rubenrodriguezentertainment.net

RRE Website: www.rubenrodriguezentertainment.net

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Morano, Stephanie J.

From: Ruben@rubenrodriguezentertainment.net [mailto:Ruben@rubenrodriguezentertainment.net]
Sent: Tuesday, May 17, 2011 11:12 AM
To: XAVIER@rubenrodriguezentertainment.net
Subject: Chris Walker 26* 307 spin in 7 days " I GOT THAT LOVE " (Pendulum)

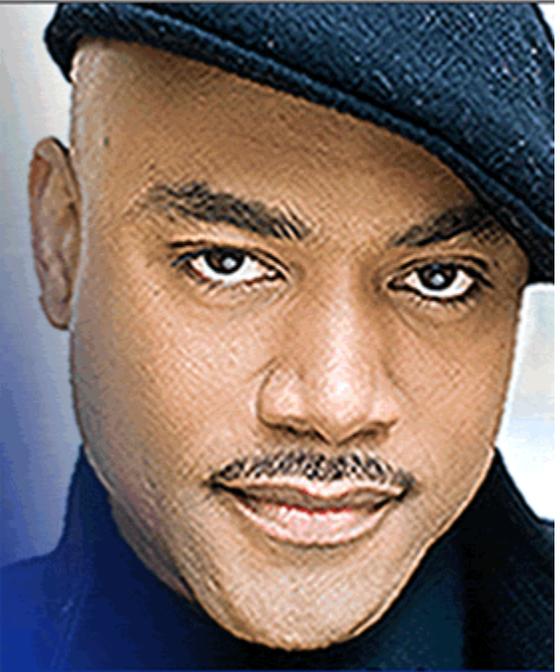
Ruben Rodriguez Entertainment, Inc.
Radio's Best Friend®

307 SPINS IN 7 DAYS
26* BDS/R&R 4.11
CHRIS WALKER
" I GOT THAT LOVE "

" WHAT A VOICE... "
RUBEN RODRIGUEZ FOUNDER OF PENDULUM RECORDS

WRITTEN BY: CHRIS WALKER & JAMIEN ARVIE
PRODUCED BY: CHRIS WALKER
EXECUTIVE PRODUCERS: RUBEN RODRIGUEZ, RAY DAVIS, CHRIS WALKER
MIXED BY: STEVE GORDON AT ROYALPALACE STUDIOS, FLORIDA
MASTERED BY: MIKE FULLER AT FULLERSOUND MIAMI, FLORIDA

Call Letters.	Market.
WBLS-FM	New York, NY
WRKS-FM	New York, NY
KJLH-FM	Los Angeles, CA
WSRB-FM	Chicago, IL
WHUR-FM	Washington, DC
WDAS-FM	Philadelphia, PA
SXHS-ST	Networks
WGPR-FM	Detroit, MI
WLXC-FM	Columbia, SC
WAGH-FM	Columbus, GA
WMGL-FM	Charleston, SC
WKSP-FM	Augusta, GA
WLWH-FM	Savannah, GA
WAKB-FM	Augusta, GA
WTUG-FM	Tuscaloosa, AL
KOKY-FM	Little Rock, AR
KMEZ-FM	New Orleans, LA
KQXL-FM	Baton Rouge, LA
WMPZ-FM	Chattanooga, TN
WVMG-FM	Montgomery, AL
WKXI-FM	Jackson, MS
WYLD-FM	New Orleans, LA
KDKS-FM	Shreveport, LA
MUSIC CHOICE	R&B



CLICK HERE TO SEE LIVE PERFORMANCE
WWW.PENDULUMRECORDS.BIZ

Warm Regards,

Ruben

Ruben Rodriguez Entertainment, Inc.

4ever Michael Jackson

Radio's Best Friend ®

CEO & Founder, Ruben Rodriguez

96 Linwood Plaza #354

Fort Lee, NJ 07024

Tel: 201-363-1461 X 201

Fax: 201-592-7970

Email: ruben@rubenrodriguezentertainment.net

RRE Website: www.rubenrodriguezentertainment.net

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Morano, Stephanie J.

From: XAVIER@rubenrodriguezentertainment.net [mailto:XAVIER@rubenrodriguezentertainment.net]

Sent: Thursday, September 29, 2011 12:42 PM

To: Mecca (MC-EX)

Cc: Ruben@rubenrodriguezentertainment.net

Subject: Chris Walker #2 Most Added @ UAC " EVERYDAY WOMAN " (Pendulum)

Dear Mecca,

Thank you for the support... Just forward me a quote and I'll feature you on the next email!

" Chris Walker hits the spot with this grown-n-sexy groove Everyday Woman "

Traci LaTrelle | WHUR 96.3 FM Music Director | WASHINGTON DC | 202.806.3551

" Everyday Woman is the joint!! Run That! "

Terrence Bibb Program Director – WLVH & WSOK



The Clear Choice
CLEAR CHANNEL SAVANNAH

WAEV • WLVH • WQBT • WSOK • WTKS • WYKZ

**20 ADDS FIRST WEEK!
#2 Most Added @ UAC**

THE BRAND NEW SINGLE FROM

CHRIS WALKER EVERYDAY WOMAN

ADDED@

SIRIUSXM

KJLH Los Angeles

WSRB Chicago

WHUR Washington D.C.

WBAV Charlotte, NC

WXST Chareston, SC

KOKY Little Rock, AR

WLXC Columbia, SC

MUSIC CHOICE

AND MORE>>>

VISIT ONLINE@ chriswalkermusic.com

WDAS Philadelphia

WGPR Detroit

WMPZ Shreveport, LA

WYLD New Orleans

WAKB Augusta, GA

WKSP Augusta, GA

WVBE Roanoke, VA

WKXI Jackson, MS

WWMG Montgomery, AL

WAGH Columbus, GA

WTUG Tuscaloosa, AL



Warm Regards
Xavier Rodriguez

Ruben Rodriguez Entertainment, Inc.

Radio's Best Friend ®

4 Ever Michael Jackson

CEO & Founder, Ruben Rodriguez

96 Linwood Plaza #354

Fort Lee, NJ 07024

Tel: 201-363-1461

Fax: 201-592-7970

Email: Xavier@rubenrodriguezentertainment.net

RRE Website: www.rubenrodriguezentertainment.net

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Morano, Stephanie J.

From: Myron Ruffin [<mailto:unlimitedwealthent@gmail.com>]

Sent: Tuesday, October 11, 2011 12:57 PM

To: undisclosed-recipients

Subject: PLEASE VIEW: Goapele Tour Flyer

Stations that have already hit the "Play" button on Goapele's single
(<http://www.youtube.com/watch?v=kRn2DAggPEE>):

VH1 Soul

KMEL/ San Francisco

KBLX/ San Francisco

KJLH/ Los Angeles

KHYL/ Sacramento

WBTJ/ Richmond

WKKV/ Millwaukee

WUFO/ Buffalo

KAZI/ Austin

WVKX/ Macon

Sirius XM Heart & Soul

Sirius XM Shade 45

Music Choice R&B Soul

GOAPELE

BREAK OF DAWN

ALBUM RELEASE TOUR

10/24

MONDAY, OCT 24
BB KINGS
NEW YORK, NY

10/25

TUESDAY, OCT 25
SOUND STAGE
BALTIMORE, MD,

10/27

THURSDAY, OCT 27
BIRCHMERE
ALEXANDRIA, VA

11/8

TUESDAY, NOV 8
KEY CLUB
LOS ANGELES, CA

11/10-13

TH - SUN, NOV 10 - 13
JAZZ ALLEY
SEATTLE, WA

11/17-20

TH - SUN, NOV 17 - 20
YOSHI'S
OAKLAND, CA



BREAK OF DAWN

--

op miller

DECON

84 wooster st #503

ny, ny, 10012

tel: [212-343-8486](tel:212-343-8486) x20

fax: [212-343-3934](tel:212-343-3934)

<http://www.deconrecords.com/>

<http://www.nevernotfresh.com/>

@decon

MC 33

THIS SUNDAY 8/7C ON ABC

AMERICAN MUSIC AWARDS

PERFORMING + NOMINATED FOR FAVORITE BAND, DUO OR GROUP (POP/ROCK)



UPDATE 11/16/11

MAROOON 5

Moves Like Jagger

OVER 3 MILLION TRACKS SOLD!

**TOP 5 @ T40 • #12 @ RHYTHM
AC: 11*-12* (+54) #2 GAINER
OVER 130MM IN COMBINED AUDIENCE**

POWER ROTATIONS:

Z100 103x • **WXRK** 102x • **KIIS** 99x • **KAMP** 130x • **WKSC** 108x
WBBM 114x • **KYLD** 121x • **KMVQ** 113x

NOMINATED FOR

PEOPLE'S CHOICE AWARDS

2011 VICTORIA'S SECRET FASHION SHOW

PERFORMING Nov 29th

PERFORMED 11/5

SATURDAY NIGHT LIVE



MOVES LIKE JAGGER (DIGITAL SINGLE)

120,465 TW 3,263,920 RTD

HANDS ALL OVER 10,739 TW 738,534 RTD



WWW.MAROON5.COM • WWW.AMOCIONE.COM • WWW.TWITTER.COM/MAROON5 • WWW.MYSPACE.COM/MAROON5

MC 34



Music Choice Custom Study

April 1, 2004

Purpose of the Study

- Music Choice wanted a better understanding of their audience
- Help answer programming questions
- Ability to measure audience (ratings from credible source), sales tool
- Understand users vs. non-users of the service
- Other perceptual questions about Music Choice service to aid decision-making

Sample Frame

- Stratified sample
- DirecTV households
- Digital Cable households in the following markets...

Atlanta (Comcast)
Cleveland (Adelphia/Cox)
Dallas (Comcast)
Denver (Comcast)
El Paso (Time Warner)
Lincoln (Time Warner)
Los Angeles (Time Warner/Comcast)
Miami (Comcast)
Nashville (Comcast)
New York City (Cablevision)
Oklahoma City (Cox)
Philadelphia (Comcast)

Phoenix (Cox)
Providence (Cox)
Richmond (Comcast)
San Diego (Cox)
Seattle (Comcast)
Syracuse (Time Warner)

Calling

- Fielded for approximately four weeks (January 8, 2004 – February 4, 2004)
- Calling spread out over all seven days of the week
- 29% response rate
- Completed interviews on target with ratio of DirecTV (36%) to Digital Cable (64%) households

What did we ask?

- Awareness/name recognition of Music Choice from person who answered the phone (residents 12+)
- Household usage of Music Choice
 - Users – used service in past month
 - Non-users – used in past year or never used
- If used within the last month, attempted to speak with primary user of Music Choice
- Demographic info (age, gender, race/ethnicity, education, hh income)

What did we ask?

- Music Choice channels listened to in past week/month (Cume estimates)
- Enumerate the additional people who listened to Music Choice w/primary user in the past week – either within or outside of household (additional listeners)
- “Yesterday” listening (AQH estimates)
- Additional information on how they listen to music and use television
- Perceptual items related to the Music Choice service

Overall Results



Unaided Awareness of Music Choice

- 73% of households indicated awareness of commercial-free music audio channels
- Of these people, 15% could name Music Choice (11% of all households)

Usage of Music Choice Service

“I’d like you to think about the last time you or anyone in your household listened to any of the Music Choice channels. Was that...?”

	Overall	Digital	DirecTV
Within last week	35.0%	34.5%	36.0%
Within last month	15.6%	14.7%	17.4%
Within last year	14.0%	14.2%	13.5%
Never	34.9%	36.1%	32.7%
Don’t Know/Ref	0.5%	0.5%	0.4%

How many households is this?

Music Choice reports 32,833,995 households with service as of 1/04 (Digital and DirecTV)

Households with someone who has listened to Music Choice in past month:

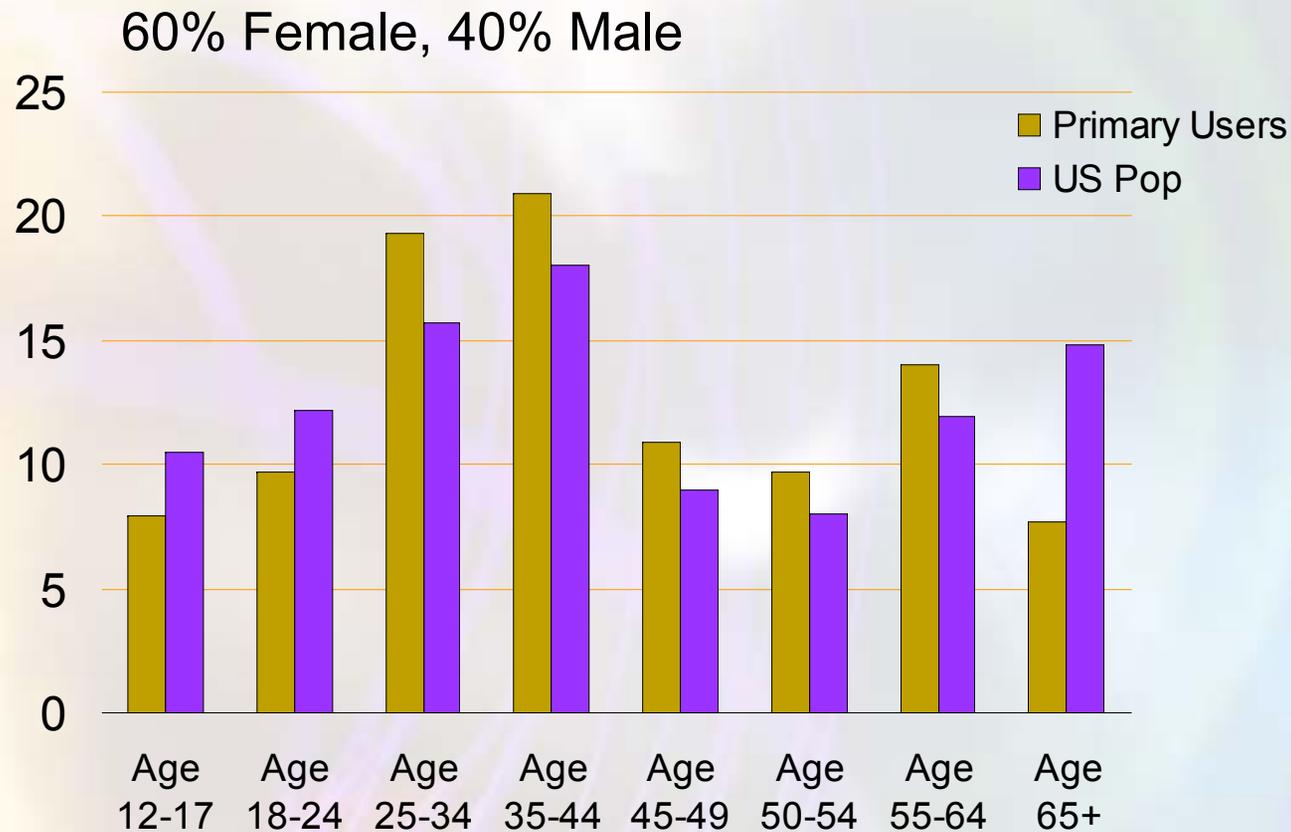
16,614,001

Households with someone who has listened to Music Choice in past week:

11,491,898



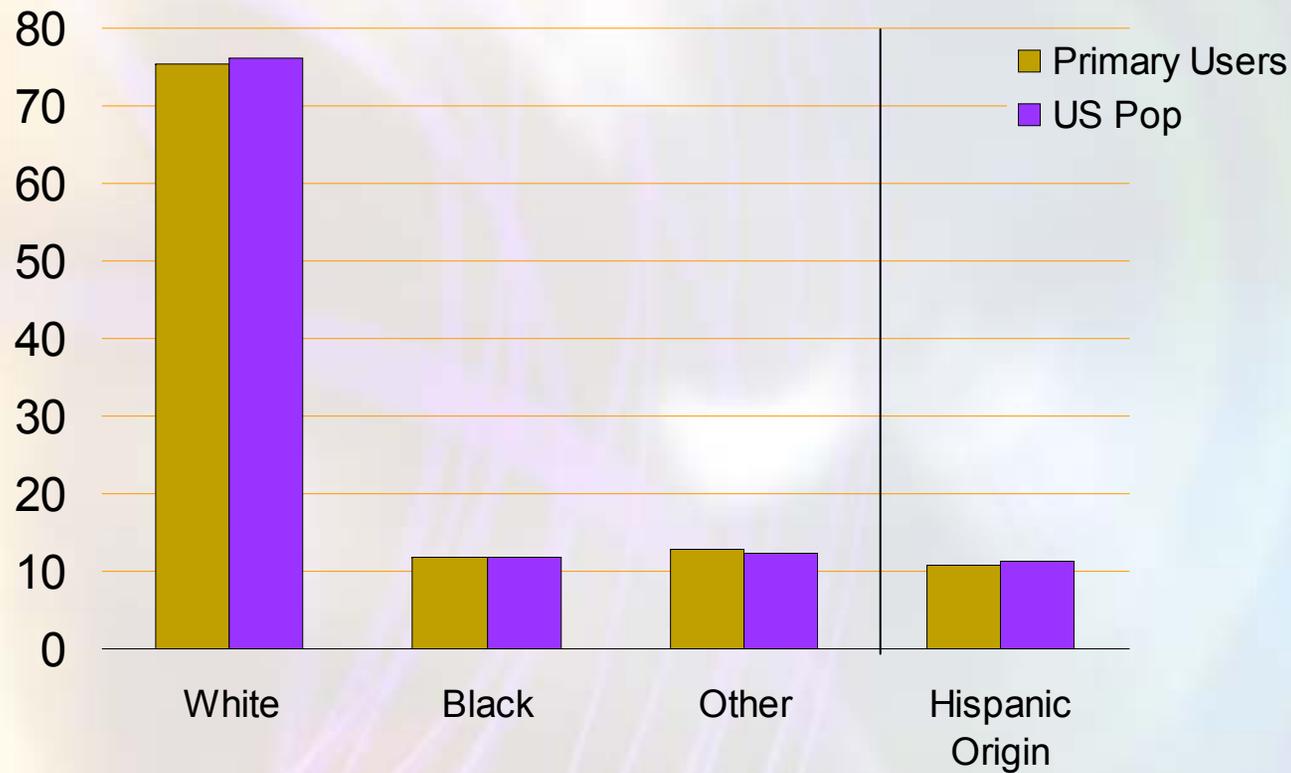
Primary Users Vs. Population Age Groups



*US Pop based on Census 2000 data updated and projected to 1/1/04 by Claritas, Inc.

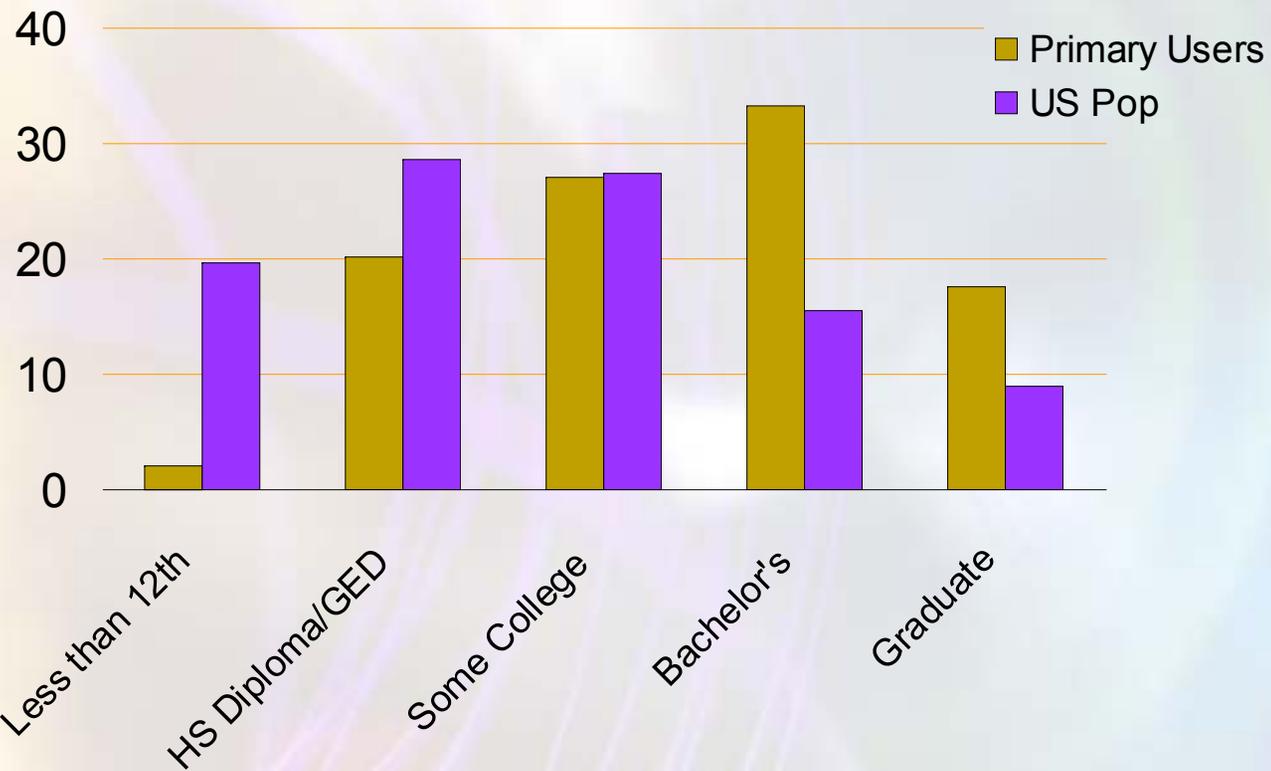


Primary Users Vs. Population Race/Ethnicity



*US Pop based on Census 2000 data

Primary Users Vs. Population Education



*US Pop based on Census 2000 data, Music Choice data based on Persons 25+ who answered question



Primary Users Vs. Population Income



*US Pop based on Census 2000 data, Music Choice data based on Persons 12+ who answered question



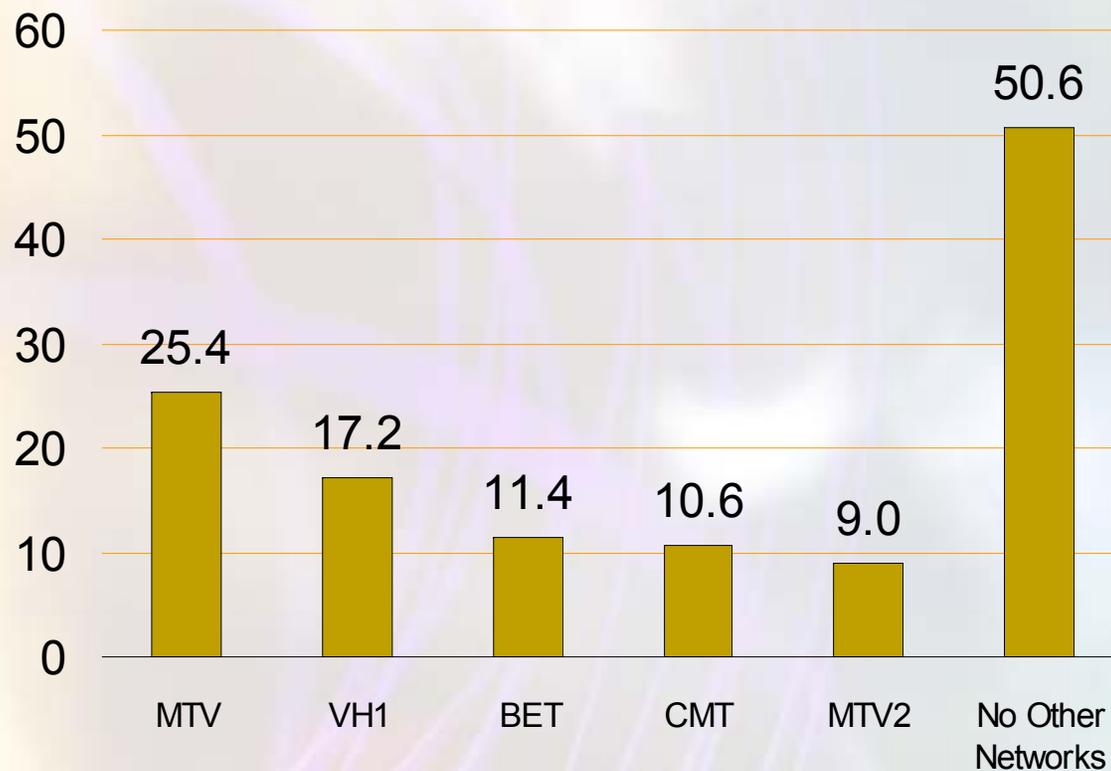
Primary Users:

- More likely to be in 25-44 demo group
- Race/ethnicity comparable to US population
- More highly educated
- Higher annual household income

Music Choice vs. Other Cable Networks



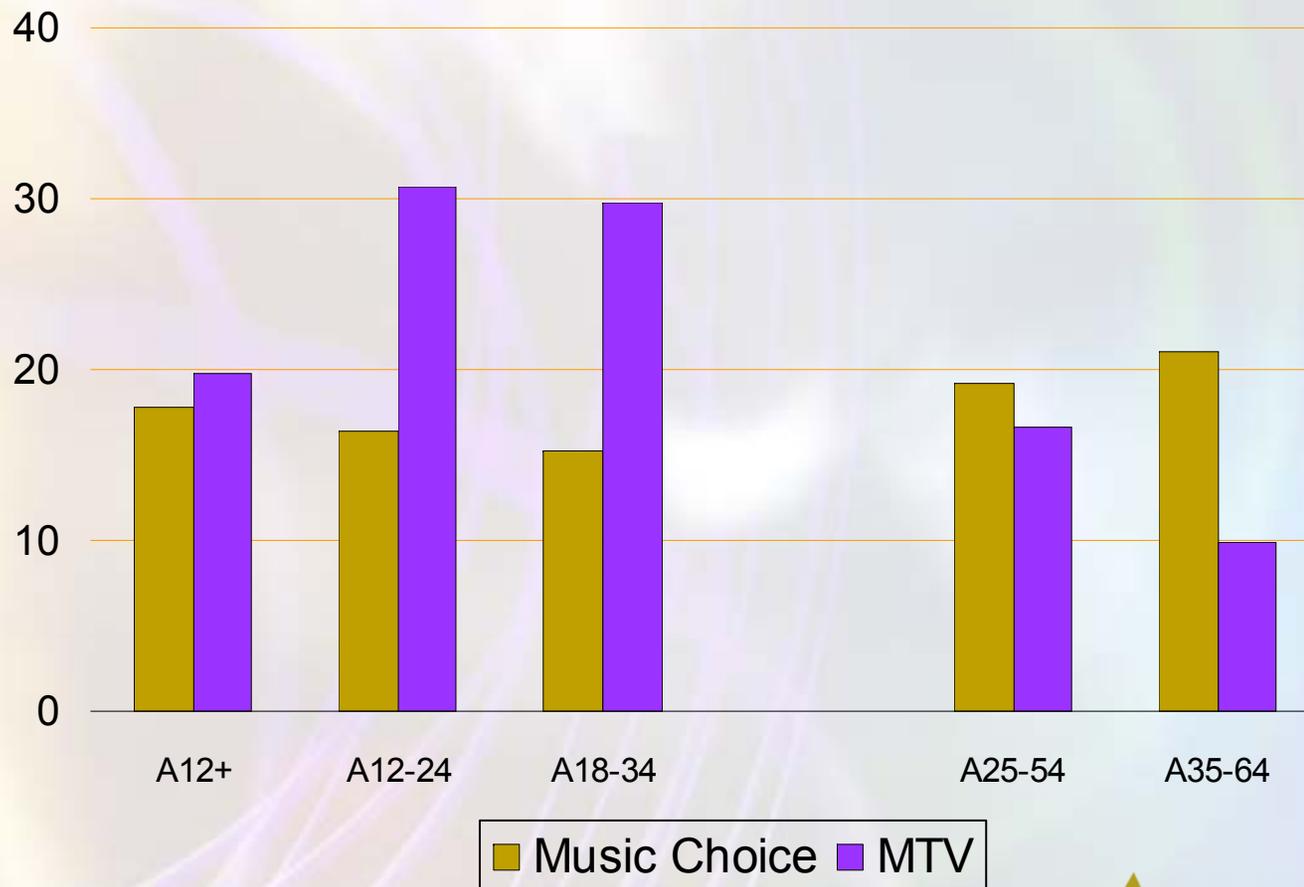
Other Cable Networks for Music



Younger demos more likely to turn to other networks.
Only 20% of 12-24 don't turn to any other network for music



Which Cable Network do you Turn to First for New Music?



Other Cable Networks Watched

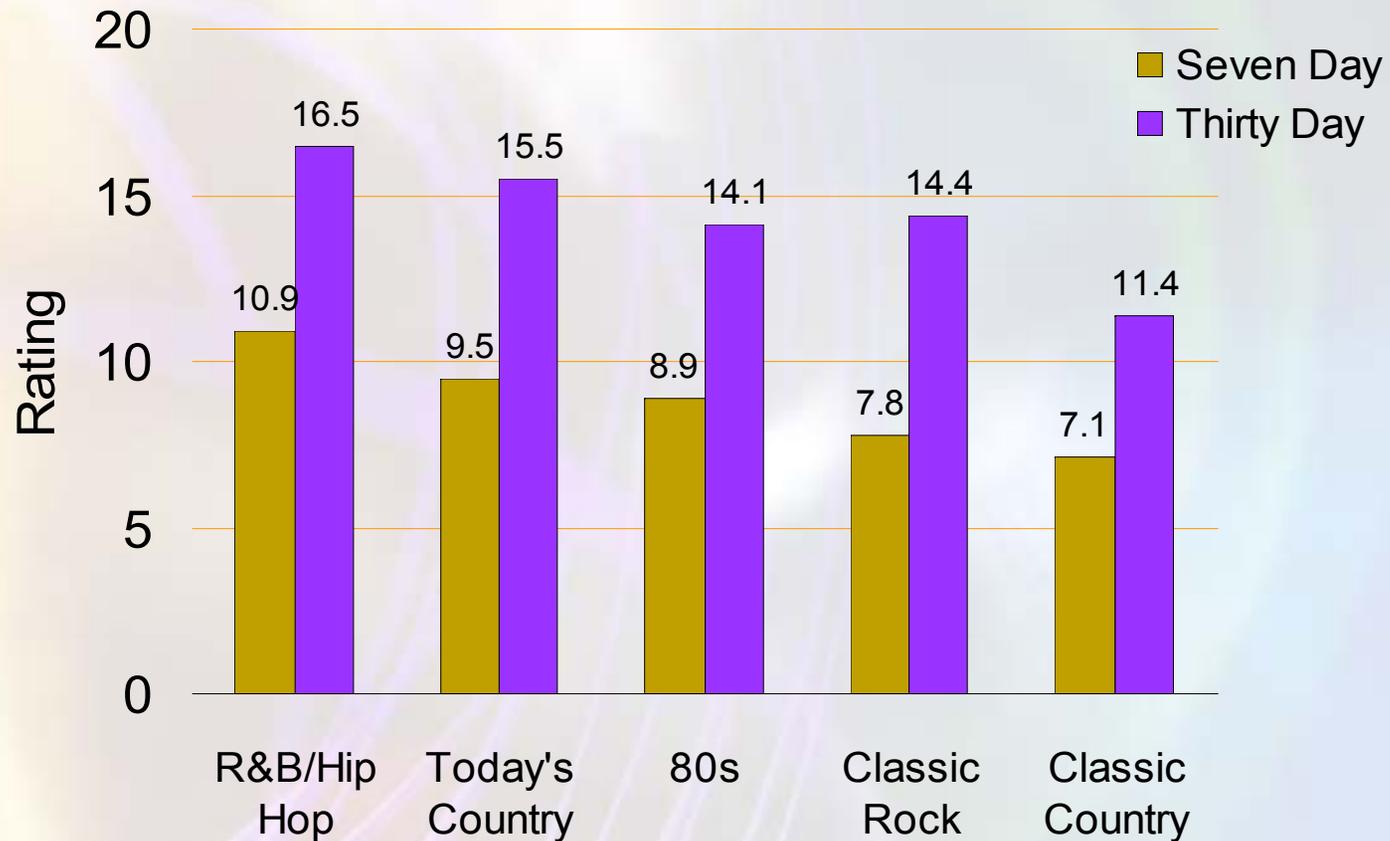
- HBOs (28%)
- Discovery Channel (20%)
- ESPN (16%)
- Lifetime (13%)
- TLC (12%)
- Fox News (11%)
- CNN (10%)
- The History Channel (10%)

Audience Estimates

Cume
AQH



Top Music Choice Cumes Persons 12+

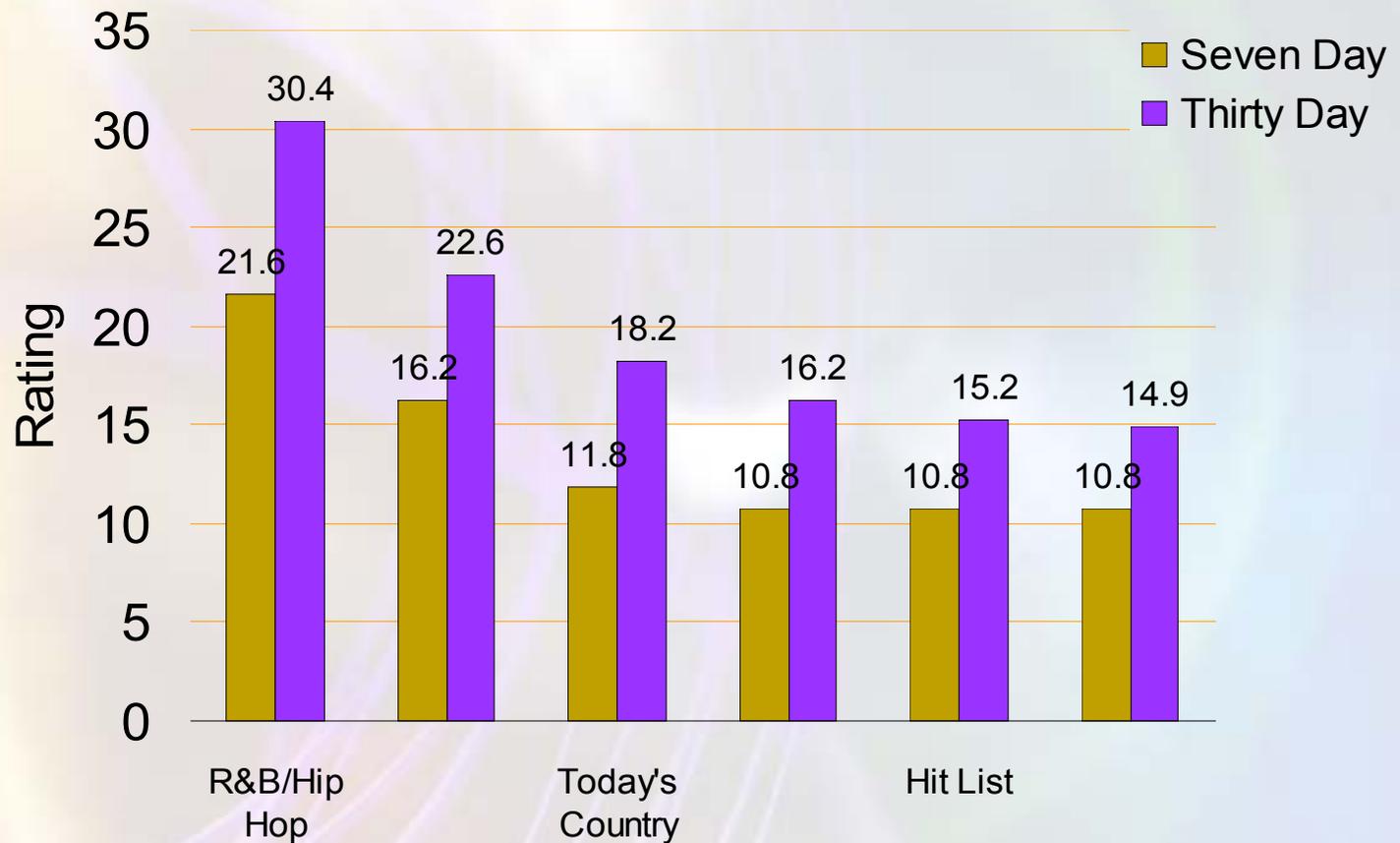


*Sounds of the Seasons #1 for 30-day Cume

**Cume estimates based on Primary users of Music Choice



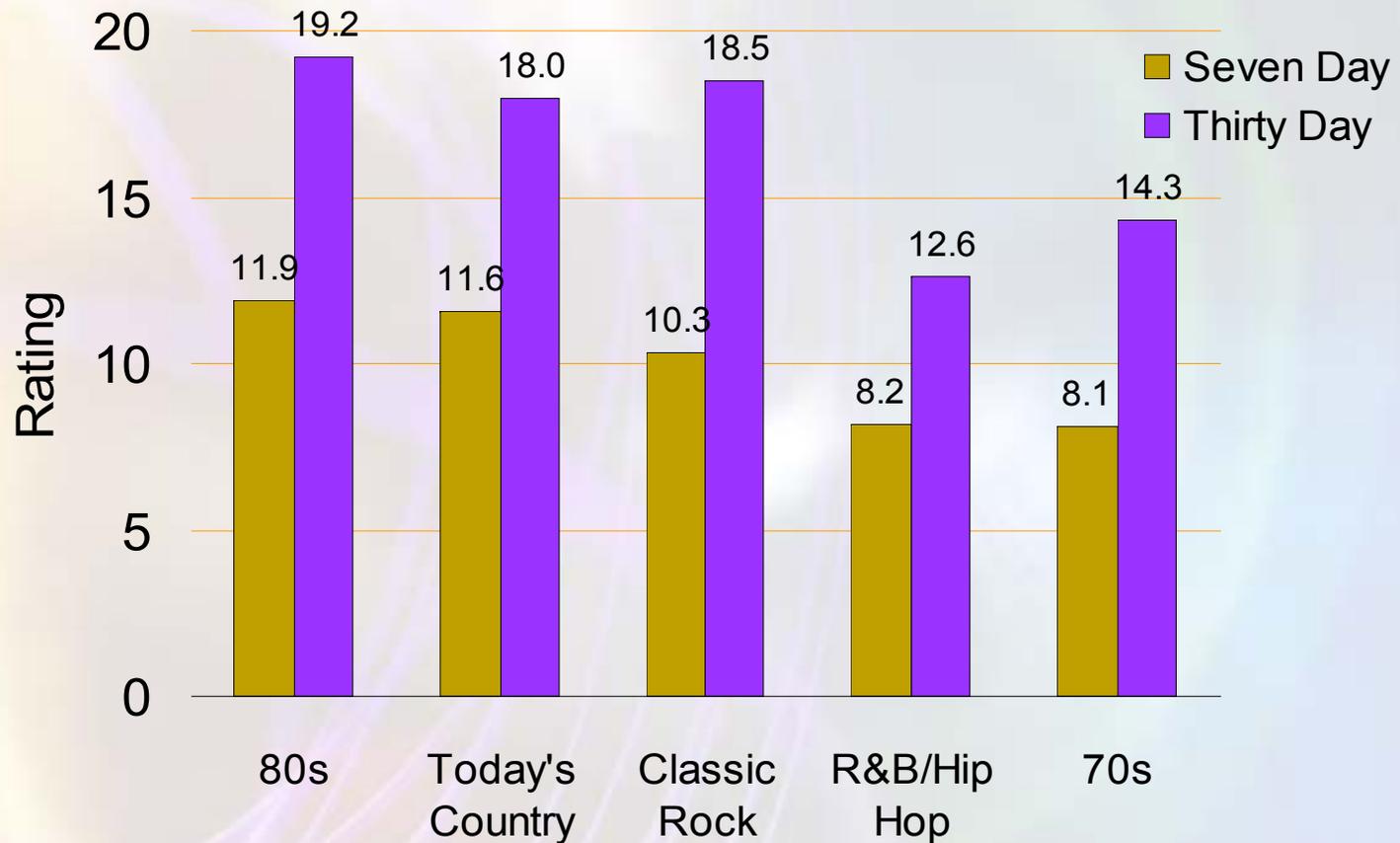
Top Music Choice Cumes Persons 18-34



*Cume estimates based on Primary users of Music Choice



Top Music Choice Cumes Persons 25-54



*Sounds of the Seasons #1 for 30-day Cume

**Cume estimates based on Primary users of Music Choice



Lowest Music Choice Cumes Persons 12+

- Latin Love Songs
- Showcase
- Americana
- Old School Rap
- Mexicana
- Opera

Channel Clusters

Channel clustering allows you to get to a larger estimate

Example:

Sample cluster that represents the adult 25-54 demo:

Today's Country

Classic Country

Classic Rock

80s

70s

Solid Gold Oldies

Classic R&B

Progressive/Adult Alternative

30-Day Cume Rating for Custom Cluster for 25-54 is 56.0



AQH Ratings

Average-Quarter-Hour Rating: In a given 15-minute period, what percentage of Primary users are listening to Music Choice

AQH is captured by asking for a 30 hour period of listening

Three ten hour time segments

- Midnight-10AM
- 10AM-8PM
- 8PM-6AM

What time did you listen and what Music Choice channels did you listen to?

All listening is normalized to Eastern Time Zone



AQH Ratings by Daypart

	12+	18-34	25-54
Mon-Sun 6A-MID	4.9	3.5	4.8
M-F 6A-10A	2.5	1.1	2.7
M-F 10A-3P	5.1	3.6	4.1
M-F 3P-7P	6.8	3.8	5.7
M-F 7P-MID	5.3	3.0	5.0
M-F MID-6A	2.0	1.2	1.9

Based on Primary users of Music Choice within past week.



AQH Ratings by Daypart

	12+	18-34	25-54
Mon-Sun 6A-MID	4.9	3.5	4.8
Wknd 6A-10A	3.2	0.5	3.7
Wknd 10A-3P	5.8	5.6	6.4
Wknd 3P-7P	5.7	3.8	6.5
Wknd 7P-MID	6.1	10.5	6.6
Wknd MID-6A	2.5	3.3	1.1

Based on Primary users of Music Choice within past week.



Additional Listeners

Early in the interview, we establish additional listeners

During the AQH section of the interview, we ask about specific additional listeners

For each listening episode, we asked if any of the additional listeners were also listening at that time

- Credit given for specific additional listening

Additional Listeners

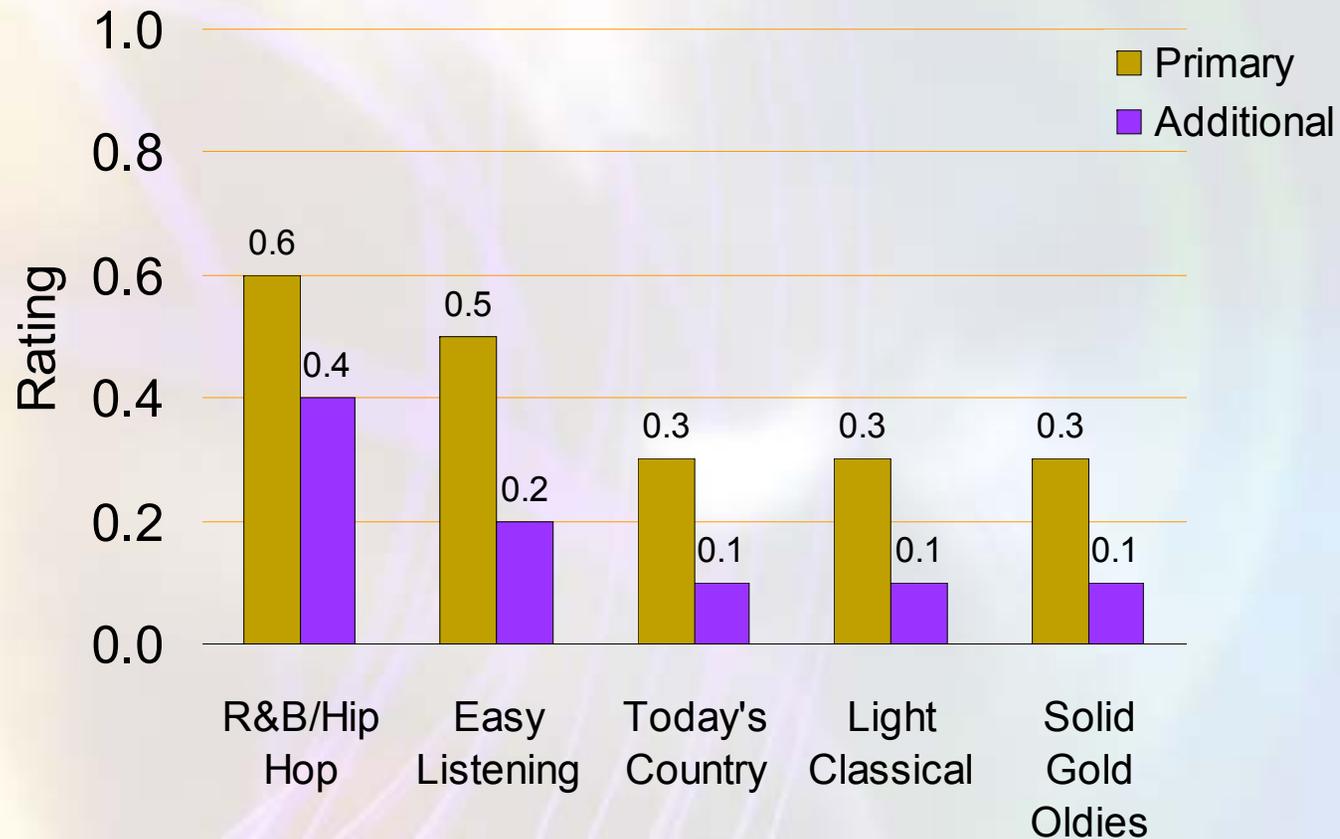
Mon-Sun 6A-MID, Persons 12+:

- Primary Listener AQH = 4.9
- Additional Listener AQH = 2.3

Approximately 47% as much listening...

- They are not the Primary Listener
- May or may not be household member
- Only picking up listening that occurs WITH Primary Listener

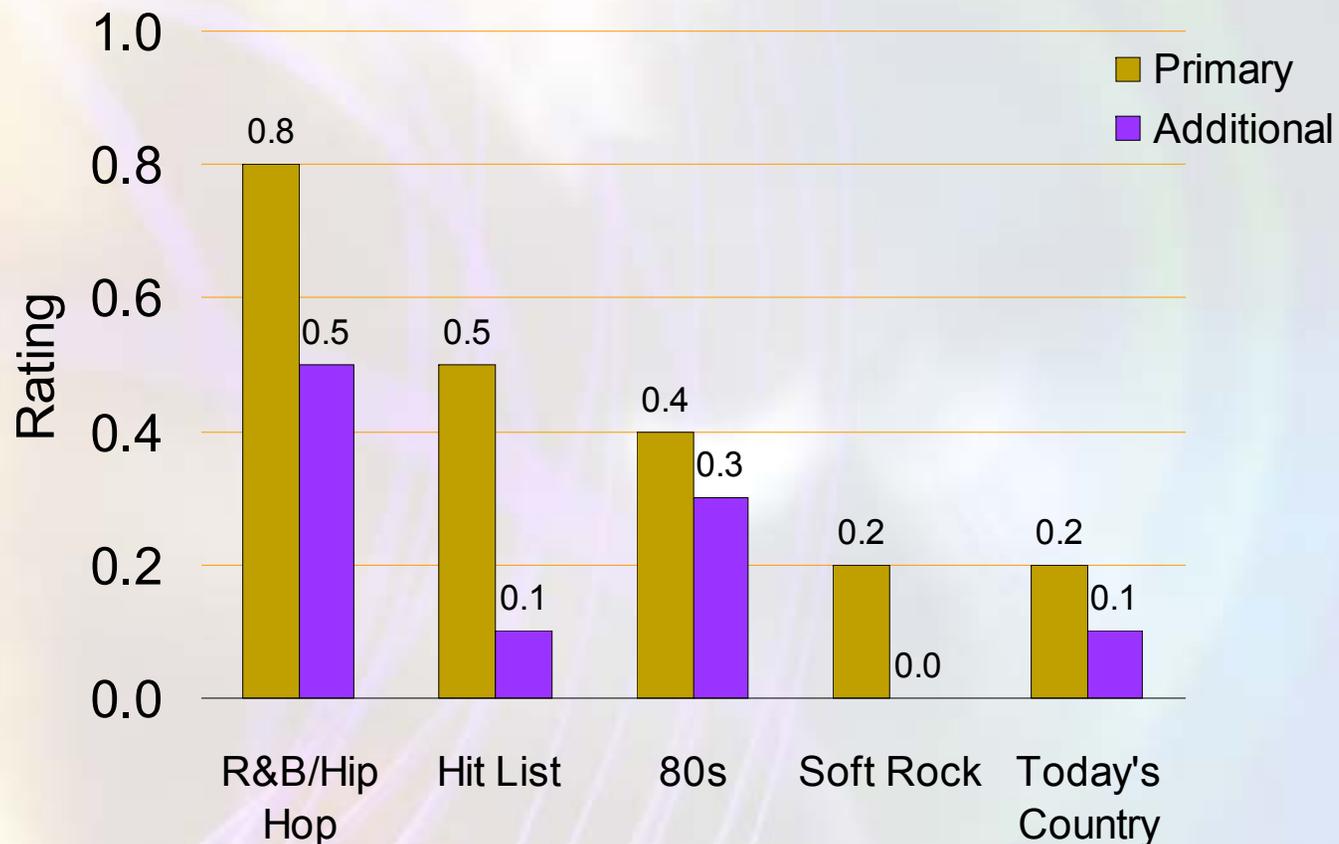
Top Music Choice AQH Ratings Persons 12+



Mon-Sun, 6AM-MID, Primary and Additional Users of Music Choice within last week.



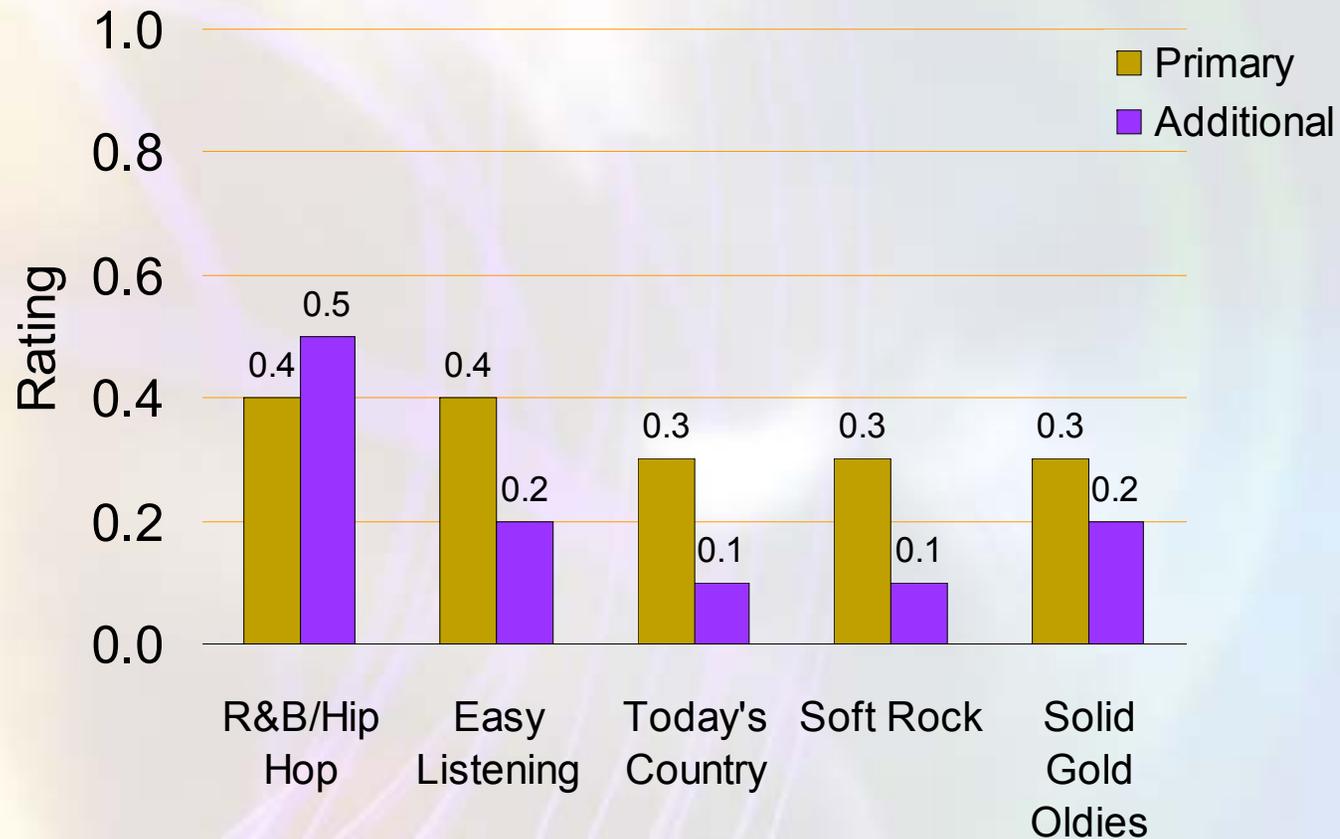
Top Music Choice AQH Ratings Persons 18-34



Mon-Sun, 6AM-MID, Primary and Additional Users of Music Choice within last week.



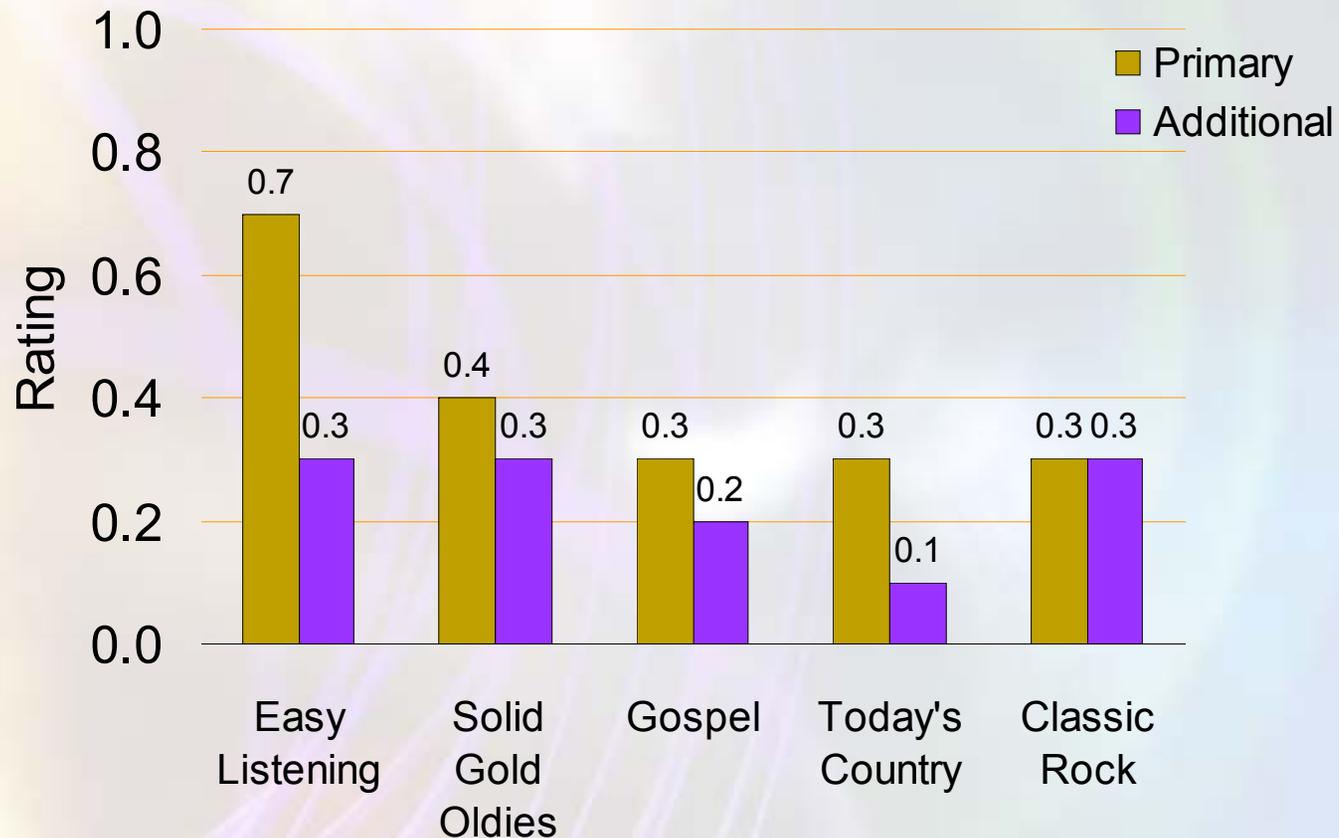
Top Music Choice AQH Ratings Persons 25-54



Mon-Sun, 6AM-MID, Primary and Additional Users of Music Choice within last week.



Top Music Choice AQH Ratings Persons 35-64



Mon-Sun, 6AM-MID, Primary and Additional Users of Music Choice within last week.



Lowest Music Choice AQH Ratings Persons 12+

- Latin Love Songs
- Musica Latina
- Show Tunes
- Rock en Espanol
- Old School Rap

Mon-Sun, 6AM-MID, Primary Users of Music Choice within last week.



Total AQH Persons by Demo

Based on Mon-Sun 6A-MID

Primary Persons + Additional Persons

12+:	754,045
18-34:	182,874
25-54:	472,297
35-64:	419,594

Total AQH Persons by Demo

12+ for Other Dayparts

Primary Persons + Additional Persons

M-F 10A-3P: 810,183

M-F 3P-7P: 968,102

M-F 7P-MID : 846,184

Wknd 10A-3P: 1,148,795

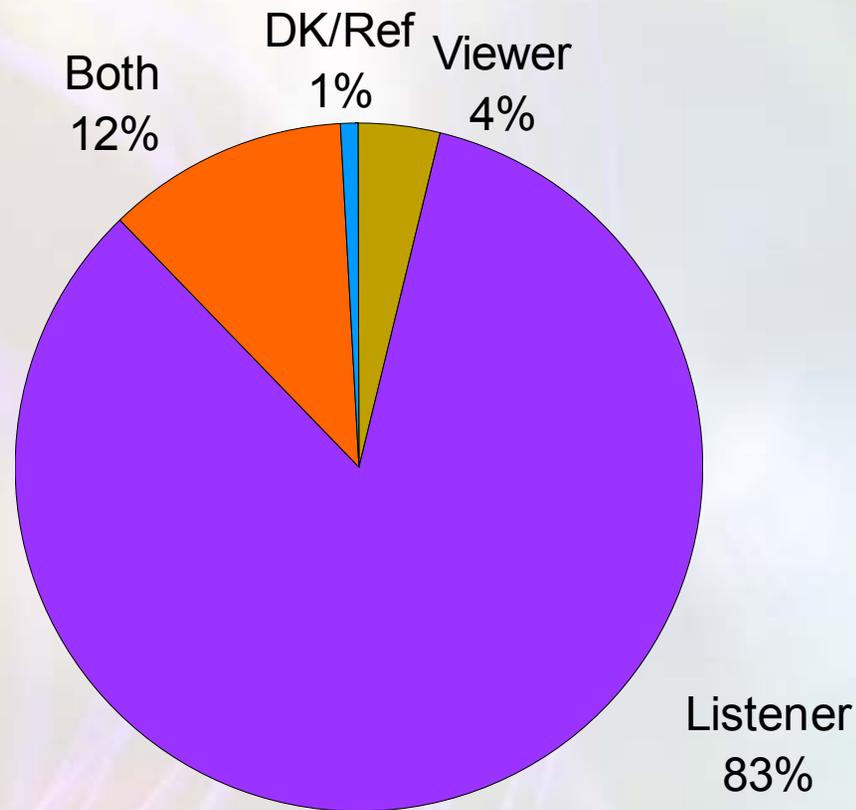
Wknd 3P-7P: 1,130,737

Wknd 7P-MID : 1,222,405

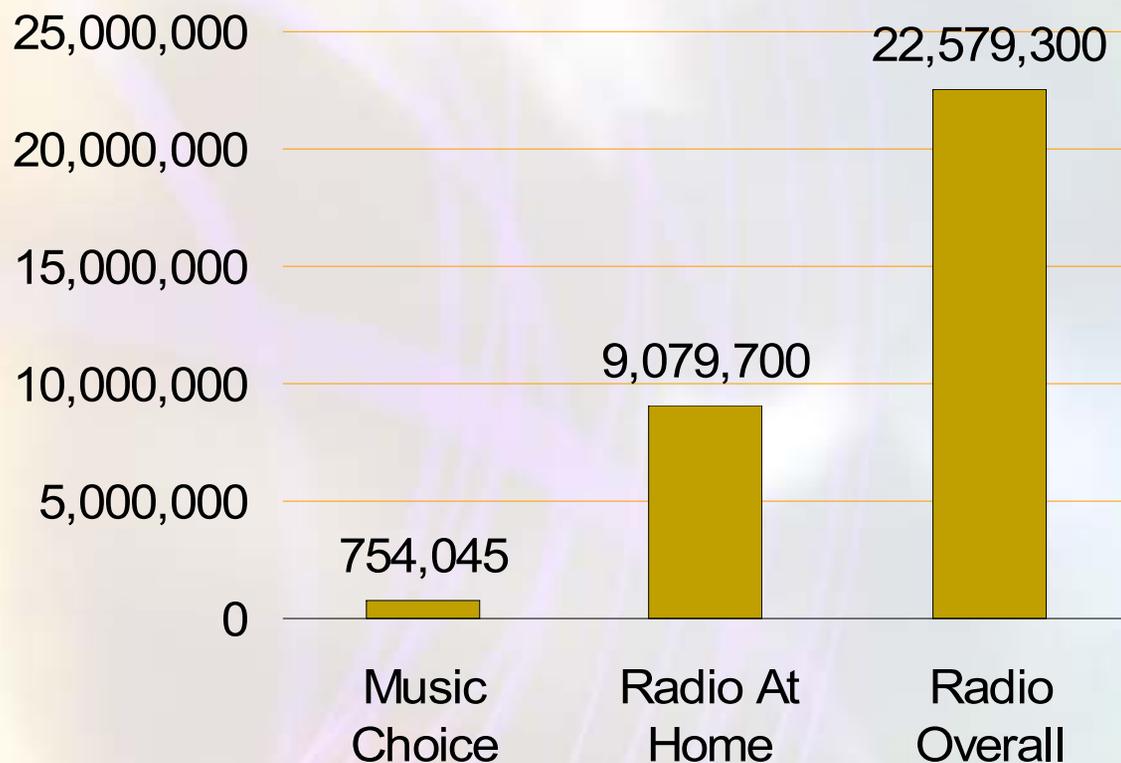
Music Choice vs. Radio



Viewer or Listener of Music Choice



Music Choice vs. Radio AQH Persons

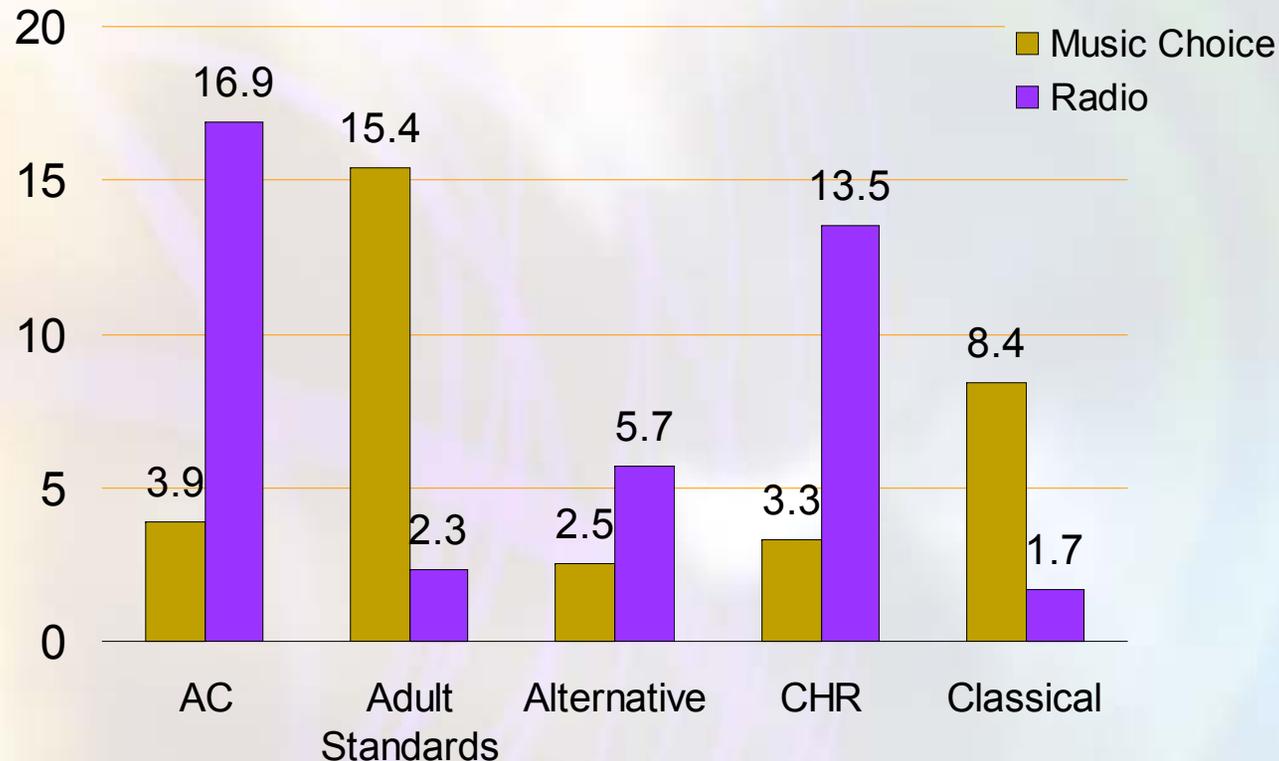


*Radio data based on Arbitron Fall 2003 Survey

**Music Choice data based on Primary and Additional Listeners combined



Music Choice vs. Radio AQH Shares by Format Groups



AC: Soft Rock

Adult Standards: Singers & Standards, Big Band & Swing, Easy Listening, Show Tunes

Alternative: Alternative Rock, Progressive/Adult Alternative

CHR: Hit List

Classical: Classical Masterpieces, Light Classical, Opera

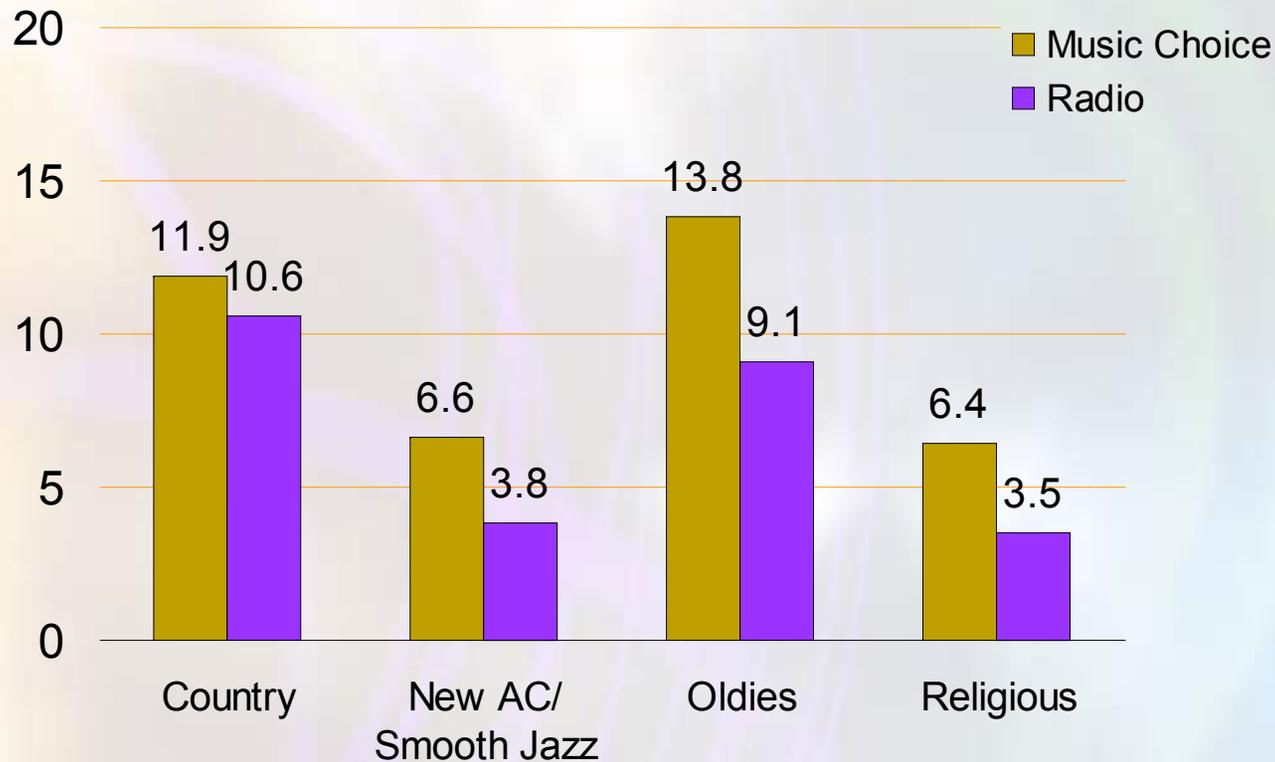
* Arbitron data based on Fall 2003 Survey

** Music Choice data based on Primary users of service



Music Choice vs. Radio

AQH Shares by Format Groups



Country: Today's Country, Classic Country, Americana, Bluegrass

New AC/Smooth Jazz: Smooth Jazz, Jazz, Soundscapes

Oldies: Disco, New Wave, 80s, 70s, Solid Gold Oldies, Party Favorites

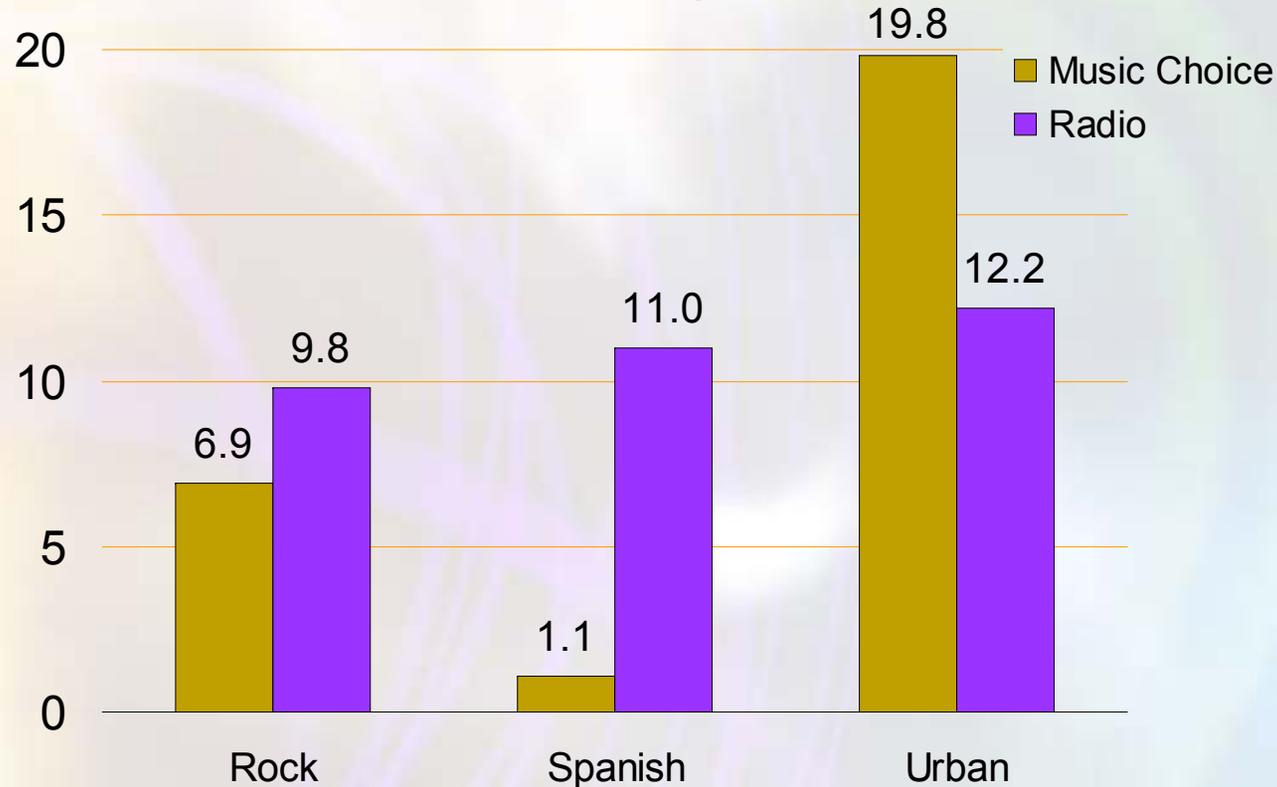
Religious: Contemporary Christian, Gospel

* Arbitron data based on Fall 2003 Survey

** Music Choice data based on Primary users of service



Music Choice vs. Radio AQH Shares by Format Groups



Rock: Classic Rock, Rock, Metal, Power Rock

Spanish: Musica Latina, Salsa y Merengue, Rock en Espanol, Latin Love Songs, Mexicana

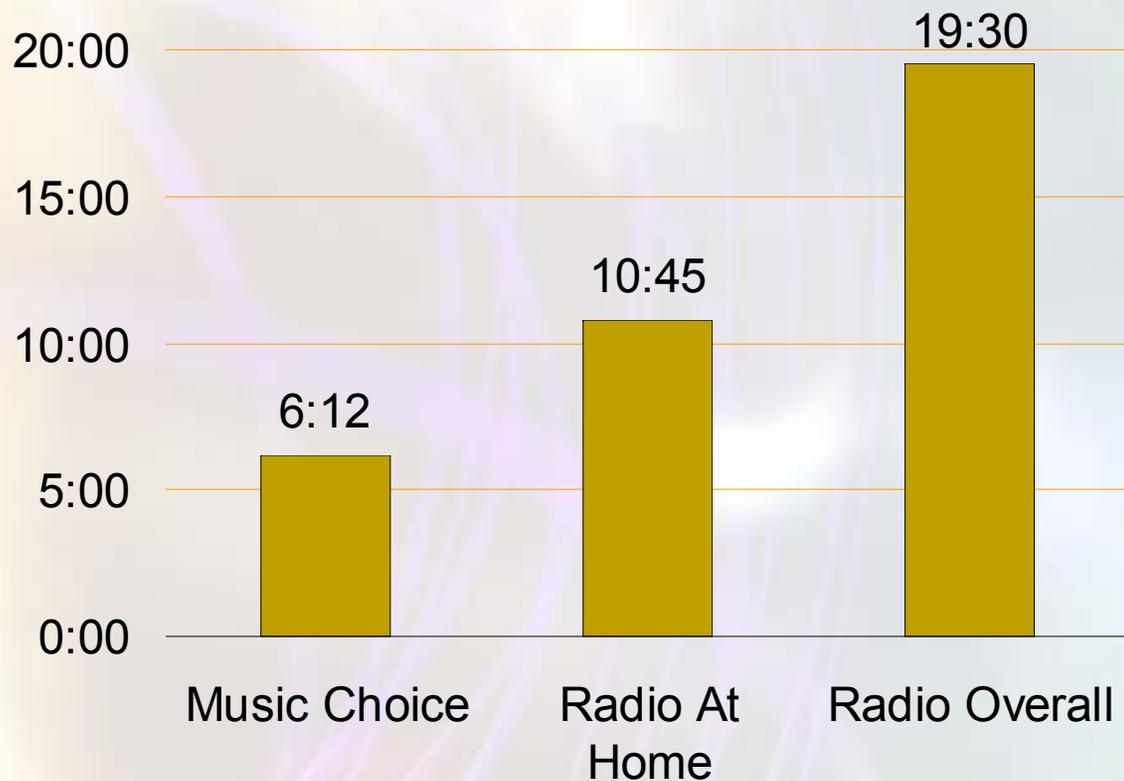
Urban: R&B and Hip Hop, Old School Rap, Rap, Classic R&B, Smooth R&B

* Arbitron data based on Fall 2003 Survey

** Music Choice data based on Primary users of service



Music Choice vs. Radio Time Spent Listening



*Radio data based on Arbitron Fall 2003 Survey

** Music Choice data based on Primary users of service



Music Choice Perceptuals



Do you ever look at the TV to see...

	Overall	Digital	DirectTV
Name of Song	84%	86%	81%
Name of Artist	85%	86%	83%
Artist Facts	61%	67%	46%
Album/CD Artwork	54%	57%	45%
Advertisements	18%	19%	16%

Do you ever look at the TV to see...

	Overall	12-24	18-34
Name of Song	84%	90%	87%
Name of Artist	85%	93%	91%
Artist Facts	61%	69%	61%
Album/CD Artwork	54%	70%	58%
Advertisements	18%	25%	19%

Older demographics less likely to look at TV screen

How often do you look at TV screen?

	Overall	Digital	DirectTV
At least a couple times per song	19%	22%	14%
Once per song	24%	24%	22%
Once every 15 min	13%	13%	13%
Only when I don't know song	22%	20%	26%
Rarely	19%	18%	20%
Never	2%	2%	3%

26% of 12-24 look at screen at least a couple times per song

Artist Facts

<u>Item</u>	<u>Avg.</u>
I think the artist facts that Music Choice puts on the screen are interesting	6.0*
It seems like I see the same artist facts over and over again	4.0*
The visual content on the screen makes the Music Choice service more enjoyable	4.7

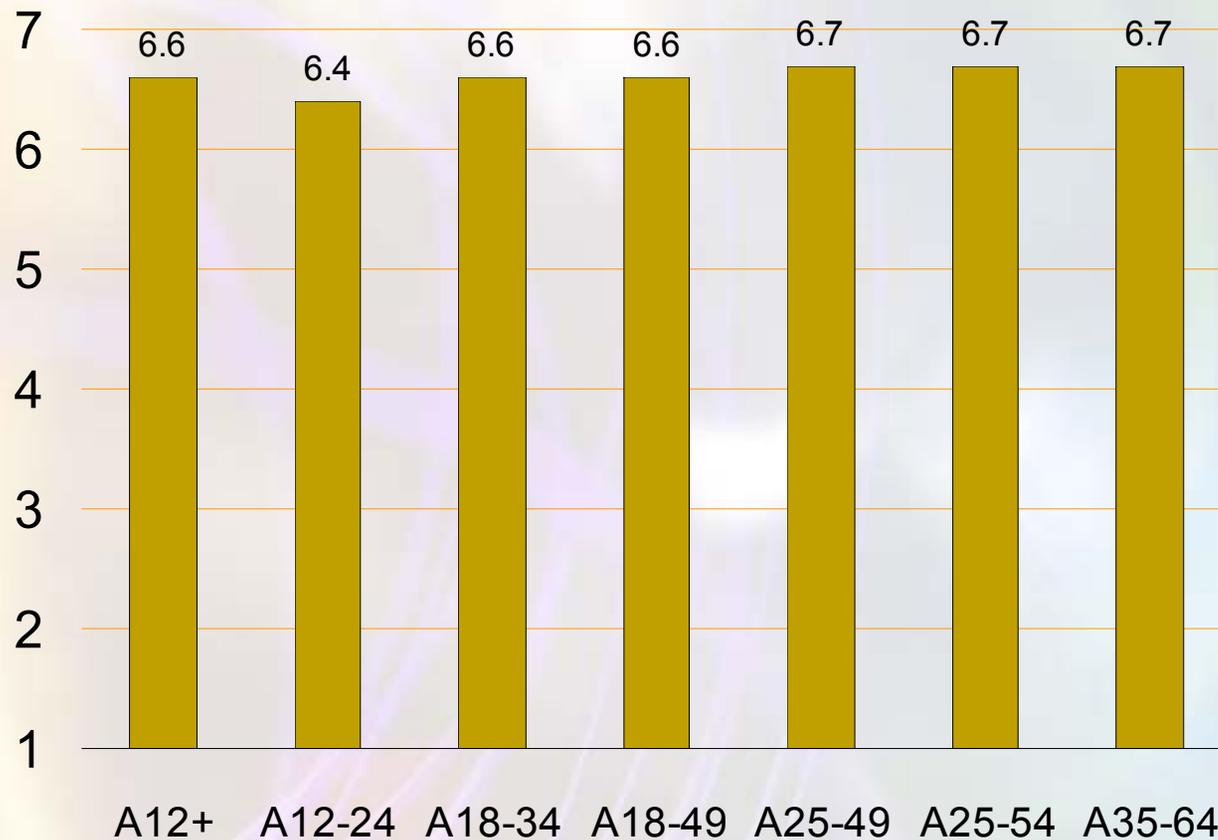
1 = Strongly Disagree

7 = Strongly Agree

*Based only on those who have seen artist facts

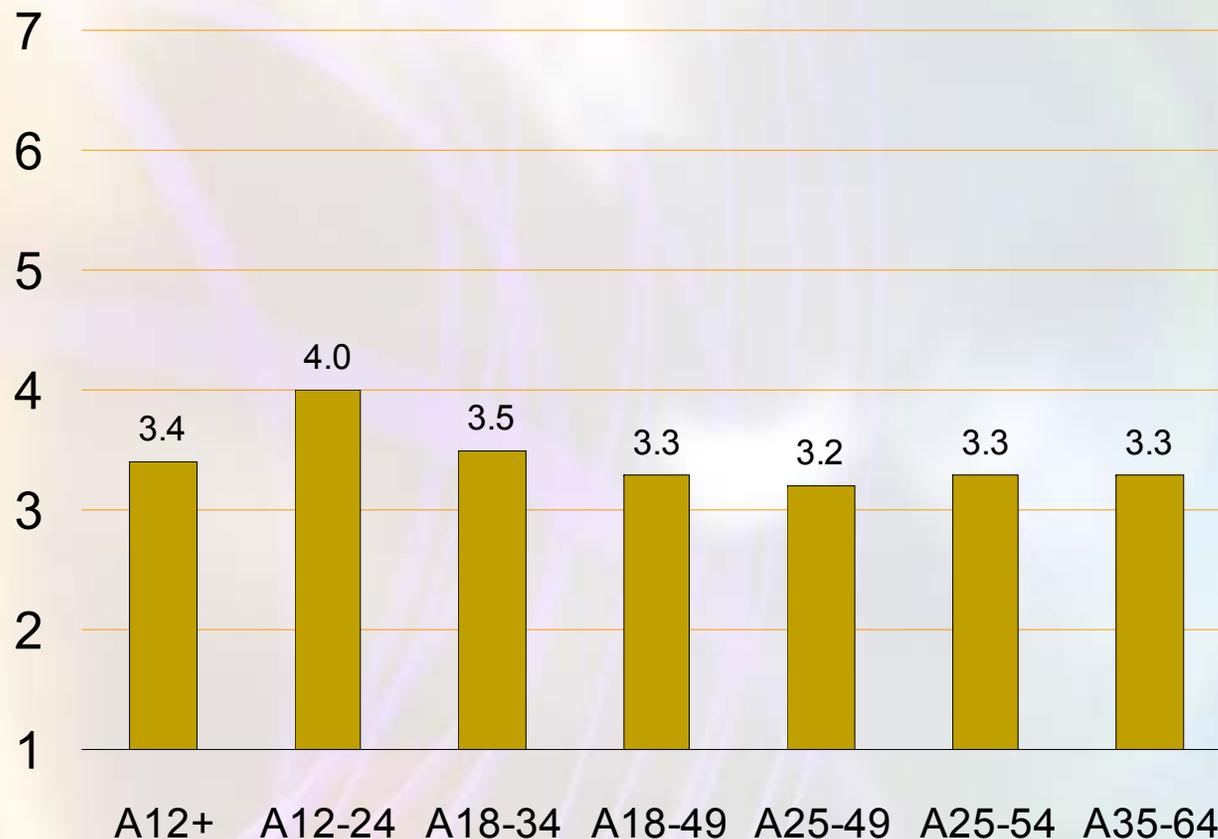


It's important to me that Music Choice doesn't interrupt the music with commercials



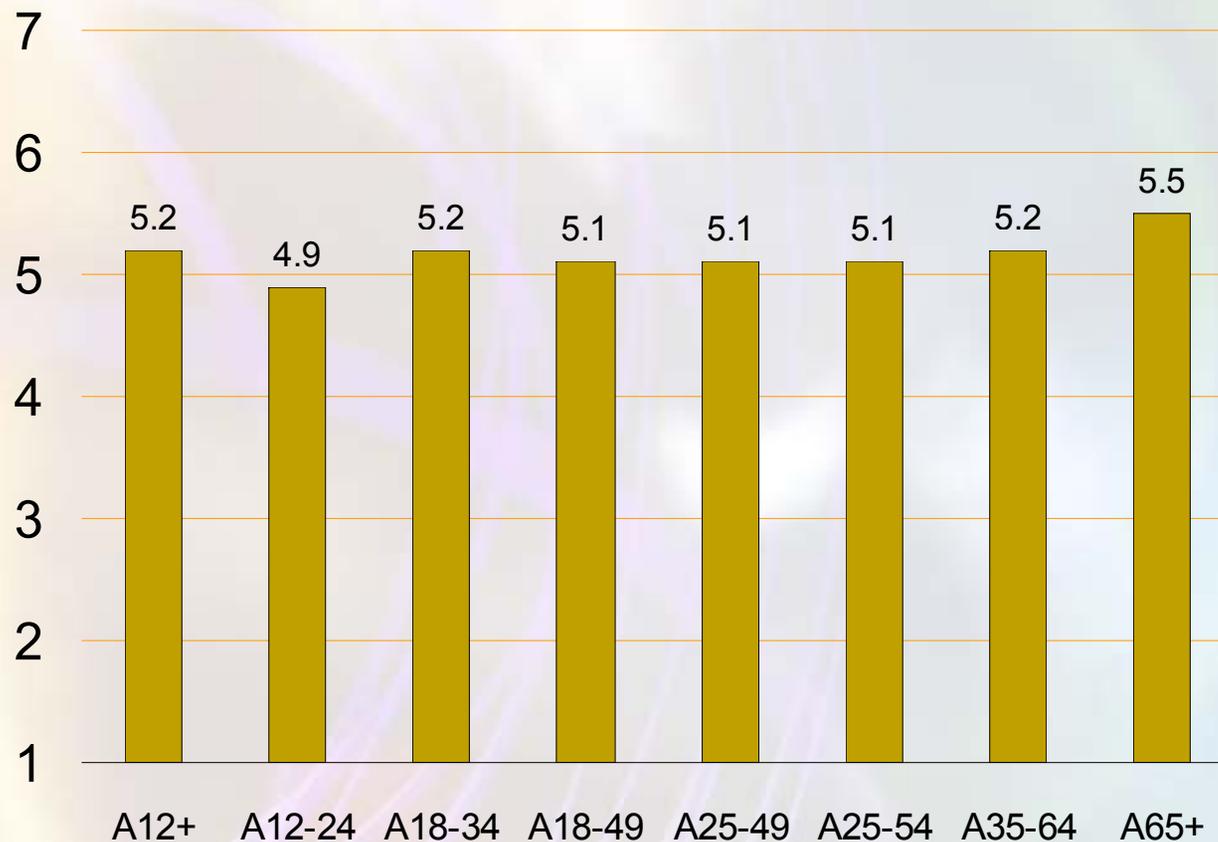
1 = Strongly Disagree
7 = Strongly Agree

I would not mind if there was an occasional announcement identifying the service or channel



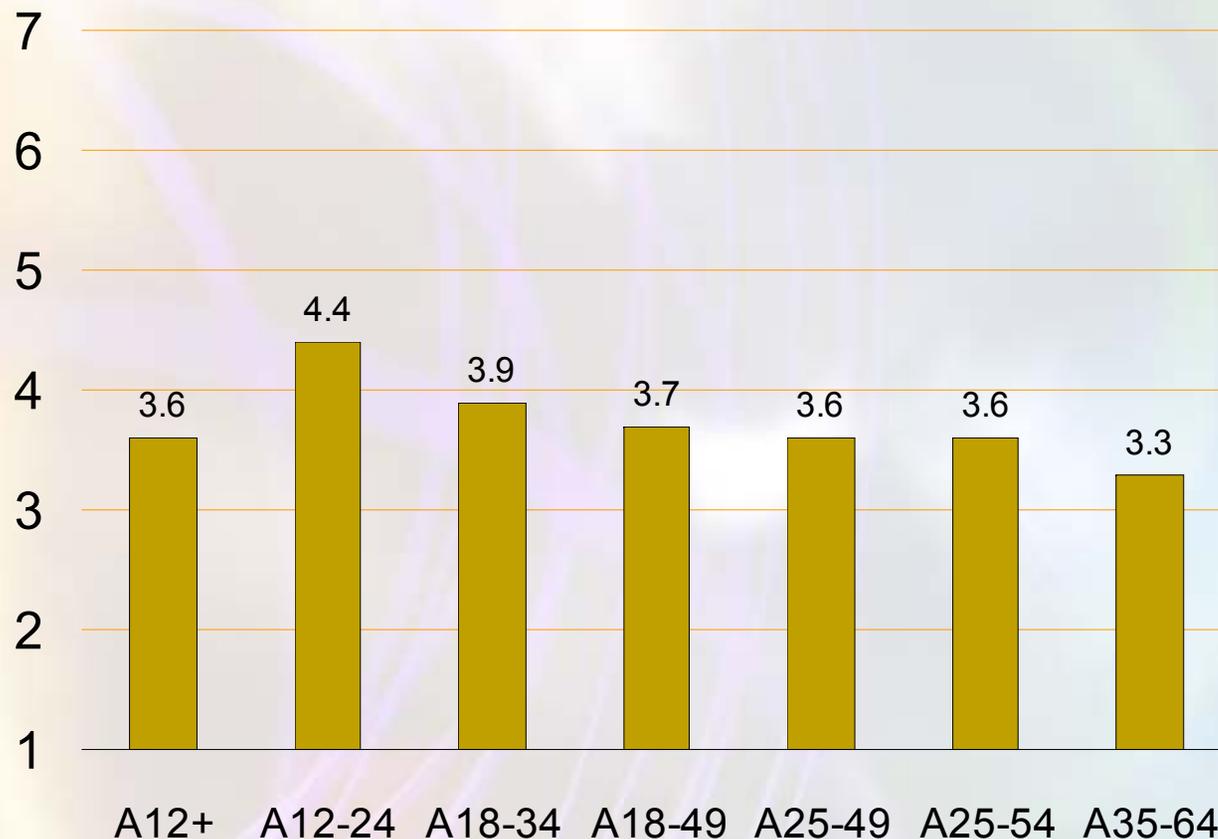
1 = Strongly Disagree
7 = Strongly Agree

If I want to listen to music at home, I am more likely to listen to Music Choice than to radio



1 = Strongly Disagree
7 = Strongly Agree

I would use the Music Choice service if it were available over the Internet (using high speed modem)



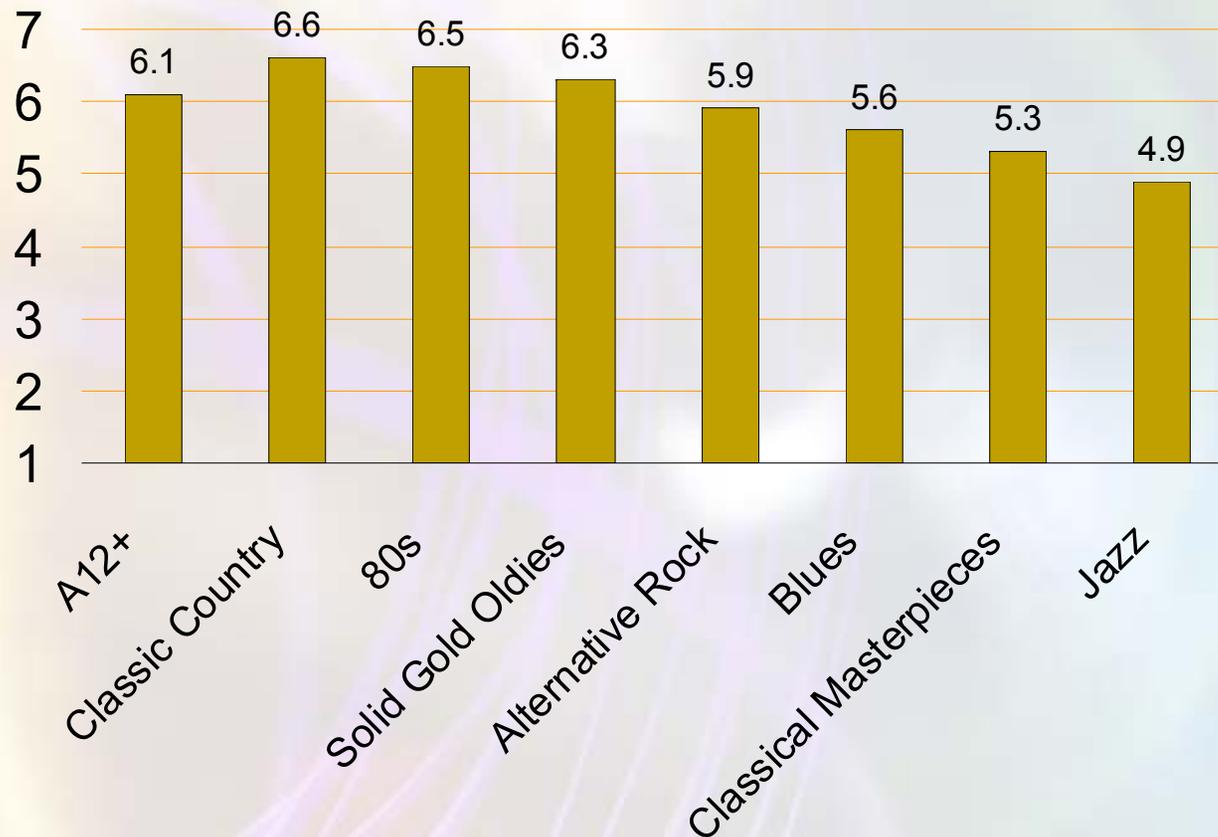
1 = Strongly Disagree
7 = Strongly Agree



Channel Information

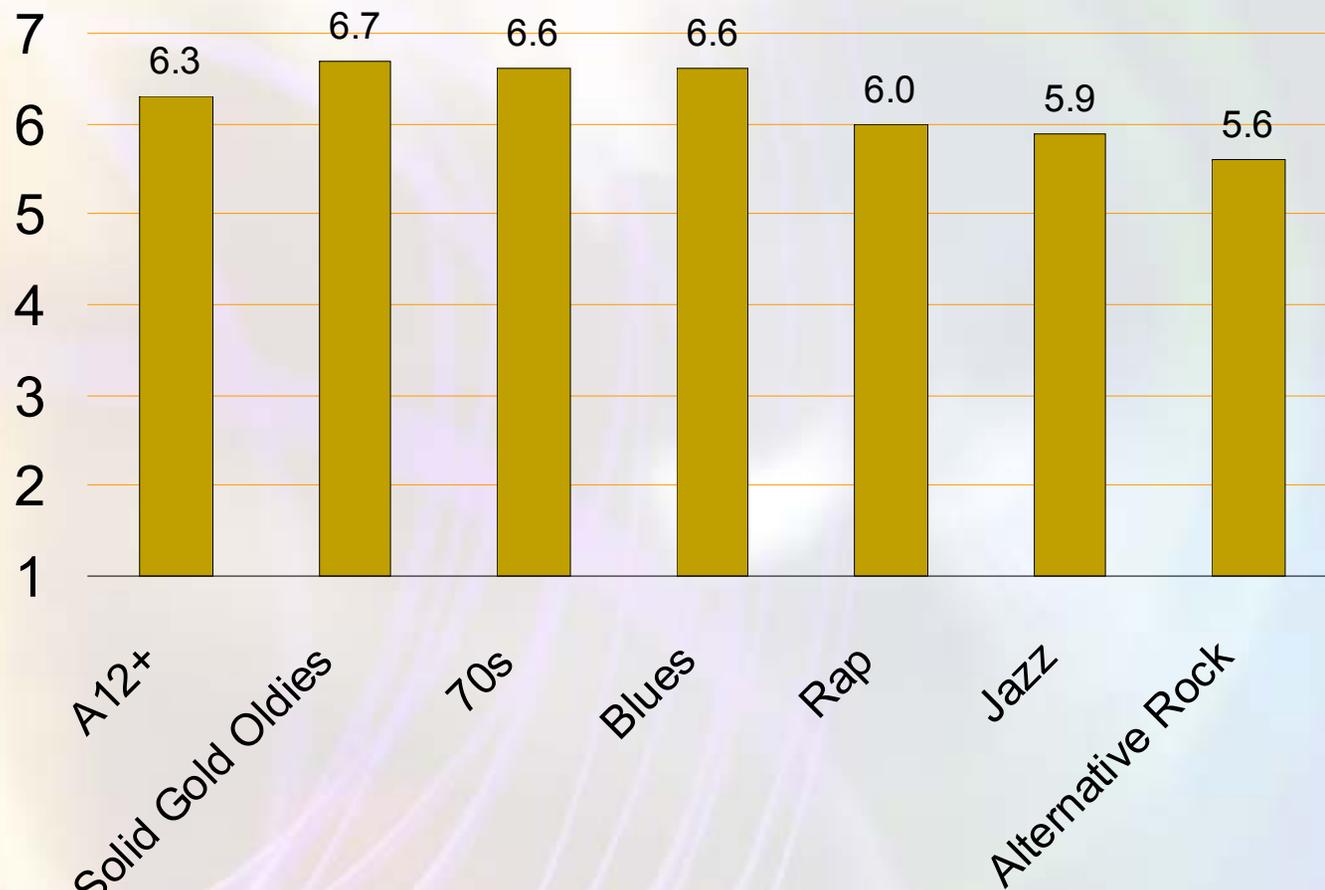


Plays music I am familiar with



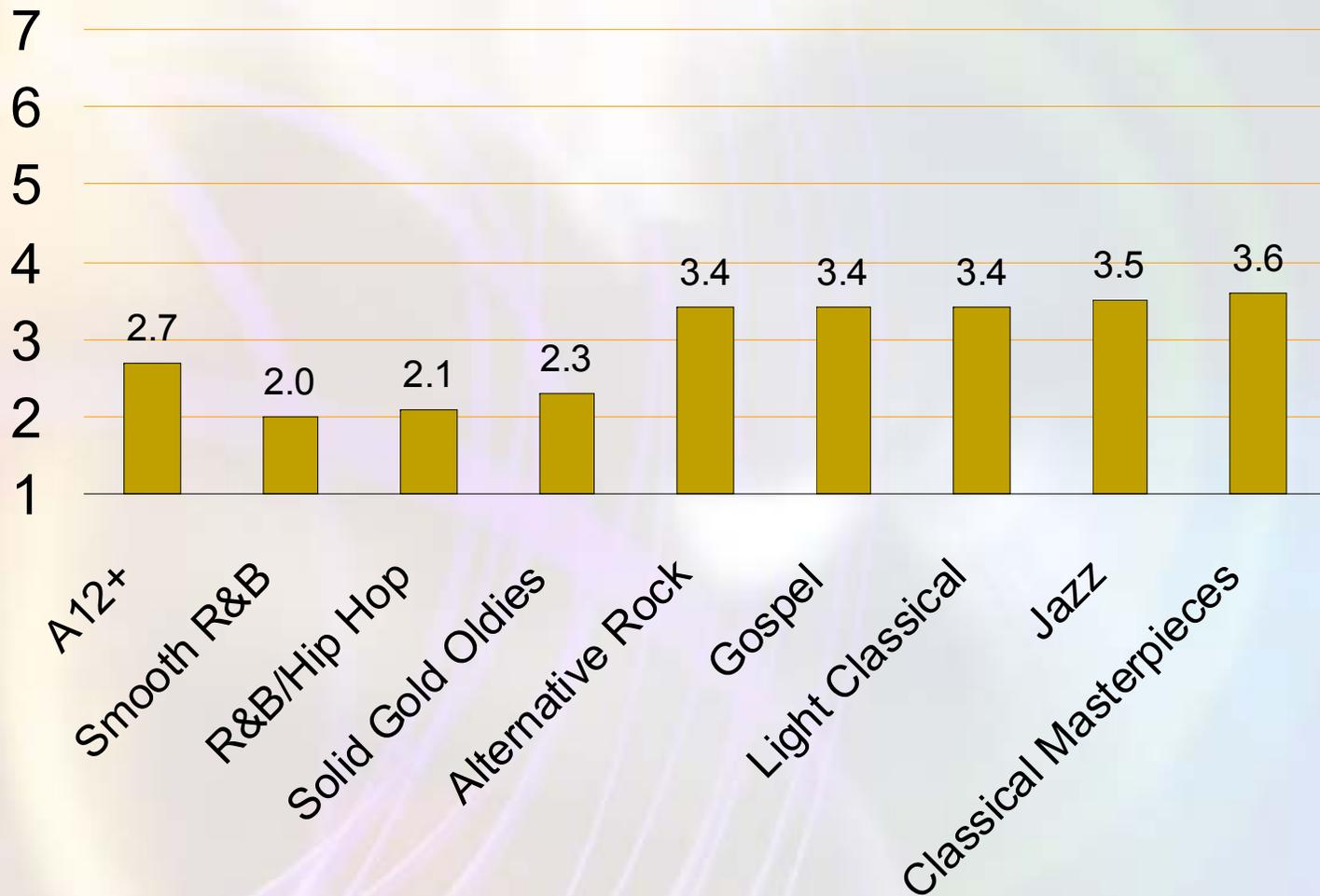
1 = Strongly Disagree
7 = Strongly Agree

Plays music I expect to hear



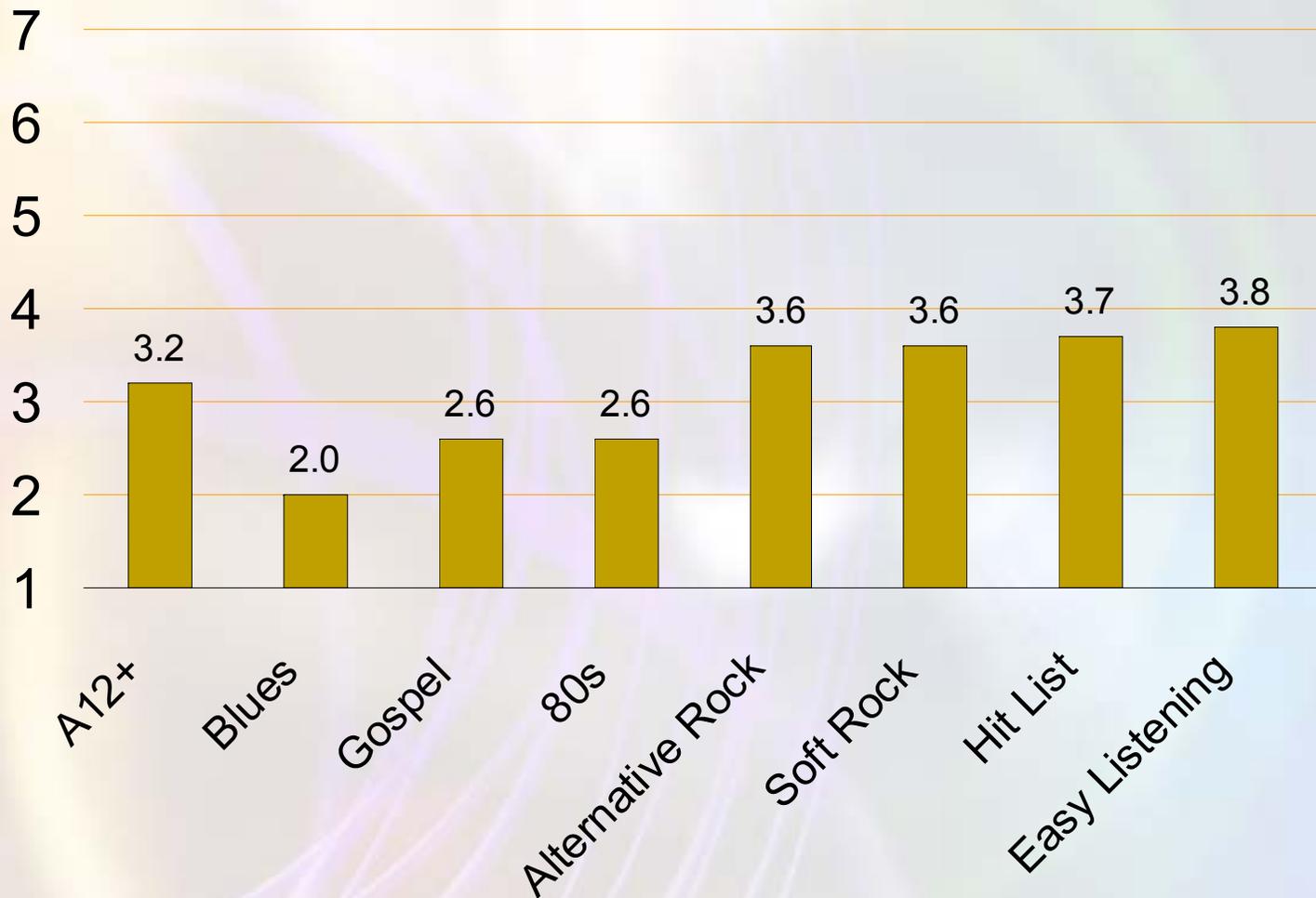
1 = Strongly Disagree
7 = Strongly Agree

Plays too many songs I don't know



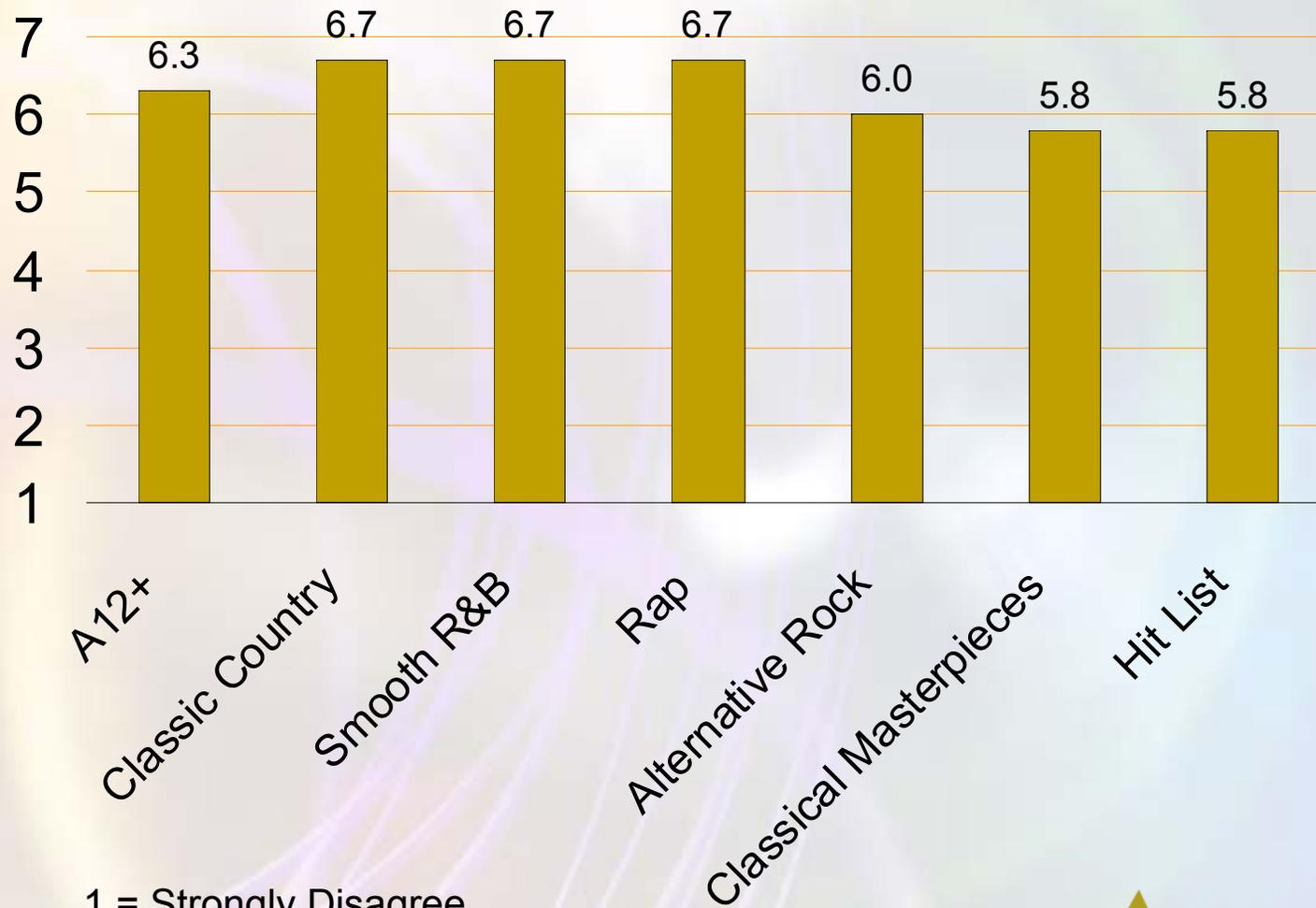
1 = Strongly Disagree
7 = Strongly Agree

Plays the same songs over and over



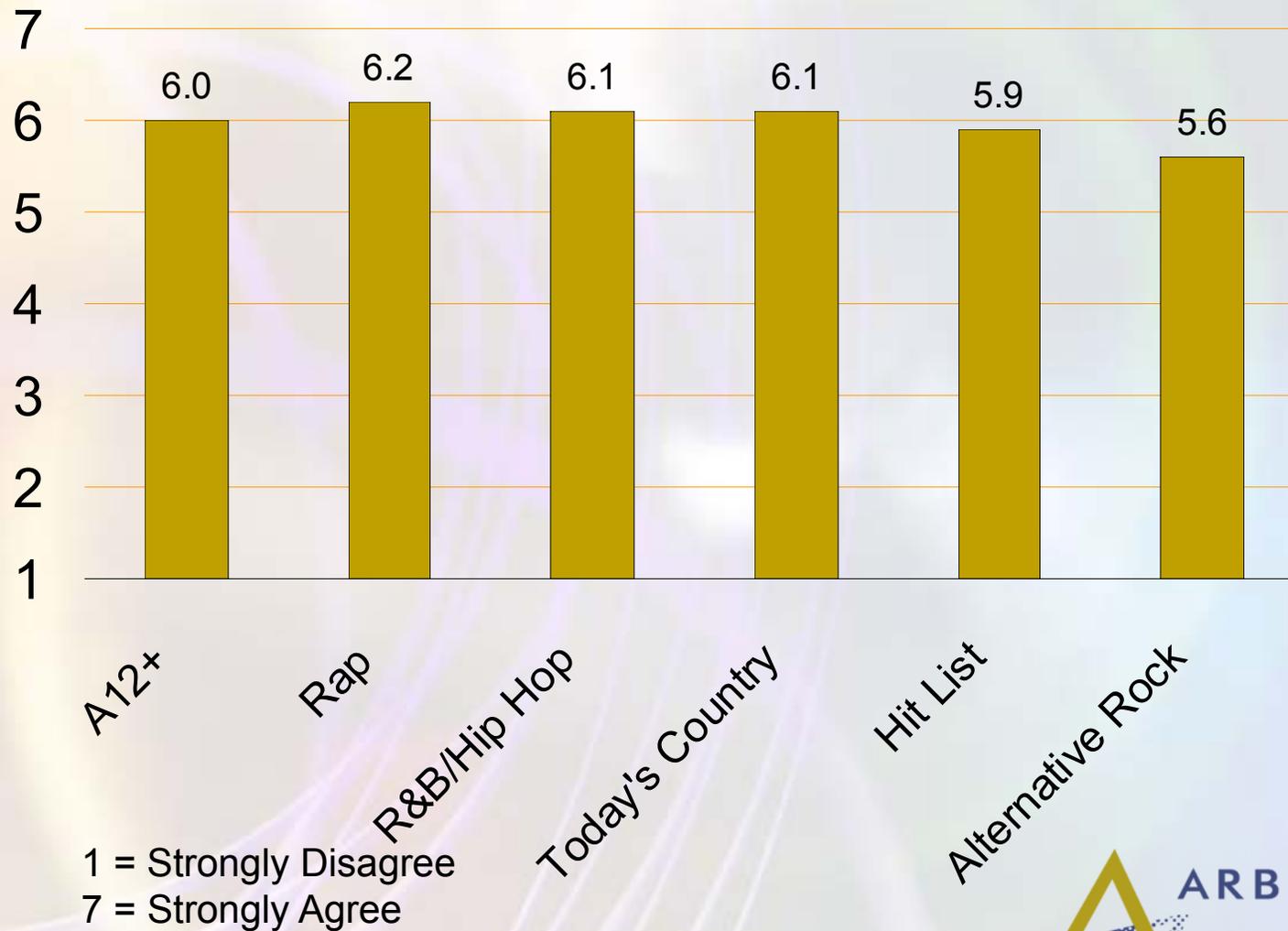
1 = Strongly Disagree
7 = Strongly Agree

Plays a wide variety of artists

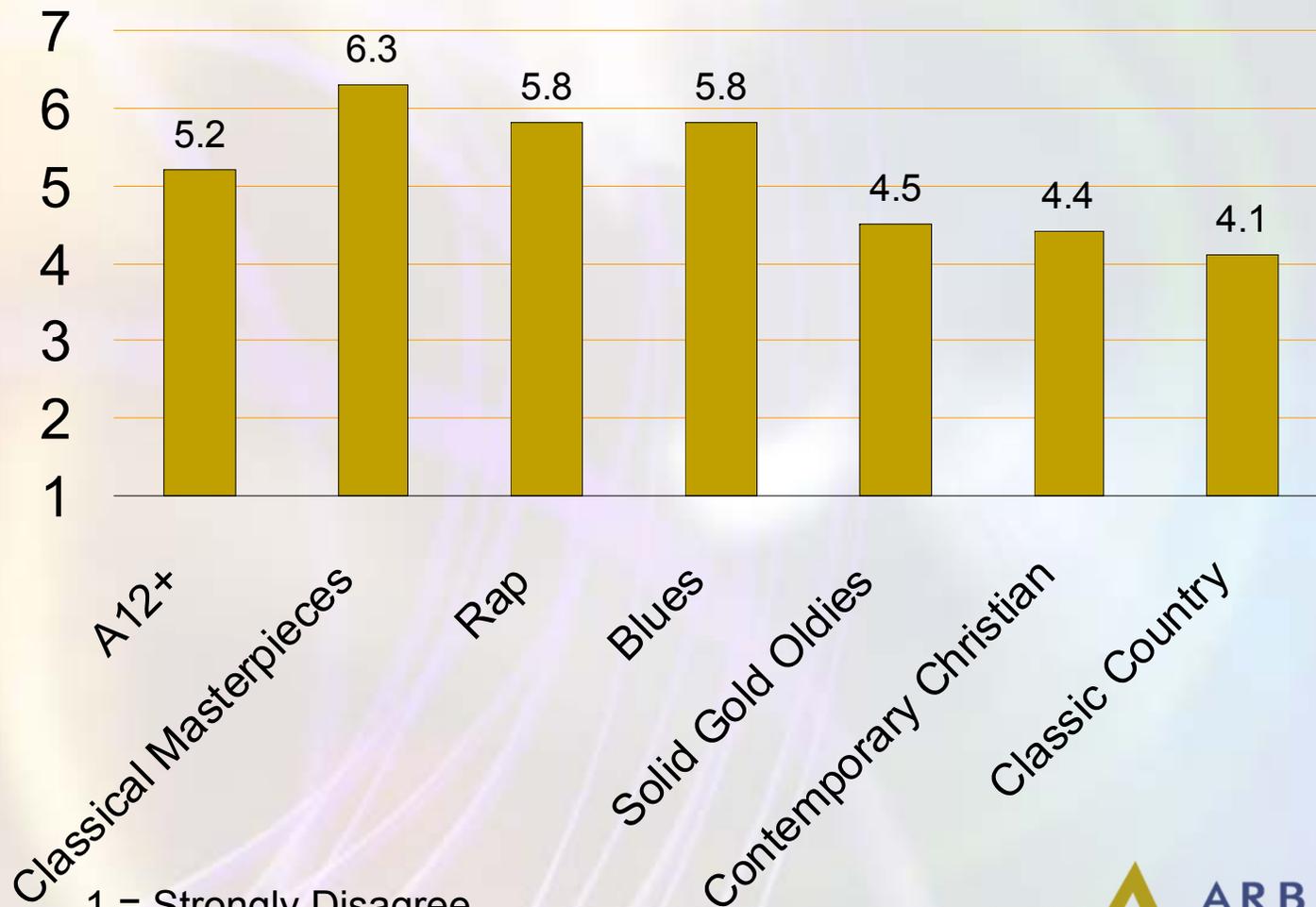


1 = Strongly Disagree
7 = Strongly Agree

Plays new music I am interested in hearing



If I hear a song I don't like, I can usually find something else I like on another Music Choice channel



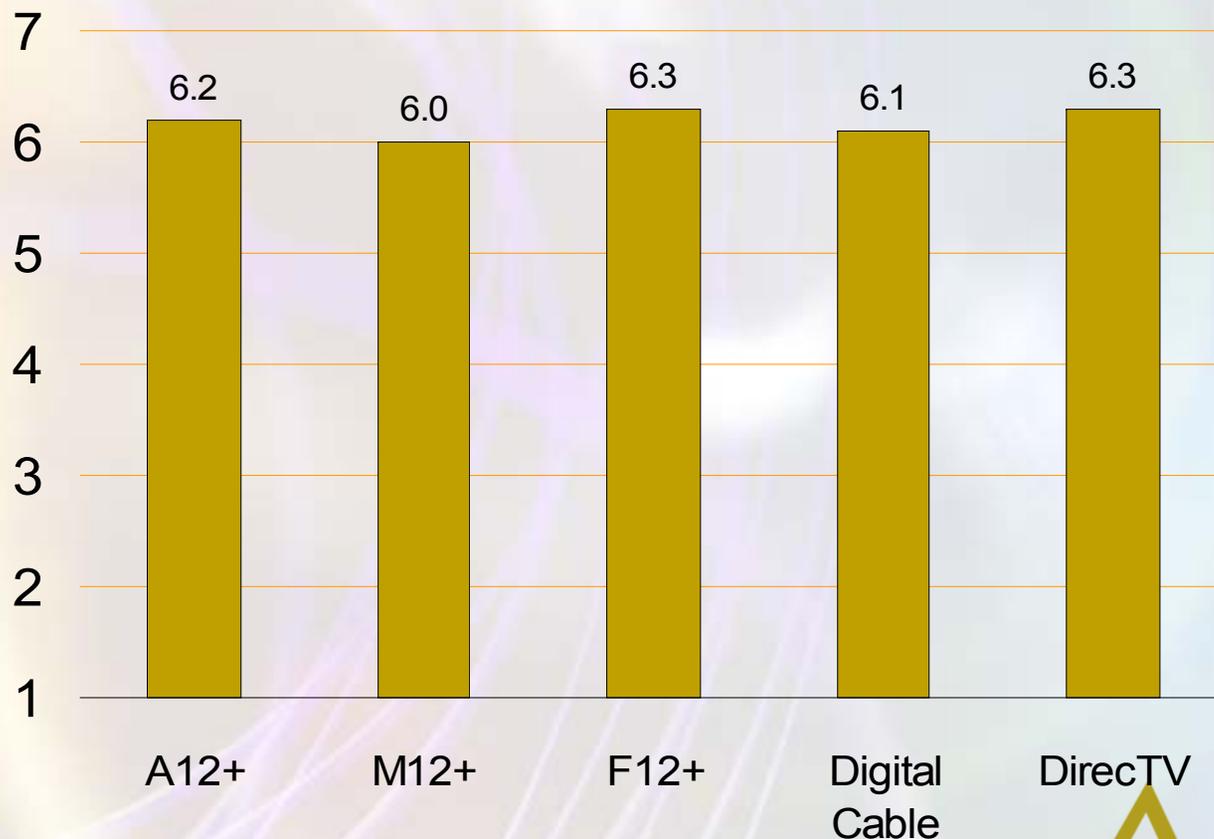
1 = Strongly Disagree
7 = Strongly Agree

What else are they listening to?

- Classical Masterpieces
 - Light Classical (33%)
 - Jazz (20%)
 - Solid Gold Oldies (13%)
- Rap
 - R&B and Hip Hop (67%)
 - Classic R&B (26%)
 - Smooth R&B (24%)
- Blues
 - Classic Rock (33%)
 - Jazz (28%)
 - 70s (18%)

Overall Satisfaction with Music Choice

95% of respondents rated this as a 5, 6, or 7



1 = Highly Dissatisfied
7 = Highly Satisfied



ARBITRON

Non-users of Music Choice

- Defined as households that have not listened in the past month
- 49% of households listen to music at home every day or almost every day (11% never listen to music at home)
- Of those who listen to music at home:
 - 67% use radio
 - 55% use CDs or cassettes
 - 11% use television (56% of which use MTV/MTV2)
 - 10% listen via Internet or downloads

Non-users of Music Choice

- When asked why they don't listen to Music Choice more often...
 - "Don't have time" (16%)
 - "Never think to listen" (16%)
 - "Watch TV when TV is on" (15%)
 - "Tried it, don't like it" (13%)
- Other objections to overcome...
 - "Too much electricity consumption"
 - "I make my own music – play an organ"
 - "Tone deaf"

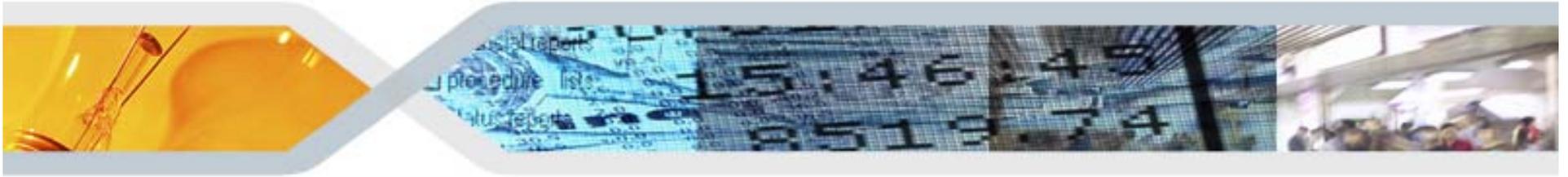
Summary

- High overall satisfaction with the Music Choice service – 95% satisfied
- 51% of all Music Choice households have a person who used the service in past month
- 35% have person who used service in past week
- Primary users of Music Choice more highly educated and higher annual household income compared to general US population
- Urban, Country, Oldies based formats strong performers
- Those 55+ more likely to listen to Music Choice over radio. (Easy Listening gets strong numbers)

Summary

- Music Choice stands out in afternoons, evenings, and especially weekends
- Usage of on-screen information highest among younger demos – 84% look at song info, 85% artist name

MC 35



Music Choice User Study Fall 2008



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- **In order to better understand Music Channel/On Demand awareness, perceptions, appeal, usage levels and behavior, Music Choice Research commissioned OTX to conduct a study among past-month users and non-users in Nov'08.**
 - Past-month user/non-user population projections were derived from a previously-fielded Enumeration Study, conducted by OTX in Sept '08.
 - Sample consisted of 2,200 Persons 13+
 - Multiple methodology recruitment to assure online, offline, and cell-only households represented.
 - Total digital cable population projections were determined, as were those for past-month Music Choice users and non-users
- **Primary goals of this research were to measure and project Music Choice Music Channels usage by channel/key demographics.**
 - Key metrics in support of this primary goal included Cume (past-month/week/day unique audience), AQH (average quarter-hour usage), and time spent listening; also included were measures of brand awareness, satisfaction, attitudes, preferences and other usage behaviors.
- **Secondary goals included measuring and projecting Music Choice On Demand usage, quantifying cross-platform usage, identifying usage barriers among non-users and profiling and sizing prospective user groups.**
 - This included measures of past-month/week Cume audiences, time spent viewing, as well as brand awareness, satisfaction, attitudes, preferences and other usage behaviors.
 - Non-users of Music Channels and On Demand were queried on reasons for not using and future usage intent.

Timing

- **Music Choice's User Study was conducted in Fall 2008.**
 - Field dates: October 29th to November 13th 2008

Sample & Screening

- **Respondents were recruited via OTX's online sample community – which utilizes a multi-source sampling methodology tapping various sample partners, communities, and web sites to create a unique, random recruitment tool.**
 - Survey quotas were set evenly for each day of the week during fieldwork to assure a balanced sample reflecting weekday and weekend usage.
 - Overall screening requirements included: US residents age 13+, digital cable in HH with 1+ set-top boxes (including Fiber Optic TV from Verizon), sensitive industry screening (e.g., can't work in research, advertising, radio or TV).
- **Respondents were then recruited according to the following main target groups:**
 - Music Choice Channel Users (N=2,500) – listened in the past month
 - Music Choice On Demand Only Users (N=100 oversample) – only watched VOD in the past month
 - Music Choice Non-Users (N=500) – did not listen to/watch any Music Choice in the past month
 - Other groups recruited more naturally included Music Channel Non-Users, On Demand Users and Non-Users, and Music Channel Only Users.

Sample & Screening (cont'd)

- Utilizing quota targets derived from the previously-conducted Enumeration Study, the sample was quota-balanced by Gender, Age, Ethnicity within target group (Music Choice Users and Non-Users), and monitored by other variables such as region and income.
 - Data was weighted on backend to adjust for any variations found versus quota targets.
 - Note, any weighting applied on the backend was minor as overall weighting efficiency (a measure of how close the ending data is to unweighted targets) was over 95%.

Survey

- Qualified respondents interacted via a custom, online Music Choice survey tool to respond to questions regarding their awareness, perceptions, usage of and satisfaction with Music Choice. Music Channel users recorded past-month and past-week listening by channel, as well as past-day usage in quarter-hour increments.
 - **Music Channel Quarter-Hour Diary Section:** Based on a day-after recall method, past-day Music Channel users were asked to identify their past-day channel usage by daypart, and then in quarter-hour increments, using an online grid of Music Channel logos/descriptions to select channels used for at least 5 minutes during the quarter hour.
 - ✓ If the respondent did not listen to any Music Channels in a given daypart for the previous day, he/she could select “none” and was automatically routed to the next daypart.

Overall Populations and Profiles

- Music Choice reaches approximately 34.9 million individuals age 13+ in a given month, about one-third of the total digital cable P13+ universe (34%).
 - A significant proportion of monthly Music Choice users listen to Music Channels (31.8 of the 34.9 million, or 91%).
 - Music Choice On Demand reaches 16.5 million monthly viewers, or 16% of the total digital 13+ population.
 - Roughly 13 million (13%) are monthly users of both Music Channels and On Demand
- Compared to the total digital population, Music Choice users (Channels or On Demand) profile younger in age, somewhat more ethnic (African-American, Hispanic), and are more apt to be students and live in larger family households.
- Music Choice users exhibit greater music category involvement—they spend more time listening to music, and are more likely to download music or listen to online radio. Users also do more with their cell phones and PCs—streaming videos, downloading/playing games, sending/receiving text/video messages/IMs, etc.

Music Choice Music Channels – Awareness, Peripheral Usage Behavior and Attitudes

- Although many are aware of Music Choice Music Channels once aided, top-of-mind (unaided) brand awareness is generally low among past-month users (17%), with an additional one-quarter (23%) not aware of the Music Choice Music Channels brand name prior to the interview.
 - Awareness of Music Choice On Demand among Music Channel users is lower.
 - Consideration should be given to improving branding/promotion of Music Choice Music Channels and cross-promoting Music Choice On Demand.
- Overall satisfaction is very favorable among Music Channel users (58% top box/92% top 2 box), greater among females and older users, though those two demo groups tend to rate more favorably.
 - Top box satisfaction is very similar among most channel types, with Instrumental and Inspirational channels garnering the highest satisfaction ratings among respective listeners, while Latin and Dance tend to have somewhat lower top box satisfaction scores than average.
- Ratings reveal Music Channel users agree the service is a great place to learn about new music and artists, and are more inclined to interact with channels if it involves voting for upcoming songs and rating songs/artists (less inclined with regard to texting other channel users). About one-third claim to buy music heard on Music Channels.
 - Younger listeners (<34), while more likely to favor their iPod for music, are most likely to be involved in the service – voting, rating songs, and sending text messages while songs play – and are more likely to listen at a party or with others. Males appear more inclined than females to buy music and text while listening.

Music Choice Music Channels – Awareness, Peripheral Usage Behavior and Attitudes (cont'd)

- Most Music Channel users (more than 9 out of 10) watch via TV at home, primarily from their living room (63%). While respondents report an average 2.1 cable TV set-top boxes typically in the home, Music Channels are typically viewed on an average 1.4 sets.
- Roughly one-third (34%) of Music Channel users have been using for less than a year; one-fifth (21%) are newer users who began watching in the past 6 months.
- Music Channel usage reflects the active/passive confluence of traditional TV and radio usage behavior; 6 out of 10 users indicate watching the channel is a secondary activity, while 4 in 10 are active users -- paying more complete attention to the screen while listening.
- Viewers indicate channel surfing is the most common way of finding out what's on Music Choice Music Channels (69%); roughly one-fifth say they get information on Music Channels from friends/family (21%) or TV ads (19%).

Music Choice Music Channels Usage

- Music Channel users are a loyal group; of the roughly 32 million digital cable P13+ that are past-month Music Channel listeners, a significant majority (86%) are past-week listeners and 70% are past-day listeners
 - Looking at past 7 day cume, weekday listening is somewhat higher than weekends (23% vs. 18%).
 - An average of 3 channels are listened to per day, modestly greater on Friday (3.4) and Sunday (3.3).
- In an average quarter hour, 4% of digital cable P13+ (14% of monthly Music Channel listeners) are listening to Music Choice Music Channels.
 - Peak listening periods are 3-7p on weekdays and 10-3p on weekends.
 - Urban, Rock and Pop channels account for most top 10 channels with regard to cume and AQH audience levels; Today's Country posts in the top 10 as well.
- In term of TSL, which is extrapolated from past day listening, listeners spend an average of 23 hours per week listening to Music Choice Music Channels, or 3.2 hours in an average 18-hour day (6a-12m).
 - When factoring in non-past-day usage into the time spent calculation, TSL remains high at 18 hours per week, 2.6 hours per day.

Music Choice Music Channels Usage (cont'd)

- Not surprisingly, an evaluation of listenership by age shows that depth of channel listening declines with age. Younger listeners (<34, notably 13-24), are more likely to listen (come or AQH) and for longer periods of time than those in older age categories.
 - Rap, Hip-Hop/R&B and Rock generate top AQH ratings among younger listeners (<34), while mid-age listeners (35-49) like 80s, Classic Rock and Rock, and older listeners (50+) favor lighter, classic fare such as Solid Gold Oldies, Classic Country and Easy Listening.
 - 35-49 genre preferences more closely resemble 13-24 preferences than 50+ preferences, indicating changes in aging population.
- Male and females tend to exhibit comparable overall listenership to Music Channels and have similar music channels in their top 10. However, males seem to have a greater preference for Rap, Rock, Classic Rock, Hip-Hop/R&B and Metal, while females like Hip-Hop/R&B, Pop and R&B Hits/Soul
- Two-thirds (63%) of monthly Music Channel users report listening with others in the past day (1.5 other listeners on average).
 - Additional listeners are more likely to live in the same household, and are evenly mixed by gender and age – though most likely to be in the 18-34 age range.

Summary of Key Findings



Music Choice Music Channels – Key Channel Profiles

- Non-decades (excludes '90s, '80s, etc.) Pop genre music listeners tend to be younger (under 35), except for Lite Hits listeners, who skew a bit older (35-49). Hit List and Party Favorites channels are more likely to attract a younger, female audience that are single and still in school. Many of these Pop channels also over-index slightly on Hispanic ethnicity.
 - As may be expected, decades Pop music channels ('90s, '80s, '70s, Solid Gold Oldies) tend to attract listeners of specific age groups; '90s channel attracts single, younger listeners (18-34), while subsequent decades channels tend to attract older adults (35+). Solid Gold Oldies attracts oldest audience (50+), with users more likely to be widowed/divorced/separated.
- Most Rock channels attract a larger proportion of Caucasian and male users, particularly Rock, Metal, Classic Rock and Arena Rock. With the exception of Classic Rock and Retro-Active, Rock channel users are younger (13-34), most notably in Metal and Alternative genres.
 - Retro-Active attracts a slightly older, more educated, affluent audience.
- Urban channel listeners (particularly Rap and Hip-Hop/R&B listeners) tend to be younger (under 35), single and current students, although Classic R&B and R&B Soul attract a slightly older audience. Not surprisingly, Urban channels (most notably Hip-Hop/R&B, R&B, Rap and Reggae) attract a great proportion of African-American and Hispanic users. R&B channels attract a larger proportion of females, while Showcase attracts a larger proportion of males.
- For the most part, Country music channels attract an older, Caucasian audience. Today's Country attracts a larger proportion of females, and with Americana (which skews more male), skews younger than other Country channels, while Classic Country and Bluegrass users are more likely to be older (50+).
- Latin channels attract a younger (<35), Hispanic audience. Consistent with a younger audience, Latin channel users are more likely to be single, students and live in larger households. Mexicana and Rock en Español over-index among males, while Salsa y Merengue over-indexes among females.



Summary of Key Findings



Music Choice On Demand

- As with Music Channels, unaided awareness of Music Choice On Demand among monthly users is not high (10%); just under two-thirds (63%) had heard of the service by name prior to the interview, while 27% are aware of the service, but not the Music Choice On Demand brand.
 - As with Music Channels, consideration should be given to improving branding/promotion of Music Choice On Demand and cross-promoting Music Channels.
- Satisfaction is very favorable for Music Choice On Demand; more than 8 out of 10 say they're satisfied with the service, with nearly half (47%) being "very satisfied".
 - As seen with Music Channels, older listeners (50+) generate slightly higher satisfaction ratings (demo typically more favorable overall)
- Music Choice On Demand viewing appears to be driven by the convenience of watching videos/programs anytime (65% agree), while—similar to Music Channels—many (61%) also agree it's a great place to discover new artists and music. About half have interest in the interactive options, such as creating their own video channel (52%), voting for (50%) or rating (47%) videos or artists, and nearly two-fifths (39%) say they buy music from artists seen on Music Choice On Demand
 - Younger viewers (<34) are more apt to be interested in the interactive aspects of the service, and males are most inclined to buy music they see on the service.

Summary of Key Findings



Music Choice On Demand (cont'd)

- Music Choice On Demand users are loyal as well; most (75%) of the 16.5 million monthly users are also past-week users.
- Nearly half (45%) of Music Choice On Demand users have been watching for less than a year, with one-fourth (28%) being newer users who began watching in the past 6 months.
- As with Music Channels, Music Choice On Demand is most commonly viewed on a single set in the home, typically located in the living room (60%), though roughly 3 out of 10 also claim to view on a set in a family room or an adult's room.
 - A modest proportion (15%) claim to view online or in someone else's home.
 - Similar to Music Channels, there are an average 2.1 cable TV set-top boxes in the home, though Music Choice On Demand is typically viewed on an average 1.4 sets.
- Viewers indicate channel surfing is the most common way of finding out what's on Music Choice On Demand.
 - Roughly one-fifth say they get information on Music Choice On Demand content from friends/family (21%) or barker-channel ads (17%).
- A notable contingent (44%) of Music Choice On Demand users typically watch with others. Among those watching with others, an additional 2.1 join in the viewing experience on average.

Music Choice Non-Users

- Two-thirds (66%) of the digital population do not listen to or watch Music Choice in a given month. In terms of the individual services, nearly 7 in 10 (69%) do not listen to Music Channels and 8 in 10 (84%) do not use Music Choice On Demand.
- Awareness and familiarity are initial barriers to usage of Music Choice among non-users. No more than 4% have top-of-mind (unaided) awareness of either Music Choice service, and only about half have heard of either service once aided. Awareness/perception issues may be overcome via enhanced branding/promotion efforts.
 - Primary barriers to Music Choice On Demand usage include a perception of having to pay for the service, lack of awareness (unsure if available or how to find it) or lack of familiarity with content.
 - Primary barriers to Music Channel usage include a preference to watch traditional content (versus music-based content) on TV and listen to music on other devices. A fair proportion of respondents don't like listening to music on their TV (VOD Only users tend to dislike their TVs sound quality for music), while others say they rarely listen to music at home.

Music Choice Non-Users (cont'd)

- There is moderate potential to convert current Music Channel non-users to users; nearly half (45%) of non-users indicate they are likely (top 2 box) to use in the future, with current Music Choice On Demand Only users reporting significantly greater future usage intent (74%).
 - Music Channel prospects (those with top 2 box interest) profile younger in age than those less likely to listen in the future (38.9 vs. 43.4 age), are more inclined to live in larger households, more likely to be racially/ethnically-diverse, spend more time listening to music, and are more likely to use different sources to access music. They favor many music genres over non-prospects, notably Urban, Dance, Jazz & Blues and Inspirational.
- Stated viewing intent for Music Choice On Demand is lower than that for Music Channels above (35% top 2 box likely to view among total non-users and 38% among current Music Channel Only users), though this still represents a substantial number of potential viewers as much of the digital cable universe (84%) does not currently use Music Choice On Demand in a given month.
 - Music Choice On Demand prospects also profile younger in age (38.1 vs. 42.8) than those less likely to view in the future, are also more likely to be racially/ethnically-diverse, spend more time listening to music, and are more likely to use different sources to access music. Music genres preferred are generally similar to non-prospects, although prospects do have a greater interest in Rock and Urban genres.

Music Choice Audience Profile: Demographics Technology

Users vs. Non-Users

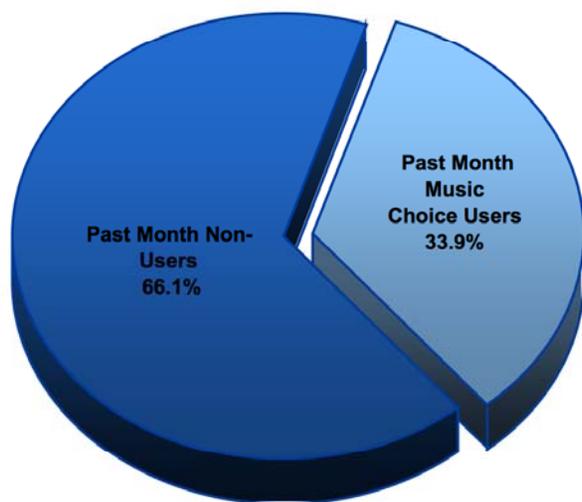
Music Choice Past-Month Audience



* Results based to Total Digital Cable Population.

- Just over one-third of the digital cable audience listens to or views Music Choice, translating to 34.9 million viewers. Most usage is attributed to Music Channels (30.9%, or 31.8 million) versus On Demand (16%, or 16.5 million).
- There is considerable overlap between the two services—just under half of Music Choice Music Channel listeners also watch Music Choice On Demand.

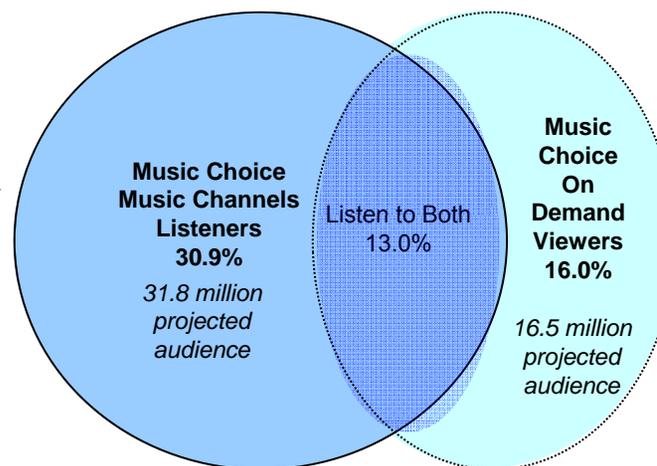
Among Digital/Fiber Optic TV Audience



103 million projected population

Past Month Music Choice Universe

34.9 million projected population



Music Choice User Profile: Demographics vs. Digital Cable Universe



- Compared to the overall digital cable universe, Music Choice users tend to be younger in age (well under the mean digital cable average of 42 years old) and over-index in the African-American segment.

	Digital Cable Universe+	Music Choice Music Channels	Music Choice On Demand
Gender			
Male	49%	48%	52%
Female	51%	52%	48%
Age			
13-17	9%	10%	12% ↑
18-24	13%	18% ↑	20% ↑
25-34	18%	20%	24% ↑
35-44	18%	21% ↑	19%
45-54	18%	14% ↓	12% ↓
55+	25%	17% ↓	11% ↓
Mean	41.6	36.8 ↓	33.8 ↓
Race/Ethnicity			
White	71%	65% ↓	60% ↓
Black	11%	16% ↑	19% ↑
Hispanic	11%	12%	14% ↑
Other	7%	7%	7%

	Digital Cable Universe+	Music Choice Music Channels	Music Choice On Demand
Marital Status (18+)			
Married/Living with Partner	58%	56%	54% ↓
Single	28%	31% ↑	36% ↑
Divorced/Widowed/Separated	13%	12%	9% ↓
Household Size			
1	18%	14% ↓	12% ↓
2	29%	28%	26% ↓
3+	53%	58% ↑	62% ↑
Mean	2.9	3.1	3.2
Nielsen Territory			
Northeast	29%	29%	30%
E. Central	13%	13%	13%
W. Central	14%	13%	13%
Southeast	18%	18%	19%
Southwest	7%	8%	7%
Pacific	19%	19%	19%

Arrow denotes significantly higher/lower than Digital Cable Universe at the 95% confidence level

+ Source: Music Choice Enumeration Survey, Sept. '08: Total (2,200), 18+ (2,000)

Source: Music Choice User Study, Nov'08, Base: Music Choice Music Channels: Total (2,500), 18+ (2,242); Music Choice On Demand: Total (1,468), 18+ (1,285)



Music Choice User Profile: Demographics vs. Digital Cable Universe



- Music Choice user HH income is comparable to that of the total digital cable universe.
- Although most are employed, Music Choice users are more apt to be students (likely driven by younger audiences), notably with some college or education beyond high school.

	Digital Cable Universe+	Music Choice Music Channels	Music Choice On Demand
Employment			
Employed (Net)	63%	57% ↓	60%
Self-Employed	9%	11%	13% ↑
Retired	18%	9% ↓	5% ↓
Student	6%	11% ↑	12% ↑
Household Income (18+)			
<\$50K	42%	43%	43%
\$50-\$99.9K	39%	38%	38%
\$100K+	19%	19%	19%
Mean (000)	\$70.2	\$69.1	\$70.3
Education			
High School or Less	35%	28% ↓	30% ↓
Trade/Some College	27%	37% ↑	34% ↑
College Grad +	36%	34%	34%

Arrow denotes significantly higher/lower than Digital Cable Universe at the 95% confidence level

+ Source: Music Choice Enumeration Survey, Sept. '08: Total (2,200), 18+ with DK/RF removed (1,645)

Source: Music Choice User Study, Nov'08, Base: Music Choice Music Channels: Total (2,500), 18+ with DK/RF removed (2,108); Music Choice On Demand: Total (1,468), 18+ with DK/RF removed (1,213)



Music Choice User Profile: Demographics vs. Non-Users



- Past-month Music Choice users are younger in age (44 and younger) and skew somewhat more African-American than non-users.

	Music Choice Users		
	Total Music Choice	Music Channels	On Demand
<i>Base:</i>	2600	2500	1468
Gender			
Male	49%	48%	52%*
Female	51%	52%	48%
Age			
13-17	10%	10%	12%*
18-24	18%*	18%*	20%*
25-34	20%	20%	24%*
35-44	21%*	21%*	19%
45-54	14%	14%	12%
55+	17%	17%	11%
Mean	36.7	36.8	33.8
Race/Ethnicity			
White	65%	65%	60%
Black	16%*	16%*	19%*
Hispanic	12%	12%	14%
Other	7%	7%	7%*

Music Choice Non-Users		
Any Non-Users	Music Channels	On Demand
500	600	1632
49%	51%	46%
51%	49%	54%*
8%	8%	8%
10%	13%	14%
17%	19%	16%
17%	16%	20%
20%*	19%*	17%*
28%*	25%*	25%*
42.8	41.3	41.2
74%*	72%*	72%*
9%	10%	12%
10%	10%	9%
8%	7%	6%

* Denotes a statistically significantly greater difference from comparative group at the 95% confidence level.

Source: Music Choice User Study, Nov'08, Base: Persons 13+ (N=3,100).

Gender: What is your gender?; Age: What is your age?; US0ETH1: Which of the following best describes you?



Music Choice User Profile: Demographics vs. Non-Users



- Although the majority are married, Music Choice users are more apt to be single and live in a 3+ person HH compared to non-users.

	Music Choice Users		
	Total Music Choice	Music Channels	On Demand
Base:	2600	2500	1468
Marital Status (18+)			
Married/Living with Partner	57%	56%	54%
Single	31% *	31% *	36% *
Divorced/Widowed/Separated	11%	12%	9%
Household Size			
1	14%	14%	12%
2	28% *	28%	26%
3+	58% *	58% *	62% *
Mean	3.1	3.1	3.2
Nielsen Territory			
Northeast	29%	29%	30%
E. Central	13%	13%	13%
W. Central	14%	13%	13%
Southeast	18%	18%	19%
Southwest	8%	8%	7%
Pacific	19%	19%	19%

Music Choice Non-Users		
Any Non-Users	Music Channels	On Demand
500	600	1632
62% *	62% *	61% *
23%	24%	25%
15% *	13%	14% *
15%	14%	15% *
36%	35% *	33% *
51%	51%	52%
2.9	3.0	2.9
29%	27%	28%
12%	13%	12%
14%	15%	14%
18%	19%	18%
7%	7%	8%
20%	20%	19%

* Denotes a statistically significantly greater difference from comparative group at the 95% confidence level.

Source: Music Choice User Study, Nov'08, Base: Persons 13+ (3,100)

Marital Status Base: Total Music Choice: 18+ (2,334); Music Channels: 18+ (2,242); On Demand: 18+ (1,286); Any Non-Users: 18+ (459); Music Channels Non-Users: 18+ (551); On Demand Non-Users: 18+ (1507).

US15MAR: What is your marital status?
S8 HH SIZE: How many people, including yourself, live in your household?; Zip: What is your ZIP code?



Music Choice User Profile: Demographics vs. Non-Users



- Music Choice users are more apt to be employed or a current student than non-users, but otherwise tend to profile similarly in terms of income and education.

	Music Choice Users			Music Choice Non-Users		
	Total Music Choice	Music Channels	On Demand	Any Non-Users	Music Channels	On Demand
Base:	2600	2500	1468	500	600	1632
Employment						
Employed (Net)	58% *	57%	60% *	51%	54%	53%
Self-Employed	12%	11%	13% *	11%	13%	10%
Retired	9%	9%	5%	19% *	17% *	15% *
Student	11% *	11% *	12% *	7%	8%	8%
Household Income (18+)						
<\$50K	43%	43%	43%	43%	41%	43%
\$50-\$99.9K	38%	38%	38%	38%	38%	38%
\$100K+	19%	19%	19%	19%	21%	18%
Mean	\$69.8	\$69.1	\$70.3	\$67.8	\$70.8	\$68.7
Education						
High School or less	28%	28%	30% *	25%	25%	25%
Trade/Some College	37%	37%	34%	39%	38%	40% *
College +	34%	34%	34%	34%	36%	34%

* Denotes a statistically significantly greater difference from comparative group at the 95% confidence level.

Source: Music Choice User Study, Nov'08, Base: Persons 13+ (3,100)

Income Base: Total Music Choice: 18+ w/ DK/RF removed (2,192); Music Channels: 18+ w/ DK/RF removed (2,107); On Demand: 18+ w/ DK/RF removed (1,214); Any Non-Users: 18+ w/ DK/RF removed (424); Music Channels Non-Users: 18+ w/ DK/RF removed (509); On Demand Non-Users: 18+ w/ DK/RF removed (1,403).

US32EMP: Which of the following best describes your employment status?; S7_Income: Which of the following income categories best describes your total household income before taxes?; US15EDU: What is the highest level of education you have completed?



Music Choice User Profile: Media/Technology

-- Cable Provider & Television Habits



- As might be expected, non-users have fewer TV set-top boxes than Music Choice users, but watch TV as frequently per week.

	Music Choice Users		
	Total Music Choice	Music Channels	On Demand
Base:	2600	2500	1468
Type of Cable TV in HH			
Digital Cable	96%	96%	96%
Fiber Optic Cable	6%	6%	8% *
Tenure with Provider			
< 1 Year	27%	27%	27%
1 Year+	72%	73% *	72%
Mean Yrs.	2.0	2.0	1.9
# of TV Set Top Boxes in HH			
1	37%	37%	32%
2+	63% *	63% *	68% *
Mean	2.1	2.1	2.2
Television Viewing: Any	99%	99%	99%
# of Days/week (mean)	6.1	6.1	5.9

Music Choice Non-Users		
Any Non-Users	Music Channels	On Demand
500	600	1632
96%	96%	96%
5%	5%	5%
28%	30%	27%
69%	68%	71%
1.9	1.9	2.0
49% *	47% *	44% *
51%	53%	56%
1.8	1.9	1.9
99%	99%	99%
6.2	6.2	6.2

* Denotes a statistically significantly greater difference from comparative group at the 95% confidence level.

Source: Music Choice User Study, Nov'08, Base: Persons 13+ (N=3,100)

S9_TV_SERVICES: Which of the following types of TV services do you have in your home?; S10C_SERVICE_TENURE: How long have you had your digital cable/fiber opticTV TV service?; S10A_TOP_BOXES: How many digital cable/fiber opticTV set top boxes do you have in your home?; C1: In a typical week, how many days do you watch TV?; C2: Approximately how much time do you spend watching TV in a typical week?



Music Choice User Profile: Media/Technology

-- General Music Listening



- In general, weekly music listening is greater among Music Choice users. While users and non-users alike tend to listen to similar music genres, Music Choice users display a greater preference for Urban music than non-users, who exhibit a greater preference for Rock.

	Music Choice Users			Music Choice Non-Users		
	Total Music Choice	Music Channels	On Demand	Any Non-Users	Music Channels	On Demand
Base:	2600	2500	1468	500	600	1632
Music Listening: Any	98% *	98% *	99% *	89%	90%	95%
# of Days/week (mean)	5.1	5.1	5.1	4.4	4.5	4.9
# of Hours/week (mean)	13.3	13.4	13.1	10.5	10.5	12.7
Types of Music Listen To						
Rock	50%	50%	52%	56% *	56%	51%
Pop	42%	42%	43%	44%	45%	41%
Urban	36% *	36% *	41% *	27%	30%	29%
Country	27%	27%	26%	31%	30%	29% *
Jazz & Blues	21%	21%	20%	19%	20%	21%
Dance	19%	18%	20% *	18%	19%	17%
Classical	19%	19%	18%	23% *	22%	21% *
Variety	19%	19%	18%	23% *	22%	21% *

* Denotes a statistically significantly greater difference from comparative group at the 95% confidence level.

Source: Music Choice User Study, Nov'08, Base: Persons 13+ (N=3,100).

C3: how often do you listen to music in a typical week?;

C4: Approximately how much time do you spend listening to music in a typical week?;

C5: What types of music do you like to listen to on a regular basis?



Music Choice User Profile: Media/Technology

-- General Music Listening (Cont'd)



- Both users and non-users are most likely to utilize traditional radio (AM/FM) for music listening, as well as MP3 players and physical music, however, Music Choice users are more inclined to also turn to the TV and online for music. In turn, Music Choice users show heavier reliance on nearly all devices, including TV, PC, MP3 and cell phone, for their musical entertainment.

	Music Choice Users			Music Choice Non-Users		
	Total Music Choice	Music Channels	On Demand	Any Non-Users	Music Channels	On Demand
<i>Base:</i>	2600	2500	1468	500	600	1632
Music Sources Use to Listen						
AM/FM Radio	68%	68%	63%	75% *	75% *	75% *
TV music channels	66% *	67% *	65% *	11%	17%	51%
MP3 Player	48% *	48%	51% *	43%	46%	44%
Physical music	43%	43%	41% *	42%	41%	44%
TV music videos	42% *	42% *	52% *	11%	16%	24%
Online Radio	25% *	25% *	26% *	18%	19%	22%
Online music videos	24% *	23% *	28% *	12%	16%	16%
Music Devices Use						
Television	73% *	74% *	73% *	16%	23%	56%
Radio receiver in car	61%	62%	55%	70% *	67% *	70% *
PC	51% *	51% *	53% *	40%	42%	46%
MP3	48% *	47%	50% *	41%	45%	43%
Home stereo	44% *	44%	44%	38%	40%	42%
Cell phone	13% *	13% *	16% *	8%	9%	9%

* Denotes a statistically significantly greater difference from comparative group at the 95% confidence level.

Source: Music Choice User Study, Nov'08, Base: Persons 13+ (N=3,100).

C6: Which of the following sources or services do you use to listen to music?;

C7: And which of the following devices do you use to listen to music over the course of a typical week?



Music Choice User Profile: Media/Technology

-- Internet Access



- While users and non-users exhibit similar behavior in terms of access type and hours spent online, Music Choice users show heavier participation in Internet activities such as IM, downloading music, video streaming, and listening to online radio.

	Music Choice Users			Music Choice Non-Users		
	Total Music Choice	Music Channels	On Demand	Any Non-Users	Music Channels	On Demand
Base:	2600	2500	1468	500	600	1632
Type of Internet Access						
Cable modem	66%	66%	66%	64%	64%	66%
DSL	24%	24%	26%	28%	27%	24%
Fiber Optic	6%	6%	6%	5%	5%	6%
Dial-up	4% *	4%	4%	2%	3%	3%
Hrs Spent/Week Online						
Mean hours (non-email)	12.1	12.1	12.2	12.2	12.2	12.0
Online Activities/Week						
Playing/downloading games	48% *	48% *	49%	43%	43%	46%
Shopping	47%	47%	46%	45%	45%	48%
Instant messaging (IM)	42% *	42% *	45% *	34%	35%	36%
Downloading music	36% *	36% *	41% *	20%	24%	27%
Watching streaming video	35% *	35% *	38% *	25%	27%	30%
Listening to radio stations	30% *	30% *	32% *	19%	21%	25%
Message boards	25% *	24% *	26% *	17%	19%	21%
Blogs	24% *	24% *	28% *	16%	18%	19%
Chat forums	20% *	20% *	24% *	14%	15%	14%

* Denotes a statistically significantly greater difference from comparative group at the 95% confidence level.
 D5_INTERNET: What type of Internet access do you have in your home?; D6_INTERNET_HRS: How many hours do you spend on the Internet for something other than e-mail in a typical week?; D7_INTERNET_ACT: Which of the following online activities do you participate in during a typical week?
 Source: Music Choice User Study, Nov'08, Base: Persons 13+ (N=3,100)



Music Choice User Profile: Media/Technology

-- Cell Phone Ownership



- Cell phone ownership is comparable between users and non-users, though similar to online behavior, Music Choice users are more involved mobile consumers, displaying higher incidence of texting, picture taking, email, Internet access, etc.

	Music Choice Users		
	Total Music Choice	Music Channels	On Demand
<i>Base:</i>	2600	2500	1468
Have Cell Phone			
Yes	72%	72%	72%
Regular phone	61%	61%	60%
Smart phone	11%	11%	11%
Cell Phone Provider			
Verizon	30%	30%	29%
AT&T	29%	29%	27%
T-Mobile	15%	15%	17%
Sprint/Nextel	12%	12%	14%
Top Phone Features Use			
Send/receive text messages	62% *	62% *	65% *
Send, receive or take pictures	42% *	42% *	45% *
Send or receive email	24% *	24% *	27% *
Browse or search the internet	21% *	20% *	23% *
Send mobile IM	19% *	19% *	22% *
Download ring tones	15% *	15% *	20% *
Send/receive/play video msgs	15% *	14% *	19% *
Download and play music	14% *	14% *	17% *
Download games	11% *	11% *	14% *

Music Choice Non-users		
Any Non-Users	Music Channels	On Demand
500	600	1632
69%	69%	71%
60%	60%	62%
9%	9%	9%
34%	35% *	32%
31%	29%	31%
13%	14%	13%
11%	12%	11%
51%	53%	55%
31%	33%	36%
16%	18%	18%
13%	15%	16%
13%	14%	14%
8%	9%	8%
7%	10%	9%
8%	9%	8%
6%	6%	6%

* Denotes a statistically significantly greater difference from comparative group at D8_PHONE: Which of the following types of phone service do you have in your home?, the 95% confidence level. Source: MC User Study, Nov'08, Base: P13+ (N=3,100). D9_CELL: Do you, personally, own a cellular phone?; D10_CELL_PROVIDER: Which cellular phone service do you subscribe to? D12_CELL_SRVS_USE: ...features you use on your cell.



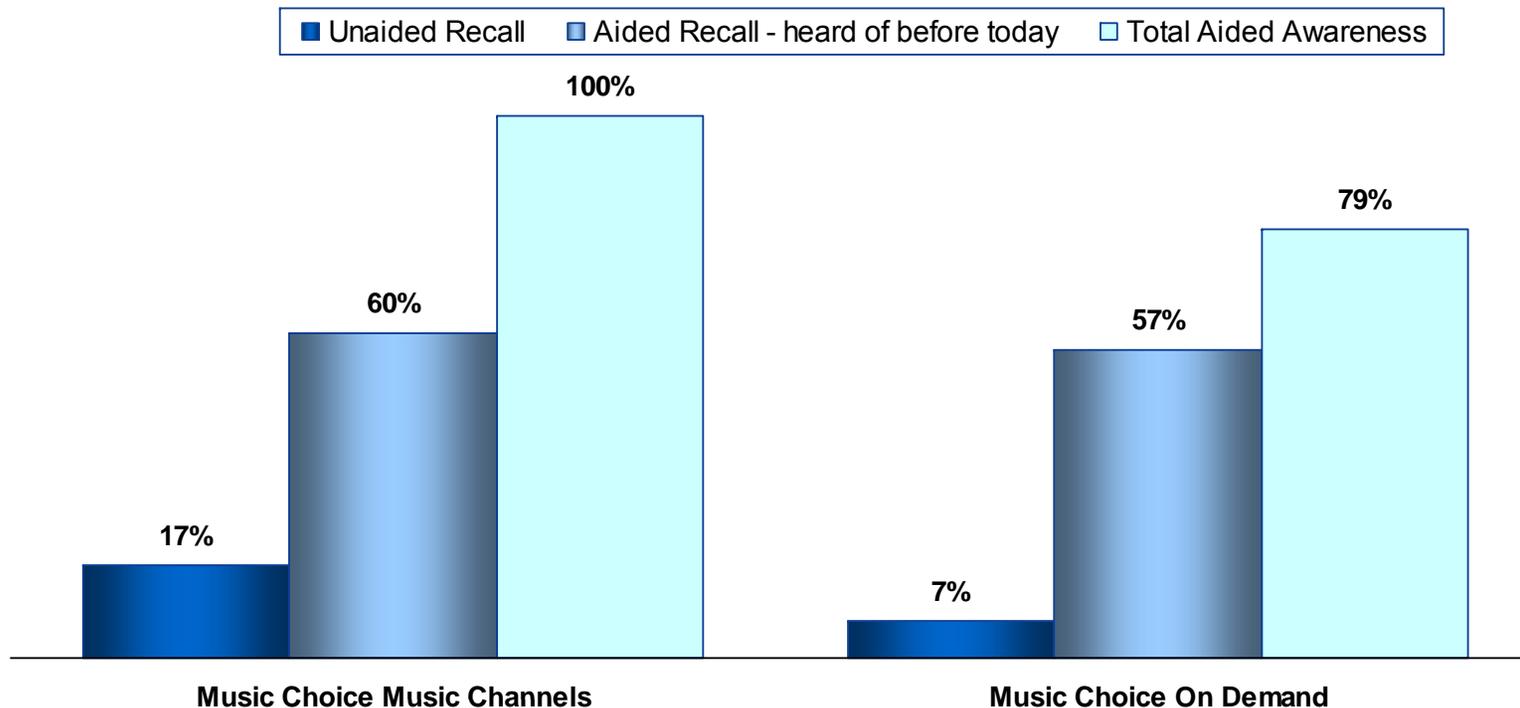
Music Choice Music Channels

Brand Awareness and Past Experience with Music Choice Among Past-Month Music Choice Channel Users



- Music Channels brand name awareness is strong once aided, though unaided awareness is generally low (17%), only 60% had previously heard of the service, and the remaining 23% were aware of the service in general, but did not recognize by name.
- Many (8 out of 10) monthly Music Channel users are also aware of Music Choice On Demand once aided; unaided awareness is very low (7%), only 60% had previously heard of the service, and over one-third (36%) were aware of the service in general, but did not recall by name.

Among Past-Month Music Choice Music Channels Users



Source: Music Choice User Study, Nov'08, Base: Total Past Month Music Choice Users (Channels or VOD) (N=2,600)

S12_AWARE_MUSIC: What commercial-free TV music channel providers are you aware of?; S13_MC_DF: ...prior to today, had you ever heard of or listened to Music Choice Music Channels?;

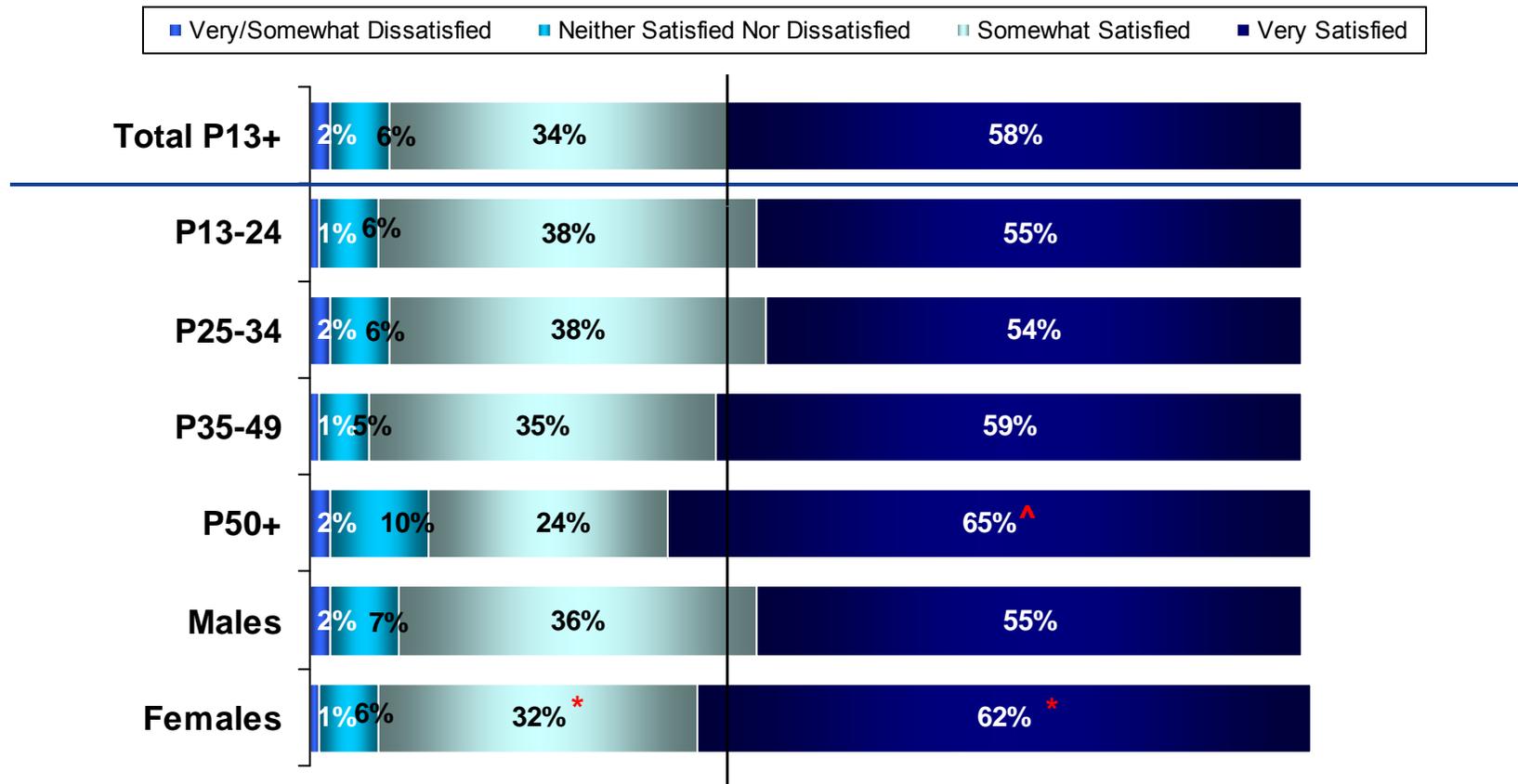
S15_AWARE_VOD: Prior to today, which music-based Video On Demand TV providers were you aware of?; S16_VOD_DEF: ...prior to today, had you ever heard of or viewed Music Choice On Demand?



Overall Music Choice Music Channels Satisfaction



- Overall Music Choice Music Channel satisfaction is strong among users, with over 90% satisfied on some level and nearly 60% very satisfied (top box). Reported top-box satisfaction is greatest among older users (50+) and females.



Source: Music Choice User Study, Nov'08, Base: Total Past Month Music Choice Music Channel Users 13+ (N=2,500). Bases for sub-groups vary.

* Denotes a statistically significantly greater difference from comparative group at the 95% confidence level.

[^] Denotes a significantly greater difference at the 95% confidence level (significantly different than 2 or more age groups for Age).

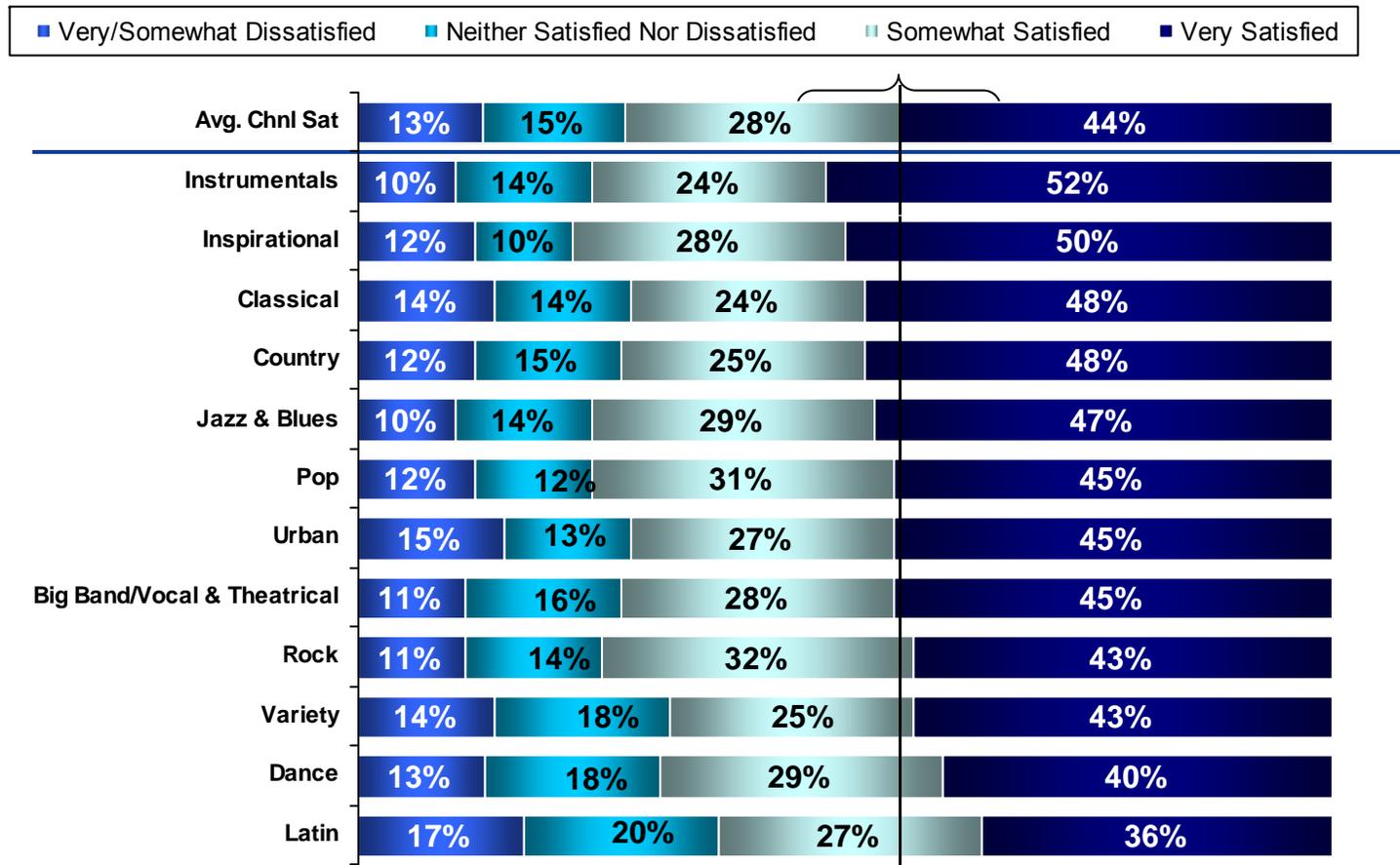
B2: Overall, how satisfied are you with Music Choice Music Channels?



Individual Music Channel Satisfaction



- **Specific Music Choice Channel satisfaction is also strong (over 70% top 2 box) on average. When looking across specific channel types, satisfaction is notably favorable for Instrumentals, Inspirational, Classical, Country and Jazz & Blues (older-skewing channels) -- where ~50% are “very” satisfied. Latin and Dance channels tend to garner lower satisfaction levels.**



Source: Music Choice User Study, Nov'08, Base: Varies by channel (based on past 30 day Music Choice Music Channel Listeners)

QB3: Thinking of the Music Choice Music channels that you have listened to, how satisfied are you with each one?



Music Channel Satisfaction Index Summary (top channels)



- Examination of individual channel satisfaction reveals that listeners are most satisfied with more classic channels such as Solid Gold Oldies, '80s, Classic Rock and Classical Masterpieces. As with channel genres, lower satisfaction is seen across a number of Latin channels such as Rock En Español, Salsa y Merengue, and Musica Urbana and Mexicana. Listeners are satisfied with these channels overall, but there are higher proportions of dissatisfied users than average.

Strong Satisfaction (Over Index on high satisfaction)

Top Rated Channels	% Top 2 Box Satisfaction	Index
Solid Gold Oldies	81%	111
'80s	80%	110
Classic Rock	79%	109
Classical Masterpieces	79%	109
Contemporary Christian	79%	109
'70s	78%	107
Today's Country	78%	107
Smooth Jazz	78%	107
Rock	77%	106
Gospel	77%	106
Easy Listening	77%	106
Big Band & Swing	77%	106
Arena Rock	76%	105
Hit List	76%	105
Classic Country	76%	105
Blues	76%	105
Light Classical	76%	105

All Channel Avg: 73%

Less Satisfied (Over Index on low satisfaction)

Low Rated Channels	% Bottom 2 Box	Index
Rock En Español	22%	173
Opera	19%	149
Salsa y Merengue	18%	141
R&B Soul	17%	134
Rap	17%	134
Musica Urbana	16%	126
Mexicana	16%	126
Hip-Hop & R&B	15%	118
R&B Hits	15%	118
Kidz Only!	15%	118
Hit List	14%	110
Classic R&B	14%	110
'90s	14%	110
Dance	14%	110

All Channel Avg: 13%

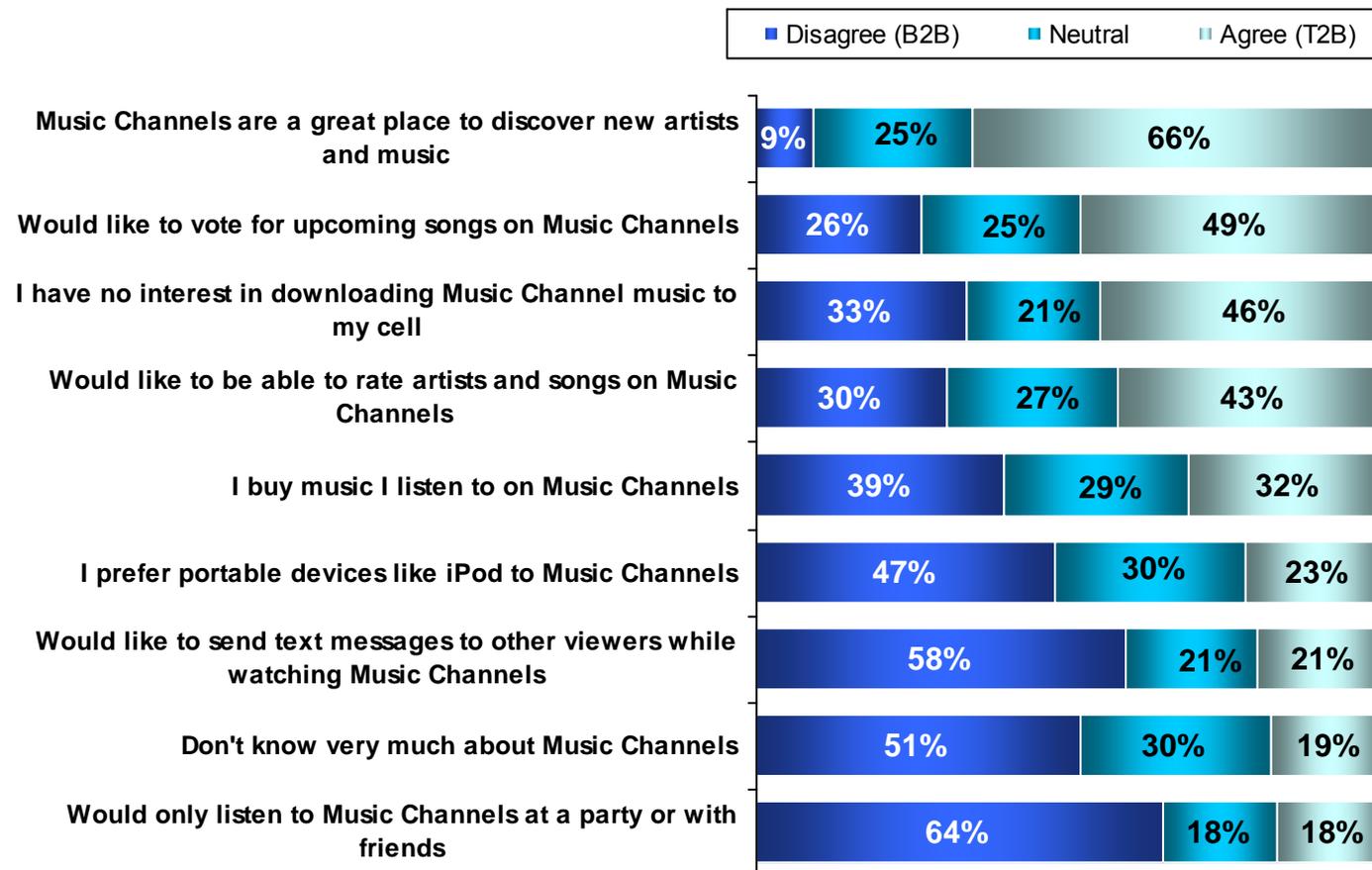
Source: Music Choice User Study, Nov'08, Base: Varies by channel (based on past-month Music Choice Music Channel Listeners)
 QB3: Thinking of the Music Choice Music Channels you have listened to in the past 30 days, how satisfied are you with each one?



Agreement Statements - Music Choice Music Channels



- Music Channel listeners feel strongly that Music Channels are a great place to discover new artists/music and are moderately inclined to interact with Music Channels by voting for upcoming songs and rating artists and songs. About one-third buy music heard on Music Channels.



Source: Music Choice User Study, Nov'08, Base: Total Past Month Music Choice Music Channel Listeners 13+ (N=2,500). Bases for sub-groups vary.

QB8A: Next are some statements that may or may not describe you or your opinions... (Agreement on a scale of 1-5)



Agreement Statements - Music Choice Music Channels Summary by Gender & Age



- Females are most likely to agree that Music Choice is a great place to discover new artists, while males are more apt to buy music they see and also send text messages while listening.
- A comparison by age shows that younger users (13-34) are most involved, being more likely to vote for songs, rate artists, and send text messages while listening to Music Choice. Youngest users (13-24) are most inclined to buy music they see, while older listeners (50+) are least interested in downloading music to their cell phones.

	Music Choice Music Channel Users by Gender & Age					
	Male	Female	13-24	25-34	35-49	50+
Base:	1203	1297	713	499	714	574
Music Channels are a great place to discover new artists and music	63%	69%	67%	69%	67%	62%
Would like to vote for upcoming songs on Music Channels	50%	49% *	61%	59%	47%	30% **
I have no interest in downloading Music Channel music to my cell	46%	47%	39% ^	40% ^	45%	63%
Would like to be able to rate artists and songs on Music Channels	45%	41%	54%	51%	40%	25% ^
I buy music I listen to on Music Channels	37%	29%	36% ^	39% ^	32%	22%
I prefer portable devices like iPod to Music Channels	29% *	18%	37%	27% ^	18%	10%
Would like to send text messages to other viewers while watching Music Channels	26% *	17%	32% ^	26% ^	19%	8%
Don't know very much about Music Channels	22% *	17%	20%	20%	16%	22%
Would only listen to Music Channels at a party or with friends	22% *	14%	23% ^	23% ^	15%	9%

Source: Music Choice User Study, Nov'08, Base: Total Past Month Music Choice Music Channel Listeners 13+ (N=2,500). Bases for sub-groups vary.

* Denotes a statistically significantly greater difference from comparative group at the 95% confidence level.

** Denotes a significant difference at the 95% confidence level (significantly different than 3 or more age groups for Age).

^ Denotes a significantly greater difference at the 95% confidence level (significantly different than 2 or more age groups for Age).

QB8A: Next are some statements that may or may not describe you or your opinions? (Agreement on a scale of 1-5)

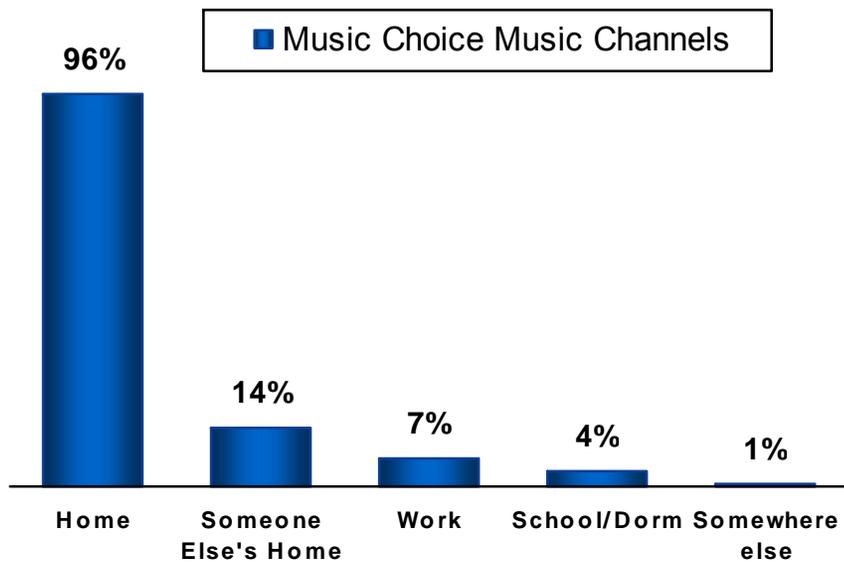


Music Choice Music Channels: Where and How Listen

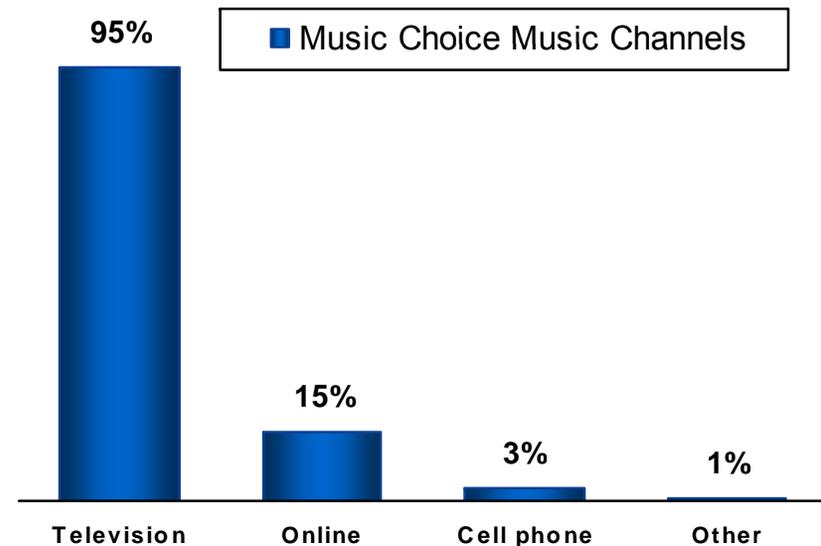


- Most Music Choice Channel listening occurs at home, with the most prominent listening device being the television. Some users (15%) claim to listen online.

Where - Places Typically Listen



How - Listening Devices



Source: Music Choice User Study, Nov'08, Base: Total Past Month Music Choice Music Channel Listeners 13+ (N=2,500).

B4_WAYSLISTEN: Which of the following devices do you use to listen to Music Choice Music Channels?;

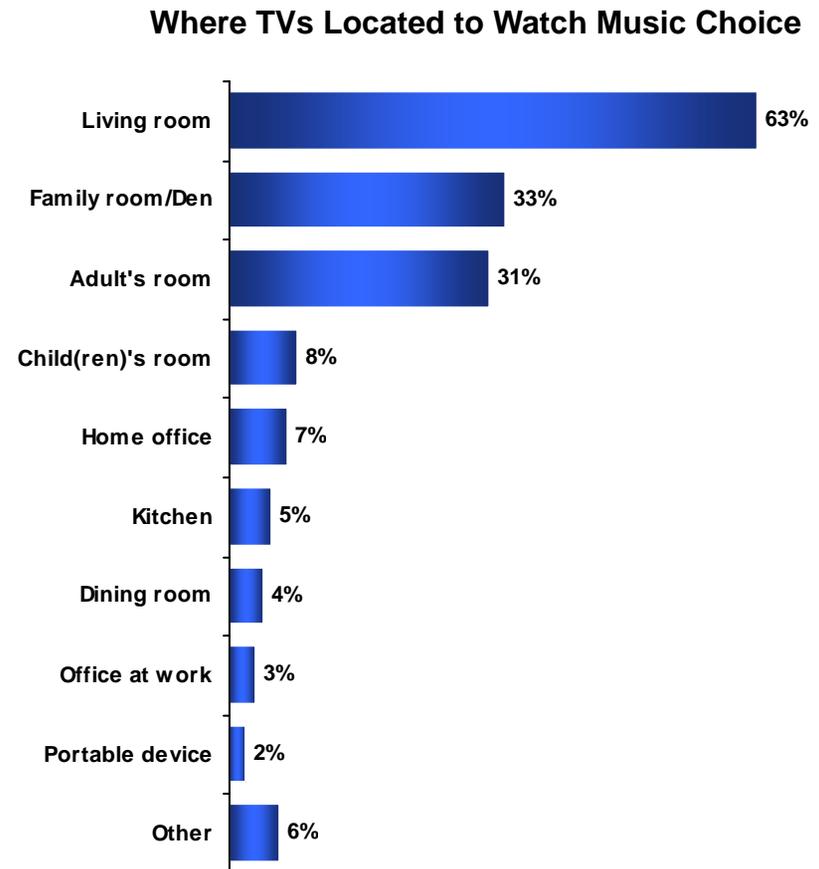
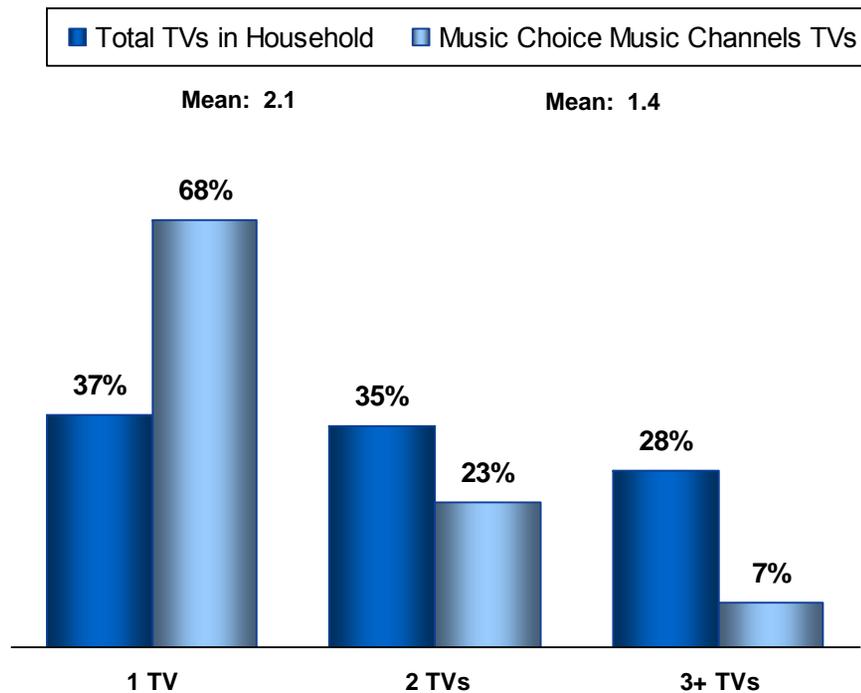
B5_PLACESLISTEN: ...where do you typically listen?



Music Choice Music Channels – Television Usage



- Music Choice Channels tend to be viewed on one TV in the household, most often the one in the living room.



Source: Music Choice User Study, Nov'08, Base: Total Past Month Music Choice Music Channel Listeners 13+ (N=2,500).

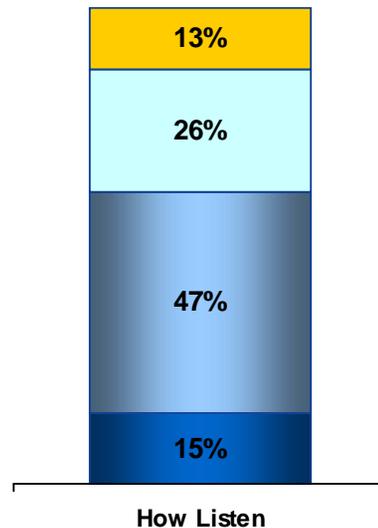
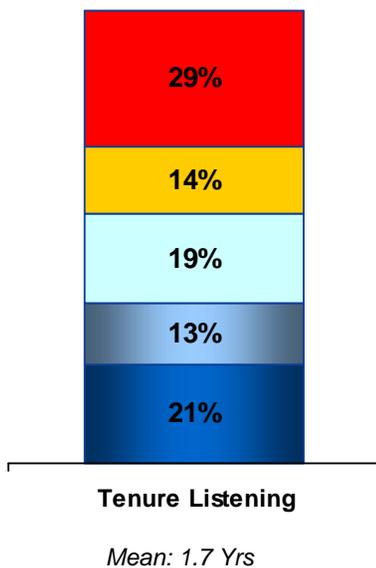
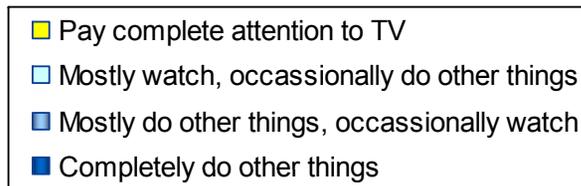
B6_BOXES_CHNLS: Of the televisions with digital cable/fiber optic TV set top boxes you have in your household, how many were used to listen to Music Choice Music Channels in the past 30 days?; B7_TVLOC_CHNLS: Where are each of the televisions located that you use to listen to Music Choice Music Channels?



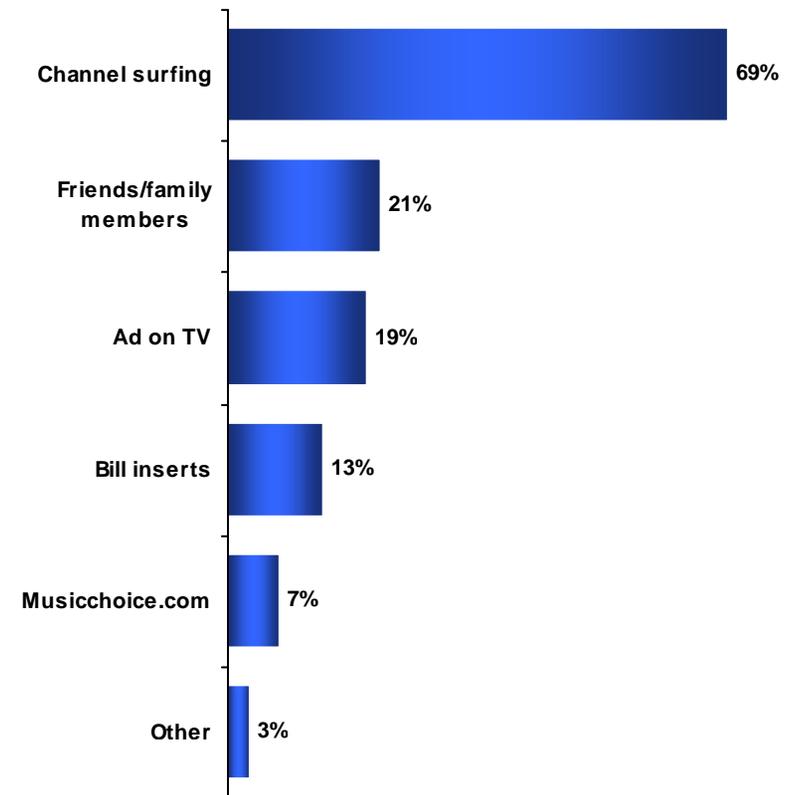
Music Choice Music Channels – Usage Experience and Programming Awareness



- Roughly one-third of Music Channels users have been using the service for under 1 year, with one-fifth (21%) being newer users (began listening in the past 6 months) . When listening, a small segment pays undivided attention to the TV, while most do other things. The most common way of finding out what’s on Music Choice is through channel surfing, though some (~20%) hear about Music Choice via word of mouth or ads on TV.



How Find Out What’s On MC Channels



Source: Music Choice User Study, Nov'08, Base: Total Past Month Music Choice Music Channel Listeners 13+ (N=2,500).

B1_TENURE_CHNLS: How long ago did you first start listening to Music Choice Music Channels?; B1A: How do you find out about what's on Music Choice Music Channels?; B8_CHNLS_DEPTH: Which of the following best describes the way you listen to Music Choice Music Channels?



Music Choice

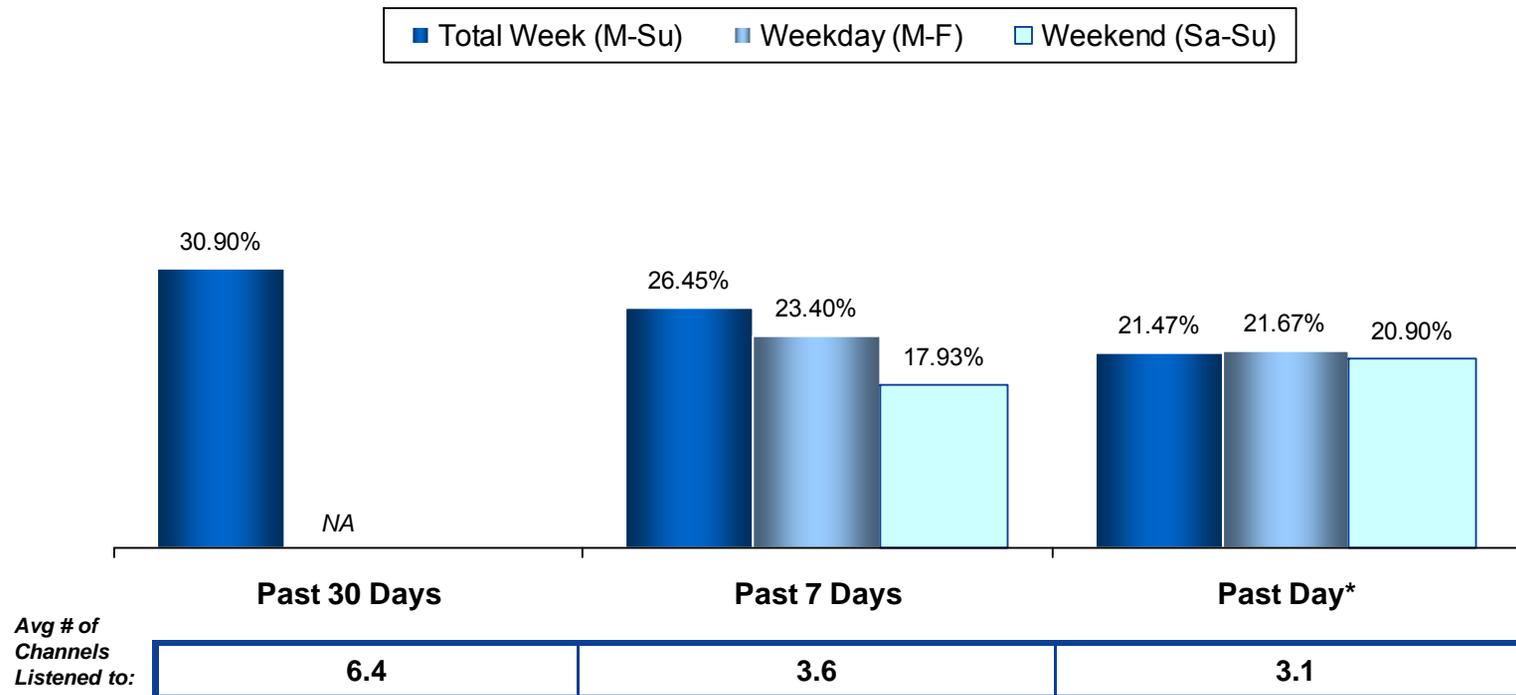
Music Channels Usage

Music Channel Unique (Cume) Audience



* Results based to Total Digital Cable Population.

- Overall, 30.9% of digital cable P13+ listen to Music Channels in a given month (past 30 day Cume). The majority of monthly listeners listen weekly (26.5% of digital cable pop) and many listen daily (21.5% of digital cable pop), with listening generally greater during the week than weekends.



*Past Day based on 6a-6a Any Day M-Su

Source: Music Choice User Study, Nov'08, Base: Total Past Month Music Choice Music Channel Listeners 13+ (N=2,500).

QA1: Which of the following MC channels have you listened to for at least 5 minutes in the **past 30 days**?; QA2: Which of the following MC channels have you listened to for at least 5 minutes in the **past 7 days**?; QA3: Which days of the past week did you listen to each of these channels?

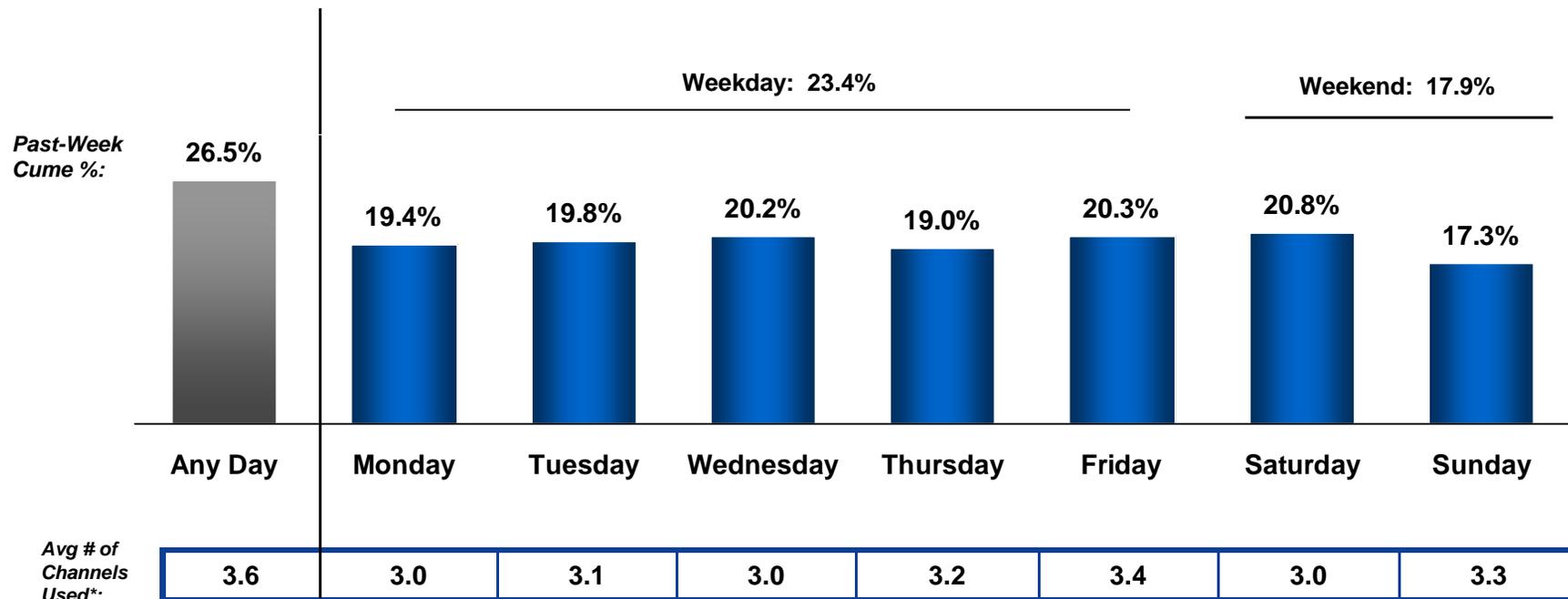


Music Channels Usage by Day



* Results based to Total Digital Cable Population.

- Music Channel users listen to an average of 3 channels per day – greatest on Friday (3.4) and Sunday (3.3)
- A greater proportion of P13+ use Music Channels during the week than on weekends; Sunday attracts the lowest unique audience of the week.



Source: Music Choice User Study, Nov'08, Base: Total Past-Month Music Choice Music Channel Listeners 13+ (N=2,500). *Avg. channels based on past-day usage 6a-6a Any Day M-Su

QA2: Which of the following MC channels have you listened to for at least 5 minutes in the **past 7 days**?; QA3: Which days of the past week did you listen to each of these channels?

Z6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channel(s) you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period.

Z01_DAY_LISTEN: Which days of the past week did you listen to each of these channels?



Music Choice Top Cume Channels (Persons 13+)



* Results based to Total Digital Cable Population.

- Urban, Rock and Pop channels generate the greatest past-month, past-week and average-day unique (cume) audiences.
- '80s, Classic Rock, Rock, '90s and Hip Hop/R&B generate the largest P13+ unique audiences on a monthly basis, though Hip-Hop/R&B, 80s, Rap and Rock record greater average-day unique audiences than other channels.
- Today's Country breaks the top 10 on past-week and average-day cume, but not past-month cume.

Rank	Past 30 Days	CUME Rtg
1	'80s	10.30
2	Classic Rock	9.13
3	Rock	8.59
4	'90s	8.21
5	Hip-Hop & R&B	7.95
6	R&B Hits	7.91
7	'70s	7.35
7	Rap	7.12
9	Hit List	7.06
10	R&B Soul	6.61

Rank	Past 7 Days	CUME Rtg
1	'80s	5.44
2	Hip-Hop & R&B	4.70
3	Classic Rock	4.50
4	Rock	4.40
5	Rap	4.29
6	R&B Hits	4.04
7	Hit List	3.81
8	'70s	3.62
9	'90s	3.50
10	Today's Country	3.35

Rank	Past Day*	CUME Rtg
1	Hip-Hop & R&B	3.83
2	'80s	3.52
3	Rap	3.50
4	Rock	3.41
5	Classic Rock	3.30
6	R&B Hits	2.93
7	Hit List	2.90
8	'90s	2.46
9	R&B Soul	2.41
10	Today's Country	2.36

*Past Day based on 6a-6a Any Day M-Su

Source: Music Choice User Study, Nov'08, Base: Total Persons 13+ (n=2,500) based to total digital population of 103 million

QA2: Which of the following channels have you listened to for at least 5 minutes in the **past 7 days**?

Q6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channel(s) you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period

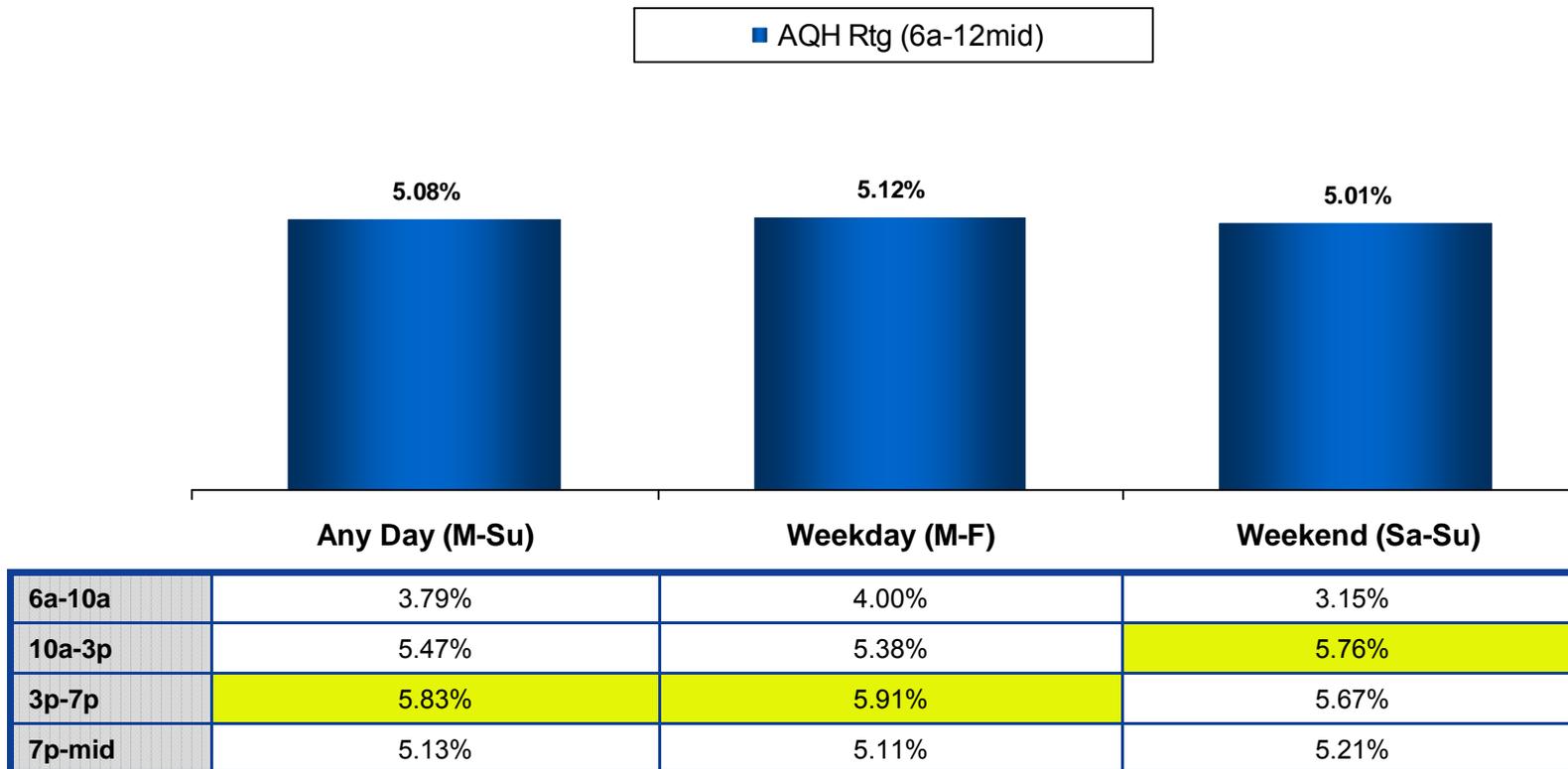


Music Choice AQH Usage



* Results based to Total Digital Cable Population.

- Overall Music Channel AQH usage from 6a-12m averages around 5% of the digital cable P13+ population, similar during the week and on weekends. Usage is lower during morning hours (6a-10a) and greater in the afternoon (3p-7p) during the week, and from 10a-3p on weekends.



Source: Music Choice User Study, Nov'08, Base: Total Persons 13+ (n=2,500) based to total digital population of 103 million

Q6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channel(s) you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period



Music Choice Top AQH* Channels (Persons 13+)



* Results based to Total Digital Cable Population.

- Like Cume, past-day AQH channel usage focuses on a similar mix of Urban, Rock and Pop channels (Hip-Hop/R&B, Rap, Rock, Classic Rock, 80s, Hit List). Today's Country is also a popular channel, more so on weekends.

Rank	Any Day (M-Su)	AQH Rtg	AQH Share
1	Hip-Hop & R&B	0.33	6.56
2	Rap	0.32	6.27
3	Rock	0.29	5.71
4	Classic Rock	0.26	5.04
5	'80s	0.23	4.55
6	Hit List	0.23	4.47
7	R&B Hits	0.21	4.23
8	R&B Soul	0.21	4.14
9	Today's Country	0.20	3.97
10	Metal	0.17	3.26

Rank	Weekday (M-F)	AQH Rtg	AQH Share
1	Rap	0.36	7.07
2	Hip-Hop & R&B	0.34	6.65
3	Rock	0.32	6.17
4	Classic Rock	0.25	4.83
5	'80s	0.23	4.51
6	Hit List	0.23	4.44
7	R&B Soul	0.21	4.20
8	R&B Hits	0.20	4.00
9	Today's Country	0.19	3.76
10	Metal	0.18	3.59

Rank	Weekend (Sa-Su)	AQH Rtg	AQH Share
1	Hip-Hop & R&B	0.32	6.32
2	Classic Rock	0.29	5.71
3	R&B Hits	0.25	5.09
4	'80s	0.23	4.67
5	Today's Country	0.23	4.55
6	Hit List	0.23	4.52
7	Rock	0.22	4.31
8	Rap	0.20	4.02
9	R&B Soul	0.20	4.00
10	Solid Gold Oldies	0.16	3.29

*AQH based on 6a-12mid

Source: Music Choice User Study, Nov'08, Base: Total Persons 13+ (n=2,500) based to total digital population of 103 million

Q6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channel(s) you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period



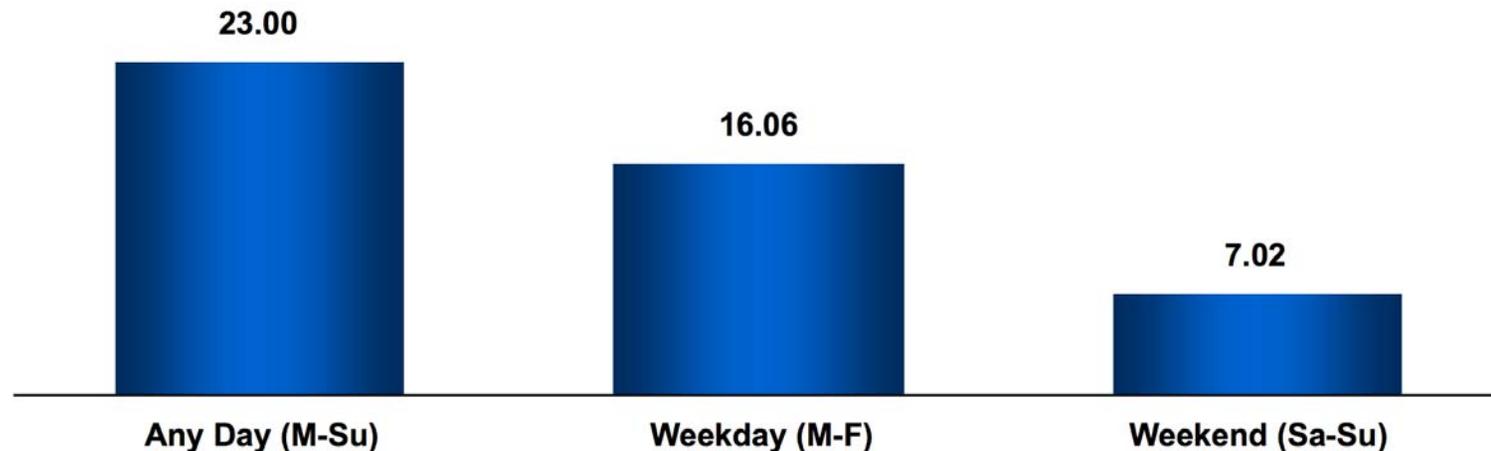
Music Choice Time Spent Listening (Persons 13+)



* Results based to Total Digital Cable Population.

- Users spend an average of 23 hours per week listening to Music Channels during the hours of 6a-12m, which translates to over 3 hours per day.
 - Note, even when factoring in non-past-day usage into the time spent calculation, TSL would still remain high at 18 hours per week, 2.6 hours per day.

Avg. Daypart TSL (in Hrs)*



*TSL based on 6a-12mid

Source: Music Choice User Study, Nov'08, Base: Total Persons 13+ (n=2,500) based to total digital population of 103 million

Q6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channel(s) you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period

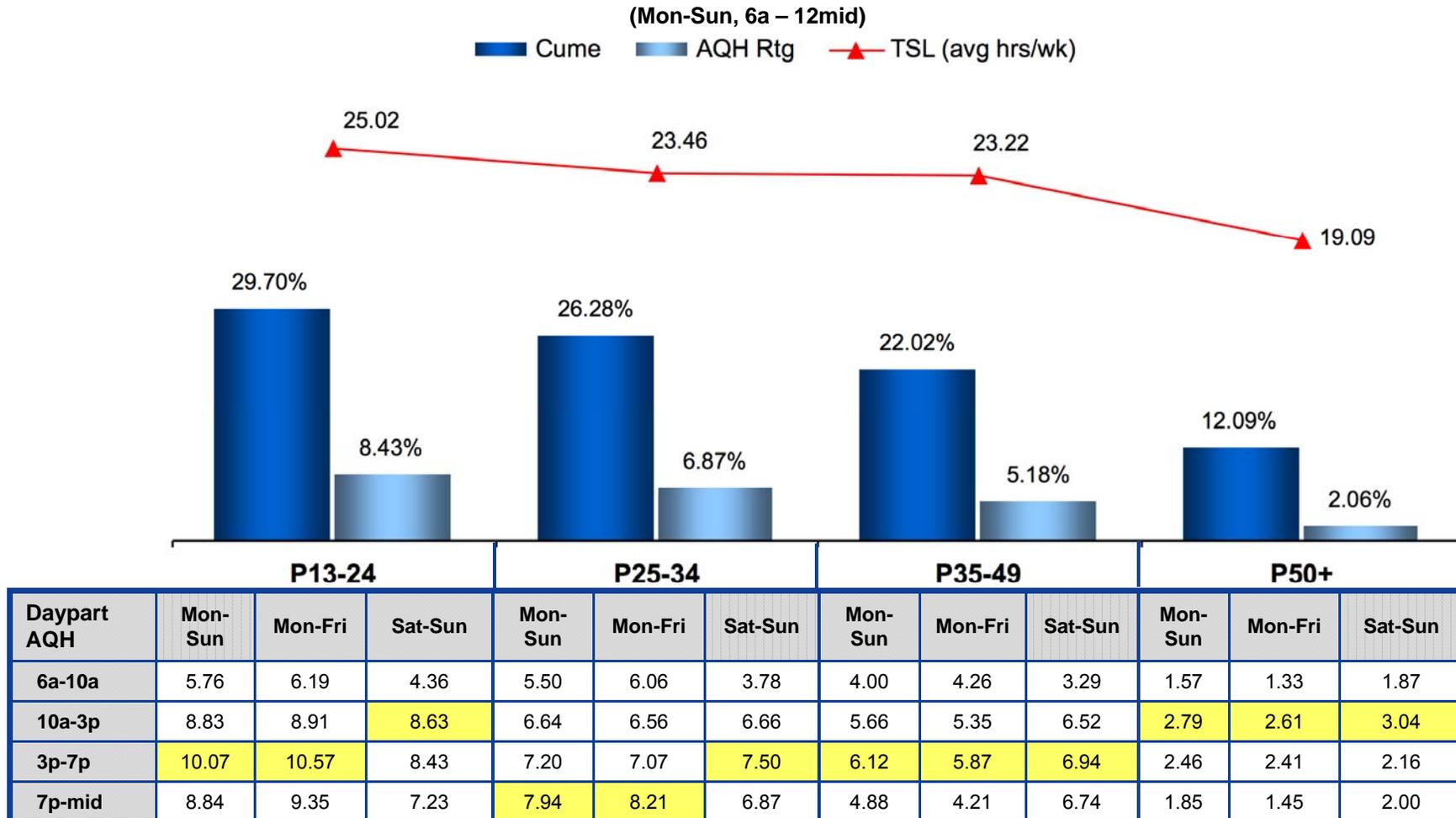


Past-Day Music Channels Usage by Key Demos



* Results based to Total Digital Cable Population.

- Music Channel usage tends to be inversely correlated with age, with younger cohorts (notably 13-24) listening more and for longer periods of time.
- Peak listening periods are 3p to midnight, notably weekday 3p-7p among younger listeners (13-24) and weekday 7p-mid among 25-34 year olds. Weekend usage among younger users peaks during the 10a-3p daypart.



Source: Music Choice User Study, Nov'08, Base: 13-24 (n=713), 25-34 (n=505), 35-49 (n=713), 50+ (n=569)

QA2: Which of the following channels have you listened to for at least 5 minutes in the past 7 days?

Q6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channel(s) you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period



Past-Day AQH Music Channel Usage by Age



* Results based to Total Digital Cable Population.

- Rap, Hip-Hop/R&B and Rock generate top AQH ratings among younger listeners (<34), who exhibit more loyal listening overall than older counterparts.
- Interest in Rock and Hip-Hop/R&B continues among older (35-49) users, though secondary to 80s and Classic Rock.
- 50+ users favor lighter, classic sounds (Solid Gold Oldies, Classic Country, Easy Listening).

AQH* Channel Ratings by Age

Rank	P13-24		P25-34		P35-49		P50+	
1	Rap	0.89	Hip-Hop & R&B	0.52	'80s	0.40	Solid Gold Oldies	0.21
2	Hip-Hop & R&B	0.74	Rap	0.48	Classic Rock	0.33	Classic Country	0.15
3	Rock	0.53	Rock	0.42	Rock	0.33	Easy Listening	0.13
4	Hit List	0.50	'80s	0.38	Hip-Hop & R&B	0.29	Light Classical	0.13
5	Metal	0.47	R&B Soul	0.36	R&B Hits	0.27	Classic Rock	0.12
6	Classic Rock	0.41	R&B Hits	0.35	Classic R&B	0.23	Smooth Jazz	0.10
7	Today's Country	0.39	Hit List	0.32	R&B Soul	0.21	Soundscapes	0.09
8	R&B Hits	0.37	Today's Country	0.29	'90s	0.20	'70s	0.08
9	R&B Soul	0.32	'90s	0.28	Hit List	0.20	Today's Country	0.08
10	Alternative	0.31	Metal	0.25	'70s	0.18	R&B Soul	0.07

*AQH based on Mon-Sun, 6am-12mid.

Source: Music Choice User Study, Nov'08, Base: 13-24 (n=713), 25-34 (n=505), 35-49 (n=713), 50+ (n=569)

Q6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channel(s) you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period

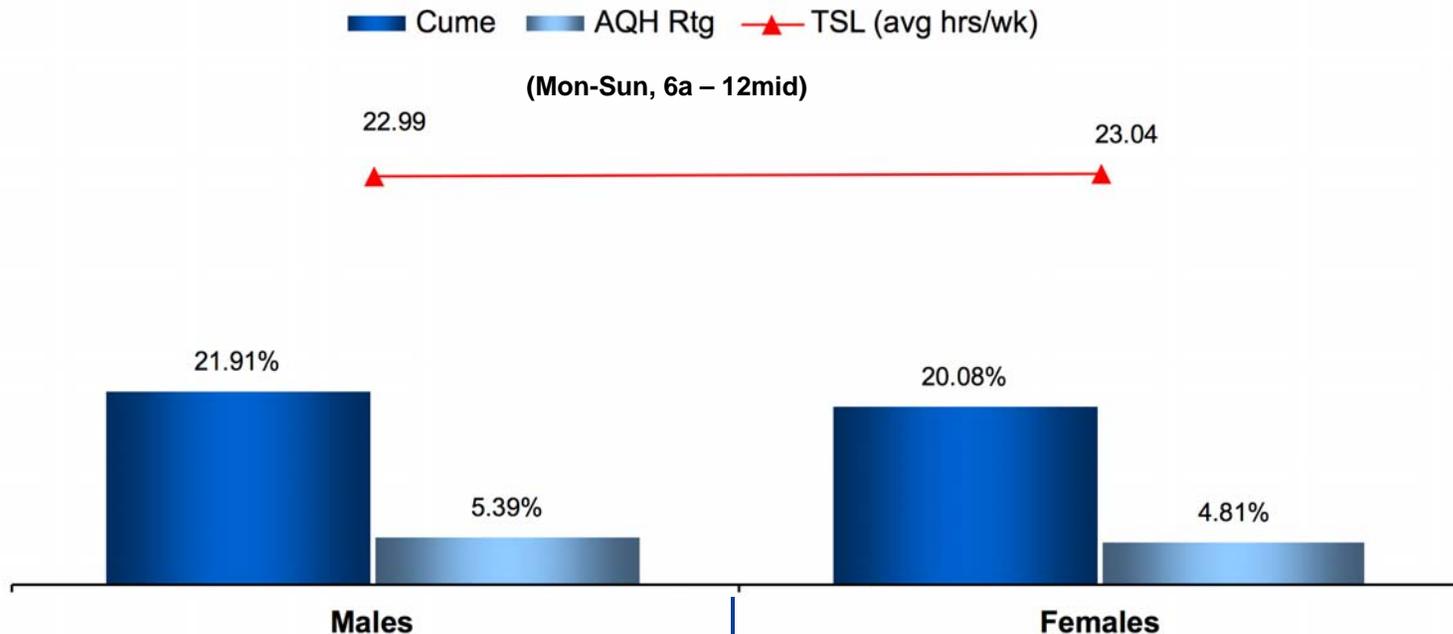


Past-Day Music Channels Usage by Gender



* Results based to Total Digital Cable Population.

- Males and females exhibit similar overall Music Channel usage, although past-day usage among males is greater during weekday 3p-7p and weekend 10a-3p dayparts, while usage among females is reversed (peak weekdays 10a-3p and weekends 3p-7p).



Daypart AQH	Males			Females		
	Total Week	Weekday	Weekend	Total Week	Weekday	Weekend
6a-10a	4.43	4.74	3.48	3.17	3.29	2.80
10a-3p	5.43	5.27	5.45	5.54	5.37	6.05
3p-7p	6.17	6.58	5.09	5.55	5.33	6.19
7p-mid	5.48	5.68	4.91	4.82	4.60	5.48

Source: Music Choice User Study, Nov'08, Base: Male (n=1,202), Female (n=1,298)

QA2: Which of the following channels have you listened to for at least 5 minutes in the past 7 days?

Q6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channel(s) you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period



Past-Day AQH Music Channel Usage by Gender



* Results based to Total Digital Cable Population.

- While Males and Females have a similar mix of channels within their top 10, somewhat different priorities emerge. Males have a greater preference for Rap, Rock/Classic Rock, Hip-Hop and Metal while females prefer Hip-Hop and R&B channels as well as Hit List.

AQH* Channel Ratings by Gender

Rank	Males		Females	
	Channel	Rating	Channel	Rating
1	Rap	0.43	Hip-Hop & R&B	0.38
2	Rock	0.41	Hit List	0.29
3	Classic Rock	0.36	R&B Hits	0.27
4	Hip-Hop & R&B	0.29	R&B Soul	0.27
5	Metal	0.23	'80s	0.25
6	'80s	0.22	Rap	0.21
7	Today's Country	0.20	Today's Country	0.21
8	R&B Hits	0.16	Rock	0.17
9	Hit List	0.16	Classic R&B	0.16
10	'90s	0.16	Classic Rock	0.16

*AQH based on Mon-Sun, 6am-12mid.

Source: Music Channel User Study, Nov'08, Base: Males (n=1,202), Females (n=1,298)

Q6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channel(s) you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period



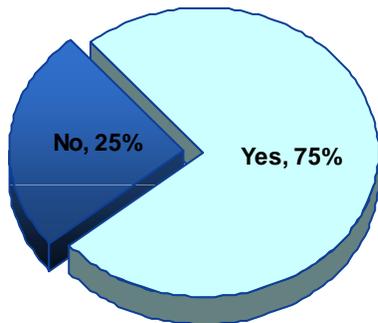
Additional Users – Music Choice Music Channels



* Results based to Total Digital Cable Population.

- On average, 75% listened to Music Choice Music Channels with others in the past week, and 63% in the past day. The typical user listens to Music Choice with 1.7 others in an average week and 1.5 others in past day; co-listeners are evenly mixed by gender and age (though most inclined to be 18-34), and are more inclined to live within the user's household.

Others Listened with You in Past 7 Days?

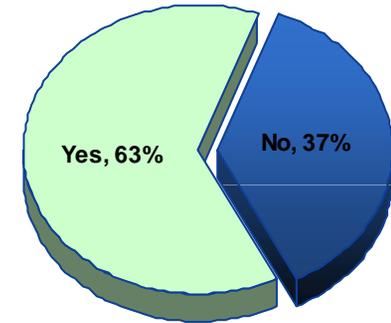


Mean Adtnl Users: 1.7

Composition of Additional Users

	Past 7 Day Adtnl Users	Past Day Adtnl Users
Gender		
Male	51%	52%
Female	49%	48%
Age		
<13	18%	18%
13-17	14%	14%
18-34	36%	36%
35-54	22%	22%
55+	9%	9%
Member of Household		
Yes	69%	78%

Others Listened with You in Past Day?



Mean Adtnl Users: 1.5

Source: Music Choice User Study, Noiv'08, Base: Total Persons 13+ (n=2,500); Past 7 Day Listeners N=2,42; Past Day Listeners N=1,737.

QA4: Additional listeners in past week – total, age, gender, member of household?

QZ7: Did additional listener listen with you in past day?



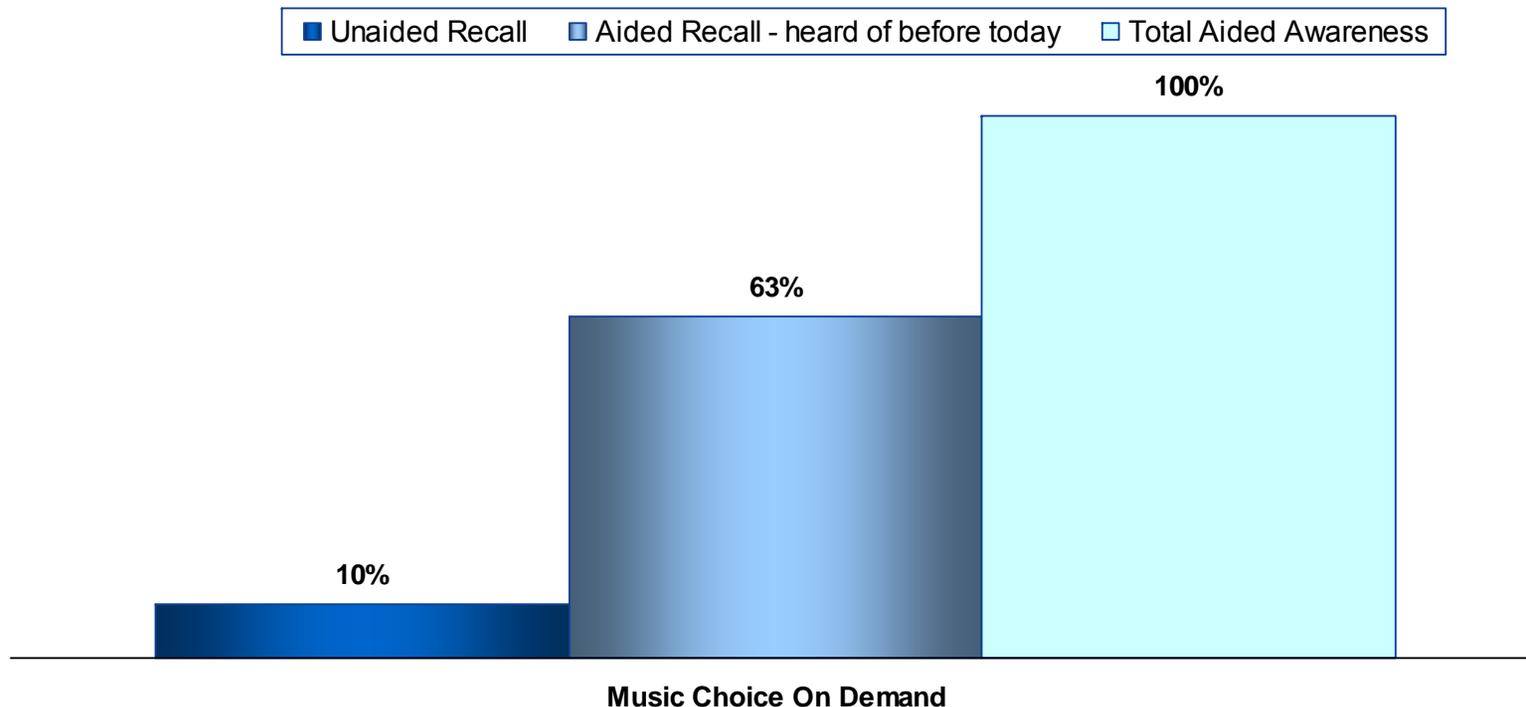
Music Choice On Demand

Brand Awareness and Past Experience with Music Choice Among Past-Month Music Choice On Demand Users



- Similar to awareness among Music Channels users, relatively few Music Choice On Demand users have top-of-mind brand name recall of Music Choice On Demand (10%). The majority recall the service specifically by name once aided (63%), with the remaining 27% having only more general (not brand-specific) awareness of the service prior to the interview.

Among Past-Month Music Choice On Demand Users



Source: Music Choice User Study, Nov'08, Base: Total Past Month Music Choice On Demand Users (N=1,468)

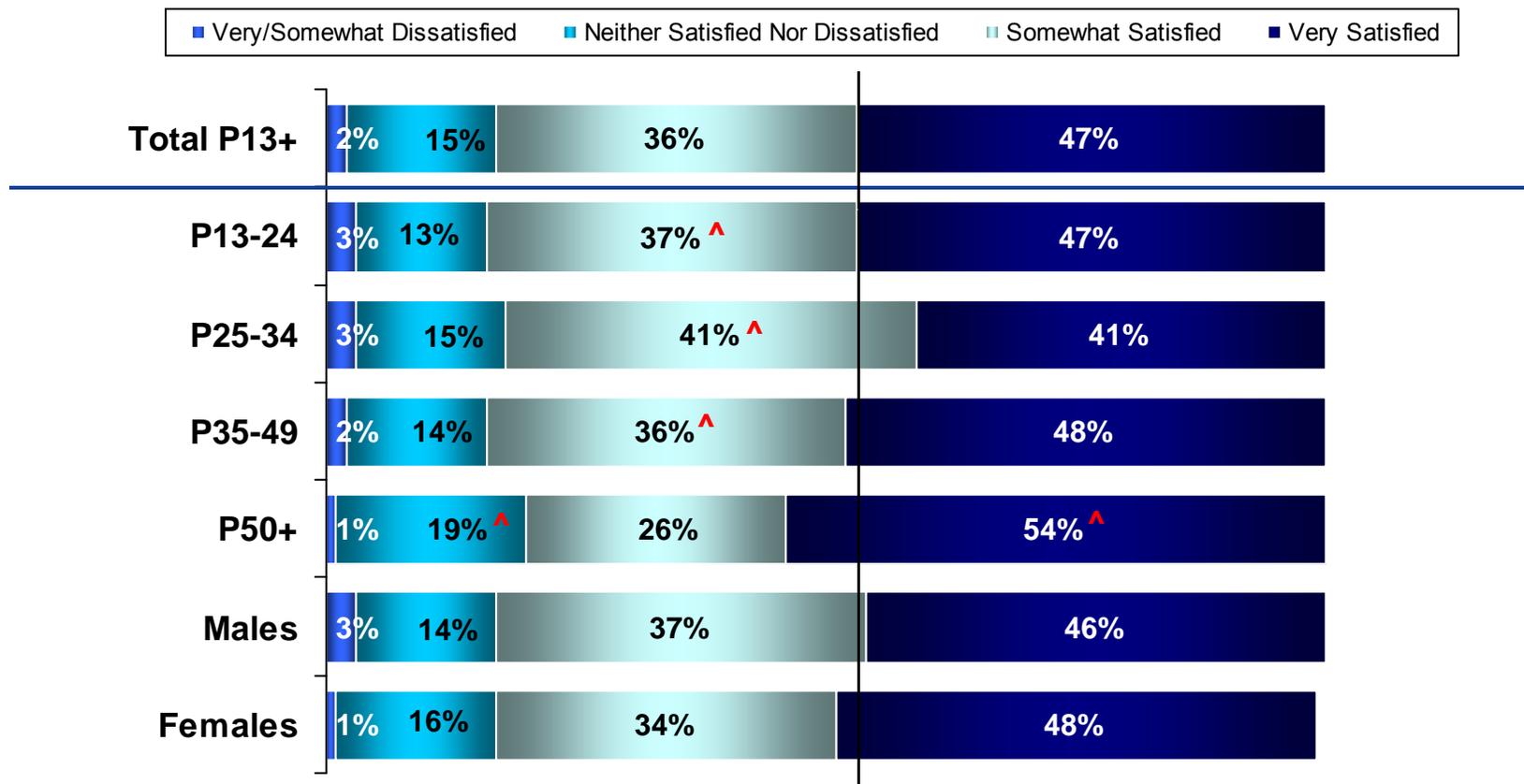
S15_AWARE_VOD: Prior to today, which music-based Video On Demand TV providers were you aware of?; S16_VOD_DEF: ...prior to today, had you ever heard of or viewed Music Choice On Demand?



Overall Satisfaction with Music Choice On Demand



- Satisfaction with Music Choice On Demand is very favorable; nearly half of users (47%) overall report being “very satisfied.” Satisfaction levels are higher among older (50+) users, though older demos generally rate more favorably.



^ Denotes a significantly greater difference at the 95% confidence level from 1 or more other Age groups.

Source: Music Choice User Study, Nov'08, Base: Total Past Month Music Choice On Demand Users (N=1468), 13-24 (N=486), 25-34 (N=348), 35-49 (N=396), 50+ (N=238), Males (N=758), Females (N=710).

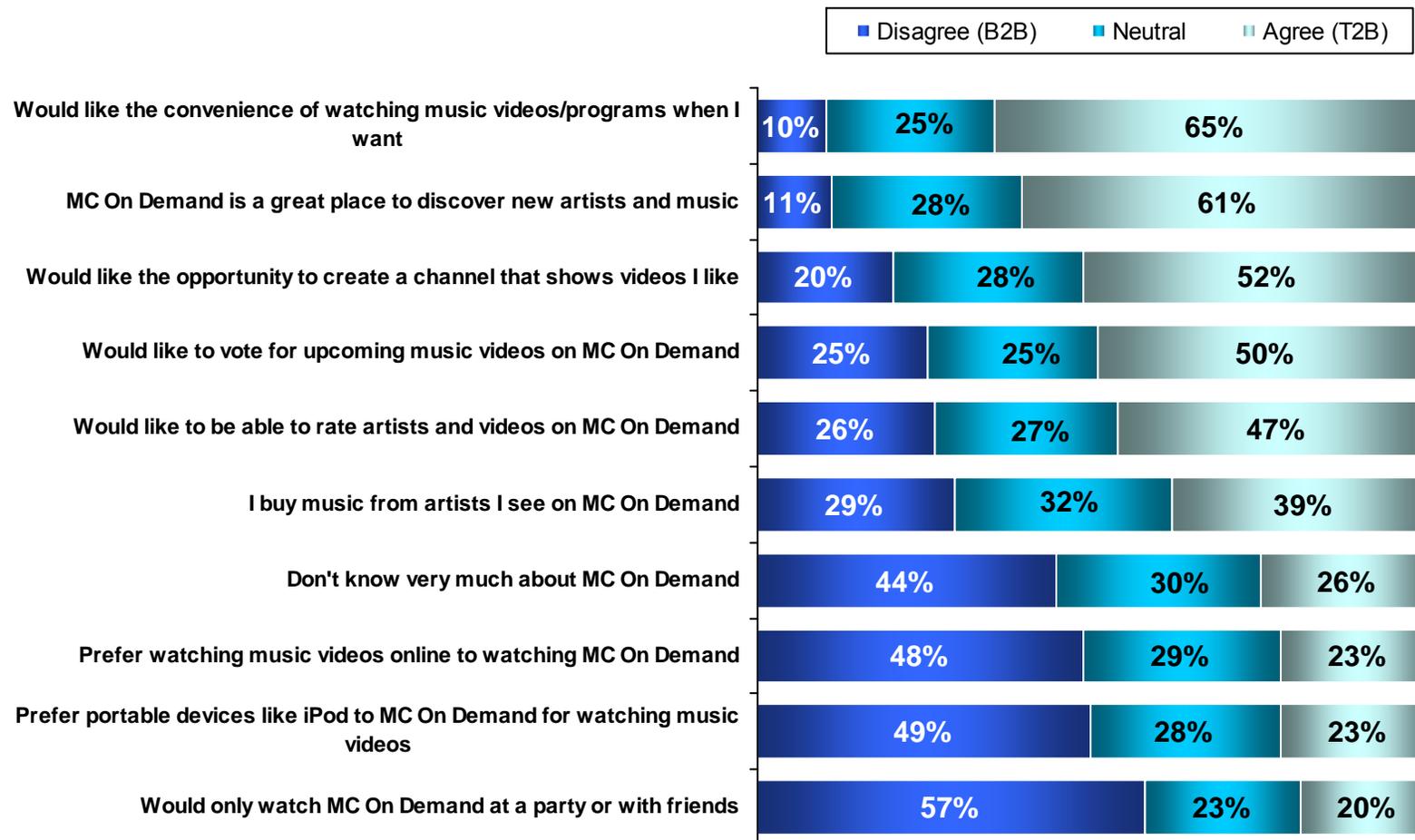
B12_SAT_VOD: Overall, how satisfied are you with Music Choice On Demand?



Agreement Statements - Music Choice On Demand



- Music Choice On Demand users enjoy the convenience of watching anytime they want and find Music Choice a great way to discover new music and artists (over 6 in 10 agree). About half of users have interest in interactive facets such as creating their own video channel, voting for upcoming videos, and rating videos and artists. Just over one-third buy music from artists they see on Music Choice VOD.



Source: Music Choice User Study, Nov'08, Base: Total Past Month Music Choice On Demand Users (N=1,468)

QB18A: Next are some statements that may or may not describe you or your opinions? (Agreement on a scale of 1-5)



Agreement Statements - Music Choice On Demand Summary by Gender & Age



- Females are most likely like the convenience of Music Choice On Demand, while males are more apt to buy music they see. Lack of familiarity with Music Choice On Demand and preference for online and portable music devices are greater barriers among males. Similar to Music Channels, younger users (<34) show greater interest in interacting with Music Choice On Demand, specifically creating their own video channel, and voting for/rating videos and artists. Portable music devices & online compete for younger user music listening time.

	Music Choice On Demand Users by Gender & Age					
	Male	Female	13-24	25-34	35-49	50+
Base:	758	710	486	348	396	238
Would like the convenience of watching music videos/programs when I want	63%	68% *	62%	68%	68%	63%
MC On Demand is a great place to discover artists and music	60%	62%	61%	60%	63%	58%
Would like the opportunity to create a channel that shows videos I like	50%	53%	57% ^	57% ^	49%	36%
Would like to vote for upcoming music videos on MC On Demand	50%	50%	56% ^	55% ^	47%	33%
Would like to be able to rate artists and videos on MC On Demand	47%	47%	53% ^	51%	45%	31%
I buy music from artists I see on MC On Demand	43% *	36%	40%	49% ^	38%	25%
Don't know very much about MC On Demand	29% *	23%	26%	27%	23%	29%
Prefer watching music videos online to watching MC On Demand	28% *	16%	25%	29% ^	20%	12%
I prefer portable devices like iPod to MC for watching music videos	29% *	16%	30% ^	28% ^	17%	9%
Would only watch MC On Demand at a party or with friends	26% *	14%	24% ^	24% ^	18%	11%

Source: Music Choice User Study, Nov'08, Base: Total Past Month Music Choice On Demand Users (N=1,468). Bases for sub-groups vary.

* Denotes a statistically significantly greater difference from comparative group at the 95% confidence level.

^ Denotes a significantly greater difference at the 95% confidence level (significantly different than 2 or more age groups for Age).

QB18A: Next are some statements that may or may not describe you or your opinions? (Agreement on a scale of 1-5)

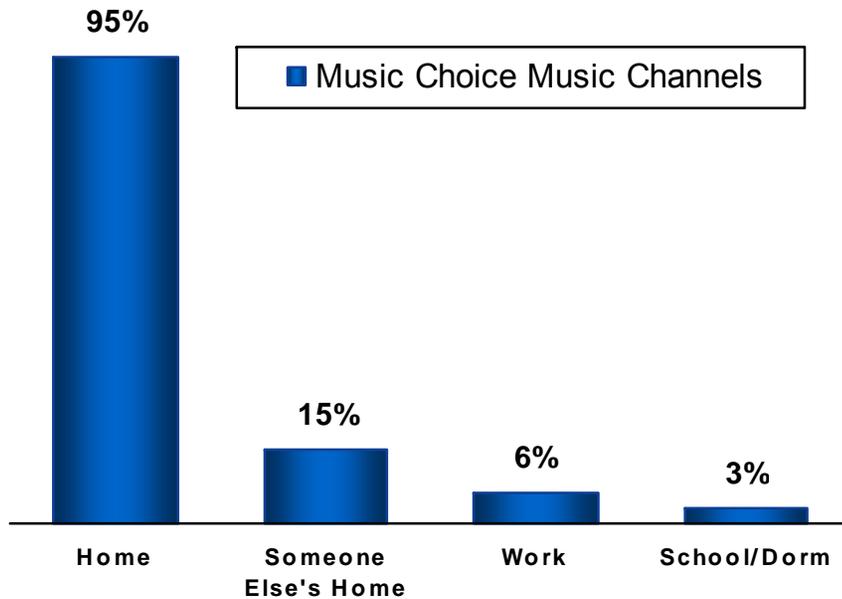


Music Choice On Demand: Where and How View

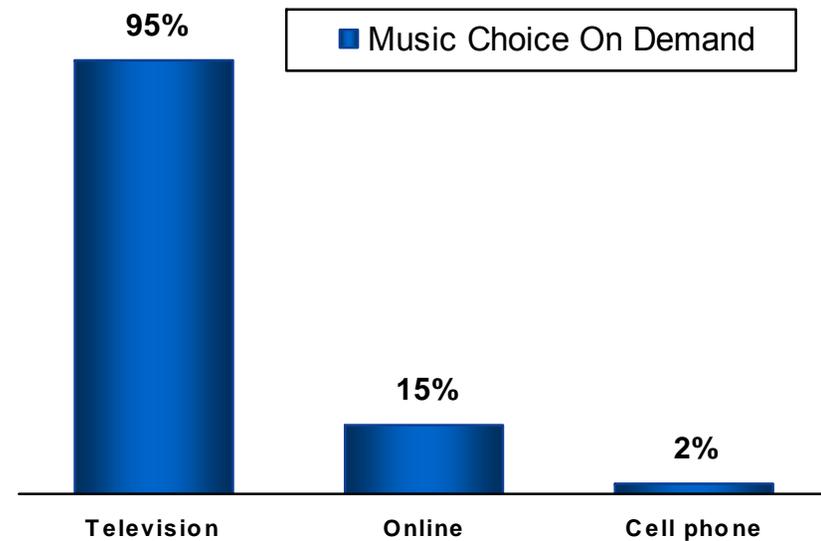


- The vast majority of Music Choice On Demand viewing occurs at home, on television, though a modest contingent (15%) say they watch in other people's homes or online.

Where - Places Typically View



How - Viewing Devices



Source: Music Choice User Study, Nov'08, Base: Total Past Month Music Choice On Demand Users (N=1,468)

B15_WAYSLISTEN_VOD: Which of the following devices do you use to watch Music Choice On Demand videos or music-based programs?;

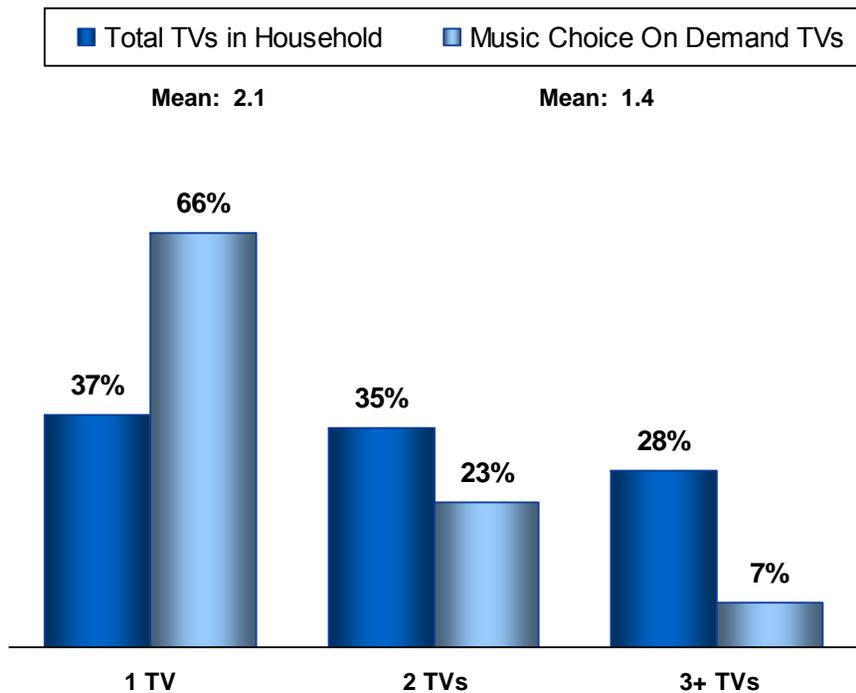
B16_PLACESLISTEN_VOD: Thinking about all the places you watch Music Choice On Demand, where do you typically watch?



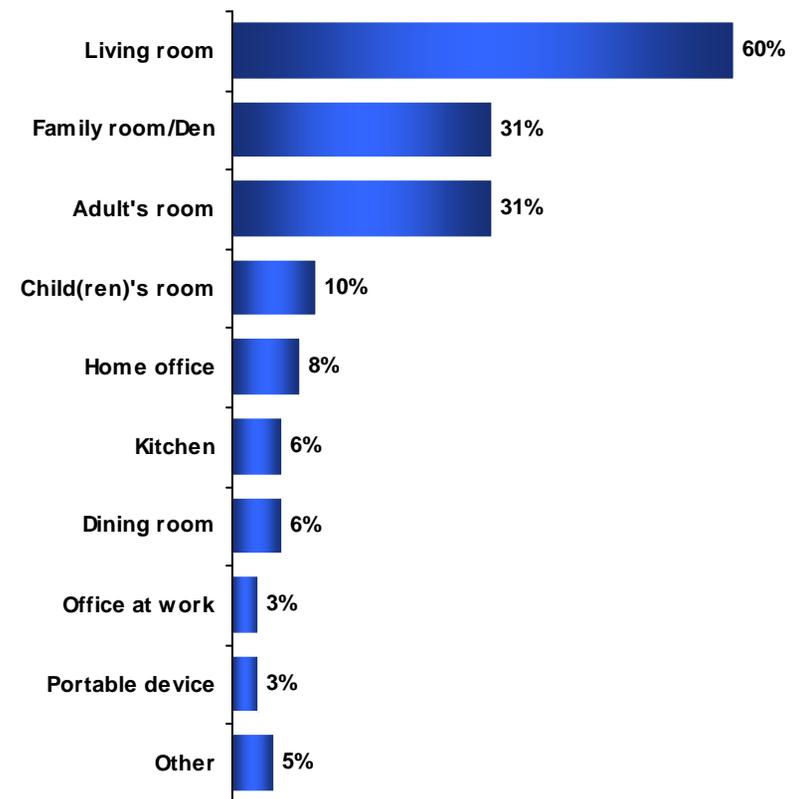
Music Choice On Demand – Television Usage



- While there are multiple TVs in the household receiving digital cable, Music Choice On Demand is most often viewed on a single television, most likely in common viewing areas such as the living room/family room. About 3 in 10 also listen in the adult bedroom.



Where TVs Located to Watch Music Choice



Source: Music Channel User Study, Nov'08, Base: Total Past Month Music Choice On Demand Users (N=1,468)

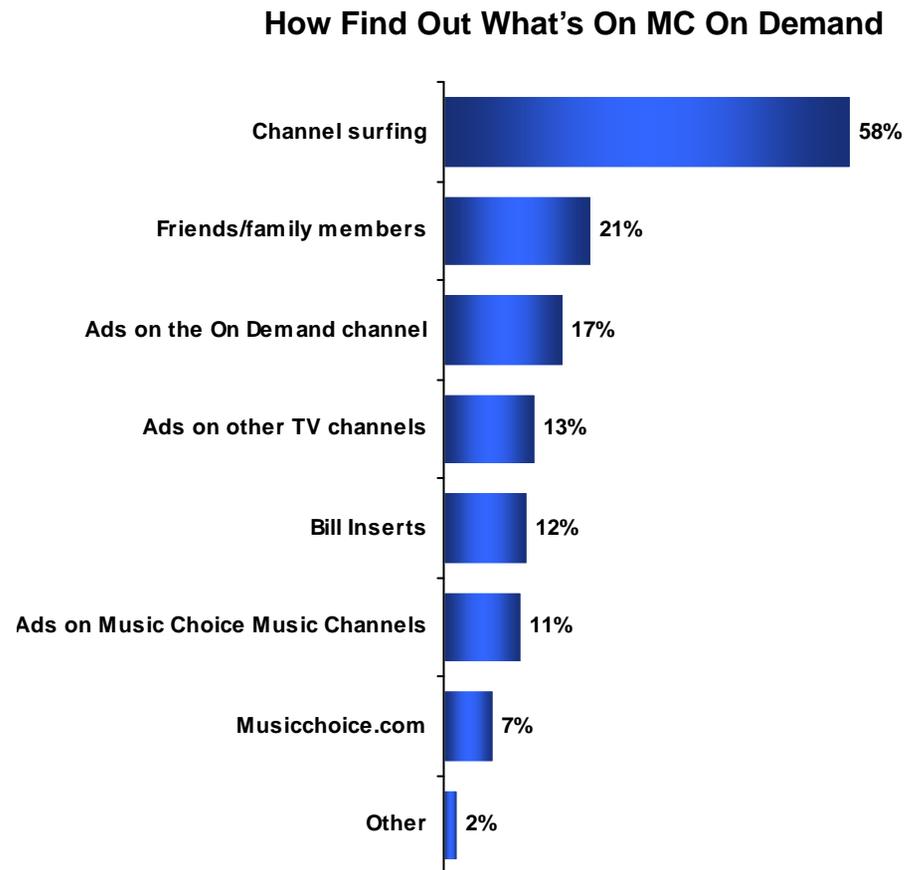
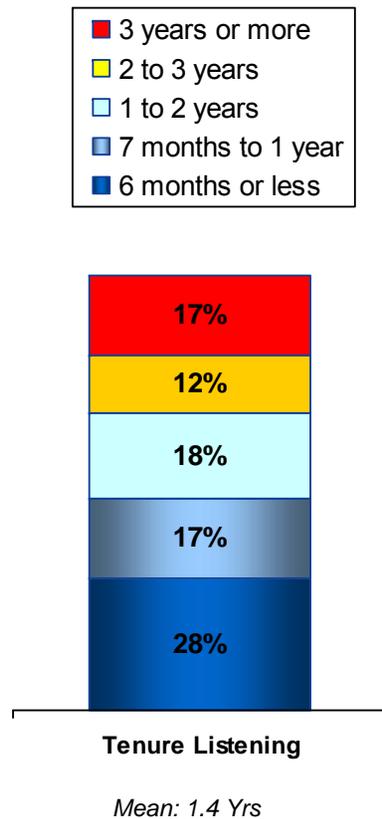
B17_BOXES_VOD: Of the televisions with digital cable/fiber optic TV set top boxes you have in your household, how many were used to watch Music Choice On Demand programming in the past 30 days?; B18_TVLOC_VOD: Where are each of the televisions located that you use to watch Music Choice On Demand?



Music Choice On Demand – Usage Experience and Programming Awareness



- Nearly half of Music Choice On Demand users have been watching for less than 1 year, with one-fourth (28%) being newer viewers (began watching in the past 6 months).
- Channel surfing is the most common way of finding out what’s on Music Choice On Demand, though roughly one-fifth find out via word of mouth or barker ads.



Base: Total Past Month Music Choice On Demand Users (N=1,468)

B11_TENURE_VOD: Approximately how long ago did you first start watching Music Choice On Demand?;

B11A: How do you find out about what's on Music Choice On Demand?

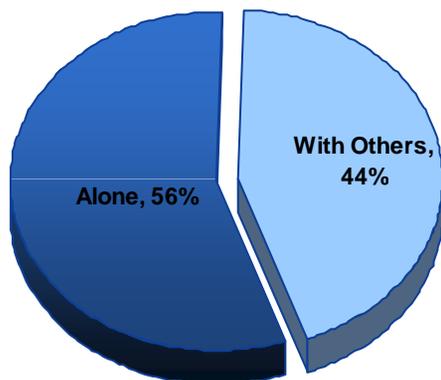


Additional Viewers – Music Choice On Demand

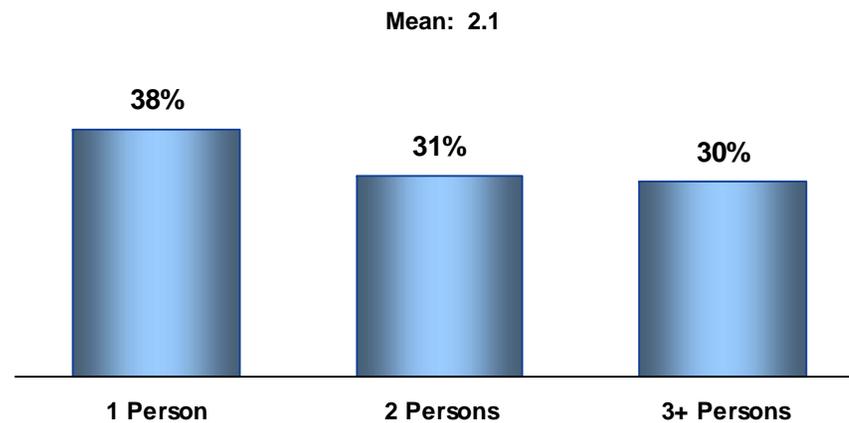


- On a typical viewing occasion, 44% of On Demand users watch with others. These individuals watch with an average number of 2.1 other people.

Typically Watch Alone or With Others?



Number of Other Persons Typically Watch With



Mean (including '0'/those listening alone): 0.9

Base: Past Month Music Choice On Demand Viewers (N=1,468); On Demand Viewers Listening with Others (N=645)

B14B_WK_OTHER_VOD: Do you typically watch Music Choice On Demand videos or music-based programs alone or with others?;

B14C_WK_QTYOTHER_VOD: How many others are typically with you while you're watching Music Choice On Demand videos or music-based programs?



Music Choice Non-Users

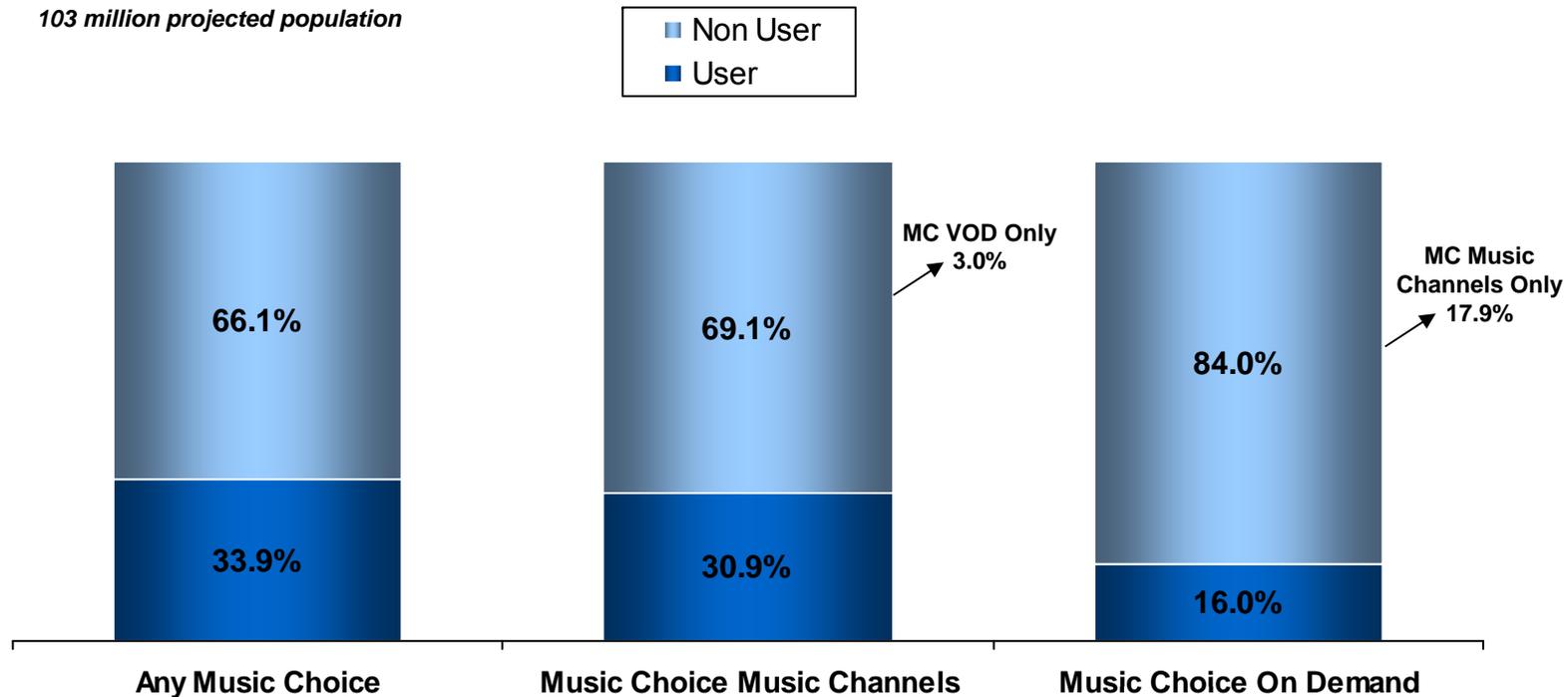
Music Choice Past-Month Non-User Audience



- Approximately two-thirds of the digital cable audience are past-month non-users of Music Choice (Music Channels or VOD).
- Looking at individual Music Choice services, 69% are Music Channel non-users (3% use Music Choice On Demand only), and 84% are Music Choice On Demand non-users (18% use Music Channels only).

Among Digital/Fiber Optic TV Audience

103 million projected population



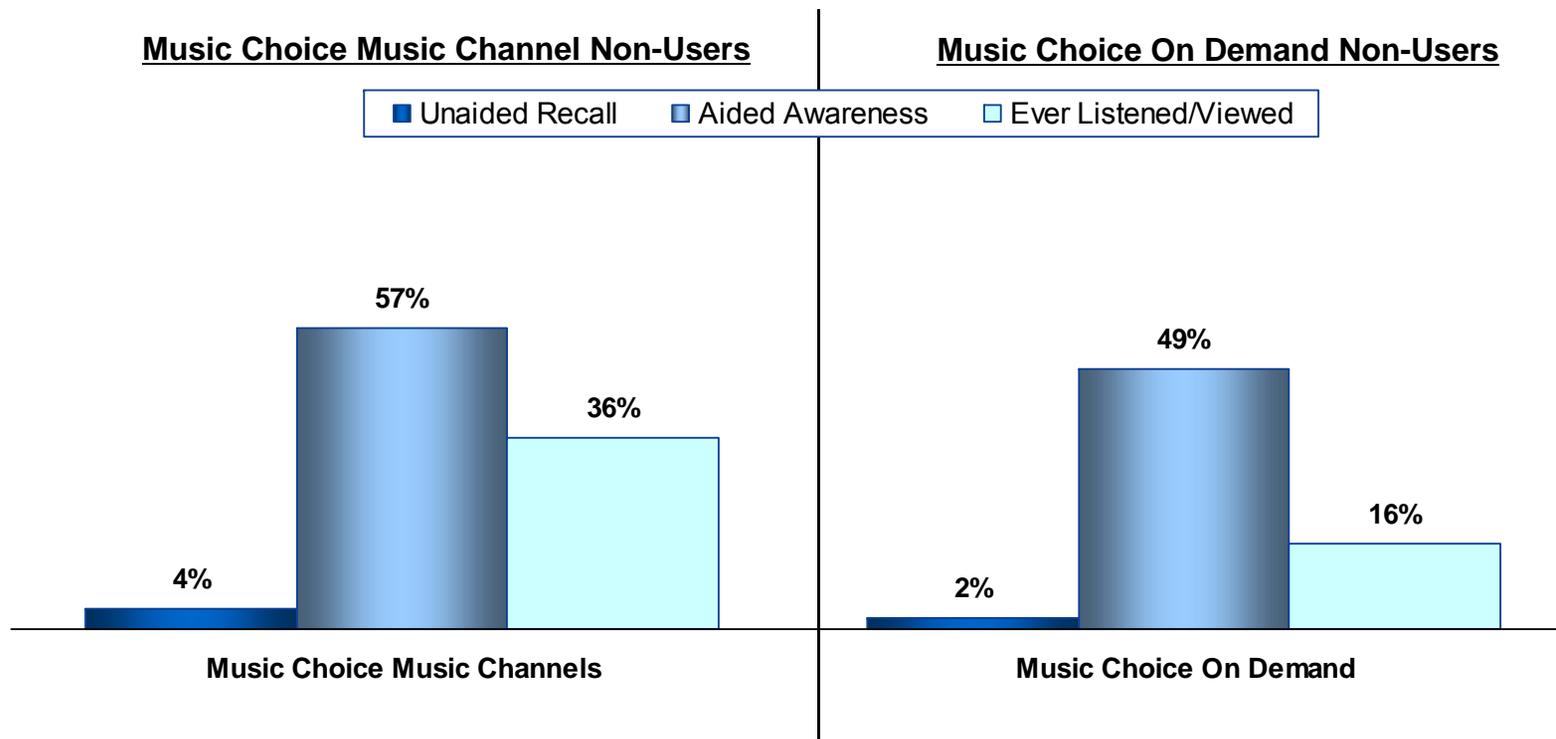
Source: Music Choice Enumeration Survey (Sept. '08)



Brand Awareness and Past Experience with Music Choice among Past-Month Non-Users



- As might be expected, top-of-mind awareness of Music Choice Music Channels or On Demand is not strong among past-month non-users. About half are aware of either service once aided (57% for Channels, 49% for On Demand).
- About one-third of respective non-users have had some experience with Music Channels, while 16% have used On Demand at some point in the past.
 - Consider strengthening promotion of the service to increase awareness and familiarity, and in turn, usage among non-users.



Source: Music Choice User Study, Nov'08, Base: Total Past Month Music Channel Non-Users (N=600), Past Month On Demand Non-Users (N=1,632)

S12_AWARE_MUSIC: What commercial-free TV music channel providers are you aware of?; S13_MC_DF: ...prior to today, had you ever heard of or listened to Music Choice Music Channels?;

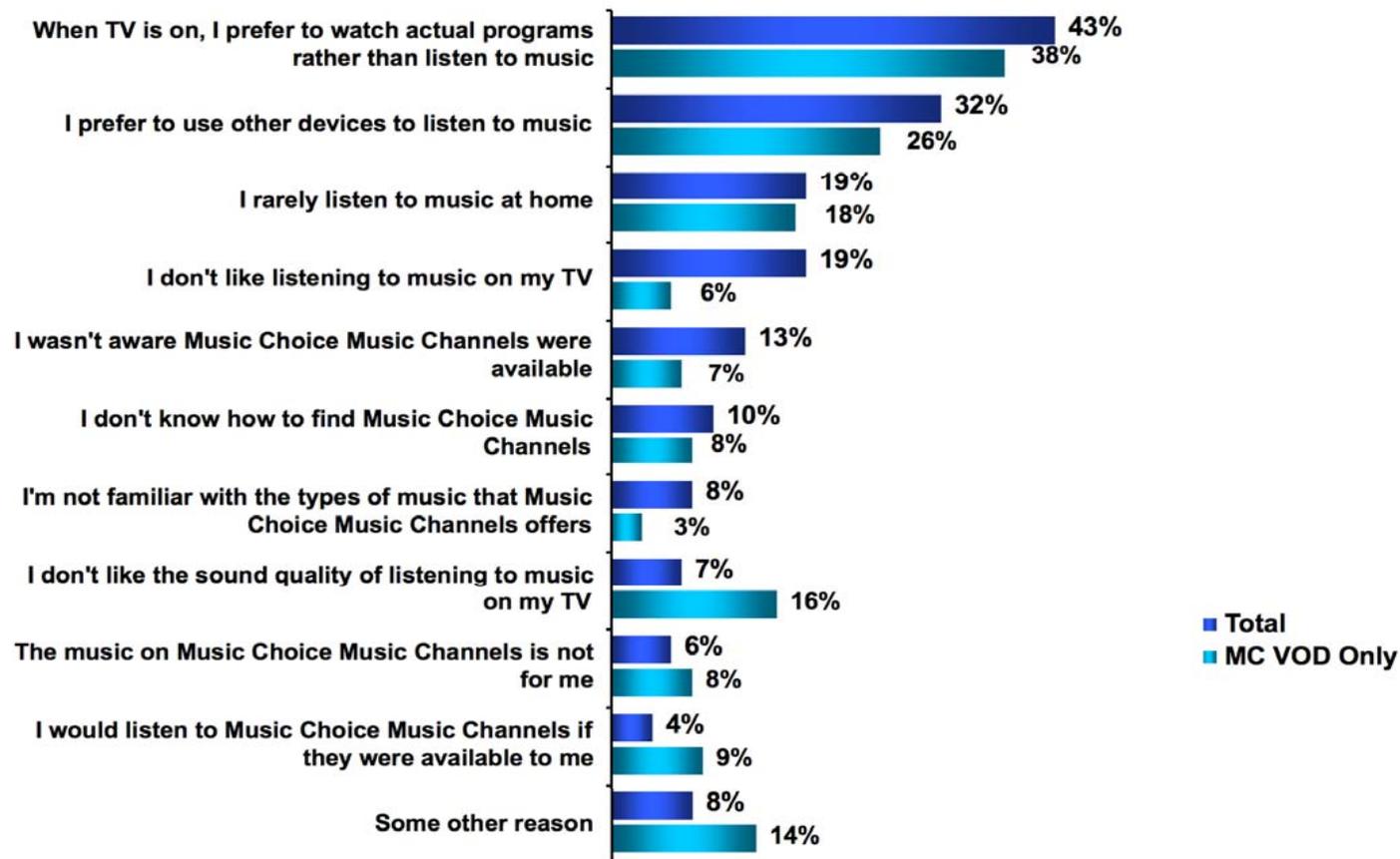
S15_AWARE_VOD: Prior to today, which music-based Video On Demand TV providers were you aware of?; S16_VOD_DEF: ...prior to today, had you ever heard of or viewed Music Choice On Demand?



Music Channel Usage Barriers (Among Past-Month Non-Users)



- Reasons for not listening to Music Channels focus on a preference for watching programs over music on TV and a penchant for other devices to listen to music. Others claim to just not listen to music much at home or like listening on their TVs (about 20%).
- Music Choice On Demand Only users provide similar reasons for not listening to Music Channels, although rather than claiming not to like listening on their TV, they mention not enjoying the sound quality of music on TV.



Source: Music Channel User Study, Nov'08, Base: Music Choice Music Channel Non-Users: Total (N=600), VOD Only (N=100)

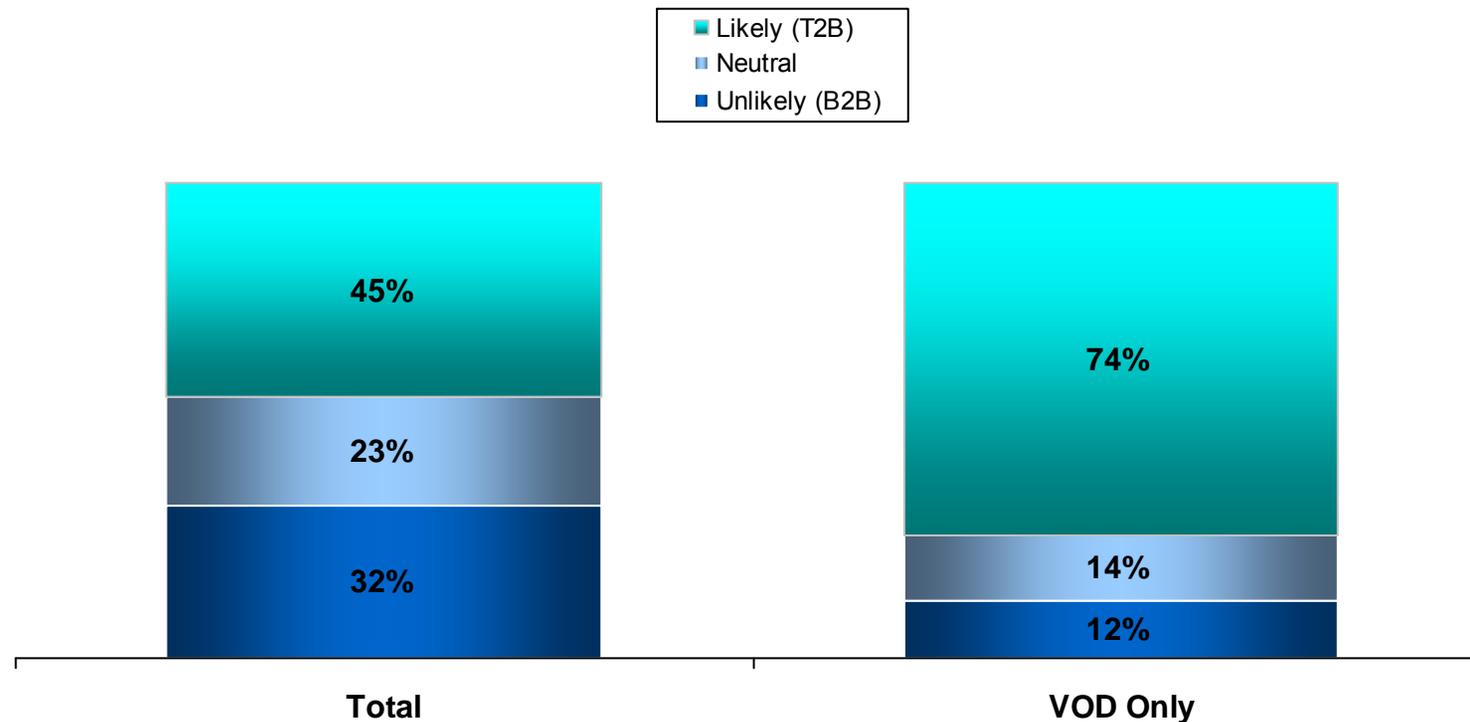
N1: Earlier you mentioned you have not listened to any Music Choice Music Channels recently. Please indicate the reasons that best describe why you do not listen to Music Choice Music Channels.



Future Music Channel Usage Intent (Among Past-Month Non-Users)



- Almost half (45%) of all non-users indicate they are likely to use Music Channels in the future, while one-third (32%) indicate they are unlikely to use the channels
- VOD Only users are even more receptive to using Music Channels – nearly three-quarters report future usage interest.



Source: Music Channel User Study, Nov'08, Base: Music Choice Music Channel Non-Users: Total (N=600), VOD Only (N=100)

N2: How likely are you to listen to Music Choice Music Channels in the future?



Future Music Channel User Prospect Profile



- Non-users most likely to use Music Channels in the future (prospects) are younger than non-prospects, are more likely to skew African-American/Hispanic, are more likely to be employed, and live in larger households.
- In terms of preferences, Music Channel user prospects spend more time listening to music weekly and have a stronger proclivity for various music genres including Urban, Dance, and Jazz & Blues. Music Channel prospects are receptive to listening to music on TV, but have a greater preference for physical music sources.

Demographic Profile	Music Choice Channels Non-Users	
	Likely to Listen in Future (T2B)	Unlikely to Listen in Future (B3B)
Gender		
Male	49%	52%
Female	51%	48%
Age		
Mean	38.9	43.4 *
Race/Ethnicity		
White	63%	80% *
Black	16% *	5%
Hispanic	14% *	7%
Employment/Income		
Employed FT/PT	60% *	48%
HH Income (mean)	\$70.9K	\$70.7K
Household Size		
2+	91% *	83%
Mean	3.17	2.80

TV/Music Profile	Music Choice Channels Non-Users	
	Likely to Listen in Future (T2B)	Unlikely to Listen in Future (B3B)
TV		
Days/week (mean)	6.1	6.2
Hrs/week (mean)	18.2	20.3
Set-top boxes in HH	57%	50%
Music		
Days/week (mean)	4.9 *	4.2
Hrs/week (mean)	11.0	10.0
Music Genres Preferred		
Urban	39% *	22%
Dance	25% *	14%
Jazz & Blues	24% *	15%
Inspirational	21% *	11%
Instrumentals	19% *	9%
World	10% *	4%
Music Sources Used		
TV	37% *	12%
Online	37% *	23%
Physical music	47% *	36%

* Denotes a significantly greater difference at the 95% confidence level.

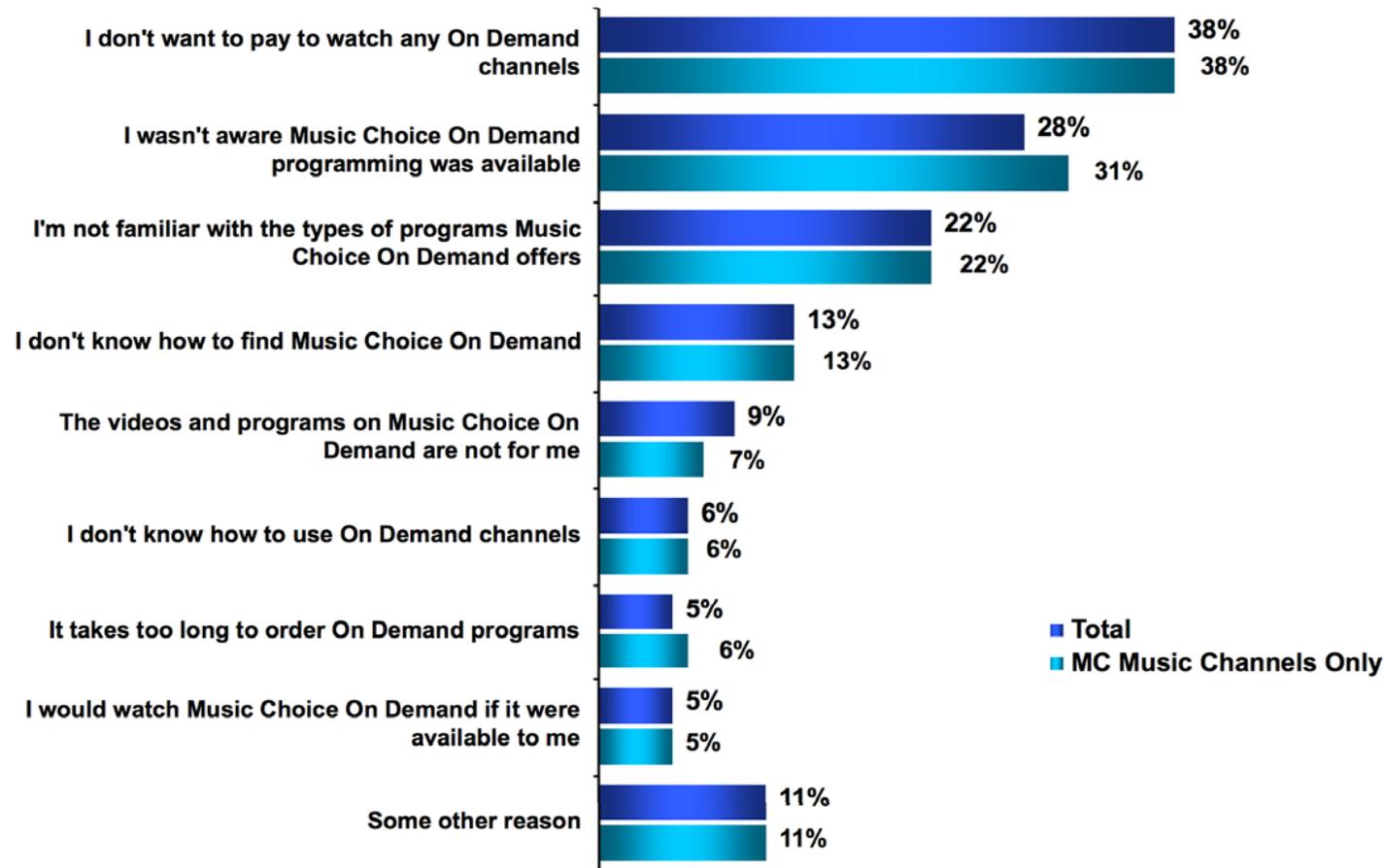
Source: Music Channel User Study, Nov'08, Base: Likely to Listen (N=271), Unlikely to Listen in Future (N=329)



Music Choice On Demand Usage Barriers (Among Past-Month Non-Users)



- A perception of having to pay for On Demand content, as well as lack of availability awareness and content familiarity are most common reasons for not using Music Choice On Demand. Usage barriers are similar among overall non-users and those who use Music Channels only.



Source: Music Channel User Study, Nov'08, Base: Music Choice On Demand Non-Users: Total (N=1,632), MC Music Channels Only (N=1,132)

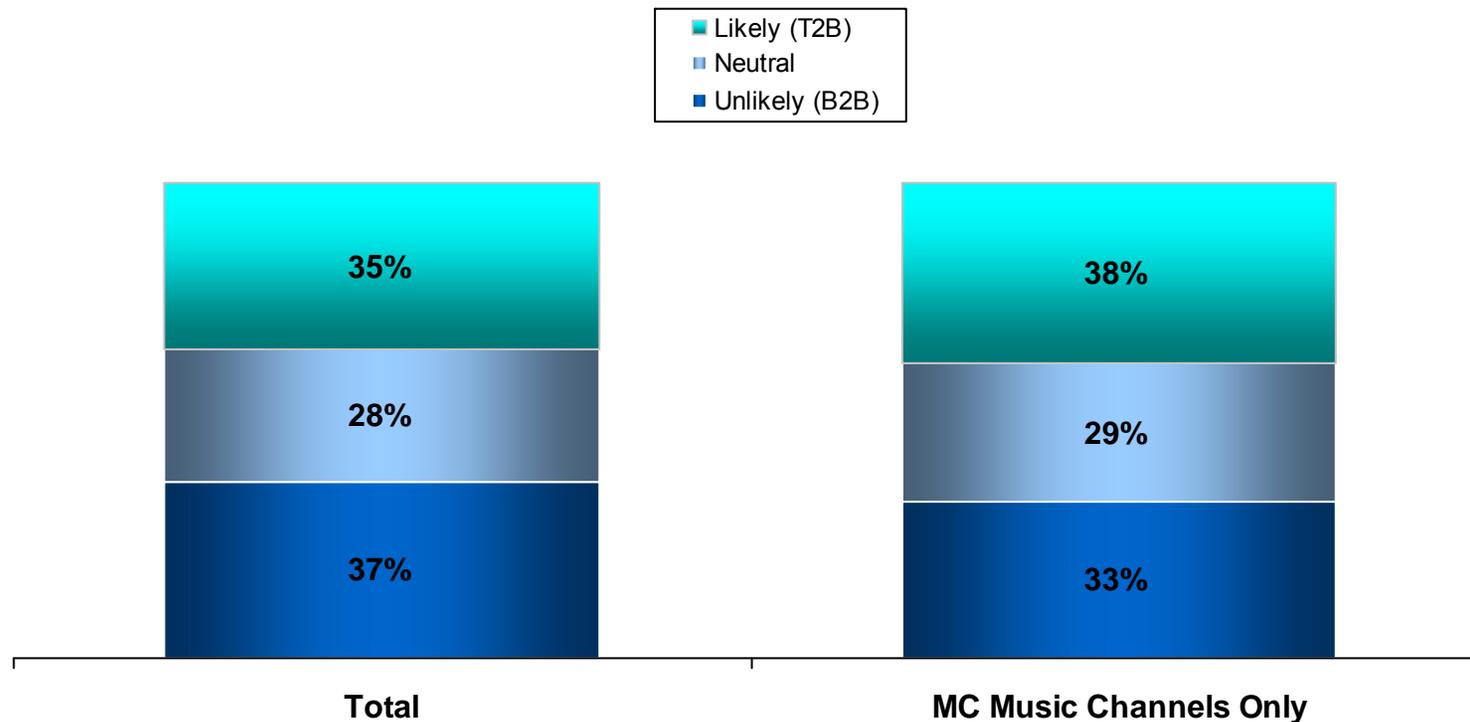
N3: You mentioned you have not watched any Music Choice On Demand programming recently. Please indicate the reasons that best describe why you do not watch Music Choice On Demand.



Future Music Choice On Demand Usage Intent (Among Past-Month Non-Users)



- There is moderate interest (just over one-third) in viewing Music Choice On Demand programming among non-users. Interest tends to be only somewhat higher among those currently using Music Channels only. Still, given that the majority (84%) of digital cable P13+ do not use Music Choice On Demand, this still represents a large number of potential listeners.



Source: Music Channel User Study, Nov'08, Base: Music Choice On Demand Non-Users: Total (N=1,632), MC Music Channels Only (N=1,132)



Future Music Choice On Demand User Prospect Profile



- Non-users most likely to use Music Choice On Demand in the future (prospects) skew younger and African-American, spend more time listening to music in an average week and have a greater penchant for Rock and Urban genres. They are more likely than non-prospects to use TV, online, and MP3 players as current music sources, but are most likely to use their TV.

Demographic Profile	Music Choice On Demand Non-Users	
	Likely to View in Future (T2B)	Unlikely to View in Future (B3B)
Gender		
Male	46%	46%
Female	54%	54%
Age		
Mean	38.1	42.8 *
Race/Ethnicity		
White	67%	75% *
Black	16% *	10%
Hispanic	11%	9%
Employment/Income		
Employed FT/PT	59% *	50%
HH Income (mean)	\$65.6K	\$70.4K
Household Size		
2+	86%	84%
Mean	3.02	2.85

TV/Music Profile	Music Choice On Demand Non-Users	
	Likely to View in Future (T2B)	Unlikely to View in Future (B3B)
TV		
Days/week (mean)	6.1	6.3
Hrs/week (mean)	19.1	19.7
Set-top boxes in HH	62% *	52%
Music		
Days/week (mean)	5.3 *	4.8
Hrs/week (mean)	14.4	11.7
Music Genres Preferred		
Rock	54% *	49%
Urban	35% *	25%
Music Sources Used		
TV	67% *	53%
Online	38% *	27%
MP3 Player	50% *	41%

* Denotes a significantly greater difference at the 95% confidence level.

Source: Music Channel user Study, Nov'08, Base: Likely to Listen (N=572), Unlikely to Listen in Future (N=1060)



- Addendum -

Music Choice Music Channels Audience Profiles

Music Choice Music Channels – Pop Channels Profile (Non-Decades)



	Total Music Choice Music Channels	Pop							
		Lite Hits		Adult Top 40		Hit List		Party Favorites	
Past 30 Day Listenership Intab	2500	214		432		572		366	
30 Day Cume P	31836934	2737976		5488687		7271556		4673662	
30 Day Cume %	30.9	2.66		5.33		7.06		4.54	
	%	%	Index	%	Index	%	Index	%	Index
Age									
13-17	10	8	80	10	100	15	150	15	150
18-34	38	38	100	45	118	53	139	48	126
35-49	29	35	121	32	110	27	93	27	93
50+	23	19	83	13	57	5	22	11	48
Mean Age	36.83	36.59	99	33.66	97	29.51	80	31.07	84
Gender									
Male	48	47	98	45	94	37	77	39	81
Female	52	53	102	55	106	63	121	61	117
Race									
White or Caucasian	65	65	100	68	105	59	91	60	92
Black or African-American	16	10	63	11	69	16	113	14	66
Hispanic	12	16	133	13	108	16	133	18	150
Education									
Some College or Less	65	63	114	66	114	72	114	69	114
College or more	33	35	106	33	100	27	82	29	88
Employment Status									
Employed Full/PT	57	57	100	63	111	56	98	58	102
Retired	9	7	78	4	44	1	11	1	11
Student	11	11	100	10	91	13	118	14	127
Other (Homemaker/Unemployed/Military/NR)	17	22	129	17	100	19	112	18	106
Household Income 18+ (DK/RF Removed)									
Population Intab	2108	188		372		453		299	
Less than \$75K	66	63	95	66	100	68	103	66	100
\$75K or more	34	37	109	34	100	32	94	34	100
Mean Income (\$000)	69.14	71.83	104	69.21	100	65.57	95	67.75	98
Median Income (\$000)	57.22	59.05	103	55.84	98	52.44	92	53.04	93
Household Size									
1	14	12	86	12	86	10	77	11	79
2+	86	88	102	88	102	90	105	89	103
Mean HH Size	3.07	3.19	104	3.20	104	3.35	109	3.38	110
Marital Status									
Married/Living with Partner	56	58	104	57	102	50	89	52	93
Single, never married	31	32	103	32	103	41	132	39	126
Widowed/Divorced/Separated	12	10	83	10	83	8	67	7	56
Past Day Listening*									
Cume Rtg	20.97	0.70		1.56		2.87		1.24	
AQH Rtg	5.08	0.04		0.09		0.23		0.08	
TSL - Hrs Week Avg	23.00	6.04		5.55		7.52		6.45	

- Non-decades Pop genre music listeners tend to be younger (under 35), except for Lite Hits listeners, who skew a bit older (35-49).
- Many of these Pop channels also over index on Hispanic ethnicity.
- Hit List and Party Favorites listeners profile similarly: younger, female, single, and current student.

*AQH based on Mon-Sun, 6am-12mid, based to total 13+ digital population of 103 million. TSL based on past day listeners 13+, 6am-12mid.

 Denotes over index by 20 points vs. Total Music Choice Music Channels.
 Denotes under index by 20 points vs. Total Music Choice Music Channels.



Music Choice Music Channels – Pop Channels Profile (Cont'd) (Decades/Solid Gold Oldies)



	Total Music Choice Music Channels	POP							
		'90s		'80s		'70s		Solid Gold Oldies	
Past 30 Day Listenership Intab	2500	664		830		598		488	
30 Day Cume P	31836934	8455890		10608066		7577190		6189100	
30 Day Cume %	30.9	8.21		10.30		7.35		6.01	
	%	%	Index	%	Index	%	Index	%	Index
Age									
13-17	10	10	100	7	70	9	90	6	60
18-34	38	52	137	37	97	26	68	22	58
35-49	29	31	107	42	145	38	131	26	90
50+	23	7	30	14	61	27	117	45	196
Mean Age	36.83	31.53	86	36.25	98	39.83	108	44.85	122
Gender									
Male	48	44	92	45	94	49	102	45	94
Female	52	56	108	55	106	51	98	55	106
Race									
White or Caucasian	65	64	98	67	103	70	108	67	103
Black or African-American	16	14	88	11	69	10	63	14	88
Hispanic	12	15	125	15	125	14	117	11	92
Education									
Some College or Less	65	67	114	64	114	67	114	68	114
College or more	33	31	94	36	109	32	97	31	94
Employment Status									
Employed Full/PT	57	61	107	65	114	62	109	57	100
Retired	9	3	33	4	44	10	111	17	189
Student	11	13	118	9	82	6	55	5	45
Other (Homemaker/Unemployed/Military/NR)	17	18	106	18	106	16	94	15	88
Household Income 18+ (DK/RF Removed)									
Population Intab	2108	567		740		520		436	
Less than \$75K	66	67	102	64	97	67	102	67	102
\$75K or more	34	33	97	36	106	33	97	33	97
Mean Income (\$000)	69.14	65.49	95	70.39	102	67.44	98	67.06	97
Median Income (\$000)	57.22	53.07	93	59.01	103	56.10	98	54.25	95
Household Size									
1	14	12	86	13	93	13	93	17	121
2+	86	88	102	87	101	87	101	83	97
Mean HH Size	3.07	3.27	107	3.13	102	3.17	103	2.87	93
Marital Status									
Married/Living with Partner	56	54	96	62	111	62	111	62	111
Single, never married	31	38	123	27	87	23	74	21	68
Widowed/Divorced/Separated	12	8	67	10	83	15	125	17	142
Past Day Listening*									
Cume Rtg	20.97	2.43		3.51		2.34		2.04	
AQH Rtg	5.08	0.16		0.23		0.13		0.15	
TSL - Hrs Week Avg	23.00	6.13		6.26		5.28		6.87	

- As may be expected, decades Pop music channels tend to attract listeners of specific age groups.
- '90s channel attracts single, younger listeners (18-34), while subsequent decades channels tend to attract older adults (35+).
- Solid Gold Oldies attracts the oldest audience (50+), with users more likely to be widowed/divorced/separated.

*AQH based on Mon-Sun, 6am-12mid, based to total 13+ digital population of 103 million. TSL based on past day listeners 13+, 6am-12mid.

Denotes over index by 20 points vs. Total Music Choice Music Channels.
 Denotes under index by 20 points vs. Total Music Choice Music Channels.



Music Choice Music Channels – Rock Channels Profile



	Total Music Choice Music Channels	Rock													
		Metal		Rock		Arena Rock		Classic Rock		Alternative		Retro-Active		Adult Alternative	
Past 30 Day Listenership Intab	2500	353		697		277		739		433		134		357	
30 Day Cume P	31836934	4406232		8850668		3489328		9410998		5565096		1731929		4597253	
30 Day Cume %	30.9	4.28		8.59		3.39		9.13		5.40		1.68		4.46	
	%	%	Index	%	Index	%	Index	%	Index	%	Index	%	Index	%	Index
Age															
13-17	10	20	200	15	150	14	140	10	100	16	160	10	100	14	140
18-34	38	54	142	47	124	48	126	36	95	52	137	43	113	51	134
35-49	29	21	72	29	100	33	114	33	114	26	90	43	148	27	93
50+	23	5	22	10	43	5	22	21	91	7	30	4	17	9	39
Mean Age	36.83	27.67	75	31.25	85	30.58	83	36.13	98	29.85	81	32.56	88	31.28	85
Gender															
Male	48	62	129	58	121	57	119	58	121	52	108	53	110	47	98
Female	52	38	73	42	81	43	83	42	81	48	92	47	90	53	102
Race															
White or Caucasian	65	79	122	76	117	75	115	79	122	76	117	68	105	75	115
Black or African-American	16	6	38	6	38	4	25	5	31	6	38	6	38	10	63
Hispanic	12	10	83	11	92	13	108	10	83	11	92	18	150	8	67
Education															
Some College or Less	65	74	114	67	103	72	111	67	103	67	103	57	88	68	105
College or more	33	23	70	32	97	26	79	31	94	32	97	42	127	30	91
Employment Status															
Employed Full/PT	57	53	93	59	104	60	105	61	107	55	96	65	114	60	105
Retired	9	2	22	3	33	4	44	7	78	2	22	0	0	2	22
Student	11	16	145	14	127	14	127	10	91	15	136	9	82	12	109
Other (Homemaker/Unemployed/Military/NR)	17	19	112	16	94	16	94	17	100	19	112	20	118	17	100
Household Income 18+ (DK/RF Removed)															
Population Intab	2108	262		561		225		639		345		114		302	
Less than \$75K	66	78	118	66	100	71	108	66	100	63	95	58	88	63	95
\$75K or more	34	22	65	34	100	29	85	34	100	37	109	42	124	37	109
Mean Income (\$000)	69.14	56.99	81	68.74	99	63.82	92	69.85	101	71.65	104	78.59	114	70.16	101
Median Income (\$000)	57.22	45.59	80	55.79	98	52.01	91	56.43	99	56.27	98	62.37	109	58.56	102
Household Size															
1	14	16	114	14	100	16	114	13	93	14	100	11	79	11	79
2+	86	84	98	86	100	84	98	87	101	86	100	89	103	89	103
Mean HH Size	3.07	3.24	106	3.25	106	3.31	108	3.15	103	3.33	108	3.42	111	3.23	105
Marital Status															
Married/Living with Partner	56	44	79	53	95	52	93	58	104	50	89	59	105	54	96
Single, never married	31	47	152	38	123	37	119	30	97	39	126	31	100	35	113
Widowed/Divorced/Separated	12	8	67	9	75	10	83	11	92	10	83	10	83	11	92
Past Day Listening*															
Cume Rtg	20.97	1.78		3.37		1.22		3.23		1.89		0.44		1.37	
AQH Rtg	5.08	0.17		0.29		0.09		0.26		0.13		0.03		0.09	
TSL - Hrs Week Avg	23.00	8.83		8.16		6.63		7.54		6.68		7.36		6.57	

- Most Rock channels attract a larger proportion of Caucasian and males users, particularly Rock, Metal, Classic Rock, and Arena Rock channels.

- Except for Classic Rock and Retro-Active, Rock channels attract a younger (<35) audience, particularly Metal and Alternative.

- Retro-Active attracts a slightly older, more educated, affluent audience.



Denotes over index by 20 points vs. Total Music Choice Music Channels.
 Denotes under index by 20 points vs. Total Music Choice Music Channels.

*AQH based on Mon-Sun, 6am-12mid, based to total 13+ digital population of 103 million. TSL based on past day listeners 13+, 6am-12mid.

Music Choice Music Channels – Urban Channels Profile



	Total Music Choice Music Channels	Urban													
		Hip-Hop & R&B		Classic R&B		R&B Soul		R&B Hits		Rap		Reggae		Showcase	
Past 30 Day Listenership Intab	2500	647		405		538		644		579		293		79	
30 Day Cume P	31836934	8188459		5157583		6813104		8150255		7335230		3744023		1006047	
30 Day Cume %	30.9	7.95		5.01		6.61		7.91		7.12		3.63		0.98	
	%	%	Index	%	Index	%	Index	%	Index	%	Index	%	Index	%	Index
Age															
13-17	10	17	170	11	110	13	130	13	130	20	200	12	120	10	100
18-34	38	59	155	45	118	46	121	49	129	61	161	53	139	59	155
35-49	29	20	69	32	110	28	97	26	90	15	52	20	69	22	76
50+	23	4	17	13	57	13	57	12	52	3	13	15	65	9	39
Mean Age	36.83	27.65	75	33.47	91	32.63	89	31.65	86	25.85	70	31.73	86	30.69	83
Gender															
Male	48	44	92	42	88	38	79	39	81	53	110	47	98	64	133
Female	52	56	108	58	112	62	119	61	117	47	90	53	102	36	69
Race															
White or Caucasian	65	43	66	38	58	32	49	36	55	44	68	49	75	66	102
Black or African-American	16	35	219	42	263	47	294	41	256	37	231	31	194	6	38
Hispanic	12	16	133	13	108	14	117	15	125	14	117	14	117	19	158
Education															
Some College or Less	65	75	114	66	114	70	114	72	114	75	114	65	114	61	114
College or more	33	23	70	31	94	29	88	26	79	22	67	33	100	37	112
Employment Status															
Employed Full/PT	57	56	98	61	107	60	105	57	100	54	95	60	105	60	105
Retired	9	1	11	2	22	3	33	4	44	1	11	2	22	3	33
Student	11	16	145	12	109	12	109	14	127	18	164	14	127	12	109
Other (Homemaker/Unemployed/Military/NR)	17	15	88	17	100	17	100	17	100	15	88	17	100	19	112
Household Income 18+ (DK,RF Removed)															
Population Intab	2108	497		338		436		511		426		242		69*	
Less than \$75K	66	74	112	71	108	75	114	73	111	75	114	65	98	62	94
\$75K or more	34	26	76	29	85	25	74	27	79	25	74	35	103	38	112
Mean Income (\$000)	69.14	60.23	87	64.01	93	59.37	86	60.46	87	60.96	88	68.35	99	67.87	98
Median Income (\$000)	57.22	48.40	85	52.01	91	47.66	83	48.95	86	48.26	84	57.16	100	49.54	87
Household Size															
1	14	11	79	12	86	11	79	12	86	12	86	10	77	19	136
2+	86	89	103	88	102	89	103	88	102	88	102	90	105	81	94
Mean HH Size	3.07	3.42	111	3.35	109	3.37	110	3.33	108	3.45	112	3.47	113	3.47	113
Marital Status															
Married/Living with Partner	56	42	75	47	84	47	84	45	80	37	66	49	88	57	102
Single, never married	31	48	155	40	129	39	126	41	132	54	174	41	132	36	116
Widowed/Divorced/Separated	12	8	67	12	100	11	92	12	100	7	58	9	75	7	58
Past Day Listening*															
Cume Rtg	20.97	3.79		1.43		2.39		2.88		3.49		1.00		0.15	
AQH Rtg	5.08	0.33		0.13		0.21		0.21		0.32		0.06		0.01	
TSL - Hrs Week Avg	23.00	8.34		8.38		8.37		7.09		8.68		5.40		7.14	

- Urban channel listeners (particularly Rap and Hip-Hop/R&B listeners) tend to be younger (under 35), single and current students, although Classic R&B and R&B Soul attract a slightly older audience.
- Urban channels (most notably Hip-Hop/R&B, R&B, Rap and Reggae) attract a great proportion of African-American and Hispanic listeners.
- R&B channels attract a larger proportion of females, while Showcase attracts a larger proportion of males.

*AQH based on Mon-Sun, 6am-12mid, based to total 13+ digital population of 103 million. TSL based on past day listeners 13+, 6am-12mid

Denotes over index by 20 points vs. Total Music Choice Music Channels.
 Denotes under index by 20 points vs. Total Music Choice Music Channels.



Music Choice Music Channels – Country Channels Profile



	Total Music Choice Music Channels	Country							
		Today's Country		Americana		Classic Country		Blue Grass	
Past 30 Day Listenership Intab	2500	458		86		381		175	
30 Day Cume P	31836934	5730648		1120660		4801010		2215851	
30 Day Cume %	30.9	5.56		1.09		4.66		2.15	
	%	%	Index	%	Index	%	Index	%	Index
Age									
13-17	10	9	90	10	100	6	60	7	70
18-34	38	41	108	47	124	32	84	36	95
35-49	29	26	90	22	76	26	90	23	79
50+	23	23	100	20	87	36	157	34	148
Mean Age	36.83	36.71	100	34.23	93	42.03	114	40.35	110
Gender									
Male	48	39	81	60	125	46	96	58	121
Female	52	61	117	40	77	54	104	42	81
Race									
White or Caucasian	65	84	129	77	118	80	123	79	122
Black or African-American	16	5	31	3	19	4	25	6	38
Hispanic	12	7	58	15	125	8	67	9	75
Education									
Some College or Less	65	69	114	56	114	68	114	55	114
College or more	33	29	88	40	121	31	94	44	133
Employment Status									
Employed Full/PT	57	51	89	66	116	53	93	64	112
Retired	9	12	133	4	44	18	200	12	133
Student	11	8	73	5	45	6	55	8	73
Other (Homemaker/Unemployed/Military/NR)	17	23	135	20	118	21	124	12	71
Household Income 18+ (DK/RF Removed)									
Population Intab	2108	385		75		337		155	
Less than \$75K	66	73	111	58	88	69	105	63	95
\$75K or more	34	27	79	42	124	31	91	37	109
Mean Income (\$000)	69.14	61.35	89	80.63	117	64.11	93	70.73	102
Median Income (\$000)	57.22	51.38	90	64.33	112	52.91	92	57.76	101
Household Size									
1	14	12	86	10	71	14	100	14	100
2+	86	88	102	90	105	86	100	86	100
Mean HH Size	3.07	3.26	106	3.58	117	3.03	99	3.13	102
Marital Status									
Married/Living with Partner	56	61	109	57	102	61	109	57	102
Single, never married	31	26	84	38	123	24	77	29	94
Widowed/Divorced/Separated	12	12	100	5	42	15	125	14	117
Past Day Listening*									
Cume Rtg	20.97	2.31		0.26		1.55		0.53	
AQH Rtg	5.08	0.20		0.02		0.12		0.05	
TSL - Hrs Week Avg	23.00	8.29		6.03		7.22		8.22	

- For the most part, Country music channels are more likely to attract Caucasian users.
- Today's Country attracts a larger proportion of females, while Americana and Bluegrass attract a larger proportion of males.
- Americana and Today's Country channels attract the youngest listeners of the larger Country genre. Americana listeners also skew more affluent, and over-index in Hispanic ethnicity.
- Classic Country and Bluegrass listeners are more inclined to be older (50+) and retired, and Classic Country listeners are more likely to be widowed/divorced/separated

*AQH based on Mon-Sun, 6am-12mid, based to total 13+ digital population of 103 million. TSL based on past day listeners 13+, 6am-12mid.

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Music Choice Music Channels – Latin Channels Profile



	Total Music Choice Music Channels	Latin									
		Musica Urbana		Salsa y Merengue		Mexicana		Rock en Español		Pop Latino	
Past 30 Day Listenership Intab	2500	120		124		94		103		134	
30 Day Cume P	31836934	1528173		1579112		1197069		1324416		1668255	
30 Day Cume %	30.9	1.48		1.53		1.16		1.29		1.62	
	%	%	Index	%	Index	%	Index	%	Index	%	Index
Age											
13-17	10	21	210	11	110	20	200	21	210	20	200
18-34	38	53	139	46	121	56	147	55	145	50	132
35-49	29	24	83	31	107	16	55	21	72	24	83
50+	23	2	9	11	48	7	30	3	13	7	30
Mean Age	36.83	27.31	74	32.39	88	28.24	77	26.89	73	29.10	79
Gender											
Male	48	48	100	39	81	58	121	66	138	50	104
Female	52	52	100	61	117	42	81	34	65	50	96
Race											
White or Caucasian	65	27	42	33	51	46	71	58	89	31	48
Black or African-American	16	13	81	10	63	8	50	7	44	14	88
Hispanic	12	55	458	50	417	41	342	30	250	48	400
Education											
Some College or Less	65	71	114	65	114	66	114	60	114	74	114
College or more	33	25	76	33	100	29	88	35	106	23	70
Employment Status											
Employed Full/PT	57	51	89	51	89	56	98	60	105	53	93
Retired	9	0	0	1	11	3	33	2	22	3	33
Student	11	13	118	15	136	14	127	18	164	14	127
Other (Homemaker/Unemployed/Military/NR)	17	21	124	25	147	18	106	11	65	20	118
Household Income 18+ (DK/RF Removed)											
Population Intab	2108	88		104		72		77		99	
Less than \$75K	66	64	97	69	105	69	105	63	95	78	118
\$75K or more	34	36	106	31	91	31	91	37	109	22	65
Mean Income (\$000)	69.14	66.55	96	68.37	99	64.94	94	75.26	109	57.36	83
Median Income (\$000)	57.22	46.53	81	51.61	90	48.92	85	53.59	94	45.40	79
Household Size											
1	14	10	71	10	71	11	79	9	64	8	57
2+	86	90	105	90	105	89	103	91	106	92	107
Mean HH Size	3.07	3.80	124	3.53	115	3.82	124	3.93	128	3.54	115
Marital Status											
Married/Living with Partner	56	51	91	52	93	50	89	51	91	49	88
Single, never married	31	46	148	39	126	46	148	47	152	43	139
Widowed/Divorced/Separated	12	3	25	9	75	4	33	3	25	6	50
Past Day Listening*											
Cume Rtg	20.97	0.58		0.53		0.32		0.47		0.44	
AQH Rtg	5.08	0.06		0.05		0.03		0.03		0.03	
TSL - Hrs Week Avg	23.00	9.01		9.11		8.01		5.76		6.96	

- Latin channels attract a younger (<35), Hispanic-skewing audience. The heaviest concentration of Hispanics are found in Musica Urbana, Salsa y Merengue & Pop Latino channels (roughly 50% of audience).
- Consistent with a younger age, Latin genre listeners are also more likely to be single, students and live in larger households.
- Mexicana and Rock en Español over-index among males, while Salsa y Merengue over-indexes among females.

*AQH based on Mon-Sun, 6am-12mid, based to total 13+ digital population of 103 million. TSL based on past day listeners 13+, 6am-12mid.

Denotes over index by 20 points vs. Total Music Choice Music Channels.
 Denotes under index by 20 points vs. Total Music Choice Music Channels.



Music Choice Music Channels – Jazz & Blues and Big Band / Vocal / Theatrical Channels Profile



	Total Music Choice Music Channels	Jazz & Blues						Big Band / Vocal / Theatrical					
		Smooth Jazz		Jazz		Blues		Big Band & Swing		Singers & Standards		Show Tunes	
Past 30 Day Listenership Intab	2500	286		263		247		188		136		186	
30 Day Cume P	31836934	3654880		3387450		3158224		2419607		1744664		2419607	
30 Day Cume %	30.9	3.55		3.29		3.07		2.35		1.69		2.35	
	%	%	Index	%	Index	%	Index	%	Index	%	Index	%	Index
Age													
13-17	10	4	40	8	80	6	60	5	50	6	60	8	80
18-34	38	33	87	42	111	38	100	32	84	29	76	31	82
35-49	29	28	97	24	83	20	69	19	66	31	107	32	110
50+	23	35	152	27	117	36	157	43	187	34	148	30	130
Mean Age	36.83	41.17	112	37.51	102	39.99	109	44.40	121	42.87	116	40.08	109
Gender													
Male	48	51	106	57	119	62	129	54	113	56	117	47	98
Female	52	49	94	43	83	38	73	46	88	44	85	53	102
Race													
White or Caucasian	65	51	78	51	78	61	94	73	112	69	106	71	109
Black or African-American	16	33	206	29	181	19	119	9	56	8	50	9	56
Hispanic	12	7	58	10	83	9	75	12	100	14	117	14	117
Education													
Some College or Less	65	56	114	52	114	54	114	52	114	48	114	51	114
College or more	33	43	130	46	139	44	133	47	142	51	155	48	145
Employment Status													
Employed Full/PT	57	67	118	70	123	67	118	61	107	63	111	60	105
Retired	9	10	111	7	78	10	111	16	178	14	156	10	111
Student	11	8	73	8	73	11	100	6	55	6	55	12	109
Other (Homemaker/Unemployed/Military/NR)	17	11	65	11	65	10	59	13	76	15	88	14	82
Household Income 18+ (DK/RF Removed)													
Population Intab	2108	257		231		222		175		123		168	
Less than \$75K	66	64	97	61	92	64	97	58	88	53	80	59	89
\$75K or more	34	36	106	39	115	36	106	42	124	47	138	41	121
Mean Income (\$000)	69.14	71.55	103	76.61	111	72.42	105	75.19	109	80.85	117	77.78	112
Median Income (\$000)	57.22	58.61	102	62.27	109	57.51	101	63.26	111	69.82	122	63.40	111
Household Size													
1	14	18	129	14	100	17	121	17	121	14	100	14	100
2+	86	82	95	86	100	83	97	83	97	86	100	86	100
Mean HH Size	3.07	2.99	97	3.13	102	3.13	102	2.85	93	2.92	95	3.13	102
Marital Status													
Married/Living with Partner	56	50	89	53	95	52	93	61	109	62	111	62	111
Single, never married	31	32	103	34	110	28	90	26	84	23	74	27	87
Widowed/Divorced/Separated	12	16	133	12	100	19	158	14	117	15	125	11	92
Past Day Listening*													
Cume Rtg	20.97	1.03		0.78		0.79		0.47		0.32		0.63	
AQH Rtg	5.08	0.08		0.05		0.06		0.03		0.02		0.03	
TSL - Hrs Week Avg	23.00	7.42		6.15		6.86		5.24		5.68		4.78	

- Jazz & Blues and Big Band/ Vocal/ Theatrical genre categories appeal to older (50+), more educated adults (college degree or above).
- Jazz & Blues channels over index on African-American and male listeners. Smooth Jazz also skews African-American, but has a more even gender split.
- Big Band/Vocal/ Theatrical genre listeners skew slightly more female and tend to have higher incomes.

*AQH based on Mon-Sun, 6am-12mid, based to total 13+ digital population of 103 million. TSL based on past day listeners 13+, 6am-12mid.

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Music Choice Music Channels – Variety / Dance / Instrumental Channels Profile



	Total Music Choice Music Channels	Variety				Dance				Instrumental			
		Kidz Only!		Sounds of the Season		Electronica		Dance		Easy Listening		Soundscapes	
Past 30 Day Listenership Intab	2500	299		295		165		316		349		223	
30 Day Cume P	31836934	3871371		3833167		2101238		4036923		4457171		2839855	
30 Day Cume %	30.9	3.76		3.72		2.04		3.92		4.33		2.76	
	%	%	Index	%	Index	%	Index	%	Index	%	Index	%	Index
Age													
13-17	10	19	190	8	80	18	180	17	170	7	70	9	90
18-34	38	51	134	43	113	55	145	50	132	25	66	39	103
35-49	29	26	90	25	86	22	76	26	90	25	86	26	90
50+	23	4	17	24	104	5	22	7	30	43	187	25	109
Mean Age	36.83	28.76	78	37.18	101	28.24	77	29.31	80	44.31	120	37.58	102
Gender													
Male	48	36	75	44	92	63	131	46	96	39	81	41	85
Female	52	64	123	56	108	37	71	54	104	61	117	59	113
Race													
White or Caucasian	65	60	92	73	112	66	102	56	86	65	100	69	106
Black or African-American	16	17	106	12	75	8	50	16	100	17	106	10	63
Hispanic	12	14	117	9	75	17	142	18	150	9	75	14	117
Education													
Some College or Less	65	73	114	60	114	59	114	66	114	61	114	58	114
College or more	33	25	76	39	118	39	118	32	97	37	112	41	124
Employment Status													
Employed Full/Pt	57	50	88	58	102	59	104	58	102	54	95	55	96
Retired	9	1	11	6	67	1	11	1	11	17	189	9	100
Student	11	13	118	9	82	17	155	16	145	7	64	12	109
Other (Homemaker/Unemployed/Military/NR)	17	23	135	23	135	15	88	14	82	17	100	18	106
Household Income 18+ (DK/RF Removed)													
Population Intab	2108	227		262		131		252		302		191	
Less than \$75K	66	64	97	59	89	66	100	63	95	64	97	66	100
\$75K or more	34	36	106	41	121	34	100	37	109	36	106	34	100
Mean Income (\$000)	69.14	71.80	104	76.34	110	68.09	98	70.67	102	69.49	101	70.97	103
Median Income (\$000)	57.22	55.67	97	63.11	110	50.93	89	57.48	100	54.37	95	56.46	99
Household Size													
1	14	5	36	14	100	20	143	12	86	16	114	22	157
2+	86	95	110	86	100	80	93	88	102	84	98	78	91
Mean HH Size	3.07	3.99	130	3.13	102	3.13	102	3.33	108	2.90	94	2.89	94
Marital Status													
Married/Living with Partner	56	66	118	61	109	43	77	48	86	61	109	53	95
Single, never married	31	27	87	29	94	48	155	43	139	21	68	31	100
Widowed/Divorced/Separated	12	5	42	10	83	8	67	9	75	18	150	16	133
Past Day Listening*													
Cume Rtg	20.97	1.38		0.88		0.74		1.17		1.00		0.85	
AQH Rtg	5.08	0.10		0.07		0.05		0.09		0.09		0.07	
TSL - Hrs Week Avg	23.00	7.19		7.65		7.03		6.93		8.32		7.62	

- As might be expected, Dance, Electronica & Kidz Only! channels tend to capture a younger audience (<35), while Easy Listening channel attracts an older audience (50+).
- Electronica over-indexes among males, while Kidz Only! attracts a female-skewing audience.

*AQH based on Mon-Sun, 6am-12mid, based to total 13+ digital population of 103 million. TSL based on past day listeners 13+, 6am-12mid.

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 Denotes under index by 20 points vs. Total Music Choice Music Channels.



Music Choice Music Channels – Inspirational / Classical Channel Profiles



	Total Music Choice Music Channels	Inspirational				Classical					
		Contemporary Christian		Gospel		Classical Masterpieces		Opera		Light Classical	
Past 30 Day Listenership Intab	2500	239		258		232		98		220	
30 Day Cume P	31836934	3018141		3247367		2979937		1260743		2827120	
30 Day Cume %	30.9	2.93		3.15		2.89		1.22		2.74	
	%	%	Index	%	Index	%	Index	%	Index	%	Index
Age											
13-17	10	11	110	8	80	7	70	8	80	7	70
18-34	38	33	87	33	87	33	87	46	121	25	66
35-49	29	35	121	28	97	20	69	20	69	21	72
50+	23	21	91	31	135	40	174	26	113	47	204
Mean Age	36.83	37.47	102	40.04	109	41.94	114	37.61	102	45.15	123
Gender											
Male	48	40	83	39	81	52	108	49	102	44	92
Female	52	60	115	61	117	48	92	51	98	56	108
Race											
White or Caucasian	65	60	92	34	52	71	109	62	95	73	112
Black or African-American	16	20	125	51	319	11	69	14	88	12	75
Hispanic	12	12	100	9	75	11	92	12	100	9	75
Education											
Some College or Less	65	65	114	66	114	46	114	46	114	47	114
College or more	33	33	100	33	100	53	161	51	155	52	158
Employment Status											
Employed Full/PT	57	48	84	53	93	60	105	63	111	57	100
Retired	9	10	111	13	144	11	122	8	89	15	167
Student	11	11	100	10	91	12	109	12	109	10	91
Other (Homemaker/Unemployed/Military/NR)	17	24	141	19	112	12	71	12	71	14	82
Household Income 18+ (DK/RF Removed)											
Population Intab	2108	199		222		207		83		195	
Less than \$75K	66	72	109	77	117	63	95	68	103	58	88
\$75K or more	34	28	82	23	68	37	109	32	94	42	124
Mean Income (\$000)	69.14	63.75	92	57.93	84	73.23	106	70.68	102	74.76	108
Median Income (\$000)	57.22	51.24	90	47.21	83	60.94	107	54.31	95	64.59	113
Household Size											
1	14	15	107	16	114	18	129	16	114	19	136
2+	86	85	99	84	98	82	95	84	98	81	94
Mean HH Size	3.07	3.28	107	3.17	103	2.87	93	3.07	100	2.73	89
Marital Status											
Married/Living with Partner	56	54	96	50	89	57	102	53	95	62	111
Single, never married	31	29	94	33	106	28	90	31	100	19	61
Widowed/Divorced/Separated	12	16	133	16	133	14	117	14	117	18	150
Past Day Listening*											
Cume Rtg	20.97	1.10		1.10		0.79		0.25		0.77	
AQH Rtg	5.08	0.09		0.08		0.06		0.02		0.07	
TSL - Hrs Week Avg	23.00	8.03		7.24		6.86		8.37		8.32	

- For the most part, Inspirational and Classical genre listeners tend to be older (35+), though Opera also attracts a respectable segment of younger listeners (18-34).
- Inspirational channels, particularly Gospel, attract a larger proportion of African-American listeners.
- Classical channel listeners tend to be more educated.

*AQH based on Mon-Sun, 6am-12mid, based to total 13+ digital population of 103 million. TSL based on past day listeners 13+, 6am-12mid.

Denotes over index by 20 points vs. Total Music Choice Music Channels.
 Denotes under index by 20 points vs. Total Music Choice Music Channels.



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MUSIC CHOICE VOD VIEWER PROFILE

AWARENESS/TRIAL/USAGE

Eight out of ten monthly P12+ Music Choice viewers and seven out of ten P12-24 digital cable subscribers are aware of Music Choice Music Channels.

- Nearly half of the average P12+ and almost seven out of ten P12-24 have heard of Music Choice Music Channels.
- 28% of P12-24 has listened to Music Choice Music Channels.
- 25% of P12+ digital cable subscribers have listened to Music Choice Music Channels.
- 47% of the monthly Music Choice P12-24 VOD viewers listened to Music Choice Music Channels in the past week.

USER CHARACTERISTICS	AWARENESS/TRIAL/USAGE					
	P12+			P12-24		
	TOTAL U.S. P12+	DIGITAL CABLE SUBSCRIBER P12+	MO. MC VOD VIEWER P12+	TOTAL U.S. P12-24	DIGITAL CABLE SUBSCRIBER P12-24	MO. MC VOD VIEWER P12-24
Heard of Music Choice Music Channels	48%	55%	81%	67%	73%	93%
Considered using Music Choice Music Channels	8%	7%	**4%	9%	9%	**6%
Have listened Music Choice Music Channels	19%	25%	69%	28%	33%	80%
Listened to Music Choice Music Channels in past mo.	11%	14%	62%	15%	19%	70%
Listened to Music Choice Music Channels in past wk.	5%	7%	44%	7%	9%	47%

Read as follows: Six out of ten monthly Music Choice P12+ VOD Viewers listened to Music Choice Music Channels in the past month.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE VOD VIEWER PROFILE

MUSIC CATEGORY/INVOLVEMENT

Monthly Music Choice P12+ and P12-24 VOD viewers exhibit greater music category affinity and involvement than the average P12+ and average P12-24.

- 54% of Monthly Music Choice P12+ VOD viewers own a portable MP3/digital media player.
- Monthly Music Choice P12-24 VOD viewers are 42% more likely than the Music Choice P12+ VOD Viewer and 38% more likely than the average P12-24 to have downloaded music in the last month.
- P12+ monthly Music Choice VOD viewers are more likely than the average P12+ to listen to internet only radio stations in the last month and to have downloaded 10+ CDs/downloads in the past year (indices: 182 and 194).

USER CHARACTERISTICS	MUSIC CATEGORY INVOLVEMENT						
	MO. MUSIC CHOICE VOD VIEWER P12+			MO. MUSIC CHOICE VOD VIEWER P12-24			
	% COMP	INDEX TO TOTAL U.S. P12+	INDEX TO AVG. VOD VIEWER P12+	% COMP	INDEX TO MO. MC VOD VIEWER P12+	INDEX TO TOTAL U.S. P12-24	INDEX TO AVG. VOD VIEWER P12-24
Purchased any CDs in the past yr.	57%	137	116	59%	104	120	113
Bought music online in the last yr.	28%	162	100	*36%	129	116	84
Downloaded any music in the last yr.	44%	174	110	59%	134	118	92
Downloaded music in the last mo.	38%	197	131	54%	142	138	117
Download music in the last wk.	19%	156	100	*30%	158	111	94
Bought 10+ CDs/downloads in the past yr.	39%	194	130	59%	151	137	116
Downloaded 20+ music files in the past yr.	23%	228	144	*39%	170	144	105
Bought Rock past yr.	15%	120	83	*17%	113	106	100
Bought Urban past yr.	23%	231	135	*36%	157	189	133
Bought Pop past yr.	13%	154	108	**16%	123	145	100
Bought Latin past yr.	*5%	148	210	**7%	147	151	159
Download Rock in the past yr.	23%	176	110	*28%	122	122	97
Download Urban in the past yr.	19%	173	95	*26%	137	100	76
Download Pop in the last yr.	16%	173	94	**19%	119	106	73
Download Latin in the past yr.	*7%	251	185	**5%	69	96	108
Own a portable MP3/Digital media player	54%	143	106	73%	135	109	100
Have downloadable ringtones on my cell	49%	158	114	61%	124	153	120
Use downloadable ringtones on my cell	*15%	237	152	**21%	140	191	124
Listen to internet only radio stations in the last mo.	17%	182	121	**24%	141	160	133
Listen to satellite radio online in the last mo.	*9%	248	163	**20%	228	260	214
Listen to traditional radio stations online in the last mo.	*13%	216	160	**21%	162	216	191
Attended a concert in the last year	44%	144	116	57%	130	139	133

Read as follows: Monthly Music Choice P12-24 VOD viewers are 128% more likely than the average P12+ and 114% more likely than average monthly P12-24 VOD viewers to listen to satellite radio online in the last month.

Music Genre Legend:

Urban genre includes: 80's Old School; Pop Hip-Hop; Early 90's Hip-Hop; Pop R&B; Hip-Hop; Traditional Soul, Rhythm & Blues; Neo Soul

Rock genre includes: 60's to 70's Pop Classic Rock; Alternative Rock; Grunge; Garage Rock; Hard Rock; Modern AC; Album Oriented Rock

Pop genre includes: AC Pop; Easy Listening; Pop Alternative; Pure Pop; Teen Pop

Latin genre includes: Latin Ballads/Romantic; Latin Jazz; Latin Rap; Latin Rock; Mexicana; Salsa/Merengue; Tejano/Banda

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE VOD VIEWER TEEN PROFILE

ATTITUDES ABOUT MUSIC

Monthly Music Choice P12-17 VOD viewers are more likely than the average P12-17 and generally as likely as overall monthly P12-17 VOD viewer to be interested in music.

- 44% of monthly Music Choice VOD viewers say they always know what's in the top ten.
- Nearly seven out of ten monthly Music Choice P12-17 VOD viewers say that music is a passion to them.
- Monthly Music Choice P12-17 VOD viewers are 17% more likely than the average P12-17 and 24% more likely than the overall monthly P12-17 VOD Viewer to feel that music is a way of escaping.
- Monthly Music Choice P12-17 VOD viewers are 28% more likely than the overall monthly P12-17 VOD viewers to feel they are in touch with the music scene.

USER CHARACTERISTICS	TEEN ATTITUDES ABOUT MUSIC		
	MO. MC VOD VIEWER P12-17	MO. MC VOD VIEWER P12-17 INDEX TO TOTAL U.S. P12-17	MO. MC VOD VIEWER P12-17 INDEX TO OVERALL MO. VOD VIEWER P12-17
I like different music than my friends	*35%	88	97
I always know what's in the top ten	*44%	147	119
I like the same music as my parents	**20%	71	80
I like listening to ads on the radio	**8%	92	147
I feel I'm in touch with the music scene	*55%	153	128
Can judge someone by his/her music/CD's	**19%	83	83
I have a wide taste in music	*50%	96	91
Music is a passion with me	*67%	137	131
Music is a way of escaping	*61%	117	124
Style of clothes reflects taste in music	**25%	109	109

Read as follows: Monthly Music Choice P12-17 VOD viewers are 47% more likely than the overall P12-17 VOD viewer to say they like listening to ads on the radio.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE VOD VIEWER TEEN PROFILE

MEDIA ATTITUDES

Monthly Music Choice P12-17 VOD viewers are more likely to be interested in media and more receptive to advertising than the average P12-17 and overall monthly P12-17 VOD viewers.

- 54% of monthly Music Choice P12-17 VOD viewers love to watch TV.
- Monthly music choice P12-17 VOD viewers are 31% more likely than the average P12-17 to have above average Ad receptivity.
- 24% of monthly Music Choice P12-17 VOD viewers feel that there aren't enough TV programs on television for people their age.
- Monthly Music Choice P12-17 VOD viewers are more likely than the overall monthly VOD viewer to say they would like to see more TV channels (index of 112).

USER CHARACTERISTICS	TEEN MEDIA ATTITUDES		
	MO. MC VOD VIEWER P12-17	MO. MC VOD VIEWER P12-17 INDEX TO TOTAL U.S. P12-17	MO. MC VOD VIEWER P12-17 INDEX TO OVERALL MO. VOD VIEWER P12-17
I like the commercials on TV	**14%	64	82
I love watching TV	*54%	91	87
Advertisements make me buy things	**22%	120	100
Most TV programs are not entertaining	**31%	107	103
Watching too much TV is bad for you	*52%	98	95
Aren't enough TV programs for people my age	**25%	76	78
TV is more exciting than real life	**11%	58	65
I like to buy things I've seen on TV	**17%	79	85
I'd like some more TV channels	**37%	90	112
It's more fun watching TV with my friends	*44%	78	71
I learn a lot from TV	**31%	76	79
Ad Receptivity: Average	**25%	106	100
Ad Receptivity: Above Average	**25%	131	104
Ad Receptivity: Far Above Average	**20%	105	125
Media Involvement: Average	**37%	146	148
Media Involvement: Above Average	**14%	74	93
Media Involvement: Far Above Average	**8%	47	53

Read as follows: Monthly Music Choice P12-17 VOD viewers are 20% more likely than the average P12-17 to say that advertisements make them buy things.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE VOD VIEWER ADULT PROFILE

MEDIA ATTITUDES

Monthly Music Choice P18+ VOD viewers are more receptive to advertising, television and radio than the average P18+ and overall monthly P18+ VOD viewer.

- Four out of ten monthly Music Choice P18+ VOD viewers say if they don't have cable, they would not watch TV.
- 29% of P18+ Music Choice viewers are 12% more likely than the average P18+ to say when commercials come on, they mute the TV.
- Monthly Music Choice P18+ VOD viewers are more likely than the average P18+ to notice ads in the lobby of a movie theater or at the bus stop (indices: 124 and 162).
- P18+ Music Choice VOD viewers are 99% more likely than the average P18+ and 73% more likely than the overall P18+ VOD viewer to say they notice ads on taxi cabs.

USER CHARACTERISTICS	ADULT MEDIA AND ADVERTISING ATTITUDES		
	MO. MC VOD VIEWER P18+	MO. MC VOD VIEWER P18+ INDEX TO TOTAL U.S. P18+	MO. MC VOD VIEWER P18+ INDEX TO MO. VOD VIEWER P18+
Notice ads in lobbies of movie theaters	37%	124	100
Pay attention to commercials in the movie theater	41%	133	108
Find TV advertising interesting	37%	151	148
Magazines are a main source of entertainment	*13%	131	141
Rely in radio to keep me informed	29%	113	107
No cable, I wouldn't watch TV	40%	147	114
Most magazines are worth the money	21%	123	131
TV is a main source of entertainment	52%	113	100
Radio is my main source of entertainment	20%	148	167
Rely on newspaper to keep me informed	34%	111	126
Read magazine ads out of curiosity	35%	133	146
When commercials come on, I mute the TV	29%	112	100
When commercials come on, I change the channel	42%	107	88
Like TV commercials that make me laugh	69%	108	99
Ads help me learn about products available	52%	117	113
Ads help me pick products for my kids	30%	159	158
Enjoy reading ads in magazines	29%	173	207
Often notice the ads at bus stops	29%	162	138
Often notice the ads on the trains	26%	189	144
Often notice the ads on the buses	36%	172	157
Often notice the ads on the taxis	26%	199	173
I often notice the ads in billboards	53%	115	102
Growth in number of cable networks deleting quality TV	27%	92	93
I can not resist buying magazines	*12%	129	122
I am a TV addict	30%	127	103
Special features important in movies on DVD	30%	163	136
Before purchasing a DVD I check the special features	29%	155	126
Always look for brand names	36%	115	116
Advertising gives true picture of products	19%	124	158
Child influenced shopper: Far Above Average	21%	133	150
Radio Involvement: Above Average	24%	130	104
TV Involvement: Far Above Average	28%	144	127
Advertising Receptivity: Far Above Average	25%	136	114

Read as follows: Monthly Music Choice P18+ VOD viewers are 67% more likely than the overall P18+ VOD viewer to say that radio is their main source of entertainment.

*Denotes a sample size less than 61. / **Denotes a sample size less than 31.

Source: Simmons National Consumer Study, Adult Full Year Fall'10. Population 18+, average Index= 100.

MUSIC CHOICE VOD VIEWER PROFILE

TECH ADOPTION

Monthly Music Choice P12+ VOD viewers exhibit greater tech receptivity and are more likely to embrace affiliate products and services than the average P12+ and P12-24.

- Monthly Music Choice P12+ VOD viewers are more likely than the average P12+ to have VOIP, a DVR and bundled cable packages (indices: 151, 121 and 128).
- 63% of monthly Music Choice P12-24 VOD viewers have bundled cable packages.
- Monthly Music Choice P12-24 VOD viewers are 47% more likely than the average P12-24 to receive premium channels.
- Monthly P12+ Music Choice VOD viewers are more likely and than the average P12+ and 70% more likely than the average P12+ VOD viewer to have ordered music programs on-demand in the last year.
- Monthly Music Choice P12-24 VOD viewers are more likely than the average P12-24 to have ordered movies, premium channels and TV programs on-demand in the last year (indices: 141, 208 and 273 respectively).

USER CHARACTERISTICS	TECH ADOPTION							
	MO. MUSIC CHOICE VOD VIEWER P12+				MO. MUSIC CHOICE VOD VIEWER P12-24			
	% COMP	INDEX TO TOTAL U.S. P12+	INDEX TO AVG. VOD VIEWER P12+	% COMP	INDEX TO MC VOD VIEWER P12+	INDEX TO TOTAL U.S. P12-24	INDEX TO AVG. VOD VIEWER P12-24	
Own HDTV	65%	110	93	68%	105	119	108	
Own LCD/Plasma/Projection TV	66%	108	90	74%	112	119	101	
Spent \$2K+ on TV	* 10%	111	77	** 10%	100	100	83	
Own 3+ PCs	17%	87	65	* 22%	129	76	63	
Receive Premium Channels	52%	153	96	53%	102	147	104	
Ordered 7+ MOD in the last 3 mos.	* 18%	470	120	** 20%	111	370	125	
7+ PPV in the last yr.	* 7%	173	62	** 6%	91	115	57	
Use cable modem to access internet at home	51%	152	94	44%	86	126	96	
Has VOIP	18%	151	106	** 15%	83	115	115	
Has a DVR	43%	121	77	42%	98	108	84	
Bundle Package	61%	128	88	63%	103	119	86	
Owns 4+ PCs	* 6%	65	43	** 10%	172	69	57	
PPV 5+ times in the last yr.	11%	163	69	** 12%	109	149	71	
PPV 3+ times in the last yr.	23%	186	82	* 29%	126	193	104	
Ordered 4+ MOD in the last 3 mos.	22%	322	85	** 25%	114	274	100	
Own a PC	81%	97	86	78%	96	89	82	
Spent 5+ hrs. on the Internet in the last wk.	44%	120	90	47%	107	100	89	
Ordered any PPV in last year	35%	156	76	* 39%	111	150	95	
Ordered MOD in the last year	29%	178	64	* 24%	83	141	65	
Ordered any MOD in the last 3 months	44%	265	85	50%	114	250	102	
Own 4+ TVs	41%	118	87	44%	107	98	85	
Use internet at work or home	87%	116	97	89%	102	110	102	
Took 100-499 pictures with Digital Camera in the last yr.	20%	131	95	** 24%	120	160	126	
Own a Digital Video Camera	28%	142	100	* 32%	114	128	110	
Own an iPod	36%	163	100	56%	156	114	95	
Ordered Movies-On-Demand in the last yr.	29%	178	64	* 24%	83	141	65	
Ordered Premium Channels-On-Demand in the last yr.	24%	296	96	* 20%	83	208	80	
Ordered TV Programs On-Demand in the last yr.	43%	330	102	41%	95	273	111	
Ordered Music Programs On-Demand in the last yr.	34%	597	170	* 30%	88	411	143	
Ordered Other Programs On-Demand in the last yr.	22%	371	105	** 20%	91	299	105	

Read as follows: Monthly Music Choice P12+ VOD viewers are 53% more likely than the average P12+ to subscribe to premium channels.

*Denotes a sample size less than 61. / **Denotes a sample size less than 31.

Source: Simmons National Consumer Study, Teen/Adult Fall'10. Population 12+, average Index= 100.

MUSIC CHOICE VOD VIEWER ADULT PROFILE

TECH ADOPTION ATTITUDES

Monthly Music Choice P18+ VOD viewers are more likely to be adopters of computer technology, new gadgets and digital TV than the average P18+.

- Monthly Music Choice P18+ VOD viewers are more likely than the average P18+ and the overall monthly P18+ VOD viewer to be the first of their friends to have new electronic equipment (indices: 184 and 180).
- Four-fifths of the monthly Music Choice P18+ VOD viewers love to buy new gadgets and appliances.
- Music Choice P18+ VOD viewers are 79% more likely than the average P18+ and the overall P18+ VOD viewer to be far above average early adopters.

USER CHARACTERISTICS	ADULT TECH ADOPTION ATTITUDES		
	MO. MC VOD VIEWER P18+	MO. MC VOD VIEWER P18+ INDEX TO TOTAL U.S. P18+	MO. MC VOD VIEWER P18+ INDEX TO OVERALL MO. VOD VIEWER P18+
I'm the first of my friends to have new electronic equipment	*18%	184	180
Friends ask my advice about buying electronic equipment	25%	148	139
I ask friends advice before buying electronic equipment	31%	117	107
Like to learn about computer technology/web	50%	97	96
I try to keep up with developments in technology	47%	115	94
Love to buy new gadgets and appliances	36%	141	116
Early Adopters: Far Above Average	43%	179	179

Read as follows: Monthly Music Choice P18+ VOD viewers are 17% more likely than the average P18+ to ask friends advice before buying electronic equipment.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE VOD VIEWER PROFILE

CELL PHONES

Monthly Music Choice P12+ and P12-24 VOD viewers are heavier cell phone and cell phone feature users than the average P12+ and P12-24.

- Nearly ten out of ten monthly Music Choice P12+ and P12-24 VOD viewers own a cell phone (96% and 95%).
- Three-fifths of P12+ Music Choice VOD viewers have text messaging on their phones and are 43% more likely than the average P12+ to use it in the last month.
- Monthly P12+ Music Choice VOD viewers are 27% more likely than the average P12+ and 77% more likely than the average P12+ VOD viewer to feel that texting is just as meaningful as an actual conversation.
- P12-24 Music Choice VOD viewers are more likely than the P12+ Music Choice VOD viewer, the average P12-24 and the average P12-24 VOD viewer to feel that their friendships wouldn't be as close without their cell phone (indices: 122, 140 and 124, respectively).
- More than half for the Music Choice P12+ and P12-24 VOD viewers like the idea of the cell phone moving beyond voicemail and text messaging.

USER CHARACTERISTICS	CELL PHONE INVOLVEMENT / ENGAGEMENT						
	MO. MUSIC CHOICE VOD VIEWER P12+			MO. MUSIC CHOICE VOD VIEWER P12-24			
	% COMP	INDEX TO TOTAL U.S. P12+	INDEX TO AVG. VOD VIEWER P12+	% COMP	INDEX TO MO. MC VOD VIEWER P12+	INDEX TO TOTAL U.S. P12-24	INDEX TO AVG. VOD VIEWER P12-24
Own a cell phone	96%	89%	107	95%	99	112	107
Have downloadable ringtones	49%	31%	158	61%	124	153	120
Have picture messaging	57%	33%	173	68%	119	145	117
Have text messaging	69%	54%	127	74%	107	114	103
Used downloadable ringtones in the last month	*15%	6%	237	**21%	140	191	117
Used picture messaging in the last month	35%	17%	213	*46%	131	164	124
Used text messaging in the last month	48%	33%	143	56%	117	124	102
Cell Phones Owned: Blackberry or iPhone	14%	12%	115	*26%	186	173	144
Have a camcorder phone	32%	20%	162	45%	141	132	102
Used web browsing in the last month	19%	12%	159	*26%	137	173	124
Have web browsing	42%	28%	151	57%	136	158	124
If I have access to a landline phone, then I won't use my cell	44%	42%	105	**19%	43	83	90
Extra features on cell are more important than traditional calling features	44%	26%	170	55%	125	162	141
My friendships wouldn't be as close without my cell	46%	26%	175	56%	122	140	124
Use my cell phone in many diff ways to get info I need	51%	34%	149	57%	112	127	110
Likely to purchase products I see advertised on my cell	*18%	6%	310	**27%	150	276	245
Only use my cell in case of emergencies	21%	20%	102	**15%	71	125	166
More likely to switch cell providers if they offer latest technology	25%	13%	191	**33	132	206	174
Cell phone connects me to my social world	49%	32%	153	51%	104	111	96
Use info from cell to decide where to go or what to do	30%	13%	222	*48%	160	192	155
Interested in receiving ads on my cell	**12%	5%	257	**12%	100	145	267
Cell phone is an expression of who I am	31%	14%	220	*49%	158	181	169
Switched to current provider because they offered better plans	38%	27%	141	*28%	74	117	112
Willing to accept ads sent to my cell if I were to receive something of value	22%	13%	173	*31%	141	155	141
Cell phone plans are confusing to me	31%	27%	114	**28%	90	133	108
Like the idea of the cell phone moving beyond voicemail and text messaging	53%	36%	147	54%	102	108	92
Like to be connected to family/friends wherever I am	74%	60%	123	71%	96	113	100
Once I find a cell provider I like, I stick with them	66%	56%	117	57%	86	112	102
Texting is just as meaningful as an actual conversation	47%	27%	177	57%	121	127	116
Rely on my cell to keep up with news/sports	22%	12%	183	**29%	132	171	181
If quality of cell service is disappointing, I will switch to a new provider	44%	43%	102	*36%	82	109	106

Read as follows: Half of the P12+ Music Choice VOD viewers and the P12-24 VOD viewers say that cell phones are an expression of who they are.

*Denotes a sample size less than 61. / **Denotes a sample size less than 31.

Source: Simmons National Consumer Study, Teen/Adult Fall'10. Population 12+, average Index= 100.

MUSIC CHOICE VOD VIEWER PROFILE

INTERNET ENGAGEMENT / SOCIAL NETWORKING

Monthly Music Choice P12+ VOD viewers are generally as social as the average P12+ and overall monthly P12+ VOD viewer, but are heavier users of the Internet and social networking sites.

- Monthly Music Choice P12+ VOD viewers are 35% more likely than the average VOD viewer to use a handheld/PDA to access the internet at home.
- 21% of Music Choice P12+ VOD viewers visited TWITTER in the last month and are more likely than the average P12+ to do the same (index 440).
- Compared to the average P12-24, Music Choice P12-24 VOD viewers are 76% more likely to use/visit blogs / blogging in the last month.
- Seven out of ten P12-24 Music Choice VOD viewers visited FACEBOOK in the last month.
- Two-fifths of P12+ Music Choice VOD viewers downloaded music files online in the last month.

USER CHARACTERISTICS	INTERNET ENGAGEMENT AND SOCIAL NETWORKING						
	MO. MUSIC CHOICE VOD VIEWER P12+			MO. MUSIC CHOICE VOD VIEWER P12-24			
	% COMP	INDEX TO TOTAL U.S. P12+	INDEX TO AVG. VOD VIEWER P12+	% COMP	INDEX TO MO. MC VOD VIEWER P12+	INDEX TO TOTAL U.S. P12-24	INDEX TO AVG. VOD VIEWER P12-24
Spent 5+ hours on the internet in the last week	44%	120	90	47%	107	100	89
Listen to satellite radio online in the last month	* 9%	248	154	** 20%	228	260	202
Listen to traditional radio stations online in the last month	* 13%	216	154	** 21%	162	216	175
Download/listen to podcasts online in the last month	20%	240	143	* 32%	160	188	145
Download movies online in the last month	19%	258	173	* 31%	163	182	135
Download music files online in the last month	38%	197	127	54%	142	138	117
Play/download online games in the last month	32%	159	114	* 46%	144	131	115
Watched videos, TV programs, movies online 1-5 times in the last month	* 8%	132	88	** 7%	94	85	66
Used cell phone to access the internet at home	30%	169	130	51%	170	189	170
Used a desktop computer to access the internet at home	57%	108	92	72%	126	124	104
Used handheld/PDA to access the internet at home	** 6%	184	135	** 11%	187	203	186
Used a laptop computer to access the internet at home	53%	147	106	51%	96	104	93
Used TV to access the internet at home	* 6%	149	127	** 12%	206	181	151
Used Instant Messaging (IM) on the internet in the last month	34%	215	155	54%	159	169	138
Visited FACEBOOK.com in the last week	48%	161	112	50%	104	114	100
Visited MYSPACE.com in the last week	22%	280	248	* 33%	150	150	183
Visited YOUTUBE.com in the last week	45%	203	129	56%	124	130	102
Visited TWITTER.com in the last week	* 15%	502	248	** 18%	120	270	164
Visited FACEBOOK.com in the last month	61%	174	117	68%	111	131	113
Visited MYSPACE.com in the last month	33%	282	220	52%	158	163	158
Visited YOUTUBE.com in the last month	61%	196	130	74%	121	132	107
Visited TWITTER.com in the last month	21%	440	245	* 30%	143	300	200
Visited FACEBOOK or MYSPACE In Last 30 Days	67%	176	120	80%	119	131	118
Used / Visited blogs/blogging (read/write online diaries) in the last month	24%	201	120	* 37%	154	176	137
Visited bulletin/message boards in the last month	23%	226	144	* 33%	143	174	150
Friends look to me to organize activities	35%	106	88	* 26%	74	68	63
I enjoy keeping in touch with my friends	66%	94	94	69%	105	97	96
I make friends easily	59%	100	97	52%	88	87	80
I have a genuine interest in the people	57%	93	88	53%	93	91	88
I like to introduce people to each other	41%	102	93	38%	93	84	76
I have many acquaintances from all walks of life	58%	106	97	51%	88	98	88

Read as follows: Seven out of ten P12-24 monthly Music Choice VOD viewers visited YOUTUBE in the last month.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

Source: Simmons National Consumer Study, Teen/Adult Fall'10. Population 12+, average Index= 100.

MUSIC CHOICE VOD VIEWER ADULT PROFILE

ATTITUDES ABOUT THE INTERNET

Monthly Music Choice P18+ VOD viewers are more engaged in the Internet than the average P18+, and are slightly less engaged than overall monthly P18+ VOD viewers.

- Half of the monthly P18+ Music Choice VOD viewers look to the internet first for information and credits the internet for increasing their desire to learn or search.
- Compared to the average P18+ and the overall P18+ VOD viewer, monthly Music Choice P18+ VOD viewers are more likely to spend less time sleeping because of the internet (indices: 160 and 147, respectively).
- Seven out of ten P18+ Music Choice VOD viewers agree that they return to sites that make it easy to find what they need.
- Monthly Music Choice P18+ VOD viewers are 33% more likely than the average P18+ to feel that the internet is their prime source of entertainment.

USER CHARACTERISTICS	ADULT ATTITUDES ABOUT THE INTERNET		
	MO. MC VOD VIEWER P18+	MO. MC VOD VIEWER P18+ INDEX TO TOTAL U.S. P18+	MO. MC VID VIEWER P18+ INDEX TO OVERALL MO. VOD VIEWER P18+
I like websites that protect my privacy	88%	123	100
I like websites that show me local info	77%	126	105
Go to websites I've never been to before	50%	164	143
Get more of my news from the internet	57%	134	104
Like to look for new/interesting websites	48%	152	126
Doing more shopping on the internet than before	39%	113	91
I return to sites that make it easy to find what I need	68%	112	88
Trust info on websites that I have heard about	46%	122	100
Like to hear about products/services by email	31%	141	135
It's safe to make purchases online	34%	85	63
Internet changed the way I spend my time	43%	106	80
Internet changed the way I get info for products	58%	107	82
I spend less time sleeping because of the internet	22%	160	147
I spend less time watching TV because of the internet	28%	119	97
Internet is the new way I socialize/meet others	26%	122	104
Internet changed how I shop for products	41%	110	76
I spend less time reading magazines because of the internet	25%	97	69
Internet is the prime source of my entertainment	28%	133	104
Internet is the prime source of my family's entertainment	21%	111	84
Internet changed the way I work	28%	103	76
Internet increased my desire to learn/search	51%	112	86
I listen less to non-internet radio because of the internet	16%	107	107
I read print news less because of the internet	27%	99	71
For information I look to the internet first	50%	103	78
Internet Activity: Far Above Average	35%	201	109
Internet Involvement: Far Above Average	30%	175	100

Read as follows: Monthly Music Choice P18+ VOD viewers are 52% more likely than the average P18+ to enjoy looking for news or interesting websites.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE VOD VIEWER TEEN PROFILE

ATTITUDES AND OPINIONS

Monthly Music Choice P12-17 VOD viewers are more likely than the average P12-17 and overall monthly P12-17 VOD viewer to consider themselves achievers, social and tech savvy.

- Nearly half of the monthly Music Choice P12-17 VOD viewers get excited when sharing opinions with others.
- Nine out of ten Music Choice P12-17 VOD viewers would like to go to college and believe that it's important to work hard at school (88% and 94%).
- Monthly Music Choice P12-17 VOD viewers are 26% more likely than the average P12-17 and 14% more likely than the overall P12-17 VOD viewer to say they enjoy going to school.
- Compared to the average P12-17, Music Choice P12-17 VOD viewers are 16% more likely to consider themselves an expert on new technology.
- P12-17 Music Choice VOD viewers are 59% more likely than the average P12-17 to far above average in relation to cool technology.

USER CHARACTERISTICS	TEEN ATTITUDES AND OPINIONS		
	MO. MC VOD VIEWER P12-17	MO. MC VOD VIEWER P12-17 INDEX TO TOTAL U.S. P12-17	MO. MC VOD VIEWER P12-17 INDEX TO OVERALL MO. VOD VIEWER P12-17
Get excited when sharing opinions with others	* 48%	105	98
Good at convincing others to try new things	* 50%	96	89
I like to share my knowledge with others	* 59%	92	89
I have genuine interest in people with others	* 50%	82	86
Not afraid to appear different than others	* 55%	93	98
I like to try things no one else has	* 66%	134	116
I am adventurous	* 51%	81	84
Meeting new people comes easy to me	* 45%	76	75
People often copy what I do or wear	** 39%	117	95
I would like to go to college	88%	99	95
I want to be famous	* 64%	120	125
Always the first to try out new things	* 50%	125	125
The more friends you have the better	* 56%	109	97
It's important to feel like part of a group	* 61%	121	107
I enjoy going to school	* 64%	126	114
It's important to work hard at school	* 94%	112	103
Prefer to buy things friends would approve	** 33%	132	122
I am easily influenced by other people	** 15%	86	79
Consider myself an expert on new technology	** 40%	116	89
Fashion Style: Far Above Average	** 40%	214	174
Unique Style: Above Average	** 26%	139	130
Spenders: Above Average	** 25%	148	156
Traditionalist: Far Above Average	** 18%	90	78
Social Isolate: Average	** 17%	88	71
Achiever: Above Average	** 43%	161	119
Rebel: Far Above Average	** 26%	117	113
Conformists: Far Above Average	** 26%	135	153
Cool Tech: Far Above Average	** 32%	159	123

Read as follows: Monthly Music Choice P12-17 VOD viewers are 34% more likely than the average P12-17 to try new things no one else has.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE VOD VIEWER ADULT PROFILE

ADULT SELF CONCEPTS

Monthly Music Choice P18+ VOD viewers are generally more social and confident than the average P18+.

- Seven out of ten P18+ Music Choice VOD viewers are affectionate, passionate, loving and romantic.
- Monthly Music Choice P18+ VOD viewers are 24% more likely than the average P18+ to be dominating, authoritarian, demanding and aggressive.
- The P18+ Music Choice VOD viewer is 18% more likely than the overall P18+ VOD viewer to be refined, gracious, sophisticated and dignified.

USER CHARACTERISTICS	ADULT SELF CONCEPTS		
	MO. MC VOD VIEWER P18+	MO. MC VOD P18+ INDEX TO TOTAL U.S. P18+	MO. MC VOD VIEWER P18+ INDEX TO OVERALL MO. MC VIEWER P18+
Affectionate, Passionate, Loving, Romantic	71%	107	100
Amicable, Amiable, Affable, Benevolent	44%	84	80
Awkward, Absent-Minded, Forgetful, Careless	29%	133	145
Brave, Courageous, Daring, Adventurousome	50%	105	100
Broadminded, Open-Minded, Liberal, Tolerant	59%	101	94
Creative, Inventive, Imaginative, Artistic	55%	104	96
Dominating, Authoritarian, Demanding, Aggressive	33%	124	103
Efficient, Organized, Diligent, Thorough	61%	107	98
Egocentric, Vain, Self-Centered, Narcissistic	*16%	128	145
Frank, Straightforward, Outspoken, Candid	51%	97	93
Funny, Humorous, Amusing, Witty	62%	101	94
Intelligent, Smart, Bright, Well Informed	71%	107	95
Kind, Good-Hearted, Warmhearted, Sincere	76%	99	96
Refined, Gracious, Sophisticated, Dignified	52%	127	118
Reserved, Conservative, Quiet, Conventional	46%	106	110
Self-Assured, Confident, Self-Sufficient, Secure	51%	90	88
Sociable, Friendly, Cheerful, Likeable	64%	94	94
Stubborn, Hardheaded, Headstrong, Obstinate	48%	125	112
Tense, Nervous, High-Strung, Excitable	24%	104	109
Trustworthy, Competent, Reliable	75%	95	89

Read as follows: Monthly Music Choice P18+ VOD viewers are 28% more likely than the average P18+ and 45% more likely than the overall monthly P18+ VOD viewers to be egocentric, vain, self-centered and narcissistic.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE VOD VIEWER PROFILE

MOVIE ATTENDANCE / LEISURE AND ACTIVITIES

Monthly Music Choice P12+ and P12-24 VOD viewers are more active when it comes to movie attendance and leisure activities than the average P12+ and P12-24, and equally as active as overall monthly P12+ and P12-24 VOD viewers.

- Nine out of ten Music Choice P12-24 VOD viewers attended the movies in the last 6 months.
- 37% of monthly Music Choice P12+ VOD viewers attended the movies 1+ times in the last month.
- Music Choice P12+ VOD viewers are 30% more likely than the average P12+ to see the 3D version of a movie if it's available.
- Monthly Music Choice P12-24 VOD viewers are more likely than the average P12+ VOD viewer to go to the movies during opening weekend (index of 180).
- Eight out of ten P12-24 Music Choice VOD viewers listened to music in the last year.

USER CHARACTERISTICS	MOVIE ATTENDANCE / LEISURE AND ACTIVITIES						
	MO. MUSIC CHOICE VOD VIEWER P12+			MO. MUSIC CHOICE VOD VIEWER P12-24			
	% COMP	INDEX TO TOTAL U.S. P12+	INDEX TO AVG. VOD VIEWER P12+	% COMP	INDEX TO MO. MC VOD VIEWER P12+	INDEX TO TOTAL U.S. P12-24	INDEX TO AVG. VOD VIEWER P12-24
Attended the Movies in the last 6 months	72%	111	92	90%	125	103	99
Attended the Movies 1+ Times in the last Month[1]	37%	138	97	51%	138	116	94
Go to the movies during the opening weekend	* 9%	135	100	** 17%	180	113	100
Go to the movies after the opening weekend/within the first 2 weeks	30%	135	97	* 38%	127	95	83
Would see the 3D version of a movie if it's available	29%	130	91	43%	148	110	93
Movie Genre I saw in the movies: Action Adventure	35%	115	88	55%	157	104	95
Movie Genre I saw in the movies: Animation	24%	145	109	* 21%	88	70	68
Movie Genre I saw in the movies: Comedy	32%	109	80	46%	144	98	85
Movie Genre I saw in the movies: Drama	26%	108	79	* 36%	138	95	84
Movie Genre I saw in the movies: Family	40%	135	105	49%	123	94	89
Movie Genre I saw in the movies: Horror	* 10%	188	156	** 19%	190	146	158
Movie Genre I saw in the movies: Romance	12%	109	80	** 22%	183	122	110
Movie Genre I saw in the movies: Sci-Fi	28%	122	88	* 45%	161	122	102
Movie Genre I saw in the movies: Thriller	15%	129	100	* 23%	153	121	115
Played Board Games in the last year	45%	133	98	50%	111	96	88
Cooked for fun in the last year	44%	121	96	* 40%	91	105	105
Dining out (Not Fast Food) in the last year	67%	125	97	53%	79	106	87
Played Fantasy Sports Leagues in the past year	** 5%	100	54	** 6%	129	85	69
Go to the Beach/Lake in the last year	49%	129	92	42%	86	93	84
Listening to Music in the last year	85%	126	106	82%	96	104	94
Photography in the last year	31%	159	119	* 34%	110	126	106
Playing musical instruments in the last year	17%	152	131	* 28%	165	112	122
Reading books in the last year	64%	120	97	54%	84	106	98
Visited an Aquarium in the last year	22%	178	105	** 17%	77	106	100
Visited a Zoo in the last year	34%	171	117	* 19%	56	83	79
Visited a Museum in the last year	27%	127	90	** 14%	52	64	58
Visited a Shopping Mall 1+ Times in the last Month[1]	61%	117	102	72%	118	118	106
Participate in Physical Fitness Program 1+ times a week[1]	59%	114	98	68%	115	101	103

Read as follows: Monthly Music Choice P12-24 VOD viewers are 29% more likely to have played in fantasy sports leagues in the past year.

*Denotes a sample size less than 61.

** Denotes a sample size less than 31.

MUSIC CHOICE VOD VIEWER TEEN PROFILE

ENTERTAINMENT AND ACTIVITY ATTITUDES

Monthly Music Choice P12-17 VOD viewers are less likely than the average P12-17 and overall P12-17 VOD viewer in the way they spend their time.

- One-fifth of Music Choice P12-17 VOD viewers are 32% more likely than the average P12-17 and 15% more likely than the overall P12-17 VOD viewer to be above average sports enthusiasts.
- 48% of the monthly Music Choice P12-17 VOD viewers say they go out a lot.
- Monthly Music Choice P12-17 VOD viewers are 21% more likely than the average P12-17 to like spending time on their own.
- Nearly eight out of ten Music Choice P12-17 VOD viewers love playing sports.

USER CHARACTERISTICS	TEEN ENTERTAINMENT AND ACTIVITY ATTITUDES		
	MO. MC VOD VIEWER P12-17	MO. MC VOD VIEWER P12-17 INDEX TO TOTAL U.S. P12-17	MO. MC VOD VIEWER P12-17 INDEX TO OVERALL MO. VOD VIEWER P12-17
I go out a lot	* 48%	100	86
Rather spend time home than out partying	** 17%	59	71
I like spending time with my family	* 45%	76	76
I like spending time on my own	* 71%	121	111
I really enjoy spending time on my computer	** 20%	72	71
I really enjoy playing video games	* 57%	106	93
Sports are a part of my social life	* 67%	112	102
I love playing sports	* 77%	114	112
Dance clubs are boring	* 49%	89	84
Sports Enthusiast: Above Average	** 23%	132	115
Sports Enthusiast: Average	** 12%	74	100
Sports Enthusiast: Far Above Average	** 39%	128	93

Read as follows: Monthly Music Choice P12-17 VOD viewers are 12% more likely than the average P12-17 VOD viewer say sports are a part of their social life.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE VOD VIEWER PROFILE

DVDS/BLU-RAYS AND VIDEO GAMES

Monthly Music Choice P12+ and P12-24 VOD viewers are more likely to use and buy DVDs/Blu-Rays and video games than the average P12+ and P12-24.

- 87% of Music Choice P12+ and P12-24 VOD viewers own a DVD player.
- Monthly Music Choice P12+ VOD viewers are 53% more likely than the average P12+ to have bought any Blu-Rays in the last year.
- P12-24 Music Choice VOD viewers are more likely than the average P12-24 and the overall P12-24 VOD viewer to have bought 10+ DVDs/Blu-Rays in the last 3 months (indices: 278 and 234, respectively).
- Monthly Music Choice P12+ VOD viewers are 54% more likely than the average P12+ to check special features before purchasing a DVD.
- The P12-24 monthly Music Choice VOD viewer is 38% more likely than the Music Choice P12+ VOD viewer to spend more time playing video games than watching TV.

USER CHARACTERISTICS	DVDS/BLU-RAYS AND VIDEO GAMES						
	MO. MUSIC CHOICE VOD VIEWER P12+			MO. MUSIC CHOICE VOD VIEWER P12-24			
	% COMP	INDEX TO TOTAL U.S. P12+	INDEX TO AVG. VOD VIEWER P12+	% COMP	INDEX TO MO. MC VOD VIEWER P12+	INDEX TO TOTAL U.S. P12-24	INDEX TO AVG. VOD VIEWER P12-24
Own a DVD player	87%	97	93	87%	100	97	96
HH owns 2+ DVD players	66%	108	88	74%	112	104	94
Own a portable DVD player	19%	125	95	** 8%	45	53	53
Own a video game system w/DVD player	15%	109	71	** 10%	64	47	42
Own Blu-Ray player	** 1%	82	113	** 1%	97	66	179
Bought any Blu-Rays in the last yr.	41%	153	124	* 47%	115	132	121
Bought any DVDs in the last yr.	71%	137	118	79%	111	118	114
Bought Blu-Rays or DVDs in the last yr.	72%	136	116	79%	110	117	113
Bought Blu-Ray/DVD in the last yr.- Hits/New Releases	36%	147	100	* 46%	128	129	110
Bought Blu-Ray/DVD in the last yr.- TV Series	* 11%	161	110	** 15%	136	136	100
Bought 10+ DVDs/Blu-Rays in the last 3 mos.	* 12%	289	238	** 17%	142	278	234
Use VCRs/DVRs to skip commercials- most of the time	16%	113	80	** 10%	63	83	63
Own or play video games	55%	132	96	77%	140	102	96
Buy a new video game within the week it is released	** 6%	265	187	** 12%	186	184	161
Video games played in the last 6 mos.- Action/Adventure	17%	132	100	* 31%	182	98	84
Video games played in the last 6 mos.- Arcade/Classic	** 8%	178	93	** 11%	135	134	69
Video games played in the last 6 mos.- Sports	* 15%	153	94	** 25%	167	125	100
Bought 6+ Video Games in the last yr.	* 12%	171	126	** 25%	208	196	167
Special features are important on a DVD	31%	165	141	* 39%	126	157	156
Check special features before purchasing a DVD	29%	154	126	* 35%	121	142	140
Video games are main source of entertainment	* 16%	179	133	* 26%	163	110	113
Video games are more entertaining than TV	* 14%	128	108	* 24%	171	81	92
Spend more time playing video games than watching TV	* 9%	115	90	** 12%	138	54	60
Spend more money on video games than music or movies	* 12%	131	109	** 24%	200	110	104
Usually borrow video games from a friend	* 15%	229	159	* 28%	187	177	147
Often notice brand name products in video games	* 12%	159	100	** 22%	183	118	88
Don't mind that brand name products appear in video games	18%	146	100	* 35%	194	129	103
Purchased on DVD/Blu-Ray- Action/Adventure	22%	137	110	* 30%	136	113	115
Purchased on DVD/Blu-Ray- Romance	* 9%	214	228	** 10%	116	144	178
Purchased on DVD/Blu-Ray- Sci-Fi	* 11%	95	79	** 14%	127	81	108
Purchased on DVD/Blu-Ray- Thriller	* 10%	213	149	** 17%	170	197	142

Read as follows: 55% of Music Choice P12+ VOD viewers own or play video games.

*Denotes a sample size less than 61. **Denotes a sample size less than 31.

Source: Simmons National Consumer Study, Teen/Adult Fall'10. Population 12+, average Index= 100.

MUSIC CHOICE VOD VIEWER PROFILE

MAGAZINE READERSHIP

Monthly Music Choice P12+ and P12-24 VOD viewers share a similar taste in magazines as the average P12+, P12-24 and overall monthly P12+ and P12-24 VOD viewer, and are more likely to have read them in the last six months.

- Eight out of ten Music Choice P12+ and P12-24 VOD viewers read a magazine in the last 6 months.
- Monthly Music Choice P12-24 VOD viewers are more likely than the P12+ VOD viewer, the average P12-24 and the overall P12-24 VOD viewer to have read Essence magazine in the last 6 months (indices: 164, 294 and 209).
- 19% of P12+ Music Choice VOD viewers read In Touch Weekly in the last 6 months.
- P12+ Music Choice VOD viewers are 158% more likely than the average P12+ and 66% more likely than the overall P12+ VOD viewer to have read Rolling Stone magazine in the last 6 months.

USER CHARACTERISTICS	MAGAZINE READERSHIP								
	MO. MUSIC CHOICE VOD VIEWER P12+				MO. MUSIC CHOICE VOD VIEWER P12-24				
	% COMP	INDEX TO TOTAL U.S. P12+	INDEX TO AVG. VOD VIEWER P12+	% COMP	INDEX TO MC VOD VIEWER P12+	INDEX TO TOTAL U.S. P12-24	INDEX TO AVG. VOD VIEWER P12-24		
Read any magazine in the last 6 months	80%	110	101	**	80%	100	109	103	
ALLURE: Read in the last 6 months	12%	210	125	**	14%	117	126	108	
AUTOMOBILE: Read in the last 6 months	**	4%	143	230	**	6%	158	177	312
COSMOPOLITAN: Read in the last 6 months		16%	167	123	*	23%	144	139	121
ENTERTAINMENT WEEKLY: Read in the last 6 months	*	12%	178	127	**	13%	108	215	160
ESPN THE MAGAZINE: Read in the last 6 months	*	9%	176	119	**	16%	187	181	114
ESSENCE: Read in the last 6 months	*	11%	243	147	**	18%	164	294	209
FITNESS: Read in the last 6 months	**	7%	152	138	**	7%	101	192	156
GAME INFORMER: Read in the last 6 months	*	10%	183	138	**	25%	253	162	147
GAMEPRO: Read in the last 6 months	**	6%	335	363	**	14%	219	269	261
GLAMOUR: Read in the last 6 months		16%	182	145	**	21%	131	147	131
GQ: Read in the last 6 months	*	9%	254	174	**	14%	148	196	146
INSTYLE: Read in the last 6 months	*	10%	166	114	**	9%	91	120	112
IN TOUCH WEEKLY: Read in the last 6 months		19%	212	127	*	28%	147	181	140
THE NATIONAL ENQUIRER: Read in the last 6 months	*	13%	172	187	**	14%	108	240	209
NEWSWEEK: Read in the last 6 months	*	7%	71	71	**	7%	95	136	118
OFFICIAL XBOX MAGAZINE: Read in the last 6 months	**	6%	271	208	**	15%	237	221	161
OK! WEEKLY: Read in the last 6 months		15%	203	150	**	21%	140	152	124
PEOPLE MAGAZINE: Read in the last 6 months		34%	119	94	*	31%	91	111	94
PLAYSTATION: THE OFFICIAL MAGAZINE: Read in the last 6 months	**	7%	303	352	**	16%	235	245	244
ROLLING STONE: Read in the last 6 months	*	13%	258	166	**	18%	138	204	138
SEVENTEEN: Read in the last 6 months	*	11%	159	130	*	23%	209	103	96
SHAPE: Read in the last 6 months	**	5%	101	69	**	6%	136	106	76
SPORTING NEWS: Read in the last 6 months	**	6%	206	186	**	10%	166	184	210
SPORTS ILLUSTRATED: Read in the last 6 months		17%	124	100	**	26%	153	169	137
STAR: Read in the last 6 months		19%	182	136	*	24%	126	155	120
US WEEKLY: Read in the last 6 months		23%	217	135	*	19%	83	105	73
VOGUE: Read in the last 6 months	*	14%	222	178	**	14%	100	129	127
W MAGAZINE: Read in the last 6 months	**	4%	254	211	**	8%	212	254	279

Read as follows: Monthly Music Choice P12+ VOD viewers are 117% more likely than the average P12+ and 35% more likely than the average P12+ VOD viewer to have read US Weekly in the last 6 months.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE MUSIC CHANNEL LISTENER PROFILE

AWARENESS/TRIAL/USAGE

More than half of the average P12+ and average P12+ digital cable subscribers are aware of Music Choice Music Channels, while one-quarter of P12+ digital cable subscribers have listened to them.

- More than seven out of ten total P12+ and P12-24 have heard of VOD.
- Two-fifths of P12+ and P12-24 digital cable subscribers have used VOD.
- 35% of P12-24 digital cable subscribers used VOD in the last month.
- Nearly four out of ten P12-24 digital cable subscribers have heard of Music Choice VOD.
- 30% of monthly P12-24 Music Choice listeners used Music Choice and 25% used it in the last 3 months.

USER CHARACTERISTICS	AWARENESS/TRIAL/USAGE					
	P12+			P12-24		
	TOTAL U.S. P12+	DIGITAL CABLE SUBSCRIBER P12+	MO. MC LISTENER P12+	TOTAL U.S. P12-24	DIGITAL CABLE SUBSCRIBER P12-24	MO. MC LISTENER P12-24
Heard of VOD	74%	81%	88%	78%	82%	89%
Consider using VOD	11%	11%	13%	11%	10%	12%
Have used VOD	27%	41%	48%	31%	44%	48%
Used VOD in the last 3 months	19%	32%	37%	23%	35%	40%
Used VOD in the last month	12%	21%	26%	14%	22%	27%
Heard of Music Choice VOD	21%	26%	41%	30%	36%	49%
Consider using MC VOD	4%	4%	6%	4%	5%	*6%
Used MC VOD	6%	9%	22%	9%	14%	30%
Used MC VOD in the last 3 mos.	4%	6%	18%	6%	11%	25%
Used MC VOD in the last mo.	2%	3%	12%	4%	7%	17%

Read as follows: Eight out of ten (82%) monthly Music Choice P12-24 digital cable subscribers have heard of VOD.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE MUSIC CHANNEL LISTENER PROFILE

MUSIC CATEGORY/INVOLVEMENT

Monthly Music Choice P12+ and P12-24 Music Channel listeners are more likely to use and buy DVDs/Blu-Rays and video games than the average P12+ and P12-24, while P12+ Music Choice VOD viewers are more likely than P12+ Music Channel listeners to be active in the category.

- Over half of the monthly P12+ and P12-24 Music Choice Channel listeners purchased any CDs in the past year.
- Monthly Music Choice P12+ Channel listeners are 69% more likely than the average P12+ and 15% more likely than the overall P12+ listeners to have purchased 10+ CDs/downloads in the past year.
- P12-24 monthly Music Choice listeners are 58% more likely than the P12+ listener to own a portable MP3/digital media player.
- Monthly P12-24 Music Choice listeners are more likely than the P12+ listener and the average P12-24 to listen to satellite radio online in the last month (indices: 194 and 182).

USER CHARACTERISTICS	MUSIC CATEGORY INVOLVEMENT						
	MO. MUSIC CHOICE LISTENER P12+			MO. MUSIC CHOICE LISTENER P12-24			
	% COMP	INDEX TO TOTAL U.S. P12+	MO. MC VOD VIEWER P12+ INDEX TO MO. MC LISTENER P12+	% COMP	INDEX TO MO. MC LISTENER P12+	INDEX TO TOTAL U.S. P12-24	MO. MC VOD VIEWER P12-24 INDEX TO MO. MC LISTENER P12-24
Purchased any CDs in the past yr.	54%	130	106	55%	102	112	59%
Bought music online in the last yr.	25%	144	112	37%	148	119	*36%
Downloaded any music in the last yr.	38%	149	116	61%	161	122	59%
Downloaded music in the last mo.	29%	151	131	49%	169	126	54%
Download music in the last wk.	19%	157	100	34%	179	126	*30%
Bought 10+ CDs/downloads in the past yr.	34%	169	115	58%	171	135	59%
Downloaded 20+ music files in the past yr.	20%	199	115	41%	205	152	*39%
Bought Rock past yr.	16%	125	94	16%	100	100	*17%
Bought Urban past yr.	18%	180	128	29%	161	153	*36%
Bought Pop past yr.	13%	150	100	14%	108	127	**16%
Bought Latin past yr.	4%	142	105	*5%	104	102	**7%
Download Rock in the past yr.	21%	161	110	25%	119	109	*28%
Download Urban in the past yr.	21%	187	90	35%	167	135	*26%
Download Pop in the last yr.	15%	159	107	21%	140	117	**19%
Download Latin in the past yr.	5%	203	123	*6%	110	125	**5%
Own a portable MP3/Digital media player	50%	134	108	79%	158	118	73%
Have downloadable ringtones on my cell	44%	143	111	48%	109	120	61%
Use downloadable ringtones on my cell	12%	184	125	15%	125	136	**21%
Listen to internet only radio stations in the last mo.	14%	156	121	19%	136	127	**24%
Listen to satellite radio online in the last mo.	7%	203	122	14%	194	182	*20%
Listen to traditional radio stations online in the last mo.	10%	162	135	14%	145	144	**21%
Attended a concert in the last year	38%	126	116	45%	118	110	57%

Read as follows: Monthly Music Choice P12-24 Music Channel listeners are 27% more likely than the average P12-24 to listen to internet only radio stations in the last month.

Music Genre Legend:

Urban genre includes: 80's Old School; Pop Hip-Hop; Early 90's Hip-Hop; Pop R&B; Hip-Hop; Traditional Soul, Rhythm & Blues; Neo Soul

Rock genre includes: 60's to 70's Pop Classic Rock; Alternative Rock; Grunge; Garage Rock; Hard Rock; Modern AC; Album Oriented Rock

Pop genre includes: AC Pop; Easy Listening; Pop Alternative; Pure Pop; Teen Pop

Latin genre includes: Latin Ballads/Romantic; Latin Jazz; Latin Rap; Latin Rock; Mexicana; Salsa/Merengue; Tejano/Banda

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE MUSIC CHANNEL LISTENER TEEN PROFILE

ATTITUDES ABOUT MUSIC

Monthly Music Choice P12-17 Music Channel listeners are more likely than the average P12-17 and are just as likely as monthly Music Choice P12-17 VOD viewers to be interested in music.

- Two-fifths (43%) of P12-17 Music Channel listeners feel that they are in touch with the music scene.
- Monthly P12-17 Music Channel listeners are 26% more likely than the average P12-17 to feel their style of clothes reflects their taste in music.
- Six out of ten monthly Music Choice channel listeners say music is a way of escaping.
- Music Choice P12-17 Channel listeners are 25% more likely than the average P12-17 and 30% more likely than the monthly P12-17 Music channel listener to have a wide taste in music.
- P12-17 Music Channel listeners are 43% more likely than the average P12-17 to always know what's in the top ten.

USER CHARACTERISTICS	TEEN ATTITUDES ABOUT MUSIC		
	MO. MC LISTENER P12-17	MO. MC LISTENER P12-17 INDEX TO TOTAL U.S. P12-17	MO. MC VOD VIEWER P12-17 INDEX TO MO. MC LISTENER P12-17
I like different music than my friends	39%	98	111
I always know what's in the top ten	43%	143	98
I like the same music as my parents	34%	121	170
I like listening to ads on the radio	**9%	100	109
I feel I'm in touch with the music scene	43%	119	78
Can judge someone by his/her music/CD's	23%	100	121
I have a wide taste in music	65%	125	130
Music is a passion with me	56%	114	84
Music is a way of escaping	61%	117	100
Style of clothes reflects taste in music	29%	126	116

Read as follows: Monthly Music Choice P12-17 listeners are 14% more likely than the average P12-17 to say music is a passion of who they are.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE MUSIC CHANNEL LISTENER TEEN PROFILE

MEDIA ATTITUDES

Monthly Music Choice P12-17 Music Channel listeners are more likely than the average P12-17 to be receptive to advertising and be interested in media, while Music Choice P12-17 VOD viewers are more likely to be involved in media.

- Monthly P12-17 Music Channel listeners are 19% more likely than the average P12-17 to think most TV programs are not entertaining.
- 63% of monthly Music Channel listeners love watching TV and 16% say TV is more exciting than real life.
- P12-17 monthly Music Choice VOD viewer is 32% more likely than the monthly P12-17 Music Channel listener to have above average ad receptivity.
- Monthly Music Choice P12-17 Channel listeners are 24% more likely than the average P12-17 to be far above average when it comes to media involvement.

USER CHARACTERISTICS	TEEN MEDIA ATTITUDES		
	MO. MC LISTENER P12-17	MO. MC LISTENER P12-17 INDEX TO TOTAL U.S. P12-17	MO. MC VOD VIEWER P12-17 INDEX TO MO. MC LISTENER P12-17
I like the commercials on TV	27%	121	52
I love watching TV	63%	107	86
Advertisements make me buy things	*22%	120	100
Most TV programs are not entertaining	34%	119	91
Watching too much TV is bad for you	49%	92	106
Aren't enough TV programs for people my age	40%	122	63
TV is more exciting than real life	*16%	86	69
I like to buy things I've seen on TV	20%	91	85
I'd like some more TV channels	43%	104	86
It's more fun watching TV with my friends	56%	100	79
I learn a lot from TV	42%	103	74
Ad Receptivity: Average	23%	100	109
Ad Receptivity: Above Average	19%	99	132
Ad Receptivity: Far Above Average	*21%	108	95
Media Involvement: Average	24%	96	154
Media Involvement: Above Average	*14%	71	100
Media Involvement: Far Above Average	22%	124	38

Read as follows: Nearly six out of ten monthly Music Choice P12-17 channel listeners say it's more fun watching TV with their friends.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE MUSIC CHANNEL LISTENER ADULT PROFILE

MEDIA ATTITUDES

Monthly Music Choice P18+ Music Channel listeners are more receptive to advertising, television and radio than the average P18+.

- One-quarter of monthly P18+ Music Channel listeners have far above average TV involvement.
- Monthly P18+ Music Channel listeners are 32% more likely than the average P18+ to pay attention to commercials in the movie theater.
- Nearly five out of ten Music Channel listeners say when commercials come on, they change the channel.
- Monthly P18+ Music Channel listeners are 63% more likely than the average P18+ Music Channel listener to often notice ads on taxis.

USER CHARACTERISTICS	ADULT MEDIA AND ADVERTISING ATTITUDES		
	MO. MC LISTENER P18+	MO. MC LISTENER P18+ INDEX TO TOTAL U.S. P18+	MO. MC VOD VIEWER P18+ INDEX TO MO. MC LISTENER P18+
Notice ads in lobbies of movie theaters	38%	128	97
Pay attention to commercials in the movie theater	41%	132	100
Find TV advertising interesting	31%	127	119
Magazines are a main source of entertainment	12%	118	108
Rely in radio to keep me informed	30%	118	97
No cable, I wouldn't watch TV	36%	133	111
Most magazines are worth the money	19%	111	111
TV is a main source of entertainment	54%	118	96
Radio is my main source of entertainment	16%	114	125
Rely on newspaper to keep me informed	33%	109	103
Read magazine ads out of curiosity	33%	126	106
When commercials come on, I mute the TV	28%	108	104
When commercials come on, I change the channel	47%	119	89
Like TV commercials that make me laugh	74%	116	93
Ads help me learn about products available	52%	118	100
Ads help me pick products for my kids	24%	128	125
Enjoy reading ads in magazines	20%	122	145
Often notice the ads at bus stops	21%	117	138
Often notice the ads on the trains	16%	120	163
Often notice the ads on the buses	26%	127	138
Often notice the ads on the taxis	16%	121	163
I often notice the ads in billboards	53%	116	100
Growth in number of cable networks deleting quality TV	33%	111	82
I can not resist buying magazines	11%	119	109
I am a TV addict	28%	122	107
Special features important in movies on DVD	22%	119	136
Before purchasing a DVD I check the special features	23%	122	126
Always look for brand names	34%	109	106
Advertising gives true picture of products	18%	114	106
Child influenced shopper: Far above average	19%	123	111
Radio Involvement: Above Average	21%	112	114
TV Involvement: Far Above Average	24%	124	117
Advertising Receptivity: Far Above Average	23%	127	109

Read as follows: Monthly Music Choice P18+ Music Channel listeners are 22% more likely than the average P18+ to consider themselves TV addicts.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

Source: Simmons National Consumer Study, Adult Full Year Fall'10. Population 18+, average Index= 100.

MUSIC CHOICE MUSIC CHANNEL LISTENER PROFILE

TECH ADOPTION

Monthly Music Choice P12+ Music Channel listeners exhibit greater tech receptivity and are more likely to embrace affiliate products and services than the average P12+ and P12-24.

- Monthly P12-24 Music Choice channel listeners are 36% more likely to receive premium channels than the average P12-24.
- Nearly seven out of ten P12+ Music Choice channel listeners own an HDTV.
- Monthly P12+ Music Choice listeners are 56% more likely than the average P12+ to have ordered any PPV in the last year.
- P12-24 monthly Music Choice channel listeners are 133% more likely than the average P12-24 to have ordered music programs on-demand on the last year.

USER CHARACTERISTICS	TECH ADOPTION						
	MO. MUSIC CHOICE LISTENER P12+			MO. MUSIC CHOICE LISTENER P12-24			
	% COMP	INDEX TO TOTAL U.S. P12+	MO. MC VOD VIEWER P12+ INDEX TO MO. MC LISTENER P12+	% COMP	INDEX TO MO. MC LISTENER P12+	INDEX TO TOTAL U.S. P12-24	MO. MC VOD VIEWER P12-24 INDEX TO MO. MC LISTENER P12-24
Own HDTV	65%	111	100	61%	94	107	103
Own LCD/Plasma/Projection TV	67%	110	99	65%	97	105	112
Spent \$2K+ on TV	10%	116	100	* 10%	100	100	120
Own 3+ PCs	21%	104	81	27%	129	93	130
Receive Premium Channels	48%	139	108	49%	102	136	104
Ordered 7+ MOD in the last 3 mos.	8%	209	224	* 12%	149	222	133
7+ PPV in the last yr.	6%	145	119	** 4%	70	73	274
Use cable modem to access internet at home	41%	125	124	42%	102	120	110
Has VOIP	14%	118	129	12%	86	92	108
Has a DVR	48%	128	90	47%	98	121	106
Bundle Package	61%	128	100	63%	103	119	116
Owns 4+ PCs	9%	106	61	12%	130	86	142
PPV 5+ times in the last yr.	9%	141	121	* 7%	82	93	228
PPV 3+ times in the last yr.	18%	149	128	16%	89	107	175
Ordered 4+ MOD in the last 3 mos.	14%	194	157	17%	121	187	147
Own a PC	87%	104	93	88%	101	100	108
Spent 15+ hrs. on the Internet in the last wk.	20%	121	115	25%	125	114	96
Ordered any PPV in last year	35%	156	100	32%	91	123	128
Ordered MOD in the last year	27%	166	107	21%	78	124	176
Ordered any MOD in the last 3 months	31%	187	142	33%	106	165	148
Own 4+ TV's	43%	125	95	55%	128	122	95
Use internet at work or home	82%	109	106	86%	105	106	101
Took 100-499 pictures with Digital Camera in the last yr.	20%	125	100	21%	105	140	90
Own a Digital Video Camera	23%	116	122	27%	117	108	107
Own an iPod	32%	145	113	57%	178	116	104
Ordered Movies-On-Demand in the last yr.	27%	166	308	21%	223	124	176
Ordered Premium Channels-On-Demand in the last yr.	15%	192	89	14%	52	146	179
Ordered TV Programs On-Demand in the last yr.	27%	206	287	26%	173	173	142
Ordered Music Programs On-Demand in the last yr.	16%	282	126	17%	63	233	124
Ordered Other Programs On-Demand in the last yr.	13%	225	138	13%	81	194	146

Read as follows: 61% of monthly Music Choice P12+ channel listeners purchase bundled cable packages.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE MUSIC CHANNEL ADULT PROFILE

TECH ADOPTION ATTITUDES

Monthly Music Choice P18+ Music Channel listeners are more likely to be adopters of computer technology, new gadgets and digital TV than the average P18+.

- 21% of P18+ monthly Music Choice channel listeners say friends ask their advice about buying electronic equipment.
- Monthly Music Choice P18+ channel listeners are 41% more likely to be the first of their friends to have new electronic equipment, than the average P18+.
- Nearly five out of ten monthly P18+ Music Channel listeners try to keep up with developments in technology.
- P18+ monthly Music Choice channel listeners are more likely than the monthly P18+ Music Channel listener to be average early adopters (index 158).

USER CHARACTERISTICS	ADULT TECH ADOPTION ATTITUDES		
	MO. MC LISTENER P18+	MO. MC LISTENER P18+ INDEX TO TOTAL U.S. P18+	MO. MC VOD VIEWER P18+ INDEX TO MO. MC LISTENER P18+
I'm the first of my friends to have new electronic equipment	14%	141	78
Friends ask my advice about buying electronic equipment	21%	122	84
I ask friends advice before buying electronic equipment	29%	108	94
Like to learn about computer technology/web	56%	110	112
I try to keep up with developments in technology	47%	116	100
Love to buy new gadgets and appliances	32%	124	89
Early Adopters: Average	19%	92	158

Read as follows: Monthly Music Choice P18+ Music Channel listeners are 24% more likely than the average P18+ love to buy new gadgets and appliances.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE MUSIC CHANNEL LISTENER PROFILE

CELL PHONES

Monthly Music Choice P12+ and P12-24 Music Channel listeners are heavier cell phone and cell phone feature users than the average P12+ and P12-24, while monthly Music Choice P12+ and P12-24 VOD users are more likely than P12+ and P12-24 Music Channel listeners to be heavy users.

- 90% of monthly Music Choice P12+ music channel listeners own a cell phone.
- Nearly seven out of ten Music Choice P12+ and P12-24 channel listeners have text messaging on their cell phones.
- P12-24 Music Choice channel listeners are 16% more likely than the P12+ channel listener to have web browsing on their cell phones and have used it in the last month.
- Monthly Music Choice P12-24 Music channel listeners are 35% more likely to feel that texting is just as meaningful as an actual conversation.
- Three-fifths of Music Choice P12+ channel listeners confirm that once they find a cell provider they like, they stick with them.

USER CHARACTERISTICS	CELL PHONE INVOLVEMENT / ENGAGEMENT						
	MO. MUSIC CHOICE LISTENER P12+			MO. MUSIC CHOICE LISTENER P12-24			
	% COMP	INDEX TO TOTAL U.S. P12+	MO. MC VOD VIEWER P12+ INDEX TO MO. MC LISTENER P12+	% COMP	INDEX TO MO. MC LISTENER P12+	INDEX TO TOTAL U.S. P12-24	MO. MC VOD VIEWER P12-24 INDEX TO MO. MC LISTENER P12-24
Own a cell phone	90%	100	107	79%	88	93	120
Have downloadable ringtones	44%	143	111	48%	109	120	127
Have picture messaging	46%	142	124	54%	117	115	126
Have text messaging	66%	121	105	68%	103	105	109
Used downloadable ringtones in the last month	12%	184	125	15%	125	136	140
Used picture messaging in the last month	27%	162	130	33%	122	118	139
Used text messaging in the last month	44%	131	109	48%	109	107	117
Cell Phones Owned: Blackberry or iPhone	13%	107	108	14%	108	93	186
Have a camcorder phone	29%	143	110	39%	134	115	115
Used web browsing in the last month	19%	153	100	22%	116	147	118
Have web browsing	38%	139	111	44%	116	122	130
If I have access to a landline phone, then I won't use my cell	43%	103	102	22%	51	96	86
Extra features on cell are more important than traditional calling features	32%	124	138	42%	131	124	131
My friendships wouldn't be as close without my cell	33%	124	139	42%	127	105	133
Use my cell phone in many diff ways to get info I need	42%	123	121	51%	121	113	112
Likely to purchase products I see advertised on my cell	9%	156	200	*13%	145	133	208
Only use my cell in case of emergencies	20%	98	105	13%	65	108	115
More likely to switch cell providers if they offer latest technology	14%	106	179	15%	107	94	220
Cell phone connects me to my social world	39%	122	126	48%	123	104	106
Use info from cell to decide where to go or what to do	19%	142	158	32%	168	128	150
Interested in receiving ads on my cell	6%	129	194	*10%	158	118	123
Cell phone is an expression of who I am	19%	137	163	35%	184	130	140
Switched to current provider because they offered better plans	32%	121	119	24%	75	100	117
Willing to accept ads sent to my cell if I were to receive something of value	17%	133	129	20%	118	100	155
Cell phone plans are confusing to me	29%	108	107	19%	66	90	147
Like the idea of the cell phone moving beyond voicemail and text messaging	44%	122	120	54%	123	108	100
Like to be connected to family/friends wherever I am	67%	111	110	60%	90	95	118
Once I find a cell provider I like, I stick with them	63%	112	105	52%	83	102	110
Texting is just as meaningful as an actual conversation	36%	134	131	49%	136	109	116
Rely on my cell to keep up with news/sports	16%	134	138	21%	131	124	138
If quality of cell service is disappointing, I will switch to a new provider	47%	110	94	30%	64	91	120

Read as follows: 44% of monthly P12+ Music Choice channel listeners like the idea of the cell phone moving beyond voicemail and text messaging.

*Denotes a sample size less than 61. / **Denotes a sample size less than 31.

Source: Simmons National Consumer Study, Teen/Adult Fall'10. Population 12+, average Index= 100.

MUSIC CHOICE MUSIC CHANNEL LISTENER PROFILE

INTERNET ENGAGEMENT / SOCIAL NETWORKING

Monthly Music Choice P12+ and P12-24 Music Channel listeners are heavier users of the Internet and Social Networking sites than the average P12+ and P12-24.

- 76% of P12+ Music Choice channel listeners enjoy keeping in touch with their friends.
- Monthly Music Choice P12-24 channel listeners are 53% more likely than the average P12-24 to have visited TWITTER in the last month.
- 45% of Music Choice P12+ channel listeners and 55% of Music Choice P12-24 channel listeners visited FACEBOOK.com in the last month.
- Monthly Music Choice P12-24 channel listeners are 55% more likely than the average P12-24 to have used/visited blogs/blogging in the last month.

USER CHARACTERISTICS	INTERNET ENGAGEMENT AND SOCIAL NETWORKING						
	MO. MUSIC CHOICE LISTENER P12+			MO. MUSIC CHOICE LISTENER P12-24			
	% COMP	INDEX TO TOTAL U.S. P12+	MO. MC VOD VIEWER P12+ INDEX TO MO. MC LISTENER P12+	% COMP	INDEX TO MO. MC LISTENER P12+	INDEX TO TOTAL U.S. P12-24	MO. MC VOD VIEWER P12-24 INDEX TO MO. MC LISTENER P12-24
Spent 5+ hours on the internet in the last week	45%	121	98	52%	116	109	90
Listen to satellite radio online in the last month	7%	203	122	14%	194	181	143
Listen to traditional radio stations online in the last month	10%	162	135	14%	145	142	150
Download/listen to podcasts online in the last month	14%	162	143	24%	171	142	133
Download movies online in the last month	11%	148	173	24%	218	138	129
Download music files online in the last month	29%	151	131	49%	169	127	110
Play/download online games in the last month	27%	135	119	40%	148	116	115
Watched videos, TV programs, movies online 1-5 times in the last month	7%	123	107	* 9%	128	108	79
Used cell phone to access the internet at home	23%	131	130	35%	152	126	146
Used a desktop computer to access the internet at home	58%	111	98	65%	112	112	111
Used handheld/PDA to access the internet at home	5%	141	131	* 6%	137	114	179
Used a laptop computer to access the internet at home	42%	117	126	50%	119	100	102
Used TV to access the internet at home	5%	126	119	* 7%	137	102	178
Used Instant Messaging (IM) on the internet in the last month	25%	160	136	47%	188	144	115
Visited FACEBOOK.com in the last week	38%	128	126	46%	121	105	109
Visited MYSPACE.com in the last week	14%	175	157	34%	243	155	97
Visited YOUTUBE.com in the last week	31%	141	145	52%	168	120	108
Visited TWITTER.com in the last week	6%	199	256	* 10%	171	155	180
Visited FACEBOOK.com in the last month	45%	128	136	55%	122	107	124
Visited MYSPACE.com in the last month	21%	183	157	47%	224	149	111
Visited YOUTUBE.com in the last month	44%	140	139	66%	150	118	112
Visited TWITTER.com in the last month	9%	183	240	16%	183	153	188
Visited FACEBOOK or MYSPACE In Last 30 Days	51%	133	131	69%	135	113	116
Used / Visited blogs/blogging (read/write online diaries) in the last month	20%	170	120	32%	160	155	116
Visited bulletin/message boards in the last month	17%	163	135	26%	153	138	127
Friends look to me to organize activities	38%	114	92	35%	92	93	74
I enjoy keeping in touch with my friends	76%	108	87	74%	97	104	93
I make friends easily	66%	111	89	66%	100	110	79
I have a genuine interest in the people	68%	111	84	61%	90	104	87
I like to introduce people to each other	46%	114	89	50%	109	112	76
I have many acquaintances from all walks of life	62%	112	94	56%	90	108	91

Read as follows: Monthly Music Choice P12+ Music Channel listeners are 60% more likely than the average P12+ to use instant messaging in the last month.

*Denotes a sample size less than 61. / **Denotes a sample size less than 31.

Source: Simmons National Consumer Study, Teen/Adult Fall'10. Population 12+, average Index= 100.

MUSIC CHOICE MUSIC CHANNEL LISTENER ADULT PROFILE

ATTITUDES ABOUT THE INTERNET

Monthly Music Choice P18+ Music Channel listeners are more engaged in the Internet than the average P18+, while monthly P18+ Music Choice VOD viewers are heavier users.

- Monthly P18+ Music channel listeners are 19% more likely than the average P18+ to return to sites that make it easy to find what they need.
- P18+ Music channel listeners are more likely than the average P18+ to say the internet changed how they shop for products and increased their desire to learn/search (indices: 129 and 123).
- Monthly Music Choice P18+ VOD viewers are 38% more likely than the P18+ Music channel listener to say it's safe to make purchases online.
- Five out of ten P18+ Music channel listeners get more of their news from the internet.
- P18+ Music Choice music channel listeners are more likely than the average P18+ to be far above average when it comes to internet activity and internet involvement (indices: 160 and 145, respectively).
- One-fifth of the monthly P18+ Music channel listeners say the internet changed the way they work.

USER CHARACTERISTICS	ADULT ATTITUDES ABOUT THE INTERNET		
	MO. MC LISTENER P18+	MO. MC LISTENER P18+ INDEX TO TOTAL U.S. P18+	MO. MC VOD VIEWER P18+ INDEX TO MO. MC LISTENER P18+
I like websites that protect my privacy	81%	112	92
I like websites that show me local info	73%	120	95
Go to websites I've never been to before	39%	126	78
Get more of my news from the internet	51%	120	89
Like to look for new/interesting websites	40%	127	83
Doing more shopping on the internet than before	40%	119	103
I return to sites that make it easy to find what I need	72%	119	106
Trust info on websites that I have heard about	47%	123	102
Like to hear about products/services by email	27%	122	87
It's safe to make purchases online	47%	116	138
Internet changed the way I spend my time	47%	115	109
Internet changed the way I get info for products	63%	116	109
I spend less time sleeping because of the internet	16%	120	73
I spend less time watching TV because of the internet	29%	121	104
Internet is the new way I socialize/meet others	29%	135	112
Internet changed how I shop for products	49%	129	120
I spend less time reading magazines because of the internet	31%	117	124
Internet is the prime source of my entertainment	28%	134	100
Internet is the prime source of my family's entertainment	27%	137	129
Internet changed the way I work	32%	119	114
Internet increased my desire to learn/search	56%	123	110
I listen less to non-internet radio because of the internet	17%	117	106
I read print news less because of the internet	34%	120	126
For information I look to the internet first	57%	118	114
Internet Activity: Far Above Average	28%	160	80
Internet Involvement: Far Above Average	24%	145	80

Read as follows: Monthly Music Choice P18+ Music Channel listeners are 16% more likely than the average P18+ to say the internet changed the way they get information for products.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE MUSIC CHANNEL LISTENER TEEN PROFILE

ATTITUDES AND OPINIONS

Monthly Music Choice P12-17 VOD viewers are more likely than the average P12-17 to consider themselves achievers, social and tech savvy.

- Half of P12-17 Music Channel listeners are good at convincing others to try new things.
- Monthly P12-17 Music Channel listeners are 23% more likely than the average P12-17 to always be the first to try out new things.
- Nearly nine out of ten P12-17 Music Channel listeners would like to go to college and 85% of them believe it's important to work hard at school.
- P12-17 Music Choice VOD viewers are 63% more likely to be above average based on unique style, than the monthly P12-17 Music Channel listener.
- Nearly two-fifths of the P12-17 Music Channel listeners consider themselves an expert on new technology.

USER CHARACTERISTICS	TEEN ATTITUDES AND OPINIONS		
	MO. MC LISTENER P12-17	MO. MC LISTENER P12-17 INDEX TO TOTAL U.S. P12-17	MO. MC VOD VIEWER P12-17 INDEX TO MO. MC LISTENER P12-17
Get excited when sharing opinions with others	47%	104	102
Good at convincing others to try new things	52%	100	96
I like to share my knowledge with others	64%	100	92
I have genuine interest in people with others	58%	96	86
Not afraid to appear different than others	63%	107	87
I like to try things no one else has	54%	110	122
I am adventurous	68%	107	75
Meeting new people comes easy to me	65%	109	69
People often copy what I do or wear	37%	110	105
I would like to go to college	89%	101	99
I want to be famous	65%	122	98
Always the first to try out new things	50%	123	100
The more friends you have the better	55%	106	102
It's important to feel like part of a group	50%	99	122
I enjoy going to school	47%	92	136
It's important to work hard at school	85%	101	111
Prefer to buy things friends would approve	29%	114	114
I am easily influenced by other people	20%	110	75
Consider myself an expert on new technology	* 36%	104	111
Fashion Style: Far Above Average	32%	172	125
Unique Style: Above Average	16%	82	163
Spenders: Above Average	23%	134	109
Traditionalist: Far Above Average	26%	133	69
Social Isolate: Average	21%	106	81
Achiever: Above Average	29%	108	148
Rebel: Far Above Average	* 25%	114	104
Conformists: Far Above Average	* 22%	114	118
Cool Tech: Far Above Average	27%	138	119

Read as follows: 68% of the monthly P12-17 Music Channel listeners say they are adventurous.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE MUSIC CHANNEL LISTENER ADULT PROFILE

ADULT SELF CONCEPTS

Monthly Music Choice P18+ Music Channel listeners are generally more social and open-minded than the average P18+.

- Seven out of ten P18+ Music Channel listeners consider themselves to be affectionate, passionate, loving and romantic.
- Monthly P18+ Music Channel listeners are 11% more likely than the average P18+ to be brave, courageous, daring and adventuresome.
- Four-fifths of P18+ Music Channel listeners are kind, good-hearted, warmhearted and sincere.
- Monthly P18+ Music Channel listeners are more likely than the average P18+ to be funny, humorous, amusing and witty (index of 114).

USER CHARACTERISTICS	ADULT SELF CONCEPTS		
	MO. MC LISTENER P18+	MO. MC LISTENER P18+ INDEX TO TOTAL U.S. P18+	MO. MC VOD VIEWER P18+ INDEX TO MO. MC LISTENER P18+
Affectionate, Passionate, Loving, Romantic	74%	112	96
Amicable, Amiable, Affable, Benevolent	54%	105	81
Awkward, Absent-Minded, Forgetful, Careless	26%	123	112
Brave, Courageous, Daring, Adventuresome	53%	111	94
Broadminded, Open-Minded, Liberal, Tolerant	65%	110	91
Creative, Inventive, Imaginative, Artistic	57%	109	96
Dominating, Authoritarian, Demanding, Aggressive	31%	114	106
Efficient, Organized, Diligent, Thorough	64%	112	95
Egocentric, Vain, Self-Centered, Narcissistic	13%	101	123
Frank, Straightforward, Outspoken, Candid	57%	109	89
Funny, Humorous, Amusing, Witty	70%	114	89
Intelligent, Smart, Bright, Well Informed	75%	114	95
Kind, Good-Hearted, Warmhearted, Sincere	83%	108	92
Refined, Gracious, Sophisticated, Dignified	46%	111	113
Reserved, Conservative, Quiet, Conventional	48%	110	96
Self-Assured, Confident, Self-Sufficient, Secure	63%	112	81
Sociable, Friendly, Cheerful, Likeable	74%	111	86
Stubborn, Hardheaded, Headstrong, Obstinate	45%	116	107
Tense, Nervous, High-Strung, Excitable	26%	114	92
Trustworthy, Competent, Reliable	85%	108	88

Read as follows: Monthly Music Channel P18+ listeners are 12% more likely than the average P18+ to self-assured, confident, self-sufficient and secure.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE MUSIC CHANNEL LISTENER PROFILE

MOVIE ATTENDANCE / LEISURE AND ACTIVITIES

Monthly Music Choice P12+ and P12-24 Music Channel listeners are more active when it comes to movie attendance and leisure activities than the average P12+ and P12-24. Monthly P12+ and P12-24 VOD viewers are slightly more active than monthly Music Choice P12+ and P12-24 Music Channel listeners in the category.

- Nearly eight out of ten Music Choice P12+ Music Channel listeners and 94% of Music Choice P12-24 Music Channel listeners attended the movies in the last 6 months.
- Music Choice P12+ Music Channel listeners are 32% more likely than the average P12+ to go to the movies after the opening weekend or within the first 2 weeks.
- Monthly P12-24 Music Channel listeners are more likely than the average P12+ listener and the average P12-24 to go to the movies during the opening weekend (indices: 208 and 167, respectively).
- P12-24 Music Channel listeners are 55% more likely than the average P12+ Music Channel listener to say they would see the 3D version of a movie if it's available.
- 84% of P12+ Music Channel listeners listened to music in the last year.

USER CHARACTERISTICS	MOVIE ATTENDANCE / LEISURE AND ACTIVITIES						
	MO. MUSIC CHOICE LISTENER P12+			MO. MUSIC CHOICE LISTENER P12-24			
	% COMP	INDEX TO TOTAL U.S. P12+	MO. MC VOD VIEWER P12+ INDEX TO MO. MC LISTENER P12+	% COMP	INDEX TO MO. MC LISTENER P12+	INDEX TO TOTAL U.S. P12-24	MO. MC VOD VIEWER P12-24 INDEX TO MO. MC LISTENER P12-24
Attended the Movies in the last 6 months	77%	117	94	94%	122	108	96
Attended the Movies 1+ Times in the last Month[1]	36%	134	103	55%	153	125	93
Go to the movies during the opening weekend	12%	176	79	25%	208	167	68
Go to the movies after the opening weekend/within the first 2 weeks	29%	132	103	42%	145	105	90
Would see the 3D version of a movie if it's available	31%	139	94	48%	155	123	90
Movie Genre I saw in the movies: Action Adventure	37%	124	95	59%	159	111	93
Movie Genre I saw in the movies: Animation	19%	116	126	24%	126	80	88
Movie Genre I saw in the movies: Comedy	34%	116	94	54%	159	115	85
Movie Genre I saw in the movies: Drama	29%	117	90	39%	134	103	92
Movie Genre I saw in the movies: Family	37%	126	108	54%	146	104	91
Movie Genre I saw in the movies: Horror	8%	138	132	18%	238	138	106
Movie Genre I saw in the movies: Romance	12%	111	100	19%	158	106	116
Movie Genre I saw in the movies: Sci-Fi	27%	119	104	39%	144	105	115
Movie Genre I saw in the movies: Thriller	15%	131	100	23%	153	121	100
Played Board Games in the last year	43%	128	105	57%	133	110	88
Cooked for fun in the last year	47%	128	94	47%	100	124	85
Dining out (Not Fast Food) in the last year	63%	119	106	56%	89	112	95
Played Fantasy Sports Leagues in the past year	6%	133	76	* 8%	138	121	71
Go to the Beach/Lake in the last year	47%	122	104	52%	111	116	81
Listening to Music in the last year	84%	125	101	87%	104	110	94
Photography in the last year	27%	139	115	33%	122	122	103
Playing musical instruments in the last year	16%	142	106	30%	188	120	93
Reading books in the last year	58%	108	110	51%	88	100	106
Visited an Aquarium in the last year	17%	138	129	20%	118	125	85
Visited a Zoo in the last year	26%	131	131	25%	96	109	76
Visited a Museum in the last year	27%	127	100	27%	100	123	52
Visited a Shopping Mall 1+ Times in the last Month[1]	58%	112	105	67%	116	110	107
Participate in Physical Fitness Program 1+ times a week[1]	59%	115	100	68%	115	101	100

Read as follows: Monthly Music Choice P12+ Music Channel listeners are 33% more likely than the average P12+ to have played fantasy sports leagues in the past year.

*Denotes a sample size less than 61. / **Denotes a sample size less than 31.

Source: Simmons National Consumer Study, Teen/Adult Fall'10. Population 12+, average Index= 100.

MUSIC CHOICE MUSIC CHANNEL LISTENER TEEN PROFILE

ENTERTAINMENT AND ACTIVITIES ATTITUDES

Monthly Music Choice P12-17 Music Channel listeners are similar in the way they spend their time as P12-17, while Music Choice P12-17 VOD viewers are slightly more likely than P12-17 Music Channel listeners to spend time participating in sports.

- Nearly half of P12-17 Music Channel listeners go out a lot.
- Monthly P12-17 Music Choice VOD viewer is more likely than the P12-17 Music Channel listener to say sports are a part of their social life.
- 67% of P12-17 Music Channel listeners like to spend time on their own.
- P12-17 Music Channel listeners are 13% more likely than the average P12-17 to say they love playing sports.
- One-quarter of P12-17 Music Channel listeners would rather spend time home than out partying.
- Monthly Music Choice P12-17 VOD viewers are 35% more likely than the P12-17 Music Channel listener to be far above average sports enthusiasts.

		TEEN ENTERTAINMENT AND ACTIVITIES ATTITUDES		
		MO. MC LISTENER P12-17	MO. MC LISTENER P12-17 INDEX TO TOTAL U.S. P12-17	MO. MC VOD VIEWER P12-17 INDEX TO MO. MC LISTENER P12-17
USER CHARACTERISTICS				
I go out a lot		46%	95	104
Rather spend time home than out partying		24%	82	71
I like spending time with my family		51%	87	88
I like spending time on my own		67%	115	106
I really enjoy spending time on my computer		21%	73	95
I really enjoy playing video games		55%	102	104
Sports are a part of my social life		63%	104	106
I love playing sports		76%	113	101
Dance clubs are boring		56%	102	88
Sports Enthusiast: Above Average	*	16%	91	144
Sports Enthusiast: Average	*	20%	124	60
Sports Enthusiast: Far Above Average		29%	96	134

Read as follows: Nearly six out of ten P12-17 Music Channel listeners say dance clubs are boring.

*Denotes a sample size less than 61.

**Denotes a sample size less than 31.

MUSIC CHOICE MUSIC CHANNEL LISTENER PROFILE

DVDS/BLU-RAYS AND VIDEO GAMES

Monthly Music Choice P12+ and P12-24 Music Channel listeners are more likely to use and buy DVDs/Blu-Rays and video games than the average P12+ and P12-24, while P12+ and P12-24 Music Choice VOD viewers are more likely than P12+ and P12-24 Music Channel listeners to be active in the category.

- Nine out of ten P12+ and P12-24 Music Channel listeners own a DVD player.
- 73% of P12-14 Music Channel listeners bought Blu-Rays or DVDs in the last year.
- P12-24 monthly Music Channel listeners are 51% more likely than the average P12+ Music Channel listener to own or play video games.
- Monthly P12+ Music Channel listeners are more likely than the average P12+ to buy a new video game within the week it is released (index 168).
- P12-24 Music Channel listeners are 133% more likely than the average P12+ Music Channel listener and 21% more likely than the average P12-24 to feel that video games are more entertaining than TV.

USER CHARACTERISTICS	DVDS/BLU-RAYS AND VIDEO GAMES						
	MO. MUSIC CHOICE LISTENER P12+			MO. MUSIC CHOICE LISTENER P12-24			
	% COMP	INDEX TO TOTAL U.S. P12+	MO. MC VOD VIEWER P12+ INDEX TO MO. MC LISTENER P12+	% COMP	INDEX TO MO. MC LISTENER P12+	INDEX TO TOTAL U.S. P12-24	MO. MC VOD VIEWER P12-24 INDEX TO MO. MC LISTENER P12-24
Own a DVD player	94%	105	93	93%	99	103	94
HH owns 2+ DVD players	71%	116	93	75%	106	106	99
Own a portable DVD player	18%	121	106	15%	83	94	57
Own a video game system w/DVD player	19%	144	79	25%	132	119	39
Own Blu-Ray player	** 1%	112	74	** 2%	103	96	69
Bought any Blu-Rays in the last yr.	29%	109	141	35%	121	97	134
Bought any DVDs in the last yr.	61%	118	116	72%	118	107	110
Bought Blu-Rays or DVDs in the last yr.	62%	118	116	73%	118	107	108
Bought Blu-Ray/DVD in the last yr- Hits/New Releases	32%	132	113	39%	122	108	118
Bought Blu-Ray/DVD in the last yr.- TV Series	9%	126	125	12%	136	109	125
Bought 10+ DVDs/Blu-Rays in the last 3 mos.	6%	145	207	* 10%	167	156	175
Use VCRs/DVRs to skip commercials- most of the time	19%	130	84	16%	84	133	63
Own or play video games	55%	132	100	83%	151	111	93
Buy a new video game within the week it is released	4%	168	157	* 9%	217	133	135
Video games played in the last 6 mos.-							
Action/Adventure	17%	128	100	32%	188	100	97
Video games played in the last 6 mos.- Arcade/Classic	7%	147	121	* 9%	141	116	116
Video games played in the last 6 mos.- Sports	14%	142	107	21%	150	105	119
Bought 6+ Video Games in the last yr.	11%	155	109	16%	145	123	156
Special features are important on a DVD	23%	122	135	27%	117	108	144
Check special features before purchasing a DVD	24%	129	121	31%	129	124	113
Video games are main source of entertainment	12%	134	133	27%	225	117	96
Video games are more entertaining than TV	15%	139	93	35%	233	121	69
Spend more time playing video games than watching TV	11%	142	79	28%	255	127	43
Spend more money on video games than music or movies	11%	121	109	22%	200	100	109
Usually borrow video games from a friend	11%	174	136	21%	191	131	133
Often notice brand name products in video games	13%	176	92	22%	169	116	100
Don't mind that brand name products appear in video games	19%	157	95	34%	179	126	103
Purchased on DVD/Blu-Ray- Action/Adventure	22%	138	100	32%	145	119	94
Purchased on DVD/Blu-Ray- Romance	6%	155	138	11%	176	158	91
Purchased on DVD/Blu-Ray- Sci-Fi	16%	141	69	23%	144	135	61
Purchased on DVD/Blu-Ray- Thriller	9%	178	116	* 12%	139	140	142

Read as follows: Six out of ten monthly P12+ Music Channel listeners bought DVDs in the last year.

*Denotes a sample size of less than 61. / **Denotes a sample size of less than 31.

Source: Simmons National Consumer Study, Teen/Adult Fall'10. Population 12+, average Index= 100.

MUSIC CHOICE MUSIC CHANNEL LISTENER PROFILE

MAGAZINE READERSHIP

Monthly Music Choice P12+ and P12-24 Music Channel listeners share a similar taste in magazines as the average P12+ and P12-24, and are more likely to have read them in the last six months.

- Eight out of ten monthly Music Choice P12+ and P12-24 Music Channel listeners read a magazine in the last six months (80% and 80%, respectively).
- Monthly P12+ Music Channel listeners are 49% more likely than the average P12+ to have read ESPN the Magazine in the last 6 months.
- P12-24 Music Channel listeners are more likely than the average P12+ Music Channel listener to have read Glamour in the last 6 months (index of 133).
- Monthly P12-24 Music Channel listeners are 28% more likely than the P12+ listener and 26% more likely than the average P12-24 to have read Us Weekly in the last 6 months.
- Compared to the average P12+, monthly Music Channel P12+ listeners are 78% more likely to have read Rolling Stone magazine the last 6 months.

USER CHARACTERISTICS	MAGAZINE READERSHIP						
	MO. MUSIC CHOICE LISTENER P12+			MO. MUSIC CHOICE LISTENER P12-24			
	% COMP	INDEX TO TOTAL U.S. P12+	MO. MC VOD VIEWER P12+ INDEX TO MO. MC LISTENER P12+	% COMP	INDEX TO MO. MC LISTENER P12+	INDEX TO TOTAL U.S. P12-24	MO. MC VOD VIEWER P12-24 INDEX TO MO. MC LISTENER P12-24
Read any magazine in the last 6 months	80%	112	98	80%	100	110	100
ALLURE: Read in the last 6 months	9%	157	129	14%	150	132	100
AUTOMOBILE: Read in the last 6 months	4%	137	104	** 6%	152	163	109
COSMOPOLITAN: Read in the last 6 months	15%	152	107	20%	133	119	115
ENTERTAINMENT WEEKLY: Read in the last 6 months	10%	157	120	* 9%	93	154	139
ESPN THE MAGAZINE: Read in the last 6 months	7%	149	119	* 11%	153	131	145
ESSENCE: Read in the last 6 months	8%	178	131	* 14%	167	226	129
FITNESS: Read in the last 6 months	6%	124	122	** 6%	102	159	121
GAME INFORMER: Read in the last 6 months	8%	153	119	20%	241	129	125
GAMEPRO: Read in the last 6 months	3%	173	194	* 8%	247	151	172
GLAMOUR: Read in the last 6 months	12%	132	133	16%	133	115	131
GQ: Read in the last 6 months	6%	165	154	* 10%	163	147	140
INSTYLE: Read in the last 6 months	7%	125	133	* 9%	120	120	101
IN TOUCH WEEKLY: Read in the last 6 months	15%	169	127	20%	133	130	140
THE NATIONAL ENQUIRER: Read in the last 6 months	11%	144	118	* 8%	72	141	176
NEWSWEEK: Read in the last 6 months	8%	86	83	** 4%	43	74	184
OFFICIAL XBOX MAGAZINE: Read in the last 6 months	5%	196	138	* 12%	262	177	125
OK! WEEKLY: Read in the last 6 months	11%	151	136	15%	136	110	140
PEOPLE MAGAZINE: Read in the last 6 months	33%	116	103	30%	91	108	103
PLAYSTATION: THE OFFICIAL MAGAZINE: Read in the last 6 months	4%	162	186	* 8%	223	126	196
ROLLING STONE: Read in the last 6 months	9%	178	147	13%	147	148	138
SEVENTEEN: Read in the last 6 months	11%	168	100	29%	264	126	79
SHAPE: Read in the last 6 months	6%	124	81	* 8%	136	131	81
SPORTING NEWS: Read in the last 6 months	4%	147	139	** 6%	152	120	153
SPORTS ILLUSTRATED: Read in the last 6 months	17%	127	100	21%	124	134	124
STAR: Read in the last 6 months	18%	174	106	20%	111	130	120
US WEEKLY: Read in the last 6 months	18%	167	128	23%	128	126	83
VOGUE: Read in the last 6 months	9%	140	159	12%	137	110	117
W MAGAZINE: Read in the last 6 months	* 2%	161	158	** 4%	157	119	214

Read as follows: Monthly Music Choice P12+ Music Channel listeners are 16% more likely than the average P12+ to have read People in the last six months.

*Denotes a sample size less than 61. / **Denotes a sample size less than 31.

Source: Simmons National Consumer Study, Teen/Adult Fall'10. Population 12+, average Index= 100.

The Experian Simmons Methodology

Methodology

- [The Simmons Methodology](#)
- [What Simmons Measures](#)

Experian Simmons' National Consumer Study

The Experian Simmons National Consumer Study uses a patented, multi-frame sample design (U.S. Patent No. 7,246,035) to produce representative measures of consumer behavior and attitudes to products, brands and media among all American adults—Hispanics/Latinos and non-Hispanics, English-speaking and Spanish-speaking.

The study uses a two-phase data collection approach, with Phase 1 consisting of a telephone placement interview to obtain the household's participation in the survey and Phase 2 involving the mailing of self-administered survey booklets to eligible household members.

The Experian Simmons National Consumer Study provides single-source measurement, year-round, of major media (English-language and Spanish-language), products/brands, services, and in-depth demographic, lifestyle and psychographic characteristics.

It enables Experian Simmons clients to compare the consumer behavior of Hispanics/Latinos to the total population using just a single research tool. All respondents—regardless of origin or language ability—are asked the full range of questions measured by the Experian Simmons National Consumer Survey.

In addition to these data elements, which are available to all Experian Simmons National Consumer Study and Experian Simmons National Hispanic Consumer Study subscribers, an additional set of "Hispanic only" questions are asked of Hispanic respondents. These additional data variables include extended demographic, lifestyle and psychographic information for Hispanic respondents and they are made available to Experian Simmons National Hispanic Study subscribers with the appropriate data license.

Additionally, the study provides extensive measurement of Spanish-language media, producing estimates of usage and time spent comparable to the estimates for English-language media. These incremental data elements enrich the ability of our Experian Simmons National Hispanic Study clients to profile and segment the diverse Hispanic/Latino market.

Experian Simmons' National Consumer Study is accredited by the Media Rating Council (MRC), a non-profit organization formed in 1964 at the urging of the U.S. Congress, whose goal is to ensure measurement services that are valid, reliable and effective. The MRC pursues this goal through use of its Minimum Standards for Media Rating Research, auditing measurement services that voluntarily submit to the MRC process, and accrediting those services that meet the MRC's Minimum Standards and that fully disclose their methodology to the MRC and service subscribers.

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MC 37

Perceptual Questions Frequencies and Percentages

TYPE OF SYSTEM		
	Frequency	Percent
Direct TV	399	39.1%
Digital Cable	622	60.9%
Total	1021	100.0%

GENDER		
	Frequency	Percent
Male	461	45.2%
Female	560	54.8%
Total Respondents	1021	100.0%

AGE RANGE		
	Frequency	Percent
12-17	105	10.3%
18-20	29	2.8%
21-24	50	4.9%
25-34	197	19.3%
35-44	217	21.3%
45-49	96	9.4%
50-54	91	8.9%
55-64	140	13.7%
65 and Over	96	9.4%

Total Respondents	1021	100.0%
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Q22. Do you subscribe to a satellite radio service?		
	Frequency	Percent
Yes	70	6.9%
No	951	93.1%
Total Respondents	1021	100.0%

Q22a. Which service you subscribe to? (Only asked of those who said "Yes" to Q22)		
	Frequency	Percent
XM Satellite Radio	46	65.7%
Sirius Satellite Radio	11	15.7%
Both	2	2.9%
Don't Know/Refused	11	15.7%
Total Respondents	70	100.0%

Q23. Do you listen to music FROM CABLE TELEVISION CHANNELS OTHER THAN MUSIC CHOICE?		
	Frequency	Percent
Yes	376	36.8%
No	645	63.2%
Total Respondents	1021	100.0%

Do you listen to music ON THE RADIO?		
	Frequency	Percent
Yes	925	90.6%
No	96	9.4%

Total Respondents	1021	100.0%
Do you listen to music FROM INTERNET WEBSITES?		
	Frequency	Percent
Yes	265	26.0%
No	756	74.0%
Total Respondents	1021	100.0%
Do you listen to music FROM SATELLITE RADIO?		
	Frequency	Percent
Yes	89	8.7%
No	932	91.3%
Total Respondents	1021	100.0%
Do you listen to music ANY OTHER SOURCE?		
	Frequency	Percent
Yes	381	37.3%
No	640	62.7%
Total Respondents	1021	100.0%

Q23a. Which cable television channels other than Music Choice do you turn to for music? (Could choose more than one answer) (Only asked of those who said "Yes" to Q22)		
	Frequency	Percent
MTV	21	30.0%
MTV2	4	5.7%
VH1	16	22.9%
VH1 Classic	2	2.9%
VH1 Country	2	2.9%

BET	5	7.1%
Fuse	2	2.9%
CMT	2	2.9%
Other	2	2.9%
Don't Listen to New Music	40	57.1%
Total Respondents	70	100.0%

Q23b. Which one of the cable channels you just mentioned do you watch most often? (If more than 1 replay to Q23a than they answered this question)

	Frequency	Percent
MTV	5	26.3%
MTV2	2	10.5%
VH1	4	21.1%
VH1 Classic	1	5.3%
VH1 Country	1	5.3%
BET	3	15.8%
Fuse	2	10.5%
CMT	1	5.3%
Total Respondents	19	100.0%

Q23c. Regardless of the type or types of music that you like to listen to, do you listen to new music, that is, songs that are being released today? (all participants answered this question unless they responded "Don't Turn to any Other Networks for Music" in either question 23a or 23b)

	Frequency	Percent
Yes	737	75.1%

No	244	24.9%
Total Respondents	981	100.0%

Q23d. Including all the possible sources you are aware of for new music, where do you go first when you want to hear new music? (Only asked of those who answered "Yes" to question 23c)		
	Frequency	Percent
MTV	35	4.7%
MTV2	2	0.3%
MTV Jams	2	0.3%
VH1	8	1.1%
VH1 Soul	1	0.1%
BET	23	3.1%
Fuse	1	0.1%
CMT	10	1.4%
GAC	1	0.1%
Other	16	2.2%
Any Music Choice Channel	28	3.8%
I only go to the Radio for New Music	452	61.3%
I only go to the internet	70	9.5%
I only use MP3 Downloads for New Music	3	0.4%
XM Satellite Radio	5	0.7%
Sirius Satellite Radio	2	0.3%
Satellite Radio	1	0.1%
Music Retail Store	20	2.7%
Other	35	4.7%

Don't Listen to New Music	5	0.7%
DK or Ref	17	2.3%
Total Respondents	737	100.0%

Q24a. Do you ever look at the TV to see information related to the NAME OF THE SONG THAT IS PLAYING?		
	Frequency	Percent
Yes	882	86.4%
No	138	13.5%
DK or Ref	1	0.1%
Total Respondents	1021	100.0%
Q24b. Do you ever look at the TV to see information related to the NAME OF THE ARTIST THAT IS PLAYING?		
	Frequency	Percent
Yes	930	91.1%
No	89	8.7%
DK or Ref	2	0.2%
Total Respondents	1021	100.0%
24c. Do you ever look at the TV to see information related to the NAME OF ALBUM CONTAINING THE SONG THAT IS PLAYING?		
	Frequency	Percent
Yes	801	78.5%
No	214	21.0%
DK or Ref	6	0.6%
Total Respondents	1021	100.0%

Q24d. Do you ever look at the TV to see information related to the ARTIST SUCH AS ARTIST FACTS? (Only asked of Digital Cable)

	Frequency	Percent
Yes	460	74.0%
No	162	26.0%
Total Respondents	622	100.0%

Q24e. Do you ever look at the TV to see ALBUM OR CD ARTWORK ASSOCIATED WITH THE SONG THAT IS PLAYING? (Only asked of Digital Cable)

	Frequency	Percent
Yes	338	54.3%
No	280	45.0%
DK or Ref	4	0.6%
Total Respondents	622	100.0%

Q24f. Do you ever look at the TV to see ADVERTISEMENTS FOR A PRODUCT OR SERVICE? (Only asked of Digital Cable)

	Frequency	Percent
Yes	159	25.6%
No	453	72.8%
DK or Ref	10	1.6%
Total Respondents	622	100.0%

Q24g. Do you ever look at the TV to see ARTIST PHOTO? (Only asked of Digital Cable)

	Frequency	Percent
Yes	390	62.7%
No	226	36.3%
DK or Ref	6	1.0%
Total Respondents	622	100.0%

Q25. Which of the statements best describes how often you look at the television screen when you are tuned into Music Choice?		
	Frequency	Percent
At least a couple times per song	266	26.1%
About once per song	223	21.8%
At least once every 15 minutes	107	10.5%
Only when there's a song on I don't know	265	26.0%
Rarely look at the screen	136	13.3%
Never	10	1.0%
DK or Ref	14	1.4%
Total Respondents	1021	100.0%

Q26. Have you ever watched or listened to any of the Music Choice Freeview concerts? (Direct TV)		
	Frequency	Percent
Yes	163	40.9%
No	224	56.1%
DK or Ref	12	3.0%
Total Respondents	399	100.0%

Alt Q26. Have you ever watched or listened to any of the Music Choice concerts? (Digital)		
	Frequency	Percent
Yes	79	12.7%
No	535	86.0%
DK or Ref	8	1.3%

Total Respondents	622	100.0%
Q27. Important to me that it doesn't interrupt the music with commercials (Mean 6.58)		
	Frequency	Percent
Strongly Disagree	21	2.1%
2	6	0.6%
3	10	1.0%
4	21	2.1%
5	56	5.5%
6	70	6.9%
Strongly Agree	830	81.3%
DK/RF	7	0.7%
Total Respondents	1021	100.0%
Plays music that I am familiar with (Mean 6.08)		
	Frequency	Percent
Strongly Disagree	19	1.9%
2	11	1.1%
3	33	3.2%
4	54	5.3%
5	151	14.8%
6	193	18.9%
Strongly Agree	553	54.2%
DK/RF	7	0.7%
Total Respondents	1021	100.0%
Plays music I expect to hear on that channel (Mean 6.24)		
	Frequency	Percent

Strongly Disagree	8	0.8%
2	14	1.4%
3	24	2.4%
4	39	3.8%
5	137	13.4%
6	196	19.2%
Strongly Agree	593	58.1%
DK/RF	10	1.0%
Total Respondents	1021	100.0%
Plays too many songs I don't know (Mean 2.65)		
	Frequency	Percent
Strongly Disagree	417	40.8%
2	194	19.0%
3	123	12.0%
4	89	8.7%
5	104	10.2%
6	39	3.8%
Strongly Agree	37	3.6%
DK/RF	18	1.8%
Total Respondents	1021	100.0%
Plays the same songs over and over (Mean 3.18)		
	Frequency	Percent
Strongly Disagree	301	29.5%
2	157	15.4%
3	176	17.2%

4	120	11.8%
5	137	13.4%
6	48	4.7%
Strongly Agree	46	4.5%
DK/RF	36	3.5%
Total Respondents	1021	100.0%
Plays a wide variety of artists (Mean 6.23)		
	Frequency	Percent
Strongly Disagree	10	1.0%
2	7	0.7%
3	19	1.9%
4	39	3.8%
5	156	15.3%
6	206	20.2%
Strongly Agree	576	56.4%
DK/RF	8	0.8%
Total Respondents	1021	100.0%
If channel is playing a song I don't like I can usually find something I like on another Music Choice channel (Mean 5.36)		
	Frequency	Percent
Strongly Disagree	120	11.8%
2	49	4.8%
3	49	4.8%
4	50	4.9%
5	153	15.0%

6	129	12.6%
Strongly Agree	434	42.5%
DK/RF	37	3.6%
Total Respondents	1021	100.0%

Plays new music I am interested in hearing (only asked for R&B, Hip Hop, Rap, Today's Country, Hit List, Alternative Rock, Showcase, Metal, Rock, Dance, Electronica, Musica Latina, Progressive, and Radio Disney) (Mean 5.73)

	Frequency	Percent
Strongly Disagree	11	3.3%
2	7	2.1%
3	13	3.9%
4	19	5.6%
5	75	22.3%
6	69	20.5%
Strongly Agree	142	42.1%
DK/RF	1	0.3%
Total Respondents	337	100.0%

Q28. Do you read either Metal Edge or Metal Maniacs magazine, even if just occasionally? (Only asked of those who answered the Metal Channel in Q15)

	Frequency	Percent
Yes	2	20.0%
No	8	80.0%
Total Respondents	10	100.0%

Q28a. Have you ever noticed any advertising for Music Choice in ether Metal Edge or Metal Maniacs Magazine? (Only asked of those who answered "Yes" to Q28)		
	Frequency	Percent
No	2	100.0%
Total Respondents	2	100.0%

Q29. If you hear a song or two that you don't like, generally, how many songs that you don't like have to come up in a row before you'll think about turning off that Music Choice Channel? (Mean 3.54)		
	Frequency	Percent
1	157	15.4%
2	271	26.5%
3	285	27.9%
4	74	7.2%
5	63	6.2%
6	12	1.2%
7	12	1.2%
8	34	3.3%
DK/RF	113	11.1%
Total Respondents	1021	100.0%

Q29a. Do you have internet access either at home, wok or school?		
	Frequency	Percent
Yes	816	79.9%
No	205	20.1%
Total Respondents	1021	100.0%

Q30. Do you ever listen to music via the internet? (Only asked of those who answered "Yes" to Q29a)		
	Frequency	Percent
Yes	320	39.2%
No	496	60.8%
Total Respondents	816	100.0%

Q30a. Do you ever download music via the internet? (Only asked of those who answered "Yes" to Q29a)		
	Frequency	Percent
Yes	201	24.6%
No	615	75.4%
Total Respondents	816	100.0%

Q30b. Have you used LAUNCH.COM within the past month? (Only asked of those who answered "Yes" to Q29a)		
	Frequency	Percent
Yes	76	9.3%
No	740	90.7%
Total Respondents	816	100.0%

Have you used RHAPSODY.COM within the past month? (Only asked of those who answered "Yes" to Q29a)		
	Frequency	Percent
Yes	28	3.4%
No	788	96.6%
Total Respondents	816	100.0%

Have you used AOL MUSIC within the past month?(Only asked of those who answered "Yes" to Q29a)		
	Frequency	Percent
Yes	96	11.8%
No	720	88.2%
Total Respondents	816	100.0%

Have you used ITUNES within the past month?(Only asked of those who answered "Yes" to Q29a)		
	Frequency	Percent
Yes	105	12.9%
No	711	87.1%
Total Respondents	816	100.0%

Have you used NAPSTER within the past month? (Only asked of those who answered "Yes" to Q29a)		
	Frequency	Percent
Yes	44	5.4%
No	772	94.6%
Total Respondents	816	100.0%

Q31. Have you heard of a Music Choice broadband service offered through your highspeed cable internet service? (Only asked of those who said "Yes" to question 2c)		
	Frequency	Percent
Yes	27	14.8%
No	156	85.2%
Total Respondents	183	100.0%

Q31a. In the past week, did you listen to Music Choice broadband service through the internet? (Only asked of those who said "Yes" to Q31)

	Frequency	Percent
Yes	1	3.7%
No	26	96.3%
Total Respondents	27	100.0%

Q31b. What percentage of you time listening to Music Choice was done through the internet? (Only asked to those who said "Yes" To Q31a)		
	Frequency	Percent
just a small amount of your listening	1	100.0%
Total Respondents	1	100.0%

Q31c. Since you began accessing Music Choice through the high speed cable internet service, would you say, overall, including your internet and cable usage, you are using MUSIC CHOICE? (Only asked of those who said "Yes" to Q31)		
	Frequency	Percent
More Often	4	14.8%
About the same as before	20	74.1%
Less Often	1	3.7%
DK/RF	2	7.4%
Total Respondents	27	100.0%

Q32. How Satisfied are you with the Music Choice service overall? (Mean 6.18)		
	Frequency	Percent
Very Dissatisfied	7	0.7%
2	8	0.8%

3	17	1.7%
4	29	2.8%
5	177	17.3%
6	245	24.0%
Very Satisfied	538	52.7%
Total Respondents	1021	100.0%

Q32a. Have you ever purchased an album or single because you heard it on a Music Choice Channel?		
	Frequency	Percent
Yes	390	38.2%
No	623	61.0%
DK or Ref	8	0.8%
Total Respondents	1021	100.0%

Q33. Are there any children under the age of 12 living in your household		
	Frequency	Percent
Yes	323	31.6%
No	698	68.4%
Total Respondents	1021	100.0%

Q33a. How many of these children are ages 6 to 8? (Only asked of those who said "Yes" to Q33)		
	Frequency	Percent
0	209	64.7%
1	95	29.4%
2	16	5.0%

3	2	0.6%
4	1	0.3%
Total Respondents	323	100.0%

Q33b. How many of these children are ages 9 to 11? (Only asked of those who said "Yes" to Q33)		
	Frequency	Percent
0	203	62.8%
1	106	32.8%
2	12	3.7%
3	1	0.3%
4	1	0.3%
Total Respondents	323	100.0%

Q33c. Do you know if any of these children listen to Radio Disney on Music Choice? (Only asked if answered 1 or more in Q33a and/or Q33b)		
	Frequency	Percent
Yes	61	30.7%
No	138	69.3%
Total Respondents	199	100.0%

Q33d. How often do you listen to Radio Disney with any of these children (Only asked of those who said "Yes" to Q33c)		
	Frequency	Percent
all the time	10	16.4%
often	10	16.4%

sometimes	31	50.8%
never	10	16.4%
Total Respondents	61	100.0%

Spanish or Hispanic Origin		
	Frequency	Percent
Yes	105	10.3%
No	903	88.4%
DK or Ref	13	1.3%
Total Respondents	1021	100.0%

Race		
	Frequency	Percent
Black/African American	166	16.3%
White/Caucasian	716	70.1%
Asian	8	0.8%
Other	111	10.9%
DK or Ref	20	2.0%
Total Respondents	1021	100.0%

Education		
	Frequency	Percent
Less than 12th grade	132	12.9%
High School Graduate or GED	213	20.9%
Some College (Associates Degree)	292	28.6%

Bachelor's Degree	229	22.4%
Graduate or Post Graduate degree	136	13.3%
DK or Ref	19	1.9%
Total Respondents	1021	100.0%

Household Income		
	Frequency	Percent
Less than 25K	66	6.5%
25K to less than 50K	225	22.0%
50K to less than 75K	192	18.8%
75K to less than 100K	116	11.4%
100K or more	179	17.5%
DK or Ref	243	23.8%
Total Respondents	1021	100.0%

Perceptual Questions broken down by gender and age groups

Q22. Do you subscribe to a satellite radio service?				
	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	6	3	9
	18-20	1	1	2
	21-24	1	0	1
	25-34	5	3	8
	35-44	10	10	20
	45-49	2	6	8
	50-54	4	3	7
	55-64	6	4	10
	65 and Over	1	4	5
Total		36	34	70
No	12-17	44	52	96
	18-20	10	17	27
	21-24	29	20	49
	25-34	93	96	189
	35-44	78	119	197
	45-49	31	57	88
	50-54	32	52	84
	55-64	63	67	130
	65 and Over	45	46	91
Total		425	526	951

Q22a. Which service you subscribe to?				
	AGE RANGE	GENDER		Total
		Male	Female	
XM Satellite Radio	12-17	2	0	2
	18-20	1	0	1
	25-34	5	3	8
	35-44	10	7	17
	45-49	1	4	5
	50-54	4	3	7
	55-64	4	1	5
	65 and Over	1	0	1
Total		28	18	46
Sirius Satellite Radio	12-17	3	0	3
	21-24	1	0	1
	35-44	0	2	2
	45-49	0	2	2
	55-64	2	1	3
Total		6	5	11
Both	45-49	1	0	1
	65 and Over	0	1	1
Total		1	1	2
Don't Know/Refused	12-17	1	3	4
	18-20	0	1	1
	35-44	0	1	1

	55-64	0	2	2
	65 and Over	0	3	3
Total		1	10	11

Q23. Do you listen to music FROM CABLE TELEVISION CHANNELS OTHER THAN MUSIC CHOICE?

	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	34	43	77
	18-20	7	16	23
	21-24	22	12	34
	25-34	33	51	84
	35-44	30	42	72
	45-49	6	22	28
	50-54	7	16	23
	55-64	13	11	24
	65 and Over	10	1	11
Total		162	214	376
No	12-17	16	12	28
	18-20	4	2	6
	21-24	8	8	16
	25-34	65	48	113
	35-44	58	87	145
	45-49	27	41	68
	50-54	29	39	68
	55-64	56	60	116
	65 and Over	36	49	85
Total		299	346	645

Do you listen to music ON THE RADIO?

	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	47	53	100
	18-20	9	17	26
	21-24	28	20	48
	25-34	88	95	183
	35-44	74	122	196
	45-49	32	59	91
	50-54	33	48	81
	55-64	64	65	129
	65 and Over	37	34	71
Total		412	513	925
No	12-17	3	2	5
	18-20	2	1	3
	21-24	2	0	2
	25-34	10	4	14
	35-44	14	7	21
	45-49	1	4	5
	50-54	3	7	10

	55-64	5	6	11
	65 and Over	9	16	25
Total		49	47	96

Do you listen to music FROM INTERNET WEBSITES?

	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	27	32	59
	18-20	5	5	10
	21-24	14	7	21
	25-34	32	21	53
	35-44	21	34	55
	45-49	7	14	21
	50-54	10	9	19
	55-64	9	12	21
	65 and Over	4	2	6
Total		129	136	265
No	12-17	23	23	46
	18-20	6	13	19
	21-24	16	13	29
	25-34	66	78	144
	35-44	67	95	162
	45-49	26	49	75
	50-54	26	46	72
	55-64	60	59	119
	65 and Over	42	48	90
Total		332	424	756

Do you listen to music FROM SATELLITE RADIO?

	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	11	3	14
	18-20	1	2	3
	21-24	5	1	6
	25-34	8	5	13
	35-44	14	10	24
	45-49	3	4	7
	50-54	4	5	9
	55-64	5	3	8
	65 and Over	3	2	5
Total		54	35	89
No	12-17	39	52	91
	18-20	10	16	26
	21-24	25	19	44
	25-34	90	94	184
	35-44	74	119	193
	45-49	30	59	89
	50-54	32	50	82
	55-64	64	68	132
	65 and Over	43	48	91
Total		407	525	932

Do you listen to music ANY OTHER SOURCE?				
	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	22	16	38
	18-20	4	8	12
	21-24	8	7	15
	25-34	35	30	65
	35-44	29	51	80
	45-49	10	21	31
	50-54	20	26	46
	55-64	26	34	60
	65 and Over	15	19	34
Total		169	212	381
No	12-17	28	39	67
	18-20	7	10	17
	21-24	22	13	35
	25-34	63	69	132
	35-44	59	78	137
	45-49	23	42	65
	50-54	16	29	45
	55-64	43	37	80
	65 and Over	31	31	62
Total		292	348	640

Q23a. Which cable television channels other than Music Choice do you turn to for music?				
	AGE RANGE	GENDER		Total
		Male	Female	
MTV	12-17	5	3	8
	18-20	1	0	1
	21-24	1	0	1
	25-34	2	1	3
	35-44	3	1	4
	45-49	1	3	4
Total		13	8	21
MTV2	12-17	1	1	2
	18-20	1	0	1
	25-34	1	0	1
Total		3	1	4
VH1	12-17	3	1	4
	18-20	1	0	1
	25-34	2	2	4
	35-44	2	1	3
	45-49	1	3	4
Total		9	7	16
VH1 Classic	45-49	0	1	1
	55-64	1	0	1
Total		1	1	2

VH1 Country	25-34	0	1	1
	50-54	1	0	1
Total		1	1	2
BET	12-17	2	1	3
	25-34	1	0	1
	35-44	1	0	1
Total		4	1	5
Fuse	12-17	1	0	1
	21-24	1	0	1
Total		2	0	2
CMT	45-49	1	1	2
Total		1	1	2
Other	18-20	0	1	1
	55-64	0	1	1
Total		0	2	2
Don't Listen to New Music	25-34	2	1	3
	35-44	7	9	16
	45-49	1	1	2
	50-54	3	3	6
	55-64	5	3	8
65 and Over		1	4	5
Total		19	21	40

Q23b. Which one of the cable channels you just mentioned do you watch most often?

	AGE RANGE	GENDER		Total
		Male	Female	
MTV	12-17	1	0	1
	25-34	1	0	1
	35-44	1	1	2
	45-49	0	1	1
Total		3	2	5
MTV2	18-20	1	0	1
	25-34	1	0	1
Total		2	0	2
VH1	12-17	1	0	1
	25-34	0	1	1
	35-44	1	0	1
	45-49	0	1	1
Total		2	2	4
VH1 Classic	45-49	0	1	1
Total		0	1	1
VH1 Country	25-34	0	1	1
Total		0	1	1
BET	12-17	1	1	2
	25-34	1	0	1
Total		2	1	3
Fuse	12-17	1	0	1
	21-24	1	0	1
Total		2	0	2
CMT	45-49	1	0	1

Total	1	0	1
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Q23c. Regardless of the type or types of music that you like to listen to, do you listen to new music, that is, songs that are being released today?

	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	46	52	98
	18-20	10	14	24
	21-24	29	16	45
	25-34	86	88	174
	35-44	68	99	167
	45-49	21	50	71
	50-54	21	37	58
	55-64	32	38	70
	65 and Over	12	18	30
Total		325	412	737
No	12-17	4	3	7
	18-20	1	4	5
	21-24	1	4	5
	25-34	10	10	20
	35-44	13	21	34
	45-49	11	12	23
	50-54	12	15	27
	55-64	32	30	62
	65 and Over	33	28	61
Total		117	127	244

23d. Including all the possible sources you are aware of for new music, where do you go first when you want to hear new music?

	AGE RANGE	GENDER		Total
		Male	Female	
MTV	12-17	7	0	7
	18-20	1	2	3
	21-24	2	3	5
	25-34	3	6	9
	35-44	3	3	6
	45-49	1	2	3
	50-54	0	1	1
	55-64	1	0	1
Total		18	17	35
MTV2	12-17	0	2	2
Total		0	2	2
MTV Jams	12-17	0	1	1
	25-34	0	1	1
Total		0	2	2
VH1	12-17	1	0	1
	21-24	0	1	1
	25-34	0	2	2
	35-44	1	0	1
	45-49	0	2	2

	55-64	1	0	1
	Total	3	5	8
VH1 Soul	25-34	0	1	1
	Total	0	1	1
BET	12-17	4	7	11
	18-20	0	1	1
	25-34	3	2	5
	35-44	2	0	2
	45-49	1	2	3
	55-64	1	0	1
	Total	11	12	23
Fuse	25-34	1	0	1
	Total	1	0	1
CMT	12-17	0	1	1
	25-34	1	2	3
	35-44	1	3	4
	45-49	1	1	2
	Total	3	7	10
GAC	65 and Over	0	1	1
	Total	0	1	1
Other	12-17	1	1	2
	21-24	1	0	1
	25-34	1	3	4
	35-44	0	3	3
	45-49	0	1	1
	50-54	1	1	2
	55-64	1	2	3
	Total	5	11	16
Any Music Choice Channel	12-17	3	3	6
	18-20	1	0	1
	21-24	1	0	1
	25-34	4	1	5
	35-44	3	4	7
	45-49	1	1	2
	50-54	1	1	2
	55-64	1	1	2
	65 and Over	1	1	2
	Total	16	12	28
I only go to the Radio for New Music	12-17	11	23	34
	18-20	4	8	12
	21-24	10	10	20
	25-34	49	58	107
	35-44	47	69	116
	45-49	14	35	49
	50-54	16	30	46
	55-64	20	28	48
	65 and Over	8	12	20
	Total	179	273	452
I only go to the	12-17	7	14	21
	18-20	2	1	3
	21-24	5	2	7
	25-34	13	7	20

internet	35-44	3	9	12
	45-49	0	2	2
	50-54	1	2	3
	55-64	0	2	2
Total		31	39	70
I only use MP3	12-17	3	0	3
Total		3	0	3
XM Satellite Radio	12-17	1	0	1
	18-20	1	0	1
	25-34	2	0	2
	55-64	1	0	1
Total		5	0	5
Sirius Satellite Radio	21-24	2	0	2
Total		2	0	2
Satellite Radio	45-49	1	0	1
Total		1	0	1
Music Retail Store	12-17	4	0	4
	18-20	1	0	1
	21-24	1	0	1
	25-34	3	4	7
	35-44	2	1	3
	45-49	0	1	1
	50-54	1	0	1
	55-64	1	0	1
65 and Over	0	1	1	
Total		13	7	20
Other	12-17	3	0	3
	18-20	0	1	1
	21-24	5	0	5
	25-34	6	1	7
	35-44	4	4	8
	45-49	0	2	2
	50-54	0	1	1
	55-64	2	2	4
	65 and Over	2	2	4
Total		22	13	35
Don't Listen to New Music	35-44	1	1	2
	55-64	1	1	2
	65 and Over	0	1	1
Total		2	3	5
DK or Ref	12-17	1	0	1
	18-20	0	1	1
	21-24	2	0	2
	35-44	1	2	3
	45-49	2	1	3
	50-54	1	1	2
	55-64	2	2	4
65 and Over	1	0	1	
Total		10	7	17

Q24. Do you ever look at the TV to see information related to the NAME OF THE SONG THAT IS PLAYING?

	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	44	45	89
	18-20	11	16	27
	21-24	24	20	44
	25-34	90	91	181
	35-44	80	118	198
	45-49	29	50	79
	50-54	29	45	74
	55-64	58	61	119
	65 and Over	32	39	71
Total		397	485	882
NO	12-17	6	10	16
	18-20	0	2	2
	21-24	6	0	6
	25-34	8	8	16
	35-44	8	11	19
	45-49	4	13	17
	50-54	7	10	17
	55-64	11	10	21
	65 and Over	13	11	24
Total		63	75	138
DK or Ref	65 and Over	1	0	1
Total		1	0	1

Do you ever look at the TV to see information related to the NAME OF THE ARTIST THAT IS PLAYING?

	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	46	52	98
	18-20	11	17	28
	21-24	27	20	47
	25-34	89	93	182
	35-44	80	122	202
	45-49	31	56	87
	50-54	30	50	80
	55-64	60	63	123
	65 and Over	39	44	83
Total		413	517	930
No	12-17	4	3	7
	18-20	0	1	1
	21-24	3	0	3
	25-34	9	6	15
	35-44	7	7	14
	45-49	2	7	9
	50-54	6	5	11
	55-64	9	8	17

	65 and Over	6	6	12
Total		46	43	89
DK or Ref	35-44	1	0	1
	65 and Over	1	0	1
Total		2	0	2

Do you ever look at the TV to see information related to the NAME OF ALBUM CONTAINING THE SONG THAT IS PLAYING?

	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	42	46	88
	18-20	11	16	27
	21-24	27	19	46
	25-34	80	84	164
	35-44	72	97	169
	45-49	31	50	81
	50-54	27	42	69
	55-64	49	49	98
	65 and Over	27	32	59
Total		366	435	801
No	12-17	8	8	16
	18-20	0	2	2
	21-24	3	1	4
	25-34	18	14	32
	35-44	14	30	44
	45-49	2	13	15
	50-54	9	13	22
	55-64	20	22	42
	65 and Over	19	18	37
Total		93	121	214
DK or Ref	12-17	0	1	1
	25-34	0	1	1
	35-44	2	2	4
Total		2	4	6

Do you ever look at the TV to see information related to the ARTIST SUCH AS ARTIST FACTS?

	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	23	24	47
	18-20	5	12	17
	21-24	16	12	28
	25-34	51	48	99
	35-44	34	58	92
	45-49	18	27	45
	50-54	14	24	38
	55-64	26	28	54
	65 and Over	21	19	40
Total		208	252	460
	12-17	10	8	18
	18-20	4	3	7
	21-24	6	4	10

No	25-34	15	17	32
	35-44	17	18	35
	45-49	3	11	14
	50-54	8	9	17
	55-64	8	7	15
	65 and Over	6	8	14
Total		77	85	162
Do you ever look at the TV to see ALBUM OR CD ARTWORK ASSOCIATED WITH THE SONG THAT IS PLAYING?				
	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	22	20	42
	18-20	7	10	17
	21-24	14	13	27
	25-34	38	38	76
	35-44	28	37	65
	45-49	12	16	28
	50-54	12	18	30
	55-64	16	13	29
	65 and Over	13	11	24
Total		162	176	338
No	12-17	11	12	23
	18-20	2	4	6
	21-24	8	3	11
	25-34	27	27	54
	35-44	23	39	62
	45-49	9	22	31
	50-54	9	15	24
	55-64	18	22	40
	65 and Over	13	16	29
Total		120	160	280
DK or Ref	18-20	0	1	1
	25-34	1	0	1
	50-54	1	0	1
	65 and Over	1	0	1
Total		3	1	4
Do you ever look at the TV to see ADVERTISEMENTS FOR A PRODUCT OR SERVICE?				
	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	9	10	19
	18-20	5	6	11
	21-24	7	5	12
	25-34	23	17	40
	35-44	12	17	29
	45-49	4	9	13
	50-54	5	6	11
	55-64	8	5	13
	65 and Over	6	5	11

Total		79	80	159
No	12-17	24	22	46
	18-20	4	9	13
	21-24	15	11	26
	25-34	43	48	91
	35-44	37	59	96
	45-49	16	29	45
	50-54	17	25	42
	55-64	24	29	53
65 and Over		19	22	51
Total		199	254	453
DK or Ref	35-44	2	0	2
	45-49	1	0	1
	50-54	0	2	2
	55-64	2	1	3
	65 and Over	2	0	2
Total		7	3	10

Do you ever look at the TV to see ARTIST PHOTO?

	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	25	24	49
	18-20	8	10	18
	21-24	14	12	26
	25-34	43	44	87
	35-44	26	43	69
	45-49	14	24	38
	50-54	13	22	35
	55-64	17	19	36
65 and Over		19	13	32
Total		179	211	390
No	12-17	8	8	16
	18-20	1	4	5
	21-24	8	4	12
	25-34	23	20	43
	35-44	24	32	56
	45-49	7	14	21
	50-54	9	11	20
	55-64	17	16	33
65 and Over		8	12	20
Total		105	121	226
DK or Ref	18-20	0	1	1
	25-34	0	1	1
	35-44	1	1	2
	65 and Over	0	2	2
Total		1	5	6

Q25. Which of the statements best describes how often you look at the television screen when you are tuned into Music Choice?

	AGE RANGE	GENDER	Total
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	AGE RANGE	Male	Female	Total
At least a couple times per song	12-17	23	24	47
	18-20	4	4	8
	21-24	16	6	22
	25-34	21	31	52
	35-44	15	31	46
	45-49	10	14	24
	50-54	11	6	17
	55-64	19	10	29
	65 and Over	10	11	21
Total		129	137	266
About once per song	12-17	4	8	12
	18-20	3	4	7
	21-24	6	8	14
	25-34	29	20	49
	35-44	17	24	41
	45-49	6	15	21
	50-54	13	15	28
	55-64	18	17	35
	65 and Over	5	11	16
Total		101	122	223
At least once every 15 minutes	12-17	6	1	7
	18-20	0	5	5
	21-24	1	1	2
	25-34	8	9	17
	35-44	11	15	26
	45-49	5	6	11
	50-54	1	4	5
	55-64	8	8	16
	65 and Over	14	4	18
Total		54	53	107
Only when there's a song on I don't know	12-17	13	15	28
	18-20	2	5	7
	21-24	4	5	9
	25-34	27	26	53
	35-44	25	37	62
	45-49	6	17	23
	50-54	4	18	22
	55-64	17	23	40
	65 and Over	6	15	21
Total		104	161	265
Rarely look at the screen	12-17	4	7	11
	18-20	2	0	2
	21-24	2	0	2
	25-34	12	12	24
	35-44	17	21	38
	45-49	4	9	13
	50-54	6	11	17
	55-64	6	11	17
	65 and Over	5	7	12
Total		58	78	136
	25-34	1	1	2

Never	35-44	1	1	2
	45-49	0	2	2
	55-64	1	1	2
	65 and Over	1	1	2
Total		4	6	10
DK or Ref	21-24	1	0	1
	35-44	2	0	2
	45-49	2	0	2
	50-54	1	1	2
	55-64	0	1	1
	65 and Over	5	1	6
Total		11	3	14

Q26. Have you ever watched or listened to any of the Music Choice Freeview concerts? (Direct TV)				
	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	6	4	10
	18-20	2	1	3
	21-24	4	1	5
	25-34	14	16	30
	35-44	15	24	39
	45-49	7	15	22
	50-54	5	7	12
	55-64	17	15	32
	65 and Over	3	7	10
Total		73	90	163
No	12-17	11	19	30
	18-20	0	2	2
	21-24	4	3	7
	25-34	16	18	34
	35-44	20	27	47
	45-49	4	10	14
	50-54	9	14	23
	55-64	17	20	37
	65 and Over	15	15	30
Total		96	128	224
DK/RF	25-34	2	0	2
	35-44	2	2	4
	45-49	1	0	1
	50-54	0	1	1
	55-64	1	1	2
	65 and Over	1	1	2
Total		7	5	12

Alt. Q26. Have you ever watched or listened to any of the Music Choice concerts? (Digital)			
	AGE RANGE	GENDER	Total

		Male	Female	
Yes	12-17	7	6	13
	18-20	0	1	1
	21-24	1	1	2
	25-34	5	7	12
	35-44	7	13	20
	45-49	1	9	10
	50-54	5	4	9
	55-64	3	4	7
	65 and Over	2	3	5
Total		31	48	79
No	12-17	26	26	52
	18-20	9	14	23
	21-24	21	15	36
	25-34	59	58	117
	35-44	44	63	107
	45-49	20	29	49
	50-54	16	29	45
	55-64	29	30	59
	65 and Over	25	22	47
Total		249	286	535
DK or Ref	25-34	2	0	2
	50-54	1	0	1
	55-64	2	1	3
	65 and Over	0	2	2
Total		5	3	8

Q27a. Important to me that it doesn't interrupt the music with commercials

	AGE RANGE	GENDER		Total
		Male	Female	
Strongly Disagree	12-17	4	1	5
	18-20	1	0	1
	21-24	0	1	1
	25-34	2	0	2
	35-44	1	0	1
	45-49	0	2	2
	50-54	3	2	5
	55-64	1	0	1
	65 and Over	1	2	3
Total		13	8	21
2	35-44	0	1	1
	45-49	1	0	1
	50-54	1	2	3
	55-64	1	0	1
Total		3	3	6
3	12-17	0	1	1
	21-24	2	1	3
	35-44	1	3	4

	45-49	0	1	1
	65 and Over	1	0	1
	Total	4	6	10
4	12-17	0	5	5
	18-20	0	2	2
	25-34	0	2	2
	35-44	1	3	4
	45-49	1	0	1
	50-54	0	2	2
	55-64	1	1	2
	65 and Over	1	2	3
	Total	4	17	21
5	12-17	3	4	7
	18-20	1	1	2
	21-24	3	3	6
	25-34	9	8	17
	35-44	5	1	6
	45-49	3	2	5
	50-54	1	3	4
	55-64	4	2	6
	65 and Over	0	3	3
	Total	29	27	56
6	12-17	6	2	8
	18-20	0	1	1
	21-24	7	2	9
	25-34	4	2	6
	35-44	8	9	17
	45-49	4	5	9
	50-54	2	4	6
	55-64	5	4	9
	65 and Over	2	3	5
	Total	38	32	70
Strongly Agree	12-17	37	41	78
	18-20	9	14	23
	21-24	18	13	31
	25-34	82	87	169
	35-44	71	112	183
	45-49	24	53	77
	50-54	29	42	71
	55-64	57	63	120
	65 and Over	38	40	78
	Total	365	465	830
DK/RF	12-17	0	1	1
	25-34	1	0	1
	35-44	1	0	1
	55-64	0	1	1
	65 and Over	3	0	3
	Total	5	2	7

Q27b. Plays music that I am familiar with

	AGE RANGE	GENDER		Total
		Male	Female	
Strongly Disagree	12-17	3	1	4
	21-24	1	0	1
	25-34	1	0	1
	35-44	4	1	5
	45-49	1	0	1
	50-54	1	0	1
	55-64	2	1	3
65 and Over	0	3	3	
Total		13	6	19
2	21-24	1	0	1
	25-34	1	1	2
	35-44	0	1	1
	45-49	2	1	3
	50-54	1	1	2
	55-64	2	0	2
Total		7	4	11
3	12-17	0	3	3
	21-24	1	1	2
	25-34	2	2	4
	35-44	2	5	7
	45-49	2	3	5
	50-54	0	2	2
	55-64	7	1	8
65 and Over	2	0	2	
Total		16	17	33
4	12-17	4	2	6
	18-20	0	1	1
	21-24	5	0	5
	25-34	4	5	9
	35-44	5	7	12
	45-49	4	1	5
	50-54	3	3	6
	55-64	1	4	5
65 and Over	3	2	5	
Total		29	25	54
5	12-17	5	10	15
	18-20	3	2	5
	21-24	5	3	8
	25-34	15	22	37
	35-44	10	15	25
	45-49	5	8	13
	50-54	4	13	17
	55-64	11	7	18
65 and Over	7	6	13	
Total		65	86	151
	12-17	13	4	17
	18-20	3	5	8
	21-24	7	4	11
	25-34	23	18	41

6	35-44	18	24	42
	45-49	3	13	16
	50-54	7	9	16
	55-64	13	13	26
	65 and Over	9	7	16
Total		96	97	193
Strongly Agree	12-17	25	34	59
	18-20	5	10	15
	21-24	10	11	21
	25-34	51	51	102
	35-44	48	76	124
	45-49	16	37	53
	50-54	20	26	46
	55-64	33	44	77
65 and Over	24	32	56	
Total		232	321	553
DK/RF	12-17	0	1	1
	21-24	0	1	1
	25-34	1	0	1
	35-44	1	0	1
	50-54	0	1	1
	55-64	0	1	1
65 and Over	1	0	1	
Total		3	4	7

Q27c. Plays music I expect to hear on that channel				
	AGE RANGE	GENDER		Total
		Male	Female	
Strongly Disagree	12-17	1	0	1
	25-34	1	1	2
	50-54	2	0	2
	55-64	1	0	1
	65 and Over	0	2	2
Total		5	3	8
2	12-17	2	2	4
	25-34	0	3	3
	35-44	1	0	1
	45-49	0	2	2
	55-64	2	1	3
	65 and Over	0	1	1
Total		5	9	14
3	12-17	2	3	5
	18-20	0	1	1
	21-24	0	1	1
	25-34	3	1	4
	35-44	2	2	4
	45-49	1	1	2
	50-54	0	2	2
	55-64	1	2	3
65 and Over	2	0	2	

Total		11	13	24
4	12-17	2	5	7
	18-20	1	0	1
	21-24	2	1	3
	25-34	3	6	9
	35-44	3	1	4
	45-49	1	3	4
	50-54	2	0	2
	55-64	2	1	3
	65 and Over	3	3	6
Total		19	20	39
5	12-17	7	9	16
	18-20	1	5	6
	21-24	6	1	7
	25-34	14	16	30
	35-44	9	14	23
	45-49	7	9	16
	50-54	2	11	13
	55-64	8	9	17
	65 and Over	7	2	9
Total		61	76	137
6	12-17	13	14	27
	18-20	4	6	10
	21-24	8	5	13
	25-34	13	20	33
	35-44	23	24	47
	45-49	4	10	14
	50-54	7	6	13
	55-64	10	13	23
	65 and Over	8	8	16
Total		90	106	196
Strongly Agree	12-17	23	21	44
	18-20	5	6	11
	21-24	14	12	26
	25-34	63	52	115
	35-44	49	86	135
	45-49	19	38	57
	50-54	23	35	58
	55-64	45	44	89
	65 and Over	24	34	58
Total		265	328	593
DK/RF	12-17	0	1	1
	25-34	1	0	1
	35-44	1	2	3
	45-49	1	0	1
	50-54	0	1	1
	55-64	0	1	1
	65 and Over	2	0	2
Total		5	5	10

Q27d. Plays too many songs I don't know

	AGE RANGE	GENDER		Total
		Male	Female	
Strongly Disagree	12-17	20	20	40
	18-20	6	5	11
	21-24	8	11	19
	25-34	35	40	75
	35-44	33	53	86
	45-49	12	33	45
	50-54	15	22	37
	55-64	30	31	61
	65 and Over	19	24	43
Total		178	239	417
2	12-17	9	11	20
	18-20	3	5	8
	21-24	6	2	8
	25-34	18	17	35
	35-44	16	27	43
	45-49	7	6	13
	50-54	11	14	25
	55-64	13	14	27
	65 and Over	8	7	15
Total		91	103	194
3	12-17	3	5	8
	18-20	0	3	3
	21-24	4	0	4
	25-34	20	14	34
	35-44	20	15	35
	45-49	3	5	8
	50-54	3	4	7
	55-64	9	7	16
	65 and Over	5	3	8
Total		67	56	123
4	12-17	5	4	9
	18-20	1	1	2
	21-24	2	3	5
	25-34	12	12	24
	35-44	3	8	11
	45-49	7	4	11
	50-54	3	5	8
	55-64	8	4	12
	65 and Over	3	4	7
Total		44	45	89
5	12-17	8	8	16
	18-20	0	1	1
	21-24	8	2	10
	25-34	9	9	18
	35-44	5	19	24
	45-49	2	9	11
	50-54	4	5	9
	55-64	3	4	7
	65 and Over	4	4	8

Total		43	61	104
6	12-17	3	3	6
	18-20	1	1	2
	21-24	0	1	1
	25-34	2	2	4
	35-44	4	4	8
	45-49	1	2	3
	50-54	0	3	3
	55-64	4	5	9
	65 and Over	2	1	3
Total		17	22	39
Strongly Agree	12-17	2	3	5
	18-20	0	2	2
	21-24	2	0	2
	25-34	1	5	6
	35-44	5	0	5
	45-49	0	3	3
	50-54	0	1	1
	55-64	2	4	6
	65 and Over	4	3	7
Total		16	21	37
DK/RF	12-17	0	1	1
	21-24	0	1	1
	25-34	1	0	1
	35-44	2	3	5
	45-49	1	1	2
	50-54	0	1	1
	55-64	0	2	2
	65 and Over	1	4	5
Total		5	13	18

Q27e. Plays the same songs over and over				
	AGE RANGE	GENDER		Total
		Male	Female	
Strongly Disagree	12-17	22	18	40
	18-20	3	10	13
	21-24	8	6	14
	25-34	26	25	51
	35-44	21	37	58
	45-49	12	20	32
	50-54	15	13	28
	55-64	24	17	41
	65 and Over	12	12	24
Total		143	158	301
2	12-17	5	10	15
	18-20	3	1	4
	21-24	2	3	5
	25-34	15	21	36
	35-44	16	21	37
	45-49	4	4	8
	50-54	7	10	17

	55-64	12	10	22
	65 and Over	9	4	13
	Total	73	84	157
3	12-17	9	13	22
	18-20	0	3	3
	21-24	7	4	11
	25-34	19	19	38
	35-44	20	18	38
	45-49	6	11	17
	50-54	5	11	16
	55-64	8	12	20
	65 and Over	2	9	11
	Total	76	100	176
4	12-17	4	2	6
	18-20	2	3	5
	21-24	4	2	6
	25-34	14	14	28
	35-44	9	10	19
	45-49	6	9	15
	50-54	3	5	8
	55-64	8	10	18
	65 and Over	5	10	15
	Total	55	65	120
5	12-17	5	5	10
	18-20	2	0	2
	21-24	5	2	7
	25-34	16	11	27
	35-44	11	22	33
	45-49	3	10	13
	50-54	3	9	12
	55-64	12	10	22
	65 and Over	8	3	11
	Total	65	72	137
6	12-17	2	2	4
	18-20	1	1	2
	21-24	2	1	3
	25-34	3	3	6
	35-44	4	9	13
	45-49	1	2	3
	50-54	2	0	2
	55-64	3	4	7
	65 and Over	4	4	8
	Total	22	26	48
Strongly Agree	12-17	3	4	7
	21-24	1	1	2
	25-34	4	4	8
	35-44	3	6	9
	45-49	1	5	6
	50-54	1	1	2
	55-64	0	5	5
	65 and Over	3	4	7
	Total	16	30	46

DK/RF	12-17	0	1	1
	21-24	1	1	2
	25-34	1	2	3
	35-44	4	6	10
	45-49	0	2	2
	50-54	0	6	6
	55-64	2	3	5
	65 and Over	3	4	7
Total		11	25	36

Q27f. Plays a wide variety of artists				
	AGE RANGE	GENDER		Total
		Male	Female	
Strongly Disagree	21-24	0	1	1
	25-34	1	1	2
	35-44	1	1	2
	50-54	2	1	3
	65 and Over	0	2	2
Total		4	6	10
2	12-17	1	0	1
	35-44	0	1	1
	55-64	3	0	3
	65 and Over	2	0	2
Total		6	1	7
3	12-17	1	1	2
	25-34	2	2	4
	35-44	1	2	3
	45-49	1	0	1
	50-54	0	1	1
	55-64	4	2	6
	65 and Over	2	0	2
Total		11	8	19
4	12-17	5	5	10
	18-20	0	1	1
	21-24	3	0	3
	25-34	2	2	4
	35-44	5	4	9
	45-49	1	2	3
	50-54	1	0	1
	55-64	3	3	6
65 and Over	1	1	2	
Total		21	18	39
5	12-17	5	10	15
	18-20	3	5	8
	21-24	4	2	6
	25-34	17	17	34
	35-44	12	22	34
	45-49	6	13	19
	50-54	3	9	12
	55-64	6	12	18

	65 and Over	4	6	10
	Total	60	96	156
6	12-17	13	13	26
	18-20	3	3	6
	21-24	10	6	16
	25-34	19	23	42
	35-44	21	22	43
	45-49	8	9	17
	50-54	9	14	23
	55-64	11	12	23
	65 and Over	5	5	10
	Total	99	107	206
Strongly Agree	12-17	25	25	50
	18-20	5	9	14
	21-24	13	11	24
	25-34	56	54	110
	35-44	47	77	124
	45-49	17	38	55
	50-54	21	29	50
	55-64	41	41	82
	65 and Over	31	36	67
	Total	256	320	576
DK/RF	12-17	0	1	1
	25-34	1	0	1
	35-44	1	0	1
	45-49	0	1	1
	50-54	0	1	1
	55-64	1	1	2
	65 and Over	1	0	1
	Total	4	4	8

Q27g. If channel is playing a song I don't like I can usually find something I like on another Music Choice channel

	AGE RANGE	GENDER		Total
		Male	Female	
Strongly Disagree	12-17	1	4	5
	18-20	0	3	3
	25-34	6	5	11
	35-44	6	8	14
	45-49	3	11	14
	50-54	4	11	15
	55-64	13	17	30
	65 and Over	11	17	28
	Total	44	76	120
2	12-17	2	2	4
	18-20	1	1	2
	21-24	2	1	3
	25-34	3	4	7
	35-44	4	1	5
	45-49	3	4	7
	50-54	2	0	2

	55-64	6	3	9
	65 and Over	4	6	10
	Total	27	22	49
3	12-17	4	4	8
	18-20	1	0	1
	21-24	1	3	4
	25-34	2	1	3
	35-44	8	1	9
	45-49	2	3	5
	50-54	3	4	7
	55-64	1	3	4
	65 and Over	6	2	8
	Total	28	21	49
4	12-17	4	3	7
	18-20	0	1	1
	21-24	4	0	4
	25-34	6	2	8
	35-44	5	2	7
	45-49	3	1	4
	50-54	1	0	1
	55-64	5	3	8
	65 and Over	7	3	10
	Total	35	15	50
5	12-17	7	7	14
	18-20	3	5	8
	21-24	8	3	11
	25-34	16	19	35
	35-44	16	21	37
	45-49	9	5	14
	50-54	5	3	8
	55-64	10	9	19
	65 and Over	5	2	7
	Total	79	74	153
6	12-17	10	10	20
	18-20	1	3	4
	21-24	6	3	9
	25-34	16	12	28
	35-44	13	15	28
	45-49	1	6	7
	50-54	6	5	11
	55-64	8	8	16
	65 and Over	1	5	6
	Total	62	67	129
Strongly Agree	12-17	22	24	46
	18-20	5	5	10
	21-24	9	10	19
	25-34	47	55	102
	35-44	34	74	108
	45-49	12	32	44
	50-54	14	28	42
	55-64	21	21	42
	65 and Over	10	11	21

Total		174	260	434
DK/RF	12-17	0	1	1
	25-34	2	1	3
	35-44	2	7	9
	45-49	0	1	1
	50-54	1	4	5
	55-64	5	7	12
	65 and Over	2	4	6
Total		12	25	37

Q27h. Plays new music I am interested in hearing				
	AGE RANGE	GENDER		Total
		Male	Female	
Strongly Disagree	12-17	3	3	6
	25-34	1	1	2
	35-44	1	0	1
	45-49	1	0	1
	55-64	1	0	1
Total		7	4	11
2	12-17	1	0	1
	25-34	0	1	1
	35-44	2	1	3
	45-49	0	2	2
Total		3	4	7
3	12-17	2	0	2
	18-20	0	1	1
	25-34	3	1	4
	35-44	1	2	3
	45-49	0	2	2
	55-64	0	1	1
Total		6	7	13
4	12-17	3	2	5
	18-20	1	1	2
	25-34	5	1	6
	35-44	1	3	4
	45-49	0	1	1
	50-54	1	0	1
Total		11	8	19
5	12-17	6	11	17
	18-20	2	1	3
	21-24	10	1	11
	25-34	8	12	20
	35-44	7	7	14
	45-49	0	2	2
	50-54	0	3	3
	55-64	0	3	3
	65 and Over	0	2	2
Total		33	42	75
	12-17	8	11	19
	18-20	3	4	7
	21-24	5	4	9

6	25-34	8	9	17
	35-44	2	7	9
	45-49	1	2	3
	50-54	1	1	2
	55-64	2	0	2
	65 and Over	1	0	1
Total		31	38	69
Strongly Agree	12-17	22	16	38
	18-20	4	6	10
	21-24	8	3	11
	25-34	16	20	36
	35-44	7	14	21
	45-49	1	7	8
	50-54	2	7	9
	55-64	1	3	4
65 and Over	1	4	5	
Total		62	80	142
DK/RF	35-44	1	0	1
Total		1	0	1

Q28. Do you read either Metal Edge or Metal Maniacs magazine, even if just occasionally?

	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	1	0	1
	25-34	1	0	1
Total		2	0	2
No	12-17	4	0	4
	21-24	0	1	1
	25-34	1	0	1
	35-44	2	0	2
Total		7	1	8

Q28a. Have you ever noticed any advertising for Music Choice in either Metal Edge or Metal Maniacs Magazine?

	AGE RANGE	GENDER		Total
		Male	Female	
No	12-17	1	0	1
	25-34	1	0	1
Total		2	0	2

Q29. If you hear a song or two that you don't like, generally, how many songs that you don't like have to come up in a row before you'll think about turning off that Music Choice Channel?

	AGE RANGE	GENDER		Total
		Male	Female	
	12-17	9	8	17
	18-20	3	6	9

1	21-24	4	1	5
	25-34	20	15	35
	35-44	12	18	30
	45-49	5	9	14
	50-54	10	9	19
	55-64	5	13	18
	65 and Over	5	5	10
Total		73	84	157
2	12-17	9	21	30
	18-20	4	4	8
	21-24	10	3	13
	25-34	29	29	58
	35-44	30	36	66
	45-49	11	13	24
	50-54	12	12	24
	55-64	16	19	35
	65 and Over	6	7	13
Total		127	144	271
3	12-17	13	11	24
	18-20	4	2	6
	21-24	11	13	24
	25-34	18	28	46
	35-44	31	44	75
	45-49	6	17	23
	50-54	9	18	27
	55-64	21	19	40
	65 and Over	12	8	20
Total		125	160	285
4	12-17	6	3	9
	18-20	0	2	2
	21-24	0	1	1
	25-34	10	8	18
	35-44	5	13	18
	45-49	1	4	5
	50-54	0	6	6
	55-64	2	5	7
	65 and Over	4	4	8
Total		28	46	74
5	12-17	3	7	10
	18-20	0	2	2
	21-24	2	2	4
	25-34	6	5	11
	35-44	4	6	10
	45-49	4	5	9
	50-54	2	3	5
	55-64	5	2	7
	65 and Over	4	1	5
Total		30	33	63
6	12-17	2	1	3
	25-34	2	0	2
	35-44	0	2	2
	45-49	0	1	1

	55-64	3	0	3
	65 and Over	0	1	1
	Total	7	5	12
7	12-17	1	0	1
	18-20	0	1	1
	21-24	1	0	1
	25-34	1	2	3
	35-44	2	0	2
	45-49	0	1	1
	50-54	0	1	1
	55-64	2	0	2
	Total	7	5	12
8+	12-17	5	2	7
	18-20	0	1	1
	25-34	2	4	6
	35-44	2	2	4
	45-49	2	4	6
	50-54	2	1	3
	55-64	2	2	4
	65 and Over	2	1	3
	Total	17	17	34
DK/RF	12-17	2	2	4
	21-24	2	0	2
	25-34	10	8	18
	35-44	2	8	10
	45-49	4	9	13
	50-54	1	5	6
	55-64	13	11	24
	65 and Over	13	23	36
	Total	47	66	113

Q29a. Do you have internet access either at home, wok or school?				
	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	45	47	92
	18-20	10	16	26
	21-24	24	16	40
	25-34	87	90	177
	35-44	71	110	181
	45-49	25	53	78
	50-54	26	45	71
	55-64	50	55	105
	65 and Over	26	20	46
	Total	364	452	816
No	12-17	5	8	13
	18-20	1	2	3
	21-24	6	4	10
	25-34	11	9	20
	35-44	17	19	36
	45-49	8	10	18
	50-54	10	10	20

	55-64	19	16	35
	65 and Over	20	30	50
Total		97	108	205

Q30. Do you ever listen to music via the internet?				
	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	33	33	66
	18-20	7	9	16
	21-24	15	7	22
	25-34	37	34	71
	35-44	22	43	65
	45-49	9	18	27
	50-54	8	11	19
	55-64	13	16	29
	65 and Over	4	1	5
Total		148	172	320
No	12-17	12	14	26
	18-20	3	7	10
	21-24	9	9	18
	25-34	50	56	106
	35-44	49	67	116
	45-49	16	35	51
	50-54	18	34	52
	55-64	37	39	76
	65 and Over	22	19	41
Total		216	280	496

Q30a. Do you ever download music via the internet?				
	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	18	15	33
	18-20	7	4	11
	21-24	16	7	23
	25-34	33	19	52
	35-44	16	27	43
	45-49	6	5	11
	50-54	4	6	10
	55-64	7	8	15
	65 and Over	2	1	3
Total		109	92	201
No	12-17	27	32	59
	18-20	3	12	15
	21-24	8	9	17
	25-34	54	71	125
	35-44	55	83	138
	45-49	19	48	67
	50-54	22	39	61
	55-64	43	47	90

	65 and Over	24	19	43
Total		255	360	615

Q30b. Have you used LAUNCH.COM within the past month?				
	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	13	19	32
	18-20	2	4	6
	21-24	4	3	7
	25-34	5	5	10
	35-44	8	7	15
	45-49	0	2	2
	50-54	1	0	1
	55-64	0	1	1
	65 and Over	0	2	2
Total		33	43	76
No	12-17	32	28	60
	18-20	8	12	20
	21-24	20	13	33
	25-34	82	85	167
	35-44	63	103	166
	45-49	25	51	76
	50-54	25	45	70
	55-64	50	54	104
	65 and Over	26	18	44
Total		331	409	740

Q30b. Have you used RHAPSODY.COM within the past month?				
	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	4	4	8
	18-20	2	2	4
	21-24	1	1	2
	25-34	2	2	4
	35-44	2	4	6
	45-49	1	0	1
	50-54	1	1	2
	55-64	1	0	1
Total		14	14	28
No	12-17	41	43	84
	18-20	8	14	22
	21-24	23	15	38
	25-34	85	88	173
	35-44	69	106	175
	45-49	24	53	77
	50-54	25	44	69
	55-64	49	55	104
65 and Over	26	20	46	
Total		350	438	788

Q30b. Have you used AOL MUSIC within the past month?				
	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	10	16	26
	18-20	1	4	5
	21-24	9	3	12
	25-34	3	5	8
	35-44	10	12	22
	45-49	2	7	9
	50-54	2	3	5
	55-64	1	5	6
	65 and Over	3	0	3
Total		41	55	96
No	12-17	35	31	66
	18-20	9	12	21
	21-24	15	13	28
	25-34	84	85	169
	35-44	61	98	159
	45-49	23	46	69
	50-54	24	42	66
	55-64	49	50	99
	65 and Over	23	20	43
Total		323	397	720

Q30b. Have you used ITUNES within the past month?				
	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	19	5	24
	18-20	2	3	5
	21-24	7	2	9
	25-34	10	13	23
	35-44	12	11	23
	45-49	3	3	6
	50-54	4	3	7
	55-64	3	2	5
	65 and Over	3	0	3
Total		63	42	105
No	12-17	26	42	68
	18-20	8	13	21
	21-24	17	14	31
	25-34	77	77	154
	35-44	59	99	158
	45-49	22	50	72
	50-54	22	42	64
	55-64	47	53	100
	65 and Over	23	20	43
Total		301	410	711

Q30b. Have you used NAPSTER within the past month?

	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	3	6	9
	18-20	1	1	2
	21-24	5	1	6
	25-34	4	4	8
	35-44	6	8	14
	45-49	0	3	3
	50-54	1	0	1
	55-64	0	1	1
Total		20	24	44
No	12-17	42	41	83
	18-20	9	15	24
	21-24	19	15	34
	25-34	83	86	169
	35-44	65	102	167
	45-49	25	50	75
	50-54	25	45	70
	55-64	50	54	104
	65 and Over	26	20	46
Total		344	428	772

Q31. Have you heard of a Music Choice broadband service offered through your highspeed cable internet service?

	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	1	0	1
	18-20	1	0	1
	21-24	1	0	1
	25-34	4	1	5
	35-44	4	6	10
	50-54	3	2	5
	55-64	1	1	2
	65 and Over	2	0	2
Total		17	10	27
No	12-17	5	8	13
	18-20	4	4	8
	21-24	11	4	15
	25-34	23	16	39
	35-44	15	20	35
	45-49	3	11	14
	50-54	3	4	7
	55-64	9	10	19
	65 and Over	1	5	6
Total		74	82	156

Q31a. In the past week, did you listen to Music Choice broadband service through the internet?

	AGE RANGE	GENDER		Total
		Male	Female	
Yes	35-44	0	1	1

Total		0	1	1
No	12-17	1	0	1
	18-20	1	0	1
	21-24	1	0	1
	25-34	4	1	5
	35-44	4	5	9
	50-54	3	2	5
	55-64	1	1	2
	65 and Over	2	0	2
Total		17	9	26

Q31b. What percentage of you time listening to Music Choice was done through the internet?				
	AGE RANGE	GENDER		Total
		Male	Female	
just a small amount of your listening	35-44	0	1	1
Total		0	1	1

Q31c. Since you began accessing Music Choice through the high speed cable internet service, would you say, overall, including your internet and cable usage, you are using MUSIC CHOICE?				
	AGE RANGE	GENDER		Total
		Male	Female	
More Often	21-24	1	0	1
	35-44	0	1	1
	50-54	1	0	1
	65 and Over	1	0	1
Total		3	1	4
About the same as before	12-17	1	0	1
	18-20	1	0	1
	25-34	4	1	5
	35-44	4	4	8
	50-54	1	2	3
	55-64	1	0	1
	65 and Over	1	0	1
Total		13	7	20
Less Often	55-64	0	1	1
Total		0	1	1
DK/RF	35-44	0	1	1
	50-54	1	0	1
Total		1	1	2

Q32. How Satisfied are you with the Music Choice service overall?				
	AGE RANGE	GENDER		Total
		Male	Female	
Very Dissatisfied	18-20	0	1	1
	35-44	0	1	1
	45-49	0	1	1

Very Dissatisfied	50-54	1	0	1
	55-64	1	1	2
	65 and Over	0	1	1
Total		2	5	7
2	25-34	1	0	1
	35-44	0	1	1
	45-49	0	1	1
	50-54	1	2	3
	55-64	1	1	2
Total		3	5	8
3	12-17	1	1	2
	21-24	1	0	1
	25-34	2	2	4
	35-44	3	2	5
	45-49	0	1	1
	50-54	1	0	1
	55-64	1	1	2
	65 and Over	1	0	1
Total		10	7	17
4	12-17	5	0	5
	25-34	5	3	8
	35-44	4	2	6
	45-49	1	2	3
	55-64	1	2	3
	65 and Over	2	2	4
Total		18	11	29
5	12-17	10	10	20
	18-20	3	5	8
	21-24	9	1	10
	25-34	16	20	36
	35-44	16	27	43
	45-49	7	7	14
	50-54	4	7	11
	55-64	9	12	21
	65 and Over	7	7	14
Total		81	96	177
6	12-17	12	19	31
	18-20	3	5	8
	21-24	9	7	16
	25-34	28	16	44
	35-44	21	28	49
	45-49	12	16	28
	50-54	6	15	21
	55-64	17	13	30
	65 and Over	14	4	18
Total		122	123	245
Very Satisfied	12-17	22	25	47
	18-20	5	7	12
	21-24	11	12	23
	25-34	46	58	104
	35-44	44	68	112
45-49	13	35	48	

	50-54	23	31	54
	55-64	39	41	80
	65 and Over	22	36	58
Total		225	313	538

Q32a. Have you ever purchased an album or single because you heard it on a Music Choice Channel?

	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	34	33	67
	18-20	7	7	14
	21-24	16	5	21
	25-34	42	41	83
	35-44	27	41	68
	45-49	10	24	34
	50-54	14	20	34
	55-64	21	19	40
65 and Over		15	14	29
Total		186	204	390
No	12-17	16	22	38
	18-20	4	11	15
	21-24	14	15	29
	25-34	56	58	114
	35-44	59	86	145
	45-49	23	38	61
	50-54	22	35	57
	55-64	48	51	99
65 and Over		31	34	65
Total		273	350	623
DK or Ref	35-44	2	2	4
	45-49	0	1	1
	55-64	0	1	1
	65 and Over	0	2	2
Total		2	6	8

Q33. Are there any children under the age of 12 living in your household

	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	18	25	43
	18-20	3	12	15
	21-24	8	8	16
	25-34	47	60	107
	35-44	40	61	101
	45-49	9	14	23
	50-54	3	7	10
	55-64	4	3	7
65 and Over		0	1	1
Total		132	191	323
	12-17	32	30	62
	18-20	8	6	14

No	21-24	22	12	34
	25-34	51	39	90
	35-44	48	68	116
	45-49	24	49	73
	50-54	33	48	81
	55-64	65	68	133
	65 and Over	46	49	95
Total		329	369	698

Q33a. How many of these children are ages 6 to 8?

	AGE RANGE	GENDER		Total
		Male	Female	
0	12-17	11	14	25
	18-20	2	9	11
	21-24	7	7	14
	25-34	31	34	65
	35-44	25	42	67
	45-49	5	8	13
	50-54	3	4	7
	55-64	4	2	6
	65 and Over	0	1	1
Total		88	121	209
1	12-17	5	9	14
	18-20	1	3	4
	21-24	0	1	1
	25-34	15	22	37
	35-44	10	16	26
	45-49	4	5	9
	50-54	0	3	3
	55-64	0	1	1
Total		35	60	95
2	12-17	1	2	3
	21-24	1	0	1
	25-34	1	4	5
	35-44	4	2	6
	45-49	0	1	1
Total		7	9	16
3	12-17	1	0	1
	35-44	1	0	1
Total		2	0	2
4	35-44	0	1	1
Total		0	1	1

Q33b. How many of these children are ages 9 to 11?

	AGE RANGE	GENDER		Total
		Male	Female	
	12-17	6	11	17
	18-20	3	7	10
	21-24	6	8	14
	25-34	35	41	76

0	35-44	28	37	65
	45-49	7	6	13
	50-54	1	3	4
	55-64	1	2	3
	65 and Over	0	1	1
Total		87	116	203
1	12-17	9	13	22
	18-20	0	4	4
	21-24	2	0	2
	25-34	11	16	27
	35-44	12	21	33
	45-49	2	7	9
	50-54	2	3	5
55-64	3	1	4	
Total		41	65	106
2	12-17	2	1	3
	18-20	0	1	1
	25-34	1	2	3
	35-44	0	3	3
	45-49	0	1	1
50-54	0	1	1	
Total		3	9	12
3	25-34	0	1	1
Total		0	1	1
4	12-17	1	0	1
Total		1	0	1

Q33c. Do you know if any of these children listen to Radio Disney on Music Choice?

	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	5	8	13
	18-20	0	3	3
	21-24	0	1	1
	25-34	8	12	20
	35-44	4	15	19
	45-49	0	3	3
50-54	0	2	2	
Total		17	44	61
No	12-17	11	14	25
	18-20	1	5	6
	21-24	2	0	2
	25-34	14	24	38
	35-44	19	22	41
	45-49	6	8	14
	50-54	2	5	7
55-64	3	2	5	
Total		58	80	138

Q33d. How often do you listen to Radio Disney with any of these children

	AGE RANGE	GENDER		Total
		Male	Female	
all the time	12-17	0	1	1
	25-34	2	2	4
	35-44	0	3	3
	45-49	0	1	1
	50-54	0	1	1
Total		2	8	10
often	12-17	1	2	3
	18-20	0	1	1
	25-34	1	2	3
	35-44	0	1	1
	45-49	0	1	1
	50-54	0	1	1
Total		2	8	10
sometimes	12-17	2	3	5
	18-20	0	1	1
	21-24	0	1	1
	25-34	5	6	11
	35-44	4	8	12
	45-49	0	1	1
Total		11	20	31
never	12-17	2	2	4
	18-20	0	1	1
	25-34	0	2	2
	35-44	0	3	3
Total		2	8	10

Q34. Spanish or Hispanic Origin

	AGE RANGE	GENDER		Total
		Male	Female	
Yes	12-17	10	12	22
	18-20	2	3	5
	21-24	7	2	9
	25-34	14	13	27
	35-44	9	16	25
	45-49	3	4	7
	50-54	0	3	3
	55-64	4	0	4
	65 and Over	3	0	3
Total		52	53	105
No	12-17	39	42	81
	18-20	9	14	23
	21-24	23	18	41
	25-34	83	85	168
	35-44	75	113	188
	45-49	30	57	87
	50-54	36	51	87

	55-64	65	71	136
	65 and Over	43	49	92
Total		403	500	903
DK/RF	12-17	1	1	2
	18-20	0	1	1
	25-34	1	1	2
	35-44	4	0	4
	45-49	0	2	2
	50-54	0	1	1
	65 and Over	0	1	1
Total		6	7	13

Q35. Race				
	AGE RANGE	GENDER		Total
		Male	Female	
Black/African American	12-17	15	27	42
	18-20	2	6	8
	21-24	3	3	6
	25-34	11	21	32
	35-44	13	14	27
	45-49	1	9	10
	50-54	8	6	14
	55-64	6	12	18
	65 and Over	6	3	9
Total		65	101	166
White/Caucasian	12-17	19	15	34
	18-20	4	8	12
	21-24	19	13	32
	25-34	71	61	132
	35-44	56	100	156
	45-49	31	50	81
	50-54	27	46	73
	55-64	58	56	114
	65 and Over	37	45	82
Total		322	394	716
Asian	12-17	1	1	2
	18-20	1	0	1
	21-24	1	0	1
	25-34	1	1	2
	55-64	1	1	2
Total		5	3	8
Other	12-17	15	11	26
	18-20	4	2	6
	21-24	7	4	11
	25-34	14	14	28
	35-44	14	13	27
	45-49	1	2	3
	50-54	1	2	3
	55-64	3	1	4
	65 and Over	3	0	3
Total		62	49	111

DK or Ref	12-17	0	1	1
	18-20	0	2	2
	25-34	1	2	3
	35-44	5	2	7
	45-49	0	2	2
	50-54	0	1	1
	55-64	1	1	2
	65 and Over	0	2	2
Total		7	13	20

Q36. Education				
	AGE RANGE	GENDER		Total
		Male	Female	
Less than 12th grade	12-17	47	51	98
	18-20	3	3	6
	21-24	3	1	4
	25-34	5	1	6
	35-44	3	1	4
	45-49	3	2	5
	50-54	0	1	1
	55-64	1	1	2
	65 and Over	1	5	6
Total		66	66	132
High School Graduate or GED	12-17	2	1	3
	18-20	4	9	13
	21-24	10	5	15
	25-34	14	19	33
	35-44	20	26	46
	45-49	4	13	17
	50-54	11	12	23
	55-64	12	20	32
	65 and Over	9	22	31
Total		86	127	213
Some College (Associates Degree)	18-20	4	3	7
	21-24	13	7	20
	25-34	34	30	64
	35-44	22	50	72
	45-49	11	21	32
	50-54	8	21	29
	55-64	22	24	46
	65 and Over	12	10	22
Total		126	166	292
Bachelor's Degree	12-17	0	1	1
	18-20	0	2	2
	21-24	3	6	9
	25-34	28	33	61
	35-44	24	37	61
	45-49	9	16	25
	50-54	8	14	22
	55-64	16	17	33
	65 and Over	9	6	15
Total		97	132	229

Graduate or Post Graduate degree	12-17	1	1	2
	21-24	1	1	2
	25-34	15	15	30
	35-44	15	15	30
	45-49	5	8	13
	50-54	7	6	13
	55-64	18	9	27
	65 and Over	15	4	19
Total		77	59	136
DK or Ref	12-17	0	1	1
	18-20	0	1	1
	25-34	2	1	3
	35-44	4	0	4
	45-49	1	3	4
	50-54	2	1	3
	65 and Over	0	3	3
Total		9	10	19

Q37. Household Income				
	AGE RANGE	GENDER		Total
		Male	Female	
Less than 25K	12-17	0	2	2
	18-20	1	2	3
	21-24	4	2	6
	25-34	5	9	14
	35-44	3	5	8
	45-49	1	4	5
	50-54	3	4	7
	55-64	2	10	12
	65 and Over	3	6	9
Total		22	44	66
25K to less than 50K	12-17	3	8	11
	18-20	1	3	4
	21-24	15	4	19
	25-34	23	25	48
	35-44	19	29	48
	45-49	7	13	20
	50-54	9	11	20
	55-64	15	18	33
	65 and Over	14	8	22
Total		106	119	225
50K to less than 75K	12-17	7	2	9
	18-20	1	1	2
	21-24	5	6	11
	25-34	26	23	49
	35-44	18	30	48
	45-49	4	14	18
	50-54	3	12	15
	55-64	16	11	27
	65 and Over	5	8	13
Total		85	107	192

75K to less than 100K	12-17	2	2	4
	18-20	3	2	5
	21-24	2	2	4
	25-34	10	16	26
	35-44	6	21	27
	45-49	4	9	13
	50-54	7	9	16
	55-64	10	5	15
	65 and Over	1	5	6
Total		45	71	116
100K or more	12-17	4	0	4
	18-20	1	1	2
	21-24	1	2	3
	25-34	22	12	34
	35-44	24	28	52
	45-49	12	14	26
	50-54	7	12	19
	55-64	17	12	29
	65 and Over	9	1	10
Total		97	82	179
DK or Ref	12-17	34	41	75
	18-20	4	9	13
	21-24	3	4	7
	25-34	12	14	26
	35-44	18	16	34
	45-49	5	9	14
	50-54	7	7	14
	55-64	9	15	24
	65 and Over	14	22	36
Total		106	137	243

MC 38



Ipsos OTX MediaCT

The Media, Content and Technology Research Specialists

Music Choice Music Channels Listenership Study 2011

**MUSIC
CHOICE®**





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- **In order to better understand current Music Channel listener demographics, behaviors and perceptions, as well as interest in potential channel enhancements and usage/perceptions of competitive music services, Music Choice commissioned Ipsos OTX MediaCT to conduct a study among past-month Music Channel listeners in Apr'11.**
 - Past-month listener populations were derived from a Music Choice Enumeration Study, also conducted by Ipsos OTX (Mar'11).
 - Sample consisted of 2,241 Persons 13+.
 - Multi-methodology recruitment utilized to ensure representative presence of online, offline, and cell-only HHs.
 - Source of total digital cable population and past-month Music Channel P13+ listener projection.
 - P2+ estimate created using proxy reporting of P2-12 listening in the HH from P13+ interviewed.
- **The primary goal of this research was to provide an updated measure of Music Channel listenership by channel, key dayparts and demographics**
 - Key metrics in support of this primary goal include Cume (past 30/7/1 day unique reach), AQH (average quarter-hour) rating by daypart, and time spent listening.
 - Where available, current audience/listenership levels are compared to 2008 study levels.
- **Secondary objectives:**
 - Identify listener perceptions of and satisfaction with Music Channels, as well as peripheral viewing behaviors (devices used, locations, etc.).
 - Evaluate cross-channel listening synergies.
 - Assess cross-platform usage of, and satisfaction with, Music Choice On Demand.
 - Compare Music Channel usage and satisfaction to same for competitive music services.
 - Gauge interest in potential features/content for future product enhancements.

Timing

- **The Music Choice Music Channel Listenership Study was fielded during Spring 2011 (April 7th to 28th).**
 - A previous wave was conducted in Fall 2008 (Oct/Nov).

Sample & Screening

- **A total of 2,501 respondents were recruited via Ipsos OTX's online sample community**
 - Multi-source sampling methodology using various sample partners, communities and web creates a unique, random sample.
 - Survey quotas were set evenly for each day of the week during fieldwork to assure a balanced sample reflecting weekday and weekend usage.
 - Overall screening requirements included: US residents age 13+, digital/fiber optic cable in HH with 1+ set-top boxes, sensitive industry screening (e.g., can't work in research, advertising, radio or TV).
 - All respondents had to be past-month Music Choice Music Channel listeners.

Sample & Screening (cont'd)

- **Utilizing quota targets were derived from the Enumeration Study, the sample was quota-balanced by gender, age and ethnicity within the target group of Music Channel listeners, and monitored by other variables such as region and income.**
 - Data was weighted on the backend to adjust for any variations found versus quota targets.
 - Note, any weighting applied on the backend was minor as overall weighting efficiency (a measure of how close the ending data is to unweighted targets) was over 90%.

Survey

- **Qualified respondents interacted via a custom, online survey tool to answer questions regarding their awareness, perceptions, usage of and satisfaction with Music Channels, recording their past-month/week listening by channel, as well as past-day usage in quarter-hour increments and additional listening behavior measures and attitudes.**
 - **Quarter-Hour Diary Section:** Based on a day-after recall method, past-day Music Channel listeners were asked to identify their past-day channel listening by daypart, and then in quarter-hour increments, for channels listened to for at least 5 minutes during the quarter-hour.
 - ✓ Channels were selected from a programming grid of 46 Music Channels.
 - ✓ If the respondent did not listen to any Music Channels in a given daypart for the previous day, he/she could select “none” and was automatically routed to the next daypart.

Music Channel Population and Profile

- Music Choice Music Channels now reach approximately 34.9 mil Persons 13+ from an estimated 14.4 mil HHs in an average month. The estimated Music Channel P2+ audience is now 38.8 mil, or just over one-fourth of the digital cable P2+ universe, up from 34.7 mil in 2008.
 - The overall incidence of P13+ Music Channel listening declined modestly from 2008 (28.4% vs. 30.9%), though audience size grew by 10%, similar to the overall growth of the digital cable universe.
- Compared to the digital cable universe, Music Channel listeners profile younger in age, lower income, less educated and somewhat more racially and ethnically diverse.
 - Both Music Channel listener and digital cable populations skew slightly older than in 2008.
- Technology and music consumption trends seen among Music Channel listeners reveal:
 - Fiber optic cable is more prevalent in the home, with more digital TVs in the home as well (70% of HHs have 2 or more set-top boxes, up from 63% in 2008).
 - Listener usage of mobile devices for music consumption and consumption of online music videos has grown considerably, supported by increased smartphone ownership, though TV/TV music channels remain their top sources.
 - General music consumption behavior is fairly consistent in terms of time spent and genre affinity, though reported listening to Rock, Urban and Variety formats is down somewhat.
 - Online behavior is heavily focused on social networking (mostly via Facebook), followed by gaming and shopping, with a notable jump in streaming videos as well.

Music Channel Awareness, Attitudes & Behaviors

- Unaided Music Choice Music Channel brand awareness remains low among listeners (17%, even with 2008). Once described, listeners are aware of the service, but nearly half (44%) had not heard the Music Choice Music Channel name prior to the interview (40% in 2008).
 - Significant branding opportunity still exists.
- Listener satisfaction with Music Channels is highly favorable (9 out of 10 satisfied; two-thirds highly satisfied) and has grown since 2008, particularly among younger listeners (13-34) and females.
 - As was the case in 2008, satisfaction with Music Channels is greater among females and older listeners.
- Top-level satisfaction ratings for Music Channel group formats are high across the board (45%-63%) and up versus 2008, led by Inspirational, Country, Urban and Instrumental groups, followed by Pop, Jazz-Blues and Classical groups, then Variety, Dance, Latin, Rock and Vocal-Theatrical groups.
 - Not surprisingly, all individual channels are rated favorably by their respective listeners, with only moderate differences in satisfying their audiences.
 - Urban, Inspirational and classic older-skewing music channels such as R&B Soul, Gospel, and Solid Gold Oldies garner highest top satisfaction marks compared to other channels. Meanwhile, Mexicana, Retro Rock, Swingers & Swing, and Stage & Screen top satisfaction marks are not as high in relation to other channels.

Music Channel Awareness, Attitudes & Behaviors (cont.)

- In terms of existing and potential product offerings, listeners are most interested in creating custom channels that reflect their favorite genres (59% interest), having artist playlists available (49%) and being exposed to new artists and music (48%).
 - Secondary feature tier based on interest (35%-41%) includes: linking to and voting for videos, seeing comments from artists on screen, mobile access to content, getting updates on songs, etc., and rating songs.
 - Interest in all features is greater among younger listeners (13-34), most particularly 25-34.
 - While top-rated features have universal gender appeal, interactive, mobile and social features are generally more appealing to males.
- Potential new genre channels receive a somewhat tepid reaction from listeners, with top-rated potentials (U.K. Pop and Celtic) generating interest from only one-quarter of listeners.
 - P25-34 exhibit greater interest in all channels, while P13-24 show greater interest in Pop (U.K. and Asian) channels, and males show greater affinity for Celtic music.

Music Channel Awareness, Attitudes & Behaviors (cont.)

- Listeners are still most likely to listen to Music Channels at home, on their TV (vs. online, and on one set. They're also still most likely to listen in the living room, though listening appears to be branching out slightly to more TVs/other rooms in the home.
- Channel surfing is still the primary way of discovering what's on Music Channels, followed by word of mouth and on-air promotion.
- Listeners are still more likely to multitask while listening to Music Channels, however, engagement with channels is up versus 2008 (44% pay complete attention/mostly watch the screen versus 39% in 2008), with half (51%) looking at the screen at least once during each song.
- A fair proportion of Music Channel listeners have sampled competitive music services, primarily YouTube (66%), MTV (45%), Pandora (32%), and Sirius/XM (23%), with one-quarter to half of those who listen to/watch those services doing so daily/almost daily.
 - Cross-channel listeners of Sirius/XM, Grooveshark and Rdio may be smaller in volume, but tend to listen more frequently than cross-channel listeners to other services.
 - Both Music Channels and Music Choice On Demand rate relatively well compared to other services, though listeners don't rate them much differently than Pandora or YouTube, and notably lower than Sirius/XM.

Music Channel Audience Measurement

- The majority of Music Channel listeners are loyal – 9 out of 10 unique monthly listeners (90%) listen weekly, and 8 out of 10 unique weekly listeners (83%) listen daily.
 - Modest uptick in core audience from 2008 (86% listened weekly and 81% listened daily).
 - Weekday and weekend audience reach are comparable on an individual day basis (roughly 1 in 5 digital cable P13+ listen daily).
 - Listeners have broadened their Music Channel consideration set; listen to 4 channels on average per day versus 3 channels in 2008.
- In an average quarter hour within the M-Su 6a-12p daypart, Music Channels reach roughly 6% of the digital cable universe, up from 5% in 2008, with AQH average greater during the week (6% vs. 5% on the weekend).
 - Peak listening dayparts are 3-7pm, followed by 10a-3p, then 7p-mid, on both weekdays and weekends.
 - Rock, Pop and Urban channels occupy most of the top 10 positions based on P13+ Cume and AQH rank, with Hip-Hop/R&B, Rock, Classic Rock and 80s consistently ranking within the top 5.
 - Likely reflecting on older audience composition, classic channels such as Solid Gold Oldies, Easy Listening and R&B Classics enter the top 10 channel mix on weekends.
- Listeners spend an average 25 hours per week listening to Music Channels, or 3.5 hours on an avg. day (6a-12m), up from 23 hours per week in 2008.
 - Niche channels such as Pop Latino, Soundscapes, Metal and Musica Urbana tend to have more loyal listening audiences in terms of time spent, though popular channels such as Rap and Hip-Hop/R&B also have loyal listening audiences.
 - Longer weekday listening led by Pop Latino, Musica Urbana, Soundscapes, Sounds of the Seasons and Rap channels helped drive TSL increases from 2008.

Music Channel Audience Measurement (cont.)

- Core 13-34 listeners are more involved with Music Channels in terms of Cume, AQH and time spent listening (based on 6a-12m daypart), with involvement among other age groups declining with age.
 - 25-34 listeners registered greatest increases in Cume, AQH and TSL from 2008. P35-49 and P50+ listening grew as well (though less significantly), while P13-24 listening grew the least (slight bump in TSL).
 - Hip-Hop/R&B, Rock, Rap, Hit List, Metal and Pop Hits are top AQH channels among younger listeners (13-34), while mid-age listeners (35-49) like '80s, Classic Rock, '70s, Hip-Hop/R&B and R&B Classics, and older listeners (50+) favor classic music such as Classic Rock, Solid Gold Oldies, Easy Listening, Smooth Jazz and Classic Country.
- Females represent a slightly larger proportion of the Music Channel audience, but males tend to be heavier listeners, spending more time listening weekly than in 2008 and versus females in 2011 (26 hours vs. 23 hours for females, 6a-12m daypart).
 - Males and females exhibit similar channel preferences, though males have a greater affinity for Rap, Classic Rock, Rock and Metal, while females favor Hit List, Today's Country and Pop Hits.
- Reported co-listening is high—8 out of 10 listen with others weekly and 7 out of 10 listen with others daily (average two others weekly and one other daily).
 - Additional listeners are fairly evenly mixed by gender and age, and are more likely to live in the same household.
- Over half of listeners with kids <13 in the home (58%; 19% of total) report <13 Music Channel listening, with age-appropriate channels such as Kidz Only! and Toddler Tunes topping the list of channels, followed by other top-rated channels (Hip-Hop/R&B, Hit List and Pop Hits).

Music Choice On Demand

- Unaided awareness of Music Choice On Demand among Music Channel listeners is low (9%); even when described, only half (53%) of listeners said they heard of the name prior to being interviewed.
 - As with Music Channels, significant branding opportunity exists.
- Cross-channel usage of Music Choice On Demand is notable and growing—two-thirds (64%) of Music Channel listeners have used Music Choice On Demand; over half (55%) report monthly usage, up from 42% in 2008.
 - Most who've tried Music Choice On Demand (86%) use monthly, with two-thirds (67%) using weekly and one-third (34%) using daily/almost daily.
 - Cross-channel users profile younger in age, more affluent and are more racially and ethnically diverse. They have stronger interest in and wider range of music genres including Rock, Pop, Dance and Latin. They are also more likely to use a wider array of devices to consume music (TV, online/computers, mobile).
- Satisfaction ratings for Music Choice On Demand are highly favorable among Music Channel listeners (59% very satisfied).
 - Similar to Music Channels, Music Choice On Demand satisfaction is greater among females and older listeners (50+).
- Channel surfing is the most common way for Music Channel listeners to find out what's on Music Choice On Demand, followed by word of mouth, barker ads and on-air promotion.

Music Channel Profiles:

Populations
Demographics
Technology
Music Usage

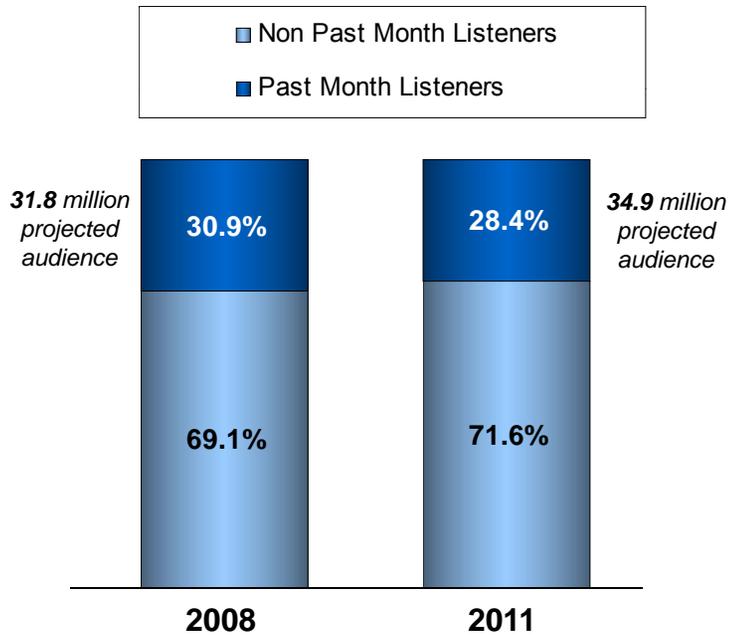


Music Channel Past-Month Listening Audience -- Persons 13+ (based to Total Digital)



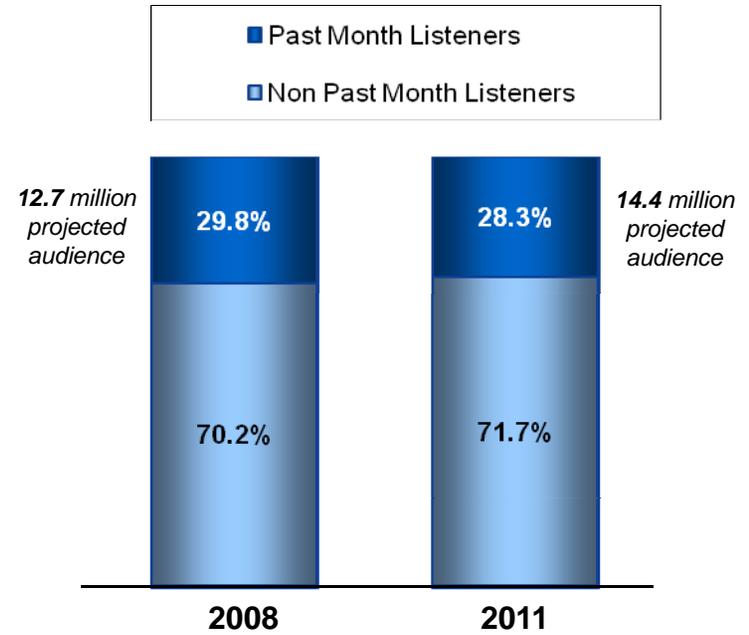
- Although the overall incidence of past-month Music Choice Music Channel listening within the digital cable universe declined modestly from '08, the population of listeners grew to 34.9 million (an increase of 10%), similar to growth in the overall digital cable universe.

Persons 13+ Audience



Projected 13+ Pop: 103 million (2008) 123 million (2011)

Household 13+ Audience



Projected 13+ HH Pop: 42.7 million (2008) 51.0 million (2011)

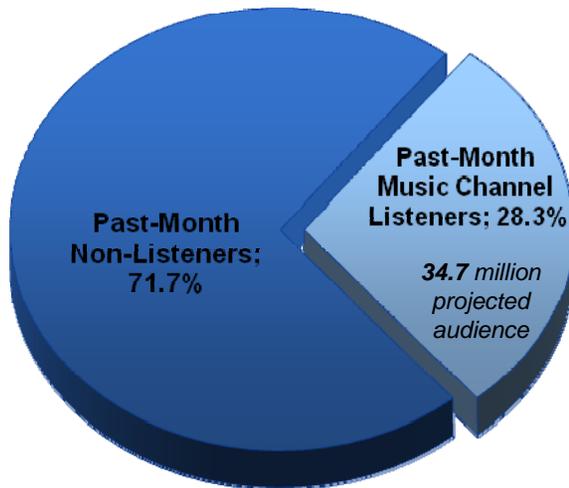


Music Channel Past-Month Listening Audience -- Persons 2+ (based to Total Digital)



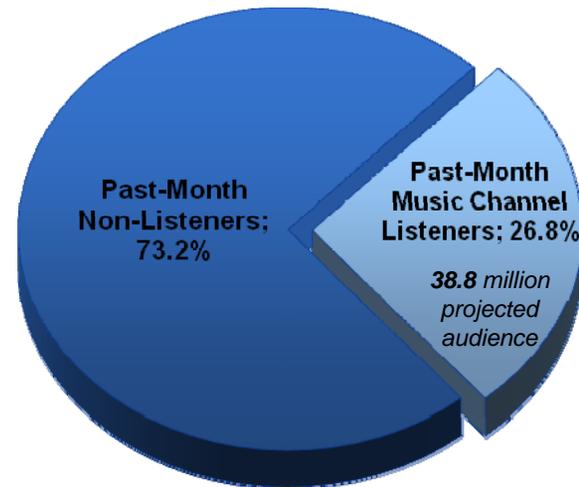
- Further estimating of the Music Channel audience reveals 39 million P2+ listeners, representing just over one-quarter of the total digital cable universe in 2011. Similar to P13+ estimates, this represents an audience growth of over 10% since 2008, though overall listening incidence is slightly lower.
 - Note, P2+ audience estimates are based on a combination of self-reported listening for individuals 13+ and estimated listening of those in the household under 13 from the same 13+ individuals being interviewed.

Persons 2+ 2008



122 million projected 2+ HH Total population

Persons 2+ 2011



145 million projected 2+ Total population



Music Channel Audience Profiles: Demographics vs. Digital Cable Universe



- Compared to the digital cable universe, Music Channel listeners tend to be younger in age (avg. <40) and over-index in African-American and Hispanic segments. Both Music Channel listener and total digital cable universe profiles have a slightly older skew than in 2008.

	Digital Cable Universe+		Music Choice Music Channels	
	2011	Index vs. '08	2011	Index vs. '08
Gender				
Male	48%	98	49%	102
Female	52%	102	51%	98
Age				
13-17	8%	89	8%	80
18-24	11%	85	13% ↑	72
25-34	16%	89	22% ↑	110
35-44	16%	89	19% ↑	90
45-54	18%	100	18%	129
55+	30%	120	21% ↓	124
Mean	43.8	106	39.9 ↓	108
Race/Ethnicity				
White	68%	96	63% ↓	97
Black	12%	109	16% ↑	100
Hispanic	12%	109	14% ↑	117
Other	7%	100	6%	86

	Digital Cable Universe+		Music Choice Music Channels	
	2011	Index vs. '08	2011	Index vs. '08
Household Size				
1	18%	98	16%	114
2	32%	110	28% ↓	100
3+	50%	94	56% ↑	97
Mean	2.9	100	3.0	97
Presence of Children				
Any children <18 (Net)	45%		45%	88
13-17	23%	109	23%	92
Under 13	32%	65	33%	89
Marital Status (18+)				
Married/Living with Partner	60%	103	56% ↓	100
Single	24%	86	30% ↑	97
Divorced/Widowed/Separated	14%	108	14%	117

Arrow denotes significantly higher/lower than Digital Cable Universe at the 95% confidence level

+ Music Choice Enumeration Survey : 2008 Total (2,200), 18+ (2,000); 2011 Total (2,241), 18+ (2,027)

Base: Music Choice Music Channels: 2008 Total (2,500), 18+ (2,242); 2011 Total (2,501), 18+ (2,309)



Music Channel Audience Profiles: Demographics vs. Digital Cable Universe



- Given its younger-skewing audience, Music Channels record a lower average income and are also less likely to have a college degree than the digital cable universe. There's an increase of Music Channel listeners from the Southwest territory, though it still represents the smallest listening territory overall.

	Digital Cable Universe+		Music Choice Music Channels	
	2011	Index vs. '08	2011	Index vs. '08
Employment				
Employed (Net)	54%	86	56%	98
Self-Employed	8%	89	6% ↓	55
Retired	20%	111	12% ↓	133
Student	12%	200	12%	109
Household Income (18+)				
<\$50K	38%	92	42% ↑	98
\$50-\$99.9K	38%	98	37%	97
\$100K+	23%	122	20% ↓	105
Mean (000)	\$76.4	109	\$69.8 ↓	101
Education				
High School or Less	33%	94	30% ↓	107
Trade/Some College	25%	92	35% ↑	95
College Grad +	41%	113	35% ↓	103

	Digital Cable Universe+		Music Choice Music Channels	
	2011	Index vs. '08	2011	Index vs. '08
Nielsen Territory				
Northeast	29%	100	31%	107
E. Central	12%	92	12%	92
W. Central	13 %	93	12%	92
Southeast	18%	100	18%	100
Southwest	10%	143	10%	125
Pacific	19%	100	18%	95

Arrow denotes significantly higher/lower than Digital Cable Universe at the 95% confidence level

+ Music Choice Enumeration Survey 2008: Total (2,200), 18+ with DK/RF removed (1,645); 2011 Total (2,241), 18+ with DK/RF removed (1,691).
Base: Music Choice Music Channels: 2008 Total (2,500), 18+ with DK/RF removed (2,108); 2011 Total (2,501), 18+ with DK/RF removed (2,148).



Music Channel Audience Profiles: Media/Technology -- Cable Provider & Television Habits



- As Fiber Optic TV penetration has increased, its presence in Music Channels households has grown (3X higher than 2008). The number of sets in the home with digital programming has increased slightly, though viewing frequency and time spent hasn't changed much since 2008.

	Music Choice Music Channels	
	2008	2011
Base:	2500	2501
Type of Cable TV in HH		
Digital Cable	96%	86% ↓
Fiber Optic Cable	6%	18% ↑
Cable Provider (among Dig Cable subs)		
Comcast	41%	40%
Time Warner Cable	22%	22%
Cablevision	8%	7%
Charter	8%	7%
Cox Communications	7%	8%
Fiber Optic Provider (among Fiber Optic subs)		
Verizon FiOS	87%	63% ↓
AT&T U-verse	--	34%

	Music Choice Music Channels	
	2008	2011
Base:	2500	2501
Tenure with Provider		
< 1 Year	27%	24% ↓
1 Year+	73%	76% ↑
Mean Yrs.	2.0	2.1
# of TV Set Top Boxes in HH		
1	37%	30% ↓
2+	63%	70% ↑
Mean	2.1	2.4
Television Viewing: Any	99%	99%
# of Days/week (mean)	6.1	6.0
# of Hours/week (mean)	18.5	18.0

Arrow denotes significantly higher/lower than 2008 at the 95% confidence level

S9_TV_SERVICES: Which of the following types of TV services do you have in your home?; S10C_SERVICE_TENURE: How long have you had your digital cable/fiber optic TV service?; S10A_TOP_BOXES: How many digital cable/fiber optic TV set top boxes do you have in your home?; C1: In a typical week, how many days do you watch TV?; C2: Approximately how much time do you spend watching TV in a typical week?



Music Channel Audience Profiles: Media/Technology

-- General Music Listening



- Overall music listening is fairly comparable to 2008; Rock and Pop genres (including Decades) ranked highest, followed by Urban and Country.
- More listeners are consuming music via mobile devices, with a bump in online music videos as well, though they're still more likely to consume via TV/TV music channels.

	Music Choice Music Channels	
	2008	2011
Base:	2500	2447
Music Listening: Any	98%	98%
# of Days/week (mean)	5.1	5.0
# of Hours/week (mean)	13.4	12.0
Types of Music Listen To (Top 10)		
Rock	50%	46% ↓
Pop	42%	41%
Urban	36%	30% ↓
Country	27%	29%
Jazz & Blues	21%	22%
Dance/Electronica	18%	16%
Classical	19%	20%
Variety	19%	13% ↓
Decades ('70s, '80s, '90s)	NA	39%
Inspirational	14%	14%

	Music Choice Music Channels	
	2008	2011
Base:	2500	2447
Music Sources Use to Listen		
AM/FM Radio	68%	54% ↓
TV music channels	67%	68%
Physical music	43%	35% ↓
TV music videos	42%	37% ↓
Online Radio	25%	28%
Online music videos	23%	35% ↑
Music Devices Use		
Television	74%	77%
Radio receiver in car	62%	55% ↓
Desktop or Laptop	51%	53%
MP3 Player	47%	44%
Home stereo	44%	38% ↓
Cell phone or smartphone	13%	21% ↑

Arrow denotes significantly higher/lower than 2008 at the 95% confidence level

C3: How often do you listen to music in a typical week?;

C4: Approximately how much time do you spend listening to music in a typical week?;

C5: What types of music do you like to listen to on a regular basis? C6: Services used to listen to music C7: Devices used to listen



Music Channel Audience Profiles: Media/Technology -- Internet Access & Cell Phone Ownership



- Social networking is by far the most popular online activity among listeners, followed by gaming and shopping, with a notable increase in streaming videos as well.
- Significant smartphone ownership gains offer listeners even greater access to the mobile web.

	Music Choice Music Channels	
	2008	2011
<i>Base:</i>	2500	2501
Type of Internet Access		
Cable modem	66%	60% ↓
DSL	24%	23%
Fiber Optic	6%	16% ↑
Dial-up	4%	3%
Hrs Spent/Week Online		
Mean hours (non-email)	12.1	12.6
Online Activities/Week		
Social Networking sites	NA	64%
Playing/downloading games	48%	49%
Shopping	47%	44% ↓
Instant messaging (IM)	42%	35% ↓
Downloading music	36%	34%
Watching streaming video	35%	43% ↑
Listening to radio stations	30%	35% ↑
Message boards	24%	19% ↓
Blogs	24%	21% ↓
Chat forums	20%	19%

	Music Choice Music Channels	
	2008	2011
<i>Base:</i>	2500	2501
Type of Social Networking (among those accessing Social Networking sites)		
Facebook page	NA	97%
MySpace page	NA	31%
Twitter account	NA	29%
Other	NA	5%
Cell Phone Ownership		
Any device (net)	72%	75% ↑
PDA/Smartphone	11%	27% ↑
Cell Phone Provider		
Verizon	30%	34% ↑
AT&T	29%	27%
T-Mobile	15%	13% ↓
Sprint/Nextel	12%	11%

D5_INTERNET: What type of Internet access do you have in your home?; D6_INTERNET_HRS: How many hours do you spend on the Internet for something other than e-mail in a typical week?; D7_INTERNET_ACT: Which of the following online activities do you participate in during a typical week?

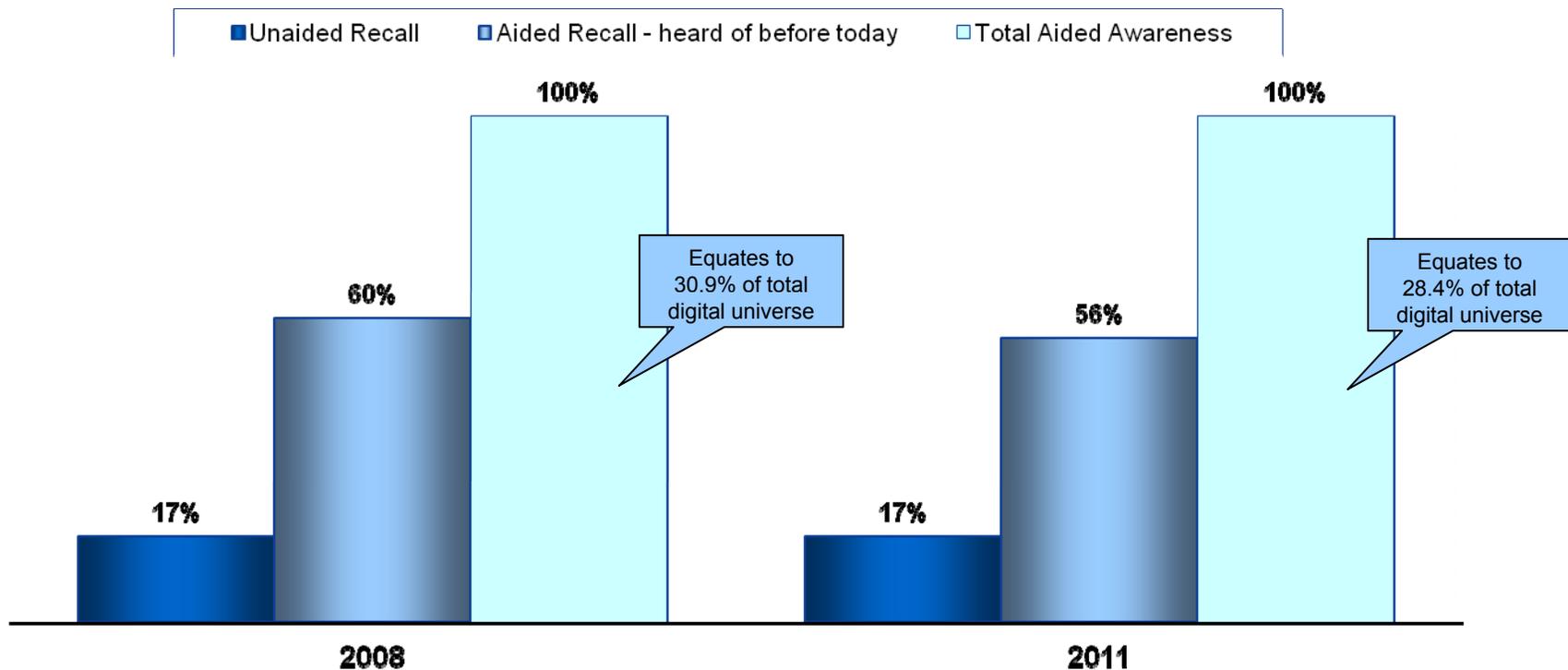
D9_CELL: Do you, personally, own a cellular phone?; D10_CELL_PROVIDER: Which cellular phone service do you subscribe to?

Arrow denotes significantly higher/lower than 2008 at the 95% confidence level

Music Channel Audience Awareness, Attitudes and Behaviors

- Similar to 2008, Music Choice brand name awareness is stronger once aided, but still only moderate among past-month users. Unaided awareness of the brand is generally low at 17%, rising to 56% aware once aided. Nearly half of listeners (44%) are aware of the service in general, but don't really know of it by name (up from 40% in 2008).

Among Past-Month Music Choice Music Channel Listeners



Base: Total past-month Music Channel listeners 2008 (N=2,500); 2011 (N=2,501)

S12_AWARE_MUSIC: What commercial-free TV music channel providers are you aware of?;

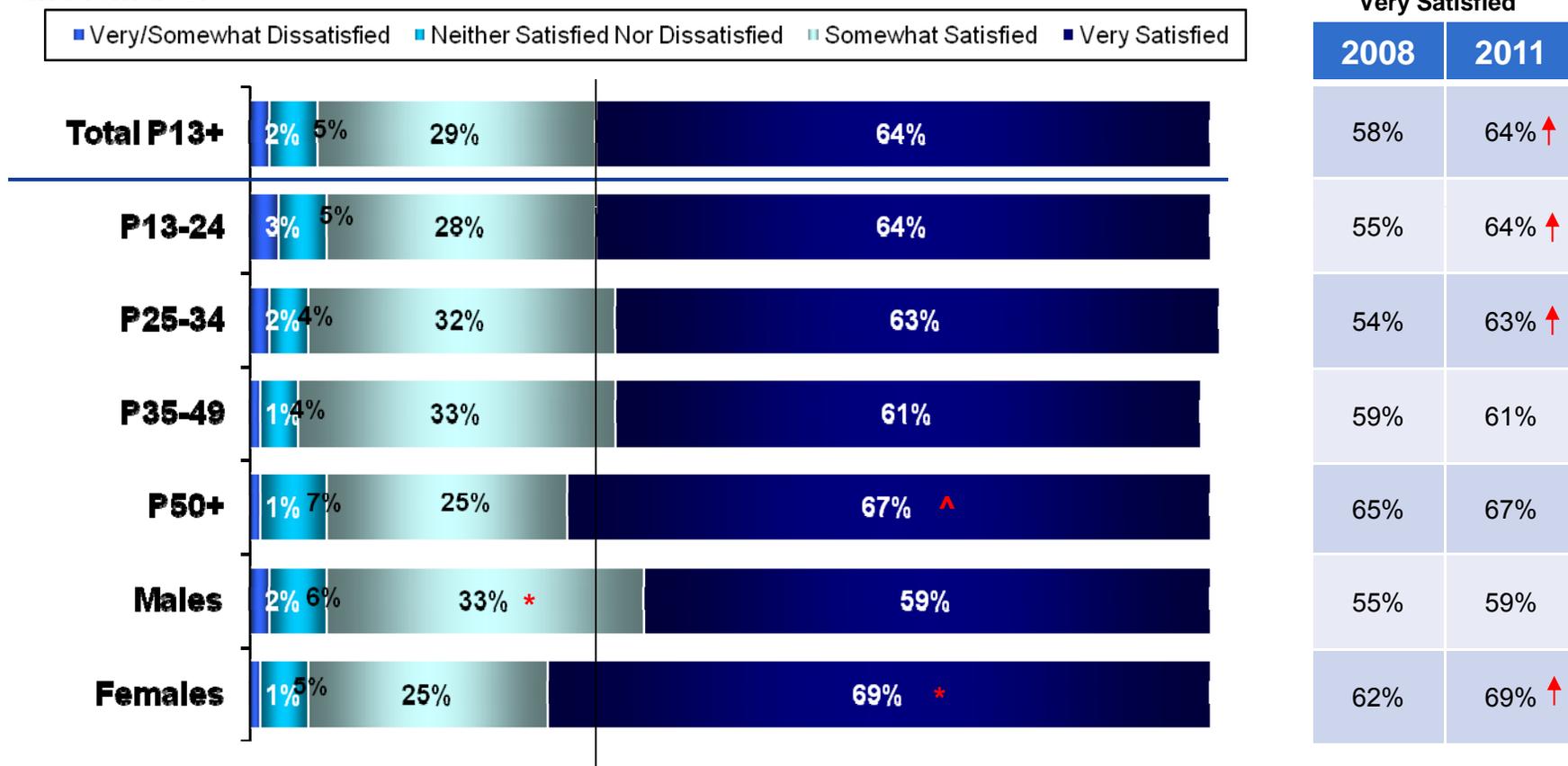
S13_MC_DF: ...prior to today, had you ever heard of or listened to Music Choice Music Channels?



Overall Satisfaction with Music Choice Music Channels



- Overall Music Channel satisfaction is very strong among listeners, with over 90% satisfied on some level and nearly two-thirds very satisfied (top box). Similar to 2008, top-box favorability is greatest among older listeners (50+) and females.
- High-end (top-box) satisfaction has improved since '08, most notably among younger listeners (13-34) and females.



Base: Total past-month Music Channel listeners 13+ 2008 (N=2,500); 2011 (N=2501). Bases for sub-groups vary.

* Denotes a statistically significantly greater difference from Male/Female at the 95% confidence level.

^ Denotes a significantly greater difference at the 95% confidence level from 2 or more Age groups.

Arrow denotes significantly higher/lower than 2008 at the 95% confidence level

B2: Overall, how satisfied are you with Music Choice?

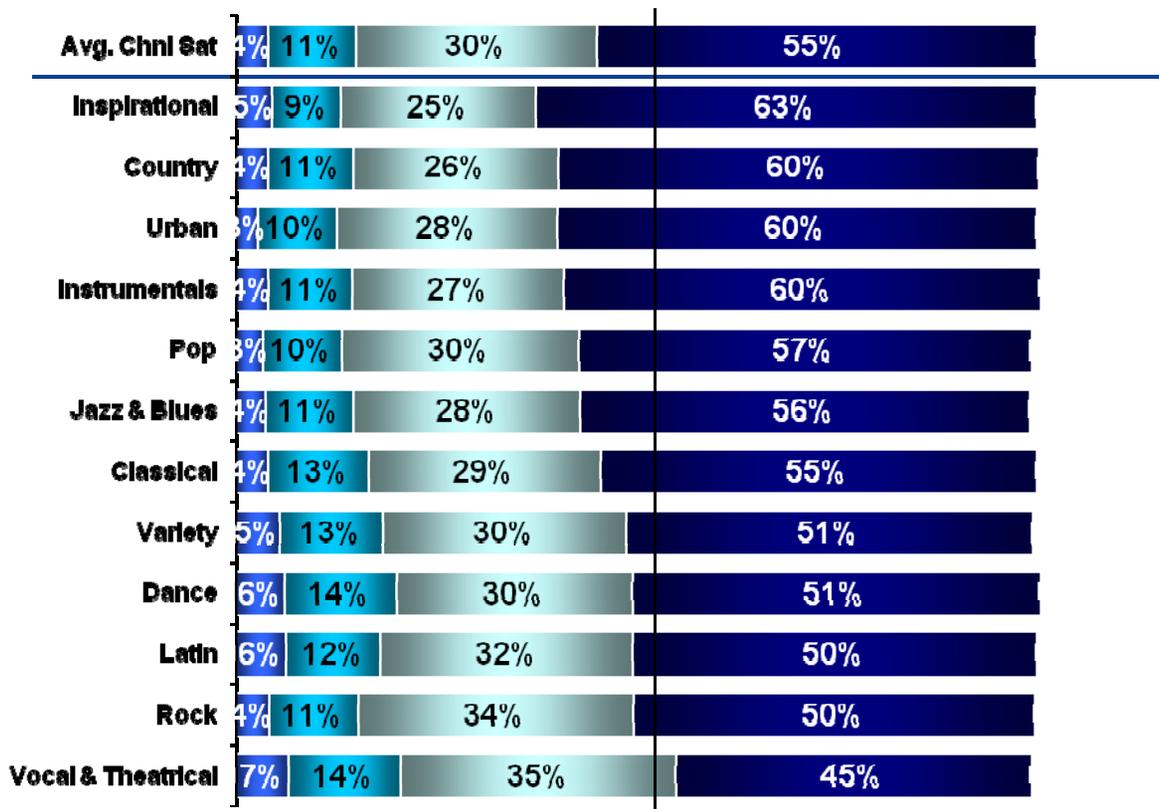


Music Channel Genres Satisfaction



- On average, satisfaction with specific genre groups is also strong (over 80% top 2 box). Listeners of Inspirational, Country, Urban and Instrumental genres ranked those genres more favorably than listeners of other genres.
- All genres recorded higher satisfaction levels than in 2008.

■ Very/Somewhat Dissatisfied
 ■ Neither Satisfied Nor Dissatisfied
 ■ Somewhat Satisfied
 ■ Very Satisfied



Very Satisfied	
2008	2011
44%	55%
50%	63%
48%	60%
45%	60%
52%	60%
45%	57%
47%	56%
48%	55%
43%	51%
40%	51%
36%	50%
43%	50%
45%	45%

Base: Varies by channel (based on past-month Music Channel individual genre listeners)

QB3: Thinking of the Music Choice Music Channels you have listened to in the past month, how satisfied are you with each one?

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Music Channel Satisfaction Index Summary (ranked by Top-Box Satisfaction)



- Not surprisingly, all individual channels are rated favorably by their respective listeners, with some relative differences in satisfying their audiences.
- Urban, inspirational and classic older-skewing music channels such as R&B Soul, Gospel, and Solid Gold Oldies garner highest top satisfaction marks compared to other channels. Meanwhile, Mexicana, Retro Rock, Swingers & Swing, and Stage & Screen top satisfaction marks are not as high in relation to other channels.

Higher Satisfaction

Top Sat. Channels	% Top Box Satisfaction	Index
R&B Soul	65%	119
Gospel	64%	117
Solid Gold Oldies	63%	115
Today's Country	62%	114
Smooth Jazz	62%	114
R&B Classics	62%	114
Throwback Jamz	62%	114
Easy Listening	61%	112
'80s	61%	112
Contemporary Christian	61%	112
Classic Rock	61%	112
Classic Country	60%	110
'70s	60%	110
Hip-Hop/R&B	59%	108

All Channel Avg: 55%

Average Satisfaction

Avg. Sat. Channels	% Top Box Satisfaction	Index
True Country	58%	106
Soundscapes	58%	106
Hit List	58%	106
Hip-Hop Classics	58%	106
Light Classical	56%	103
MC Mix Tape	56%	103
Jazz	55%	101
Pop Hits	55%	101
Dance/Electronica	54%	99
Musica Urbana	54%	99
Pop Latino	54%	99
Rock	54%	99
Classical Masterpieces	53%	97
'90s	53%	97
Rap	53%	97
Sounds of the Seasons	53%	97
Blues	52%	95

Lower Satisfaction

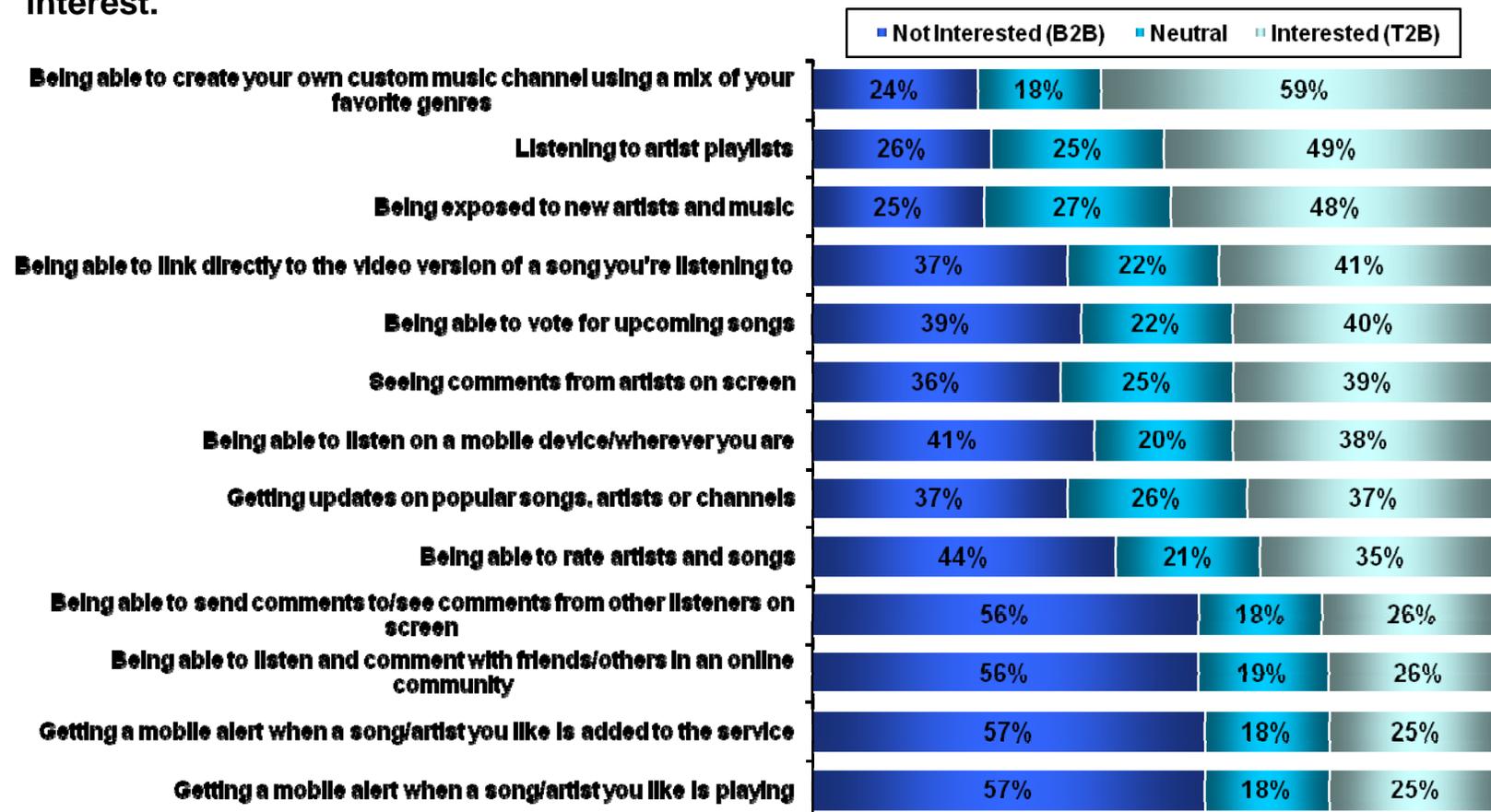
Lower Sat. Channels	% Top Box Satisfaction	Index
Tropicales	51%	93
Kidz Only!	51%	93
Alternative	50%	92
Metal	50%	92
Soft Rock	49%	90
Toddler Tunes	49%	90
Reggae	48%	88
Romances	48%	88
Party Favorites	47%	86
Classic Alternative	47%	86
Adult Alternative	46%	84
Mexicana	45%	82
Retro Rock	45%	82
Singers & Swing	45%	82
Stage & Screen	44%	81

© 2

Base: Varies by channel (based on past-month Music Channel listeners)

QB3: Thinking of the Music Choice Music Channels you have listened to in the past month, how satisfied are you with each one?

- Many Music Channel listeners are interested in creating their own custom music channels (59%), listening to artist playlists (49%) and being exposed to new artists and music through their Music Channel service (48%).
- There's also interest in linking to/voting for videos, seeing artist comments on screen, having mobile access, receiving updates and rating songs, while remaining features generated lower interest.



Base: Total past-month Music Channel listeners 13+ (N=2,501). Bases for sub-groups vary.

QB8B: Following are a list of features that may or may not be available as part of your Music Choice Music Channels service. Please rate your interest in each feature using a scale of 1 to 5, where 1 is "Not very interested" and 5 is "Very interested."



Interest in Music Choice Music Channel Features Summary by Gender & Age



- Not surprisingly, interest in all features is greater among younger listeners (13-34), most particularly 25-34.
- While top-rated features have universal gender appeal, interactive, mobile and social features are generally more attractive to males.

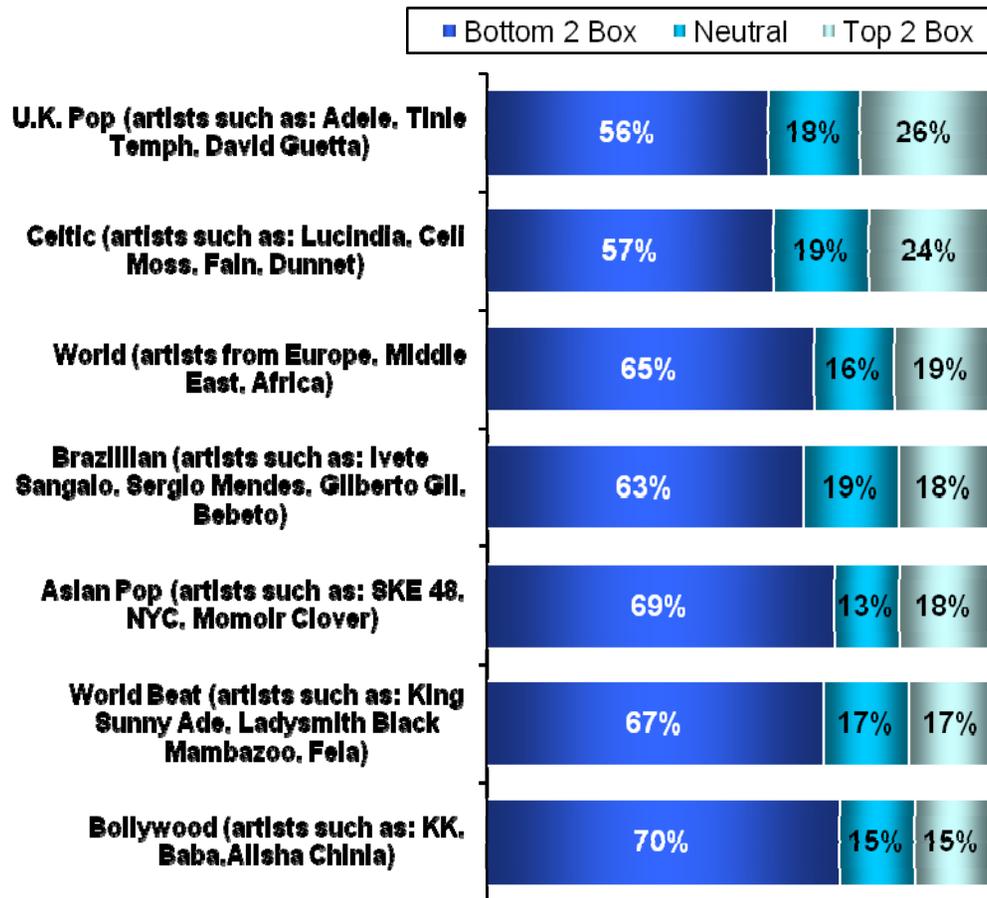
Top 2 Box Interest	Music Choice Music Channel Listeners by Gender & Age					
	Male	Female	13-24	25-34	35-49	50+
Base:	1210	1291	517	546	705	733
Being able to create your own custom music channel using a mix of your favorite genres	59%	58%	61%	73% ^	64%	40%
Listening to artist playlists	49%	49%	56%	62% ^	50%	33%
Being exposed to new artists and music	48%	48%	56% ^	58% ^	47%	37%
Being able to link directly to the video version of a song you're listening to	43%	40%	47%	54% ^	43%	26%
Being able to vote for upcoming songs	42% *	37%	54% ^	52% ^	38%	21%
Seeing comments from artists on screen	40%	37%	46% ^	46% ^	40%	26%
Being able to listen on a mobile device	40% *	36%	47% ^	51% ^	39%	21%
Getting updates on popular songs, artists or channels	37%	36%	41%	45% ^	38%	26%
Being able to rate artists and songs	38% *	32%	44% ^	51% ^	33%	18%
Being able to send comments to/see comments from other listeners on screen	29% *	23%	32% ^	37% ^	26%	13%
Being able to listen and comment with friends/others in an online community	29% *	22%	34% ^	36% ^	26%	12%
Getting a mobile alert when a song/artist you like is added to the service	26%	24%	32% ^	31% ^	27%	13%
Getting a mobile alert when song/artist liked is playing	27% *	23%	30% ^	33% ^	26%	13%

* Denotes a significantly greater difference from Male/Female at the 95% confidence level.

^ Denotes a significantly greater difference at the 95% confidence level from 2 or more Age groups.

QB8B: Following are a list of features that may or may not be available as part of your Music Choice Music Channels service. Please rate your interest in each feature using a scale of 1 to 5, where 1 is "Not very interested" and 5 is "Very interested."

- Potential new genre channels receive a somewhat tepid reaction from listeners, with top-rated potentials (U.K. Pop and Celtic) generating interest from only one-quarter of listeners. Again, strongest appeal is seen within the 13-34 segment, specifically, 25-34, plus males generally rate potential channels more favorably.



Top 2 Box Interest by Age & Gender

	Male	Female	13-24	25-34	35-49	50+
U.K. Pop	26%	25%	33% [^]	35% [^]	27%	12%
Celtic	27% [*]	22%	19%	31% [^]	26%	21%
World	20%	18%	19%	26% [^]	20%	13%
Brazilian	21% [*]	16%	13%	22% [^]	22% [^]	15%
Asian Pop	20% [*]	15%	27% [^]	27% [^]	16%	6%
World Beat	19% [*]	15%	16%	26% [^]	18%	9%
Bollywood	16% [*]	13%	16%	22% [^]	15%	7%

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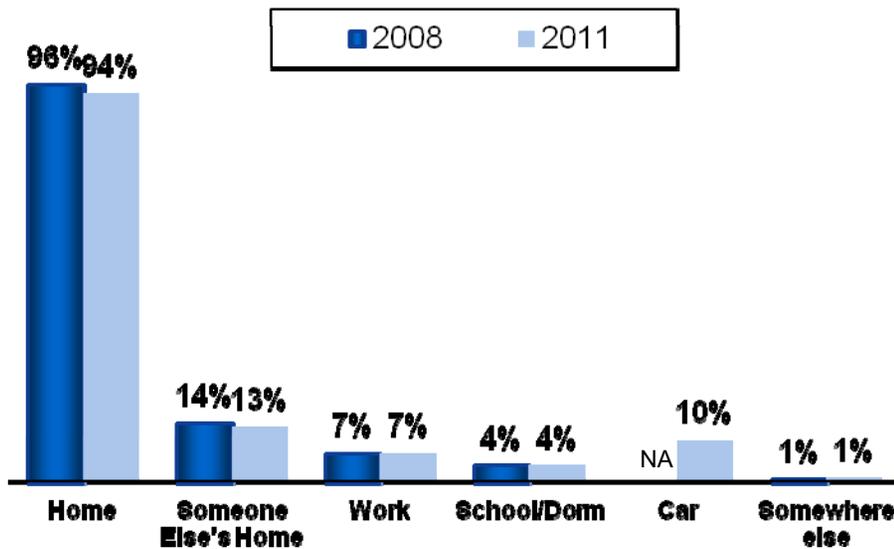
* Denotes a significantly greater difference from Male/Female at the 95% confidence level.

[^] Denotes a significantly greater difference at the 95% confidence level from 2 or more Age groups.

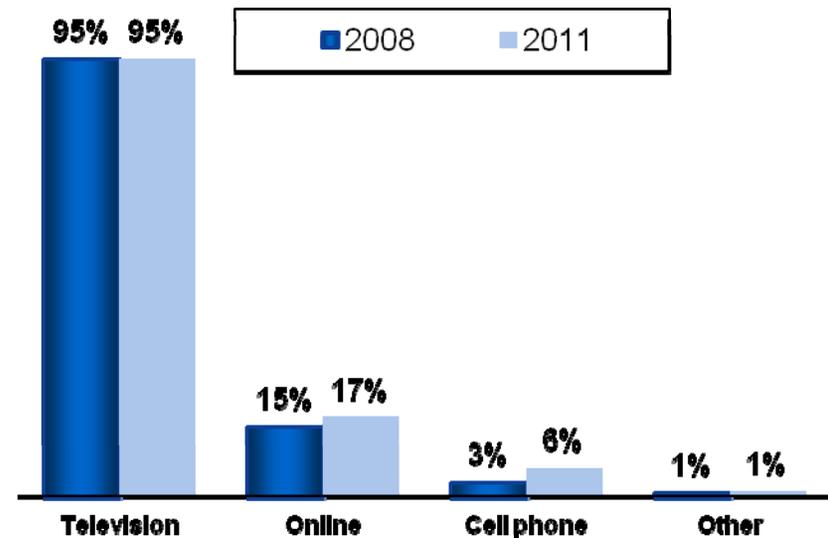
QB3A: On a scale of 1 to 5, where 1 means "Not At All Interested" and 5 means "Very Interested", how interested are you in having the following music channels available to you on Music Choice?

- As was the case in 2008, most Music Channel listening occurs at home, with the most prominent listening device being the television. Only a modest proportion of listeners (17%) claim to listen online.

Where - Places Typically Listen



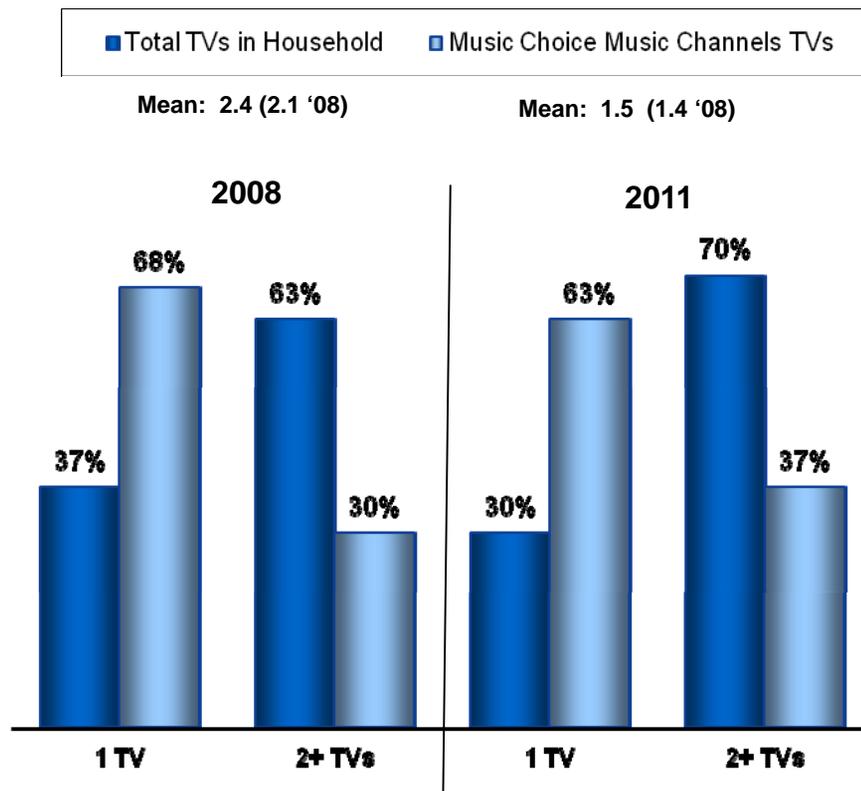
How - Listening Devices



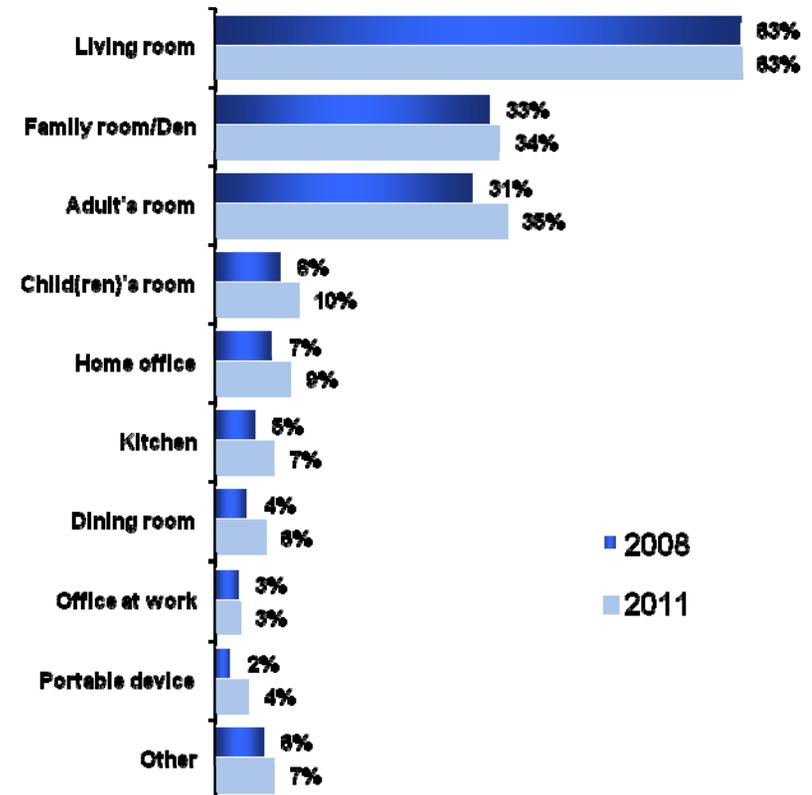
Base: Total past-month Music Channel listeners 13+ (N=2,501).

B4_WAYSLISTEN: Which of the following devices do you use to listen to Music Choice Music Channels?;
 B5_PLACESLISTEN: ...where do you typically listen?

- Listeners are still more likely to listen to Music Channels on one household TV, most often the one in the living room, though there has been a modest uptick in multiple TV usage (both overall and for Music Channels), as well as evidence that Music Channels are being used in more locations throughout the household.



Where TVs Located to Watch Music Choice



Base: Total past-month Music Channel listeners 13+ (N=2,501).

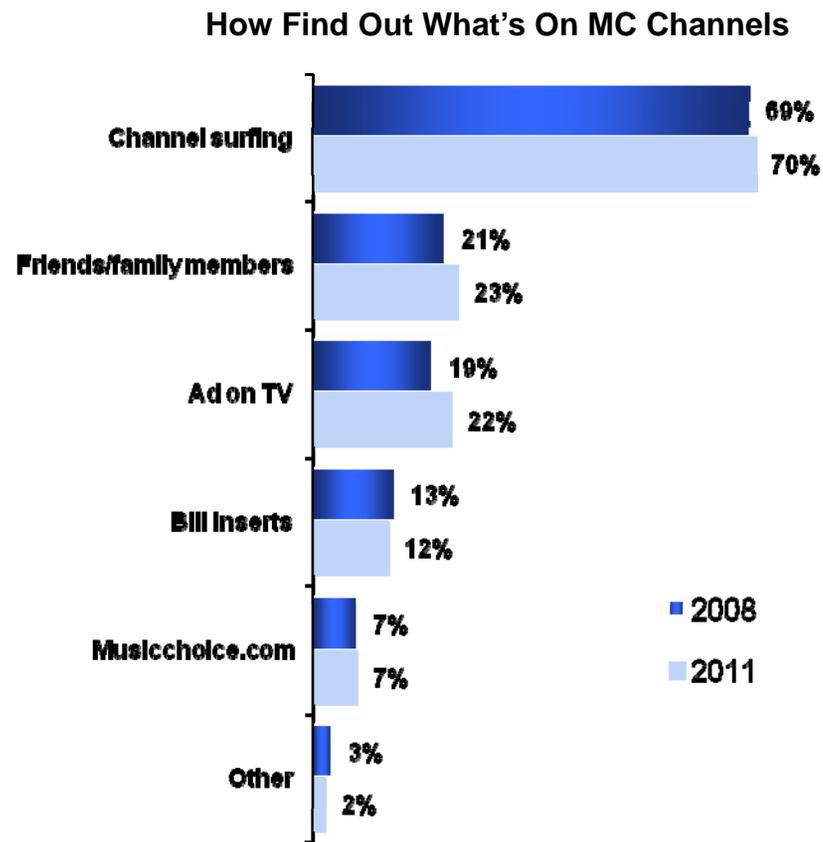
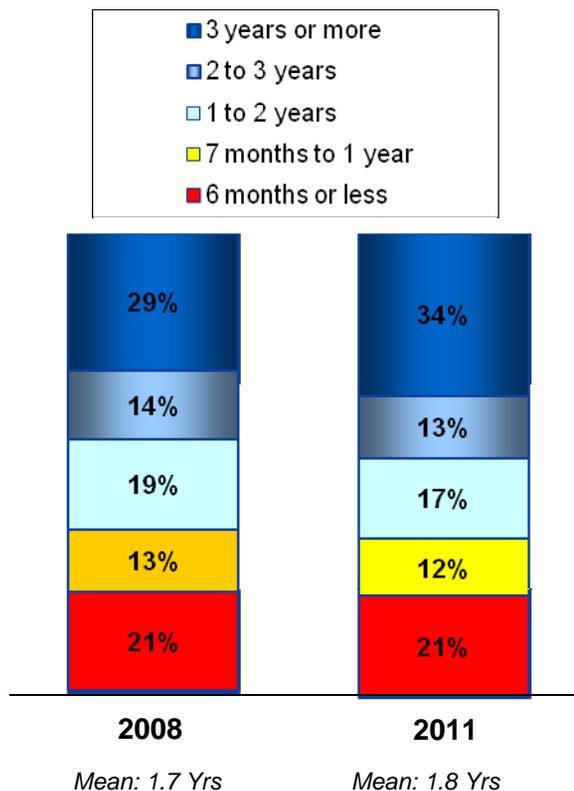
B6_BOXES_CHNLS: Of the televisions with digital cable/fiber optic TV set top boxes you have in your household, how many were used to listen to Music Choice Music Channels in the past 30 days?; B7_TVLOC_CHNLS: Where are each of the televisions located that you use to listen to Music Choice Music Channels?



Music Choice Music Channels – Listening Tenure and Information Sources



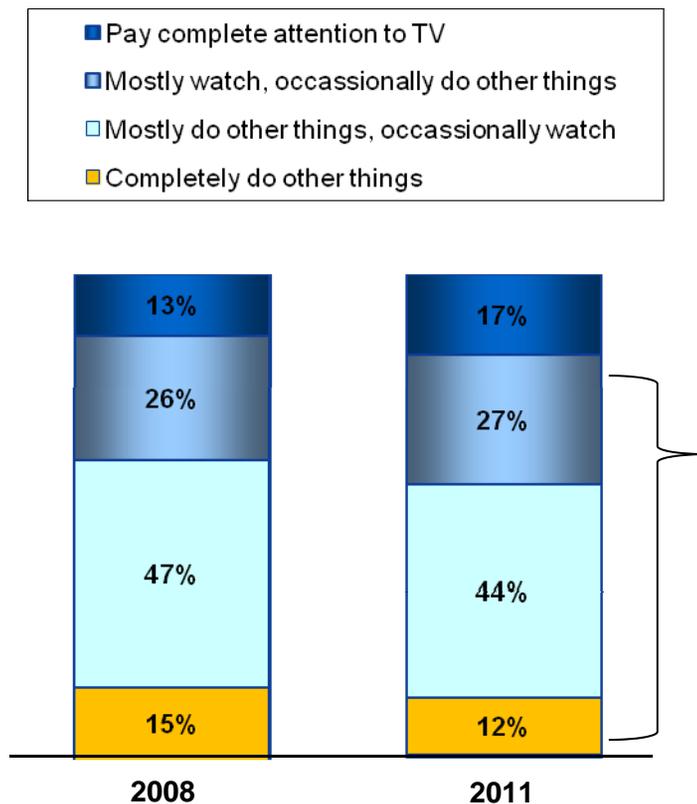
- On average, listeners have been listening to Music Channels for almost 2 years – up slightly versus 2008 – with some increase seen in the 3+ year tenure band.
- Listeners still primarily use channel surfing to find out what’s on Music Channels, though slightly more are getting information via word of mouth or on-air promotions (~20% each).



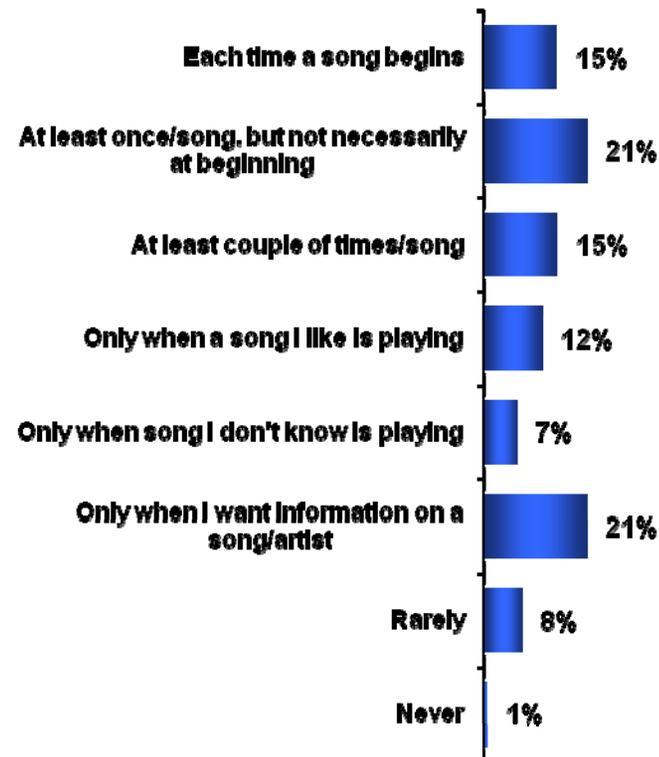
Base: Total past-month Music Channel listeners 13+ (2008 N=2,500, 2011 N=2,501).

B1_TENURE_CHNLS: How long ago did you first start listening to Music Choice Music Channels?; B1A: How do you find out about what's on Music Choice Music Channels?

- When listening to Music Channels, a small, but growing segment pays undivided attention to the TV (just under 20%), with more paying attention at least most of the time than in 2008 (44% vs. 39%). Over half (51%) of listeners look at their TV at least once during a song.



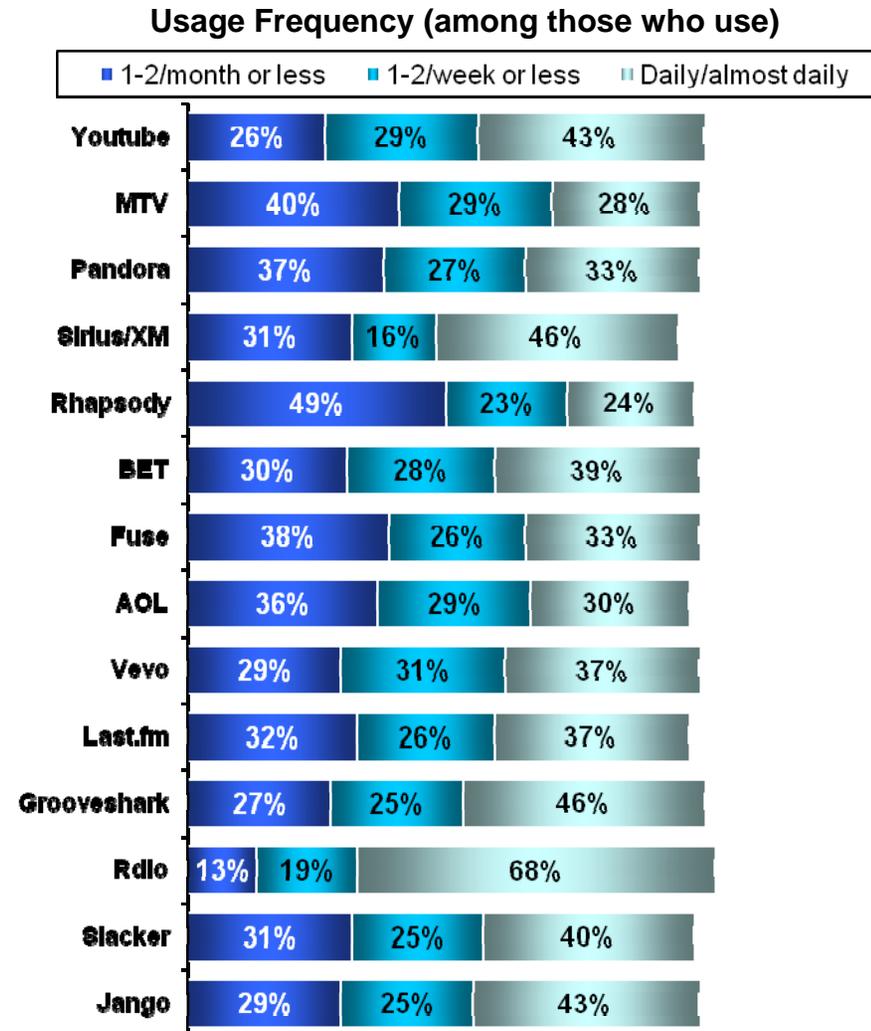
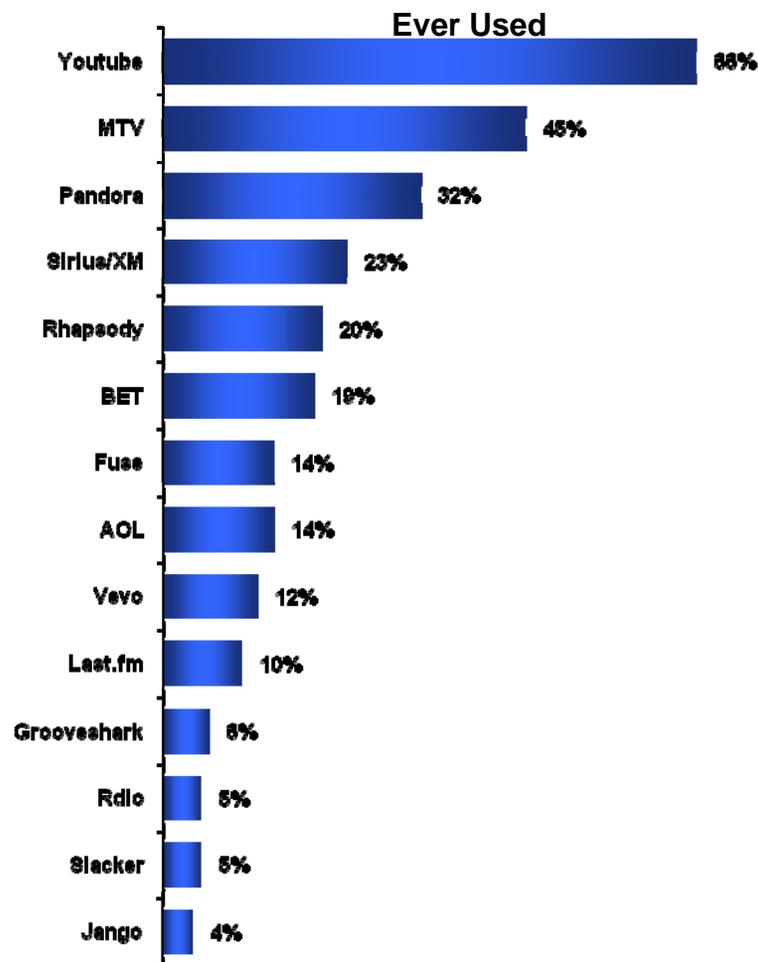
Best Describes How Often Glance at TV (2011)



Base: Total past-month Music Channel listeners 13+ (2008 N=2,500, 2011 N=2,501, 1,412 do not pay complete attention).

B8_CHNLS_DEPTH: Which of the following best describes the way you listen to Music Choice Music Channels? B8A_CHNLS_ENGAGE: And which of the following best describes how often you glance at your TV screen while listening to Music Choice Music Channels.

- A fair proportion of Music Channel listeners also use competitive music services, most notably YouTube (66%), followed by MTV (45%) and Pandora (32%); roughly one-third to half of competitive service users use these services daily/almost daily.



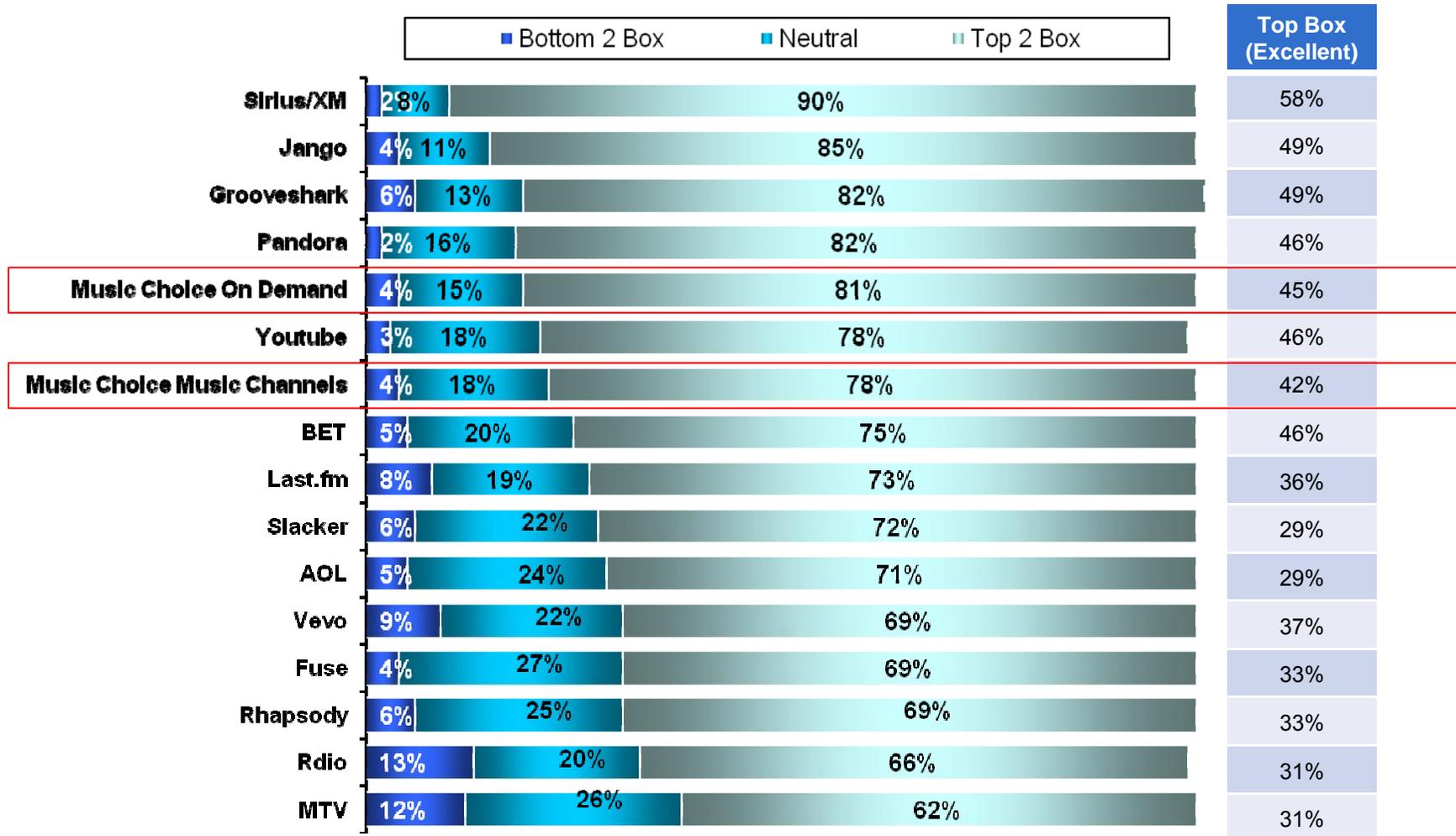
Base: Music Service Usage=2447

(C8) Which of the following services have you ever used to listen to music or watch music videos?

(C9) How often do you go to these services to listen to music?

Competitive Music Service Ratings

- Music Choice Music Channels and On Demand rate well in relation to most competitive services used, ranking within the top half of services tested, behind Sirius/XM and Jango, and similar to Grooveshark, Pandora and YouTube.



Base: Varies by service used

C10: On a scale from 1 to 5, where 1 means "Poor" and 5 means "Excellent," how would you rate each of the following music services?

Music Channel Audience Measurement

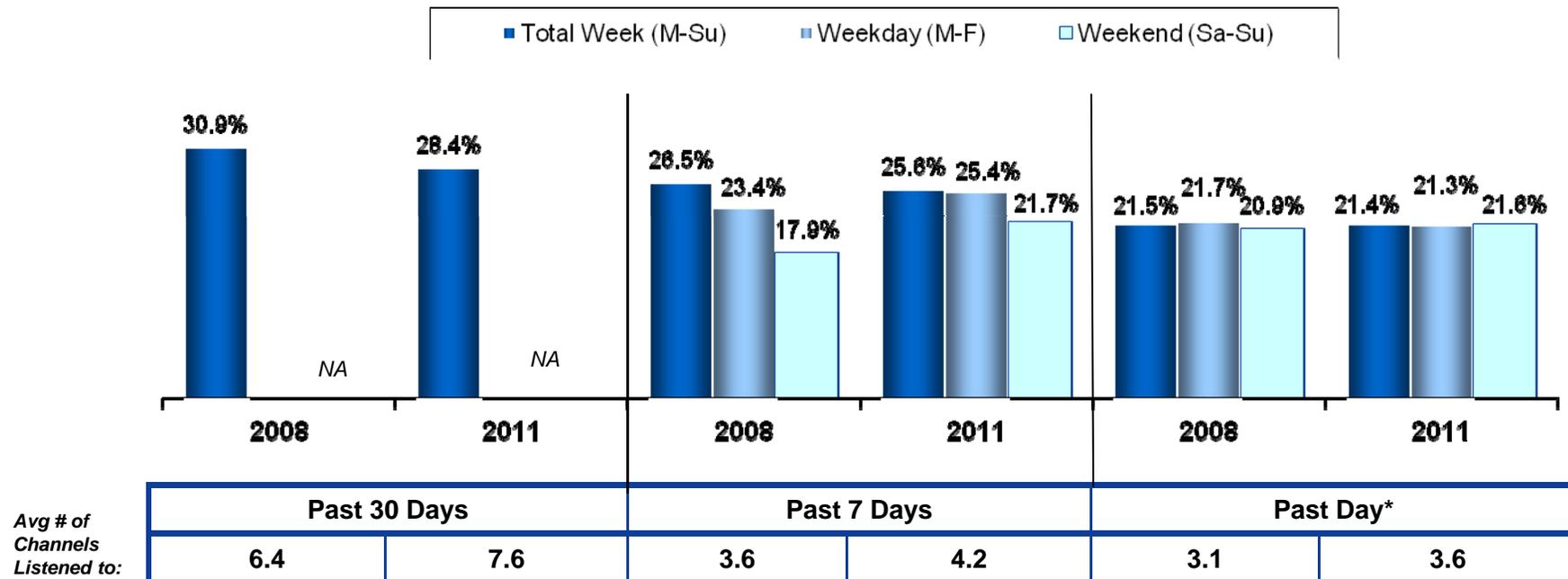


Music Channel Unique (Cume) Audiences



* Results based to Total Digital Cable Population.

- Overall, 28.4% of the digital cable P13+ universe listens to Music Channels in a given month (past-month Cume), down modestly versus 2008 (30.9%).
- 9 out of 10 monthly listeners (90%) listen weekly and 8 out of 10 weekly listeners (83%) listen daily, with listening frequency up from 2008 (86% and 81%, respectively).
- On an individual day basis, weekday and weekend reach are comparable; roughly 1 in 5 digital cable P13+ listen daily.
- Listeners have broadened their Music Channel usage, with increases in average channels listened to monthly, weekly and daily.



*Past Day based on 6a-6a Any Day M-Su.

Base: Total past-month Music Channel listeners 13+ (2008 N=2,500 / 103 mil dig. Pop.; 2011 N=2501 / 123 mil. Dig. Pop.).

QA1: Which of the following MC channels have you listened to for at least 5 minutes in the **past 30 days**?; QA2: Which of the following MC channels have you listened to for at least 5 minutes in the **past 7 days**?; QA3: Which days of the past week did you listen to each of these channels?

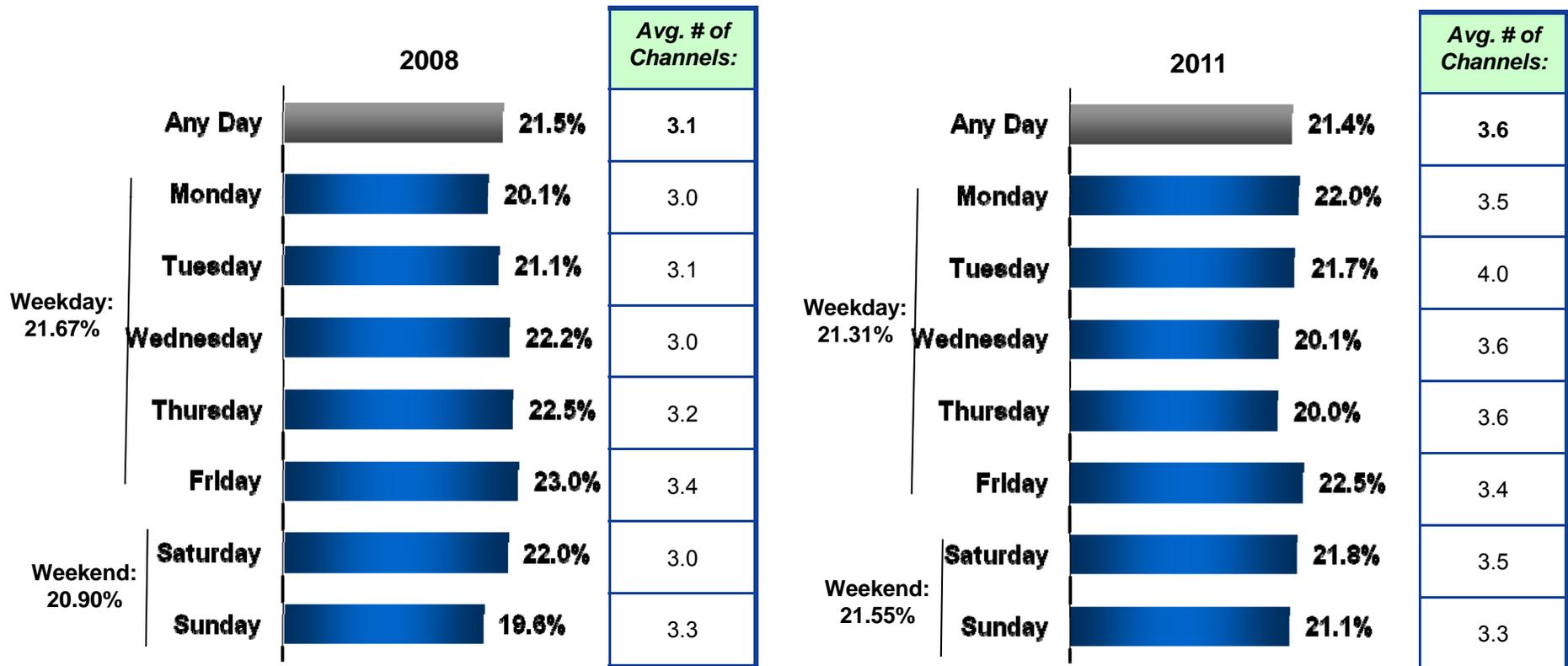


Music Channel Cume Audiences by Day



* Results based to Total Digital Cable Population.

- 2011 unique audiences are fairly consistent by day, settling around the 21% level.
- On average, Music Channel listeners now listen to nearly 4 channels per day, up from 3 channels in 2008.



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*Cume based on 6a-6a listening

Base: Total past-month Music Channel listeners 13+: 2008 (n=2,500 & 103 mil dig pop), 2011 (n=2,501 & 123 mil pop)

Z6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channels you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period.

Z01_DAY_LISTEN: Which days of the past week did you listen to each of these channels?



Top Cume Music Channels (Persons 13+)



* Results based to Total Digital Cable Population.

- Rock, Classic Rock, 80s and Hip-Hop/R&B are top 5-ranked channels for monthly, weekly and average day unique audiences, while 90s, Pop Hits, and Hit List consistently rank in the top 10.

Rank	Past 30 Days	CUME Rtg
1	Rock	9.83
2	Classic Rock	9.66
3	'80s	9.31
4	Hip-Hop/R&B	8.45
5	'90s	8.24
6	Pop Hits	8.12
7	Hit List	7.69
7	R&B Classics	6.80
9	'70s	6.75
10	Soft Rock	6.45

Rank	Past 7 Days	CUME Rtg
1	Rock	5.52
2	Classic Rock	5.11
3	Hip-Hop/R&B	4.99
4	'80s	4.74
5	Hit List	4.24
6	Pop Hits	4.21
7	'90s	3.95
8	Today's Country	3.55
9	'70s	3.49
10	Rap	3.45

Rank	Past Day*	CUME Rtg
1	Rock	4.11
2	Hip-Hop/R&B	3.97
3	Classic Rock	3.45
4	'80s	3.42
5	Pop Hits	3.26
6	Hit List	3.20
7	'90s	2.82
8	Rap	2.79
9	R&B Soul	2.53
10	R&B Classics	2.50

*Past-day based on M-Su 6a-6a listening (any day)

Base: Total past-month Music Channel listeners 13+: 2008 (n=2,500 & 103 mil dig pop), 2011 (n=2,501 & 123 mil pop)

QA2: Which of the following channels have you listened to for at least 5 minutes in the **past 7 days**?

Q6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channels) you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period

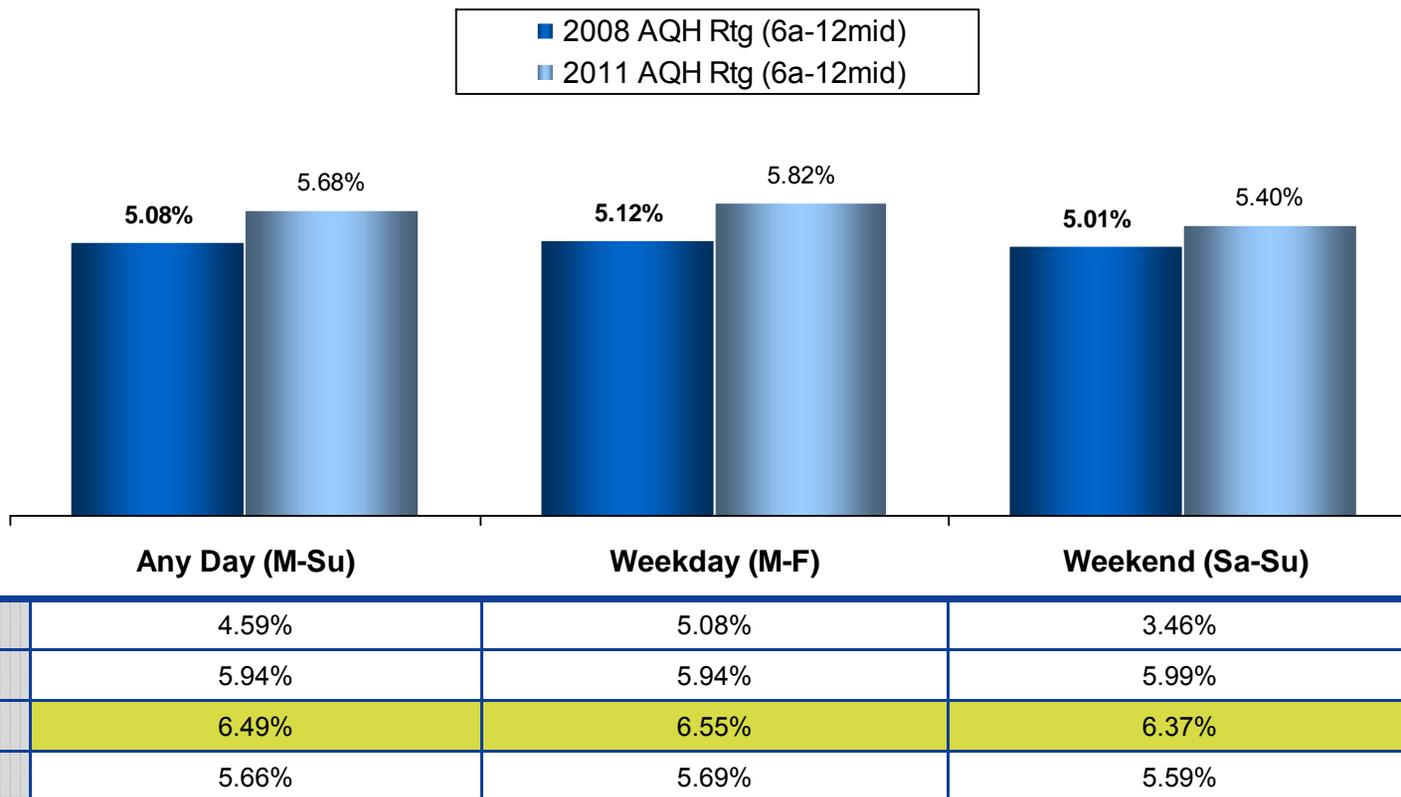


Music Channel AQH* Audiences



* Results based to Total Digital Cable Population.

- AQH listenership (6a-12m) for Music Channels increased to around 6% of the digital population, with gains overall and in virtually all dayparts from 2008.
- Listening is slightly greater during the week than on weekends; listening peaks during the 3-7p daypart, followed by the 10a-3p daypart, and is lowest during morning hours (6a-10a daypart) regardless of the day.



AQH based on M-Su 6a-12m.

Base: Total past-month Music Channel listeners 13+: 2008 (n=2,500 & 103 mil dig pop), 2011 (n=2,501 & 123 mil pop)

Q6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channels you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period



Top AQH* Music Channels (Persons 13+)

* Results based to Total Digital Cable Population.



- Hip-Hop/R&B, Rock, Classic Rock and 80s rank as top 5 AQH channels as well as top 5 Cume channels, and with R&B Classics and Hit List, rank as top 10 AQH channels during the week and on weekends.
- Rap, Metal and Pop Hits are top 10 AQH channels overall and during the week, while Today's Country ranks as a top 10 AQH channel overall and during weekends.
- Top weekend AQH channels include some older-skewing channels (Solid-Oldies, Easy Listening).

Rank	Any Day (M-Su)	AQH Rtg	AQH Share
1	Hip-Hop/R&B	0.36	1.26
2	Rock	0.31	1.10
3	Classic Rock	0.26	0.93
4	Rap	0.25	0.88
5	'80s	0.25	0.87
6	Hit List	0.24	0.86
7	Metal	0.20	0.71
8	Today's Country	0.19	0.68
9	R&B Classics	0.19	0.67
10	Pop Hits	0.19	0.67

Rank	Weekday (M-F)	AQH Rtg	AQH Share
1	Hip-Hop/R&B	0.39	1.37
2	Rock	0.33	1.17
3	Rap	0.29	1.02
4	Hit List	0.26	0.91
5	'80s	0.24	0.86
6	Classic Rock	0.24	0.85
7	Metal	0.22	0.76
8	Pop Hits	0.21	0.74
9	R&B Classics	0.20	0.69
10	R&B Soul	0.18	0.65

Rank	Weekend (Sa-Su)	AQH Rtg	AQH Share
1	Classic Rock	0.31	1.11
2	Hip-Hop/R&B	0.28	0.99
3	Today's Country	0.27	0.97
4	Rock	0.25	0.89
5	'80s	0.25	0.88
6	Hit List	0.21	0.73
7	R&B Classics	0.18	0.62
8	R&B Soul	0.17	0.61
9	Solid Gold Oldies	0.17	0.61
10	Easy Listening	0.17	0.60

*AQH based on M-Su 6a-12m

Base: Total past-month Music Channel listeners 13+: 2008 (n=2,500 & 103 mil dig pop), 2011 (n=2,501 & 123 mil pop)

Q6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channels) you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period

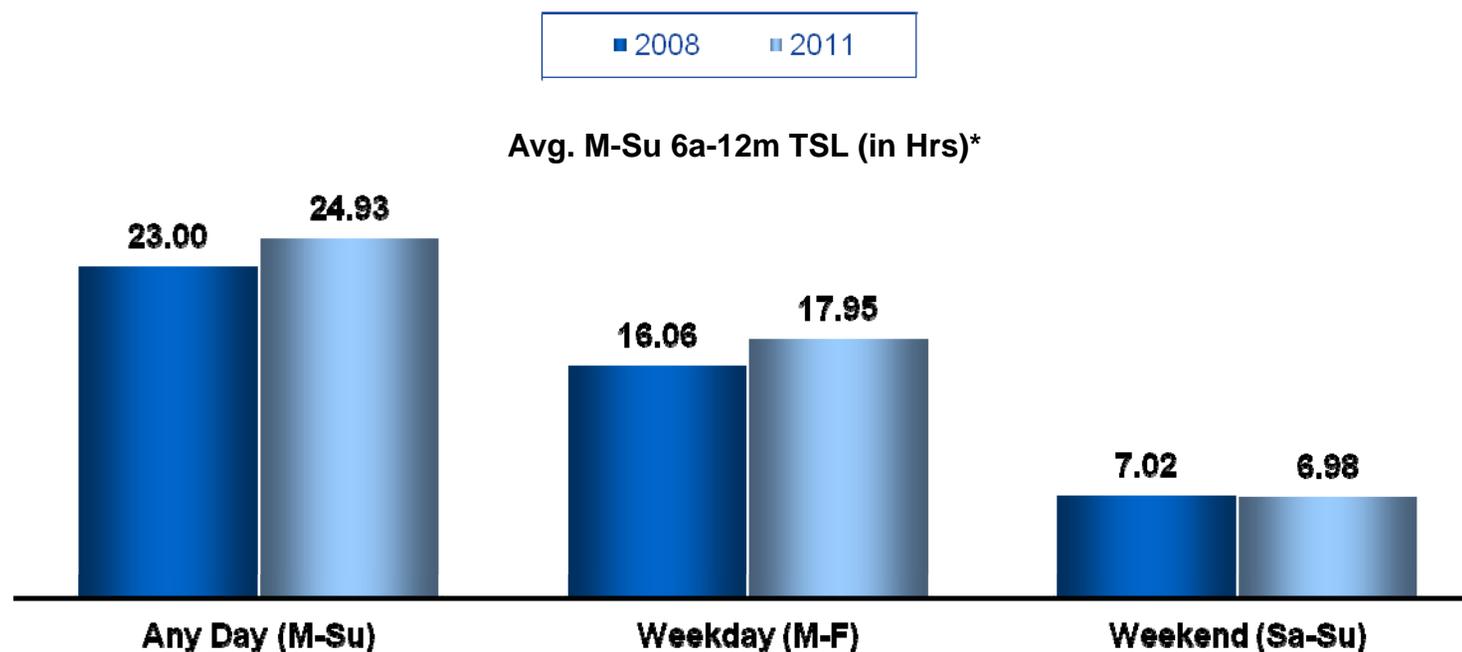


Music Channel Time Spent Listening* (Persons 13+)



* Results based to Total Digital Cable Population.

- Overall, listeners listen to Music Channels a little over 3.5 hours per day, or roughly 25 hours weekly, up modestly versus 23 hours weekly in 2008.
- Time spent listening is up slightly during the week (18 hours), and consistent on weekends (7 hours).



*TSL based on M-Su 6a-12m

Base: Total past-month Music Channel listeners 13+: 2008 (n=2,500 & 103 mil dig pop), 2011 (n=2,501 & 123 mil pop)

Q6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channels) you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period



Top TSL* Music Channels (Persons 13+)



* Results based to Total Digital Cable Population.

- Niche channels, such as Pop Latino, Soundscapes, Metal and Musica Urbana record the greatest overall TSL among listeners; other top TSL channels include a mix of niche and mainstream channels, such as Rap, Hip-Hop/R&B, Dance, Mexicana, Smooth Jazz and Sounds-Seasons.
- Latin (Pop Latino and Musica Urbana) and Variety (Soundscapes, Sounds-Season) channels rank highest in TSL during the week, while Inspirational (Contemporary Christian and Gospel) and Country (Today's Country, Classic Country) channels are tops in TSL on weekends.

Rank	Any Day (M-Su)	TSL
1	Pop Latino	9.65
2	Soundscapes	8.87
3	Metal	8.71
4	Musica Urbana	8.57
5	Rap	8.44
6	Hip-Hop/R&B	8.35
7	Dance/Electronica	8.16
8	Mexicana	8.05
9	Smooth Jazz	7.99
10	Sounds of the Seasons	7.99

Rank	Weekday (M-F)	TSL
1	Pop Latino	7.80
2	Musica Urbana	6.99
3	Soundscapes	6.55
4	Sounds of the Seasons	6.53
5	Rap	6.46
6	Metal	6.32
7	Hip-Hop/R&B	6.02
8	Mexicana	5.99
9	Romances	5.87
10	Dance/Electronica	5.87

Rank	Weekend (Sa-Su)	TSL
1	Contemporary Christian	2.75
2	Gospel	2.73
3	Today's Country	2.66
4	Classic Country	2.61
5	Blues	2.51
6	Smooth Jazz	2.49
7	Soundscapes	2.45
8	Mexicana	2.42
9	Solid Gold Oldies	2.38
10	Metal	2.36

*TSL based on M-Su 6a-12mid

Base: Total past-month Music Channel listeners 13+: 2008 (n=2,500 & 103 mil dig pop), 2011 (n=2,501 & 123 mil pop)

Q6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channels) you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period

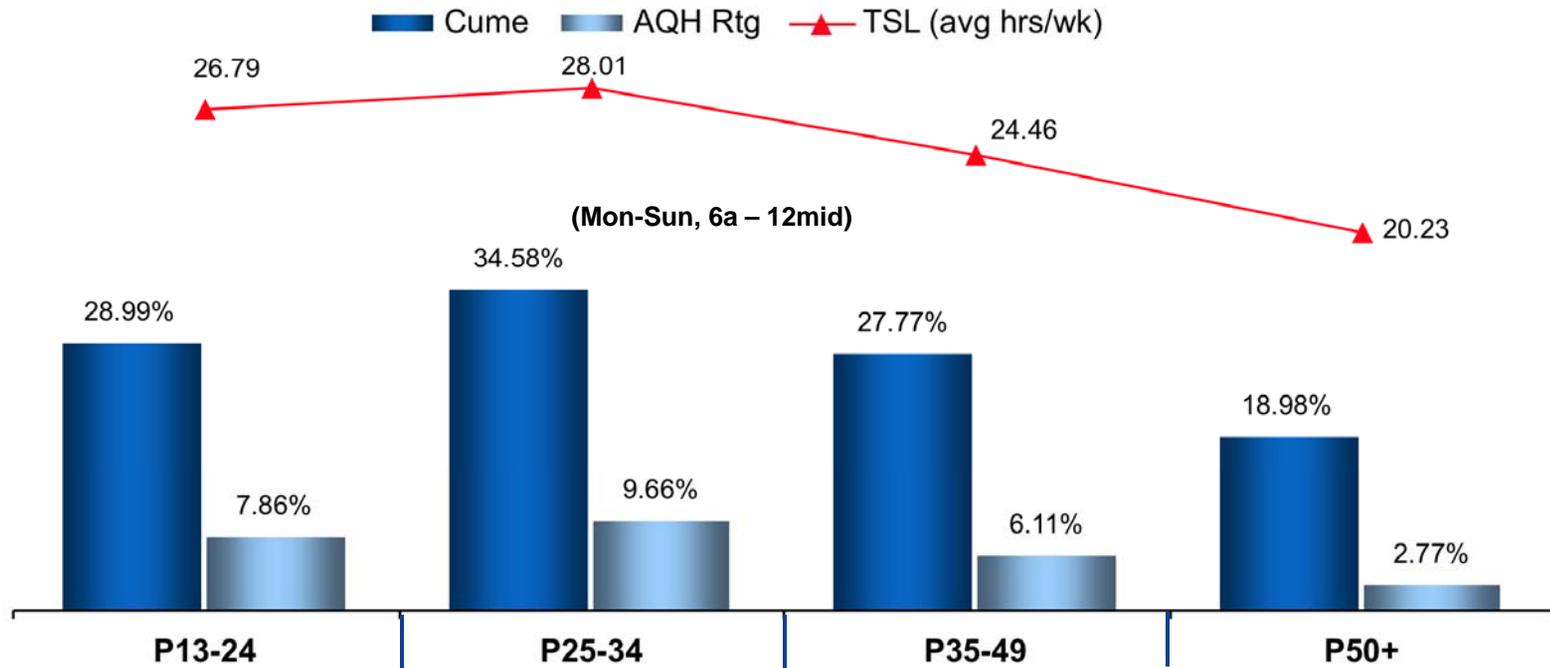


Past-Day Music Channel Listenership Summary - by Age



* Results based to Total Digital Cable Population.

- Depth of Music Channel listenership tends to be inversely correlated with age, with younger cohorts (notably 13-34) more likely to listen and listen for longer periods of time.
- Peak listening periods are M-Su 3p-7p for all except older listeners (50+), who listen earlier in the day (10a-3p) across the board, and 25-34 year olds, who listen earlier on weekends (10a-3p).



Daypart AQH	P13-24			P25-34			P35-49			P50+		
	Mon-Sun	Mon-Fri	Sat-Sun									
6a-10a	7.03	7.45	6.05	8.42	9.32	6.27	4.31	4.73	3.43	2.07	2.20	1.85
10a-3p	7.89	7.99	7.58	9.90	9.49	11.44	6.06	5.93	6.47	3.36	3.34	3.46
3p-7p	9.37	9.41	9.17	10.54	10.73	10.52	7.34	7.13	7.99	2.92	2.74	3.18
7p-mid	7.29	7.31	7.32	9.71	9.54	10.43	6.60	6.62	6.57	2.60	2.51	2.75

Base: (2008: 13-24 (n=713), 25-34 (n=505), 35-49 (n=713), 50+ (n=569)); (2011: 13-24 (n=518), 25-34 (n=543), 35-49 (n=707), 50+ (n=734))

QA2: Which of the following channels have you listened to for at least 5 minutes in the past 7 days?

Q6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channel(s) you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period



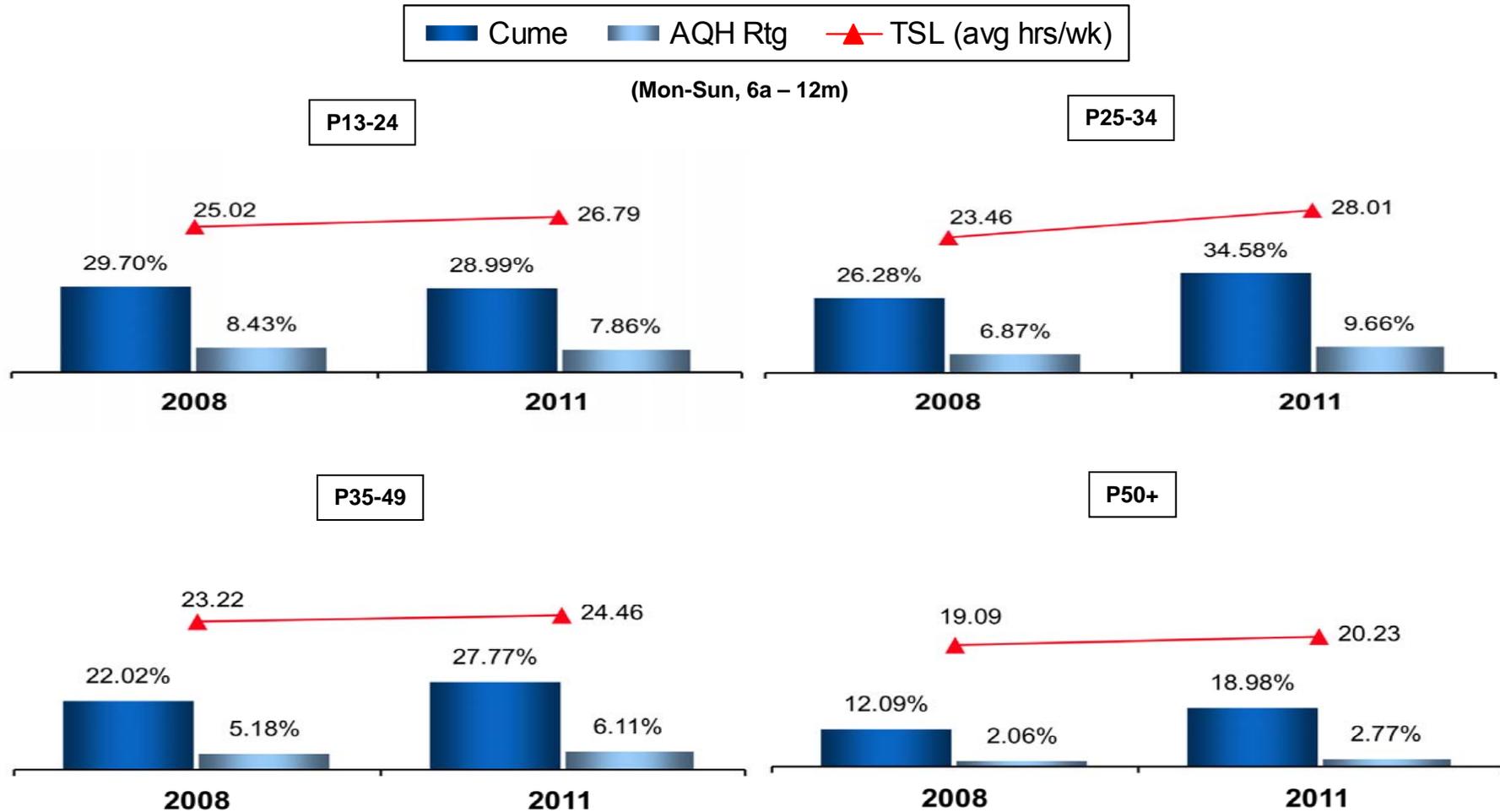
Past-Day Music Channel Listenership Summary

- by Age



* Results based to Total Digital Cable Population.

- Weekly time spent listening to Music Channels has grown across all age groups.
- While 13-24 Cume and AQH ratings are essentially even with '08 levels, there are increases in Cume and AQH ratings across all other groups, most notably among 25-34 year olds.



Base: (2008 :13-24 (n=713), 25-34 (n=505), 35-49 (n=713), 50+ (n=569)); (2011: 13-24 (n=518), 25-34 (n=543), 35-49 (n=707), 50+ (n=734))

Q2: Which of the following channels have you listened to for at least 5 minutes in the past 7 days?
 Q6-Daily: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channels) you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period



Top AQH* Music Channels (M-Su 6a-12m) – by Age



* Results based to Total Digital Cable Population.

- Younger listeners (13-34) are more likely to listen to Hip-Hop/R&B, Rock, Rap and Hit List channels during the M-Su 6a-12m daypart, followed by Metal and Pop Hits.
- Middle-aged listeners (35-49) tend to listen to decades music ('80s, '70s, and '90s), as well as Classic Rock/Rock, Hip-Hop/R&B and R&B Classics.
- Among older listeners (50+), Classic Rock and lighter, classic sounds (Solid Gold Oldies, Easy Listening, Smooth Jazz) rank highest.

Top AQH* Channels by Age (M-Su 6a-12m)

Rank	P13-24		P25-34		P35-49		P50+	
	Channel	AQH	Channel	AQH	Channel	AQH	Channel	AQH
1	Hip-Hop/R&B	0.93	Rock	0.69	'80s	0.48	Classic Rock	0.25
2	Rap	0.68	Hip-Hop/R&B	0.63	Classic Rock	0.32	Solid Gold Oldies	0.21
3	Hit List	0.64	Metal	0.56	'70s	0.28	Easy Listening	0.17
4	Rock	0.58	Rap	0.42	Hip-Hop/R&B	0.27	Smooth Jazz	0.17
5	Pop Hits	0.36	Hit List	0.41	R&B Classics	0.26	Classic Country	0.15
6	Metal	0.30	Pop Hits	0.40	Rock	0.24	'70s	0.14
7	Hip-Hop Classics	0.28	'80s	0.38	Today's Country	0.23	Soundscapes	0.14
8	Today's Country	0.28	Alternative	0.36	R&B Soul	0.22	R&B Classics	0.13
9	Alternative	0.24	'90s	0.33	'90s	0.21	Today's Country	0.12
10	Dance/Electronica	0.23	Dance/Electronica	0.33	Hip-Hop Classics	0.18	R&B Soul	0.11

*AQH based on M-Su, 6a-12m.

Base: 13-24 (n=518), 25-34 (n=543), 35-49 (n=707), 50+ (n=734)

Q6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channel(s) you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period



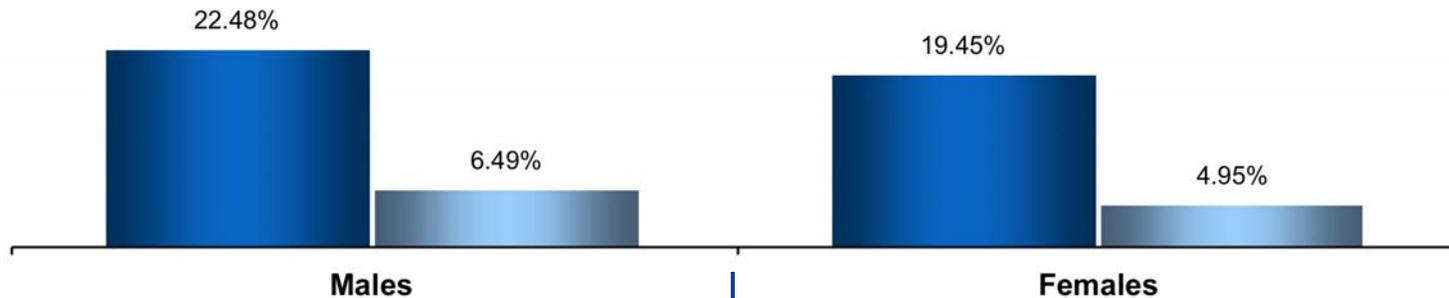
Past-Day Music Channel Listenership Summary

-- by Gender



* Results based to Total Digital Cable Population.

- Past-day listening is greater among males than females in all dayparts, plus males are listening over 2 hours more than females over the course of a week.



Daypart AQH	Males			Females		
	Total Week	Weekday	Weekend	Total Week	Weekday	Weekend
6a-10a	5.50	6.02	4.39	3.75	4.24	2.79
10a-3p	6.50	6.60	6.24	5.44	5.31	5.79
3p-7p	7.14	7.18	6.96	5.89	5.94	5.90
7p-mid	6.74	6.78	6.65	4.67	4.68	4.62

QA2: Which of the following channels have you listened to for at least 5 minutes in the **past 7 days**? Base: (2008: Male (n=1,202), Female (n=1,298)); (2011: Male (n=1,215), Female (n=1,286))

Q6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channels you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period

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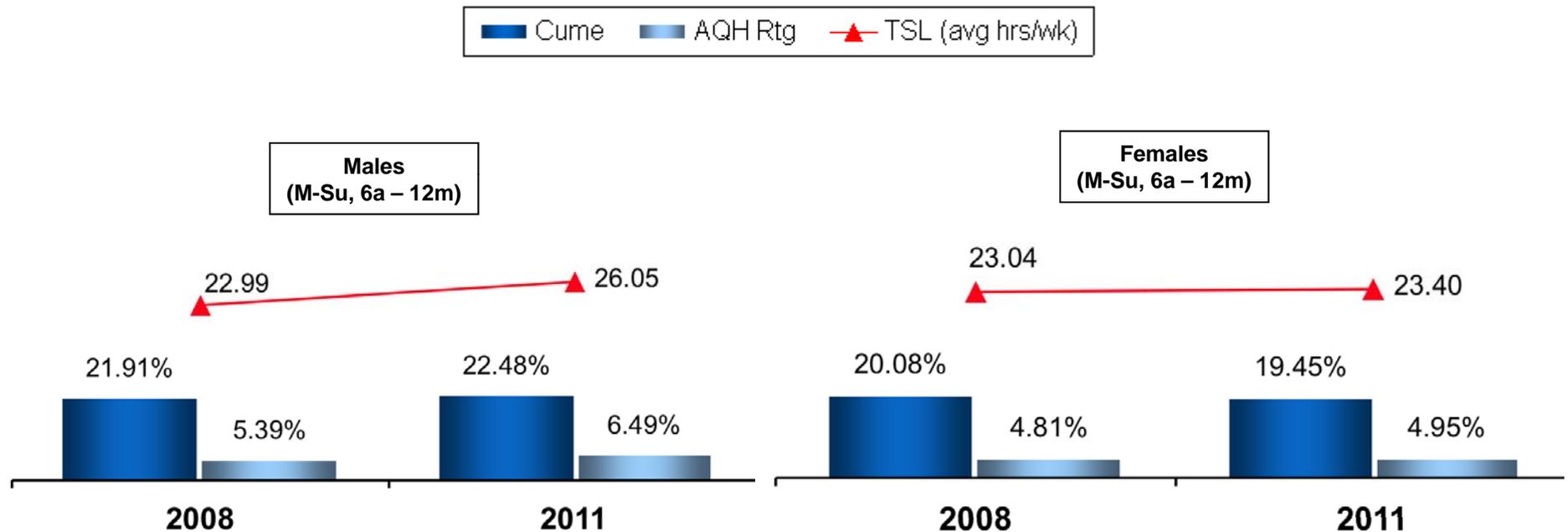


Past-Day Music Channel Listenership Summary -- by Gender



* Results based to Total Digital Cable Population.

- Males appear to be driving the growth in Music Channel ratings and listenership. The biggest shift is seen in TSL, with males listening 3 hours more than they did in 2008, while females post virtually stable ratings and time spent listening when compared to 2008.



Base: (2008: Male (n=1,202), Female (n=1,298)); (2011: Male (n=1,215), Female (n=1,286))

QA2: Which of the following channels have you listened to for at least 5 minutes in the **past 7 days**?

Q6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channels) you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period



Past Day AQH* Music Channel Listenership by Gender – Top Channels



* Results based to Total Digital Cable Population.

- While Males and Females have a similar mix of channels within their top 10, including higher preferences for Hip-Hop/R&B and Rock, somewhat different priorities emerge. Males have a greater preference for Rap, Classic Rock and Metal, while females favor Hit List, Today’s Country and Pop Hits channels.

Top AQH* Channels by Gender (M-Su 6a-12m)

Rank	Males		Females	
	Channel	Share	Channel	Share
1	Hip-Hop/R&B	0.40	Hit List	0.32
2	Rock	0.40	Hip-Hop/R&B	0.31
3	Rap	0.38	Today’s Country	0.24
4	Classic Rock	0.38	Rock	0.23
5	Metal	0.33	Pop Hits	0.23
6	'80s	0.29	'80s	0.21
7	Hip-Hop Classics	0.20	R&B Classics	0.19
8	R&B Classics	0.19	R&B Soul	0.19
9	'70s	0.17	Classic Rock	0.16
10	'90s	0.17	'90s	0.16

*AQH based on M-Su, 6a-12m.

Base: Males (n=1,215), Females (n=1,286)

Q6_Diary: You said you were listening to Music Choice Music Channels during the time periods below. Please indicate the specific Music Choice Music Channels) you listened to for at least 5 of the 15 minutes in each time period. Please select no more than 3 channels for each time period



Music Channel Co-Listening

* Results based to Total Digital Cable Population.

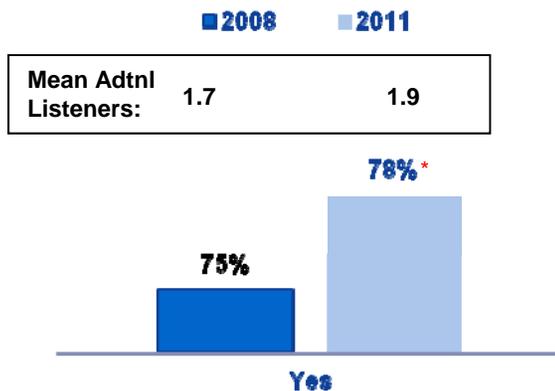


- On average, nearly 8 in 10 listeners (78%) listen with others in a week, essentially even with 2008 co-viewing (75%), while 3 out of 4 listeners (72%) listen with others at some point during a day (up from 63% in 2008).
- The typical listener listens to Music Channels with roughly 2 others in an average week (1.4 others in an average day); co-listeners are fairly evenly mixed by gender and age, and more likely to reside in the same household.

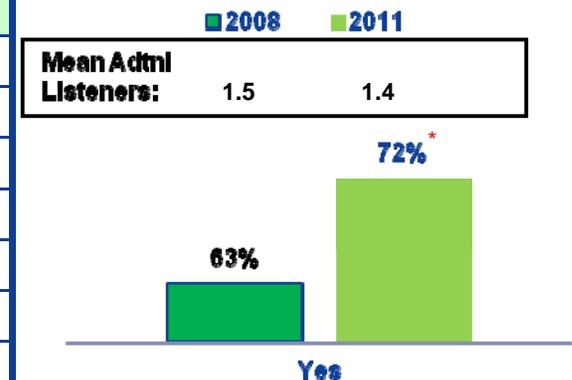
Composition of Additional Listeners

	Past 7 Day Adntl Listeners	Past Day Adntl Listeners
Gender		
Male	51%	52%
Female	49%	48%
Age		
<13	19%	19%
13-17	12%	12%
18-34	34%	34%
35-54	23%	23%
55+	12%	11%
Member of Household		
Yes	68%	76%

Others Listened with You in Past 7 Days?



Others Listened with You in Past Day?



* Denotes a significantly greater difference from 2008 at the 95% confidence level.

Base: 2008 Total Persons 13+ (n=2,500); Past 7 Day Listeners N=2,242; Past Day Listeners N=1,737.

2011 Total Persons 13+ (n=2,501); Past 7 Day Listeners N=2,254; Past Day Listeners N=2,333.

QA4: Additional listeners in past week – total, age, gender, member of household?

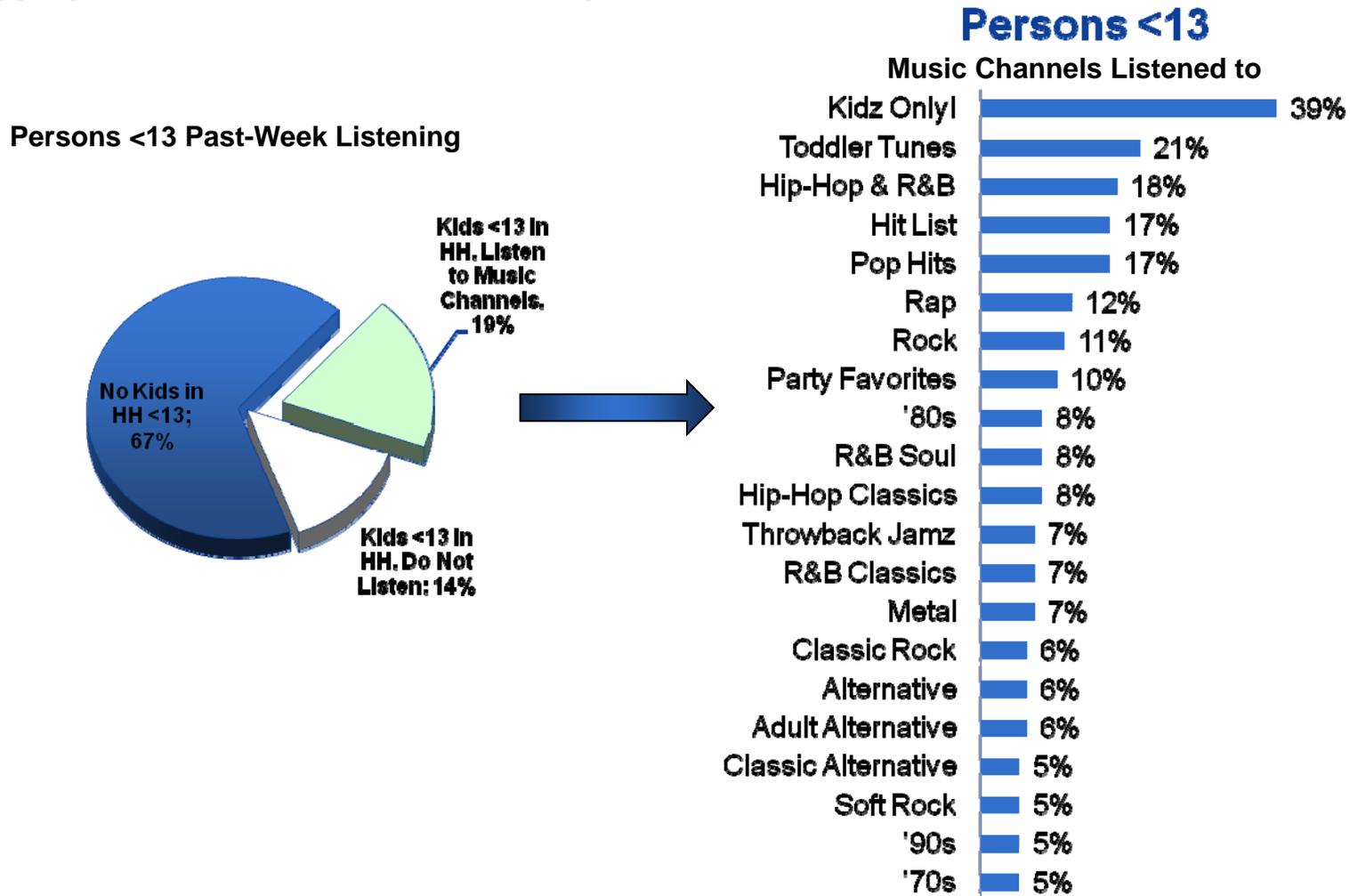
QZ7: Did additional listener listen with you in past day?



Past-Week Music Channel Listening Among Household Persons <13



- The majority of households with Persons <13 report kids watch Music Channels weekly, most often age-appropriate channels such as Kidz Only! and Toddler Tunes.



Base: Total Past Month Music Choice Music Channel Listeners 13+ (2011 N=2,501, 420 Kids <12 Listen to Music Choice).

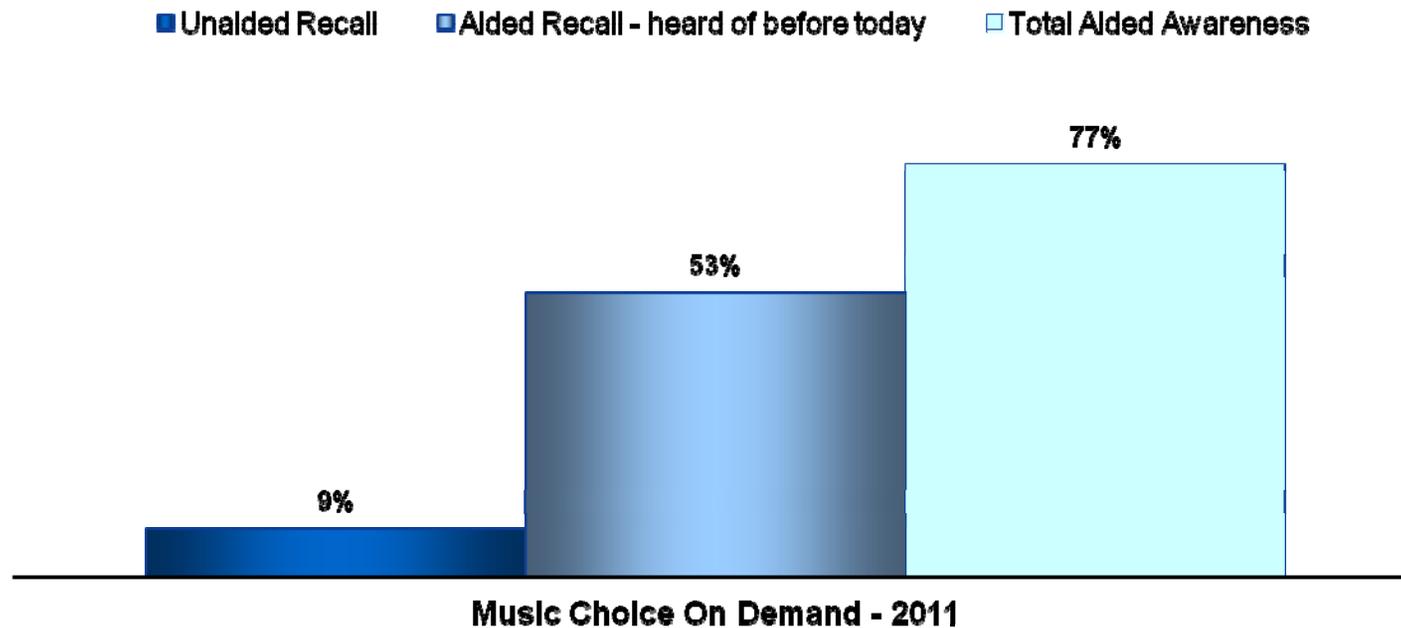
Z8_KIDS_WEEK_CHNL: Has anyone in your household age 12 or under listened to Music Choice Music Channels for at least 5 minutes in the past 7 days, regardless of whether you listened with them or not?

Z9_KIDS_WEEK_CHNL: Which of the following Music Choice Music Channels has a member of your household age 12 or under listened to for at least 5 minutes in the past 7 days, regardless of whether you listened with them or not?

Music Choice On Demand Viewing

- Although most Music Channel listeners are aware of Music Choice On Demand, few (9%) have top-of-mind brand name recall of Music Choice On Demand, and only about half (53%) know of the service by name once aided. There is an opportunity to strengthen branding in the future – for both On Demand and Music Channels.

Among Past-Month Music Channel Listeners

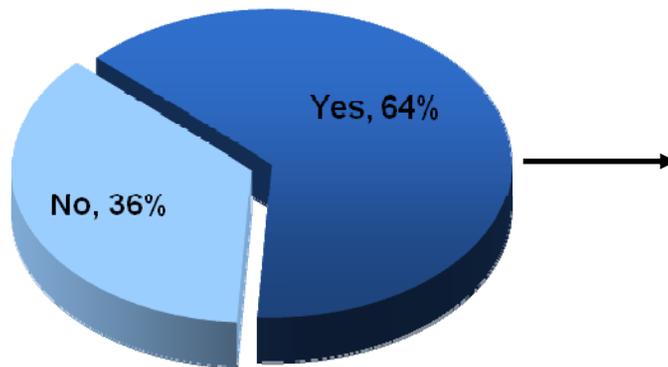


Base: Total Persons 13+ (N=2,501)

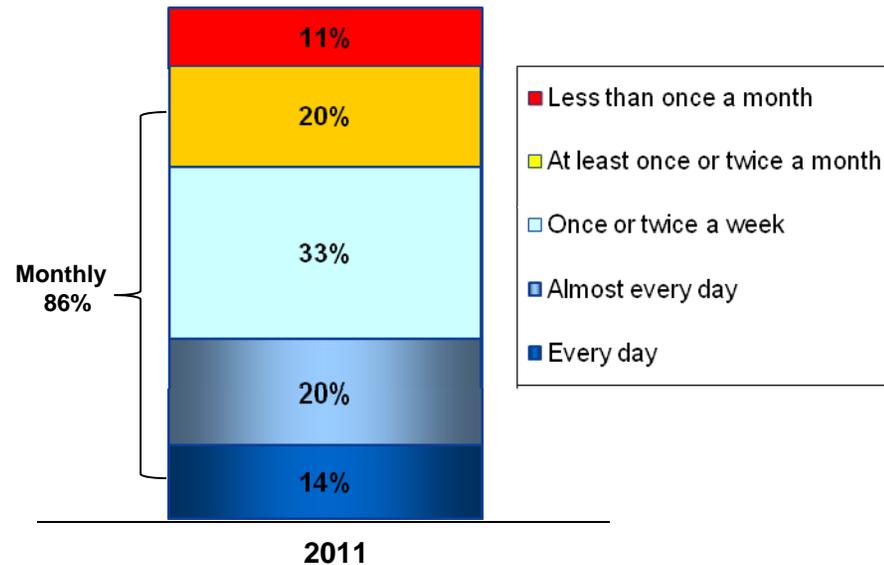
S15_AWARE_VOD: Prior to today, which music-based Video On Demand TV providers were you aware of?; S16_VOD_DEF: ...prior to today, had you ever heard of or viewed Music Choice On Demand?

- Many Music Channel listeners have also watched Music Choice On Demand (64%).
- Over two-thirds who've watched watch weekly (67%), with one-third (34%) accessing the service almost every day/daily.

Ever Used Music Choice On Demand



**Frequency Viewed
(among those who've
watched)**



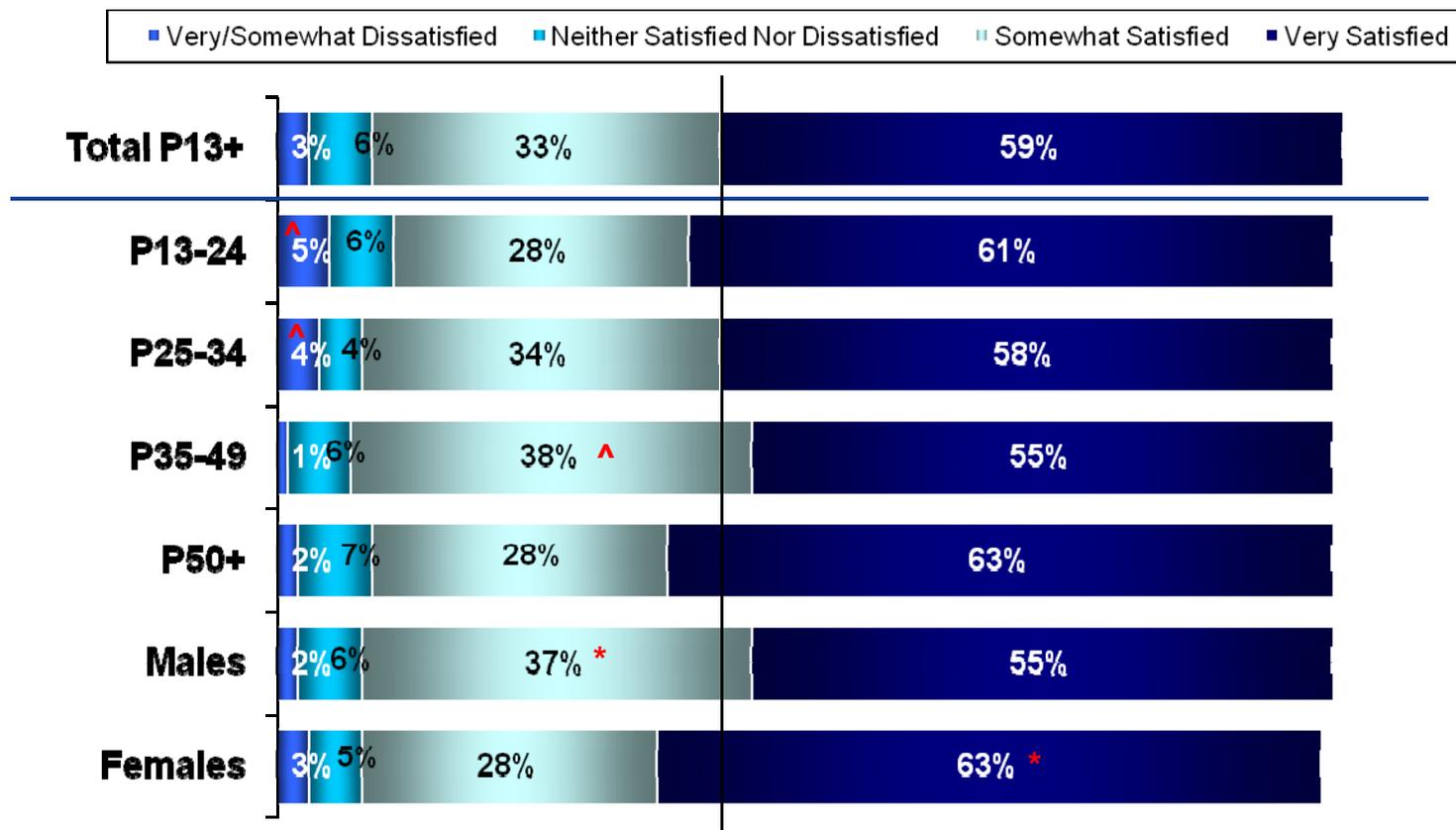
Note: Don't know not shown above

Base: Total Persons 13+ (N=2,501), Ever Viewed On Demand Users (1,597).

S16: Regardless of what you answered in the previous question, had you ever heard of or viewed Music Choice On Demand prior to today?;

S17_VOD_FREQ: How often do you watch Music Choice On Demand using your current digital cable/fiber optic TV service?

- Satisfaction with Music Choice On Demand is highly favorable among Music Channel listeners, with well over half (59%) very satisfied with the service. Higher satisfaction ratings are recorded by females and older (50+) Music Channel listeners, as well as younger (13-24) listeners.



* Denotes a significantly greater difference from Male/Female at the 95% confidence level.

^ Denotes a significantly greater difference at the 95% confidence level from 2 or more other Age groups.

Base: Total past-month Music Choice On Demand Users (N=1378), 13-24 (N=344), 25-34 (N=372), 35-49 (N=384), 50+ (N=278), Males (N=686), Females (N=682).

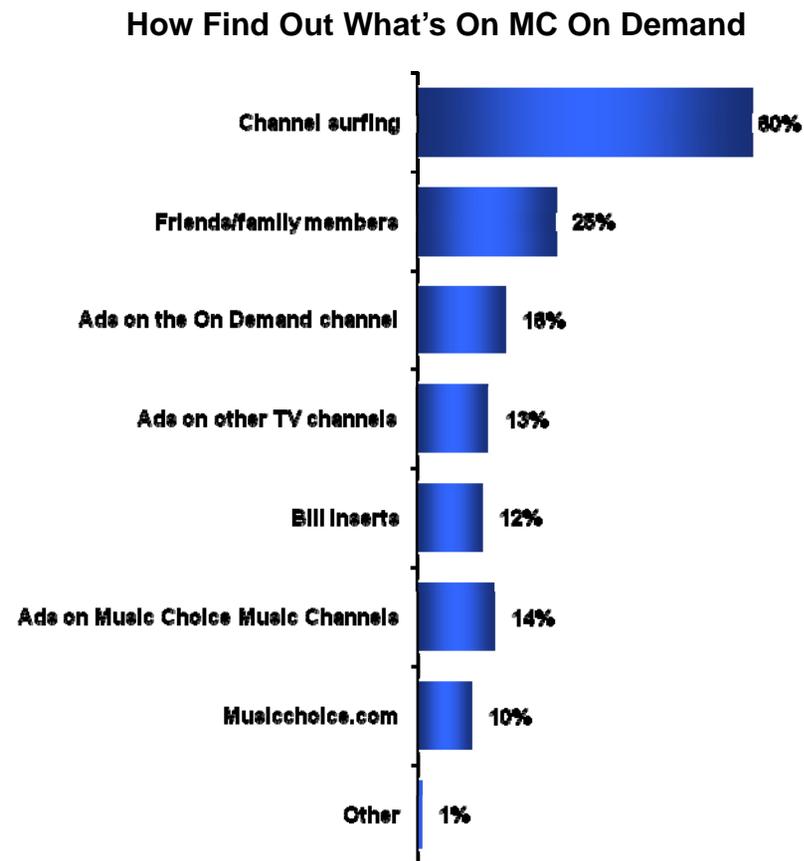
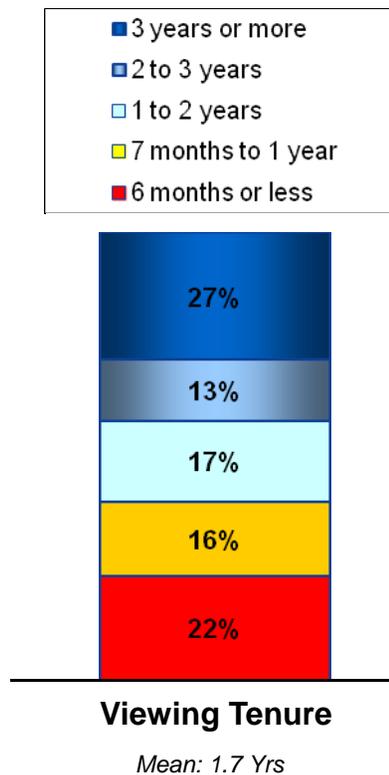
B11A_SAT_MCVOD: Overall, how satisfied are you with Music Choice On Demand?



Music Choice On Demand – Listening Tenure and Information Sources



- On average, Music Channel listeners have been watching Music Choice On Demand for nearly 2 years (mean of 1.7 yrs), with roughly 1 in 5 (22%) being newer viewers (watching 6 mos. or less).
- Channel surfing is the most common way of finding out what’s on Music Choice On Demand (60%), though some get information via word of mouth, ads on the On Demand barker or on-air promotions.



Base: Total past-month Music Choice On Demand Users (N=1,378)

B11_TENURE_VOD: Approximately how long ago did you first start watching Music Choice On Demand?

B11A: How do you find out about what’s on Music Choice On Demand?



Music Choice On Demand Profile: Demographics (Among Music Channel Listeners)



- Not surprisingly, Music Channel listeners who also watch Music Choice On Demand are younger and more likely to be single, yet come from higher-earning households than non-VOD listeners.
- They're also less likely to be White, over-indexing in Black and Hispanic ethnicity.

Demographic Profile	Music Choice Channel Listeners	
	Non-VOD (MC Channels Only)	Watch Music Choice On Demand
Gender		
Male	47%	50%
Female	53%	50%
Age		
Mean	44.4	36.3 *
Race/Ethnicity		
White	73% *	55%
Black	10%	21% *
Hispanic	10%	17% *

Demographic Profile	Music Choice Channel Listeners	
	Non-VOD (MC Channels Only)	Watch Music Choice On Demand
Employment/Income		
Employed FT/PT	50%	60% *
18+ HH Income (mean)	\$65.7K	\$74.2K *
Household Status/Size		
Married/living with partner	60% *	54%
Single, never married	24%	35% *
Mean HH size	2.8	3.1

* Denotes a significantly greater difference at the 95% confidence level.

Base: Non-VOD (N=1123), VOD Listeners (N=1378)



Music Choice On Demand Profile: TV/Music (Among Music Channel Listeners)



- Despite similar TV and music consumption in general, Music Channel listeners who also watch Music Choice On Demand have greater music preferences for many genres, notably Rock, Pop (though less interested in Decades channels) and Urban genres.
- Listeners who watch Music Channel On Demand are more likely to use a wider variety of devices to listen to music, including computers and mobile devices.

TV/Music Profile	Music Channel Listeners	
	Non-VOD (MC Channels Only)	Watch Music Choice On Demand
TV		
Days/week (mean)	6.1 *	5.8
Hrs/week (mean)	18.4	17.7
Set-top boxes in HH (mean)	2.1	2.5
Music		
Days/week (mean)	4.8	5.1 *
Hrs/week (mean)	11.5	12.5
Music Genres Preferred		
Rock	43%	48% *
Pop	37%	44% *
Urban	21%	37% *
Decades ('70s, '80s, '90s)	42% *	37%
Dance/Electronica	11%	20% *
Latin Pop/Rock/Rap (Net)	6%	14% *
Children's	6%	10% *

Music Sources/Devices	Music Channel Listeners	
	Non-VOD (MC Channels Only)	Watch Music Choice On Demand
Music Sources Used		
TV	72%	82% *
Online	43%	54% *
Radio	65% *	59%
Music Devices Used		
TV	77%	77%
Desktop/Laptop computer	50%	55% *
Radio receiver in car	64% *	49%
Mobile receiver	5%	10% *
MP3 Player	40%	47% *
Cell phone/Smartphone	16%	25% *
Tablet computer	3%	10% *
Music Services Used		
Except for Pandora (used most by both groups), all services have higher usage among Music Choice On Demand listeners		

* Denotes a significantly greater difference at the 95% confidence level.

Base: Non-VOD (N=1123), VOD Listeners (N=1378)

Individual Music Channel Profiles



Music Choice – Pop Channels – Audience Profiles (Non-Decades)



	Total Music Choice Music Channels	Pop							
		Pop Hits		Hit List		Party Favorites		MC Mix Tape	
Past 30 Day Listenership Intab	2501	715		677		386		175	
30 Day Cume P	34919077	9,982,863		9,452,305		5,389,350		2,443,358	
30 Day Cume %	28.4	8.12		7.69		4.38		1.99	
	%	%	Index	%	Index	%	Index	%	Index
Age									
13-17	8%	11%	138	12%	150	13%	163	9%	113
18-34	35%	47%	134	51%	146	46%	131	54%	154
35-49	28%	26%	93	27%	96	29%	104	28%	100
50+	29%	15%	52	11%	38	12%	41	9%	31
<i>Mean Age</i>	39.9	33.8	85	32.1	80	33	83	32.1	80
Gender									
Male	49%	39%	80	36%	73	37%	76	47%	96
Female	51%	61%	120	64%	125	63%	124	53%	104
Race									
White or Caucasian	63%	64%	102	62%	98	58%	92	39%	62
Black or African-American	16%	14%	88	15%	94	15%	94	34%	213
Hispanic	14%	16%	114	17%	121	18%	129	19%	136
Education									
Some College or Less	65%	68%	105	72%	111	65%	100	63%	97
College or more	35%	32%	91	28%	80	35%	100	37%	106
Employment Status									
Employed Full/Part Time	58%	57%	98	56%	97	56%	97	64%	110
Student	12%	19%	158	20%	167	21%	175	14%	117
Other	17%	18%	106	19%	112	18%	106	19%	112
Household Income 18+									
Population Intab	2150	586		548		316		154	
Less than \$75K	66%	68%	103	66%	100	63%	95	63%	95
\$75K or more	34%	32%	94	34%	100	37%	109	37%	109
<i>Mean Income (\$000)</i>	69.84	68.84	99	68.84	99	76.47	109	81.71	117
Household Size									
1	16%	15%	94	15%	94	15%	94	15%	94
2+	84%	85%	101	85%	101	85%	101	85%	101
<i>Mean HH Size</i>	2.99	3.21	107	3.21	107	3.29	110	3.13	105
Marital Status									
Married/Living with partner	56%	50%	89	49%	88	52%	93	48%	86
Single, never married	30%	39%	130	41%	137	37%	123	42%	140
Widowed/Divorced/Separated	14%	11%	79	10%	71	10%	71	10%	71
Past Day Listening									
Cume Rtg	20.92	3.20		3.13		1.12		0.65	
AQH Rtg	5.68	0.19		0.24		0.07		0.04	
TSL - Hrs Week Avg	24.93	5.45		7.14		5.53		5.19	

- Non-decades Pop channel listeners tend to be younger (< 35), skew female and are more likely to be single and students.
- Many of these Pop channels also over-index versus the overall Music Channel average on Hispanic ethnicity.
- MC Mix Tape over-indexes on African-Americans and Hispanics and posts a more even gender split.

Denotes over index by 20 points vs. Total Music Choice Music Channels.

Denotes under index by 20 points vs. Total Music Choice Music Channels.

*AQH based on M-Su 6a-12m, based to total 13+ digital population of 123 million. TSL based on past day listeners 13+, M-Su 6a-12m.



Music Choice – Pop Channels – Audience Profiles (Cont'd) (Decades/Solid Gold Oldies)



	Total Music Choice Music Channels	Pop							
		'90s		'80s		'70s		Solid Gold Oldies	
Past 30 Day Listenership Intab	2501	726		820		594		529	
30 Day Cume P	34919077	10,136,445		11,448,878		8,293,455		7,385,922	
30 Day Cume %	28.4	8.24		9.31		6.75		6.01	
	%	%	Index	%	Index	%	Index	%	Index
Age									
13-17	8%	6%	75	4%	50	3%	38	2%	25
18-34	35%	48%	137	34%	97	25%	71	20%	57
35-49	28%	33%	118	41%	146	37%	132	24%	86
50+	29%	12%	41	20%	69	35%	121	54%	186
Mean Age	39.9	34.6	87	39	98	43.3	109	49.2	123
Gender									
Male	49%	46%	94	47%	96	53%	108	47%	96
Female	51%	54%	106	53%	104	47%	92	53%	104
Race									
White or Caucasian	63%	62%	98	68%	108	70%	111	67%	106
Black or African-American	16%	16%	100	12%	75	12%	75	16%	100
Hispanic	14%	16%	114	14%	100	13%	93	12%	86
Education									
Some College or Less	65%	66%	102	64%	98	66%	102	65%	100
College or more	35%	34%	97	36%	103	34%	97	35%	100
Employment Status									
Employed Full/Part Time	58%	62%	107	66%	114	62%	107	53%	91
Student	12%	13%	108	8%	67	6%	50	4%	33
Other	17%	20%	118	20%	118	20%	118	18%	106
Household Income 18+									
Population Intab	2150	636		737		546		488	
Less than \$75K	66%	69%	105	65%	98	66%	100	68%	103
\$75K or more	34%	31%	91	35%	103	34%	100	32%	94
Mean Income (\$000)	69.84	67.35	96	70.77	101	68.59	98	66.37	95
Household Size									
1	16%	16%	100	17%	106	17%	106	17%	106
2+	84%	84%	100	83%	99	83%	99	83%	99
Mean HH Size	2.99	3.15	105	3.06	102	2.92	98	2.75	92
Marital Status									
Married/Living with partner	56%	53%	95	56%	100	56%	100	59%	105
Single, never married	30%	38%	127	30%	100	28%	93	21%	70
Widowed/Divorced/Separated	14%	10%	71	13%	93	16%	114	20%	143
Past Day Listening									
Cume Rtg	20.92	2.77		3.30		2.28		1.79	
AQH Rtg	5.68	0.16		0.25		0.16		0.14	
TSL - Hrs Week Avg	24.93	5.46		6.87		6.28		7.13	

- As might be expected, Pop music channels programmed by decades tend to attract listeners of corresponding generations.
- '90s channel attracts single younger listeners (< 35), while other decade channels tend to attract older adults (35+).
- Solid Gold Oldies posts the highest concentration of P50+.
- '80s and '70s channels tend to under-index on African-American audiences and students.

Denotes over index by 20 points vs. Total Music Choice Music Channels.

Denotes under index by 20 points vs. Total Music Choice Music Channels.

*AQH based on M-Su 6a-12m, based to total 13+ digital population of 123 million. TSL based on past day listeners 13+, M-Su 6a-12m.



Music Choice – Rock Channels – Audience Profiles



	Total Music Choice Music Channels	Rock							
		Metal		Rock		Classic Rock		Alternative	
Past 30 Day Listenership Intab	2501	414		866		851		522	
30 Day Cume P	34919077	5,780,287		12,091,132		11,881,701		7,288,188	
30 Day Cume %	28.4	4.70		9.83		9.66		5.93	
	%	%	Index	%	Index	%	Index	%	Index
Age									
13-17	8%	12%	150	9%	113	5%	63	11%	138
18-34	35%	49%	140	45%	129	32%	91	53%	151
35-49	28%	31%	111	30%	107	34%	121	26%	93
50+	29%	8%	28	16%	55	29%	100	10%	34
Mean Age	39.9	32.1	80	34.6	87	40.6	102	31.4	79
Gender									
Male	49%	60%	122	55%	112	56%	114	47%	96
Female	51%	40%	78	45%	88	44%	86	53%	104
Race									
White or Caucasian	63%	66%	105	70%	111	73%	116	67%	106
Black or African-American	16%	8%	50	9%	56	7%	44	8%	50
Hispanic	14%	18%	129	14%	100	13%	93	18%	129
Education									
Some College or Less	65%	74%	114	70%	108	67%	103	69%	106
College or more	35%	26%	74	30%	86	33%	94	31%	89
Employment Status									
Employed Full/Part Time	58%	61%	105	62%	107	62%	107	61%	105
Student	12%	19%	158	16%	133	9%	75	20%	167
Other	17%	17%	100	18%	106	19%	112	17%	100
Household Income 18+									
Population Intab	2150	334		733		764		423	
Less than \$75K	66%	70%	106	66%	100	67%	102	66%	100
\$75K or more	34%	30%	88	34%	100	33%	97	34%	100
Mean Income (\$000)	69.84	66.51	95	69.32	99	70.09	100	71.56	102
Household Size									
1	16%	18%	113	17%	106	17%	106	17%	106
2+	84%	82%	98	83%	99	83%	99	83%	99
Mean HH Size	2.99	3.14	105	3.11	104	2.94	98	3.11	104
Marital Status									
Married/Living with partner	56%	45%	80	51%	91	55%	98	48%	86
Single, never married	30%	46%	153	38%	127	30%	100	44%	147
Widowed/Divorced/Separated	14%	9%	64	11%	79	15%	107	8%	57
Past Day Listening									
Cume Rtg	20.92	2.11		4.08		3.41		2.15	
AQH Rtg	5.68	0.20		0.31		0.26		0.14	
TSL - Hrs Week Avg	24.93	8.71		7.01		7.09		5.98	

- Metal, Rock and Alternative Rock skew younger (< 35) and over-index on singles and students, while Classic Rock skews slightly older (41).

- Metal and Alternative channels attract a greater proportion of Hispanic listeners than the average music channel.

- African Americans are significantly less likely to listen to Rock channels.

 Denotes over index by 20 points vs. Total Music Choice Music Channels.

 Denotes under index by 20 points vs. Total Music Choice Music Channels.

*AQH based on M-Su 6a-12m, based to total 13+ digital population of 123 million. TSL based on past day listeners 13+, M-Su 6a-12m.

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Music Choice – Rock Channels – Audience Profiles (Cont'd)



	Total Music Choice Music Channels	Rock							
		Retro Rock		Adult Alternative		Classic Alternative		Soft Rock	
Past 30 Day Listenership Intab	2501	303		383		344		568	
30 Day Cume P	34919077	4,230,500		5,347,464		4,802,944		7,930,442	
30 Day Cume %	28.4	3.44		4.35		3.91		6.45	
	%	%	Index	%	Index	%	Index	%	Index
Age									
13-17	8%	8%	100	10%	125	8%	100	7%	88
18-34	35%	38%	109	45%	129	43%	123	32%	91
35-49	28%	39%	139	32%	114	32%	114	31%	111
50+	29%	15%	52	13%	45	16%	55	30%	103
Mean Age	39.9	36.7	92	34	85	35.6	89	40.3	101
Gender									
Male	49%	57%	116	44%	90	52%	106	47%	96
Female	51%	43%	84	56%	110	48%	94	53%	104
Race									
White or Caucasian	63%	67%	106	67%	106	67%	106	68%	108
Black or African-American	16%	7%	44	14%	88	11%	69	9%	56
Hispanic	14%	16%	114	13%	93	16%	114	15%	107
Education									
Some College or Less	65%	62%	95	66%	102	60%	92	66%	102
College or more	35%	38%	109	34%	97	40%	114	34%	97
Employment Status									
Employed Full/Part Time	58%	69%	119	64%	110	65%	112	60%	103
Student	12%	11%	92	18%	150	14%	117	11%	92
Other	17%	16%	94	14%	82	16%	94	18%	106
Household Income 18+									
Population Intab	2150	268		326		299		500	
Less than \$75K	66%	67%	102	64%	97	63%	95	64%	97
\$75K or more	34%	33%	97	36%	106	37%	109	36%	106
Mean Income (\$000)	69.84	76.77	110	72.3	104	76.54	110	71.89	103
Household Size									
1	16%	19%	119	16%	100	18%	113	14%	88
2+	84%	81%	96	84%	100	82%	98	86%	102
Mean HH Size	2.99	3.08	103	3.16	106	3.00	100	3.01	101
Marital Status									
Married/Living with partner	56%	56%	100	50%	89	52%	93	59%	105
Single, never married	30%	33%	110	39%	130	38%	127	28%	93
Widowed/Divorced/Separated	14%	11%	79	11%	79	10%	71	13%	93
Past Day Listening									
Cume Rtg	20.92	0.98		1.18		0.89		1.77	
AQH Rtg	5.68	0.08		0.08		0.06		0.11	
TSL - Hrs Week Avg	24.93	7.12		6.45		6.41		5.63	

- For the most part, Rock channels align demographically with the overall Music Channel audience.
- Soft Rock has an audience age distribution relatively aligned with the total Music Channel audience, while Classic Alternative, Adult Alternative and Retro Rock all skew slightly younger than the Music Channel average.
- Adult Alternative is the only Rock channel that does not under-index significantly on African Americans.

 Denotes over index by 20 points vs. Total Music Choice Music Channels.

 Denotes under index by 20 points vs. Total Music Choice Music Channels.

*AQH based on M-Su 6a-12m, based to total 13+ digital population of 123 million. TSL based on past day listeners 13+, M-Su 6a-12m.



Music Choice – Urban Channels – Audience Profiles



	Total Music Choice Channels	Urban											
		Hip-Hop & R&B		R&B Classics		R&B Soul		Rap		Hip-Hop Classics		Throwback Jamz	
Past 30 Day Listenership Intab	2501	744		599		516		546		510		296	
30 Day Cume P	34919077	10,387,762		8,363,265		7,204,416		7,623,277		7,120,643		4,132,766	
30 Day Cume %	28.4	8.45		6.80		5.86		6.20		5.79		3.36	
	%	%	Index	%	Index	%	Index	%	Index	%	Index	%	Index
Age													
13-17	8%	13%	163	7%	88	6%	75	15%	188	9%	113	9%	113
18-34	35%	53%	151	41%	117	43%	123	58%	166	52%	149	52%	149
35-49	28%	24%	86	28%	100	29%	104	22%	79	28%	100	26%	93
50+	29%	9%	31	24%	83	23%	79	5%	17	10%	34	12%	41
Mean Age	39.9	31	78	38.3	96	37.5	94	29.1	73	32.7	82	32.8	82
Gender													
Male	49%	45%	92	46%	94	40%	82	54%	110	48%	98	41%	84
Female	51%	55%	108	54%	106	60%	118	46%	90	52%	102	59%	116
Race													
White or Caucasian	63%	41%	65	37%	59	28%	44	38%	60	40%	63	34%	54
Black or African-American	16%	32%	200	41%	256	48%	300	32%	200	33%	206	45%	281
Hispanic	14%	19%	136	16%	114	16%	114	23%	164	20%	143	14%	100
Education													
Some College or Less	65%	73%	112	68%	105	69%	106	71%	109	70%	108	73%	112
College or more	35%	27%	77	32%	91	30%	86	28%	80	30%	86	27%	77
Employment Status													
Employed Full/Part Time	58%	56%	97	58%	100	57%	98	59%	102	61%	105	58%	100
Student	12%	20%	167	11%	92	12%	100	20%	167	16%	133	15%	125
Other	17%	20%	118	20%	118	21%	124	19%	112	18%	106	23%	135
Household Income 18+													
Population Intab	2150	594		527		462		430		430		246	
Less than \$75K	66%	72%	109	68%	103	72%	109	66%	100	68%	103	72%	109
\$75K or more	34%	28%	82	32%	94	28%	82	34%	100	32%	94	28%	82
Mean Income (\$000)	69.84	64.32	92	65.64	94	62.85	90	69.31	99	68.46	98	63.95	92
Household Size													
1	16%	13%	81	15%	94	18%	113	14%	88	14%	88	15%	94
2+	84%	87%	104	85%	101	82%	98	86%	102	86%	102	85%	101
Mean HH Size	2.99	3.31	111	3.07	103	3.12	104	3.31	111	3.22	108	3.21	107
Marital Status													
Married/Living with partner	56%	46%	82	51%	91	45%	80	48%	86	49%	88	46%	82
Single, never married	30%	45%	150	33%	110	39%	130	46%	153	42%	140	43%	143
Widowed/Divorced/Separated	14%	9%	64	16%	114	16%	114	6%	43	10%	71	10%	71
Past Day Listening													
Cume Rtg	20.92	3.94		2.45		2.49		2.73		1.81		1.09	
AQH Rtg	5.68	0.36		0.19		0.18		0.25		0.15		0.08	
TSL - Hrs Week Avg	24.93	8.35		7.12		6.69		8.44		7.51		6.97	

- Urban channels attract a greater proportion of African-American and, to a lesser degree, Hispanic listeners than the average music channel.
- Except for R&B Soul and R&B Classics, Urban channels tend to attract younger audiences (< 34) and for the most part all over-index on singles and students, though R&B Soul and R&B Classics are still slightly younger on average than the average Music Channel listener (38 yrs each vs. 39 yrs)

Denotes over index by 20 points vs. Total Music Choice Music Channels.

Denotes under index by 20 points vs. Total Music Choice Music Channels.

*AQH based on M-Su 6a-12m, based to total 13+ digital population of 123 million. TSL based on past day listeners 13+, M-Su 6a-12m.



Music Choice – Country Channels – Audience Profiles



	Total Music Choice Music Channels	Country					
		Today's Country		Classic Country		True Country	
Past 30 Day Listenership Intab	2501	558		435		331	
30 Day Cume P	34919077	7,790,822		6,073,490		4,621,437	
30 Day Cume %	28.4	6.34		4.94		3.76	
	%	%	Index	%	Index	%	Index
Age							
13-17	8%	7%	88	6%	75	7%	88
18-34	35%	37%	106	30%	86	34%	97
35-49	28%	28%	100	23%	82	26%	93
50+	29%	28%	97	41%	141	33%	114
<i>Mean Age</i>	39.9	39.6	99	44	110	40.7	102
Gender							
Male	49%	38%	78	48%	98	47%	96
Female	51%	62%	122	52%	102	53%	104
Race							
White or Caucasian	63%	73%	116	70%	111	72%	114
Black or African-American	16%	7%	44	8%	50	8%	50
Hispanic	14%	13%	93	12%	86	11%	79
Education							
Some College or Less	65%	67%	103	67%	103	69%	106
College or more	35%	33%	94	33%	94	31%	89
Employment Status							
Employed Full/Part Time	58%	58%	100	57%	98	61%	105
Student	12%	10%	83	7%	58	9%	75
Other	17%	21%	124	18%	106	19%	112
Household Income 18+							
Population Intab	2150	482		378		283	
Less than \$75K	66%	67%	102	68%	103	66%	100
\$75K or more	34%	33%	97	32%	94	34%	100
<i>Mean Income (\$000)</i>	69.84	68.24	98	65.49	94	67.8	97
Household Size							
1	16%	15%	94	18%	113	16%	100
2+	84%	85%	101	82%	98	84%	100
<i>Mean HH Size</i>	2.99	3.10	104	2.86	96	3.01	101
Marital Status							
Married/Living with partner	56%	60%	107	60%	107	61%	109
Single, never married	30%	26%	87	24%	80	26%	87
Widowed/Divorced/Separated	14%	14%	100	17%	121	13%	93
Past Day Listening							
Cume Rtg	20.92	2.33		1.65		1.14	
AQH Rtg	5.68	0.19		0.12		0.06	
TSL - Hrs Week Avg	24.93	7.59		6.56		5.09	

- Country listeners are as old as or older than the average Music Channel listener, with Today's Country attracting the youngest Country audience.
- Those that listen to Classic Country are more likely to be older (avg. age 44) and Today's Country attracts significantly more females than males.
- All Country channels are less likely to attract an African-American audience.

 Denotes over index by 20 points vs. Total Music Choice Music Channels.

 Denotes under index by 20 points vs. Total Music Choice Music Channels.

*AQH based on M-Su 6a-12m, based to total 13+ digital population of 123 million. TSL based on past day listeners 13+, M-Su 6a-12m.



Music Choice – Jazz & Blues and Vocal / Theatrical Channels – Audience Profiles



	Total Music Choice Music Channels	Jazz & Blues						Vocal & Theatrical			
		Smooth Jazz		Jazz		Blues		Singers & Swing		Stage & Screen	
Past 30 Day Listenership Intab	2501	399		385		313		176		160	
30 Day Cume P	34919077	5,570,856		5,375,388		4,370,120		2,457,320		2,233,927	
30 Day Cume %	28.4	4.53		4.37		3.55		2.00		1.82	
	%	%	Index	%	Index	%	Index	%	Index	%	Index
Age											
13-17	8%	4%	50	5%	63	5%	63	6%	75	9%	113
18-34	35%	28%	80	33%	94	36%	103	39%	111	40%	114
35-49	28%	28%	100	30%	107	26%	93	25%	89	25%	89
50+	29%	40%	138	32%	110	33%	114	31%	107	26%	90
<i>Mean Age</i>	39.9	44.5	112	41.7	105	41.2	103	41.6	104	37.9	95
Gender											
Male	49%	53%	108	56%	114	59%	120	58%	118	43%	88
Female	51%	47%	92	44%	86	41%	80	42%	82	57%	112
Race											
White or Caucasian	63%	47%	75	47%	75	50%	79	59%	94	63%	100
Black or African-American	16%	31%	194	27%	169	25%	156	14%	88	8%	50
Hispanic	14%	13%	93	18%	129	14%	100	17%	121	17%	121
Education											
Some College or Less	65%	54%	83	53%	82	59%	91	44%	68	47%	72
College or more	35%	46%	131	47%	134	41%	117	56%	160	53%	151
Employment Status											
Employed Full/Part Time	58%	64%	110	64%	110	67%	116	67%	116	66%	114
Student	12%	7%	58	10%	83	9%	75	9%	75	16%	133
Other	17%	12%	71	13%	76	13%	76	10%	59	9%	53
Household Income 18+											
Population Intab	2150	364		345		281		159		137	
Less than \$75K	66%	61%	92	62%	94	65%	98	55%	83	50%	76
\$75K or more	34%	39%	115	38%	112	35%	103	45%	132	50%	147
<i>Mean Income (\$000)</i>	69.84	78.79	113	78.4	112	71.33	102	85.95	123	98.12	140
Household Size											
1	16%	20%	125	19%	119	20%	125	18%	113	20%	125
2+	84%	80%	95	81%	96	80%	95	82%	98	80%	95
<i>Mean HH Size</i>	2.99	2.73	91	2.88	96	2.81	94	2.66	89	2.91	97
Marital Status											
Married/Living with partner	56%	59%	105	58%	104	54%	96	63%	113	56%	100
Single, never married	30%	25%	83	29%	97	32%	107	28%	93	36%	120
Widowed/Divorced/Separated	14%	15%	107	13%	93	14%	100	9%	64	8%	57
Past Day Listening											
Cume Rtg	20.92	1.53		1.48		1.02		0.58		0.41	
AQH Rtg	5.68	0.13		0.11		0.07		0.04		0.03	
TSL - Hrs Week Avg	24.93	7.99		6.95		6.01		7.13		6.52	

- Both Jazz & Blues and Vocal & Theatrical genres appeal to adults with advanced education (college degree or above), and all except Stage & Screen attract a 40+ audience.

- Jazz & Blues channels over-index on African-American listeners (Jazz over-indexes on Hispanics as well), whereas Vocal & Theatrical genres are more likely to attract Hispanic listeners.

- Vocal & Theatrical genre listeners tend to have higher incomes than the average Music Channel listener.

Denotes over index by 20 points vs. Total Music Choice Music Channels.

Denotes under index by 20 points vs. Total Music Choice Music Channels.

*AQH based on M-Su 6a-12m, based to total 13+ digital population of 123 million. TSL based on past day listeners 13+, M-Su 6a-12m.



Music Choice – Variety / Dance / Instrumental Channels – Audience Profiles



	Total Music Choice Music Channels	Variety						Dance				Instrumental			
		Kidz Only!		Toddler Tunes		Sounds of the Seasons*		Dance/Electronica		Reggae		Easy Listening		Soundscapes	
Past 30 Day Listenership Intab	2501	295		190		279		362		288		508		277	
30 Day Cume P	34919077	4,118,804		2,652,789		3,895,411		5,054,261		4,021,069		7,092,719		3,867,487	
30 Day Cume %	28.4	3.35		2.16		3.17		4.11		3.27		5.77		3.15	
	%	%	Index	%	Index	%	Index	%	Index	%	Index	%	Index	%	Index
Age															
13-17	8%	12%	150	4%	50	6%	75	14%	175	8%	100	4%	50	6%	75
18-34	35%	49%	140	52%	149	38%	109	52%	149	49%	140	24%	69	31%	89
35-49	28%	32%	114	28%	100	25%	89	25%	89	26%	93	26%	93	30%	107
50+	29%	7%	24	17%	59	31%	107	10%	34	18%	62	47%	162	34%	117
Mean Age	39.9	32.1	80	36	90	40.7	102	31.3	78	34.6	87	47.3	119	41.8	105
Gender															
Male	49%	35%	71	35%	71	42%	86	48%	98	51%	104	46%	94	47%	96
Female	51%	65%	127	65%	127	58%	114	52%	102	49%	96	54%	106	53%	104
Race															
White or Caucasian	63%	56%	89	60%	95	65%	103	52%	83	44%	70	65%	103	64%	102
Black or African-American	16%	17%	106	12%	75	11%	69	12%	75	28%	175	14%	88	12%	75
Hispanic	14%	17%	121	17%	121	17%	121	23%	164	21%	150	13%	93	14%	100
Education															
Some College or Less	65%	66%	102	52%	80	55%	85	59%	91	65%	100	56%	86	51%	78
College or more	35%	34%	97	48%	137	45%	129	40%	114	35%	100	44%	126	49%	140
Employment Status															
Employed Full/Part Time	58%	57%	98	63%	109	60%	103	59%	102	62%	107	56%	97	64%	110
Student	12%	19%	158	9%	75	11%	92	24%	200	15%	125	7%	58	7%	58
Other	17%	22%	129	22%	129	15%	88	14%	82	17%	100	14%	82	17%	100
Household Income 18+															
Population Intab	2150	237		170		248		296		252		455		249	
Less than \$75K	66%	65%	98	57%	86	58%	88	64%	97	65%	98	60%	91	59%	89
\$75K or more	34%	35%	103	43%	126	42%	124	36%	106	35%	103	40%	118	41%	121
Mean Income (\$000)	69.84	73.98	106	79.66	114	84.78	121	78.26	112	73.35	105	76.96	110	84.59	121
Household Size															
1	16%	8%	50	10%	63	17%	106	18%	113	17%	106	16%	100	20%	125
2+	84%	92%	110	90%	107	83%	99	82%	98	83%	99	84%	100	80%	95
Mean HH Size	2.99	3.72	124	3.40	114	2.96	99	3.16	106	3.00	100	2.73	91	2.72	91
Marital Status															
Married/Living with partner	56%	62%	111	71%	127	58%	104	44%	79	50%	89	64%	114	62%	111
Single, never married	30%	31%	103	20%	67	30%	100	46%	153	40%	133	20%	67	26%	87
Widowed/Divorced/Separated	14%	7%	50	9%	64	13%	93	10%	71	10%	71	16%	114	12%	86
Past Day Listening															
Cume Rtg	20.92	1.19		0.70		0.60		1.58		1.08		1.70		1.04	
AQH Rtg	5.68	0.09		0.06		0.05		0.14		0.08		0.12		0.10	
TSL - Hrs Week Avg	24.93	6.91		7.61		7.99		8.16		7.09		6.43		8.87	

- Dance, Kidz Only! Reggae and Toddler Tunes capture younger audiences (< 40), while Easy Listening, Soundscapes and Sounds-Season attract older audiences (40+).
- Toddler Tunes over-indexes on 18-34, females, Hispanics and married listeners with higher incomes and college degrees.
- Dance over-indexes on Hispanics, whereas Reggae attracts both Hispanics and African Americans.
- Instrumental channels and Sounds-Seasons also attract listeners with higher incomes and college degrees.

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Music Choice – Inspirational / Classical Channels – Audience Profiles



	Total Music Choice Music Channels	Inspirational				Classical			
		Contemporary Christian		Gospel		Classical Masterpieces		Light Classical	
Past 30 Day Listenership Intab	2501	246		271		292		317	
30 Day Cume P	34919077	3,434,663		3,783,714		4,076,917		4,425,969	
30 Day Cume %	28.4	2.79		3.08		3.32		3.60	
	%	%	Index	%	Index	%	Index	%	Index
Age									
13-17	8%	7%	88	5%	63	6%	75	5%	63
18-34	35%	35%	100	31%	89	36%	103	30%	86
35-49	28%	27%	96	27%	96	22%	79	24%	86
50+	29%	30%	103	37%	128	35%	121	41%	141
Mean Age	39.9	39.9	100	42.4	106	41.8	105	44.7	112
Gender									
Male	49%	44%	90	42%	86	48%	98	44%	90
Female	51%	56%	110	58%	114	52%	102	56%	110
Race									
White or Caucasian	63%	55%	87	34%	54	62%	98	64%	102
Black or African-American	16%	21%	131	49%	306	11%	69	13%	81
Hispanic	14%	17%	121	11%	79	15%	107	12%	86
Education									
Some College or Less	65%	60%	92	64%	98	46%	71	47%	72
College or more	35%	40%	114	36%	103	53%	151	53%	151
Employment Status									
Employed Full/Part Time	58%	62%	107	63%	109	58%	100	55%	95
Student	12%	10%	83	9%	75	13%	108	9%	75
Other	17%	18%	106	14%	82	11%	65	14%	82
Household Income 18+									
Population Intab	2150	212		238		258		284	
Less than \$75K	66%	64%	97	70%	106	57%	86	58%	88
\$75K or more	34%	36%	106	30%	88	43%	126	42%	124
Mean Income (\$000)	69.84	70.52	101	66.12	95	86.97	125	82.95	119
Household Size									
1	16%	15%	94	17%	106	20%	125	17%	106
2+	84%	85%	101	83%	99	80%	95	83%	99
Mean HH Size	2.99	3.26	109	2.94	98	2.64	88	2.73	91
Marital Status									
Married/Living with partner	56%	56%	100	50%	89	57%	102	65%	116
Single, never married	30%	29%	97	33%	110	32%	107	24%	80
Widowed/Divorced/Separated	14%	15%	107	17%	121	10%	71	11%	79
Past Day Listening									
Cume Rtg	20.92	1.17		1.29		1.07		1.12	
AQH Rtg	5.68	0.10		0.11		0.08		0.08	
TSL - Hrs Week Avg	24.93	7.56		7.55		6.57		6.68	

- For the most part, Inspirational and Classical channel listeners tend to be older (40+), except for Contemporary Christian (< 40).
- Contemporary Christian and Gospel over-index on African Americans; Contemporary Christian over-indexes on Hispanics as well.
- Classical listeners tend to be college educated and have higher income.

Denotes over index by 20 points vs. Total Music Choice Music Channels.

Denotes under index by 20 points vs. Total Music Choice Music Channels.

*AQH based on M-Su 6a-12m, based to total 13+ digital population of 123 million. TSL based on past day listeners 13+, M-Su 6a-12m.



Music Choice – Latin Channels – Audience Profiles



	Total Music Choice Music Channels	Latin									
		Musica Urbana		Mexicana		Pop Latino		Romances		Tropicales	
Past 30 Day Listenership Intab	2501	121		118		187		173		118	
30 Day Cume P	34919077	1,689,408		1,647,521		2,610,903		2,415,434		1,647,521	
30 Day Cume %	28.4	1.37		1.34		2.12		1.96		1.34	
	%	%	Index	%	Index	%	Index	%	Index	%	Index
Age											
13-17	8%	9%	113	6%	75	7%	88	5%	63	6%	75
18-34	35%	56%	160	50%	143	54%	154	42%	120	45%	129
35-49	28%	27%	96	29%	104	27%	96	30%	107	29%	104
50+	29%	9%	31	15%	52	12%	41	24%	83	20%	69
Mean Age	39.9	31.9	80	35.3	88	33.7	84	38.4	96	36.1	90
Gender											
Male	49%	51%	104	56%	114	52%	106	48%	98	55%	112
Female	51%	49%	96	44%	86	48%	94	52%	102	45%	88
Race											
White or Caucasian	63%	34%	54	31%	49	30%	48	44%	70	30%	48
Black or African-American	16%	16%	100	13%	81	11%	69	17%	106	17%	106
Hispanic	14%	41%	293	47%	336	51%	364	27%	193	43%	307
Education											
Some College or Less	65%	55%	85	49%	75	50%	77	53%	82	54%	83
College or more	35%	44%	126	51%	146	50%	143	47%	134	46%	131
Employment Status											
Employed Full/Part Time	58%	73%	126	75%	129	71%	122	68%	117	65%	112
Student	12%	14%	117	10%	83	13%	108	10%	83	13%	108
Other	17%	12%	71	8%	47	10%	59	15%	88	14%	82
Household Income 18+											
Population Intab	2150	106		105		163		153		105	
Less than \$75K	66%	54%	82	62%	94	59%	89	58%	88	57%	86
\$75K or more	34%	46%	135	38%	112	41%	121	42%	124	43%	126
Mean Income (\$000)	69.84	85.23	122	81.97	117	87.06	125	83.91	120	82.98	119
Household Size											
1	16%	18%	113	17%	106	21%	131	22%	138	22%	138
2+	84%	82%	98	83%	99	79%	94	78%	93	78%	93
Mean HH Size	2.99	3.14	105	3.16	106	3.00	100	2.89	97	2.86	96
Marital Status											
Married/Living with partner	56%	52%	93	56%	100	51%	91	54%	96	59%	105
Single, never married	30%	44%	147	34%	113	40%	133	30%	100	31%	103
Widowed/Divorced/Separated	14%	4%	29	11%	79	9%	64	16%	114	10%	71
Past Day Listening											
Cume Rtg	20.92	0.41		0.36		0.76		0.57		0.34	
AQH Rtg	5.68	0.04		0.03		0.08		0.05		0.02	
TSL - Hrs Week Avg	24.93	8.57		8.05		9.65		7.37		5.87	

- Latin channels attract younger (< 40) audiences that are more likely to be Hispanic, college educated and have higher income than the average Music Channel listener.

Denotes over index by 20 points vs. Total Music Choice Music Channels.

Denotes under index by 20 points vs. Total Music Choice Music Channels.

*AQH based on M-Su 6a-12m, based to total 13+ digital population of 123 million. TSL based on past day listeners 13+, M-Su 6a-12m.

MC 39

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Saturday July 9th, 2011



From the bottom to the top, Britney Spears and Chris Brown are two of music's biggest comeback kids. Both were teen phenoms, but then real life happened along with real mistakes. But hey, they're human, too! (Everybody needs to shave their head in public once in their life, right?) Whose career bounced back better in recent years? See what our panelists think on the premiere of *Certified: Comeback Champ*. [Watch »](#)

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Want to rub elbows with Justin Timberlake on the red carpet? Follow us on Twitter to win passes to attend the world premiere of his hilarious new comedy, *Friends With Benefits*. In theaters July 22!

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Did Big Sean Write a Love Song?

Download Big Sean's unreleased track, "Almost Wrote You a Love Song," for free right here! Just whip your phone out and snap the QR code. You can also catch the code during his episode of *The Cut* on Music Choice On Demand.

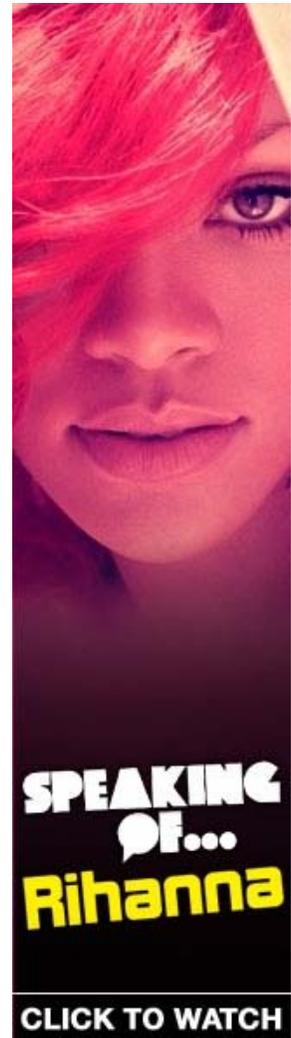
[Watch »](#)



Staind Gets Transformed

Optimus Prime does some serious damage in *Transformers: Dark of the Moon*, but Staind does damage on the movie's soundtrack with their single "The Bottom." Hear it now on Music Choice's Rock channel.

[Listen »](#)



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Morano, Stephanie J.

From: Prager, Justin (MC-EX) [jprager@musicchoice.com]
Sent: Friday, September 30, 2011 3:57 PM
To: Williams, Damon (MC-EX)
Subject: Big Sean QR promotion press

From: Paganuzzi, Josefa (MC-EX)
Sent: Friday, July 15, 2011 11:06 AM
To: MC Associates (MC-EX); MC Assistants (MC-EX)
Subject: Music Choice in the News

The following items ran on the Big Sean QR Code for The Cut.

Highlights include Multichannel News article that was also included in their e-blast this am and On Demand Weekly which included great visuals.

ENJOY!

http://www.multichannel.com/article/470990-Music_Choice_Island_Def_Jam_Cut_Big_Sean_Promo.php
<http://www.multichannel.com/article/470990-Music_Choice_Island_Def_Jam_Cut_Big_Sean_Promo.php>

Music Choice, Island Def Jam Cut Big Sean Promo

Network Watchers Can Activate Code To Score Free Song For Their Phones

Mike Reynolds -- Multichannel News, 7/14/2011 1:22:09 PM

Music Choice and Island Def Jam are sounding a marketing campaign around Big Sean that will give watchers access to a free song from the Detroit rapper.

Big Sean is featured on Music Choice's *The Cut* this month talking about the best new school rap videos. During the show, an overlay appears with a quick response code pointing viewers to scan to receive the free song, "Almost Wrote You a Love Song," which can be heard instantaneously on viewers' phones upon code activation. Viewers will also be able to receive the song via email for download and access behind the scenes photos from the set.

"Music Choice has supported Big Sean's music for a long time, so we were more than happy to participate in *The Cut*," said Mike Brinkley, the artist's manager, in a statement.

Hosted by Niko, each episode of *The Cut* focuses on a specific theme and includes a candid one on one conversation with an artist about their video selection. A viewer's version of the show is available on SWRV, the interactive video music network. <http://www.multichannel.com/article/448594-Music_Choice_Premieres_Interactive_Channel.php?rssid=20062>

http://ondemandweekly.com/blog/article/music_choice_offers_fans_free_big_sean_song_via_qr_code_activation_during_t
/

On Demand Weekly

Music Choice Offers Fans FREE Big Sean Song Via QR Code Activation During The Cut TV Show

http://ondemandweekly.com/blog/article/music_choice_offers_fans_free_big_sean_song_via_qr_code_activation_during_t/

July 14, 2011

http://ondemandweekly.com/blog/article/music_choice_offers_fans_free_big_sean_song_via_qr_code_activation_during_t/

Music Choice

Music Choice Offers Fans FREE Big Sean Song Via QR Code Activation During The Cut TV Show First Time QR Code Used For TV On Demand

Music Choice and Island Def Jam are offering a free song from Detroit rapper Big Sean to viewers of THE CUT show as part of a QR Code Marketing Campaign. Big Sean will be featured on the program this month talking about his video picks for best new school rap videos. During the show, an overlay will appear with a QR CODE prompting viewers to scan to receive a free song.

The song “Almost Wrote You a Love Song” can be heard instantaneously on viewers’ phones once the code is activated. Viewers will also be able to receive the song via email for download and access behind the scenes photos from the set.

Big Sean

Big Sean's Manager Mike Brinkley stated "Music Choice has supported Big Sean's music for a long time, so we were more than happy to participate in THE CUT."

Detroit Born Rapper Big Sean has only been signed to G.O.O.D. Music/Island Def Jam a few short years and has already garnered the praise and admiration of critics and fans alike. His debut album "Finally Famous" catapulted to #2 on the itunes albums chart in the first few hours of its release and he is projected to sell around 100K units in his first week. For a brand new artist this is a phenomenal accomplishment and we can only expect his star to continue to rise from here.

THE CUT can be found on Music Choice On Demand and is available nationwide. Hosted by NIKO, each episode focuses on a specific theme and includes a candid one on one conversation with an artist about their video selection. A viewer's version of the show is available on SWRV, the first interactive video music network.

Niko and Big Sean

http://ondemandweekly.com/blog/article/music_choice_offers_fans_free_big_sean_song_via_qr_code_activation_during_the_cut_tv_show.aspx

And additional ones:

<http://digitalreporter.blogspot.com/2011/07/music-choice-offers-fans-free-big-sean.html>

<http://www.sunherald.com/2011/07/14/3271306/music-choice-offers-fans-free.html>

<http://www.rapbiz.com/21118-music-choice-island-def-jam-cut-big-sean-promo-multichannel-news>

<<http://www.rapbiz.com/21118-music-choice-island-def-jam-cut-big-sean-promo-multichannel-news>>

<http://www.reuters.com/article/2011/07/14/idUS148887+14-Jul-2011+BW20110714>

<http://www.flowattic.com/?p=428>

<http://www.brandon.com/2011/07/14/3346451/music-choice-offers-fans-free.html>

<http://news.morningstar.com/all/business-wire/20110714005831/music-choice-offers-fans-free-big-sean-song-via-qr-code-activation-during-the-cut-tv-show.aspx>

<http://www.technology-news-reports.com/news/43886-music-choice-offers-fans-free-big.html> <<http://www.technology-news-reports.com/news/43886-music-choice-offers-fans-free-big.html>>

Josefa Paganuzzi

Director, PR

Music Choice

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New York, NY 10001

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----- End of Forwarded Message

MC 40



Music Choice
328 W. 34th Street
NY, NY 10001

Music World Entertainment
1505 Hadley Street
Houston, Texas 77002

Dear Nichelle Poindexter:

Music Choice desires to transmit on its digital audio service via all distribution and transmission mediums (e.g., cable, satellite, telco and Internet) all of the sound recordings from the Trin-i-tee 5:7 album "Angel & Chanelle" without having to comply with restrictions under applicable copyright laws, and is requesting Music World Entertainment's permission to do so.

Accordingly, Music World Entertainment hereby grants to Music Choice the non-exclusive right to transmit, broadcast, play and publicly perform such sound recordings, including the right to create any ephemeral recordings or incidental copies necessary for the foregoing activities, by such means of digital transmission or retransmission as Music Choice uses to transmit its digital audio service and without regard to any restrictions or obligations under the Digital Performance Right in Sound Recordings Act of 1995, the Digital Millennium Copyright Act or any other provision of Title 17 of the United States Code, each as amended, including, without limitation, the restrictions set forth in 17 U.S.C. Secs. 112, 114(d)(1)(C)(iv) and 114(d)(2)(B). Music World Entertainment has the full right and authority to make the foregoing grant of right to Music Choice. Music Choice acknowledges that it shall be responsible for paying any music performance fees required for its performance of the musical compositions embodied in such sound recordings.

Please acknowledge your agreement with the above by having a duly authorized representative sign and return this letter to me by facsimile at (646) 459-3309. If you have any questions, please call me at (646) 459-3331. I appreciate your cooperation on this matter.

Very truly yours,

Damon Williams
VP, Programming & Content Development

ACCEPTED AND AGREED:

Music World Entertainment

By: 

NICHELLE POINDEXTER



Music Choice Promotional Partnership

Artist: Trin-i-tee 5:7

Label: Music World Gospel

Contact: Nichelle Poindexter -Senior Vice President

Phone: (713) 772-5175

Email: nichelle.poindexter@musicworldent.com

Flight: 5/27 – 6/5

Promotion Name: “Spirit & Soul”

A) Music Choice to Provide

Programming:

- Music - “Angel & Chanelle” album will be aired in full on the Gospel music channel. Below is the schedule:
 - Sunday (5/29) 12n, 3p, 6p, 9p
 - Monday (5/30) 12n, 3p, 6p, 9p
 - Tuesday (5/31) 12n, 3p, 6p, 9p
- Music Videos - “Heaven Hear My Heart” and “Over and Over” will be placed into the following locations within Music Choice On Demand:
 - Hip-Hop and R&B > All Artists
 - Hip-Hop and R&B > Just Added (Week of 5/30 only)
 - Hip-Hop and R&B > R&B Soul

Marketing: (5) Promotional panels will air on the following channels: Gospel, R&B Soul and Classic R&B.

- (1) Campaign panel - “Spirit and Soul”
- (1) Retail panels - New Release available 5/31, New Release available now
- (1) Album airing tune In Panel (airs on Gospel only)
- (1) Song tune In Panel – “Heaven Hear My Heart”
- (1) Video On Demand Tune In Panel – “Heaven Hear My Heart”

Added Value:

- Inclusion in Music Choice Social Media outreach (Facebook & Twitter) which reaches an estimated 215K Music Choice fans

Estimated Households: 47 Million

Estimated Impressions: 15 Million

Total Promotional Media Value - \$50,000

B) Music World to Provide

Music World will tag our logo on the following assets beginning in June:

Marketing Elements: Inclusion in media campaign:

- TV - Logo placement with :30 TV campaign - HH 24 mill (networks to include WE, Bravo, BET, TV One, Centric, VH1, Gospel Music Channel, Telemundo, Warner Bros.) Run Dates: May 27 - June 5
- Print - Logo placement on Rolling Out Full Page Ads - HH TBD

Digital and Social Media Promotion:

- Music Choice logo or hotlink inclusion on T57 banner on MusicWorldent.com front page
- Two (2) eblast to T57 + Music World list (over 100k)

Estimated Households: 24 Million

Estimated Impressions: TBD

SPIRIT & SOUL
TRIN-LEE 5:7
HEAR THE MUSIC
WATCH THE VIDEOS



**PLAYING
NEW TRACKS
FROM ANGEL & CHANELLE
BY TRIN-I-TEE 5:7**





**HEAR IT
HERE**

**TRIN-I-TEE 5:7
"OVER & OVER"**

**HEAR IT
HERE**

**TRIN-I-TEE 5:7
"HEAVEN HEAR MY HEART"**





TRIN-I-TEE 5:7
ALL MEMORIAL DAY WEEKEND
ON MUSIC CHOICE

**Music
CHOICE®**

TRIN-I-TEE 5:7
ANGEL & CHANELLE
IN STORES NOW



TRIN-I-TEE 5:7
ANGEL & CHANELLE
IN STORES 5.31



MC 41

Morano, Stephanie J.

From: Breeze (MC-EX)
Sent: Tuesday, October 04, 2011 4:12 PM
To: Williams, Damon (MC-EX)
Cc: Unterweiser, Janis (MC-EX); Santos, Nadine (MC-EX)
Subject: FW: Music Choice VOD Report 8/24/11
Attachments: Music Choice VOD Report IGA 8.24.11.pdf; ATT00001.htm

FYI

From: Zeller, Jennifer [<mailto:jennifer.zeller@umusic.com>]
Sent: Wednesday, August 24, 2011 6:33 PM
To: Prager, Justin (MC-EX); Breeze (MC-EX)
Subject: Fwd: Music Choice VOD Report 8/24/11

Mindless Behavior ft Diggy "Mrs. Right" #1 again (ahead of Beyonce...)!

900k+ orders this week, over 2.8 million orders in 3 weeks!

WOW!!!!

Begin forwarded message:

From: "demanded@musicchoice.com" <demanded@musicchoice.com>
Date: August 24, 2011 5:55:51 PM EDT
Subject: **Music Choice VOD Report 8/24/11**

Video Promo!

See what got added to VOD this week and how your video ranks on Music Choice Video On Demand. Plus check out overall video airplay on the network and other useful tid-bits that'll come in handy for your next nat'l call and marketing meeting ... it's all inside this week's **Music Choice Video On Demand** Report (attached).

***** Reminder: All video submissions **must be CC** *****

- **TYGA DEBUTS "FAR AWAY" IN THE TOP 20! NOW THAT'S FAR FROM THE BOTTOM!**
- **ANOTHER HUSTLER'S ANTHEM! ACE HOOD DEBUTS "GO N' GET IT" AT #11!**
- **GET LIKE HIM! WIZ KHALIFA'S "ON MY LEVEL" DEBUTS IN THE TOP 10!**
- **RIHANNA'S "MAN DOWN" KEEPS RISING! THIS WEEK SHE'S #15!**

VIDEO ADDS – STARTING 8/ 29/ 11

URBAN

- Diggy Simmons "Copy, Paste" (Atlantic Records)
- Swizz Beatz "International Party" (Swizz Beatz Productions)
- Maino "Let It Fly" (E1 Entertainment)
- DJ Drama "Oh My" (E1 Music)
- Hamilton Park "Thing Called Us" (Atlantic Records)
- Big Bad 40 "Welcome To California (Remix)" (Zoo Life Entertainment)
- The Game "Pot Of Gold" (DGC/ Interscope Records)

POP

- Maroon 5 "Moves Like Jagger" (A&M/ Octone Records)
- Pia Toscano "This Time" (19 Recordings)

ROCK

- VHS Or Beta "Breaking Bones" (Krian Music Group/ Chromosome Music)
- Set It Off "Breathe In, Breathe Out" (Equal Vision Records)
- TV On The Radio "Caffeinated Consciousness" (DGC/ Interscope Records)
- Foster The People "Helena Beat" (Columbia Records)
- Funeral Party "New York City Moves To The Sound Of LA" (RCA Records)
- Blue October "The Chills" (Up/ Down Records)

LATIN

- N/ A

COUNTRY

- Scotty McCreery "I Love You This Big" (19 Recordings)
- Joe Nichols "Take It Off" (Show Dog Universal Music)

ORIGINAL SHOWS ON DEMAND

AIRING NOW

Rick Ross: Speaking Of...
Joe Jonas: Speaking Of...
Certified: Comeback Champ (Chris Brown vs. Britney Spears)
Certified: Lady Gaga vs. Justin Bieber
Akon: The Cut
Big Sean: The Cut
NRS: Jacob Latimore, Mike Posner, Oh Land, Big Sean, Tinie Tempah

Video Playlists

Jay-Z vs. Kanye West: the top videos from Kanye & Jay-Z
Summer With Miami: feat. Rick Ross, Ace Hood
Indie In August: feat. Matt & Kim, Givers
J.Lo vs. Marc!!!: top videos from J. Lo and Marc Anthony
Vid Of The Year: feat. Bruno Mars, Adele
Country Collabos: feat. Zac Brown Band, Brad Paisley

COMING SOON

DJ Khaled: The Cut
Matthew Morrison: The Cut

last week	this week	originals	artist	title	label
WEEK ENDING 8/14/11					
1	1		Mindless Behavior feat. Diggy	Mrs. Right	Streamline / Interscope
3	2		Beyonce	Best Thing I Never Had	Columbia
5	3		Bruno Mars	The Lazy Song	Atlantic
11	4		DJ Khaled feat. Drake, Lil Wa...	I'm On One	Cash Money/ Universal Motown
8	5		Nicki Minaj	Super Bass	Young Money/ Cash Money
13	6		Kelly Rowland feat. Lil Wayne	Motivation	Universal Motown
16	7	C	Chris Brown feat. Busta Rhy...	Look At Me Now	Jive
18	8		LMFAO	Party Rock Anthem	Interscope
20	9	C	Chris Brown feat. Justin Bieber	Next 2 You	Jive
~	10	+	Wiz Khalifa	On My Level	Atlantic
~	11	+	Ace Hood	Go N' Get It	Island Def Jam
24	12		Katy Perry	Last Friday Night (T.G.I.F.)	Capitol
~	13	+	Young Jeezy feat. Lil Wayne	Ballin'	Island Def Jam
43	14		Lil Wayne feat. Rick Ross	John	Cash Money/ Universal Motown
37	15		Rihanna	Man Down	Island Def Jam
48	16		Selena Gomez & The Scene	Love You Like A Love Song	Hollywood
~	17	+	Lil Twist feat. Mishon	New Money	Young Money/ Cash Money
~	18	+	Tyga feat. Chris Richardson	Far Away	Young Money/ Cash Money
57	19		Lil Wayne feat. Cory Gunz	6 Foot, 7 Foot	Cash Money
~	20	+	The Band Perry	If I Die Young	Republic Nashville
55	21		Big Sean feat. Chris Brown	My Last	Island Def Jam
75	22		Selena Gomez & The Scene	Who Says	Hollywood
73	23		New Boyz feat. Chris Brown	Better With The Lights Off	Warner Bros.
71	24		YC feat. Future	Racks	Universal Motown Group
79	25		T-Pain feat. Chris Brown	Best Love Song	Jive
102	26		Adele	Rolling In The Deep	Columbia
81	27		Meek Mill feat. Rick Ross	Tupac Back	MMG/ Warner Bros.
127	28		Avril Lavigne	Smile	RCA
68	29		Jawan Harris feat. Tyga	Keisha	Jive
145	30	C	Britney Spears	I Wanna Go	Jive
174	31		Jennifer Lopez feat. Lil Wayne	I'm Into You	Island Def Jam
163	32		Waka Flocka Flame feat. Kebo...	Grove St. Party	Warner Bros.
172	33		Wiz Khalifa	Roll Up	Rostrum/ Atlantic
233	34	NRS	Jacob Latimore	Nothing On Me	Jive
212	35		Pitbull feat. Afrojack, Nayer &...	Give Me Everything	J
207	36		Jennifer Hudson	No One's Gonna Love You	RCA
214	37		Bad Meets Evil	Fast Lane	Shady/ Interscope
~	38	+	DJ Khaled feat. Fabolous, Ja...	It Ain't Over Til It's Over	We The Best/ Cash Money
~	39	+	Paramore	Monster	Atlantic
143	40		Lupe Fiasco feat. Trey Songz	Out Of My Head	Atlantic

rank	originals	artist	title	label
------	-----------	--------	-------	-------

WEEK ENDING 8/14/11

Top 10 Urban Videos

1		Beyonce	Best Thing I Never Had	Columbia
2		DJ Khaled feat. Drake, Lil W a...	I'm On One	Cash Money/ Universal Motown
3		Nicki Minaj	Super Bass	Young Money/ Cash Money
4		Kelly Rowland feat. Lil Wayne	Motivation	Universal Motown
5	+	W iz Khalifa	On My Level	Atlantic
6		Rej3ctz	Cat Daddy	Renaissance Music
7	+	Ace Hood	Go N' Get It	Island Def Jam
8	+	Young Jeezy feat. Lil Wayne	Ballin'	Island Def Jam
9	C	Chris Brown	She Ain't You	Jive
10		Tyga feat. Chris Richardson	Far Away	Young Money/ Cash Money

Top 10 Pop Videos

1		Mindless Behavior feat. Diggy	Mrs. Right	Streamline / Interscope
2		Bruno Mars	The Lazy Song	Atlantic
3		LMFAO	Party Rock Anthem	Interscope
4		Chris Brown feat. Justin Bieber	Next 2 You	Jive
5		Katy Perry	Last Friday Night (T.G.I.F.)	Capitol
6		Rihanna	Man Down	Island Def Jam
7		Selena Gomez & The Scene	Love You Like A Love Song	Hollywood
8	+	Lil Twist feat. M ishon	New Money	Young Money/ Cash Money
9		Avril Lavigne	Smile	RCA
10	C	Britney Spears	I Wanna Go	Jive

Top 10 Rock Videos

1		Avenged Sevenfold	So Far Away	Warner Bros.
2		Foster The People	Pumped Up Kicks	Columbia
3		Avenged Sevenfold	Nightmare	Warner Bros.
4		Linkin Park	Waiting For The End	Warner Bros.
5		3 Doors Down	When You're Young	Universal Republic
6		Black Veil Brides	Fallen Angels	Universal Republic
7		Attack Attack!	Smokahontas	Rise
8		Linkin Park	Iridescent	Warner Bros.
9		Rise Against	Make It Stop (September's Child)	Interscope
10		Hollywood Undead	Hear Me Now	A&M/ Octone

Top 5 Latin Videos

1		Prince Royce	El Amor Que Perdimos	Top Stop Music
2		Don Omar	Taboo	Machete Music
3		Plan B feat. Tony Dize, Zion & L...	Si No Le Contesto	Pina
4		Romeo Santos	You	Sony BMG Latin
5		La Arrolladora Banda El Limo...	Cuanto Me Cuesta	Disa

Top 5 Country Videos

1	+	The Band Perry	If I Die Young	Republic Nashville
2		Taylor Swift	Mean	Big Machine
3		Jason Aldean	Dirt Road Anthem	Broken Bow
4		Chris Young	Tomorrow	RCA Nashville
5		Zac Brown Band feat. Jimmy B...	Knee Deep	Atlantic



C = Certified NRS = New Rookie Smell SO = Speaking Of... TC = The Cut + = Debut

last week	this week	originals	artist	title	last week	this week	orders to date
WEEK ENDING 8/14/11							
1	1		Mindless Behavior feat. Di...	Mrs. Right	888,320	907,687	2,837,580
18	18		LMFAO	Party Rock Anthem	375,582	385,308	4,736,063
130	145		Keri Hilson feat. Chris Brown	One Night Stand	163,698	147,504	4,756,647
97	187		Jodeci	FreekN You	176,815	124,964	339,515
205	212		50 Cent	P.I.M.P.	125,629	114,243	1,017,028
214	232		Bad Meets Evil	Fast Lane	118,637	105,680	536,263
275	276	C	Lady GaGa	The Edge Of Glory	106,592	96,192	787,278
277	289		Eminem	Lose Yourself	99,265	93,896	2,966,735
281	312		Enrique Iglesias feat. Lil W...	Dirty Dancer	97,447	83,938	334,176
322	330	C	Lady GaGa	Judas	85,381	76,995	1,450,792
344	336	C	Lady GaGa	Bad Romance	76,428	73,918	4,573,279
341	340		Nicole Scherzinger feat. 5...	Right There	78,713	73,886	805,721
332	348		Greyson Chance	Unfriend You	81,030	72,507	253,835
334	350		Eminem feat. Dr. Dre	Guilty Conscience	81,021	72,142	863,178
348	352		Black Eyed Peas	Don't Stop The Party	75,936	70,542	601,586
352	356		Keyshia Cole	Long Way Down	74,563	69,971	3,335,345
357	367		Diddy - Dirty Money feat. R...	Your Love	73,484	66,804	1,478,850
373	375		Keyshia Cole	Take Me Away	70,729	65,881	2,570,665
~	398	+	Lil Play feat. Matthew K...	BirthDay Dress	~	60,953	74,011
395	400		Diddy - Dirty Money feat. C...	Yesterday	64,710	60,411	2,651,937
491	507		Dr. Dre feat. Akon	Kush	45,004	40,928	2,505,932
550	559		Enrique Iglesias	Do You Know? (The Ping Po...	36,917	33,235	125,041
614	648		Blink-182	Dammit	30,916	26,168	67,107
625	717		Aerosmith	Janie's Got A Gun	29,359	22,604	59,141
703	746		Diddy - Dirty Money feat. U...	Looking For Love	24,081	21,469	296,667
690	811		Rye Rye feat. Robyn	Never Will Be Mine	24,480	18,275	47,815
858	824		Daddy Yankee	Ella Me Levanto	16,425	17,596	547,910
567	833		Skylar Grey	Dance Without You	34,790	17,334	56,832
819	837		Marilyn Manson	mOBSCENE	18,065	17,121	105,571
855	856		Escape the Fate	Issues	16,728	16,130	378,522
798	867		Weezer	Say It Ain't So	19,556	15,635	41,253
872	915		Beck	Loser	15,459	14,516	92,374
898	920		Toby Keith	Courtesy Of The Red, White...	14,751	14,336	100,397
911	926		Hollywood Undead	Hear Me Now	14,312	13,510	606,287
907	929		Rise Against	Make It Stop (September's C...	14,502	13,492	84,909
749	942		Blink-182	Down	22,169	13,108	216,487
947	990		Eminem	When I'm Gone	13,508	11,812	4,112,419
1,014	1,019		Weezer	Pork And Beans	11,374	10,981	135,416
1,019	1,043		Toby Keith	How Do You Like Me Now?!	11,287	10,340	73,656
988	1,066		Timbaland feat. OneRepublic	Apologize	12,207	9,361	21,570



C = Certified NRS = New Rookie Smell SO = Speaking Of... TC = The Cut + = Debut

last week	this week	originals	artist	title	last week	this week	orders to date
980	1,099		Natalia Kills feat. will.i.am	Free	12,355	8,208	23,044
1,099	1,146		Timbaland feat. Justin Tim...	Carry Out	8,467	6,201	257,803
1,113	1,176		50 Cent feat. Justin Timbe...	Ayo Technology	7,753	5,546	13,287
1,110	1,179		The Pussycat Dolls feat. Ti...	Wait A Minute	8,127	5,361	13,491
1,132	1,180		Timbaland feat. D.O.E., Ker...	The Way I Are	7,258	5,354	12,612
1,150	1,215		Timbaland feat. Drake	Say Something	6,383	4,794	3,783,192
1,231	1,221		Toby Keith	I Love This Bar	5,023	4,660	32,721
1,188	1,259		Timbaland feat. Katy Perry	If We Ever Meet Again	5,756	3,910	398,250
1,239	1,280		Timbaland feat. Nelly Furt...	Morning After Dark	4,719	3,445	274,091
1,295	1,329		Timbaland	Scream	3,362	2,236	5,598
~	1,366		Blink-182	I Miss You	~	1,076	5,780
1,354	1,367		Stars	We Don't Want Your Body	2,066	1,066	3,458
TOTAL					3,411,139	3,233,230	51,469,117



Overview: Let's celebrate the brand new school year by encouraging students to perform at their best! SWRV presents *SWRV Space powered by Music Choice*, an interactive music experience featuring Interscope Recording Artists Mindless Behavior, on Monday September 19th at **4 Sixty 6**, located at 466 Prospect Avenue in West Orange, NJ. SWRV strives to partner with local schools, Performing Arts studios, Boys and Girls Clubs and YMCAs to provide deserving students with a red carpet event filled with fun, excitement and a chance to meet Mindless Behavior from 5:30 – 7:30pm.

About the Students: We are targeting students that are between 13-16 years old (Middle School and H.S. Freshman), that will be selected by the school's administration to attend. SWRV will supply the students with credentials to gain entrance into the venue.

Number of students to attend per school: 40 students

About Mindless Behavior: **Mindless Behavior** is an American boy band, best known for the single "My Girl", produced by Walter Millsap. The band was put together in Los Angeles in 2008, by Millsap (who has previously worked with Beyoncé and Timbaland) and Vincent Herbert (Lady Gaga, Toni Braxton), and the band trained in dance and singing for two years before releasing a recording. The members, all in their early teens, are Ray Ray, Princeton, Prodigy and Roc Royal. The band has toured as opening act for Backstreet Boys and for Justin Bieber in 2010. They performed "My Girl" on The Today Show in November 2010.

About SWRV: SWRV is the only network that puts viewers in control, letting them participate in the content through their mobile phones and computers. They can vote for their favorite music videos, host their own show, send in pics and videos, and more. SWRV is currently available in 9 million households with further rollout beginning in 2Q 2011.

About Music Choice: Music Choice is a multi-platform video and music network that delivers music programming to millions of consumers nationwide through television, online and mobile devices. Music Choice also programs dozens of uninterrupted music channels; produces Music Choice Originals that feature today's hottest established and emerging artists; and offers thousands of music videos.

Web Links

Mindless Behavior's Website –

<http://www.mindlessbehavior.com/order/>

Mindless Behavior on Facebook –

<http://www.facebook.com/mindlessbehavior>

Mindless Behavior on Twitter –

<http://twitter.com/#!/mindlessbhavior>

Mindless Behavior on SWRV-

http://www.youtube.com/results?search_query=SWRV+Mindless+Behavior

Sir
SPACE

POWERED BY MUSIC CHOICE®

FEATURING

**MINDLESS
BEHAVIOR**



**MUSIC
CHOICE®**

**POWER
105.1**

Let's celebrate the brand new school year
by encouraging students to perform at their best!



a FREE interactive music experience featuring Interscope Recording Artists

MINDLESS BEHAVIOR

on Monday September 19th at 4 Sixty 6, located at
466 Prospect Avenue in West Orange, NJ, from 5:30-7:30p.

POWERED BY MUSIC CHOICE™



SWRV strives to partner with local schools, Performing Arts studios, Boys and Girls Clubs and YMCA's just like yours to provide deserving students with a red carpet event filled with fun, excitement and a chance to meet

MINDLESS BEHAVIOR



is the only network that puts viewers in control, letting them participate in the content through their mobile phones and computers. They can vote for their favorite music videos, host their own show, send in pictures, videos, and more. SWRV is currently available in 9 million households. Locally, SWRV is available on Verizon FiOS TV channel 1799.

- **TYGA DEBUTS "FAR AWAY" IN THE TOP 20! NOW THAT'S FAR FROM THE BOTTOM!**
- **ANOTHER HUSTLER'S ANTHEM! ACE HOOD DEBUTS "GO N' GET IT" AT #11!**
- **GET LIKE HIM! WIZ KHALIFA'S "ON MY LEVEL" DEBUTS IN THE TOP 10!**
- **RIHANNA'S "MAN DOWN" KEEPS RISING! THIS WEEK SHE'S #15!**

VIDEO ADDS – STARTING 8/ 29/ 11

URBAN

- Diggy Simmons "Copy, Paste" (Atlantic Records)
- Swizz Beatz "International Party" (Swizz Beatz Productions)
- Maino "Let It Fly" (E1 Entertainment)
- DJ Drama "Oh My" (E1 Music)
- Hamilton Park "Thing Called Us" (Atlantic Records)
- Big Bad 40 "Welcome To California (Remix)" (Zoo Life Entertainment)
- The Game "Pot Of Gold" (DGC/ Interscope Records)

POP

- Maroon 5 "Moves Like Jagger" (A&M/ Octone Records)
- Pia Toscano "This Time" (19 Recordings)

ROCK

- VHS Or Beta "Breaking Bones" (Krian Music Group/ Chromosome Music)
- Set It Off "Breathe In, Breathe Out" (Equal Vision Records)
- TV On The Radio "Caffeinated Consciousness" (DGC/ Interscope Records)
- Foster The People "Helena Beat" (Columbia Records)
- Funeral Party "New York City Moves To The Sound Of LA" (RCA Records)
- Blue October "The Chills" (Up/ Down Records)

LATIN

- N/ A

COUNTRY

- Scotty McCreery "I Love You This Big" (19 Recordings)
- Joe Nichols "Take It Off" (Show Dog Universal Music)

ORIGINAL SHOWS ON DEMAND

AIRING NOW

Rick Ross: Speaking Of...
Joe Jonas: Speaking Of...
Certified: Comeback Champ (Chris Brown vs. Britney Spears)
Certified: Lady Gaga vs. Justin Bieber
Akon: The Cut
Big Sean: The Cut
NRS: Jacob Latimore, Mike Posner, Oh Land, Big Sean, Tinie Tempah

Video Playlists

Jay-Z vs. Kanye West: the top videos from Kanye & Jay-Z
Summer With Miami: feat. Rick Ross, Ace Hood
Indie In August: feat. Matt & Kim, Givers
J.Lo vs. Marc!!!: top videos from J. Lo and Marc Anthony
Vid Of The Year: feat. Bruno Mars, Adele
Country Collabos: feat. Zac Brown Band, Brad Paisley

COMING SOON

DJ Khaled: The Cut
Matthew Morrison: The Cut

last week	this week	originals	artist	title	label
WEEK ENDING 8/14/11					
1	1		Mindless Behavior feat. Diggy	Mrs. Right	Streamline / Interscope
3	2		Beyonce	Best Thing I Never Had	Columbia
5	3		Bruno Mars	The Lazy Song	Atlantic
11	4		DJ Khaled feat. Drake, Lil Wa...	I'm On One	Cash Money/ Universal Motown
8	5		Nicki Minaj	Super Bass	Young Money/ Cash Money
13	6		Kelly Rowland feat. Lil Wayne	Motivation	Universal Motown
16	7	C	Chris Brown feat. Busta Rhy...	Look At Me Now	Jive
18	8		LMFAO	Party Rock Anthem	Interscope
20	9	C	Chris Brown feat. Justin Bieber	Next 2 You	Jive
~	10	+	Wiz Khalifa	On My Level	Atlantic
~	11	+	Ace Hood	Go N' Get It	Island Def Jam
24	12		Katy Perry	Last Friday Night (T.G.I.F.)	Capitol
~	13	+	Young Jeezy feat. Lil Wayne	Ballin'	Island Def Jam
43	14		Lil Wayne feat. Rick Ross	John	Cash Money/ Universal Motown
37	15		Rihanna	Man Down	Island Def Jam
48	16		Selena Gomez & The Scene	Love You Like A Love Song	Hollywood
~	17	+	Lil Twist feat. Mishon	New Money	Young Money/ Cash Money
~	18	+	Tyga feat. Chris Richardson	Far Away	Young Money/ Cash Money
57	19		Lil Wayne feat. Cory Gunz	6 Foot, 7 Foot	Cash Money
~	20	+	The Band Perry	If I Die Young	Republic Nashville
55	21		Big Sean feat. Chris Brown	My Last	Island Def Jam
75	22		Selena Gomez & The Scene	Who Says	Hollywood
73	23		New Boyz feat. Chris Brown	Better With The Lights Off	Warner Bros.
71	24		YC feat. Future	Racks	Universal Motown Group
79	25		T-Pain feat. Chris Brown	Best Love Song	Jive
102	26		Adele	Rolling In The Deep	Columbia
81	27		Meek Mill feat. Rick Ross	Tupac Back	MMG/ Warner Bros.
127	28		Avril Lavigne	Smile	RCA
68	29		Jawan Harris feat. Tyga	Keisha	Jive
145	30	C	Britney Spears	I Wanna Go	Jive
174	31		Jennifer Lopez feat. Lil Wayne	I'm Into You	Island Def Jam
163	32		Waka Flocka Flame feat. Kebo...	Grove St. Party	Warner Bros.
172	33		Wiz Khalifa	Roll Up	Rostrum/ Atlantic
233	34	NRS	Jacob Latimore	Nothing On Me	Jive
212	35		Pitbull feat. Afrojack, Nayer &...	Give Me Everything	J
207	36		Jennifer Hudson	No One's Gonna Love You	RCA
214	37		Bad Meets Evil	Fast Lane	Shady/ Interscope
~	38	+	DJ Khaled feat. Fabolous, Ja...	It Ain't Over Til It's Over	We The Best/ Cash Money
~	39	+	Paramore	Monster	Atlantic
143	40		Lupe Fiasco feat. Trey Songz	Out Of My Head	Atlantic

rank	originals	artist	title	label
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WEEK ENDING 8/14/11

Top 10 Urban Videos

1		Beyonce	Best Thing I Never Had	Columbia
2		DJ Khaled feat. Drake, Lil W a...	I'm On One	Cash Money/ Universal Motown
3		Nicki Minaj	Super Bass	Young Money/ Cash Money
4		Kelly Rowland feat. Lil Wayne	Motivation	Universal Motown
5	+	W iz Khalifa	On My Level	Atlantic
6		Rej3ctz	Cat Daddy	Renaissance Music
7	+	Ace Hood	Go N' Get It	Island Def Jam
8	+	Young Jeezy feat. Lil Wayne	Ballin'	Island Def Jam
9	C	Chris Brown	She Ain't You	Jive
10		Tyga feat. Chris Richardson	Far Away	Young Money/ Cash Money

Top 10 Pop Videos

1		Mindless Behavior feat. Diggy	Mrs. Right	Streamline / Interscope
2		Bruno Mars	The Lazy Song	Atlantic
3		LMFAO	Party Rock Anthem	Interscope
4		Chris Brown feat. Justin Bieber	Next 2 You	Jive
5		Katy Perry	Last Friday Night (T.G.I.F.)	Capitol
6		Rihanna	Man Down	Island Def Jam
7		Selena Gomez & The Scene	Love You Like A Love Song	Hollywood
8	+	Lil Twist feat. M ishon	New Money	Young Money/ Cash Money
9		Avril Lavigne	Smile	RCA
10	C	Britney Spears	I Wanna Go	Jive

Top 10 Rock Videos

1		Avenged Sevenfold	So Far Away	Warner Bros.
2		Foster The People	Pumped Up Kicks	Columbia
3		Avenged Sevenfold	Nightmare	Warner Bros.
4		Linkin Park	Waiting For The End	Warner Bros.
5		3 Doors Down	When You're Young	Universal Republic
6		Black Veil Brides	Fallen Angels	Universal Republic
7		Attack Attack!	Smokahontas	Rise
8		Linkin Park	Iridescent	Warner Bros.
9		Rise Against	Make It Stop (September's Child)	Interscope
10		Hollywood Undead	Hear Me Now	A&M/ Octone

Top 5 Latin Videos

1		Prince Royce	El Amor Que Perdimos	Top Stop Music
2		Don Omar	Taboo	Machete Music
3		Plan B feat. Tony Dize, Zion & L...	Si No Le Contesto	Pina
4		Romeo Santos	You	Sony BMG Latin
5		La Arrolladora Banda El Limo...	Cuanto Me Cuesta	Disa

Top 5 Country Videos

1	+	The Band Perry	If I Die Young	Republic Nashville
2		Taylor Swift	Mean	Big Machine
3		Jason Aldean	Dirt Road Anthem	Broken Bow
4		Chris Young	Tomorrow	RCA Nashville
5		Zac Brown Band feat. Jimmy B...	Knee Deep	Atlantic

last week	this week	originals	artist	title	last week	this week	orders to date
WEEK ENDING 8/14/11							
1	1		Mindless Behavior feat. Di...	Mrs. Right	888,320	907,687	2,837,580
18	18		LMFAO	Party Rock Anthem	375,582	385,308	4,736,063
130	145		Keri Hilson feat. Chris Brown	One Night Stand	163,698	147,504	4,756,647
97	187		Jodeci	FreekN You	176,815	124,964	339,515
205	212		50 Cent	P.I.M.P.	125,629	114,243	1,017,028
214	232		Bad Meets Evil	Fast Lane	118,637	105,680	536,263
275	276	C	Lady GaGa	The Edge Of Glory	106,592	96,192	787,278
277	289		Eminem	Lose Yourself	99,265	93,896	2,966,735
281	312		Enrique Iglesias feat. Lil W...	Dirty Dancer	97,447	83,938	334,176
322	330	C	Lady GaGa	Judas	85,381	76,995	1,450,792
344	336	C	Lady GaGa	Bad Romance	76,428	73,918	4,573,279
341	340		Nicole Scherzinger feat. 5...	Right There	78,713	73,886	805,721
332	348		Greyson Chance	Unfriend You	81,030	72,507	253,835
334	350		Eminem feat. Dr. Dre	Guilty Conscience	81,021	72,142	863,178
348	352		Black Eyed Peas	Don't Stop The Party	75,936	70,542	601,586
352	356		Keyshia Cole	Long Way Down	74,563	69,971	3,335,345
357	367		Diddy - Dirty Money feat. R...	Your Love	73,484	66,804	1,478,850
373	375		Keyshia Cole	Take Me Away	70,729	65,881	2,570,665
~	398	+	Lil Play feat. Matthew K...	BirthDay Dress	~	60,953	74,011
395	400		Diddy - Dirty Money feat. C...	Yesterday	64,710	60,411	2,651,937
491	507		Dr. Dre feat. Akon	Kush	45,004	40,928	2,505,932
550	559		Enrique Iglesias	Do You Know? (The Ping Po...	36,917	33,235	125,041
614	648		Blink-182	Dammit	30,916	26,168	67,107
625	717		Aerosmith	Janie's Got A Gun	29,359	22,604	59,141
703	746		Diddy - Dirty Money feat. U...	Looking For Love	24,081	21,469	296,667
690	811		Rye Rye feat. Robyn	Never Will Be Mine	24,480	18,275	47,815
858	824		Daddy Yankee	Ella Me Levanto	16,425	17,596	547,910
567	833		Skylar Grey	Dance Without You	34,790	17,334	56,832
819	837		Marilyn Manson	mOBSCENE	18,065	17,121	105,571
855	856		Escape the Fate	Issues	16,728	16,130	378,522
798	867		Weezer	Say It Ain't So	19,556	15,635	41,253
872	915		Beck	Loser	15,459	14,516	92,374
898	920		Toby Keith	Courtesy Of The Red, White...	14,751	14,336	100,397
911	926		Hollywood Undead	Hear Me Now	14,312	13,510	606,287
907	929		Rise Against	Make It Stop (September's C...	14,502	13,492	84,909
749	942		Blink-182	Down	22,169	13,108	216,487
947	990		Eminem	When I'm Gone	13,508	11,812	4,112,419
1,014	1,019		Weezer	Pork And Beans	11,374	10,981	135,416
1,019	1,043		Toby Keith	How Do You Like Me Now?!	11,287	10,340	73,656
988	1,066		Timbaland feat. OneRepublic	Apologize	12,207	9,361	21,570



C = Certified NRS = New Rookie Smell SO = Speaking Of... TC = The Cut + = Debut

last week	this week	originals	artist	title	last week	this week	orders to date
980	1,099		Natalia Kills feat. will.i.am	Free	12,355	8,208	23,044
1,099	1,146		Timbaland feat. Justin Tim...	Carry Out	8,467	6,201	257,803
1,113	1,176		50 Cent feat. Justin Timbe...	Ayo Technology	7,753	5,546	13,287
1,110	1,179		The Pussycat Dolls feat. Ti...	Wait A Minute	8,127	5,361	13,491
1,132	1,180		Timbaland feat. D.O.E., Ker...	The Way I Are	7,258	5,354	12,612
1,150	1,215		Timbaland feat. Drake	Say Something	6,383	4,794	3,783,192
1,231	1,221		Toby Keith	I Love This Bar	5,023	4,660	32,721
1,188	1,259		Timbaland feat. Katy Perry	If We Ever Meet Again	5,756	3,910	398,250
1,239	1,280		Timbaland feat. Nelly Furt...	Morning After Dark	4,719	3,445	274,091
1,295	1,329		Timbaland	Scream	3,362	2,236	5,598
~	1,366		Blink-182	I Miss You	~	1,076	5,780
1,354	1,367		Stars	We Don't Want Your Body	2,066	1,066	3,458
TOTAL					3,411,139	3,233,230	51,469,117

Morano, Stephanie J.

From: Baynes, Nolan (MC-EX)
Sent: Tuesday, September 20, 2011 5:42 PM
To: MC Associates (MC-EX); McKeever, Joanna (MC-EX)
Cc: Foreman, Doug (MC-EX); Grindell, Nadine (MC-EX); Hall, Rashaun (MC-EX); Jackson, Chiari (MC-EX); Lecce, Nora (MC-EX); Main, Liz (MC-EX); McCaw, Rob (MC-EX); Stec, Kevin (MC-EX); Townsend, Joe (MC-EX)
Subject: SWRV Space feat. Mindless Behavior



SWRV Space feat **Mindless Behavior** was simply amazin! It was loud and louder and did I mention loud? ...but amazing!

300 teens partied w/ us on a Monday night, overdosed on frozen mock-tails and screamed their heads off for anything our host NIKO said containing the words Mindless or Behavior. He even had an Oprah moment when he told them SWRV was going to give them a signed CD (before it hit shelves on 9/20) to go home with...louder screams!!! Management, label and artists were genuinely excited and SWRV received tremendous love.



Every kid seemed to be recording video, shooting pictures or sharing the live experience w/ friends who couldn't be there, on their mobile devices. They all seemed very aware of Music Choice. One 13 year old told me, *"I watch MB on Music Choice; I saw their NRS and all their videos"*. No issue with brand awareness with these kids.

The social media activity was incredible as Anna and team tweeted play by play and received all sorts of love in return. We collected UGV (Moirra would be proud) and spread the SWRV gospel among some pretty dogmatic fans. One little girl told me that she had been using SWRV for months, voting for her favorite videos on line, her family has FIOS at home.



Sample Tweets:

[SWRV_TV](#) [SWRV](#)
Onstage for [@MindlessBehavior](#)'s surprise performance! <http://yfrog.com/hw8dehej>
[20 hours ago](#)
in reply to [@SWRV_TV](#) ↑



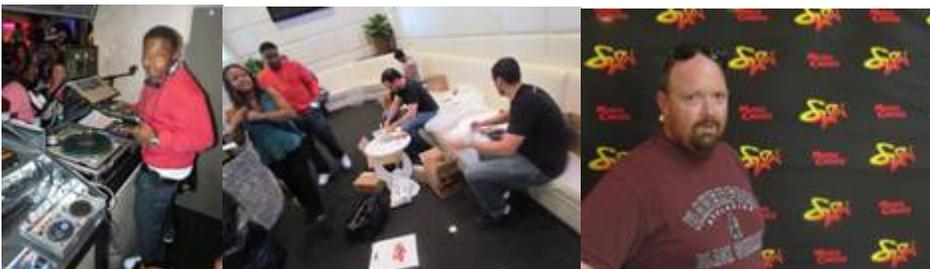
[@MBFORLIFEXX](#) YESENIA BAEZ
[@SWRV_TV](#) IM SO MAD WITH YAH YAH DIDNT PICK ME TO WIN TO GO SEE [@MindlessBehavior](#) I WAS CRYING THAT DAY :(
[20 hours ago](#) via web from New York, NY



[@Diosa_xoxo](#) Diosa_xoxo
It was fun seeing [@MindlessBehavior](#), thanks [@SWRV_TV](#) for making it happen;1
[14 hours ago](#) via [Twitter for iPhone](#)

In total, the SWRV Space Featuring Mindless Behavior netted us 586 new Twitter followers, 180 new Tumblr followers and over 2,400 new Facebook fans

Chiari's connection with Power 105.1, who gave away tickets on air, helped created a huge buzz around town. DJ Whutevva had the kids jamming and did a great job of plugging SWRV. The venue received calls all week about SWRV Space & MB from kids, parents, aunties and uncles trying to buy tickets!



Our team was on point! Doug F, Joe T, Chiari J, Rob M and our Production Management folks Ty and Kashiem; were incredible. Production (Erica, Jeff, Jim, David, etc.) went above and beyond to ensure the event was a success (truly all hands on deck). Erika and Jeff helped us stuff gift bags; Jim helped us set up those 300 ft SWRV/Music Choice flags that could be seen from 2 miles away...thanks everyone.



Our brand ambassadors represented us perfectly; Joe, Jessica, Karina, Avantia, Jamel, Veronica, Michelle...

SWRV Space was a great way to promote SWRV to a targeted demo (12-18 year olds) via partnerships with educational and youth institution such as Boys and Girls Clubs, YMCA, etc. Working with Mindless Behavior and Interscope also enabled us to demonstrate that MC and SWRV can help grow artists by sustaining our support over time. This model will help the music industry to truly understand the promotional power and value of Music Choice. SWRV Space is also a turnkey event that is expandable. SWRV Space tour has a nice ring to it.

Once again thank you all for your hard work in making this happen in less than 3 weeks and I hope I didn't forget anyone!

Nolan M Baynes

MUSIC CHOICE / SWRV - Director of Marketing

328 W34th Street NYC 10001/646-459-3373 (O)

nbaynes@musicchoice.com

Contains confidential and/or proprietary information. Please handle accordingly. If you received this transmission in error, do not use in any way and delete immediately.

MC 42

Morano, Stephanie J.

Subject: RE: RE: Brad Paisley

From: Tiffany Sinder [mailto:tiffany.sinder@gmail.com]
Sent: Monday, November 01, 2010 3:17 PM
To: Zach, Bari (MC-EX); Calhoun, Paula (MC-EX)
Subject: Fwd: RE: Brad Paisley

This covers us?
Tiffany

----- Forwarded message -----

From: <jeff.tanner@sonymusic.com>
Date: Nov 1, 2010 3:05 PM
Subject: RE: Brad Paisley
To: <tsinder@musicchoice.com>, <tiffany.sinder@gmail.com>
Cc: <laura.mckinley@sonymusic.com>

This email is confirmation that Sony is granting Music Choice limited permission to pre-announce (pre-promote) the Brad Paisley promotion as described below. Please work with Laura regarding the banner ads.

Thank you.

Jeff

From: Sinder, Tiffany (MC-EX) [mailto:tsinder@musicchoice.com]
Sent: Monday, November 01, 2010 12:09 PM
To: Tanner, Jeffrey, Sony Music
Cc: McKinley, Laura, Sony Music
Subject: Brad Paisley

Jeff:

I want to make sure we are clear on the consent Music Choice is requesting of Sony as we don't believe your license agreement works. Under the DMCA, Music Choice has the right to play tracks from the album *Hits Alive* and we will be complying with the "sound recording performance complement" restrictions of the DMCA when airing those tracks. We will also make all royalty payments as required under the DMCA. All we are asking permission for is to pre-announce the airing of the album during the day tomorrow, November 2, 2010 through banner ads on our service and other means (Twitter/Facebook) We would say something like "*Today Only! Check out Tracks from Hits Alive! In Stores Today!*".

Can Sony just grant us that limited permission to pre-announce the album airing tomorrow as described above? We could do this through a simple letter agreement or e-mail confirmation from someone at Sony with authority to grant permission is fine.

Tiffany Sinder

MUSIC CHOICE

328 West 34th St

New York, NY 10001

[646-459-3343](tel:646-459-3343)

AIM: Tiffer1878



**MUSIC
CHOICE**

NOW PLAYING TRACKS FROM

HITS ALIVE

2 Discs - 25 Song Set

**From the Studio And Live From The
H2O TOUR!**

AVAILABLE TODAY!

Write a comment...



Brad Paisley

Tune-In Alert! Watch Brad on ABC's second annual prime-time special, "In the Spotlight with Robin Roberts: All Access Nashville," TONIGHT at 10/9c. Check out a preview below!



Inside Country Star Brad Paisley's Home

abcnews.go.com

Inside Country Star Brad Paisley's Home

Like · Comment · Share · November 3, 2010 at 1:14pm ·

641 people like this.

View all 59 comments

Write a comment...



Brad Paisley

Today Only! "Today's Country" channel on Music Choice is playing tracks all day from Brad's new Greatest Hits / Live Album, "Hits Alive"! Use the link below for more information on how you join Music Choice and hear Brad's new music!



Music Choice

www.musicchoice.com

Music Choice

Like · Comment · Share · November 2, 2010 at 5:03pm ·

458 people like this.

View all 28 comments



Tamiko Holling CONGRADULATIONS BRAD!! LOVE YOU!!

November 10, 2010 at 11:55pm · Like



Misty Sobecki ive been waiting for years for this collection! thanks so very very much for the hits!

November 11, 2010 at 8:31pm · Like · 1

MC 43



**Music
CHOICE**

Your Music. Your Choice.™

TRAPT

PROMOTION SUMMARY

**Music
CHOICE** Your Music. Your Choice.™

TRAPT

Trapt Album & Tour Promotion Summary

Summary

Music Choice, the pioneer in music programming in over 26 Million digital cable households, utilized numerous assets including Music Choice On-Demand, our Broadband website, low speed website and our National Audio Service to heighten consumer awareness and stimulate sales for the release of *Someone In Control*. In addition, we utilized these assets to increase exposure for their tour with Aphasia & Blindside from September through November. We were pleased to take part in such a successful promotion where the album came in as the #1 Hard Rock Album after one week and the tour sold exceptionally well. Overall, we felt that we were able to accomplish the goals that we set out to achieve.

- I. National Audio Service
- II. Music Choice On-Demand
- III. Online

Trapt Promotion Summary

I. National Audio Service – Album Promotion

One on screen ad panel pre-promoting the release of *Someone In Control* was featured on the Music Choice Rock, Alternative and Hit List channels between 9/6/05 and 9/13/05. Another “in stores now” ad panel was also featured on the Rock channel from 9/16/05 through 9/30/05. These ads were scheduled to run 4 times per hour and whenever a Trapt song was played on either channel. A total of 1,367 on screen ads were featured during that time period. Below you will find examples of each:

Example of On Screen Ad Panel



Example of On Screen Ad Panel



Trapt Promotion Summary

I. National Audio Service – Album Promotion

The Trapt *Someone In Control* album premiere show ran on the Music Choice Rock channel from 9/6/05 through 9/13/05. This show was also supported with tour dates, ticket purchasing information, artist facts and various band related news. Ad panels pre-promoting the album premiere show also ran on the Rock Channel between 8/31/05 - 9/13/05. The set of tune in ads, which consisted of the album premiere ad, album promotion and tour promotion ads, were shown 4 times per hour and when any song from the band was played. A total of 395 tune in ads were shown between that time, while show banners were predominately featured throughout the entire album premiere show. Below are examples of the on screen images and show ads looked like:

On Screen
Ad Panel



The screenshot shows a dark-themed on-screen ad panel. At the top left is the 'Music CHOICE' logo. To its right, the word 'ROCK' is displayed in a bold, white, sans-serif font. Below the logo, there is a central graphic area. On the left side of this area is a black and white photo of the band Trapt with the text 'THIS IS THE TRAPT' in large, bold, white letters. To the right of the photo is the text 'SOMEONE IN CONTROL Album Premiere' and the website 'www.trapt.com'. To the right of the central graphic is the section 'ARTIST FACT' with the text 'Trapt are influenced by bands such as Metallica, Korn and Soundgarden'. At the bottom left of the panel, the following information is listed: 'Artist : Trapt', 'Song : Stand Up', and 'Album : Someone In Control'. At the bottom right, there is a small square image of the album cover for 'Someone In Control'. A red arrow points from the right side of the panel towards the 'ARTIST FACT' section.

Content Header
& Artist Information



**Music
CHOICE** Your Music. Your Choice.™

TRAPT

Trapt Promotion Summary

I. National Audio Service – Tour Promotion

One on screen ad panel promoting the tour with Aphasia and Blindsight, was featured on the Music Choice Rock, Alternative and Hit List channels between 8/31/05 and 12/13/05. On screen support for the tour also consisted of a tour content header featuring tour dates, ticket purchasing information, artist facts and various band related news, all related to the tour. A total of 15,271 on screen tour ads were shown between those dates.

On Screen
Ad Panel



Music CHOICE

ROCK

ON TOUR

11/8 Lubbock, TX
11/9 Albuquerque, MN
11/11 Tempe, AZ
11/12 Hollywood, CA

TRAPT
LIVE IN CONCERT
W/ SPECIAL GUESTS
For dates visit www.trapptour.com

Artist : Trapt
Song : Stand Up
Album : Someone In Control

Tour Content
Header & Dates



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TRAPT

Trapt Promotion Summary

II. Music Choice On-Demand – Album Promotion

The MC Exclusive program titled Trapt: In Control, was available on our Video On-Demand service throughout the months of November and December 2005. Within those two months, the show generated 38,653 requests. One :15 second commercial spot was also created to promote this exclusive content. This spot was attached to videos from bands such as Aphasia, Avenged Sevenfold and 30 Seconds To Mars. In total, this spot was viewed 762,688 times.

A collection of Trapt's best videos were grouped together as a Hot Videos List from 9/4/05 through 9/18/05. This collection of videos generated 45,986 orders.

Example of MC Exclusive On Screen Ad



Example of Best of Video List On Screen Ad



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TRAPT

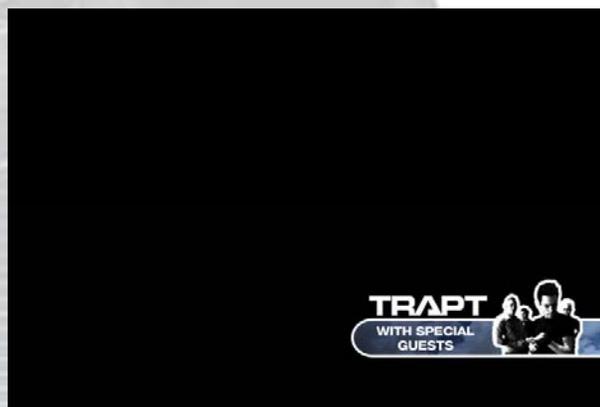
Trapt Album & Tour Promotion Summary

II. Music Choice On-Demand – Tour Promotion

One :15 second label created commercial spot aired to promote Trapt on tour with Aphasia and Blindside. This spot was attached to all of the Trapt, Aphasia and Blindside videos featured On-Demand. In addition, a graphic overlay was also created and placed on all of the Trapt videos containing ticket purchasing information for the tour. This spot was viewed 834,901 times. Please find all of the request information from each of the videos below.

<u>Artist</u>	<u>Video</u>	<u>Requests</u>
Trapt	Headstrong	233,062
Trapt	Stand Up	227,267
Trapt	Echo	122,351
Trapt	Still Frame	76,361
Trapt	Stories	56,503

Example of Graphic Overlay on Videos:



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Trapt Promotion Summary

II. Music Choice On-Demand – Tour promotion

We also supported the tour through our local ad inserter. This feature is available in all homes that carry our Video On-Demand service and allows us to target a show within a particular market. Each ad that was created featured the specific date, city, venue and ticket purchasing information.

Local ads were created for the following markets: Albuquerque, NM, Baltimore, MD, Boston and Worcester, MA, Chicago, IL, Cleveland, OH, Denver CO, Detroit, MI, Ft. Wayne, IN, Los Angeles, CA, Myrtle Beach, SC, Philadelphia, PA, Santa Cruz, CA, Seattle and Spokane WA, and Washington, D.C.

Below are examples of the tour ads that were created:



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Trapt Album & Tour Promotion Summary

III. Online – Album & Tour Promotion

The MC Exclusive special Trapt: In Control was also available on our Music Choice for Cable High Speed internet site, currently available in 8 million homes.

The :15 sec commercial spot promoting this exclusive show, was also attached to numerous rock music videos and Music Choice related programming.

The Trapt tour with Aphasias and Blindside was also featured as a daily Music Choice news segment in October.

Example of MC Exclusive Broadband Banner

The screenshot displays the Music Choice website interface. At the top, the logo reads "Music CHOICE Your Music. Your Choice.™" with a "Welcome" message and "Edit My Info" and "Sign Out" buttons. Below the logo is a navigation menu with tabs for "MUSIC CHOICE TODAY", "VIDEOS", "MY MUSIC CHOICE", and "MC EXCLUSIVE". Underneath, there are sub-tabs for "MY CREATIONS", "LISTEN TO MUSIC CHOICE", "TOP 10 CHARTS", and "GET MUSIC". The main content area features a large video player showing a live performance by the band Trapt. Below the video player is a "MUSIC CHOICE NEWS" section with a grid of news items including "New Order", "Taking Back Sunday", "Dierks Bentley", and "Archived Stories". At the bottom, there are buttons for "ADVERTISE WITH US", "FOR BUSINESS", "FAQs", and "MORE MUSIC CHOICE". A prominent "TRAPT Exclusive Interview" banner is visible at the bottom of the page, with a "Select MC Exclusive" button.

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TRAPT

Trapt Album & Tour Promotion Summary III. Online – Album & Tour Promotion

The following banners all rotated along the bottom of our broadband Homepage, promoting the album, album premiere show, MC Exclusive and tour. The album Promotion banner also hot linked directly to Trapt's website.

Example of Album Promotion Broadband banner



Example of Album Promotion Broadband banner



Example of Tour Promotion Broadband banner



Example of Album Premiere Show Broadband banner



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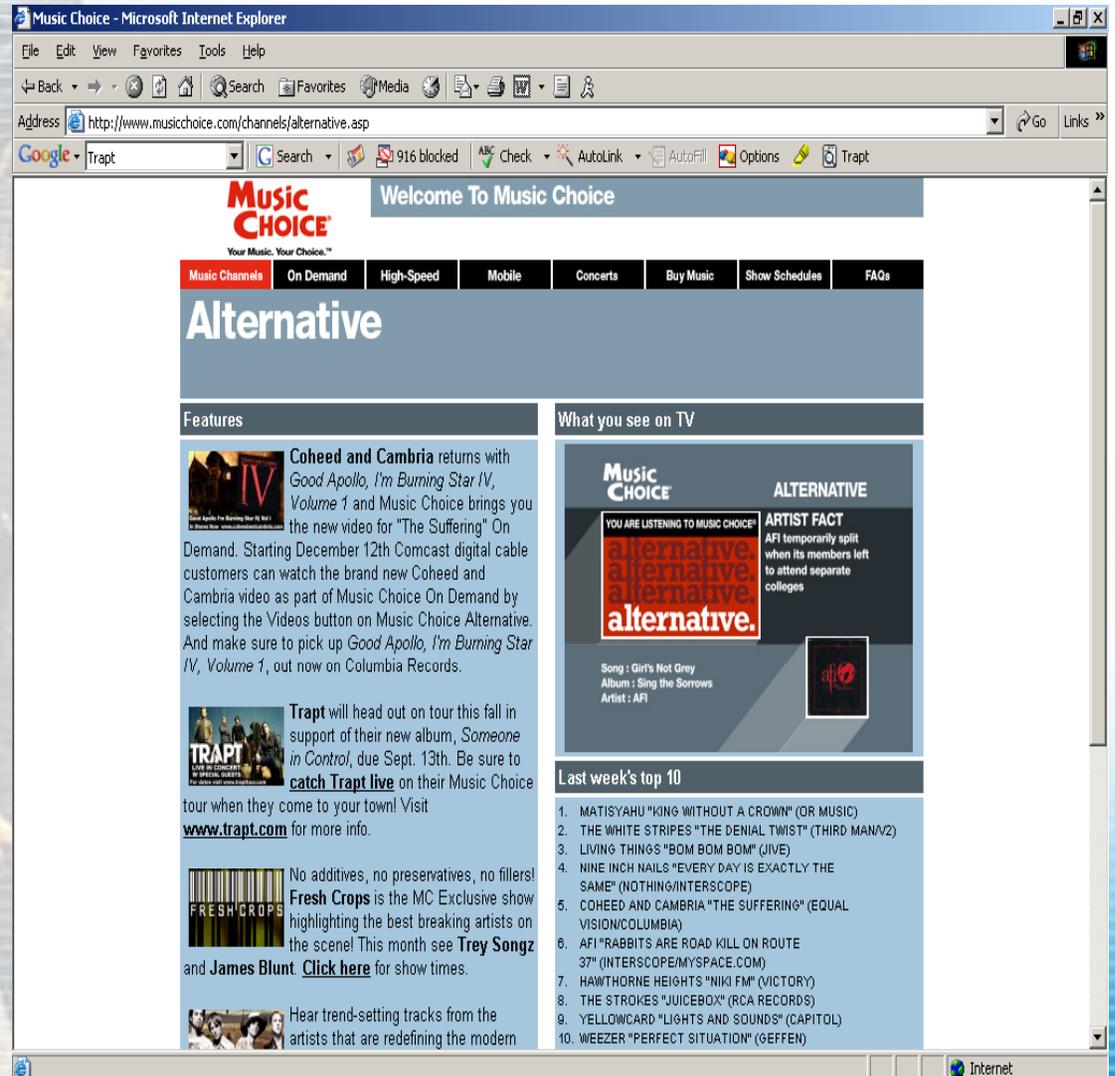
Trapt Album & Tour Promotion Summary

III. Online – Album & Tour Promotion

The Trapt tour with Aphasia and Blindside was also supported with a web blurb on our low speed internet site:

www.musicchoice.com/rock & www.musicchoice.com/alternative

The Web blurb consisted of a Music Choice on screen banner, featuring the tour image, tour dates, guest band info, ticket purchasing information and link to the official site for tickets: www.trapptour.com



The screenshot shows a Microsoft Internet Explorer browser window displaying the Music Choice website. The address bar shows the URL <http://www.musicchoice.com/channels/alternative.asp>. The page features a navigation menu with options like Music Channels, On Demand, High-Speed, Mobile, Concerts, Buy Music, Show Schedules, and FAQs. The main content area is titled "Alternative" and includes several promotional sections:

- Coheed and Cambria**: Promoting their new video for "The Suffering" and their album *Good Apollo, I'm Burning Star IV, Volume 1*.
- Trapt**: Announcing their tour dates and album *Someone in Control*, due September 13th.
- Fresh Crops**: Highlighting the best breaking artists on the scene, including Trey Songz and James Blunt.
- AFI**: Promoting their album *Sing the Sorrows*.
- Last week's top 10**: A list of popular tracks including Matisyahu, The White Stripes, Living Things, Nine Inch Nails, Coheed and Cambria, AFI, Hawthorne Heights, The Strokes, Yellowcard, and Weezer.

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Trapt Album & Tour Promotion Summary

Record Sales

Soundscan's market analysis shows that during the promotion window, there was positive impact on the album sales of *Someone In Control* on 9/13/05. The album was the #1 Hard Rock Album after it's first week out.

<u>Week Ending</u>	<u>Soundscan</u>
9/18/05	61,080
9/25/05	28,255
10/2/05	17,065
10/9/05	13,335
10/16/05	10,809
10/23/05	9,153
10/30/05	7,868
11/06/05	7,293
11/13/05	6,084
11/20/05	5,555
11/27/05	6,368
12/4/05	5,557
12/11/05	6,669

Conclusion

We look forward for the opportunity to work with Warner Bros. Records and Trapt again on more promotions in the near future, so that we can utilize all of our assets to extend the same exposure. Please feel free to contact us with any questions or concerns regarding this summary. Thank you.

MC 44

DISTURBED

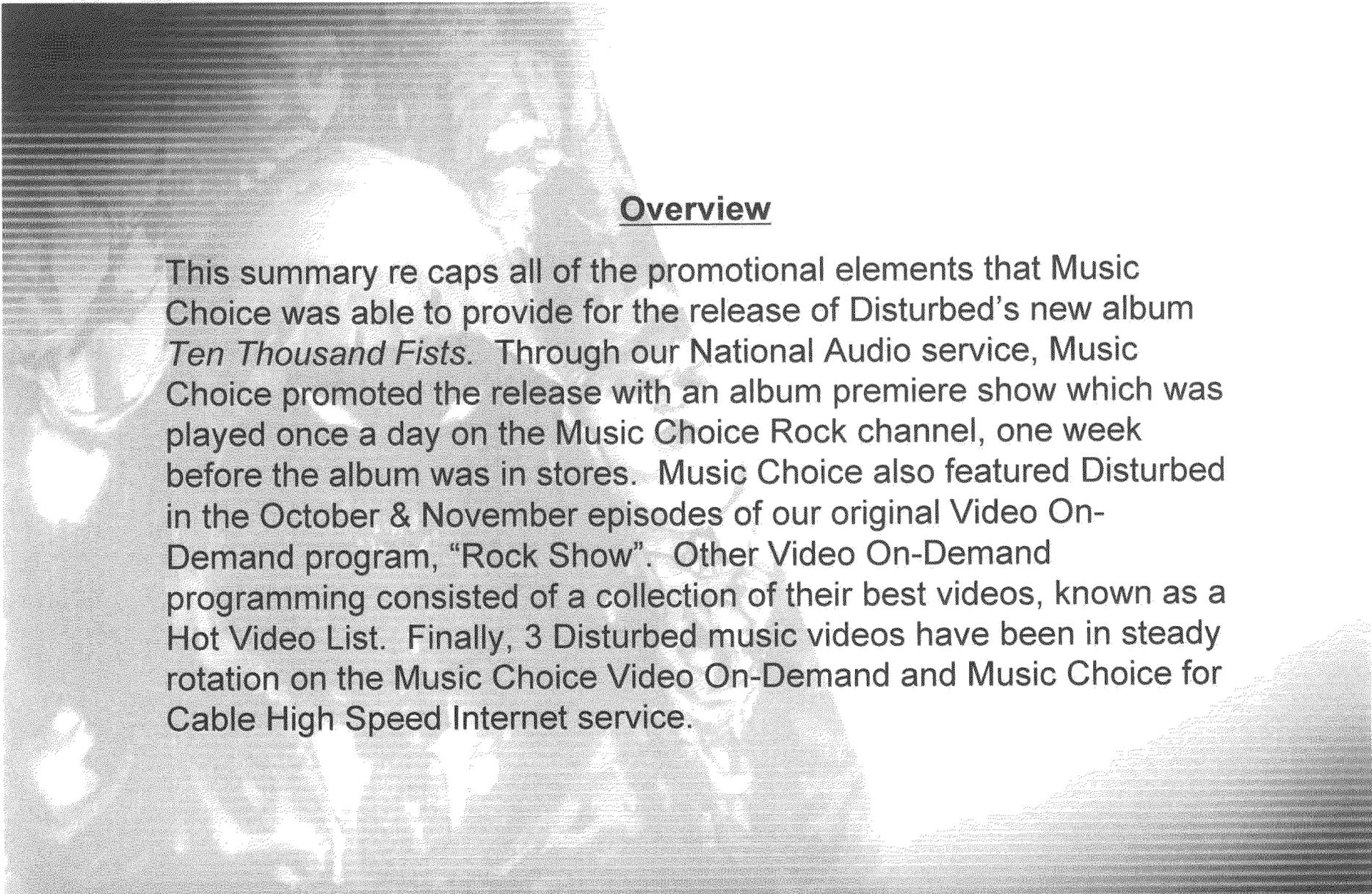
TEN THOUSAND FISTS

**MUSIC
CHOICE**[®]

Your Music. Your Choice.[™]

**MUSIC
CHOICE**[®] Your Music. Your Choice.[™]

DISTURBED
TEN THOUSAND FISTS



Overview

This summary re caps all of the promotional elements that Music Choice was able to provide for the release of Disturbed's new album *Ten Thousand Fists*. Through our National Audio service, Music Choice promoted the release with an album premiere show which was played once a day on the Music Choice Rock channel, one week before the album was in stores. Music Choice also featured Disturbed in the October & November episodes of our original Video On-Demand program, "Rock Show". Other Video On-Demand programming consisted of a collection of their best videos, known as a Hot Video List. Finally, 3 Disturbed music videos have been in steady rotation on the Music Choice Video On-Demand and Music Choice for Cable High Speed Internet service.

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TEN THOUSAND FISTS

Album Premiere Show 9/13/05 to 9/20/05 – National Audio Service
(26M Homes)

The album premiere program showcased the complete album in its entirety on the Music Choice Rock channel, one week before the album was in stores. It was supported with tune in ad panels that ran during various time blocks on the Music Choice Rock channel for one week prior to 9/13/05. The tune-in ad panel was also followed by an album release ad panel, promoting the release date of the record with band website. Show ad panels were then featured along with album promotion ad panels during the show itself.

Ad Panel Summary:

Channel: Rock

Duration: 9/6/05 through 9/20/05

Number of Ads: 1,079

Impressions: 30 Million

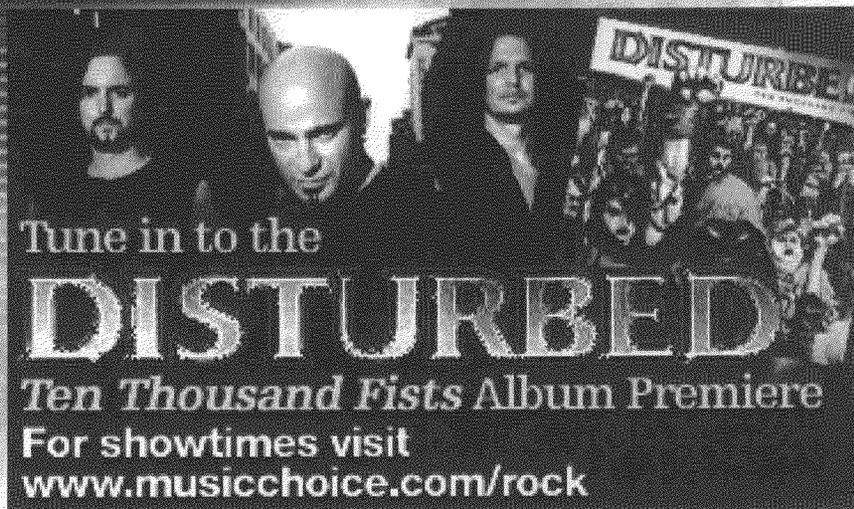
Value: 90K

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DISTURBED
TEN THOUSAND FISTS

Examples of Ad Panels – National Audio Service

Tune In Ad Panel



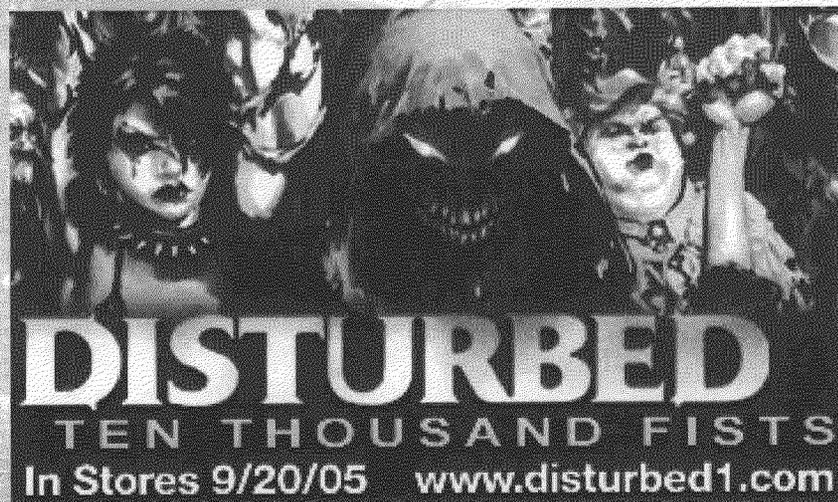
Tune in to the
DISTURBED
Ten Thousand Fists Album Premiere
For showtimes visit
www.musicchoice.com/rock

Premiere Show Ad Panel



This is the
DISTURBED
Ten Thousand Fists Album Premiere
www.disturbed1.com

Album Promo Ad Panel



DISTURBED
TEN THOUSAND FISTS
In Stores 9/20/05 www.disturbed1.com

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DISTURBED
TEN THOUSAND FISTS

Examples of Broadband banners - Music Choice for Cable High Speed Internet
Banners were created to run on our broadband home page, promoting tune-in to the album premiere show and to promote the release of *Ten Thousand Fists*. These banners rotated throughout various time blocks.

Premiere Show Broadband Banner



Tune in to the
DISTURBED
Ten Thousand Fists Album Premiere

For showtimes visit
www.musicchoice.com/rock

This banner features a black and white photograph of the band Disturbed performing on stage. The text is overlaid on the left side, and the website URL is on the right.

Album Promotion Broadband Banner



DISTURBED
TEN THOUSAND FISTS

In Stores 9/20/05
www.disturbed1.com

This banner features a black and white photograph of the band Disturbed performing on stage. The text is overlaid on the left side, and the release date and website URL are on the right.

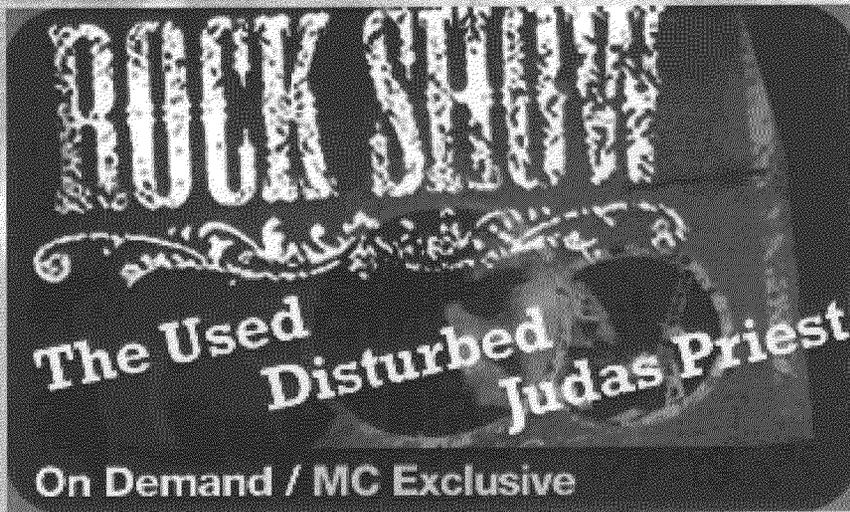
**Music
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DISTURBED
TEN THOUSAND FISTS

Rock Show – Views on VOD & Broadband (18M Homes)

Show Description: "Rock Show" is an original Music Choice program available to our Video On-Demand and High Speed Internet subscribers. October's show featured Disturbed, The Used and Judas Priest. This show was supported with commercial spots tagged to applicable music videos on our VOD service, along with on screen ads on our audio service and broadband home page. This show was available on-demand throughout the months of October and November.

On Screen Ad Panels in VOD Markets



Platform: Comcast VOD

Duration: 10/1/05 through 11/30/05

Comcast Homes: 10 Million

Number of Views: 86,233

Rock Show Broadband Banner



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DISTURBED
TEN THOUSAND FISTS

Disturbed Hot Video List – Traffic Hits on VOD (10M Homes)

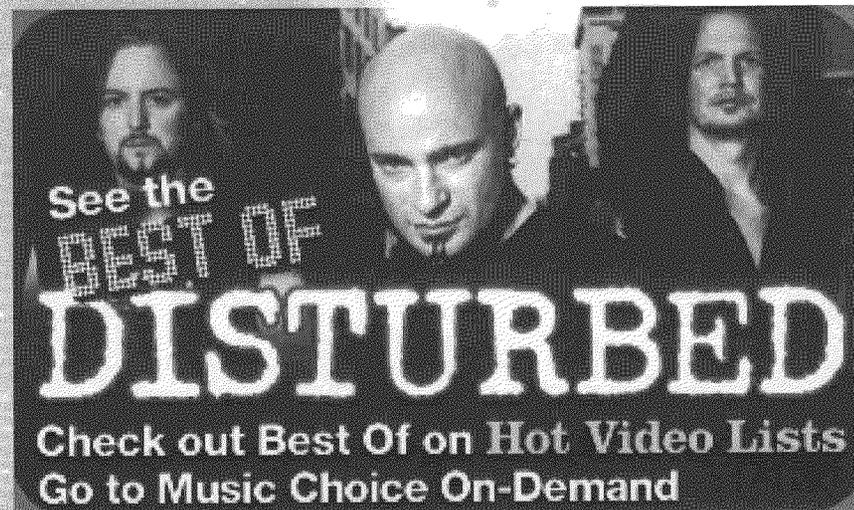
From 10/16/05 – 10/30/05, a group of Disturbed's best videos were featured as a Hot Video List on our Video On-Demand service. The videos that were featured in this group were "Stupify", "Down With The Sickness", "Prayer", "Remember" and "Stricken". This "best of" set of videos was supported with on screen ads on our audio service and broadband home page.

Platform: Video On-Demand

Duration: 10/16 – 10/30

Comcast Homes: 10M

Number of Hits: 63,699



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TEN THOUSAND FISTS

Disturbed Music Videos on VOD (10M Homes)

Over the past few months, a total of 3 Disturbed videos have been available on our Video On-Demand service. Below is a breakdown of when each video was available; along with the number of orders these videos have received.

<u>Title</u>	<u>Requests</u>	<u>Dates</u>
"Stricken"	330,257	10/2/05 – 11/13/05
"Remember"	131,431	5/22/05 – 7/17/05
"Down With Sickness"	345,189	2/6/05 – 6/12/05
Total Views:	806,877	

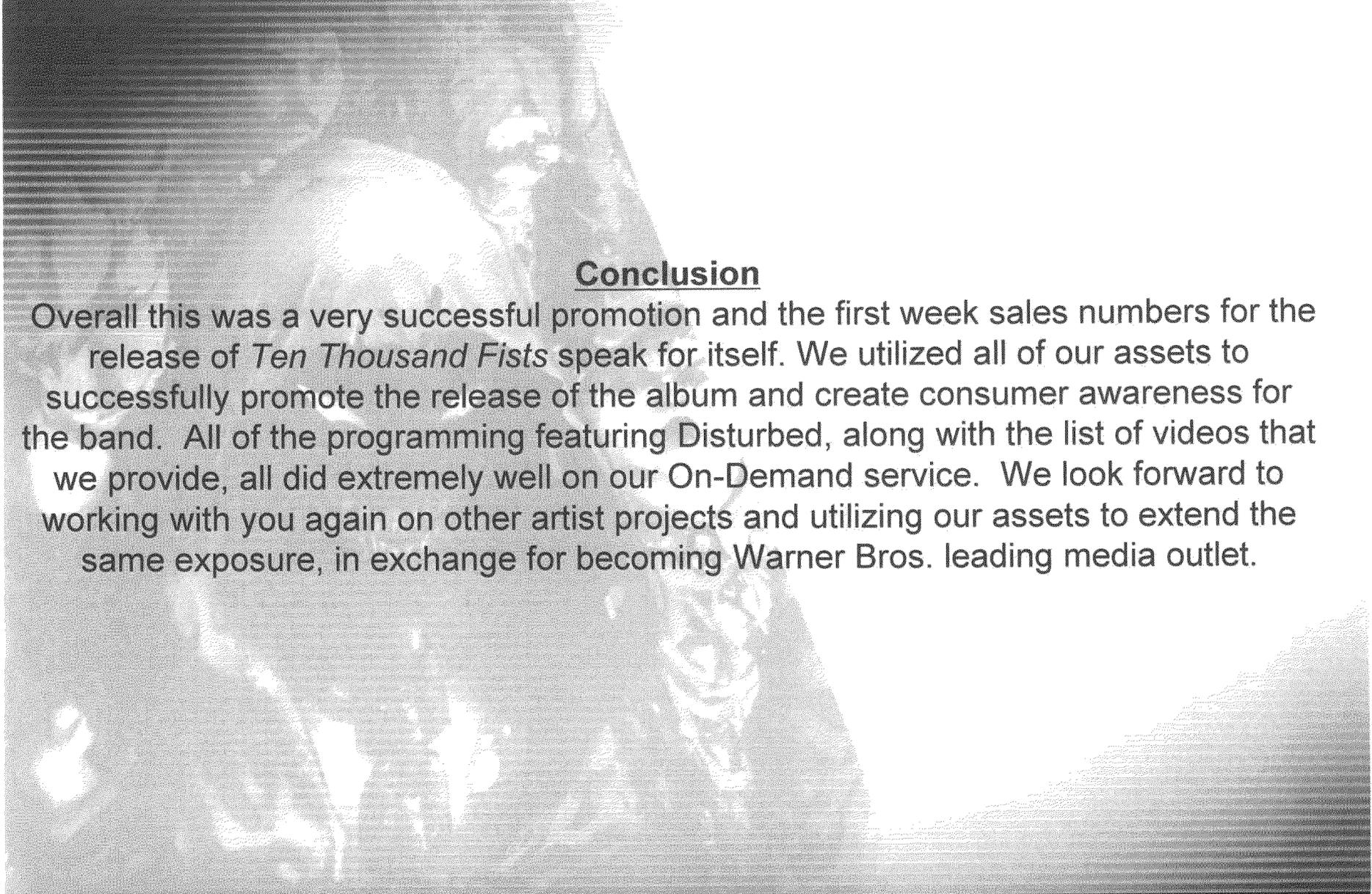
Record Sales

With our album premiere show running one week prior to the release of *Ten Thousand Fists*, Soundscan's market analysis showed that there was an extremely positive impact on album sales during the first week. Disturbed's album amazingly entered the charts with the #1 record in the country on 9/25/05. Sales of the album were also very strong during the first two weeks in October when our Rock Show premiered.

<u>Dates</u>	<u>Music Choice Show</u>	<u>Soundscan</u>
9/13 - 9/20	Album Premiere Show	X
9/25/05	X	238,528 (#1)
10/2/05	Rock Show	92,335
10/9/05	Rock Show	65,461
10/16/05	Rock Show/Hot Video List	51,063
10/23/05	Rock Show/Hot Video List	40,635
10/30/05	Rock Show/Hot Video List	33,422
11/6/05	Rock Show	31,482

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TEN THOUSAND FISTS



Conclusion

Overall this was a very successful promotion and the first week sales numbers for the release of *Ten Thousand Fists* speak for itself. We utilized all of our assets to successfully promote the release of the album and create consumer awareness for the band. All of the programming featuring Disturbed, along with the list of videos that we provide, all did extremely well on our On-Demand service. We look forward to working with you again on other artist projects and utilizing our assets to extend the same exposure, in exchange for becoming Warner Bros. leading media outlet.

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DISTURBED
TEN THOUSAND FISTS

MC 45



MUSIC CHOICE PROMOTION CASE STUDY
~ Shadows Fall ~

Artist: Shadows Fall
Label: Century Media Records
Channel: Metal
Promotion Run Dates: 9/13 – 9/24 2004

OVERVIEW: MUSIC CHOICE® featured Shadows Fall on the Metal Channel program *Declassified*; a sixty-minute produced show that features artist interviews and new album releases in their entirety. This special program was designed to provide the MUSIC CHOICE® metal audience (in over 30 million homes) the opportunity to hear new albums prior to their in-store availability and interview clips from the musicians. *Declassified* is typically used to promote album sales and inform viewers of the artist's current activities, including tour dates, album release dates, promotions, news, etc. In this case, *Declassified* featuring Shadows Fall featured the band's new record, *The War Within*. The show aired once a day for a 12-day period prior to and during the week of September 21, 2004, when the record was released. Century Media Records waived typical digital media act restrictions by signing a release allowing the record to play in its entirety during the show's airings.

Declassified Program Details:

1. This sixty-minute program was produced and aired 12 times on the MUSIC CHOICE® Metal Channel between the dates of September 13, 2004 and September 25, 2004.
2. Program featured:
 - a. Tracks from *The War Within*
 - b. DJ drops promoting the album in-store dates
 - c. Interview segments with Shadows Fall members
3. Program was supported by the following on screen elements:
 - a. New album release information
 - b. Band current activities (news, tour dates, artist facts and any other priority messages)
 - c. Advertising panels prompting viewers to purchase *The War Within* any desired website and/or music retailer supplied by Century Media Records
 - d. Advertising banner aired during regular Metal channel programming hours as part of the *Declassified* viewer tune-in campaign
4. The MUSIC CHOICE® Metal Channel web page featured a Shadows Fall spotlight, *Declassified* program tune-in features, and links to Century Media Records and/or other desired websites

TUNE-IN CAMPAIGN

Onscreen

Viewer tune-in to the *Declassified: Shadows Fall* was accomplished through MUSIC CHOICE® Television screen advertisements that rotated for 30 seconds through out various time-blocks on the Metal Channel. Screen ads, featuring Shadows Fall album artwork and/or graphics and call-to-action retail messaging, prompted viewers to tune-in to the program at specific times/dates. Sample screen ads are shown below.

In addition to airing during the *Declassified: Shadows Fall* show, screen ads were also scheduled to appear anytime Shadows Fall received any airplay on the Metal Channel.

Declassified: Shadows Fall program details, show times, and any desired web links were predominately displayed on the MUSIC CHOICE® Metal Channel Web Page at www.musicchoice.com/metal

Screen Ad Examples:



DECLASSIFIED VALUE SUMMARY – (Based on 2004 pricing grid)

Element	Sub's / Impressions	# of Ads	Value
Program Production	N/A	N/A	\$2,500 per airing x 12 = \$30,000
Onscreen			
-Tune-In Ads	2.9M	1,672	\$8,790
-Program Airing Ads x 12 shows	3.1M	100 Ads per airing x 12 shows = 1,200	\$9,360
TOTAL	6M	2,872	\$48,150
			NO CHARGE

Promotion Results & Anecdotes:

- This release led Shadows Fall to be picked up by major label, Atlantic Records.
- **The War Within has sold 263,558 records to date.** (Soundscan)
- In late 2004, Music Choice employees Gary Susalis, Jessica Siracusa, Adam Neiman (former employee) received plaques from Century Media in gratitude of 100K albums sold.
- Shadows Fall has become one of the more popular Metal bands. They have been featured on magazine covers such as Revolver and have toured with Ozzfest and Sounds of the Underground.

Record Label Feedback:

George Vallee/Publicity and Video Promotions/Century Media Records

"Music Choice's audio promotions have been extremely beneficial to Century Media Records especially in the case of Shadows Fall's "Declassified" promo. This promotion ran the week before the album's release and in turn helped the disc debut at #20 in the Billboard Top 200 chart, which is a first for our label. Music Choice is a platform that has a huge impact on our target market and in turn results in higher CD sales. We could not be happier with Music Choice's services and look forward to working together more in the future."



MUSIC CHOICE® PROMOTION OVERVIEW
~ Shadows Falls Declassified ~

Shadows Fall Declassified featuring *The War Within* was featured in its entirety according to this schedule:

Show #	Date	Day	Time
1.	9/13/04	Monday	6:00 p.m.
2.	9/14/04	Tuesday	11:00 p.m.
3.	9/15/04	Wednesday	2:00 a.m.
4.	9/16/04	Thursday	7:00 p.m.
5.	9/17/04	Friday	1:00 p.m.
6.	9/18/04	Saturday	10:00 p.m.
7.	9/19/04	Sunday	2:00 p.m.
8.	9/20/04	Monday	3:00 p.m.
9.	9/21/04	Tuesday	1:00 a.m.
10.	9/22/04	Wednesday	4:00 p.m.
11.	9/23/04	Thursday	9:00 p.m.
12.	9/24/04	Friday	2:00 a.m.

*All times et

II. MUSIC CHOICE AUDIO SERVICE – Onscreen Branding

Shadows Fall Declassified, featuring *The War Within* was promoted through the following onscreen initiative on the MUSIC CHOICE® Metal channel.

- a. New album release information
- b. Band current activities (news, tour dates, artist facts and any other priority messages)
- c. Advertising panels prompting viewers to purchase *The War Within* any desired website and/or music retailer supplied by Century Media Records

The screenshot shows a Music Choice onscreen branding panel for the Metal channel. At the top left is the Music Choice logo, and at the top right is the word "METAL". The main content area is split into two sections. On the left, there is a promotional image for the album "The War Within" by Shadows Fall, with the text "FEATURING THE WAR WITHIN" and "THE NEW SHADOWS FALL ALBUM" below it. On the right, under the heading "MUSIC NEWS", there is a text box that reads: "Shadows Fall will team up with Damageplan for a US tour beginning in October". At the bottom left, there is a list of details: "Song : Act of Contrition", "Artist : Shadows Fall", and "Album : The War Within". At the bottom right, there is a small image of the album cover.

Screen Ad Details:

- Five ads were designed
- Ads ran a minimum of two times an hour to promote the program on MUSIC CHOICE® Metal
- Ads ran throughout the entire *Declassified* program

MC 46



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Music Choice Declassified: God Forbid



Overview

Music Choice Declassified: God Forbid was developed to extend promotion for God Forbid and drive CD sales of their new release *IV: Constitution of Treason*.

Music Choice Declassified is an original program that airs on the Music Choice Metal channel on our national audio service currently available in over 26 million digital cable households. This program featured the new album, played in its entirety, along with commentary segments from the band in between each song. This show aired from September 13th through September 20th (one week), prior to the albums in store date. On screen ad panels ran for one week prior to the airing of the program to promote tune in to Declassified. In addition, ad panels were run throughout the program promoting the new albums and in store date. In total, there were 540 on screen ads promoting tune in to the Declassified show between 9/6/05 and 9/20/05. During the same time frame, there was also 820 ads promoting the release of the new album.

Please see examples of the ads below.

Declassified – National Audio Service (26M Homes)



Tune-in Ad Panel
Panel



Program Ad Panel

Album Ad

Record Sales:

Soundscan's market analysis shows that there was a significant impact on the bands first week album sales for *IV: Constitution of Treason*. This program helped to generate the highest first week sales for God Forbid to date. Below you will see a breakdown in the sales from week to week:

<u>DATES</u>	<u>Album</u>	<u>DECLASSIFIED</u>	<u>SALES</u>
9/13/05 – 9/20/05	<i>IV: Constitution of Treason</i>	SHOW AIRS ONCE DAILY FOR 8 DAYS	X
9/25/05	<i>IV: Constitution of Treason</i>	X	8,186

<u>DATE</u>	<u>Album</u>	<u>DECLASSIFIED</u>	<u>SALES</u>
2/29/04	<i>Gone Forever</i>	X	2,816

<u>DATE</u>	<u>Album</u>	<u>DECLASSIFIED</u>	<u>SALES</u>
12/21/03	<i>Better Days</i>	X	229

<u>DATE</u>	<u>Album</u>	<u>DECLASSIFIED</u>	<u>SALES</u>
4/22/01	<i>Determination</i>	X	442

Viewer Comments:

Attached are a few viewer responses that were posted under the comments section in God Forbid's My Space Page. It clearly shows that fans of the band definitely tuned in and made it known how much they loved the show and new album.

KURT



Sep 9, 2005 5:07 PM

ATTENTION ALL GOD FORBID FANS!!!

If you want a sneak preview of the entire new album, tune in to the MUSIC CHOICE METAL channel during one of the following times (all times listed are EST):

Tue: 9/13 4pm
Wed: 9/14 8pm
Thu: 9/15 11pm
Fri: 9/16 6pm
Sat: 9/17 2am
Sun: 9/18 12am
Mon: 9/19 9pm
Tue: 9/20 1pm

Craig



9/19/2005 6:58:00 PM

Just heard most the new album on Music Choice, great work guys. I'll be picking up the album the day it comes out, tomorrow!
I'll see u October 30th. C ya

Danny



Sep 18, 2005 8:51 AM

THE NEW ALBUM IS FUCKING AMAZING!!!
music choice is really showing you dudes some respect! end of the world is sick and doc's pops rips the piano... keep it up and see yas in philly!

MFM



Sep 16, 2005 6:06 PM

Jesus, I've been watching Music Choice for hours trying to catch The Absence... and it's been non-stop God Forbid. Nice. Very nice. :D

Have a great show tonight. Sorry I missed seeing you guys by 1 day. The show at CBGB's went well.

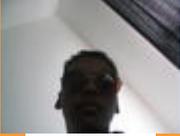
See you in OCT.!! It's gonna be silly.

Sean



Sep 15, 2005 11:03 PM

I'm watching and listening to *God Forbid: Declassified* on Music Choice Metal right now!
You guys fucking rock!

<p>X=Shut Up</p> 	<p>Sep 13, 2005 4:54 PM</p> <p>I listened to your album on the Direct tv music choice thing, it kicks ass, just thought id let you know</p>

Conclusion:

As we extend our promotions beyond our national audio service, and on to other platforms such as Video On-Demand and Broadband, there are countless ways in which we can make an impact on future album sales. We look forward for the opportunity to work with other Century Media artists again in the near future.

MC 47

A portrait of Avril Lavigne with long, wavy blonde hair, wearing a black top with a "Drink Me" tattoo on her chest. She is looking slightly to the side with a neutral expression.

NEW VIDEOS

AVRIL LAVIGNE

"SMILE"

MUSIC CHOICE ON DEMAND ► HIT LIST



NEW VIDEOS

**ENRIGUE
IGLESIAS
"DIRTY DANCER"**

MUSIC CHOICE ON DEMAND ► HIT LIST

NEW VIDEOS
FOO FIGHTERS
"WALK"



MUSIC CHOICE ON DEMAND ▶ ROCK

A promotional image for a music release. It features two men in a dark, textured environment. The man on the left is wearing a black beanie and sunglasses, looking upwards. The man on the right is wearing a red beanie and a dark jacket, also looking upwards. A large white text overlay is positioned on the left side of the image.

**HEAR IT
HERE**

**ALEXIS & FIDO
FEAT. TONY DIZE
"DEJA VER"**

**HEAR IT
HERE**

**MINDLESS
BEHAVIOR**

“ # 1 GIRL ”



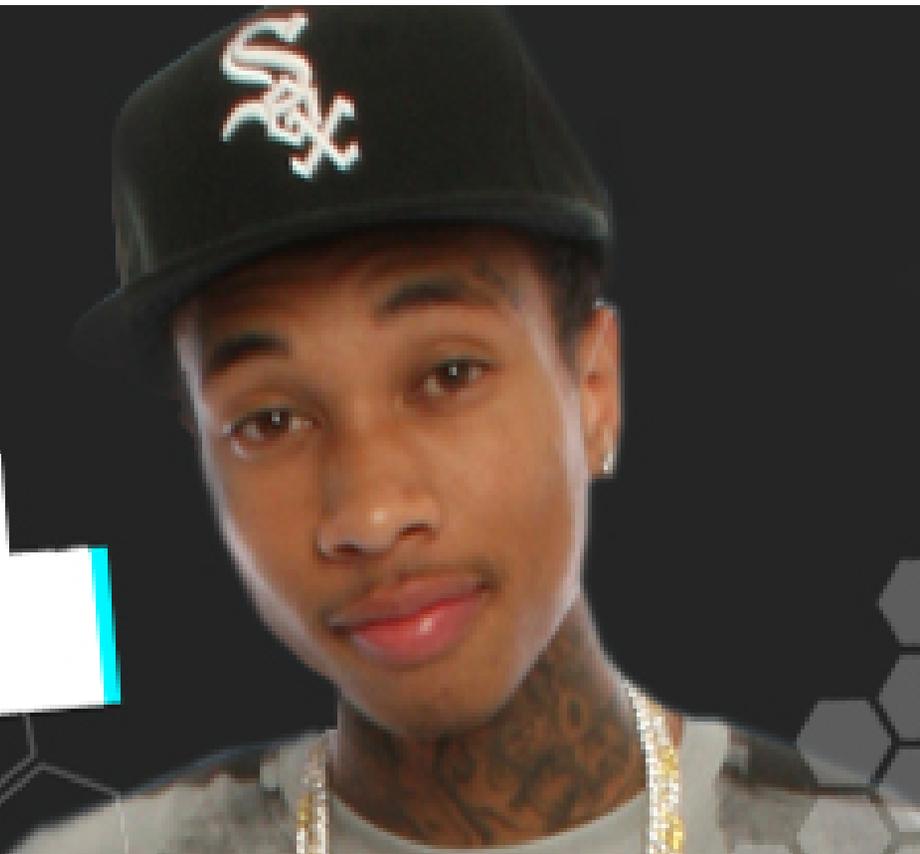
**HEAR IT
HERE**

**WALE
“LOTUS FLOWER BOMB”**



HEAR IT
HERE

TYGA
"STILL GOT IT"



**HEAR IT
HERE**

**TRIN-I-TEE 5:7
"HEAVEN HEAR MY HEART"**



HEAR IT
HERE

**TAIO CRUZ
FEAT. FLO RIDA
"HANGOVER"**



**HEAR IT
HERE**

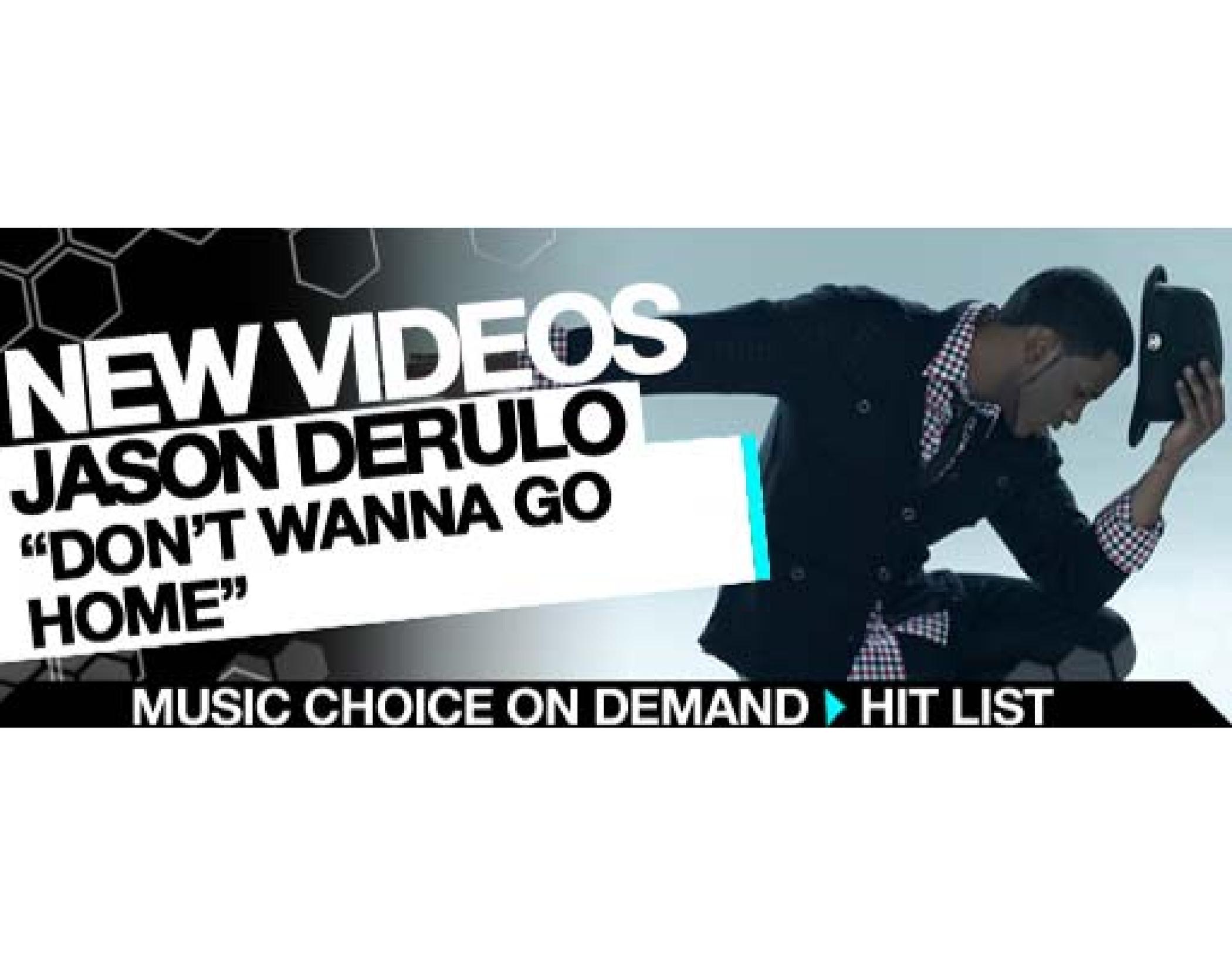
**NE-YO
"THE WAY YOU MOVE"**



HEAR IT
HERE

JOE JONAS
"JUST IN LOVE"





NEW VIDEOS
JASON DERULO
“DON'T WANNA GO HOME”

MUSIC CHOICE ON DEMAND ▶ HIT LIST

**HEAR IT
HERE**

**FLO RIDA
"GOOD FEELING"**



HEAR IT
HERE

DADDY YANKEE
"LOVUMBA"



NEW VIDEOS

**PITBULL
"RAIN OVER ME"**



MUSIC CHOICE ON DEMAND ▶ LATINO

A promotional photograph of the rock band Wilco. The six band members are standing in a row against a background of vertical wooden planks. From left to right: a man with long brown hair in a dark jacket, a man with glasses in a dark jacket, a man with a beard and dark hair in a blue shirt and dark jacket, a woman in a red jacket, a man in a purple shirt, and a man in a dark purple shirt with his arms crossed. A white banner with black text is overlaid across the bottom of the image.

**HEAR IT
HERE**

WILCO
"DAWNED ON ME"

**HEAR IT
HERE**

**RIHANNA
"WE FOUND LOVE"**



**HEAR IT
HERE**

**RADIOHEAD
"LITTLE BY LITTLE"**



A close-up portrait of Beyoncé with her hair blowing in the wind. The background is dark with a hexagonal pattern. A white banner with a blue tip is overlaid on the left side, containing text.

**HEAR IT
HERE**

**BEYONCE
"COUNTDOWN"**

MC 48

Morano, Stephanie J.

----- Forwarded message -----

From: <jeff.tanner@sonymusic.com>
Date: Nov 1, 2010 3:05 PM
Subject: RE: Brad Paisley
To: <tsinder@musicchoice.com>, <tiffany.sinder@gmail.com>
Cc: <laura.mckinley@sonymusic.com>

This email is confirmation that Sony is granting Music Choice limited permission to pre-announce (pre-promote) the Brad Paisley promotion as described below. Please work with Laura regarding the banner ads.

Thank you.

Jeff

From: Sinder, Tiffany (MC-EX) [mailto:tsinder@musicchoice.com]
Sent: Monday, November 01, 2010 12:09 PM
To: Tanner, Jeffrey, Sony Music
Cc: McKinley, Laura, Sony Music
Subject: Brad Paisley

Jeff:

I want to make sure we are clear on the consent Music Choice is requesting of Sony as we don't believe your license agreement works. Under the DMCA, Music Choice has the right to play tracks from the album *Hits Alive* and we will be complying with the "sound recording performance complement" restrictions of the DMCA when airing those tracks. We will also make all royalty payments as required under the DMCA. All we are asking permission for is to pre-announce the airing of the album during the day tomorrow, November 2, 2010 through banner ads on our service and other means (Twitter/Facebook) We would say something like "*Today Only! Check out Tracks from Hits Alive! In Stores Today!*".

Can Sony just grant us that limited permission to pre-announce the album airing tomorrow as described above? We could do this through a simple letter agreement or e-mail confirmation from someone at Sony with authority to grant permission is fine.

Tiffany Sinder

MUSIC CHOICE

328 West 34th St

New York, NY 10001

[646-459-3343](tel:6464593343)

AIM: Tiffer1878



Music Choice
328 W. 34th Street
NY, NY 10001

Music World Entertainment
1505 Hadley Street
Houston, Texas 77002

Dear Nichelle Poindexter:

Music Choice desires to transmit on its digital audio service via all distribution and transmission mediums (e.g., cable, satellite, telco and Internet) all of the sound recordings from the Trin-i-tee 5:7 album "Angel & Chanelle" without having to comply with restrictions under applicable copyright laws, and is requesting Music World Entertainment's permission to do so.

Accordingly, Music World Entertainment hereby grants to Music Choice the non-exclusive right to transmit, broadcast, play and publicly perform such sound recordings, including the right to create any ephemeral recordings or incidental copies necessary for the foregoing activities, by such means of digital transmission or retransmission as Music Choice uses to transmit its digital audio service and without regard to any restrictions or obligations under the Digital Performance Right in Sound Recordings Act of 1995, the Digital Millennium Copyright Act or any other provision of Title 17 of the United States Code, each as amended, including, without limitation, the restrictions set forth in 17 U.S.C. Secs. 112, 114(d)(1)(C)(iv) and 114(d)(2)(B). Music World Entertainment has the full right and authority to make the foregoing grant of right to Music Choice. Music Choice acknowledges that it shall be responsible for paying any music performance fees required for its performance of the musical compositions embodied in such sound recordings.

Please acknowledge your agreement with the above by having a duly authorized representative sign and return this letter to me by facsimile at (646) 459-3309. If you have any questions, please call me at (646) 459-3331. I appreciate your cooperation on this matter.

Very truly yours,

Damon Williams
VP, Programming & Content Development

ACCEPTED AND AGREED:

Music World Entertainment

By: 

NICHELLE POINDEXTER

Warner Bros. Records Inc.
3300 Warner Boulevard
Burbank, California, 91505

Dated as of September 1, 2005

MUSIC CHOICE
525 7th Ave.
12th Floor
New York, NY 10018
Attn: Gary Susalis

Re: Music Choice Promotion of Trapt Album *Someone In Control*

Dear Gary:

Warner Bros. Records Inc. ("WBR" or "we" or "us") has the exclusive exploitation rights in the sound recordings embodied in the above-referenced album (collectively the "Sound Recordings") by the artist professionally known as Trapt (the "Artist"). In connection with Music Choice conducting a mutually agreeable promotion for the Artist, we hereby grant Music Choice a non-exclusive right to transmit the Sound Recordings in sequential order as embodied on the above-referenced album on the Music Choice Rock Channel (each such transmission shall hereinafter be referred to as a "Broadcast") solely once per day during the time period beginning September 6, 2005 and ending September 13, 2005 (the "Broadcast Period"). Without limiting any of our rights or remedies, each of which are hereby expressly reserved, and subject to the terms and conditions set forth in this letter, solely as between Music Choice and WBR, WBR hereby agrees to grant such license without regard to any restrictions or obligations under the Digital Performance Right in Sound Recordings Act of 1995 (the "DPRSA") or any other provision of Title 17 of the U.S. Code, each as amended, including the statutory license conditions of §114(d)(2)(B)(i) of the DPRSA solely with respect to the Broadcasts and solely during the Broadcast Period.

Other than any underlying periodic subscriber fees charged by cable or satellite services transmitting the Broadcast, the Broadcasts shall be free transmissions to subscribers (i.e., subscribers shall not be charged an additional fee or payment to receive the Broadcasts) and such transmissions shall take place solely via your digital audio service. Except as provided herein, you will have no right to re-transmit the Broadcasts, either in whole or in part, or otherwise exploit it in any manner whatsoever, in whole or in part, at any time thereafter. You will not sublicense, assign or convey in any manner any of the rights granted herein.

In connection with the Broadcasts, as between Music Choice and WBR, Music Choice shall be responsible for obtaining any and all rights (excluding rights with respect to Artist and other parties who performed services with respect to the creation of the Sound Recordings) necessary for the transmission of the Broadcasts and the promotion thereof, including,

1

without limitation, obtaining any musical composition rights necessary for the transmission of the Broadcasts and for all costs associated with the Broadcasts and the promotion thereof.

Music Choice shall prominently promote the Broadcasts with at least 880 easily readable on-screen ad panels (each of which ad panels will be displayed for a duration of at least 30 seconds) displayed and transmitted on the Music Choice Rock Channel over a ten-day period commencing prior to the Broadcast Period free of charge to WBR and Artist.

Any and all rights of any kind or nature whatsoever are expressly reserved by us, except as expressly provided in this letter. Please indicate below your acceptance with the terms and conditions contained in this letter and return a signed copy to my attention, by fax, at 818-840-2340. If you have any questions, I can be reached directly at 818-953-3468.

Very truly yours,

Thomas P. McLean

ACCEPTED AND AGREED TO:

MUSIC CHOICE

By: 

GARY SUSAGIS

cc: B. Brown*, S. Genco, R. Gordon

Warner Bros. Records Inc.
3300 Warner Boulevard
Burbank, California, 91505

Dated as of August 5, 2005

MUSIC CHOICE
525 7th Ave.
12th Floor
New York, NY 10018
Attn: Gary Susalis

Re: Music Choice Promotion of Disturbed Album *Ten Thousand Fists*

Dear Gary:

Warner Bros. Records Inc. ("WBR" or "we" or "us") has the exclusive exploitation rights in the sound recordings embodied in the above-referenced album (collectively the "Sound Recordings") by the artist professionally known as Disturbed (the "Artist"). In connection with Music Choice conducting a mutually agreeable promotion for the Artist, we hereby grant Music Choice a non-exclusive right to transmit the Sound Recordings in sequential order as embodied on the above-referenced album on the Music Choice Rock Channel (each such transmission shall hereinafter be referred to as a "Broadcast") solely once per day during the time period beginning September 13, 2005 and ending September 20, 2005 (the "Broadcast Period"). Without limiting any of our rights or remedies, each of which are hereby expressly reserved, and subject to the terms and conditions set forth in this letter, solely as between Music Choice and WBR, WBR hereby agrees to grant such license without regard to any restrictions or obligations under the Digital Performance Right in Sound Recordings Act of 1995 (the "DPRSA") or any other provision of Title 17 of the U.S. Code, each as amended, including the statutory license conditions of §114(d)(2)(B)(i) of the DPRSA solely with respect to the Broadcasts and solely during the Broadcast Period.

Other than any underlying periodic subscriber fees charged by cable or satellite services transmitting the Broadcast, the Broadcasts shall be free transmissions to subscribers (i.e., subscribers shall not be charged an additional fee or payment to receive the Broadcasts) and such transmissions shall take place solely via your digital audio service. Except as provided herein, you will have no right to re-transmit the Broadcasts, either in whole or in part, or otherwise exploit it in any manner whatsoever, in whole or in part, at any time thereafter. You will not sublicense, assign or convey in any manner any of the rights granted herein.

In connection with the Broadcasts, as between Music Choice and WBR, Music Choice shall be responsible for obtaining any and all rights (excluding rights with respect to Artist and other parties who performed services with respect to the creation of the Sound Recordings) necessary for the transmission of the Broadcasts and the promotion thereof, including,

without limitation, obtaining any musical composition rights necessary for the transmission of the Broadcasts and for all costs associated with the Broadcasts and the promotion thereof.

Music Choice shall prominently promote the Broadcasts with at least 880 easily readable on-screen ad panels (each of which ad panels will be displayed for a duration of at least 30 seconds) displayed and transmitted on the Music Choice Rock Channel over a ten-day period commencing prior to the Broadcast Period free of charge to WBR and Artist.

Any and all rights of any kind or nature whatsoever are expressly reserved by us, except as expressly provided in this letter. Please indicate below your acceptance with the terms and conditions contained in this letter and return a signed copy to my attention, by fax, at 818-840-2340. If you have any questions, I can be reached directly at 818-953-3468.

Very truly yours,

Thomas P. McLean

ACCEPTED AND AGREED TO:

MUSIC CHOICE

By 

GARY SOSACIS

cc B. Brown*, S. Genco, R. Gordon



MUSIC CHOICE®

110 Gibraltar Road
Suite 200
Horsham, PA 19044

September 6, 2005

Century Media Records
1453-a 14th street #324
santa monica, ca 90404

Dear Kurt Briggs,

Music Choice desires to transmit on its digital audio service via all distribution and transmission mediums (e.g., cable, satellite, telco and Internet) all of the sound recordings from **God Forbid's IV: Constitution Of Treason** without having to comply with restrictions under applicable copyright laws, and is requesting **Century Media Records** permission to do so.

Accordingly, **Century Media Records** hereby grants to **Music Choice** the non-exclusive right to transmit, broadcast, play and publicly perform such sound recordings, including the right to create any ephemeral recordings or incidental copies necessary for the foregoing activities, by such means of digital transmission or retransmission as **Music Choice** uses to transmit its digital audio service and without regard to any restrictions or obligations under the Digital Performance Right in Sound Recordings Act of 1995, the Digital Millennium Copyright Act or any other provision of Title 17 of the United States Code, each as amended, including, without limitation, the restrictions set forth in 17 U.S.C. Secs. 112, 114(d)(1)(C)(iv) and 114(d)(2)(B). **Century Media Records** has the full right and authority to make the foregoing grant of right to **Music Choice**. **Music Choice** acknowledges that it shall be responsible for paying any music performance fees required for its performance of the musical compositions embodied in such sound recordings.

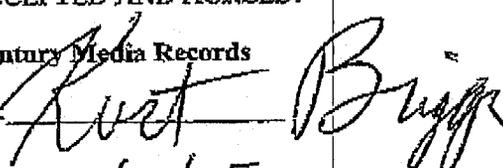
Please acknowledge your agreement with the above by having a duly authorized representative sign and return this letter to me by facsimile at 646-459-3309. If you have any questions, please call me at 646-459-3318. I appreciate your cooperation on this matter.

Very truly yours,

Gary M. Susalis
Associate Rock Programmer

ACCEPTED AND AGREED:

Century Media Records

By: 

9/6/05

MUSIC CHOICE®

1000 Star Road
P.O. Box 1000
Pittsburgh, PA 15044

June 12, 2003

Metal Blade Records
828 California St, FMB 302
San Francisco, CA 94108

Dear Jennifer Graham

Music Choice desires to transmit on its digital audio service via all distribution and transmission mediums (e.g., cable, satellite, telco and Internet) all of the sound recordings from the CD: **In The Eyes Of The Beholder** without having to comply with restrictions under applicable copyright laws, and is requesting Metal Blade Records' permission to do so.

Accordingly, Metal Blade Records hereby grants to Music Choice the non-exclusive right to transmit, broadcast, play and publicly perform such sound recordings, including the right to create any ephemeral recordings or incidental copies necessary for the foregoing activities, by such means of digital transmission or retransmission as Music Choice uses to transmit its digital audio service and without regard to any restrictions or obligations under the Digital Performance Right in Sound Recordings Act of 1995, the Digital Millennium Copyright Act or any other provision of Title 17 of the United States Code, each as amended, including, without limitation, the restrictions set forth in 17 U.S.C. Secs. 112, 114(d)(1)(C)(iv) and 114(d)(2)(B). Metal Blade Records has the full right and authority to make the foregoing grant of right to Music Choice. Music Choice acknowledges that it shall be responsible for paying any music performance fees required for its performance of the musical compositions embodied in such sound recordings.

I hereby acknowledge your agreement with the above by having a duly authorized representative sign and return this letter to me by facsimile at 646-459-3309. If you have any questions, please call me at 646-459-3311. I appreciate your cooperation on this matter.

Very truly yours,

Gary Susalis
Rock Programmer/Producer

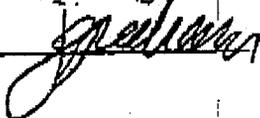
ACCEPTED AND AGREED:

Metal Blade Records

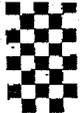
Print Name:

Jennifer Graham

Sign Name:



p:\back\metal\records\programming\GrantofRightLetter.doc



Music Choice

110 Gibraltar Road
Suite 200
Horsham, PA 19044

Post-It* Fax Note	7671	Date	8/17	# of pages	1
To	GARY/MC	From	TOM/EUR		
Co./Dept.		Co.			
Phone #		Phone #			
Fax #	646-459-3309	Fax #			

August 15, 2006

Equal Vision Records
PO Box 38202
Albany, NY 12203

Dear Tom Mullen,

Music Choice desires to transmit on its digital audio service via all distribution and transmission mediums (e.g., cable, satellite, telco and Internet) all of the sound recordings from Seemless' *What Have We Become* CD without having to comply with restrictions under applicable copyright laws, and is requesting Equal Vision Records permission to do so.

Accordingly, Equal Vision Records hereby grants to Music Choice the non-exclusive right to transmit, broadcast, play and publicly perform such sound recordings, including the right to create any ephemeral recordings or incidental copies necessary for the foregoing activities, by such means of digital transmission or retransmission as Music Choice uses to transmit its digital audio service and without regard to any restrictions or obligations under the Digital Performance Right in Sound Recordings Act of 1995, the Digital Millennium Copyright Act or any other provision of Title 17 of the United States Code, each as amended, including, without limitation, the restrictions set forth in 17 U.S.C. Secs. 112, 114(d)(1)(C)(iv) and 114(d)(2)(B). Equal Vision Records has the full right and authority to make the foregoing grant of right to Music Choice. Music Choice acknowledges that it shall be responsible for paying any music performance fees required for its performance of the musical compositions embodied in such sound recordings.

Please acknowledge your agreement with the above by having a duly authorized representative sign and return this letter to me by facsimile at 646-459-3309. If you have any questions, please call me at 646-459-3318. I appreciate your cooperation on this matter.

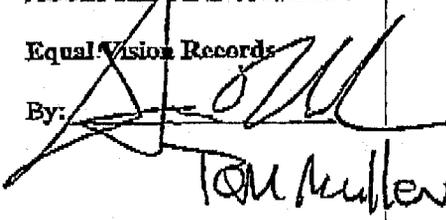
Very truly yours,

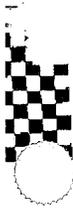
Gary Susalis
Rock Programmer/Producer

ACCEPTED AND AGREED:

Equal Vision Records

By:


Tom Mullen → Director of Marketing



**Music
CHOICE®**
328 West 34th St.
New York, NY 10001

January 20, 2006

Ferret Music
258 Livingston Ave
New Brunswick NJ 08901

Dear Ferret Music:

Music Choice desires to transmit on its digital audio service via all distribution and transmission mediums (e.g., cable, satellite, telco and Internet) all of the sound recordings from *In Flames Come Clarity CD* without having to comply with restrictions under applicable copyright laws, and is requesting Ferret Music's permission to do so.

Accordingly, Ferret Music hereby grants to Music Choice the non-exclusive right to transmit, broadcast, play and publicly perform such sound recordings, including the right to create any ephemeral recordings or incidental copies necessary for the foregoing activities, by such means of digital transmission or retransmission as Music Choice uses to transmit its digital audio service and without regard to any restrictions or obligations under the Digital Performance Right in Sound Recordings Act of 1995, the Digital Millennium Copyright Act or any other provision of Title 17 of the United States Code, each as amended, including, without limitation, the restrictions set forth in 17 U.S.C. Secs. 112, 114(d)(1)(C)(iv) and 114(d)(2)(B). Ferret Music has the full right and authority to make the foregoing grant of right to Music Choice. Music Choice acknowledges that it shall be responsible for paying any music performance fees required for its performance of the musical compositions embodied in such sound recordings.

Please acknowledge your agreement with the above by having a duly authorized representative sign and return this letter to me by facsimile at 646-459-3309. If you have any questions, please call me at 646-459-3318. I appreciate your cooperation on this matter.

Very truly,

Gary Susalis
Metal Programmer

ACCEPTED AND AGREED:

Ferret Music

By: 

CARL SEVERSTON

MC 49

Morano, Stephanie J.

From: Morris, Patricia
Sent: Thursday, August 11, 2011 3:58 PM
To: Semanovich, Bob; Coriano, Wanda; Thompson, Greg
Subject: Coldplay purchase on demand

This is what I was thinking with the Music Choice channel....a feature at the bottom of the screen that allows the viewer to click "select" at anytime to purchase the new Coldplay album while watching any coldplay ondemand programming.....there has to be a way. If we don't do this, someone else soon will...

<http://abcnews.go.com/Technology/cablevision-unveils-interactive-banner-ads-tv/story?id=8595843>

Patricia Morris-Capers
VP Adult Promotion
Capitol Music Group
212-786-8224
patricia.morris@capitolmusic.com

Music from EMI

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Registered Office: 27 Wrights Lane, London W8 5SW

Registered in England No 229231.

N -----

MC 50

Exhibit 50

**RESTRICTED – Subject to Protective Order in
Docket No. 2011-1 CRB PSS/Satellite II**

MC 51

Morano, Stephanie J.

Subject: RE: Music Choice Blast | Game's Guilty Pleasures, Bahamas with Brad Paisley, J. Cole Live Undefined - Sample e-mail blast we send to customers

From: Calhoun, Paula (MC-EX) [mailto:pcalhoun@MusicChoice.com]

Sent: Friday, November 18, 2011 1:12 PM

To: Fakler, Paul M.

Subject: FW: Music Choice Blast | Game's Guilty Pleasures, Bahamas with Brad Paisley, J. Cole Live Undefined - Sample e-mail blast we send to customers

Paula

Contains confidential and/or proprietary information. Please handle accordingly. If you received this transmission in error, do not use in any way and delete immediately.

From: Music Choice [mailto:no-reply@email.musicchoice.com]

Sent: Saturday, November 12, 2011 9:01 AM

To: MC Associates (MC-EX)

Subject: Music Choice Blast | Game's Guilty Pleasures, Bahamas with Brad Paisley, J. Cole Live Undefined

[View in Web Browser](#)

Be sure to add no-reply@email.musicchoice.com to your address book or safe sender list so our emails go to your inbox.



Saturday November 12, 2011

Thank you
@MusicChoice for
already playing
nonstop
Christmas music.
I absolutely love it.
#Soundsoftheseason
- @AnnFairview





Get a taste of what happened on the set of *The Cut* with Game on MusicChoice.com. Then tune in Monday 11.14 for the full episode on Music Choice On Demand, where the rapper breaks down his top five guilty pleasure songs. He reveals which crooning boy toy got him through tough times—and a few other “iPod-only” faves.

[Watch »](#)

Sweepstakes



Brad And The Beach

You've got a week left to cover a Brad Paisley song for the chance to see him perform at Atlantis Resort in the Bahamas! Enter now: Sea breezes & daiquiris await you.

[Enter »](#)

Music Channels



It's A Cole World

J. Cole got down with our new concert series, *Live Undefined*. The exclusive tracks are spinning now on Hip-Hop and R&B. If you want to see the man in action, check out the video footage on Music Choice On Demand.

[Listen »](#)

Facebook



Show Us Some "Like"

Get first dibs on sweepstakes, music news, and Music Choice exclusives by liking us on Facebook! :)

[Fan Us »](#)

AMAZING PRODUCTS YOU'VE NEVER SEEN

Special Offer Daily!

[See Today's »](#)

Keep up with Music Choice



MusicChoice.com | [Original Shows](#) | [Listen to Music](#)

**MUSICIANS
ON CALL**
Presents

Chicago

November 28

B.B. King
BLUES CLUB & GRILL
NEW YORK

Get Tickets

Help deliver live music to
the bedsides of patients.

mcassociates@musicchoice.com: [Manage Email Preferences](#) | [Unsubscribe](#)

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Morano, Stephanie J.

Subject: RE: SWRV Blast | Nicole Scherzinger Mixes Things Up, a Level 10 Marathon, and Rihanna Finds Love

From: SWRV [mailto:no-reply@email.musicchoice.com]

Sent: Saturday, November 19, 2011 9:01 AM

To: MC Associates (MC-EX)

Subject: SWRV Blast | Nicole Scherzinger Mixes Things Up, a Level 10 Marathon, and Rihanna Finds Love

www.musicchoice.com/ShowOff/Default.aspx

[View in Web Browser](#)

Be sure to add no-reply@email.musicchoice.com to your address book or safe sender list so our emails go to your inbox.

SWRV BLAST

DON'T JUST WATCH.

Saturday November 19th, 2011



Nicole Scherzinger Cooks Up a Takeover

Nicole Scherzinger mixes girl power with a dash of rock for her *Takeover* video playlist, premiering this Wednesday at 6p ET. Want to do a little video mixing yourself? Upload your own episode at SWRV.tv!

[MORE »](#)

LIVE UNDEFINED
SONG CHALLENGE

GET YOUR SONG *PROFESSIONALLY MASTERED*
— AND SPUN ON MUSIC CHOICE TV! —

MUSIC CHOICE[®] POWERED BY
Breakout Bands

Stuff



My 5: NeverShoutNever

Their Top 5 Animated Videos
[PLAY VIDEO »](#)



SWRV Pics

Foster The People
[VIEW GALLERY »](#)



SWRV Shows

UR FAVE ARTISTS TAKEOVER:

» [SWRV Takeover: Miley Cyrus](#)
Saturday @ 1p ET

Thanksgiving's Level 10 Marathon

Take it easy this Thanksgiving with our "10 Levels of Gluttony" marathon, a six-hour block of *Level 10* that starts Wednesday 11a ET. Step 1: Eat turkey. Step 2: Vote for your favorite videos. Step 3: Repeat.
[MORE »](#)

Rihanna Talks the Talk

Rihanna chases a buzz and the love of a Chris Brown lookalike in her gritty new video, "We Found Love." Vote for it on *Fan Faves* this Saturday at noon if you want to catch it.
[MORE »](#)

» [SWRV Takeover: The Ready Set Sunday @ 1p ET](#)

UR ON BLAST

"Hell yeah! Getting @AllTimeLow to play on @SWRV_TV is the best! :D #ifeellikedancing" - @TomadoTy_13847



- @SWRV_TV Twitter follower

Follow SWRV



LIVE
UNDEFINED

WATCH EXCLUSIVE
— PERFORMANCES —



— FEATURING —
PATRICK
STUMP

MUSIC
CHOICE

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J COLE

COLE WORLD
THE SIDELINE STORY

"CAN'T GET ENOUGH"



AVAILABLE NOW

J COLE

COLE WORLD
THE SIDELINE STORY
& "WORK OUT"



AVAILABLE NOW

JCOOLÉ

COLE WORLD THE SIDELINE STORY

& "WORK OUT"



AVAILABLE NOW

JCOOLÉ

COLE WORLD THE SIDELINE STORY

FEATURING: "MR. NICE WATCH"



AVAILABLE NOW

JCOOLÉ

COLE WORLD THE SIDELINE STORY

"CAN'T GET ENOUGH"



AVAILABLE NOW

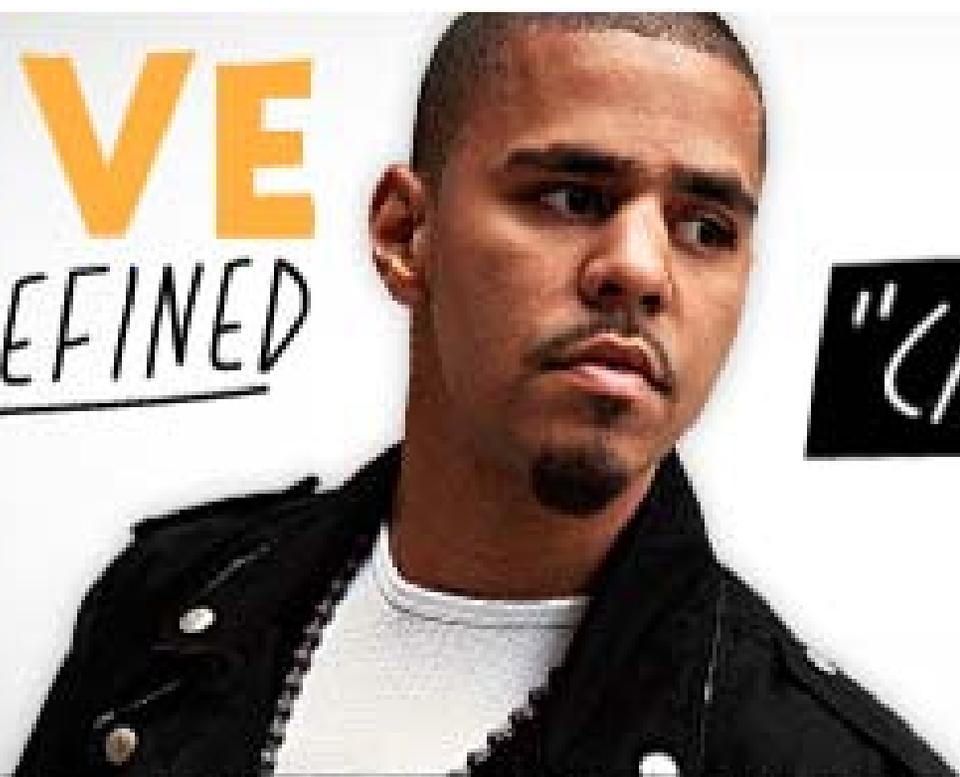


LIVE
UNDEFINED

**AVAILABLE
NOW**

MUSIC CHOICE ON DEMAND ► ORIGINAL SHOWS

LIVE
UNDEFINED



WATCH

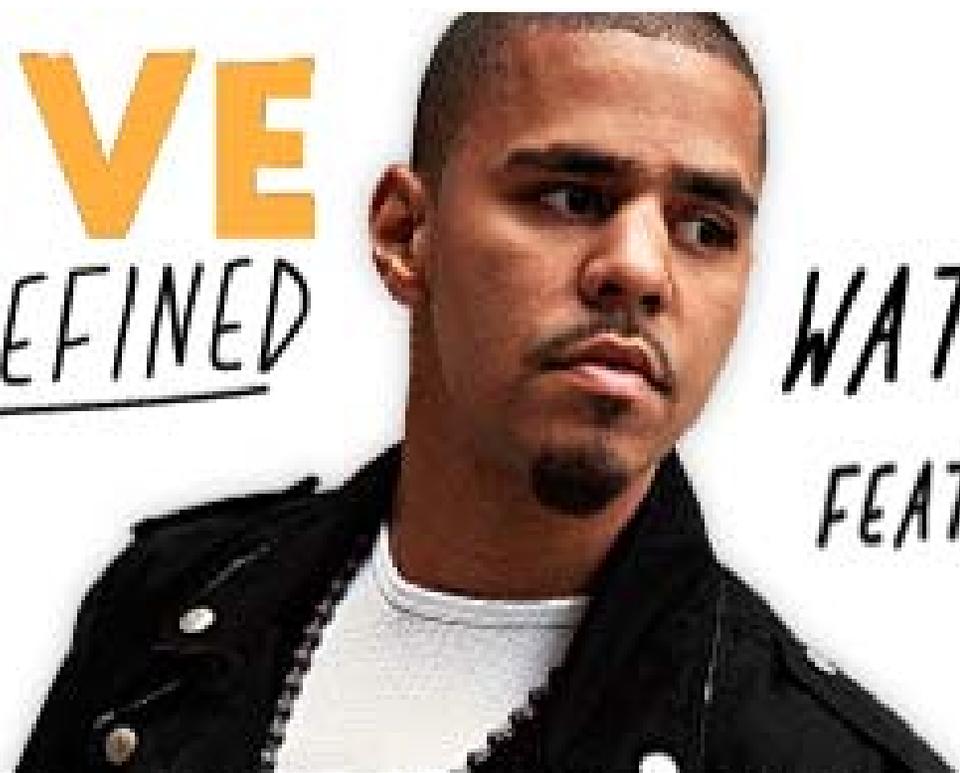
"CAN'T GET ENOUGH"

FEATURING

J. COLE **Music CHOICE**

MUSIC CHOICE ON DEMAND ► ORIGINAL SHOWS

LIVE
UNDEFINED



WATCH "WORK OUT"
FEATURING **J. COLE**

**Music
CHOICE**

MUSIC CHOICE ON DEMAND ► ORIGINAL SHOWS

J COLE

COLE WORLD
THE SIDELINE STORY

FEATURING: "MR. NICE WATCH"



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Education

Ph.D. in Economics, Stanford University, Stanford, CA, 1998
B.A., Economics (with Honors), University of Pennsylvania, Philadelphia, PA, 1991

Professional Experience

University of Warwick, Department of Economics

Professor of Economics, September 2008-present

Director of Research, September 2009-present

Courses taught: *Graduate*: Empirical Industrial Organization (MSc/PhD), Empirical Methods. *Undergraduate*: Introductory Econometrics (time series, limited dependent variables, panel data), Undergraduate Business Strategy.

Centre for Economic Policy Research (CEPR)

Research Fellow, Industrial Organization Programme, February 2011-present

Federal Communications Commission (FCC)

Chief Economist, September 2007 - August 2008

Reported to the then-FCC Chairman, Kevin Martin. Primary responsibilities were to advise the Chairman and his staff regarding the economic issues facing the Commission, to formulate and implement desired policies, to communicate and discuss these policies with senior Commission staff, and to assist as needed the 40+ staff economists. Main workstreams focused on the cable and satellite industries, including bundling and tying in wholesale and retail cable and satellite television markets and the economic analysis of XM/Sirius satellite radio merger. Also consulted on spectrum auction design, net neutrality, access pricing, ownership rules, and various international policy issues. Previous to joining the Commission, wrote a sponsored study analyzing media ownership and its impact in television markets.

University of Arizona, Department of Economics

Associate Professor of Economics, September 2008-August 2009 (on leave)

Assistant Professor of Economics, September 2002-August 2008 (on leave, 2007-08)

Courses taught: *Graduate*: Empirical Industrial Organization (2nd-year PhD), Business Strategy (MBA) *Undergraduate*: Introductory Econometrics (cross-section).

Duke University, Department of Economics

Assistant Professor of Economics, September 1997-August 2002

Courses taught: *Graduate*: Empirical Industrial Organization (2nd-year PhD), Graduate Econometrics (1st-year PhD), *Undergraduate*: Introductory Econometrics (cross-section), Introductory Microeconomics, The Economics and Statistics of Sports.

Other Academic Appointments

Visiting Professor, European School of Management and Technology, Berlin, Summer 2007.

Visiting Professor, Fuqua School of Business, Duke University, 2000-2001

Consulting Experience (Country)

Evaluating “neighborhooding” of news channels on Comcast cable systems (US), 2011, lead expert – Designed and executed expert reports for complaint to FCC by Bloomberg (Television) L.P. (BTV) that Comcast was not fulfilling the neighborhooding conditions imposed during Comcast-NBCU merger (see below). Defined news neighborhoods and investigated incidence of carriage of BTV on such neighborhoods. Compared patterns to neighborhooding of sports channels on Comcast and news channels on other operators and analyzed Comcast channel changes over time. Decision pending at the FCC.

Evaluating switching costs in fixed voice telephony markets (UK), 2010-11, lead expert – Designed and executed reports for Office of Communication (Ofcom) evaluating the impact of automatically renewable (‘rollover’) contracts (ARCs) introduced by British Telecommunications (BT) in the UK fixed voice telephony market. Based on this analysis, Ofcom prohibited rollover contracts in all residential and small business fixed voice and broadband markets.

Evaluating competitive harms, Comcast-NBCU (US), 2010, consulting expert – Worked closely with lead expert to design and execute economic and econometric analyses in support of Bloomberg (Television) L.P.s opposition to Comcast-NBCU merger. Analysis included business news market definition and quantifying the potential harms of the merger, including those related to “neighborhooding” of television channels and refusal to carry (foreclosure). Report submitted to media regulator (FCC). FCC conditions required merged firm not to favor their content in general, with specific provisions for the neighborhooding of news (including business news) channels.

Analysis of advertising market regulations (UK), 2009-10, consulting expert – Advised project team on analysis of demand for advertising for the purpose of evaluating changes in regulation of advertising minutes on public-service broadcasters in the United Kingdom. Designed econometric model and supervised implementation and description of results. Report submitted to media regulator (Ofcom).

Distribution of cable copyright royalties (US), 2009-10, testifying expert – Submitted rebuttal

testimony to copyright royalty judges regarding relative market value of programming provided on the distant broadcast signals carried by U.S. cable systems. Testified before judge panel.

Blockbuster/Hollywood Video (US), 2005, consulting expert – Supported BatesWhite team to establish liability for FTC challenge of proposed merger.

Echostar/DirecTV (US), 2002-03, consulting expert – Supported analysis by AES Consulting (now Compass) of liability for proposed merger. Helped design econometric model of pay-television demand and participated in conference calls with opposing lawyers and experts.

Advisory roles (US):

AMD/Intel, 2009; DRAM Litigation, 2009; German media market, 2007;
AT&T/BellSouth, 2006; Auto-finance merger, 2005; Death-care industry merger, 2005;
Vitamins price-fixing litigation, 1999-2001

Bates White LLC, Academic Affiliate, 2005-present

Publications

“Price Discrimination in Service Industries,” (with A. Lambrecht, K. Seim, N. Vilcassim, A. Cheema, Y. Chen, K. Hosanger, R. Iyengar, O. Koenigsberg, R. Lee, E. Miravete, and O. Sahin), forthcoming, *Marketing Letters*.

“The Welfare Effects of Bundling in Multi-channel Television Markets,” (with Ali Yurukoglu), University of Warwick, April 2011, forthcoming, *American Economic Review*.

“Cable Regulation in the Satellite Era,” Chapter 5 in Rose, N., ed, “Economic Regulation and Its Reform: What Have We Learned?”, forthcoming, University of Chicago Press.

“Economics at the FCC: 2007-2008,” (with Evan Kwerel and Jonathan Levy), *Review of Industrial Organization*, v33n3 (November 2008), 187-210.

“The Discriminatory Incentives to Bundle: The Case of Cable Television,” *Quantitative Marketing and Economics*, v6n1 (March 2008), 41-78.

- Winner, 2009 Dick Wittink Prize for the best paper published in the *QME*

“Bidding Asymmetries in Multi-Unit Auctions: Implications of Bid Function Equilibria in the British Spot Market for Electricity, (with Joseph Crespo and Helen Tauchen), *International Journal of Industrial Organization*, v25n6 (December 2007), 1233-1268.

“Bundling, Product Choice, and Efficiency: Should Cable Television Networks Be Offered A La Carte?,” (with Joseph Cullen), *Information Economics and Policy*, v19n3-4 (October 2007), 379-404.

“Monopoly Quality Degradation and Regulation in Cable Television,” (with Matthew Shum), *Journal of Law and Economics*, v50n1 (February 2007), 181-209.

“Uncertainty and Learning in Pharmaceutical Demand,” (with Matthew Shum),
Econometrica, v73n4 (July 2005), 1137-1174.

“Recent Advances in Structural Econometric Modeling: Dynamics, Product Positioning,
and Entry,” (with J.-P. Dube, K. Sudhir, A. Ching, M. Draganska, J. Fox,
W. Hartmann, G. Hitsch, B. Viard, M. Villas-Boas, and N. Vilcassim),
Marketing Letters, v16n2 (July 2005).

“The Impact of the 1992 Cable Act on Household Demand and Welfare,”
RAND Journal of Economics, v31n3 (Autumn 2000), 422-449.

Reports

“Empirical analysis of BT’s automatically renewable contracts,” (with ESMT Competition
Analysis, Commissioned Research Study for the Office of Communications), August 2010.
Also Supplementary Report, February 2011.

“Television Station Ownership Structure and the Quantity and Quality of TV
Programming,” (Commissioned Research Study for the Federal Communications
Commission), July 2007.

Work in Progress

Articles Under Review

“The impact of ‘rollover’ contracts on switching in the UK voice market: Evidence from
disaggregate customer billing data,” (with Nicola Tosini and Keith Waehrer), Working
paper, University of Warwick, June 2011. *Under revision for resubmission*

“Accommodating Endogenous Product Choices: A Progress Report,” Working paper,
University of Warwick, October 2011. *Under revision for resubmission*

Working Papers

“The (inverse) demand for advertising in the UK: Should there be more advertising on
television?,” (with Sally Dickerson, Neil Mortensen, Jeremy Smith, and Paul Sturgeon),
Working paper, University of Warwick, October 2011.

“The Welfare Effects of Monopoly Quality Choice: Evidence from Cable Television Markets,”
(with Matthew Shum and Alex Shcherbakov), mimeo, University of Warwick, September 2011

“The Empirical Consequences of Advertising Content in the Hungarian Mobile Phone Market,”
(with Jozsef Molnar), University of Arizona, March 2008.

Work In Progress

“Quantifying adverse selection in credit markets,” (with Nicola Pavanini and Fabiano Schivardi)
University of Warwick, October 2011.

“Accommodating choice set heterogeneity in demand: Evidence from retail scanner data,” (with Rachel Griffith and Alessandro Iaria), University of Warwick, October 2011.

“Orthogonal Instruments: Estimating Price Elasticities in the Presence of Endogenous Product Characteristics,” (with Dan Akerberg and Jin Hahn), mimeo, University of Warwick, of Arizona, June 2011.

“An Empirical Analysis of Manufacturer-Retailer Interaction: What Determines Wholesale Prices?” (with Zsolt Macskasi), May 2006.

Grants

“Endogenous Product Characteristics in Empirical Industrial Organization,” Economic and Social Research Council, £140,000 (~\$220,000), 2010-2012.

“The Empirical Consequences of Advertising Content” (with Jozsef Molnar), Hungarian Competition Commission, 10,000,000 Hungarian Forint (~\$50,000), 2007-2008

Other Professional Activities

Associate Editor, *International Journal of Industrial Organization*, October 2005 - present.

Editorial Board, *Information Economics and Policy*, December 2007 - present.

Referee for *Econometrica*, *American Economic Review*, *Review of Economics Studies*, *RAND Journal of Economics*, *Review of Economics and Statistics*, *Quantitative Marketing and Economics*, *National Science Foundation*, *International Journal of Industrial Organization*, *Journal of Industrial Economics*, *Journal of Applied Econometrics*, *Information Economics and Policy*, *Management Science*, *Southern Economic Journal*

2010 Presentations: LBS (1/10), UCL (4/10), Oxford (5/10), Invitational Choice Conference (5/10), Manchester University (9/10), EIEF (Rome, 10/10), University of Venice (10/10), University College Dublin (11/10).

2009 Presentations: ESMT, Berlin (5/09), CEPR IO, Mannheim (5/09), University of Leuven (9/09), University of Toulouse (Econometrics Workshop and Competition Policy Workshop), (11/09)

2008 Presentations: UK Competition Commission (1/08), Oxford University (1/08), University of Warwick (1/08), University of Virginia (3/08), Industrial Organization Society (5/08), NBER Summer Institute, IO Group (6/08), 6th Workshop in Media Economics, Zurich (10/08), Network of Industrial Economics, London (12/08)

2007 Presentations: University of Pennsylvania (Wharton, 3/07), ESMT (Berlin, 4/07), Northwestern University (5/07), Bates White Antitrust/Merger Conference (6/07), University of Wisconsin, Madison (10/07), Duke University (Fuqua, 11/07)

2006 Presentations: AEA Meetings, Boston (1/06), Columbia (3/06), University of Chicago Marketing (3/06), Bates White Antitrust/Merger Conference (6/06),

EARIE Amsterdam (8/06)
2005 Presentations: NBER Conferences on Regulation (2/05, 6/05), Econometric Society World Congress, London (8/05)
2004 Presentations: Stanford University (3/04), CEPR “The Role of Competition in the New Economy”, Greece (5/04), Invitational Choice Conference (6/04), FCC Symposium on ‘A La Carte’ MVPD Pricing (7/04)
Conference Organization: Triangle Applied Micro Conference, April 2000, Triangle Applied Micro Conference, May 1999 (co-organizer)

MC 53

Exhibit 53

**RESTRICTED – Subject to Protective Order in
Docket No. 2011-1 CRB PSS/Satellite II**

MC 54

Creative Industries

*Contracts between
Art and Commerce*

Richard E. Caves

Harvard University Press
Cambridge, Massachusetts, and London, England

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Payola

"Payola" is a bribe paid in order to influence a gatekeeper's choice among competing creative products. In the United States broadcasting stations are legally restricted from taking pay for airplay. In fact payola occurs in markets for differentiated goods of all sorts, but it does have a special affinity for creative goods. That is because *infinite variety* tends to ensure a large number of creative goods clamoring at the gate, *nobody knows* which the ultimate consumer will prefer, and the creative good's cost is mostly fixed and sunk.

Logic of Payola

Some simple economic considerations point to the likely settings for payola. In a purely competitive market, many sellers provide a homogeneous product to many buyers at a single prevailing price. Each seller, if seeking maximum profits, offers the quantity of its good such that the last unit's marginal cost equals the market price. Since the last unit sold earns the seller zero profit, there is no gain from offering the buyer a price cut to purchase one more unit. Payola would not pay. In other market conditions payola is profitable for the seller, either as a selective bribe or as a regular rebate. They all involve the seller's "regular" price exceeding its marginal cost, creating a standing incentive to cadge an extra sale by a selective price cut, rebate, or bribe. The seller can sometimes identify reluctant customers who value the product less than the standard price but more than its marginal cost. A special price, which could take the form of a selective rebate or bribe, then makes a sale while bringing the seller some profit. The conventionalized prices commonly found in creative industries, when they exceed sellers' marginal costs, create the same incentive.

Two features that promote payola are common in creative activities. The first is the prevalence of costs that are fixed (do not vary with the seller's out-

put) and sunk covers the seller inflating the value of the bribe. Conventionalized prices (if

The second benefit to the radio station is the profit from the sale of their own radio station goods. The label gets a price for the spillover can be

The situation is a legal concept that accepts payment from the station's listener. However, the principle of the station, and any station is the to the station prone is the employment of any bribe that would require a record on the bribe must fit the profit line bribe buyer case the

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put) and sunk (irrecoverable). These increase the gap between a price that covers the seller's average cost and marginal cost of another unit, thereby inflating the value of an extra sale and intensifying the incentive to "deal" or bribe. Conventionalized prices and price competition muffled by product differentiation (*infinite variety*) also weigh in.

The second feature appears when the buyer's purchase yields a spillover benefit to the seller without affecting the buyer's willingness to pay. When a radio station plays a pop record, it attracts listeners, who in turn bring the station profit from advertising revenue. Airplay causes some of these listeners to buy their own copies; the record label profits from those purchases, but the radio station gets no benefit. The spillover inflates the effective net price that the label gets without raising its marginal cost. Even if the station pays no explicit price for the individual record or the right to play it, the publicity spillover can still make a bribe profitable for the label.

The situation of the buyer (and bribe recipient) needs a closer look. The legal concept of bribery focuses on the employee (disk jockey—DJ) who accepts payment for playing (say) a record that is not the first choice of the station's listeners, and hence cuts into the station's profits. Payola could, however, be a profitable deal for the station. With records differentiated, in principle there exists one best playlist to maximize net revenue for the station, and any deviation lowers profits. *Infinite variety*, however, tends to make the loss of ratings and profit small, easily offset by a modest bribe.¹ The station is the loser, however, if the DJ employee pockets the bribe, unknown to the station owner who suffers the associated loss of profit. How bribe-prone is the DJ, and whether payola cheats the station, depends on the DJ's employment terms. Paid a straight salary and not monitored, he would take any bribe that came along. Dependent on the station's audience ratings, he would require a big enough payment to offset the likely drag of a weak record on the ratings. If he owns the station and receives all of its profits, the bribe must fully offset the station's expected profit loss. If taking payola is potentially profitable to the station, the payment might well be not a clandestine bribe but a factor rolled into the DJ's compensation package. In the former case the station owner shuns payola; in the latter he quietly welcomes it.

Payola and the Sound of Music

Payola's long history in the popular music industry began with publishers of sheet music in the nineteenth century and continues with record labels to the present day. The mechanism at work is clear. Many songs compete to be sung, or records to be played, and for the gatekeeper many are often close substitutes. The 1920s singer who popularized a song increased sales of its

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sheet music, just as the station's airplay causes some listeners to purchase a record today.²

Music Publishing

The competing music publishers on New York's Tin Pan Alley (28th Street) employed "song pluggers" whose job was to make the nocturnal rounds of the city's bars, dives, and theaters to get the publisher's songs played or sung by whatever means worked. Petty bribery was the standard procedure: a round of drinks for the band, a small payment to the singer.³ Hiring claquees to applaud the publisher's songs was another practice. The rise of ballroom bands and of radio stations to broadcast them increased and formalized the payments. Bandleaders wanted arrangements suited to their styles, and publishers could be induced to hire expensive arrangers to supply them gratis. Leading singers could command a formal share of royalties for a period of years on songs that they introduced. Plugging an unknown song in the 1900s was said to cost around \$1,300 for a cash advance and ongoing royalty payments, with the singer's picture on the cover of the sheet music as part of the deal. Some deals gave the singer a period of exclusive use of a song, providing a strong incentive to perform it.⁴ Rent was extracted from the publishers fully enough to send some of them to deal with lesser singers, who might ask a fixed sum for a few performances.

The publishers could gain by colluding to restrict the transfer of rents to singers, and in 1917 the Music Publishers Protective Association (MPPA) was formed for this purpose. Interestingly, it was promoted by the trade publication *Variety*, whose advertising services competed with payola for getting a song played. Among the publishers, its support came mainly from those having trouble getting through to the top singers. It was no more successful than most cartels that are unable to detect and punish cheating, but it did manage to convince some vaudeville executives that payola distorted the choices of songs used in vaudeville acts enough to impair their profits significantly.⁵ In 1934 the song pluggers themselves formed a union called Professional Music Men. Ostensibly founded as a mutual-benefit association, one of its main objectives was to deter payola, which the pluggers correctly saw as substituting for their own direct song-promoting services and reducing their employment.⁶

Payola and Radio Airplay

As phonograph records became more and more popular, the song publisher's efforts to maximize the value of its copyrights focused increasingly on getting

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the firm's songs recorded. That made the labels' A&R (artist and repertory) personnel the natural targets for payola. The practice's best-known appearance comes, however, one step farther along in the production process as the label seeks airplay for the records it has released. The central role of airplay in a record's success was shown in Chapter 9. The best documented pattern of broadcasting payola came in the 1950s and led to Congressional hearings followed in 1960 by legislation that made payola under certain circumstances a crime.

A true entrepreneur of payola was broadcaster Dick Clark, who began his career by taking over the program *Bandstand* on a Philadelphia TV station. Records were played as teenagers danced to them, and recording artists occasionally appeared to lip-synch their songs. The popular program generated substantial local sales of the records that were played. Viewers got a chance to see the recording artists, and for the artists a *Bandstand* appearance substituted for numerous local promotional visits. Philadelphia was an excellent base for the program. A large metropolitan area with a number of local record-distribution companies, it was also a "break-out city" in which popular records were commonly tested before national distribution. The program's local success led the ABC network to pick it up for national distribution as *American Bandstand*.⁷ It was a huge success on ABC, and it began to drive the playlists of local DJs around the country, as listeners would request local play of songs heard on *American Bandstand*.

Clark's predecessor *Bandstand* host had joined with partners to start his own record label to "cover" (re-record a song with a different singer from its originator) national rhythm and blues hits, and these records sold well in Philadelphia thanks to *Bandstand* exposure. Even before the program received national distribution, a local record company offered Clark 25 percent of the publisher's royalties to a promising song in exchange for a major promotional "hype," a practice that was already common among Philadelphia DJs.⁸ Clark built up this practice by organizing a dummy company to hold the rights and receive payments, and it came out in the Congressional hearings that 145 of the 162 song copyright interests Clark then owned had been given to him.⁹ Clark's empire expanded to soak up other rents generated by *American Bandstand*'s promotional prowess. Performers appearing on the program received union-scale wages for their appearance, but they were expected to sign these back to Clark's corporation, or have their record company pay for the performance directly. The ABC network had its own label, Am-Par Records, and Am-Par assigned Clark substantial publishing royalties for songs promoted on the program.¹⁰ The program's practice of not playing songs on labels that lacked national distribution opened the way for package deals that brought artists onto Clark's program and to Am-Par Records.¹¹

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The several record companies that Clark himself owned joined with other Philadelphia record-company interests to form a distribution company, which extended Clark's rent-interception apparatus one step forward in the production chain.¹² It was also extended one step backward through Clark's ownership of a record-pressing plant, as record companies discovered that using this plant increased their chances of getting songs on *American Bandstand*.¹³ Finally, Clark was partner in an artist-management company, which steered the promising rock 'n' roll guitarist Duane Eddy to one of Clark's record companies, where he apparently received a substantially lower royalty rate than competitive bidding would have supported. Eddy appeared many times on Clark's shows, and many of his releases made top-hit lists.¹⁴

The story of *American Bandstand* illustrates the situation of the payola recipient. Clark could not arbitrarily make a hit out of a weak song (some records that he played repeatedly never landed on the "top hit" lists), but he had discretionary influence and checked carefully on the degree to which the market was following his choices.¹⁵ Evidence that emerged in the Congressional hearings of the late 1950s showed the widespread use of payola by record-label sales personnel with the DJs who were the gatekeepers of radio stations' airplay lists. The low ratio of new records played to records received by a station (see Chapter 9) ensured that many choices were made casually based on little consideration, which favored payola. The practice had greater value for small, independent labels than it did for the major ones. The majors' representatives dealt with the DJs on a regular basis and could offer their reputations as leverage to get airplay for records that the label thought would benefit the most. Independents lacked this asset but could deploy payola as a substitute. Also, independents worried less about loss of corporate reputation if payola should become a scandal.¹⁶ The supply of payola was selectively enhanced by the concentration of radio stations on Top 40 Hits. For a song with a shot at the national list, the value to the record company of airplay on an additional station could be quite high, for the number of relevant stations was said to be only 42.¹⁷

Consequences of Payola and Its Regulation

If the Top 40 format encouraged the use of payola to break into the winners' circle, the format was itself encouraged by the public revelation of payola practices. Radio stations responded to the public scandal by taking their airplay lists out of the hands of DJs and placing them in the station's program director. By implication, payola had bribed the DJs against the interest of the station's profits. Station managers, however, could hardly have been ignorant of the apparently widespread practice. If DJs received compensation in the

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form of payola, the station could get their services for less straight pay.¹⁸ Payola reforms may have served the public's sense of morality more than the stations' economic interests. They may also have had some unintended consequences. Program directors live and die by the station's audience ratings, while most DJs have substantive interests in new music and performers and can capture some reputation benefits by making astute if risky selections among new records. This R&D or innovative function was cut back.¹⁹

The payola scandals and their aftermath also illustrate the efficiency advantage that bribe-based promotion may enjoy against "respectable" forms that cost more in economic resources. The case was vividly put by independent record-label executive Hy Weiss: "Payola is the greatest thing in the world because it means that you don't have to spend time with some schmuck you don't like, eat dinner and all that, you pay him off . . . Instead of having an army of promotion men spending your money . . . , living off your expense account, you give it all to one guy and save yourself a million dollars."²⁰ When payola was restricted by the Federal Bribery Act of 1960, the major record companies augmented their staffs of professional pluggers to persuade program directors to playlist their wares. The fixed cost of promotion staffs put the smaller independent labels at a disadvantage, and the disappearance of a number of independent R&B labels may have been due partly to the suppression of payola.²¹

The saga of payola and its restriction took a striking turn during the late 1970s and 1980s. The practice never died out after the 1960 legislation, if only because of generous loopholes in the statute. It addressed the payment of money or "valuable considerations," but it left untouched phony contests that DJs could win and no-work consulting assignments or master-of-ceremonies jobs for which they could be hired. Payola continued at a low level, though executives of major record companies remained studiously uninvolved, from fear less of the little-enforced bribery statute than the Racketeering Influenced and Corrupt Organizations Act.²² During the 1980s payment by the record companies for airplay again escalated greatly, and in a way that resulted from the legislative restrictions.²³ Promoters of records to broadcasting stations could be either independents or employees of one company. Stations preferred the independents, whose prioritized recommendations among the gaggle of new records would at least be neutral among labels. So, at this time, did major labels, if only because any payola that passed from independent promoters to the stations could not be traced back to implicate the label's executives.

Beginning in 1980 most of the large record companies instituted a pay-for-play policy with the independent promoters, paying a set fee each time a radio station added a record to its playlist. Competition among the labels

quickly escalated the fee to the range of \$500 to \$3,000, raising the cost of promoting a hit single record to about \$150,000. Eventually, the fee reached \$10,000.²⁴ This form of incentive compensation proved all too powerful. It attracted to the independent-promotion business a group of men (large and accompanied by bodyguards) who were willing and able to gain control of radio stations' playlists. Their reliance on bribes and threats for this purpose is not well documented, but Mafia connections seem very likely. Worse yet, the independent promoters managed to collude with one another in their dealings with the record labels. They divided stations among themselves, so that each had a chain of stations whose playlists were his property. The labels dealt not with (say) one promoter per song, but with the promoter who controlled access to a particular station. The labels could not avoid what had turned into extortionate payments for independent promotion. In the early 1980s, CBS was spending \$8 million to \$10 million annually on independent promotion, and the industry as a whole was spending probably \$40 million. By 1985 the industry was spending \$60 million to \$80 million at a (prosperous) time when its pretax profits were at most \$200 million.²⁵

Neither individually nor collectively could the major record companies resist effectively. In 1980 the Warner label initiated a halt to independent promotion. CBS followed, but other labels dragged their feet. The independents' network retaliated by knocking off the charts one promising song of each company that bowed out.²⁶ Prevented by the antitrust laws from colluding formally to restrict promotion, in 1985 the companies sought to have the independents investigated for payola through their trade association, Record Industry Association of America, but that plan also crumbled. One reason is that the recording artists and their managers had nothing to lose from the transfer of profits from labels to promoters (and possibly stations). The labels were bailed out exogenously by a TV journalist's report on the promoters' Mafia connections, which allowed the record companies to express shock and indignation and swear they would stop using independent promoters. The stations also reaffirmed their anti-payola policies, and the practice went into retreat.²⁷ One consequence is that independent promotion once again became an economical policy for small, independent labels. The major labels' thralldom to the independent promoters had had the incidental advantage of raising their smaller rivals' promotion costs.²⁸

The evidence supports a simple interpretation of the economics of payola in broadcasting. Promotion benefits to the label cannot be captured directly by the broadcaster, who lives by advertising revenue that generally will not reflect this benefit. Payola compensates for valuable promotion, and leaves us wondering why it is stigmatized as bribery rather than recognized as payment for services rendered. The broadcasters evidently assume that their goodwill

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asset with the listening public depends on the apparent exercise of independent judgment in the music to be played. This assumption might be accurate, or it might just internalize the regulatory constraint that U.S. broadcast licenses are held on a public-trust basis. Payola then looks like a compromise, invading this goodwill asset to an extent just offset by the net profit increase from the payment. But then why does the transfer so often seem to benefit station personnel rather than the profit of the broadcast enterprise? This paradox lends interest to a recent trend toward overt payments for airplay in broadcasting, analogous to the "infomercials" that are a staple of television.²⁹

Recent interest in pay-for-play arises from the rapid reorganization of the U.S. radio broadcasting industry. Removal of Federal Communications Commission restrictions on stations' common ownership has led to a great turnover of ownership, with more than one-quarter of the nation's 10,000 or so stations having changed hands in two years. Ownership has become concentrated in groups such as Jacor Communications, Inc., with 192 stations. The logic of this consolidation, as with movie theatres and fast-food restaurants, lies in economizing on entrepreneurial or managerial input into relatively simple and similar business units. Any new owner naturally seeks additional profit opportunities, and radio chains pursue economies of centralized dealings with suppliers such as record companies. Jacor and CBS Radio both floated the idea of pay-for-play in country music, which might take the form of an hour-long showcase program broadcast over the firm's stations nationwide. Another idea was à la carte purchase of several plays for a single song. Country music is a natural site for the experiment, because sales of country albums have been declining, and labels' promotion budgets are smaller for country music than for rock records. The proposal left some record labels and broadcasters looking nervously at ghosts of payola past, and it was not obvious how the fact of commercial sponsorship could be conveyed in the broadcast with sufficient candor to satisfy the Federal Communications Commission.

Other examples have surfaced, such as a deal between an independent station and a label to play an emerging artist's song 50 times in five weeks in exchange for \$5,000. A new artist's success is always highly risky, and the deal was seen as a sharing of risk between label and station. A music-video TV channel in 1994 adopted a program (called Playola) of showing a record company's video 42 times during two weeks in exchange for \$27,000. These developments have met the standard objections about compromised independence and deception of listeners. Could compilers of Top Hits lists distinguish between autonomous and purchased play? The potential efficiency gains from pay-for-play, however, were also noted. It could replace under-the-counter contracts by which airplay depended on conventional ads on the

station purchased by a label. Artists are sometimes pressed to play concerts sponsored by radio stations in order to gain airplay or retain a place on a station's playlist.

Payola in Other Settings

The broadcasting sector illustrates one factor—spillovers—that promotes payola. Other creative activities also harbor payola driven by promotional benefits. In popular entertainment, fan magazines commonly trade mentions in their news columns for advertising purchases, free trips for writers, and the like. Reviewers are paid little but may receive records and other freebies, free travel, or possibly job opportunities from the companies whose records they review.³⁰ Television broadcasts and cable channels whose program content deals with cinema films commonly demand advertising from studios whose new films they feature, atop contributions to the cost of preparing the program material.³¹ Some clubs and venues hold particular value for promoting artists beyond the listeners whom they attract directly. To obtain bookings there, a label may pick up part of its group's regular fee, or buy large numbers of tickets and pay charges for numerous invited guests.³² A New York club of moderate size was viewed by promoters as a particularly attractive rung on a ladder of venues for successful groups, and in competitive bidding by presenters it obtained an arrangement to share profits on subsequent local appearances by groups that had performed there.³³

Another spillover promotion benefit generates payment for the placement of a manufacturer's product in a cinema or TV film. The cornflakes box visible in the breakfast-table scene must be one brand or another, or perhaps a contrived one. Filmmakers once resisted giving incidental plugs to existing brands, on grounds of creative autonomy. But the cereal maker will pay for the exposure of its trademark. Because of the huge audiences attracted by popular films, the promotional benefits to products can be very large. When a child fed Reese's Pieces to a friendly alien in the film *E.T.*, the candy's sales rose 65 percent.³⁴ Filmmakers must obtain releases for the conspicuous exposure of any trademark, but rather than paying for the privilege, the game is to extract maximum rents from the trademark's holder. The product's placement can be more or less conspicuous or favorable in the film. The extra product sales can yield large or small profits to its maker. Hence, payments can vary from free provision of the product up to very large sums. Daimler-Benz reportedly paid \$1 million for its M-Class sports utility vehicle to appear in *The Lost World*. Fees in the range of \$20,000 to \$100,000 are common; since a film might offer twenty to fifty potential placement opportunities, it can easily realize \$1 million in additional revenue.³⁵ This market for

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product-placement opportunities has attracted its own brokerage industry, with fifteen to thirty independent companies seeking placements for their manufacturer-clients and negotiating terms.³⁶ It has been an area of significant litigation, because studio and product-maker find it difficult to contract before the film is completed on the positiveness of the product's use.³⁷

The other explanation for payola, sticky prices, has its own domain in the creative industries. It seems to apply to deals offered by chain bookstores and superstores to book publishers. Bookstores can selectively promote particular books by placing large quantities on display at the front of the store, giving publishers a special space for newly published works, including certain books in catalogues, and the like. The superstores and chains best able to offer these services are also the ones that commonly discount books from their retail list prices (so the buyer swayed by a book's promotion in one store gets no benefit from buying it at another). With special displays and promotions proximately benefiting the retailer's own sales, spillovers do not explain why publishers might pay extra for these services. The book chain does pick one book over others for special promotion, however, and the publisher is vulnerable to demands for payment to get his onto the front table. Publishers' prices to retailers are expressed as discounts from the trade book's suggested retail price; these do not vary from book to book, and so constitute the requisite sticky price. The chains can efficiently coordinate such promotions among their many stores, offering the publisher various promotional packages that cost little per book but do add substantially to the stores' profits. Barnes and Noble's "Discover Great New Writers" program assures that a book appears face-out in every store for two or three months and gets a review in a special brochure, for \$1,700 per title. To have a book featured for a month on a special stand at the front of each store costs \$10,000. End-of-aisle displays go for \$3,000 a book or \$10,000 for the whole display. Borders charges \$15,000 for a package that includes a month of front-of-store display and advertisement of the book discounted by 30 percent in a special issue of *USA Today*.³⁸ Amazon.com briefly joined the party by charging publishers for putting titles on its recommended list.³⁹ These practices have entered into the controversy between publishers and the traditional independent booksellers over promotional allowances and other terms that disproportionately benefit chains and superstores. The problem in part is one of transaction costs: the deal that is worthwhile when it covers a chain's hundreds of stores does not repay the negotiating costs and paperwork for a single store.

The bookstores' practices resemble those of grocery chains, which also find their stores' shelf capacity inadequate to display all the products that manufacturers would offer. The solution is not simply to make the stores bigger, because (among other reasons) diminishing returns set in for the shopper as

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the cart-miles needed to fill the grocery list increase. Given grocers' mark-ups, the store's shelf space comes to acquire a positive shadow price. New products come to require "slotting allowances" to get stocked, and end-of-aisle positions can command a premium.⁴⁰

Vertical Corporate Mergers: Capitalized Payola

The essentials of payola transactions appear in a seemingly different setting—the mergers and acquisitions that have been common among large entertainment firms. A small number of major studios distribute films that, after their round of exhibition in cinemas, become available for showing on television. A small number of television networks and cable channels provide outlets for showing these films. The films' negative costs and the costs of their promotion to cinema audiences are fully sunk. Although the marginal cost of making the film available for broadcast exhibition is negligible, the studios are able to extract substantial rents from the broadcasters. A broadcaster might be nearly indifferent among several available films. Clearly, in a spot transaction a studio would willingly offer payola to get its film selected. Now allow a studio (Disney) to acquire control of a broadcast network (Capital Cities-ABC). The ABC network can be instructed to pick Disney films over those offered by other studios. ABC's payment to Disney is an internal transfer that leaves the firm's profits unaffected, while the same payment to another studio is a direct cost. The Disney film might draw fewer viewers than another studio's, but the in-house selection remains a good deal until the lost profit approaches the size of the license fee to another studio.

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Organizing to Collect Rents: Music Copyrights

One rides the elevator in a modern high-rise building soothed by a bland recorded arrangement of "Tea for Two." This respite from silence might be worth, say, \$0.0025. Can the composer collect that sum? What about the recording artists? Creative goods enjoy legal copyright protection, but the holder of the copyright must enforce it and collect payments for use of the copyrighted good. Many legal and economic issues of intellectual property rights are not specific to creative industries and apply to patents and trademarks as well. One exception, localized to the music industry, is flagged by the elevator rider's benefit: the lumps of rent are very small, very numerous, and hence feasible to collect only through some cooperative organization.

Intellectual Property Rights in Creative Activities

Copyrights to music compositions make the same compromise between economic costs and benefits as other legal rights to intangible intellectual property. Songs are public goods. Once written down, recorded, or even just performed in public, they come available to persons other than the songwriter at no (or little) marginal cost. If the song is free for the taking, the songwriter reaps no reward for her creative labors. Valuing *art for art's sake*, she may still bestow her lyrical gifts on the world; but she must earn a living somehow, so supplies even of creative goods shrivel when no economic rewards can be claimed. Giving the songwriter a property right, however, leads to another social cost. If the resource cost of the song's passage to another listener is zero, yet the songwriter charges each listener a positive price, a market distortion results (price exceeds marginal cost). The best compromise solution to this problem is the one that public policy actually embraces: give the songwriter her monopoly and let her collect her tribute, but limit the monopoly in time (in the United States, the creator's life plus 50 years). After that the song reverts to the public domain.

Several other issues entwine the copyright. Even the artist ready to donate her lyrical gift still needs the collaboration of humdrum inputs. The firm that publishes the song or issues its recording holds out for a normal return on its investment. Although humdrum inputs demand their paychecks, they may be clever about obtaining them in other ways, if intellectual property rights are not available. A book publisher, for example, might print initially enough copies of an uncopyrighted manuscript to serve its expected demand. Once this fixed cost is incurred and sunk, any pirate faces the authorized publisher as a competitor with a zero marginal cost, hence willing to meet any low price the pirate quotes and preclude the pirate's covering his fixed costs. A drawback of the intellectual property right is the rent-seeking that it induces. Successful creative goods regularly attract lawsuits from parties who claim that the work was stolen from them. Songs are particularly vulnerable, because notes can be arranged in only so many ways, so similar (short) sequences can easily occur by chance.

Songwriters and Royalty Sources

Some historical background sheds light on the royalty streams earned by songs and the institutions that collect them. Popular songwriters (composers and lyricists) once were typically not performers, only authors who took their creations to publishers, who in turn printed sheet music for sale to professional and amateur performers. Their song-plugging efforts (Chapter 18) sought to promote the sheet-music sales that were the source of royalties to the songwriter and profits to the publisher. Time brought new technologies for delivering professional performance to the music-loving public: recordings, radio, sound motion pictures, broadcast and cable television. The parlor piano fell into disuse, sheet-music sales plummeted, and the royalty and profit streams for songwriter and publisher increasingly depended on public performance.

The role of the publisher was transformed to the point where the term is now a misnomer. First, the publisher's best strategy for maximizing the rent stream to himself and the songwriter abruptly shifted from subsidizing public performance to taxing it (Chapter 18). U.S. legislation in 1909 both provided for compulsory royalties on music reproduced mechanically (then, record cylinders and piano rolls) and permitted copyright holders to collect royalties for public performances undertaken for profit. This law launched an effort to organize institutions to collect the newly authorized royalties. Second, the seismic shift in popular-music styles since the 1950s and the rise of the songwriter-performer made the physical printing of songs increasingly irrelevant. Since 1976 copyright no longer requires a song to be fixed in

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printed form (a recording will do), and many copyrighted songs are not printed. The publisher still promotes songs to performers and filmmakers who might use them, but he is mainly a collector of rents.

Mechanical Royalties

Under U.S. law, songwriters nowadays obtain royalty income from two major and several minor sources.¹ Mechanical royalties (the name harks back to the mechanical reproduction of sound) are paid by record companies for each copy of a song that they record. The complex job of negotiating and collecting royalties of a few cents per record was resolved mainly by legislation. The 1909 act set a statutory royalty rate of two cents per song per recording. That rate persisted until 1976 legislation created a Copyright Royalty Tribunal to set an inflation-adjusted rate, now 6.95 cents per song of standard length. A nonprofit organization, the Harry Fox Agency, emerged that gathers royalty revenues, audits recording company records, and disburses the revenues received minus its expenses.² In 1994 mechanical royalties made up 31 percent of music royalty income.³

Mechanical royalties stem from a compulsory licensing requirement. After a song's first recording, anyone else may record it, subject to the payment of mechanical royalties. When songwriter and performer were different artists, this practice was unexceptional. The interest of the songwriter and publisher lay in the song's widest possible dissemination—the most performers recording it, and the most records sold. The marginal cost to the copyright's owner was zero unless a singer somehow devalued a song's appeal to others. The singer picking a song to perform could hardly search the world's songwriters for one willing to knock off a penny per record. The terms for mechanical royalties resemble the other conventionalized or (in this case) statutorily fixed prices, around which most parties find no net benefit in negotiating. The correspondence is not quite complete, however. That is because the compulsory rate carries rather onerous record-keeping requirements, so record label and publisher often settle on a negotiated rate below (but apparently related to) the statutory rate.⁴ Also, when the songwriter is also the performer, record-company contracts normally truncate what the artist receives for so-called controlled compositions at 75 percent of the statutory rate.

The singer-songwriter may well have reason to resist compulsory licensing. As a songwriter, she benefits from the maximum number of singers attracted to her song. As a singer, however, she recognizes other singers as competitors whose records compete with her own. If allowed to set royalty rates for other singers, she could select the right set of singers and charge each a royalty rate that would maximize the joint profits from all versions of her song, and re-

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quire other singers to remit the profit shares falling into their hands.⁵ She is not allowed to set such a rate, however. The force of this limit was evident in the diffusion of rock 'n' roll in the 1950s, with "cover" versions of blacks' R&B songs, cleaned up for white audiences, taking the dominant share of the record market.⁶

Performance Royalties

Any public performance of music (with a few exceptions) incurs an obligation to pay performance royalties: live entertainment, recorded songs performed on radio or television, juke boxes, background music. A (near-) duopoly of copyright collectives, ASCAP (American Society of Composers, Authors, and Publishers) and BMI (Broadcast Music, Inc.), arose to negotiate royalty payments with these users. ASCAP is also responsible for another conventionalized price: the equal division of performance royalties between songwriter and publisher. The copyright collectives and the reorganization of the publishing industry that resulted from this fixed division of rents are treated subsequently. Performance royalties in 1994 accounted for 44 percent of total royalty income.

The benefits to music presenters from public performance of recorded music depend on the score devised and presented by songwriter and publisher, but also on the solo performer, background musician, recording engineer, record producer, the label's support personnel, and others. How many of these participants get performance royalties? A successful recording depends on at least competent performance by each of the participants (by the *motley crew* property). Market data cannot expose even roughly the values of individual contributions by most of these participants. That leaves their entitlements a matter of public policy and private rent-seeking efforts. U.S. public policy has cut off participants other than songwriter and publisher by means of the doctrine of first sale, meaning that their claims do not reach beyond the record buyer's purchase into the buyer's use of the recording. The American Federation of Musicians in the 1940s tried to capture performance rents by the indirect method of curtailing the production of new recordings in order to force public presenters to employ more "live" musicians. This campaign did succeed in imposing a tax on sales of recordings, with the revenue passing to the union and not to the particular musicians who made them. That choice caused trouble within the union by creating a conflict between musicians (especially in New York and Los Angeles) who were the sidemen on the recordings and other musicians who were the main beneficiaries of the tax. The former were allowed to bargain separately for higher recording-session wages,

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and eventually captured revenue from a tax on payments for the reuse of filmed TV programs.⁷

Other Sources

When a copyrighted song is included in the soundtrack of a cinema film or TV program, the producer obtains a so-called synchronization license from the publisher. Unlike the mechanical and performance royalties, individual transactions are sufficiently heterogeneous and important to warrant case-by-case negotiations. While the rent that any one song can command is limited by terms quoted by the publishers of competing songs, the prices and terms vary mainly with the value of the song's use to both the filmmaker and the publisher. License fees for using a single song in a cinema film were quoted (in the early 1990s) between \$12,000 and \$35,000 for the life of the song's copyright. The conspicuousness of the song's use (for example, is it sung by a character in the film?) is one determining factor. For TV use the fee may vary with the particular channel(s) involved—free, cable, or pay TV. The price drops if the filmmaker commits to a nationally distributed soundtrack album—in this case the publisher reaps mechanical royalties as well, and the filmmaker can press for a co-ownership share of the copyright or share of the mechanical royalties to capture the film's contribution.⁸ Synchronization license fees for TV are quite low (\$3,000 to \$8,000), because the publisher also receives performance royalties from TV showings. For the producer of a continuing TV series, price-shopping and quantity discounts may affect the license fee. TV synchronization income for the producer may have the advantage of depending little on the program's success, in contrast to feature films' highly variable box-office outcomes.⁹ When songs are licensed for TV commercials, publishers tend to hold out for a high fee (\$100,000 to \$300,000 for a year's use), because of the likely negative impact on the song's potential for future mechanical and syndication licensing.¹⁰

Publishers' income from synchronization royalties in 1994 was 8 percent of their total royalty income. Royalties from printed music were similar (9 percent), based on a conventional 20 percent royalty rate on the retail price of single-song sheet music and about half of that on folios or collections of songs. The remaining 8 percent of royalty income stems from still other sources, such as "grand" rights for the performance of a whole musical-comedy score. These are negotiated individually.¹¹ The boundary line between grand rights and those for single songs cleared routinely through the performing-rights organizations is wobbly and litigious because the parties may differ as to which approach yields them the better terms.¹²

Copyright Collectives

This review of sources of royalties for publishers and songwriters indicates that performance royalties pose the most difficult problem for organizing the collection process. Hundreds of thousands of songs might be performed over vast numbers of radio and television outlets, hotels, clubs, ballrooms, juke joints, college campuses, and the like. For the holder of copyright in a single song, the transaction cost of authorizing or detecting performance and collecting payment would be prohibitive except for the most conspicuous and accessible users. Even a collective organization faces a daunting task of identifying all users legally obligated to pay, negotiating terms, monitoring their use of music, collecting the royalties and remitting them to the appropriate rights holders. The history of ASCAP and its main competitor, BMI, illustrates the many analytical and organizational problems posed by these tasks.¹³

Assembling the Coalition

In 1909 U.S. legislation first authorized the collection of royalties when copyrighted music was performed in public for profit. Organization to collect these royalties from venue owners coincided with efforts by the Tin Pan Alley song publishers (that is, the mainstream publishers of popular songs) to conclude on limiting payola to performers for promoting a song's performance.¹⁴ After World War I the sheet-music business underwent a meltdown, with many stores closing their music departments and sheet-music sales of reasonably popular songs falling from 500,000 in the 1920s to 50,000 in the 1930s. The publishers, recognizing that demand had grown less elastic as it contracted, tripled the price in 1919.¹⁵ The receding importance of sheet music and the possibility of capturing royalties from public performance both reduced the spillover value of public performance and created a legal basis for collecting tribute. The publishers who joined the Music Publishers Protective Association (Chapter 18)—that is, the bulk of major publishers of contemporary popular music—were the same ones who shortly after climbed aboard ASCAP. The main problem of assembling the coalition of publishers was thus solved at the outset by their common interest in trying to reverse the stream of payments between publishers and the parties involved in public performance. Publishers could take different views of how to deal with their key revenue sources, however, and there were numerous withdrawals and rejoins among the smaller publishers. The organization's feasibility was not confirmed until the U.S. Supreme Court resolved the meaning of "public performance for profit" (explained subsequently).

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when their core policies leave some members with better options outside and the defection of these members impairs the scale economies that benefit the still-loyal. Once ASCAP was established as a copyright collective, it was fairly well insulated against defection. The service it provided was not a public good, because nonmembers could be excluded from its benefits. Even a large independent publisher doing its own licensing could not touch its scale economies. The only holdout would be a publisher whose special situation made performance royalties easy to collect.¹⁶ When ASCAP came to face competition from BMI (discussed subsequently), its problem was its own exclusion of publishers of popular music in styles other than Tin Pan Alley's, until it was forbidden to do so by the 1941 consent decree that followed an antitrust intervention. The ASCAP members may have sought to weaken or exclude competitors, or they may simply have acted from snobbery.¹⁷

Negotiating Royalty Payment

Rent-seeking is always highly litigious. The pot of gold need not be mined, only captured. Not picks and shovels but lawsuits and political campaigns are the tools of choice for either annexing or retaining property rights in streams of rents. The collection of performance royalties illustrates the point well: no substantial group of payers ever gave in without litigation, and skirmishes continue eight decades after ASCAP's founding. Hotels and clubs or cabarets were pressed at the outset. Both sought exclusion on the ground that they provided music as a bundled service and, while operating for profit, did not charge their patrons for music as such. This argument prevailed through the U.S. district and appellate courts, but the Supreme Court saw these music users' bundled services for what they are. Motion pictures were silent in ASCAP's early years, but film exhibitors did employ the piano accompanist to heighten the visual effect with whatever melodies seemed appropriate. The motion picture exhibitors were targeted by ASCAP for licenses. In response they raised a war chest, sought Congressional action, and instituted a lawsuit on grounds similar to the hotels' and cabarets'. ASCAP prevailed with its own infringement suit, with the district court rejecting the first of many claims that ASCAP violated the Sherman Antitrust Act. The theatre owners then proceeded with another two-pronged attack. They sought to enlist the film studios in a general boycott of music represented by ASCAP, and to develop non-ASCAP sources of music by promising the exhibitors' promotional assistance to any publisher supplying music outside of ASCAP. Neither maneuver worked, and by 1924 the majority of theatres were licensed.¹⁸ ASCAP's cumulative total legal expenses then exceeded the royalty income it had received.

One puzzling feature of ASCAP's early operations is its failure to seek royalties from the vaudeville theatres that were then the nation's main form of musical entertainment. Like the touring theatre troupes, vaudeville was then manifestly declining in the face of motion-picture competition, and many theatres were converting in part to showing films ("pic-vaude houses"). ASCAP may have skipped a fight with the vaudeville interests for that reason alone, but the decision was apparently more complicated. Vaudeville theatres and the booking of talent were then largely controlled by the Albee-Keith organization. It apparently had significant monopsony power with performers, and was deemed capable of capturing some payola rents they had received for plugging Tin Pan Alley's songs. The Albee-dominated vaudeville managers' association proposed to ASCAP that it subcontract the collection of performance royalties from the pic-vaude houses and from non-Albee theatres, in exchange for a 50 percent cut of what it collected and exemption of Albee's own theatres from performance royalties.¹⁹ This smelly deal never took effect.

New Music-Distribution Technologies

In the 1920s and 1930s, ASCAP dealt with two important new technologies for disseminating musical entertainment—sound motion pictures and radio broadcasting. Warner Bros.'s first sound film, *The Jazz Singer* (1927), was hugely profitable and made it clear that music would be embodied in films and not just played as accompaniment. As noted previously, the importance and heterogeneity of music's use in cinema films from the start warranted direct negotiations over licensing with the publisher rather than clearance through ASCAP. Nonetheless, the studios' switchover to sound films did affect ASCAP's core membership. In the late 1920s the studios bought controlling interests in several of the major music publishers. The reason for these acquisitions is clear. Music embodied in films would add greatly to the studios' profits, and exhibition of sound films would strongly promote their songs in other embodiments (recordings, sheet music). These spillovers would bring profit windfalls (performance and other royalties) to the music publishers, windfalls that would accrue to the studios if they could buy publishing firms at market values that did not fully anticipate these rents. The studios' fast action likely captured much of this prize. The studios may also have sought insurance against an ASCAP-mounted squeeze on music sources.²⁰ This development affected ASCAP's governance in that the studios now controlled a substantial bloc of its voting members. The studios had reason to welcome ASCAP's efficient mechanism for collecting performance royalties, however, and the captive publishers' relations with ASCAP continued un-

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changed. ASCAP was in any case somewhat insulated from the defection of publishers (even if it had been in their interest to defect). That is because publishers and songwriters were admitted to ASCAP separately and on different bases, making it tricky for a publisher to exit without harming the interests of the songwriters it had published.²¹

The early radio industry relied heavily on broadcasting music, recorded or live, and became a key target for ASCAP in 1922. The broadcasters, not yet profitable and facing a property-right claim on their lifeblood, were understandably concerned. The major companies then involved in radio (RCA, AT&T, General Electric, Westinghouse) indicated a willingness to discuss reasonable royalties, but ASCAP made the tactical error of declaring that it expected radio to be a major revenue source. The stations rejected wholesale the temporary licenses that ASCAP offered, while long-run royalty rates remained unresolved. The National Association of Broadcasters (NAB), the independent stations' trade association, sought to develop non-ASCAP sources of music. Publishers with backlists of more traditional music indeed were not well represented in ASCAP in 1922, which provided an opening for the NAB, but ASCAP vigorously recruited them during the next two years. Several legal challenges from the NAB were defeated in the courts, and attempts to obtain an exemption from Congress or federal regulation of ASCAP's rates were unsuccessful. By 1932 all the major broadcasters were licensed.²² Furthermore, ASCAP's publisher-members were congruent with the trade group that negotiated mechanical licenses for the broadcast networks' "electrical transcriptions," special recordings of music and programming for the use of network's member stations.²³

Structure of ASCAP's Charges and Disbursements

ASCAP faced problems of both how to collect from users and how to divide the revenues among its members so as to keep the coalition together. The most efficient way to extract rents enjoyed by (say) a radio station is to identify the increment of profit associated with the use of ASCAP songs and demand it as payment in an all-or-nothing offer. The profit increment might be identified either as specific to each individual song played, or as an aggregate due to the station's selections from the whole ASCAP catalogue.²⁴ The latter, blanket-license approach had the great advantage of simplicity, but it also clearly placed ASCAP in the position of a cartel pricing the use of its members' songs collectively. If, instead, each ASCAP member priced its own songs' use separately, with ASCAP serving only as collecting agent and bookkeeper, the organization's subsequent vulnerability to antitrust charges would have been much lessened. But it was long accepted that individual

pricing of ASCAP's many songs, with each price conditional on user and use, was infeasible.²⁵

ASCAP settled early on the blanket license for all ASCAP songs, with a royalty tied to the theatre's number of seats or the broadcaster's gross revenue (after deductions).²⁶ Besides keeping transaction costs low, this system could claim economic efficiency. The costs incurred to write and publish ASCAP's songs were all sunk. The marginal cost of using a song is zero. Therefore, it was efficient for ASCAP's charges to impose no tax on the use of an additional ASCAP song, on the replacement of a non-ASCAP song by an ASCAP-represented one, or on the use of one song rather than another.²⁷ Furthermore, the music user's costs typically did not vary with the number of ASCAP songs used, so that the songs' contribution to the user's profit was the same as their contribution to its total revenue.

While blanket licenses efficiently targeted the royalties for collection, the disbursement of the proceeds to members did require ASCAP (and later BMI) to identify what songs were actually used. This was done by requiring major users to keep logs of the music performed, while minor users were sampled.²⁸ A projection of the extent and nature of use of each song assigned it a certain number of "points," and the payment made per point was simply ASCAP's total receipts less operating costs divided by the total number of points awarded. Again, subject to sampling error, the system induced no biases among members by under- or overrewarding particular songs or types of songs.

Two features of the distribution of royalties that ASCAP collected, however, did have important effects. One was the convention of dividing royalties equally between publisher and songwriter(s), which to this day applies to mechanical and synchronization royalties as well as performance royalties. Its effects are discussed subsequently. The other is ASCAP's practice of rewarding songwriters and publishers not just on the basis of points allocated for current use of their music. The songwriter may choose between this plan and an alternative that favors cumulative play of the writer's songs and also benefits the classical composers who are ASCAP members. BMI adopted a similar system, without as much seniority bias but also including a feature that escalated the rewards to the most successful songwriters. Both collectives paid publishers on the basis of current performance.²⁹ This seniority bias in ASCAP's allocation became important when it faced competition from BMI, because it disfavored the currently "hot" songs and songwriters and pushed them to seek BMI membership. The problem with ASCAP's publisher members was similar. Due apparently to ASCAP's founders and its original governance structure, publishers were divided into several groups with the effect of multiplying or discounting the royalties due them in relation to the play that their

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songs received. In 1935 Warner Bros.'s song publishers, on the losing end of this hierarchy, withdrew and sought to create their own licensing organization, but the scale-economy advantages of sticking with ASCAP proved overwhelming.³⁰

ASCAP Faces Competition

By the late 1930s ASCAP had brought all major classes of music users under license for performance royalties. Its licensees were sullen but not mutinous. ASCAP then began maneuvering to impose an increase that would double its royalty stream from radio, with the change structured to load the burden on the broadcast networks and ease it on individual small stations.³¹ With existing licenses expiring at the end of 1940, ASCAP furthermore was coy about exactly what terms it would demand, so the odor of a hold-up reached the networks' nostrils. In 1939 the National Association of Broadcasters set to work establishing BMI as a competitor to ASCAP. This did not prove a difficult task, because the radio industry (the principal source of performance royalties) stood ready to welcome new songs and songwriters. Only one major publisher was attracted from ASCAP, because of the problem of relocating a publisher and his songwriters all at once.³² A substantial clientele of songwriters and publishers was receptive to the invitation, however, because the organization had never welcomed other music styles—such as rhythm and blues, country and western, and Latin.³³ Furthermore, in 1940 the admission of any publisher or songwriter to ASCAP was subject to rather stringent conditions of prior activity and success. Restrictiveness obviously benefited current members, who could divide the blanket-license revenue among fewer recipients, but it opened the door to a competing coalition.³⁴ In April 1940 NBC and CBS instructed their music departments to avoid use of ASCAP songs whenever possible, and a progressively imposed boycott eliminated ASCAP songs from radio play by the beginning of 1941. Between BMI's holdings and public-domain music, the boycott brought only a minor jolt to the nation's radio audience.³⁵ In the settlement finally reached with ASCAP in late 1941, royalty obligations were indeed focused on the networks (a function of their numbers of affiliates and gross revenues), with simple blanket licenses for individual stations, but the charges represented a cut rather than the increase that ASCAP had sought. One estimate held that, had ASCAP's 1941 contract been in effect during 1935, ASCAP would have collected \$3.1 million rather than the nearly \$5 million that it actually collected.³⁶

Important changes in ASCAP's internal policies sprang from this competition, when it led the Department of Justice to intervene in 1940. Probably

intending to force an ASCAP-radio settlement, the Justice Department brought broad charges of illegal pooling, price-fixing, and discrimination against ASCAP, BMI, NBC, and CBS. BMI soon signed a consent decree permitting its members to license songs directly when they wished (that is, membership did not entail exclusive licensing) and requiring that per-piece or per-program as well as blanket licenses be offered. ASCAP came under similar restrictions. That organization was also forced to ease its entry restrictions and reform its old-boy governance structure. The reformed payment system placed increased weight on performance and decreased weight on seniority in payments to songwriters. In 1950 the consent decrees were modified to impose arbitration by a U.S. district court when ASCAP and licensees could not agree on terms. ASCAP became in principle a regulated monopoly, although there has been little resort to arbitration.³⁷

This episode not only introduced competition in royalty collection but also affected the songwriting and music publishing industries substantially. The number of active music publishers and the turnover in their success with top-hits songs increased, and the copyright registrations of songs increased more than the nation's economic recovery seems able to explain.³⁸

Ongoing Negotiation and Rivalry

ASCAP and BMI settled into a pattern of rivalry with each other and continual conflict with licensees and potential licensees involving a morass of negotiations, lawsuits, threatened lawsuits, and contests for political influence. The blanket licenses favored by both ASCAP and BMI have been under continuous attack despite their previously noted efficiency, and despite the fact that licenses on a per-program basis had to be offered since 1941. Licensees' attacks usually rested on this sort of reasoning: The licensee pays ASCAP (or BMI) $\$X$ for use of any or all of the many thousands of songs it represents, but it only wants to use a small fraction $1/n$ of these, so instead it should be allowed to pay $\$(X/n)$ for just the songs that it wants. Given ASCAP's legal power to extract the value added by performance of copyrighted songs, the argument is spurious. The licensee has in fact already made his choice of the $1/n$ songs that he actually uses, and pays a license fee reflecting (presumably) the value added by this ad-libbed selection of songs. The tactical purpose of the position is to force ASCAP to quote license fees on specific songs; because the copyright collective may not prevent the publisher from making his own deal, that would allow the licensee to start a bidding war between ASCAP and its member publisher. The outcome would leave ASCAP serving only as a collection agency.³⁹ One version or another of this attack on blanket licenses was pursued first by the broadcast networks (led by CBS), then in a

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class-action suit by local TV stations, and most recently by cable program suppliers and cable system operators. In each round, the courts declined in the end to find blanket licenses illegal.⁴⁰

What one makes of blanket licensing as a matter of economic policy depends on the level of the license fees set. If transaction costs were magically swept away, and holders of song copyrights could compete freely to line up licensees and collect from them, the licensees would get the benefit of lowered prices due to rivalry among these differentiated products. If ASCAP's blanket licenses represented a pure monopolization of songwriters' services, they would create an economic distortion. ASCAP does compete with BMI, however. Also, it operates under supervisory court decrees that hold out arbitration as a cap on license fees. Although the effect on license fees cannot be quantified, ASCAP and BMI have certainly competed in setting terms with the main groups of licensees. Licensee groups do not typically seek bids and take one or the other collective's bundle of songs. Both are bought, but their bundles of songs (though different considerably in composition because they still reflect their respective origins) are comparable in overall size, so that one collective cannot generally hold out for a blanket license fee much higher than the other's.⁴¹ The collectives appear to be unable to price their blanket licenses monopolistically, although the amount of shortfall is unclear.

Rivalry between ASCAP and BMI has also affected the terms that they offer to publishers and songwriters. ASCAP's favoritism of its old boys has been a point of vulnerability. If some members get more than the royalties imputable to their songs, others must get less, and the competing collective can perhaps offer them a better deal. Although each organization's rules impose some lock-in, they are active rivals in recruiting members, and this has squeezed out some of the redistribution implicit in their disbursement methods.⁴² The favorable effects of rivalry between ASCAP and BMI in setting license fees and attracting members should be weighed against the element of natural monopoly that brought ASCAP into being in the first place. Each maintains an administrative apparatus that represents a separate fixed cost.⁴³ Combining them into a single entity would save one fixed cost, plus the cost of their continual legal skirmishes with each other, but the benefits of their competition would be lost.⁴⁴

The struggle to bring public music users into licensee status continues. Jukebox operators succeeded for two decades in preserving a Congressional exemption from royalty payments, but finally lost it in the copyright legislation of 1976. Cable television also became liable for licensing at that time. The act removed the "for profit" condition on public performance subject to license, pushing the Public Broadcasting System into licensee status. Religious broadcasters were put under license, although they have lately followed

the course of seeking exemption or rate regulation from Congress.⁴⁵ ASCAP, with perhaps more legal propriety than political savvy, sought to license the Girl Scouts and other campfire singers of copyrighted songs.⁴⁶

Songwriters' and Publishers' 50-50 Split

The equal division of all types of music royalties (except sheet-music sales) between songwriter and publisher is another puzzling conventionalized price. ASCAP adopted this rule early in its history, and songwriters and publishers hold equal numbers of seats on its board of directors. The rule cannot claim to be an equilibrium price, clearing the market for services of songwriters and publishers. Since publishers serve as gatekeepers, and many songs go unpublished (and unsung), the amount of music published will depend on this rule. Increase the songwriters' share, and fewer songs will be published, although each will earn more revenue. Over the twentieth century the publisher's contribution to a song's success has greatly diminished. The crumbled market for sheet music and the dominance of the singer-performer as recording artist removed most of the music publisher's promotional function (although the pursuit of mechanical and synchronization royalties remains) and left him with mainly bookkeeping tasks.

If the 50-50 split represented a market equilibrium when it was adopted in the 1920s, it evidently moved toward overvaluing the publisher's contribution. This could lead to a number of adjustments, such as underemployed publishers pursuing a diminished supply of songwriters and seeking kernels among the chaff of unpublished songs. In fact the publisher's role has contracted to the point where anybody can be a music publisher. The only essential task is the administration of the copyright, and that can be subcontracted to other firms. The movie studios first responded to this incentive with the coming of sound, which put them in need of access to music catalogues. It also generated opportunities to publish (and collect royalties for) music written for use in films, notably "work for hire" whose copyright benefit flowed to the employer rather than the salaried composer. By the early 1930s Warner Bros. controlled no less than 20 percent of ASCAP-assigned music.⁴⁷

With the arrival of rock and the singer-songwriter, music royalties came to yield immense wealth to publishers as well as songwriters, incidental to the process of making and promoting recordings. By 1990 Paul McCartney's "Yesterday" had been recorded by 1,600 other artists worldwide, all yielding mechanical royalties to the songwriter.⁴⁸ The record labels moved vigorously to start or acquire their own music publishers, especially in Britain, land of the Beatles.⁴⁹ If the label could become a music publisher, so could the songwriter, and in the 1970s successful songwriters began owning their own pub-

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lishing companies.⁵⁰ A publishing firm can dwell in a file drawer, owned by the songwriter but administered by one of the major (conventional) music publishers. As a consequence, ASCAP recently represented 29,400 songwriters but also 12,000 publishers, while BMI counted 65,000 and 37,000, respectively.⁵¹

Music publishers' royalties become a contention in contracts between songwriter-performers and labels because both wished to claim the publisher royalties. Labels tend to demand publishing rights for a new and untried artist because of the high probability that the advance will not be fully recouped. That is because mechanical royalties to the artist's publishing company are not recoupable by the label, while those due to its own publisher flow directly to its pocket. When the artist does retain the publishing function, the label caps the rate of mechanical royalties to 75 percent of the Copyright Royalty Tribunal rate.⁵²

The publisher's share of music royalties has turned into a freely traded cash flow.⁵³ The copyright administrator still performs bookkeeping and perhaps promotional tasks, but the administrator may be the assignee rather than the owner of publishing rights, so nothing impedes trading them like any other speculative asset. In 1985 Michael Jackson bought the ATV catalogue, including some 250 Beatles songs and numerous others, for less than \$50 million.⁵⁴ In 1988 the copyright on "Happy Birthday to You," with 22 years of life remaining, was bought by Warner Communications for \$28 million.⁵⁵ Bargains have no doubt been available in this market when estate sales and corporate reorganizations put song catalogues on the market, but rivalry among international entertainment and publishing conglomerates has pushed up prices, to the benefit of owners of song catalogues.⁵⁶

Creative Work without Copyright: British Novelists in Nineteenth-Century America

Copyright and other intellectual property rights are largely settled in the laws of the industrial countries, but they raise an international conflict with other countries that deny protection to foreigners' intellectual property and then do a brisk business in pirated and counterfeit editions. Economists are curious about how people adjust to different systems of property rights. In the field of copyright, history offers an adroit controlled experiment. The United States did not extend the copyright privilege to books by foreign authors until 1891, and so Britain's Victorian novelists and their publishers had to cope with a thriving band of piratical U.S. publishers.

Lacking a legal property right, parties seek a preemptive substitute.⁵⁷ Before 1891 British books were regularly pirated in the United States, but sub-

ject to considerable honor among thieves. A published book imported from Britain could be copied without payment to author or publisher, but it could be copied earlier if the British author were paid to provide proof sheets of the London edition. The U.S. publisher with a known head start had a decisive advantage, unless the book was so popular that it made a second American version profitable. That mechanism let British writers command substantial honoraria from the pirates. Typesetting technologies in the early nineteenth century caused the author to receive proofs in small batches over relatively long periods of time, and so the author's duplicate proofs often (without benefit of author's corrections) made their way across the Atlantic.⁵⁸

This preemptive strategy was supported by a practice of "trade courtesy" among the U.S. publishers. When an ad was placed in *Commercial Advertiser* announcing the publication of a foreign author, it was accepted as fixing priority among a quite large number of reputable U.S. publishers (whether or not the British author got paid). Coordination problems were not absent, however, because U.S. publishers had no way to know whether the British author or the publisher held the right to publish abroad, so conflicting negotiations could take place.⁵⁹

The lack of copyright did not necessarily preclude mutually agreeable repeated dealings between U.S. publishers and British authors, a practice well illustrated by the experience of novelist William Makepeace Thackeray. His first "book" was a pirated U.S. edition of a serial that had appeared in *Fraser's Magazine* in 1837, and it and subsequent piracies gained him a substantial reputation in the United States that later created an eager demand for his lecture tours (which Thackeray considered easy money). Harper and Brothers became his regular pirate, thanks to trade courtesy, and made substantial voluntary payments for all his books beginning with *Henry Esmond*. Only one duplicating pirate edition appeared, for *The Virginians*, which was expected to be his most profitable book in the United States. Appleton did issue Thackeray's works extensively in a paperback series, and they also offered compensation of 100 pounds sterling for editing volumes out of his contributions to *Punch*; these Thackeray could later use in a series of collections put out by his British publisher.⁶⁰

Before 1891 American authors had long supported U.S. copyright privileges for their British colleagues, perhaps from professional courtesy, but certainly because their royalty-free volumes were low-cost competitors. Wendy Griswold sampled novels published in America between 1876 and 1910, divided about equally between U.S. and foreign authors. Before 1891, she found, books by American authors carried higher list prices (\$1.04 versus \$0.64 during 1876–1884); after 1891, American books were cheaper (\$1.22 versus \$1.38 during 1905–1910). The proportion of authors in her sample

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who were Americans rose from 48 percent to 67 percent, as the obligation to pay royalties cut into the profitability of British authors' U.S. editions. She also found some evidence that, before 1891, American authors had differentiated their subject matter and themes some distance away from the British novelists. That divergence declined after the change in copyright policy.⁶¹

Copyright in Perspective

This chapter has focused on a few issues of the many that arise with intellectual property rights and the behavior that they promote. Composers of songs, symphonies, dances, and plays all require the collaboration of performing artists, and they all hold the right to collect royalties when their creations get public performance. Only song composers face a dire problem of efficient collection. The educational use of brief passages of published text, however, is quickly sending their copyright holders to watch over the photocopy machine and the website, hoping to scoop up increasingly similar streams consisting of many small particles of benefit. Collective collection seems inevitable in this area as well.

For other artists, rent streams are easier to capture, because public presentation of their works involves a large and conspicuous transaction—a new production of a play or opera, a new edition of a novel. Still others find themselves at a disadvantage, cut off from access to the small rents that could flow from their creations. The novelist collects every time her book is sold, but not every time it is read. She might price discriminate between libraries (many prospective readers) and sales to individuals (one or a few readers), as do many scholarly journals. The composer is fenced off by practicality from collecting each time a music-lover plays her recording. The legal doctrine of first sale here codifies practicality. The visual artist neither legally nor practically can collect from each viewer who enjoys her work on the museum wall—although she can now generally collect each time her work is photographically reproduced.

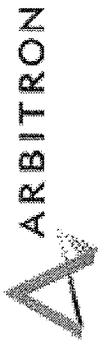
Similar margins of practicality affect other artists who might lay claim to rents. For complex goods assembled by a *motley crew* of artists, feasible collection falters because the proportional contribution of each to the finished work defies definition or negotiation. That has not precluded the bitter disputes over unexpected rents from cinema films, with the copyright owners repeated and vigorously pressed by creative participants to hand over some of the bounty (Chapter 7).

MC 55

The Infinite Dial 2010: Digital Platforms and the Future of Radio



Sponsored by **TargetSpot™**
Turning Up Internet Radio Advertising



Methodology Overview

- » In February 2010, Arbitron and Edison Research conducted a national telephone survey (landline and cell phone) of 1,753 people aged 12 and older
- » This is the 18th study in our series dating to 1998
- » These studies have explored digital platforms and their impact on radio and other media



The Internet Is Catching Up to Radio for How Americans Discover Music

- » Overall, four in 10 Americans say radio is how they hear about new music compared with two-thirds in 2002
- » However, the Internet has surpassed radio for how young Americans discover new music by nearly a two-to-one margin

MC 56

Exhibit 56

**RESTRICTED – Subject to Protective Order in
Docket No. 2011-1 CRB PSS/Satellite II**

MC 57

Let's PLAY



The American Music Business



Let the Music Play

An industry transformed...

It's hard to imagine any industry that has reinvented itself like the music business has during the past decade. Ten years ago the CD was the dominant format for listening to music and the legal digital marketplace was in its infancy. Fast forward to today and there are more than 400 authorized digital music services worldwide offering more than 12 million songs. Digital sales already comprise nearly half of total revenues for the music business in the United States. **In short, it's no longer just about CDs, it's about access to music anytime, anywhere and the experience that keeps fans coming back for more.**

In short, it's no longer just about CDs, it's about access to music anytime, anywhere and the experience that keeps fans coming back for more.

Different business models will continue to evolve, but one fundamental remains the same: it's all about the music. More than any other art or entertainment form, music transports, transforms and reconnects us. But behind the emotional attachment and beyond the artist on the album cover is an army of people who make the music play — planning, developing and investing in your next favorite song.

Providing the songs that make up the soundtrack to your life takes significant work and investment, and the modern label is committed to giving fans more musical options than ever. Which is just another reason why the American music industry is the best in the world.



The Big Concert



The anticipation. The excitement. The continuous playback of the album so you can be prepared to sing along at the top of your lungs and fist-pump the air for three straight hours. A football stadium, civic auditorium, buzzing coffeehouse or college amphitheater. From Boston to Houston to Seattle and countless small towns in between...your best concert experiences will stay with you for a lifetime.



Part I: REWIND

You know your favorite songs and what they mean to you. But there's a big picture — the hows and whys of music.

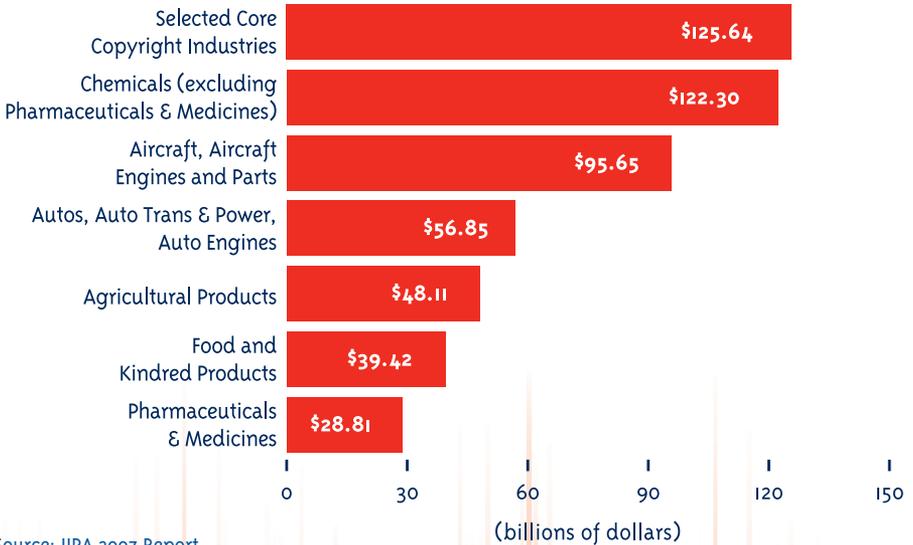
What the World Needs Now

American music inspires the world over

The global demand for American creativity and culture is evident. Go to just about any city — from Berlin to Bangkok — and you will hear American music. The music industry is part of a creative community that collectively exports more than \$125 billion each year, fueling American jobs while energizing mp3 players and dance floors around the world.



U.S. COPYRIGHT EXPORTS COMPARED TO OTHER INDUSTRIES



Source: IIPA 2007 Report

2009 WORLDWIDE DIGITAL SONG SALES

Of the top 10 digital songs sold worldwide, U.S. artists accounted for 100 percent.

Rank	Artist	Track title
1	Lady Gaga	Poker Face
2	Black Eyed Peas	Boom Boom Pow
3	Jason Mraz	I'm Yours
4	Lady Gaga	Just Dance
5	Black Eyed Peas	I Gotta Feeling
6	Taylor Swift	Love Story
7	Beyoncé	Single Ladies (Put A Ring On It)
8	Soulja Boy Tell 'Em	Kiss Me Thru The Phone
9	Kanye West	Heartless
10	Britney Spears	Circus

Source: IFPI

Photo Credit: Pa'lma Kolansky

We Will Rock You

Music labels are looking for your new favorite artist...today

Music labels are a primary link in a chain of individuals and businesses that make up the American music industry.

A label's role is discovering, developing, producing and promoting talent. A music label is a performer's close partner and collaborator, providing a level of financial and business support in production, marketing and touring that most individual artists would never be able to afford on their own. That investment is usually the difference between giving away

songs online to a few devoted friends, and having a Platinum album. The investment associated with developing new talent is substantial. In fact, music companies exceed most industries in investing in the future.

Songwriters, recording artists, producers, music publishers, performance rights organizations and many others are among the enormous cast of industry players working behind the scenes to bring music to your ears today.



Photo Credit: Pamela Littky

EXAMPLE OF TYPICAL LABEL INVESTMENT IN A NEW POP ACT

Advance	\$200,000
Recording	\$200,000
3 videos	\$200,000
Tour support	\$100,000
Promotion and marketing	\$300,000
TOTAL	\$1,000,000

Source: IFPI



Photo Credit: Andrew Southam



Photo Credit: Christian Lantry



Photo Credit: Harper Smith

Gold and Platinum Certification Program



Photo Credit: Russ Harrington

1958 Program launched by the RIAA to honor artists and create a standard by which to measure sales of a sound recording

First Gold song certification goes to **Perry Como** for his single “**Catch a Falling Star**” (RCA Records)

First Gold album certification awarded to the cast album to “**Oklahoma!**” sung by **Gordon MacRae** (Capitol)

1964 **The Beatles** earn their first Gold album certification for “**Meet The Beatles!**” (Apple Corps Ltd./Capitol). Today the band is the most awarded in G&P history having certified 199 million units across all formats

1999 Diamond Award established to honor sales of 10 million copies or more of an album or single

2004 Digital Sales Award introduced in recognition of the significant sales of emerging digital music formats

2005 First Platinum Digital Single Award goes to **Gwen Stefani** for her “**Hollaback Girl**” (Interscope) selling more than one million downloads

2006 Master Ringtone Award introduced to recognize the growing popularity of enjoying music through cell phones

2009 **Michael Jackson’s** legendary album “**Thriller**” (Epic/Legacy) certifies 29x multi-Platinum to join the **Eagles’** “**Eagles - Their Greatest Hits 1971-1975**” (Elektra/Warner Bros.) as the highest album certification in G&P history

Lil Wayne’s ringtone “**Lollipop**” (Cash Money) becomes the highest certified ringtone to date at 5x multi-Platinum

2010 The **Black Eyed Peas** earn the highest digital song certification ever upon certifying “**I Gotta Feeling**” (Interscope) 6x multi-Platinum



Photo Credit: Meeno

Thriller

Labels + artists = chart toppers

The label/artist collaboration takes talent to the next level, pairing a great act with a defining package that transforms an aspiring musician into a successful artist - the perfect song, memorable cover art, a groundbreaking music video, and a push to nationwide play on FM and digital radio services like Pandora and Sirius XM Satellite Radio.

For more than five decades, the RIAA's historic Gold and Platinum certification program has tracked major music sales and extraordinary artist achievements. First awarded to LP recordings but expanded to a variety of formats as technology advanced to include cassette tapes, CDs, digital tracks, digital albums, and ringtones, more than 13,000 titles have been certified Gold by the RIAA since 1958.



Photo Credit: Miranda Penn Turin



The new hits, the new artists, the new discoveries and old favorites — how piracy puts the brakes on the next generation of music.

Don't Stop Thinking About Tomorrow

Digital theft dims future for all consumers

Music theft is a real, ongoing and evolving challenge. Both the volume of music acquired without paying for it and the resulting drop in revenues are staggering. Digital sales, while on the rise, are not making up the difference. Consider this: in the decade since Napster emerged in 1999, **music sales in the U.S. have dropped 47 percent**, from

As a result of sound recording piracy:

The U.S. economy loses \$12.5 billion in total output annually;

The U.S. economy loses 71,060 jobs;

U.S. workers lose \$2.7 billion in earnings annually;

U.S. federal, state and local governments lose \$422 million in tax revenues annually

Source: Institute for Policy Innovation

\$14.6 billion to \$7.7 billion. From 2004 through 2009 alone, approximately 30 billion songs were illegally downloaded on file sharing networks according to research by the NPD Group. And although use of peer-to-peer sites has flattened during recent years, other forms of digital theft are emerging, most notably “digital storage lockers” used

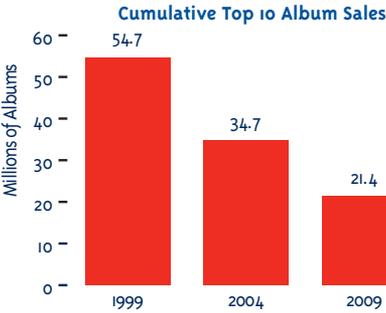
to distribute copyrighted music. The music industry, while enormous in its economic, cultural and personal impact, is by business standards relatively small. So theft on this scale has a noticeable and devastating impact: employment at the major U.S. music companies has declined by thousands of workers, and artist rosters have been significantly cut back. The successful partnership between a music label and a global superstar — and the revenue generated — finances the investment in discovering, developing and promoting the next artist. Without that revolving door of investment and revenue, the ability to bring the next generation of artists to the marketplace is diminished.

“Digital piracy has almost completely destroyed the profession of songwriting, and is slowly destroying the music industry. Every major music publisher has laid off at least half, and sometimes all, of their professional songwriters. According to the Bureau of Labor Statistics, songwriter income dropped 32% between 2003 and 2006 alone (for the lucky few who still had jobs).”

Rick Carnes, *President, Songwriters Guild of America*

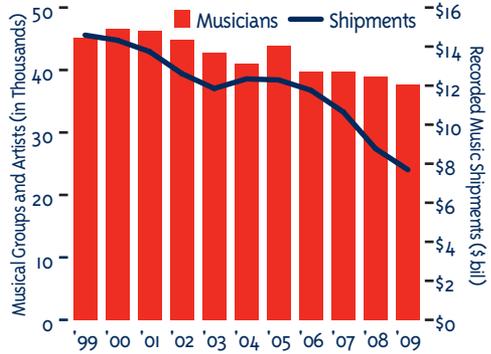
THE COST OF STEALING

The most popular music is also the most pirated, and that is why sales of the top 10 selling albums have declined significantly during the past ten years



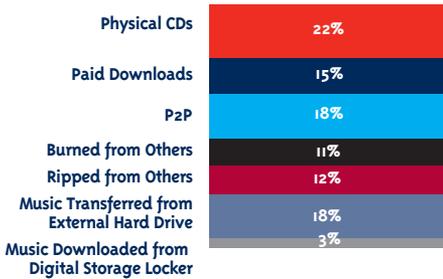
Source: SoundScan

RECORDED MUSIC SHIPMENTS AND EMPLOYMENT OF MUSICIANS AND ARTISTS



Source: U.S. Department of Labor, Bureau of Labor Statistics, RIAA

THE VOLUME OF MUSIC ACQUIRED WITHOUT PAYMENT



Only 37% of music acquired by U.S. consumers in 2009 was paid for.



Source: NPD Digital Music Study December 2009 (U.S. Internet Population)

CASE STUDY

Spain provides a fascinating – and scary – case study. Home to global superstars such as Julio and Enrique Iglesias, Spain has been an important developed, western market. But because of steep declines in revenues primarily attributable to piracy, music companies are finding it more difficult than ever to

invest in and develop new talent. The proof? In 2008, only one new Spanish act made the list of the top 50 best selling albums in the world. In 2009 there were no new local acts in the top 50. Compare that to 2003 when there were 10 new Spanish acts amongst the top 50 best sellers.

The anthem

Some songs define the times. They capture an attitude...the unrest...a movement...the crusade. Maybe they inspired you to do something. Or maybe just singing along made you feel a part of something greater. So you marched, you joined, you posted it on your Facebook page. That song says something about you. It says something about us.



Photo Credit: Mathew Roiston



Clouds, streams, nirvana - for the music business and music fans, the future is now.

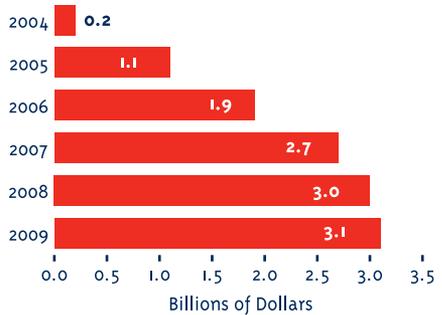
The Times They Are a-changin’

Evolution of Music

Music used to be connected to a piece of plastic—a record album, a cassette tape, a CD. During the last decade, music has been freed from its physical state, as digital technology has enabled consumers to download music, shift it among multiple devices and play it on multiple platforms. In the coming years, music will be even more accessible as more consumers transition to “cloud” services that move music and other data from desktop or hard drive storage to Internet-based on-demand models. Current models for listening — from satellite radio, to audio and video streaming, to personal (and

portable) digital music players — are all creeping up on the still popular AM/FM radio as ways consumers are enjoying their favorite songs.

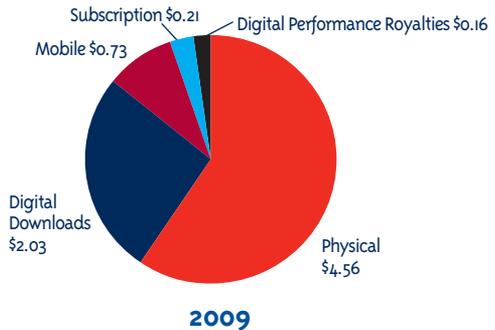
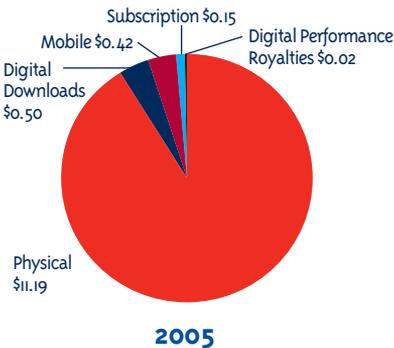
U.S. DIGITAL MUSIC SALES



Source: RIAA

DIVERSIFYING REVENUE STREAMS

Billions of dollars



Source: RIAA (Shipment Statistics Database)

Any Way You Want It

Digital Music for All

Social networking makes it easier for artists to get music “out there,” and new ways for consumers to experience music are cropping up everyday. Yet the role of music labels has never been more critical. On MySpace alone are more than **2 million pages** devoted to music acts competing for the attention of music fans. There are now **more than 400 licensed music services worldwide** and music labels today create a huge variety of separate products designed to appeal to many types of fans. Cutting through, creating, distributing and marketing this volume of products is unrealistic for most artists acting on their own. Music companies are leading the way in fulfilling the potential of 21st century music – connecting artists with fans on a myriad of formats, so they can play and experience music the way they want it.

DIGITAL MUSIC THEN AND NOW

	2003	2009
Licensed Music Services	Fewer than 50	400+
Catalogue Available	1M tracks	11M+ tracks
Industry’s Digital Revenues	\$20M	\$3.8B

Source: IFPI, RIAA, Global Figures

The *sing-along*

In the car...in the shower...on the dance floor. No matter who is listening...or trying not to stare. No matter how much friends make fun of your air guitar, but hey – they all play Guitar Hero too. That song does something to you. You can’t help yourself. You hear the opening notes and your inhibitions leave you. It is madness. It is joy. It is music.



ONE RELEASE, 191 PRODUCTS

P!nk's "Funhouse"

2 Physical Albums	1.5M Units Sold
3 DVDs	81K Units Sold
12 Digital Albums	323K Downloads Sold
5 Digital Singles	29K Downloads Sold
48 Album and Remix Tracks	8.9M Downloads Sold
47 Mastertones	1.3M Units Sold
12 Ringback Tones	272K Units Sold
15 Mobile Full Track Downloads	311K Units Sold
12 Other Mobile Products	10K Units Sold
35 Videos	339K Downloads Sold 23.8M Streams Viewed
Web Site	44.8M Page Views 6.5M Unique Visitors

191 Pieces of Content  13.0M+ Units Sold
1.8M Albums — 9.2M Tracks

U.S. Sales as of November 10, 2010,
Includes "Funhouse Tour: Live in Australia"
Source: Sony Music Entertainment



Photo Credit: Andrew Zaeh



Photo Credit: Alix Malka



Recording Industry Association of America
1025 F Street, NW
10th Floor
Washington, DC 20004
202/775-0101
www.riaa.com

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MC 58

The Digital Music Industry Outlook

Evolving business models, key players, new challenges and the future outlook

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shifting towards simply accessing music rather than owning it with the emergence of streamed music services such as Spotify, MOG and Pandora.

Introduction

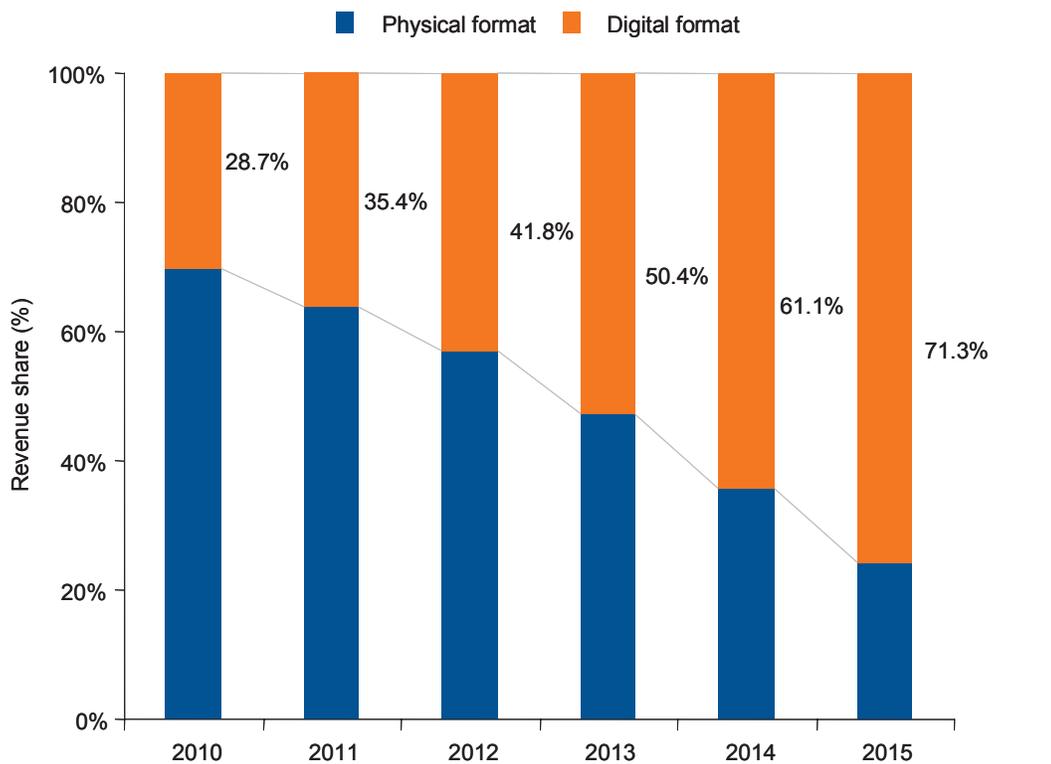
This chapter discusses the digital music market size by value, segments, geographic segmentation, and industry trends and drivers. It also analyzes the inhibitors to the industry growth.

Digital music industry market size by value

Business Insights anticipates that global digital music revenues will more than double to \$20.1bn by 2015, from \$7.4bn in 2010, growing at a CAGR of 22.1%. This growth will be driven by online and mobile music subscriptions, higher internet and broadband penetration and expanding online music catalogs.

The figure below shows that the digital format had a 28.7% share in total recorded music industry sales in 2010. Digital music revenue is likely to overtake CD sales in 2013 and by 2015 it is expected to account for about 71.3% of total record music industry sales. The uptake in the digital music channel is a result of growing consumer interest towards consuming music through digital platforms.

Figure 1: Global digital music revenues as a % of total record music industry, 2010–15



Source: Ovum, Business Insights

BUSINESS INSIGHTS

Table 1: Global digital and physical music revenues (\$bn), 2010–15

Revenues (\$bn)	2010	2011	2012	2013	2014	2015	CAGR
Physical format	18.4	15.7	14.5	12.7	10.3	8.1	-15.1%
Digital format	7.4	8.6	10.4	12.9	16.2	20.1	22.1%
Total record music	25.8	24.3	24.9	25.6	26.5	28.2	1.8%

Source: Ovum, Business Insights

BUSINESS INSIGHTS

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WRITTEN REBUTTAL TESTIMONY OF CHARLES CIONGOLI

Background and Qualifications

I am Executive Vice President and Chief Financial Officer for Universal Music Group North America (“UMG”), a position I have held since 2003. I am responsible for the financial activities of UMG’s North American operations, which include nine United States record label groups, as well as music publishing, selling, and distribution operations. In my capacity as Executive Vice President and Chief Financial Officer, I have knowledge of and regularly review the finances of both UMG’s U.S. record label and the music publishing operations of Universal Music Publishing Group (“Universal Publishing”).

I was previously Senior Vice President of Finance for UMG. Prior to that, I was employed as Vice President of Finance for MCA Records, and also served as Vice President and Group Controller for both MCA Records and MCA Music Publishing. I began my employment with MCA in 1990 as the Group Controller for the MCA Music Entertainment Group, which became UMG in 1996. Prior to joining MCA in 1990, I was a Senior Manager with the international accounting and consulting firm Price Waterhouse, where for ten years I provided a variety of audit, accounting and special services for Mergers and Acquisitions.

I received a Bachelor’s degree in Finance and Auditing from California State University at Northridge. I am a Certified Public Accountant (CPA) in the State of California, and I am a member of the American Institute of Certified Public Accountants and the California State Society of CPAs.

Universal Music Group and Universal Music Publishing

UMG is the largest record company in the world with over a 31% share of the domestic recorded music market in 2006. It consists of numerous acclaimed and popular record labels, including Motown Records, Universal Records, Geffen Records, Interscope Records, MCA Nashville, Island Records, and Def Jam Music Records.

Universal Publishing recently completed the acquisition of BMG Music Publishing which, as a result, has made Universal Publishing the largest publishing operation in the United States and the world, with a combined U.S. market share of approximately 20-24%.

Overview

I am submitting this testimony to provide the Copyright Royalty Judges with information concerning the sound recording and music publishing businesses, which operate separately at UMG but which each report their finances through me.¹ As part of this testimony, I am providing comparative financial data on UMG's U.S. record label and Universal Publishing's music publishing operations. For purposes of this comparison, I have excluded all BMG Music Publishing financial data, as it is not applicable for 2006 and prior years. To assist the Judges, I have attached copies of UMG's Consolidated U.S. Record Label Income Statements for 1999 through 2006 (SX Ex. 213 RR) and Universal Publishing's U.S. Music Publishing Income Statement (SX Ex. 214 RR) as exhibits to this written testimony. I have reviewed these documents in preparing this testimony, and I regularly review such materials in the ordinary course of my professional responsibilities.

¹ I understand that in Docket No. 2006-1 CRB DSTR and Docket No. 2005-5 CRB DTNSRA, XM Satellite Radio Inc., Sirius Satellite Radio Inc. and MTV Networks (collectively, "the Services") have proposed benchmarks based on the royalty rates for musical works paid to performance rights organizations such as ASCAP, BMI and SESAC. I submit this testimony to rebut the Services' testimony proposing those benchmarks.

As discussed in more detail below, there are fundamental differences between the sound recording and music publishing businesses. They play very different roles in the sale of music and also vary greatly in terms of the magnitude of the investments required and the level of risk associated with those investments.

There is little consumer market for musical works by themselves (e.g., as sheet music). The actual products that consumers buy and to which they listen are sound recordings, and musical works are one component of sound recordings. The sound recording is created, marketed, and distributed by the record company. While music publishers earn royalties from the sale of sound recordings (e.g., on CD and as digital downloads and mastertones) and music videos, they invest very little. Although they do have to pay advances against royalties to songwriters (or their publishing designees), music publishers are able, to a large degree, to ride the coattails of the record companies. Unlike record companies, music publishers do not incur significant recording, marketing, promotion, sales, distribution, creative services, video, new technology, or personnel costs. Rather, it is the record companies that expend enormous sums to create and promote their products to consumers. The publishers are the beneficiaries of the record companies' work and investment.

It is therefore unsurprising that the risks and rewards -- and the levels of compensation -- for sound recordings and musical works differ greatly in markets where music is disseminated. I have frequently heard the sound recording business described as being like the stock market -- high risk, high reward -- and the music publishing business described as being like the bond market -- low risk, consistent but lower returns. I agree with that characterization.

The sound recording business is risky and speculative. A record company invests large sums of money before a final product is created. Once created, the record company must then

undertake great expense and effort to market and promote the sound recordings, with the hope that it can earn back its substantial upfront investment. In reality, the vast majority of sound recordings are not profitable for record companies; for each record that earns a profit for a record company, there are approximately nine others that do not.

The music publishing business, by contrast, is much less risky. Unlike the sound recording business, the music publishing business is not fundamentally about creating a product. To a certain extent, then, the music publishing business resembles a bank. When music publishers invest in the acquisition of catalogs of musical works, their decision to invest is based on the catalog's proven value. In general, the music publisher knows what the catalog has earned in the past, and is investing in an income stream for the future based on past performance, primarily from sales of CDs or downloads and performances on over-the-air broadcasts, and use in motion pictures and television advertising. Music publishers may also invest in musical works that do not have a proven track record, but generally do so only where a record company previously has signed the recording artist/songwriter to a recording agreement and has made clear that it will be spending significant sums to develop, promote, and market sound recordings by that recording artist/songwriter, all of which will help to ensure revenue from those musical works. Thus, a music publisher will give a significant advance to a new singer-songwriter only if it knows that a record company is going to spend far greater sums to promote that artist.

For all of these reasons, the music publishing business is materially different in character from the sound recording business.

Comparison of Investment, Risks, and Operations of Sound Recording and Music Publishing Businesses

As I discuss below, UMG's record label operations are characterized by a greater level of investment and risk than Universal Publishing's music publishing operations. Record labels

engage in a very risky business that requires substantial expenditures for recording costs, overhead, marketing, promoting, manufacturing and distributing sound recordings. For most sound recordings, the majority of the costs are incurred before a single unit is sold. By contrast, the publishing business involves less risk and less cost. Universal Publishing spends little or nothing to create, market, promote, manufacture and distribute copyrighted musical works. Moreover, the music publishing business benefits from the record company's marketing, promotion and other efforts, which help generate mechanical royalties and public performance royalties that publishers and songwriters receive. Further, when a record company makes a sound recording a hit, music publishers are able to garner significant license fees for synchronization uses of the sound recording. The greater costs and upfront investments make the recorded music business less profitable and much riskier than the music publishing business. These differences in investment characteristics also reflect one of the reasons for the greater return generally provided to sound recording copyright owners than musical works copyright owners.

Before I discuss the different types of investment, I must note that the distinct and interrelated finance and accounting concepts of costs, expenses, investments and cash expenditures are often conflated in general discussion. For present purposes, the technical distinctions among those terms are not instructive. Accordingly, my testimony uses the term "cost" broadly to give the Judges an instructive sense of the financial scope of UMG's and Universal Publishing's businesses.

A. Artist and Repertoire ("A&R") Investment

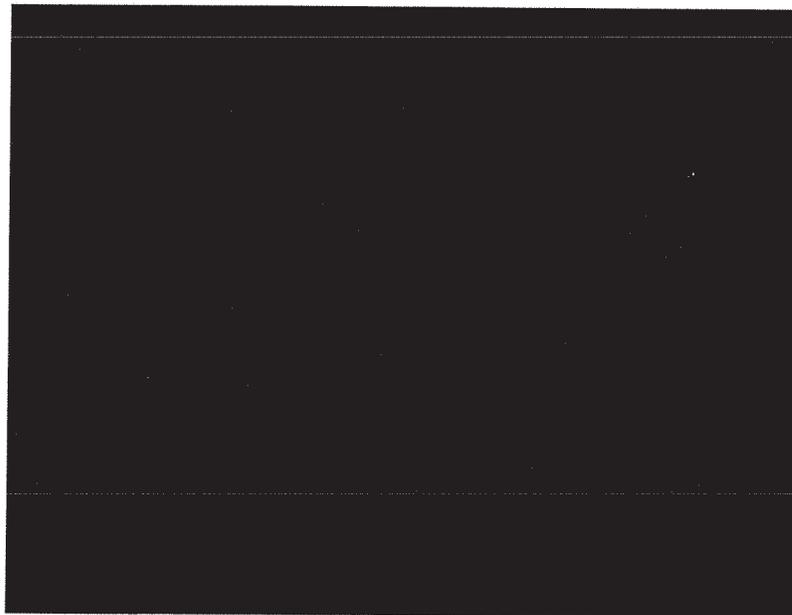
The creation or acquisition of copyrighted works that generate income requires both the recorded music and music publishing operations to incur expenses in acquiring the services of

artists and songwriters. Record companies and music publishers both pay advances, which they hope to recoup from future earnings. Despite these apparent similarities, however, expenditures on A&R are vastly different in the sound recording and music publishing businesses. Record company investments in A&R include all of the work that goes into finding and developing talented artists and bringing the product (i.e., the sound recording with its underlying musical work) to market, including paying for advances and recording costs. Record companies advance large amounts of money to artists and pay for all of the recording, producing, mixing, mastering and other expenses involved in creating a sound recording. Some expenditures are not recoupable at all because with a large percentage of artists, record companies never recoup the given advance.

In contrast, music publishers spend little to create the product that is sold to consumers. They do provide advances to songwriters, but those advances are generally smaller and are wholly recoupable by the publishers. Moreover, music publishers often pay advances to songwriters who already have revenue in the pipeline either from sales of proven catalog tracks or recently released albums that have sold but for which royalties have not yet been paid. Overall, then, the risk of investment falls almost completely on the record company.

The dramatic difference in the two businesses can be seen by looking at the data regarding their investment in A&R. Gross A&R expenditures for UMG's record labels and Universal Publishing show that the sound recording business requires a significantly greater investment (and thus a significantly greater return to make it profitable) than the music publishing business. In 2006, UMG's record labels had gross A&R expenditures of [REDACTED]. In marked contrast, Universal Publishing's gross A&R expenditures were [REDACTED] for the same time period.

On UMG's income statements for both the record label and music publishing operations, we report a line item for total A&R costs. This line item reflects net A&R investment and therefore refers to the amount of unrecouped advances and recording costs to artists and songwriters paid or expensed in the relevant period. As shown in SX Ex. 213 RR and SX Ex. 214 RR, the net A&R expense for UMG's record labels in 2006 vastly exceeded Universal Publishing's net A&R expense for the same time period. As shown in Figure 1 below, UMG's record labels had net A&R expense of [REDACTED], or [REDACTED] of our labels' FY 2006 total net revenue. The comparable data for our music publishing operations are a net positive of [REDACTED] of net revenue for FY 2006.



Note that these figures do not include overhead -- i.e., the cost of personnel to engage in A&R activities. The A&R staffs of record companies are much larger than those of music publishers and significantly more expensive. These A&R overhead expenses are included in the "overhead" category discussed below.

B. Marketing Costs

UMG's record labels market and promote their new albums and artists to consumers in order to achieve sales. The investment in marketing includes the cost of music videos, print advertisements, television advertisements, point of purchase advertising materials, co-op advertising, radio advertising, Internet advertising, promotional merchandise, and a host of other expenses. Most of these marketing costs are incurred up front, before the record company is able to generate any revenue from the music that is being marketed. These expenditures -- if successful -- benefit both record companies and music publishers, who each earn revenues when a particular artist, song, or album becomes popular.

By contrast, Universal Publishing generally does not have to undertake much in the way of marketing efforts. It simply relies on the record company to do the bulk of the marketing. Accordingly, the marketing costs incurred by the recorded music businesses are substantially higher than the marketing costs incurred by the music publishing operations. As SX Ex. 213 RR demonstrates, in FY 2006, UMG record labels spent a total of [REDACTED] of their total net sales, on marketing. Universal Publishing, on the other hand, does not even have a separate line item for marketing. If, however, one totaled all of the publicity, promotion, and travel and entertainment expenses, it would total [REDACTED] of its total publishing income in FY 2006. See SX Ex. 214 RR. Figure 2 below shows the comparison.



Once again, none of these figures includes overhead, discussed below, which is vastly greater in the recorded music business because of the personnel required to conduct all of the marketing and other promotional activities that form no part of the music publishing business.

C. Overhead

UMG's record labels have much larger overhead expenses than Universal Publishing because, as I have discussed above, the labels must undertake many more activities. Overhead expenses include, for example, salary and benefits, office space, supplies, utilities, office equipment, furniture, and travel and entertainment costs. The extent of these costs is largely driven by the number of personnel involved in an operation. Because UMG's recorded music operations have a greater need for personnel than Universal Publishing, UMG incurs greater overhead expenses. UMG requires personnel to do all of the work in finding, developing, promoting, and marketing sound recordings -- work from which music publishers benefit without cost. As SX Ex. 213 RR shows, UMG's record labels had overhead expenses (excluding

overhead for selling and distribution, discussed below) in FY 2006 of [REDACTED] of net sales. By comparison, Universal Publishing had overhead costs of [REDACTED] of total revenues for FY 2006. *See* SX Ex. 214 RR.



D. Manufacturing and Distribution Costs

UMG's record labels also must pay significant manufacturing costs in order to produce the physical product that is sold to the customer. Manufacturing costs are incurred before sales are made to customers, and with no guarantee that they will be recovered from sales. In FY 2006, UMG's record labels incurred [REDACTED] in manufacturing and inventory related costs. *See* SX Ex. 213 RR. Another substantial expense incurred by UMG's record labels is the cost of distributing their sound recordings to retailers and consumers. In FY 2006, UMG's record labels spent [REDACTED] on distribution and selling expenses (including overhead). *See* SX Ex. 213 RR.

The transition to more digital distribution of sound recordings does not mean that record companies' manufacturing and distribution costs have disappeared. Rather, record companies must maintain two separate (and expensive) chains of distribution -- incurring all of the costs of digitizing sound recordings, collecting and updating metadata, building and operating systems for distribution, and actually distributing digital versions of sound recordings to retailers and other outlets. These costs include the investment in IT for system development, the cost of labor related to the housing of data and other digital assets, and other expenditures. In addition, record companies must maintain all of the relationships with the ever-growing number of outlets selling digital and mobile music in various forms. All of these expenses are encompassed within distribution expenses or overhead expenses. All told, UMG's manufacturing and distribution costs for 2006 were [REDACTED] of net sales. *See* Figure 4.

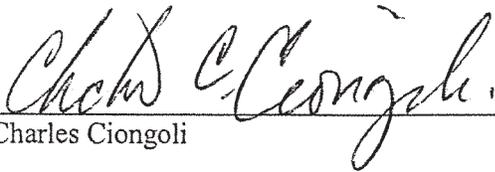
Music publishers, in most cases, need not undertake any of these activities because they are not providing a product directly to retailers or consumers. Universal Publishing earns revenue from licensing its musical works. It does not manufacture physical products and thus incurs no manufacturing costs at all. Universal Publishing therefore has no budget line item for this cost category and takes none of the risks associated with producing a physical product. Similarly, Universal Publishing does not incur distribution costs and thus has no line item for those costs, nor does it incur separate expenses for digital and mobile activities.



Conclusion

As the foregoing discussion and data make clear, the character of the sound recording business is markedly different from the music publishing business. UMG's record labels incur much greater cost in creating sound recordings than Universal Publishing incurs in creating musical works. Music publishers, including Universal Music Publishing Group, benefit from the creation of sound recordings by record companies and earn revenues from the efforts of record companies without having to engage in the same type of investments. At the same time, there is substantially more risk associated with UMG's recorded music operations than with Universal Publishing's music publishing operations.

I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge and belief.


Charles Ciongoli

Date: July 24, 2007

Exhibits Sponsored by Charles Ciongoli

**Restricted exhibits, which are identified by the suffix "RR," are not included
in the Public Version of SoundExchange's Rebuttal Case**

Exhibit No.	Description
SX Exhibit 213 RR	Universal Music Group US Only Income Statement, 1999-2006 Actuals
SX Exhibit 214 RR	Universal Music Publishing Group, US - Publishing, Full Year Historical Results and Historical Overhead Expense, 1999-2006

MC 60

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of)
)
)

ADJUSTMENT OF RATES AND TERMS FOR)
PREEXISTING SUBSCRIPTION SERVICES)
AND SATELLITE DIGITAL AUDIO RADIO)
SERVICES)
)

Docket No. 2006-1 CRB DSTRA

REBUTTAL TESTIMONY OF

MARK EISENBERG

Executive Vice President, Business and Legal Affairs
Global Digital Business Group
SONY BMG MUSIC ENTERTAINMENT

Public Version

July 2007

Rebuttal Testimony of Mark Eisenberg

I previously filed written direct testimony discussing the factors that SONY BMG considers when licensing its sound recordings for exploitation on an array of digital platforms and the various rates SONY BMG receives when doing so. My background was provided with my written direct testimony.

I have reviewed the public versions of the written direct statements of the economists of XM Satellite Radio, Inc. (“XM”) and Sirius Satellite Radio, Inc. (“Sirius”) (collectively, “the Services”) who use as a benchmark, and argue that the royalty rate for sound recordings should be derived from, the royalty rate for musical works paid to performance rights organizations such as ASCAP, BMI and SESAC.¹ The musical works benchmark, however, has no logical application to the exploitation of sound recordings by the Services. As discussed below, the relative economic values (i.e., compensation) attaching to the musical works and master recordings distributed to end-users as music products and services are routinely asymmetrical. Indeed, as this Court itself recognized in its recent webcasting decision, in all cases in which end-users enjoy master recordings in a manner similar to the entertainment experience within a DMCA-licensed radio service, the sound recording copyright owners are compensated at significantly higher levels than musical works copyright owners.² This disproportionate allocation of the economic pie reflects a variety of considerations, including the significantly greater levels of investment and risk that sound recording copyright owners take in discovering and developing talent and in creating, marketing and promoting artists and their music to the general public.

¹ I note that in Docket No. 2005-5 CRB DTNSRA, XM, Sirius and MTV Networks similarly rely on the same type of musical works benchmark. I include those services in my definition of “Services” in this written statement.

² See *Determination of Rates and Terms of Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2005-1 CRB DTRA (Mar. 2, 2007) (“*Webcasting Determination*”).

I. The Distinct Markets for Sound Recordings and Musical Works

The fundamental hypothesis underlying the Services' use of a musical works benchmark is that sound recordings and musical compositions share the same economic value in the marketplace and that, for a given service, the licenses, fees, and rates for sound recordings are or should be no more than the licenses, fees, and rates for musical compositions. That tired hypothesis is directly contrary to my experience and is contradicted by historical fact. It was flatly rejected by the Judges in the Webcasting Determination, and should be similarly rejected here.

As I stated in my written direct testimony, I oversee the negotiation of all of SONY BMG's licensing of sound recordings for distribution in all forms over digital platforms, including the Internet. I oversee these negotiations whether the recordings are distributed by (i) performance or permanent reproduction such as interactive, or "on-demand," and non-interactive streaming; (ii) audiovisual works (i.e., music videos) or audio-only works (i.e., sound recordings), and/or (iii) by full-length, complete sound recordings (e.g., tracks and albums) or fractional excerpts (e.g., ringtones and mastertones). SONY BMG grants extensive catalog rights encompassing substantial portions of its commercial music archive and encompassing these myriad formats and functionalities.

In each instance – across all of the differentiated business models, product configurations and consumer experiences – music distributors must clear separate, independent rights to the master recording and the underlying musical composition, respectively. However, in *none* of these markets does musical works copyright owners receive compensation equal to that of sound recording copyright owners. Nor, to my knowledge, do musical works copyright owners themselves, in their direct negotiations, posit that a musical works rate should be equal to or on

par with the compensation received by sound recording copyright owners with respect to digitally-delivered audio products and services. Indeed, in the pending proceeding before this Court to determine mechanical royalties, Docket No. 2006-3 CRB DPRA, the music publishers themselves have proposed musical works royalties for various digital services that, while much higher than I believe appropriate, are nonetheless a fraction of the compensation received by sound recording copyright owners with respect to the very same services.

To my knowledge, the Services have never tendered an offer to music publishers which proposes paying equivalent rates to music publishers for the reproduction, distribution and/or public performance made in the course of digital audio transmissions. That is simply because the market values for sound recordings and musical works are different – and the Services themselves have economically benefited from this marketplace distinction.

Moreover, regardless of what piece of the pie music publishers might seek in their negotiations with digital distributors, SONY BMG negotiates economic terms with digital retailers and distributors based upon SONY BMG's own valuation of the use of its sound recordings in conjunction with the benefits and enjoyment accorded service providers and end-users. SONY BMG does not predicate its economic valuation upon what the music publishers might negotiate. From my perspective, as an executive charged with negotiating rates and developing sound business models for our music across newly emerging distribution platforms, such as the Internet and mobile networks, the publishers' level of compensation from digital music services is of little consequence to me. The only time such a reference might be made would be in instances when a distributor is looking to suppress our economic participation by claiming that the distributor had already committed its "pot of monies," otherwise allocable for all "licensing," to other copyright holders, such as musical works owners and/or other labels. In

my experience, however, rates requested or received by music publishers from others are irrelevant to my task of establishing a fair economic return for our company's level of investment and risk in our artists and in our recorded music business. Our objective is to obtain a fair market rate without regard to what the publishers receive from digital music services.

II. Comparing the Markets For Sound Recordings and Musical Works

As I discuss above, there is no basis whatsoever for using negotiations by ASCAP, BMI, and SESAC as a benchmark for determining the Services' rates that should be paid to copyright owners of sound recordings. The two markets are simply distinct.

My written direct testimony described the levels of compensation that sound recording copyright owners receive in many of these markets. For purposes of illustration below, I have collected information relating to the rates that music publishers receive for those very same exploitations, relying on a variety of publicly available information, as well as proprietary information from SONY BMG and my personal experiences negotiating with digital music services and music publishers. In every case, the sound recording copyright owner receives substantially more than the musical works copyright owner — hands down. Moreover, “most favored nations” clauses, which equate the amounts received by sound recording copyright owners to musical works copyright owners, do not exist in these licensing and distribution scenarios. One need only look at the actual rates that sound recording copyright owners and musical works copyright owners are paid in catalog digital distribution agreements to appreciate the marked distinctions. Indeed, they are not even close:

Service	Sound Recording Rate (in SONY BMG agreements)	Publishing Rate	Rough Multiple (Sound recording rate/publishing rate)
Wireless Full-Length Audio Downloads (Portable)	[REDACTED] ³	\$.091 per track ⁴	[REDACTED] ⁵
Digital Downloads	[REDACTED]	\$.091 per track ⁶	[REDACTED] ⁷
Mastertones and Ringtones	[REDACTED]	[REDACTED] ⁸	[REDACTED] ⁹

There are some caveats with respect to some of the markets discussed above. Record labels and distributors set the wholesale rates for sound recordings sold to end-users as digital downloads via individual, bilateral voluntary negotiations (though in essence, the theoretical “free market” rates for sound recordings are compromised to a large degree by the deleterious effects of online piracy), whereas the royalty rates for musical works in digital downloads are

³ In my written direct testimony in this proceeding, I testified that the current rate that SONY BMG receives for wireless full-length audio downloads is [REDACTED] per track. At the hearing, however, I testified that SONY BMG was in the process of renegotiating some of its contracts for wireless full-length audio downloads. Since then, SONY BMG has amended its wireless full-length audio download agreement with Verizon. In addition to other changes, we lowered the per track rate for wireless full-length audio downloads to [REDACTED]. See SX Ex. 254 RR. Similarly, we are currently operating under the terms of a draft amendment with Sprint Spectrum in which we have reduced the per track rate for wireless full-length audio downloads to [REDACTED]. See SX Ex. 253 RR. The rates in our contracts with other providers remain at [REDACTED] per track. I am submitting with this testimony a number of agreements showing the range of sound recording performance rates across the range of digital services. See SX Ex. 253 RR - SX Ex. 254 RR; SX Ex. 256 RR - SX Ex. 258 RR.

⁴ Statutory Rate set by the Copyright Office and to be set by the Judges.

⁵ This multiple reflects my having backed out \$.091 from the indicated sound recording rate, which is a gross number that includes the rate owed to the publishers.

⁶ Statutory Rate set by the Copyright Office and to be set by the Judges.

⁷ This multiple reflects my having backed out \$.091 from the indicated sound recording rate, which is a gross number that includes the rate owed to the publishers.

⁸ Based on SONY BMG’s own agreements and published reports.

⁹ This multiple reflects my having backed out \$.091 from the indicated sound recording rate, which is a gross number that includes the rate owed to the publishers.

statutory rates (and new such rates will be set by the Judges). Nonetheless, the [REDACTED] difference is a reflection of the significantly greater value of sound recordings and the investment of sound recording copyright owners. Indeed, in many cases, record companies pay less than the statutory rate for mechanical licenses, showing that the current rate is actually above a free market rate.

Even in markets where the musical works rates have not yet been determined, the aspirational rates being sought by the publishers still do not reflect the 1:1 ratio assumed by the Services. Some of these are set forth in the following chart.

Service	Sound Recording Rate (in SONY BMG agreements)	Aspirational Publishing Rate	Rough Multiple (Sound recording rate/publishing rate)
Preprogrammed Music Videos	[REDACTED]	5.1% of revenue for performance ¹⁰ ; plus additional fees for synch rights under negotiation	[REDACTED]
On-Demand Music Videos	[REDACTED]	6.5% of revenue for performance ¹¹ ; plus additional fees for synch rights under negotiation	[REDACTED]

With respect to music videos, the rates incorporated in the chart above reflect aspirational fees sought by the performance rights societies and do not include the synchronization right, for which negotiations with the publishers are still pending. Once those are determined and added in, they will lower somewhat the ratios that I have provided above. [REDACTED]

¹⁰ Based on ASCAP Internet Music License Agreements, available at <http://www.ascap.com/weblicense> (last visited July 20, 2007).

¹¹ *Id.*

[REDACTED]
[REDACTED]
[REDACTED]

The royalty regimes for other closely analogous services largely defy comparison altogether. For noninteractive webcasting, for example, this Court recently set a per-play sound recording performance royalty of \$0.0011 in 2007, going up to \$0.0019 in 2010. The PROs, by contrast, publicly seek a rate of 5.1% of revenue, unconnected to the number of performances.¹² Although the per-play sound recording rate certainly would translate to a revenue share for webcasters that is multiples higher than 5.1%, the exact ratio could vary significantly among webcasters, thus making comparisons as the Services attempt to do here extremely difficult.

Similarly, for interactive streaming services, SONY BMG receives [REDACTED]
[REDACTED]
[REDACTED]. The PROs, by contrast, publicly seek a rate of 6.5% of revenue, unconnected to the number of performances.¹³ At the same time, the publishers have proposed a complex mechanical royalty rate regime of the greater of 12.5% of revenue; “\$.00275 per use or \$0.00053 per minute of playing time or fraction thereof”; or “27.5 percent of the total content costs paid for mechanical rights to musical compositions and rights to sound recordings.”¹⁴ Here again, the differences in the structures of the regimes renders it difficult to make the type of comparison that the Services are attempting. In any event, even the aspirational rates sought by the publishers for interactive streaming appear to be significantly lower than the prevailing rates that SONY BMG receives for sound recording performances.

¹² *Id.*

¹³ *Id.*

¹⁴ These numbers represent what the publishers have sought in their rate proposal in the mechanicals proceeding in this Court in *In the Matter of mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding*, Docket No. 2006-3 CRB DPRA. The aspirational rates thus represent an unrealistic upper bound.

At bottom, music publishers themselves do not argue that they should receive parity in compensation with sound recording copyright owners. Music publishers – in negotiations or in other contexts, such as legislative lobbying and even in their advocacy in ratemaking proceedings before the Judges – do not advance the equivalency theory that the Services claim here. In other words, the Services here are making an argument about the value of musical works that even the music publishers themselves do not make.

The overall point is *not* that there is a particular economic “ratio” between the rates payable to sound recording copyright owners relative to musical work copyright owners. Rather, it is simply that the two markets operate completely distinct from one another. While the musical work copyright owners may ride the coattails of the sound recording copyright owners’ success (if any), they do so at a much lower level of economic participation.

Of course, none of this is new to the Judges. As the Judges conclusively held in their Webcasting Decision, “contrary to . . . 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.” *See Webcasting Determination* at 40. I am not aware of any changes in the relevant marketplaces which would lend credibility to the Services’ attempt to resuscitate this rejected benchmark here.

III. The Example of Ringtones

Ringtones provide a useful example of why the musical works benchmark is inapt. The ringtone market is a market that 1) music publishers tout as an example of the value of their content, and 2) record companies believe reflects a market in which publishers have extracted above-market rates for a variety of reasons. As I explained in my written direct testimony,

ringtones are excerpts of music that play exclusively on cell phones and serves as a substitute for a traditional “ringer” or “pager.” While there are several types of musical ringtones available in the marketplace, at a basic level, ringtones can be categorized into 2 general groupings: a) poly- or monophonic ringtones, which consist of electronic “synthesizer-like” versions of musical works that do not incorporate the original sound recording, and b) mastertones, which consist of an excerpt of a label’s master recording (together with the underlying musical work). A distributor of a mono- or polyphonic ringtone need only license the underlying musical work, whereas a distributor of a mastertone must obtain clearances for *both* the underlying musical work and the original sound recording.

The market for ringtones has substantially developed with the rapid deployment of cell phone handsets capable of playing different kinds of music. The earliest cell phones could not play music at all. Thereafter, “first generation” versions of music-enabled cell phones were introduced that could play mono- and then polyphonic sounds like ringtones, but not multi-track, fully-mixed recordings or even excerpted tracks like mastertones. In response to the heightened demand for high quality digital music products, cell phone manufacturers and carrier networks began moving as quickly as possible to incorporate full music functionality into their handsets and wireless data networks. At present, all mobile carriers in the U.S. now offer mastertones to their subscribers. Moreover, in the coming years, including during this license period, virtually all cell phones and carrier networks will feature sound recordings, both as mastertone or ringback excerpts and as full-length masters delivered in the form of downloads and streams.

Since mono- and polyphonic ringtones were developed years before the advent of more progressive technologies enabling the wireless delivery of master recordings, music publishers negotiated their licenses with mobile distributors with respect to musical compositions first,

before sound recording copyright holders even had a product to sell. Publishers were thus successful in extracting relatively high prices for their copyrights because the cell phone carriers had only one (rather than two) copyright owners to pay for the synthesizer-like instrumental versions of songs incorporated as mono and polyphonic ringtone products. Typically, publishers received approximately 10% of the retail selling price of a polyphonic ringtone. In the infancy of that market, polyphonic ringtones often sold for \$1.99. With the subsequent introduction of mastertones which incorporated the actual “hit” sound recording, the retail value of mono and polyphonic ringtones dropped off significantly.

In fact, once cell phones designed to play mastertones arrived on the market, consumers demonstrated their heightened interest in such a premium product by paying higher prices for mastertones – often \$2.99 or higher per excerpted master. For mastertones, publishers receive [REDACTED] [REDACTED]. However, in contrast to the publishers, SONY BMG receives [REDACTED] [REDACTED] – which is significantly more than the music publishing rate. Out of the [REDACTED] that SONY BMG receives, the publishers receive only [REDACTED].

Indeed, to accelerate the mastertone clearance process for mobile carriers and to ensure a steady flow of “hit” product releases in a timely manner, SONY BMG itself entered into direct licenses with music publishers for mastertones. Under these license agreements, the distributor pays SONY BMG [REDACTED] [REDACTED]. Thus, publishers receive just [REDACTED] of the monies allocated to the copyright holders in respect of a mastertone (which is [REDACTED] of what SONY BMG receives). While SONY BMG continues to believe that even this rate demanded by the

publishers is disproportionately high when viewed in the context of allocations of risk and investment (and the traditional splits between record companies and publishers), we acquiesced thereto on an interim, non-precedential basis, in order to avoid staying out of the marketplace altogether while pirated substitutes overtook the market, in a manner similar to what the industry had regrettably experienced in the online world.

The ringtone paradigm – while disproportionately valuing the musical composition in relation to the sound recording, due to the historical anomaly of polyphonic ringtones – nevertheless refutes the “value parity” proposition that the Services advance. The Services argue that, because one needs licenses for both copyrights, they should be valued the same. In reality, however, they are valued very differently, and the only product consumers are interested in is the sound recording.

IV. The Substitutional Impact of the Services

The Services repeatedly make the argument that their exploitation of our sound recordings increases or promotes sales of CDs and digital downloads. In turn, they argue that this proposed promotional effect warrants a decreased sound recording performance royalty. In the context of their proposed musical works benchmark, they take this argument further and contend that the supposed promotional effect justifies a sound recording royalty that is lower even than the musical works royalty. This argument is wrong for several reasons.

As an initial matter, the Services concede that if satellite radio were promotional, the promotional effect would benefit the musical works copyright holders as well as the sound recording copyright holders. They claim, however, that the economic return from each incremental sale of a sound recording due to satellite radio benefits the sound recording copyright holder more than it does the musical works copyright holder because the sound

recording copyright holder makes more money from the sale of a CD or a digital download than does the owner of the copyright in the corresponding musical work. That the sound recording copyright owner makes more money than the owner of the musical work copyright from each sale of a CD or digital download merely makes my point from above – that the sound recording copyright is worth more than the musical work copyright. As a relative matter, however, the alleged benefit touted by the Services to the owner of each right is the same – for every incremental sale, the owner of each right would earn the rate or margin to which it is entitled.

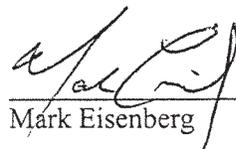
More importantly, however, my experience in the industry is consistent with other evidence that I understand that SoundExchange simultaneously is submitting which shows that subscribing to satellite radio, in fact, results in a significant and measurable net substitution effect – that is, subscribing to satellite radio actually causes subscribers to purchase *fewer* CDs. The significance of this substitutional effect cannot be overstated.

Sony BMG's gross margin on the sale of a top-line priced CD is [REDACTED], before taking into account costs such as recording costs, A&R, marketing, overhead, and unrecouped artist advances. That figure represents the net sale price of a top-line CD of [REDACTED], less average variable costs of sale of [REDACTED]. The gross margin of [REDACTED] is a number of which I remain keenly aware, as it is critical to my work in negotiating license agreements with digital service providers. As I have testified, where the service of a given digital licensee has the potential to substitute for – i.e., to decrease – CD sales, SONY BMG demands a higher rate from the service.

The reason for this should be obvious. SONY BMG depends on its margin to pay for things such as recording costs, A&R, marketing, overhead, and unrecouped artist advances. Lost CD sales that result from a particular service's substitutional effect thus are an economic loss for SONY BMG. Accordingly, if a potential licensee's service would result in a net loss of some

number of CDs per subscriber, SONY BMG knows that it needs to recover at least the value of those lost CDs through the rate *just to break even*. And because SONY BMG is not in the business of licensing its content just to break even, we would demand – *on top of that break even sum* – the normal licensee fee to which we would be entitled in the marketplace absent a substitution effect. We could never allow the loss that would result from a known substitution effect to result in SONY BMG receiving, at the end of the day (i.e., subtracting out the loss due to the substitution effect), anything less than the market rate that SONY BMG otherwise would be able to obtain.

I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge and belief.



Mark Eisenberg

Date: July 24, 2007

Exhibits Sponsored by Mark Eisenberg

**Restricted exhibits, which are identified by the suffix "RR," are not included
in the Public Version of SoundExchange's Rebuttal Case**

Exhibit No.	Description
SX Exhibit 253 RR	Amendment No. 3 to Sony BMG Digital Download Sales Agreement with Sprint Spectrum L.P. (Mar. 25, 2007)
SX Exhibit 254 RR	Amendment No. 4 to the Nov. 5, 2004 letter agreement between Verizon and Sony BMG (Apr. 27, 2007)
SX Exhibit 256 RR	Ringtones agreement between Sony BMG and Alltel Communications, Inc. (SE 0000617 et seq.) (Nov. 7, 2006)
SX Exhibit 257 RR	Ringtones agreement between Sony BMG and Helio LLC (SE 0001138 et seq.) (Dec. 22, 2006)
SX Exhibit 258 RR	Video license agreement between Sony BMG and Yahoo! Inc. (SE 0005328 et seq.) (June 16, 2005)

MC 61

PUBLIC

Before the
COPYRIGHT ROYALTY JUDGES

Library of Congress
Washington, D.C.

Digital Performance Right
Sound Recordings and
Ephemeral Recordings

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Docket No. 2005-1
CRJ DTRA

Testimony of ADAM B. JAFFE

I. Introduction and Background

A. Qualifications

My name is Adam B. Jaffe. I am the Fred C. Hecht Professor in Economics and Dean of Arts and Sciences at Brandeis University in Waltham, Massachusetts. Before becoming the Dean of Arts and Sciences, I was the Chair of the Department of Economics. Prior to joining the Brandeis faculty in 1994, I was on the faculty of Harvard University. During academic year 1990-91, I took leave from Harvard to serve as Senior Staff Economist at the President's Council of Economic Advisers in Washington, D.C. At the Council, I had primary staff responsibility for science and technology policy, regulatory policy, and antitrust policy issues. I have served as a member of the Board of Editors of the *American Economic Review*, the leading American academic economics journal, as an Associate Editor of the *Rand Journal of*

Economics, and as a member of the Board of Editors of the *Journal of Industrial Economics*. I also serve as Co-organizer of the Innovation Policy the Economy Group at the National Bureau of Economic Research.

I have served as a consultant to a variety of businesses and government agencies on economic matters, including antitrust and competition issues, other regulatory issues, and the valuation of intellectual property, including music performance rights. I have served as a business consultant and testified on behalf of both owners and licensees on the subject of the valuation and pricing of intellectual property such as copyrights. I was also the Chair of the Brandeis Intellectual Property Policy Committee. I have filed expert testimony and been qualified as an economic expert in a variety of regulatory, judicial, and arbitration proceedings including the prior copyright arbitration proceedings relating to the statutory licenses at issue in this proceeding. At Brandeis and Harvard, I have taught graduate and undergraduate courses in microeconomics, industrial organization, and the economics of innovation and technological change. A true and accurate copy of my *curriculum vitae* is attached as Appendix A.

B. Background and Overview

In this proceeding, I have been asked by a group of webcasters¹ that are members of the Digital Media Association ("DiMA") including America Online, Inc. ("AOL"), Live365, Inc. ("Live365"), Microsoft, Inc. ("Microsoft"),

¹ I used the term "webcasters" to refer to Internet-only audio streaming businesses.

and Yahoo! Inc. ("Yahoo") to provide an economic analysis of issues related to valuation of the right of public performance of digital sound recordings under 17 U.S.C. § 114(f)(2)(B) and 17 U.S.C. § 112(a) for the period beginning on January 1, 2006, and ending on December 31, 2010. Section II provides a framework for my analysis. Section III examines benchmarks to use in fee-setting, and Section IV presents the fee model that I propose to be applicable for webcasters. Section V discusses other factors to consider when setting a reasonable fee, with particular attention to factors that are discussed in the statute.

II. Framework for Economic Analysis

A. Economic Justification for Compulsory License

From the perspective of economic analysis, the public policy motivation of a compulsory license/rate court framework for a sound recording performance royalty derives from the underlying structure of the market for the public performance right. The nature of broadcasting/webcasting is such that many or most broadcasters/webcasters need permission for public performance from many distinct original rightsholders in order to produce and broadcast/webcast the kind of programming that listeners find most enjoyable. Further, the identification of the particular sound recordings that are going to be broadcast/webcast at a point in time is often decided only shortly before the broadcast/webcast and consequent public performance of the recordings. These two factors combine to create a situation in which a

competitive market for public performance royalties for sound recordings may well be characterized by significant transactions costs, because negotiating agreements for the right of public performance with many different parties, often with uncertainty about what is going to be performed when and how often, would involve considerable time, inconvenience, and out-of-pocket costs.

In general, public policy seeks to encourage reliance on competitive markets, because such markets in most cases result in prices tied to costs, and prices that appropriately capture the value that buyers put on the good or service in question. But in a market in which a competitive structure would create large transactions costs, it may be advantageous to reduce those transactions costs by allowing centralized licensing of the right in question. Such centralized licensing permits broadcasters/webcasters to license the rights that they need from a single party, and removes from the licensee the burden of determining, on a performance-by-performance basis, how to acquire the necessary performance rights.

This centralization of licensing of the right of public performance comes at a cost: the loss of the benefits of competitive pricing for the right in question. A single party licensing performance rights on behalf of all or most owners of the rights in sound recordings will not license that right at a competitive price. Rather, such an entity can be expected to act as a monopolist, insisting on a fee for the performance license chosen to maximize

the revenues received. In the language of economics, such a centralized licensor has "market power," which is the ability to elevate the market price above the competitive level.

Indeed, the high transactions costs that were the justification for centralized license administration make it likely that the monopolist licensor will have considerable market power, i.e., will be able to succeed in setting a monopoly price that is considerably higher than the competitive level. The ability of a monopolist to elevate the price is limited only by the possibility that too high a price will induce some potential buyers to forgo purchasing. In the case of a public performance right, a broadcaster/webcaster has only three ways to avoid taking a license from a centralized licensor (in the absence of a compulsory license mechanism, which we will come to in a moment). First, the broadcaster/webcaster could try to get the necessary rights from the individual underlying rightsholders, bypassing the centralized license administrator (assuming that the right of the centralized administrator to license the underlying works is non-exclusive). But the high transactions costs make this option unlikely to be economically viable for most broadcasters/webcasters. Second, the broadcaster/webcasters could infringe the copyrights, but such an illegal option has to be thought of as either unavailable or very costly. Finally, the broadcaster/webcaster can choose not to broadcast/webcast at all, thereby forgoing the overall economic value of its business. Since all of these options are expensive for potential

licensees, they impose only a mild discipline on a centralized license administrator who is not subject to any external pricing constraint.

Thus in the absence of a more interventionary public policy, markets of this type must either be hindered by high transactions costs, or else be burdened by monopoly prices that are likely to be far in excess of competitive levels. Compulsory licensing, with the terms and conditions set by some kind of regulatory body, offers a solution to this dilemma. It offers the possibility of transaction cost-efficient centralized licensing, with terms and conditions of those licenses kept from monopolistic levels by the regulatory process. I now turn to the particular statutory framework created to implement this approach for particular digital public performances of sound recordings.

B. Willing Seller/Willing Buyer Marketplace

The statute specifies that the determined license rates and terms should be those "that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." The determination of the willing buyer/willing seller marketplace rate should be based on economic, competitive, and programming information, including certain specific criteria listed in the statute. I will discuss these specific criteria below. For the moment, I want to focus specifically on the economically appropriate interpretation of the willing buyer/willing seller marketplace test that the statute specifies for the rates and terms that should be established.

The discussion in the previous section suggests that, from an economic perspective, the compulsory licensing/regulatory regime that the statute establishes has a specific economic and public policy motivation. It is designed to resolve the dilemma created by the existence of licensing transactions costs, i.e., the desire to reduce such costs through centralization, combined with concern that such centralization creates market power. Compulsory licensing combined with recourse to a judicial authority can resolve this dilemma: a centralized licensing authority can be authorized to minimize transactions costs. An obligation to license under rates and terms subject to recourse to a regulatory review can then be used to ensure that the resulting rates and terms are kept to the competitive level.

Thus the economic and public policy interpretation of the compulsory licensing/rate court regime suggests that the willing buyer/willing seller marketplace test should be interpreted to mean that rates and terms should be set that would prevail in a market that is competitive while minimizing transactions costs. After all, if Congress had considered it acceptable for a "market" rate to be one at the level a monopolist would set at any price, it likely never would have created a compulsory license. If the law had simply created a right in the public performance of sound recordings by digital means, and left it entirely to users and rightsholders to negotiate terms, presumably they would have done so. The Recording Industry Association of America ("RIAA"), acting as a monopolist, would have insisted on a monopoly

level for the rates; it would license only licensees willing to pay at supra-competitive prices; and it would not have had any incentive to grant licenses to users unwilling to pay that monopoly rate. In the end, we would have had some number of "willing" buyers paying at above-competitive market rates and a willing seller engaged in a "marketplace" transaction; and we would not have had to adjudicate to get that result.² It simply makes no sense to think that Congress created a compulsory license with the objective of reproducing the kinds of supra-competitive transactions made between monopolistic "willing sellers" and circumscribed "willing buyers" that would occur absent a compulsory license constraint. An interpretation of the willing buyer/willing seller marketplace rule that did not ensure rates and terms at the competitive level would therefore be inconsistent with the statute's economic and policy motivation.

The problem of mitigation of market power is handled in an analogous manner with respect to the licensing of the performance rights in musical works. In that arena, the major collective licensing organizations, the American Society of Composers, Authors and Publishers ("ASCAP") and

² In fact, the previous CARP and the Librarian dismissed this interpretation. The Librarian endorsed the CARP's rejection of 25 of 26 agreements reached by the RIAA as not representative of transactions between a willing buyer and a willing seller. "...the Panel did not accept the 26 voluntary agreements at face value. ...Ultimately, it gave little weight to 25 of the 26 agreements for these reasons and because the record demonstrated that the rates in these licenses reflect above-marketplace rates due to the superior bargaining position of RIAA or the licensee's immediate need for a license, due to unique circumstances." Library of Congress, Copyright Office 37 CFR Part 261, Docket No. 2000-9 CARP DTRA1&2, Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, *Federal Register*, Volume 67, No 130, July 8, 2002 ("Librarian Decision 2002"), at 45248.

Broadcast Music, Inc. ("BMI"), operate subject to Consent Decrees with the Department of Justice that resolved antitrust litigation against them. Under these Decrees, both organizations are constrained to offer licenses under specified terms, and at "reasonable" rates. The Federal Courts that administer the Decrees play a role analogous to the Copyright Royalty Board ("CRB") (and previous arbitration panels), reviewing the rates demanded by the organizations if a voluntary agreement cannot be reached. The Courts have interpreted the term "reasonable" to mean competitive market rates, precisely to prevent the exercise of what otherwise would be the market power of ASCAP and BMI.

Thus, another way to state the conclusion that the statute requires that rates and terms be kept to the competitive level would be that the Courts should determine "reasonable" rates and terms. Indeed, the legislative history related to Section 114(f)(2)(B) observes that the CRB will "determine reasonable rates and terms" and that this process is "[c]onsistent with existing law."³ I will, therefore, for convenience, use the term "reasonable" to describe the rates and terms to be set by the CRB, by which I mean rates and terms consistent with those that would prevail in a competitive market.⁴

³ H. Conf. Rep. No 105-796, 105th Congress, 2d Sess. At 86 (1998).

⁴ The Librarian agreed with this interpretation, noting that the CARP interprets the statutory standard as "the rates to which, absent special circumstances, most willing buyers and willing sellers would agree in a competitive marketplace." Librarian's 2002 Decision at 45244-45245. (emphasis added) See also, the very title of the Final Rule issued by the Library of Congress entitled "Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings," 37 CFR at 45240

C. Using Benchmarks to Determine Reasonable Fee

As a matter of economic analysis, it is typically not possible to determine the reasonable or competitive fee level on the basis of the fundamental underlying costs and benefits. This fundamental indeterminacy of a reasonable fee is common with respect to the valuation of intellectual property, because the "cost" of providing that property to an additional user is essentially zero, while the "value" of the property to the user is inextricably interwoven with other components of the user's product or service. For these reasons, it is common—both in litigation and in voluntary commercial transactions—for royalties for the use of copyrights, patents, and other intellectual property to be established by reference to "comparables" or "benchmarks" rather than derived from explicit cost or value considerations.

For any possible benchmark, one must first determine whether the rate it presents can be presumed reasonable, since a benchmark that is itself unreasonable cannot be used to derive a reasonable rate. Second, one must determine the most economically appropriate metric or fee base to be used in translating the reasonable fee in the benchmark context into a corresponding fee in the current context. Finally, one must consider how much weight to give to each benchmark, based on its overall economic significance and the relative reliability of any adjustments that may be necessary in each case.

(emphasis added); Librarian's 2002 Decision at 45241 ("CARP Proceeding to Set Reasonable Rates and Terms")

There will always be a range of buyer "valuations" corresponding to potential users with varying perspectives, such as different ways of using the rights, differing perceptions of the importance to outside market and financial observers of having secured the rights, different levels of risk aversion, and differing access to financial resources. Despite the transactions cost issues discussed above, there may be one or a handful of observable transactions that have occurred between the monopolist licensor and individual licensees who, for various reasons, may be willing to transact at monopoly prices.⁵ But in a competitive market, the market price will not be determined by the valuation of specific users who, for particular reasons, are willing to transact at high prices. Thus, even if such individual deals are in some sense between a willing buyer and a willing seller, they are not indicative of the reasonable, competitive market rate. We are therefore unlikely to have available to us demonstrably reasonable benchmark rates from transactions involving the rights and parties covered by Section 114(f)(2)(B).

Given this situation, we have two choices. We can rely on limited benchmarks that are not likely to be reasonable, or we can turn to the rates that are paid by webcasters for a closely related right to provide evidence on the competitive rate level. The problem with the first approach is that it is very difficult to know what adjustments would be necessary to an

⁵ See discussion *supra* at footnote 2 and citation to the circumstances found to have existed in the previous CARP.

unreasonable rate in order to render it reasonable. In contrast, by starting with a tested rate in the same context, considering a range of possible adjustments, and being conservative as necessary, we can produce a much more reliable indicator of the reasonable rate in the case at hand.

III. The Benchmark Fee

A. The 2001 Decision Setting Sound Recording Performance Royalty Is Not an Appropriate Benchmark

The rates that webcasters pay SoundExchange through the end of 2005 were set by the Librarian of Congress in 2002. After the Copyright Arbitration Royalty Panel ("CARP" or "Panel") issued its report, the Librarian of Congress reviewed the decision by the Panel in the case regarding the setting of a reasonable rate for the public performance of sound recordings for the 1998-2000 time period and the 2001-2002 time period.⁶ In the decision, the Librarian set a rate of \$0.0007 per performance for the public performance of all Internet transmissions.⁷ In large part, this decision was based on the experience of a single customer, even though the Panel recognized the customers could have a range of valuations.⁸

⁶ Report of the Copyright Arbitration Royalty Panel, In the Matter of Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings, February 20, 2002 ("2002 Report of the CARP"). Librarian Decision 2002 at 45240-45276.

⁷ Librarian Decision 2002 at 45255.

⁸ 2002 Report of the CARP at 24, 74.

Since 2002, webcasters have been paying SoundExchange at rates that were set in the first CARP on this issue.⁹ Although this rate is for the same right that is at issue here, this decision is not an appropriate starting point for the following reasons:

It is based on a contract for a single user with special circumstances. Although the CARP recognized that there could be a range of valuations for digital sound recording performances, it ignored this in implementing a rate to be paid by the webcasting industry. This is not consistent with the outcome in a competitive market. The statute does not say that the CARP should set rates and terms that were in fact negotiated by a single entity in the marketplace, but instead rates that *would have been* negotiated in the marketplace, taking into account certain factors. In 2001, the Panel interpreted the statute's 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."¹⁰ The Yahoo contract that was the basis for the 2001 decision was indeed negotiated under such distinctive conditions. Yahoo was willing to agree to a royalty rate insisted on by the RIAA that was

⁹ Note that, in 2003, as part of the extension of the 2002 decision, the webcasters and the RIAA/SoundExchange agreed to the level of royalties for Internet radio services to pay to recording companies for 2003 and 2004. See "DiMA and RIAA Submit Joint Royalty Proposal," DiMA press release, April 3, 2003. Library of Congress, Copyright Office 37 CFR Parts 262 and 263, Docket No. 2002-1 CARP DTRA3 and 2001-2 CARP DTNSRA, Digital Performance Right in Sound Recordings and Ephemeral Recordings, *Federal Register*, Volume 69, No 25, February 6, 2004 ("Librarian Decision 2004"), at 5693-5702.

¹⁰ 2002 Report of the CARP at 25; Librarian Decision 2002 at 45244-45245.

significantly in excess of the competitive level because Yahoo calculated that the cost of litigation to achieve such a competitive royalty would be greater than the savings from paying a reasonable rate and having to spend litigation fees to get it.¹¹ The ASCAP and BMI rate courts have similarly rejected previously negotiated agreements as benchmarks where such agreements reflect the exercise of significant market power and/or the alleged benchmarks were negotiated under distinctive conditions rendering them inappropriate as the basis for reasonable rates.

Yahoo valued the certainty that entering into a license with the RIAA granted with respect to its ability to budget and to manage the potential risk from an adverse judgment. Yahoo was also less concerned about the level of fees since it was entitled to pass through license fees to its broadcast.com clients.¹² In addition, by entering into a voluntary agreement, it was able to eliminate some uncertainties about whether radio retransmissions on broadcast.com met the criteria to qualify for a statutory license.

The cost of litigation was large. The value of a CARP-determined statutory license as a substitute for a voluntary deal is inherently limited by the legal costs that parties expect would accompany that option. Put simply, the cost of relying on the statutory license would be the expected reasonable rate plus litigation costs. Thus, if the RIAA-proposed voluntary deal

¹¹ Testimony of David Mandelbrot, Yahoo! Inc., In the Matter of Digital Performance Right in Sound Recording and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA1&2, October 15, 2001 ("2001 Mandelbrot Testimony") at pages 3-4.

¹² *Id.*

exceeded a reasonable rate, but exceeded it by less than the expected
litigation costs, licensees would still agree to the proposed unreasonable rate.
This message implies that, even if Yahoo believed that the reasonable rate
was zero, they would still be better off accepting the RIAA's "proposed
numbers," because litigating to get the reasonable rate would cost even
more.¹³ It appears undisputed that this was a central feature surrounding
the Yahoo-RIAA license.

*Yahoo's agreement was negotiated against the backdrop that
Yahoo's business model primarily involved broadcast simulcasting.*
Yahoo's voluntary negotiated agreement from August 2000 included two
rates that were applicable after a lump sum payment: [REDACTED;
RESTRICTED] Yahoo stated that its primary concern was the overall cost of
the deal, not the specific rate for different types of transmissions.¹⁴

At the time the agreement was negotiated and the time of the previous
CARP, over 90% of Yahoo's business was the rebroadcast of radio signals. In
1999, Yahoo acquired broadcast.com, a service whose business included
streaming audio for several hundred over-the-air radio stations. At the time
that Yahoo negotiated its license with the RIAA in 2000, it was willing to
negotiate a higher rate for the Internet-only transmission in return for a

¹³ See 2001 Mandelbrot Testimony at pages 3-4; Rebuttal Testimony of Adam B. Jaffe, In the
Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings,
Docket No 2000-9 CARP DTRA1&2, October 4, 2001, ("Jaffe Rebuttal Testimony"), at 62;
and Librarian Decision 2002 at 45255.

¹⁴ 2001 Mandelbrot Testimony at 4.

lower rate on the radio retransmission, since most of its payments would be for radio retransmissions.¹⁵ “The Panel found the rate for the IO [Internet-only] transmissions to be artificially high and, conversely, the rates for the RR [radio retransmission] to be artificially low. For this reason, it made a downward adjustment to the IO rates and an upward adjustment to the RR rates.”¹⁶

Yahoo’s business model has changed entirely since the initial RIAA-Yahoo deal. Yahoo’s activities under the webcasting statutory license now consist almost entirely of Internet-only streaming.¹⁷ Indeed, it is telling that Yahoo did not renew its license with the RIAA in 2001 precisely because it deemed the rates to be unreasonable.¹⁸ Thus, whatever may be said of the (questionable) relevance of the 2000 Yahoo-RIAA agreement in relation to the prior CARP term, it plainly is of little or no value as a benchmark for the 2006 – 2010 license term.

If the voluntary agreement rate turned out to be too high as compared with the statutory rate, Yahoo would have been able to avail itself of the lower rate. To the extent that arbitration resulted in

¹⁵ 2001 Mandelbrot Testimony at 4.

¹⁶ The Librarian recognized that “the real agreement between Yahoo! and RIAA was for a single, unitary rate for the digital performance of a sound recording...rates, which the Panel found were artificially high (for IO transmissions) and low (for RR).” Librarian Decision 2002 at 45252. See also Librarian Decision 2002 at 45253.

¹⁷ See Testimony of Robert Roback, Yahoo! Inc. (“Roback Testimony”).

¹⁸ See Roback Testimony.

lower fees going forward, Yahoo would have been able to take advantage of the lower rate after the expiration of the agreement.

Sound recording royalties are out of line with musical works royalties. As discussed below, the rates that were approved by the Librarian set royalties for the sound recording copyright significantly higher than the royalties for the musical work. Each of the DiMA companies participating in this proceeding has paid significantly more to SoundExchange to license performing rights for sound recordings than to the Performing Rights Organizations ("PROs") to license the performance rights for musical works.

In conclusion, in setting industry-wide fees, the CARP and the Librarian did not account for the unique facts and circumstances surrounding the Yahoo-RIAA agreement, yet the Panel explicitly relied on terms and conditions of the Yahoo-RIAA agreement as a benchmark for industry rates. A single specific agreement based upon the special situation of an individual company whose business model, at the time the agreement was struck, was not representative of the business models of Internet webcasters, was an unreliable benchmark to serve as the basis for fees for all webcasters and is even less appropriate as a benchmark year later, after Yahoo itself elected not to renew it. By not taking these factors into consideration, the Panel and the Librarian misapplied the Yahoo agreement to set rates for the entire industry that are excessive.

B. 2004 Extension Is Not an Appropriate Benchmark

For the period covering 2003 - 2005, DiMA and the RIAA agreed to an industry-wide extension of the royalty rates set for the public performance of sound recordings.¹⁹ The Librarian's final decision regarding rates from 1998 to 2002 was issued in July of 2002, near the end of the period covered by the license. Parties subject to that agreement were, at the end of 2002, still litigating some of the issues decided and were not ready to mount a costly legal battle to challenge the fees. Additionally, parties were awaiting a decision from Congress on whether it would reform the process by which royalties for all statutory copyright licenses were determined. Because of these circumstances, the parties further extended the royalty structure set forth by the Librarian in the 2002 agreement through the end of 2005 as they were awaiting a decision from Congress.²⁰ These extensions served as temporary fixes to avoid large legal bills so shortly after the conclusion of the previous arbitration, and allowed the industry to develop experience under the new rates. These extensions suffer from the same deficiencies as described above, cannot be presumed to be reasonable, and therefore cannot be relied on as a benchmark for fee-setting.

¹⁹ Librarian Decision 2004 at 5693-5702; See also footnote 20 *infra* and accompanying text.

²⁰ See Testimony of Jonathan Potter, Executive Director of the Digital Media Association, and "DiMA, Recording Industry and Artists Propose Internet Radio Royalty Extension," DiMA press release, August 31, 2004. Ultimately, Congress passed the Copyright Royalty and Distribution Reform Act of 2004 on November 30, 2004, and created the Copyright Royalty Board. As part of that change, the Act provided that rates in place on December 31, 2004, would stay in place through 2005 or until such a date as the Copyright Royalty Judges determine.

C. Performance Right Benchmark

Given that there are not benchmarks for the performance of sound recordings under the webcasting statutory license, the best available starting point for a reasonable fee for the public performance of sound recordings is the fee paid for the closely related public performance of musical works. The musical work and the sound recording are inextricably intertwined in producing the value of the public performance. In most cases, to make the performances, a user needs both rights. There are no incremental costs in either case of making the underlying intellectual property available for public performance. Thus, there is no reason to expect that the outcome of the negotiations would be higher for one or the other.

Use of the royalty rate for performances of the musical work to infer a reasonable royalty rate for the sound recording is not without precedent: the CARP determined fees for the public performance of sound recordings by subscription digital cable radio services under the Digital Performance Rights in Sound Recording Act of 1995 based on the royalty rate for musical works performances.²¹

The available theoretical and empirical evidence suggests that the fee paid by users for the performance of a musical work provides an upper bound to the value of the performance of a sound recording. Thus, setting the

²¹ See discussion in Librarian of Congress, Final Rule and Order, 63 Fed. Reg at 25394, 25404 (May 8, 1998); Report of the Copyright Arbitration Royalty Panel, Docket No. 96-5 CARP DSTRA, November 28, 1997, at para. 197-202.

royalty rate for sound recordings at a level that is equal to the royalty rate for musical works would produce a reasonable rate for sound recordings.

1. Implications of the willing buyer/willing seller model

To understand the implications of the willing buyer/willing seller model on the relationship between the musical work and sound recording, we must analyze how both buyers and sellers would approach a negotiation over blanket licenses for digital performance rights. In both cases, we can analyze how the “willing buyer” (a licensee) and a “willing seller” (a licensor) would approach these negotiations. If both the buyers and the sellers would be approaching these negotiations from economic positions that are similar with respect to musical works and sound recordings, then there is no economic basis for concluding that the market values for the two rights would differ.

The buyer side of the negotiations: The value that buyers put on the right of the public performance of both the musical works and the sound recordings is derived from the value that they expect to realize by making the public performance of music. Each of these rights is needed for a public performance, and in order for the buyers’ valuations of the two rights to differ, it would have to be the case that there is some distinction in the manner or extent to which each right facilitates such performances. But no such differences exist because a buyer needs both rights to make a public performance. This means that each right is worthless to the buyers unless they also procure the other right. Once both sets of rights are procured, they

each contribute symmetrically to the generation of the value of the public performance. Because of this symmetry and mutual necessity, the buyers' "willingness to pay" for each right will be derived in the same way from the value that buyers expect to derive from making the performances. Hence, there is no difference in a buyer's demand or willingness to pay for the musical work and the sound recording. Going into negotiations over either right, buyers will be in the same position.

Note that this is important for the analysis of a blanket license for a substantial portion of the repertoire, which is the case we are discussing. For a *specific* sound recording or musical work, the user may value one over the other. For example, if I were considering broadcasting Frank Sinatra singing "As Time Goes By," I might want a Sinatra performance, or I might want the particular song. Depending on my preference, I may be willing to substitute another recording of the song, or choose to substitute another Sinatra sound recording. But this analysis applies to specific sound recording/musical work combinations. While buyers may have varying relative willingness to pay for a *specific* sound recording or musical work, at the *blanket license* level, I do not have the choice to substitute a different sound recording or a different musical work. Whatever I broadcast, it must contain both a musical work

and a sound recording.²² As long as I am negotiating for a blanket right to each, they are both essential and I would value them equally.

The seller side of the negotiation: The sellers of each right are not the same, but each comes to the negotiation from a similar position. In each case, the costs of producing the underlying intellectual property are “sunk,” by which economists mean that the investments have already been made, and the decision or action currently being considered (i.e., to license or not the right of performance of existing sound recordings via the narrowly specified performances at issue in this proceeding) does not affect the cost of producing the intellectual property. Further, in each case, owners of the sound recordings and publishing rights look to recover these costs (including compensation for risks incurred) from revenues earned in other markets. In the case of sound recording rightsholders, the costs are covered by CD sales,²³ and, increasingly, other digital media such as downloads. In the case of musical work rightsholders, the costs are covered by a combination of

²² This statement is not strictly true because of some slight differences in copyright treatment of sound recordings and musical works. On the musical works side, there are some compositions that are in the public domain. On the sound recording side, pre-1972 recordings do not carry the right to control the public performance. But overall this is a small set of performances.

²³ The vast majority of the record industry's \$12 billion in sales comes from the sales of CDs. See 2004 RIAA Year-end Statistics, U.S. Manufacturers Unit Shipments and Value (www.riaa.com/news/newsletter/pdf/2004yearEndStats.pdf).

mechanical royalties and over-the-air performance royalties.²⁴ The digital performance royalty is incremental to this substantial revenue in both cases.

Finally, there is no incremental cost imposed on either the musical work or the sound recording licensor by virtue of making the underlying intellectual property available for digital performance. In such a situation, economics tells us that both the sound recording and musical work rightsholders would approach this negotiation for the performance rights in the same way: they would recognize that there is no incremental cost to supply this market and would simply hold out for as much of the user's overall performance value as they could get.

The RIAA has long argued that sound recording royalties should be higher than musical works royalties because their investment in the original creation of the work is greater. If this argument is made in the context of the licensing of the right at issue (as distinct from the original market for the sale of the sound recordings themselves), it amounts to a claim that the market for digital performance rights should be affected by sunk costs. It is one of the most basic tenets of economics that rational decisionmakers should not allow sunk costs to affect forward-looking decisions. One can imagine that an owner of sound recordings would *like* to recover more revenue from a

²⁴ In 2001, publishers were paid \$318 million in royalties for radio performances and \$553 million in mechanical royalties. See National Music Publishers' Association, Inc., and the Harry Fox Agency, Inc., *NMPA International Survey of Music Publishing Revenues*, 12th Edition, at 8. In 2004, radio stations still earned substantial royalties from radio; radio stations had blanket licenses with ASCAP and BMI for over \$350 million. See www.radiomlc.com/ascap_faq.html and www.radiomlc.com/faq.html.

webcaster license, in recognition of the cost of creating that sound recording originally, or in the hopes that this greater revenue will help to finance the creation of the *next* sound recording to be created. But it is irrational to bring this wish to the negotiating table for webcaster licenses, because neither the cost of the original investment, nor the cost of the new investment, will be affected by whether or not this particular license is issued.

This is not to say that real business decisionmakers do not sometimes make the mistake of allowing their decisions to be affected by sunk costs. They do, just as real decisionmakers make all kinds of mistakes, every day. But the standard for this proceeding is that of an overall market test, not the peculiarities of particular decisionmakers. And in competitive markets, the market outcomes are determined, at least in the long run, by the actions of rational decisionmakers. Thus it is simply inconsistent with economic analysis of how competitive markets work to suggest that a competitive royalty for webcaster performances of sound recordings would be affected by the original cost of creating sound recordings, or by the expected cost of creating new sound recordings in the future.²⁵

This analysis does not in any way suggest that the zero incremental cost of the right being transferred would lead to a zero royalty. Quite the

²⁵ Theoretically, it would be possible for the royalty for webcaster performances of sound recordings to be affected by the expected cost of making *future* sound recordings, but for this to be true it would have to be the case that the licensing of sound recording performances to the webcasters somehow necessitates the creation of additional sound recordings without corresponding additional revenue. I do not see any economically reasonable mechanism by which this would occur.

contrary, intellectual property with zero incremental cost is routinely licensed at positive royalty rates. With respect to both musical works and sound recordings, we have a potential licensee with some maximum willingness to pay that is derived from the value of the buyer of the performances, and we have a seller with a minimum willingness to accept a zero royalty. The economics of bargaining suggests that the parties will reach agreement at some point in between. Economics cannot tell us where in the interval between the buyer's maximum royalty and the seller's minimum royalty the parties will come out. It will depend on the negotiating skills of the parties. This, combined with the going-in valuation for each party, determines the outcome. Because the going-in valuations on both the buyer's and seller's sides are the same with respect to musical works and sound recordings, there is no reason to expect that the outcomes would be higher for one or the other. *Thus, I would expect that, from the perspective of a willing buyer and a willing seller, the musical works royalty would be equivalent to the sound recording royalty.*

Actually, there is one factor that suggests that, in general, the owners of sound recording performance rights may well be willing to license at *lower* rates than the owners of musical works. In both cases, the willingness of the licensor to agree to a low royalty is increased by any expectation of *promotional value* associated with the licensed performance. And because sound recording owners derive more revenue from every CD sold than do the

owners of the attached musical works, the value of such promotion is greater for the sound recording owner than it is for the musical works owner. Indeed, there is a long history in the U.S. of practices related to "payola," whereby owners of sound recordings have bribed or otherwise tried to induce broadcasters to play their recordings. There has never been, to my knowledge, evidence of owners of musical work copyrights engaging in such practices. This asymmetry between sound recording owners and musical works owners in their incentive to induce promotion of their works by webcasters, combined with the perfect symmetry that exists in the value of the two rights to the webcaster licensee, suggests that, if anything, competitive market royalties for sound recordings are likely to be *lower* than those of musical works.

2. Marketplace Evidence of Equality of Sound Recording and Musical Work Performances

In order to test this framework, I looked for situations where a buyer was negotiating for musical work and sound recording rights at the same time, for the same use, in actual competitive markets. The U.S. does not generally recognize the right of public performance in sound recordings, so it is not possible to make a direct comparison of musical work and sound recording performance royalties in a competitive market. A circumstance, however, where the market does value the rights related to sound recordings and musical rights is when a producer of a motion picture or television program wishes to incorporate a pre-existing sound recording into a newly

created audio-visual program. In such a situation, the producer must secure the right to reproduce both the sound recording itself and the underlying musical work.

The economic incentives underlying the determination of these royalties correspond to those described above: the buyer needs both the musical work and sound recording rights, and the licensors of both the sound recording and the musical work rights face zero incremental cost in conveying the rights in question. Further, the markets in which these rights are purchased are competitive because the payments for each song are negotiated separately, and producers have access to multiple sound recordings and musical works. The economic analysis of the incentive underlying the bargaining for the acquisition of these rights is exactly the same as the analysis above, except that it occurs on a song-by-song basis, rather than on a blanket basis.

An analysis of movie and television data relating to the use of previously existing sound recordings and musical works in movies and television programming demonstrates that competitive markets value sound recording performances no more highly than musical work performances. In order to include a pre-existing sound recording in a motion picture or television episode, two rights must be obtained: the master use right (covering use of a particular sound recording) and the synchronization ("synch") right (covering use of the musical work). A particular producer

may care about getting a specific performer or may care about getting a specific song, so that for any single song, the payment for the sound recording may be greater or lesser than the payment for the musical work. On average, however, if my analysis of the underlying economics applies, the two should be approximately equal.

In 2001, I obtained data on the level of fees paid for sound recording and musical works fees from three major Hollywood studios and analyzed the relative valuation of musical works and sound recordings based on approximately [REDACTED; RESTRICTED].²⁶ The data, covering movies and television shows, overwhelmingly show that musical works and sound recordings are valued approximately equally in the market.²⁷

Figure 1A and Figure 1B reproduce the results of my analysis of motion pictures and television programs respectively. From my review of the data, it is clear that, although there are individual instances where master use fees are higher than synch fees (and vice versa), the two fees are identical in the majority of cases. Further, an examination of the contracts struck between the studios and the rightsholders reveals that guaranteed parity of musical work and sound recording fees is often written into the use agreement contracts in the form of Most Favored Nation ("MFN") clauses.

²⁶ See Jaffe Rebuttal Testimony at 20-24.

²⁷ In order to ensure that reported fees represent competitive market conditions, I excluded transactions that were not at "arm's-length," where other services or rights were bundled with those of interest, where the sound recording and musical works rights were owned by the same party, and where the songs were written or re-recorded for the production.

MFNs were sought by holders of both the musical work copyright and the
sound recording copyright, ensuring that if the holder of one of the copyrights
negotiated a higher fee from the licensee-studio, the other fee would be
adjusted to that level. Indeed, overall, the payments for sound recordings are
slightly less than those of musical works, with the sound recording payments
[REDACTED; RESTRICTED]. But the overall tendency towards equality is
unmistakable.²⁸

The evidence from 2001 is overwhelming that the value of the sound
recording right is no greater than the value of the musical work right. As
discussed by witness Karyn Ulman based on her extensive experience in the
music licensing marketplace, I am advised that the licensing patterns I
observed in 2001, as summarized above, have not changed in any tangible
respect. Thus there is no reason to believe that the results of my 2001
analysis would be different if conducted with more recent data.

IV. The Fee Model

A. Structure of Fee Proposal

Because of varied business models of the webcasters, I propose that the
webcaster be able to elect one of the following ways of paying fees to
SoundExchange: i) a fee per performance, ii) a fee per Aggregate Tuning
Hours ("ATH"), or iii) a fee as a percentage of revenue associated with the

²⁸ Performing this analysis after excluding transactions that include a MFN clause produces similar results.

streaming website.²⁹ This fee structure is consistent with the current options that are available to subscription services under the statutory license.

Structuring fees on a per-performance basis or on a per-ATH basis are both metrics that vary with the scale of activity by the webcaster. When fees are tied to the volume of performances or use of bandwidth, the level of the fee will vary by licensees and over time as the number of performances increases or decreases. Generally speaking, this scaling of the royalty paid to the extent of use of the licensed matter is intuitively appealing and is a common feature of intellectual property licenses in certain contexts.

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. Nonetheless, licensing intellectual property with royalties calculated as a percentage of revenue is also a common practice in competitive markets, so long as the revenue base used for royalty calculation is carefully defined to correspond as closely as possible to the intrinsic value of the licensed property, and to exclude revenue that is likely to be driven by other factors.

B. Performing Rights Royalties

In order to determine the appropriate fee, I look to the payments made on the basis of agreements that the webcasters have in place with ASCAP, BMI,

²⁹ See Testimony of J. Donald Fancher, Deloitte and Touche ("Fancher Testimony") for definition of revenue associated with streaming.

and SESAC, Inc. ("SESAC"), the performing rights organizations that represent the rightsholders of the copyright embodied in the musical work. The model presented here compares favorably to the PRO-based model advanced by the webcasters in the previous CARP, which was keyed off of PRO fees by *other parties (i.e., broadcast radio stations)* for performances of works in a *different medium (i.e., broadcast radio)* which required the making of calculation assumptions, also not applicable here. The model set forth below is based on the PRO fees paid by the *same* webcasters litigating herein for the *same* Internet radio performances for which they are obligated to pay SoundExchange under the statutory license at issue. As discussed above, I believe that the musical work fee represents an upper bound on a reasonable fee for a sound recording. It is clear that the fees that are currently paid under the statutory license for the digital performance of sound recordings are far out of line with the fees that are paid for the rights to the musical works embedded in the same performances.

Percent-of-Revenue Royalty Rate: The standard "form" license offered by ASCAP and BMI to license musical works on Internet sites has several options based on a percent of revenue. These licenses cover the musical works performance rights for the same performances for which this proceeding will determine the rate for the sound recording performance right (plus some additional performances not covered by this proceeding). Licensees have the option of paying 1.75% to BMI and 1.85% to ASCAP of

gross revenue that includes a broad definition of Internet-related revenue. A
"pure play" webcasting site would pay under such a formula, paying the
PROs approximately 3.8% of its revenue once SESAC is factored in.

For multi-media operations, ASCAP and BMI offer a second option to
pay a slightly higher percentage of a more circumscribed definition of
revenue. As discussed by witness J. Donald Fancher of Deloitte and Touche,
the definition of revenue that is associated with this option is designed to
capture only music area revenue, that is, those revenues directly associated
with the performance of music. It is my understanding that the RIAA has
already adopted a definition that is largely consistent with this definition for
subscription services operating under the statutory license. Services that
avail themselves of this option pay a higher royalty rate (approximately 5.5%
aggregated over all three PROs) over a smaller music-only-related revenue
base. ASCAP's license under this option calls for payments of 2.76% of
revenue directly attributable to music performances, while BMI's license
under this option calls for payments of 2.5% of such revenues. The standard
Internet license offered by SESAC is not revenue-based; however, SESAC
historically has accounted for a small share of the overall royalty picture and
[REDACTED; RESTRICTED]. Hence the overall musical works royalty is

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approximately 5.5% of revenue limited to a revenue base directly attributable to music performances.³⁰

This percentage-of-revenue figure reflects what the PROs ask for in a standard contract. Many webcasters, however, negotiate individual agreements with the PROs under terms that are presumably more favorable to them than the standard-form rate. Further, the 5.5% reflects a royalty payment at a higher rate than the 3.8% of revenue rate that is available to a pure play webcaster. Finally, ASCAP also provides a third option: If revenue that is associated specifically with ASCAP music can be identified, services can pay ASCAP at 5.1% of revenue for those performances. If this same rate were to be applied to performances associated with the other PROs, it implies an overall rate for all performances of 5.1% of revenue specifically associated with music performances. Given these various options, the aggregate 5.5% of revenue rate based on music-related revenue represents an upper bound for a reasonable royalty as a percentage of revenue.

The webcasters have agreements with the PROs to license the musical works from ASCAP, BMI, and SESAC. Some of these licenses are structured as percentage-of-revenue licenses that fall within the range of 3.8% to 5.5% of revenue for payments to ASCAP, BMI, and SESAC.³¹ For those webcasters

³⁰ The 5.5% figure is calculated as 2.76% for ASCAP plus 2.5% for BMI plus .24% for SESAC. SESAC royalty rate as a percent of revenue is calculated based on webcaster payments to SESAC as a percentage of total PRO payments. This calculation is also consistent with a SESAC license [REDACTED; RESTRICTED]

³¹ [REDACTED; RESTRICTED]

that are paying these PROs on a basis other than a percentage of revenue, I am unable to determine the implicit percentage of revenue actually being paid, because these webcasters have had no reason to maintain the records necessary to calculate revenue on the appropriate basis.³² Of course, since all webcasters have available the option of licensing the musical works at the percentage-of-revenue rates offered in the standard-form PRO licenses, we can infer that any webcasters that negotiated licenses on some other basis are likely to be paying less than the standard-form percentage of revenue. Hence it is clear that the 3.8% to 5.5% of revenue range is, overall, an overstatement of the rates paid by webcasters to license the performances of musical works.

This range compares to a 10.9% of revenue option available to subscription services under the extension of the 2001 agreement by the CARP. Because the definitions of revenue subject to fee are not precisely the same, these percentages may not be exactly comparable. It is clear, however, that both are intended conceptually to measure revenue that is associated only with music service activities covered by the underlying licenses. Thus, even with an allowance for a possibly inexact match in revenue definitions, it is clear that the Internet royalty rate for musical works is much lower than the rate for sound recordings.

³² See Roback Testimony and Testimony of Christine Winston, AOL, Inc ("Winston Testimony"). I also understand that on a going-forward basis, the webcasting services will be able to track webcasting revenue in accordance with the definition proposed by Mr. Fancher. *Id.*

Per-Performance or Per-ATH: We can also examine the fees paid by AOL, Live365, MSN, and Yahoo to ASCAP, BMI, and SESAC for the performances of the musical works that are associated with the sound recordings that are the subject of this proceeding and translate those fees into a per-ATH or per-performance measure of the fee. Each of the webcasters has agreements with the PROs to license the public performance of musical works from ASCAP, BMI, and SESAC. These webcasters provided the fees that are associated with the license of the musical works at issue in this proceeding.³³ The summary of PRO fees for calendar year 2004 allows a concrete and direct measure of market rates for digital performance of musical works that covers the overwhelming majority of broadcasts at issue in this proceeding.

Because we can calculate the ATH and/or the number of performances associated with the webcasting business, these licenses fees can be converted into both a per-performance and a per-ATH rate. Figure 2 summarizes the range of fees and the average fees on a per-performance and a per-ATH basis for the webcasters involved in this proceeding.

PRO licenses for some of the services cover all audio and video streaming as well as other uses of music on the website, whereas the payments for sound recordings that are covered under this proceeding cover only audio

³³ See Winston Testimony, Roback Testimony, Testimony of David Porter, Live365, Inc., Testimony of Don Holtzinger, Microsoft, Inc.

streaming. For example, the PRO licenses of Yahoo and AOL cover their
music video streaming activities, while these activities are not subject to the
sound recording statutory license. To compare the musical work fees paid to
the PROs with the rights being licensed here, I thus exclude from the PRO
fees the percentage of total ATH that are *not* covered under the sound
recording statutory license. For example, as explained in the Roback
testimony, if 25% of a webcaster's streaming hours (ATH) represented music
video streaming hours and 75% represented statutory license radio
streaming, then I would use 75% of the webcaster's PRO fees for purposes of
the comparisons described above.

[REDACTED; RESTRICTED]. The SoundExchange rates for the
sound recordings are thus significantly higher than the rates paid to the
musical work rightsholders for the same performances, whether measured on
the basis of percentage of revenue, per-ATH or per-performance.

Figure 2 does show significant variation in the fees paid by different
webcasters, whether on a per-performance, per-ATH, or percentage-of-
revenue basis. Such variations occur in most real markets and are
particularly unsurprising in the dynamic context of the Internet. At the
same time, there is not a single licensee who currently pays as much for
musical works as for sound recordings, regardless of which metric of
valuation we examine. Hence the evidence is overwhelming and
unambiguous that the current SoundExchange rate is too high.

As is always the case for an honest depiction of "reasonable fees" based on observable benchmarks, there is some fee range, rather than any specific number, that can be characterized as reasonable given the available data. An obvious reference point for a reasonable rate in this proceeding is the overall industry average royalty rate paid for musical works. [REDACTED; RESTRICTED] But given the available data, there is a zone of reasonableness around these average rates. [REDACTED; RESTRICTED]. Note that even the upper limits of these reasonable ranges are, in all cases, significantly below the current SoundExchange rates. Further, as discussed below, there are multiple factors suggesting that these musical work-derived rates are, in fact, *overstatements* of a reasonable rate for sound recordings. Hence it is clear that significant reductions in the SoundExchange royalties are necessary to render them reasonable.

V. Other Factors to Consider in Setting a Reasonable Fee

Based on the theoretical discussion and empirical evidence considered above, there does not appear to be any basis from an economic perspective for saying that the "true" value of a sound recording is greater than the value of a musical work. Of course, one can identify particular musical works that have a value that transcends any particular sound recording as well as sound recordings whose value transcends that of the musical work being rendered.

There are several reasons why the musical work benchmark derived from fees paid to ASCAP, BMI, and SESAC is likely to be an upper limit on

the reasonable sound recording royalty being determined as part of this proceeding, both as a general proposition within the competitive markets framework and on the basis of the specific statutory criteria enumerated in Section 114(f)(2)(B):

- The ASCAP, BMI, and SESAC fees that compose the benchmark are above the reasonable rate because of the market power of those entities.
- The promotional value of public performances or "airplay" by webcasters is significantly greater to the owners of sound recording copyrights than it is to the owners of the musical works copyrights.
- The technological contribution of the webcasters is significantly greater than that of the rightsholders.
- The capital investment of the webcasters is significant, and there is significant doubt regarding their ability to recoup these investments with reasonable returns.
- The risks currently faced by the webcasters far exceed the risks faced by the rightsholders.
- The costs borne by the webcasters, relative to their likely revenues during the license period, are much greater than the costs of the rightsholders relative to their overall revenues.
- The legal right conveyed by Section 114(f)(2)(B) is limited in ways that diminish that right's value, at least for some webcasters.

I will now discuss each of these points in more detail.

Market Power of ASCAP, BMI, and SESAC: The organizations that offer blanket performance licenses for musical works have market power because many broadcasters have no realistic alternative to the licenses they offer. In the case of ASCAP, this is disciplined by the possibility of appeal to

the ASCAP Rate Court, but this means only that the ASCAP fee cannot exceed the reasonable level by more than an amount that corresponds to the cost and risk of a licensee initiating a Rate Court proceeding. The situation with BMI is similar. As to SESAC, there is no rate court option. Although SESAC provides only a small portion of the fees (because of the small repertoire that it controls), it is likely that this fee component is above the competitive level because broadcasters' only alternative to a SESAC license is to try to purge their programming of SESAC music. In effect, SESAC is large enough to make it difficult to broadcast/webcast without it, while small enough to apparently avoid Justice Department scrutiny.

Promotional Value: Whatever the underlying or fundamental value of a musical work or sound recording, the competitive market royalty of a public performance of each would be affected by the promotional value created by that performance. From an economic perspective, we would expect that the *total consideration* provided by a licensee to the owner of a performance right would approximately correspond to the "value" of a performance of the underlying musical work or sound recording. But "consideration" does not come only in the form of the royalty paid. Typically, a broadcast/webcast public performance also provides benefit to the owner of the underlying musical work or sound recording by stimulating sales of albums and other fixed media containing the work being performed.

Though the RIAA is concerned that the Internet radio stations are too specialized and are therefore substitutes for CDs, webcasters function in a manner similar to over-the-air radio by playing a list of songs with each listener having only limited ability to influence the songs that he or she hears. In order to obtain a statutory license under the DMCA, webcasters must abide by certain restrictions for their non-subscription services. The webcasters cannot publish an advance schedule or announce the title of a sound recording prior to transmission.³⁴ Additionally, webcasters cannot play more than three songs from one album in a three-hour timeframe, and they cannot play more than two songs from one album consecutively.³⁵ Webcasters have invested in proprietary software that restricts the number of songs from the same artist or album that are played in a particular time period.³⁶ Internet listeners are unable to request a specific song and they are unable to play a given artist, album, or song on demand.³⁷ Finally, some of the non-subscription services covered by the statutory license offer a lower-quality sound recording than one would obtain with the purchase of a CD.³⁸ These limitations on sound recordings make streaming a poor substitute for purchasing albums or downloads.

³⁴ 17 U.S.C. § 114(d)(2)(C)(ii).

³⁵ 17 U.S.C. § 114(d)(2)(C)(i). The statute details limitations that restrict the number of songs from the same artists or albums that can be played.

³⁶ See Roback Testimony and Winston Testimony.

³⁷ See Roback Testimony.

³⁸ See Roback Testimony.

Record companies have long recognized the promotional value inherent in traditional, over-the-air radio play and have worked with terrestrial radio stations to promote new artists and new albums. Recently, record labels increasingly have started working with Internet radio stations, in the same manner that they have worked with over-the-air broadcasters for years, in order to reach the large Internet listening audience. The audience for Internet radio has grown significantly and the weekly audience is nearly 20 million people.³⁹ The record labels are now "servicing" webcasters like they do traditional broadcasters. The record labels provide large webcasters with advance copies of new songs to play before the release of a CD in order to promote new releases or artists.⁴⁰ Internet radio play of new artists has created large increases in record sales. For example, AOL Breakers and artist-specific promotions on LAUNCHcast have been shown to have significant promotional value to the artists featured on these programs.⁴¹ Webcasters have invested in capturing this promotional value by adding "Buy Now" features to their radio players and displaying the song title, album, and artist while the song plays so that listeners have the information necessary to purchase music they like.⁴²

³⁹ Arbitron/Edison Media Research, *Internet and Multimedia 2005: The On-Demand Media Consumer*, at 5.

⁴⁰ See Roback Testimony and Testimony of Jack Isquith, AOL, Inc. ("Isquith Testimony").

⁴¹ See Testimony of Jay Frank, Yahoo!, Inc. ("Frank Testimony") and Isquith Testimony.

⁴² See Frank Testimony, Isquith Testimony, and Testimony of N. Mark Lam, Live365, Inc. ("Lam Testimony").

Additionally, play on Internet radio is now treated similarly to play on over-the-air radio in tracking sales of records. Broadcast Data Systems ("BDS"), which provides data to *Billboard* for its radio play charts, has started to monitor radio plays on some of the large webcasters; and MediaBase, another monitoring company, has plans to gather data on Internet radio play.⁴³ Record companies can track when and how often their sound recordings are played on the Internet. The fact that BDS and MediaBase monitor streaming also allows record labels access to more detailed demographic information (gathered by webcasters) on the people who have heard their songs.⁴⁴ It is expected that BDS and MediaBase will incorporate Internet play into their radio airplay charts and webcasting will soon have the same impact on radio airplay charts as over-the-air radio.⁴⁵

Through servicing and radio airplay monitoring, Internet radio stations are being treated similarly to terrestrial radio stations by the record labels. As a result of promoting artists and songs on Internet radio, record labels have been able to positively impact their record sales. Therefore, the compensation to record companies for the sound recordings that are streamed through the Internet is not just the royalty payment that is made by the webcasters. Rather, the total compensation to the record companies is the royalty fee plus the additional profit they receive from the increased record

⁴³ See Frank Testimony.

⁴⁴ See Frank Testimony.

⁴⁵ See Frank Testimony.

sales. Traditional, over-the air broadcasters do not pay a royalty for sound recordings because radio play is considered to have significant promotional value, and the owners of the copyrights in sound recordings receive a significant part of their income from the sale of albums. Although the owners of the copyrights in musical works do derive some income from the sale of albums (through mechanical royalties), this income is typically much less than the incremental profit of record companies. Therefore, setting a fee for the performance of a sound recording equal to the fee for the musical work actually provides to the owners of the sound recording (the record labels) greater compensation than to the owners of the musical work.

Relative contribution of technology, capital investment, cost, and risk: The contributions of the sound recording owners are contained in the sound recordings themselves; there is no additional contribution on their part in connection with the webcasting of public performances. On the other hand, the contribution of the webcasters is significant. Webcasters are incurring substantial business risks and costs, whereas the sound recording owners bear no risk associated with their licensing of sound recordings for webcast performances, and most of their costs are sunk.

Webcasters spend millions on equipment, R&D, programming, music purchase, bandwidth, encoding, and personnel. The webcasters have invested in developing software applications and databases in order to be

able to deliver their services to a large audience.⁴⁶ Webcasters also continue to spend significant amounts of money on ongoing operational costs, including bandwidth and licensing fees.⁴⁷ The webcasters are responsible for all the costs associated with playing music over the Internet. The owners of the sound recording rights have, in many cases, already recovered their costs through the sale of albums. The licensees are incurring costs relative to the revenue that they are collecting that are far greater than the costs borne by the record companies, relative to their revenues.

The licensees face significant risk of overall business failure. In fact, the number of webcasters has decreased significantly after the fee decision from the previous CARP.⁴⁸ One of the factors that contributed to this decline was that the rates set in 2001 were too high for many webcasters and they had to stop business operations. Additionally, the webcasters in this proceeding have indicated that they are now limiting the amount of time that listeners can use their non-subscription radio services.⁴⁹ The webcasters have considered discontinuing their non-subscription services altogether because

⁴⁶Testimony of Robert D. Roback, In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No 2000-9 CARP DTRA1&2, October 4, 2001, ¶28.

⁴⁷ Testimony of Fred McIntyre, In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No 2000-9 CARP DTRA1&2, April 11, 2001, ¶13. See Lam Testimony.

⁴⁸ It is worth noting that after the rates were set under the previous CARP ruling there was a decrease in the total number of Internet radio stations. From 2001 to 2002, the number of stations declined by over 30%. See "BRS Media's Web-Radio reports a steep decline in the number of stations webcasting," BRS Media, Inc., press release, September 12, 2002.

⁴⁹ See Roback Testimony, Winston Testimony, and Lam Testimony.

of the significant costs associated with this line of business.⁵⁰ In contrast, the record companies face risks in the creation and promotion of any single record, but they can spread these risks over their portfolio of recordings. Even at the rates requested by the RIAA, webcaster royalties will be a trivial fraction of record company revenues, so the level of such rates cannot conceivably have more than a trivial impact on the investment recovery of the record companies.

Legal right is more limited: The legal rights granted by Section 114(f)(2)(B) are restricted by the requirements of the statute, whereas the musical performance licenses contain few, if any, such restrictions. The rights conveyed under Section 114 bear certain specific limitations that do not apply to the musical work performance rights whose value has been calculated above.⁵¹ From an economic perspective, a legal right that is restricted in various ways is likely to be less valuable, all else equal, than one that is not.

Conclusion: This qualitative evidence points to the fact that the fee for the sound recording should be less than for the musical work. Hence, the proposal to base the fee in this proceeding on the corresponding rates for musical works is conservative from the perspective of the licensees. This means that the upper end of the range of observed musical works royalties

⁵⁰ See Roback Testimony, Winston Testimony, and Lam Testimony.

⁵¹ 17 U.S.C. § 114(d)(2)(C).

described above are not, in fact, likely to correspond to reasonable rates for the sound recording royalty. In order to establish reasonable royalties in this proceeding, the CRB should set sound recording royalty rates towards the middle or lower end of the observed range of musical work performance royalties for webcasters.

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Dean of Arts and Sciences, 2003 - present
Fred C. Hecht Professor in Economics, 2003 - present
Chair, Department of Economics, 2000 - 2002
Professor of Economics, 1999 - 2003
Associate Professor of Economics, 1994 - 1999
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Member, University Advisory Council, 2001 - present

Harvard University, Faculty of Arts and Sciences, Cambridge, MA

Associate Professor of Economics, 1989 - 1994
Assistant Professor of Economics, 1985 - 1989
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President's Council of Economic Advisers, Washington, DC
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EDUCATION

Harvard University, Cambridge, MA

Ph.D. in Economics, 1985

Dissertation: "Quantifying the Effects of Technological Opportunity and Research Spillovers in Industrial Innovation"

Massachusetts Institute of Technology, Cambridge, MA

S.M. in Technology and Policy, 1978

Thesis: "Regulating Chemicals: Product and Process Technology as a Determinant of the Compliance Response"

S.B. in Chemistry, 1976

arbitration proceeding involving the valuation of the right of public performance of digital sound recordings and ephemeral recordings, April 11, 2001; Oral Testimony, August 27-28, 2001; Written Rebuttal Testimony, October 4, 2001; Oral Rebuttal Testimony, October 19-20, 2001.

The Burlington Northern and Santa Fe Railway Company (Steptoe & Johnson, Washington, DC)
Before the American Arbitration Association, Tucson Electric Power Company, Claimant, v. Burlington Northern and Santa Fe Railway Company, Respondent. Direct testimony in an arbitration proceeding concerning a coal transportation contract, January 26, 2001; Deposition, February 9, 2001.

Cheminova A/S (Beveridge & Diamond, Washington, DC)
Before the American Arbitration Association, In The Matter of Arbitration Between Cheminova A/S, Claimant and Griffin LLC, Respondent, Docket No. 23 171 00020 99. Direct Oral Testimony in a data compensation case concerning a pesticide, December 7, 2000; Oral Rebuttal Testimony, December 9, 2000.

Music Choice (Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, Washington, DC)
In the United States District Court, Southern District of New York, United States of America against Broadcast Music, Inc., et ano., In the Matter of the Application of Music Choice, et al., Applicants, for the Determination of Reasonable License Fees. Affidavit, July 28, 2000; Expert Report, January 26, 2001; Supplemental Expert Report, March 9, 2001; Deposition, March 28, 2001; Affidavit, April 9, 2001; Oral Testimony, May 29, 2001.

Wilson-Cook Medical Incorporated (Brinks Hofer Gilson & Lione, Chicago)
In the United States District Court for the District of Massachusetts, Boston Scientific Corporation and SCIMED Life Systems, Inc., v. Wilson-Cook Medical Incorporated. Expert Report analyzing irreparable harm related to preliminary injunction in a patent infringement case, July 26, 2000; Deposition, July 27, 2000; Supplemental Expert Report, September 15, 2000.

Owens-Corning (Forman, Perry, Watkins, Krutz & Tardy, Jackson, MS)
In the Circuit Court of Jefferson County, Mississippi, Ezell Thomas, et al. (as to all defendants) and Owens-Corning (as to tobacco defendants only) versus R.J. Reynolds Tobacco Company, et al., and Amchem Products, Inc., et al. Expert Report prepared on behalf of Owens Corning in tobacco litigation, June 14, 2000; Deposition, September 13, 2000.

Ellis Simon, et al. (Brown, Rudnick, Freed & Gesmer, Boston)
In the United States District Court, Eastern District of New York, Ellis Simon, et al., v. Philip Morris Incorporated, et al., CV-99-1988, First Amended Class Action Complaint. Testimony on behalf of the plaintiffs in tobacco litigation; Expert Disclosure Statement, December 20, 1999; Deposition, February 28, 2000; Affidavit, April 13, 2000.

Vastar Resources, Inc.

Before the United States of America, Department of the Interior, Minerals Management Service, Further Supplementary Proposed Rule for Establishing Oil Value for Royalty Due on Federal Leases, Affidavit, January 31, 2000. Before the United States of America, Department of the Interior, Minerals Management Service, Vastar Resources, Inc.'s Request for a Binding Value Determination on Transportation Allowances, Affidavit April 4, 2000. Testimony on behalf of Vastar Resources, Inc., on issues related to the appropriateness and reasonableness of various methodologies that may be employed for the purpose of determining transportation allowances to be used for royalty payments from federal leases.

Pharmaceutical Research and Manufacturers of America

Prepared research report entitled "Consequences of Pharmaceutical Price Controls on Innovation" (with Catherine Moore), May 1999.

PacifiCorp (Stoel Rives, Portland, OR)

Before the Public Utility Commission of Oregon, UE 102, In the Matter of the Application of Portland General Electric Company for Approval of the Customer Choice Plan. Testimony on behalf of PacifiCorp regarding the company's eligibility to participate in an auction of generation assets, April 26, 1999.

Turner Broadcasting System, Inc., et al. (Weil, Gotshal & Manges, New York)

In the United States District Court, Southern District of New York, United States of America against American Society of Composers, Authors, and Publishers, In the Matter of the Application of Turner Broadcasting System, Inc., et al., Applicants, For the Determination of Reasonable License Fees, CIV. NO. 13-95 (WCC), Expert Report prepared on behalf of the applicants in litigation about music licensing fees, April 16, 1999; Deposition, July 26-27, 1999; Rebuttal Expert Report, December 16, 1999; Deposition, March 3, 2000.

The American Chemical Society

Developed and evaluated a number of approaches to pricing the web editions of ACS's publications. Modeled the performance of the various pricing plans to assess their ability to protect ACS's publications revenue as web editions replace paper. (1999)

Copyright Clearance Center, Inc. (Weil, Gotshal & Manges, New York, NY)

Primary consultant on statistical and economic matters since 1985; designed and implemented CCC's initial statistical methodology for pricing corporate photocopy licenses; recently assisted the Rightsholders Committee of the Board of Directors in designing a new market-based approach to valuation of copyright licenses and distribution of the resulting royalties. (ongoing)

Procter & Gamble, Inc. (Torys, Toronto)

In the Matter Between Unilever PLC. and Lever Brothers Limited, Plaintiffs, and Procter & Gamble, Inc., and the Procter & Gamble Company, Defendants, Court File No. T-2534-85,

Expert Report prepared on behalf of the defendants in patent dispute, January 11, 1999; Reply Report, January 29, 1999; Oral Testimony, December 6-7, 1999.

Ironworkers Local Union No. 17 Insurance Fund and its Trustees (Milberg, Weiss, Bershad, Hynes & Lerach, San Diego)

Ironworkers Local Union No. 17 Insurance Fund and its Trustees, et al., vs. Philip Morris, Inc., et al. (Ohio), Expert Report prepared on behalf of the plaintiffs in tobacco litigation, November 6, 1998; Supplemental Report, December 17, 1998; Deposition, January 11 and 21, 1999; Oral Testimony, February 23, 1999.

State of Wisconsin (Habush, Habush, Davis & Rottier, Milwaukee)

The State of Wisconsin v. Philip Morris, et al. Prepared Expert Witness Report on behalf of the plaintiffs in tobacco litigation, November 1, 1998.

Trans-Alaska Pipeline (Steptoe & Johnson, Washington, DC)

In the Matter of the Correct Calculation and Use of Acceptable Input Data to Calculate the 1997, 1998, 1999, 2000 and 2001 Tariff Rates for the Intrastate Transportation of Petroleum over the Trans Alaska Pipeline System Filed by Amerada Hess Pipeline Corporation; Arco Transportation Alaska, Inc.; BP Pipelines (Alaska) Inc.; Exxon Pipeline Company; Mobil Alaska Pipeline Company; Phillips Alaska Pipeline Corporation; Unocal Pipeline Company; Phillips Transportation Alaska, Inc.; and Williams Alaska Pipeline Company, LLC, and the Protest by Tesoro Alaska Petroleum Company of the 1997 and 1999 Tariff Rates, Before the Regulatory Commission of Alaska, Docket No. P-97-4. Prepared Direct Testimony evaluating whether the TAPS Intrastate Settlement and the ratemaking methodology it established produce tariff rates that are just and reasonable, October 8, 1998; Second Prepared Direct Testimony, July 12, 2000; Prepared Rebuttal Testimony, February 26, 2001; Oral Testimony, April 10-13, 2001.

Commonwealth of Massachusetts (Brown, Rudnick, Freed & Gesmer, Boston)

The Commonwealth of Massachusetts vs. Philip Morris Incorporated, et al., Civil Action Number 95-7378. Prepared Expert Disclosure Report on behalf of the plaintiffs in tobacco litigation, June 16, 1998; Affidavit in Opposition to Defendants' Motions for Summary Judgement, October 30, 1998.

CBS (Weil, Gotshal & Manges, New York)

CBS Inc. v. American Society of Composers, Authors & Publishers, New York State Supreme Court, New York County. Prepared Expert Report regarding timing of payments under ASCAP agreements, August 11, 1997; Deposition, June 12, 1998; Addendum to Prepared Expert Report, December 1, 1998; Supplemental Deposition, January 28, 1999.

Public Broadcasting System, National Public Radio, and the Corporation for Public Broadcasting (Weil, Gotshal & Manges, New York)

Prepared testimony regarding royalties for copyrighted musical compositions, *In the Matter of the Rates for Noncommercial Educational Broadcasting Compulsory License, Before the*

Copyright Arbitration Royalty Panels, Docket No. 96-6, CARP NCBRA, 1997. Written Testimony, April 1, 1998; Oral Testimony, April 1-2, 1998; Rebuttal Testimony, April 15, 1998; Oral Rebuttal Testimony, May 7, 1998.

State of Minnesota (Robins, Kaplan, Miller & Ciresi, Minneapolis)

The State of Minnesota and Blue Cross and Blue Shield of Minnesota vs. Philip Morris Incorporated, et al., Court File No. C1-94-8565. Prepared Expert Witness Report on behalf of the plaintiffs in antitrust litigation involving allegations of collusive conspiracy, May 29, 1997; Deposition, June 26-27, 1997; Oral Trial Testimony, March 18-23, 1998.

PacifiCorp (Stoel Rives, Portland, OR)

PacifiCorp, Electric Restructuring Transition Plan, Before the Montana Public Service Commission, Docket No. D97.7.91. Prepared Prefiled Rebuttal Testimony evaluating testimony regarding market power in the generation of electricity in Montana, February 24, 1998; Prefiled Surrebuttal Testimony, July 21, 1998.

PacifiCorp (Stoel Rives, Salt Lake City)

United States District Court for the District of Idaho, Snake River Valley Electric Association v. PacifiCorp, Case No. CV 96-0308-E-BLW. Testimony analyzing allegations of anticompetitive behavior and evaluating market power. Expert Witness Statement, October 17, 1997; Affidavit, February 27, 1998; Expert Report, January 22, 2002; Supplement to the Expert Report, April 8, 2002; Revised Supplement to the Expert Report, August 15, 2002; Affidavit, September 18, 2002; Oral Testimony, September 20, 2002, October 15, 2002.

Trans-Alaska Pipeline (Steptoe & Johnson, Washington, DC)

Prepared Affidavit and Rebuttal Affidavit evaluating the competitive impact of the Amended and Restated Capacity Settlement Agreement, Exxon Pipeline Co., et al., Application of TAPS Carriers for Approval of Amended and Restated Capacity Settlement Agreement, Before the Federal Energy Regulatory Commission, Docket No. OR96-1-000, et al. (1997)

The Burlington Northern and Santa Fe Railway Company (Steptoe & Johnson, Washington, DC)

Prepared Verified Statement regarding market power in transporting coal, In the Matter of Western Fuels Service Corporation v. The Burlington Northern and Santa Fe Railway Company, Before the Surface Transportation Board, STB Docket No. 41987. (1997)

PacifiCorp (Stoel Rives, Portland, OR)

Assisted in FTC pre-merger Hart-Scott-Rodino review; prepared Economic Analysis of Alleged Vertical Market Power Consequences of Merger of PacifiCorp and Peabody Coal. (1997)

Subaru of New England, Inc. (Todd & Weld, Boston)

Subaru of New England, Inc., vs. Subaru of Wakefield, Inc., Civil Action No. 96-01475-A, Commonwealth of Massachusetts, Norfolk County, Superior Court Department. Prepared Affidavit regarding appropriate methodology for assessing competitive impact of dealer relocation, November 20, 1996.

Public Service Company of New Hampshire

Direct testimony before the State of New Hampshire Public Utilities Commission, Docket No. DR 96-150, Electric Industry Restructuring, with Joseph P. Kalt, October 18, 1996.

Pro Se Testimony

United States of America before the Federal Energy Regulatory Commission "Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, Regulation of Negotiated Transportation Services of Natural Gas Pipelines," Docket No. RM-96-7-000. Comments of Adam B. Jaffe and Joseph P. Kalt, May 30, 1996.

Massachusetts Technology Collaborative

Prepared a study assessing the effects of reductions in federally funded R&D on the Massachusetts economy. (1995-96)

Federal Trade Commission

Asked by Commission staff to prepare testimony for Hart-Scott-Rodino preliminary injunction hearing regarding anticompetitive impact of a proposed acquisition. (1995)

GAF Corporation, et al. (Hannoch Weisman, Roseland, NJ)

Joseph Rossi, et al., vs. Standard Roofing, et al., Civil Action No. 92-5377, United States District Court, District of New Jersey. Prepared Expert Witness Report on behalf of six defendants in antitrust litigation involving conspiracy and monopolization claims. (1995)

Connecticut Light and Power Company

Before the Connecticut Department of Public Utility Control, Investigation into Restructuring of the Electric Industry, Docket No. 94-12-13. Submitted Written and Oral Hearing Testimony. (1995)

New England X-Ray & Electronics Inc. (Kushner & Sanders, Wellesley, MA)

New England X-Ray & Electronics Inc. vs. Robert T. Kennedy, Inc., et al., Commonwealth of Massachusetts, Number 88-5532. Presented damages study and jury trial testimony regarding breach of contract. (1990-95)

Florida Gas Transmission Company

Before the Federal Energy Regulatory Commission, Docket No. RP95-103-000, Written Testimony supporting FGT's proposed flexible service offerings, inflation-indexed rate, and removal of regulatory constraints on the secondary market for pipeline capacity. (1995)

Burlington Northern Railroad Company (Steptoe & Johnson, Washington, DC)

Southwestern Electric Power Company, Plaintiff, vs. Burlington Northern Railroad Company, Defendant, in the 102nd Judicial District Court of Bowie County, Texas, No. D-102-CV-91-720. Presented Oral Trial Testimony before a state court jury regarding the pricing provisions in two long-term coal transportation agreements, in defense against a claim by the shipper of

overcharges resulting from the contract rates failing to reflect the railroads' productivity improvements. (1994)

Houston Lighting & Power Company

Before the Texas Public Utilities Commission, Docket No. 12065, Written Testimony regarding appropriate regulatory policy changes dictated by emerging competition in electricity markets. (1994)

Boston Ventures Management (Boston)

Prepared a report for a venture capital firm on the adverse consequences on investment of the re-regulation of cable TV. (1994)

Kern River Gas Transmission Company (Salt Lake City)

Before the Public Service Commission of Utah, Application of Mountain Fuel Supply Company for Approval of Modifications to its Tariff to Implement a Firm Transportation Rate, Docket No. 94-057-02. Prepared Prefiled Direct and Rebuttal Testimony, as well as Oral Testimony, before the Public Service Commission of Utah regarding the appropriateness of a firm gas distribution tariff including within it costs of upstream pipeline transportation. (1994)

Burlington Northern Railroad Company (Stephoe & Johnson, Washington, DC)

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Arco Pipe Line Company (Stephoe & Johnson, Washington, DC)

Prepared written *Comments in Response to Notice of Inquiry, Market-Based Ratemaking for Oil Pipelines, U.S. Federal Energy Regulatory Commission, Docket No. RM94-1-000. (1994)*

Kern River Gas Transmission Company (Wright and Talisman, Washington, DC)

Before the Federal Energy Regulatory Commission In the Matter of Kern River Gas Transmission Company, Docket No. RP92-226-000. Delivered Written and Oral Testimony regarding rate design for pipelines built under optional certificates. (1993)

ISK Biotech Corp. (Beveridge and Diamond, Washington, DC)

In the Matter of the Arbitration between ISK Biotech Corporation and Veterans Chemicals, Prepared Testimony regarding allocation rules and competitive impacts in an arbitration proceeding regarding data compensation under the Federal Insecticide, Fungicide and Rodenticide Act. (1993)

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Enron Gas Services Corp.

Co-authored study analyzing appropriate Public Utility Commission policy towards utility procurement of natural gas and emissions allowances in developing competitive markets. (1993)

New York Power Authority

Prepared analysis and delivered Public Hearing Testimony before the Board of Trustees regarding the economic consequences of below-market pricing for electricity. (1993)

Coalition of Non-Utility Generators

Co-authored study analyzing the effect of power from non-utility generators on electricity prices in New England. (1993)

U.S. Department of Commerce, Economics and Statistics Administration

Co-authored study analyzing the effect of U.S. environmental regulations on U.S. competitiveness. (1993)

International Energy Group

Before the Federal Energy Regulatory Commission, Docket No. PL91-1-000, Prepared Written Testimony regarding electricity transmission access policy. (June 1991)

El Paso Natural Gas Co. (Andrews & Kurth, Washington, DC)

Before the Federal Energy Regulatory Commission, Docket No. CP88-434-000, Prepared Written Testimony analyzing the extent of competition faced by El Paso as a seller of natural gas. (1989)

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OTHER PROFESSIONAL ACTIVITIES

Guest Associate Editor, Management Science Special Issue: "Managing Knowledge in Organization," 2001

Co-organizer, National Bureau of Economic Research Innovation Policy and the Economy Group, 1999-present

Member, National Academy of Engineering Committee on the Impact of Academic Research on Industrial Performance, 1998-2001

Lead author, Third Assessment Report, Intergovernmental Panel on Climate Change, 1998-2001

Associate Editor, *Rand Journal of Economics*, 1997-2003

Member, Economics Roundtable, Advanced Technology Program, U.S. National Institute of Standards and Technology, 1995-present

Member, Board of Editors, *Journal of Industrial Economics*, 1995-2003

Member, Board of Editors, *American Economic Review*, 1995-2000

Co-organizer of the National Bureau of Economic Research Science and Technology Policy Research Workshop, 1995-1998

Project Coordinator, National Bureau of Economic Research Project on Industrial Technology and Productivity, 1994-1999

Member, Stanford Energy Modeling Forum, Working Group on Competitive Electricity Markets (EMF 15)

Member, Economic Impact Committee, Association of University Technology Managers, 1994-1995

Contributing Author, Working Group III (socioeconomics) of the Intergovernmental Panel on Climate Change (IPCC), 1993-1994

Member, Stanford Energy Modeling Forum, Working Group on Energy Conservation (EMF 13), 1992-94

Referee/reviewer for *American Economic Review*, *Journal of Applied Econometrics*, *Econometrica*, *Economic Inquiry*, *Economic Journal*, *Economics of Innovation and New Technology*, *Journal of Economics Organization and Management*, *Journal of Environmental Economics and Management*, *Journal of Health Economics*, *Journal of Industrial Economics*, *Journal of Law and Economics*, *Journal of Political Economy*, *Quarterly Journal of Economics*, *Rand Journal of Economics*, *Research Policy*, *Review of Economics and Statistics*, *Science*, and MIT Press.

TEACHING EXPERIENCE

Introductory Economics (undergraduate), Microeconomic Theory (Ph.D.), Law and Economics (undergraduate), Environmental and Natural Resource Economics (undergraduate), Industrial Organization (Ph.D. and undergraduate), Government Regulation and Antitrust Policy (Ph.D. and undergraduate), R&D, Innovation and Productivity Growth (undergraduate), Applied Welfare Economics (John F. Kennedy School of Government)

Foundation for American Communications, economics education for journalists, "The Role of Government in the Economy" (1996)

Designed and implemented a two-year Policy Analysis Lecture Series for the U.S. Army Corps of Engineers, New England Division, Regulatory Branch (1988-89)

HONORS AND AWARDS

Research Associate, 1994-present, and Faculty Research Fellow, 1985-1994, National Bureau of Economic Research

Principal Investigator, National Science Foundation Grant, "A Protocol for Empirical Measurement of the Impact of Public Research Funding," 2000-2001.

Co-Principal Investigator, U.S. Department of Energy Grant, "The Effects of Government Policies on the Invention, Innovation, and Diffusion of Energy-Efficient Technologies," 1998-2001.

Co-Principal Investigator, U.S. Department of Energy Research Grant, "Energy-Efficiency Innovation and the Economic and Regulatory Environment," 1995-1998

Project Director, National Science Foundation Research Grant, "Using Patent Citation Data to Trace Knowledge Flows," 1994-97

Project Director, National Science Foundation Research Grant, "The Sources and Effects of Knowledge Spillovers," 1994-97

Invited Speaker, National Academy of Sciences Symposium: *Science and the Economy*, April 1994

Co-Principal Investigator, National Science Foundation Research Grant, "Getting Down to Basics: Using University and Corporate Patents to Identify Basic Inventions and Trace Their Diffusion," 1991-92

Co-Principal Investigator, Environmental Protection Agency Exploratory Research Grant, "Evaluating the Relative Effectiveness of Economic Incentives and Direct Regulation for Environmental Protection: Impacts on the Diffusion of Technology," 1991-93

Alfred P. Sloan Dissertation Fellowship, Harvard, 1984-85

Alfred P. Sloan Research Fellowship, MIT, 1976-77

Phi Beta Kappa, 1976

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1 I Qualifications

2 My name is John R. Woodbury and I am a vice president at CRA International, an
3 economics and business consulting firm, where I have been employed since 1992. I
4 received my B.A. from the College of the Holy Cross (*summa cum laude*) and my M.A.
5 and Ph.D. in Economics from Washington University (St. Louis). Among other
6 positions, I have served as a Brookings Economics Policy Fellow at the Civil Aeronautics
7 Board, as a Senior Economist on the Network Inquiry Special Staff of the Federal
8 Communications Commission, as Vice President for Research and Policy Analysis at the
9 National Cable Television Association (now the National Cable and Telecommunications
10 Association), and as Associate Director for Special Projects in the Bureau of Economics
11 of the Federal Trade Commission.

12 I have been involved in numerous matters regarding intellectual property. During
13 my tenure at the National Cable Television Association, I served as staff liaison to the
14 Association's Copyright Committee, charged with overseeing economic initiatives and
15 proceedings before the Copyright Royalty Tribunal. In that capacity, I was responsible
16 for analyzing the empirical basis for the then 3.74% distant signal compulsory license fee
17 and for estimating the appropriate inflation adjustment for distant signal payments made
18 by cable operators and for presenting those findings to various claimant groups. In
19 addition, I was part of a small negotiating team that included the Association's President
20 and the Chairman of its Executive Committee whose purpose was to determine whether
21 an agreement could be reached with the Motion Picture Association of America
22 ("MPAA") on simplifying the copyright royalty payment scheme.

23 I have testified a number of times before the Copyright Royalty Tribunal and
24 before the Copyright Arbitration Royalty Panel ("CARP") as a rebuttal witness on behalf
25 of MPAA addressing issues dealing with the distribution of distant signal license
26 payments. I provided both direct and rebuttal testimony on behalf of Music Choice
27 (formerly known as DCR) and DMX in the first CARP under the Digital Performance
28 Right in Sound Recordings Act of 1995. I (along with my colleague, Jane Murdoch) also
29 provided written direct and rebuttal testimony on behalf of the Corporation for Public
30 Broadcasting and National Public Radio addressing reasonable license fees for the public

1 performance of sound recordings by public radio entities on their Internet sites. Most
2 recently, I provided both direct and rebuttal testimony on behalf of Music Choice
3 regarding the appropriate rate to be paid to BMI for performances of musical
4 compositions. My *curriculum vitae* is attached as Exhibit 1 to this report.

5 II Overview

6 I have been asked by Sirius and XM to estimate a reasonable rate to be paid for
7 the sound recording performance right ("SRPR") when these services transmit
8 performances of sound recordings to subscribers of satellite radio. I understand that in
9 this regard, Sirius and XM satisfy the definition of pre-existing services in the Digital
10 Performance Right in Sound Recordings Act of 1995 ("Act").¹ From that same Act, I
11 understand that the Copyright Royalty Board ("CRB") must choose a rate that satisfies
12 four statutory objectives ("801(b) objectives"):

- 13 (A) To maximize the availability of creative works to the public;
- 14 (B) To afford the copyright owner a fair return for his creative work and the
15 copyright user a fair income under existing economic conditions;
- 16 (C) To reflect the relative roles of the copyright owner and the copyright user in
17 the product made available to the public with respect to relative creative
18 contribution, technological contribution, capital investment, cost, risk, and
19 contribution to the opening of new markets for creative expression and media
20 for their communication;
- 21 (D) To minimize any disruptive impact on the structure of the industries involved
22 and on generally prevailing industry practices.²

23 As a general matter, there are a number of avenues available to an economist (and
24 the CRB) for identifying an appropriate price for a good or service. In some cases,
25 factors that identify the demand for and the supply of a good or service are readily
26 available and can be used to estimate a market-clearing price, i.e., a price at which the
27 quantity demanded and supplied are equated. Numerous transactions across buyers and

¹ Pub. L. No. 104-39, 109 Stat. 336 (1995).

² 17 U.S.C. 801(b)(1).

1 sellers or across time enable the use of this approach. Another common approach to
2 identifying a price is to search for a comparable product whose price can be used as a
3 benchmark. For example, suppose a policy maker was concerned that a price of a good
4 or service reflected market or monopoly power on the part of the seller. An economist
5 could look to the sale of similar goods or services being sold but under more competitive
6 conditions and compare that price to the price in the market of concern. While these
7 comparisons are not perfect, economists are usually able to account for the relevant
8 differences in the good or service in question to permit an “apples to apples” comparison.

9 In conducting previous analyses of appropriate royalties, I have sought
10 benchmark rates associated with services that are generally analogous to the services and
11 the rights for which the rate is being determined. In these kinds of rate-setting
12 proceedings, the identification of useful benchmarks provides a sound starting point for
13 determining the appropriate payment between the parties for the sound recording
14 performance right in accordance with section 801(b) of the Act. I, like other economists,
15 would regard rates negotiated at arms-length as a promising start to developing the rate in
16 question. Similarly, a useful start would be rates that have been determined by a third
17 party, such as the CRB and the courts.

18 The benchmark approach to rate-setting for performance rights is also a familiar
19 one in these kinds of proceedings. For example, the Librarian of Congress, in the 1998
20 rate setting proceeding concerning the sound recording statutory license for non-exempt
21 digital transmission services, quoted a 1980 proceeding for coin-operated phonorecord
22 players, in which the Tribunal wrote, “While acknowledging that our rate cannot be
23 directly linked to marketplace parallels, we find that they serve as an appropriate
24 benchmark to be weighed together with the entire record and the statutory criteria.”³
25 However, courts recognize that the benchmark may need to be adjusted based on
26 contrasts between the benchmark and the target settings. In its recent Music Choice—
27 BMI decision, the Second Circuit, quoting an earlier decision, stated, “In choosing a
28 benchmark and determining how it should be adjusted, a rate court must determine ‘the

³ Library of Congress, Copyright Office 37 CFR Part 260, Docket No. 96-5 CARP DSTRA, Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, Federal Register, Volume 63, No 89, May 8, 1998 (“Librarian Decision 1998”) at 25404, quoting 1980 Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players, 46 FR 884, 888 (1981).

1 degree of comparability of the negotiating parties to the parties contending in the rate
2 proceeding, the comparability of the rights in question, and the similarity of the economic
3 circumstances affecting the earlier negotiators and the current litigants.”⁴

4 I have concluded that one possible benchmark is the rate paid by the pre-existing
5 subscription services (“PSS”)—Music Choice, DMX, and Muzak—for the SRPR after
6 suitable adjustments and after accounting for the 801(b) factors as they apply to XM and
7 Sirius. As discussed below, this rate was originally established in the 1998 proceeding at
8 6.5% and then renegotiated in 2003 to 7.25%.

9 Upon consideration of the nature of the service provided by the PSS on one hand,
10 and XM and Sirius on the other, I have identified a number of substantive differences
11 between the services that result in adjustments to the 7.25% rate. One difference stems
12 from the end-to-end functionality of XM and Sirius, another from the mobility of the XM
13 and Sirius services, and still another from the suite of music and non-music channels
14 offered by the services. Music Choice, for example, offers a suite of commercial-free
15 music channels sold to third-party providers, who in turn deliver the service to consumers
16 as part of a bundle of services for in-home listening. By contrast, XM and Sirius provide
17 both music and non-music channels in a complete, end-to-end package for mobile,
18 nationwide listening (including in-vehicle and in-home listening) directly to subscribers.
19 The importance of these kinds of differences in the services was acknowledged in the
20 earlier appellate ruling in the Music Choice—BMI litigation cited above: “If it were
21 demonstrated that retail purchasers were motivated to pay more because of advantages
22 that resulted from a particular mode of delivery, such as better quality, better accessibility
23 or whatever, this might justify a conclusion that retail price of the service purchased by
24 the customer exceeded the fair market value of the music.”⁵ My analysis incorporates
25 this insight.

26 A second benchmark is the payments made by XM and Sirius to ASCAP, BMI,
27 and SESAC for the musical works rights that underlie the public performance of a sound

⁴ United States v. Broad. Music, Inc., 04-3444-CV, 2d Cir., Oct. 6, 2005 at p. 8, quoting United States v. ASCAP (Application of Buffalo Broad. Co., Inc.), No. 13-95 (WCC), 1993 U.S. Dist. LEXIS 2566, at *61 (S.D.N.Y. Mar. 1, 1993).

⁵ United States v. Broad. Music, Inc., 316 F.3d 189 (2d Cir. 2003) at 196 n.3.

1 recording, the proceeds of which are distributed to music publishers and composers. The
2 acquisition of both the musical works rights and the SRPR are necessary for a user to
3 provide a public performance of the sound recording.

4 The analyses of these two benchmarks lead to rate estimates ranging from 0.88%
5 to 2.35% of the gross revenues of XM and Sirius.

6 I have also evaluated how accounting for the 801(b) factors would affect where in
7 this range the rate should be set. Among other conclusions, it is my opinion that XM and
8 Sirius generally outperform the PSS with respect to enhancing the availability of music,
9 have made more significant creative contributions (e.g., in the creation of enhancements
10 to the music channels as well as original non-music programming), technological
11 contributions (e.g., the development of a mobile, end-to-end satellite system), and
12 investments. They have incurred greater costs and risk than the PSS, and they have done
13 (and will continue to do) more to open new markets in providing their services, relative to
14 the PSS. I make similar observations with respect to XM and Sirius relative to the record
15 labels. As a result, I conclude that a fair rate under the Act is one that would be at the
16 lower end of the range.

17 In forming my opinions, I have reviewed a variety of materials. In particular, I
18 have reviewed XM's and Sirius' financial statements and the results of market surveys
19 conducted by XM and Sirius, as well as various analyst reports. I have interviewed
20 business people at XM and Sirius to better understand the nature of their business. At
21 XM, these executives include Eric Logan, Executive Vice President of Programming;
22 Mark Vendetti, Senior Vice President of Corporate Finance; John Kramer, Vice President
23 of Corporate Finance; Stephen Cook, Executive Vice President, Automotive (previously
24 Executive Vice President of Sales and Marketing); John Dealy, Senior Advisor to the
25 CEO; and Tony Masiello, Senior Vice President of Operations. At Sirius, these
26 executives include David Frear, Chief Financial Officer; Michelle McKinnon, Director of
27 Investor Relations; and Douglas Kaplan, Senior Vice President, Business Affairs and
28 Development, Entertainment and Sports. I have also reviewed previous decisions relating
29 to the determination of reasonable fees paid by Music Choice to BMI and to the
30 Recording Industry Association of America ("RIAA"), as well as my own expert reports
31 in these matters. In addition, I have reviewed publicly available information on the

1 promotional value of satellite radio to recording artists and record labels as well as
2 internal information provided by XM and Sirius. I have compiled a list of these materials
3 contained in Exhibit 2.

4 The analysis that I present in this report has been performed by me or under my
5 direction. As additional evidence becomes available prior to trial, I reserve the right to
6 refine my analysis.

7 In the next section, I provide a description of the XM and Sirius services. In
8 Section IV, I discuss the benchmark approach and introduce the potential benchmark
9 rates available for my analysis of the SRPR fee to be paid by XM and Sirius. In Section
10 V, I discuss the first potential benchmark, the SRPR rate paid by the PSS, and the
11 adjustments to this benchmark that are required to make the analogy appropriate. In
12 Sections VI to IX, I present the conceptual framework, the implementation of the various
13 adjustments, as well as a summary of the rate estimates based on the PSS rate. In Section
14 X, I discuss the second potential benchmark – the rates paid by XM and Sirius to the
15 Performance Rights Organizations (“PROs”). In Section XI, I address the 801(b) factors
16 as they apply to XM and Sirius. The final section summarizes my conclusions.

17 **III The XM and Sirius Services**

18 Sirius and XM compete with each other, as well as with terrestrial radio and other
19 ways of spending discretionary time, to attract and retain subscribers to their subscription
20 radio services. These services are designed primarily for listening in a car or other
21 vehicles and can also be used for in-home listening. Because they are satellite delivered,
22 each service is available throughout the United States, for a monthly subscription fee that
23 is currently \$12.95.⁶ Sirius’ service consists of nearly 130 digital channels, including 66
24 commercial-free music channels, 3 comedy channels, 2 kids’ channels, and 56 non-music
25 channels.⁷ Similarly, XM’s service consists of more than 170 digital channels, including

⁶ Both companies also offer subscription fee discounts for purchases of additional radios or commitments to annual or other longer-term subscriptions. XM Service & Subscription at http://www.xmradio.com/service_subscription/service_subscription.jsp?refsrc=hp_gs. Sirius Plans, at <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=Page&cid=1150907696769>.

⁷ Reported channel counts were compiled by CRA and are based upon a complete listing of Sirius’ channels, obtained from the Sirius website as of September 26, 2006.

1 69 commercial-free music channels, 4 comedy channels, 2 kids' channels, the 5 music
2 channels programmed by Clear Channel, and 93 non-music channels.⁸ (See Exhibits 3
3 and 4, which present the complete list of XM and Sirius channels, respectively.)

4 Channels that use commercially released sound recordings include the commercial-free
5 music, the comedy channels, and the kids channels; and, in the case of XM, they also
6 include the channels programmed by Clear Channel. In the analysis that follows, I refer
7 to "music channels" as all channels that use commercially released music. For Sirius,
8 this represents a total of 71 channels, and for XM, 80 channels.

9 The services that Sirius and XM provide require a license from the FCC, a
10 process that took 5 years from the start of the FCC license proceeding to the time the
11 licenses were awarded in 1997.⁹ Indeed, I understand that Sirius had begun efforts to
12 persuade the FCC to issue a license as early as 1990.

13 In order to provide an end-to-end mobile service with a national footprint, Sirius
14 and XM each undertook substantial infrastructure investments. For example, I
15 understand that each firm had to develop or assist in the development of a suitable audio
16 compression system to "fit" the channels into a single encrypted signal while maintaining
17 the audio quality of the service. XM and Sirius also had to develop their own uplink
18 systems that transmit the service signal to the satellite and (in this case) authorize the
19 receipt of the signal by a subscriber. These systems were not off-the-shelf systems.

20 In addition to developing a customized uplink to the satellite, Sirius and XM were
21 each responsible for building, launching, and tracking their own satellites. Each service
22 has developed its own satellite system to provide a service that would permit radios in
23 cars (and other moving vehicles) to receive a satellite signal within a nationwide
24 footprint. My understanding is that a signal by a conventional satellite would be too weak
25 to be received by anything but an earth station of substantial size, likely too large to fit on
26 the roof of a car. The satellites developed by the two services were designed to be

⁸ As with Sirius, reported channel counts were compiled by CRA and are based upon a complete listing of XM's channels, obtained from the XM website as of September 26, 2006. The five Clear Channel transmissions include commercials.

⁹ See FCC News Report No. IN 97-4, "FCC Announces Plan for Satellite DARS," at http://www.fcc.gov/Bureaus/International/News_Releases/1997/nrin7004.txt.

1 powerful enough to be received by a small antenna on a moving vehicle anywhere in the
2 country.

3 Sirius owns and operates three satellites—launched in 2000—in a highly inclined
4 elliptical orbit above North America, meaning that the Sirius satellites rise and set over
5 the United States.¹⁰ Once a satellite moves below the horizon, its transmission cannot be
6 received. Accordingly, two of Sirius' satellites are always above the country, beaming
7 their signal from that orbit. In addition, the Sirius satellites are positioned in such a way
8 that the signal travels to the earth at a steep angle, thus reducing most of the interference
9 from tall buildings, trees, and other obstacles. To handle the remaining reception
10 difficulties, Sirius has constructed a network of 140 terrestrial repeaters that receive the
11 Sirius signal and retransmit the signal to subscribers.¹¹

12 XM owns and operates three satellites, each covering the continental United
13 States from widely separated positions in geostationary orbit over the equator.^{12,13} Two
14 satellites were launched in March and May of 2001 (and are currently co-located in one
15 orbital slot due to faster than expected equipment degradation) and the third was
16 launched in February, 2005. One replacement satellite (XM-4) is scheduled to be
17 launched this year, and another new satellite (XM-5) will serve as a ground spare.¹⁴ XM
18 uses an extensive network of approximately 800 terrestrial repeaters located throughout
19 the continental United States.¹⁵

¹⁰ Sirius also maintains a fourth satellite on the ground, ready to be launched in the event that one of its three active satellites fails. See 2005 Form 10-K, Sirius Satellite Radio Inc, p. 7.

¹¹ 2005 Form 10-K, Sirius Satellite Radio Inc, p. 8.

¹² Telesat Canada monitors and controls the satellites for XM. Sea Launch provided launch services. XM Fast Facts, at http://www.xmradio.com/corporate_info/fast_facts.html; 2005 Form 10-K, XM Satellite Radio Holdings Inc., p. 28.

¹³ Like Sirius, one of XM's satellites broadcasts 4.7 seconds ahead of the other, providing a memory buffer. (I understand that the third XM satellite is a spare in the event that either one of its other two satellites fail.) "About Sirius," at <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=Page&cid=1018209032792>. Heltzel, Paul, "Tuning In to Satellite Radio," January 25, 2002, Technology Review, at http://www.technologyreview.com/read_article.aspx?id=12736&ch=infotech. I understand that a fourth XM satellite will be launched shortly; see 2005 Form 10-K, XM Satellite Radio Holdings Inc., p. 12.

¹⁴ See 2003 Form 10-K, XM Satellite Radio Holdings Inc., pp. 12, 14; 2005 Form 10-K, XM Satellite Radio Holdings Inc., p. 12; and Satellite Radio Outlook, Kagan Research, LLC, July 2005, p. 21.

¹⁵ 2005 Form 10-K, XM Satellite Radio Holdings Inc., p. 13.

1 My understanding is that the repeaters of both services were again not off-the-
2 shelf, but were designed to provide the subscriber with a seamless listening experience.

3 Because traditional AM/FM radios cannot receive satellite signals, XM and Sirius
4 had to develop their own radios, with customized chipsets that allow the requisite
5 functionality. I understand that XM's proprietary chipset consists of two custom
6 integrated circuits that process satellite and repeater signals and decode audio and data
7 streams, enabling channel tuning and providing for the display of information. I also
8 understand that Sirius has undertaken similar efforts. These radios receive and decrypt
9 the digital data signal from specially-designed satellite transponders and repeaters. In
10 addition to the encoded sound, these devices can also unscramble additional information
11 transmitted by the services—such as the song title, the artist, and the genre of music and
12 other information—for display on the radio. Finally, I understand that both companies
13 have developed algorithms to minimize signal interruption where the signal may be
14 weak.

15 XM and Sirius expend substantial resources in attracting and retaining
16 subscribers. Each service has third-party arrangements for the sale of radios. One
17 significant sales channel for both companies is the automotive original equipment
18 manufacturer ("OEM"). XM and Sirius have arrangements with numerous car
19 manufacturers for the installation of XM and Sirius radios in the OEM's vehicles. These
20 OEMs include GM, Toyota, Honda, and Nissan for XM, and they include Ford, Chrysler,
21 BMW, Audi/VW, and KIA for Sirius.¹⁶ Both services subsidize the cost of the radio, the
22 design of the space in the vehicle where the radio is located, its installation in the vehicle,
23 and the training of OEM salespeople with respect to the services. The OEMs also
24 generally receive a share of subscription revenues for all car buyers who activate a
25 regular subscription to the services after the free trial period. This revenue share provides
26 incentives to the OEMs to advertise the subscription radio service and, ultimately, to
27 increase sales of cars with preinstalled receivers.

¹⁶ 2005 Form 10-K, XM Satellite Radio Holdings Inc., p. 2; 2005 Form 10-K, Sirius Satellite Radio Inc, pp. 2-3.

1 In addition, XM and Sirius have third-party deals with a number of retailers, such
2 as Wal-Mart, Best Buy, and Target, for the sale of the radios and the monthly service.¹⁷
3 The services pay these retailers for shelf space, provide them with sales training, and
4 offer a commission on sales. The radios can also be purchased online directly from XM
5 and Sirius.

6 Of course, the cost of the radio can represent a significant deterrent to
7 subscription sales. To lower this cost to subscribers, Sirius and XM engage in a variety
8 of subsidies and revenue sharing arrangements. For example, XM subsidizes its radio
9 manufacturers on a per radio basis, in an effort to reduce the wholesale cost borne by
10 retailers and car manufacturers, and ultimately to place downward pressure on equipment
11 prices paid by subscribers. Sirius does the same with its manufacturers.

12 In addition, Sirius and XM have state-of-the-art broadcast studio facilities located
13 in New York City and Washington D.C., respectively, used for live performances and for
14 the production of original programs. The XM broadcast center covers 150,000 square
15 feet and includes some 80 programming and broadcast studios.¹⁸ XM's state-of-the-art
16 network storage and server infrastructure is capable of broadcasting more than two
17 million recorded tracks. Besides the main studio in Washington, XM has additional
18 broadcast studios in New York City, Chicago, and Nashville.¹⁹

19 Similarly, Sirius has state of the art, all digital studio facilities around the country,
20 including New York City, Houston, Memphis, Nashville, and Los Angeles.²⁰ These
21 studios allow Sirius to record and broadcast live performances as well as to produce
22 original programming for the various channels. It also has a network server infrastructure
23 comparable to that of XM. These are two of the largest broadcasting facilities in the
24 world.

25 Exhibit 5 presents a simplified illustration of how the XM and Sirius system
26 works. The programming is prepared at services' studio and production facilities and
27 then "uplinked" or transmitted by each service to its satellite system. The signal is then

¹⁷ 2005 Form 10-K, XM Satellite Radio Holdings Inc., pp. 5, 37; 2005 Form 10-K, Sirius Satellite Radio Inc, p. 5.

¹⁸ "XM Studios," at http://www.xmradio.com/how_it_works/xm_studios.html.

¹⁹ 2005 Form 10-K, XM Satellite Radio Holdings Inc., p. 10.

²⁰ 2005 Form 10-K, Sirius Satellite Radio Inc, p. 8.

1 beamed back down to earth for reception by a radio or to a repeater which then
2 retransmits the signal to the subscriber's radio.

3 **IV Identifying a Benchmark Rate**

4 The ideal benchmark rate would be a competitively-negotiated, arms-length rate
5 for a right perfectly analogous to the SRPR by a service that is perfectly analogous to XM
6 and Sirius and reflects the application of 801(b) factors. While perfect analogies are not
7 usually available, there nonetheless may be services and rates sufficiently comparable to
8 those being examined that they can provide useful benchmarks. With respect to a
9 generally analogous service, economists look to services that are similar to those whose
10 rates are at issue, making adjustments where appropriate to account for any significant
11 differences. With respect to an analogous rate, economists look to fees paid for rights
12 that are comparable to those at issue, making adjustments where appropriate to account
13 for any significant differences in the rights.

14 In subsequent sections of this report, I discuss two rates that can be used as
15 starting points to estimate a reasonable rate for XM and Sirius. One benchmark is the
16 current rate paid by the PSS for the SRPR. The advantage of this benchmark is that the
17 services are generally analogous and the rights in question are the same as those in this
18 proceeding, and the rate was recently re-negotiated in the shadow of the 801(b) factors, at
19 least as applicable to the PSS. Another benchmark is the collection of rates paid by XM
20 and Sirius for musical composition performance rights. The advantage of this benchmark
21 is that the services are those in this proceeding (and so perfectly analogous) and the rights
22 are for the use of inputs comparable to the SRPR.

23 While both benchmarks have their appeal, neither is perfectly analogous in all
24 respects. In the next sections, I describe the relevant differences and suggest
25 modifications to these candidate benchmark rates to account for the differences. I discuss
26 each benchmark in turn.

1 **V Appropriately Adjusted, the SRPR Rate Paid by the PSS**
2 **is a Useful Benchmark Rate**

3 a. *XM and Sirius offer services generally analogous to those offered by the*
4 *PSS*

5 Like XM and Sirius, the PSS provide a subscription music service for use by
6 consumers. They all offer digital quality sound, and most of their music channels are
7 commercial-free. The PSS, XM, and Sirius each offer a large number of musical genres
8 and a large number of music channels within each genre. Exhibit 6 presents the number
9 of music channels provided by each of XM, Sirius, and Music Choice (which I treat as a
10 typical PSS), by genre.²¹ XM and Sirius offer more music channels than does Music
11 Choice. XM has a total of 80 music channels, 69 of which are commercial-free.²² By
12 comparison, Sirius has 71 music channels, 66 of which are commercial-free, and Music
13 Choice has 58 music channels, all of which are commercial-free. I understand, however,
14 that the number of Music Choice channels received by most cable subscribers is much
15 lower than that. For example, I understand that the number of Music Choice channels
16 offered as part of Comcast cable packages ranges from 40 to 47.

17 The PSS are currently paying a SRPR rate of 7.25%, a rate that I understand was
18 based on an agreement between Music Choice and SoundExchange, the organization
19 representing the holders of the SRPR in this proceeding.²³ In particular, I understand that
20 in 2003, Music Choice agreed to pay SoundExchange 7% of its gross revenues in 2002
21 and 2003 and 7.25% in 2004 through 2007. I understand that this negotiated rate was the

²¹ To create this comparison of channels by genre, I assigned Sirius and XM channel groupings (as presented in Exhibits 3 and 4) to the Music Choice defined genres. In doing so, I relied upon channel descriptions available on the XM and Sirius websites.

²² Recall that I define “music channels” to include all channels that use commercially released sound recordings.

²³ I understand that a number of record labels have a significant ownership interest in Music Choice. I am assuming for purposes of this discussion that the financial interests of the other non-label owners of Music Choice will ensure that any negotiated rate between Music Choice and SoundExchange is one that is arms-length.

1 first rate change for a pre-existing service following the proceeding that established the
2 initial rate of 6.5% in 1998.²⁴

3 In addition to being an outcome of an agreement, a key advantage of the PSS
4 7.25% rate as a benchmark rate is that the Music Choice/SoundExchange negotiations
5 took place in the shadow of a rate-setting proceeding to which either of the parties could
6 have resorted in the event of a negotiation failure. Because any rate setting proceeding
7 would have been based upon the 801(b) statutory factors, the negotiated rate presumably
8 reflects those factors as well.

9 Still, for at least three reasons, the PSS rate needs to be tailored to the XM and
10 Sirius services before it can be applied to XM and Sirius. First, the PSS offer only music
11 audio services without any embellishment. In contrast, XM and Sirius offer substantial
12 non-music programming to their subscribers, including that on the music channels. As I
13 discuss in greater detail below, the services have made investments in acquiring exclusive
14 talent (such as Howard Stern and Oprah) for non-music channels. And on their music
15 channels, both services have hired programmers with substantial and acknowledged
16 expertise in particular musical genres. In addition, both services employ experienced on-
17 air talent for their music services, including experienced music programmers and well-
18 known artists.

19 Second, XM and Sirius provide an end-to-end service with a national footprint
20 directly to subscribers and incur all of the costs of providing the end-to-end service. As
21 noted above, these costs included the design, building, and launch of the satellite system
22 capable of providing a mobile service, the design and development of the radios, and all
23 of the marketing associated with attracting and retaining individual subscribers to the
24 service as well as the billing and collections costs, all required for a direct-to-the-
25 consumer business. By contrast, the PSS provide a service that it hands off to a cable
26 operator. The cable operator then incurs the costs of distributing the service to cable
27 subscribers, the costs of billing, and the costs of fee collection.

²⁴ See Library of Congress, Copyright Office 37 CFR Part 260, Docket No. 2001-1 CARP DSTR2, Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings by Preexisting Subscription Services, *Federal Register*, Volume 68, No 128, July 3, 2003 at 39840.

1 Third, the XM and Sirius services are not only end-to-end services, they are end-
2 to-end mobile services with a national footprint—the subscriber can listen to the services
3 in a vehicle, at home, or (depending on the radio) while walking about. The PSS services
4 are available only for in-home listening.

5 All of the above-referenced differences between XM/Sirius on the one hand and
6 the PSS on the other require adjustments to the 7.25% SRPR fee paid by the PSS before it
7 can be applied to the revenues of XM and Sirius.²⁵ In addition (but discussed separately
8 below), the application of the statutory factors in the XM and Sirius rate determination
9 may be different from that encompassed in the PSS rate.

10 b. *Use of the 7.25% PSS rate*

11 I understand that the SRPR rate paid by the PSS services will be determined as
12 part of this proceeding and the PSS may be recommending a downward adjustment to
13 that rate. Thus, my use of the 7.25% rate may be misplaced. In particular, the same
14 methodology adopted by the CARP and the Librarian in setting the prior 6.5% rate could
15 today yield a lower rate for the PSS.

16 The original PSS rate of 6.5% of gross revenues for the use of the SRPR by pre-
17 existing services appears to have been based on the DMX/Music Choice – ASCAP rate
18 that was being adjudicated at the time.²⁶ Recognizing that this benchmark rate itself was
19 being decided and that the ultimate ASCAP rate paid by DMX/Music Choice would not
20 be as low as the then interim rates, both the Librarian and the CARP based the SRPR rate
21 on “an upper limit on the value of the performance right for the musical compositions.”²⁷
22 The numerical range used by the CARP has been redacted from the public versions of the
23 Librarian’s and CARP’s decisions. However, based upon the discussion by the Librarian,
24 it is reasonable to assume (at least in principle) that the upper bound would reflect an
25 offer from ASCAP to the PSS.

²⁵ While my discussion focuses on modifying the PSS rate that will be applied to the Sirius and XM revenues, I could have equivalently modified the revenues of XM and Sirius to account for the described differences, and then applied the PSS rate to the adjusted XM and Sirius revenues.

²⁶ Librarian Decision 1998 at 25404, 25414.

²⁷ Librarian Decision 1998 at 25403.

1 In the Music Choice – BMI proceeding, which was taking place
 2 contemporaneously, BMI offered Music Choice a rate of 3.75%.²⁸ To the extent that this
 3 offer was similar to the offer made by ASCAP to Music Choice, the rate of 3.75% may
 4 reflect the “upper limit” of the Librarian’s and the CARP’s original range. I understand
 5 that ultimately, however, Music Choice and BMI reached agreement on a [[]] rate
 6 for past payments (and 2.5% for payments going forward). Had the CARP and the
 7 Librarian known of the ultimate [[]] rate, they would have likely started with a
 8 lower rate at the top end of the range and then adjusted that rate downwards upon
 9 applying the logic of the 801(b) factors.

10 To see this, if the upper bound in the original pre-existing PSS proceeding was
 11 based on a 3.75% rate and if SESAC payments amounted to [[]] the ASCAP and BMI
 12 payments, then the sum of PRO rates would be [[]] (i.e., $2 \times 3.75\% \times [[]]$).²⁹
 13 After accounting for the 801(b) factors, the actual rate was set at 6.5% by the Librarian.
 14 This suggests that the 801(b) factors had the effect of setting the SRPR rate [[]]
 15 below the upper bound. The subsequently negotiated PSS rate of 7.25% then represented
 16 an increase of 11.5% over the 6.5% rate.

17 However, I understand that today the now-finalized BMI rate is not 3.75% but
 18 [[]]. If the Librarian followed the same logic as in the original PSS proceeding, the
 19 upper bound for that rate would have been [[]] (i.e. $2 \times [[] \times [[]]$).
 20 Accounting for the effect of the 801(b) factors would have resulted in a rate of [[]]
 21 (i.e., [[]] times the $(100\% - [[]]$). The subsequent rate increase of 11.5%
 22 would have resulted in a current PSS rate of [[]], not 7.25%.

23 While my discussion of the PSS benchmark focuses on the 7.25% rate, I note
 24 what the implications would be if the [[]] rate were used instead. More generally,
 25 the methodology described below can be used to derive a rate for the XM and Sirius
 26 services even if the CRB were to determine a PSS rate different from the 7.25% rate or
 27 the [[]] rate. That derivation would be a calculation that simply replaces the
 28 [[]] rate with the CRB-determined rate, absent any other mitigating factors.

²⁸ United States v. Broad. Music, Inc., No. 64 Civ. 3787 (LLS), 2001 U.S. Dist. LEXIS 10368 (S.D.N.Y. July 23, 2001) at pp. 5-6.

²⁹ I understand that historically, XM and Sirius payments to SESAC for their subscription radio service have equaled about [[]] of their combined payments to ASCAP and BMI.

1 c. *Some revenues earned by XM and Sirius are attributable to non-music*
 2 *services and need to be accounted for in setting the SRPR rate*

3 A key difference between XM and Sirius on the one hand and the PSS on the
 4 other is in the broader suite of channels offered by XM and Sirius. Music Choice and the
 5 other PSS offer no non-music audio services. By contrast, Sirius offers its subscribers 56
 6 non-music channels and XM as many as 93 non-music channels, in addition to their
 7 music channel offerings.³⁰ (See Exhibit 7.) Indeed, non-music programming has become
 8 an increasingly central element of the Sirius and XM services. In 2001, the year its
 9 service was launched, XM offered non-music programming on 27% of its channels (27
 10 out of 101). By 2005, non-music channels had increased to 46% of channels (61 out of
 11 133), while the number of music channels had actually decreased slightly.³¹ For Sirius,
 12 the percentage of non-music channels has grown from 39% (39 out of 101) in 2002, the
 13 first year of operation, to 44% (59 out of 133) last year.³² (See Exhibits 8.a and 8.b.)

14 But simple channel counts understate the significance of non-music programming
 15 in the efforts of the two services to attract and retain subscribers. Both services have
 16 made substantial investments in original, exclusive and non-exclusive brand-name non-
 17 music content. These investments are intended to attract subscribers to Sirius' and XM's
 18 subscription radio services and to distinguish the one service from the other and from
 19 other competing services like Music Choice and over-the-air radio.³³ Sirius has signed
 20 exclusive contracts with individual celebrities, such as Howard Stern, Martha Stewart,
 21 Jerry Rice, Barbara Walters, and Deepak Chopra, as well as with the National Football
 22 League, the National Basketball Association, the National Collegiate Athletic
 23 Association's Mens Division I Basketball Championship, and Wimbledon – where these
 24 exclusives are relative to XM.³⁴

³⁰ A large portion of XM's non-music channels consist of play-by-play sports channels that subscribers receive as part of the Sports Package. For example, there are 15 major league baseball play-by-play channels and 5 NHL hockey channels.

³¹ In these counts, multiple play-by-play channels are counted as a single channel.

³² Information on historical channel lineups from 2001-2005 is taken from XM and Sirius Form 10-Ks.

³³ "Satellite Radio Outlook," *op. cit.*, p. 63.

³⁴ 2005 Form 10-K, Sirius Satellite Radio Inc., p. 5; "Sirius Reports Strong Second Quarter 2006 Results," August 1, 2006, at <http://investor.sirius.com/releaseprint.cfm?releaseid=205864>

1 Similarly, XM has signed exclusive contracts with celebrities such as Oprah, Opie
2 and Anthony, Bob Dylan, Ellen Degeneres, and Bob Edwards, as well as with Major
3 League Baseball and NASCAR.³⁵ Indeed, MLB is carried on 16 XM channels during
4 the baseball season.³⁶ In addition, XM and Sirius have non-exclusive content deals that
5 include: ABC News and Talk; BBC World Service News; Bloomberg News; CNBC;
6 CNN; C-Span; E! Entertainment; ESPN; ESPNEWS; Fox News; Radio Disney; and The
7 Weather Channel, among others.³⁷ All of these services represent well-known consumer
8 brands and represent an investment by the two services in accumulating their own brand
9 equity.

10 This growth in the role of non-music programming has been accompanied by
11 substantial expenditures on those programs. For example, based on the contractual
12 obligations for non-music programming at XM, it is clear that the increases in
13 programming expenses on the non-music side have been dramatic. In 2004, [[

14]] of XM's total programming costs, were dedicated to non-music
15 programming contractual payments. In 2005, that number had risen to [[
16]] of programming costs.³⁸ The Sirius story is even more dramatic. In 2004, its non-
17 music expenditures accounted for [[]] of programming costs. By
18 2006, those expenditures had increased to [[]] of programming costs.
19 See Exhibit 9.

20 A number of investments in non-music programming are particularly noteworthy.
21 In October 2004, Sirius signed a five year, \$500 million deal to broadcast Howard Stern
22 programming on two dedicated channels.³⁹ In addition to the Howard Stern deal, Sirius
23 has acquired broadcast rights for other celebrity hosts, such as Martha Stewart.⁴⁰ Earlier
24 this year, XM announced a three year, \$55 million deal to broadcast the Oprah & Friends

³⁵2005 Form 10-K, XM Satellite Radio Holdings Inc., p. 1-2. NASCAR will move to Sirius starting in 2007. See 2005 Form 10-K, Sirius Satellite Radio Inc., p. 4.

³⁶ 2005 Form 10-K, XM Satellite Radio Holdings Inc., p. 8.

³⁷ "Satellite Radio Outlook," *op. cit.*, p. 63.

³⁸ Note that these numbers are a lower bound of the share of programming costs attributed to non-music programming, since some of the non-contractual programming expenditures were for non-music programming as well.

³⁹ "Satellite Radio Outlook," *op. cit.*, p. 63.

⁴⁰ 2005 Form 10-K, Sirius Satellite Radio Inc., p. 3.

1 channel.⁴¹ In addition, XM has additional deals for rights to other celebrity broadcasts,
2 such as The Opie & Anthony Show.⁴²

3 Similarly, in October 2004, XM agreed to an eleven year, \$650 million deal with
4 Major League Baseball.⁴³ Through this year, NASCAR had been broadcast on XM,
5 costing XM about [[]] per year. However, Sirius has acquired the rights to
6 broadcast NASCAR starting in 2007 for about \$22 million per year.⁴⁴ In addition, XM
7 and Sirius have bid against each other for the rights to broadcast other sports leagues and
8 events as well.⁴⁵

9 Various industry sources attest to the value of these deals in attracting new
10 subscribers. In describing the Oprah & Friends deal, industry analyst Tom Eagan of
11 Oppenheimer stated that, "On a per-subscriber basis, XM can break even on this deal if
12 they add 145,000 subscribers over the three-year period. That should be very easy for
13 them to do."⁴⁶ Regarding the Howard Stern deal, Business Week wrote, "It can't be
14 denied: Howard Stern is earning his keep at Sirius Satellite Radio ("SIRI"). Since the
15 talk-radio star announced he would join Sirius, its subscriber rolls have jumped to more
16 than 4 million, with more than 1 million net additions attributable to Stern, analysts
17 say."⁴⁷

18 Advertising revenues provide an additional measure of the increasing role of non-
19 music programming. These revenues are driven by non-music channels since the music
20 channels are predominantly commercial-free. The advertising revenues of both Sirius
21 and XM are now beginning to reflect that importance. In 2005, the advertising revenues
22 of XM were \$20.1 million while those of Sirius were \$6.1 million. In just the first half of
23 2006, following the launch of the Stern programming, I understand that Sirius' ad

⁴¹ 2005 Form 10-K, XM Satellite Radio Holdings Inc., p.1.

⁴² 2005 Form 10-K, XM Satellite Radio Holdings Inc., p. 9.

⁴³ "Major League Baseball Partners with XM Satellite Radio for 11-Year, \$650 Million Broadcast and Marketing Agreement," at http://xmradio.mediaroom.com/index.php?s=press_releases&item=1209.

⁴⁴ "NASCAR Selects Sirius as New Home on Satellite Radio," February 22, 2005, <http://investor.sirius.com/ReleaseDetail.CFM?ReleaseID=156582>.

⁴⁵ "Satellite Radio Outlook," op. cit., p. 70.

⁴⁶ Quoted at <http://www.orbitcast.com/archives/oprah-joins-xm-satellite-radio.html>, visited on 8/29/06.

⁴⁷ "Stern Is the Draw At Sirius Satellite Radio", *Business Week*, April 10, 2006, p. 104. See also "Is Howard Stern Worth It?", *Business Week*, January 23, 2006, p. 38; "Can Stern Make Satellite Radio Hum?", *CNNMONEY.com*, December 21, 2005.

1 revenues totaled [[]]. By contrast, both services had relatively trivial
2 advertising revenues in the first year of operation.⁴⁸

3 The platform for advertising growth is comprised in large part of the talent and
4 other non-music programming that has been acquired by the two services. For example, I
5 noted above the expectations regarding the effect of Howard Stern's exclusive
6 relationship with Sirius on increasing Sirius' subscribership. The same is true for the
7 subscriber effect of XM's exclusive relationship with Oprah. These and other
8 programming investments discussed above are expected to generate greater listenership
9 in the future, to these particular services as well as to other ad-supported services.

10 As a final measure of the significance of non-music programming to satellite
11 radio revenues, survey results suggest that talk and other non-music channels
12 disproportionately drive subscriber decisions. In a 2006 survey, Sirius listeners were
13 asked which channels they had listened to in the past week.⁴⁹ For each channel they had
14 listened to, they were then asked whether they would cancel their subscription if that
15 channel were no longer offered.

16 Using these data, I created a "channel-attachment" index to measure the
17 cancellation responses for music relative to non-music programming. Specifically, for
18 each Sirius channel, I multiplied the fraction of the surveyed Sirius subscribers listening
19 to the channel in the last week by the fraction of those subscribers who indicated that they
20 would cancel their service if the channel were deleted from the Sirius lineup. This
21 calculation produces a weighted cancellation rate, where the weight is the fraction of
22 surveyed subscribers listening to the channel. I then sum these weighted cancellation
23 rates over all channels and calculate the fraction of that sum accounted for by music and
24 non-music channels.

25 For example, suppose that 20% of Sirius subscribers listened to a particular music
26 channel in the past week and 20% of those indicated that they would cancel the Sirius
27 service if the channel were withdrawn from the Sirius lineup. Further suppose that 40%

⁴⁸ See 2003 and 2005 Form 10-K, XM Satellite Radio Holdings Inc.; 2003 and 2005 Form 10-K, Sirius Satellite Radio Inc. Note that Kagan Research forecasts that Sirius' ad revenues will continue to grow as a fraction of total revenues, reaching 11.5% in 2014 versus 2.5% in 2005 (*Satellite Radio Outlook*, Kagan Research, LLC, July 2005, p. 74.)

⁴⁹ *Sirius Satellite Radio Listener Study – Wave 2*, June 2006, pp. 37-61. The number of useable responses was [[]].

1 of Sirius subscribers listened to a particular non-music channel in the previous week and
 2 50% of those indicated that they would cancel the Sirius service if Sirius stopped offering
 3 that channel. The weighted cancellation rate for the music service is 0.04 (i.e. 0.2×0.2),
 4 and the weighted cancellation rate for the non-music service is 0.2 (i.e. 0.5×0.4). The
 5 sum of the weighted cancellation rates in this example is 0.24, and 83% of these total
 6 0.24 “points” are accounted for by the non-music channel.

7 Overall, [[]] of the channels listened to during the survey period were music
 8 channels.⁵⁰ However, music channels accounted for only [[]] of total weighted
 9 cancellation rates. (See Exhibit 10.) Non-music channels accounted for the remainder.⁵¹
 10 This suggests that listenership may overstate the significance of music channels to
 11 subscribers. This does not seem particularly surprising, as suggested by the apparently
 12 substantial advertising efforts undertaken by the two services to promote (e.g.) Howard
 13 Stern and Oprah.

14 In short, the benchmark PSS SRPR rate must be adjusted to reflect the
 15 significance of non-music programming in generating the revenues of XM and Sirius,
 16 before it can be applied to the XM and Sirius revenues. Note that this package of non-
 17 music programming benefits SRPR holders: it attracts more subscribers than would
 18 otherwise be the case and diverts their music listening from over-the-air radio that pays
 19 no SRPR fee to XM and Sirius that do pay that fee. Indeed, another survey conducted by
 20 Sirius indicates that after subscribing to Sirius, in-vehicle listenership to AM and FM
 21 stations dropped from [[]] of the time spend in the vehicle to [[]]. (See Exhibit
 22 11.)

23 d. *Some revenues incurred by XM and Sirius are due to enhanced music*
 24 *programming*

25 The music channels of Music Choice and the other PSS contain jukebox-style
 26 music programming. That is, they offer continuous music generated primarily by

⁵⁰ This survey only asks about which channels were listened to and not how much time was spent listening to each channel.

⁵¹ If the Howard Stern channels are excluded, [[]] of the channels listened to were music channels, but music still accounted for less [[]] of the total weighted cancellation rates than would be suggested by the listenership data.

1 computer-generated playlists. By contrast, XM and Sirius use a variety of talent,
2 including experienced music programmers with genre-specific expertise, to program most
3 of their various music channels in order to make those channels more attractive to
4 subscribers. In particular, I understand that both XM and Sirius have hired program
5 directors that have extensive experience in each genre of focus. For example, XM has
6 hired Robert Aubrey Davis and Martin Goldsmith to oversee the XM classical music
7 offerings. Similarly, Sirius has contracted with classic rocker Little Stevie Van Zandt to
8 program its Underground Garage music channel offering a variety of alternative rock
9 music.

10 In addition, both services offer individual artists the opportunity to lead specific
11 programs in their lineup. For example, Bob Dylan hosts a weekly XM show where he
12 reminisces and chooses what music to play and what kind of theme to offer listeners.
13 Similarly, Tom Petty is host of a weekly XM show playing classic rock and roll.
14 Eminem created the channel Shade 45 on Sirius, which is dedicated to uncensored hip-
15 hop music, and Shooter Jennings hosts his own show on Sirius' Outlaw Country channel.

16 Both services also host live performances and other programs to highlight
17 individual performers. Sirius' *The Who* channel plays a full recent concert recording by
18 The Who every night, and every concert on Jimmy Buffett's "Party at the End of the
19 World Tour" will air live on Sirius' *Radio Margaritaville*. On XM,
20 "Then...Again...Live" offers classic rock artists the chance to perform their music again,
21 likely exposing some listeners to performers of whom they might otherwise not have
22 been aware. XM has also broadcast live from various musical events. For example, in
23 2005, I understand that the service carried more than 55 hours of Live 8 performances
24 held in London, Paris, Rome, Berlin, Philadelphia, and Toronto.

25 Like non-music programming, enhanced music programming generates
26 subscribership for XM and Sirius over and above that for a plain-vanilla music-only
27 service. Enhanced music programming also provides benefits to SRPR holders to the
28 extent that it results in more listening to music, diverting listeners from terrestrial radio
29 that does not pay a SRPR fee to a service that does.

1 e. *XM and Sirius incur higher costs than Music Choice because they*
2 *provide a mobile service delivered directly to ultimate subscribers*

3 I understand that services like Music Choice and other PSS use their own
4 facilities and personnel to program and store the music for various music channels. The
5 PSS then “uplink” (or transmit) the music channels to a conventional for-lease satellite.
6 The signal is then “handed off” to a purchasing cable operator who receives the signal via
7 its own earth stations at its head-end. The cable operator pays a fee to the “hand-off”
8 provider for its service that reflects the value of the audio music service to the cable
9 operator’s subscribers and then distributes the music service via its cable infrastructure to
10 the homes of its subscribers. The cable operator is also responsible for attracting and
11 retaining the subscriber, billing the subscriber, and collecting the subscriber payments, a
12 portion of which are effectively used to offset the cable operator’s payment to the music
13 service provider.⁵² Thus, the hand-off provider incurs the costs to the point of hand-off,
14 and the cable operator incurs the remainder of the costs as well as the cost of the hand-off
15 service itself. A simplified version of this kind of two-part distribution system is
16 depicted in Exhibit 12.

17 Like a hand-off provider, XM and Sirius create a programming package that is
18 uplinked to a satellite system, and as such, incur the same general categories of costs as
19 does a hand-off provider. These costs include the uplink costs as well as the costs of
20 compiling the programming package. For convenience, I refer to these costs as “hand-
21 off provider costs.”

22 But unlike the hand-off provider (or the PSS), the core business of XM and Sirius
23 is to provide an end-to-end, mobile service directly to subscribers. Accordingly, XM and
24 Sirius also incur substantial additional costs, on top of the hand-off provider costs. These
25 costs include the cost of distribution, including the design, building, and launch of a
26 customized satellite system to provide a mobile service as well as the radios that receive
27 and decode the XM and Sirius transmissions; the cost of marketing the services directly
28 to subscribers; the cost of subscriber acquisition and retention; as well as the cost of

⁵² Both XM and Sirius (and, at one point, Music Choice) also sell their service to the direct broadcast satellites, DirecTV and Dish. The discussion in the text focusing on the “hand-off” to cable operators is for ease of exposition only. My focus here is on the core business of XM and Sirius—the provision of a direct-to-subscriber mobile audio service.

1 billing and collection of fees from their subscribers. For convenience, I describe all of
 2 these additional costs borne by an end-to-end, mobile service provider as “subscriber
 3 distribution and acquisition costs.”

4 In sum, XM and Sirius incur subscriber distribution and acquisition costs not
 5 incurred by a hand-off provider to deliver their programming to final subscribers. Those
 6 greater costs are driven by both the mobile characteristic of the XM and Sirius service
 7 and the accompanying added cost responsibility borne by XM and Sirius for delivering
 8 the service directly to consumers (costs that are borne by the cable operator in the case of
 9 the PSS).⁵³ As with the need to adjust the PSS rate to account for the non-music channels
 10 provided by XM and Sirius, that rate must be adjusted to reflect these greater costs
 11 incurred by XM and Sirius for the mobility characteristic and for the end-to-end cost
 12 responsibility before the PSS rate can be applied to the revenues of the two services. If
 13 the 7.25% rate were applied to the XM and Sirius revenues without adjustment, the
 14 payments to SoundExchange would be excessive—even if the music offerings of XM and
 15 Sirius were identical to those of the PSS. The SRPR fee paid by XM and Sirius would be
 16 higher only because of the added revenue (reflecting the higher costs) attributable to
 17 providing an end-to-end mobile service, not necessarily because of any inherently higher
 18 value of the music.⁵⁴

19 In what follows, I describe the kinds of adjustments that would account for these
 20 differences in costs and in the subsequent section, I implement those adjustments.

21 **VI The Conceptual Framework for Accounting for the** 22 **Functional Differences between XM and Sirius and a** 23 **Hand-Off Provider**

24 To explain the practical importance of the functional differences between XM and
 25 Sirius and a hand-off provider in calculating an appropriate SRPR fee, I provide a simple

⁵³ To be sure, many XM and Sirius listeners who have portable radios listen to the services at home as well as in a vehicle. But I understand that only a small fraction of listening is solely within the home. For example, a survey conducted by Sirius reports that only [[]] of its subscribers listen to the service only in non-vehicle locations. *Sirius Customer Satisfaction Monitor 2Q '06 Results*, August 28, 2006, p. 20. The total number of respondents was [[]].

⁵⁴ Of course, to the extent that mobility results in more music listening, SRPR holders will directly benefit, even with the adjustments described below.

1 example. Suppose a hand-off provider offers an audio music-only service like the PSS,
2 hands off its service to a cable operator for in-home listening, and earns \$1000 from the
3 cable operator. Suppose as well that that service must pay 7.25% of its revenues for the
4 use of the SRPR, and so pays \$72.50 to SoundExchange (i.e., 7.25% of \$1000).

5 Now suppose the cable operator charges its cable subscribers that \$1000 plus
6 another \$2000 to recoup the costs for final distribution, marketing, billing, and fee
7 collection, for total subscriber payments of \$3000. Thus, the total payments made by
8 cable subscribers for the music service recoup not just the costs of the hand-off provider
9 service alone, but also the costs of delivering that music to ultimate subscribers. If
10 instead the hand-off provider paid the cable operator for the use of its infrastructure and
11 performed the billing and fee collection services itself at a cost of \$2000, the hand-off
12 provider would charge its subscribers a total of \$3000.

13 Since the ultimate service that subscribers purchase is, by assumption, exactly the
14 same in both cases, the SRPR fee should be the same in both cases, \$72.50. If the rate for
15 the SRPR were to be levied on the hand-off provider's total revenues (because the hand-
16 off provider now provides an end-to-end service), the appropriate rate would be 2.42%,
17 which, when applied to revenues of \$3000, would also yield \$72.50 for the use of the
18 SRPR. In this example, the only, but key, difference between the two scenarios is
19 whether the hand-off provider or the cable operator is responsible for final distribution,
20 marketing, billing, and fee collection, leading to a difference in the revenues against
21 which the rate is assessed.⁵⁵

22 That key difference provides yet another way of reaching the same result. That is,
23 we could have adjusted the 7.25% rate to account for the relative difference in the cost of
24 providing the hand-off provider service and the end-to-end service. It is that cost
25 difference that drives the revenue difference in the two scenarios. The appropriate rate to

⁵⁵ Suppose the hand-off provider had always provided the end-to-end service and the SRPR rate had been levied on the end-to-end revenues of the (now misnamed) hand-off provider to begin with, i.e., the original SRPR rate was 2.42%. If this provider now decided to hand off its service to the cable operator, letting the cable operator incur the final distribution costs, marketing costs, and the costs of billing and collection, the firm's revenues would be \$1000. It would not be any more appropriate to apply the 2.42% to the new revenues of \$1000 than it would be to apply the 7.25% to the revenues of \$3000. The music delivered is exactly the same, so the payment for the SRPR should be the same (i.e., \$72.50). Thus the "new" SRPR rate would have to be adjusted upwards from 2.42% to 7.25%.

1 be levied on the end-to-end version of the service would be 7.25% times (\$1000/\$3000),
2 or 2.42%.

3 This example suggests one way of accounting for the fact that XM and Sirius
4 offer subscribers an end-to-end service and not a hand-off provider service: Determine
5 the dollar payment that would be made by XM and Sirius for the SRPR if they offered
6 only a hand-off provider service. In principle, this could be done by applying the 7.25%
7 rate to the revenues earned by XM and Sirius if they provided a hand-off provider
8 service. To then calculate the SRPR rate that would be applied to the end-to-end
9 revenues of XM and Sirius, I would divide the dollar payment made to SoundExchange
10 for the hand-off provider service of XM and Sirius by the end-to-end revenues of XM
11 and Sirius, just as in the example above.

12 Of course, I do not know directly what the hand-off provider revenues of XM and
13 Sirius would be since they do not offer that more limited service as a core business.
14 However, one way to meter revenues, as suggested above, is through costs. The relative
15 revenues earned by a hand-off provider service hypothetically provided by XM and Sirius
16 and by the end-to-end services actually provided by XM and Sirius would reflect the
17 relative costs of the two types of services. Thus, if I could estimate what a hand-off
18 provider service would cost XM and Sirius and if I knew the costs of the end-to-end
19 service, I could use that information to adjust the 7.25% rate so as to apply the adjusted
20 rate to the end-to-end revenues of XM and Sirius.

21 Any translation of the 7.25% rate to one that could be levied on the end-to-end
22 revenues of XM and Sirius must also reflect other key differences between the XM and
23 Sirius service and the PSS service above and beyond the end-to-end nature of the XM
24 and Sirius services. XM and Sirius have incurred considerable costs to develop and
25 deploy a mobile service as well as to provide substantial non-music components to the
26 audio package provided. Applying the PSS rate to Sirius and XM revenues when both of
27 these services provide significant attributes unavailable on a PSS would overstate the
28 payment due to SoundExchange. That is, it is not the music that drives the higher per-
29 subscriber revenues earned by XM and Sirius. Rather, it is in large part the mobility
30 characteristic, along with the non-music offerings and the enhancements to the music
31 offerings of XM and Sirius, that drives those revenues. That conclusion is consistent

1 with the inability of Music Choice, DMX, and Muzak to financially sustain a standalone
2 in-home, music-only premium cable service. Apparently, not enough consumers valued
3 an à la carte audio service consisting of multiple channels of continuous music streams in
4 the home to render an à la carte service profitable. The difference between XM and
5 Sirius on the one hand and the PSS on the other is the mobility of the service (along with
6 the non-music programming, and the music enhancements offered by the satellite radio
7 services).

8 To develop a way of estimating the costs of a more limited hand-off provider
9 service offered by XM and Sirius, consider the following thought experiment. Suppose it
10 were possible to divide XM and Sirius into two parts. One part would be the functional
11 equivalent of a hand-off provider, compiling the audio programming and uplinking the
12 programming to third parties (which would be the "other" part of XM and Sirius) using
13 conventional satellite technology. The third parties would then be responsible for
14 injecting the service with the mobility characteristic and for the ultimate distribution to
15 the consumer (including advertising, promotion, the sale of radios, customer service, and
16 billing). And the third parties would have the customer relationship. If I knew the costs
17 of the hand-off provider service of XM and Sirius, I could then calculate what fraction of
18 the costs of the end-to-end mobile service actually incurred by XM and Sirius was
19 accounted for by the hand-off provider service of XM and Sirius (including the SRPR
20 payment that would be made by levying the 7.25% rate on the hand-off provider revenues
21 for XM and Sirius). Just as in the example above, that fraction could be used to translate
22 the 7.25% rate into a rate that could be applied directly to the end-to-end revenues of XM
23 and Sirius. This functional adjustment to the 7.25% rate for XM and Sirius would then
24 account for the mobile as well as the end-to-end component of the XM and Sirius service,
25 and would be the equivalent of the PSS rate in terms of the fees that it would generate for
26 SoundExchange (because the lower rate is applied to greater revenues) for a hand-off
27 provider service provided by XM and Sirius. (Of course, I also need to consider
28 programming adjustments to that rate, as discussed later.)

VII Accounting for the Functional Differences between XM and Sirius and a Hand-Off Provider Service

The framework developed in the previous section suggests a mechanism for translating the 7.25% rate into one that can be levied on end-to-end revenues of XM and Sirius. I would expect that the higher revenues earned on the end-to-end mobile service relative to the hypothetical hand-off provider service will reflect the higher costs of the end-to-end mobile service relative to the hand-off provider service. This is a matter of simple economics: Higher costs require that the firm generate higher revenues if it is to remain financially viable.

One translation mechanism is to adjust the PSS rate to account for the relative difference between costs that would be incurred by Sirius and XM if they offered their core business service as only a hand-off provider and their actual end-to-end costs.⁵⁶ That translation of the 7.25% rate could then be levied on the end-to-end revenues of XM and Sirius because that rate would then have accounted for the higher costs on the end-to-end mobile service relative to their hand-off provider service. The translation would result in XM and Sirius paying SoundExchange the same dollar amount it would have been paid if XM and Sirius offered only the hand-off provider service in the same functional manner as Music Choice, DMX, or Muzak.

The first step in the translation process is to generate a functional adjustment to the 7.25% PSS rate that will account for the mobility characteristic of the XM and Sirius service as well as for other end-to-end services provided by the two companies. This functional adjustment requires an estimate of which of the end-to-end costs incurred by XM and Sirius would fall into the hand-off provider category. Of course, an important question is what the "hand-off provider" service would be for XM and Sirius. I define the hand-off provider to include the entire audio package (both music and non-music programming) offered by Sirius and XM, because it is that package that would generate the demand for the service by third parties in turn that would reflect ultimate demand for the XM and Sirius services by consumers, not just the music component of the package.⁵⁷

⁵⁶ As noted previously, I account for the non-music programming of XM and Sirius below.

⁵⁷ Of course, as I have noted a number of times, I must still account for the differences in the programming offered by XM and Sirius and that of the PSS.

1 The subscriber distribution and acquisition costs that would be incurred by the third-party
2 distributors (i.e., the “other” part of XM and Sirius) would include the additional end-to-
3 end costs as well as the costs of injecting the XM and Sirius services with the mobility
4 characteristic.

5 a. *Cost assignment for XM*

6 My decomposition of costs between hand-off provider costs and subscriber
7 distribution and acquisition costs begins with an analysis of XM’s costs, by line item.
8 Exhibit 13 details a set of cost line items provided by XM, averaged over the fiscal years
9 2005 and the first two quarters of 2006. Because unanticipated costs can vary from year
10 to year, I use average costs over this period. The Appendix describes the XM line items
11 in Exhibit 13 and the reasons for categorizing them as either hand-off provider costs or
12 subscriber distribution and acquisition costs.

13 Some cost line items, even at a detailed level, cannot be categorized as a hand-off
14 provider cost or as a subscriber distribution and acquisition cost. In such cases, I allocate
15 that cost line item according to the ratio of hand-off provider costs to end-to-end costs for
16 the other assignable cost line items.⁵⁸ Additionally, I exclude certain cost line items
17 which are not relevant to this calculation (for example, XM’s share of the earnings or
18 losses of its Canadian affiliate). Exhibit 13 reports each of the “baseline” line items
19 provided to me by XM and how those items were assigned to the hand-off provider or
20 subscriber distribution and acquisition category, as well as indicating which line items
21 were allocated between the two cost categories.

22 b. *Cost assignment for Sirius*

23 I repeat this categorization of baseline cost data as hand-off provider or subscriber
24 distribution and acquisition costs for Sirius in Exhibit 14, with the detailed line items
25 described in the Appendix. Like XM, Sirius provided data for fiscal year 2005 and the

⁵⁸ I have allocated some of the cost components that could not be directly assigned to the hand-off provider or to the subscriber distribution and acquisition cost category because it did not seem reasonable to assign all of the, for example, G&A expenditures to either the hand-off provider or to the subscriber distribution and acquisition level. Against that background, allocation of these unassigned costs to the hand-off provider level by the ratio of the assignable hand-off provider costs to the end-to-end costs seemed reasonable.

1 first half of fiscal year 2006. However, a key cost component for Sirius programming—
 2 the Howard Stern deal—is not reflected in the 2005 data. To ensure that going forward
 3 the Stern costs were appropriately counted, I assigned the 2006 Stern costs to 2005 as
 4 well. As with XM, costs that could not be obviously assigned to the hand-off provider or
 5 subscriber distribution and acquisition category were allocated to the hand-off provider
 6 category by the ratio of assignable hand-off provider costs to end-to-end costs.

7 c. *Imputing the payment for the use of SRPR*

8 The second step in estimating the cost ratio is to impute what the payments to
 9 SoundExchange would be based upon the fraction of total Sirius and XM costs that are
 10 accounted for by the hand-off provider costs.⁵⁹ Based on the current end-to-end revenues
 11 of XM and Sirius, I use the ratio of the hand-off provider costs to end-to-end costs to
 12 estimate what the hand-off provider revenues of XM and Sirius would be. This assumes
 13 that the relative difference between the revenues of providing the hand-off provider
 14 service and the end-to-end service reflects the relative difference in costs between the
 15 hand-off provider service and the end-to-end service (both cost components including the
 16 SRPR fee itself).⁶⁰ I then use the PSS rate of 7.25% to determine what the payments to
 17 SoundExchange would be based upon hand-off provider revenues for XM and Sirius, and
 18 incorporate those payments as part of both the hand-off provider and end-to-end costs.

19 The assumption that the hand-off provider revenues relative to the end-to-end
 20 revenues directly reflects the hand-off provider costs relative to the end-to-end costs is
 21 reasonable. In competitive markets, revenues tend to be driven to costs and the services
 22 offered by XM and Sirius (at both the hand-off provider level and the end-to-end level)
 23 are competitive, as I discuss in greater detail below. But for my purposes here, revenues

⁵⁹ Of course, these estimated payments will be excessive because (e.g.) the calculations do not account for the distinction between music and non-music services, a distinction we address in the next section, or the application of the 801(b) factors.

⁶⁰ To be precise, I assumed that $(R_{\text{hand-off provider}}/R_{\text{ee}}) = (C_{\text{hand-off provider}}/C_{\text{ee}})$ where “ee” refers to the end-to-end service, R refers to revenues, and C refers to costs. In the baseline case being developed here, XM’s estimated payments to SoundExchange are equal to the 7.25% PSS rate applied to the ratio of hand-off provider costs to end-to-end costs, multiplied by XM’s actual revenue. The estimated payment to SoundExchange is also a component of the hand-off provider and end-to-end costs, which means that the estimated payment to SoundExchange can be determined by rearranging this equation and solving for the payments to SoundExchange.

1 do not have to be equal to costs or approximately so for my analysis to be valid: All that
2 is necessary is that the revenues at both the hand-off provider and the end-to-end levels
3 be in the same proportion to costs. Below, I address factors that support my conclusion
4 that deviations from equality do not seem to be a significant issue in the sense that such
5 deviations would lead to a systematic underestimate of the applicable SRPR rate.

6 d. *Calculating the PSS rate using the functional adjustment*

7 I now have the data to apply a functional adjustment to the PSS SRPR rate, i.e., an
8 adjustment to account for the fact that, unlike the PSS, XM and Sirius provide a
9 nationwide mobile end-to-end service. To determine the SRPR rate that would be
10 applied to the end-to-end revenues of XM and Sirius to account for this functional
11 difference, I multiplied the 7.25% rate by the ratio of hand-off provider costs to end-to-
12 end costs.⁶¹ Using the baseline data and allocations in Exhibits 13 and 14 for XM and
13 Sirius, respectively, that ratio for XM is about [[]] and for Sirius, that ratio is about
14 [[]]. That exercise results in a functionally-adjusted rate of [[]] for XM and
15 [[]] for Sirius, i.e., one that is now consistent with the end-to-end service provided
16 by XM and Sirius. (See Exhibit 15.) Of course, this functionally-adjusted rate cannot be
17 the final rate because it fails to account for the non-music programming components of
18 XM and Sirius, programming which is unavailable on Music Choice, DMX, and Muzak.
19 I make this adjustment in a subsequent section.

20 e. *Other considerations*

21 There are a number of issues that might be raised in using this approach to
22 estimate a functionally-adjusted rate. First, my calculations rely upon a categorization of
23 cost line items maintained by XM and Sirius in the normal course of business, and as
24 such, these cost categories were not created inherently to distinguish between hand-off
25 provider and end-to-end functions. I adopted an approach that is reasonable, which is to

⁶¹ Of course, I could have obtained this same result by dividing the imputed SoundExchange payments by the end-to-end revenues earned by XM and Sirius. However, the discussion in the text retains the fundamental intuition of the approach here—that the PSS rate needs to be adjusted for the fact that XM and Sirius incur end-to-end costs and the PSS services do not.

1 allocate these costs that I could not assign to the hand-off provider level by the ratio of
2 assignable costs at that level to assignable end-to-end costs.

3 A second issue is that some of the accounting costs may not accurately reflect
4 economic costs. Most obviously, the interest cost of debt is a component of both the
5 hand-off provider and the end-to-end costs and is included in the analysis, but I have not
6 accounted for the cost of equity. Because the end-to-end costs encompass some of the
7 riskiest components of the XM and Sirius business—such as those arising from the need
8 to design and develop a satellite transmission infrastructure quite different than an off-
9 the-shelf satellite system and associated receivers—the end-to-end costs may be
10 substantially understated. Similarly, I have not accounted for the over \$3 billion of losses
11 already incurred by each of XM and Sirius in offering their services, losses that would (if
12 amortized) likely increase the end-to-end costs of XM and Sirius relative to the hand-off
13 provider costs. In short, I have no reason to believe that accounting biases would result
14 in a systematic understatement of the cost ratio, and many of those biases result in an
15 overstatement of the cost ratio, and so result in an excessive rate.⁶²

16 Of course, these functionally-adjusted rates for the SRPR are excessive because
17 (among other things) they fail to account for the extent to which non-music components
18 of the XM and Sirius service generates revenues for the two services. We turn to those
19 additional adjustments now.

20 **VIII Accounting for Revenues Generated by Non-Music** 21 **Programming on XM and Sirius**

22 In addition to the functional adjustment of the PSS rate, the PSS rate also needs to
23 be adjusted for the fact that unlike the PSS, XM and Sirius both offer non-music channels
24 and music channels to their subscribers. As I have already explained, those services
25 appear to have a significant impact on attracting and retaining subscribers. Accordingly, a

⁶² A third possibility is that the relationship of relative revenues and relative costs may not be one-to-one because many of the end-to-end costs are being incurred in anticipation of future subscribers. That is, because those end-to-end costs are intended to support future as well as current subscribers, the ratio of hand-off provider-equivalent costs to end-to-end costs will appear artificially low and as a result, so may the corresponding imputed SoundExchange payments. However, there is no particular reason to believe that the fraction of hand-off provider-level costs that are undertaken in anticipation of future revenues would differ from the analogous end-to-end fraction.

1 portion of XM and Sirius revenues are generated not by music but by non-music services.
 2 Without accounting for the effect of non-music programming on revenues, the
 3 application of the adjusted PSS rate to the end-to-end revenues of the two services will
 4 result in an overpayment to SoundExchange. In this section, I consider a number of
 5 methods to account for the availability and importance of non-music services to XM and
 6 Sirius subscribers.

7 a. *Programming adjustment using listenership data*

8 Listenership data collected by both XM and Sirius provide one way to account for
 9 the importance of non-music programming to subscribers. XM collects channel-specific
 10 listenership through Arbitron, where listening is measured using Arbitron's average-
 11 quarter-hour listening.⁶³ Sirius conducted a survey of its subscribers that asked, among
 12 other things, how many hours they spent listening to music and non-music programming
 13 in the last week prior to the survey.⁶⁴

14 A key limitation with the listenership data is that its correlation with the value
 15 consumers place on music and non-music is uncertain. There may well be some non-
 16 music channels (or music channels) that are highly valued but not listened to for any
 17 extended period of time (e.g., the NFL or local weather and traffic channels). Thus,
 18 listenership is very likely an imperfect indicator of the value that consumers place on
 19 non-music services relative to music services. Nonetheless, a listenership adjustment is
 20 an obvious one to consider. The listenership data indicates that [[]] of all of XM's
 21 listenership is accounted for by music. For Sirius, the corresponding figure is [[]]. If
 22 the functionally-adjusted rates are modified to account for these listenership patterns,
 23 then this programming adjustment results in a corrected rate for XM of [[]] and
 24 [[]] for Sirius.

⁶³ XM Arbitron Custom Study, Fall 2005. The average quarter hour measure is for Monday to Sunday, 6 AM through midnight.

⁶⁴ *Sirius Customer Satisfaction Monitor 2Q '06 Results*, August 28, 2006, p. 22. The survey polled [[]] Sirius subscribers, who on average listened to music for [[]] of listening to all Sirius channels.

1 b. *Programming adjustment using a channel attachment index*

2 The channel attachment index I discussed previously provides another way to
3 account for the importance of non-music programming to subscribers. Data on those
4 consumers who are prepared to cancel the service if any particular channel is withdrawn
5 provide an indication of the intensity of their demand for a particular channel:
6 Notwithstanding the availability of other channels on the services, these consumers are
7 prepared to forego the entire service if a particular channel is unavailable. These data are
8 similar to survey data often compiled in antitrust matters to identify the products that are
9 close substitutes for the product under antitrust scrutiny. The consumer is asked what
10 product he/she would choose if a preferred product was unavailable. Here, the question
11 is analogously informative: Is the channel in question so important to the subscriber that
12 he/she would choose to cancel the Sirius subscription if this channel were eliminated
13 from Sirius' channel lineup, notwithstanding the array of other channels available on the
14 service. In this way, the Sirius cancellation data provide useful information on the
15 importance to consumers of music versus non-music channels.⁶⁵

16 As I explained previously, for each Sirius channel, I calculate the fraction of
17 Sirius subscribers responding that they would cancel their Sirius subscription if the
18 channel were dropped. Because listenership varies across channels, I weight these
19 cancellation percentages by the fraction of subscribers who responded that they had
20 listened to the channel in the previous week. Finally, I calculate the sum of these
21 weighted cancellation percentages for music channels, and then take that sum and divide
22 by total of the weighted cancellation percentages across all channels (music and non-
23 music channels). In this way, I create an index of the attachment of subscribers to music
24 channels relative to non-music channels.⁶⁶

⁶⁵ Of course, a consumer who cancels his/her Sirius subscription as a result of withdrawal of a particular channel on Sirius may choose to subscribe to another service (like XM) that does offer a channel comparable to that lost on Sirius. However, there is no reason to conclude that there is a differential availability of attractive music channels on alternative services relative to attractive non-music services. Thus, there is no reason to believe that the differences in cancellation rates more likely reflect the relative availability of alternatives to Sirius for the withdrawn service rather than the relative intensity of demand for those services.

⁶⁶ As in the other adjustments for non-music programming, here I treat Sirius' comedy and kids channels as music programming.

1 Because I only have cancellation data for Sirius, I use the same data for XM as
 2 well. However, in the case of XM, I exclude Howard 100 and Howard 101 (channels
 3 with high cancellation percentages and high listenership). This assumes that the other
 4 music and non-music programming of the two services is roughly comparable in terms of
 5 listeners' attachment.

6 Including the Stern channels produces an index of the importance of music
 7 programming of [[]], while excluding the Stern channels increases the index to
 8 [[]]. If the functionally-adjusted rate is modified using these indices (I apply the
 9 with-Stern index to Sirius' functionally-adjusted rate and the without-Stern index to
 10 XM's functionally adjusted rate), this programming-adjusted rate would be [[]] for
 11 Sirius and [[]] for XM.

12 c. *Programming adjustment using program expenditure data*

13 One natural way of accounting for the significance of music relative to all
 14 programming on XM and Sirius is to apply a programming adjustment based on the ratio
 15 of music programming expenditures to total programming expenditures, which would
 16 reflect the relative importance of music programming and non-music programming for
 17 the Sirius and XM services. I understand that the two services have spent a substantial
 18 amount of money for non-music programming because they expect that these
 19 expenditures will lead directly to increased subscribers and subscription revenue.

20 For XM, we estimate music programming expenditures as [[]] and
 21 total programming expenditures as [[]] (including the imputed
 22 SoundExchange payment), the resulting ratio of music to total programming expenditures
 23 being [[]].⁶⁷ Similarly, for Sirius, we estimate music programming expenditures
 24 as [[]] and total programming expenditures as [[]]. In the
 25 case of Sirius, the resulting ratio of music to total programming expenditures is
 26 [[]]. This programming adjustment leads to a rate of [[]] for XM and
 27 [[]] for Sirius.

⁶⁷ Music programming expenditures include the payment for the SRPR, which is determined as the result of this computation. For the sake of simplicity in calculating this adjustment, I use the estimated SRPR payment from the baseline case, which is conservative insofar as it will result in a higher programming-adjusted rate.

1 The obvious appeal of this approach is that it highlights the important role that
2 non-music programming plays in the packaging of the two services. In particular, this
3 approach can be thought of as identifying the value that consumers place on the
4 programming containing sound recordings of the audio package compiled by XM and
5 Sirius relative to the value they place on the non-music programming.

6 However, the approach does have limitations. Roughly speaking, the adjustment
7 may not fully “meter” the revenues associated with music programming. Some
8 consumers who subscribe to the services largely because of the non-music programming
9 services will nonetheless listen to some music and that additional listening will not be
10 captured in this adjustment. So this particular programming adjustment may understate
11 the SRPR rate. However, to the extent that some consumers subscribe to the services
12 because of the music, some of those will also listen to the non-music programming, and
13 this adjustment approach would fail to account for the additional revenues associated
14 with resulting from the availability of non-music programming to subscribers.

15 Nonetheless, because the programming expenditure-based adjustment may
16 understate what a reasonable rate should be, I have not included those rates in my
17 consideration of the reasonable range of rates. However, this rate calculation does
18 underscore the importance of non-music to the services and their view of what
19 programming is necessary to attract additional subscribers. In so doing, it provides me
20 comfort that the lower bound I do include is reasonable.

21 **IX Summary of Rate Estimates Based on the 7.25% PSS** 22 **Rate**

23 It is my opinion that the PSS 7.25% rate paid by a hand-off provider service
24 offering an audio package like that of XM and Sirius provides a useful benchmark rate to
25 determine royalties payable to SoundExchange. Upon consideration of the differences
26 between XM and Sirius on the one hand and the PSS on the other, I have identified the
27 need for three significant adjustments (two of which are feasible given data limitations).
28 The first is the functionality adjustment, accounting for the end-to-end mobile service
29 provided by XM and Sirius in contrast to the more limited service offered by the PSS.

1 The second is a programming adjustment accounting for the importance of non-music
2 programming to XM and Sirius.

3 Exhibit 16 summarizes the complete analysis. As is obvious, the program-
4 adjusted rates for XM and Sirius fall within a narrow range and given the similarity
5 between the estimated rates of the two services, the use of the same rate for both seems
6 reasonable. Thus, based on the PSS rate, a reasonable range for the SRPR rate for XM
7 and Sirius is between 0.88% and 1.04%.

8 Instead of the 7.25% starting rate, it may be more appropriate to consider a lower
9 starting rate of [[]] for a PSS. This lower rate, the derivation of which is explained
10 above, reflects the logic of the original PSS decision but is based on the actual PRO
11 benchmark rate that was used in that proceeding. Applying the adjustments to this lower
12 rate results in a range of rates between [[]] and [[]] for the two services.
13 (See Exhibit 17.) (Of course, the rates in Exhibits 16 and 17 do not account for the 801(b)
14 factors.)

15 Finally, the third adjustment stems from the value-added contributions made by
16 XM and Sirius to music programming. To the extent that these enhancements result in a
17 higher subscription price for the XM and Sirius services, then the SRPR holders may be
18 overcompensated because I have not accounted for these enhancements in my analysis.
19 Suppose, for example, that after adding the enhanced music, the number of sound
20 recording performances remained unchanged but the price that consumers were willing to
21 pay for the service increased. Under a per-listener/performance fee, the payments for the
22 use of the SRPR would not change. But because the fee here is based on a percentage of
23 revenue, the payments to the SRPR holders will increase even though the number of
24 sound recording performances has not changed.

25 **X Appropriately Adjusted, the Payments Made by XM and**
26 **Sirius to the Performance Rights Organizations May**
27 **Provide a Useful Upper Bound to the SRPR Rate for XM**
28 **and Sirius**

29 Another useful benchmark for the SRPR royalty rate is the set of royalty
30 payments made to the performance rights organizations: ASCAP, BMI, and SESAC.

1 These payments are the royalties received by composers and publishers for the use of the
2 musical works public performance rights underlying the sound recording performance.

3 The appropriate SRPR payment should be no larger than the PRO payment. A
4 buyer of the sound recording performance rights needs both rights in order to render a
5 public performance of the sound recording. Thus, the buyer is in exactly the same
6 position with regard to the two broadcast rights: Both are needed to broadcast sound
7 recordings, and the benefit received by the buyer applies to both rights jointly. In
8 addition, each seller of the sound recording performance right is in the same position as
9 the seller of the musical works performance right for that sound recording. From the
10 seller's perspective, the direct cost of using either right for additional performances of a
11 sound recording is the same (zero).

12 The characterization that the sellers of the sound recording performance rights
13 and the musical works rights face zero incremental costs seems a good one as an
14 empirical matter. To see this, consider the fact that record companies earned a total of
15 \$24.4 billion from worldwide sales of recorded music in 2005.⁶⁸ Even supposing that
16 XM and Sirius both paid a PSS rate of 7.25%, (a completely inappropriate rate for the
17 reasons I have already explained), the combined payments by XM and Sirius to
18 SoundExchange would still account for less than 0.24% of recorded music revenues.
19 Accordingly, a reasonable conclusion is that the fees received by SoundExchange for the
20 use of the SRPR from XM and Sirius would not have any detectable effect on the sound-
21 recording production decisions of the labels. Thus, the assumption that the cost of
22 extending the SRPR to XM and Sirius is effectively zero seems appropriate. Hence
23 (based on the direct costs and benefits of the transaction) whatever bargaining process is
24 used to determine one royalty rate would arrive at the same result for the SRPR royalty
25 rate as well. As I will discuss shortly, consideration of indirect promotional benefits
26 suggests that the SRPR royalty would be somewhat less than the musical works
27 performance royalty.

⁶⁸ I estimate worldwide record company sales of \$24.4 billion by dividing Warner Music Group's \$2.924 billion in worldwide recorded music sales by its 12.0% share of retail record sales. See Warner Music Group, 2005 Annual Report, p. 2; International Federation of the Phonographic Industry, as reported in *Market Share Reporter*, 2007, Volume 1, "Top Music Firms Worldwide, 2006," p. 446.

1 I understand that XM has negotiated a final rate with ASCAP of [[]] of its
2 adjusted gross revenues for the next five years for the use of the musical works
3 performance right to the music in the ASCAP library. In addition, I understand that
4 payments to SESAC are about [[]] of the payments made to ASCAP and BMI.⁶⁹
5 While XM has not yet negotiated a final rate with BMI, my understanding is that ASCAP
6 and BMI typically have the same rates.

7 As noted, the XM-ASCAP rate applies to adjusted revenues, where these
8 adjustments include certain deductions such as [[]] of subscriber acquisition costs. I
9 understand that the XM-ASCAP rate of [[]] of adjusted gross revenues accounts
10 for about [[]] of gross revenues. Accordingly, the total payment to the PROs made
11 by XM would be [[]] of gross revenues (i.e. [[]]). I also understand
12 that Sirius has not yet negotiated any final rates with the PROs; for purposes of this
13 discussion, I am assuming that the rates Sirius ultimately pays will be comparable if not
14 identical to those paid by XM.⁷⁰

15 For a number of reasons, the sum of these PRO rates is likely to be an upper
16 bound on the rate to be levied for the use of the SRPR. First, the PRO rates themselves
17 are negotiated in the shadow of the courts that administer the Department of Justice's
18 consent decrees for BMI and ASCAP. In order to become the sole agents for the musical
19 works performance rights in their respective libraries, ASCAP and BMI each had to agree
20 to terms embodied in the consent decree, which were designed by the Justice Department
21 to constrain the exercise of monopoly or market power by each monopoly rights agent.⁷¹
22 In the event that the rights user believed the negotiated rates would be too high, it could
23 incur the costs of litigation to ask the courts administering the consent decree to
24 determine a reasonable rate for the use of the musical works in the library of each PRO.
25 However, the incentive to incur litigation costs may be different for a user of rights than

⁶⁹ XM's payments to SESAC were [[]] of the payments to ASCAP and BMI over 2005 and the first two quarters of 2006. (XM financials.) The corresponding figure for Sirius was [[]]. (Sirius financials.)

⁷⁰ However, I do understand that Sirius views the rates paid by XM as excessive and so believes that basing an upper bound on the PRO rates of XM is equally excessive.

⁷¹ See, for example, the discussion of the earlier decrees in the Department of Justice press releases describing more recent decree modifications: <http://www.usdoj.gov/opa/pr/2000/September/517at.htm> and http://www.usdoj.gov/atr/public/press_releases/1994/211869.htm.

1 for the PRO. For the user, the rates are set for that particular use, while for the PRO the
2 rates can serve as a precedent for other ratemaking negotiations and proceedings
3 involving other uses, i.e., they could serve as benchmarks for rates in those other uses.
4 Because the benefit of a successful litigation is higher for a PRO than for a user, the PRO
5 will be prepared to bargain harder with the user for a higher rate. Thus, the current
6 ASCAP and BMI rates may be well in excess of that which would be forthcoming in a
7 more competitive market.

8 Second, the payments to the PROs do not reflect consideration of the 801(b)
9 factors and should be considered an upper bound for the SRPR rate to be levied on the
10 revenues of XM and Sirius. While I discuss the 801(b) factors below, some of that
11 discussion is worth foreshadowing here.

12 When a sound recording is performed on XM and Sirius, it generates a
13 promotional benefit to the SRPR holders in that some listeners who hear the performance
14 (and see the artist name and song title displayed on their receiver) may go out and
15 purchase a copy of that recording via a CD or download. As discussed below, this
16 promotional benefit spans the range of genres played on Sirius and XM, and applies to
17 both new and old recordings. While both the PRO and the SRPR holder benefit from the
18 additional sales of sound recordings, the incremental return on the sale of a sound
19 recording is likely to be greater than that for the holder of the musical works right
20 because the price of the CD itself is designed to recoup all of the costs borne by the
21 producer of the sound recording. Moreover, the increased exposure of artists will likely
22 increase the sales from concert tours, some of which will no doubt be contractually
23 captured by the labels. While we discuss these benefits in detail below, the effort exerted
24 by the labels to obtain airplay from terrestrial radio suggests that the flow of payments in
25 a more competitive market may well be from the SRPR holders to the SRPR users.

26 A third factor which leads to the conclusion that the use of the PRO rates as a
27 benchmark is an upper bound stems from the fact that the PRO rate is levied on the use of
28 all of the music in the PRO libraries. By contrast, it is my understanding that under the
29 Act, performances of pre-1972 recordings are exempt from the payment of the SRPR.
30 Thus, because the library of sound recordings is smaller than the entire library, if the
31 PRO rate were used as the starting point for setting the SRPR rate, one would have to

1 reduce that rate to reflect the reduction in the library of relevant recordings. In addition,
 2 the services are not required to pay a SRPR fee for live performances and archival
 3 performances, while payments to the PROs are required. This would require yet another
 4 downward adjustment in the PRO rate before being applied to the revenues of XM and
 5 Sirius as a SRPR rate.

6 An additional factor is the broader scope of the PRO license compared to the
 7 SRPR license. The SRPR licensee is subject to the sound recording complement rule that
 8 (unless granted an exception by the record companies, which may require additional
 9 compensation) limits the number of songs played from a particular album to no more than
 10 two in a row, or three in any three hour period. In addition, no more than three songs in a
 11 row, or four in any three hour period, can be played from the same artist or boxed set.⁷²

12 There is no such limitation on the scope of the PRO license.

13 Finally, I note that Sirius has not as yet accepted the rate of [[]] of adjusted
 14 revenues of the XM-ASCAP agreement. To the extent that Sirius and ASCAP agree
 15 upon a lower rate, the upper bound of the range estimated here should be adjusted to
 16 reflect this change. I understand that Sirius will be testifying regarding its view as to why
 17 the ASCAP rate is excessive. I also understand that XM agreed to this rate with ASCAP
 18 in light of other consideration.

19 **XI Consideration of the 801(b) Factors Suggests that the** 20 **SRPR Rate to be Paid by XM and Sirius Should Be** 21 **Towards the Low End of the Range**

22 As noted at the outset, the rates ultimately established for the SRPR payment by
 23 XM and Sirius must reflect the Section 801 (b) factors:

- 24 (A) To maximize the availability of creative works to the public;
- 25 (B) To afford the copyright owner a fair return for his creative work and the
 26 copyright user a fair income under existing economic conditions;
- 27 (C) To reflect the relative roles of the copyright owner and the copyright user in
 28 the product made available to the public with respect to relative creative
 29 contribution, technological contribution, capital investment, cost, risk, and

⁷² For the complement rule see <http://www.copyright.gov/fedreg/1997/62fr34035.html>.

1 contribution to the opening of new markets for creative expression and media
2 for their communication;

3 (D) To minimize any disruptive impact on the structure of the industries involved
4 and on generally prevailing industry practices.⁷³

5 Using the rates estimated above, a range of estimates for the reasonable rate of the
6 SRPR can vary from 0.88% (based on the 7.5% PSS rate) to 2.35% (based on the PRO
7 rates). However, the estimates based on payments to the performance rights
8 organizations do not account for the 801(b) factors. As I understand it, those rates are
9 subject to a willing buyer/willing seller standard. The rates based upon the PSS rate do
10 reflect the 801(b) factors, but as they apply to Music Choice and (perhaps) DMX and
11 Muzak, not to XM and Sirius.

12 What follows is my assessment of the performance of XM and Sirius in fostering
13 objectives A, C, and D relative to the record companies (who I identify for shorthand
14 purposes as the holder of the SRPR) and Music Choice, as a representative PSS. I
15 conclude that based on these factors, the rate for XM and Sirius should be towards the
16 lower end of the range of estimated rates. In satisfying these objectives, such a rate
17 would provide a fair return to the holder of the SRPR because it accounts for these and
18 marketplace factors.

19 a. *Evaluating the role of XM and Sirius in promoting the availability of*
20 *music*

21 In evaluating the XM and Sirius contribution to the “availability” of music,
22 “availability” can be interpreted in terms of music distribution, i.e., transmitting more
23 music and more types of music to more listeners, or in terms of the supply of music, i.e.,
24 the creation of more music.

25 I understand that in previous decisions, the Librarian has interpreted “availability”
26 to mean only the production of sound recordings.⁷⁴ However, an economist would
27 naturally interpret “availability” to encompass both distribution and production. And
28 given the nexus between the two described below, that interpretation is key to

⁷³ 17 U.S.C. 801(b)(1).

⁷⁴ See Librarian Decision 1998 at 25406.

1 understanding how distribution affects the production of sound recordings. I discuss each
2 of these in turn.

3 i. Availability interpreted as music distribution

4 The XM and Sirius services currently encourage the more widespread availability
5 of music in a number of ways. First, the services offer subscribers a substantially wider
6 array—in terms of formats or stations within a format—than do over-the-air radio and
7 Music Choice. Sirius and XM both provide more music channels than are found in even
8 the largest terrestrial radio markets, and those channels cover a more diverse set of
9 genres. While Sirius has 71 music channels and XM has 80, the five largest radio
10 markets, as measured by BIA, have an average of 43 music stations.⁷⁵ Of these music
11 stations in the largest terrestrial radio markets, 52% are in the rock or pop genres. In
12 contrast, pop and rock stations at XM and Sirius account for only 39% and 45%,
13 respectively, of the music channels.

14 The remaining channels span a wider array of formats than are found even in the
15 top five radio markets. For example, the top five radio markets have no stations
16 dedicated to playing kids music and only one station (in San Francisco) using a dance
17 music format. Both Sirius and XM have multiple channels in each of those formats.

18 Moreover, even within the common genres, there is a greater diversity in the
19 satellite radio offerings. For example, four of the top five terrestrial radio markets have
20 only one station in the jazz and blues genre. The fifth, San Francisco, has two, but both
21 offer a smooth jazz format.⁷⁶ In contrast, both Sirius and XM have five channels in the
22 jazz and blues genre, with each channel focused on a different subgenre (classic jazz,
23 modern jazz, blues, etc.). The contrast between the number and range of choices for
24 music available on Sirius and XM and what is available on terrestrial radio in smaller
25 markets would be even more pronounced.

⁷⁵ Information on terrestrial radio markets is from the 2006 BIA Investing In Radio Market Report; see Exhibit 18. See Exhibits 3 and 4 for the channel lineups on XM and Sirius.

⁷⁶ See 2006 BIA Investing In Radio Market Report, p. 2.

1 Similarly, both XM and Sirius offer more music channels than Music Choice,
2 indicating that the contribution of XM and Sirius to music distribution is greater than that
3 of Music Choice. (See Exhibit 6.)

4 Second, the labels do not expend any incremental effort to provide music to XM
5 and Sirius that will enhance the transmission of the music provided by the two services.
6 The labels are not involved in those transmission decisions and so do not enhance the
7 availability of music in terms of its distribution.

8 ii. Availability interpreted as the supply of new music

9 I earlier observed that availability can also be interpreted to mean the supply of
10 sound recordings. To be sure, the recording companies, the performers, and composers
11 are directly involved in the production of music, unlike XM/Sirius. But as I noted above,
12 even if XM and Sirius were to pay SRPR fees at the inappropriate and excessive rate of
13 the PSS, those payments would likely have an undetectable effect on increasing the
14 supply of sound recordings.⁷⁷ Moreover, the fees paid by XM and Sirius for the SRPR
15 may represent fees that record companies would not otherwise accrue. As shown in
16 Exhibit 11, most of the listening to Sirius is diverted from over-the-air radio which pays
17 performers and the holders of the SRPR nothing for airplay. SoundExchange benefits
18 directly from this conversion of over-the-air listeners to XM and Sirius subscribers
19 because terrestrial radio does not pay a SRPR fee.

20 In addition, there is normally a tension in simultaneously attempting to increase
21 both the distribution of a product and the supply of a product. A lower price charged by
22 the distributor for the product will the increase number of consumers to whom the
23 product is available, but can reduce the earnings of the product supplier and so reduce the
24 supply of the product.

25 Here, the tension between these two goals is muted if not completely absent. A
26 lower SRPR fee leading to more widespread distribution of the XM and Sirius services
27 will expose listeners to artists, songs, and genres more or more effectively than would

⁷⁷ Indeed, it appears that nearly a third of the revenues collected by SoundExchange are not distributed to the responsible artists, further diminishing any effect of the SRPR fee on encouraging the supply of new musical works. See http://soundexchange.com/news/documents/SoundExchange_PR_6_14_05.pdf.

1 otherwise be the case. That exposure, in turn, will tend to encourage the sale of music
2 (CDs, downloads) to final consumers, thus benefiting the artists and recording companies
3 and thereby encouraging the production of new sound recordings. While the SRPR
4 payments themselves by XM and Sirius may have no measurable effect on encouraging
5 new sound recordings, that does not mean that the services do not contribute to
6 expanding the supply of sound recordings. The evidence certainly suggests that the
7 recording industry values the promotional impact of XM and Sirius (or services like
8 them) on sales of sound recordings and concert tickets.

9 Record companies engage in numerous promotional practices to increase airplay
10 for their artists. Some of the practices used to influence terrestrial radio airplay have
11 recently received considerable notoriety in the investigation carried out by the New York
12 State Attorney General. As the AG's office noted in the press release announcing a
13 settlement with Universal Records, "Radio airplay is the single most effective driver of
14 music sales."⁷⁸ Among the practices documented in that investigation are payments to
15 radio stations and programmers, sponsorship of events and listener contests, and use of
16 independent promoters, all efforts intended to increase the airplay of the label's sound
17 recordings.⁷⁹

18 While promotion on terrestrial radio is an important and ongoing component of
19 the marketing strategy of record companies, the effectiveness of that component is
20 limited by the range of programming carried over broadcast radio. A 2001 article from
21 *Billboard* begins by stating the problem: "While labels have increased the amount of new
22 product coming through the pipeline, radio has tightened its playlists. It's like trying to
23 pour a gallon of water into a pint-sized container."⁸⁰ The article concludes quoting Fred
24 Mills, a promotion representative from DreamWorks: "Maybe we will have to find other
25 avenues to expose product, whether it be through more fragmentation of formats, the
26 Internet, satellite radio, or visual mediums." Thus this article, written shortly before

⁷⁸ http://www.oag.state.ny.us/press/2006/may/may11a_06.html

⁷⁹ See "Executive fired amid charges of payoffs", *New York Times*, January 12, 2005; "Sony BMG settles radio payola probe", *Washington Post*, July 26, 2005; "Music labels say it costs too much to get songs on the radio," *The Wall Street Journal*, June 10, 2002, p. B1.

⁸⁰ "Radio and labels at odds again," *Billboard*, May 12, 2001, p. 135.

1 satellite radio service was launched, had already begun envisioning a role for satellite
2 radio in expanding the promotional reach of record labels.

3 From the inception of service, an element of the strategic plan for satellite radio
4 was to develop promotion opportunities for record companies, taking advantage of the
5 scale economies and national coverage of satellite radio.⁸¹ This has been accomplished
6 by the breadth of musical styles covered among the music channels as well as specific
7 opportunities to feature and promote artists.⁸² For example, XM has an Artist
8 Confidential series in which an artist from somewhere across the spectrum of musical
9 genres gives a live performance from XM's performance theater, which is broadcast on
10 the appropriate music channel.⁸³ Numerous shows anchored by celebrity hosts on both
11 Sirius and XM provide opportunities to expose devotees of particular music formats to
12 new or less well known artists.⁸⁴ XM produces a program called "Then...Again...Live"
13 that features classic rock performers giving live renditions of their classic rock and
14 another called "Offstage" in which XM visits a performer at his or her home and
15 broadcasts a show from that home.⁸⁵ Sirius also broadcasts a number of live shows, both
16 from its own studios and from remote locations such as those hosting various winter
17 extreme-sports events. These efforts go beyond anything undertaken by the PSS audio
18 services.

19 Satellite radio has also provided a forum for airplay for veteran artists who, while
20 no longer listed on the top of the charts essential for terrestrial radio playlists,
21 nevertheless are able to reach potential buyers among devoted fans listening to the
22 targeted musical formats on satellite radio.⁸⁶ Emails received from subscribers⁸⁷ and

⁸¹ See 2001 Form 10-K, XM Satellite Radio Holdings Inc., p. 4

⁸² See "Start Me Up: satcasters go early on new artists," *Billboard*, March 17, 2006, p. 135.

⁸³ See 2005 Form 10-K, XM Satellite Radio Holdings Inc., p. 8; *Satellite Radio Outlook*, Kagan Research, LLC, July 2005, p. 74.

⁸⁴ Among the hosts of music shows on Sirius are Eminem, Tony Hawk, and Jimmy Buffett; XM hosts include Snoop Dogg, Bob Dylan, Tom Petty, and Ludacris. See <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/Page&c=Page&cid=1065475754125> and <http://www.xmradio.com/exclusivemusic/>.

⁸⁵ See <http://www.xmradio.com/exclusivemusic/offstage.jsp>

⁸⁶ See "Stymied by radio, veteran acts try new outlets," *Billboard*, January 29, 2005, p. 30; "XM credited for band's worldwide exposure," *Richmond Times Dispatch*, August 10, 2006, p. F-11.

- 1 artists⁸⁸ attest to the value of airplay on satellite radio in increasing CD and download
- 2 sales.

⁸⁷ For example, "Where can I purchase your music? I was listening to it on XM and fell in love with it! I work at a top 40 station and need a change of music for the drive home---yours was perfect!!!" (3/17/2006, p. 8); "A station like the Loft has been sorely missing for years in Southern California and your station is the reason I became an XM subscriber. Now I have three radios. I have found that since I started listening, I am actually buying more music than before....I listen at home and in the car ... weekdays and weekends ... and I'm a total cheerleader for the format. Thanks for making me enthusiastic about radio again." (9/12/05 p. 3); "If it only had channel 74 that would be enough for me to keep paying my subscription to xm radio. Since I got the new car (and xm radio) I have heard so many new (and old artists). For the first time in a long time I'm buying music and attending live shows. For example, I heard Sonny Landreth's 'Congo Square' for the first time on XM...(not much Louisiana Music here in Boston). I bought the album and as good luck would have it learned he would be performing nearby. My son, an aspiring guitarist (at 16 he has no interest in the blues) went to the show and had a ball." (3/21/06 p. 23). "I'm trying to find a good Download Site that carries the music played on XM-31 since i-tunes and Napster don't carry a lot of the music you play. Can you recommend anywhere on the Web that offers these tunes and others you play for download? Pay, of course" (3/20/06, p. 25); "Thank god I opted for XM so I could discover what you are putting together. I am one of the pickiest people when it comes to music. I have not listened to radio music for about ten years, online or local. I could never find something to hit my exact taste. Not only do you play the indie rock titles that I am addicted to but you also play many up and coming r and b, rap groups. I thought if I had satellite radio, I would not have to buy so many cd's. Now that i have XMU, I have doubled my catalog. Thanks for all of the hard work." (11/26/05, p.27) "Thank you for a great station and some incredible new music. Because of U-POP I have been purchasing the artists I hear you play (some are very hard to find in U.S. even from iTunes). My music collection is now back to the levels when I was in high school 10 years ago." (12/13/04, p. 31) "The fact that I can REAL music that I have not heard before, and see who is actually playing it to buy the album is AWESOME. You guys are great for the record industry." (7/14/03, p. 66); "When I bought my XM, the salesman told me I would no longer need my CD's. With the variety of music, I would listen to the XM radio all the time. My purchases have actually increased because I hear songs I haven't heard in years. I also buy music I would never have heard on commercial radio I LOVE XM!!!!!!" (11/15/02, p. 70); "This is the best service that I have ever bought, and I have never looked back on it. Furthermore, I never bought too many CD's in the past, but now with artists names and titles being shown, I am going out and buying CD's of bands that I have never heard before. Thanks again for the awesome service you provide." (1/21/03, p. 71); "i love this radio station more and more each day. i have bought more cds from hearing them on your station, than i ever have. i would do anything to have my band heard on this station even if it is the only station we are ever heard on again." (2/22/06, p. 100)

⁸⁸ []

1 Furthermore, there is no evidence to support the proposition that satellite radio
 2 listenership displaces any CD or download sales, let alone by a large enough amount to
 3 offset the substantial promotional benefits.⁸⁹ In addition, the sound recording
 4 complement rule described previously further limits the ability of XM and Sirius listening
 5 to substitute for purchasing recorded music.

6 Moreover, accounting for the effect of satellite radio listenership on CD purchase
 7 or downloading habits (and associated consequences to SRPR holders) would require
 8 systematic review of potential changes in all of the other ways in which subscribers may
 9 use their discretionary time (e.g. DVD watching, video game playing, use of iPods,
 10 listening to over-the-air radio, etc.), making the empirical effort difficult at best.

11 In short, the transmission of music by XM and Sirius is unlikely to reduce, and in
 12 fact is likely to enhance, the production of music by the recording artists and the record
 13 labels. Application of this factor to XM and Sirius suggests that a reasonable rate would
 14 be at the lower end of the range.

15 b. *Evaluating the role of XM and Sirius in “creative contribution,*
 16 *technological contribution, capital investment, cost, risk, and*
 17 *contribution to the opening of new markets for creative expression”*

18 In this section, I review the role of XM and Sirius in advancing the objectives of
 19 the 801(b) factor (C), relating to creative contribution, technological contribution, capital

II

⁸⁹ While not directly relevant, it is instructive to note that there is a growing literature on the effect of music downloading on CD sales and concert revenues. On music downloading, there is no clear consensus on the direction or magnitude of the effect of downloading on CD sales. For example, a 2005 study by Oberholzer and Strumpf finds no statistically significant effect of file-sharing on CD sales. (See Oberholzer and Strumpf, “The Effect of File Sharing on Record Sales: An Empirical Analysis,” Working Paper, 2005.) A 2004 study by Blackburn finds that file-sharing has a negative impact on the sales of an average CD, though it has a positive effect for relatively unknown artists and a negative effect for popular artists. (See Blackburn, “On-line Piracy and Recorded Music Sales,” Harvard University Dissertation Thesis, 2004.) On concert revenues, Mortimer and Sorenson find that music downloading has eroded CD sales, but that the loss of these revenues is more than offset by increases in the number of live concert performances and the profitability of those performances. (See Mortimer and Sorenson, “Supply Responses to Digital Distribution: Recorded Music and Live Performances, Working Paper, 2005.) If downloading has no clear displacement effect or effect on artists’ incomes, then it seems even less likely that listening to satellite radio would lead to displacement.

1 investment, cost, risk, and contribution to the opening of new markets for creative
2 expression and media for their communication. I discuss each in turn.

3 i. Creative Contribution

4 With respect to “creative contribution,” it is certainly true that record labels and
5 performers (along with composers and publishers) are directly involved in the music
6 production process. Nonetheless, I am unaware of any evidence that the labels expend
7 any incremental effort to create new music for XM and Sirius. This is not surprising
8 since as previously noted, any fees paid by XM and Sirius for the SRPR would be a very
9 small fraction of their overall revenues.

10 However, both XM and Sirius have invested in the creation of attractive non-
11 music content, including music-related programs (such as Willie’s Place hosted by Willie
12 Nelson) and other programs (including Oprah, Martha Stewart, and MLB). In addition,
13 both services have incurred costs to tailor their experienced music programmers and
14 personalities to various music channels in order to make those channels more attractive to
15 listeners. None of the music channels offered by Music Choice have such enhancements
16 and Music Choice offers only music programming. In this important programming
17 dimension, XM and Sirius clearly deserve more weight than Music Choice as creative
18 contributors.

19 The non-music focus of XM and Sirius has likely increased the number of
20 subscribers to these services. For example, as noted previously, the skew of XM and
21 Sirius towards non-music programming and the apparently substantial attachment that
22 subscribers have to the non-music program offerings have likely attracted subscribers
23 who may have been “talk-focused” but still listened to some extent to music on terrestrial
24 radio. Some, if not all, of these subscribers will switch their music listening from
25 terrestrial radio to the music services of XM and Sirius and so will contribute to the
26 SRPR payments being made to performers. Moreover, the addition of the non-music
27 services may result in greater promotion of the sale of sound recordings by these new
28 subscribers to the extent that these subscribers either increase their music listening above
29 what it was prior to subscribing to XM or Sirius or because they take advantage of the

1 other promotional aspects of the XM and Sirius services, namely, song and singer
2 identification.

3 ii. Technological Contribution

4 The technological contribution of XM and Sirius to music distribution is
5 substantial and one in which the recording industry played no role. As noted above, both
6 Sirius and XM developed their own satellite systems to provide a mobile service and
7 developed the chipsets required for the satellite radios themselves. With respect to the
8 radios in particular, [[

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]] That was an effort undertaken by XM. In addition, the antenna for the vehicle installation needed to be as unobtrusive as possible—a design effort that was also undertaken by XM. I understand that the first XM antennas were quite bulky, but now are about the size of a quarter, which has enhanced the ability of XM to attract OEM partners.

My understanding is that Sirius also faced many of these same technological hurdles in developing its service. Sirius developed a chipset with the assistance of Lucent that was capable of receiving and playing the satellite signals, and built into these chipsets the ability for its radios to choose the strongest signal source (either of two satellites or terrestrial repeaters) and buffer the signal so that, for example, the broadcast is uninterrupted when driving through an underpass. Sirius also incurred the costs associated with developing unobtrusive (so that they can easily be installed on the roof of a vehicle) antennas capable of receiving its programming (in contrast, satellite television services like DirecTV require antennas greater than a foot and a half in diameter). Sirius also works with consumer electronics companies and OEM partners to subsidize the development of new radios and the integration of Sirius radios into new automobiles.

Both XM and Sirius have received patents for a number of their innovations. XM has 42 patents, with 8 more pending, while Sirius has 12 patents and 2 pending. As an example, XM has more than 10 patents related to the design of mobile antennas that can access satellite signals, while Sirius was awarded several patents related to using the

1 elliptical geosynchronous orbit of its satellites. A complete listing of the patents can be
2 found in Exhibit 19.

3 Investments in R&D have totaled [[]] over the past 3 years for XM.
4 Sirius, which tracks expenditures on engineering, design, and development, has spent
5 [[]] in the past 3 years. (See Exhibit 20.) There is no corresponding
6 incremental contribution by the recording companies in expanding and improving upon
7 the innovations in satellite radio.

8 Similarly, the innovations of XM and Sirius are not matched by those of Music
9 Choice. Music Choice has relied on conventional distribution schemes (transponder
10 leases on conventional satellites and use of the existing cable infrastructure) while XM
11 and Sirius created an entirely new music distribution system. The number of patents
12 received by Music Choice is significantly less than that of XM and is also smaller than
13 that of Sirius. Among the innovative features pioneered by XM and Sirius are the plug-
14 and-play satellite radio concept that allows the same radio to be used in a home docking
15 station or in an automobile; the development of a portable/wearable radio, including the
16 miniaturization of the antenna, that allows subscribers to receive live satellite radio
17 broadcasts; the initial chipset development for satellite radios and the subsequent
18 reduction in size, reduction in power consumption, and improvements in signal
19 reliability; and work with automobile manufacturers to integrate satellite radio antennas
20 into their vehicles. (See Exhibit 19.)

21 iii. Capital Investment, Cost, and Risk

22 XM and Sirius have expended considerable funds on both capital investments and
23 R&D investments to deploy a satellite radio service—the design and production of
24 receivers, the acquisition of the land rights and the positioning of repeaters, the satellite
25 design itself, all done well in advance of service launch. These investments have totaled
26 [[]] since inception for XM and [[]] million for Sirius, or more than
27 [[]] dollars combined across the two services. (See Exhibit 21. Exhibit 22
28 details the services' satellite expenditures.) They also have invested in developing
29 innovative content for both the music and non-music services (which in turn, attracts
30 more listeners to the service). By contrast, the recording companies have not incurred

1 any incremental investment or any other costs with respect to the development and
2 deployment of satellite radio service or programming on that service.

3 Similarly, XM and Sirius have likely expended far more in capital investments
4 and other costs than Music Choice. Music Choice relied on standard satellite
5 transmission technology and cable infrastructure for the deployment of its service and
6 provides only all-music channels. XM and Sirius developed a customized satellite radio
7 service for mobility in a nationwide footprint.

8 The same higher level of expenditures associated with satellite radio service also
9 represents highly risky investments on the part of the two services. They deployed new
10 satellite technology, bought and launched their own satellites, invested in the chipset and
11 other aspects of the satellite radio itself, invested in the development of non-music
12 content for both the music and non-music channels, and invested in the promotion of a
13 new service that still has no guarantee of ultimate success.

14 The only possible risk that the recording labels incur is that of displacement of
15 CD or download sales, but as discussed above, there is no credible reason to believe that
16 such displacement is either significant or indeed exists at all. In fact, to the extent that
17 XM and Sirius provide another avenue of exposure promoting the artists, CD sales,
18 downloads, and concerts, the overall risk of recording and distributing CDs and
19 downloads to the recording companies and of selling concert tickets may be reduced.
20 Moreover, to the extent that XM and Sirius subscriptions come at the expense of
21 terrestrial radio, the recording artists and labels will earn fees for the SRPR that they
22 would otherwise not receive.

23 It is also likely that the risk incurred by XM and Sirius is greater than that
24 incurred by Music Choice, both at the outset and today as well. As noted, XM and Sirius
25 developed their own satellite and radio technology while Music Choice relied largely on
26 existing technology. In addition, the size of the financial stake—the magnitude of the
27 investments that are at risk for XM and Sirius—is likely much more substantial for Sirius
28 and XM.

1 iv. Opening New Markets

2 As noted previously, the development of satellite radio has provided a mobile
3 service that offers more music and non-music services than is available via traditional
4 radio. XM and Sirius both overcame substantial obstacles in order to obtain licenses from
5 the FCC. In 1990, Sirius first approached the FCC regarding the possibility of allocating
6 satellite spectrum for a satellite-based radio service. The services (or their corporate
7 predecessors) applied to the FCC for licenses in 1992. It wasn't until 1997 that XM and
8 Sirius were awarded the licenses.⁹⁰ Chief among the obstacles confronted by XM and
9 Sirius in seeking the licenses was the persistent objections by what I have understood to
10 be one of the most powerful lobbying organizations in the country, the National
11 Association of Broadcasters whose members include commercial over-the-air radio
12 stations. As the above discussion suggests, there has been no effort by the recording
13 companies to assist either the initial acquisition of the licenses or in the development of a
14 mobile satellite radio service.

15 The key contrast with the contributions of Music Choice and other PSS to
16 opening new markets is the development of the mobile satellite radio service. The PSS
17 introduced cable operators and their subscribers to a new way of receiving in-home music
18 without commercials. XM and Sirius went substantially beyond the efforts of the PSS by
19 providing an end-to-end mobile service. This effort, unlike the efforts of the PSS,
20 required the development of complex technology required to support that service. In
21 addition, XM and Sirius both offer subscribers more channels of music and more music
22 diversity than the PSS, providing an increased opportunity for subscriber exposure to new
23 artists and different music genres. This discussion suggests that the contribution of XM
24 and Sirius to opening new markets is more substantial than that of the PSS, particularly in
25 light of the required new technology development by XM and Sirius. Indeed, while XM
26 and Sirius appear several times in one compilation of a list of important events in radio
27 history, Music Choice does not appear at all.⁹¹

⁹⁰ See FCC News Report No. IN 97-4, "FCC Announces Plan for Satellite DARS," at http://www.fcc.gov/Bureaus/International/News_Releases/1997/nrin7004.txt.

⁹¹ See http://beradio.com/features/radio_today_radio_history/.

1 c. *Evaluating the potential for a SRPR rate that could prove disruptive to*
2 *the satellite radio business*

3 Under Section 801(b), the statute requires that the chosen SRPR rate “minimize
4 any disruptive impact on the structure of the industries involved and on generally
5 prevailing industry practices.” XM and Sirius clearly have not turned the corner on the
6 profitability of their service. As shown in Exhibit 23, XM lost \$667 million last year,
7 while Sirius lost \$863 million. The cumulative losses to date for each company are well
8 over \$3 billion. Indeed, analyst reports suggest that it will take several years before XM
9 and Sirius have positive net income. These projections rely on the assumption that both
10 companies will at least double the number of subscribers over that time frame; if these
11 additional subscribers do not materialize, then the companies will not turn a profit.⁹² And
12 of course even if things play out according to the projections, total accumulated losses
13 will have risen by another billion dollars or more by the time these companies reach the
14 break even point.⁹³ This suggests that for some time to come, both XM and Sirius will
15 remain financially fragile. That fragility is underscored by the sea of competition faced
16 by Sirius and XM. Most obviously, every vehicle produced (as far as I know) has as
17 standard equipment an AM-FM radio by which consumers can listen to music and talk
18 “channels.” As noted earlier, in the five largest radio markets, free over-the-air radio
19 provides listeners on average with 43 music channels and 74 channels in all. (See Exhibit
20 18.)

21 Because terrestrial radio pays no SRPR fee for its over-the-air service, that tilts
22 the competition towards terrestrial radio. When considering adding more music to their
23 services, terrestrial radio, XM and Sirius will consider the costs and benefits of adding
24 that music. But in performing that calculus, over-the-air radio will not account for a
25 SRPR fee that it does not have to pay, and thus has a greater incentive at the margin to
26 play more music.

27 In the near term, the competition provided by terrestrial radio to XM and Sirius is
28 likely to become more intense as radio goes digital. One website notes that as a result,
29 radio will offer more genres of music, more non-music programming, real-time traffic

⁹² See “Satellite Radio Outlook,” op. cit., pp. 5-15.

⁹³ See “Satellite Radio Outlook,” op. cit., p 15.

1 reports and stock prices, and real-time song, singer, and album identification. The site
2 notes that these services will be provided “**free of charge** like radio should be” (emphasis
3 in the original) and with “no subscription costs, no plans, and no monthly bills.”⁹⁴

4 Moreover, competition with over-the-air radio may be becoming more intense in
5 other dimensions as well. I understand that some large group owners of radio stations
6 have begun reducing the number of commercials on air or to make those commercials
7 less intrusive.⁹⁵

8 In addition, XM and Sirius are not likely to be less financially fragile than Music
9 Choice. Indeed, the financial stake in success or failure is much greater for XM and
10 Sirius than for Music Choice. In 2005, the revenues of Music Choice were only 0.9% of
11 the total operating expenses of XM and 1.0% of the total operating expenses of Sirius.⁹⁶

12 These circumstances suggest that the established SRPR should be set towards the
13 lower end of the range. In considering where to set that rate, an economist would also
14 consider the asymmetric effect of making a mistake in setting the SRPR rate. If the rate
15 is set too low, the recording companies will not exit the industry nor will there be any
16 measurable effect on the companies’ incentives to create new sound recordings. If the
17 rate is mistakenly set too high, XM and Sirius will likely confront a substantial increase
18 in financial risk which in turn will result in a curtailment of their services offered and a
19 reduction in their ongoing investments in innovation.

20 d. *Providing a fair return to both the copyright owner and copyright user*
21 *under existing economic conditions*

22 A rate towards the lower end of the range described above satisfies the statutory
23 requirement that the rate be fair to both the copyright owner and copyright user. First, the
24 Music Choice benchmark used here is a negotiated rate and so must be viewed by both
25 parties as “fair” in light of all of the statutory standards. The rate is “fair” to the
26 copyright owner precisely because it is based on that benchmark and is consistent with

⁹⁴ See http://www.hdradio.com/what_is_hd_digital_radio.php.

⁹⁵ See “Fewer commercials on the horizon?” CNNMoney.com, August 15, 2005; “Satellite option forces traditional radio to alter format” *Newsday*, December 11, 2005.

⁹⁶ Music Choice earned \$10.3 million in fiscal 2005. See Hoover’s Company Record – Basic Record, Music Choice, 8.22.06; 2005 Form 10-K, XM Satellite Radio Holdings Inc., p. 35; 2005 Form 10-K, Sirius Satellite Radio Inc., p. F-4.

1 the music works rates that are market-driven. That rate (or a rate towards the lower end of
2 the range) will also permit satellite radio to remain competitive with the numerous
3 competitive alternatives to satellite radio.

4 Similarly, the rate “fairly” compensates the copyright holder for the use of the
5 SRPR by XM and Sirius. Indeed, to the extent that satellite radio acquires its subscribers
6 because it attracts them from over-the-air radio, the holders of the SRPR will clearly
7 benefit. Subscribers are being diverted from a medium (over-the-air radio) that has no
8 obligation to compensate performers and SRPR holders to one that does (satellite radio).

9 **XII Conclusion**

10 Based on the foregoing analysis, I conclude that a reasonable range for the SRPR
11 fee to be paid by XM and Sirius should be between 0.88% and 2.35%. This rate range is
12 based on rates paid by analogous services or for analogous rights. Consideration of the
13 801(b) factors leads me to the conclusion that the rate should be set at the lower end of
14 the range. I understand that XM and Sirius are proposing a rate of 0.88% and such a rate
15 would be consistent with the analysis I have conducted.

16 Given the data available, there are a number of reasons to regard this estimated
17 range as generally conservative. First, I have not accounted for the value to subscribers
18 of the enhancements that each service creates for its music channels. Thus, some of the
19 payments to SoundExchange will be excessive in that they reflect the subscriber value of
20 the enhancements rather than the value of the underlying music. This means that
21 programming adjustments based on listenership and subscriber cancellation rates may
22 overstate the value of the underlying sound recording performances on the music
23 channels. In particular, the listenership adjustment counts all music listening without
24 counting the effect of the music programming enhancements on music listening. Thus, I
25 may be giving credit to the sound recording performance that in fact is attributable to the
26 programming enhancements. While the attachment index based on cancellation rates
27 may be a better indicator than listenership of the value that consumers place on music and
28 non-music programming, those subscribers who indicate that they are prepared to cancel
29 the Sirius service if a favored music channel is pulled from the Sirius lineup may be
30 doing so at least in part because of the music channel enhancements. This index, then,

1 may also overstate the significance of the sound recording performance for rate-making
2 purposes.

3 Second, in tallying the costs of the end-to-end level, I have not accounted for the
4 cost of equity capital acquired by both services. Given the substantial inherent riskiness
5 of the two services, as indicated by their cumulative losses, this is a significant omission
6 and likely results in a substantial overstatement of the hand-off provider costs relative to
7 the end-to-end costs. Nor have I accounted for the cumulative losses that the two
8 services have already incurred.

9 Third, the PRO rates likely overstate the “true” upper bound of the range of
10 reasonable rates. Those rates may be excessive because of the incentive of the PROs to
11 harden their bargaining stance in light of the possible precedential value of the rates. In
12 addition, I have not accounted for the fact that pre-1972 sound recordings, live
13 performances, and archival performances are not subject to the SRPR while all musical
14 works performances result in payments to the PROs. That failure results in an
15 overstatement of the upper bound. Moreover, the sound recording performance license is
16 more restrictive than the musical works license because of the sound recording
17 performance complement. Thus, other things equal, the PRO right would be more
18 valuable than the sound recording performance right.

19 Fourth, neither the PRO upper bound rate nor the rates that derive from my use of
20 the PSS rate as a benchmark reflect the 801(b) factors. I have concluded that the
21 application of the factors to XM and Sirius would result in a rate towards the lower bound
22 of the range. But I have not suggested that those factors should be lower than that lower
23 bound even though had I been able quantify those factors, that might well be the case. I
24 have recommended the lower end of the range because as a general matter, XM and
25 Sirius appear to outperform the recording labels and the PSS with respect to these factors.
26 As one obvious example, the importance of airplay could lead competing record labels to
27 pay compensation to the services to encourage sound recording performances, not the
28 reverse.

29 It is certainly possible that there are reasons why my estimates understate the
30 “true” SRPR rate. For example, it’s possible that the amortization schedules for the up-
31 front content payments by XM and Sirius are excessive, but I have no reason to believe

1 that that would be the case. It's also possible that a refined study would better reveal
2 subscriber valuation of the music and non-music programming, and in particular reveal
3 that I have overstated the importance of non-music programming. But based on my
4 analysis here, I have no reason to believe that such a study would contradict my
5 conclusions and in fact could indicate a greater significance to non-music programming
6 than I have assumed. As a final example, it is possible that I have understated the
7 likelihood that listening to satellite radio displaces CD and download sales, but that too
8 seems unlikely based on my previous discussion.

9 In short, while there are certainly assumptions embedded within my analysis that
10 could result in an understatement of the rate, I conclude on balance that given the data
11 available, my approach more likely than not overstates that rate.

Appendix

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This Appendix describes the particular line items in the data provided to me by XM and by Sirius, and their categorization as hand-off provider costs and subscriber distribution and acquisition costs. Sirius and XM each reviewed the categorization of these various line items.

*Assignment of XM Costs*⁹⁷

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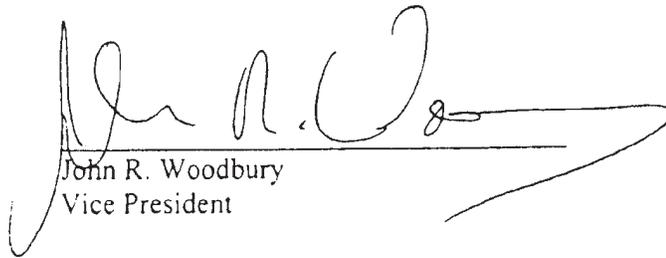
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Certification

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: Washington D.C.

October 30, 2006



John R. Woodbury
Vice President

Index of Exhibits for John Woodbury

Ex. No.	Sponsored By:	Description
SDARS-Woodbury Ex. 1	John Woodbury	John Woodbury Curriculum vitae
SDARS-Woodbury Ex. 2	John Woodbury	List of Documents and Materials Reviewed
SDARS-Woodbury Ex. 3	John Woodbury	XM Radio Channels by Format
SDARS-Woodbury Ex. 4	John Woodbury	Sirius Radio Channels by Format
SDARS-Woodbury Ex. 5	John Woodbury	Diagram of "How Satellite Radio Works"
SDARS-Woodbury Ex. 6	John Woodbury	Music Choice, XM Satellite Radio, and Sirius Satellite Radio Music Channels by Format
SDARS-Woodbury Ex. 7	John Woodbury	Music Choice, XM Satellite Radio, and Sirius Satellite Radio Non-Music Channels by Format
SDARS-Woodbury Ex. 8.a	John Woodbury	Number of Music and Non-Music Channels on XM, 1999-2005
SDARS-Woodbury Ex. 8.b	John Woodbury	Number of Music and Non-Music Channels on Sirius, 2000-2005
SDARS-Woodbury Ex. 9.a	John Woodbury	XM Expenditures on Music and Non-Music Programming and Content, 2004 to 2005
SDARS-Woodbury Ex. 9.b	John Woodbury	Sirius Expenditures on Music and Non-Music Programming and Content, 2004 to 2006

Ex. No.	Sponsored By:	Description
SDARS-Woodbury Ex. 10.a	John Woodbury	Relative Importance of Music and Non-Music Channels on Sirius using Attachment Index
SDARS-Woodbury Ex. 10.b	John Woodbury	Summary of Relative Importance of Music and Non-Music Channels on Sirius using Attachment Index
SDARS-Woodbury Ex. 11	John Woodbury	In-Vehicle Listening Habits Before and After Subscribing to Sirius
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SDARS-Woodbury Ex. 19.a	John Woodbury	List of XM Patents

Ex. No.	Sponsored By:	Description
SDARS-Woodbury Ex. 19.b	John Woodbury	List of Sirius Patents
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SDARS-Woodbury Ex. 20	John Woodbury	Sirius Expenditures on Engineering, Design, and Development and XM Expenditures on Research and Development
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SDARS-Woodbury Ex. 22	John Woodbury	Sirius and XM Expenditures on Satellites
SDARS-Woodbury Ex. 23	John Woodbury	Sirius and XM Net Losses Since Inception

Exhibit 1



INTERNATIONAL

JOHN R. WOODBURY
Vice President

Ph.D. Economics,
Washington University

M.A. Economics,
Washington University

B.A. Economics,
College of the Holy Cross

Dr. Woodbury's principal fields of expertise are industrial organization, regulation, antitrust, law, and economics. He is an expert in and has published on the economics of antitrust and regulation in broadcasting, cable, telecommunications, and other industries.

PRIOR PROFESSIONAL EXPERIENCE

1989–1992 *Principal*, Microeconomic Consulting and Research Associates, Inc.
(formerly Competitive Analysis Group, ICF Consulting Associates)

- Responsible for providing antitrust and regulatory advice to clients.

1989 *Research Associate*, Analysis Group

- Responsible for providing antitrust and regulatory advice to clients.

1985–1989 Federal Trade Commission

Associate Director for Special Projects, Office of the Bureau Director, Bureau of Economics

- Responsible for initiating, conducting, and reviewing economic studies on Commission and other regulatory policies (including telecommunications); drafting speeches for the chairman; and reviewing Bureau participation in Federal Trade Commission cases.

Assistant Director for Rulemaking, Division of Policy and Evaluation, Bureau of Consumer Protection

- Responsible for managing the Commission's rulemaking agenda and drafting recommendations to the Commission from the Bureau director. Rules reviewed include holder-in-due-course, vocational schools, cooling-off, and funeral rules.

-
- Deputy Assistant Director, Regulatory Analysis, Bureau of Economics*
- Responsible for conducting or supervising studies or filings before regulatory agencies, including the Federal Communications Commission, the International Trade Commission, and the National Highway Traffic Safety Administration.
- 1983–1985 *Vice President, Department of Research and Policy Analysis, National Cable Television Association*
- Responsible for conduct or supervision of studies related to cable television, including consumer costs of the franchising process, deregulation of cable prices, effects of copyright fees on consumers, and the extent of competition with cable television.
- 1982–1983 *Senior Economist, Regulatory Analysis Division, Bureau of Economics, Federal Trade Commission*
- Responsible for broadcasting and telecommunications.
- 1979–1982 *Federal Communications Commission*
- Chief, Economics Division, Common Carrier Bureau*
- Senior economic advisor to Bureau and Commission on common carrier policy. Directed 25 subordinates in policy analysis.
- Industry Economist, Network Inquiry Special Staff*
- Responsible for the analysis of the program supply industry and the competitive impact of new broadcast technology.
- 1978–1979 *Assistant Chief, Policy Analysis Division, Brookings Economic Policy Fellow, assigned to Office of Economic Analysis, Civil Aeronautics Board*
- Responsible for the development of merger policy, international aviation policy, and service to small communities.
- 1977–1978 *Assistant Professor of Economics, State University of New York at Albany*
- 1975–1977 *Economist, International Research Department, Federal Reserve Bank of New York*
- Responsible for assessing bank-reported capital flows and exchange-rate movements.
- 1974–1975 *Lecturer, Southern Illinois University, Carbondale*

EXPERT WITNESS ACTIVITIES

Expert witness in a BMI rate setting proceeding on behalf of Music Choice, Second District Court of New York (expert report, supplemental report, direct case report, data affidavit, deposition testimony, and trial testimony), November 2003-April 2004.

Expert witness in a conspiracy/monopolization matter on behalf of IBEW Local No. 3. Expert report and deposition testimony. October-December 2002.

Expert witness before the Copyright Arbitration Royalty Panel, Direct and rebuttal testimony, regarding the determination of reasonable license fees for digital performance right in sound recordings and ephemeral recordings of music performed on public radio websites. Prepared on behalf of National Public Radio/Corporation for Public Broadcasting. April and October 2001.

Expert witness before the Illinois Commerce Commission, regarding the proposed SBC/Ameritech merger. Prepared on behalf of Sprint Communications Company, L.P. July 1999.

Expert witness before the Commonwealth of Virginia State Corporation Commission, regarding the proposed Bell Atlantic/GTE merger. Prepared on behalf of Sprint Communications Company, L.P. March 1999.

Expert witness before the Ohio Public Utilities Commission, regarding the proposed SBC/Ameritech merger. Prepared on behalf of Sprint Communications Company, L.P. December 1998.

Expert witness before the Illinois Commerce Commission, regarding the proposed SBC/Ameritech merger. Prepared on behalf of Sprint Communications Company, L.P. October and December 1998.

Expert witness to Copyright Arbitration Royalty Panel, Direct and Rebuttal Testimony, regarding the determination of reasonable rates for the digital performance of sound recordings. Prepared on behalf of Music Choice and DMX. June and July 1997.

Expert witness to Copyright Arbitration Royalty Panel, Rebuttal Testimony, regarding the shares of royalties due copyright claimants. Prepared on behalf of the Motion Picture Association of America. March 1996.

Expert witness before the Copyright Royalty Tribunal, rebuttal testimony on the value of distant signal sports programming. Prepared on behalf of the Motion Picture Association of America, December 1991.

Expert witness preparation in five antitrust investigations, 1988-1992, on behalf of the FTC.

Expert witness, FTC v. Elders Grain, Preliminary Injunction Proceeding, Sixth District Court. Testimony prepared on behalf of the FTC, June 1988.

Expert witness before the International Trade Commission and Department of Commerce, imports of Japanese semiconductors. Testimony prepared on behalf of the FTC, 1986.

Expert witness, Texas International/National/Pan American Acquisition Case and Continental/Western acquisition case. Testimony prepared on behalf of the Civil Aeronautics Board, 1978-1979.

Expert witness, PCS Wireless Inc. v. Sprint Corporation, Circuit Court of Cook County, Illinois, on behalf of Sprint Nextel Corporation, January 2006.

Expert witness, Horizon Personal Communications and Bright Personal Communications v. Sprint Corporation and UbiquiTel Inc. v. Sprint Corporation, Court of Chancery of the State of Delaware in and For New Castle County. Testimony on behalf of Sprint Nextel Corporation, April-May 2006.

OTHER SELECTED CONSULTING ACTIVITIES

Submitted a report, "In the Matter of Implementation of Section 621 (a) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311." With Stanley M. Besen. To the Federal Communications Commission on behalf of the National Cable & Telecommunications Association, 2006.

Submitted a report, "Attachment B to, In re Applications of Nextel Communications, Inc., Transferor, and Sprint Corporation, Transferee, for Consent to the Transfer of Control of Entities Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310 (d) of the Communications Act." With Stanley M. Besen and Steven C. Salop. To the Federal Communications Commission on behalf of Sprint Nextel Corporation, 2005.

Submitted a report, "Economic Analysis of the DOT's NPRM Proposals—Reply Comments." With Professor Steven C. Salop. To the Department of Transportation on behalf of Sabre, Inc., 2003.

Submitted a report, "Economic Analysis of DOT's NPRM Proposals." With Professor Steven C. Salop. To the Department of Transportation on behalf of Sabre, Inc., 2003.

Submitted a report, "Cable Television Subscriber Limits: A Critique." With Carl Shapiro. To the Federal Communications Commission on behalf of National Cable and Telecommunications Association, 2002.

Submitted a report to the Justice Department regarding unilateral effects related to a merger in the personal care industry, 2001.

Submitted a report to the European Commission on the effect of partial ownership interests in the luxury goods industry, 2001.

Submitted a report, "The Incentives of Cable Operators to Carry Multiple ISPs." With Stanley M. Besen and Patrick J. DeGraba. To the Federal Communications Commission on behalf of The National Cable Television Association, 2000.

Submitted a report on a media merger to the European Commission, 2000.

Submitted a report, "The Staff's Flawed Economic Analysis of Harm from Control Over 'Inactive Programs'" With Steven C. Salop. To the Federal Communications Commission on behalf of CBS Corporation and Viacom, Inc., 2000.

Submitted a report, "An Economic Analysis of the Effects of the AT&T-MediaOne Merger on Competition in the Supply and Distribution of Video Program Services: Response to the Critics." With Stanley M. Besen and Serge X. Moresi. To the Federal Communications Commission on behalf of AT&T, 1999.

Submitted a report, "An Economic Analysis of the proposed Bell Atlantic/GTE Merger." With Stanley M. Besen and Padmanabhan Srinagesh. To the Federal Communications Commission on behalf of Sprint Communications Company, L.P., 1998.

Submitted a report, "An Economic Analysis of the proposed SBC/Ameritech Merger." With Stanley M. Besen and Padmanabhan Srinagesh. To the Federal Communications Commission on behalf of Sprint Communications Company, L.P., 1998.

Submitted a report, "An Economic Analysis of the FCC's Cable Ownership Restrictions." With Stanley M. Besen. To the Federal Communications Commission on behalf of Tele-Communications, Inc., 1998.

Submitted a report, "Comments on Dertouzos and Wildman, 'Programming Access and Effective Competition in Cable Television.'" With Stanley M. Besen. To the Federal Communications Commission on behalf of Tele-Communications, Inc., 1998.

Submitted a report, "An Economic Analysis of the Effects of Partial Ownership Interests in Cable Systems." With Stanley M. Besen, Daniel P. O'Brien, and Serge X. Moresi. To the Federal Communications Commission on behalf of Tele-Communications, Inc., 1998.

Submitted a report, "A Response to Ameritech's New Media's 'Allegations of a Price Squeeze' by Vertically Integrated Cable Operators." With Stanley M. Besen. To the Federal Communications Commission on behalf of Tele-Communications, Inc., 1998.

Submitted a report, "A Further Analysis of the Effects of Cable Diversion, Premium Service Buy Rates, and Volume Discounts on Primestar's Competitive Incentives: A Response to Dr. Rosston." With Steven C. Salop, Stanley M. Besen, and E. Jane Murdoch. To the Federal Communications Commission on behalf of PRIMESTAR Partners, L.P., 1998.

Submitted a report, "An Economic Analysis of the Impact of the WorldCom-MCI Merger on the Provision of Internet Backbone Services." With Stanley M. Besen and Padmanabhan Srinagesh. To the Federal Communications Commission and the European Commission on behalf of Sprint Corporation, 1998.

Submitted a report, "A Comparison of Primestar's Costs with Those of a Standalone Entrant." With Steven C. Salop, Stanley M. Besen, and E. Jane Murdoch. To the Federal Communications Commission on behalf of PRIMESTAR Partners, L.P., 1998.

Submitted a report, "An Economic Analysis of Primestar's Competitive Behavior and Incentives: Reply to the Oppositions." With Steven C. Salop, Stanley M. Besen, and E. Jane Murdoch. To the Federal Communications Commission on behalf of PRIMESTAR Partners, L.P., 1998.

Submitted a report, "An Economic Analysis of Primestar's Competitive Behavior and Incentives." With Steven C. Salop, Stanley M. Besen, and E. Jane Murdoch. To the Federal Communications Commission on behalf of PRIMESTAR Partners, L.P., 1998.

Conducted statistical and other analyses of anticompetitive allegations surrounding a major media merger and submitted to the Federal Trade Commission, 1996.

Submitted a report, "Competitive Market Considerations in the Licensing of the 37-40 GHz Band." With Steven R. Brenner. To the Federal Communications Commission on behalf of WinStar Wireless, Inc., 1996.

Conducted statistical and other analyses of anticompetitive allegations surrounding a major media acquisition and submitted to the Justice Department, 1995.

Assisted in the preparation of testimony for the D.C. District Court regarding the competitive effects of the "must-carry" rules imposed on cable systems, 1996.

Submitted a report, "A Competitive Markup Approach to Establishing Rates When Adding Cable Program Services." With Stanley M. Besen. To the Federal Communications Commission on behalf of Tele-Communications, Inc., 1994.

Submitted a report, "Exclusivity and Differential Pricing for Cable Program Services." With Stanley M. Besen and Steven R. Brenner. To the Federal Communications Commission on behalf of Tele-Communications, Inc., 1993.

Submitted a report, "An Analysis of Cable Television Rate Regulation." With Stanley M. Besen and Steven R. Brenner. To the Federal Communications Commission on behalf of Tele-Communications, Inc., 1993.

Evaluated the prospects for Direct Broadcast Satellites on behalf of a potential investor, 1992.

Assisted in the preparation of testimony on the value of distant signal programming to earth station owners on behalf of the Motion Picture Association of America, 1992.

Prepared estimates of the supply elasticity of crude oil production and a paper, with F. Warren-Boulton and K. Baseman, on the alternatives to traditional pipeline regulation for a pipeline client, 1991-1992.

Prepared analyses of liability and damage estimates, with F. Warren-Boulton, on behalf of NEC in a bid-rigging allegation and presented those analyses to Justice Department officials, 1991.

Prepared a report, "Economic Analysis and Policy Implications of the Financial Interest and Syndication Rule." With F. Warren-Boulton. On behalf of the Motion Picture Association of America, 1990.

Submitted a report, "Assessing The Effect of Rate Deregulation on Cable Subscribers." With Sherman and Baseman. To the Federal Communications Commission on behalf of the National Cable Television Association, 1990.

Submitted an affidavit, "Economic Implications of the Pac Tel/Chicago Waiver Request." To the Department of Justice on behalf of the National Cable Television Association, January 1990.

Submitted an analysis of sham litigation allegations to the Justice Department on behalf of a software client, 1989.

PUBLICATIONS

"Analyzing Vertical and Horizontal Cross Ownership in Cable Television: the Time Warner-Turner Merger (1996)," in J.E. Kwoka and L.J. White, *The Antitrust Revolution: Economics, Competition, and Policy*, Scott, Foresman. With S. Besen, E. Murdoch, D. O'Brien, and S. Salop. Third Edition, Oxford University Press, 1999.

"Telecommunications in the U.S.: Evolution to Pluralism." With S. Besen and S. Brenner. In B. Lange (ed.), *ISDN in the USA, Japan, Singapore and Europe*, 1996.

"Market Structure, Program Diversity, and Radio Audience Size." With R. Rogers. *Contemporary Economic Policy* 1996.

"Rate Regulation, Effective Competition, and the Cable Act of 1992." With S. Besen. *Hastings Communications and Entertainment Law Journal*, 1994.

"Assessing Competition and Deregulation in Telecommunications: Some Observations on Methodology." In B. Cole (ed.), *After the Breakup: Assessing the New Post-AT&T Divestiture Era*. New York: Columbia University Press, 1991.

"Deterrence and Justice." With J. Bilmes. *Research in Law and Economics*, 1991.

"The First Amendment, Cable MTV, and the Must-Carry Rule: Towards a Cost-Benefit Analysis." *Proceedings of the Airlie House Conference on Telecommunications*, 1987.

"Video Competition and Consumer Welfare." In E. Noam (ed.), *Proceedings of the Arden House Conference on Video Competition*. New York: Columbia University Press, 1986.

Misregulating Television. With S. Besen, R. Metzger, and T. Krattenmaker. Chicago: University of Chicago Press, 1984.

"Regulation, Deregulation, and Antitrust in Telecommunications." With S. Besen. *Antitrust Bulletin*, Spring 1983.

"Determinants of Network Television Program Prices: Implicit Contracts, Regulation, and Bargaining Power." With S. Besen and G. Fournier. *Bell Journal of Economics*, Autumn 1983.

"Advertising, Price Competition, and Market Structure." With A. Arterburn. *Southern Economic Journal*, January 1981.

"Exchange Rate Stability and Monetary Policy." With B. Putnam. Albany Discussion Paper #95 in *Review of Economics and Business Research*, Winter 1980.

"Capital Market Integration Under Fixed and Floating Exchange Rates: An Empirical Analysis." *Journal of Money, Credit, and Banking*, May 1980.

OTHER COMPLETED RESEARCH

"Empirical Evidence on Efficiencies in the Common Ownership of Broadcast Stations." With K. Anderson. Comments on FCC Proceeding, 1991.

"Do Government-Imposed Ownership Restrictions Inhibit Efficiency?" *Working Paper of the Bureau of Economics*, No. 169, 1988.

"Over-the-Air Television and Cable Prices: An Econometric Inquiry." With M. Bykowsky. Served as basis of FCC decision deregulating cable prices, 1985.

"The Effect of Rate Regulation and Franchise Delay on Program Availability." With D. Koran. Comments on FCC Proceeding, 1985.

"Pricing Flexibility and Consumer Welfare: The Deregulation of Basic Cable Rates." NCTA White Paper, 1984.

"Economic Assessment of the Financial Interest and Syndication Rules." With K. Anderson. Comments on FCC Proceeding, 1983.

"Domestic Fixed Satellite Transponders Sales." Comments on FCC Proceeding, 1982.

An Analysis of Television Program Production, Acquisition, and Distribution. With R. Metzger. Network Inquiry Special Staff, Preliminary Report, Federal Communications Commission, June 1990.

"Production Abroad: Theoretical Considerations and Empirical Analysis." Mimeo, 1978.

"Scale Economies in the Airline Industry: A Survey." Mimeo, 1978.

PRESENTED PAPERS

"Market Structure, Program Diversity, and Radio Audience Size." With R. Rogers. Meetings of the Western Economics Association, July 1993.

"The Effects of Rate Deregulation on Cable Subscribers." With K. Baseman. Policy Approaches to the Deregulation of Network Industries: An American Enterprise Institute Conference, October 1990.

"Economic Analysis and Policy Implications of the Financial Interest and Syndication Rule." Telecommunications Policy Research Conference, Airlie House, October 1990.

"The Design and Evaluation of Competitive Rules Joint Ventures for Mergers and Natural Monopolies." With F. Warren-Boulton. American Economic Association Meetings, December, October 1990.

"Do Media Ownership Restrictions Reduce Economic Efficiency?" Telecommunications Policy Research Conference, Airlie House, November 1989.

"The Conflict Between Spectrum Efficiency and Economic Efficiency." With R. Rogers. Telecommunications Policy Research Conference, Airlie House, November 1989.

"Regulation versus Antitrust." Annenberg Conference: The Divestiture Five Years Later." March 1989.

"Regulating Cable Television." Telecommunications Policy Research Conference, Airlie House, September 1987.

"An Empirical Analysis of Television Program Prices." With S. Besen and G. Fournier. Meetings of the Southern Economic Association, November 1981.

"Flexible Exchange Rates and Market Integration." With B. White. Federal Reserve System Conference on Financial Market Research, June 1979.

"Advertising, Price Competition, Market Structure." With A. Arterburn. Meetings of the Southern Economic Association, November 1978.

"The Effects of Exchange Rate Systems on International Capital Market Integration." With B. White. Federal Reserve System Conference on International Research, November 1977.

OTHER PROFESSIONAL ACTIVITIES

Chair, "Competition between Cable Television and Telephone Companies." Telecommunications Policy Research Conference, September 1991.

Discussant, "Competition and Ownership in the Media." Telecommunications Policy Research Conference, September 1991.

Chair, "Spectrum Management Session." Telecommunications Policy Research Conference, Airlie House, September 1988.

Book Review, *Productivity in the United States* by John Kendrick and Elliot Grossman, *Southern Economic Journal*, April 1981.

Discussant, "Deregulation of Telecommunications." Meetings of the Western Economic Association, July 1981.

Referee, *Southern Economic Journal*, *RAND Journal of Economics*, Harvard University Press.

AWARDS

- Award for Excellence in Economics (FTC), 1988
- Competition Advocacy Award (FTC), 1987
- Brookings Economic Policy Fellow, 1978-1979
- SUNY Faculty Research Grant, 1978
- NSF Traineeship, 1973-1974
- *Finalist*, Woodrow Wilson Fellowship Competition, 1971

Exhibit 2: List of Documents and Materials Reviewed

I. Prior Decisions and Codes of Law

- 1 17 U.S.C. 801(b)(1)
- 2 "Digital Performance Right in Sound Recordings Act of 1995," Pub. L. No. 104-39, 109 Stat. 336 (1995)
- 3 Copyright Office 37 CFR Part 260, Docket No. 96-5 CARRP DSTR A, "Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings," *Federal Register*, Volume 63, No 89, May 8, 1998
- 4 Copyright Office 37 CFR Part 260, Docket No. 2001-1 CARRP DSTR A2, "Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings by Preexisting Subscription Services," *Federal Register*, Volume 68, No 128, July 3, 2003
- 5 Copyright Office 37 CFR Chapter II, Docket No. RM 96-3A, "Notice and Recordkeeping for Subscription Digital Transmissions," *Federal Register*, Volume 62, No. 121, June 24, 1997
- 6 Copyright Office 37 CFR Part 261, Docket No. 2000-9 CARRP DTR A 1&2, "Determination of Reasonable rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings," *Federal register*, Vol. 67, No. 130, July 8, 2002
- 7 United States, Music Choice v. Broadcast Music, Inc., 04-3444-CV (2d Cir., Oct. 6, 2005)
- 8 United States, Music Choice v. Broadcast Music, Inc., Docket No. 01-6183 (2d Cir. 2003)
- 9 United States, Music Choice v. Broadcast Music, Inc., No. 64 Civ. 3787 (LLS), 2001 U.S. Dist. LEXIS 10368 (S.D.N.Y. July 23, 2001)

II. Email

- 1 Promotion Emails from Artists
- 2 Promotion Emails from Subscribers
- 3 Promotion Emails from Record Labels

III. Sirius and XM Internal Documents

- 1 Sirius Financial Data
- 2 Sirius Satellite Radio Listener Study – Wave 2, June 2006
- 3 Sirius Satellite Radio Listener, Customer Satisfaction Monitor, 2Q'06 Results, August 28, 2006 - Final
- 4 Sirius Satellite Radio 2005 Annual Report and Proxy Statement
- 5 Sirius Subscriber Past Week Listening and Satisfaction, June 2006
- 6 XM Financial Data
- 7 ~~LL~~
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- 9 ~~LL~~
- 10 XM Annual Shareholders Meeting, May 2006
- 11 ~~LL~~
- 12 ~~LL~~

IV. Publicly Available Data
1 2006 BIA Investing in Radio Market Report

V. News Articles and Press Releases

- 1 "FCC Announces Plan for Satellite DARS," *FCC News Report No. IN 97-4*
- 2 "Stern Is the Draw At Sirius Satellite Radio," *Business Week*, April 10, 2006
- 3 "Is Howard Stern Worth It?" *Business Week*, January 23, 2006
- 4 "Can Stern Make Satellite Radio Hum?" *CNN/MONEY.com*, December 21, 2005
- 5 "Justice Department Agrees to Modify Broadcast Music Inc. 1966 Consent Decree," *DOJ Press Release*, June 30, 1994
- 6 "Justice Department Announces Agreement to Modify ASCAP Consent Decree," *DOJ Press Release*, September 5, 2005
- 7 "Sound Exchange Board Meets, Extends Deadlines for Artists/Labels to Receive Royalties from First Distribution, Votes on New Board Members and Receives Word on Latest Distribution," *SoundExchange Press Release*, June 4, 2005
- 8 "Universal Music Settles Payola Probe," *Office of New York State Attorney General Press Release*, May 11, 2006
- 9 "Executive fired amid charges of payoffs," *New York Times*, January 12, 2005
- 10 "Sony BMG settles radio payola probe," *Washington Post*, July 26, 2005
- 11 "Music labels say it costs too much to get songs on the radio," *The Wall Street Journal*, June 10, 2002
- 12 "Radio and labels at odds again," *Billboard*, May 12, 2001
- 13 "Start Me Up: satcasters go early on new artists," *Billboard*, March 17, 2006
- 14 "Slymled by radio, veteran acts try new outlets," *Billboard*, January 29, 2005
- 15 "XM credited for band's worldwide exposure," *Richmond Times Dispatch*, August 10, 2006
- 16 "Fewer commercials on the horizon?" *CNN/Money.com*, August 15, 2005
- 17 "Satellite option forces traditional radio to alter format," *Newsday*, December 11, 2005
- 18 "Tuning In To Satellite Radio," *Technology Review*, January 25, 2002
- 19 "Major League Baseball Partners With XM Satellite Radio for 11-Year, \$650 Million Broadcast and Marketing Agreement," *XM News Release*, October 20, 2004
- 20 "NASCAR Selects SIRIUS As New Home on Satellite Radio," *Sirius News Release*, February 22, 2005
- 21 "Sony BMG Music Settles Spitzer's Payola Probe," *MSNBC.com*, July 27, 2005

VI. Academic Articles

- 1 Blackburn, D. (2004) "On-line Piracy and Recorded Music Sales." Harvard University Ph.D. Dissertation
- 2 Mortimer, J.H. and A. Sorenson (2005) "Supply Responses to Digital Distribution: Recorded Music and Live Performances," Working Paper
- 3 Oberholzer, F. and K. Strumpf (2005) "The Effect of File Sharing on Record Sales: An Empirical Analysis," Working Paper

VII. 10-Ks and other SEC Filings

- 1 Forms 10-K, XM Satellite Radio Holdings Inc., 1999-2005
- 2 Form 10-K Amendment, Sirius Satellite Radio Inc., 1996, 1998, 2001
- 3 Forms 10-K, Sirius Satellite Radio Inc., 1996-2005
- 4 Form 10-Q, XM Satellite Radio Holdings Inc., June 2006
- 5 Form 10-Q, Sirius Satellite Radio Inc., June 2006
- 6 Form 10-K, Microsoft Corporation, 2005
- 7 Form 10-K, Motorola Inc., 2005
- 8 Form 10-K, Sony Corporation of America, 2005
- 9 Form 10-K, Warner Music Group Inc, 2005
- 10 Form 10-K, EMI Music, 2005
- 11 Form 10-K, Adelphia Cable Communications, 2005
- 12 Form 10-K, Comcast Cable Communications, 2005
- 13 Form 10-K, Cox Communications, 2005
- 14 Form 10-K, Time Warner Cable, 2005

VIII. Websites (as viewed on October 29, 2006)

- 1 <http://www.sirius.com>
- 2 <http://www.sirius.com/server/ContentServer?pagename=Sirius/P/age&c=Page&cid=1065475754125>
- 3 <http://www.sirius.com/server/ContentServer?pagename=Sirius/CachedP/age&c=Page&cid=1150907696769>
- 4 <http://investor.sirius.com/releaseprint.cfm?releaseid=205864>
- 5 <http://www.sirius.com/server/ContentServer?pagename=Sirius/CachedP/age&c=Page&cid=1018209032792>
- 6 <http://www.xmradio.com>
- 7 <http://www.xmradio.com/exclusivemusic/>
- 8 <http://www.xmradio.com/exclusivemusic/offstage.jsp>
- 9 http://www.xmradio.com/service_subscription/service_subscription.jsp?retsrc=hp_gs
- 10 http://www.xmradio.com/corporate_info/fast_facts.html
- 11 http://www.xmradio.com/how_it_works/xm_studios.html
- 12 http://beradio.com/features/radio_today_radio_history/
- 13 <http://www.musicchoice.com/>
- 14 <http://www.orbicast.com/archives/oprnh-joins-xm-satellite-radio.html>
- 15 http://www.hdradio.com/what_is_hd_digital_radio.php
- 16 http://www.stateofthenewsmedia.org/2005/narrative_radio_contentanalysis.asp?cat=2&media=8
- 17 <http://patf.uspto.gov/netahtml/PTOsearch-bool.html>
- 18 <http://appf1.uspto.gov/netahtml/PTOsearch-bool.html>

IX. Testimony

- 1 Testimony of Adam B. Jaffe, in the matter of Digital Performance Right Sound Recordings and Ephemeral Recordings on behalf of Digital Media Association
- 2 Direct and Rebuttal Testimony of Erik Brynjolfsson, in the matter of Digital Performance Right Sound Recordings and Ephemeral Recordings, on behalf on SoundExchange
- 3 Testimony of Michael Pelcovits, in the matter of Digital Performance Right Sound Recordings and Ephemeral Recordings, on behalf of SoundExchange
- 4 Direct and Rebuttal Testimony of John R. Woodbury in re: Determination of Statutory License Terms and Rates for Certain Digital Subscription Transmissions of Sound Recordings on behalf of DCCR and DMX
- 5 Direct and Rebuttal Testimony of John R. Woodbury in BMI rate setting proceeding on behalf of Music Choice
- 6 Direct and Rebuttal Testimony of E. Jane Murdoch and John R. Woodbury before CARP on reasonable license fees for digital performance right in sound recordings and ephemeral recordings of music performed on public radio websites on behalf on NPR/Corporation for Public Broadcasting

X. Interviews

- 1 Interviews with Eric Logan, Executive Vice President of Programming, XM
- 2 Interviews with Mark Vendetti, Senior Vice President of Corporate Finance, XM
- 3 Interviews with John Kramer, Vice President of Corporate Finance, XM
- 4 Interviews with Stephen Cook, Executive Vice President, Automotive, XM
- 5 Interviews with Tony Masello, Senior President of Operations, XM
- 6 Interviews with John Dealy, Senior Advisor to the CEO, XM
- 7 Interviews with David Frear, Chief Financial Officer, Sirius
- 8 Interviews with Michelle Mckinnon, Director of Investor Relations, Sirius
- 9 Interviews with Douglas Kaplan, Senior Vice President, Business Affairs and Development, Entertainment and Sports, Sirius

XI. Other Materials Reviewed

- 1 Satellite Radio Outlook, Kagan Research, LLC, July 2005
- 2 Warner Music Group, 2005 Annual Report
- 3 Market Share Reporter, 2007, Volume 1, "Top Music Firms Worldwide, 2006
- 4 Hoovers Company records - Basic records, Music Choice, August 22, 2006
- 5 Morgan Stanley Analyst Reports
- 6 Bernstein Analyst Reports
- 7 Lehman Brother Analyst Reports

Exhibit 3: XM Radio Channels by Format

Non-Music Content	Music Content
<u><i>Especially for Women (2 channels)</i></u> Take Five Oprah & Friends	<u><i>Christian (3 channels)</i></u> The Message Spirit enLighten
<u><i>News (13 channels)</i></u> ABC News & Talk BBC World Service CNN Headline News CNN Quoi de Neuf Canada 360 XM Public Radio FOX News The Weather Channel C-SPAN Radio CNN en Español Bloomberg Radio CNBC	<u><i>Classical (3 channels)</i></u> XM Classics Vox XM Pops
<u><i>Talk & Entertainment (13 channels)</i></u> E! Entertainment The Power FamilyTalk XM Live: Open Road FOX News Talk High Voltage Extreme XM Talk Radio Air America Radio Radio Classics America Right Sonic Theater	<u><i>Comedy (4 channels)</i></u> Laugh USA XM Comedy Laugh Attack National Lampoon Comedy Radio
<u><i>Regional Talk, News & Music (1 channel)</i></u> WLW	<u><i>Country (7 channels)</i></u> US Country Willie's Place Bluegrass Junction America The Village Highway 16 X Country
	<u><i>Dance (5 channels)</i></u> Chrome The System XM-Chill BPM The Move
	<u><i>Decades (6 channels)</i></u> The 40s The 50s The 60s The 70s The 80s The 90s
	<u><i>Jazz & Blues (5 channels)</i></u> Beyond Jazz Real Jazz Watercolors Frank's Place Bluesville

(Exhibit 3 Continued)

(Exhibit 3 Continued)

Non-Music Content

Music Content

Traffic & Weather (22 channels)

Miami/Ft. Lauderdale, FL
Washington, DC
Dallas/Ft. Worth, TX
Chicago, IL
Tampa / St. Petersburg, FL
Boston, MA
St. Louis, MO
Seattle, WA
San Francisco, CA
Pittsburgh, PA
XM Emergency Alert
Atlanta, GA
Los Angeles, CA
Houston, TX
Detroit, MI
Phoenix, AZ
Philadelphia, PA
Orlando, FL
New York, NY
Baltimore, MD
San Diego, CA
Minneapolis/St. Paul, MN

Sports (42 channels)

XM Sports Guide
NASCAR Radio
FOX Sports Radio
ESPNEWS
ESPN Radio
XM Sports Nation
XM Deportivo
Home Ice
NHL Hockey Play-by-Play (5 channels)
College Sports - PAC-10 (3 channels)
MLB Play-by-Play Channels (14 channels)
College Sports - Big Ten (3 channels)
College Sports - ACC (3 channels)
MLB Play-by-Play en Español
PGA TOUR Network
Sport Plus
IndyCar Series Racing
MLB Home Plate™
Big East Football/Basketball

Pop & Hits (8 channels)

Top 20 on 20
On Broadway
Cinemagic
U Pop
The Blend
XM Hitlist
Flight 26
The Heart

Kids (2 channels)

Radio Disney
XM Kids

Latin (4 channels)

Caliente
Aguila
Viva
Fuego

Lifestyle (4 channels)

Audio Visions
Escape
Hear Music™
Fine Tuning

Regional News & Talk (5 channels)

Nashville (Today's Country)
KISS
WSIX (Nashville Country)
MIX
Sunny

Rock (14 channels)

Bone Yard
Deep Tracks
Fred
Top Tracks
XM Cafe
XMU
The Verge
XM Liquid Metal
Big Tracks
Lucy
Fungus
Squizz
The Loft
Ethel

(Exhibit 3 Continued)

(Exhibit 3 Continued)

Non-Music Content	Music Content
	<u>Hip-Hop & Urban (7 channels)</u> RAW The Heat Soul Street The City The Groove The Rhyme Suite 62 <u>World (3 channels)</u> Sur La Route The Joint Air Musique

Note:

Reported channel counts are based upon a complete listing of channels obtained from XM's website as of September 27, 2006. The channel formats in this exhibit reflect the channel classifications used by XM. The channels in the music, comedy, and kids formats are assigned to "music" content because they all use commercially released music.

Source:

XM website.

Exhibit 4: Sirius Radio Channels by Format

Non-Music Content	Music Content
<u>Family & Kids (2 channels)</u> RadioClassics Discovery Radio Channel	<u>Christian (3 channels)</u> Revolution Praise Spirit
<u>Financial News (2 channels)</u> CNBC Bloomberg Radio	<u>Classical (3 channels)</u> Symphony Hall Classical Voices SIRIUS Pops
<u>International News (6 channels)</u> BBC Mundo CBC Radio One Première Plus BBC World Service News Radio Korea World Radio Network	<u>Comedy (3 channels)</u> Blue Collar Comedy Raw Dog Laugh Break
<u>Public Radio (3 channels)</u> NPR Talk PRI Public Radio International C-SPAN Radio	<u>Electronic and Dance (5 channels)</u> Area 33 Boombox Chill The Beat The Strobe
<u>Religion (2 channels)</u> Christian Talk EWTN Global Catholic Network	<u>Family & Kids (2 channels)</u> Radio Disney Kids Stuff
<u>Talk (13 channels)</u> Howard 100 Howard 101 SIRIUS Stars E! Entertainment Radio Maxim Radio Court TV Radio SIRIUS Patriot FOX News Talk SIRIUS Left Road Dog Trucking SIRIUS OutQ Playboy Radio The Roadhouse	<u>Jazz & Blues (5 channels)</u> Planet Jazz Jazz Café Pure Jazz Spa 73 SIRIUS Blues
<u>US News (5 channels)</u> FOX News Channel CNN CNN Headline News NPR Now ABC News & Talk	<u>Latin & International (5 channels)</u> Universo Latino Rumbón Bande À Part CBC Radio 3 Iceberg Radio
	<u>Country (5 channels)</u> The Roadhouse Outlaw Country New Country Prime Country Bluegrass

(Exhibit 4 Continued)

(Exhibit 4 Continued)

Non-Music Content

Traffic & Weather (12 channels)

New York
Boston/Philadelphia
Los Angeles
Chicago/St. Louis
Washington DC/Baltimore
Atlanta/Miami
Dallas/Houston
Detroit/Pittsburgh
San Francisco/Seattle
Phoenix/San Diego
Orlando/Tampa-St. Petersburg
SIRIUS Weather & Emergency

Lifestyles (3 channels)

Martha Stewart Living Radio
LIME
Cosmo Radio

NBA (1 channel)

NBA Radio on SIRIUS

NFL (1 channel)

SIRIUS NFL Radio

Sports News & Talk (6 channels)

Sports Play-by-Play 1
ESPN Radio
ESPNEWS
Sports Byline USA
SIRIUS Sports Action
ESPN Deportes

Music Content

Rock (19 channels)

Classic Rewind
The Vault
Jam_ON
The Spectrum
Buzzsaw
Octane
Alt Nation
First Wave
Hair Nation
SIRIUS Disorder
Underground Garage
Left Of Center
Hard Attack
Faction
The Coffee House
Radio Margaritaville
Reggae Rhythms
Rolling Stones Radio
Classic Vinyl

Standards (2 channels)

Standard Time
Broadway's Best

Hip-Hop/R&B (6 channels)

Backspin
Shade 45
Hot Jamz
Heart & Soul
Soul Town
Hip-Hop Nation

Pop (13 channels)

SIRIUS Hits 1
Star Lite
SIRIUS Love
Movin' Easy
SIRIUS Gold
'60s Vibrations
Totally '70s
Big '80s
The Pulse
The Bridge
BBC Radio 1
Super Shuffle
Elvis Radio

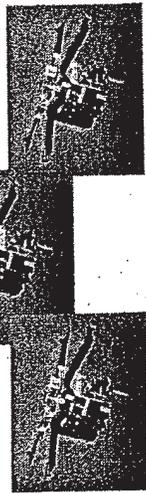
Note:

Reported channel counts are based upon a complete listing of channels obtained from Sirius' website as of September 27, 2006. The channel formats in this exhibit reflect the channel classifications used by Sirius. The channels in the music, comedy, and kids formats are assigned to "music" content because they all use commercially released music.

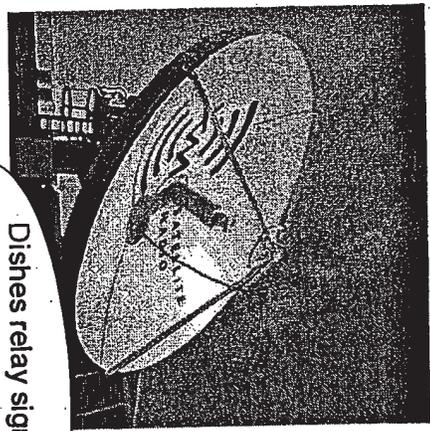
Source:

Sirius website.

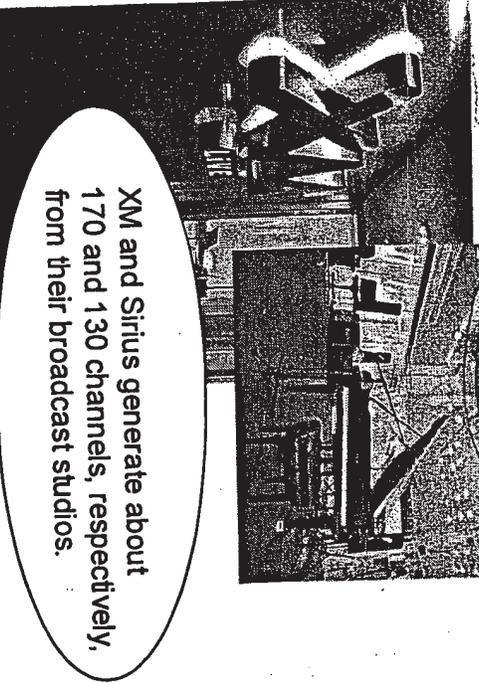
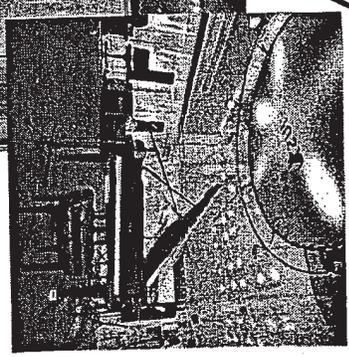
Exhibit 5: How Satellite Radio Works



The XM satellites are in stationary orbit
The Sirius satellites are in an inclined
elliptical orbit



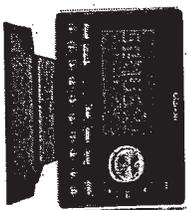
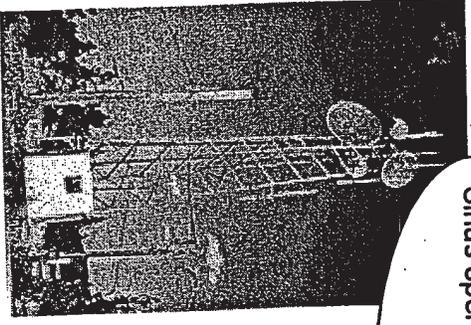
Dishes relay signals to fleets
of satellites owned by the
satellite radio companies.



XM and Sirius generate about
170 and 130 channels, respectively,
from their broadcast studios.

Some consumers receive
signals directly, others via a
ground repeater.

XM operates 800 repeaters and
Sirius operates 140 repeaters.



Consumers can listen
to their satellite radios
in the car or at home.



**Exhibit 6: Music Choice, XM Satellite Radio, and Sirius Satellite Radio
Music Channels by Format**

Format¹	Music Choice (Audio Content Only)	XM Radio	Sirius Radio
Urban ²	7	7	6
Rock	8	14	19
Pop ³	9	17	13
Dance ⁴	3	5	5
Country ⁵	4	9	5
Jazz & Blues	3	5	5
Classical	3	3	3
Religious ⁶	2	3	3
Kids ⁷	1	2	2
Comedy ⁸	0	4	3
Standards and Theatrical ⁹	3	0	2
Latin and International ¹⁰	10	7	5
Lifestyle ¹¹	0	4	0
Other Genres ¹²	5	0	0
TOTAL¹³	58	80	71

Notes:

1. These formats reflect CRA's categorization of the formats used by Music Choice, XM, and Sirius. Except where otherwise noted, CRA format classifications follow those used by Music Choice, XM, and Sirius.
2. Urban includes Sirius' Hip-Hop and R&B formats, and XM's Hip-Hop & Urban format
3. Pop includes Music Choice's Pop format and Party Favorites channel within its Variety format; XM's Hits, Decades, and parts of its Regional N&T formats.
4. Dance includes Sirius' Electronic and Dance formats.
5. Country includes XM's Country format and the two country channels from the Regional N&T format.
6. Religious includes the Christian format for both XM and Sirius.
7. Kids includes Radio Disney from Music Choice's Variety format; Sirius' channels within the Family and Kids format (depending on whether they were music or talk centered); and Radio Disney on XM and XM Children. These channels are treated as "music" channels because they use commercially released music.
8. The comedy channels are treated as "music" channels because they use commercially released music.
9. Standards and Theatrical includes Music Choice's Vocal/Theatrical format and its Big Band and Swing channel in its Variety format. Also includes Sirius' Standards format.
10. Latin and International includes Music Choice's Latin format and its Reggae channel from its Variety format. Also includes XM's Latin and World formats and Sirius' Latin & International format.
11. Lifestyle format is split depending on whether the channels are music or talk oriented. Music Choice carries no channels in the Lifestyles format. XM's channels in the Lifestyle format are music and Sirius' channels in the Lifestyle format are talk.
12. Other Genres include Music Choice's Instrumentals format and Showcase and Sounds of the Seasons from the Variety format.
13. XM's Regional N&T channels are not commercial free. The number of commercial-free XM music channels is 69.

Sources:

- XM website.
- Sirius website.
- Music Choice website.

Exhibit 7: Music Choice, XM Satellite Radio, and Sirius Satellite Radio Non-Music Channels by Format

Genre¹	Music Choice (Audio Content Only)	XM Radio	Sirius Radio
Sports ²	0	42	8
News ³	0	14	16
Traffic & Weather	0	22	12
Talk ⁴	0	14	13
Kids ⁵	0	0	2
Religious ⁶	0	1	2
Lifestyle	0	0	3
TOTAL	0	93	56

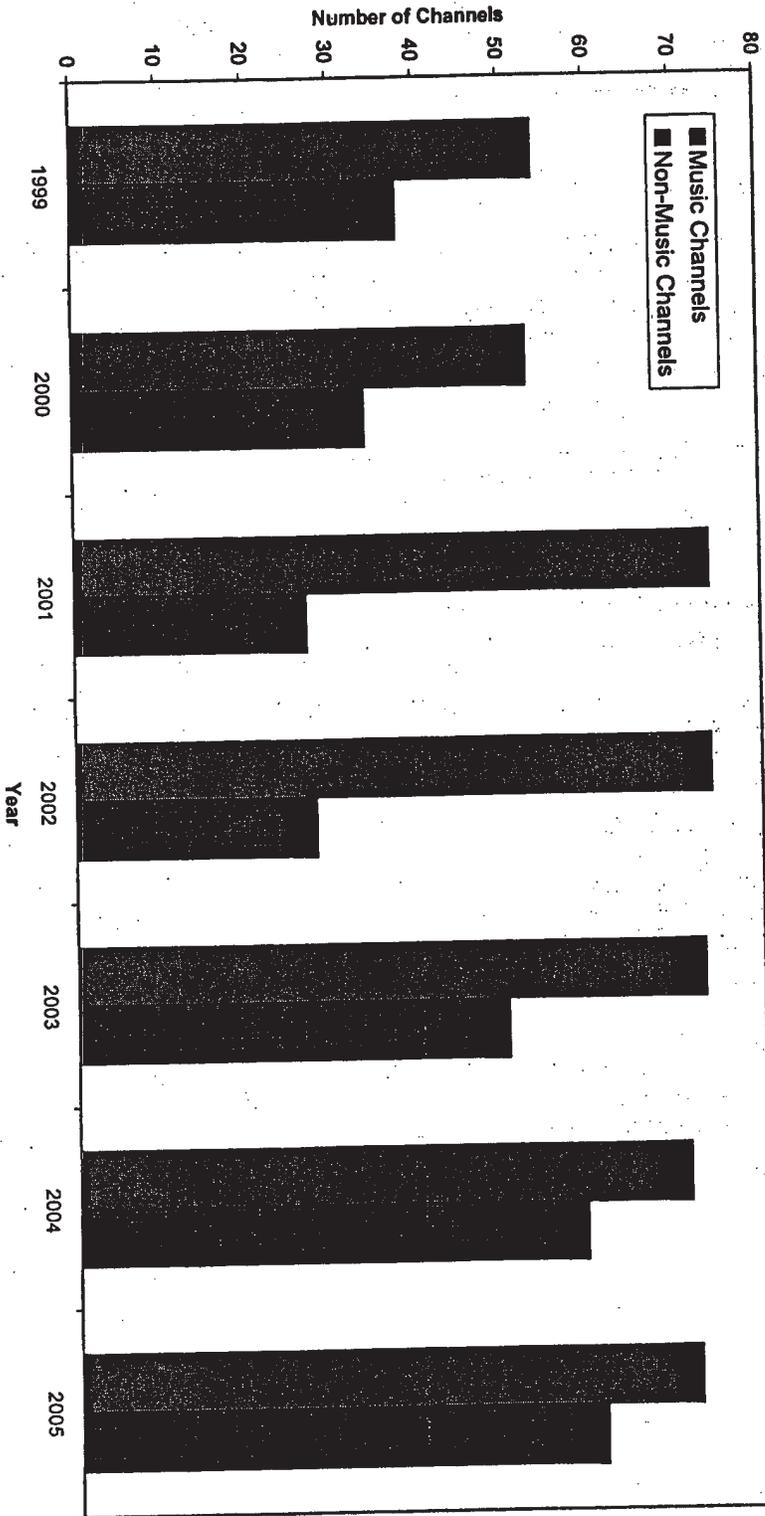
Notes:

1. These formats reflect CRA's categorization of the formats used by XM and Sirius. Except where otherwise noted, CRA format classifications follow those used by XM and Sirius.
2. Sports includes Sirius' NBA, NFL, and Sports News & Talk formats.
3. News includes Sirius' Financial News, International News, Public Radio and US News formats; and XM's News format as well as the WLW channel within the Regional News & Talk format.
4. Talk includes XM's Talk (except for the Christian Talk channel), Entertainment, and Especially for Women formats.
5. Kids includes Sirius' channels within the Family and Kids formats (depending on whether they were music or talk centered).
6. Religious includes Sirius' Religion format and the Christian Talk channel from XM's Talk format.

Sources:

- XM website.
- Sirius website.
- Music Choice website.

Exhibit 8.a: Number of Music and Non-Music Channels on XM, 1999-2005

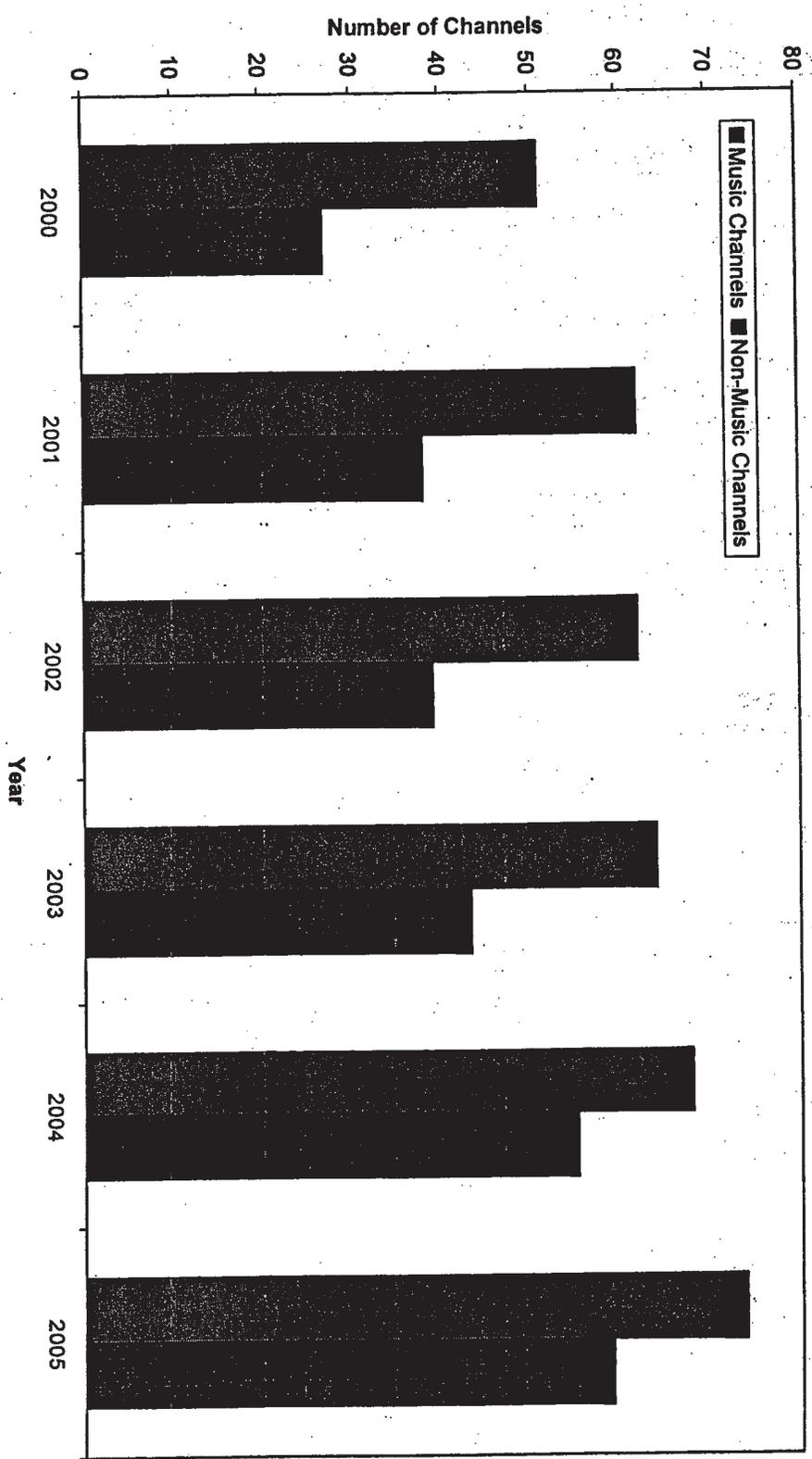


Notes:

1. 1999 and 2000 channel lineups were representative of what XM planned to offer at the time for future programming. These channel lineups included "Reserved Channels" for Special / Events programming.
2. XM channel lineups in 2001 and 2005 include the Preview channel as a non-music channel.
3. Play-by-Play channels are reported as one channel.
4. Kids and Comedy channels are counted as music channels.

Sources: XM Form 10-K's, 1999-2005.

Exhibit 8.b: Number of Music and Non-Music Channels on Sirius, 2000-2005



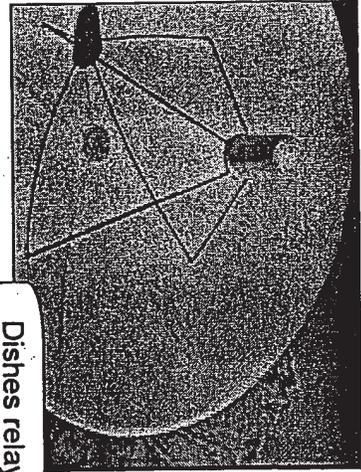
Note:
Kids and Comedy channels are counted as music channels.
Sources: Sirius Form 10-K's, 1999-2005

**THIS EXHIBIT CONTAINS
RESTRICTED INFORMATION
PURSUANT TO THE DECEMBER 20,
2006 PROTECTIVE ORDER AND
THEREFORE WAS OMITTED FROM
THIS PUBLIC VERSION**

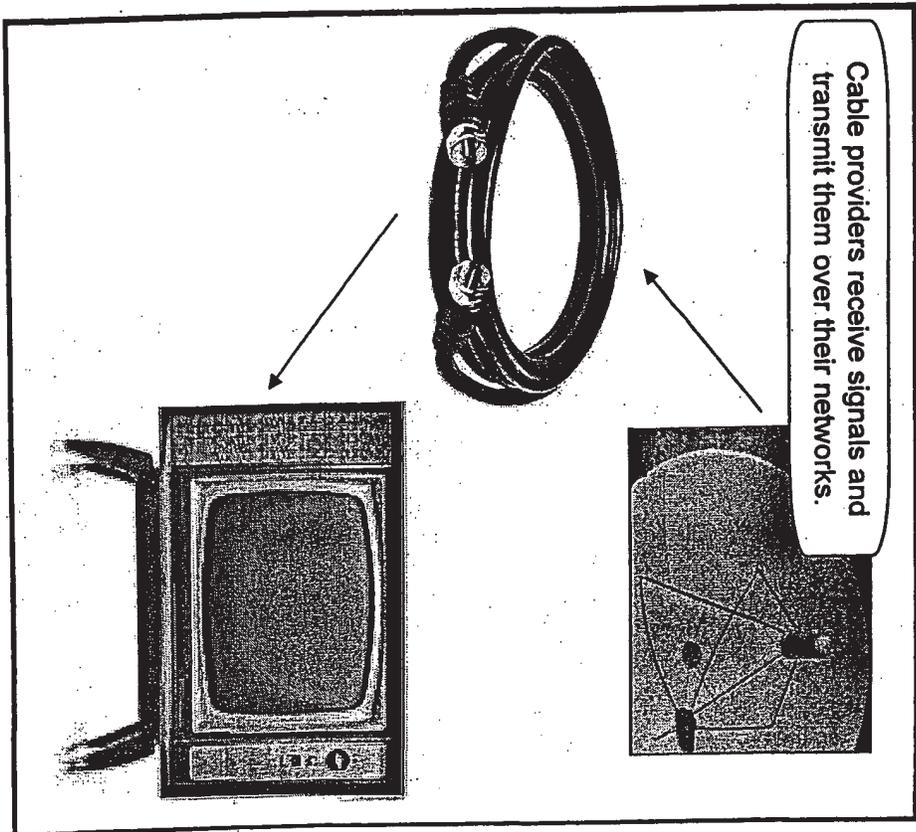
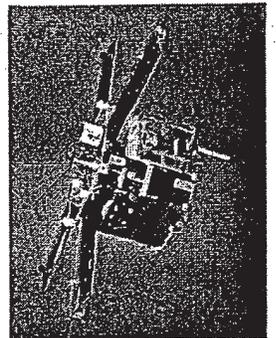
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RESTRICTED INFORMATION
PURSUANT TO THE DECEMBER 20,
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THIS PUBLIC VERSION**

Exhibit 12: How Music Choice Works



Dishes relay signals to third-party satellites.



Cable providers receive signals and transmit them over their networks.

MUSIC CHOICE

Music Choice programs approximately 58 music channels.

**THIS EXHIBIT CONTAINS
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Exhibit 18: Music Channels by Format for XM, Sirius, and the Five Largest Over-the-Air Radio Markets

Format ¹	Over-the-Air Radio Markets ¹⁵						
	XM	Sirius	New York	Los Angeles	Chicago	San Francisco	Dallas-Ft. Worth
Urban ²	7	6	5	4	4	3	6
Rock ³	14	19	10	4	9	11	3
Pop ⁴	17	13	16	15	22	13	10
Dance ⁵	5	5	0	0	0	1	0
Country ⁶	9	5	0	0	3	2	11
Jazz & Blues ⁷	5	5	1	1	1	2	1
Classical	3	3	1	1	1	1	1
Religious ⁸	3	3	1	1	4	1	5
Kids ⁹	2	2	0	0	0	0	0
Comedy ¹⁰	4	3	0	0	0	0	0
Standards and Theatrical ¹¹	0	2	7	3	5	1	2
Latin and International ¹²	7	5	4	3	4	3	5
Lifestyle ¹³	4	0	3	0	0	2	0
Total Music Channels ¹⁴	80	71	48	32	53	40	44
Total Channels	173	127	73	75	86	68	67

Notes:

1. These formats reflect CRA's categorization of the formats used by BIA, XM, and Sirius. Except where otherwise noted, CRA format classifications follow those used by BIA, XM, and Sirius.
2. Urban includes Sirius' Hip-Hop and R&B formats; XM's Hip-Hop & Urban format; and BIA's Urban format (excluding Blues).
3. Rock includes BIA's Rock and Album Oriented Rock/Classic Rock formats.
4. Pop includes XM's Hits, Decades and parts of its Regional N&T formats; BIA's Oldies, Adult Contemporary, and Contemporary Hit Radio/Top 40 (excluding Dance) formats.
5. Dance includes Sirius' Electronic and Dance formats; and Dance in BIA's Contemporary Hit Radio/Top 40 format.
6. Country includes XM's Country format and the two country channels from the Regional N&T format.
7. Jazz & Blues includes BIA's Jazz/New Age format and Blues in its Urban format.
8. Religious includes the Christian format for both XM and Sirius and BIA's Religion format.
9. Kids includes Sirius' channels within the Family and Kids format (depending on whether they were music or talk centered); and Radio Disney on XM and XM Children. These channels are treated as "music" channels because they use commercially released music.
10. The comedy channels are treated as "music" channels because they use commercially released music.
11. Standards and Theatrical includes Sirius' Standards format; BIA's Nostalgia/Big Bands and Middle of the Road (excluding full services) formats.
12. Latin and International include: XM's Latin and World formats; Sirius' Latin & International format; and BIA's music stations under the Spanish format.
13. Lifestyle format is split depending on whether the channels are music or talk oriented. XM's channels in the Lifestyle format are music; Sirius' channels in the Lifestyle format are talk. Lifestyle also includes BIA's Easy Listening/Beautiful Music format.
14. Over-the-air radio stations with talk format or mixed format are not included in the count.
15. Largest markets determined by metro area population.

Sources:

- Sirius website.
- XM website.
- 2006 BIA Investing In Radio Market Report.

Exhibit 19.a: XM Patents

Patent Number	Filing Date	Patent Title
6,493,546	March 5, 1999	System for providing signals from an auxiliary audio source to a radio receiver using a wireless link
6,272,328	May 12, 1999	System for providing audio signals from an auxiliary audio source to a radio receiver via a DC power line
6,823,169	May 25, 1999	Low cost interoperable satellite digital audio radio service (SDARS) receiver architecture
6,735,416	May 25, 1999	Receiver architecture for SDARS full band signal reception having an analog conversion to baseband stage
6,724,827	May 25, 1999	Low cost interoperable satellite digital audio radio service (SDARS) receiver adapted to receive signals in accordance with advantageous frequency plan
6,295,033	May 25, 1999	Vehicle antenna assembly for receiving satellite broadcast signals
6,154,452	May 26, 1999	Method and apparatus for continuous cross-channel interleaving
6,640,085	September 1, 1999	Electronically steerable antenna array using user-specified location data for maximum signal reception based on elevation angle
6,564,003	November 4, 1999	Method and apparatus for composite data stream storage and playback
6,549,774	November 4, 1999	Digital audio service satellite receiver having switchable operating modes for stationary or mobile use
6,510,317	November 4, 1999	Satellite digital audio radio service tuner architecture for reception of satellite and terrestrial signals
6,442,385	November 4, 1999	Method and apparatus for selectively operating satellites in tundra orbits to reduce receiver buffering requirements for time diversity signals
6,347,216	November 4, 1999	Method and system for providing geographic specific services in a satellite communications network
6,229,824	November 4, 1999	Method and apparatus for concatenated convolutional encoding and interleaving
7,020,217	November 4, 1999	Satellite digital audio radio receiver with instant replay capability
7,123,875	November 4, 1999	System and method for multipoint distribution of satellite digital audio radio service
6,563,805	November 5, 1999	Digital radio prepaid music recording system
6,397,076	November 5, 1999	Method and apparatus for dispatch communications in a broadcast radio system
6,229,499	November 5, 1999	Folded helix antenna design
6,232,926	November 10, 1999	Dual coupled vehicle glass mount antenna system
7,010,263	December 14, 1999	System and method for distributing music and data
6,614,767	October 17, 2000	Method and apparatus for continuous cross-channel interleaving
6,876,835	October 25, 2000	Method and apparatus for providing on-demand access of stored content at a receiver in a digital broadcast system
6,834,156	October 25, 2000	Method and apparatus for controlling user access and decryption of locally stored content at receivers in a digital broadcast system
6,686,880	October 25, 2000	Method and apparatus for prompting a reverse channel response from receiver in a digital broadcast system
6,970,565	December 22, 2000	Apparatus for and method of securely downloading and installing a program patch in a processing device
6,538,609	April 30, 2001	Glass-mountable antenna system with DC and RF coupling
7,058,086	May 7, 2001	Method and apparatus for concatenated convolutional encoding and interleaving
6,785,656	June 5, 2001	Method and apparatus for digital audio playback using local stored content
6,483,471	June 6, 2001	Combination linearly polarized and quadrifilar antenna
6,470,058	June 11, 2001	System for and method of jointly optimizing the transmit antenna patterns of two geostationary satellites in a satellite broadcasting system
6,553,077	July 31, 2001	Method and apparatus for customized selection of audio channels

Patent Number	Filing Date	Patent Title
7,010,264	August 17, 2001	System and method for detecting the connections of two antennae to a radio receiver
6,421,020	September 17, 2001	Vehicle antenna assembly for receiving satellite broadcast signals
7,075,946	October 2, 2001	Method and apparatus for audio output combining
6,535,179	October 2, 2001	Drooping helix antenna
6,686,882	October 19, 2001	Apparatus and method for transferring DC power and RF energy through a dielectric for antenna reception
7,035,628	December 31, 2001	Method and apparatus for content blocking
6,661,386	March 29, 2002	Through glass RF coupler system
6,621,458	April 2, 2002	Combination linearly polarized and quadrifilar antenna sharing a common ground plane
6,806,838	August 14, 2002	Combination satellite and terrestrial antenna (Patent Jointly Held with Delphi-D Antenna Systems)
6,810,233	November 7, 2002	System for providing signals from an auxiliary audio source to a radio receiver using a wireless link
Pending	April 30, 2001	Glass-mountable antenna system with DC and RF coupling
Pending	May 7, 2001	Method and apparatus for concatenated convolutional encoding and interleaving
Pending	June 14, 2004	Antenna diversity system
Pending	December 15, 2004	Digital remodulation
Pending	January 14, 2005	Automatic on/off switch for vehicle power outlets
Pending	January 14, 2005	Method and system for converting streaming digital data to FM modulated data
Pending	April 22, 2005	Method and system for hierarchical modulation and demodulation for digital radio
Pending	September 22, 2005	Wireless satellite digital audio radio service (SDARS) head unit with portable subscription and cell phone abilities (Joint Filing with Interoperable Technologies and Sirius)

Note:
The Patent and Trademark Office's Patent Application Full-Text and Image Database only includes pending patents filed since 2001.

Sources:
United States Patent and Trademark Office, Patent Full-Text and Image Database, available at <<http://patft.uspto.gov/netahtml/PTO/search-bool.html>>.
United States Patent and Trademark Office, Patent Application Full-Text and Image Database, available at <<http://appft1.uspto.gov/netahtml/PTO/search-bool.html>>.

Exhibit 19.b: Sirius Patents

Patent Number	Filing Date	Patent Title
5,278,863	April 10, 1992	Radio frequency broadcasting systems and methods using two low-cost geosynchronous satellites
5,319,673	April 16, 1993	Radio frequency broadcasting systems and methods using two low-cost geosynchronous satellites
5,485,485	April 13, 1994	Radio frequency broadcasting systems and methods using two low-cost geosynchronous satellites and hemispherical coverage antennas
5,592,471	May 4, 1995	Mobile radio receivers using time diversity to avoid service outages in multichannel broadcast transmission systems
5,745,839	September 1, 1995	Satellite multiple access system with distortion cancellation and compression compensation
5,864,579	July 25, 1996	Digital radio satellite and terrestrial ubiquitous broadcasting system using spread spectrum modulation
5,720,039	November 1, 1996	Satellite multiple access system with distortion cancellation and compression compensation
5,794,138	February 26, 1997	Satellite broadcast system receiver
6,023,616	March 10, 1998	Satellite broadcast receiver system
6,223,019	May 20, 1998	Efficient high latitude service area satellite mobile broadcasting systems
6,564,053	October 19, 2000	Efficient high latitude service area satellite mobile broadcasting systems
6,892,987	July 25, 2003	Predicting, bounding and mitigating satellite attitude disturbances arising from infrared earth sensors for satellites in inclined, elliptical orbits
Pending	July 9, 2001	System and method for creating and receiving personalized broadcasts
Pending	September 22, 2005	Wireless satellite digital audio radio service (SDARS) head unit with portable subscription and cell phone abilities (Joint Filing with Interoperable Technologies and XM)

Note:

The Patent and Trademark Office's Patent Application Full-Text and Image Database only includes pending patents filed since 2001.

Sources:

United States Patent and Trademark Office, Patent Full-Text and Image Database, available at <<http://patft.uspto.gov/netahtml/PTO/search-bool.html>>.
 United States Patent and Trademark Office, Patent Application Full-Text and Image Database, available at <<http://appft1.uspto.gov/netahtml/PTO/search-bool.html>>.

Exhibit 19.c: Music Choice Patents

Patent Number	Filing Date	Patent Title
6,879,963	April 12, 2000	Cross channel delivery system and method
7,028,082	March 8, 2001	Personalized audio system and method
7,076,561	March 18, 2002	Personalized audio system and method
Pending	April 12, 2006	Media content delivery systems and methods

Note:

The Patent and Trademark Office's Patent Application Full-Text and Image Database only includes pending patents filed since 2001.

Sources:

United States Patent and Trademark Office, Patent Full-Text and Image Database, available at <<http://patft.uspto.gov/netahtml/PTO/search-bool.html>>.
United States Patent and Trademark Office, Patent Application Full-Text and Image Database, available at <<http://appft1.uspto.gov/netahtml/PTO/search-bool.html>>.

**Exhibit 20: Sirius Expenditures on Engineering, Design, and Development
and XM Expenditures on Research and Development**

Year	Sirius Engineering, Design, and Development ¹ ('000s)	XM Research and Development ² ('000s)
1994 to 1997	\$1,390	N/A
1998	\$2,150	\$7,311
1999	\$33,134	\$6,510
2000	\$70,690	\$11,948
2001	\$58,453	\$13,689
2002	\$30,087	\$10,843
2003	\$24,534	\$12,285
2004	\$30,520	\$23,513
2005	\$44,745	\$31,218
First and Second Quarters 2006	\$35,166	\$19,499
Cumulative Expenditures Since 1994 ³	\$330,869	\$136,816
Cumulative Expenditures Since 2003	\$134,965	\$86,515

Notes:

1. Expenditures reported for Sirius from 1994 to 1996 are for research and development. Expenditures for 1997 to 2006 are for engineering, design, and development.
2. XM research and development expenditures exclude depreciation and amortization.
3. Research and development expenditures for XM were not available prior to 1998.

Sources:

XM Form 10-Ks, 1999-2005; XM Form 10-Q, June 2006.
Sirius Form 10-Ks, 1996-2005; Sirius Form 10-K Amendment, 1996; Sirius Form 10-Q, June 2006.

**THIS EXHIBIT CONTAINS
RESTRICTED INFORMATION
PURSUANT TO THE DECEMBER 20,
2006 PROTECTIVE ORDER AND
THEREFORE WAS OMITTED FROM
THIS PUBLIC VERSION**

**THIS EXHIBIT CONTAINS
RESTRICTED INFORMATION
PURSUANT TO THE DECEMBER 20,
2006 PROTECTIVE ORDER AND
THEREFORE WAS OMITTED FROM
THIS PUBLIC VERSION**

Exhibit 23: Sirius and XM Net Losses Since Inception¹

Year	Sirius Net Losses ('000s)	XM Net Losses ('000s)
Prior to 1997	-\$18,536	N/A
1997 ²	-\$4,737	-\$1,659
1998	-\$48,396	-\$16,167
1999	-\$62,822	-\$36,896
2000	-\$134,744	-\$51,873
2001 ³	-\$235,763	-\$284,379
2002 ⁴	-\$422,481	-\$495,012
2003	-\$226,215	-\$584,535
2004	-\$712,162	-\$642,368
2005	-\$862,997	-\$666,715
First and Second Quarters 2006	-\$696,372	-\$378,330
<hr/>		
Cumulative Net Losses Since 2003	-\$2,497,746	-\$2,271,948
Cumulative Net Losses Since Inception	-\$3,425,225	-\$3,157,934

Notes:

1. Sirius' inception was in May 1990 (as Satellite CD Radio), followed by an initial public offering (as CD Radio) in September 1994. XM's inception was in June 1992 (as American Mobile Radio), followed by an initial public offering was in October 1999.
2. Sirius and XM received licenses from the FCC in October 1997 to construct and operate satellite radio services.
3. XM service became available nationwide in November 2001.
4. Sirius service became available nationwide in July 2002.

Sources:

XM Form 10-Ks, 1999-2005. XM Form 10-Q, June 2006.
 Sirius Form 10-Ks, 1996-2005. Sirius Form 10-K Amendment, 1996. Sirius Form 10-Q, June 2006.

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2007, I caused copies of the Public Version of The Witness Testimony and Exhibits Jointly Submitted by Sirius Satellite Radio Inc. and XM Satellite Radio Inc. in Docket No. 2006-1 CRB DSTRA, without exhibits, previously served in its entirety on October 30, 2006, to be served via overnight courier on the following parties:

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MC 63

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of)
)
)

ADJUSTMENT OF RATES AND TERMS FOR)
PREEXISTING SUBSCRIPTION SERVICES)
AND SATELLITE DIGITAL AUDIO RADIO)
SERVICES)
)
)

Docket No. 2006-1 CRB DSTRA

REBUTTAL TESTIMONY OF

JANUSZ ORDOVER

Professor of Economics
and former Director of the Masters in Economics Program at New York University

Public Version

July 2007

WRITTEN REBUTTAL TESTIMONY OF JANUSZ A. ORDOVER

I. Introduction

1. In my initial report, as well as in my hearing testimony, I concluded that the section 801(b) statutory criteria, in this case, are best satisfied by a rate that is set through voluntary negotiations in a marketplace free of regulatory compulsion or other distortions that might obstruct the negotiating parties from reaching an efficient outcome, taking into account the need to avoid substantial disruptions to suppliers and purchasers of musical content. I explained that freely negotiated deals, by the very nature of the economic factors that influence the end result, necessarily reflect the considerations enumerated in the first three statutory criteria, unless there is substantial evidence of market power or beneficial externalities which would potentially mandate adjustment of rates under the first three statutory factors. Here, there is no evidence that market rates for musical content reflect unchecked exercise of market power and there is no evidence that subsidizing musical content to the SDARS would engender beneficial external effects on the American public. As to the fourth statutory factor, I articulated my view that the selected market rates may require adjustment in one direction or the other to account for the potential disruptive effects that the fourth factor addresses.

2. To be abundantly clear, my opinion is that observed market rates that are the product of voluntary negotiations between copyright holders and service providers represent the proper starting point to develop a reasonable rate (or range of rates) in this case. To that end, in my earlier testimony I presented several alternative marketplace analogies from which I calculated rates that the SDARS could be reasonably expected to pay to SoundExchange for the relevant blanket license. These rates served to corroborate the reasonableness of the rate proposal submitted by SoundExchange.

3. Coincident with the filing of my initial report, Dr. Woodbury submitted testimony on behalf of the SDARS. He also provided testimony at the hearing before the Court in June of this year. I have been asked by counsel for SoundExchange to respond to Dr. Woodbury's conclusions.

II. Summary of Conclusions

4. My review and consideration of Dr. Woodbury's testimony has led to the following conclusions:

- a) The rate paid by the pre-existing subscription services (PSS) to SoundExchange is not a proper benchmark for setting rates to be paid by the SDARS. There is no sound basis upon which to conclude that the PSS rate reflects the 801(b) criteria as they would apply to the development of the appropriate rate in this case. Attempts to defend the PSS benchmark, as articulated by Dr. Woodbury in his testimony, should be rejected as a matter of economics.
- b) The PSS rate is not an appropriate benchmark for the SDARS rate because it was negotiated in the shadow of regulation. That is, it is a rate negotiated against the backdrop of a previous regulatory determination and against the prospect of further regulatory intervention in the event of a breakdown in negotiations. As such, it reflects the parties' expectations as to the determination the Copyright Arbitration Royalty Panel would have made, if such a proceeding were to occur, and the parties' aversion to regulatory risk.
- c) When setting a rate under section 801(b), the Court should, if possible (as it is here), rely on market rates as initial benchmarks, and not regulated rates or rates negotiated in shadow of regulation. Market-based rate (or rates) may have to be adjusted to reflect the 801(b) factors. However, in this rate-setting proceeding, there is no compelling public policy need to adjust market-based rates other than to ensure that the new rate is not disruptive to the operations of the industry.
- d) The PSS rate is also an inappropriate benchmark because pre-existing subscription services differ substantially from satellite radio in a number of relevant dimensions as evidenced by Dr. Woodbury's proposed adjustments to the prevailing PSS rate. Moreover, consumer demand for the

PSS is extremely weak, as evidenced by the small monthly amount of [REDACTED] per subscriber paid by the cable companies to the PSS, the fact that cable companies were not successful in their attempts to provide PSS on an *a la carte* basis, and the exit of two of the three PSS from the marketplace as of 2003 (when Dr. Woodbury's benchmark rate was established). As a result, even in an arms-length deal with the PSS, a record company's ability to obtain a fee that is more than trivial would be seriously constrained.

- e) Moreover, Dr. Woodbury's PSS benchmark is based on the unsupported assertion that sound recordings have a "commodity" price that should apply in all cases in which sound recordings are an input to a service. In his view, the PSS rate reflects the "commodity" price of music. Dr. Woodbury's premise that there is such a thing as a "commodity price" for music is demonstrably false as an empirical matter and is unsound as a matter of economics.
- f) Dr. Woodbury's second proposed benchmark, the rate for musical works rights, is not a proper benchmark for purposes of determining the sound recording royalty rate to be paid by the SDARS. As a rate set under regulatory constraints, the musical works rate suffers from some of the same significant shortcomings as does the PSS rate. Moreover, there is overwhelming empirical evidence that copyright holders of sound recordings receive substantial multiples relative to their musical works counterparts.

- 5. I discuss in detail the above conclusions in the remainder of this report.

III. The PSS Rate Is An Inappropriate Benchmark

A. Introduction

- 6. It is my overarching conclusion that the Court's analysis in this proceeding should first attempt to identify a rate that would be set in an arms-length transaction between an SDARS and a record company. It appears that Dr. Woodbury agrees that a market-based rate represents a useful starting point. Voluntarily negotiated deals, absent a market failure, would be expected to

account for the objectives identified in statutory factors one through three.¹ In the current proceeding, there are two sources of market failure that theoretically could come into play. The first would arise in the event of demonstrated monopoly power on either the buying side or the selling side. In my view, observed market-based rates in other channels of music distribution are not distorted by unconstrained exercise of monopoly power on either side of the bargain. The second potential market failure would arise in the presence of externalities, specifically a situation where there are significant social benefits to producing (or distributing) more music, but the producer (or distributor) for whatever reason cannot capture a remunerative portion of that value. As with the issue of monopoly power, I do not see externalities as being a relevant concern in this case. Nor does Dr. Woodbury suggest that either possible market failure in this case amounts to more than a theoretical concern.

7. Given the absence of the sorts of market failures noted above, there is no reason to adjust market-based rates in order to satisfy the first three statutory criteria. Possible adjustment, if any, thus would be confined to the fourth factor. As I have previously testified, I rely on the testimony of Mr. Butson for the proposition that the rates proposed by SoundExchange will not threaten the financial viability and long-term business prospects of the SDARS. Insofar as the proposed rates represent a significant increase relative to what the SDARS anticipated paying or budgeted to pay, whatever resulting disruptive impact from higher rates is attenuated by the gradual implementation of rate increases over the six-year license.

B. The observed PSS rate should not inform the determination of an appropriate rate in this case.

8. As an initial matter, the PSS benchmark proposed by Dr. Woodbury is flawed because it is the product of a negotiation that took place in the shadow of a previous regulatory determination and under the specter of further regulatory

¹ Expert Report of Dr. John R. Woodbury, October 30, 2006 (“Woodbury Report”) at 3.

intervention. As such, it does not necessarily reflect the marketplace dynamics embedded in the first three statutory criteria. While I acknowledge that the PSS rate could, in theory, reflect a "market rate," Dr. Woodbury has not made this demonstration.

9. In negotiating the current PSS rate, the parties understood that a failure to come to agreement would result in costly litigation and ultimate resolution by a copyright royalty panel. The CARP's potential finding is inherently uncertain. Consequently, it is plausible that the parties would, in their negotiations, factor in their expectations about how the CARP would have applied the 801(b) factors to arrive at a licensing rate. In the end, as I stated previously, the negotiated rate might mimic a market-based rate, but absent a deep understanding of the considerations of each party during the negotiations, one cannot reliably conclude how closely, if at all, the observed rate conforms to a market-based outcome free of regulatory oversight. Moreover, the negotiated rate does not offer any indication as to how the four statutory criteria influenced the negotiation. Thus, the observed rate could very well reflect an aggregate adjustment for the four factors that is entirely unsuitable for the current proceeding.

10. Moreover, the litigation costs of proceedings such as these may have further affected the parties' decisions and led to an agreed upon rate that is not fairly characterized as market-based. Given that the total amount of royalties paid by the PSS is quite small, significant legal fees and other expenses create incentives to reach a settlement in advance of formal adjudication. Dr. Woodbury offers no evidence that would guide a determination of how these factors affected the negotiated rate, despite the fact that his proposed analysis should account for their effect.

11. As I understand Dr. Woodbury's testimony, his response to this argument is that the optimal starting point for purposes of selecting a benchmark in this case is a rate that is determined with reference to the four statutory criteria. As I stated in my initial report and at the hearing, this response cannot be squared with the meaning of the statutory factors. The four factors are quite plainly time and

service (license) specific. A rate that balances the varying interests of buyers and sellers in accordance with the factors in this case will be a function of the SDARS' competitive positioning, their business model, their current and forecasted financial status, consumer demand for their services, and many other variables pertinent to them. As such, determination of a rate in this case must begin with recent market-based rates for distribution of content in channels that as closely as possible resemble distribution of content via the SDARS along the relevant dimensions. As I discuss below, the PSS rate fails to meet this requirement. In addition, I explain that even if one were to accept Dr. Woodbury's contention that the optimal starting point is a rate established with reference to the 801(b) factors, the PSS rate, in my view, does not represent a reasonable benchmark.

C. The rate paid by the PSS is an outlier and thus an improper benchmark

12. Even a cursory comparison between the PSS and satellite radio reveals many substantive differences between their respective business operations. As an initial matter, there is, at best, extremely weak demand for the services offered by the PSS. The initial business model developed and implemented by the PSS envisioned an *a la carte* offering that cable consumers would separately subscribe to and pay for. This model failed because consumers were not willing to pay an additional sum for music programming delivered through their television sets. The services of the PSS were then included in the basic tier of programming offered by the cable companies. I understand that, as of 2005, cable companies paid the PSS, on a monthly basis, approximately [REDACTED] per-subscriber per month.² The very low PSS rate reflects the fact that consumers place very little, if any, value, on the service provided by PSS. Indeed, I am not aware of any evidence – and Dr. Woodbury adduced none – that consumers subscribe to cable in order to obtain access to the PSS. Consequently, whether

² See SX Ex. 205 RR (Direct Written Testimony of George G. Strong, Jr. in Docket No. 2006-1 CRB DSTRA, at 12 and attached Ex. MC 36).

negotiated in the shadow of regulation or in a pure arm's length deal, a record company likely would be unable to obtain anything more than a very low fee from the PSS on a monthly, per-cable subscriber basis. The weak demand for the PSS, irreducible fixed costs, and their resulting financial fragility, simply prevents the PSS from paying very much, at least under the conditions present today and in the recent past.

13. It is also worth noting that as of today, two of the three PSS have exited the market. Furthermore, I understand that Music Choice is shifting the focus of its business to the provision of video on demand and other new services,³ which would seem more attractive to consumers, relative to music, given distribution through television sets. The exit of two of the three providers of PSS, and the re-orientation of the business of the third, provides further compelling evidence of the extremely weak consumer demand for the PSS.

14. Furthermore, XM and Sirius offer a service comparable to the PSS to the direct broadcast satellite operators, EchoStar and DIRECTV. XM and Sirius view these services principally as a promotional vehicle to stimulate consumer demand for their core satellite radio service. The materials presented by Dr. Chipty and referenced at note 4 below supports these propositions. These types of services are thus primarily a marketing cost, not a direct source of revenue, for XM and Sirius. The revenues they receive are insignificant.⁴

15. These circumstances could not be more different when it comes to satellite radio, where even Dr. Woodbury acknowledges that more than [REDACTED] of the quite substantial overall revenues collected by the SDARS are reasonably attributable to music programming.⁵ Thus, while the PSS appear to add practically no value

³ See SX Ex. 207 RR (MC Ex. 10); SX Ex. 208 RP.

⁴ See SX Ex. 209 RP (Trial Testimony of Dr. Tasneem Chipty on behalf of XM and Sirius Radio, Docket No. 2005-5, Tuesday July 10, 2007 at 166).

⁵ See, e.g., Woodbury Report at 20 and n. 51 (Dr. Woodbury's channel attachment index indicates that [REDACTED] of survey respondents would cancel their subscriptions to Sirius if music programming were not available, and [REDACTED] would cancel if Stern channels were excluded.); Tr., June 13, 2007, at 52 (Dr.

(footnote continued...)

to cable television service, music is clearly the backbone of satellite radio and the most important driver behind its rapid subscriber growth. As such, there is no reason to believe that the rate paid by the PSS reflects considerations that are relevant for purposes of determining an appropriate rate for the SDARS. This is true whether one views the PSS rate as a market-based rate or a rate that incorporates the 801(b) factors.

D. The value of music is properly assessed in the context of consumer demand for the ultimate service.

16. One argument Dr. Woodbury offers to defend his PSS benchmark is that “the inherent value of music” is the same for both the PSS and the SDARS, and presumably also for all other channels that distribute sound recordings.⁶ Under this view, all of the additional value of a service, as measured by consumers’ willingness to pay, comes from the delivery mode and thus should be retained by the service provider. One fundamental problem with this argument is that, even if it were true, Dr. Woodbury does not establish why the PSS is the appropriate benchmark that “reveals” this “universal” value. Indeed, if anything it appears to be an outlier, paying a much lower royalty rate than virtually all other services in the marketplace. As the table below illustrates, record companies are able to capture a significant portion of the value that is created by combining music with attractive distribution media.

(...footnote continued)

Woodbury testimony acknowledging that his channel attachment index implies that subscribers to satellite radio pay roughly \$6.00 per month for music content).

⁶ See, e.g., Tr., June 12, 2007, at 359 (Woodbury testimony).

Table 1: Licensing Rates across Digital Distribution Services

Channel	Per-Play	% of Revenue	Per-Unit or Subscriber
Permanent Audio Download	n/a	[REDACTED]	[REDACTED]/track
Cellular (OTA Download)	n/a	[REDACTED]	[REDACTED]/track
Cellular (Ringtone)	n/a	[REDACTED]	[REDACTED]/tone
Interactive Subscription (Portable)	[REDACTED]	[REDACTED]	[REDACTED]/sub/mo
Interactive Subscription (Non-Portable)	[REDACTED]	[REDACTED]	[REDACTED]/sub/mo

Source: Compass contract analyses

17. The rates provided in Table 1 reflect an analysis of contracts between record labels and service providers undertaken by my staff, under my direction. What the analysis clearly shows is that record companies obtain licensing rates in the marketplace that capture a significant portion of the overall value of the service. In particular, the bottom two rows are highly informative. The only difference between these two services relates to portability. If Dr. Woodbury is right that there is an inherent value of music, record companies should receive the same payment from providers of interactive subscription services, irrespective of whether the service offers consumers portability. There is no evidence that *direct costs* to a record company of providing music content to a portable service are any higher than the costs of providing the same content to a non-portable service. What differs is the package of rights that a record company licenses and the consumer demand for the particular service. Since portability of music is revealed in the market to be relatively more valuable to subscribers, record companies capture some of that benefit and receive a per-subscriber rate that is [REDACTED] as high for interactive subscription services that offer portability.⁷

⁷ At the hearing in June before the Court, Dr. Woodbury was asked whether record companies received greater payments for a portable service as compared to an otherwise identical non-portable service. He replied that he did not know the answer to the question. See Tr., June 13, 2007 at 22-23 (Woodbury testimony). I find his answer perplexing insofar as licensing rates for portable and non-portable

(footnote continued...)

Table 1: Licensing Rates across Digital Distribution Services

Channel	Per-Play	% of Revenue	Per-Unit or Subscriber
Permanent Audio Download	n/a	[71%]	[]/track
Cellular (OTA Download)	n/a	[]	[]/track
Cellular (Ringtone)	n/a	[]	[]/tone
Interactive Subscription (Portable)	[]	[]	[]/sub/mo
Interactive Subscription (Non-Portable)	[]	[]	[]/sub/mo

Source: Compass contract analyses

17. The rates provided in Table 1 reflect an analysis of contracts between record labels and service providers undertaken by my staff, under my direction. What the analysis clearly shows is that record companies obtain licensing rates in the marketplace that capture a significant portion of the overall value of the service. In particular, the bottom two rows are highly informative. The only difference between these two services relates to portability. If Dr. Woodbury is right that there is an inherent value of music, record companies should receive the same payment from providers of interactive subscription services, irrespective of whether the service offers consumers portability. There is no evidence that *direct costs* to a record company of providing music content to a portable service are any higher than the costs of providing the same content to a non-portable service. What differs is the package of rights that a record company licenses and the consumer demand for the particular service. Since portability of music is revealed in the market to be relatively more valuable to subscribers, record companies capture some of that benefit and receive a per-subscriber rate that is [] as high for interactive subscription services that offer portability.⁷

⁷ At the hearing in June before the Court, Dr. Woodbury was asked whether record companies received greater payments for a portable service as compared to an otherwise identical non-portable service. He replied that he did not know the answer to the question. *See* Tr., June 13, 2007 at 22-23 (Woodbury testimony). I find his answer perplexing insofar as licensing rates for portable and non-portable

(footnote continued...)

Moreover, while as a percentage of revenue the figures are nearly identical, they are applied against quite different retail prices. Research undertaken by my staff shows that the average monthly retail price for portable, interactive subscription services is approximately \$15; the analogous figure for the non-portable version of the service is roughly \$10.⁸

18. It is plain, I think, that in the marketplace copyright holders receive some portion of the value to consumers from utilizing a particular distribution channel, beyond Dr. Woodbury's inherent value of music. As discussed in the preceding paragraph, an increase in the value of a digital music service to a consumer (due to portability, say) will generate incremental payments to record companies, measured on a per-play or a per-subscriber basis. Dr. Woodbury's approach in this case wholly ignores actual marketplace outcomes and instead advances a theory that payments to copyright holders should be based on a commodity value of music. It is rather astonishing that Dr. Woodbury disregards market evidence as to valuation of music content in various distribution channels as a basis for setting a rate and, instead, relies solely on rates that were set in the shadow of proceedings conducted under a possible compulsory license, and which apply to a failing service. In fact, he further deflates the already low PSS rate for reasons that, at least to me, are totally nontransparent.

19. Because his conclusions are clearly inconsistent with the application of the market-based approach, Dr. Woodbury is perhaps of the view that his approach is consistent instead with application of the 801(b) factors. But in his report he stated that he views "... rates negotiated at arms-length as a promising start to developing the rate in question."⁹ Moreover, in an earlier proceeding before a

(...footnote continued)

interactive subscription services were presented in my original report. *See* Written Direct Testimony of Dr. Janusz Ordover at 51 ("Ordover WDT").

⁸ *See* SX Ex. 210 RP (summarizing data).

⁹ Woodbury Report at 3.

Copyright Arbitration Royalty Panel, Dr. Woodbury endorsed an approach based upon observed marketplace rates.¹⁰ Thus Dr. Woodbury clearly acknowledges a connection between observed market rates and the rate resulting from an application of the 801(b) factors. Otherwise, both could not represent reasonable approaches to answering the same question. It thus follows that if Dr. Woodbury's approach in this case is flatly inconsistent with actual marketplace outcomes, as I have demonstrated it to be, his approach is similarly at odds with the 801(b) statutory criteria. Furthermore, 801(b) rates cannot be deduced from "first principles": if the rate is to be set with reference to the 801(b) factors, it must start from somewhere. To an economist, the best starting point is one or more observed market rates.

20. Perhaps as an attempt to square his "inherent value of music" hypothesis with the empirical evidence, Dr. Woodbury testified that the "value" to which he refers is actually "the 801(b) value of the music."¹¹ I am not sure what to make of this testimony, other than to say it is either circular or irrelevant. The 801(b) factors cannot be relied upon in the abstract to establish the "value" of music. Instead, these criteria can be understood only as possibly modifying the value of music, as revealed by marketplace transactions or other appropriate benchmarks, to account for possible market failures that I discussed above, as well as any potential disruptive impact to the industry and its participants.

21. Dr. Woodbury's use of his "801(b) value of music" formulation would seem to imply that the first 801(b) determination for digital PSS services in 1997, as extended by the negotiated settlement in 2003, must necessarily form the basis for all future determinations. However, such an approach in this case would run directly counter to observed marketplace outcomes and, equally importantly, be inconsistent with sound public policy objectives that the four factors are supposed

¹⁰ Tr., June 13, 2007, at 73 (Woodbury testimony). Dr. Woodbury stated at the hearing that he still agreed with his earlier testimony "as a general matter." *Id.*

¹¹ Tr., June 12, 2007, at 351 (Woodbury testimony).

to promote. The evidence of significant dispersion in payments to copyright holders in different channels reflects the differing values of the music provided by the services to consumers, and the record companies' ability to capture some of that value. In other words, market-based rates make clear that music does not have a single "value" irrespective of the service into which it is incorporated, and I am not aware of any language in section 801(b) that suggests the Court is supposed to assign a single value to recorded music.

22. Dr. Woodbury contends that his approach is not undermined by observed differences in market-based rates by arguing that copyright holders should receive greater compensation when they provide value-added enhancements to their sound recordings.¹² I certainly do not quarrel with this conclusion. I do disagree with what Dr. Woodbury makes of this observation in the instant rate-setting proceeding. He points to downloading and interactivity as two examples of functionality that is provided by the record companies for which the record companies should be compensated.¹³ On the other hand, he contends that portability (mobility) is an attribute that is provided by the distributor, and consequently, copyright holders should earn the same compensation irrespective of whether a service is portable (or mobile), even if consumers value a mobile (portable) service more highly as compared to some alternatives.

23. To begin with, I have already shown that copyright holders receive greater compensation for a portable service as compared to an otherwise identical non-portable service. In addition, the distinction he draws between portability and other functionality is flawed. The attributes that a distributor is able to offer, including portability, are defined by the copyright holders in the licenses that permit the provision of services with particular attributes. This is no less the case with portability than it is with interactivity and other functionality. That is, a service that does not have a license that permits portability of music cannot offer a

¹² See, e.g., Tr., June 13, 2007 at 14 (Woodbury testimony).

¹³ Tr., June 13, 2007 at 14 (Woodbury testimony).

portable service, period. On the other hand, it is always the distributor that executes the necessary engineering and other work to develop and offer a service with specific attributes as permitted under the license. So the distinction that Dr. Woodbury relies upon to explain observed differences in market-based rates, and to justify his use of the PSS rate in this case, is entirely vacuous. As I have shown, what explains variations in marketplace rates is the fact that copyright holders are able to obtain a portion of the value of the service, as reflected in consumers' willingness to pay for the service, and that the portion which they are able to obtain may vary across services. There is no basis in economics to conclude that the SDARS rate should substantially deviate from this paradigm.

24. Dr. Woodbury further defends the relatively low PSS rate by pointing out that the amounts paid by the SDARS to SoundExchange represent for the record companies a trivial fraction of their total revenues.¹⁴ The implication is that a higher rate, namely one that is in-line with observed marketplace rates, will only slightly increase record company revenues, and thus will have, at best, a minimal effect on their incentives to create new works, and thus would not advance the 801(b)(1) criterion.

25. Dr. Woodbury's argument is fatally flawed. First, even at current subscriber levels,¹⁵ that is, ignoring net subscriber additions going forward, the difference between the two sides' proposals in dollar terms over the course of the statutory license is obviously quite substantial. The assertion that either the record companies or the individual artists would consider amounts of this magnitude to be a mere "rounding error" is without basis and not pertinent.¹⁶ Dr. Woodbury has no basis on which to opine on the levels of additional revenues that record

¹⁴ Tr., June 12, 2007 at 327-328 (Woodbury testimony).

¹⁵ In press releases announcing financial results for the first quarter of 2007, XM reported that it had recently passed the 8 million subscriber mark, *see* SX Ex. 212 RP, and Sirius announced a subscriber count of approximately 6.6 million, *see* SX Ex. 211 RP.

¹⁶ Tr., June 12, 2007 at 327-328 (Woodbury testimony).

companies and artists would (or would not) consider meaningful contributions to their revenue streams.

26. Second, even taking Dr. Woodbury's characterization at face value, namely that payments by the SDARS amount to a trivial fraction of total record company revenues, the conclusion he draws is entirely inapt. Record companies undertake significant and irreversible investments to develop talent and produce new works, and in order to maximize their incentives to continue to do so, it is important that they receive from each distribution channel revenues that reflect the value of their contributions. Dr. Woodbury's view seems to be that record company revenues from a particular channel need only reflect the value of their contributions when the channel in question contributes a not insignificant amount to their overall revenues.¹⁷ Such a conclusion finds no support in economics. Record companies' incentives to produce new music are based upon their expected revenues from all available sources. A claim that one particular channel should pay very little because it accounts at present to a small percentage of total record company revenues directly undermines incentives to create new works. Indeed, under this view, record companies would collect market-based rates only from CDs, and perhaps audio download services. This claim makes even less sense as record companies' businesses increasingly depend on a diverse range of revenue streams, none of which, as yet, is individually as significant as CD sales revenue. If record companies could not reflect the value of their contributions in all of their revenue streams because only one or two of them were adjudged to be sufficiently significant, their viability as a business going forward would be undermined. Moreover, such arbitrary limits on what each service should be required to contribute could distort a competitive playing field among music distribution channels, which would not be sound public policy.¹⁸

¹⁷ Tr., June 12, 2007 at 327 (Woodbury testimony).

¹⁸ Dr. Woodbury does not explain why costs of music to SDARS should be kept low so that it would cost potential subscribers less to obtain Howard Stern or ESPN.

27. Perhaps Dr. Woodbury reckons that the SDARS should pay very little for sound recording rights because the record companies are able to cover their costs and earn a normal rate of return from other available sources of revenue. Leaving aside whether such an opinion is even factually correct, the flaw in his reasoning is apparent when it is applied to the SDARS themselves. Indeed, there is no indication that the SDARS intend to offer very low rates to incremental subscribers once they have covered their costs and earned a normal rate of return from inframarginal subscribers. At roughly \$12 per month over 12 months, \$144 from an incremental subscriber is surely "a drop in the bucket" compared to an SDARS' annual revenues. Hence, by Dr. Woodbury's reasoning, each satellite radio distributor should offer subscription rates equal to marginal cost of serving one additional subscriber after it hits its revenue target (or an appropriate rate of return on its assets). It is quite clear that this would not make sense as a business matter or be sound public policy: the SDARS, just like the record companies, undertake investments based upon the aggregate expected revenues from all sources, and to arbitrarily curtail the revenues available from a particular source would only serve to weaken investment incentives on a going forward basis.

28. Finally, for the reasons I set out in some detail in my initial report, as a matter of economic principles it is simply not the case that intellectual property, such as sound recording copyrights, should be priced uniformly across all of its uses. While a uniform low price that reflects marginal costs serves the goals of static efficiency, it undermines dynamic efficiency considerations because it precludes the owner of the intellectual property from ever being able to recoup its initial investment. As a result, the investment will never be undertaken in the first place. A solution to this tension is found in so-called Ramsey pricing principles, where the value a consumer (or group of consumers) places on the product determines the price they pay in market-based transactions. Through application of Ramsey pricing principles, consumers with a high willingness to pay (*i.e.*, those with inelastic demands) contribute disproportionately to the recovery of up-front investments, while consumers with a lower willingness to pay (*i.e.*, with highly elastic demands) pay less but still have the opportunity to access the

content. In this way, Ramsey pricing provides the proper incentives for producers of content insofar as overall revenues from all sources are expected to recover the costs of creating the content in the first place, while minimizing the consequences of pricing above marginal costs.¹⁹ These well-established economic principles are directly contrary to the unproven assumption embraced by Dr. Woodbury, namely that music is a commodity-like product that should command the same price irrespective of the value of the service to which it contributes.

E. Other critiques of the PSS rate

29. In addition to being flatly inconsistent with observed marketplace rates for sound recording rights in other digital distribution channels, Dr. Woodbury's PSS benchmark is similarly untethered to the deals the SDARS have reached with various providers of non-music content. These agreements appear to reflect the expected value, *i.e.*, additional subscribership, to the SDARS from being able to offer specific content to their subscribers. This may explain why Howard Stern and Oprah receive more than the National League Hockey. Thus, if non-music content providers are compensated based upon the value that they add to the SDARS' services, I can think of no sound economic basis upon which to conclude that compensation to copyright holders of sound recordings should be determined any differently.

30. Dr. Woodbury may respond that non-music content deals are exclusive and thereby provide added value relative to a non-exclusive deal. Even if this is so, in the end, the value to the SDARS is based upon the expected incremental revenues that the content will generate. Exclusivity, all else being equal, simply means that expected incremental revenues are higher relative to the same content being licensed on a non-exclusive basis. While it is the case that the relevant blanket license is non-exclusive, Dr. Woodbury and I agree that music is the basis for

¹⁹ Of course, I do not for an instant recommend that the recording music industry should be subject, through regulation, to Ramsey pricing. My point is that Ramsey pricing provides sound underpinnings for differential pricing in industries (such as recorded music or satellite radio) in which up-front fixed costs are high relative to incremental costs.

roughly 50% of the SDARS' overall revenues. No single non-music content provider can make this claim, and yet there are numerous non-music content deals under which the licensor earns compensation well in excess of the amounts SoundExchange would earn under Dr. Woodbury's PSS benchmark.

31. The reasonableness and reliability of Dr. Woodbury's PSS benchmark rate is further undermined by the numerous and arbitrary adjustments he implements which reduce the rate from 7.25% all the way down to 0.88%. A reliable benchmark should not require a series of arbitrary adjustments and cost allocations in order to arrive at a rate for the SDARS. As I explained in my initial report, the principal disadvantage of a benchmark rate based upon payment terms voluntarily negotiated between record companies and other digital distribution channels is that consumers may value music differently when it is delivered *via* different media, with different functionalities, varying features, and so forth. Consequently, the selected benchmark should mimic, as closely as possible, the pertinent factors as they apply to the SDARS.

32. A comparison of the PSS and the SDARS highlights a number of critical differences. Dr. Woodbury claims that the PSS and the SDARS offer similar services, but as shown above, this is an untenable position. In particular, the PSS are offering a service for which there almost no willingness to pay, as evidenced by its failure as a standalone offering and the near zero monthly, per-subscriber revenues the PSS receive from cable companies. By contrast, the SDARS, since their inception, have grown rapidly in terms of subscribership, and have done so at a monthly subscription price of almost \$13.

33. Observed marketplace rates across a number of digital distribution channels (which I presented in my initial report) demonstrate that the PSS rate is an outlier, and thus an inappropriate candidate for a benchmark in this case. Other digital audio services represent much closer analogies to the SDARS' target market and business operations. In my initial report, for example, I presented two benchmark rates based upon interactive subscription services. These services, like satellite radio but unlike the PSS, are sold on a subscription basis to consumers. The PSS

attempted to implement such a business model and failed. Interactive subscription service providers, like satellite radio but unlike the PSS, are actively promoting their services in the marketplace and have provided no indication that they intend to exit the marketplace or otherwise re-vamp their operations. Interactive subscription services receive monthly revenues of approximately \$10 to \$15 per-subscriber, a range that is consistent with the monthly, per-subscriber revenues received by the SDARS, but substantially different than the nominal retail value implied by the [REDACTED] per-subscriber wholesale price received monthly by Music Choice, even if we allow for the fact that Music Choice does not sell directly to listeners. It should be clear, then, that interactive subscription services are a decidedly superior starting point for purposes of determining a SDARS rate in this proceeding. Certain adjustments still must be made, but they are substantially less drastic and arbitrary than the adjustments to which Dr. Woodbury subjects the PSS rate.²⁰

IV. Musical Works Benchmark

34. As a second benchmark Dr. Woodbury points to the musical works royalty payments made to the performance rights organizations – ASCAP, BMI, and SESAC.²¹ It is Dr. Woodbury’s opinion that the royalty rate established in this proceeding should not exceed the royalty rate for musical works.²² To defend his

²⁰ Subsequent to the filing of my written direct testimony in October 2006, I received additional information relevant to one of these benchmarks. Specifically, as it relates to the interactive webcasting service benchmark, I understand that Universal Music and SONY BMG each have indicated that users of non-interactive video services listen [REDACTED] as intensively as compared to users of interactive video services. This leads to a downward reduction to the interactivity adjustment I proposed by a factor of two. Subsequent to my written testimony I also learned that both SONY BMG and Universal have entered into new contracts for audio download services to cell phones that are [REDACTED] the rates indicated in my report, also suggesting a change to my “immediacy” adjustment. That royalty rates remain fluid in the marketplace with respect to these functionality adjustments highlights the wisdom of not placing undue weight on any one particular benchmark when the marketplace is highly dynamic and still evolving. Rather, a more robust approach, and the one used by myself and Dr. Pelcovits to corroborate SoundExchange’s rate proposal, is to develop a series of calculations, based upon benchmark markets and otherwise, that yield a range of reasonable rates.

²¹ Woodbury Report at 36.

²² Woodbury Report at 37.

view, Dr. Woodbury first points out that a buyer of sound recording performance rights requires as well the musical works right in order to distribute a public performance of the sound recording.²³ While true, the fact that a distributor like XM or Sirius requires both rights does nothing to support the proposition that the two rates should be equivalent, or even remotely close. Numerous products and services require multiple inputs, but that fact alone does not lead to price parity across those inputs to the buyer. For example, a personal computer requires both a microprocessor and dynamic random access memory (DRAM), but the computer manufacturer pays very different prices for those two essential inputs. Similarly, the SDARS require both satellites for transmission and recorded music for content, but nobody is suggesting that, assuming that flows of services can be made commensurate, they should be priced the same to the satellite radio company.

35. The evidence from marketplace for the digital distribution of music also shows that two necessary inputs -- sound recording rights and musical works rights -- command different license fees. A quick review of the royalty rates paid by various services, including permanent download services like iTunes, interactive subscription services like Rhapsody, and so on, demonstrates that copyright holders of sound recordings are paid multiple times the amounts paid for musical works rights. These rates are presumably influenced by many factors, but they demonstrate that there is not a single ratio that can be used to translate musical works rates into sound recording rates, and certainly not a 1:1 ratio. These differences in the rates are plausibly explained by the fact that sound recording copyright owners provide the bulk of the investment in the products that benefit both sound recording copyright owners and musical works copyright owners. For that reason among others, the sound recording royalty is typically many multiples higher than the musical works royalty. The Court earlier this year

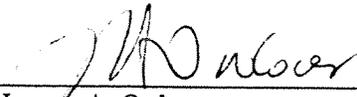
²³ Woodbury Report at 37.

pointed to this substantial empirical evidence as a compelling reason to reject the use of musical works rates in setting a rate for sound recording rights.²⁴

36. The musical works rate is further flawed as a benchmark because it, like the PSS benchmark, was established in the shadow of regulatory intervention. As I explained earlier, a rate that is negotiated under regulatory constraints may bear little or no relationship to a rate that would prevail in an unfettered market setting. Absent a demonstration that observed musical works rates are consistent with market-based rates for such rights and that there is a reasonable link between these rights and the rights at issue in this proceeding, their use as a benchmark in this proceeding is, in my view, inappropriate.

²⁴ 37 CFR 380 at 24094 (2007).

I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge and belief.



Janusz A. Ordovery

Date: July 23, 2007

Exhibits Sponsored by Janusz Ordover

**Restricted exhibits, which are identified by the suffix "RR," are not included
in the Public Version of SoundExchange's Rebuttal Case**

Exhibit No.	Description
SX Exhibit 205 RR	Excerpts from Written Direct Testimony of George G. Strong Jr., and Music Choice Ex. 36
SX Exhibit 206 RR	Excerpts from the Written Direct Testimony of David J. Del Beccaro
SX Exhibit 207 RR	Music Choice Financials, 1996-2010 (Strong Dep. Ex. 10)
SX Exhibit 208 RP	Music Choice On Demand web page
SX Exhibit 209 RP	Excerpts from the oral testimony of Dr. Tasneem Chipty in Docket No. 2005-5 CRB DTNSRA
SX Exhibit 210 RP	Monthly Retail Price for Audio Interactive Subscription Services
SX Exhibit 211 RP	Sirius press release: "SIRIUS Satellite Radio Reports Strong First Quarter 2007 Results" (May 1, 2007)
SX Exhibit 212 RP	XM press release: "XM Satellite Radio Holdings Inc. Announces First Quarter 2007 Results" (Apr. 26, 2007)

MC 64

MEASURING THE EFFECT OF FILE SHARING ON MUSIC PURCHASES*

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ABSTRACT

File sharing may substantially undermine the intellectual property rights of digital goods. This paper concentrates on the music industry. I estimate the effect of music downloads on the probability of purchasing music using a European individual-level cross section of 15,000 people from 2001. A simple comparison of means shows that people who regularly download music online are more likely to buy music. The positive relationship persists when controlling for observed characteristics. However, simultaneity between tastes for music and peer-to-peer usage makes it difficult to isolate the causal effect of music downloads on music purchases. To break that simultaneity, this paper uses measures of Internet sophistication and the speed of the Internet connection as instruments. The results suggest that peer-to-peer usage reduces the probability of buying music by 30 percent. On the basis of my estimates, back-of-the-envelope calculations indicate that—without downloads—sales in 2002 would have been around 7.8 percent higher.

I. INTRODUCTION

THE global music industry was quite successful during the 1990s. According to the International Federation of the Phonographic Industry (IFPI), album sales grew from US\$24.1 billion in 1990 to US\$39.4 billion in 1996 and remained at a high level until 1999. Those days are over, and the industry is now struggling. Global music sales have been falling for the last 3 years (Figures 1 and 2). Global sales (units) of CDs—the most popular format—fell in 2001 for the first time since its introduction in 1983.

This downturn coincides with the proliferation of online music file sharing. In June 1999, Napster was created, making the work of many artists available for free. Its popularity was immediate. According to Mediametrix, a company that provides Internet rankings and measurement, Napster was the fastest software adoption in history (Associated Press 2000). Given its impact, the

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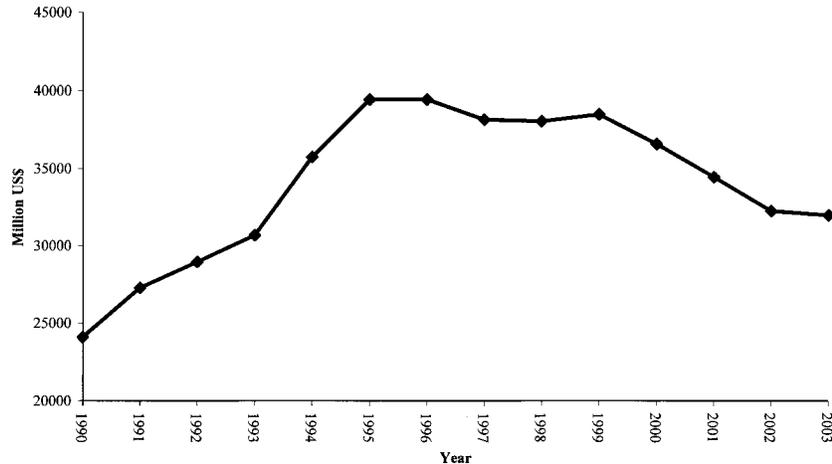


FIGURE 1.—Global music sales in million US\$ (IFPI 2004a). Local currency values are converted to dollars at the exchange rate of each year. Music videos are included since 2001.

Recording Industry Association of America (RIAA) soon filed a motion against Napster in the U.S. District Court of San Francisco for “engaging in or enabling, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner” (*A&M Records v. Napster*, 2001 U.S. Dist. LEXIS 2186 [N.D. Cal., March 5, 2001]). Napster was shut down in February 2001. However, many peer-to-peer alternatives for sharing music over the Internet remain available. In 1993, Kazaa claimed to be the most downloaded application, with more than 230 million users worldwide (Black 2003b). According to the Yahoo Buzz Index, an index that measures Internet searches using the Yahoo search engine, “Kazaa” was the number one searched term on the Internet in 2003.¹

File sharing has an important online presence. In May 2002, IFPI estimated that there were 3 million simultaneous global users and 500 million files available for copying at any given time (IFPI 2002a). In 2002, NetPD, a company that provides protection services to copyright owners whose material is being pirated through the Internet, reported that 3.6 billion files were downloaded monthly, of which around 60–70 percent were music files (Rowan 2002). The most popular albums are available for online sharing almost immediately after release and in some cases, such as Oasis and Eminem, even before (IFPI 2002b). Copy protection technology has been ineffective.

¹ The Yahoo Buzz Index is available at <http://buzz.yahoo.com>.

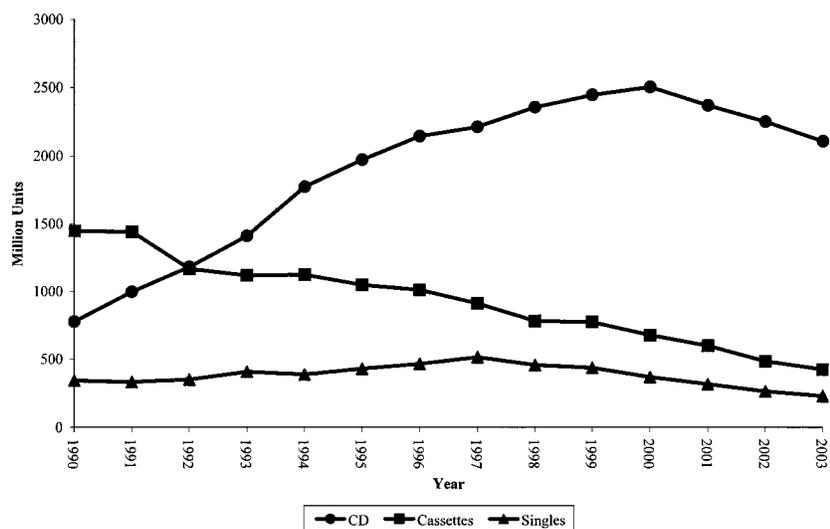


FIGURE 2.—Global music sales in million units (IFPI 2004a)

The development of broadband facilitates music sharing. A soundtrack that takes more than 12 minutes to download with a dial-up connection can be downloaded in as little as 20 seconds with a high-speed connection. Napster and its successors were banned in many universities because the very fast connections apparently induced so much file sharing that there was little available bandwidth left for anything else. In the case of the University of Illinois at Urbana-Champaign, this amounted to 75 percent of the total bandwidth (Ante 2000).

File sharing is not limited to music. The development of fast connections is extending downloading to other digital goods such as movies, software, video games, and books. Some movies are available online during the opening week of theatrical release and before the authorized DVD is available.

Does file sharing reduce music sales? If so, what is the magnitude of the impact of file sharing on music sales? Is file sharing responsible for the recent drop in sales? Inside the music industry, it is generally accepted that music sales have been affected negatively by file sharing, but there has not been much empirical work done to measure the sign and extent of this effect.

The question is important because file-sharing technology may undermine the effective protection offered by copyright. Strong property rights create monopoly distortions, but weak property rights may lead to low levels of creation of artistic work or innovation.² The balance between these opposing

² Romer (2002) analyzes this trade-off for the case of musical recordings. See Boldrin and Levine (2002) and Klein, Lerner, and Murphy (2002) for a discussion of the effect of file sharing on copyright value.

forces has rarely been empirically addressed. Knowledge of the impact of file sharing on sales is an essential part of the information needed for balancing these factors in the case of digital goods. Another important component for this balancing—which is not addressed in this paper—is the elasticity of the supply of talent.

The objective of this paper is to obtain estimates of the impact of online file sharing on music purchases. The main difficulty in the estimation of the effect of downloads on purchases of music, using individual-level data, is the presence of unobserved heterogeneity in music tastes among individuals. To control for this heterogeneity, it would be ideal to follow individuals through time. In the absence of such panel data, I use a major European cross-sectional database of 15,000 observations from October 2001. With these data, I attempt to identify the causal effect of downloading MP3 files on the probability of buying music.

Ordinary least squares (OLS) estimates show a positive—although not significant—relationship between peer-to-peer usage and the probability of purchasing music. However, OLS estimates are biased and inconsistent in the presence of unobserved heterogeneity. People who download music may have a greater taste for music. To overcome this obstacle, my approach is to use instrumental variables techniques. This requires an instrumental variable that explains peer-to-peer systems usage but is otherwise unrelated to music purchases. I employ measures of Internet sophistication and access to broadband as instruments. My estimates indicate that peer-to-peer usage reduces the probability of buying music. Using measures of sophistication as instruments, I find that music downloading reduces the probability of buying music by 30 percent.

Because of the large change in the estimated effect found in the instrumented regressions, special attention is given to the validity of the instruments and robustness of the results. First-step regressions show a positive and significant correlation of the instruments with peer-to-peer usage. I present tests of overidentifying restrictions to analyze the exogeneity of the instruments. I also analyze the exclusion restrictions by studying how MP3 file downloading affects purchases of other entertainment goods and by studying the relationship of the instruments with variables that may signal taste for music and the value of time. I analyze the robustness of the results by restricting the analysis to Internet users and to individuals who had an Internet connection before Napster started—to control for the possibility that people went online in order to download music.

The data employed in this paper do not contain the information on the intensity of music purchases and downloading necessary to make a direct analysis of the effect of file sharing on music sales. However, using my estimate for the reduction in the probability of buying music, back-of-the-envelope calculations indicate that—without file sharing—sales in 2002 would have been around 7.8 percent higher in the countries considered.

The paper is organized as follows. Section II provides an overview of the literature. Section III summarizes the main features of the music industry. Section IV describes the data. Section V presents the empirical strategy and results. Section VI discusses the implications of the estimated coefficients for music sales. Finally, Section VII concludes.

II. RELATED LITERATURE

To the best of my knowledge, the first empirical attempt to measure the effect of online file sharing on music sales is the one prepared in the legal battle against Napster. To measure this effect, the plaintiff hired Soundscan, a company that developed an information system to capture point-of-sale data on music sales in more than 18,000 stores throughout the United States. Soundscan (*A&M Records v. Napster*, 114 F. Supp. 2d 896 [2000]) compared sales means for the first quarter of the years 1997, 1998, 1999 (when Napster was not available) and 2000 (when Napster was available) for all stores, stores within 1 mile of any college or university, stores within 1 mile of the top 40 most-wired universities, and stores near universities that banned Napster use after the first quarter of 2000. From the first quarter of 1999 to the first quarter of 2000, national sales grew 6.6 percent, sales near all universities dropped 2.6 percent, sales near most-wired schools dropped 6.2 percent, and sales near schools where Napster was banned after the first quarter of 2000 fell 8.1 percent. However, as noted by Fader (2000) in the *Napster* case, sales near universities had been falling since 1998, at a time when Napster was not available and national sales were growing, which casts doubts on the conclusion of Soundscan's report. More recent empirical attempts to measure this effect are Liebowitz (2003), Zentner (2005a), Oberholzer-Gee and Strumpf (2005), and Rob and Waldfogel (2004).³

Using a time series of aggregate data for the United States, Liebowitz (2003) analyzes the effect of a variety of reasons that could explain the drop in music sales, including income, prices of albums, prices of complements and substitutes, recording formats, interest in music, demographics, and distribution channels. He finds that these alternative reasons cannot explain the observed reduction in sales.

Zentner (2005a) uses Internet and broadband usage by country as proxies for music downloaders and documents that countries with greater Internet and broadband penetration have suffered greater reductions in music sales. Some types of music would be expected to be more susceptible to file sharing than others. For a given country, international repertoire—as opposed to domestic repertoire—is music that it is not produced inside that country. Music produced in the United States is more popular among young individ-

³ Hui and Png (2003) analyze the effect of commercial piracy on music sales with data from the years 1994–98. See Liebowitz (2005) for a more extensive analysis of the literature including several more recent studies.

uals in international markets who are more likely to share files online, whereas the domestic repertoire contains albums that appeal more to an older and less computer-friendly population. Zentner (2005a) finds some evidence that file sharing may be behind the recent increase in the share of domestic repertoire in total sales.

Using a panel of weekly album sales and information on the weekly number of downloads by album for the United States, Oberholzer-Gee and Strumpf (2005) find that music downloading has an effect on sales that is statistically indistinguishable from zero. To establish causality, they employ technical features related to file sharing as instruments. The high-frequency nature of their identification strategy—across-weeks variation within album—and the durability of music may restrict the interpretation of the results to the lack of contemporaneous substitution.⁴

Rob and Waldfogel (2004) collected individual-level data on album downloads and purchases by 500 college students. They find evidence that each album download reduces music purchases by .2 albums in the OLS specification, and they find a much bigger effect when using instrumental variables. They also address causality issues by using the speed of the Internet connection as an instrument. In addition to individual-level self-reported broadband access, they employ broadband access variation at the school level as an alternative instrument. They also collected information on consumers' valuation of these albums, which allows them to document that downloaded albums are valued less than purchased albums. The restriction to 500 college students in four schools limits generalizations of their results.

III. THE MUSIC INDUSTRY

Global music sales in 2002 totaled US\$32.2 billion. Forty-one percent of these sales were made in North America, 34.5 percent in Europe, 18.6 percent in Asia—with Japan representing more than 80 percent of Asian sales—3.1 percent in Latin America, and 2.7 percent distributed among Australasia, the Middle East, and Africa. Sales are concentrated in the top markets. The top five countries—the United States, Japan, the United Kingdom, France, and Germany—represent 76.5 percent of global sales, and the top 10—the top five above plus Canada, Italy, Spain, Australia, and Mexico—represent 85 percent (IFPI 2002b).

Sales are also concentrated among a few companies. The four biggest companies—Universal, Sony-BMG, EMI, and Warner—control more than 70 percent of the global market of music sales, with the rest of the market share distributed among many independent record labels. These latter labels,

⁴ To address this concern they present a distributed lag model. See Liebowitz (2004) for a critique of the instruments and Rob and Waldfogel (2004) for a more detailed analysis of the identification strategy.

in some cases, have an important presence in an individual country, region, or continent.

Companies and musicians usually negotiate exclusive multiyear contracts. When producing a new album, artists typically receive an up-front payment and a royalty somewhere between 5 and 13 percent of the retail price of the record (Standard & Poor's 2002).

The CD is the most popular music format, representing 72 percent of total international units sales. Sales of singles, LPs, and cassettes continue to be replaced by sales of CD albums (IFPI 2002b). Two new formats, DVD Audio and Super Audio CD, are growing but do not yet have an important share. These new formats have higher sound quality and extra content such as video clips and interviews with the artists. The tendency to include extra content might have been accelerated by the need to differentiate the product from the illegal online substitute.

There is variability in prices across CDs. While the average retail price of a CD in the United States is US\$14.19 (Black 2003a), 28 of the top 50 albums on the *Billboard* charts have a list price between US\$17.98 and US\$19.98, and only seven are listed at US\$14.98 or less (Morris 2002). There is little information on music prices for other countries. In 2001, the European Commission opened an investigation to study the higher prices in Europe and the divergence in prices inside the European Union.⁵ In 2003, the average price of a CD in the United Kingdom was US\$16.80 (British Phonographic Industry 2004).

Distribution costs of music represent a very important share of total costs. A CD with a suggested price to consumers of US\$16.98 has a price of US\$10.50 to the retailer (Standard & Poor's 2002). This latter figure includes distribution costs from the record company to the retailer.

The distribution channels have been changing. Music stores have been shrinking as a source of sales and are being replaced by supermarkets, discount stores, department stores, and online retail. In the United States, music stores' share of sales fell from 62 percent in 1991 to 42 percent in 2000 (RIAA 2000). In the United Kingdom, supermarkets increased their share of music sales from 11.2 percent in 1999 to 17.7 percent in 2001 (IFPI 2002b). Online retail (off-line delivery), as a share of total sales, increased from 6 percent in 2001 to 9 percent in 2002 in Germany and from 4 percent to 6 percent in the United Kingdom and remained steady at 3 percent in the United States. Online legitimate delivery became available in 2001, but it is still not an important source of sales. In 2003, sales of music downloads in

⁵ It was found that the major labels were including minimum advertised prices linked to cooperative advertising agreements in Germany (Tannock 2003). A lawsuit alleging the same practices was filed in the United States. The case ended with a settlement in which the companies agreed to refund US\$67.4 million to consumers and discontinue their minimum pricing policies (Deutsche 2002).

the United States totaled US\$30 million, which represents .25 percent of total music sales (IFPI 2004b).

Online legitimate delivery and file sharing are possible in MP3 format. The MP3 format is a way to compress audio data without significantly compromising sound quality.

Sound recordings are originally represented as waves. When the sounds are digitalized, these waves are sampled many times per second and a file is created. Compact disc quality needs a sampling of 44,100 times per second (44.1 KHz). Humans can hear only around 10 percent of the sounds that are recorded on a CD. The MP3 compression system eliminates sounds that are not perceptible to humans and softer sounds when different sounds are playing simultaneously. There are different qualities of MP3 compression (depending on the bit rate of the file). Bit rates between 64 and 192 Kbps are standard on the Internet, but only files above 160 Kbps have quality comparable to CDs.

A 5-minute soundtrack that would take more than 50 MB in CD compression format can be reduced to a file of 5 MB without significantly affecting the sound quality. A compressed file of this size can be downloaded in as fast as 12 minutes with a dial-up Internet connection (56 Kbps modem downstream), 1 minute and 20 seconds with a regular DSL or cable connection (512 Kbps downstream), and 20 seconds with a fast DSL connection (2,000 Kbps downstream). However, the actual downloading speed also depends on the upstream speed connection of the computer providing the file, and the upstream speed is usually lower than the downstream speed.⁶

People can upload (rip) CDs to their PCs' hard drives and listen to music on their computer, compress the files to an MP3 format to reduce the storage memory requirement and to facilitate the sharing of the files over the Internet, and convert the files back to a CD format and burn CDs that can be played in a regular player. The development of these technologies could represent a very significant reduction in costs considering that around 50 percent of music costs are distribution expenses.

There are many alternatives for getting music online. They can be divided into two groups: legitimate and illegitimate (under the current law).

Legitimate companies either own the copyright or make deals with copyright owners to distribute their music. Among the biggest companies are iTunes, Napster, Rhapsody, and the Europe-based OD2. Most services offer

⁶ Having a high-downstream-speed connection allow users to download many files at the same time. In addition, in many peer-to-peer services, such as Kazaa, it is possible to download the same file from different users. The program recognizes the same file in different computers, partitions the file in several pieces, and allows downloading of each piece from a different peer. These two ways help circumvent the bottleneck created by a lower upstream speed than downstream speed. Universities have T3 connections that are much faster than residential service (from 3 Mbps to 45 Mbps downstream).

unlimited “streaming audio” and “tethered downloads”⁷ for a fixed charge per month of around US\$10 and the possibility of permanent burnable downloads for around US\$1 per song. In 2003, prices of digital tracks in Europe were higher, between US\$1.76 and US\$2.35 per song (Koranteng 2003), but they have decreased in the past 2 years.

Online legitimate digital delivery has been overshadowed by piracy. After the shutdown of Napster, illegitimate music online can still be found globally on peer-to-peer file-sharing services such as Kazaa, BitTorrent, and several others. These services are distributed without charge and allow users to download both licensed and unlicensed files, including music, movies, games, and software. The amount of music available through these services is larger than on any legitimate site.

Since the second half of 2003, the RIAA has been suing individual users who are offering substantial amounts of copyrighted music over peer-to-peer networks. The industry claims that these lawsuits are behind the leveling off of the decline in U.S. music sales in 2004.

IV. THE DATA

This paper uses a European consumer mail survey by Forrester Research from October 2001 called Consumer Technographics. Forrester is a business research company specializing in the information economy. The fieldwork was conducted by the market research company Taylor Nelson Sofrés. The sampling methodology is proprietary but is meant to ensure a representative sample in each country. The survey contains more than 70 questions about many different topics, with many subitems and multiple answers. Analogous U.S. data from Forrester have been used extensively in the economic literature related to the Internet (Goolsbee 2000, 2001; Goolsbee and Brown 2002; Goolsbee and Klenow 2002).

The survey includes 22,488 observations and is designed to be representative of the total 16 and older population in seven European countries: France, Germany, Italy, Netherlands, Spain, Sweden, and the United Kingdom.⁸ Three of these countries are among the top five music markets, and five are among the top 10. In 2001, they represented 27.8 percent of international music sales (IFPI 2002b).

The database contains a discrete $\{0, 1\}$ variable indicating purchases of

⁷ Streaming audio gives the opportunity to listen to soundtracks without downloading them to the hard drive. Tethered downloads are downloads to the hard drive that cannot be burned into a CD. The music is no longer available when subscription is ended.

⁸ I found modest differences in age and gender when comparing these data with country-level censuses. A total of 7,355 individuals have missing values for at least one of the variables. Income is the only missing variable for 2,625 individuals. The results below are similar if these individuals are included in the regressions and income is not included as a control. English proficiency is the only missing variable for 1,083 individuals. The results are similar when including these individuals and not using this variable as a control.

TABLE 1
SUMMARY STATISTICS

Statistic	Value
Overall population ($N = 15,133$) (%):	
Internet users	50.7
People who regularly download MP3 files	9.0
People who bought music during the last month	39.3
People who bought music during the last month given that they regularly download MP3 files	55.8
People who bought music during the last month given that they do not regularly download MP3 files	37.7
People with DSL or cable Internet connection	4.3
Internet connection at home ($N = 5,917$) (%):	
People who regularly download MP3 files	21.0
People who bought music during the last month	47.1
People who bought music during the last month given that they regularly download MP3 files	55.1
People who bought music during the last month given that they do not regularly download MP3 files	45.0
People with DSL or cable Internet connection	11.0
Probability of buying music:	
France	.33
Germany	.48
Italy	.34
Netherlands	.30
Spain	.27
Sweden	.37
United Kingdom	.53

music—CDs, tapes, or records—during the month prior to the survey for each respondent. This question is broad in the sense that it is not restricted to off-line purchases. For each respondent it also contains information about access to the Internet; purchases of many goods during the last month, including videos, books, software, and groceries; ownership of many electronic goods, including portable stereos, hi-fi stereos, cellular phones, DVD players, MP3 players, CD writers, and game consoles; and demographic variables such as gender, age, work status, education, household size, and household income.

For Internet users, the database contains information on the weekly average number of hours spent online, the number of years that they have been going online and using e-mail, and information about their Internet activity, including checking e-mail, using search engines, purchasing goods online, publishing their own Web pages, participating in online auctions, and downloading MP3 files. For people with an Internet connection at home, the database contains information on the type of connection—DSL, cable, ISDN, or dial-up.

Table 1 presents summary statistics. Across the overall sample (15,133 observations after dropping individuals with missing values), 39.3 percent

bought music during the month prior to the interview, 9.0 percent regularly download MP3 files,⁹ and 50.7 percent have Internet access.

Downloading's current illegal status may induce a negative bias in the fraction of people who report downloading music. However, the industry strategy of suing individuals—rather than companies, for contributory and vicarious liability—who are illegally sharing music is recent, and the risk of individuals being prosecuted or fined was probably negligible in October 2001.¹⁰ Only in the middle of 2004 did the industry start suing European individuals (RIAA 2003).

The percentage of people who bought music is much larger among the group who regularly download MP3 files (55.8 percent) than among those who do not (37.7 percent), which suggests that MP3 downloaders have a strong taste for music. Considering only those people who have an Internet connection at home (5,917 observations), 47.1 percent bought music during the month prior to the interview and 21.0 percent regularly download MP3s. Again, the fraction of people who bought music is higher among those who regularly download music (55.1 percent) than among those who do not regularly download music (45.0 percent).

Table 2 compares Internet users and broadband access by country in Forrester's sample with data on the number of Internet users by the International Telecommunication Union (ITU). The ITU does not collect the data by itself, but it compiles information from different country-level surveys.¹¹ Forrester's data show a higher number of Internet users and broadband users than the data by the ITU.

There is heterogeneity in per capita music sales among the countries considered. According to the IFPI (2002b), in 2001 per capita music sales (CDs,

⁹ There are two questions about music downloading in the survey: regularly "download music (MP3)" and regularly do "file sharing (e.g., Napster)." I report the results of a variable by assigning a value of 1 to doing any of these activities. These two variables have a high correlation. The results below are similar using any of these two variables separately.

¹⁰ Because of the design of the questionnaire, it is not possible to know whether some individuals refused to answer if they regularly download music. File sharing is an item in a question with more than 40 items, and individuals are asked to mark all the statements that apply. Regularly "download music (MP3)" and regularly do "file sharing (e.g., Napster)" are two of these statements. An important characteristic of the questionnaire is that the subitems including the question asking if they bought music in the month prior to the survey and the subitem including the question asking if they regularly download music are in different sections. While the first question is asked of the whole sample, the second is asked only of individuals with access to the Internet. There are many questions about completely different topics in between them. This may be important because individuals might strategically misreport their actions if they are supporters of file sharing or are against it. By answering both questions together, they could predict that the results are going to be used to evaluate the effect of file sharing on music sales. This may be a problem for analyses based on surveys that concentrate only on music purchases and downloads.

¹¹ The date of the year in which the data were collected in each country and the broadness of the measure of Internet access—access at home or overall access—are not known. International Telecommunication Union data are from their Web site (<http://www.itu.int/ITU-D/ict/statistics>).

TABLE 2
INTERNET PENETRATION (%)

	FORRESTER (October 2001)			INTERNATIONAL TELECOMMUNICATION UNION		
	Access at Home	Overall Access	Broadband	Internet 2001	Internet 2002	Broadband 2002
France	28.6 (.753)	39.2 (.813)	2.3 (.254)	26.3	31.3	2.4
Germany	43.8 (.853)	55.6 (.854)	4.8 (.368)	37.3	42.3	3.9
Italy	40.1 (1.119)	53.1 (1.139)	1.4 (.269)	26.8	30.1	1.5
Netherlands	58.8 (1.335)	66.7 (1.279)	15.2 (.975)	49.0	53.0	7.2
Spain	18.1 (.902)	33.2 (1.102)	1.8 (.311)	18.2	19.3	1.1 ^a
Sweden	58.3 (2.449)	67.0 (2.336)	8.1 (1.357)	51.6	57.3	7.8
United Kingdom	47.8 (.972)	59.9 (.954)	3.8 (.375)	32.9	40.6	2.3

NOTE.—Standard errors are listed in parentheses.

^aBroadband access for 2001, not 2002.

cassettes, singles, and LPs) per year were 4.79 units in the United Kingdom, 3.53 in Sweden, 3.16 in Germany, 2.89 in France, 2.31 in the Netherlands, 2.02 in Spain, and .85 in Italy. Average per capita unit sales per year over the countries considered in the sample were 2.83. The microdata do not contain sales quantities to match to the IFPI data.¹² Table 1 also reports probabilities of music purchases by country.

V. EMPIRICAL APPROACH

The goal of this paper is to estimate the effect of peer-to-peer usage on the probability of purchasing music. It was shown in the last section that a comparison of means indicates that individuals who regularly download MP3s are more likely to buy music. This positive relationship persists—although it is not statistically different from zero—when controlling for several individual-level characteristics.

I consider the following model:

$$B_i = b_1 D_i + b_2 \mathbf{X}_i + \varepsilon_i,$$

where for individual i , B_i and D_i are discrete $\{0, 1\}$ variables indicating that individual i bought music during the month prior to the survey and regularly downloads MP3 files, respectively, \mathbf{X}_i is a vector of observed individual characteristics, and ε_i represents the error. Column 1 of Table 3 presents OLS estimates for respondents with and without Internet access. Feasible generalized least squares is employed to allow for heteroskedasticity across in-

¹²The microdata probably include purchases of illegitimate copies of music (commercial piracy). Seasonality in music sales and the fact that Forrester does not include individuals 15 years old and younger make it difficult to compare probabilities computed from the microdata with data on quantities from the IFPI. To my knowledge, information on country-level seasonality is not available.

TABLE 3
ORDINARY LEAST SQUARES (OLS) AND INSTRUMENTAL VARIABLES:
PROBABILITY OF PURCHASING MUSIC

	OLS	INSTRUMENTAL VARIABLES			
	(1)	(2)	(3)	(4)	(5)
Download MP3 files	.0135 (.0153)	-.4982* (.2485)	-.3195* (.1246)	-.3271* (.1288)	-.3843* (.1736)
Age	-.0033** (.0003)	-.0035** (.0003)	-.0034** (.0003)	-.0037** (.0007)	-.0044** (.0010)
Log of income	-.0030 (.0070)	-.0064 (.0074)	-.0052 (.0071)	-.0075 (.0132)	-.0035 (.0196)
No Internet access	.0134 (.0103)	.0065 (.0111)	.0089 (.0105)	N.A.	N.A.
Listen to music while online	.0667** (.0115)	.1391** (.0371)	.1138** (.0209)	.1218** (.0207)	.1181** (.0260)
Household size	-.0143** (.0038)	-.0127** (.0040)	-.0133** (.0039)	-.0094 (.0062)	-.0186* (.0091)
Confidence in English	.0076* (.0037)	.0102* (.0040)	.0093* (.0038)	.0148* (.0064)	.0116 (.0094)
Male	.0496** (.0086)	.0633** (.0111)	.0586** (.0093)	.0975** (.0181)	.1211** (.0265)
Hours of TV	-.0003 (.0004)	-.0002 (.0004)	-.0003 (.0004)	.0000 (.0008)	-.0003 (.0011)
Hours of Internet	-.0024** (.0008)	.0040 (.0032)	.0018 (.0018)	.0020 (.0017)	.0026 (.0021)
Student	.0273 (.0182)	.0701* (.0282)	.0552** (.0213)	.0352 (.0291)	.0371 (.0405)
Work full-time	.0165 ⁺ (.0095)	.0052 (.0113)	.0091 (.0100)	.0056 (.0158)	-.0112 (.0232)
Education	-.0072 (.0053)	-.0111 ⁺ (.0058)	-.0097 ⁺ (.0055)	-.0057 (.0094)	.0057 (.0135)
Own Walkman	.0773** (.0087)	.0801** (.0090)	.0791** (.0088)	.0783** (.0144)	.0718** (.0203)
Own MP3 player	.0215 (.0204)	.0510 ⁺ (.0262)	.0407 ⁺ (.0221)	.0202 (.0330)	.0273 (.0455)
Own hi-fi stereo	.0665** (.0092)	.0614** (.0096)	.0632** (.0093)	.0284 (.0212)	.0223 (.0318)
Own CD writer	-.0013 (.0117)	.0674 ⁺ (.0356)	.0434* (.0205)	.0487 ⁺ (.0253)	.0643 ⁺ (.0360)
Overidentifying restrictions test (<i>P</i> -value)	N.A.	N.A.	.102	.453	.271
<i>N</i>	15,133	15,133	15,133	5,917	3,257

NOTE.—The dependent variable is a dummy variable for buying music during the last month. Column 2: download MP3 files is instrumented (instruments: have a DSL or cable Internet connection). Column 3: download MP3 files is instrumented (instruments: publish own Web page, participate in online auctions, ask for technical support online, read computer magazines, how long using Internet, and how long using e-mail). Column 4: same instruments as column 3 and the regression is restricted to Internet users, Column 5: same instruments as column 3 and the regression is restricted to Internet users with more than 2 years going online. Other controls (dummies) included for all regressions are region (53 regions within countries), ownership of goods (TV, widescreen TV, dish, cable TV, set-top box for TV, VCR, PC, digital assistant, handheld game, wireless application protocol phone, camcorder, printer, digital camera, digital camcorder, Web camera, game console, DVD drive, DVD player, scanner, and mobile phone), purchases of goods (books, videos, video games, software, toys, sporting goods, clothing, footwear, jewelry, gifts, flowers, event tickets, electronics, groceries, beer, wine, or spirits, tobacco, health and beauty), and read magazines (women, family, home, cooking, travel, health, sports, motor, men, TV, celebrity, news, business, finance, and nature). Robust standard errors are in parentheses.

⁺ Significant at the 10% level.

* Significant at the 5% level.

** Significant at the 1% level.

dividuals. Household income was standardized to gross annual euros per year, and its logarithm was included in the regression. Age is measured in years. Confidence in English is measured from 1 to 5, with 5 being “very confident.” Education takes values from 1 to 3 for lower, middle, and upper levels. Household size has a cap of five or more people in the household. Hours of television and hours of Internet (only for Internet users) are the average hours per week and take the values 2, 7, 12, 17, 22, 27, and 30 (with a cap of 30 or more hours). All the other controls are dummies.

Note that prices of music are not included in the analysis. As the coefficient is identified in the cross section, the relevant variation in prices is the variation across regions. In a concentrated music market, it is possible that there exists some price variation across regions. To my knowledge, regional price information is not available. The regressions include 53 within-country regional dummies that may account for this possibility.¹³

The downloaded online product can theoretically be a complement for music in regular formats (CDs, cassettes, LPs) as the means comparison and the OLS regression suggest.¹⁴ Consumers may get to know albums by downloading some tracks from the Internet and then decide whether or not to buy the album. Downloading takes time, but this cost could be lower than the cost of getting to know music by going to the store and listening to different albums before purchasing. Also, not having an MP3 player, not being able to burn CDs in order to listen to the downloaded copy on a regular stereo system, or some quality difference between the copy and the original may induce the purchase of the album.

However, radios advertise music, and the technology is available to burn good-quality CDs from MP3 files in order to listen to the downloaded copy on a regular player. The presence of unobserved heterogeneity in music tastes across individuals may be an obstacle to the identification of the causal effect. The approach of this paper is to use instrumental variables techniques. To

¹³ Despite many missing observations, for each individual the survey contains brackets for the size of the population in the city (not available for Germany). The brackets are different for every country and do not coincide with the within-country regions. For example, for Italy the brackets are as follows: fewer than 10,000, 10,000–30,000, 30,000–100,000, and more than 100,000 individuals. In a few cases a specific city is listed. For the listed cities, I imputed the real population. For the other cities, I imputed the median value of the range of the bracket. For the top bracket I tried different values. The magnitude of the effect of downloading in the regressions below is similar when I include the size of the city as an additional control and measures of Internet sophistication are used as instruments. The coefficient is estimated more imprecisely but is also similar in magnitude when including size as a control and instrumenting with the speed of the connection. The coefficient and standard error in this latter case are similar when including or excluding the size of the city as a control, which suggests that the increased imprecision is a consequence of the missing observations.

¹⁴ It should be noted that this is valid for both legal and illegal downloads. A related question to the one analyzed in this paper—that to my knowledge has not been addressed in the literature—is whether legal downloads reduce sales of music in traditional format.

achieve the goal requires an instrumental variable that explains peer-to-peer systems usage but is otherwise unrelated to music purchases.

To account for the presence of unobserved heterogeneity, I consider the following model:

$$B_i = b_1 D_i + b_2 X_i + \theta_i + v_i,$$

where, for individual i , θ_i represents unobserved taste for music and v_i represents the error. If θ_i and D_i are not orthogonal, OLS gives a biased and inconsistent estimate of b_1 . One way to overcome this problem is to find an instrumental variable Z_i that explains D_i but is orthogonal to θ_i .¹⁵

The first instrument that I consider is access to a broadband connection.¹⁶ The idea is that it is considerably faster to download a music file with a high-speed connection, which reduces the cost in time of downloading music.

Column 1 of Table 4 shows that having a broadband connection significantly increases the probability of downloading music. The first stage shows who downloads music. Young individuals,¹⁷ students, males, owners of MP3 players, owners of CD writers, and individuals who listen to music while online are more likely to be downloaders.

The second stage presented in column 2 of Table 3 suggests a reduction of 50 percent in the probability of buying music. Purchases of music are negatively correlated with age and household size and positively correlated with listening to music while online,¹⁸ being male, being a student, the level of confidence in English, owning CD writer and an MP3 player, and owning complements of music in traditional format, such as a Walkman and a hi-fi stereo.

A problem with this instrument is that it is a choice variable, and it is

¹⁵ Estimation of models of limited dependent variables (LDVs) with endogenous continuous regressors has been discussed extensively in the literature (Newey 1987; Rivers and Vuong 1988). However, here the endogenous regressor is a dummy variable. Angrist (2001) shows different ways of dealing with dichotomous endogenous regressors in models of LDVs. Using linear instrumental variables with a local average treatment effect interpretation is one of the proposed alternatives. Kane, Rouse, and Staiger (1999) show that instrumenting a dummy regressor measured with error biases the coefficient away from zero (see note 10).

¹⁶ Having a broadband connection might be correlated with a high downloading intensity. If there was misreporting (see note 10), I do not see a reason to believe that the unobserved downloading intensity would be correlated with this hypothetical misreporting in a particular way. Only recently has the RIAA started suing U.S. individuals who share large amounts of music online.

¹⁷ Note that the age variable is not significant. Including the variable age implicitly assumes that the marginal effect computed at different ages is the same. The substitution of the variable age for dummy variables by years of age does not change the result of the second-stage regressions.

¹⁸ This is not necessarily streaming audio by the context in which the question is asked. The question is "do you ever do any of the following while online?" One of the options is "listen to music/radio," and there are many other options, such as "have the TV on," "have friends over," and "read magazines."

TABLE 4
FIRST-STEP ORDINARY LEAST SQUARES REGRESSIONS FOR THE PROBABILITY OF
DOWNLOADING MUSIC ONLINE

	(1)	(2)
Have broadband connection	.0847** (.0174)	N.A.
Publish own Web page	N.A.	.0636** (.0224)
Read computer magazines	N.A.	.0683** (.0111)
Participate in online auctions	N.A.	.0523** (.0203)
Ask for technical support online	N.A.	.0475** (.0143)
How long using the Internet	N.A.	.0056 (.0049)
How long using e-mail	N.A.	-.0022 (.0047)
Age	-.0003 (.0002)	-.0003 (.0002)
Log of income	-.0059 (.0041)	-.0038 (.0041)
No Internet access	-.0125** (.0045)	-.0071 (.0051)
Listen to music while online	.1413** (.0093)	.1355** (.0093)
Household size	.0028 (.0024)	.0040 ⁺ (.0023)
Confidence in English	.0053* (.0021)	.0031 (.0021)
Male	.0266** (.0047)	.0186** (.0047)
Hours of TV	.0003 (.0002)	.0003 (.0002)
Hours of Internet	.0117** (.0007)	.0103** (.0008)
Student	.0835** (.0134)	.0845** (.0133)
Work full-time	-.0212** (.0052)	-.0223** (.0052)
Education	-.0070* (.0030)	-.0088** (.0029)
Own Walkman	.0051 (.0046)	.0059 (.0045)
Own MP3 player	.0564** (.0156)	.0559** (.0154)
Own hi-fi stereo	-.0101* (.0040)	-.0090* (.0040)
Own CD writer	.1311** (.0089)	.1236** (.0089)
R^2	.30	.31
F -test (global test of excluded in the second-stage instruments)	N.A.	15.3 ($P = .000$)

NOTE.—The dependent variable is a dummy variable for regularly download MP3 files (mean among overall population = .09). Other controls (dummies) included for all regressions are region (53 regions within countries), ownership of goods (TV, widescreen TV, dish, cable TV, set-top box for TV, VCR, PC, digital assistant, handheld game, wireless application protocol phone, camcorder, printer, digital camera, digital camcorder, Web camera, game console, DVD drive, DVD player, scanner, and mobile phone), purchases of goods (books, videos, video games, software, toys, sporting goods, clothing, footwear, jewelry, gifts, flowers, event tickets, electronics, groceries, beer, wine, or spirits, tobacco, health and beauty), and read magazines (women, family, home, cooking, travel, health, sports, motor, men, TV, celebrity, news, business, finance, and nature). Robust standard errors are in parentheses. $N = 15,133$.

⁺ Significant at the 10% level.

* Significant at the 5% level.

** Significant at the 1% level.

probably related to the interest in downloading music.¹⁹ However, if people who have broadband connections have a strong taste for music—and subscribing to a broadband connection in order to download music may signal

¹⁹ A better instrument would be variation in broadband availability at the regional level. Regions are within countries, and there are a total of 53 regions in the sample. However, to my knowledge, data on European broadband availability at the within-country regional level is not available. Moreover, the database is not precise about which cities are considered in each region to match broadband availability at the regional level. For example, for the United Kingdom the regions are North, Midlands, and South.

a strong taste for music—the bias goes in the direction of underestimating the effect of downloads on the probability of buying music. In fact, in 2001 many broadband service providers explicitly advertised the ability to download music quickly. On the other hand, if—for a given taste for music—people who buy broadband connections are people who are going to substitute more, then the bias goes in the direction of overestimating the average reduction in the probability of buying.

Measures of Internet sophistication could be employed as alternative instruments. The presumption is that downloading MP3 files requires a high degree of Internet sophistication. In the database there is information about many uses of the Internet and information on the number of years individuals have been using the Internet and e-mail. There is also a dummy variable for individuals who read computer magazines. A large number of years using the Internet and e-mail and some uses of the Internet such as “publish own Web pages,” “participate in online auctions,” and “ask for technical support online” and “read computer magazines” might signal a high degree of Internet sophistication. These variables could increase the probability of downloading music but might be otherwise unrelated to an unobserved taste for music or entertainment.

Column 2 of Table 4 reports the first-step regression of “download MP3” on the proposed instruments. As noted in Table 1, the percentage of people who download MP3 files across the overall population is 9 percent. The first stage shows that sophisticated Internet users have a higher probability of downloading music online. The probability value of an *F*-test of the global significance of the excluded in the second-stage variables is reported at the bottom of Table 4. Table 4 also shows that being a student, being male, listening to music while online, and the ownership of complements of music in digital format—MP3 player and CD writer—increase the probability of downloading music.

In column 3 of Table 3, “download MP3,” is instrumented with the proposed variables. The coefficient on “download MP3” is negative and significant. It indicates that downloading MP3 files reduces the probability of buying music by 32 percent.

In the case of a dummy independent variable, a dummy treatment, and a dummy instrument, instrumental variables has a local average treatment effect interpretation (Angrist 2001). When using the speed of the connection as an instrument, the estimate measures the average treatment effect for those who would be induced to download if broadband is provided. Downloading intensity is not available in the database. Having a broadband connection may induce a high downloading intensity and thus generate a big reduction in the probability of buying music. This may explain a lower estimated effect when using measures of Internet sophistication as an instrument. The broadband instrument is interesting for forecast analysis if it is assumed that broadband will be ubiquitous in the near future.

The instruments “how long using the Internet” and “how long using e-mail” are not significant in the first step. Even having a high global significance of the instruments— F -value of 14.7²⁰—in the first-step regression, it may be better to exclude them from the analysis in order to avoid the risk of dealing with weak instruments. The results do not change much when these instruments are excluded from the analysis.

To further analyze the robustness of the results, columns 4 and 5 of Table 3 restrict the regressions to people with Internet access at home and to Internet users with more than 2 years of online experience, respectively. The regression with individuals with more than 2 years of Internet experience is performed to exclude people who acquired an Internet connection after Napster was introduced—to control for the possibility that people went online in order to download music.²¹ The estimated effects of downloading music on the probability of buying music are similar when restricting to these groups.

Given that the number of instruments exceeds the number of endogenous variables, it is possible to test for overidentifying restrictions. The probability values for this test are reported in Table 3. The results support the exclusion of the instruments from the purchase equation. Given the large change in the estimated coefficient in the instrumented regressions in comparison with the OLS estimate, special scrutiny of the instruments is necessary.

To overstate the negative effect of downloads on music purchases, the instruments would have to be correlated with a weak taste for music. Another possibility is that the instruments were correlated with an unobserved low value of time. Downloading music from an illegitimate site is free of charge. However, there are other costs associated with the process of downloading. An important one is the cost of time involved in this process. The risk is that sophisticated Internet users are people with a low value of time and therefore—for a given taste for music—more willing to substitute music purchases for freely downloaded music.

Table 5 presents OLS regressions of goods that may be related to a taste for music or entertainment on the instruments. Sophisticated Internet users may have a tendency to use complements of music in digital (nontraditional) formats—MP3 players and CD writers—and substitute away from complements of music in regular formats—Walkmans and hi-fi stereos. Sophisticated Internet users may also have a tendency to use the computer to watch videos or to play games, which induces a negative correlation between the instru-

²⁰ A rule of thumb for being concerned about weak instruments in the case of a single endogenous regressor is to have an F -value lower than 10 (Staiger and Stock 1997).

²¹ Napster was launched 2 years and 4 months before the fielding of the survey. The coefficient is similar but the standard error is bigger when restricting to Internet users with more than 3 years and with more than 4 years of Internet experience.

ments and having a DVD player or a game console.²² The mean values of having these goods at home are reported in the last row of Table 5.

Publishing a Web page is positively correlated with having an MP3 player and a CD writer but is negatively correlated with owning a Walkman and a hi-fi stereo.²³ As suggested before, this may be explained by a negative effect of music downloading on purchases of complements of music in regular formats. Excluding “own a Web page” from the list of instruments results in a similar estimated impact of downloading MP3 on the probability of purchasing music.

Table 5 also reports an OLS regression of the number of hours that respondents watch television, an activity that may be thought to be negatively correlated with the value of time, on the instruments. The number of hours of television watched per week correlates negatively with “publish own Web pages” and “ask for technical support online,” which suggests that Internet-sophisticated people do not place an especially low value on time. However, this analysis may not be valid if using the Internet and watching television are substitutes.

To further analyze the exogeneity of the instruments, I study how purchases of goods that may signal a taste for entertainment are affected by MP3 file downloading. Table 6 presents instrumental variables regressions of purchases of books, videos and DVDs,²⁴ video games, and audiovisual electronics. If the instruments were selecting individuals with weak taste for entertainment or individuals with low probability of buying entertainment goods, a negative impact of the predicted values of MP3 file downloading on purchases of these goods would be expected. None of the regressions show that downloading music reduces the probability of buying other entertainment goods. This suggests that the negative effect of downloading music on the probability

²² The regressions control for “have a CD writer” and “have an MP3 player.” Owning an MP3 player may be thought to reduce music purchases by allowing downloaders to listen to the downloaded files away from the computer. Also, as MP3 files can be converted back to a CD format, burning CDs may be expected to reduce music purchases too. Unfortunately, the survey does not ask people if they regularly burn CDs. The survey does ask about the ownership of CD writers. The regressions in Table 3 show a positive effect of owning MP3 players and CD writers on the probability of buying music. However, these variables may also be correlated with the unobserved heterogeneity in tastes for music. Among music downloaders, having a CD writer reduces the probability of buying music by 5.6 percent and having an MP3 player reduces the probability of buying by 2 percent.

²³ The regressions in Table 3 include complements of music as controls. However, these decisions might be determined jointly. An interpretation of this negative correlation with complements of music in regular format and positive correlation with complements of music in digital format is that downloading affects not only sales of music but also the whole regular-format music market.

²⁴ Sharing films on the Internet has some importance now but was nearly nonexistent in 2001. Sharing films requires fast connections because the files are big (around 600 MB). Another important difference between downloading songs and movies is that repeated play of movies does not seem to be as usual as repeated play of records. This characteristic may explain the popularity of rental of movies but not of records.

TABLE 5
 CORRELATION OF INSTRUMENTS WITH THE PROBABILITY OF HAVING GOODS THAT SIGNAL TASTE FOR
 ENTERTAINMENT AND WITH THE VALUE OF TIME (Ordinary Least Squares)

	Walkman	Hi-Fi Stereo	MP3 Player	CD Writer	DVD	Game Console	Hours of TV
Publish own Web page	-.0422 ⁺ (.0220)	-.0296* (.0147)	.0243 ⁺ (.0141)	.0720** (.0216)	.0070 (.0182)	.0144 (.0211)	-.7659 ⁺ (.3999)
Read computer magazines	-.0022 (.0126)	-.0080 (.0085)	.0031 (.0067)	.0813** (.0128)	.0140 (.0096)	-.0006 (.0119)	.1758 (.2390)
Participate in online auctions	-.0044 (.0152)	.0115 (.0091)	-.0060 (.0080)	.0799** (.0154)	.0199 (.0124)	-.0023 (.0144)	-.5017 ⁺ (.2789)
Ask for technical support online	.0142 (.0196)	-.0127 (.0115)	-.0005 (.0120)	.0056 (.0200)	.0175 (.0175)	.0131 (.0191)	.2300 (.3764)
How long using the Internet	-.0039 (.0062)	-.0084 ⁺ (.0045)	.0056 ⁺ (.0030)	.0033 (.0057)	.0022 (.0043)	-.0018 (.0056)	.1298 (.1113)
How long using e-mail	.0075 (.0060)	.0060 (.0042)	-.0052 ⁺ (.0027)	.0029 (.0055)	-.0020 (.0041)	-.0119* (.0054)	-.3118** (.1064)
Age	-.0042** (.0003)	-.0039** (.0003)	.0002 (.0001)	-.0003 (.0002)	-.0005** (.0002)	-.0035** (.0003)	.0442** (.0064)
Log of income	-.0088 (.0070)	.0324** (.0061)	.0036 (.0032)	.0137** (.0051)	.0118** (.0043)	-.0236** (.0059)	-.5196** (.1426)
No Internet access	-.0168 (.0110)	-.0206* (.0086)	.0107* (.0048)	-.0103 (.0079)	-.0050 (.0067)	.0100 (.0095)	.4591* (.2056)
Listen to music while online	.0427** (.0107)	-.0012 (.0069)	.0023 (.0051)	.0396** (.0104)	.0150 ⁺ (.0079)	-.0022 (.0101)	-.3070 (.2001)

Household size	.0349** (.0038)	-.0014 (.0030)	.0025 (.0017)	.0010 (.0030)	-.0018 (.0025)	.0552** (.0035)	-.5282** (.0730)
Confidence in English	.0213** (.0037)	.0042 (.0030)	-.0029 ⁺ (.0016)	.0046 (.0028)	-.0021 (.0023)	-.0056 ⁺ (.0031)	-.1273 ⁺ (.0714)
Male	-.0386** (.0086)	.0288** (.0075)	-.0042 (.0037)	-.0050 (.0064)	-.0096 ⁺ (.0052)	.0008 (.0070)	.7057** (.1728)
Hours of TV	.0019** (.0004)	.0000 (.0004)	-.0002 (.0002)	-.0004 (.0003)	.0005 ⁺ (.0003)	.0015** (.0004)	N.A.
Hours of Internet	-.0016* (.0008)	-.0003 (.0005)	.0012* (.0005)	.0044** (.0008)	-.0007 (.0006)	-.0006 (.0008)	.1136** (.0149)
Student	.0749** (.0161)	-.0387** (.0121)	.0099 (.0083)	-.0118 (.0150)	-.0549** (.0111)	-.0481** (.0165)	-.8211* (.3236)
Work full-time	.0389** (.0094)	.0141 ⁺ (.0074)	-.0023 (.0040)	-.0109 (.0073)	.0005 (.0060)	.0197* (.0082)	-1.4893** (.1804)
Education	.0151** (.0052)	.0126** (.0045)	-.0014 (.0023)	.0006 (.0039)	-.0042 (.0033)	-.0229** (.0044)	-.4453** (.1022)
Mean of dependent variable	.51	.79	.03	.19	.08	.27	16.09

NOTE.—Other controls (dummies) included for all regressions are region (53 regions within countries), ownership of goods (TV, widescreen TV, dish, cable TV, set-top box for TV, VCR, PC, digital assistant, handheld game, wireless application protocol phone, camcorder, printer, digital camera, digital camcorder, Web camera, game console, DVD drive, DVD player, scanner, and mobile phone), purchases of goods (books, videos, video games, software, toys, sporting goods, clothing, footwear, jewelry, gifts, flowers, event tickets, electronics, groceries, beer, wine, or spirits, tobacco, health and beauty), and read magazines (women, family, home, cooking, travel, health, sports, motor, men, TV, celebrity, news, business, finance, and nature). Robust standard errors are in parentheses. $N = 15,133$.

⁺ Significant at the 10% level.

* Significant at the 5% level.

** Significant at the 1% level.

TABLE 6
 PROBABILITY OF PURCHASING GOODS THAT SIGNAL TASTE FOR ENTERTAINMENT: INSTRUMENTAL VARIABLES

	Books	Videos and DVDs	Video Games	Audiovisual Electronics
Download MP3 files	.0759 (.1181)	.1724 ⁺ (.1021)	.3681** (.1025)	.2190* (.0964)
Purchase music	.1343** (.0087)	.1071** (.0067)	.0341** (.0056)	.0285** (.0055)
Age	.0027** (.0003)	-.0015** (.0003)	-.0009** (.0002)	.0004 ⁺ (.0002)
Log of income	.0216** (.0076)	-.0057 (.0055)	-.0152** (.0047)	.0054 (.0045)
No Internet access	-.0177 (.0110)	.0167* (.0080)	.0052 (.0067)	.0060 (.0067)
Listen to music while online	-.0034 (.0198)	-.0254 (.0168)	-.0552** (.0171)	-.0350* (.0157)
Household size	-.0020 (.0040)	-.0016 (.0032)	.0061* (.0028)	-.0003 (.0027)
Confidence in English	.0253** (.0039)	.0029 (.0028)	-.0023 (.0023)	-.0037 (.0024)
Male	-.0400** (.0098)	.0143* (.0069)	.0111 ⁺ (.0059)	.0115 ⁺ (.0061)
Hours of TV	-.0029** (.0004)	.0009** (.0003)	.0008** (.0003)	.0003 (.0003)
Hours of Internet	.0016 (.0017)	-.0000 (.0014)	-.0029* (.0014)	-.0003 (.0014)
Student	-.0042 (.0210)	-.0489** (.0165)	-.0548** (.0158)	-.0045 (.0152)
Work full-time	-.0024 (.0101)	-.0015 (.0077)	-.0109 ⁺ (.0066)	.0002 (.0066)
Education	.0609** (.0057)	.0021 (.0042)	.0013 (.0036)	.0009 (.0035)
Own Walkman	.0217* (.0090)	.0062 (.0064)	-.0065 (.0054)	.0134* (.0054)
Own MP3 player	.0310 (.0204)	-.0109 (.0184)	-.0106 (.0160)	.0105 (.0165)
Own hi-fi stereo	.0164 (.0108)	-.0067 (.0065)	-.0152** (.0052)	-.0017 (.0057)
Own CD writer	-.0301 (.0197)	-.0450** (.0164)	-.0463** (.0160)	-.0299* (.0151)

NOTE.—Download MP3 files is instrumented (instruments: publish own Web page, participate in online auctions, ask for technical support online, read computer magazines, how long using Internet, and how long using email). Other controls (dummies) included for all regressions are region (53 regions within countries), ownership of goods (TV, widescreen TV, dish, cable TV, set-top box for TV, VCR, PC, digital assistant, handheld game, wireless application protocol phone, camcorder, printer, digital camera, digital camcorder, Web camera, game console, DVD drive, DVD player, scanner, and mobile phone), purchases of goods (books, videos, video games, software, toys, sporting goods, clothing, footwear, jewelry, gifts, flowers, event tickets, electronics, groceries, beer, wine, or spirits, tobacco, health and beauty), and read magazines (women, family, home, cooking, travel, health, sports, motor, men, TV, celebrity, news, business, finance, and nature). Robust standard errors are listed in parentheses. $N = 15,133$.

⁺ Significant at the 10% level.

* Significant at the 5% level.

** Significant at the 1% level.

of buying music is not driven by instruments that pick individuals with a weak taste for entertainment goods.

One alternative explanation for the recent drop in music sales is that prices of substitutes (DVDs and video games) have been dropping. The inclusion of prices of DVDs and video games in the analysis is essential if time variation is the source of identification. Note that Table 6 shows that purchasing music is positively correlated with buying DVDs and games. The positive effect of downloading on purchases of other entertainment goods may indicate that downloading free music induces purchases of alternative entertainment goods.

File sharing is an activity concentrated in the younger population, which makes it difficult to estimate the effect of downloading for different age groups. Fifteen percent of the population 40 years old and younger downloads music. On the other hand, the percentage of downloaders among the population aged 40 and older is only 4 percent. When separating the analysis for individuals younger than 40 from the 40-and-older population, the coefficient is similar to the results presented so far for the younger group. For the older population, the coefficient is smaller but estimated imprecisely.

As mentioned before, having a high-speed connection considerably reduces the cost in downloading time. This suggests that the effect of downloading on sales should be larger for downloaders with broadband. Despite the estimates presenting high standard errors, separating MP3 downloaders with and without broadband shows a big reduction in purchases among the first group.²⁵

VI. EFFECTS OF ONLINE MUSIC DOWNLOADING ON MUSIC SALES

Instrumenting with measures of Internet sophistication, the results in the last section indicate that downloading MP3 files online reduces the probability of buying music during the month prior to the survey by 30 percent. Downloaded music may be shared with people who do not download MP3 files and affect their purchases as well. In this event, the estimates understate the effect of online music downloading on music sales.

The database does not contain information on quantities of music purchased or on intensities of music downloads to calculate what music sales would have been in the absence of music downloading. Moreover, the probability of buying music and intensity of purchases may vary in complicated ways.

Another obstacle in calculating the impact on sales comes from the possibility of having downloaders incorrectly measured. Forrester's data overestimate the number of Internet users compared to the ITU (Table 2), which suggests that the number of downloaders may be overestimated. That said,

²⁵ See Zentner (2005b) for this analysis and other results not reported here.

and with the goal of having a back-of-the-envelope estimate of the predicted effect on sales, in this section I investigate this counterfactual.

Across the overall population, 9 percent regularly downloaded music in 2001.²⁶ Therefore, if both digital music users and nonusers had the same propensity to buy music, the effect on the music industry would be a reduction in music sales units of 2.7 percent.

But digital music users have a greater propensity to buy music, which indicates that a correction for the heterogeneity in the groups is needed. It was shown in Table 1 that the probability of buying music for people who download music is higher than the probability for nonusers of peer-to-peer systems. Also, using my estimate with a treatment on the treated interpretation, the proportion of music downloaders who would have bought music would have been around 30 percent higher if the possibility of downloading music did not exist. This suggests that the probability of buying music for downloaders would have been around double the probability of buying for nondownloaders.²⁷

As there are no data on quantities of music purchased, an assumption about the number of units bought is needed. A probably conservative assumption is that users and nonusers of peer-to-peer systems, when reporting that they bought music during the month prior to the survey, bought the same quantity of units. With this assumption, the estimated impact on units sold—at the 2001 level of file sharers—would be a reduction of 4.9 percent.²⁸ If users of peer-to-peer systems not only have greater propensity to buy music but also would have bought more units conditional on buying, this would be an underestimate of the impact.

In October 2001 Napster was over and Kazaa was not yet an option. In 2002, the number of users increased from 3 million to 5 million (IFPI 2003). Assuming that this magnitude is representative of the increase in the number of downloaders in the European countries considered, and that these new downloaders have the same probability of buying as people who were downloaders in October of 2001, sales in 2002 would have been around 7.8 percent higher.

In summary, if music downloading reduces the probability of buying by 30 percent, if 15 percent of the population downloads music, if downloaders are twice as likely to buy music than nondownloaders, and if—conditional on buying—downloaders and nondownloaders buy the same quantity of units, then sales in 2002 would have been 7.8 percent $(.3 \times [(15 \times 2)/115])$ higher.

²⁶ Legal online digital delivery was nearly nonexistent in 2001.

²⁷ $(55.8 + 30)/37.7$.

²⁸ $[(.09 \times 2)/109] \times (-0.3)$.

VII. CONCLUSION

Global music sales have experienced a large drop during the last 4 years. This paper uses a European individual-level database to measure the impact of online music downloads on the probability of buying music and finds that file sharing reduces this probability. Using measures of Internet sophistication as instruments, downloads may explain a 30 percent reduction in the probability of buying music.

The estimates in this paper are an important component of any welfare analysis of file sharing or copyright. The interest is not exclusive to the music industry. Other digital copyrighted goods such as movies, software, games, and books are also being shared online. The development of fast connections is likely to increase the impact of file sharing on sales of these goods. This is going to become an increasingly important issue in the next few years.

Downloading copyrighted material is illegal under the current legal system. The music industry is fighting file sharing in court.²⁹ In the United States, music piracy has been legally fought on the basis of contributory and vicarious liability (Landes and Lichtman 2003). Under these doctrines, copyright holders sue parties that in some way contribute to or benefit from the infringing conduct, instead of suing individuals. However, the new peer-to-peer systems have proven to be more difficult to fight legally because they do not require a central server to operate (Varian 2000) and have alternative legitimate uses. The other difficulty is that many of these new systems are established in countries with different legal systems: Kazaa is registered in the South Pacific island nation of Vanuatu, the software distributor is in Australia, and the servers are in the Netherlands (Associated Press 2003).

After running into difficulties shutting down file-sharing systems, the RIAA changed strategy and has been “gathering evidence and preparing lawsuits against individual computer users who are illegally offering large amounts of copyrighted music over peer-to-peer networks” (RIAA 2003). In Europe, the industry started suing individuals only in the middle of 2004.

There is controversy about the effect of this strategy on the number of downloads. While suing individuals who offer music—as opposed to individuals who download files—may reduce the number of files available to download, it is not clear whether this would actually affect the number of downloads. This is important when considering the public-good nature of the files offered online. In addition, while it appears that the number of users has decreased for some popular sites such as Kazaa, the legal strategy appears to have induced individuals to use alternative and less popular sites and forums where the risk of being prosecuted may be lower. The music industry

²⁹ Many countries impose taxes on blank CDs and burners. Another way to combat piracy is to flood the net with decoy files (Lichtman and Jacobson 2000).

claims that the recovery of sales that occurred in the United States in 2004 may be explained by the success of the new legal strategy.

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FILE SHARING: CREATIVE DESTRUCTION OR JUST PLAIN DESTRUCTION?*

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ABSTRACT

The sharing of sound recordings over the Internet is the newest controversy in a long-running battle between copyright owners and copying technologies. In order to provide some context, perspective, and background, this paper examines the short history of file sharing, the longer history of record sales, various explanations for the change in record sales, and some analysis of the economics of copying. Although file sharing has been imperfectly and inconsistently measured, it nevertheless appears to reveal a fairly close linkage between changes in file sharing and changes in record sales. Explanations, other than file sharing, for the recent decline in record sales seem to have little or no support. Because economic theories of the impacts of copying hold out little hope for a benign impact of file sharing, these results should not be surprising. These findings reinforce the econometric results from most of an expanding literature.

I. INTRODUCTION

TEN years ago the term “file sharing” was unknown. Then Napster arrived, and both file sharing and Napster quickly became etched into the public’s consciousness. Although Napster was effectively shut down as an unauthorized file-sharing service within 2 years of its birth, its progeny live on, as do new habits of music listeners. These dramatic changes have given us the now familiar additions to the lexicon such as “ripping” files from CDs, listening to MP3s on iPods, and, of course, downloading files online using programs such as Kazaa or Grokster.

Yet the file-sharing saga and the controversy surrounding it might appear a mere replaying of a narrative we have encountered several times before. The photocopier, introduced by Xerox in 1959, allowed individuals to cheaply and conveniently copy printed pages. Audiotaping, which became popular in the 1970s, made it easy and inexpensive for individuals to copy sound

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recordings, with dual cassette decks intended for high-speed copying becoming commonplace. Videotaping, which became popular in the 1980s, allowed individuals to copy broadcasts and prerecorded movies.

The copyright industries reacted negatively when each of these copying technologies appeared. The publishing industry complained about photocopying, although an analysis by Liebowitz (1985) concluded that photocopying was beneficial to the industry. The movie and television industries brought suit to stop the video recorder, but after the Supreme Court's ruling (*Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 [1984]) went against these industries, a new market emerged—prerecorded video—which, although largely unanticipated, now provides the movie industry with revenues far in excess of box office revenues.¹

The sound-recording industry had an equally negative response to copying technology. No less a luminary than Alan Greenspan, prior to his becoming chairman of the Federal Reserve Bank, stated, "At present . . . severe economic damage [is being done] to the property rights of owners of copyrights in sound recordings and musical compositions. . . . [U]nder present and emerging conditions, the industry simply has no out. . . . Unless something meaningful is done to respond to the . . . problem, the industry itself is at risk" (U.S. Senate 1983). Sales of sound recordings began a decade-long expansion not long after this testimony (ending a 4-year decline), once again making the claims of concern by the copyright industry appear unwarranted.

Nevertheless, as explained in Section IV, the role of these older copying technologies as economic precedents is limited both because there are important differences between file sharing and these prior copying technologies and because the impacts of these technologies were not so clear-cut.

Each of the previous copying technologies brought forth some work by economists on the economics of copying, although the focus was more on theory than empirics (for surveys, see Varian 2005; Watt 2004). Among the problems with conducting empirical analyses of these older technologies was the difficulty in measuring the extent of unauthorized copying. One of the incidental benefits of the new digital copying technology should be to provide better data, although a great deal of imprecision remains.

This current copying technology of file sharing was personified by Shawn Fanning, who created Napster with the purpose of allowing music files to be shared among strangers. Napster began operations in mid-1999 and quickly rose to international prominence. The sound-recording industry experienced a dramatic swoon in sales beginning the next year, continuing unabated (with one informative exception) through 2005. The industry has blamed this sales decline on the rapid growth of file sharing and, in an attempt to stem the decline, has sued thousands of individuals heavily engaged in file sharing

¹ See Liebowitz (2004a), where prerecorded video revenues were estimated to be twice as high as revenues from theatrical showings.

(as well as suing the file-sharing services).² These lawsuits have led to a heated debate, often uninformed by facts. We are fortunate to have in this issue a detailed study by Bhattacharjee and colleagues (2006) that examines the impacts of those lawsuits on the amount of file sharing.

File sharing has generated far more attention than earlier copying technologies.³ It is easy to dismiss the intense media coverage, as evidenced by *Time* magazine's putting Fanning on its cover (October 2, 2000), as just another case of romanticizing the impact of a new technology. Yet Napster truly began a revolution in music listening with a still uncertain impact on the entire economic model that has been used by the sound-recording industry for much of the last century. Copyright industries also tend to attract more attention than might appear warranted by their share of gross domestic product (GDP) alone.⁴ This is most likely due to the fact that consuming these products occupies a majority of the time that individuals spend on leisure activities, with the average American watching 4.5 hours of television and listening to more than 3 hours of music each day (U.S. Census Bureau 2003). Thus the impact of these industries on the collective consciousness is very large.

Naturally, the current concern over the impacts of file sharing brought forth among economists a renewed interest in the economic consequences of copying. Recent econometric studies include, but are not limited to, the two very fine empirical examinations found in this issue—one by Rafael Rob and Joel Waldfogel (2006) and the other by Alejandro Zentner (2006; see also Blackburn 2004; Hong 2004; Michel 2005; Oberholzer-Gee and Strumpf 2005; Peitz and Waelbroeck 2004; Zentner 2005). Although neither of these two papers attempts to measure the impact of file sharing on the full U.S. sound-recording market, which is my focus in this paper, a recent econometric study (Liebowitz 2006) examines that specific question. All of the papers of which I am aware, except one, find that file sharing brings about some degree of harm to copyright owners.⁵

² According to the Recording Industry Association of America (RIAA) Web site, the recording industry announced plans to bring lawsuits against file sharers on June 25, 2003 (RIAA 2003c). On September 8, 2003, the RIAA brought what they referred to as the "first wave" of lawsuits against 261 individuals (RIAA 2003b).

³ Besides the economic studies discussed in this paper, there are papers of a more philosophical legal bent, particularly from some very vocal critics who have voiced their unhappiness with copyright law and the entertainment industry. These copyright critics, sometimes associated with the concept of the "creative commons" and the Electronic Frontier Foundation, argue that copyright laws are being used by the sound recording, movie, and software industries to thwart innovative forces that would otherwise open up the market to new competition. See, for example, Lessig (2004).

⁴ It is estimated to be between 5 and 7 percent of the gross domestic product (GDP), according to a report produced for a copyright trade association (Siwek 2002).

⁵ The one paper that does not find file sharing to harm record sales is Oberholzer-Gee and Strumpf (2005). Of the other papers, which cover different countries, different time periods, and different approaches, some find results that could be classified as consistent with the

Econometric studies are usually self-contained, but they do not, or should not, occur in a vacuum. In order to make an informed judgment about the impact of file sharing it is useful to understand the industry background. This should include examining the nature and size of file sharing as best we know it and investigating the history of the sound-recording market to gain some perspective on the current decline. It is also useful to examine the economic theories of copying that have been suggested. Finally, no judgment would be complete without examining the range of possible sources of evidence, particularly sources that might not be amenable to inclusion in econometric studies. This paper attempts to perform some of these tasks.

II. THE BRIEF HISTORY OF FILE SHARING AND ITS MEASUREMENT

File sharing, simply put, allows one computer on the Internet to search for and access files on the hard drives of other computers that are connected to the Internet. Any individual on a file-sharing network can make available any file on his or her hard drive to all other members of the file-sharing network.

The term “file sharing” is actually something of a misnomer, however. Individuals do not “share” the files that move back and forth on the Internet. They do not experience these files together nor are they likely to ever meet or even know one another. Nor do they lend or trade the files among one another, since the files are not borrowed or given back. A more appropriate term might be “anonymous file copying,” since that reflects what actually occurs. The end result of file sharing is that individuals who do not own and have not purchased a particular song or movie can nevertheless obtain that song or movie from unknown third parties.

Currently, file sharing encompasses sound recordings, films and television programs, computer software, various forms of pornography, and other products that can be digitized. Because music files are easily compressed, relatively small, very popular, and the primary type of file downloaded, they appear to be the best candidate for assessing the impact of file sharing itself.⁶ As Internet transmission speeds increase, file sharing is likely to focus more

possibility that the entire decline might be due to file sharing (Blackburn 2004; Liebowitz 2006; Zentner 2005), while others (Hong 2004) apportion only a part of the decline to file sharing, and yet others are difficult to classify in this manner. A detailed discussion of this literature can be found in Liebowitz (2005).

⁶ IDATE (2003) claimed that the ratio of audio files to video files was 100:1 in an October 28 report. Note, however, that the IDATE report seems of somewhat questionable value, as discussed below. Lyman and Varian (2003) report in their table 8.9 that although shared video files took up twice as much hard drive space as shared audio files, audio files were nevertheless 10 times as common as video files in 2003. An Organisation for Economic Co-operation and Development (2004, figure 5) report using data from BigChampagne claimed that the number of audio files transferred was only twice the number of video files in 2003. This claim seems somewhat implausible (unless most of these are short clips of pornography), given the enormous size of movie files.

on full-length movies and computer programs. This threatens or promises, depending on your point of view, to do for the movie and software industries what it has done for the sound-recording industry, which is one reason it is so important to understand its impacts.

Napster was, for all intents and purposes, shut down by a preliminary injunction granted to the recording industry in February 2001 (*A&M Records v. Napster*, 239 F.3d 1004 [9th Cir. 2001]). Into the void stepped numerous other file-sharing programs, particularly those that, unlike Napster, were not based on a central server. Figure 1 provides an estimate of the number of home-based file sharers in the United States during this transition. (Data are from Jupiter Media Metrix 2001; comScore Networks 2002.) The legal “victory” of the recording industry over Napster is not in evidence in these statistics, since the number of file sharers continued its upward trend within months of Napster’s shutdown.

The impact of file sharing is something of a moving target, so we should not expect a single-sized impact at all times and all places. When Napster first came into existence in 1999, most downloaders would not have had in place CD burners, and MP3 players did not yet exist. MP3 files, therefore, were not terribly good substitutes for music purchased on a CD since the downloaded music was tethered to the computer. Any negative impact of file sharing at that time should have been quite small. Since then, devices that can play MP3 files have become increasingly popular, CD writers have become ubiquitous, and Internet speeds have increased as broadband has become more common, shortening the time needed to download songs.⁷ Because file sharing currently produces files that are much better substitutes for purchased CDs than was the case at the time of Napster, any negative impact of file sharing per shared file should be greater now than it was in, say, 2000.⁸

The digital and public nature of file sharing would seem to make it more amenable to analysis than prior methods of copying. The reality of file-sharing measurements, however, does not yet live up to this promise.

Although there have been numerous news stories reporting statistics on

⁷ In June 2002, according to Ipsos/Tempo (Ipsos-Reid 2002), 53 percent of American file sharers had CD burners, which was more than twice as high as for the general population as a whole. Ipsos/Tempo also reported that the penetration of CD burners for the general population increased from 22 percent to 31 percent from the first quarter of 2002 to the first quarter of 2004 (“Ownership of Digital Music Peripherals Trending” [slide], provided by Matt Kleinschmidt, senior research manager, Ipsos). If the growth in penetration for the population of downloaders was similar, this would have led to a penetration rate of 75 percent among those engaged in file sharing. Nielsen NetRatings reported that Broadband users represented 64 percent of Internet users in October 2005, up from less than 10 percent at the time of Napster, although the growth in broadband appeared to be slowing (data were provided by Kaizad Gotla, senior Internet analyst, Nielsen/NetRatings, September 2004).

⁸ Nevertheless, they are not quite perfect substitutes. The compression involved with MP3 files reduces sonic quality, according to audio purists. Also, it takes some time and effort to download the files, so they are not quite free.

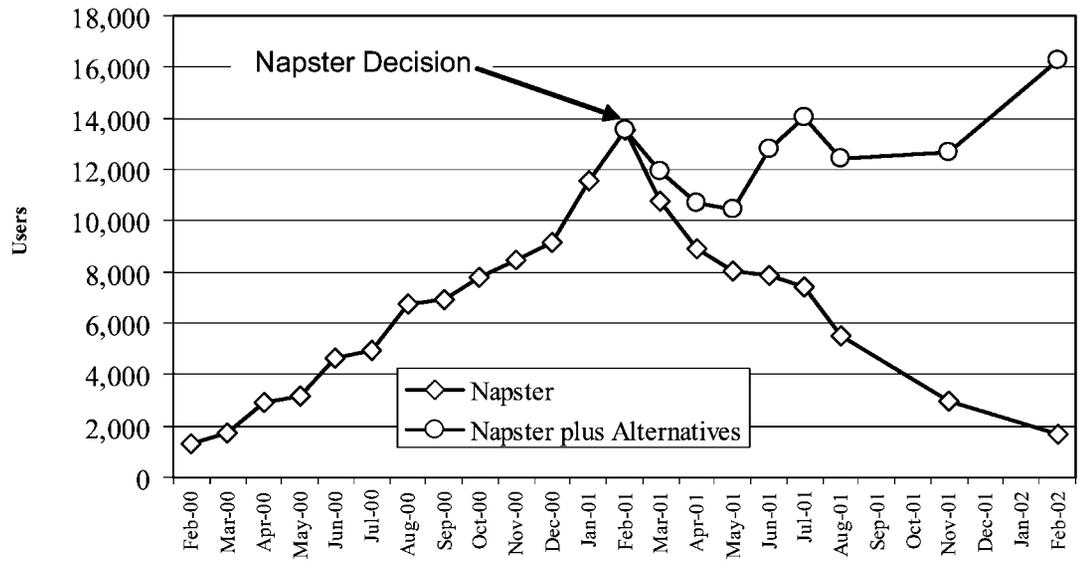


FIGURE 1.—American file sharers at home (1,000s)

file sharing, these reports generally cite the same few sources. At the time of Napster, the press quoted Webnoize almost exclusively regarding the number of files that were being downloaded (Evangelista 2001). It is not clear what methodology the (now defunct) Webnoize used, but it reported that 2.79 billion files had been transferred in Napster's peak month (February 2001) and that by August 2001 the number of files transferred on the four leading Napster replacements (FastTrack, Audiogalaxy, iMesh, and Gnutella) had reached above 3.05 billion per month (Gerals 2001). To put this in perspective, worldwide sales of music amounted to about 3 billion songs per month in 2000, so one might conclude from these figures that the number of songs being downloaded on file-sharing networks was equivalent to the number of songs purchased in the authorized retail market (IFPI 2001).⁹ IDATE (2003) claims that worldwide file sharing was four times as large as worldwide sales in 2003.

The statistics reported for the American market, the focus of our analysis, also come from just a few key sources. At the high end, there are claims that up to 60 million Americans have used peer-to-peer networks,¹⁰ that perhaps as many as 5 billion music files are downloaded by Americans in a typical month (18 files for every man, woman, and child!),¹¹ and that perhaps 60 percent or more of all Internet bandwidth is taken up by file sharing (Reuters 2003).¹² Although these are among the more striking numbers that have been put forward, even the more modest estimates appear less reliable than we would like. Before discussing the actual measurements, however, a brief discussion of the methodologies is in order.

There are various methodologies for measuring file sharing. Most count the number of participants in file-sharing activities (for example, comScore Media Metrix, Nielsen NetRatings, BigChampagne, the Pew Internet, and American Life Project). Nielsen and comScore examine the number of users of particular file-sharing programs, such as Kazaa or BitTorrent, on the basis

⁹ IFPI (2001) reports 3.5 billion albums per year. If we assume 10 songs per album, this works out to 2.91 billion songs per month.

¹⁰ The Electronic Frontier Foundation reports that 60 million Americans use file-sharing software (File Sharing: It's Music to Our Ears, at <http://www.eff.org/share/>), but it is not clear where that estimate comes from.

¹¹ According to IDATE (2003), there were either 65 billion audio files downloaded in the United States in 2003 or 12 billion in the world, depending on which of two seemingly inconsistent statements you wish to believe. The breathless prose goes on to predict that by 2007 broadband users will download an average of 4,300 audio files per year, which seems somewhat fanciful.

¹² IDATE (2003) reports that "According to virtually all the experts in this field, P2P represents on average between 50% and 60% of all broadband traffic during the daytime, and as much as 80% to 90% of all night time traffic."

of panels of users.¹³ Since the number of programs available to users is large and growing, data based on the number of users of a particular program have become less reliable over time as a measure of aggregate downloads.¹⁴ BigChampagne measures the number of users of file-sharing networks.¹⁵ BigChampagne's method of measuring the activity on file-sharing networks is proprietary and therefore difficult to judge.¹⁶ The NPD Group is the only organization, to my knowledge, that attempts to monitor the number of files actually transferred by a panel of users. The Pew Internet and Society Project conducts numerous surveys on Internet usage, as do Ipsos/Tempo and Forrester. The hearings that led to the preliminary injunction against Napster featured dueling surveys offering opposing opinions about the impact of file sharing (on the Napster surveys, see Liebowitz 2002, chap. 7).

Unfortunately, each data source, regardless of data type or methodology, suffers from one or more imperfections. All panel-based data sources are open to the criticism that the panel might not reflect the user population. For example, it is plausible that voluntary Internet panels might underrepresent the population of people actively engaged in file sharing, as those users may be particularly reluctant to have their computers monitored by third-party software.¹⁷

¹³ Panel members agree to allow a program to monitor and report their computer usage in return for some nominal compensation. These panels range from a few thousand to the hundreds of thousands. Alternatively, it is possible to create a panel whose members are unaware of being monitored, as Bhattacharjee et al. (2006) have done.

¹⁴ If file sharers were migrating away from monitored programs toward programs that were not monitored, such measurements will undercount users. Companies such as comScore tried to update their list of programs to keep up to date, but this always lagged somewhat behind the behavior of users. In August 2005 I was told that comScore was no longer reporting these measurements because they did not feel they could keep up with all the new programs (Graham Mudd, industry analysis manager, comScore Networks, telephone conversation with the author, August 1, 2005). The number of users followed by Bhattacharjee et al. (2006) would also suffer from this same problem.

¹⁵ There are often several different software programs that use the same network. These networks are not identical to the programs that use these networks. For example, Kazaa, Grokster, Kazaa Lite (a competitor to Kazaa), and iMesh all use the FastTrack network, but there are also other networks, such as Gnutella and DirectConnect, that are used by other programs.

¹⁶ For a critique of BigChampagne's methods, see Lawrence (2003). I have a concern with the claimed peak and average values, which seem too close to one another. The peak monthly values (measured every few minutes) are only about 60 percent above the average values in the last half of 2003 and only about 30 percent higher in the first half of 2004. Eric Garland, chief executive officer of BigChampagne, suggests that this small difference between peak and average monthly values is due to the fact that many Internet users keep their computers and file-sharing software running 24 hours a day (e-mailed correspondence with the author, October 2004). I find it unlikely that dial-up users (who were in the majority) keep their phone lines occupied 24 hours a day, but further analysis would be useful.

¹⁷ This criticism loses some force from the fact that most file-sharing software (for example, Kazaa) includes spyware and adware, which monitor the usage of the computer for vendors of various products. This means that many file sharers have already allowed third-party software on their computer and in many cases they were aware of it.

TABLE 1
 PERCENTAGE OF ADULT POPULATION ANSWERING YES TO THE QUESTION,
 “DO YOU EVER DOWNLOAD MUSIC FILES ONTO YOUR COMPUTER SO
 YOU CAN PLAY THEM AT ANY TIME YOU WANT?”

	July–August 2000	August–September 2001	October 2002	June 2003	November 2003	May–June 2004	February 2005
Overall	11	15	19	19	9	13	13
18–29	25	36	41	43	23	31	32
30–49	11	16	21	20	9	11	13
50–64	3	6	8	8	4	6	7
65+	2	2	3	1	2	2	1
Men	12	19	22	23	12	17	14
Women	10	13	16	15	7	9	12

SOURCE.—Pew Internet Project, “Usage over Time” (spreadsheet) (<http://www.pewinternet.org/trends/UsageOverTime.xls>).

Metrics based on the number of users alone might fail to capture increases or decreases in the number of files exchanged per user. Such changes can be large even when the number of individuals using file-sharing software is stable, as, for example, when users are shifting to broadband. Finally, to the extent that movies, video games, and computer files take up changing shares of the file-sharing universe, measures of overall file sharing might not properly reflect the downloading of music files.

Surveys suffer from potential problems where consumers might not know the answers to the questions they are being asked or where they might be reluctant to tell the truth if that means possibly incriminating themselves or (in their minds) inviting a lawsuit. These fears should tend to generate answers that understate the extent of file sharing. The survey used by Zentner (2006) is based on consumers in Europe, where this controversy has been less political and at a time when such lawsuits had not yet come into existence. The surveys used by Rob and Waldfogel (2006) were conducted in conditions where the respondents knew the identity of those giving the surveys and the purpose of the survey. In each of these cases the likelihood of intentionally incorrect answers was lessened. Nevertheless, the expectation in each case would be that the answers might be somewhat biased toward lowering the impact of file sharing. The Pew surveys suffer more seriously from this problem, particularly after the lawsuits began in mid-2003.

With these caveats in place, what do the data tell us about file sharing? Results from the Pew Internet and American Life project indicate that music file sharers tend to be young and male and more likely to be poor and less educated (see Rainie et al. 2004, p. 4). Table 1 provides some of their statistics.¹⁸ These numbers are consistent with a view that file sharing is a

¹⁸ To construct this table, I multiplied the percentage of respondents answering this question in the affirmative, which was asked only to those with Internet access, by the number of respondents claiming to have Internet access.

very popular activity.¹⁹ The sharp decline from June 2003 to November 2003 is also fully consistent with the Bhattacharjee et al. (2006) finding that the initiation of Recording Industry Association of America (RIAA) lawsuits reduced file sharing. These numbers appear to be considerably higher than the European value of 9 percent reported by Zentner (2006) based on the October 2001 European Forrester Research survey, but that survey asked if users “regularly” downloaded music, so the two are not strictly comparable. A slightly later Forrester survey (Stagia 2002) had numbers closer to, but still lower than, the Pew values.²⁰

What do the other data sources have to say about the number of file sharers? ComScore claims that there were 40 million unduplicated users of file-sharing software during January 2003, which is in general agreement with the Pew numbers. BigChampagne measured the average number of “simultaneous” users in January 2003 to be just shy of 4 million users. It is difficult to compare BigChampagne numbers with comScore since comScore essentially measures, by way of analogy to television and radio, the reach per month, which is always a higher number than average audience.

Do these data allow us to draw any conclusions about the historical trend in organized file sharing? Clearly, organized file sharing stood at zero in 1998. We know from Figure 1 that the important growth did not start until 2000. The Pew surveys in Table 1 indicate an increase in the popularity of file sharing on the order of 70 percent from the summer of 2000 to October of 2002, which is smaller than what comScore reports in Figure 1, even though the comScore figures only go through February 2002.

In Figure 2, which allows examination of the more recent trends, each of three data sets is normalized so that its starting measurement is 1 in order to make the numbers somewhat comparable. Both of the data sets with full-year 2003 data indicate a substantial drop during 2003, with comScore (and Pew in Table 1) matching these declines directly to the RIAA lawsuits (as do Bhattacharjee et al. 2006), although BigChampagne shows the declines beginning before the lawsuits were announced.²¹ File sharing appears to have

¹⁹ If the question “Do you ever . . .” were interpreted in the past tense, such as “Have you ever . . .” we would not expect the numbers to ever fall as long as respondents are being truthful. The decline that does occur can be taken either as evidence that the question is not interpreted as “Have you ever . . .” or that some respondents might have begun to lie because of fear of prosecution. It is also possible that some respondents might have stopped downloading but still answer the question in the affirmative because they interpret the question to mean “Have you ever . . . ?”

²⁰ A Forrester survey in the second quarter of 2002 indicated that 29 percent of European Internet users had ever downloaded music, and since slightly more than half of the population used the Internet, this would imply that on the order of 15 percent of the population had downloaded music, which is fairly close but still slightly below the American Pew figure.

²¹ Pew and comScore produced a joint report directly crediting the lawsuits with decline in file sharers (Madden and Lenhart 2004). This result is not without contention. Some have argued that the lawsuits have had virtually no impact (Karagiannis et al. 2004). The Karagiannis et al. paper bases its results on a single 1-hour observation prior to the lawsuits and a single 1-hour observation after the lawsuits, with very few controls.

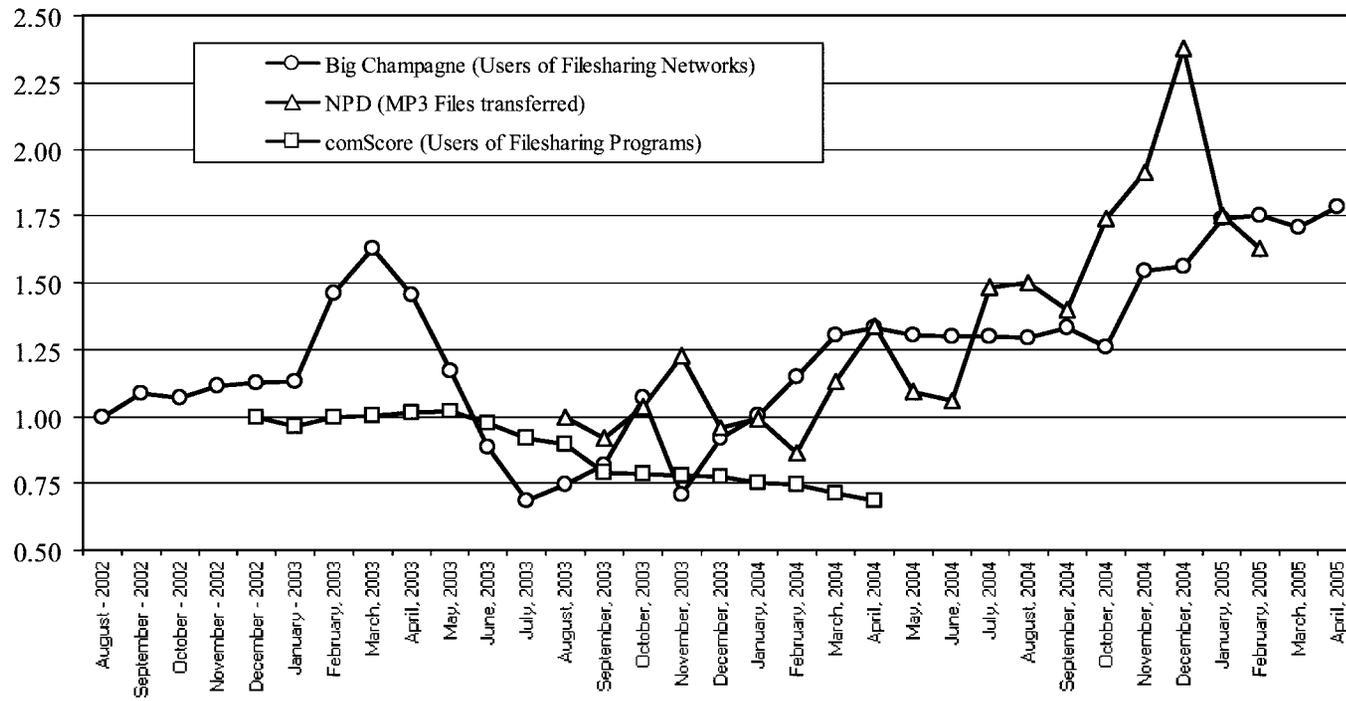


FIGURE 2.—Various measurements of file sharing

increased again in 2004, although BigChampagne shows file sharing returning to (and then surpassing) its 2003 peak, whereas the Pew surveys indicate that it did not return to its prior peak through 2004.²²

This brings us to measurements of the absolute size of file-sharing activities. The dispersion of estimates is nothing short of remarkable. If the Webnoize statistics on Napster use had been accurate, and if the United States contributed 30 percent of the world usage of Napster, this would have implied about 1 billion files per month downloaded by Americans.²³ By way of comparison, there were about 800 million albums sold yearly in 2003 and 2004, which works out to 800 million files per month if there were 12 songs per album. The Webonize estimate is lower than the more recent statistic of 5 billion files per month reported by IDATE, which was mentioned at the beginning of this section. But both of these estimates are in stark contrast to the numbers reported by NPD.

NPD reports that for 2004 there were 225 million music files downloaded in the United States. This is less than one-twentieth the monthly estimates reported by IDATE and less than one-fourth the numbers reported by Webnoize for a period 3 years earlier. Since the methodology behind NPD's numbers is fairly transparent, whereas that of Webnoize is unknown, and since some of IDATE's prognostications appear rather incredible, it is tempting to accept the NPD data as correct. Although it is probably premature to go that far, the NPD data should probably be taken as the current standard.

The NPD data, if correct, indicate that file-sharing activity, instead of surpassing the legitimate music business in size, is actually considerably dwarfed by the legitimate market (legitimate market purchases were approximately three times as large in 2004).

The absolute size of file-sharing activities has an importance quite separate from the information found in the trends of file-sharing activities. When downloads appear much more numerous than any possible decline in sales, as is the case with Webnoize and IDATE estimates, it is obvious that a large portion of downloaded files do not replace the purchase of originals. This would be consistent with Rob and Waldfogel's (2006) ordinary least squares estimates that they take to be a likely underestimate of the impact of file sharing for their population of users (college students). If the NPD figures are correct, however, the number of files shared is fairly similar to the decline in sales, a result that would be consistent with Rob and Waldfogel's larger instrumental variables estimate if file sharing were the sole cause of the sales decline.

²² ComScore did not report this upturn in 2004, but it stopped reporting in 2004 after throwing in the towel on its methodology, as explained in note 14.

²³ NUA reports that in August 2001 there were 515 million Internet users worldwide and 166 million in the United States and Canada. See http://web.archive.org/web/20050331085826/www.nua.ie/surveys/how_many_online/.

In conclusion, we can state that file sharing is a very popular activity. Although claims have been made that more music files are obtained this way than through retail purchases, these claims may exaggerate somewhat the size of file-sharing activity. File sharing grew very rapidly in its first year or two and then continued to grow until the introduction of the RIAA lawsuits. The lawsuits caused a diminution of file-sharing activity, although this activity has since increased. File-sharing activity appeared to be higher in 2005 than it had been prior to the lawsuits, although there is no complete agreement on this claim. Although a history can be pieced together, the data do not allow easy and transparent analysis.

III. THE HISTORY OF RECORD SALES

Data on the sales of recorded music in the United States are available from the RIAA as well as for purchase from Nielsen SoundScan. The RIAA reports information on all shipments (net of returns), whereas SoundScan reports shipments based on data from retail outlets. Although the two sources of data should and do provide similar results most of the time, there are some notable differences.²⁴ SoundScan, although it includes Internet retailers, does not include information on nonretail outlets such as record clubs and direct selling on television, which were responsible for 25 percent of all units sold in the late 1990s. The recent decline in sound-recording sales has fallen disproportionately on nonretail units (nonretail outlets accounted for 42 percent of the total decline in units that has occurred since 1999), so there is a danger in underestimating the impact of file sharing by using SoundScan data (used in regressions by Blackburn 2004; Liebowitz 2006; and Oberholzer-Gee and Strumpf 2005).

Figure 3 represents (as closed circles) the per capita sale of full-length albums sold in the United States since 1973 using RIAA data (RIAA 2003a).²⁵ Although the RIAA data include unit quantities and dollar revenues, the revenues are merely hypothetical numbers based on list prices and are not actual transaction revenues. The RIAA unit measurements, therefore, are to be preferred to the RIAA revenue values. Prerecorded singles are excluded from the analysis (except for downloaded digital songs, which are included but grouped into virtual albums by dividing the number of such digital songs by 10) because they have experienced a very strong decline as part of what appears to be a long secular trend quite separate from file sharing. The 2005

²⁴ SoundScan data report the sales decline beginning after 2000 instead of 1999. The severity of the decline is considerably greater with RIAA numbers than with SoundScan numbers, even after correcting for record clubs, although it is not clear why.

²⁵ The data begin in 1973 because that is when units sold were first reported. For prior years only the industry revenues were reported. Pre-1990 data are from Joseph Jones, RIAA, communication with the author, August 2002.

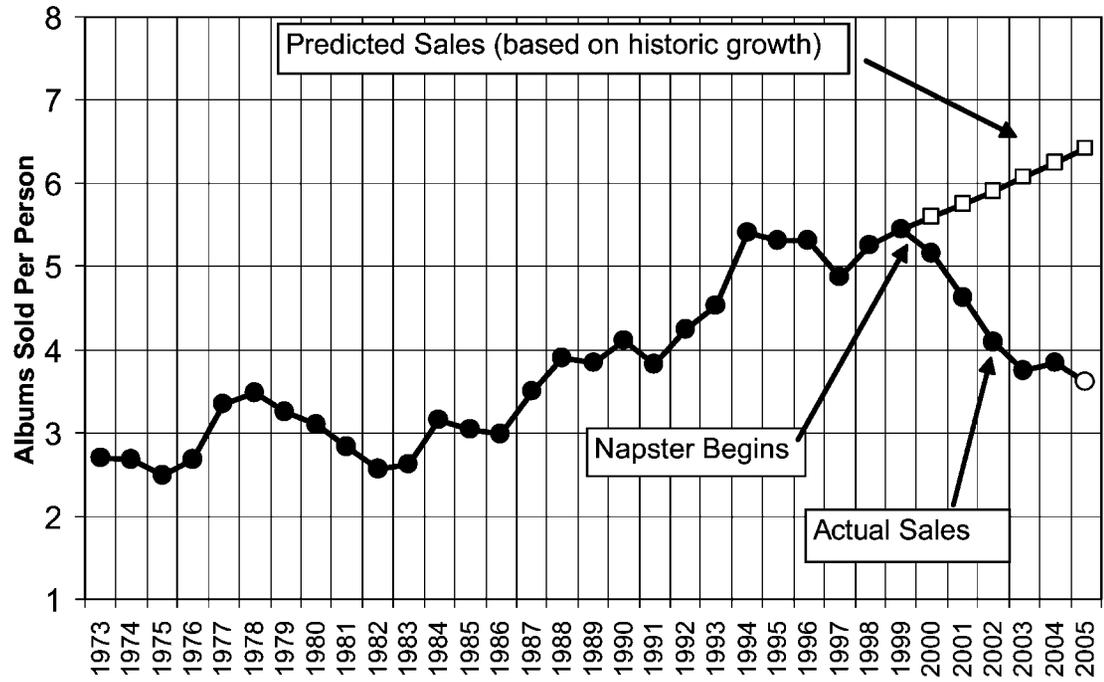


FIGURE 3.—Albums sold per capita

TABLE 2
YEAR-TO-YEAR PERCENTAGE CHANGES IN
HALF-YEAR UNIT SALES OF ALBUMS

Period	Change	Period	Change
2000-1	1.25	2003-1	-16.7
2000-2	-8.24	2003-2	-1.15
2001-1	-8.36	2004-1	5.32
2001-2	-9.40	2004-2	2.15
2002-1	-8.06	2005-1	-4.14
2002-2	-11.62		

SOURCE.—Recording Industry Association of America (2003a).

value (appearing as an empty circle) is an estimate based on SoundScan results since full-year RIAA results were not yet available for 2005.²⁶

The sales decline that begins in 2000 is clearly the largest that has occurred in this period. The timing of this decline is quite striking. This decline begins the year after the arrival of Napster and, as can be seen from Figure 1, the year that Napster ramped up its user base. The pattern of file sharing's birth and rapid growth followed immediately by the unusually large decline in the sound-recording market is in itself a strong clue that file sharing is responsible for the sales decline.

Figure 3 also reports what sales would have been if, counterfactually, they had continued to grow at their prior average rate after Napster's introduction, represented by the squares.²⁷ Looked at this way, the sales deficit might be considerably larger than the sales decline.

The year 2004 might appear to be something of an anomaly since it is the only year after the advent of file sharing without a sales decline. Some press reports (and economists) have suggested that the failure of sales to fall was evidence that file sharing did not have the pernicious impacts that had been attributed to it.²⁸ Although one could always just write off this sales increase as being a random fluctuation in sales due to factors such as an abundant crop of popular albums being released, the results actually fit into a pattern consistent with the hypothesis that file sharing is harmful to industry sales.

Table 2 provides details on half-year unit sales of full-length albums using

²⁶ Sales for combined CDs and digital downloads were down approximately 5 percent for 2005, according to reports based on SoundScan data. Midyear statistics from the RIAA reported a sales decline of -4.14 percent.

²⁷ If one regresses unit sales on either disposable income or GDP through 1999 and calculates predicted values of album sales, one gets an almost identical predicted sales line.

²⁸ See Charman (2004), which includes quotes from economists. She states, "[T]here is one final fly in the ointment that can't easily be explained away: during the past nine months, CD sales in America have increased by 7%, despite continued growth in file sharing."

RIAA statistics for the entire market (not controlling for population growth).²⁹ These changes in industry sales largely, although imperfectly, coincide with the changes in file sharing. First note that the sales decline in 2000 did not begin until the second half, which is when, according to Figure 1, Napster had ramped up to a reasonable size. Second, beginning in the latter half of 2003, and lasting for a year and a half, the sales decline subsided, although it appears to have resumed in 2005. The second half of 2003 is when the lawsuits began, bringing about a decline in file sharing, so this reversal is also consistent with the hypothesis that file sharing harms sales, although the situation is complicated somewhat by the fact that the price of sound recordings fell by a small amount in the second half of 2003.³⁰

File sharing declined, year to year, in the first half of 2004, so the rise in sales during this period provides further support to the hypothesis.³¹ The only discordant note is in the second half of 2004 (relative to the second half of 2003), where sales are flat, although measures of file sharing reported by NPD and BigChampagne show clear increases in file sharing (the Pew numbers do not provide a clear result during this interval, and the survey is likely marred by untruthful responses). The sales decline that begins again in 2005 is consistent with the increase in file sharing reported by NPD and BigChampagne. Since there is clear volatility in record sales owing to factors other than file sharing, we should not place too much emphasis on these results. Still, the tenor of these results does provide additional support to the bulk of econometric studies.

Finally, sales by genre are worth a quick look and can be purchased from Nielsen SoundScan. The raw totals are reported in Table 3. The year 2000 is chosen as the base year since SoundScan statistics mark that as the beginning of the sales decline (see note 24). There are many problems with using genre statistics, and the interested reader is referred to Liebowitz (2006)

²⁹ In an attempt to keep the product close to the ideal of a full-length album, the numbers in this table include full-length CDs, cassettes, LPs, DVD audio, Super Audio CDs, and all digital downloads (aggregated into albums) but exclude all video products (music video and DVD video) and all format singles except digital downloads.

³⁰ The RIAA full-year (list) prices on CDs dropped by only a nominal 1 percent in 2004. Universal Music, the largest record company, was supposed to have lowered its list prices by 25 percent in the second half of 2003, but there was some debate about how much of this decline was passed through to consumers (see McCarthy 2003). News reports also claimed that NPD reported a 4 percent decline in transaction prices during the first quarter of 2004 relative to the prior year period (see Austin 2004).

³¹ ComScore and Pew (Madden and Lenhart 2004) each show large declines of approximately 30 percent, whereas BigChampagne shows a small decline of approximately 5 percent. The earlier discussion of these data sources leads us to downplay the comScore magnitudes since the defections of users to new programs not monitored by comScore biases downward the measure of decline. There is also reason to believe that the Pew numbers might also overstate this particular decline as cautious file sharers become reluctant to truthfully reveal the extent of their illegal activities.

TABLE 3
ALBUM SALES BY GENRE (1,000s)

	Classical	Jazz	Hard	Alternative	Rap	R&B	Country
2000	16,403	18,416	89,924	131,138	105,515	197,141	67,115
2001	15,846	19,514	88,158	131,594	89,279	195,498	67,241
2002	14,776	19,901	74,677	125,752	83,346	160,183	75,362
2003	17,727	22,366	74,629	128,344	75,854	149,972	70,944
2004	19,098	19,156	76,887	135,317	81,558	165,364	82,041
% Change:							
2000–2004	16.43	4.02	–14.50	3.19	–22.70	–16.12	22.24
2000–2003	8.07	21.45	–17.01	–2.13	–28.11	–23.93	5.71

SOURCE.—Data purchased from Nielsen SoundScan.

for more detail.³² Nevertheless, at the most basic level it is plausible that two genres that are less likely to be downloaded in file-sharing systems, classical and jazz, did not participate in the sales decline, whereas other genres that are more likely to be heavily affected by file sharing (hard rock, rap, alternative, R&B) generally did participate in the decline. Since the sales decline paused in 2004, the yearly changes are calculated for periods ending in both 2003 and 2004.

IV. ECONOMIC THEORY OF FILE SHARING'S IMPACT

In the last few decades, economists have come to understand that unauthorized copying of originals need not have negative effects on copyright owners. The question becomes the relative strength of potentially competing economic impacts.

The first of these potential impacts is that the unauthorized downloading of a copyrighted file can be a substitute for the purchase of that copyrighted work. The substitution of a downloaded copy for a purchased original obviously has a negative impact on sales. It is hard to imagine that this substitution effect does not play an important role for some reasonable subset of the downloading population.

The second potential behavior engendered by file sharing might occur if users downloaded songs with the purpose of finding those songs and albums that most closely matched their tastes. These consumers would then adjust their purchases in accordance with this new information. Although this idea can be traced back several decades, and was originally referred to as the exposure effect (Liebowitz 1985), it is currently called the sampling effect.

This sampling hypothesis is usually accompanied by a claim that the seller

³² Genre statistics are quite unreliable because of changes in genre definition and double counting of albums in multiple genres, which is discussed in Liebowitz (2006). That paper performs regressions using genre-based sales in cities as one of the sets of dependent variables. The results from the regressions are in general agreement with these simple statistics.

will benefit if consumers are allowed to become more familiar with the product before they purchase it.³³ As I have argued (Liebowitz 2005), however, sampling in the market for music files has an ambiguous impact on record sales. Using an insight of Jack Hirshleifer (1971), the basic idea is that albums that have more prescreening by consumers will contain, on average, music that provides greater utility than would otherwise be the case, or a greater amount of what we can call “music service.” This prescreening has the effect of rotating the demand for albums clockwise. Because the initial albums purchased will have more music-listening services, this will raise the price intercept, but because satiation of music-listening services can be achieved with a smaller number of albums, the quantity intercept declines. Even if one were to argue that the demand for music services is never satiated (which implies that time is the constraint on consumption), a seemingly reasonable assumption that consumers spend more time listening to albums with more music-listening services would also lead to the conclusion that sampling will reduce the number of albums they listen to in their fixed amount of time. Therefore, even if a large subset of file sharers engaged in sampling, there would be no reason to believe it would counterbalance the negative impacts of the substitution effect.

A third potential impact of file sharing is related to possible network effects in music listening. Models such as those found in Conner and Rumelt (1991) and Takeyama (1994) demonstrate that under certain conditions unauthorized users of an intellectual product might create sufficient additional value to the purchasers of legitimate copies that sellers might benefit from the unauthorized use. For example, if individuals become familiar with a spreadsheet by using an unauthorized copy, then their employers, who purchase legitimate copies, might place higher values on purchasing spreadsheets because of the now lower training costs. Several issues arise in trying to apply this logic to sound recordings, as has recently been attempted by Gayer and Shy (2005). The first is whether there are network effects at all for music listening. A second issue is whether such network effects, if they exist, would work to alter the size of the total market, as assumed by these theorists, or merely shift demand among different sound recordings. Finally, a simple but practical difficulty with applying the network effects model to file sharing is that radio already allows unlimited music listening at zero cost. Thus, it is difficult to imagine that file sharing would provide any new network effects.

Some additional support for a skeptical view of network effects and sampling comes from examining the impact of radio play (which should allow

³³ This claim has been made, for example, by Hall (2000) in his expert report in the *Napster* case.

sampling and create network effects) on overall record sales, where there does not appear to be a positive relationship.³⁴

A final possible impact of copying is indirect appropriability. This is a concept coined by Liebowitz (1985) and recently championed by Boldrin and Levine (2004). The basic idea is that demand for originals from which copies are made might increase as those making copies of originals capture some of the value from those receiving the copies. In order for indirect appropriability to work, however, one of two market conditions must hold. Either the variability in the number of copies made must be small, as would be the case if everyone made one copy of a CD for use in his or her automobile. Alternatively, the seller would need to be able to identify those originals from which the most copies are made and then charge higher prices for those originals, just as journal publishers charge higher prices to libraries than to individual subscribers.

Because there is great variability in the copies made from each original on file-sharing systems and the sellers of originals cannot identify which originals are going to be used on file-sharing systems, the mechanisms that allow indirect appropriability to function will not work, as noted in Klein, Lerner, and Murphy (2002). Perhaps even more fundamental, indirect appropriability requires a mechanism that transmits the values from those using copies to those providing copies—indirect appropriability requires appropriation. The pure anonymity and zero payments involved with file sharing preclude this possibility.

In sum, economic theory provides only a very thin foundation on which to support any expected impact of file sharing on sales of sound recordings other than a negative one. Nor does the history of copyright owners trying to suppress new copying technologies, only to discover the benefits after losing the battle, provide much support for a claim that critics of copying are generally myopic. The two prior technologies that are thought to have most clearly benefited copyright owners, photocopying and VCRs, had some unique characteristics not shared by file sharing.

Photocopying was well positioned for strong indirect appropriability because the copyrighted products most heavily photocopied were journal articles and that copying took place mainly in libraries. Thus, publishers were able to identify the originals that were being copied (library subscriptions) and charge higher prices to libraries than to individuals. Liebowitz (1985) documents that this price discrimination began contemporaneously with the adoption of photocopiers and that the price differentials were related to the frequency with which articles were copied.

The net impact of VCRs on copyright owners was also positive, but for a very different reason. Although producers of movies and television pro-

³⁴ The impact of radio play on record sales has been examined in historical context in Liebowitz (2004a) and using econometrics in Liebowitz (2006).

grams sued to stop the VCR, it was not out of fear that prerecorded movies would be harmed but instead that television advertising would be harmed. When the original Betamax VCR (for which the case was popularly named) came on the market, it was not even capable of recording a movie since its playing time was limited to 1 hour. Any impact of VCRs on the television market turned out to be small for several reasons, the most basic being that recording television programs did not become an important activity (relative to overall viewing) for viewers. Instead, VCRs were mainly used to view rented and purchased prerecorded movies, an extremely popular activity that provided an enormous boost to movie producers.

Although movie producers clearly benefited from the VCR, the copying ability of VCRs might nevertheless have reduced somewhat the market for prerecorded movies. Since making an unauthorized copy of a movie would have required two VCRs or a machine capable of holding two cassettes, both fairly rare occurrences, any impact would likely have been minor. Even so, some prerecorded tapes eventually came with a form of copy protection, which indicates that there was at least some concern about this type of copying.

The impact of audio cassette taping on the market for sound recordings is not clear. Although Alan Greenspan attributed the decline in sales from 1978 to 1982 to audiotaping (U.S. Senate 1983), the market turned around shortly after, even as audiotaping continued to increase. Complicating the measurements were the new uses for prerecorded music brought about by the advent of audio cassettes—the ability to play prerecorded music on portable devices and in automobiles.³⁵ Even if audio copying per se had a consequential negative impact on sales, it might have been overwhelmed by the positive impact of the new markets opened up by audio cassettes.

If digital files such as MP3s open up new markets, a similar confounding of results might occur, but as ubiquitous as iPods might have seemed on college campuses, unit sales of MP3 players were still only half those of portable CD players in 2004, and the installed base was far smaller, seemingly too small to have an important impact on the amount of music listening. Further, although MP3 players hold more music and are smaller than prior portable players, it is not clear whether they will open up new listening locations the way that cassette players did. Of course, if iPod sales continue to grow at their recent explosive rate and do lead to a boom in music listening, the resulting increase in music usage might overcome the pernicious effects of file sharing, and the sales decline may come to an end in spite of increases in file sharing.

There are two other important differences between audiotaping and file

³⁵ Prior to the cassette, the only portable form of music was radio. The growth in albums during the later 1980s closely matches the growth in penetration of portable cassette and CD players. See Liebowitz (2004b).

sharing. First, audiotaping required getting an original from a personal acquaintance. The library of albums held by acquaintances is limited. Second, since the quality of a taped copy degraded with each generation, copies could not travel very far down a network of acquaintances. Since those making copies needed to be in proximity to those purchasing originals, there was a natural damping mechanism on the impacts of copying.

File sharing has neither of these attributes. Copies are made from complete strangers and, thanks to digitization, there is no limit to how many generations deep a copy might be while still retaining its original audio quality. Further, the collection of songs held on file-sharing networks is enormous. File sharing, therefore, would seem likely to exert a more negative impact on sales than did prior analog copying technologies.

V. INVESTIGATING ALTERNATIVE EXPLANATIONS

There are obviously many factors that could have had an impact on record sales besides file sharing, many of which cannot be easily fit into an econometric study. Although it is not necessarily the burden of any individual paper to answer, a finding that file sharing played little or no role in the unusually large CD sales decline would leave us with the instant question, what did? Alternatively, if econometric studies indicate that file sharing is responsible for most of the decline, a look at other plausible explanations provides an additional check on the econometric results.

I have examined some of these alternative factors in prior work (Liebowitz 2004b) and will summarize that work here. The factors considered were album prices, income, music quality (measured by concerts and radio listenership), markets for substitutes and complements, the opening of new listening venues (portability), and “librarying”—the act of replenishing album collections as formats change, such as replacing prerecorded cassettes with CDs. The findings were (1) that list prices adjusted for inflation have been virtually constant for the last decade, disallowing price (as far as we can measure it) as an explanation of the sales decline. (2) Real GDP (and disposable income) was related to record sales, but the recession of 2001 was insufficient to account for even a small part of the sales decline and cannot explain the continued sales decline. (3) Trends in videogame receipts and movie box office receipts did not change in or around the year 2000. (4) The increased portability of prerecorded music brought about by audiocassettes (and CDs) appears to have played an important role in the increased sales of prerecorded music, but there has been no ascertainable decrease in portability, and the rise of the iPod would make such a claim risible. (5) There was no noticeable impact of librarying, whether from LPs to cassettes or cassettes to CDs. (6) Although overall radio listenership has fallen over this period, the decline was centered on categories of old music; the audience for contemporary music actually increased.

Finally, it has been suggested by Oberholzer-Gee and Strumpf (2005, p. 35) that DVD growth might be the primary alternative suspect for the fall in CD sales: "A shift in entertainment spending towards recorded movies alone can largely explain the reduction in music sales. The sales of DVDs and VHS tapes increased by over \$5 billion between 1999 and 2003. This figure more than offsets the \$2.6 billion reduction in album sales since 1999. The shift in spending in part reflects a sharp change in relative prices: since 1999 CD prices increased 10% while DVD prices decreased by 20%, and the price of DVD players fell by 60%."

Could the noted increase in DVD sales (and decline in DVD price) be responsible for the decline in CD sales?³⁶ The evidence, more fully presented, does not support this view.

The main difficulty with this claim is that it isolates the DVD market as *sui generis* and limits its scope to a time when the prerecorded video market was going through an important format transition. It seems more appropriate to examine the entire video market, which was mainly VHS in 1999 and remained primarily VHS until 2002. Unlike DVDs, prerecorded movies as a whole have not undergone a sustained a price drop but instead have had essentially flat real prices over this interval.³⁷ Since CD prices were also constant, in real terms, the relative prices of video and audio has largely been unchanged over this period.

Further, the video market has changed in an important but more subtle way. On initial inspection the combined sales of VHS and DVD movies has increased substantially, and it is even the case that an acceleration in revenue growth appears to have occurred in the period 1999–2000, which would seem to support their thesis. This is shown as the bottom line in Figure 4.

A closer inspection of the markets, however, reveals that the increase in sales of prerecorded movies that has occurred in the last few years came largely at the expense video rentals. The top line in Figure 4 represents (real per capita) expenditures on combined video sales and rentals. By way of contrast, this trend shows little in the way of any change around the year 2000. That is because expenditures on rentals fell 18 percent in this period.

Finally, if one wanted to test the suggestion that the prerecorded video market was likely to influence the sales of sound recordings, the period from 1983 to 1989 would obviously be the place to look since the increase in video revenues during that period dwarfs that from any other period. Yet not only was there was no pronounced decline in record sales during the mid to

³⁶ We should note that while it is true that real DVD prices fell during this period, the real list prices of CDs can be more accurately said to have remained constant, rising 3.2 percent from 1999 to 2003 but falling 1.1 percent from 1999 to 2004.

³⁷ According to data purchased from Adams Media Research (27865 Berwick Drive, Carmel, CA 93923), the real price (in 1998 dollars) of all prerecorded movies was \$12.96, \$13.44, \$13.66, \$13.19, \$13.23, and \$13.17 from 1998 through 2003. DVD prices, which were initially much higher than VHS prices, dropped 33 percent during this same period.

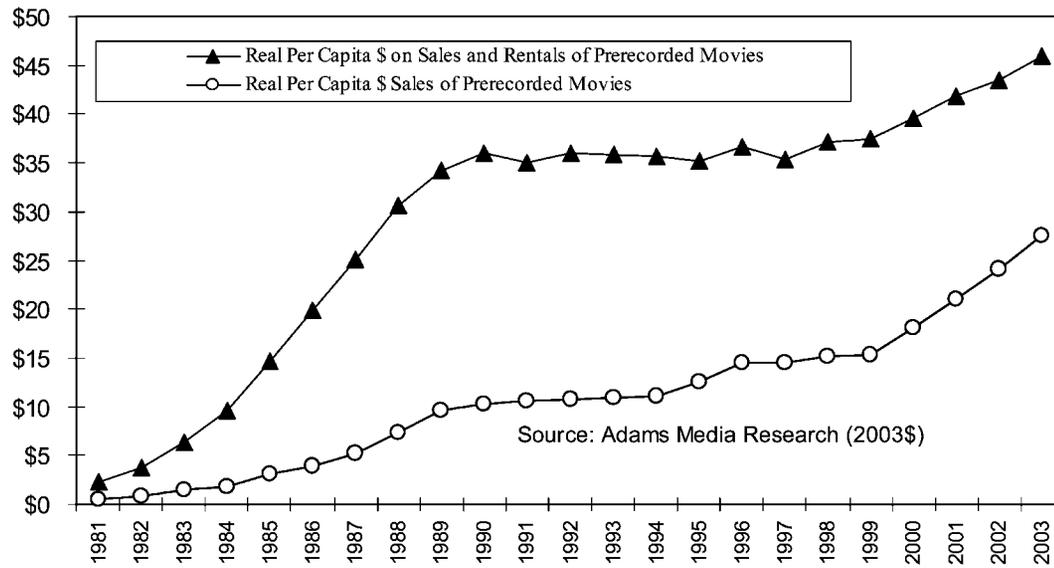


FIGURE 4.—Change in prerecorded movie sales and rentals

late 1980s, there was a fairly robust increase. Thus, the evidence from the prerecorded video market, as was the case with other substitutes, does not support a claim that consumers suddenly abandoned music for alternative forms of entertainment. We thus appear left with no viable alternative explanation other than file sharing.

VI. CONCLUSIONS

File sharing is the newest and most publicized copying technology. With the advent of each of the earlier copying technologies, questions were raised about the impact of the new technology on copyright owners. Data, however, were sparse, and only a small number of statistical studies were undertaken. Instead, answers tended to come through the rearview mirror as is the case with video recorders, where 20 years after their arrival the movie industry is observed to derive more revenues from selling prerecorded videotapes than from theatrical exhibitions.

The digital characteristic of file sharing, and the fact that it is undertaken through computers—devices capable of measuring the activity we wish to analyze—seemed as if it would provide economists with an unprecedented cornucopia of high-quality data. The data have not yet lived up to this expectation. Nevertheless, various examinations of the impact of file sharing have been undertaken, although many of them depend on old-fashioned survey results.

One needs to be careful in wading through the data that are there. There are inconsistencies among these data sets in terms of both the fluctuations and the quantity of file sharing that is taking place. Even such seemingly straightforward measures as the number of sound recordings sold have hidden traps for the unwary analyst.

All the same, the evidence here supports the current findings from almost all econometric studies that have been undertaken to date, including those in this issue—file sharing has brought significant harm to the recording industry. The birth of file sharing and the very large decline in CD sales that immediately followed is a powerful piece of evidence on its own. The 2004 increase in CD sales, temporarily reversing the decline, largely matches a reversal in the amount of file-sharing activity. Furthermore, analysis of the various possible alternative explanations for the decline in CD sales fails to find any viable candidates.

This conclusion, preliminary though it might be, should not be much of a surprise. Common sense is, or should be, the handmaiden of economic analysis. When given the choice of free and convenient high-quality copies versus purchased originals, is it really a surprise that a significant number of individuals will choose to substitute the free copy for the purchase? The conditions needed to override this basic intuition are demanding and seemingly not met in the case of file sharing.

Nevertheless, real markets are always difficult subjects of study. We do not yet have enough evidence to draw any but a preliminary conclusion. The papers in this symposium can be thought to represent the end of the beginning stage of research, not the beginning of the end stage. Further work is called for to provide additional evidence on this subject. With a technology this young, and markets changing this fast, it would be most unwise to claim too much given the risk that the future may prove a current conclusion to be incorrect.

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**PIRACY ON THE HIGH C'S: MUSIC
DOWNLOADING, SALES DISPLACEMENT,
AND SOCIAL WELFARE IN A SAMPLE
OF COLLEGE STUDENTS***

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ABSTRACT

Recording industry revenue has fallen sharply in the last 3 years, and some—but not all—observers attribute this to file sharing. We collect new data on albums obtained via purchase and downloading, as well as consumers' valuations of these albums, among a sample of U.S. college students in 2003. We provide new estimates of sales displacement induced by downloading, using both ordinary least squares and an instrumental variables approach with access to broadband as a source of exogenous variation in downloading. We find that each album download reduces purchases by about .2 in our sample, although possibly by much more. Our valuation data allow us to measure the effects of downloading on welfare as well as expenditure in a subsample of University of Pennsylvania undergraduates, and we find that downloading reduces their per capita expenditure (on hit albums released 1999–2003) from \$126 to \$101 but raises per capita consumers' surplus by \$70.

No black flags with skull and crossbones, no cutlasses, cannons, or daggers identify today's pirates. You can't see them coming; there's no warning shot across your bow. Yet rest assured the pirates are out there because today there is plenty of gold (and platinum and diamonds) to be had. [Recording Industry Association of America 2003]

I. INTRODUCTION

AFTER growing an average of 10 percent per year over the previous 7 years, U.S. music industry revenue has shrunk by 16 percent in the last 3 years (see Figure 1). Although there is considerable debate about causes, the advent and spread of Internet technology, and the file sharing that it enables,

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have emerged as potentially important culprits. This study examines the effect of downloading on sales and welfare. In particular, we address the following three questions. (1) How many purchased albums are displaced by each album that is illegally downloaded? (2) Is the subjective valuation of downloaded albums high or low? (3) What are the revenue and welfare consequences of downloading?

To answer these questions we administered a survey at four U.S. colleges. Among other things, the survey asked students to list which and how many albums they purchased and downloaded, whether they had an Internet connection, and, if so, whether the connection was broadband. We surveyed 412 students, eliciting information on their purchases and downloads of 8,200 albums. Using both ordinary least squares (OLS) and an instrumental variable approach with access to broadband as a source of exogenous variation in downloading, we show that one downloaded album reduces music purchases by roughly one-fifth of an album, and possibly by much more. Using this conservative estimate and information on the average number of albums purchased and downloaded, we infer that downloading reduced purchases by individuals in the sample by about 10 percent during 2003.

We then turn to the question, which albums tend to be downloaded, those to which individuals assign high or low subjective valuation? To address that question, the survey asked respondents not just what they purchased and downloaded, but also how highly they value the music in dollar terms. We document that, on average, our respondents downloaded music that they value a third to a half less than their purchased music. This result is consistent with our incomplete-displacement finding (that one downloaded album displaces less than one purchased album), which indicates that at least some of the music that is downloaded would not have otherwise been purchased. It also suggests that some of the surplus enjoyed by downloaders would have otherwise been the deadweight loss associated with foregone, but socially beneficial, transactions.

This last result led us to revenue and welfare analysis. Two features of the CD market make the welfare analysis of downloading interesting. First, substantial price discrimination was impracticable and was not exercised. As a result, firms priced albums as single-price monopolists, leaving some socially beneficial transactions (with buyer valuation above marginal cost but below the monopoly price) unconsummated. This problem was exacerbated by CDs' second feature: the product has a low marginal cost, so the market without illegal downloading has the potential for substantial deadweight loss.

While perhaps paradoxical to the law-abiding citizen, illegal downloading may actually alleviate the monopoly deadweight-loss problem. Indeed, down-

helpful comments. Rob thanks the National Science Foundation and Waldfogel thanks the Wharton Electronic Business Initiative and the Mack Center for Technological Innovation at Wharton for financial support. All errors are our own.

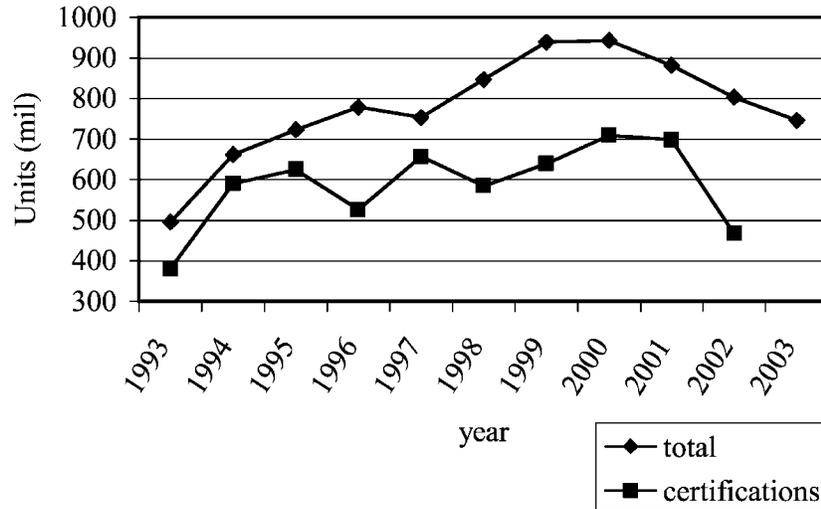


FIGURE 1.—Albums sold, 1993–2003

loading allows consumers to engage in a crude “do-it-yourself” form of price discrimination. On the basis of access to the Internet and willingness to engage in file sharing, consumers segment themselves into downloaders and buyers. Downloaders pay zero and are clearly (by revealed preference) better off. Whether these gains are offset by harm done to firms and their suppliers depends on which albums consumers download. If downloading tends to occur for albums that consumers value highly and would otherwise have purchased, then revenues are reduced and an offsetting harm indeed occurs. However, if downloading tends to occur for low-valued albums, downloaded albums are not candidates for being purchased in the first place, and, hence, no harm is done. As stated above, our empirical results indicate that downloaded albums tend to be low valued, which suggests that the harm done by downloading is limited.

To further investigate this question and to quantify welfare losses or gains, we made a welfare comparison between a (counterfactual) regime in which illegal downloading is feasible and a regime in which it is not. To carry out this comparison, we administered an additional survey to 92 students, eliciting both ex ante and ex post valuation information for 1,209 purchased and downloaded music albums (this information is elicited because music is an experience good, so the purchase versus no-purchase decision is based on ex ante valuations). Using the information on ex post valuations, we created an empirical demand curve for music, which we apply to both the downloading and the no-downloading regimes. Using the information on ex ante valuations and assuming that consumers would have paid \$15 for each album

they valued at or above \$15, we partitioned individual-album pairs into situations that would and would not have resulted in purchases if downloading had not been feasible. We then compute welfare at the (counterfactual) outcome that would have occurred in the no-downloading regime as well as welfare at the (factual) outcome in the downloading regime and compare the two. We found that downloading reduces per capita expenditures by individuals in this subsample by \$25, from \$126 to \$101 per capita, but raises consumers' surplus by \$70 per capita (for purchases of hit albums 1999–2003). Thus, illegal downloading effected a per capita decrease of \$45 in deadweight loss, which is nearly double the reduction in industry revenue.

The paper proceeds in five sections. Section II provides industry background and links to relevant literatures. Section III explores possible effects of downloading on consumption and welfare in theory. Section IV describes the data used in the study. Section V presents empirical results on sales displacement and whether high- or low-valuation albums are downloaded. Section V also presents estimates of the effects of downloading on welfare. Section VI concludes.

II. BACKGROUND

A. *Industry Background*

The U.S. music industry is highly concentrated. Although there are hundreds of labels, five owners account for 80 percent of music sales. The major firms include Sony, Vivendi-Universal, EMI, Bertelsman, and Time Warner (Graves 2004). According to some reports, there are nearly 30,000 CDs released per year. The major labels collectively release about 7,000.¹ Sales are very highly concentrated, however. In 2000, the top 250 (100, 50, 10) albums accounted for 48 (32, 22, 8) percent of total sales. Sales in other years are similarly skewed.

After increasing about 10 percent per year during the 1993–99 period, U.S. album sales have declined 16 percent since that time (see Figure 1). The recording industry, represented by the Recording Industry Association of America (RIAA), blames illegal downloading, which it terms “piracy,” for sales displacement. “Each year, *the industry loses about \$4.2 billion to piracy worldwide*—‘we estimate we lose millions of dollars a day to all forms of piracy’” (RIAA 2003). The decline in demand is substantial enough to encourage consolidation. Sony and Bertelsman have had discussions, and EMI and Time Warner have been rumored to be in discussions (Helmore 2003).

Other developments are suggestive of downloading. Internet penetration has increased from 16 percent in 1997 to 47 percent in 2000. And broadband

¹ These figures are attributed to the RIAA (Ziemann 2002).

connection, allowing convenient downloading of large files, stood in early 2003 at 40 percent of connected households. Moreover, the sales of important complementary goods, MP3 players and blank CDs, have increased substantially over the past 5 years. Sales of MP3 players grew to an estimated 3.8 million in 2003 (Consumer Electronics Association 2004). Of course, one can use such goods for purchased as well as downloaded music, so these developments are merely suggestive of illegal downloading.

Concerned with reductions in revenue—and convinced that music downloading is the cause—the industry responded in three ways. First, the industry initiated hundreds of lawsuits against illegal downloaders as a means of deterring downloading activity. There is some evidence that the lawsuits are having an effect (Schwartz 2004). Second, the industry slashed prices, making it more attractive to purchase albums rather than illegally download them. For instance, Universal reduced its list prices by 30 percent in October 2003 (McCarthy and Grant 2003).

The third response is more recent. The music industry, initially slow to offer sales over the Web, has moved recently to make music available online. Leading this trend is Apple Computer, maker of the dominant MP3 player, which launched its iTunes music site in 2002. There consumers can download music for \$.99 per song. As of March 2004, customers had downloaded 50 million songs from iTunes (Apple Computer 2004).

B. Relevant Literature

1. Theoretical Literature

This study is related to several strands of theoretical research. The first strand is research on differentiated product oligopoly, which includes the literature on monopolistic competition, found in Spence (1976a, 1976b) and Dixit and Stiglitz (1977). This literature considers the endogenous offering of product variety (in our case, different genres of music and different varieties within one genre) and how that relates to the firm revenues. The revenues that firms harvest, in turn, are determined by the competition and the demand conditions they face. Obviously, downloading reduces demand and thereby undermines the ability of firms to harvest revenues. Our paper speaks to this revenue effect but not to whether this induces a reduction in the varieties of music offered.

More relevant to what we do here is the literature on the effect of reproduction technology on markets for information goods, beginning with work by Liebowitz (1985), who argues that reproduction of journal articles through photocopying need not reduce the demand for and, hence, the profit from selling academic journals. He argues that prices that publishers charge libraries can be raised to reflect the value to library patrons from photocopying. Then, although publishers lose much of the individual market to photocopiers,

they recoup some of these losses from higher library prices. The issues addressed and the line of reasoning in Liebowitz are echoed in the software piracy literature (Besen 1986; Conner and Rumelt 1991; Takeyama 1997).

More recent literature extends these ideas to a context in which file sharing takes place in small groups—for example, within families or among friends. A number of papers make the point that file sharing need not reduce seller revenue (Bakos, Brynjolfsson, and Lichtman 1999; Varian 2000). To see this, imagine two individuals each valuing a good below its price. If they share cost and content, they may together be willing to purchase the good that they individually were not willing to purchase, which implies that seller revenue may actually increase rather than decrease. Our work relates to this strand of literature inasmuch as we document the effect of reproduction or downloading on demand and seller revenue. On the other hand, our work does not relate to the argument that file sharing, which takes place in an anonymous setting and without a middleman who stands to benefit from it, may benefit sellers because cost sharing is not feasible. Another theoretical argument relevant to our study is that file sharing is like free samples and, as such, it may actually stimulate sales (Shapiro and Varian 1999).

2. Empirical Literature

Our paper is one of a number of recent empirical studies of the effect of music downloading on album sales. Liebowitz (2003) examines a variety of possible explanations for the recent reductions in album sales and, finding them all wanting, concludes that downloading must be responsible.

Zentner (2003) uses international time-series aggregate data, in conjunction with Internet connectedness, to document that places with more Internet—and broadband—connections have experienced sharper reductions in album sales. He also uses European individual-level data to show that persons who self-report downloading music—instrumented with measures of technical sophistication—are also less likely to have purchased music recently. Zentner's micro data include only binary measures of downloading and music purchase (Do you download music? Have you purchased music recently?), which prevents him from measuring the size of the downloading-induced sales displacement. By contrast, we collected data on the numbers of albums purchased and downloaded, which enables us to quantify this displacement.

Hui and Png (2003), using international panel data for 1994–98, estimate that each download reduces sales by .42. The time period they study predates the growth of broadband and widespread file sharing. Moreover, their measure of piracy has the shortcoming that it is an estimate based in part on the level of legitimate sales in a country.

On the other hand, Oberholzer and Strumpf (2004) examine weekly time-series data on downloading and sales of major hit albums and find little relationship. And in expert testimony on the Napster case, Fader (2000)

argues that file sharing stimulates sales of recorded music, although his analysis covers a period prior to the sales decline depicted in Figure 1.

Oberholzer and Strumpf (2004) combine weekly album sales data by album with novel data on the weekly volume of downloads. Their approach identifies sales displacement using within-album weekly variation in downloading and sales. Using this data and estimation approach, they ask whether an album sells fewer copies in a week that it is downloaded frequently. This approach faces three obstacles, however. The first obstacle is that CDs are durable goods and, hence, if substitution or displacement occurs, it need not occur within 1 week. If an individual decides to download instead of purchase, her decision may very well be reflected in her future purchasing behavior; the absence of contemporaneous substitution does not rule out substitution more generally.

Their contemporaneous-album-sales approach also faces the handicap that the variation in a particular album's popularity over time would tend to induce a positive relationship between purchases and downloads. Purchase and download are simply two ways of obtaining an album. To see this clearly, consider a different pair of channels for obtaining an album, from Sam Goody or from HMV. Virtually no one purchases a particular album from both outlets. Thus, the displacement is one for one. Yet the weekly sales of a particular album at Sam Goody are surely highly positively correlated with the weekly sales of the same album at HMV (as a result of aggregate temporal shocks that affect both). Do HMV sales stimulate Sam Goody sales? Probably not. Looking at downloading and purchases has the same problem. An album's popularity has a time component to it, and when it is popular through one distribution channel, it is popular through other channels as well. But this does not mean that availability through one of the channels stimulates demand through other channels.

A third shortcoming is that this estimation approach does not necessarily inform the sales versus displacement question. Suppose there are two types of consumers, buyers and downloaders. Suppose that buyers never download and downloaders never buy. Then a negative correlation between sales and downloads across albums just means that buyers and downloaders have different tastes. What we really want to know is whether a person's downloading of an album reduces the probability that he will purchase the album. Hence, it is not enough to have sales and downloads by album. Rather, one needs data on sales and downloads by person, or groups of persons.

The ideal data for studying sales displacement would be volumes of sales and downloads by individual rather than by album. If one could find exogenous variation in downloading across individuals, then displacement could be inferred from the relationship between downloads and sales (for example, do people who download more albums, or songs, purchase fewer albums?). To our knowledge, surveys are the only way to obtain this information.

A lack of alternative data sources led us to undertake our own surveys.

The benefit of this data collection is that it allowed us to get information on individuals' volumes of music downloads and purchases (and on willingness to pay). Because we surveyed the college student populations available to us, our surveys are necessarily not nationally representative. We cannot therefore draw inferences about the magnitude of the U.S.-wide effect of downloading on album sales. But we can ask whether the sales displacement phenomenon operates in our sample. That is, do people who download more purchase less? If so—and if we believe we have isolated exogenous variation in the volume of downloading—then we can at least draw an inference about whether downloading—again for our sample—tends to stimulate or cannibalize album sales. This is the spirit in which we proceed.

III. THEORY

In this section we outline the theory underlying our welfare comparison exercise. It is the routine theory of monopoly pricing and its attendant deadweight loss, except that we have to specify the outcome that would have occurred in the (counterfactual) no-downloading regime. To this end, two features are relevant. The first is the distinction between *ex post* and *ex ante* valuation, which is necessary because music is an experience good. The second is the relationship between the decision to download and the subjective *ex post* valuation. To simplify the exposition we ignore for now the distinction between *ex ante* and *ex post* valuation and focus instead on the possibility that downloading may be correlated with valuations. We integrate *ex ante* valuation into the theory immediately afterward.

To further simplify the exposition we also assume that the marginal cost of CDs is zero. One justification for this is that digital distribution, which has virtually zero marginal cost, is technically feasible. If the marginal cost is not zero, then our computations are easily adapted, since the procedure that we introduce here (and on which these computations are based) is quite general.

A. *Effects of Downloading on Revenues and Welfare*

Consider a world without downloading and let $D(p)$ be a demand function for some album. Since each consumer buys one album at the most, $D(p)$ reflects the distribution of consumers' willingness to pay for this album. The seller is viewed as a single-price monopolist. Then, for a typical demand function, this will lead to monopoly pricing, restriction of output, and deadweight loss. The areas corresponding to revenue, consumers' surplus, and deadweight loss at the profit-maximizing outcome are illustrated in Figure 2. These areas add up to the total area under the demand curve. This provides a baseline with which the outcome under downloading is compared.

Consider now a world with downloading. Then the overall demand $D(p)$ is segmented into two subdemands, buyers' demand $D_B(p)$ and down-

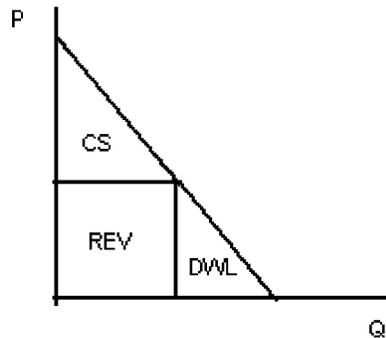


FIGURE 2.—Single-price monopoly: the market before downloading. CS = consumer surplus; DWL = deadweight loss; rev = revenue.

loaders' demand $D_D(p)$. The term $D_D(p)$ reflects hypothetical willingness to pay, since downloaders' demand does not (obviously) translate into revenues. By definition, these subdemands add up to the overall demand: $D_D(p) + D_B(p) = D(p)$, for each p .

To show how welfare comparisons (in terms of deadweight loss, revenues, and consumers' surplus) between a downloading and a no-downloading regime work, and what these comparisons hinge on, we work through three illustrative examples.

First, consider an example in which each consumer is a downloader with some probability, say q , and a buyer with the complementary probability, $1 - q$, where q is independent of the consumer's valuation. In this case downloaders are uniformly drawn from the overall distribution of valuations. The buyers' demand curve in this "neutral" example is simply a proportional inward rotation of the overall demand, $D_B(p) = (1 - q)D(p)$. In this example downloading raises consumers' surplus while reducing revenue and deadweight loss; the monopolist's profit-maximizing price remains the same.

Second consider two polar cases, illustrated in Figures 3 and 4, where q does depend on valuation. In one polar case, low-valuation consumers are downloaders and high-valuation consumers are buyers, so $q = 1$ for sufficiently low p and $q = 0$ for sufficiently high p . To further accentuate what happens in this case, let the critical p (the p at which q changes from zero to one) be the predownloading price. Then the monopolist's postdownloading price equals his predownloading price. Also, all consumers with valuations above p continue to purchase, while all consumers with valuations between p and zero, which is the marginal cost of downloading, download. In this extreme case, both revenue and consumers' surplus of persons who bought prior to downloading are unaffected by downloading. The deadweight loss existing prior to downloading is transformed into consumers' surplus (see

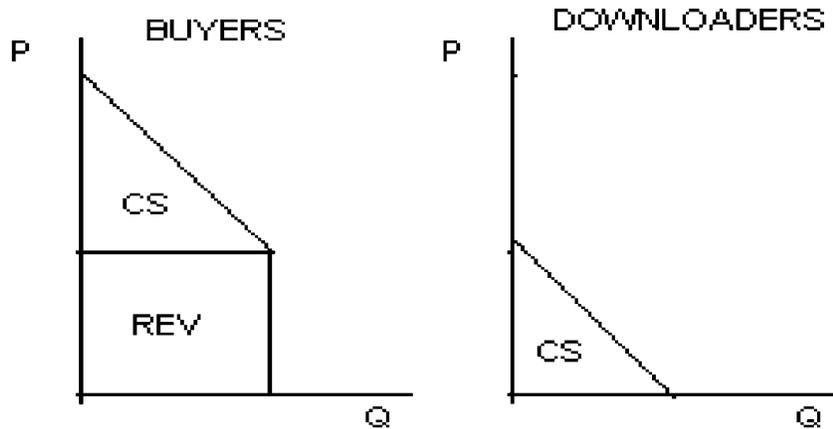


FIGURE 3.—Downloaders are low-valuation demanders. CS = consumer surplus; rev = revenue.

Figure 3). This is a case, therefore, in which there are only welfare gains and no welfare losses from downloading.

In the other polar case, high-valuation consumers are downloaders and low-valuation consumers are buyers, so $q = 1$ for sufficiently high p and $q = 0$ for sufficiently low p . Again, let the critical p be the predownloading price. Then, given that high-valuation consumers no longer buy, the monopolist lowers his price to attract some low-valuation consumers. Consequently, regions representing consumers' surplus and revenue prior to downloading become downloader surplus. And the region formerly representing deadweight loss now contains revenue, additional consumers' surplus, and some deadweight loss. Thus, overall consumers' surplus in this case increases and deadweight loss decreases. Seller's revenue, however, decreases, so there is harm along with reduced deadweight loss (see Figure 4).

As stated earlier, these special cases are concocted to illustrate how downloading works and its welfare consequences. A realistic analysis of the welfare effects of downloading requires information about the actual distribution of valuations for buyers and downloaders. Then we can measure areas under the empirical demand curve and quantify welfare changes. For now let us just note that the key question, for both the welfare analysis of downloading and the size of the sales displacement, is whether individuals download high- or low-valuation albums. The more that consumers obtain low-valuation music through downloading, the smaller its negative impact on revenue and the greater its beneficial effect on welfare.

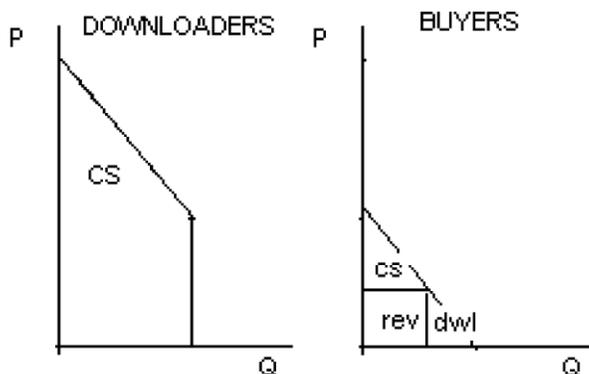


FIGURE 4.—Downloaders are high-valuation demanders. CS = consumer surplus; DWL = deadweight loss; rev = revenue.

B. Procedure and Incorporation of Ex Ante Valuation

Because music is an experience good, the ex ante valuation determining purchase is not the same as the ex post valuation, which becomes known only after purchase. As a result, actual welfare is slightly more complicated than the foregoing section would suggest. At the time of first obtaining the album, the individual's willingness to pay is based only on a guess about how much she will like an album. Call this the ex ante valuation, v_i^a , where superscript *a* denotes ex ante and subscript *i* indexes a consumer-album pair. A consumer's ex post valuation of the album, once she has listened to it for a while, can deviate from v_i^a . Term the ex post valuation v_i^p , where the superscript *p* denotes ex post. Define p_i as the purchase price the consumer faces. Finally, each consumer-album pair has a binary willingness to download: δ_i equals one if yes, zero if no.

As before, there are two regimes: a downloading regime (when illegal downloading is feasible) and a no-downloading regime (when it is not). When downloading is feasible, each consumer-album pair requires first a decision about willingness to download. If δ_i equals one (yes), then downloading occurs as long as $v_i^a > 0$ (regardless of whether $v_i^a \geq p_i$). If δ_i equals zero (no), then the consumer purchases only if $v_i^a \geq p_i$. If δ_i equals zero and $v_i^a < p_i$, she goes without, even though she has valuation in excess of downloading's zero marginal cost. In the no-downloading regime, individuals purchase only when $v_i^a \geq p_i$.

While individuals decide whether and how to obtain albums on the basis of (v_i^a, δ_i, p_i) , their ultimate satisfaction from the album depends on v_i^p , less a price paid, if any. When this theory is implemented, the procedure for computing welfare in the two regimes is as follows. Consumers' surplus in the downloading regime is $CS = v_i^p$ for downloaded albums, $CS = v_i^p -$

TABLE 1
SUMMARY OF BEHAVIOR AND WELFARE IN DOWNLOADING AND
NO-DOWNLOADING REGIMES

Ex Ante Valuations Relative to Price	Willing to Download ($\delta_i = 1$)	Not Willing to Download ($\delta_i = 0$)
Downloading regime:		
$0 < v_i^a < p_i$:	$v_i^p = \text{CS}$ rev = 0 downloading occurs	$v_i^p = \text{DWL}$ rev = 0 album not obtained not observed in our data
$v_i^a \geq p_i$:	$v_i^p = \text{CS}$ rev = 0 downloading occurs	$v_i^p - p_i = \text{CS}$ $p_i = \text{rev}$ purchase occurs
No-downloading regime:		
$0 < v_i^a < p_i$:	$v_i^p = \text{DWL}$ rev = 0 album not obtained	$v_i^p = \text{DWL}$ rev = 0 album not obtained not observed in our data
$v_i^a \geq p_i$:	$v_i^p - p_i = \text{CS}$ $p_i = \text{rev}$ purchase occurs	$v_i^p - p_i = \text{CS}$ $p_i = \text{rev}$ purchase occurs

NOTE.—Assume that zero marginal cost distribution is available when illegal downloading is not feasible. CS = consumers' surplus; DWL = deadweight loss; rev = revenue.

p_i for purchased albums, and zero otherwise. Sellers' revenue in the downloading regime is p_i for each purchased album and zero otherwise. Consumers' surplus in the no-downloading regime is $\text{CS} = v_i^p - p_i$ (if they purchase), and seller's revenue is p_i . Table 1 summarizes this information in the downloading and no-downloading regimes and according to whether δ_i equals one and whether $v_i^a \geq p_i$. To deliver quantitative information we let $p_i = 15$ and let δ_i take its empirical value (one if the individual bought and zero otherwise).

One point bears discussion here. Because our survey—discussed below—elicits information only about albums that individuals have in their possession (either via purchase or downloading), we will have data on v^a , v^p , and δ for only three of the four cells in the tables. We have no valuation information about albums that people are neither willing to download or purchase (with $\delta = 0$ and $v_i^a < p_i$). Note, however, that the deadweight loss in this cell is identical across downloading and no-downloading regimes, so our inability to measure this will not inhibit our ability to measure the change in welfare from downloading.

IV. DATA

The basic data for this study are derived from two surveys administered to college students (at the University of Pennsylvania, Hunter College, the University of Chicago's Master of Arts [M.A.] program in public policy, and City College of New York [CCNY]) between December 2003 and February

2004. The first survey, administered to 412 students, elicited information on the respondent (age, race, gender, family income, number of CDs owned, speed of Internet access, and interest in music), along with ex post valuation on two groups of albums purchased or downloaded: those obtained in the last year and those among a common list of 261 hit albums released since 1999.²

Table 2 presents some characteristics of the individuals in the survey 1 sample. Blacks make up 9 percent of the sample; Hispanics, 10 percent; and Asians, 32 percent. The remainder are white. Fourteen percent of the sample has family income below \$25,000; 20 percent has family income between \$25,000 and \$50,000; 28 percent has family income between \$50,000 and \$100,000; 22 percent has family income between \$100,000 and \$250,000; and the remaining 16 percent has family income in excess of \$250,000. The mean age is 21.9.

The respondents report a high level of interest in music. Only 15 percent report being less of a music fan than others they know. Nearly 40 percent claim to be about the same, 30 percent are somewhat more, and 17 percent are a lot more interested in music than others they know. The mean CD collection is 103.

In a second wave of the first survey we asked about current and past Internet access. We obtained this information on 260 of the 412 respondents. Seventy percent report having dial-up access in 1999, while 21 percent had broadband (digital subscriber line [DSL], cable modem, or Ethernet) access in 1999. By 2003, roughly 85 percent had high-speed access, while the remainder had dial-up access.

Respondent characteristics vary substantially across the universities sampled. Chicago and Penn are heavily white and Asian, while Hunter and especially CCNY have larger black and Hispanic populations. Chicago income is low because the M.A. students tend to report their own, as opposed to parents', income (note their comparatively high ages). Penn income is substantially higher than elsewhere. Reported interest in music is somewhat higher at Penn and Hunter than elsewhere. Finally, patterns of Internet access differ substantially across schools. Penn students, most living in wired dorms, have virtually 100 percent broadband access. Rates elsewhere are much lower.

The second part of survey 1 asks respondents to attach a dollar value to two groups of albums they have. First, we present them with a list of all 261 albums certified by the RIAA as having sold 2 million or more copies since 1999. For each album, respondents indicate whether they own it, how they got it, and how highly they value it in dollar terms. We term this the "hit"

² Our survey responses are unlikely to be much affected by legal song downloading sites such as iTunes for two reasons. First, many of the albums we ask about were released before iTunes was introduced in April 2003. Second, iTunes' cumulative sales reached 50 million songs after we completed our surveys. At \$.99 per song, iTunes' online song sales amount to less than half a percent of annual CD sales.

TABLE 2
RESPONDENT CHARACTERISTICS

	OVERALL	CITY COLLEGE OF NEW YORK	UNIVERSITY OF CHICAGO	HUNTER COLLEGE	UNIVERSITY OF PENNSYLVANIA	
					Survey 1	Survey 2
Male	60	65	29.7	45.4	67.7	58
<i>N</i>	414	66	64	33	251	98
Black	8.9	31.8	10.9	6.3	4.0	3.0
Hispanic	9.8	33.3	3.1	25.0	3.2	1.0
Asian	31.8	21.2	26.6	12.5	38.5	43.4
White	48.2	13.6	59.4	53.1	53.8	52.5
<i>N</i>	409	66	64	32	247	99
Age	21.9/400	24.6	27.4	20.5	20.0	20.2
Annual income:						
<\$25K	14.3	23	41.4	12.9	5.2	2.2
\$25K–\$50K	19.8	41.5	25.9	38.7	19.8	8.8
\$50K–\$100K	27.6	29.2	17.2	29.3	27.6	36.3
\$100K–\$250K	21.9	4.6	12.1	12.9	30.4	34.1
>\$250K	16.4	1.5	3.5	6.5	24.8	18.7
<i>N</i>	384	65	58	31	230	91
Music fan:						
1 (low)	6.3	6.2	6.3	3.0	6.8	11.1
2	9.2	9.2	10.9	6.1	9.2	10.1
3	38.4	47.7	43.8	30.3	35.6	33.3
4	29.6	18.5	12.3	36.4	33.2	29.3
5	16.5	18.5	15.6	24.2	15.2	16.2
<i>N</i>	412	65	64	23	250	
Dial-up:						
1999	70.4	85.2	56.5	N.A.	73.2	76.0
2000	63.1	82.1	60.3	N.A.	60.9	59.8
2001	49.8	77.8	58.7	N.A.	42.0	29.9
2002	31.5	63.0	47.6	N.A.	20.6	20.6
2003	16.2	53.6	32.3	N.A.	4.1	4.1
Present	15.2	57.1	30.6	N.A.	2.4	3.2
High-Speed:						
1999	20.6	.0	29.0	N.A.	20.8	17.7
2000	31.9	7.1	28.6	N.A.	37.3	38.1
2001	47.1	18.5	31.7	N.A.	57.4	69.1
2002	66.5	33.3	46.0	N.A.	79.4	79.4
2003	83.8	46.4	67.7	N.A.	95.9	95.9
Present	86.0	42.9	69.4	N.A.	97.6	96.8
<i>N</i>	260	28	63		170	97
Number of CDs in collection	103.3	157.9	147.5	96.4	79.0	83.6

NOTE.—Data are percents unless otherwise specified. N.A. = not available because the survey administered at Hunter College did not elicit information about connection speed.

TABLE 3
AVERAGE VALUE OF HITS AND CURRENT PURCHASES

	HIT			CURRENT		
	Mean (\$)	Median (\$)	<i>N</i>	Mean (\$)	Median (\$)	<i>N</i>
Survey 1 (buy), ex post:						
Bought	12.70	12	2,726	15.25	15	695
Downloaded	8.81	8.5	1,512	11.15	10	337
Survey 1 (sell), ex post:						
Bought	56,344	100	702	1,831	100	173
Downloaded	2,534	30	264	710	50	64
Survey 2, ex ante:						
Bought	15.91	15	617			
Downloaded	10.66	10	592			
Survey 2, ex post:						
Bought	13.39	13	617			
Downloaded	10.47	10	592			

module, and responses to this module provide valuations on a common set of albums across all respondents. Second, we ask respondents to list all albums they have obtained in the past year. For each album they list, we ask them how they obtained it (via purchase, downloading, or as a gift) as well as their valuation. We term this the “current” module.

Two different versions of the valuation question were used initially. The “buy” set asked respondents, “Imagine you no longer have the album and must pay to get it. What is the maximum you are willing to pay to get the album?” In the alternative “sell” treatment, the question is worded, “Imagine someone offered to pay you money to permanently give up the album (and never again hear any of the songs on it). For each album, how much compensation would you require never to hear it again?” We employed the buy formulation for 337 of 412 surveys.

We use the survey data in two ways. First, we can aggregate them to the respondent level to create a cross-respondent data set on the volume of CDs purchased and downloaded. Although we do not know when respondents purchased each CD, we do know the CDs’ “vintages,” that is, the years in which they were first certified. This allows us to create a second panel data set on the numbers of albums downloaded and purchased, among those of each vintage. Third, we can use the data at the album level.

Table 3 reports mean and median valuations of purchased (including gifts) and downloaded hit and current albums using both the buy and sell valuation methods. The first point to note is that sell-based valuations are enormous. The average purchased hit is valued at over \$50,000. While the means are sensitive to outliers, even the median sell valuations—\$100 per album for hits and current albums—are rather high. The buy-based valuations appear to be more reasonable. Of 2,726 purchased hits, the mean valuation is \$12.70,

while the mean valuation of a purchased current album is \$15.25. Second, downloaded albums are valued substantially below purchased albums.

Although more reasonable in the sense of being within an order of magnitude of purchase prices, the survey 1 buy valuation data are still, at first blush, puzzlingly low. Of 2,726 purchased albums valued via the buy method, the mean valuation was \$12.70. On its face this seems to contradict logic, since a person should buy a product only if the value equals or exceeds the price. And, indeed, 58 percent were valued below \$15. Moreover, 28 percent were valued below \$10. These results raised concerns for us that music may be (1) an experience good, (2) subject to depreciation as listeners grow tired of music, or (3) both.

Low ex post valuations are not just a theoretical curiosity; they also prevent using survey 1 valuation data to determine which downloaded albums would have been purchased absent downloading. It seems natural to assume that individuals would have purchased albums when $v > p$. Yet it is not true that v exceeds p for all, or even most, purchased albums.

Our concern about music as an experience good led us to administer survey 2 to 92 Penn students, asking about both ex ante and ex post valuations of the 261 albums in the hit sample, as well as the individual characteristics covered in survey 1. Our valuation instructions on this survey were rather explicitly designed to elicit ex ante valuations at or above the prices paid.

Initial Valuation. *At the time you obtained the album, what is the maximum you would have been willing to pay for it? If you paid for it, you must have valued it at least as much as its price initially. For this question, suppose that there is only one possible source. That is, your answer should not be based on an alternative price or sharing opportunity. (Don't say you're not willing to pay since you know you can obtain it via sharing for free or that you are not willing to pay more than some particular amount since you know you can buy from another seller for some particular price. Here, you are asked to assume no such alternative sources exist.)*

Finally, if you would have been willing to purchase it at the time you downloaded it or received it as a gift, report a valuation at or above the going price at that time.

Current Valuation. *Now that you've had the music for a while, what is the maximum you would be willing to pay for it? Here, again, suppose that there is only one possible source so your answer, as above, should not be based on an alternative price or sharing opportunity.*

The last column of Table 2 reports characteristics of the individuals in the survey 2 sample. The lower part of Table 3 reports ex ante and ex post valuations of hits from survey 2. Here, the mean ex ante valuation is nearly \$16, while the mean ex post valuation, at \$13.39, is very similar to the (ex post) valuation in survey 1. Two points merit discussion. First, the ex post valuation is below the ex ante, which indicates depreciation. Second, the correlation of ex ante and ex post value is only about .6, which indicates that most of the variation in ex post value is realized after purchase, so the experience good aspect of music is important.

TABLE 4
PURCHASES AND DOWNLOADS

	Hit			CURRENT		
	Purchase	Download	<i>N</i>	Purchase	Download	<i>N</i>
All	8.24	5.36	365	2.61	1.24	349
Asian	6.74	7.98	108	1.98	1.16	101
Black	9.53	2.34	32	3.34	1.31	32
Hispanic	11.62	4.83	37	2.85	1.03	33
White	8.31	4.55	184	2.75	1.35	179
City College of New York	10.96	3.24	54	2.90	.63	52
University of Chicago	8.21	2.25	56	2.82	.54	57
Hunter College	11.13	1.72	32	3.96	.56	27
University of Pennsylvania	7.17	7.17	365	2.31	1.67	213

We supplement the survey data with information on aggregate sales data on all of our hits—as well as roughly 8,000 other hit albums certified by the RIAA—from the RIAA Web site.³ The source reports individual certifications. An album is certified “gold” when it has sold .5 million units and “platinum” when it sells 1 million, and it receives a multiple platinum certification for each additional million copies sold. An album released in, say, 1985, can continue to sell in subsequent years. We attribute the additional sales leading to most recent certification to the year of the current certification. This makes the certification-based data compatible with the RIAA aggregate sales data (except that the aggregate data also include albums selling fewer than .5 million copies). The RIAA also provides data on annual units sold and revenue. Figure 1 shows the overall and certified album sales. Albums certified by the RIAA account for roughly three-quarters of overall sales.

Table 4 presents the average number of purchases and downloads, in the current and hit samples, overall and by race and school.⁴ Respondents report an average of 7.8 hit purchases and 5.1 hit downloads (for albums first certified in 1999 and by late 2003 selling at least 2 million copies). Blacks download fewer albums than others in the sample. Penn students in our sample download substantially more albums than Hunter, CCNY, or Chicago students (7.2 hit albums as opposed to 2–3). Interestingly, Penn students purchase fewer albums than the others, which suggests sales displacement.

We can compare our self-reported purchase information with aggregate data on album sales. According to the RIAA, U.S. album sales in 2002 totaled \$11.233 billion. Of this total, 11.5 percent, or \$1.292 billion, was sold to persons aged 20–24. According to the 2000 census, there were 18.964 million persons in this age group in 2000. Dividing, we get average annual expen-

³ RIAA, Gold and Platinum (<http://www.RIAA.com/gp/default.asp>).

⁴ In this paper we group albums received as gifts with purchases. All exercises reported in the paper were also performed excluding gifts from purchases. No substantive results change.

diture of \$68 per person aged 20–24. Given the price of CDs, this translates to just under five albums per person. Our respondents, by contrast, report purchasing an average of 2.6 albums in the past year.

We can also examine the share of albums obtained via download by date of first certification, 1999–2003. The number obtained declines over time because albums released later have fewer years of sales exposure. Roughly a third of hit albums released in 1999 are obtained by downloading. The share rises to nearly half for albums released during 2002–3.

V. SALES DISPLACEMENT

A. Does Downloading Reduce Album Sales?

Aggregating our survey data to the respondent level creates data on album purchases and downloads for 412 individuals. Of these, 364 have valid data on all variables needed for basic analysis of the hits. Our first pass at the sales displacement question is through cross-sectional regressions of the number of albums purchased on the number of albums downloaded and a host of controls. In particular, we estimate the following equation:

$$P_i = X_i\beta + \alpha D_i + \varepsilon_i, \quad (1)$$

where P_i is individual i 's purchases of albums from some set (either the hit or current), D_i is individual i 's downloads of albums (again from some set), X_i includes characteristics of the individual such as his or her level of interest in music, race, and income, ε_i is unobserved characteristics, and α and β are coefficients to be estimated.

Columns 1–3 of Table 5 report estimates of equation (1) using the entire hit album sample. In this equation, P is the total number of albums on the hit list (those albums selling 2 million or more between 1999 and 2003) that the individual has purchased, while D is the number of those albums that the person has obtained via downloading. The first column shows that the estimated sales displacement coefficient α using the full time period is insignificantly different from zero. The result does not change if we control for school (column 2) or estimate a Tobit rather than an OLS model (column 3). Columns 4–6 present estimates of equation (1) using the current sample. The OLS regressions in columns 4 and 5 give displacement estimates of $-.17$ to $-.19$, changing little when we control for school. Column 6 reports a Tobit estimate on the current sample, yielding a negative and significant displacement estimate.⁵

In interpreting these estimates, it is important to keep in mind that broadband Internet access stood at low levels for our respondents in 1999. If a

⁵ Because purchases are positive for 243 of 347 observations, the associated displacement estimate is $-.18$.

person is not connected, there is no scope for downloading to displace her purchases. Many, if not most, of the persons in the sample purchased 1999 releases prior to having the ability to download. The sales displacement question is addressed cleanly only when people have the ability to download albums at the time they might otherwise have purchased them. These considerations suggest that recent years would be most useful for detecting possible displacement and explain why we see displacement in the current estimates but not for the 1999–2003 hits overall. When we estimate equation (1) only on the hits first certified in 2003, we find displacement of $-.09$ ($p = .10$, two-sided).

The estimates in Table 5 are vulnerable to the concern that downloading is endogenous, or at least that it is subject to unobserved heterogeneity. We might expect music lovers to both download and purchase more music. One way to deal with this is simply to recognize that it would lead OLS regressions to underestimate the amount of sales displacement and to view our coefficients as underestimates of true sales displacement. Alternatively, one can try to find instruments for music downloading that are not themselves related to music demand. The speed of one's access to the Internet can serve as such an instrument, provided that connection speed is exogenous to interest in music. It would undermine this strategy, for example, if people chose high-speed connections because of their interest in music.

We have two approaches to using access speed as an instrument for downloading. First, we can use the school the student attends, and second, for a subsample, we can use whether she has broadband access. Far more than college students at Hunter or CCNY, or M.A. students at Chicago, Penn students live in dormitories with high-speed Internet access. "Only 612 of Hunter's 17,000 students have the opportunity to live in the Residence Hall."⁶ And there are no dormitories at CCNY.⁷ By contrast, there is space for "roughly 5,600" of the nearly 10,000 undergraduates at Penn.⁸ Our own survey shows this: broadband access is ubiquitous among Penn students and far less common among others. Our two instrumental variables (IV) strategies are (1) to use which school they attend to instrument downloading and (2) to use the survey's individual measure of broadband access as an instruments.

The first four columns of Table 6 present first- and second-stage regressions on the hit sample. The first two columns report first-stage (download) regressions, using school attended and the individual broadband access variables, respectively, as instruments for downloading. As one would expect from the raw data in the tables, Penn students download more than other

⁶ Hunter: Brookdale Residence Hall (<http://studentservices.hunter.cuny.edu/rhhome.shtml/index.html>).

⁷ About the City College of New York (http://www.ccnycuny.edu/bulletin02/about_usU.htm).

⁸ Dina Matkevich, University of Pennsylvania Housing and Conference Services, e-mail to the author, March 30, 2006.

TABLE 5
ORDINARY LEAST SQUARES (OLS) AND TOBIT SALES DISPLACEMENT ESTIMATES

	HIT PURCHASES ($N = 364$)			CURRENT PURCHASES ($N = 347$)			2003 HIT PURCHASES ($N = 364$):
	OLS (1)	OLS (2)	Tobit (3)	OLS (4)	OLS (5)	Tobit (6)	OLS (7)
Current downloads				-.1945** (.0718)	-.1722* (.0728)	-.2579* (.1001)	
Hit downloads	-.0266 (.0521)	-.0085 (.0527)	-.0310 (.0598)				-.0910 (.0556)
Male	-3.3089** (.9708)	-3.5692** (1.0173)	-4.4627** (1.1373)	-.6344* (.3167)	-.6188 (.3306)	-1.0338* (.4419)	
Music fan:							
2	4.0584 (2.4907)	3.7992 (2.4789)	8.0407** (2.9994)	.1022 (.8161)	.0572 (.8161)	1.1415 (1.2328)	.3705 (.2494)
3	5.6050** (2.1314)	5.3117* (2.1219)	9.2048** (2.6438)	.9109 (.6982)	.8855 (.6979)	2.4968* (1.0789)	.5430* (.2128)
4	6.7212** (2.1738)	6.4736** (2.1652)	10.6962** (2.6787)	1.9665** (.7144)	1.9228** (.7141)	3.9187** (1.0955)	.6201** (.2173)
5	9.9391** (2.3228)	9.5997** (2.3144)	14.1591** (2.8243)	2.6707** (.7518)	2.5686** (.7527)	4.8472** (1.1391)	.6221** (.2327)
\$25K-\$50K	2.2034 (1.5629)	1.6273 (1.5824)	2.0517 (1.7785)	.5603 (.4988)	.4071 (.5089)	.4576 (.6768)	.0848 (.1564)
\$50K-\$100K	1.0381 (1.3790)	1.1821 (1.4304)	1.5687 (1.6202)	.2371 (.4659)	.2931 (.4823)	.1194 (.6504)	-.0025 (.1373)

\$100K–\$250K	.7783 (1.4597)	1.3815 (1.5420)	2.2364 (1.7435)	.3413 (.4827)	.5042 (.5088)	.5354 (.6845)	.0577 (.1450)
>\$250K	2.6972 (1.6185)	3.4626* (1.7117)	4.3480* (1.9276)	.4111 (.5340)	.6026 (.5647)	.5559 (.7550)	.0485 (.1606)
Black	1.7491 (1.7698)	.3582 (1.8678)	.6459 (2.0700)	.3397 (.5682)	.2338 (.5923)	.4188 (.7799)	.7495** (.1768)
Hispanic	1.7620 (1.6841)	-.0623 (1.8210)	.0169 (2.0131)	-.2467 (.5553)	-.5010 (.6063)	-.2740 (.7901)	.2155 (.1689)
Asian	-.8649 (1.1388)	-.9258 (1.1535)	-1.6524 (1.3002)	-.7525* (.3611)	-.6987 (.3667)	-1.0400* (.4964)	.2989** (.1126)
University of Chicago		-3.5870 (1.9267)	-3.9167 (2.1508)		-.3204 (.6088)	-.5408 (.8167)	
Hunter College		-1.4116 (2.0773)	-1.3880 (2.3001)		.4883 (.7008)	.6874 (.9171)	
University of Pennsylvania		-4.1112* (1.6526)	-4.5066* (1.8442)		-.6275 (.5351)	-.5965 (.7167)	
Constant	2.8597 (2.2992)	6.4934* (2.8164)	2.1786 (3.3257)	1.7047* (.7482)	2.0768* (.9027)	.0260 (1.3107)	-.1857 (.2214)
R^2	.12	.14		.14	.15		

NOTE.—Standard errors are in parentheses. OLS = ordinary least squares.

*Significant at the 5% level.

**Significant at the 1% level.

TABLE 6
INSTRUMENTAL VARIABLES ESTIMATES OF HIT AND CURRENT SALES DISPLACEMENT

SAMPLE	Hit				CURRENT			
	Download		Purchase		Download		Purchase	
	School (1)	Individual (2)	School (3)	Individual (4)	School (5)	Individual (6)	School (7)	Individual (8)
Current downloads							-.8804 (.4570)	-1.4676 (.8502)
Hit downloads			-.5719 (.3334)	-.2563 (.4415)				
Broadband access		3.9311 (2.0540)				1.0707* (.5222)		
Male	.1042 (1.0355)	.4737 (1.3606)	-2.9788** (1.1299)	-3.0819* (1.1891)	.5737* (.2475)	.9173** (.3465)	-.2050 (.4551)	.4658 (1.0341)
Music fan:								
2	3.3970 (2.5165)	3.9291 (3.3562)	5.8858 (3.0582)	6.4379* (3.1422)	.6286 (.6149)	.7874 (.8373)	.4870 (.9552)	.7147 (1.5463)
3	6.0806** (2.1350)	7.5175** (2.7380)	8.8921** (3.1421)	6.8162 (3.9991)	.7307 (.5251)	.9770 (.7038)	1.3940 (.8494)	2.3849 (1.4629)
4	5.8373** (2.1814)	6.7521* (2.8182)	9.8673** (3.1280)	8.7015* (3.7107)	.8491 (.5368)	1.0916 (.7232)	2.5449** (.8912)	3.2605* (1.5214)
5	4.8969* (2.3410)	5.3952 (3.0554)	12.4919** (3.0726)	9.9086** (3.4224)	.8452 (.5661)	1.3516 (.7707)	3.1924** (.9150)	4.8208** (1.7036)
\$25K-\$50K	.6323 (1.6102)	1.1859 (2.2458)	2.3412 (1.7926)	3.5615 (1.9947)	.1678 (.3839)	-.1327 (.5638)	.6081 (.5640)	-.0888 (.9854)
\$50K-\$100K	1.3031 (1.4543)	1.8318 (1.9315)	2.2499 (1.7400)	1.5951 (1.9552)	.5565 (.3627)	.4007 (.5105)	.7611 (.6282)	1.0134 (1.0181)

\$100K–\$250K	1.6783 (1.5669)	.9198 (2.0122)	2.5392 (1.9796)	.1394 (1.8480)	.6131 (.3825)	.4236 (.5225)	1.0042 (.6970)	.9678 (1.0653)
>\$250K	.9148 (1.7415)	.4349 (2.2544)	4.1691* (2.0549)	3.4247 (1.9585)	.6004 (.4248)	.2875 (.5968)	1.1005 (.7535)	.6888 (1.1256)
Black	–.4683 (1.9010)	.1327 (2.5156)	1.0382 (2.0723)	.8998 (2.1152)	.6541 (.4455)	.8319 (.6096)	.6239 (.6679)	.3569 (1.2014)
Hispanic	2.2792 (1.8495)	4.3455 (2.6193)	2.3844 (1.9655)	4.9284 (2.5741)	.4618 (.4568)	.9973 (.6604)	–.1939 (.6278)	1.1861 (1.2501)
Asian	3.4776** (1.1592)	5.8701** (1.5129)	1.3554 (1.8671)	.7168 (2.8829)	–.0192 (.2767)	.1463 (.3935)	–.7229 (.4081)	–.9885 (.6960)
University of Chicago	.0573 (1.9611)				.4089 (.4588)			
Hunter College	–1.3440 (2.1131)				.0841 (.5288)			
University of Pennsylvania	3.6365* (1.6707)				1.0906** (.3994)			
Constant	–4.1479 (2.8580)	–6.7023* (3.3334)	1.2116 (2.8147)	1.7005 (2.9569)	–1.0581 (.6787)	–1.4387 (.8401)	1.3955 (.8686)	1.1489 (1.3918)
<i>N</i>	364	231	364	231	347	219	347	219

NOTE.—The dependent variables are download and purchase. The instruments are school and individual. Standard errors are in parentheses.

*Significant at the 5% level.

**Significant at the 1% level.

TABLE 7
LONGITUDINAL SALES DISPLACEMENT ESTIMATES: HIT SAMPLE

	Purchases from Year: OLS (1)		Purchases from Year All: FE (2)		Purchases from Year > 5: FE (3)	
Downloads from year	-.0447	(.0458)	-.0789*	(.0334)	-.1565*	(.0656)
Year:						
2000	.0527	(.1138)	.0656	(.1137)	.2061	(.2113)
2001	-.6141**	(.0995)	-.6110**	(.1131)	-.9055**	(.2096)
2002	-1.1111**	(.1185)	-1.1141**	(.1131)	-2.0608**	(.2096)
2003	-1.8747**	(.1291)	-1.8987**	(.1154)	-3.5251**	(.2135)
Music fan:						
2	.9301**	(.2558)				
3	1.2497**	(.2035)				
4	1.4370**	(.2221)				
5	2.0663**	(.3374)				
\$25K–\$50K	.3723	(.2932)				
\$50K–\$100K	.1326	(.2475)				
\$100K–\$250K	.0702	(.2776)				
>\$250K	.3923	(.2710)				
Black	.4463	(.3307)				
Hispanic	.4105	(.3766)				
Asian	-.0662	(.2273)				
Constant	.8397**	(.2218)	2.4469**	(.0885)	4.4216**	(.1625)
<i>N</i>	1,820		1,820		820	
<i>R</i> ²	.14		.22		.39	
Number of individuals			364		164	

NOTE.—Robust standard errors are in parentheses. OLS = ordinary least squares; FE = fixed effects.
* Significant at the 5% level.
** Significant at the 1% level.

students, after accounting for race, income, and interest in music. Columns 3 and 4 report second-stage hit displacement regressions, and the estimated hit sales displacement coefficients are $-.25$ and $-.57$. Columns 5–8 repeat the exercise using the current sample, and, again, individuals with broadband access download more, and the estimated current sales displacement coefficients are $-.88$ and -1.47 . The estimated IV displacement coefficients in Table 6 are much larger than their OLS analogs in Table 5, although they are also less precisely estimated.

The panel structure of our data allows another empirical approach. Table 7 uses the panel data, in which a unit of observation is a person by vintage for the hit sample. We estimate equations of the form

$$P_{it} = X_i\beta + \alpha D_{it} + \phi_t + \varepsilon_{it}.$$

Thus we run regressions of the number of albums released in each year that an individual purchased on the number of that year's albums that the person downloads, along with time dummies (ϕ_t) and our various controls. These pooled cross-section time-series estimates give sales displacement coeffi-

coefficients of roughly $-.04$, but they are not significant. The second column of Table 7 incorporates individual fixed effects, identifying the sales displacement coefficient from the relationship between changes in the tendency to download and changes in the tendency to purchase, over and above the common vintage pattern. That is, we make the substitution $\varepsilon_{it} = \mu_i + \nu_{it}$, where μ_i is an individual-specific fixed effect and ν_{it} is an individual- and year-specific error. Here we obtain a coefficient estimate of $-.08$, and it is statistically significant. When we restrict attention to persons purchasing more than five albums from the hit sample, we get a coefficient twice as large ($-.15$ and significant).

What do all of these estimates mean? Estimates based on data for periods when downloading is feasible suggest sales displacement of roughly $-.2$ per album downloaded in the OLS specifications and much higher values in the IV estimates. Average current-year downloads—see Table 4—were 1.24, while current purchases averaged 2.61. Using the $-.2$ displacement estimate, in the absence of downloading, purchases would have averaged 2.86, which suggests that downloading reduced purchases by individuals in the sample by about 9 percent.

B. *Do Consumers Download High- or Low-Value Music?*

Before analyzing the valuation data, it is worthwhile to discuss the virtues and shortcomings of survey-based valuation information. Economists have traditionally been skeptical of surveys of valuation because a respondent's valuation of an object he has never thought about—or never will see—may not have any meaning (Diamond and Hausman 1994). In our context, however, we are asking about familiar objects. Indeed, we are in particular asking about objects that the respondents actually possess. Moreover, these are objects of a sort the respondents have obtained repeatedly, so their valuation responses may be more meaningful than responses about unfamiliar and largely hypothetical goods.

Hence, we are willing to put aside qualms about survey valuation data to ask whether downloading is a means of obtaining high- or low-valuation albums. To this end, Tables 8 and 9 report album-level regressions of log valuation on a downloading dummy. Table 8 reports regressions of log (ex post) valuation on a downloading dummy, using data from survey 1. Only buy valuation data are included in these regressions (to ensure comparability with survey 2 results). The first column shows that downloaded hits are valued 33 percent below purchased hits. The second column shows that downloaded current albums are valued 39 percent less than purchased current albums. Standard errors in all regressions are adjusted for clustering on individuals. Columns 3 and 4 repeat the exercise with individual fixed effects, showing not only that downloaded albums are less valuable than purchased albums but also that this is true within individuals.

TABLE 8
RELATIVE VALUATION OF DOWNLOADED CDS: SURVEY 1, EX POST VALUATION
(Log Values) ($N = 1,133$)

	ORDINARY LEAST SQUARES		FIXED EFFECTS	
	Hit (1)	Current (2)	Hit (3)	Current (4)
Downloaded	-.330** (.072)	-.390** (.089)	-.177** (.023)	-.238** (.041)
Constant	2.382** (.037)	2.605** (.038)	2.331** (.011)	2.557** (.018)
N	4,017	1,011	4,017	1,011
R^2	.05	.08	.02	.04
Number of individuals			284	226

NOTE.—Robust standard errors are in parentheses.
** Significant at the 1% level.

TABLE 9
RELATIVE VALUATION OF DOWNLOADED CDS: SURVEY 2, EX ANTE AND
EX POST VALUATIONS, HITS ONLY (Log Values) ($N = 1,133$)

	ORDINARY LEAST SQUARES		FIXED EFFECTS	
	Ex Ante (1)	Ex Post (2)	Ex Ante (1)	Ex Post (2)
Downloaded	-.4623** (.0822)	-.2654* (.1043)	-.2857** (.0283)	-.0857 (.0511)
Constant	2.7104** (.0348)	2.3879** (.0765)	2.6253** (.0175)	2.3013** (.0317)
R^2	.15	.02	.09	.00
Number of individuals			93	92

NOTE.—Robust standard errors are in parentheses.
* Significant at the 5% level.
** Significant at the 1% level.

Table 9 performs a similar exercise on the ex ante and ex post hit valuation information from survey 2. As in survey 1, the ex post valuations of downloaded albums are nearly a third (27 percent) less than the valuations for purchased albums. The ex ante valuations of downloaded albums, relative to purchased albums, however, are even lower than the ex post valuations (46 versus 27 percent). At the time of obtaining the music, then, persons expect the albums they download to be much less valuable to them than purchased music. This suggests that they would not have been willing to pay much for this music and that they would not likely have purchased it. But the coefficient estimate describes only the average valuation difference between downloaded and purchased CDs. A more thorough analysis of downloading requires information about the full structure of ex ante valuation (for demand) and ex post valuation (for welfare).

TABLE 10
EX ANTE AND EX POST VALUATIONS

	Mean	Ex Post Valuation (1)	Ex Post – Ex Ante Valuation (2)
Ex ante valuation	\$13.34	.8178** (.0183)	
Ex post valuation	\$11.94		
Ex ante and ex post correlation	.6389		
Pleasantly surprised	16.4%	4.2537** (.4657)	
Grew on me	16.5%	4.7717** (.4656)	
Familiar before I bought	21.8%	.2707 (.4921)	
Guessed right	11.5%	.1277 (.5110)	
Disappointed from start	9.5%	–5.5276** (.5782)	
Grew tired of it	31.7%	–5.2951** (.5028)	
Released in 1999			–3.1906** (.7635)
Released in 2000			–1.7907* (.7534)
Released in 2001			–1.7723* (.7931)
Released in 2002			–.0587 (.8038)
Constant		1.6733** (.5214)	.3375 (.6831)
R^2		.74	.03

NOTE.—Standard errors are in parentheses. $N = 1,209$.

* Significant at the 5% level.

** Significant at the 1% level.

C. *Ex Ante and Ex Post Valuation of Music*

This section provides some descriptive characterization of the ex ante and ex post valuation data. For each album, we asked for an ex ante valuation, a price (if they purchased the album), an ex post valuation, as well as indicators for why the current valuation deviated (from the initial valuation). If the current valuation exceeded the initial valuation, we allowed respondents to indicate (1) that they were pleasantly surprised, (2) that the music grew on them, or (3) both. If the current valuation equaled the initial, we allowed respondents to indicate that (1) they were familiar with the music before purchase, (2) they guessed right, or (3) both. Finally, if the current valuation fell short of the initial valuation, we allowed respondents to indicate that (1) they were disappointed from the start, (2) they grew tired of the music, or (3) both.

The data are described in Table 10. The average ex ante valuation is \$13.34, while the average ex post valuation is \$11.94 for the 1,209 albums in survey 2, which indicates depreciation. Respondents report higher ex post than ex ante valuations because of pleasant surprise at 16.4 percent of albums and that 16.5 percent of albums grew on them. Respondents report equal ex post and ex ante valuations: 21.8 percent of albums were familiar before purchase, and respondents guessed accurately on the value of 11.5 percent of albums. Finally, respondents report lower ex post than ex ante valuations for many albums: 9.5 percent of albums are disappointing from the start, while respondents grew tired of 31.7 percent of albums.

These data also allow us to explore the distributions of ex ante and ex post valuations and therefore what the determinants of purchase decisions and welfare look like. Figure 5 depicts the distribution of ex ante valuations, ordered from highest to lowest. The curve is, in effect, a demand curve, since points above any price indicate a willingness for an individual to purchase an album. It is worth noting that the demand curve does not appear to belong to any familiar parametric family. If ex ante valuations, which are guesses about how much the person will like an album, are not accurate, then the area under the demand curve does not represent welfare.

Figure 6 shows the distribution of ex post valuations. This curve is not relevant to purchase decisions, since the valuations are not known at the time of purchase. These valuations are relevant to welfare, however. The curves in Figures 5 and 6 look very similar, but one needs to bear in mind that they are ranked by different variables.

Figure 7 illustrates the distinction between ex ante and ex post valuation more directly; that is, it presents the information in a different way, with a plot of ex post valuation on ex ante valuation and a 45-degree line. This diagram too shows that, while ex ante and ex post valuations are correlated, the correlation, at .63, is far from perfect. Moreover, the preponderance of dots below the 45-degree line indicates depreciation overall.

Column 1 of Table 10 reports a regression of ex post valuation on ex ante valuation and dummies that reflect, for example, whether an individual has grown tired of an album. The coefficient on “grew tired of it” is negative and significant.

The true ex post valuation of an album is the sum over the flow utilities experienced, appropriately discounted. If the flow utility declines over time, then the current valuation of a 3-year-old album will understate its original ex post value. To address this, we examine average depreciation directly, via a regression of (ex post valuation – ex ante valuation) on dummies for year of release.⁹ Albums released in 1999 are on average \$3 less valuable than albums released in 2003, and the earlier the release, the greater the gap, which we interpret as depreciation. Consequently, we adjust ex post valuation by adding back the average depreciation depicted in column 2 of Table 10. By construction this equalizes average ex ante and ex post valuation.

D. Simulating the Effects of Downloading on Sales and Welfare

We now turn to measuring the welfare effects of downloading directly for a subsample. Given that we have data on ex ante and ex post valuations for respondents in the second Penn sample, we can calculate their expenditure, consumer surplus, and the number of albums purchased and downloaded

⁹ We do not know the year the individual obtained the album, but we assume earlier acquisition of albums released sooner.

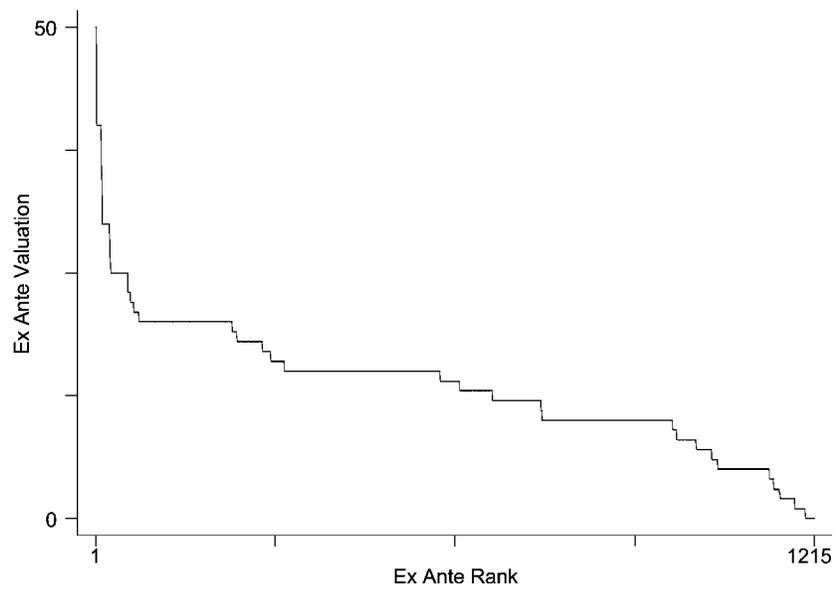


FIGURE 5.—Ex ante valuation: demand

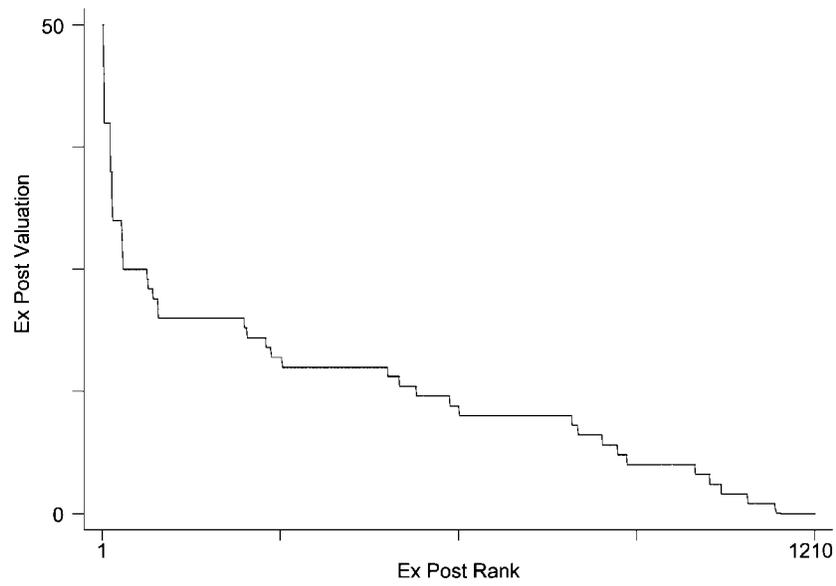


FIGURE 6.—Ex post valuation: welfare

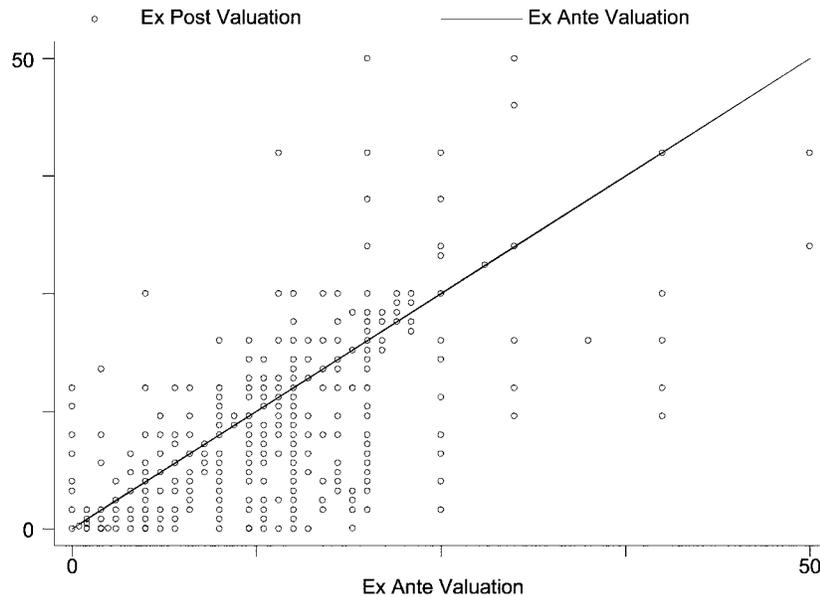


FIGURE 7.—Demand curve and ex post valuation

(in the downloading regime) straightforwardly according to the scheme in Table 1.

Assuming that p_i is \$15, all of the information required to simulate expenditure, consumer surplus, and deadweight loss is available in Tables 11 and 12.¹⁰ Of the 1,209 albums in sample 2 obtained under the downloading regime, 617 albums were purchased, while 592 albums were downloaded by the 92 persons in the (ex post – ex ante) valuation subsample. The buyers paid \$15 per album, generating revenue of \$9,255. Buyers experienced ex post valuations of \$14.94 per album, giving rise to buyer consumer surplus of $-\$37$.¹¹ The 154 downloaded albums that would have been purchased are valued at \$17.91 each, generating \$2,738 in surplus. In conjunction with the 438 albums that would not have been purchased and that are ultimately valued at \$9.48 each, the total downloader surplus is \$6,910 and the overall consumer surplus under downloading is \$6,873.

If downloading were not feasible, the 617 purchased albums would still be purchased, as would 154 downloaded albums with ex ante valuations of

¹⁰ We asked prices paid for albums in survey 2. The mean price paid was \$15.30. The simulation results do not change in important ways if we use different prices (for example, \$13, \$14, or \$16).

¹¹ Note that negative consumer surplus is ruled out by construction with ex ante valuations but is possible with ex post valuation realizations below prices paid.

TABLE 11
REVENUE AND WELFARE WITH AND WITHOUT DOWNLOADING

	<i>N</i>	Price	Ex Ante Valuation	Ex Post Valuation	Ex Post Valuation (Adjusted)
Did buy	617	15	15.91	13.34	14.94
Downloaded, but:					
Would buy if downloading were not feasible	154	15	17.82	16.72	17.91
Would not buy	438	N.A.	8.15	8.28	9.48

NOTE.—Based on 92 individuals in the survey 2 sample. We assume that the price of albums is \$15. Welfare calculations are based on ex post valuation adjusted for depreciation. We assume that a downloaded album would have been purchased if the consumer's ex ante valuation were \geq \$15. N.A. = not applicable.

\$15 or more, generating revenue of \$11,565 from this sample. Sales and revenue—since prices are assumed constant—are 20 percent lower with downloading than without it. Consumer surplus would include both the $-\$37$ from those albums that were purchased along with \$448 from the 154 albums that would have been purchased, generating \$17.91 in ex post valuation on average, for a total of $-\$411$ in consumer surplus. Finally, the sum of the ex post valuations of the albums that would not have been purchased (with ex ante valuations below \$15) generates deadweight losses of \$4,152.

In per capita terms, consumers spend \$126 without downloading and \$101 with downloading. Downloading increases consumer welfare by \$70 per capita for sample individuals. Nearly two-thirds (64 percent) of this derives from the \$45 per capita reduction in deadweight loss. The remaining 36 percent comes from the \$25 per capita reduction in spending.

If we compute consumer surplus and deadweight loss using ex ante rather than ex post music valuations (see Table 12), the results are similar. Downloading raises consumer welfare for sample individuals by \$64 per capita, and 60 percent of this results from the \$39 per capita reduction in deadweight loss.¹²

¹² We administered a small-scale follow-up survey to address two questions left unanswered by the previous analysis, the relationship between song and album downloads and the tendency for people to purchase albums following downloading. Our surveys asked respondents to indicate whether they had obtained “albums” via sharing. As Table 3 indicates, Penn students report downloading roughly as many albums as they purchase (about 7.2). Yet music downloading is done song by song, which raises the question of what it means to download an album. To address this we administered a follow-up survey asking 25 Penn students how many songs they had obtained via sharing from each of the albums in the hit sample. For these students, the mean number of purchased albums is 6.96, just slightly below the full Penn sample average. The average number of albums from which they had obtained at least one song via sharing was 19.7, or more than double the number of “albums” they reported obtaining via sharing. On the other hand, they report downloading an average of only 4.0 entire albums. It appears, then, that including all albums from which they download six or more songs, they obtained 4.1 albums via sharing. Constructing successively more inclusive sharing measures, we obtain the following: including five or more songs yields 4.6, four or more yields 6.3, three

TABLE 12
REVENUE AND WELFARE WITH AND WITHOUT DOWNLOADING

	NO DOWNLOADING		DOWNLOADING		CHANGE	
	Total	Per Capita	Total	Per Capita	Total	Per Capita
Quantity sold	771	8.38	617	6.71	-154	-1.67
Quantity downloaded	0	0	592	6.43	592	
Quantity consumed	771	8.38	1,209	13.41	438	4.76
Revenue (\$)	11,565	126	9,255	101	-2,310	-25.1
Ex post valuations:						
Buyer CS (\$)	411	4.47	-37	-.40	-448	-4.87
Downloader CS (\$)	0	0	6,910	75.1	6,910	75.1
CS total (\$)	411	4.47	6,873	74.7	6,462	70.2
DWL (\$)	4,152	45.1	0	0	-4,152	-45.1
Ex ante valuations:						
CS total (\$)	996	10.82	5,880	74.73		
DWL (\$)	3,570	38.80	0	0	-3,570	-38.80

NOTE.—Based on 92 individuals in survey 2 sample. We assume that the price of albums is \$15. Welfare calculations are based on ex post valuation adjusted for depreciation. We assume that a downloaded album would have been purchased if the consumer's ex ante valuation were \geq \$15. Deadweight loss in this table excludes forgone welfare from albums that consumers are unwilling to either purchase or download. See Table 1 and the surrounding text. CS = consumers' surplus; DWL = deadweight loss.

VI. CONCLUSION

We argue that successfully measuring the possible sales-displacing effect of unpaid music downloading requires data on the quantities of purchases and downloads made by individuals, which led us to conduct original surveys. Using a variety of empirical approaches, we document that downloading displaces sales among a convenience sample of college students. The estimate we consider most conservative indicates that an additional download reduces sales by between .1 and .2 units. As a result, for the individuals in our sample, downloading reduced expenditure by about 10 percent but possibly by much more. Supporting incomplete sales displacement is our finding that downloaded music is valued much less than purchased music.

While downloading reduces expenditure (on hit albums, 1999–2003) by \$25 per capita in the subsample for which we perform a direct welfare analysis of downloading, it raises sample consumers' welfare associated with these albums by \$70 per capita. Some of the benefit to consumers is transfers from sellers, but most of the benefit (\$45 per capita) comes from reductions in deadweight loss.

Our results contrast somewhat with results of other recent studies. Like Zentner (2003) we use individual-level data, but unlike Zentner we find

or more yields 8.8, and two or more yields 14.3. It therefore appears that respondents reported obtaining an album if they have downloaded three or four (or more) of its songs. The follow-up survey also allows us to examine whether people download and then buy. Of the 476 albums—or album fragments—obtained via sharing, respondents subsequently purchased 21, or 4.4 percent.

evidence of displacement in OLS regressions. The difference may be due to the fact that we have continuous measures of album consumption, while his measures are binary. Our results contrast more sharply with Oberholzer and Strumpf (2004), who use a cross-album rather than cross-individual research design. How should one reconcile our results with theirs? In our view, unobservable determinants of music demand are likely to bias both approaches away from finding displacement. Just as albums that are popular to purchase are also popular to download, persons who like music may like to both download and purchase music. These possibilities would lead to positive relationships between downloading and purchases, both across albums and across individuals, even if downloading did not actually stimulate sales. Hence, while a finding of a positive relationship from either of these approaches might be dismissed as a residue of unobserved heterogeneity, we interpret our negative findings as indications that downloads displace sales.

Two facts bear emphasis again. First, our sample is not representative, so our results should not be generalized. Second, our evaluation of welfare takes supply as given. It is entirely possible that downloading has important effects on the quantity and types of music recorded and marketed in the first place. This is an important area for further research.

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CERTIFICATE OF SERVICE

I, Paul Fakler, do hereby certify that copies of the foregoing Public Written Direct Statement of Music Choice, Declaration, Rule 11 Certification of Paul Fakler, Testimony of Damon Williams with Exhibits, Testimony of David J. Del Barraco with Exhibits and Testimony of Gregory Crawford with Exhibits were sent via electronic mail on 29th day of November, 2011 and Federal Express on the 29th day of November, 2011, to the following:

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