

Before the
Copyright Royalty Board
Library of Congress
Washington D.C.

In the Matter of

DIGITAL PERFORMANCE RIGHT IN
SOUND RECORDINGS AND EPHEMERAL
RECORDINGS

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Docket No. 2005-1 CRB DTRA

**Direct Testimony of SBR Creative Media Inc.
Submitted by David W. Rahn, Co-President SBR Creative Media**

SBR Creative Media, Inc. ("SBR") respectfully submits this written statement in the above reference proceeding. As a small, entrepreneurial company we do not have the resources to present as thorough and in-depth case as undoubtedly many of the other participants in this proceeding will. However, we greatly appreciate the opportunity to convey our experience, observations and data and hope these will contribute to the overall outcome of the proceeding.

ABOUT SBR

SBR is a leading independent music, programming, marketing and research consultant to Adult Rock radio stations in the United States and Canada. Its principals David Rahn and John Bradley are nationally recognized as pioneers of the Adult Album Alternative (AAA) format. Its broadcast clients include such notable stations as KFOG/San Francisco (Susquehanna), WXRT/Chicago (Infinity), KBCO/Boulder-Denver (Clear Channel), KMTT/Seattle (Entercom) and many others.

SBR is intimately involved with both the radio and record industries. It hosts the annual Radio and Records Triple A Summit each August in SBR's hometown of Boulder, Colorado. SBR produces New Music Sampler CDs, a unique promotional tool for both recording artists and radio stations. The company also handles licensing and production of benefit CDs featuring in-studio radio station recordings of major recording artists.

In 1999, SBR launched a service called Custom Channels (www.customchannels.net) designed to assist broadcast radio stations, record labels, artists and other commercial sites in the creation, management, streaming and licensing of specialized, DMCA-compliant webcasts contest commonly known as "side channels". Side channels are a way for broadcast stations and others to expand programming offerings and for labels to promote artists and music which may not otherwise have a home on FCC regulated, broadcast commercial radio.

Examples of SBR produced side channels include:

- The KYGO Country New Music Channel
- 107.5 The End Alternative 80's Channel
- The WQMX Classic Country Channel
- Radio Bonnaroo featuring music of the Bonnaroo Music Festival
- The KINK Acoustic Channel
- The KFOG Adult Alternative New Music Channel
- The WJXQ Alternative Rock Channel
- Liquid Radio Live Alternative Rock Channel
- Holiday Music Channels for over 60 stations of all formats each December

As broadcasters, consultants and webcasters, SBR has been a vocal advocate for webcasting as a tool to expand on the programming traditionally offered by broadcast radio and that webcasting offers an unprecedented opportunity to expose and promote artists and music in a way that is economically unfeasible on commercial broadcast radio today.

SBR's David Rahn has been a speaker and panelist on webcasting topics at such industry conventions as the NAB, Streaming Media West, Radio and Records, Radio Ink Radio Internet Conference, Radio and Internet Newsletter (RAIN) meetings and others. SBR is a former member of the Digital Media Association (DiMA) and has actively participated in webcaster's efforts to obtain reasonable and practical licensing solutions to ensure the success and growth of webcasting for the benefit of both webcasters and the musicians whose work is exposed, played and promoted by webcasters.

SBR'S POSITION

SBR fully supports the right of copyright owners to receive fair compensation and return on their creative efforts for the use of their works in digital media.

We believe webcasting – like broadcast radio – is a vital partner to songwriters and musicians. Popular webcasts, like popular radio stations, offer artists an opportunity to expose their work to a listening audience. Artists benefit from the web/broadcaster's audience "reach" and the creative ways Web/broadcasters package and present the artists' works with compelling programming.

Under the Section 114 and 112 statutory licenses of the DMCA, artists benefit directly from webcast royalties and, as with broadcast radio, indirectly through web/broadcast exposure which can result in increased CD and concert ticket sales and important "buzz" which can make or break an artist's career.

Certainly, music-based web/broadcasting cannot exist without reasonable access to music. At the same time, copyright owners must acknowledge the significant contributions that web/broadcasters bring to the equation when they create compelling and commercially-viable programming. There are very few broadcast radio stations that find commercial success by simply playing music in random jukebox fashion. A great deal of research, music programming expertise, on-air personalities, marketing and audience development on the part of the web/broadcaster goes into making any music-based broadcast or webcast venture successful. Only if a web/broadcaster is commercially and financially viable can they stay in business and pay the royalties due record labels, musicians, composers and publishers. So the financial viability of the webcaster is critical if they are to play a role in maximizing the availability of creative works to the public while insuring copyright owners get a fair return on their efforts.

SBR believes the current webcast rates, first established by the U.S. Copyright Office after it rejected the even higher rates proposed by a contentious and controversial CARP (Docket 2000-9 CARP DTRA 1 & 2) are unreasonably high for the webcaster and contribute to making webcasting an unattractive business model. The considerations and conclusions of the CARP were flawed and did not result in rates that "most clearly represent the rates and terms that would have been negotiated in the marketplace." We feel the current rates dramatically overstate the intrinsic commercial value of music performances to the public, have saddled webcasters with an unrealistically high barrier to entry and, as a result, are limiting copyright owners' potential direct royalty revenue from webcasting.

A lot has been changed in the world of webcasting in the five years since the first CARP was convened. SBR respectfully requests the CRB "start from scratch" in its view of the rates and consider real-world and theoretical models as well as the reasoned opinions of a variety of "willing buyer" webcasters in determining acceptable terms and rates. As a small company, we appreciate the opportunity to have a voice in this proceeding whereas we reasonably could not in the prior CARP.

From SBR's point of view, the Section 114 and 112 statutory license rates being contemplated by this proceeding are only part of the overall "music use" costs which the webcaster must consider as part of its operations. Like broadcasters, webcasters also pay royalties to composers, publishers and owners of the underlying musical composition, typically through licensing arrangements with such performance rights organizations as ASCAP, BMI and SESAC ("PROs"). These license agreements, in total will typically cost the web/broadcaster on the order of 4% of revenue.

We cannot understand a rate which places the commercial value of the sound recording at more than three times that of the musical composition, especially given the extensive promotional and exposure opportunities afforded copyright owners through the public performance of their creative works through webcasting and broadcasting. It's widely known that record labels spend tens of millions of dollars a year just promoting their works to radio stations for airplay and exposure to the public. Further, the fact that analogous broadcast radio transmissions pay no royalty for the sound recording whatsoever makes justification for such an excessive rate in the case of webcasting hard for us to fathom.

SBR would be willing to pay a rate for the non subscription digital transmission of sound recordings that is approximately equal to that historically paid to the PROs for broadcast public performances, resulting in a total "music use cost" (to both the PROs and to sound recording copyright owners) on the order of 8% of revenue. This would mean the Section 114/112 licenses together should be on the order of 4% of revenue. This would still result in SBR paying at least twice in total music use fees what a comparable radio broadcaster pays.

We also believe a comparable "per performance" or Aggregate Tuning Hour (ATH) rate can be determined through an analysis of the commercial value of music programming transmitted to a listener as represented by the established and "real-world" economics of broadcast radio.

We encourage the CRB to support the creation of two methods of rate determination: 1) *a percentage of revenue method*; and, 2) *a per performance or Aggregate Tuning Hour (ATH) method* in order to accommodate different webcast business models and encourage growth of the industry by allowing small webcasters a reasonable "foot in the door."

The recommendations of the CARP (Docket 2000-9 CARP DTRA 1 & 2 to determine rates for the 1998-2002 period) were based on negotiations that did not represent a representative "willing buyer/willing seller" standard for the vast majority of then current and potential licensees and did not "most clearly represent the rates and terms that would have been negotiated in the marketplace."

At The CARP, the RIAA presented 26 negotiated licenses as evidence to support their proposed rates. All but one of those licenses appeared to be at or close to the RIAA's so called "sweet spot" of \$.004 (four tenths of a cent). The other agreement – The Yahoo! Agreement – was carefully crafted to preserve the RIAA's sweet spot rate while providing exceptions and rate tiers that would give Yahoo! a lower effective rate that fit Yahoo's business model (primarily retransmission of AM/FM signals over the Internet).

The webcasters and Broadcasters presented what The CARP called "an elaborate theoretical model" to justify and support a much lower rate.

The CARP rejected the webcasters and Broadcaster's model and focused only on the 26 actual licenses presented by the RIAA. The CARP noted that the RIAA had successfully completed licenses with only 26 entities out of the 60 with which it had had "meaningful discussions." And, the CARP noted that these represent only a small portion of the 2300 webcasters that filed Notices of Intent to use the statutory license.

The CARP report at 48-51 notes: "RIAA devoted extraordinary efforts and incurred substantial transactional costs to negotiate successfully a relatively small number (26 agreements out of hundreds of services) of license agreements with mostly minor services -- services that promised very little actual payment of royalties. Such sacrificial conduct makes economic sense only if calculated to set a high benchmark to be later imposed upon the much larger constellation of services." Later, in the CARP notes: "...the Panel infers that this majority of buyers was simply unwilling to agree to the rates RIAA was seeking..."

Of the 26 licenses presented by the RIAA, 25 were deemed by the CARP as being not useful as benchmarks for determining the rate for a variety of reasons:

- They paid no royalties beyond the prescribed minimum.
- They quickly went out of business
- They could not wait for the statutory license due to factors that compelled them to seek a license (often due to the need for "business certainty" to satisfy investors or for public relations purposes)
- The licensee's lack of negotiating sophistication enhanced RIAA's ability to secure above-market rates that it could later offer as benchmarks.

The CARP therefore rejected all of the 25 "Non Yahoo!" agreements and focused entirely on the single Yahoo! Agreement as the benchmark to represent the "willing buyer/willing seller" standard for ALL webcast licensees to fulfill their mission and "establish rates and terms that *most clearly* represent the rates and terms that would have been negotiated in the marketplace."

It is SBR's opinion that the single Yahoo! negotiation was not representative of a willing buyer/willing seller standard for the webcast industry.

We suggest that, like many of the other 25 companies that successfully negotiated agreements with the RIAA, Yahoo! could not wait for the statutory license. Yahoo! had just completed one of the largest Internet business acquisitions in history when it bought the webcast/streaming operations of Broadcast.com for an estimated \$5.7 Billion at the height of the "dot com frenzy." This acquisition dwarfed most any all others done previously or since in the Internet industry and, if it failed, it could have had dire consequences for Yahoo! It could be argued that an agreement with the RIAA on streaming rights would be a cheap "insurance policy" relative to the cost of the Broadcast.com investment to help protect Yahoo! from uncertain future liability or litigation. In our view, Yahoo!, like most every company that sought agreements from the RIAA, needed *business certainty* to reassure shareholders that their Broadcast.com acquisition was a reasonable business decision. Yahoo! had much more to lose from licensing problems than did any other, smaller or stand alone webcaster. So, a few tens or even hundreds of millions in license fees was arguably a good business decision to obtain business certainty. But if Yahoo! was a "willing buyer", they had a rhetorical gun to their head – not by the RIAA – but to support and insure the success of Broadcast.com acquisition (we should note that Yahoo! shuttered the Broadcast.com operation just a few months after the CARP concluded).

In our opinion, The CARP should have dismissed the Yahoo! agreement for the same reasons it dismissed the other 25. Unfortunately, due to confidentiality and "non cooperation" clauses of the RIAA/Yahoo! Agreement, the CARP was never able to hear what the Yahoo's real motivation and circumstances behind negotiating the deal they did was. It's only implied by the existence of the Agreement that Yahoo! was a "willing buyer." We don't fault the parties for seeking and getting the confidentiality and non-cooperation language. But the existence of these restrictions serves, in our opinion, to shut out information that would have been highly relevant in order for a free market to exist and to the CARP itself as it tries to set rates for an entire industry.

The CARP, by summarily dismissing the models presented by webcasters, and focusing on a single deal by a major company and which was clearly not representative of the entire webcasting industry, failed in its mission of determining a marketplace rate between a willing buyer and willing seller by failing to consider the industry – theoretical models and all – as a whole. The fact that so few webcasters out of thousands were willing buyers at the rates requested by the RIAA should carry as much or weight than the fact that one company did.

The U.S. Copyright Office rejected the CARP proposal and established rates for the 1998-2002 period which were approximately half of those proposed by the CARP. We feel the rates proposed by the flawed CARP were seven times higher than was acceptable to the majority of webcasters. So while the Copyright "adjustment" was welcome relief, the established rates were (are) still at least three time higher than we find acceptable.

BROADCAST RADIO AND WEBCASTING ARE ANALOGOUS IN MATERIAL RESPECTS

Over the past five years, the lines between internet-delivered radio programming and terrestrial broadcast-delivered programming has become blurred in the minds of the audience. Listeners have embraced streaming media and to many the PC is their preferred "entertainment appliance" often replacing AM/FM radios especially in the work setting. In the past 12 months many broadcast radio stations have begun streaming their signals again, not because it makes great economic sense but because listeners are demanding it.

The majority of DMCA-compliant webcasters of music-based programming have very similar business models to those of their over-the-air radio broadcast programming cousins.¹

As with the broadcaster, the webcaster relies on two primary methods of generating revenue: 1) the sale of commercial advertising time; or 2) subscriptions or donations from listeners. In either case, the Web/broadcaster needs to create exceptionally compelling programming in order to build an audience large enough to be of interest to advertisers and/or passionate enough about the programming to be motivated to send the web/broadcaster money directly.

Both must reach a certain level of "critical mass" of audience size and revenue before their fixed costs of rent, equipment, staff, etc. are covered and they can begin to make a profit.

Radio broadcasters have learned that creating compelling programming capable of generating an audience big enough to support the enterprise requires more than just putting the program director's favorite songs into a playlist and hitting "shuffle". Audience research, marketing, personalities, promotional imaging, and many other investments must be made in order to attract a sizeable audience in a competitive marketplace.

The web/broadcaster must make significant contributions of time, creativity, capital investment, risk and marketing foresight to open a new market for their service. Radio stations all have access to the same vast pool of musical works from which to choose. But some stations (even among those with comparable formats, broadcast signals and financial resources) are more successful than others because of the many contributions that skilled music programmers, marketers and personalities bring to the equation.

SBR asserts it does not cost any LESS to create compelling, audience-generating programming for a webcast than it does to create compelling, audience-generating programming for an over-the-air broadcast.

¹ A common counter-argument to our comparison of webcasting to broadcast radio is that the webcaster does not have to invest in an expensive FCC license and the myriad responsibilities that come with being an FCC licensee. Indeed, the initial "cost of entry" for the webcaster is much lower than it is for the broadcaster. However, an FCC license has an intrinsic asset-value which historically has increased in value as a market's population and advertising revenue increases – often regardless of the performance of the station itself. An FCC license is not an operating expense; it's an asset that will likely be worth more tomorrow than it is today. Webcasters have no such asset; they're merely "renters", while broadcasters are "homeowners", building equity year after year. We believe it's more relevant to look at operating expenses and revenue than return on asset value since webcasters have few assets other than their goodwill. Except for those operating expenses specific to an FCC-licensed facility (e.g. costs of license compliance, tower rent, etc.) the programming and operating costs of the webcaster are in all material ways identical to that of the broadcaster.

Radio stations invest in better programming, research, personalities, etc. because their markets have become more competitive. In a major market often *several dozen* radio stations compete for the ears of listeners. But the radio broadcaster's competitive situation pales in comparison to that of the webcaster. The webcaster not only has to compete with over 10,000 well-entrenched broadcast radio stations across the country, but as well with of *thousands* of on-line webcast offerings vying for the attention of listeners scattered not just in local markets, but all over the globe.

To the audience, listening to most webcasts of music programming is a very similar to listening to a broadcast station – it's a non-interactive, "sit back" experience. Like radio listeners, webcast listeners vote with their knob (or mouse). If they like the content, they keep listening; if they don't they switch stations.

KEY DIFFERENCES BETWEEN BROADCAST RADIO AND WEBCASTING

Although broadcast radio and webcasting are very similar in the keys areas of programming methods and content cost structure, revenue business models and end-user (listener) experience, there are several key differences between the mediums which should be noted.

Even if webcasters, like broadcasters, were to pay no sound recording performance royalty DMCA compliant webcasting would be economically disadvantaged relative to broadcast radio. Webcasting has to deal with:

- **No equity in FCC license.** FCC licenses are the broadcaster's key asset – a regulated, finite supply and transferable asset. Licenses are expensive but, like real estate, increase in base value with population increases and market ad revenue. Webcasters own no real estate.
- **Unlimited competition.** Radio is a federally-regulated oligopoly resulting in a limited amount of AM/FM signals and on-air advertising inventory in each market. There is no limit to the number of webcasters that can exist.
- **DMCA Programming Complement restriction.** Compliant webcasters cannot provide certain kinds of programming features (such as extended album or artist features) that broadcast radio can program without restriction.
- **Lack of sales and ratings infrastructure.** Radio enjoys the benefits of an efficient, highly-evolved and standardized relationship with advertisers and ratings services which aid greatly in Radio's ability to generate revenue easily with audience ratings. Webcasting's ratings and sales infrastructure is in its early stages of infancy.
- **Webcasting doesn't "scale" well.** In radio, the cost of adding an additional listener is zero. Since webcasters pay bandwidth costs for each additional connection, operating costs of content delivery increase in a straight-line correlation to audience size.
- **Not ubiquitous and "free" to listeners.** AM/FM radios exist in nearly every American home and car and are available to listeners at a very low cost. Webcasting requires listeners purchase specialized equipment and often an internet connection, presenting an additional barrier to acquiring listeners. To date, webcasting is primarily a "wired" medium, requiring listeners to be at a PC or other appliance with an internet connection.

On the positive side, webcasting has a **low cost of entry** compared to broadcast radio. Webcasters can offer multiple unique and experimental programming choices to superserve niche audiences that broadcast radio would never consider due to its extreme high cost of entry. This should be of particular interest to the vast majority of recording copyright owners who have little opportunity to benefit from exposure to the public of their creative works through broadcast radio airplay.

Certainly we expect that some of these differences –especially those related to sales infrastructure and ubiquity of service –will diminish over time and with growth of the industry and technology. But for the foreseeable future (and certainly in the next five years) we expect the economics of webcasting to be significantly inferior that of broadcast radio.

By presenting these points of similarities and differences, we do not mean to imply that webcasting can or should be in the business of competing directly with broadcast radio. Instead, we believe webcasting is a valuable and much needed extension of the entertainment, information services to the public beyond what the limited number of broadcast radio stations in existence can realistically offer. However, we do wish to emphasize that the two mediums have far more in common in terms of business plans, operations, content creation costs and listener experience than they have differences.

Because there is no unified ratings service or revenue reporting mechanism for webcasting, it's impossible to estimate how many Aggregate Tuning Hours are transmitted or how much revenue is generated by webcasters per ATH annually as we can with broadcast radio. But our experience in both mediums over the past five years tell us when it comes to generating revenue from the value of a listening audience of any size, the economic advantage clearly and logically falls to the favor of the long-established, regulated, ubiquitous, highly-efficient, and consolidated broadcast radio model.

Webcasters cannot hope for a level playing field when it comes to competing to radio economically. Broadcast radio is the "gold standard" of economic success that webcasters seek someday to obtain. But onerous music use license fees far in excess of what broadcast radio pays for analogous services only serve to set webcasting back even further back.

COMMERICAL BROADCAST MUSIC RADIO AS A BENCHMARK FOR DETERMINING THE COMMERCIAL VALUE OF THE TRANSMISSION OF A MUSIC PROGRAMMING TO A LISTENER.

Because of broadcast radio's long history as the primary way the American public becomes exposed to and listens to music, we suggest that radio represents a near-perfect "real world" example to determine the commercial value of the transmission of a music recording to a listener. We believe this analysis would be helpful in determining a *per performance* or *Aggregate Tuning Hour (ATH)* rate comparable to our proposed "percentage of revenue" rate of 4%.²

As our calculations in Exhibit A show in more detail, we estimate that commercial, music-based radio industry-wide in the United States generates:

\$14.2 billion in direct advertising revenue on an ATH of about 171 billion total listening hours resulting in average revenue of about 8.3 cents per ATH.

We submit that because of the sheer size of the radio industry, its ubiquity and audience reach in every American market and its variety of market sizes and formats, that music radio's average revenue per ATH is a valid "real world" proxy for the commercial value of an hour of programmed music transmitted to a listener. Further, we believe it's a reasonable benchmark on which to base a per-performance or per ATH royalty rate.

For example, if broadcast radio were subject to the current sound recording performance rates that webcasters are the royalties generated would be:

171 billion ATH x \$.0117 = \$2 billion in royalties annually (or about 14% of estimated music radio broadcast revenue of \$14.2 billion)

In contrast, in 2004 broadcast radio industry-wide (music and non music stations included) paid musical composition performance royalties to ASCAP and BMI of \$176 Million³ each (about 1.2% of the estimated \$14.2 Billion music radio revenue for each⁴).

Under our proposal that digital sound recording transmissions rate should be 4%, comparable to rate historically paid for the musical composition broadcast performance right. It would follow that an appropriate "per ATH" rate would be at most \$.0033 per ATH:

171 billion ATH x \$.0033 = \$564 million in royalties annually (about 4% of estimated music radio broadcast revenue of \$14.2 billion).

² We have argued that broadcast radio in the aggregate is clearly superior to webcasting in terms of generating revenue on the basis of a listening audience. Here, we suggest that broadcast radio revenue per ATH provides a valid benchmark for calculating webcast royalty rates on an ATH basis. We do not mean to be contradictory in our position, only realistic. In our effort to identify real, not theoretical, marketplace data we must look at the closest, most analogous model to webcasting which, we have also argued is broadcast radio. We believe it's possible for webcasters to someday achieve a similar economic return on the value of a listening audience as does broadcast radio. We believe this analysis works to the favor of copyright owners and suggests that webcasting should not be held to a lower economic standard than the broadcast radio benchmark.

³ Source: Radio Music Licensing Committee website

⁴ ASCAP and BMI rates have each historically been in the 1.5% of revenue range, so we surmised that our music radio revenue figures were in the ballpark and, if anything, on the high side. They may actually be closer to \$12 billion than \$14 billion.

As these calculations demonstrate, the current sound recording transmissions rate, if they were required to be paid by broadcast radio, would put a major economic dent in an otherwise healthy and well-established industry. The nascent webcasting industry is in a significantly worse economic position than broadcast radio to absorb the licensing costs as they exist today.

BOTH PERCENTAGE OF REVENUE AND ATH RATE METHODS SHOULD BE PROVIDED

We ask the CRB to consider two options under which webcasters could determine their royalties for non-subscription digital transmissions:

1) 4% of gross revenue; or

2) \$.0033 per Aggregate Tuning Hour (\$3.30 per 1000 ATH)

Each might be subject to certain minimum annual fees per service and restrictions as to how and when webcasters can change their option election.

The option of both rate calculation methods to webcasters will ensure that small webcasters will be able to get started in the business and not have to pay an unrealistically high percentage of revenue while building a "critical mass" of listeners (as most would if only an ATH method were provided).

As the webcaster grows in revenue he/she might decide to elect the ATH model – especially if the webcaster's efforts and contributions result in them achieving more revenue per ATH annually than the average commercial radio station does. This model provides a clear economic incentive for the webcaster to succeed.

In either case copyright owners are paid fairly for the use of their works regardless of the webcaster's audience size and no "free ride" is offered to webcasters.

DIGITAL DELIVERY IS THE FUTURE

As a final comment, we offer some observations as to the future of digital delivery of music programming. As consultants and industry observers, there is little doubt in our mind that digital transmissions is growing rapidly as the preferred method of distributing music programming to listeners. Our world is becoming increasingly "connected" by a variety of innovative means including broadband in homes, WiFi in city centers and neighborhoods, cell phones and PDAs capable of receiving streaming audio and video. Even analog broadcast radio as an industry is working to rapidly deploy digital HD Radio[™] technology for their terrestrial signals.

American listeners are rapidly adopting digital technology as a convenient and often preferred method of receiving programmed content including music programming. Whether it is a stream of a broadcast radio station or one of thousands of internet-only webcasts available, listeners are finding they can hear what they want, when they want it, on a variety of wired and unwired devices that provide an alternative to AM and FM radios.

We expect innovative technology for digital distribution of programming to continue to expand rapidly in the next few years. And we expect there to be more and more content providers seeking to distribute their programming through digital means.

With the exception of terrestrially-transmitted HD Radio, which will not be subject to sound recording performance royalties, all of these other services will either have to negotiate direct licenses or operate under the provisions of the DMCA provided compulsory licenses.

As the world "goes digital" the pie gets bigger. If copyright owners received \$.0033 of broadcast radio's ATH today; they'd be over a half a billion dollars a year richer for it, more than offsetting the millions spent each year on radio airplay promotion. We can't predict if or when digital transmissions might meet or exceed broadcast radio's reach. But it's clear to us that the trend is in that direction.

We believe the unrealistic and ill-conceived rates currently in place will continue to severely curtail interest in providing content for new digital distribution and devices, thus slowing consumer adoption of new technologies and ultimately limiting copyright owner's income.

We appreciate the CRB's consideration of our testimony.

Respectfully submitted October 31, 2005:

David W. Rahn
Co-President
SBR Creative Media, Inc.

EXHIBIT A – COMMERCIAL BROADCAST MUSIC RADIO AS A BENCHMARK FOR DETERMINING THE COMMERCIAL VALUE OF THE TRANSMISSION OF A MUSIC PROGRAMMING TO A LISTENER – FACTS AND FIGURES.

- Radio (all stations) reaches 94.2% of the U.S. Population aged 12+ every week (Arbitron)
- Average Time Spent Listening (TSL) per person = 19 Hours, 45 Minutes per week (Arbitron)
- US Population = 235 Million people aged 12+ (US Census)
- Radio’s Weekly Reach = Population X 94% = 220 million Listeners
- Weekly Hours Tuned to Radio = 220 Million X 19.75 Hours = 4.35 Billion Hours
- Yearly Hours Tuned to Radio = 4.35 Billion X 52 Weeks = 226 Billion Hours
- Subtract 23 Billion Hours to non-commercial radio and “other” listening (10%)⁵
- Leaves 203 Billion Yearly Tuning Hours to Commercial Radio (all formats)
- Music formats account for 84% of all Hours Tuned to Radio each week (Arbitron), so
- Subtract 32 Billion Hours (16%) to account for listening to commercial non music radio (News, sports, etc.)
- Leaves **171 Billion Yearly Tuning Hours to Commercial Music Radio**
- Radio Revenue: \$20 Billion to ALL RADIO in 2004 (RAB)
 - Subtract \$ 1 Billion to Network Sales⁶
 - Subtract \$4.8 Billion to non music stations (25%)⁷
- **Leaves \$14.2 Billion Annual Gross Revenue to Commercial Music Radio**

\$14.2 Billion Revenue


171 Billion Listening Hours **=8.3 cents Per Listener Hour**

⁵ 10% adjustment for non-commercial, satellite and “other” estimate of all Arbitron Reported listening suggested by James Duncan, Duncan’s American Radio

⁶ \$1 billion adjustment for non-station “network” billing suggested by James Duncan, Duncan’s American Radio

⁷ SBR estimate - Music radio accounts for 84% of all listening hours (Arbitron), but a lesser percentage of gross radio revenue as news/talk and sports stations generate a disproportionate share of revenue.

I hereby declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge and belief.

A handwritten signature in black ink that reads "David W. Rahn". The signature is written in a cursive style with a large, looped initial "D".

**David W. Rahn
SBR Creative Media, Inc.
October 31, 2005**

CERTIFICATE OF SERVICE

I, David W. Rahn, hereby certify that a copy of the foregoing DIRECT TESTIMONY OF SBR CREATIVE MEDIA, INC. has been served this 31st day of October, 2005 by electronic mail and by overnight express mail (except where noted by * which was hand-delivered) on the following persons identified on the Service List for Docket No. 2005-1 CRB DTRA published by the Copyright Office on October 20, 2005.

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