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Oral Argument Not Yet Scheduled

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 07-1123, 07-1168, 07-1172, 07-1173, 07-1174, 07-1177, 07-1178, 07-1179

INTERCOLLEGIATE BROADCAST SYSTEM, *et al.*,
Appellants,

v.

COPYRIGHT ROYALTY BOARD,
Appellee,

SOUNDEXCHANGE, INC., NATIONAL ASSOCIATION OF BROADCASTERS,
Intervenors.

On Appeal of an Order of the
Copyright Royalty Board

BRIEF OF APPELLANTS BONNEVILLE INTERNATIONAL CORP. AND NATIONAL RELIGIOUS BROADCASTERS MUSIC LICENSE COMMITTEE AND INTERVENOR NATIONAL ASSOCIATION OF BROADCASTERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Bonneville International Corp. and National Religious Broadcasters Music License Committee (Appellants in Case No. 07-1179) and Intervenor National Association of Broadcasters hereby certify:

A. Parties

The parties to the proceeding before the Copyright Royalty Board were:

(i) the Digital Media Association ("DiMA") and certain of its member companies, including America Online, Inc., Yahoo! Inc., Microsoft, Inc., and Live365, Inc.;

(ii) certain radio broadcasters, including Bonneville International Corp., Clear Channel Communications, Inc., National Religious Broadcasters Music License Committee, and Susquehanna Radio Corp.;

(iii) certain companies participating collectively as the Small Commercial Webcasters, including AccuRadio, LLC, Digitally Imported, Inc., Radioio.com, Discombobulated, LLC, 3WK, LLC, Radio Paradise, Inc.;

(iv) National Public Radio, Inc., Corporation for Public Broadcasting-Qualified Stations, National Religious Broadcasters Noncommercial Music License Committee, Collegiate Broadcasters, Inc., Intercollegiate Broadcasting System, Inc., and Harvard Radio Broadcasting, Inc.;

(v) SBR Creative Media, Inc.;

(vi) Royalty Logic, Inc.; and

(vii) SoundExchange, Inc.

The parties in this Court include Intervenors SoundExchange, Inc. and the National Association of Broadcasters.

B. Ruling Under Review

The order under review is a decision of the Copyright Royalty Board issued on March 1, 2007 and published in the Federal Register on May 1, 2007. *Determination of Rates and Terms, Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. 24084 (May 1, 2007) (codified at 37 CFR pt. 380) (JA __).

C. Related Cases

This case has been consolidated with the following cases in this Circuit: Case Nos. 07-1123, 07-1168, 07-1172, 07-1173, 07-1174, 07-1177 and 07-1178.

Respectfully submitted,

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DISCLOSURE STATEMENT PURSUANT TO RULE 26.1

Bonneville International Corp. ("Bonneville") is a privately held corporation organized under the laws of the State of Utah, with its principal place of business in Salt Lake City, Utah. Bonneville's stock is owned entirely by Deseret Management Corporation, also a privately held corporation. Bonneville has not issued any shares or debt securities to the public, and it has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

National Religious Broadcasters Music License Committee ("Committee") is a non-profit, incorporated association of radio station owners, which serves and represents specialty and talk-formatted radio stations in music licensing proceedings. The Committee has not issued any shares or debt securities to the public, and the Committee has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

National Association of Broadcasters ("NAB") is a non-profit, incorporated association of more than 8,300 local radio and television stations and also broadcast networks, which serves and represents the broadcasting industry. NAB has not issued any shares or debt securities to the public, and NAB has no parent

companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public.

Respectfully submitted,

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JURISDICTIONAL STATEMENT

The Copyright Royalty Board's ("Board") Determination of Rates and Terms was published on May 1, 2007. *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. 24,084 (May 1, 2007) ("Order") (to be codified at 37 C.F.R. pt. 380). Appellants filed timely notices of appeal on May 31, 2007. Jurisdiction and venue are proper in this Court under 17 U.S.C. § 803(d).

STANDING

Appellants have standing because they (or their members) are subject to the rates and terms imposed by the Board. *Brooklyn Union Gas Co.* v. *FERC*, 409 F.3d 404, 406 (D.C. Cir. 2005).

RELEVANT STATUTES AND REGULATIONS

The relevant statutes and regulations are contained in an Addendum to the brief of Appellant Royalty Logic, Inc. and are incorporated herein by reference.

STATEMENT OF ISSUES

1. Whether the Board's threshold decision to require Simulcasters to pay a per-performance, per-listener royalty, rather than an annual flat fee, violated the Copyright Act and the Administrative Procedure Act ("APA").

2. Whether the specific per-performance rates that the Board selected violated the Copyright Act and the APA.

STATEMENT OF FACTS

Appellants adopt the statement of the case and statement of facts in the brief of Appellants DiMA *et al.*

SUMMARY OF ARGUMENT

The Board's threshold ruling that terrestrial radio stations that stream their stations on the Internet ("Simulcasters") must pay a per-performance, per-listener royalty, instead of an annual flat fee royalty, was unlawful. The Copyright Act requires the Board to determine the rates and terms that a willing buyer and willing seller would have negotiated in the marketplace, and it separately requires the Board to identify the different "types" of webcasters that should pay different rates. Simulcasters submitted extensive evidence showing that these statutory tests required an annual *flat fee* royalty, because that is what Simulcasters have negotiated in other similar marketplace contexts and because a per-performance fee structure would undermine Simulcasters' business models. The Board's Order never addresses any of Simulcasters' arguments. *See* Order at 17-25 (JA__). This is a fundamental violation of basic principles of administrative law. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (decision must be reversed if it "entirely failed to consider an important aspect of the problem").

Even if the Board could have justified a per-performance fee structure for Simulcasters, the Board's determination of the precise royalty rates was unlawful for four principal reasons. *First*, the Board's decision to use royalty agreements between record companies and *interactive* webcaster services as benchmarks was arbitrary and violated the Act's "willing buyer/willing seller" standard. Although the statute permits the Board to look at rates and terms from market agreements involving "comparable types of digital audio transmission services," interactive services are not remotely "comparable" to the non-interactive services at issue here. *Second*, the Board's brief discussion of why Simulcasters should not pay a lower per-performance rate than Internet-only webcasters was arbitrary and failed to consider the record evidence. *Third*, the mathematical model on which the Board relied in its attempt to adjust for indisputably significant distinctions between interactive and non-interactive services produces absurd results, and the Board's one-sentence rejection of Simulcasters' criticisms was patently arbitrary. *Fourth*, the Board did not consider the record evidence in refusing to permit Simulcasters to use the alternative "aggregate tuning hours" method for calculating royalties.

STANDARD OF REVIEW

Section 803 of the Act provides that "[s]ection 706 of title 5 shall apply with respect to review by the court of appeals under this subsection." *See* 17 U.S.C.

§ 803(d)(3). Section 706 is a provision of the Administrative Procedure Act ("APA"), which requires that agency action be vacated if it is "arbitrary and capricious," "unsupported by substantial evidence," or "otherwise not in accordance with law." *See* 5 U.S.C. § 706.

Agency action is arbitrary and capricious if the agency has not "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (citations omitted). The agency must "consider[] the relevant factors," and "an agency rule would be arbitrary and capricious if the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Id.* The Court may consider only the reasons articulated by the agency itself, and may not supply its own basis for the agency's action. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

ARGUMENT

I. THE BOARD'S THRESHOLD DECISION TO IMPOSE A PER-PERFORMANCE, PER-LISTENER FEE STRUCTURE ON SIMULCASTERS VIOLATED THE COPYRIGHT ACT AND THE APA.

The Board's threshold determination that Simulcasters – *i.e.*, traditional, terrestrial radio stations that simultaneously stream their broadcasts on the Internet

– must pay a per-performance, per-listener royalty instead of an annual flat royalty was unlawful. Order at 17-25 (JA__). The Board *completely ignored* Simulcasters' arguments and extensive evidence that the statute required a flat annual fee structure because of Simulcasters' unique circumstances. The result is a decision that both violates the statute and fails to comply with the most basic requirements of reasoned decisionmaking. *See State Farm*, 463 U.S. at 43 (agency must "consider[] the relevant factors," and "an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem").

The statute requires the Board to undertake several inquiries. The Board must determine what would "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and willing seller." 17 U.S.C. § 114(f)(2)(B). In assessing the marketplace evidence, the Board is entitled to consider the rates and terms for "comparable types of digital audio transmission services." *Id.* And, independently, the Board is required to identify the "different types" of webcasters who will pay different rates: the Board's "rates and terms *shall* distinguish among the different types of eligible nonsubscription transmission services then in operation . . ., such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or

may promote the purchase of phonorecords by consumers." *Id.* The Board did not engage in any of these statutory inquiries specifically with respect to Simulcasters. The "willing buyer/willing seller" standard here required a flat fee structure. Moreover, the Board should have analyzed Simulcasters separately from other webcasters, because of the differences in the "quantity and nature" of Simulcasters' use of sound recordings and the degree to which Simulcasters' services promote, and do not substitute for, the purchase of records.

The Board's errors here stem largely from its unexamined and unwarranted assumption that Simulcasters *today* could lawfully be treated the same way they were in the prior rate-setting decision. *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45240 (July 8, 2002) ("*Webcaster I*"). In that case, the Copyright Arbitration Royalty Panel ("CARP") and Librarian of Congress ("Librarian") derived the prior sound recording royalty rates from a single agreement – the 2001 agreement between the Recording Industry Association of America ("RIAA") and Yahoo!. *Id.* at 45245. At that time, most radio stations contracted with Yahoo! to conduct their simulcasting operations, and Yahoo!, not the station, paid the royalties.[1] Yahoo!, which was an Internet webcaster with a radically different business model from terrestrial radio stations, negotiated per-

[1] Halyburton WDT ¶¶ 5, 28 (JA__); Parsons WDT ¶¶ 26-28 (JA__).

performance rates with RIAA for *all* of its Internet radio stations (Internet-only and simulcasted) in one unified agreement. Although Yahoo! had negotiated separate rates for Internet-only and simulcasted stations (with the simulcaster rate much lower), and although the CARP initially adopted that distinction itself, the Librarian overturned the CARP on this point and used the Yahoo! agreement to set a single, blended rate for all webcasters (thus substantially increasing the simulcaster rate that Yahoo! had negotiated). *Id.* at 45252-53.

Within weeks of *Webcaster I*, Yahoo! exited the simulcaster market and dropped all of its simulcasted stations; Yahoo! never paid the *Webcaster I* rates.[2] Forced to conduct their simulcasting operations (and pay the royalties) themselves, many radio stations decided not to simulcast.[3] This is because a per-performance fee structure undermines any viable simulcasting business model; simulcasting revenues from advertising are relatively small and severely limited in growth for any realistic increases in the number of listeners, while Simulcasters' costs with a per-performance royalty structure increase linearly with the number of listeners the

[2] Halyburton WDT ¶¶ 13, 26-28 (JA__) (executive involved in negotiating Yahoo! agreement has publicly admitted seeking high per-performance rate to force smaller webcasters to rely on Yahoo!); Parsons WDT ¶¶ 26-28 (JA__).

[3] Parsons WDT ¶ 7 (JA__) (only a tiny percentage of Clear Channel stations could economically justify simulcasting, and most were talk stations or stations in very small markets); Broadcasters/DiMA JFF ¶ 3 (JA__).

Simulcaster attracts.[4] This creates a fundamental disconnect between a Simulcaster's cost structure and revenue stream, which results in royalties that quickly overwhelm any potential revenues under any reasonable simulcasting business model.[5] Most of the music stations that tried to simulcast after *Webcaster I* have lost money, RB PFF ¶¶ 271-87 (JA__), and many have resorted to measures designed to limit audience, such as a cap on the number of simultaneous listeners at any one time. RB PFF ¶¶ 21, 279 (JA__).

Given these circumstances, the Board could not simply assume without any analysis that the approach taken in *Webcaster I* remained valid or that there were no relevant differences under the statute between Simulcasters and other webcasters. The statute required the Board to conduct a new analysis under the "willing buyer/willing seller" standard, looking at current market information. But the Board did not consider any of the agreements or other marketplace information in the record specific to *radio broadcasters* at all. In reality, there is no

[4] Simulcasters' ability to generate revenue from simulcasted stations is extremely limited. Even though the *content* of the simulcasted station is identical to that of the terrestrial station, Simulcasters do not retransmit all the terrestrial station's *advertisements* on the Internet, because arrangements between national advertising agencies and talent would make it prohibitively expensive. *See* Parsons WDT ¶¶ 14-21 (JA__).

[5] *See, e.g.,* Parsons WDT ¶ 1(B) (JA__) ("the current fee structure does not permit many Clear Channel music stations to stream without incurring significant economic losses"; "[royalties] increase in direct proportion to listenership, while revenues, derived exclusively from advertising, do not exhibit the same kind of growth"); Halyburton WDT ¶¶ 10-11 (JA__).

marketplace example of radio broadcasters and Internet-only webcasters jointly negotiating royalty agreements in the free market. To the contrary, Simulcasters and Internet-only webcasters separately negotiated royalty agreements with the performance rights organizations representing music composers and publishers, such as ASCAP and BMI, for the use of those works on Internet radio stations, with the Internet-only webcasters negotiating a percentage of revenues arrangement and Simulcasters negotiating an annual flat fee arrangement. RB PFF ¶¶ 202-07 (JA__); *see also* RB Reply PFF ¶ 9 (JA__).[6]

In this regard, ASCAP and BMI appropriately recognized that simulcasting's value is significant but ancillary to the terrestrial stations' core businesses, and therefore those organizations agreed to modest, annual flat fees that are properly tailored to Simulcasters' business models. Indeed, as the record showed, virtually all of the radio broadcasters' royalty agreements are flat fee agreements (including musical works royalties for its terrestrial stations); the Board's per-performance, per-listener fees are derived solely from royalty agreements negotiated by five subscription interactive Internet music services, and therefore have no relevance to the types of agreements appropriate for Simulcasters. RB PFF ¶ 209 (JA__). Accordingly, there was no market evidence

[6] Although such agreements are typically subject to judicial review pursuant to a consent decree, *see, e.g., United States* v. *Broadcast Music Inc.*, 426 F.3d 91 (2d Cir. 2005), these agreements for the use of musical works on Internet radio were negotiated in the free market without court oversight.

supporting the conclusion that Simulcasters as "willing buyers" and copyright owners as "willing sellers" would have reached a marketplace agreement to perpetuate the prior arrangements.

The Board also did not make the required determination with respect to the "different types" of webcasters. *See* 17 U.S.C. § 114(f)(2)(B) ("rates and terms *shall* distinguish among the different types of eligible nonsubscription transmission services . . ., such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers") (emphasis added). Both statutory factors required separate treatment for Simulcasters and a flat annual fee structure, because of Simulcasters' very different circumstances and business models. *See, e.g.*, RB CL ¶¶ 12-19.

While many Internet-only webcasters offer hundreds of channels, each simulcasting terrestrial radio station is offering only a single channel – the simulcasted station.[7] Moreover, simulcasting is ancillary to Simulcasters' primary businesses, which are their terrestrial radio stations – indeed, Simulcasters stream their stations over the Internet mostly to reach local listeners either at their

[7] Sometimes radio stations may offer additional channels available only on the Internet, but those channels would be considered Internet-only webcasting stations for purposes of sound recording royalties. *See, e.g., Webcaster I*, 67 Fed. Reg. at 45257-58.

computers at work or in isolated spots where reception is poor.[8] Equally important, the terrestrial radio stations that Simulcasters stream over the Internet have an intensely local focus. Many Internet-only stations consist almost entirely of music, but simulcasted stations play sound recordings as part of a much larger offering that includes disk jockeys, news, weather, traffic, and much other specifically local content (*e.g.*, local contests and promotions). Because of this intensely local orientation, the great majority of a simulcasted station's listeners are within the terrestrial radio station's broadcast area.[9]

These characteristics, which are unique to Simulcasters, mean that both the "quantity" and "nature" of their use of sound recordings differ from other webcasters' use. Each Simulcaster's audience is small, stable, and extremely localized (typically a tiny fraction of the terrestrial radio station's audience); Simulcasters' local radio stations have no realistic prospect (or ambition) of attracting large national followings on the Internet.[10] Accordingly, there is a natural, practical ceiling on the "quantity" of any Simulcaster's use; the number of performances and listeners is not suddenly going to skyrocket beyond its historically limited levels. RB PFF ¶ 160 (JA__). Internet-only services, by

[8] RB PFF ¶¶ 12, 18, 20 (JA__); *see also id.* ¶¶ 123-40 (JA__); RB Reply PFF ¶¶ 117-19 (JA__); Halyburton WDT ¶ 4 (JA__) ("core business" is over-the-air broadcasting, and "[s]treaming is a supplemental activity").

[9] RB PFF ¶ 18 (JA__); *see also id.* ¶¶ 149-53 (JA__).

[10] RB PFF ¶ 22 (JA__).

contrast, because of the functionally infinite capacity of the Internet, can provide an endlessly expandable number of channels simultaneously – and thus can engage in a potentially unlimited number of sound recording performances. The "nature" of Simulcasters' use is also different. Simulcasters use sound recordings as only one aspect of a much broader offering, whereas most Internet-only services simply offer streams of music, without other features found on terrestrial radio stations, and their services are aimed at a national audience. RB PFF ¶¶ 197-98 (JA__) (terrestrial stations play less music per hour).[11]

The other statutory factor – the degree to which the service promotes or substitutes for record-buying – also distinguishes Simulcasters from other webcasters. Because radio stations have substantial local followings, they are in a position to confer an enormous promotional benefit on record companies, as Congress has recognized for decades.[12] As SoundExchange's own witnesses established, record companies routinely give their sound recordings to radio stations for free, and in addition they spend hundreds of millions of promotional dollars each year (through departments staffed with hundreds of employees) to try

[11] Moreover, most Internet-only services offer the customer the ability to search the hundreds of channels they offer to find the types of music that the customer wants to listen to, and to customize the service to suit the customer's preferences. SX PFF ¶ 233 (JA__); RB PFF ¶ 173 (JA__). Because simulcasters offer only the stream of the simulcasted radio station, simulcasters have no occasion to offer searchable or customizable access to channels. RB PFF ¶ 19 (JA__).

[12] RB PFF ¶¶ 27-35 (JA__).

to convince radio stations to play those sound recordings on the air. RB PFF ¶¶ 51-65 (JA__). As SoundExchange's economic expert conceded – and as common sense confirms – no rational record company would spend these hundreds of millions of dollars each year unless the net promotional value of that radio airplay was at least equal to the amount spent, nor would record companies make these efforts if radio airplay substituted for record sales.[13] Because the simulcasted station is identical to the terrestrial station and serves the same local audience, the simulcasted station confers the same promotional benefits on the record companies; indeed, if anything, simulcasted stations confer only greater promotional value, because Simulcasters' websites typically provide information about the records that are being played, and they even *facilitate* the sales of records through "click-to-buy" features. RB PFF ¶¶ 69-77 (JA__).

Indeed, Simulcasters' services are also less substitutional than Internet-only services. SoundExchange's witnesses contended that what makes a service substitutional is the ability of the user to select and customize from varied offerings. SoundExchange's witnesses conceded that AM/FM simulcasters are not interactive or customizable. *Id.* ¶¶ 87-100, 170-77 (JA__).

All of these differences establish that Simulcasters are a different "type" of webcaster for purposes of establishing the "rates and terms" of the sound recording

[13] RB PFF ¶ 64 (JA__); *see also id.* ¶¶ 79-82 (JA__).

royalty, and should have been analyzed separately. For many of the same reasons discussed above, those differences required a flat fee structure for Simulcasters. The quantity and nature of Simulcasters' use, which ensures that each Simulcaster's audience is small and localized, do not require the sort of per-performance per-listener fee to capture large unanticipated growth in the use of sound recordings (as if their services might suddenly become nationally popular). Similarly, the promotional value of simulcasting, which is enormously valuable to the record companies, would be undermined by a per-performance fee, which gives radio stations a marginal disincentive to play music (and indeed, has frequently either deterred entry or led to caps on the number of simultaneous listeners).

The Board's Order does not even mention, much less address, *any* of this evidence. Its discussion on fee structure is devoted solely to an explanation of why a per-performance, per-listener fee structure is better than a *percentage of revenue* fee structure – as if those were the only two options. Order at 17-25 (JA__). The closest the Board comes to saying anything relevant to Simulcasters' arguments is its suggestion that, in the abstract, royalties that increase with usage are more desirable than revenue-based approaches. *See* Order at 20-21, 23-24 (JA__) (citing only economist testimony from the 2001 CARP proceeding). Simulcasters' proposal, however, addressed this concern: it provided for tiered annual fees that increase with the size of the radio market and with the degree to which the

Simulcaster's format relied on music. RB PFF ¶¶ 325-341 (JA__). The Board's refusal even to address whether Simulcasters should pay an annual flat fee is even more puzzling considering that, in the very next section of the Order on noncommercial webcasters, the Board (1) *does* consider the actual agreements those services entered into, (2) concludes that "in contrast to the general commercial marketplace, [such agreements for noncommercial services] typically structured payments as flat fees," and (3) that such flat fees "do not present the complexity, measurement difficulties, accounting and enforcement issue presented by revenue-based alternatives," and accordingly (4) adopts flat fees for that type of webcaster. Order at 25-28 (JA__).

On this record, the Board's entire rate determination with respect to Simulcasters must be reversed. Simulcasters did not bury their arguments in a footnote; these arguments constituted Simulcasters' central contentions below, consuming multiple witness statements, days of testimony and cross-examination at trial, and the bulk of Simulcasters' proposed findings of fact and conclusions of law. Yet the Board has not even tried to explain why Simulcasters should pay a per-performance, per-listener fee in the first place; it has not even attempted to apply the statutory "willing buyer/willing seller" standard to Simulcasters or make the required determination whether Simulcasters constitute a "different type" of webcaster; and it has not even met the most basic requirements of reasoned

decisionmaking. If the Board believes Simulcasters should not have an annual flat fee, it is obligated to explain why; the APA does not permit the Board simply to ignore Simulcasters' entire case. *See, e.g.*, *Morall* v. *DEA*, 412 F.3d 165, 167, 178 (D.C. Cir. 2005) (agency decision that "entirely ignore[d]" relevant testimony "was stunningly one-sided in its focus and, thus, utterly arbitrary"); *Robinson* v. *NTSB*, 28 F.3d 210, 216 (D.C. Cir. 1994) (agency not entitled simply to ignore testimony); *Puerto Rico Higher Educ. Assistance Corp.* v. *Riley*, 10 F.3d 847, 852 (D.C. Cir. 1993) (agency decision "hardly exemplifies reasoned decisionmaking," because it "failed to address many of the factors upon which [the] application was based and failed to explain the Department's reasons for ignoring them").

II. THE BOARD'S DETERMINATION OF THE ROYALTY RATE ALSO VIOLATED THE COPYRIGHT ACT AND WAS ARBITRARY.

A. The Board's Determination That Agreements Involving Interactive Music Services Were "Comparable" For Purposes of the Statute Was Unlawful.

Section 114(f)(2)(B) requires the Board to determine what "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(2)(B). As part of that inquiry, the Board "may consider the rates and terms for comparable types of digital audio transmission services." *Id.* Here the Board decided to derive royalties for non-interactive webcasting services from four license agreements

between the four largest record companies and five subscription interactive Internet music services. Order at 31-42 (JA__). That decision was clear error for multiple reasons. DiMA explains in its brief why the large increases in royalties (which were already many times the rate for musical works paid to ASCAP and BMI) are unreasonable on their face, why the interactive services benchmark is inappropriate because that market is not sufficiently competitive, and some of the reasons why those services are not "comparable" to non-interactive webcasting. *See* DiMA Brief at 15-27. Simulcasters join that discussion and add the following additional points.

First, interactive music services are not remotely "comparable" to non-interactive webcasting services for purposes of the "willing buyer/willing seller" standard, and that is especially true with respect to Simulcasters. Interactive services, by definition, allow users to pay a fee for the right to listen to the specific music of their choosing, whenever and however they want. *See* 17 U.S.C. § 114(j)(7). Webcasters, by contrast, offer a service in which consumers are passive listeners to a stream of music programmed by the webcaster. The two contexts are apples and oranges: it is essentially the difference between a record store and a radio station.

Simulcasters in particular are the polar opposite of an interactive music service. Interactive services typically permit access to a comprehensive library of

commercially available music at the customer's choosing, while Simulcasters offer a single stream of programming (the simulcasted station). The Board's use of the interactive service benchmark necessarily assumes that webcaster services are just like subscription interactive Internet music services in all respects except for interactivity. Order at 32 (JA__). In holding all else equal, however, the Board's approach necessarily assumes that the non-interactive service has a large number of channels – indeed, SoundExchange's own witness conceded this point. RB PFF ¶ 211 (JA__); *see generally* RB PFF ¶¶ 209-13 (JA__). Accordingly, Simulcasters are *not* just like interactive services but for interactivity, because they do not offer hundreds of channels (*i.e.*, they do not offer the equivalent of a large library of music but merely on a non-interactive basis). Interactive services thus are clearly not "comparable" to simulcasting under any reasonable interpretation of that statutory term. Nothing in the Board's methodology relies on any marketplace information that would account for the difference between an interactive service with the equivalent of hundreds of channels and a radio station with *one channel*. *See, e.g.*, RB PFF ¶ 210(a) (JA__) (none of the Board's benchmark agreements involved radio broadcasters, only large Internet-only music services). The Board's refusal to address any of these points was arbitrary. *See State Farm*, 463 U.S. at 43.

Indeed, the Board ignored the terms of the statute, which place the focus on whether the "type of digital audio transmission service" is "comparable," not whether the type of copyright is comparable. Simulcasters and DiMA argued below that the Board should have used marketplace agreements for musical work royalties that had been negotiated for the *same* "digital audio transmission service" at issue here – non-interactive webcasting services. Broadcasters/DiMA JFF ¶¶ 16-79. The Board instead fixated on the fact that the interactive service agreements involved royalties for sound recordings (Order at 32 (JA__)), even though the "digital audio transmission service" there (interactive music services) was not remotely "comparable" to the non-interactive webcasting services at issue. The Board's approach cannot be squared with the statute, and this Court should now make clear that the statute requires the Board to start with a presumption that, where available, it will look to agreements involving the same type of digital audio service. Although the musical work agreements involve a "digital audio transmission service" that is obviously far more "comparable" to – indeed, it is the same as – the one at issue, the Board chose a very different type of service as its benchmark, which then required a host of complex and irrational adjustments to avoid apples-to-oranges comparisons and to back out the effects of a core feature of that market (interactivity).[14] The interactive services market is simply too

[14] *See also* Broadcasters/DiMA JFF ¶¶ 22, 27-31(JA__).

different from the type of services at issue to use agreements from that market as "comparable" benchmarks – especially with respect to Simulcasters – and the Board did not address these concerns, or contrary precedent, in its Order.[15]

The Board also misapplied the statutory standard in another respect – indeed, it turned the entire statutory test upside down. The statute *requires* the Board to determine what the parties "most clearly" would have negotiated as willing buyers and sellers. 17 U.S.C. § 114(f)(2)(B). The statute then provides that the Board "shall" base that rate determination on "economic, competitive, and programming information submitted by the parties," which must include (1) whether "use of the service may substitute for or promote the sales of phonorecords" and (2) the "relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, costs and risk." *Id.* Only then does the statute provide that the

[15] The Board did not address the Librarian's previous approval of the validity of a musical works benchmark, *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 63 Fed. Reg. 25394, 25404, 25410 (May 8, 1998); *Webcaster I*, 67 Fed. Reg. at 45246-47; Broadcasters/DiMA JFF ¶¶ 48-50 (JA__), or its previous rejection of the use of interactive service agreements like the one the Board relied on here, *Webcaster I*, 67 Fed. Reg. at 45257. *See, e.g.*, *Ramaprakash* v. *FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) ("[a]n agency's failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decisionmaking") (internal quotations omitted).

Board "may" consider rates and terms for "comparable digital audio transmission services." *Id.*

The Board did not follow this framework; instead, working backwards, it did only what was permitted and ignored what was required. The Board considered the entire inquiry to be which agreements were most "comparable"; without referring to any of the statutory factors, the Board selected the interactive service benchmark based solely on SoundExchange's argument that the interactive service agreements, once corrected to remove the effects of interactivity, were "comparable." Order at 32-33 (JA__). Only at the very end of its analysis did it mention any of the factors the statute required it to consider, and even then the Board asked only whether it should make any further adjustment to its chosen benchmark rates to account for these factors. Citing *Webcaster I* (*see* 67 Fed. Reg. at 45244), the Board concluded, conveniently, that all of those factors were already accounted for in its benchmark rates and no further adjustment was necessary. Order at 43-45 (JA__); *see also id.* at 30-31 (JA__).

The Board's approach to the statutory inquiry, and its reliance on *Webcaster I*, were unlawful. As explained above, the "comparable" agreement on which the Librarian was relying in *Webcaster I* was the agreement between Yahoo! and RIAA for the use of sound recordings on the *same* type of non-interactive webcasting services at issue here. *See Webcaster I*, 67 Fed. Reg. at 45245.

Webcaster I cannot be relied upon for the very different proposition that the Board is entitled to assume that the statutory factors are already reflected in whatever type of agreement the Board happens to think is "comparable," merely because it is "comparable." The Board's approach represents an abdication of its statutory responsibility, and essentially reads the remaining factors that the Board is required to consider out of the statute. Moreover, even if the statutory factors were reflected in the benchmark, the Board never explains where or how those factors are reflected. *See also* Broadcasters/DiMA JCL ¶¶ 53-71 (JA__).

The Board's conclusion is particularly indefensible as it relates to the promotional or substitutional value of the services. Interactive services permit a subscriber to pay a fee and obtain access to almost any commercially available piece of music, whenever the subscriber wants it – in other words, the service is tantamount to purchasing music. The Board's claim, in essence, is that the degree to which one service (non-interactive webcasting) promotes a second activity (the sale of records) is already embedded in agreements involving the promoted activity itself (the sale of such music). This is nonsensical, and the Board's unexamined assumption that *Webcaster I* supports such a notion was arbitrary. As explained above, simulcasted radio stations confer enormous promotional benefits on record companies and do not substitute for record sales, and the Board did not even attempt to explain how services that are tantamount to purchasing music could

reflect the degree to which terrestrial radio stations streamed over the Internet promote, and do not substitute for, such purchases. The Board also completely ignored Simulcasters' extensive showing that the relative contributions of Simulcasters and copyright owners greatly favor Simulcasters. *See* RB PFF ¶¶ 101-40 (JA__).

B. Even if a Per-Performance Rate For Simulcasters Was Appropriate, the Board's Refusal To Award a Lower Rate for Simulcasters Was Unexplained and Unlawful.

The only time the Board specifically discussed Simulcasters in the Order was when it considered the limited question whether Simulcasters should pay a lower *per-performance* rate than Internet-only webcasters. Order at 46 (JA__). The Board's two reasons for refusing to do so were both arbitrary.

First, the Board relies again on *Webcaster I,* noting that the Librarian there declined to adopt different rates for Simulcasters and Internet-only webcasters, and asserting that "we find no facts to persuade us of a change in circumstance since then." *Id.* (JA__). This statement is stunning. As explained above, *Webcaster I* was based entirely on the unique negotiating history of the agreement between Yahoo! and RIAA; the Librarian there found that even though Yahoo! had actually negotiated separate rates for the two services, it in reality intended to secure a single blended rate for all its webcasting services. *See Webcaster I*, 67 Fed. Reg. at 45251-53. The Board ignores the undisputed, subsequent facts that (1) in reaction

to the *Webcaster I* decision to increase the simulcasting rate, Yahoo! immediately exited the simulcasting market; (2) the high, per-performance rates have since either precluded or otherwise limited radio broadcasters' simulcasting operations; and (3) since *Webcaster I*, radio broadcasters have uniformly negotiated separate royalty arrangements, with different rates and terms, than Internet-only webcasters. The Board again failed to address an important aspect of the issues. *See State Farm*, 463 U.S. at 43.

The Board's declaration that the record "fails to persuade us" that Simulcasters operate in a "submarket separate from and non-competitive with other commercial webcasters" (Order at 46 (JA__)) is also arbitrary. The record demonstrates that Simulcasters and Internet-only webcasters negotiate separate royalty arrangements with different terms in the free market; the mere fact that they are in some sense competitors, even if true, does not mean that copyright owners would necessarily deal with each group the same way.[16]

More fundamentally, the Board's statements here epitomize three basic errors in the Board's entire approach to this case: (1) The burden should have been

[16] RB CL ¶¶ 7-10 (JA__). Moreover, the "substantial evidence" the Board cited was extremely thin. *See* Order at 46 (JA__) (citing SX PFF ¶¶ 1107-1110). SoundExchange's assertion that Simulcasters and Internet-only webcasters "compete for the same advertisers" was supported by evidence that *Internet-only* webcasters obtain the same advertising from national sources. SX PFF ¶ 1110. In fact, the substantial majority of Simulcaster advertising is locally originated. RB PFF ¶¶ 18, 23 (JA__); *see also* RB Reply PFF ¶¶ 107-10 (JA__).

on SoundExchange to justify its proposed rate increases, and yet the Order here as elsewhere improperly places the burden on the webcasters to accept SoundExchange's framework and offer specific quantified changes; (2) instead of acting like a rate *court* and performing the specific inquiries required by statute and conducting independent factfinding, the Board improperly treated this proceeding essentially like baseball arbitration, and refused to adopt any rate proposal that had not been specifically offered and quantified by a party; and (3) the Board's conclusions constitute unlawful bootstrapping, because it rejects Simulcasters' arguments on the ground that such concerns are already reflected in the Board's benchmarks, but the Board has never explained why Simulcasters are paying a per-performance rate in the first place, why the interactive service benchmark is appropriate for Simulcasters, or specifically how the differences in Simulcasters' services are nonetheless reflected in these benchmarks.

C. The Model Used By The Board To Compute The Royalties for All Commercial Webcasters Is Fatally Flawed.

The Board's failure to acknowledge or explain its decision to compute rates using an economic model that was proven to be fatally flawed and to produce invalid results also requires reversal. *State Farm*, 463 U.S. at 43.

The Board computed royalties using a model proposed by SoundExchange's expert, Dr. Pelcovits (the "Pelcovits Model"),[17] but this model contains at least two fatal flaws. The first flaw – which the Board refused to address – is that simple algebra shows that the model's "key" assumptions are invalid. The Pelcovits Model assumes both that (1) the ratio of the royalty to the retail subscription price is the same for interactive and non-interactive music services,[18] and (2) the difference between the retail subscription price and licensing fee is the same for interactive and non-interactive music services.[19] Simple algebra shows, however, that these relationships hold true only if (1) retail subscription prices for interactive and non-interactive music are the same or (2) the retail subscription price for interactive music service is equal to the license fee for interactive music services.[20]

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[17] Order at 46-48 (JA__).

[18] Pelcovits WDT at 32 (JA__) ("The key to this analysis, of course, is the assumption that the ratio of consumer price to royalty rate would be the same in both markets"); 5/16/06 Tr. 12:14-16 (Pelcovits) (JA__) (this is "a key assumption"); *see also* Pelcovits WDT at 31, 36-37, 41-42 (JA__); Broadcasters/DiMA JFF ¶ 142 (JA__); Broadcasters Rehearing Mot. at 3 (JA__); Broadcasters Rehearing Supp. Br. at 5 (JA__).

[19] 5/16/06 Tr. 185:10-22 (Pelcovits) (JA__) (no "reason to believe that the production costs plus a reasonable profit margin for non-interactive digital services are any less than the production costs plus a reasonable profit margin for interactive music service"); Pelcovits WDT at 13, 34 (JA__); *accord* Brynjolfsson WRT at 10 (JA__); Jaffe WRT at 20 (JA__); Broadcasters/DiMA JFF ¶ 142 (JA__); Broadcasters Rehearing Mot. 3 (JA__); Broadcasters Rehearing Supp. Br. 5 (JA__).

[20] The algebraic steps are shown in Broadcasters Rehearing Supp. Br. at 7-9 (JA__). *See also* Broadcasters/DiMA JFF ¶¶ 146-147 (JA__).

Dr. Pelcovits conceded, and indeed his entire analysis depends on, the fact that both of these latter statements are not even remotely true.[21] Thus, it is mathematical fact that what Dr. Pelcovits contended was the "key to this analysis" is simply wrong.[22]

SoundExchange did not dispute this math. Instead, it tried to explain it away by claiming the Pelcovits Model's assumption that the ratio of the licensing fee to subscription price is the same was only "essentially" correct and was not important to the results.[23] In fact, the model does depend on this precise relationship[24] and Dr. Pelcovits described that relationship as "key" to his analysis.[25] Moreover, changing that assumption quickly changes the results dramatically. SoundExchange itself offered a hypothetical in which it assumed that the ratios of the royalty to retail subscription price for the two services differed by 0.11,[26] which according to SoundExchange, would be "not precisely the same but very close, just

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[21] *See, e.g.*, Pelcovits WDT at 39-40 (JA__) (retail subscription prices for non-interactive services are nearly half that of interactive services); Pelcovits WDT at 36 (JA__) (retail prices are more than $8 and licensing fees are less than $3).

[22] *See* Broadcasters Rehearing Supp. Br. at 7-9 (JA__); Broadcasters/DiMA JFF ¶¶ 146-147 (JA__).

[23] SoundExchange Rehearing Reply at 7-10 (JA__).

[24] Pelcovits WDT at 33-37, 41-42 (JA__); Broadcasters/DiMA JFF ¶ 142 (JA__); Broadcasters Rehearing Mot. at 3 (JA__); Broadcasters Rehearing Supp. Br. at 5 (JA__).

[25] Pelcovits WDT at 32, 36 (JA__); 5/16/06 Tr. 12:14-16 (Pelcovits) (JA__).

[26] SoundExchange Rehearing Reply at 9 (JA__).

as Dr. Pelcovits suggested."[27] But such a change would in fact have a substantial impact on the resulting fee: if the ratio for non-interactive services were .11 lower than that for interactive music, then the proposed license fee would have been nearly 30% lower than the fee proposed by Dr. Pelcovits.[28]

For these reasons, the Pelcovits Model is unusable and the Board's decision to rely on it was arbitrary. The Board never addressed these criticisms at all either in its Order or on rehearing,[29] and its refusal even to consider this fundamental mathematical flaw in the model was clear error. *See, e.g.*, *U.S. Air Tour Ass'n* v. *FAA*, 298 F.3d 997, 1018-19 (D.C. Cir. 2002); *Appalachian Power Co.* v. *EPA*, 249 F.3d 1032, 1053-54 (D.C. Cir. 2001); *Owner-Operator Indep. Drivers Ass'n* v. *Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 204 (D.C. Cir. 2007).

The Pelcovits Model is invalid for a second, independent reason. Using market data, Dr. Pelcovits estimated that the average subscription price for

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[27] *Id.* (JA__).

[28] The Pelcovits Model assumes that the ratio of licensing fees to subscription prices for both interactive and non-interactive services is . Pelcovits WDT at 36-37 (JA__). Dr. Pelcovits estimates that the subscription price for non-interactive music is $4.56, resulting in a computed subscription fee of . If the fee to price ratio for interactive music services were decreased by 0.11 to , as SoundExchange's hypothetical assumes, then the resulting computed license fee would be , *i.e.*, 30% lower.

[29] Broadcasters Rehearing Mot. at 3-4 (JA__); Broadcasters Rehearing Supp. Br. at 6-10 (JA__).

interactive music services is $8.29.[30] He assumed that the market for interactive music services is fully competitive,[31] which means that this price is equal to the provider's cost plus a competitive return on investment.[32] Dr. Pelcovits determined that the average per-performance license fee for the interactive service's use of sound recordings is ,[33] and thus the interactive music service's other costs are .[34] Dr. Pelcovits further testified that these costs net of obtaining the sound recording license would be the same for non-interactive music services, *i.e.*, .[35]

The Pelcovits Model, however, cannot be reconciled with these data. According to the Pelcovits Model, the retail subscription price for non-interactive music services is $4.56,[36] which is *lower* than Dr. Pelcovits's estimate of such services' non-royalty costs plus a competitive return on investment of .[37] Again, the Pelcovits Model keeps refuting itself. His model, at its root, assumes

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[30] Pelcovits WDT at 36-37 (JA__).

[31] Pelcovits WDT at 5 (JA__) ("I further assume that no party has monopoly power"); *id.* at 34 (assuming "competitive market"); Pelcovits WRT at 30 (JA__) (assuming market "fully competitive").

[32] Pelcovits WDT at 34-35 (JA__).

[33] *Id.* at 36-37 (JA__).

[34] Jaffe WRT at 21 (JA__); *see also* Broadcasters/DiMA JFF ¶¶ 143-145 (JA__).

[35] 5/16/06 Tr. 185:10-22 (Pelcovits) (JA__); Pelcovits WDT at 13, 34 (JA__, ___); Jaffe WRT at 21 (JA__).

[36] Jaffe WRT at 21-22 (JA__).

[37] *Id.* (JA__).

that providers of non-interactive music services have been operating at a loss – charging $4.56 for a service that costs *even before paying any sound recording royalties*. This is contrary to the evidence and Dr. Pelcovits's own contentions.[38]

Dr. Pelcovits conceded this serious flaw in his analysis on cross-examination.[39] While his written rebuttal testimony tried to explain it away,[40] his post-hoc arguments do not withstand scrutiny. His main argument was that non-interactive music service providers would simply raise their prices to recover the costs associated with the licensing fee.[41] His data and modeling assumptions, however, result in a negative economic return even before the additional licensing fee, so even if prices were to increase in an amount equal to the licensing fee, his model still predicts that that non-interactive music services are not viable enterprises. Moreover, to the extent that Dr. Pelcovits is asserting that the actual average subscription price for non-interactive services will be different than the

[38] *See, e.g.*, Pelcovits WRT at 30 (JA__) (non-interactive providers have profit margins of nearly percent).

[39] 5/16/06 Tr. 192:4-20 (Pelcovits) (JA__). *See also* Broadcasters/DiMA JFF ¶ 143 (JA__); Jaffe WRT at 20-21 (JA__).

[40] Pelcovits WRT at 29-30 (JA__).

[41] *Id.* (JA__).

$4.56 price used in his model to compute the licensing fee, he is merely conceding that the royalty developed by his model is wrong.[42]

Dr. Pelcovits' backup argument was that perhaps non-interactive service providers are earning supra-competitive profits, and thus would be able to absorb the additional license fee costs.[43] But again, Dr. Pelcovits cannot have it both ways. Either the non-interactive market is competitive, as the Pelcovits Model expressly assumes, in which case non-interactive providers cannot be earning supra-competitive profits; or the market is not competitive, which destroys the foundations on which the model is based. In any case, even if non-interactive music service providers could absorb the full cost of the license fee, that does not address the fact that his data and model predict negative profits even without the license fees.

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[42] The argument is self-refuting for two additional, more technical reasons: (1) According to the Pelcovits Model, the licensing fee is equal to times the subscription price. But if the subscription price is assumed to increase, then the licensing fee must also increase – but that, in turn, would require a further subscription price increase, and so on to infinity, a manifestly invalid result. (2) The Pelcovits Model assumes that the elasticities of demand for interactive and non-interactive services are identical, Pelcovits WDT at 36 (JA__), but changing the price for non-interactive music would change the price elasticity of demand, since Dr. Pelcovits is assuming linear demand curves. *See id.* at 33-34 (JA__); Jaffe WRT at 18-19 (JA__). Therefore, unless the price for interactive music also changes proportionately, and there is no record evidence that it would, the price elasticity of demand for the two services will no longer be the same.

[43] Pelcovits WRT at 29-30 (JA__).

The Board's discussion of this issue was limited to a single, cryptic sentence: "[T]his criticism ignores the profits earned by interactive services, or, alternatively, assumes without basis that the same dollar amount of profit should be earned by services in the non-interactive market."[44] This sentence is incoherent. Even if the reference to "ignor[ing] profits" can be interpreted charitably as referring to Dr. Pelcovits's argument that non-interactive music service providers could raise prices, that argument is illogical as explained above. The Board's statement that the criticism of the model "assumes without basis that the same dollar amount of profit should be earned by services in the non-interactive market" is even more puzzling; that is the assumption that *Dr. Pelcovits* used to compute the royalty, and if that assumption is "without basis," the Board was obligated to explain why it was nonetheless relying on the Pelcovits Model.

In short, the Pelcovits Model is fundamentally invalid and should not have been used for any ratemaking purpose. The Board's one-sentence response falls far short of the "satisfactory explanation" required by the APA. *State Farm*, 463 U.S. at 43; *U.S. Air Tour Ass'n*, 298 F.3d at 1008; *Owner-Operator Indep. Drivers Ass'n*, 494 F.3d at 205; *Appalachian Power*, 249 F.3d at 1053-54; *Columbia Falls Aluminum Co.* v. *EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998). Indeed, in an immediately subsequent proceeding involving copyright royalties for satellite

[44] Order at 40 (JA__).

radio, SoundExchange abandoned its approach here in favor of a completely different approach which, if applied here, would have resulted in rates much closer to what the webcasters proposed. *See* DiMA Brief at 35-36. For these reasons, the per-performance rates for all Commercial Webcasters should be vacated.

D. The Board Should Have Permitted Simulcasters to Use the "ATH" Method.

Finally, even under a per-performance rate, the Board's decision is arbitrary to the extent that it does not permit Simulcasters to use aggregate tuning hours ("ATH") to calculate their royalty payments. The Board's refusal to permit the ATH option again ignores the realities of radio broadcasting. Broadcasters' Rehearing Mot. at 7-8 (JA__). Without the ATH option, it is technically impossible for Simulcasters to report accurately on a per-performance, per-listener metric because the data necessary for each such recording simply is not available. In the context of Simulcasting, the information about the number of listeners to a simulcast station at any given time and the information about what is played and when are tracked by two different systems, and Simulcasters have no technical means for matching up the number of people listening to any given recording at any given time. *Id.* Although Simulcasters could develop systems at great expense that would allow tracking of at least some performances,[45] it was arbitrary to

[45] Even expensive new systems will not allow tracking of all performances; for example, syndicated radio programs typically do not provide the necessary

require Simulcasters to develop such systems given that the costs are enormous compared to the small role simulcasting plays in a broadcaster's operations. The Board recognized these difficulties to the extent they allowed Simulcasters to use ATH for a transition period of two years, Order at 47 n.33 (JA__), but rather than forcing terrestrial radio stations to incur substantial costs and to reorient their entire businesses around an adjunct such as simulcasting, the Board should have simply permitted Simulcasters to continue using the ATH method.

III. THE COURT SHOULD ADOPT THE BROADCASTERS' PROPOSED RATES, OR AT A MINIMUM, REMAND TO THE BOARD TO DETERMINE AN APPROPRIATE FLAT FEE.

Section 803(d)(3) authorizes the Court itself, if it finds the Board's decision to be arbitrary, to "enter its own determination with respect to the amount or distribution of royalty fees and costs, and order the repayment of any excess fees, the payment of any underpaid fees, and the payment of interest pertaining respectively thereto, in accordance with its final judgment." 17 U.S.C. § 803(d)(3). This Court should exercise that option here. Simulcasters provided an extensive showing below justifying a tiered set of flat fee royalties, based on factors including the revenue rank of the radio market, the comparative size of the station within that market, and the format of the station. RB PFF ¶¶ 325-341 (JA

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information in the format the Board's approach requires, and it is unrealistic to expect the terrestrial radio industry to change longstanding practices for the sake of simulcasting.

__). No party below seriously refuted these showings, and the Court can and should simply adopt them here without a remand. In the alternative, the Court should vacate the rate determination and remand this case with instructions to the Board either to determine an appropriate annual flat fee for Simulcasters, or, alternatively, to correct the manifest errors in its per-performance royalties (with refunds from SoundExchange retroactive to January 1, 2006).

CONCLUSION

For the foregoing reasons, the Board's Order should be vacated, and this Court should either adopt Simulcasters' proposed royalty rates, or remand the matter to the Board for further proceedings.

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and this Court's order of November 15, 2007 because this brief contains 8141 words (as determined by the Microsoft Word 2003 word-processing system used to prepare the brief), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF FILING AND SERVICE

I certify that on this 10th day of March 2008, service of two copies of the foregoing Brief of Appellants Bonneville International Corp. and the National Religious Broadcasters Music License Committee and Intervenor the National Association of Broadcasters – Public Version has been made by first-class mail, postage pre-paid, on the following:

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