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In The United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Digital Media Association, et al.
Appellants,

v.

Copyright Royalty Board,
Appellee.

**MOTION OF APPELLANTS DIGITAL
MEDIA ASSOCIATION (“DiMA”), NATIONAL PUBLIC RADIO, INC.,
ACCURADIO, LLC, DIGITALLY IMPORTED, INC., RADIOIO.COM LLC, and
RADIO PARADISE, INC.,
FOR A STAY PENDING APPEAL**

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RELIEF REQUESTED

Pursuant to Fed. R. App. P. 18 and 27 and D.C. Cir. Rules 18 and 27, Appellants the Digital Media Association (“DiMA”), National Public Radio, Inc. (including its member stations and all Corporation for Public Broadcasting-qualified stations, collectively “NPR”), and a coalition of Small Commercial Webcasters (“SCWs”) consisting of Accuradio, LLC, Digitally Imported, Inc., Radioio.com LLC, and Radio Paradise, Inc., hereby request a stay pending appeal of the Final Determination of Rates and Terms (the “Final Determination”) issued by the Copyright Royalty Board (“CRB”) on May 1, 2007. *See* Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24084 (May 1, 2007) (to be codified at 37 CFR pt. 380). The Final Determination is appealable to this Court pursuant to 17 U.S.C. § 803(d), and a timely appeal was filed on May 30, 2007.

REQUEST FOR EXPEDITIOUS CONSIDERATION PURSUANT TO RULE 27(f)

Pursuant to D.C. Cir. Rule 27(f), Appellants request expeditious consideration of this motion. Absent relief in accordance with this motion, the Final Determination will take effect on July 15, 2007 (45 days after the end of the month in which it was published in the Federal Register). 17 U.S.C. § 803. Appellants have contacted both the Clerk’s Office and opposing counsel advising them of this Motion. Appellants have sought the consent of Appellees CRB and SoundExchange, Inc. (“SoundExchange”) to the relief requested by this Application. Neither Appellee has provided consent.

RELIEF SOUGHT BEFORE THE AGENCY

Appellants sought a stay of various portions of the Final Determination as it was initially released on March 2, 2007, arguing that the decision was arbitrary, was contrary to law, and

would cause irreparable harm. The CRB denied that request on April 26, 2007, on the ground that the agency lacked the statutory authority to grant a stay:

Other parties request that the [CRB] stay implementation of certain of the rates and terms established in the Initial Determination until all administrative appeals and judicial review are complete. *See* Motions of DiMA, NPR, and SCW. [The CRB then quoted portions of 17 U.S.C. §§ 803(c)(2)(E)(ii), 803(c)(2)(E)(iii), 804(b)(3).] As these sections of the Copyright Act indicate, Congress, not the [CRB] determined the effective dates for the royalty rates and terms the [CRB] established under Copyright Act Sections 114 and 112. Moreover, Congress determined that these rates would go into effect, notwithstanding any pending motions for rehearing. Finally, Congress set forth the remedy that would apply should those rates later be determined to result in an overpayment or underpayment of royalties. The provisions of these sections are clear and we will follow the statute. As a result, the motions for a stay are **DENIED**.

Order Denying Motions for Rehearing at 3.

PRELIMINARY STATEMENT

This case involves “online radio” or “webcasting” – that is, radio programming transmitted over the Internet instead of the terrestrial airwaves, satellite signals, or cable. Several thousand webcasters offer Internet-only original programming for every conceivable taste. *See, e.g.,* www.live365.com; www.npr.org; www.radio.real.com; www.music.yahoo.com/launchcast; www.pandora.com. Online radio is not confined by radio spectrum limitations and provides a much more diverse range of content, featuring many more independent artists, than terrestrial radio. Appendix (“A”) 1-2. A typical over-the-air station may cycle 40-100 songs through its playlist; an online station might have over 1,000. Online radio services operate under the statutory licenses available at 17 U.S.C. §§ 114 and 112 (the “Statutory License”), and are enjoyed by 50 million to 70 million listeners every month.

On May 1, 2007, the CRB issued the Final Determination, which imposes a radical and arbitrary increase in the copyright royalty rates applicable to online radio services for the period from 2006-2010, while also eliminating the revenue-based alternative royalty structure that

previously existed for certain classes of services (as well as the lump sum arrangements previously in effect for NPR and other noncommercial webcasting services). The decision ignores the interests of the webcasting community and listening public and instead adopts wholesale the basic proposals of SoundExchange, a digital music fee collection body created by the recording industry. The irreparable harm manifests itself in different ways for different Appellants, but one common thread runs throughout: absent a stay prior to the effective initial payment date of July 15, 2007, the decision will cause wide-scale shutdowns of Appellants' webcasting offerings.

The “minimum” fee: The Final Determination imposes a “minimum” fee of \$500 “per station” or “per channel” that – although appearing modest at first glance – threatens to reach truly astronomical levels. Online radio includes not just pre-programmed radio channels, but also a variety of other innovative programming. For example, RealNetworks, Yahoo! and Pandora utilize databases and computer algorithms that enable them to deliver to their listeners playlists of tracks that are inspired by the works of different artists or influenced to some extent by preferences expressed by a listener (while conforming to the programming requirements of the Statutory License). Supplemental Sealed Appendix (“SA”) 18-20, SA 30-32, SA 39-40. Because the CRB failed to provide any clear definition of the terms “station” or “channel,” SoundExchange has taken the position that *each* of the hundreds of thousands (or even millions) of these program streams and playlists constitutes a separate “station” or “channel.” SA 20-22, 32-33, 40-41.

Under that position, “minimum” annual webcaster fees would oxymoronically reach *hundreds of millions of dollars per licensee*. SA 21, 33, 40. In stark contrast, the *total* royalties for *all licensees* operating under the Statutory License were less than \$10 million in 2004, under

\$14 million in 2005, and approximately \$18 million (estimated) in 2006. SA 210. Yet the “minimum” fees for 2006 for just three licensees (RealNetworks, Pandora, and Yahoo!) would be over *\$1.15 billion!* SA 21, 33, 40. They would dwarf the licensees’ radio-related revenue by *substantially more than a billion dollars.* *Id.* They would be more than *64 times* the *total* royalties collected by SoundExchange in 2006; an increase of more than *10 million percent* over the 2005 minimum fee of \$2,500 per licensee; and more than 150 times the entire radio royalties these licensees in the aggregate would pay for 2006, even under the sharply increased CRB performance-based rates. SA 21, 33, 40-41. Such outrageous costs will force the immediate shutdown of numerous innovative and popular services on July 15, 2007. SA 23-24, 35-37, 43.

Further, “aggregator” webcast services such as Live365 consist of thousands of “hobbyist” and hundreds of terrestrial radio stations. SA 44-45. As literally construed, the CRB ruling would produce a “minimum” annual fee of \$5 million that would render its business wholly uneconomic. SA 46, 49-50. Absent a stay, Live365 will be forced to shut down on July 15, 2007. SA 46, 49-50.

Small webcasters: The Final Determination will cause additional irreparable injury because it eliminates the percentage-of-revenue basis upon which most SCWs previously operated and imposes a dramatic increase in per-performance rates that will force many small webcasters to shut down if they are required to pay such royalties. SA 186-87, 193-95, 199-201, 206-209. For four of the SCWs that participated before the CRB, royalties will increase from 11% of revenues under the pre-existing rate structure to 300% of revenues in 2006, 306.5% of revenues in 2007, and 345% of revenues in 2008 – royalty increases of over 2,000%! SA 187, 193-94, 199-200, 207. By comparison, terrestrial radio stations pay no royalties at all for sound recordings. Satellite radio services, whose sound recording royalties have been paid under a

lump sum agreement through 2006, pay the equivalent of less than 5% of their revenues, according to public reports. Digital radio services delivered to residential consumers (along with satellite/digital cable TV programming subscriptions) pay at a statutory rate of 7.25% of revenues.

Noncommercial webcasters: The Final Determination causes further irreparable harm to NPR. Public radio webcasters face the same per-station minimum fee of \$500, which covers each station for up to 159,140 “aggregate tuning hours” (“ATH”) of programming per month. (“Aggregate tuning hours” refers to the total hours of programming transmitted to all listeners during the relevant time period. For example, one hour of programming transmitted to 20 simultaneous listeners would produce 20 ATH.) Once public radio webcasters pass this arbitrary ATH threshold, they will be required to pay the (CRB-increased) commercial royalty rate on a per-performance basis. But, as demonstrated by the very evidence ostensibly relied upon by the CRB, the vast majority (more than three quarters) of NPR’s member stations simply cannot track their ATH at all. SA 57. Further, even if they could track ATH, the payment formula created by the CRB for NPR (which was not proposed by any party) is unadministrable, because NPR stations cannot feasibly identify, within their broad mix of programming, particular copyrighted sound recording performances for which license fees would be due once they pass the ATH threshold. SA 58-60. Unless stayed, the Final Determination will cause NPR substantially to reduce its online radio offerings as of July 15, 2007. SA 61.

The Final Determination will lead to the loss of many diverse sources of music. It will have a devastating impact on independent artists, small stations, and audiences. A 1-2. Quite literally, the date on which the Final Determination becomes effective will be “the day the music dies” for online radio. A stay pending appeal thus is urgently needed.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

A. The Statutory Background

Section 102 of the Copyright Act provides copyright protection for a “musical work,” which refers to the notes and lyrics of a song, and for a “sound recording,” which results from “the fixation of a series of musical, spoken, or other sounds.” 17 U.S.C. §§ 101, 102(2), 102(7). Typically, a record label owns the copyright in a sound recording and a music publisher owns the copyright in a musical work. Final Determination at 8.

The Copyright Act draws a distinction between “musical works” and “sound recordings” with respect to the so-called “public performance” right (that is, the right to make or authorize the performance to the public of a copyrighted work). The performance right extends to all categories of copyrighted works with one exception: sound recordings. Thus, a conventional over-the-air radio station need not pay *any* royalties to a record label for the public performance of a sound recording when it broadcasts a song over the airwaves.

Only digital transmissions of sound recordings are treated differently. Under the Digital Performance Right in Sound Recordings Act (“DPRA”), Pub. L. 104-39, 109 Stat. 336 (1995), copyright owners of sound recordings are granted a limited performance right to make or authorize the public performance of their works “by means of a digital audio transmission.” 17 U.S.C. § 106(6). The DPRA of 1995 authorized noninteractive subscription services and preexisting satellite digital audio radio services to make digital transmissions of sound recordings, upon payment of a statutory royalty and compliance with certain other statutory conditions. 17 U.S.C. § 114.

Congress expanded the statutory license for digital audio transmissions of sound recordings in the Digital Millennium Copyright Act of 1998 (“DMCA”), Pub. L. 105-304, 112

Stat. 2860 (1998). The DMCA provides that certain digital transmissions and retransmissions, popularly known as “webcasting” or “online radio,” are subject to the Section 106(6) digital performance right. The statute distinguishes between *interactive* and *non-interactive* webcasting services. The former are given no statutory license; they must obtain the consent of, and negotiate fees with, individual owners of sound recordings. However, non-interactive webcasting is eligible for a statutory license upon payment of statutory royalties. 17 U.S.C. § 114(d)(2) & (f)(2).

Congress provided that the statutory standard for determining rates and terms is what would “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). Further:

In determining such rates and terms, the Copyright Royalty Judges shall base [their] decision on economic, competitive and programming information presented by the parties, including--

(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner’s other streams of revenue from its sound recordings; and

(ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements described in subparagraph (A).

Id.

B. The Procedural History of this Case.

This case involves the very first proceeding conducted by the Copyright Royalty Board (“CRB”), which was established by Congress as part of the Copyright Royalty and Distribution Reform Act of 2004, Pub. L. 108-419, 118 Stat. 2341. The CRB is composed of three Article I copyright royalty judges. Their task is to determine the royalty rates applicable to various

statutory licenses under the Copyright Act. Previously, royalty rates were determined by the Copyright Royalty Tribunal and then by a Copyright Arbitration Royalty Panel (CARP), overseen by the Copyright Office of the Library of Congress.

The proceeding below was initiated on October 31, 2005, by the submission of written direct statements. 17 U.S.C. § 803(b)(6)(C). Appellants DiMA, NPR, and the SCWs participated in the proceedings before the CRB, as did radio broadcasters, SoundExchange, and other parties. On March 2, 2007, CRB released its initial determination which set the rates and terms for the applicable period from January 1, 2006 to December 31, 2010.

Appellants and other parties immediately filed motions for rehearing which, *inter alia*, requested the CRB to consider and clarify the meaning of the “per station” and “per channel” component of the \$500 minimum fee determination and objected to the failure of the CRB to consider a percentage-of-revenue royalty. The CRB denied rehearing without specifically addressing Appellants’ primary objections. Instead, it opined in conclusory fashion that the proceeding did not present “the type of exceptional case that would warrant a rehearing or reconsideration.” In addition, the CRB refused to stay its decision pending appeal. On May 1, 2007, the CRB published the Final Determination in the Federal Register.

REASONS FOR GRANTING A STAY PENDING APPEAL

The standards in this Circuit for a stay pending appeal are well known. The movant must show: (1) it has a substantial likelihood of success on the merits; (2) it will suffer irreparable injury if the stay is denied; (3) issuance of the stay would not cause substantial harm to other parties; and (4) the public interest would be served by issuance of the stay. *See Washington Metro. Area Transit Com. v. Holiday Tours, Inc.*, 559 F. 2d 841, 843 (D.C. Cir. 1977) (“*WMATA*”). In balancing these factors, “[t]he court is not required to find that ultimate success

by the movant is a mathematical probability, and indeed, . . . may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors." *Id.* Quoting Judge Friendly, this Court has opined that "it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i. e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Id.* at 844 (internal quotation marks and citation omitted). Here, all four factors militate in favor of a stay.

A. Appellants Have a Substantial Likelihood of Success on the Merits.

1. Congress Provided For Searching Appellate Review of the CRB's Determinations.

At the outset, searching judicial review is appropriate here because this case is the very first proceeding ever conducted by the CRB. It has no record of experience or expertise. Moreover, Congress deliberately stiffened the standard of judicial review in the Copyright Royalty and Distribution Reform Act of 2004. Under the previous statutory system, a rate determination of a Copyright Arbitration Royalty Panel (CARP) was first reviewed by the Librarian of Congress, who was required to accept or modify the CARP determination based on the recommendation of the Registrar of Copyrights — providing what was essentially a first level of appeal. *See* 17 U.S.C. § 802(f) (repealed).² Although this Court had jurisdiction to

² In the one prior CARP case involving webcasting royalties, the Librarian — upon appeal from the CARP's initial determination — halved the rates. Final Rule, 67 Fed. Reg. 45239 (July 8, 2002). Congress, concerned that the royalties still remained too high, intervened and adopted a percentage-of-revenue approach in the Small Webcaster Settlement Act. Pub.L. 107-321, §1, 116 Stat. 2780.

review the Librarian's decision, this Court had no authority to disturb that decision unless it found "on the basis of the record before the Librarian, that the Librarian acted in an arbitrary manner." 17 U.S.C. 802(g) (repealed). This Court noted that such a standard of review was "significantly more circumscribed" than APA review and afforded the Librarian "exceptional deference." *Nat'l Ass'n of Broadcasters v. Librarian of Congress*, 146 F.3d 907, 918 (D.C. Cir. 1998) ("*NAB*"). This Court was required to "uphold a royalty award if the Librarian offered a facially plausible explanation for it in terms of the record evidence." *Beethoven.Com LLC v. Librarian of Congress*, 394 F.3d 939, 946 (D.C. Cir. 2005) (quoting *NAB*).

In stark contrast, when Congress enacted the 2004 CARP Reform legislation, it excluded the intermediate appeal process to the Librarian and deleted the prior Section 802(g) appellate standard of review. Congress noted that this Court was particularly "familiar with the standard of review for agency determinations and the often intricate body of law to which agencies are subject." H. Rep. 108-408 (committee report accompanying H.R. 1417, the Copyright Royalty and Distribution Reform Act of 2003). Consequently, Congress provided that the standard of review for CRB determinations is the APA test of 5 U.S.C. § 706 – namely, whether an agency action is "arbitrary and capricious" or "otherwise not in accordance with law."

Under the APA, an agency action is considered to be arbitrary and capricious when it: relies on factors that Congress did not intend it to consider; fails to consider entirely an important aspect of the problem; offers an explanation for the decision that runs counter to the evidence presented before the agency; issues a decision that is so implausible that it cannot be explained as a product of agency expertise or a difference of viewpoint; fails to articulate a satisfactory explanation for its action; or entails the unexplained discrimination or disparate treatment of similarly situated parties. *E.g., Motor Vehicle Mfrs. Ass'n. State Farm Mutual Auto. Insurance*

Co., 463 U.S. 29, 43 (1983); *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 810-13 (D.C. Cir. 2007); *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 840-44 (D.C. Cir. 2006); *Airmark Corp. v. FAA*, 758 F.2d 685, 691-92 (D.C. Cir. 1985). The Final Determination suffers from all of these flaws.

2. The \$500 Minimum Fee Is Invalid.

The CRB's decision to impose a minimum fee of \$500 for each "channel" or "station" operated by a webcaster service is plainly arbitrary and capricious. The CRB's 115-page decision contains only a *single paragraph* of explanation for the \$500 minimum fee. Final Determination at 48-49. The CRB purportedly based the fee on the administrative costs of SoundExchange in processing royalties, but it acknowledged that "we are provided with little evidence of the administrative cost per licensee." *Id.* at 48. Indeed, the agency record is devoid of any evidence *at all* to support the proposition that SoundExchange incurs administrative costs of \$500 per channel or station, or any other proposition to warrant the CRB's minimum fee.

The prior minimum fee for each licensee (regardless of number of "channels" or "stations") could not exceed \$2,500. 37 C.F.R. 262.3(d)(2). The new minimum fee would produce (under SoundExchange's interpretation) *more than a billion dollars* in payments, and it is simply preposterous to maintain that such Brobdingnagian fees are needed to cover the administrative costs of SoundExchange – an entity that collected only an estimated \$18 million of royalties in total in 2006. SA 210. There is nothing in the record to show that SoundExchange incurs administrative costs of more than \$2,500 per licensee, or that its administrative costs increase on a linear basis of \$500 per channel or per station. In fact, royalty reporting is not related at all to the number of "channels" or "stations" a licensee may operate. The *licensee*, not SoundExchange, undertakes the costs of aggregating data across its multiple

offerings and reports the total number of times a song has been played. SA 22-23, 34-35, 41-42, 48.

The CRB did not consider any of these factors in its analysis. Adding to its error, the CRB inexplicably cited for support the Librarian's decision in the prior webcasting CARP ("Webcaster I") and the 2003 "rollover" agreement between DiMA and the recording industry. Final Determination at 48 n.36. But these authorities refute the CRB's decision. The Webcaster I decision established a \$500 annual minimum fee *per licensee*, irrespective of the number of channels or stations operated by the licensee, *id.*; and the 2003 rollover agreement established a \$500 per station annual minimum fee *but with a cap of \$2,500 per licensee. Id.* As the CRB's citation in footnote 36 explains, the 2003 agreement between the webcasters and SoundExchange with respect to the minimum fee was codified at 37 C.F.R. 262.3(d)(2). That provision makes clear that the minimum fee for each licensee is "\$2,500, or \$500 per channel or station (excluding archived programs, but in no event less than \$500 per Licensee), *whichever is less*, for each calendar year." (emphasis added). The Final Determination's quotation of 37 C.F.R. 262.3(d)(2) omits the crucial phrase "whichever is less," demonstrating that the CRB fundamentally misread the pertinent regulation.

The CRB's minimum fee determination also is fundamentally at odds with the Board's own reasoning. The CRB blithely described the minimum fee as "low" and predicted it was "likely to have a declining financial impact over the course of the term of the license." Final Determination at 48. It gave as an example of a "per channel" application of the minimum fee a radio station with one simulcast station and one side channel, resulting in an annual minimum fee of \$1,000. *Id.* This description of the fee as "low" is fundamentally irreconcilable with a result that would make webcasters liable for over \$1 billion in annual fees and cause the immediate

shutdown of many webcasting offerings and businesses. Yet, on Applicants' motions for rehearing, the Board inexplicably and arbitrarily issued a blanket denial of the motions *without saying one word* about the minimum fee issue. The CRB failed either (i) to cap the minimum at a reasonable amount, such as the pre-existing \$2,500 per-license cap, or (ii) to clarify the definition of "channel" or station." Simply put, the CRB's minimum fee determination cannot possibly meet the APA standard of review.

3. The Treatment Of Small Webcasters Is Arbitrary and Capricious.

The Board rejected a percentage-of-revenue based royalty for SCWs based on an arbitrary and capricious conclusion that the SCWs supposedly were "unconcerned with the actual structure" of the fee and focused only on its overall amount. Final Decision at 19. The record evidence contradicts the Board's assertion. In fact, without a percentage-of-revenue approach, the SCWs will be put out of business. Moreover, a per-performance standard is infeasible because most SCWs have no means of tracking the number of listeners who hear each and every song they play and therefore of determining the total number of "performances." SA 193 n.1, 199 n.1, 207 n.1.

The CRB's arbitrary decision stemmed from its misinterpretation of a footnote in the SCWs' testimony. (SA 214 n.2). The footnote arose in the context of a statement that only a percentage-of-revenue approach would produce an economically viable royalty (while recognizing the mathematical truism that a performance-based royalty could be set at such an extremely low rate that it would not put SCWs out of business). This testimony, however, explained that such a royalty would have to be set at a fraction of the per-performance rate that had previously existed. The CRB focused entirely on this single footnote out of context and ignored the remainder of the SCWs' written and live testimony showing that a percentage-of-

revenue standard was vital.¹ In light of this substantial evidence, the Board's statement that a percentage-of-revenue option was unnecessary is arbitrary and capricious and "does not withstand review because [it] entirely ignored relevant evidence." *Morall v. DEA*, 412 F.3d 165, 178 (D.C. Cir. 2005) (citing cases).

The Board also acted arbitrarily in asserting that a "small webcaster" could not be defined. Final Determination at 19, 21-22. In fact, the record evidence showed that there was a feasible distinction between a "large" and "small" webcaster, based on a single, self-selecting criterion – a webcaster's willingness to be subject to a percentage-of-revenue royalty calculated on *gross* revenues. SA 228.⁴ This criterion would also moot the Board's conclusion that there was no clear manner of deciding what "revenue" would be subject to royalty. Unlike large webcasters, whose audio services represent but a small proportion of their overall Internet presence and online revenues, small independent webcasters focus almost exclusively on online audio services that predominantly account for whatever revenues they earn. SA 212. Accordingly, they would willingly accept a percentage-of-revenue royalty based on their gross

¹ For example, at the outset of his written direct testimony, the SCWs' witness stated that "it is critical for these small companies ... to have a royalty based on a reasonable percentage of their revenues. Fees based on the numbers of listeners, or the number of performances ... simply will not allow these independent companies to operate." SA 213. The testimony added that SCWs "would, and could, not be 'willing buyers' of a performance right ... unless there was a reasonable percentage-of-revenue option." *Id.*; *see also* SA 221-22.. The testimony concluded by stressing that its "most important point" was that "for both the health of the companies involved" and the "consumers who benefit from their existence," there must "exist a royalty rate ... that is in the traditional form of a percentage of revenues." SA 229 (emphasis original). Similarly, the SCWs' live testimony made clear that they had been able to stay in business solely because of the percentage-of-revenue standard of the Small Webcaster Settlement Act. A 15. Without a percentage-of-revenue option, entry by prospective SCWs would be barred, and there would not be "any start-ups of consequence." A 16.

⁴ To the extent the CRB preferred gross revenue limits, it could have adopted the definitional terms of the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78510 (2002), or, as suggested in the Findings and Conclusions of the SCWs, adopted the test for a "Small Business" used by the Small Business Administration. 13 C.F.R. § 121.101 et. seq.

revenues, leaving no uncertainties at all in respect of defining “revenue.” *Id.* The Board wholly ignored this evidence, and it acted arbitrarily and capriciously in imposing vastly higher revenue rates that will force the shutdown of many small webcasters.

4. The Treatment Of Public Radio Webcasters Is Arbitrary and Capricious.

The Final Determination requires NPR and its stations to track two data points on a station-by-station basis: (1) each station’s monthly aggregate tuning hours (ATH); and (2) in the event the station’s monthly ATH exceeds an arbitrary threshold of 159,140 ATH, individual performances of sound recordings above that threshold. No party to the proceedings proposed this system. The Final Determination is arbitrary and capricious because, *inter alia*, the very evidence cited by the CRB shows that it is impossible for NPR to track, compute, and report its royalties on such a basis.²

The CRB relied on a rough survey conducted by NPR (Final Determination at 61) in which certain NPR respondent stations reported an average of 218 simultaneous connections — which the CRB (though not the survey itself) equated to 159,140 ATH per month (218 x 24 hrs x 365/12). SX Trial Ex. 67. However, the survey found that “79% of stations that air audio on their web sites are unable to provide their station’s weekly Aggregate Tuning Hours (ATH).” SA 57, 65; *see also* SA 76 (same). In other words, the very evidence on which the CRB relied in fashioning a monthly threshold of 159,140 ATH indicated that the substantial majority of NPR

² The CRB’s determination as to NPR is also arbitrary and capricious (and contrary to the evidence of SoundExchange’s own expert) in that it treated public radio stations no differently from commercial webcasters after an arbitrary point of “convergence” (based exclusively on ATH volume). *Compare, e.g.*, the testimony of SoundExchange’s own expert: “[I]t does not make sense to set a market rate based on smaller webcasters, non-commercial webcasters or webcasters not attempting to maximize their webcasting revenues, because those buyers are not primarily driven by market concerns.” SA 232. NPR also supports the challenge of the other Appellants to the \$500 minimum annual fee determination.

stations are *unable even to calculate that threshold* because they are unable to compute their monthly ATH.

Moreover, NPR stations generally *cannot* calculate, as the Final Determination would require, the number of copyrighted sound recordings for which payment would be owed if a station exceeded the monthly ATH threshold. NPR stations transmit a broad mix of programming, dominated by news, public affairs and talk. SA 58-60. There was no evidence that NPR could feasibly determine, from its program streaming data, how many sound recordings were transmitted during any relevant time period (never mind to any known number of listeners). In addition, much of the music contained in NPR webcasts does not require a license from SoundExchange, as it is directly licensed from the copyright owner, performed live in NPR's studio, or subject to a statutory exemption, such as fair use. SA 59-60. Because NPR cannot track the specific sound recordings that would require payment at the CRB's announced statutory rate, the Final Determination is arbitrary and capricious.

5. The CRB Royalty Rates Are Arbitrary and Capricious.

The preceding grounds provide ample basis for a stay pending appeal. Although this Court need not reach any further issues on the present motion, it is also apparent that the CRB's drastically increased per-performance royalty rates were invalid.

- The rates imposed by the CRB could not possibly comply with the "willing-buyer willing-seller" standard of § 114(f)(2)(B), because no "willing buyer" would *ever* agree to the ruinous royalty levels contained in the Final Determination. These rates greatly exceed the total revenues of the SCWs. Even for large webcasters, the per-performance rates are untenable, wholly apart from the \$500 "minimum" fee. For example, for Yahoo!, Pandora, and Live365, the rates would amount (in the aggregate) to 48% of radio-related revenues in 2006 and 62% in 2007; after that, the rates escalate for 2008-2010. SA 33 n.2, 41 n.2, 47. And the CRB royalty

for NPR would generate a fee increase of 30-50 times the lump sum amount previously in place. SA 60-61. No buyers would willingly agree to such crushing rates.

- The CRB misunderstood the statutory test by failing to use the “willing seller-willing buyer” standard to replicate a sufficiently *competitive* market, as recognized by this Court in *Beethoven*, 394 F.3d at 952 (endorsing an analysis of whether the chosen benchmark was “competitive”), and by Webcaster I, 67 Fed. Reg. at 45,244-45 (interpreting “the statutory standard as ‘the rates to which, absent special circumstances, *most* willing buyers and willing sellers would agree’ in a *competitive* marketplace”) (emphasis added). The CRB arbitrarily chose, as its “benchmark” for fee-setting, agreements secured between the four major record labels and on-demand (or “interactive”) music services. Final Determination at 32-40. But on-demand services are fundamentally not comparable to the types of non-interactive services operating under the Statutory License, either in terms of the product offering to consumers or the supply and demand characteristics of the markets. The on-demand market is dominated by a small number of sellers wielding significant market power. SA 238-58. In fact, the CRB relied on some of the very same deals that previously had been *rejected* in Webcaster I precisely because “the rates in these licenses reflect above-marketplace rates due to the superior bargaining position of RIAA or the licensee’s immediate need for a license due to unique circumstances.” 67 Fed. Reg. at 45248. Webcaster I also rejected label licenses with on-demand services because “the rates in those agreements were for rights beyond those granted under the statutory license.” *Id.* at 45256, *aff’d*, *Beethoven*, 394 F.3d at 943-44, 947.

The CRB provided no explanation for this inconsistency with the Webcaster I decision. And it arbitrarily refused to consider agreements with markedly lower royalty amounts that these same labels (and hundreds of smaller independent record labels) had entered into with Yahoo!

for its consumer-influenced webcasting service, even though all parties conceded that Yahoo's service was much more comparable to the services operating under the Statutory License than were the on-demand services proffered as the benchmark by SoundExchange. SA 260-64, 270, 276-78, 288, 290-92. Given the statutory mandate that, in establishing rates, the Board "may consider the rates and terms for *comparable* types of digital audio transmission services . . . under voluntary license agreements," § 114(f)(2)(B) (emphasis added), the CRB acted arbitrarily in choosing the fundamentally non-comparable on-demand service market as its benchmark. The CRB in effect imported supra-competitive rates into the *non-interactive* market – negating the very purpose of the Statutory License for the latter.³

- The CRB failed properly to apply the factors established by Congress in § 114(f)(2)(B), which unmistakably point to *lower* royalties for online radio. For example, Congress instructed the Board to consider "whether use of the service may substitute for or may promote the sales of phonorecords." Online radio promotes rather than displaces record sales. The essentially unrebutted testimony showed that record labels constantly seek and thank online and streaming radio services for the promotion they provide for their artists. SA 294-95. Online radio exposes audiences to new genres, artists, and songs and makes it easy for listeners to buy the music they hear by providing the name of every song, artist, and title, often accompanied by a link to enable immediate purchase. Congress also instructed the CRB to examine the "relative creative contribution, technological contribution, capital investment, cost, and risk." Unlike terrestrial or satellite radio, online radio is a nascent industry with new entrants and innovative webcasters.

³ The CRB purported to adjust for the difference between the value of interactive and non-interactive services by accepting certain testimony from a SoundExchange expert economist. Final Determination at 32. But this testimony was fatally flawed. SA 257-59. After rebuttal evidence was submitted to the CRB, SoundExchange itself abandoned its expert's reasoning and his "interactivity adjustment" in a subsequent proceeding involving satellite radio (Docket No. 2006-1 CRB DSTRA). The CRB's royalty calculations hinged on this fatally flawed evidence.

A 16. The statutory factors demonstrate that online radio should be encouraged, not punished with higher royalties.

B. Appellants Will Suffer Irreparable Injury In The Absence Of A Stay

This case does not involve merely speculative allegations of recoverable financial injury. Rather, this case involves the “very existence” of a company’s business in “its current form,” which this Court has long acknowledged qualifies as “irreparable harm.” *WMATA*, 559 F.2d at 843. There is no doubt that the Final Determination will have an imminent, certain, and devastating impact on online radio. The shutdown or substantial curtailment of webcasting services represents “substantial unrecoverable economic harm.” *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). There is a clear and present need for a stay.

SoundExchange will undoubtedly argue that the existence of a statutory refund scheme in the event of overpayments (17 U.S.C. § 803(d)(3)) eliminates the threat of irreparable injury. That argument is wrong. The irreparable harm in this case is not the mere payment of money. It is the immediate shutdown of online radio services, in their entirety or in substantial part – coupled with the irretrievable loss of customers and audiences. The instant case thus presents *extraordinary* circumstances — that were plainly not contemplated by § 803(d)(3) — in which a licensee is unable to continue to operate pending appeal and pay the challenged royalty under protest. Here, the disastrous and irreparable harm from implementation of the Final Decision on July 15, absent a stay, will force operational shutdowns—thereby effectively depriving the movants of their right to appeal.

C. Issuance of the Stay Would Not Cause Substantial Harm to SoundExchange

The stay will not cause substantial harm to SoundExchange. Pending their appeal, Appellants are prepared to pay the pre-existing royalty rates and pre-existing minimum

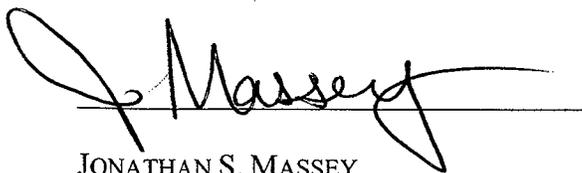
administrative fees in effect prior to the Final Determination, as the services have been doing throughout the course of this proceeding. Further, if this Court were ultimately to affirm the Final Determination, it would have ample authority under 17 U.S.C. § 803(d)(3) to order “the payment of any underpaid fees, and the payment of interest pertaining respectively thereto.” Accordingly, the economic interests of SoundExchange are fully protected.

D. The Public Interest Strongly Favors A Stay.

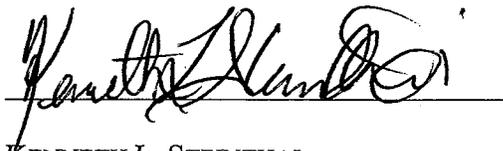
The public interest requires a stay. The Final Determination will harm not only Appellants, but also musical artists, who increasingly depend on online radio to build their fan base (especially early in their careers), and the 50 million to 70 million listeners who tune in every month to the innovative and diverse services offered by online radio. A 1-2. Not surprisingly, the Final Determination has sparked a great public outcry, and bipartisan legislation to reverse it is pending on Capitol Hill. The Internet Radio Equality Act, H.R. 2060, has attracted more than 100 co-sponsors and, accordingly to a spokeswoman for Rep. Jay Inslee (D-Wash.), “has generated more response than any other topic, including the Iraqi war.” Will A Rise In Royalties Kill The Web Radio Star? *The Oregonian*, May 13, 2007. Members of Congress have reportedly received more than 500,000 phone calls, letters, faxes and emails protesting the CRB’s decision, and over 6,000 artists have joined a coalition opposing it, www.savenetradio.org.

CONCLUSION

For these reasons, Appellants respectfully request that the Court grant their Emergency Motion for a Stay Pending Appeal.



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Dated: May 31, 2007
Washington, D.C.

ADDENDUM

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

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

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

(ii) certain radio broadcasters: 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” (“SCWs”): 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.

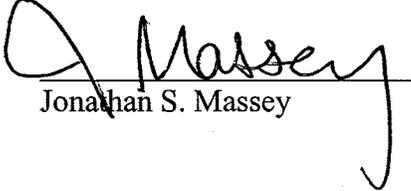
B. Ruling Under Review

The order under review is the Determination of Rates and Terms, Digital Performance Right in Sound recordings and Ephemeral Recordings, 72 Fed. Reg. 24084 (May 1, 2007) (to be codified at 37 CFR pt. 380).

C. Related Cases

There are no related cases within the meaning of D.C. Cir. Rule 28(a)(1)(C).

Respectfully submitted,


Jonathan S. Massey

DISCLOSURE STATEMENT PURSUANT TO RULE 26.1

The Digital Media Association (“DiMA”) hereby states that it is a national trade organization devoted primarily to the online audio and video industries, and more generally to commercially innovative digital media opportunities. It has no parent companies, and no publicly traded company holds a 10% or greater ownership interest. It has the following member companies: Amazon, AOL, Apple, Broadband Instruments, E-Cast, Live365, Loudcity, Mercora, MicroSoft, Motorola, MP3.com/CNET, MTV Networks, MusicNet, Muzak, Napster, National Geographic Society, NativeRadio.com, Nellymoser, Netflix, Pandora Media, RealNetworks, Sony Connect, Spatial Audio Solutions, TouchTunes, Yahoo!, and YouTube.

National Public Radio, Inc. states that it is an independent, private, nonprofit membership organization funded primarily through its own service-generating activities. It was incorporated pursuant to the Public Broadcasting Act of 1967. It has no parent companies, and no publicly traded company holds a 10% or greater ownership interest in it.

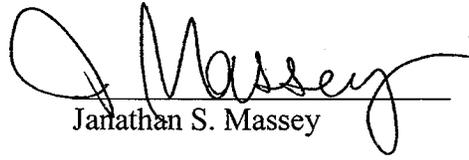
Accuradio, LLC states that it has no parent companies and that no publicly traded company holds a 10% or greater ownership interest in it.

Digitally Imported, Inc. states that it has no parent companies and that no publicly traded company holds a 10% or greater ownership interest in it.

Radioio.com a service owned by Radio.com LLC, which is wholly is owned by IOMedia World, Inc. a public company.

Radio Paradise, Inc. states that it has no parent companies and that no publicly traded company holds a 10% or greater ownership interest in it.

Respectfully submitted,

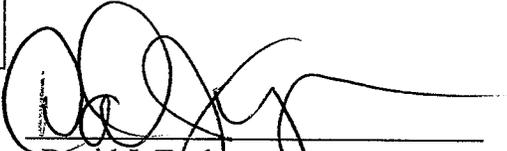

Jonathan S. Massey

CERTIFICATE OF SERVICE

I, David J. Taylor, hereby certify that copies of the Motion to Stay of Appellants was served on May 31, 2007 by overnight mail or alternatively served by hand where required on the following parties:

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David J. Taylor