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**United States Court of Appeals  
for the Ninth Circuit**

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UMG RECORDINGS, INC., a Delaware corporation,

*Plaintiff-Counter-Defendant-Appellant,*

— v. —

TROY AUGUSTO, an individual doing business as Roast Beast Music  
Collectables doing business as Roastbeastmusic,  
and DOES 1 through 10, inclusive,

*Defendant-Counter-Claimant-Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT, CENTRAL  
DISTRICT OF CALIFORNIA, HON. S. JAMES OTERO,  
USDC NO. 2:07 CV 3106 SJO (AJW)

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**BRIEF FOR *AMICUS CURIAE* RECORDING INDUSTRY  
ASSOCIATION OF AMERICA IN SUPPORT OF REVERSAL**

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**RULE 26.1 STATEMENT OF PROPOSED *AMICUS CURIAE***

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, proposed *amicus curiae*, the Recording Industry Association of America, Inc., hereby states that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: New York, New York  
December 22, 2008

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## I. INTEREST OF AMICUS<sup>1</sup>

*Amicus* the Recording Industry Association of America (“RIAA”) is the trade association that represents the sound recording industry in the United States. Its members are record companies in the United States that collectively create, manufacture and/or distribute the vast majority of all sound recordings that are legitimately produced and sold in the United States. *Amicus* respectfully submits that it has a useful understanding of the law and the commercial realities of the music industry that can aid the Court in resolving the questions presented on this appeal.

The participation of *amicus* RIAA is particularly appropriate here because the outcome of this case will have a significant impact on the music industry. The District Court’s decision ignores well-settled law to hold that the defendant’s unauthorized sale of specially-marked, limited-edition promotional copies of sound recordings, originally provided under license to radio stations and other media for the limited purpose of promoting the sale of authorized commercial copies, is privileged under 17 U.S.C. § 109(a). Contrary to the express language printed on the recordings and their packaging, and decades of custom and practice in the music industry, the court below concluded that the Defendant-Appellee was not a mere possessor but the “owner” of the promotional copies he acquired, and thus entitled to the statutory re-sale privilege under Section 109(a). In actuality, because the

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<sup>1</sup> Counsel for Defendant-Appellee has consented to the filing of this brief *amicus curiae*.

promotional copies were never transferred, but only licensed—in effect lent—to music industry professionals, the Defendant-Appellee cannot be an “owner” and Section 109(a) is inapplicable.

In reaching its erroneous result, the court renders impracticable a long-established commercial practice in the music industry that the courts have never before challenged. The effects on the music industry, and on all copyright industries that supply promotional copies of their works to the media, will be substantial. Like the recording industry, other copyright owners such as motion picture producers and book publishers often make promotional copies of forthcoming works available to selected professional recipients under license, on terms very similar to those at issue here. The harm from the District Court’s ruling could therefore extend well beyond the music industry. This Court should reject the District Court’s errant reasoning, particularly where the likely consequences for copyright owners are so damaging. *Amicus* RIAA respectfully urges the Court to reverse the District Court’s Opinion.

## II. SUMMARY OF ARGUMENT

The District Court fundamentally misinterpreted the law by finding that Defendant-Appellee was an “owner” of the copies he obtained and sold without Plaintiff-Appellant’s authorization. The copies themselves were clearly marked with language indicating that they were not for sale and were licensed to the intended recipient for promotional use only. They were provided by Plaintiff-Appellant to radio stations, journalists, and others in the music industry pursuant to

well-settled industry practices of which Defendant-Appellee was aware. The brief of Plaintiff-Appellant UMG Recordings, Inc. well presents the facts and the law, and correctly identifies the numerous errors committed by the District Court in its opinion. *Amicus* RIAA fully endorses and supports the arguments made by Plaintiff-Appellant in support of reversal, and will concentrate in this *amicus curiae* brief on the background of industry practice regarding the use of promotional copies of sound recordings, and on the harm the recorded music industry will suffer if the District Court's decision is not reversed.

### III. ARGUMENT

#### A. **The Unauthorized Sale of Promotional Copies Will Unsettle Established Practices In the Recording Industry and Cause Significant Harm to the Industry**

The practice of making specially labeled promotional copies of copyrighted sound recordings ("Promotional Copies") and supplying them under license to selected industry insiders for the limited purpose of promoting new commercial recordings has been prevalent throughout the music industry for many decades.<sup>2</sup> Promotional Copies have been provided in a number of physical formats over the years, including 45 RPM single recordings, long-playing vinyl albums, audiocassettes and other configurations.

All of the leading producers of sound recordings, and virtually all

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<sup>2</sup> This brief *amicus curiae* deals only with Promotional Copies. Commercial copies sold to the public are not subject to license restrictions.

independent labels (collectively "Record Companies"), continue to promote their new releases by means of Promotional Copies because the product itself, a recording of a musical work, cannot meaningfully be experienced without actually hearing it. Music is, in this respect, extremely difficult to advertise and promote without offering a direct experience to the consumer or reviewer.

For this reason, the music industry has never considered the authorized, promotional use of recorded music to be the equivalent of a conventional commercial exploitation.<sup>3</sup> Accordingly, a public performance in a record store for purposes of promoting record sales does not give rise to public performance royalties under Section 110(7) of the Copyright Act, 17 U.S.C. § 110(7), and as a matter of general industry practice, Promotional Copies supplied to radio stations and journalists under a "promotional use only" license do not give rise to mechanical royalties that would otherwise be paid to songwriters. See Al Kohn and Bob Kohn, *The Art of Music Licensing* (Prentice Hall Law & Business 1992), at 326 (model mechanical license agreement) (attached) ("no such royalty shall be payable with respect to promotional phonorecords sent to disc jockeys, reviewers and the like, which are clearly marked 'Promotional Records Not for Sale' and which are

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<sup>3</sup> Analogously, the 1976 Copyright Act recognized the unique promotional value of the direct experience of musical works in Section 110(7), which creates an exemption to the public performance right for any live or recorded performance at "a vending establishment open to the public at large ... where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work, or of the audiovisual or other devices utilized in such performance, and the performance is not transmitted beyond the place where the establishment is located and is within the immediate area where the sale is occurring" (emphasis added).



not being distributed by Licensee for resale”).

Nor does a Promotional Copy generate royalties for the recording artist who performed on the recording or provide revenue for a legitimate retailer. To the contrary, Defendant-Appellee’s unauthorized sale of the Promotional Copies here at issue damages not only the owner of copyright in the sound recording, but also materially harms the songwriters, artists and legitimate retailers who depend on the sale of authorized, commercial recordings for their livelihood:

As with any number of other things in life, unfortunately the theory and reality of promo records don’t quite converge. While these records are meant for disc jockeys, they sometimes end up being sold in record stores. And of course they’re priced cheaply, for the obvious reason that the person selling them to the store didn’t pay for them.

What is less obvious is that the people who created the record don’t get paid for sales of promos. Thus, while someone is enjoying a bargain, it’s at the expense of the artist, publisher, songwriter, record company, unions, etc. (I hope I’m making you feel guilty if you buy records marked “promo-only,” since you’re taking bread out of the mouths of your creative brothers and sisters.)

Donald S. Passman, *All You Need to Know About the Music Business* (Free Press, 6th ed. 2006), at 70 (attached).<sup>4</sup>

Accordingly, the unauthorized sale of Promotional CDs undermines the fundamental Constitutional premise of copyright, which is to promote the progress

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<sup>4</sup> It should be noted that some Promotional CDs are not in fact “priced cheaply.” Passman’s central point, that Promotional CD sales do not yield income for their creators, is not affected by this distinction.

of science and the useful arts by encouraging the creation of works of authorship. U.S. Const., Art. I, Sec. 8. When Promotional CDs are sold in direct competition with authorized commercial copies, no one involved in bringing the work to the public—not the author, not the performer, not the Record Company, not the legitimate retailer—derives the benefit to which copyright law entitles them. The progress of science and the useful arts cannot possibly be promoted by shortchanging the very authors whom the Constitution seeks to encourage.

Moreover, the conduct of Defendant-Appellee here is even more harmful than that of the promo-record sellers from the past, because of the degree to which Defendant-Appellee is able to market his unauthorized wares globally, through the Internet. Not content with making a few isolated sales in his local record shop, Defendant-Appellee has made a business of selling Promotional Copies, and has made them freely accessible to any interested buyer with a connection to the World Wide Web. The magnitude of harm from the unauthorized sale of Promotional CDs is therefore far greater than any the music industry has previously suffered, and comes at a time when both the Record Companies and legitimate retailers of physical CDs, such as the now-defunct Tower Records chain, are in extreme peril.

Further, it has been the experience of the Record Companies that producers of counterfeit CDs will often try to disguise their illicit copies by printing a “Promotional Use Only” legend on them, thereby hoping to avoid detection or

liability. If the District Court's ruling is not reversed, this practice will only increase, to the great detriment of the recording industry. A correct ruling by this Court, on the other hand, condemning the practice of selling Promotional CDs, will deprive counterfeiters and pirates of a perceived safe haven.

## **B. Industry Practices**

### **1. The Role of Promotional Copies in the Marketing of Recorded Music**

Promotional Copies are supplied to a select group of people—industry insiders including radio program directors and music directors, disk jockeys, reviewers, promoters, TV-show bookers, physical retail buyers and “gatekeepers” such as AOL and Yahoo (“Insiders”)—for a single specific purpose: marketing and promoting a specific commercially-released recording.<sup>5</sup> Accordingly, Promotional Copies are generally supplied to Insiders prior to the release of the corresponding full album to the public. Such Insiders may, *e.g.*, play the songs on the radio or in clubs, or write reviews of the music contained on the Promotional Copies, thereby increasing the exposure of that particular commercially-released recording to the public. As explained in a noted reference guide to the music industry, the number of Promotional Copies created, and the length of time they are provided to major radio stations prior to the official release date of the corresponding commercial recording,

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<sup>5</sup> Promotional CDs are generally part of a comprehensive and coordinated promotional campaign to promote a particular new recording, in conjunction with tours, co-op advertising, artist interviews with print and electronic media, in-store appearances at retail locations, and other events.

can be correlated with the eventual sales success of that particular commercial CD:

[R]ecord labels will usually see to it that those stations receive advance album copies way in advance of the release date, usually at least four months. Radio stations know that getting the albums on the release date, or even one to three months in advance, indicates a lower priority at the label. It suggests that less money will be committed, fewer marketing tools will be used, and there will be less follow-up from the record company divisions (field sales personnel, publicists, etc.), fewer in-stores, less co-op advertising, fewer radio station personnel appearances, etc.—all those things that will eventually confirm to the radio station's listeners the correctness and foresight of a particular radio station programmer or DJ for having chosen that record as "hit bound." The importance of a company manifesting its commitment to an artist and recording cannot be overemphasized. Radio station personnel will, at best, be cautious before "going on" a record that it is not convinced a record label is fully committed to.

Peter M. Thall, *What They'll Never Tell You About the Music Business* (Watson-Guption Publications 2002), at 132 (attached).

Since the late 1980s the predominant format of Promotional Copies has been Promotional CDs. Promotional CDs, like the promotional vinyl disks and audiocassettes that preceded them, are physical copies (phonorecords) that contain one or several tracks of copyrighted recorded music. Sometimes the Promotional CDs will contain all of the music from the corresponding commercial album,<sup>6</sup> but more frequently Promotional CDs are "singles," containing only the particular selection or selections from an album that the Record Company hopes to promote as

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<sup>6</sup> Promotional albums, often furnished to "retail partners" such as buyers for physical retail chains, may contain "bonus tracks" that are not included in the publicly released album.

featured tracks, such as singles or material included in a forthcoming film or television program. In fact, "CD singles" are now produced solely as Promotional CDs. For some years there has been no viable commercial market for the single-CD format in which Promotional CDs continue to be furnished to radio stations and other Insiders.

In addition, Promotional CDs often have artwork that differs from the corresponding commercial release, and they may be packaged with background notes and biographical material that is never made available to the general public. A Promotional CD may contain a version of the sound recording that is never released to the general public, such as a "radio edit" tailored to the timing requirements of a radio station, or an *a cappella* or other "remix" version of the song designed to cater to the specific promotional activities of the Insiders to whom they are provided. Defendant-Appellee sought to capitalize on such differences by advertising them as selling points for his Promotional CDs:

- "the rare, circa 2006 Killers promotional CD" ER:1293
- "includes a cool promo-only disc and exclusive promo artwork" ER:1351
- "Features 2 tracks, the 3:24 Radio and dirty versions!" ER:388
- "2 tracks: 3:59 Chris Lord-Alge Edited Mix, 4:19 Album version!" ER:397
- "Features 2 tracks, the 3:42 album version, 3:46 Instrumental!" ER:469
- "CD features 4 tracks, with exclusive non-album versions!" ER:498
- "Features 5 tracks, with exclusive non-album selections!" ER:505

In many instances the Record Company itself may be prohibited by contractual restrictions from publicly releasing the sound recording contained on a

Promotional CD single. That is, some tracks that are authorized for promotional use are not authorized for commercial distribution.

The release of a commercial music album is a complex, expensive, often prolonged and always sensitive undertaking, in which the provision of the appropriate promotional materials to the appropriate industry Insiders at the appropriate times plays a key strategic role. The “leak” of a Promotional CD to the public—material released before the intended time, or the release of material never intended to be publicly disseminated—can be highly problematic. Nor is the harm from the sale of Promotional CDs mitigated by the relatively small number of Promotional CDs that may find their way into the marketplace. Because the Promotional CDs are digital copies, they can easily be reproduced as perfect physical or virtual copies. Moreover, because they are in many cases unique items that cannot be purchased legitimately, it is highly likely that such downstream copying will occur. Accordingly, and in light of the carefully planned scheduling that surrounds the release of a new sound recording, the circulation of unauthorized digital copies by third parties can do enormous damage to the commercial prospects of a commercial recording, no matter how few Promotional CDs may have been improperly sold; a single upload of a “leaked” Promotional CD to a peer-to-peer file sharing site, from which it could then be globally distributed, could be catastrophic.

A Record Company typically makes a few thousand copies of a given

Promotional CD; the appropriate number is calculated by the Record Company's promotion and/or release planning personnel depending on such variables as the style of the music (the Promotional CD itself and the commercial CD it is intended to promote), intended audience, and radio station format. For example, the number may be calculated in part based on the number of radio stations that offer programming in the relevant music format, and the individuals at those stations—music director, promotional director, etc.—on whose desks the Promotional CD should be placed in order to maximize the promotional benefit for that particular recording.

Promotional CDs are sent by mail, commercial courier and occasionally by hand delivery, with a return address to permit them to be returned to the issuing Record Company if delivery cannot be made. Promotional CDs are virtually never refused or returned by the intended addressee. When a Promotional CD is undeliverable—an exceedingly low number, perhaps 1% of the total furnished—it is usually because the Insider for whom it was intended has left the job. When that happens the Record Company will be careful to update its distribution lists.

## 2. Promotional CDs Are Essential to Competing in the Marketplace for Recorded Music

Insiders and the entities that employ them have limited space—shelf space for physical retailers, page space for journalists—or time—in a radio station’s broadcast day—for which the Record Companies must compete. Promotional CDs are indispensable to that competition, the only proven and practicable means by which to inform and educate Insiders, who in turn inform consumers, about a specific new release. Accordingly, the Record Companies support virtually *every* release of a commercial sound recording by making Promotional CDs available to Insiders.

Promotional CDs, by allowing Insiders to hear new recordings and alert the public to those they deem worthy of note, are a uniquely effective method of promoting the sale of particular new sound recordings. Neither the intent nor the result is anti-competitive; quite the contrary. The information that Promotional CDs make available to the industry, and ultimately to the buying public, is essential to a fair competitive marketplace for recorded music.

There is nothing to stop Defendant-Appellee or anyone else from selling legitimate “used records,” as to which the Record Company has parted with ownership by a first sale or otherwise. The restriction on sale by the recipients of Promotional CDs serves only to maximize their positive promotional benefits, by minimizing the degree to which such CDs may diminish or cannibalize sales of legitimate, royalty-paying commercial product.



**3. The Terms Upon Which Promotional CDs Are Supplied to Selected Individuals and Entities Are Understood and Accepted by the Recipients**

**a. Promotional CDs Are Supplied Free of Any Charge**

The Insiders have always been given possession of Promotional CDs and their predecessors for free; the Record Companies have never sold Promotional Copies. Individual Record Company personnel are also prohibited from selling Promotional CDs, as shown by an employee manual from an RIAA member: "Personnel may not post or offer for sale or auction any company product obtained in his or her capacity as company personnel including, without limitation, CDs, demos, outtakes, posters, and other artwork." Sony/BMG employee policy, section [3] (October 2006)(attached).

**b. No Transfer of Ownership**

The Record Companies in supplying Promotional CDs to Insiders have never transferred, or otherwise parted with, ownership of such copies. Rather, Insiders who receive Promotional Copies have been given only possession—a loan of indefinite duration—of the copy, with the Record Company expressly retaining title. As one industry observer noted above, the Record Company "could demand return of the record at any time." Passman, *All You Need to Know About the Music Business*, at 70.

**c. Promotional CDs Are Licensed for a Limited Purpose**

Such has been the understanding throughout the music industry—on the part

of both the Record Companies and the Insiders who have received Promotional Copies. The Insiders have understood, based on the language on Promotional Copies and their packaging as well as decades of practice, that Promotional Copies are provided for their personal use only, for a specific limited purpose related to promoting and advertising the music on the Promotional Copies. It has been the experience of the Record Companies that the vast majority of recipients recognize the limited purpose for which the recordings are intended. *See, e.g.*, ER:849-850 (David Benjamin deposition) (“[t]he instances of people not acting in accordance with that custom and practice are very rare. It’s the outliers. Everyone – 99 and 44/100ths to make up a number. The vast majority seem to understand completely from day one what the custom and practice is.”).

Insiders not only understand and willingly participate in the practice, they in fact rely on it in order to conduct their own business. It is well understood that Promotional CDs are provided not as gifts, but as tools in a marketing effort in which the Record Companies and Insiders are mutual participants.

Promotional copies have been labeled in a way that reflects that intent and understanding. Recipients are advised prior to opening or using Promotional Copies that “acceptance of this CD shall constitute an agreement to comply with the terms of the license,” and have the opportunity to decline or return them. Labeling includes language such as “This CD is the property of [the Record Company]”; “For Promotional Use Only—Not For Sale”; and language expressly prohibiting resale or transfer of possession. Even Defendant-Appellee conceded that Promotional CDs

“typically” bear a legend such as “For Promotional Use Only.” ER:693 (Deposition of Troy Augusto).

Regardless of the specific language used on a given Promotional CD, the general parameters and ground rules underlying Promotional Copy practice are universally understood within the industry.

#### **4. The Record Companies’ Lists and Enforcement Efforts**

The Record Companies devote significant resources to keeping records of the recipients of Promotional CDs (“Lists”), who are chosen by various labels and departments based on their individual needs. Not everyone who requests to be placed on a Record Company’s List is added. Such requests are regularly refused, when adding the recipient is not deemed to be a good use of the label’s limited promotional resources, and Lists are regularly scrutinized and fine-tuned in order to achieve the best possible return on the significant cost of promotion. Lists, accordingly, are treated as proprietary information by the Record Companies. When Promotional CDs are returned as undeliverable, the Lists are adjusted accordingly.

The Record Companies also keep track of recipients of Promotional CDs who are found to have offered them for sale. Such parties are invariably deleted from the labels’ Lists. The Record Companies also devote substantial resources to policing sales of Promotional CDs on eBay, treating such sales as the equivalent of bootleg sales, and regularly use eBay’s VeRO (Verified Rights Owner) Program to “take down” offers of bootlegs and Promotional CDs.

Despite the Record Companies’ efforts to maintain cost-effective Lists and

police the sale of Promotional CDs on-line, tracking each individual promotional copy is not practicable. As was the case with their vinyl-disk and cassette-tape predecessors, all of the copies of a Promotional CD are identical. Individual copies are not watermarked, coded, or otherwise individually labeled, and records are not kept as to which particular Promotional Copy was received by which specific Insider. Nor are Insiders requested to physically return Promotional CDs. The cost of such individual marking, recordkeeping and administration would overwhelm the likely marketing and promotional benefit of distributing Promotional Copies. Moreover, such efforts would have to be done copy-by-copy, which would be extremely time consuming, and would introduce significant delay into the carefully choreographed pre-release promotional process.

The prohibitive expense would in any case be unnecessary. The Record Companies' promotional and equivalent personnel are in constant communication with the radio stations and other Insiders who receive Promotional CDs, soliciting a constant stream of feedback. That constant feedback has borne out that the overwhelming majority of Insiders receiving Promotional Copies abide by their obligation not to sell or distribute them.

**5. The Record Companies Derive Recurring Benefits from Promotional CDs**

The District Court further erred in finding that Plaintiff-Appellant derived no recurring benefit from supplying Promotional CDs to Insiders. First, the District Court erred by requiring any such recurring benefit as a precondition of a valid

license. Many licenses are issued for a single one-time payment, or no payment at all, and are no less enforceable as a result. *See Jacobsen v. Katzer*, 535 F.3d 1373, 1379 (Fed. Cir. 2008) (enforcing license requiring no monetary payment to licensor).

Further, and contrary to the District Court's unsupported assertion, Promotional CDs do provide the Record Companies with recurring benefits. The benefits to the Record Companies from the industry Insiders' possession of Promotional Copies may accrue immediately—*e.g.*, a write-up or review published prior to the commercial release of a particular album—or many years downstream—*e.g.*, a radio station's continued or revived public performance of the music track(s) on the Promotional CD, or a critic's retrospective review of important new releases during the preceding year or decade. It cannot be predicted when a given Promotional CD may become relevant, or regain relevance, to a given Insider. The subsequent inclusion of a recording in the soundtrack of a film or television program, for example, or even a topical event in the news, could generate interest and sales for a recording long after its initial release.

The Record Companies receive those recurring benefits only if the Promotional CDs stay in the hands of the recipients for their intended use. Requesting or requiring the return of Promotional CDs could defeat the very purpose behind them, by taking the CDs out of the hands of Insiders who might make further promotional uses.

## 6. The Postal Services Act Is Inapplicable

The District Court erred in applying the Postal Services Act, 39 U.S.C. § 3009 (“Section 3009”), to the Record Companies’ supply of Promotional CDs to Insiders. As the District Court recognized, the purpose of Section 3009 is to prevent the practice of shipping unordered merchandise to consumers and then tricking or bullying them into paying for it.

The longstanding music industry practice of supplying Promotional Copies for free to selected sophisticated music industry Insiders does not remotely resemble the practices Section 3009 was designed to prevent. Promotional CDs are not “merchandise” within the meaning of Section 3009. Promotional CDs are different in form and content from the commercial CDs that are sold to the public; they are sent free of any charge to selected industry Insiders who are ready participants in the practice, many of whom explicitly request to receive them. The sole restriction is that the recipient is to keep possession of the Promotional CD.

Insiders, accordingly, are not “consumers” intended to be protected by Section 3009. Promotional Copies are provided free to people and entities that expect and need to receive them; and that receive them not as consumers, but as industry professionals, for a business purpose unrelated to payment or sale.

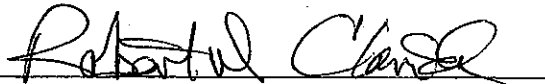
#### IV. CONCLUSION

Based upon the reasons and authorities set forth above, and those set forth in the Opening Brief of Plaintiff-Appellant, *Amicus* RIAA respectfully urges that this Court reverse the decision of the District Court and enter judgment in favor of Plaintiff-Appellant UMG.

Dated: New York, New York  
December 22, 2008

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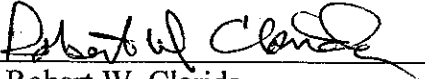
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December 22, 2008

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# THE ART OF MUSIC LICENSING

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## FORM 7.2

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written by \_\_\_\_\_ (hereinafter referred to as the  
"Composition") in the recording, making and distribution of:

(Check appropriate lines:)

- A. \_\_\_\_\_ Single: a non-visual "single" phonorecord in disc  
form;
- B. \_\_\_\_\_ Album: a track on non-visual album phonorecord in  
disc form;
- C. \_\_\_\_\_ Tape: a segment of a non-visual prerecorded tape  
phonorecord in reel to reel, cassette or cartridge form;
- D. \_\_\_\_\_ C.D.: a track on non-visual album phonorecord on  
compact disc form;

to be made and distributed in the United States, its territories and  
possessions, in accordance with the provisions of Section 115 of  
the Copyright Act of the United States of America of October 19,  
1976, as amended (the "Act"), except it is agreed that: (1) Licensee  
need not serve or file the notices required under the Act; (2) the  
accountings and payment of the royalty herein provided for shall  
be made quarterly, on the fifteenth day of February, May, August  
and November for the quarters ending the last day of December,  
March, June and September, respectively; and (3) a net royalty of

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SIX and ONE QUARTER CENT (\$.0625) or ONE and TWO HUNDREDTHS OF ONE CENT (\$.012) per minute of playing time or fraction thereof, whichever is greater, shall be payable by Licensee to Licensor on each phonorecord made, distributed and not returned (whether or not sold); provided, however, that no such royalty shall be payable with respect to promotional phonorecords sent to disc jockeys, reviewers, and the like, which are clearly marked "Promotional Records Not For Sale" and which are not being distributed by Licensee for resale. If the compulsory license royalty under Section 115 of the Act is hereafter adjusted to provide for a copyright royalty rate in excess of SIX and ONE QUARTER CENT (\$.0625) and/or ONE and TWO HUNDREDTHS OF ONE CENT (\$.012) per minute of playing time or fraction thereof, then the rate(s) set forth above shall be deemed automatically increased (proportionately, if applicable) to conform to such higher rate(s) for all phonorecords distributed following the effective date of such adjustment. The term "phonorecord" shall have that meaning set forth in Section 101 of the Copyright Act.

This license is limited to the particular recording and use of the Composition herein described and shall not include any other recording or form of recorded sound.

This license includes the privilege of making a musical arrangement of the Composition to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement made (i) may not change the basic melody or fundamental character or the lyrics of the Composition, (ii) shall not be subject to protection under the Act by Licensee as a derivative work, and (iii) may be freely used by Licensor for any and all purposes.

Failure to render timely accountings or make timely payments to Licensor shall, if not cured by Licensee within thirty (30) days after written notice thereof from Licensor, constitute a material breach of this license entitling Licensor, in addition to its other remedies, to immediately terminate this license and all rights granted to Licensee hereunder. Such termination shall render either the mak-

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ing or the distribution, or both, of all phonorecords for which royalties have not been paid, actionable as acts of infringement under, and fully subject to, the remedies provided by the Act. A waiver of any breach hereunder shall not constitute a waiver of any succeeding breach, whether similar or dissimilar. Upon written request and during Licensee's regular business hours, Licensee agrees to make its books and records relating to the subject matter hereof available for audit by Licensor and Licensor shall have the right to make copies thereof. Reasonable reserves may be withheld in the same manner as Licensee withholds and liquidates reserves in accordance with its current arrangement with The Harry Fox Agency, Inc.

This license is personal, non-licensable and non-assignable, except by Licensor. This license does not supersede nor affect any prior licenses or agreements now in force respecting recordings of the Composition. This license shall be governed by and construed under the laws of the State of California.

THIS LICENSE IS NOT VALID UNTIL LICENSOR RECEIVES A FREE COPY OF THE SINGLE, ALBUM AND/OR TAPE LICENSED HEREUNDER AND A COUNTERSIGNED COPY OF THIS LICENSE.

Dated: \_\_\_\_\_

LICENSEE:

LICENSOR:

\_\_\_\_\_

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By: \_\_\_\_\_

By: \_\_\_\_\_

Release Date: \_\_\_\_\_

Timing: \_\_\_\_\_

Single Number: \_\_\_\_\_

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Tape Number: \_\_\_\_\_

C.D. Number: \_\_\_\_\_

Recording Artist: \_\_\_\_\_

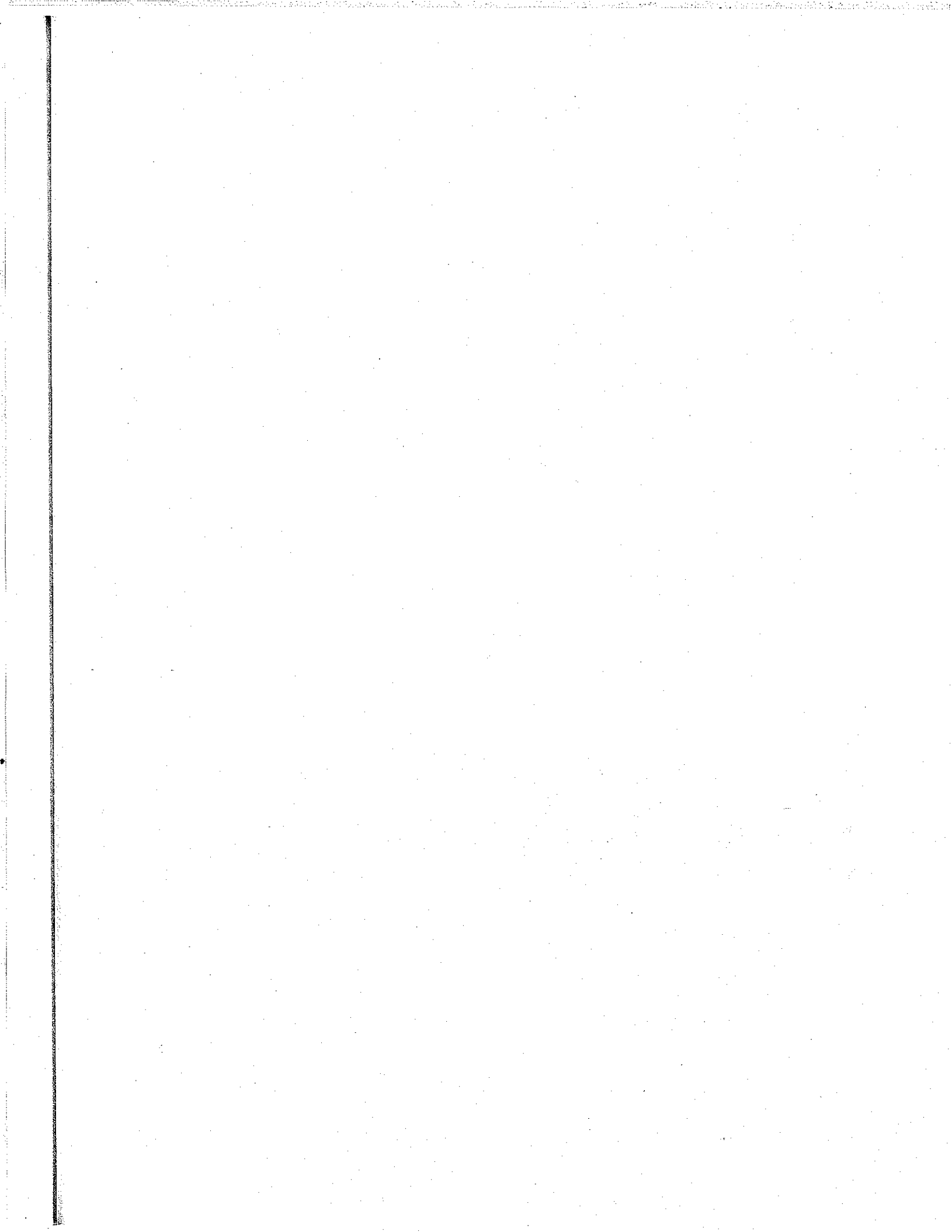
All payments to be made to Licensor hereunder shall be made to Licensor in care of:

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cranky hold-outs, clinging to the old system, (3) I spent hours writing that section and hate to see it go to waste, and (4) I thought you might need it some night if you have trouble sleeping.)

To follow this next part, we'll need to use a little math. Don't worry if numbers aren't your strong suit—I'll go slowly. I explained these concepts to my cousin David, who has to take off his shoes and socks to count to twenty, and he understood them.

Here's how it works:

1. The artist royalty is a percentage of the **wholesale price**. The companies also call this price the **published price to dealers (PPD to its friends)**, or sometimes **base price to dealers (BPD)**.

Each royalty percentage is known as a **point**, so if you have a 10% royalty, you have **10 points**.

2. You multiply your royalty percentage times the wholesale price to find out the number of pennies you'll get. Here's an example (using easy math numbers):

CD wholesale price	\$10
Royalty rate	$\times 10\%$
ROYALTY	\$1

That part's simple enough, but here's a few wrinkles:

### Free Goods

Royalties are paid for each record sold. Why do I emphasize the word "each"? Well, the companies give away **free goods**, also known as **special campaign free goods**. This started when the companies wanted to promote large numbers of a particular artist's album. To get the stores to stock more of it, they gave away 5% or 10% of all records shipped. Initially, these were short-term deals (a few months), but they've evolved into a near-permanent arrangement.

These **free goods** are a very real discount of the price. Because these goods actually cost the record company, they don't bear royalties.

### Promo Copies

Copies given away for promotion, such as radio-station copies, are **free goods** and don't bear royalties. They are known as **promo-**

tional or *promo* (pronounced "pro-moe") records. These don't go to retailers and are marked "not for sale."

As with any number of other things in life, unfortunately the theory and reality of *promo* records don't quite converge. While these records are meant for disc jockeys, they sometimes end up being sold in record stores. And of course they're priced cheaply, for the obvious reason that the person selling them to the store didn't pay for them.

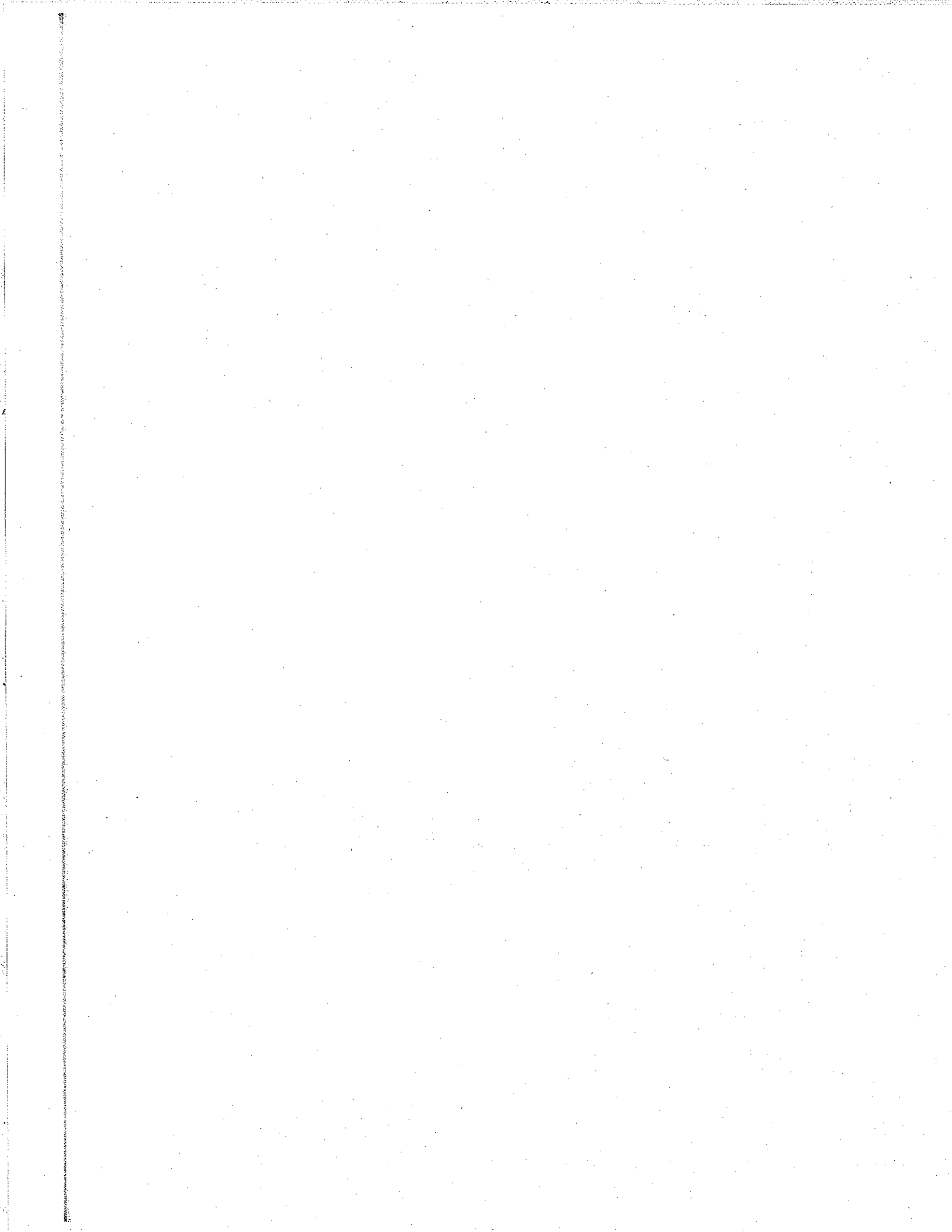
What is less obvious is that the people who created the record don't get paid for sales of promos. Thus, while someone is enjoying a bargain, it's at the expense of the artist, publisher, songwriter, record company, unions, etc. (I hope I'm making you feel guilty if you buy records marked "promo-only," since you're taking bread out of the mouths of your creative brothers and sisters.)

Some record companies—for example, Sony—have tried to solve the problem by stamping their promotional product with an official-looking statement that says the record is only licensed for promotional use, as opposed to being given away. The theory is that the record company keeps ownership of each promo record, and so any resale of it is illegal. In theory the company is absolutely right—it *is* illegal to sell something you don't own, and Sony could demand return of the record at any time. However, you can imagine how meaningful this concept is to the owners of Mortimer's Used Records and Ski Shop in East Elk, Vermont. So the best cure is an informed boycott. Let's start one.

### Return Privilege

To understand this next part, you need to know that records are sold on a **100% return privilege**. This means that, if a retailer orders one hundred records from RCA but can't sell them, it can bundle them up, ship them back to RCA, and get credit for (or a refund of) the price it paid. Such a practice is unlike most other businesses, because if you buy a load of plastic flamingos and can't sell them, you eat them.

The reason for this return policy is that records have to be pushed out quickly in large numbers, and the retailers simply aren't willing to take the risk of getting stuck with too many of them (especially for new artists). Thus the retailers have always said they will only stock large quantities if the manufacturer agrees to take back the stiffs. (For you sticklers, I'm aware that most companies now charge penalties for returns in excess of a set percentage of records shipped [16% to 20%, depending on the company] and they also give a discount for returning



WHAT THEY'LL NEVER  
TELL YOU ABOUT THE  
MUSIC BUSINESS

The Myths, the Secrets,  
the Lies (& a Few Truths)

PETER M. THALL

Watson-Guptill Publications / New York

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phones and e-mail servers to foreign affiliates are all operative and should be used in order for your manager to make decisions on the basis of what, for example, television advertising has done for other artists, where, and at what cost.

## **RADIO PROMOTION**

What good is a good record if no one ever hears it? How easy it is these days to produce a wonderful recording in the confines of one's own home studio. But what to do once you have completed it? How do you get potential buyers to actually listen to it? In fact, the only way is for your record to be played on the radio. Really. I know, it sounds somewhat obvious on one level and ridiculous on another. But can you conceive of another means? Snipe (sticker) every city and small town and college in the world? Play every city and small town and college in the world? I don't think so. Just as television was the catalyst behind the success of Andrea Boccelli and The Three Tenors (and even the Irish Tenors), so radio is the only catalyst we know behind the success of recording artists. Sure, the Internet is beginning to have an impact and Ani DiFranco has figured out how to sell records out of the back of her van, but for most of us, the only way we will hear about a new act is through radio performance—and possibly summer festivals. Therein lie the opportunities—and the headaches.

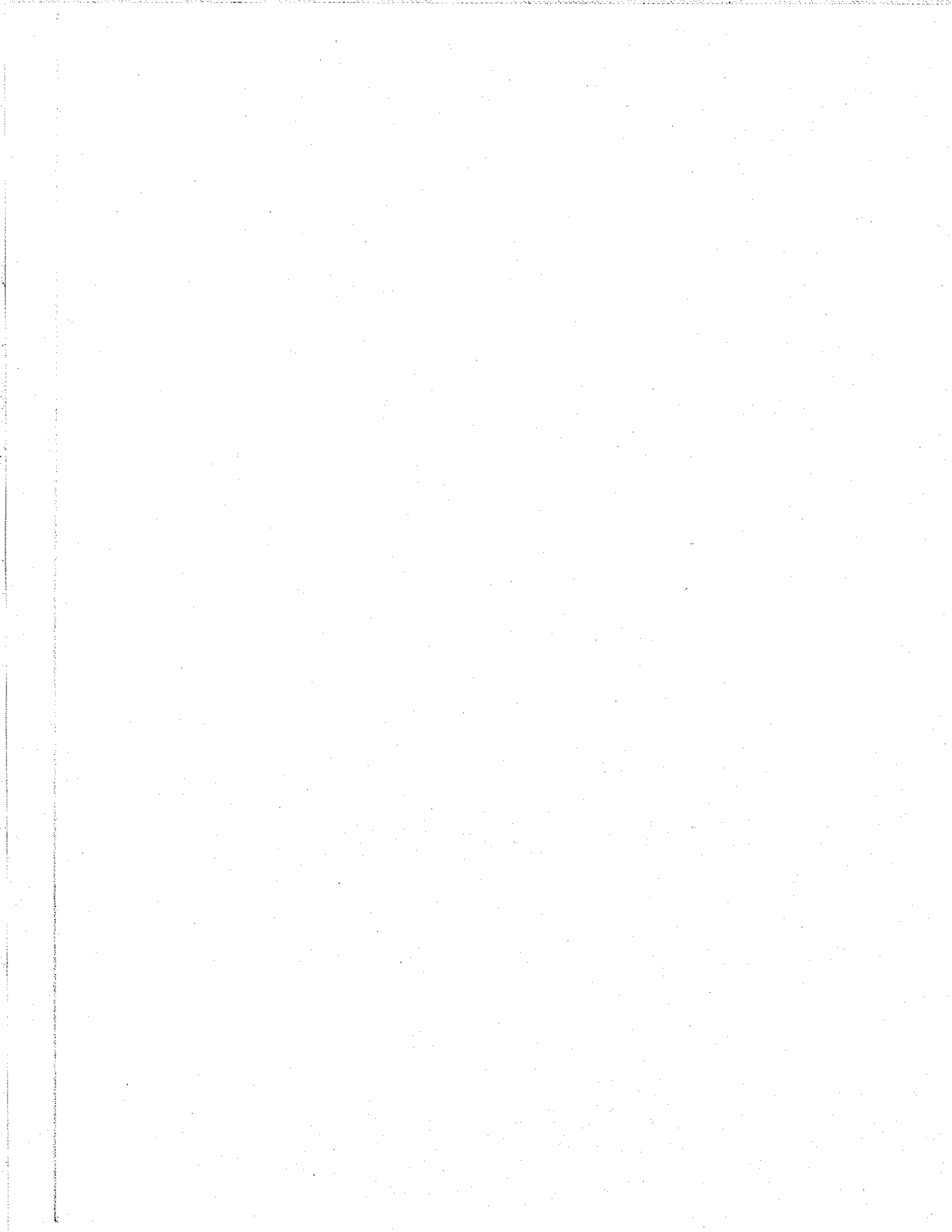
### **Airplay**

In the world of radio promotion, some stations, known in the business as "parallel one" stations, have more influence than others on *Billboard* and other chart publications. To have a record added to a playlist on, say, 40 parallel one stations in the first week of a record's release will most likely assure it a spot on the Hot 100. Therefore record labels will usually see to it that those stations receive advance album copies way in advance of the release date, usually at least four months. Radio stations know that getting the albums on the release date, or even one to three months in advance, indicates a lower priority at the label. It suggests that less money will be committed, fewer marketing tools will be used, and there will be less follow-up from the record company divisions (field sales personnel, publicists, etc.), fewer in-stores, less co-op advertising, fewer radio station personal appearances, etc.—all those things that will eventually confirm to the radio station's listeners the correctness and foresight of a particular radio station programmer or DJ for having chosen that particular record as "hit bound." The importance of a company manifesting its commitment to an artist and recording cannot be overemphasized. Radio station personnel will, at best, be cautious before "going on" a record that it is not convinced a record label is fully committed to.

### **Radio Promotion and Payola**

A combination of FCC rules and federal statutes govern payola, which is defined as the unreported payment to, or acceptance by, employees of broadcast stations, program producers, or program suppliers of any money, service, or valuable consideration to achieve airplay. In short, payola is a bribe. One FCC rule references the applicable statute and FCC policies on payola (47 C.F.R. Section 73.4180). Simply stated, the





### **[3] HONESTY**

#### **Respect for Intellectual Property Rights**

Our company holds significant intellectual property in the form of copyrights, patents, designs, trademarks and trade secrets that are protected by applicable local laws and regulations governing intellectual property. We also possess, through agreements, material that is the intellectual property of third parties. When personnel use this material, they are obligated to adhere to the terms of our agreements with third parties and to applicable intellectual property laws. Further, to the extent permitted by and subject to applicable local laws and regulations, all inventions and creations generated by personnel in the course of their job performance or during business hours belong to the company and such personnel must follow company instructions to secure the company's rights to such inventions and creations.

Copyright law prohibits the copying, performing, distributing, or displaying of copyrighted works without the prior permission of the copyright owner. These restrictions apply to software, audio and video material available on the Internet (including, without limitation, uploading or downloading intellectual property except from authorized legal sites), as well as printed material, and extend to the creation of new works or compilations derived from copyrighted material. Company policy prohibits the unauthorized copying of materials as a substitute for the purchase of appropriate licenses, subscriptions or additional authorized copies. Even inadvertent violations of intellectual property laws can result in substantial civil and criminal penalties for the company and our personnel.

Trademark laws protect names, logos and affiliations. Before adopting any name, logo or other signifier for a business use, personnel should check with company counsel.

#### **Protection of Assets**

Our company is committed to maintaining an atmosphere of trust and integrity. The company's assets are to be used only for legitimate business purposes and only by authorized personnel or their designees. Company policy prohibits acts of theft, fraud, embezzlement, and misappropriation or unauthorized use of company funds and assets, and all personnel have a duty to protect such funds and assets from loss, damage, misuse, theft and sabotage. This covers both tangible and intangible assets, including brand, copyright, trademark, know-how, confidential or proprietary information and information systems, and the company's facilities and equipment. To the extent permitted under applicable laws, the company reserves the right to monitor and inspect how its assets are used by personnel, including inspection of all company property, e-mail, data and files on PCs or other network terminals.

Personnel may not appropriate for themselves or for others business opportunities presented to the company in areas where the company conducts business or, to the employee's knowledge, is considering conducting business. Taking a benefit from a

customer or supplier – for example, a rebate or discount – that properly belongs to the company is similarly prohibited.

Personnel may not post or offer for sale or auction any company product obtained in his or her capacity as company personnel including, without limitation, CDs, demos, outtakes, posters, and other artwork. Actions such as seeking reimbursement for costs that are not legitimate business expenses through expense accounts or other channels are similarly prohibited.

### **Relationships with Partners, Vendors and Competitors**

Our company is committed to showing respect to our partners, vendors and competitors. Company policy prohibits engaging in schemes to defraud customers, suppliers, or others out of money, property or services. Statements about the company's products and services must be truthful and not misleading. Personnel must not make promises they cannot keep. Providing products or services on terms not in accordance with business unit policy may be fraudulent and is prohibited.

### **Advertising**

The company sells products and services on their merits. It is the company's policy not to engage in false or misleading advertising or advertising that defames others. In any country in which comparative advertising is not prohibited, any reference to a competitor or its products or services should be substantiated and the statement should be complete, accurate and not misleading.

### **Inside Information; Insider Trading**

The company is committed to complying with all applicable securities laws. The laws of most territories, including the United States, prohibit the use of material inside information about any company by any person in purchasing or selling securities (including the exercise of options, warrants or similar instruments), as well as communication of inside information to another for such use. Material information is any information that an investor would consider in determining whether to buy, sell or hold securities. Inside information is information that has not been made generally available to the investing public.

Information that should be considered material includes, but is not limited to, earnings estimates, merger or acquisition proposals or agreements, deal negotiations, major litigation, and significant management developments concerning our company or any other company. If you come across such information at work or otherwise, you must not use it in connection with any securities transaction or pass it to others who may use it in such a way. Any question as to whether specific information constitutes material inside information should be directed to company counsel.

The company is jointly owned by Bertelsmann AG and Sony Corporation of America ("Sony Corp."), a publicly held company. Accordingly, all personnel are subject to the company's internal policies and rules related to the trading of securities, including Sony Corp. stocks and securities by personnel. A comprehensive

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I, \_\_\_\_\_, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On **DEC 22 2008**

deponent served the within: **Brief for Amicus Curiae Recording Industry Association of America in Support of Reversal**

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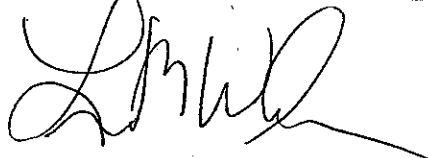
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Sworn to before me on **DEC 22 2008**



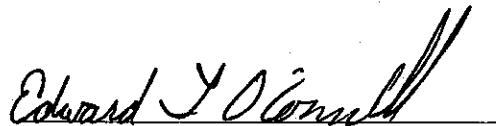
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