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Copyright Royalty Board
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BEFORE THE UNITED STATES COPYRIGHT ROYALTY JUDGES
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Washington, D.C.

IN THE MATTER OF:	Docket No. 2009-1
	CRB Webcasting III
DIGITAL PERFORMANCE RIGHT in SOUND RECORDINGS and EPHEMERAL RECORDINGS.	REBUTTAL PHASE
	Volume 1
	(Pages 1 - 272)

Washington, D.C.

Wednesday, July 28, 2010

The following pages constitute the Rebuttal Phase in the above-captioned matter at the Library of Congress, Madison Building, 101 Independence Avenue, Southeast, Washington, D.C., before Shari R. Broussard, RPR, CSR, of Capital Reporting Company, a Notary Public in and for the District of Columbia, beginning at approximately 9:36 a.m. when were present on behalf of the respective parties:

1 A P P E A R A N C E S

2 Copyright Royalty Tribunal:

3 CHIEF JUDGE JAMES SLEDGE
JUDGE WILLIAM ROBERTS
4 JUDGE STANLEY C. WISNIEWSKI
Library of Congress
5 Madison Building
101 Independence Avenue, Southeast
6 Washington, D.C. 20540

7 On behalf of SoundExchange, Inc.:

8 JARED O. FREEDMAN, ESQUIRE
GARRETT A. LEVIN, ESQUIRE
9 DAVID HANDZO, ESQUIRE
Jenner & Block, L.L.P.
10 1099 New York Avenue, Northwest
Suite 900
11 Washington, D.C. 20001
(202) 649-6000
12

13 On behalf of Live365, Inc.:

14 DAVID D. OXENFORD, ESQUIRE
Davis Wright Tremaine, L.L.P.
15 1919 Pennsylvania Avenue, Northwest
Suite 200
16 Washington, D.C. 20006
(202) 973-5256
17
- and -
18
ANGUS MacDONALD, ESQUIRE
19 ABRAHAM YACOBIAN, ESQUIRE
Hovanesian & Hovanesian, P.C.
20 301 E. Colorado Boulevard, Suite 514
Pasadena, California 91101
21 (626) 737-7288

22

1 A P P E A R A N C E S

2 On behalf of Live365, Inc.: (Continued)

3 DAVID ROSENBERG, ESQUIRE
Live365, Inc.
4 950 Tower Lane
Suite 1550
5 Foster City, California 94404
(650) 345-7400
6

7 On behalf of Intercollegiate Broadcasting System:

8 WILLIAM MALONE, ESQUIRE
Miller & VanEaton, P.L.L.C.
9 1120 Connecticut Avenue, Northwest
Suite 1000
10 Washington, D.C. 20036
(202) 785-0600
11

12 ALSO PRESENT:

13 Colin Rushing
Susan Chertkof
14

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1 C O N T E N T S

2 WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
3 Michael A. Salinger	5	85, 145	137	--
4 Alexander Smallens	149	236	--	--

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8 LIVE365 REBUTTAL EXHIBITS: *	MARKED	RECEIVED
9 Number 1	12	34
10 Number 2	163	181

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22 (*Exhibits retained.)

1 P R O C E E D I N G S

2 CHIEF JUDGE SLEDGE: Thank you. We'll come

3 to order. We return today to initiate the rebuttal

4 phase of Webcasting III, and under our scheduling

5 order Live365 will go first in this phase of the

6 proceeding and then followed by IBS and then completed

7 by SoundExchange.

8 All right. Is Live365 ready to proceed?

9 MR. OXENFORD: Yes, Your Honor, we are ready

10 to proceed.

11 CHIEF JUDGE SLEDGE: All right. Go ahead.

12 WHEREUPON,

13 MICHAEL A. SALINGER

14 called as a witness, and having been first duly

15 sworn, was examined and testified as follows:

16 MR. MacDONALD: Good morning, Your Honors.

17 I should have spoken and said that Live365 calls as

18 its first witness for the rebuttal phase Dr. Michael

19 Salinger.

20 DIRECT EXAMINATION BY COUNSEL FOR LIVE365

21 BY MR. MacDONALD:

22 Q Good morning, Dr. Salinger.

1 A Good morning.
2 Q For the record, could you please state and
3 spell your name?
4 A Michael Alvin Salinger, M-I-C-H-A-E-L,
5 A-L-V-I-N, S-A-L-I-N-G-E-R.
6 Q And where are you employed?
7 A Two places. Boston University School of
8 Management and LECG, which is a consulting firm.
9 Q What is your relationship with LECG?
10 A My title there is managing director. I am
11 the sector head for the global competition practice,
12 and -- and I do my consulting exclusively through
13 them.
14 Q Would you please briefly summarize your
15 educational background?
16 A Yes. I have an undergraduate degree from
17 Yale with a major in economics, and I have a Ph.D. in
18 economics from MIT.
19 Q Did your academic studies include a focus on
20 econometrics?
21 A Yes. As a doctoral student, you had to have
22 two major fields and one of my major fields was

1 econometrics.
2 Q What was the other major field that you
3 studied?
4 A Industrial organization or industrial
5 economics.
6 Q What does the discipline of industrial
7 organization entail?
8 A It's the use of economic modeling principles
9 to understand individual markets and industries as
10 distinct from the economy as a whole.
11 Q Now, you mentioned that you're employed at
12 Boston University. In what capacity?
13 A My title there is Professor of Economics and
14 Everett. W. Lord Distinguished Faculty Scholar.
15 Q What subjects do you teach at Boston
16 University?
17 A Over the years I've taught a lot of
18 different subjects, but most of my teaching has been
19 the core managerial economics and statistics courses
20 that our undergraduates and MBAs have to take.
21 Q Have you served on the faculty at any other
22 colleges or universities?

1 A Yes. I was from 1982 to 1990 on the faculty
2 of the Graduate School of Business at Columbia and I
3 also spent a year as a visiting professor at the
4 Sloane School of Management at MIT.
5 Q What courses did you teach at MIT?
6 A I taught their core managerial economics
7 course for their MBAs and I also taught an industrial
8 economics course also for the MBAs.
9 Q Have you ever worked in government?
10 A Yes, twice.
11 Q In what capacities?
12 A Both were with the Federal Trade Commission.
13 One was in the mid '80s. I was a staff economist
14 there in a position where I was on loan from Columbia
15 a year. And then more recently I was the Director of
16 the Bureau of Economics from 2005 to 2007.
17 Q Is that the chief economist at the FTC?
18 A Yes, it's the chief economist position.
19 Q Have you published any journals or --
20 sorry -- any articles in academic journals relating to
21 industrial organizations?
22 A Yes.

1 Q Approximately how many articles?
2 A I'd say about 20.
3 Q Have you published any articles in academic
4 journals relating to statistics?
5 A Yes.
6 Q Approximately how many articles?
7 A I would say about ten.
8 Q Have you published any articles in academic
9 journals relating to antitrust matters?
10 A Yes.
11 Q Approximately how many?
12 A About 20.
13 Q Have you served on any editorial boards for
14 any --
15 JUDGE WISNIEWSKI: When you say "published,"
16 as a sole author or co-author? How was that?
17 THE WITNESS: It's a mix of -- of sole
18 authored and co-authored for -- for all three of the
19 categories that he asked about.
20 JUDGE WISNIEWSKI: Thank you.
21 BY MR. MacDONALD:
22 Q Have you served on any editorial boards for

1 any journals?
2 A Yes. I was on the editorial board of the --
3 of the Journal of Industrial Economics, of Review of
4 Industrial Organization, and I'm currently an editor
5 of a -- of a journal called Competition Policy
6 International.
7 Q Have you testified before congress?
8 A Yes.
9 Q On how many occasions?
10 A Three times.
11 Q On what subjects?
12 A Twice was about the cable television
13 industry, once was about the oil industry. Two of
14 those were when I was with the FTC where I was
15 presenting testimony on behalf of the commission.
16 Once was much earlier when I was asked to testify
17 about research I had done on the cable television
18 industry related to the double marginalization problem
19 that might come up today.
20 Q Have you ever testified in legal proceedings
21 related to the music industry?
22 A Yes.

1 Q Would you identify those proceedings?
2 A I testified in a proceeding between Record
3 Club of America and United Artists a long time ago,
4 and then I -- more recently I worked for Turner
5 Broadcasting in -- in a proceeding to determine the
6 rates that cable networks had to pay for their ASCAP
7 license.
8 Q Other than those proceedings related to the
9 music industry, have you testified in other legal
10 proceedings related to the value of copyrighted
11 content?
12 A Yes. I appeared before this board with
13 respect to the distribution of copyright funds paid by
14 cable systems for the retransmission of distant
15 broadcast signals and then I also testified in an
16 earlier proceeding before the -- the predecessor to
17 this board, the Copyright Arbitration Royalty Panel,
18 and I did that twice.
19 Q Were you admitted as an expert in those
20 prior CARP proceedings and the CRB proceeding?
21 A Yes.
22 Q Overall how many times have you been

1 retained as an expert witness in a judicial
2 proceeding?
3 A About 20.
4 Q Of those approximately 20 proceedings, have
5 you ever been determined not to be qualified as an
6 expert witness?
7 A No.
8 MR. MacDONALD: Your Honors, Live365
9 proffers Dr. Salinger as an expert in industrial
10 economics and statistics.
11 CHIEF JUDGE SLEDGE: Any objection?
12 MR. HANDZO: No objection, Your Honor.
13 CHIEF JUDGE SLEDGE: Without objection the
14 proffer is accepted.
15 MR. MacDONALD: Your Honor, may we approach
16 the bench and the witness with an exhibit?
17 CHIEF JUDGE SLEDGE: Yes, sir.
18 MR. MacDONALD: Thank you.
19 (Live365 Rebuttal Exhibit Number 1
20 was marked for identification.)
21 BY MR. MacDONALD:
22 Q Dr. Salinger, I've handed you what we have

1 marked for identification as Live365 Rebuttal Exhibit
2 1.
3 Do you recognize this document?
4 A Yes.
5 Q What is this document?
6 A It's my rebuttal testimony in this case.
7 Q Was this testimony prepared by you?
8 A Yes.
9 Q Can you please turn to the last page of your
10 written testimony before the attachments? It's the
11 page that appears after page 28.
12 Do you see where I'm at?
13 A Yes.
14 Q Is this your signature?
15 A Yes.
16 Q Do you affirm under oath that your written
17 rebuttal testimony is true and correct?
18 A Yes.
19 Q Now, do you see that there are documents
20 attached to your report with six corresponding tabs?
21 A Yes.
22 Q What is the document under Tab 1?

1 A It's my -- my CV.
2 Q What's the document under Tab 2?
3 A It's a redacted version of SoundExchange's
4 budget.
5 Q Did you review this budget in connection
6 with preparing your report?
7 A Yes.
8 Q Why?
9 A It had data that formed the basis for my
10 calculations.
11 Q What is the document under Tab 3?
12 A It's a report prepared by a consulting firm,
13 Strategic Pricing Group, that was -- that's about
14 the -- the economic value of webcaster statutory
15 licenses.
16 Q Why did you include this document with your
17 report?
18 A It's cited in my report as -- as authority
19 for one of the points that I made.
20 Q What is the document under Tab 4?
21 A It reports the -- the details of a
22 calculation that is reported in my report.

1 Q What about the document under Tab 5? What
2 is this document?
3 A It reports the details of another
4 calculation that's in my report.
5 Q And what is the document under Tab 6?
6 A It reports the details of yet another
7 calculation that's in my report.
8 Q Are each of these exhibits true and correct
9 copies of the documents you reviewed or relied upon in
10 connection with preparing your written testimony?
11 A Yes.
12 MR. MacDONALD: Your Honor, I would like to
13 offer Live365 Rebuttal Exhibit 1 into evidence.
14 CHIEF JUDGE SLEDGE: Any objection to
15 Exhibit 1?
16 MR. HANDZO: Yes, Your Honor, at least to a
17 portion of it.
18 We filed a Motion to Strike portions of
19 Dr. Salinger's written testimony on July 16th and
20 Live365 has responded in writing.
21 Essentially we're looking to strike material
22 contained primarily in paragraphs 20, 54 and 65 of the

1 testimony.

2 The basis of the motion is that in those

3 paragraphs Dr. Salinger refers to nonprecedential

4 agreements, which under the WSA are not admissible in

5 this proceeding. And what he does in his testimony is

6 he doesn't actually recite the actual terms of those

7 agreements, but he asks the Court to infer what they

8 are. He argues that the Court should infer from the

9 fact that there are nonprecedential deals that the

10 rates in those deals are lower than the rates in the

11 precedential deals with the NAB and with Sirius XM,

12 and based on that inference about what the rates are

13 in the nonprecedential deals he asks the Court to not

14 credit the rates in the precedential agreements.

15 We believe that that violates the provisions

16 of the WSA, which say that the provisions and the

17 terms of nonprecedential deals should not be admitted

18 into evidence or used for any purpose.

19 Clearly, Dr. Salinger could not sit here and

20 say I know what the terms of those agreements are and,

21 therefore, you should not give any credence to the

22 precedential deals, but it's equally improper we think

1 for him to get around that by essentially saying well,
2 you should infer what the provisions of those
3 nonprecedential deals are. It's really just getting
4 to the same thing.
5 And in any event, at the end of the day it's
6 really the rank speculation as well and not
7 appropriate for any witness, including an expert, to
8 speculate about.
9 So for those reasons we would ask the Court
10 to strike those portions of his testimony, and we did
11 attach to -- in our motion the specific pages of the
12 testimony with redactions shown highlighted so that
13 the Court will know exactly what we're asking to
14 strike.
15 JUDGE ROBERTS: Mr. Handzo, if you will look
16 at paragraph 54 of Dr. Salinger's testimony, the
17 portion that you have highlighted that you wish to see
18 struck, the third sentence where it is discussed about
19 the agreements that were included in this proceeding,
20 what is offensive about that sentence? So this is the
21 sentence that's talking about the agreements that are
22 actually admitted into this proceeding.

1 MR. HANDZO: Right. And I would say that
2 the -- that sentence only has relevance in the context
3 of the rest of the discussion talking about the fact
4 that there are these other agreements that weren't
5 admitted.
6 His whole point here is there's two sets of
7 agreements, some were admitted, some aren't, and
8 putting those two facts together there are inferences
9 that you need to draw without --
10 JUDGE ROBERTS: Well, wait a minute. Isn't
11 he saying just in that sentence that the inference you
12 should draw is because SoundExchange put in these
13 agreements, they're probably favorable to
14 SoundExchange's position? Isn't that what that
15 sentence says?
16 MR. HANDZO: I think it says more than that,
17 Your Honor. I think, again, sort of read in the
18 context of everything that's here it's saying you
19 should infer that these are particularly favorable
20 agreements that don't reflect the market rates because
21 there are other agreements.
22 Obviously -- I mean otherwise it seems to be

1 a little bit of a non sequitur. Obviously any time an
2 entity puts in evidence it's putting in evidence
3 because it thinks that evidence supports its case. I
4 don't think Live has put in any evidence in this case
5 that didn't think it supported its case. The whole
6 point he's making here is something a little beyond
7 that.
8 JUDGE ROBERTS: So is that sentence in your
9 view violative of the WSA as well or are you just
10 objecting to it on the grounds that the witness should
11 not be speculating as to what the meaning of the
12 agreement submitted is or is not?
13 MR. HANDZO: Well, I would say actually
14 both. I do think, again, given the entirety of the
15 testimony, it does violate the WSA, but I would also
16 say that if you then sort of take a very, very narrow
17 view of what he's saying, if all he's saying is you
18 put in a piece of evidence because it supports you, it
19 becomes speculation and testimony that I think is not
20 proper for an expert, any expert.
21 JUDGE ROBERTS: All right.
22 CHIEF JUDGE SLEDGE: Mr. Handzo, do you have

1 any voir dire?

2 MR. HANDZO: No, Your Honor.

3 CHIEF JUDGE SLEDGE: We have received your

4 response. Is there anything else or do you wish to

5 present any voir dire?

6 MR. OXENFORD: Your Honor, if I may have

7 leave to speak because I worked on the response to the

8 Motion in Limine.

9 CHIEF JUDGE SLEDGE: All right.

10 MR. OXENFORD: We disagree with Mr. Handzo

11 that the purpose of the testimony that's provided here

12 is to draw attention at all to the excluded WSA

13 agreements that the WSA suggests should not be

14 admitted into evidence. We've not talked about any of

15 the rates, the terms, any specifics, even that such

16 agreements exist.

17 To the extent that Dr. Salinger's testimony

18 even talks about the possibility of agreements other

19 than the ones that were admitted here, he's speaking

20 about hypothetically there could be agreements,

21 whether those agreements exist under the WSA or in

22 some other format that we don't know about that for

1 whatever reasons were not admitted here.

2 In particular, the testimony of Dr. Salinger

3 is relevant because it directly rebuts the testimony

4 of Dr. Pelcovits. Dr. Pelcovits spent five, six pages

5 in his direct case testimony -- his amended direct

6 case testimony, pages 14 through 20, talking about why

7 the admitted WSA agreements were relevant to this

8 proceeding, why the regulatory overlay of the fact

9 that they would be admissible in this proceeding

10 should not diminish the weight that the judges give to

11 those agreements.

12 All Dr. Salinger is doing is taking the

13 obverse of that argument saying that yes, in fact, the

14 regulatory overlay of this proceeding, the fact that

15 the parties agree to have them admitted into this

16 proceeding should be taken into account in assessing

17 the weight to be given to those agreements.

18 So, in effect, what Mr. Handzo is arguing is

19 that their side should be able to make that argument,

20 but we shouldn't be able to rebut that argument.

21 It seems to us that the mere fact that these

22 agreements -- the precedential agreements, the Sirius

1 XM agreement and the broadcasters agreement -- have
2 been put into the record and there is a provision that
3 specifically was negotiated by the parties saying that
4 they could be used as evidence in this proceeding, in
5 and of itself, makes the reason that those documents
6 were admitted, the theories behind the admission of
7 those agreements and the weight to be given to those
8 agreements by the judges perfectly permissible grounds
9 for Dr. Salinger as an expert to testify about.
10 JUDGE ROBERTS: Well, Mr. Oxenford,
11 Dr. Salinger in a normal setting could have spoken as
12 to a rebuttal of what Dr. Pelcovits had offered, the
13 admitted agreements, he could have spoken to the
14 details and specifics of the nonadmitted agreements,
15 but, of course, the WSA prevents him from doing that.
16 So here he is speculating as to a what-if scenario,
17 and on what grounds can a witness who has been
18 qualified as an expert be speculating as to what-if
19 scenarios?
20 MR. OXENFORD: The only what-if scenario
21 that he's speculating as to is really why these were
22 selected as agreements to be admitted, that there

1 would be an upward bias in the rates that were
2 determined under these agreements because the parties
3 agreed to admit them. And that is effectively what
4 his testimony says, which is exactly the opposite of
5 what Dr. Pelcovits said, is that there's no bias
6 because the parties knew that they would be admitted
7 into this proceeding.
8 JUDGE ROBERTS: But what fact is he pointing
9 to to support this testimony?
10 MR. OXENFORD: The mere fact that there is a
11 provision in these agreements that says the parties
12 hereby agree to put these into evidence.
13 JUDGE ROBERTS: Isn't he implying a lot more
14 than that? Isn't he implying that in the situation of
15 these negotiated agreements that someone has more
16 control than the other side and that's why these
17 agreements are being offered?
18 MR. OXENFORD: Certainly. But I don't see
19 that that's impermissible. The fact of who's got
20 control or who's decided whether to admit this
21 agreement or not has a question about whether these
22 agreements -- what weight these agreements should be

1 given in your determination.
2 JUDGE ROBERTS: Yes, but I'm asking you why
3 isn't he just speculating that's the situation. I
4 don't see where he's pointing to any particulars or
5 details of facts to support his contention.
6 CHIEF JUDGE SLEDGE: Your last response I
7 heard you say that it's okay to draw an inference from
8 an assumed fact as opposed to drawing an inference
9 from a fact.
10 JUDGE ROBERTS: That's what I hear you
11 saying as well, Mr. Oxenford.
12 MR. OXENFORD: Okay. Then perhaps I've
13 misspoken. The fact is that these agreements were
14 admitted. The fact is that these agreements have
15 provisions where the parties agree to admit them.
16 Dr. Salinger at paragraph 54 under the lines
17 that Mr. Handzo asked to strike talks about as a
18 matter of economics these agreements are impacted by
19 whether or not the decision was made as to whether to
20 include them in this proceeding.
21 CHIEF JUDGE SLEDGE: You phrased the
22 situation differently than the testimony that is being

1 attacked. You said that the agreements include a
2 provision that the parties agree that the agreements
3 may be admitted.
4 MR. OXENFORD: Correct.
5 CHIEF JUDGE SLEDGE: The attacked testimony
6 says that SoundExchange has the option to admit these
7 agreements. Those are very different facts.
8 MR. OXENFORD: Well, even the second fact I
9 believe is admissible; that SoundExchange has the
10 option to determine whether or not to admit these
11 agreements.
12 CHIEF JUDGE SLEDGE: That's not what you've
13 said the facts are. The facts are, as you said, that
14 the agreements reached between the parties to the
15 agreement include a provision that the agreement is
16 admitted.
17 MR. OXENFORD: Correct.
18 CHIEF JUDGE SLEDGE: The attacked testimony
19 says that one party to that agreement has the option
20 to do something.
21 MR. OXENFORD: Correct.
22 CHIEF JUDGE SLEDGE: Those are different

1 facts.

2 MR. OXENFORD: I believe both of those facts

3 are contained in this testimony and both of those

4 facts --

5 CHIEF JUDGE SLEDGE: Where is the fact

6 saying that SoundExchange has the option to admit

7 these agreements?

8 JUDGE WISNIEWSKI: Where is that fact in

9 evidence, Mr. Oxenford?

10 MR. OXENFORD: I think it's a matter of law.

11 CHIEF JUDGE SLEDGE: Show it to us.

12 MR. OXENFORD: In Section 114(5)(c), the

13 very last sentence. "This subparagraph shall not

14 apply to the extent that the receiving agent and a

15 webcaster that is a party to an agreement entered into

16 pursuant to subparagraph (a) expressly authorizes

17 submission of the agreements in a proceeding under

18 this subsection."

19 JUDGE WISNIEWSKI: But that is the first set

20 of facts that Judge Sledge referred to, not the fact

21 that we're asking you about. The fact we're asking

22 you about that you're claiming has to do with

1 SoundExchange by itself exercising an option here.
2 We're asking you where is that in evidence
3 for the expert, therefore, to testify or raise an
4 opinion about?
5 MR. OXENFORD: That SoundExchange has
6 exercised the option to make this admissible in the
7 provision in the agreements where the parties agree to
8 --
9 JUDGE WISNIEWSKI: Where the parties agree.
10 CHIEF JUDGE SLEDGE: Where the parties
11 agree.
12 MR. OXENFORD: Correct.
13 CHIEF JUDGE SLEDGE: That's different than
14 SoundExchange deciding.
15 MR. OXENFORD: But it is -- SoundExchange is
16 one of the parties. So both SoundExchange --
17 CHIEF JUDGE SLEDGE: One of the parties.
18 MR. OXENFORD: -- so both SoundExchange and
19 the other party agreed to make these agreements
20 admissible.
21 CHIEF JUDGE SLEDGE: That's not what the
22 attacked testimony is saying. The attacked testimony

1 is saying that SoundExchange has the option to put
2 these agreements into evidence.
3 MR. OXENFORD: Without the consent of
4 SoundExchange these agreements would not have been put
5 into evidence. Both parties must agree. So
6 effectively either party has a veto.
7 CHIEF JUDGE SLEDGE: That's not true. The
8 law says that the agreements are admissible. If the
9 agreements are admissible, then you can put them into
10 evidence.
11 MR. OXENFORD: I believe the law says the
12 receiving agent and a webcaster agree to make them
13 admissible.
14 CHIEF JUDGE SLEDGE: All right.
15 MR. OXENFORD: So both of them have to
16 admit -- agree to admit them. So that either party
17 can veto the fact that they would become admissible.
18 JUDGE WISNIEWSKI: But that's the obverse of
19 what you're claiming as the fact here.
20 You're claiming a positive action by
21 SoundExchange, not a veto.
22 MR. OXENFORD: Well, I mean essentially the

1 fact that they did not exercise their veto is, in
2 fact, a positive act.
3 JUDGE WISNIEWSKI: But the other side would
4 have also had to also positively not exercise their
5 veto.
6 MR. OXENFORD: And the witness --
7 JUDGE WISNIEWSKI: And, therefore, that
8 requires a meeting of the minds between two parties,
9 not the action of a single party.
10 MR. OXENFORD: And the witness --
11 JUDGE WISNIEWSKI: And that's not the fact
12 in evidence that the witness is testifying on.
13 CHIEF JUDGE SLEDGE: What are you citing?
14 MR. OXENFORD: I'm sorry?
15 CHIEF JUDGE SLEDGE: What are you citing?
16 MR. OXENFORD: I was about to say that the
17 witness --
18 CHIEF JUDGE SLEDGE: No. What are you
19 citing?
20 MR. OXENFORD: Oh, citing. The last -- last
21 sentence of the paragraph in Section 114 that deals --
22 114(f)(5)(C).

1 CHIEF JUDGE SLEDGE: All right. I'm reading
2 that from the motion, that's on the first page of
3 SoundExchange's motion. I'm also reading it from the
4 first page of your opposition to the motion.
5 What y'all have given us in your pleadings
6 is different than what you're saying.
7 MR. OXENFORD: In what way, Your Honor? I
8 don't understand why it would be different.
9 CHIEF JUDGE SLEDGE: Well, I'm just reading
10 the quotes in the first page of each of your pleadings
11 and that's different than what you just read to us
12 about something about the receiving agent and a
13 webcaster must agree before it becomes admissible.
14 MR. OXENFORD: What I just read to you, Your
15 Honor, was the last sentence -- the same as the last
16 sentence of footnote two on page three of
17 SoundExchange's motion where it states that both the
18 receiving agent and a webcaster expressly authorize
19 the submission. "The restriction against using it
20 shall not apply if both expressly authorize the
21 admission."
22 So actually, Judge Wisniewski, expressly

1 authorized. It's not even a veto power. They both
2 have to expressly authorize.
3 JUDGE WISNIEWSKI: But that's the admission
4 of the agreements that have been admitted.
5 You're talking here about agreements that
6 have been excluded and you're speculating as to
7 SoundExchange at its own option having the right to
8 exclude those agreements, and that's not a fact in
9 evidence.
10 MR. OXENFORD: The argument that's being
11 made here by Dr. Salinger is not that these other
12 agreements are lower, it's that these agreements that
13 are admitted are higher than any other hypothetical
14 agreements that could be out there.
15 JUDGE WISNIEWSKI: But that's not what
16 you're talking about in this particular paragraph.
17 You're talking about the excluded agreements and the
18 rationale for why they're excluded and that it's
19 SoundExchange that excluded them, and that is not a
20 fact we have in evidence anywhere that you've been
21 able to point to.
22 Can you point to that as being in evidence

1 someplace?

2 MR. OXENFORD: Again, the second --

3 JUDGE WISNIEWSKI: Help us out.

4 MR. OXENFORD: The second sentence in

5 paragraph 54 is --

6 JUDGE WISNIEWSKI: The second sentence, yes.

7 MR. OXENFORD: The second sentence which is

8 talking about excluded agreements --

9 JUDGE WISNIEWSKI: Yes.

10 MR. OXENFORD: -- is referring to the first

11 paragraph --

12 JUDGE WISNIEWSKI: Is referring to the --

13 MR. OXENFORD: -- is referring to the first

14 sentence in paragraph 54 --

15 JUDGE WISNIEWSKI: Yes.

16 MR. OXENFORD: -- where Dr. Salinger is not

17 talking specifically about agreements. He's talking

18 about, as a hypothetical matter, other agreements

19 could have been reached that would be lower that would

20 have been excluded. Not that there are specific

21 agreements, just that hypothetically they could have

22 reached other agreements. And, as a matter of

1 economics, the mere fact that they decided to include
2 them here means that this Court should take that into
3 account in judging the weight to be given to those
4 agreements.
5 JUDGE WISNIEWSKI: Well, can he reach an
6 opinion as an expert reasoning from a hypothetical?
7 MR. OXENFORD: Yes, I think he can.
8 CHIEF JUDGE SLEDGE: Any other questions?
9 JUDGE WISNIEWSKI: No.
10 CHIEF JUDGE SLEDGE: All right. We'll
11 recess to consider the motion.
12 (Brief recess 10:09 a.m. to 10:14 a.m.)
13 CHIEF JUDGE SLEDGE: Thank you. We'll come
14 to order.
15 Having reviewed the motions in opposition in
16 advance and then hearing the arguments today and there
17 being no further questioning of the witness under voir
18 dire, the objection is sustained and the motion by
19 SoundExchange is granted.
20 The judges find that the basis for the
21 testimony is speculation and not facts that are
22 admitted and that the expert opinions in paragraph 54

1 and referenced in the other places identified, 20 and
2 65, are based on those speculated facts.
3 And, Mr. Handzo, I believe, and I'm asking
4 you to confirm that this observation is correct, it
5 appears that the way that the Motion in Limine is
6 phrased and your objection referring to the motion,
7 then the order sustaining that objection does not
8 impact the admissibility of the balance of the
9 exhibit.
10 MR. HANDZO: That is correct, Your Honor.
11 CHIEF JUDGE SLEDGE: With the exclusions in
12 the Motion in Limine, Rebuttal Exhibit 1 is admitted.
13 (Live365 Rebuttal Exhibit Number 1
14 was received into evidence.)
15 JUDGE ROBERTS: Mr. MacDonald, before you
16 continue let me first say that I would appreciate it
17 if in your rebuttal testimony in offering
18 clarification as to the operation of Live365 with
19 respect to webcasting, broadcasting, et cetera, and I
20 would strongly encourage you in the rebuttal phase
21 both with this witness and with Mr. Smallens to follow
22 that you observe those boundaries and do not use those

1 terms loosely again so that we don't have any
2 confusion as to broadcasting, webcasting, et cetera,
3 as to the operations of Live365.
4 MR. MacDONALD: Thank you, Your Honor. We
5 will certainly do our best to avoid any further
6 confusion.
7 JUDGE ROBERTS: Very good.
8 BY MR. MacDONALD:
9 Q Dr. Salinger, what was the scope of your
10 retention in this matter?
11 A I was asked to review and comment upon
12 Dr. Pelcovits' report.
13 Q Now, before getting into your comments and
14 your specific critiques of Dr. Pelcovits, could you
15 briefly summarize what Dr. Pelcovits did in arriving
16 at his range of reasonable rates that are set forth in
17 his testimony?
18 A Yes. To determine a range of rates
19 Dr. Pelcovits put forward two benchmarks. One
20 benchmark which he calls the interactive services
21 agreements benchmarks are based on agreements between
22 the -- between four major record labels and

1 interactive Internet music services. And -- and so --
2 and then he adjusts the rates that he observes in
3 those agreements to a rate that he concludes would be
4 comparable for -- for noninteractive Internet music
5 services and then -- and he comes up with a number of
6 .0036 per play.
7 And then the -- the other benchmark is -- is
8 the agreements between SoundExchange and -- and the
9 set -- and two sets of webcasters. One of them is
10 broadcasters represented by NAB, the other is XM
11 Sirius. And there he comes up with benchmarks --
12 because those agreements have different rates for
13 different years, those -- those rates start at -- in
14 2011 at, I think I recall .00175 per play rising to
15 .00245 per play in 2015. And he says that -- that
16 those two benchmarks form the -- the range within
17 which -- and that anything within that range would
18 meet the statutory standard of rates to which a
19 willing buyer and willing seller would agree.
20 Q Could you provide just a little bit more
21 detail about how Dr. Pelcovits arrived at the .0036
22 per play rate?

1 A Yes. It's actually at its core a very
2 simple calculation. And there are a lot of bells and
3 whistles to it, but -- but it's important to focus on
4 the core calculation.
5 So he takes these agreements between the
6 major record labels and interactive music services, he
7 computes an average royalty rate for them, which is --
8 which was .021, and I'm going to forget the last two
9 digits, per play. And then -- then he ascertains that
10 the -- that those royalties constitute 47 percent --
11 approximately 47 percent of the revenues for the --
12 for the interactive music services. And so he says
13 that the appropriate way to apply the benchmark is to
14 come up with a royalty rate for the noninteractive
15 services that would generate that same 47 percent of
16 revenues that would be the royalties for the
17 noninteractive services.
18 And so then what he does is he computes a
19 revenue per play for the -- for noninteractive music
20 services by taking subscription rates and -- which
21 gives you a revenue per -- per subscriber, and then
22 dividing it by an estimate of plays per subscriber to

1 get a revenue per play for -- for noninteractive
2 services, right, which he gets to be about .0073 cents
3 per play. And then he says well, to get the -- to get
4 the royalty you take the 47 percent, right, which is
5 the -- the royalty is a fraction or is a percentage of
6 revenues in the interactive service, apply that to the
7 .0073, which is his estimate of the revenues per play
8 that he got for the noninteractive services, to get
9 approximately .0036. And -- and the calculation
10 doesn't come out exactly .0036 because there are some
11 bells and whistles that change it a little but, but
12 that's the guts of the calculation.
13 Q And sticking with Dr. Pelcovits' interactive
14 services benchmark analysis, and before we get into
15 specifics what at a high level did Dr. Pelcovits do
16 wrong?
17 A I have -- I have a lot of detailed
18 criticisms of Dr. Pelcovits, but I have two main ones
19 that are the most important.
20 Okay. So -- so the first one is that --
21 that the conclusion that he arrived at appears to be
22 wrong on its face. And the reason it appears to be

1 wrong on its face is that he -- he gets an estimated
2 number of .0036 per play and he says that a -- he
3 concludes that a willing buyer would -- would accept
4 that rate. But that .0036 appears to be above the
5 revenues per play that noninteractive services are
6 able to get and -- right. So -- so whatever, you
7 know, the plausibility of the methodology of this, it
8 seems to have arrived at the wrong answer.
9 So then you want to ask well, why did I
10 arrive at the wrong answer? And there's actually --
11 and that leads to my second criticism, and it's really
12 very simple, which is that he looked at the
13 noninteractive services and he assumed that they were
14 entirely subscriber-supported services. And yet when
15 you -- when you -- when you look at the economic model
16 of any business, you have to understand how they
17 actually generate their -- their revenue. And -- and
18 so a substantial fraction of the noninteractive music
19 services are primarily advertising-supported services,
20 and the revenue per play for advertising-supported
21 services appears to be substantially below the revenue
22 per play for the subscriber.

1 So -- so what he did was a little bit like
2 trying to figure out the -- the revenue per user for
3 an airline and saying well, I'm just going to use the
4 full fare first-class seats as being representative,
5 ignoring the fact that most of the seats on the plane
6 are coach seats perhaps sold -- sold at a discount.
7 And if you wanted to understand the economics of the
8 airline industry, that's a reality you'd have to take
9 into account.
10 If he wants to understand the basic
11 economics of Internet radio, he needs to take account
12 of the -- of the fact that it's -- that the revenue
13 stream supporting it is a -- is a mix of subscribers
14 and -- and free users who are being paid for it on an
15 ad-supported basis.
16 Q Thank you, Dr. Salinger.
17 JUDGE ROBERTS: Dr. Salinger, just a
18 question on the second point with respect to
19 Dr. Pelcovits examining the interactive service market
20 and the fact that that's principally subscription
21 based.
22 Is there any way in your opinion that he

1 could have made an adjustment to address that fact,
2 that it is principally subscription based whereas the
3 noninteractive market it's not, or does that really
4 just doom his theory or his benchmark with respect to
5 using interactive services --
6 THE WITNESS: No. I don't --
7 JUDGE ROBERTS: -- because no adjustment can
8 be made?
9 THE WITNESS: It doesn't doom the
10 benchmark -- the benchmark approach. If he -- if you
11 start with the assumption that you want to set a
12 royalty rate that will -- that is likely to generate
13 royalties as a percent of revenues that are the same
14 for the -- for noninteractive and interactive
15 services, you can apply that logic to the actual
16 revenues for the noninteractive services taking into
17 account both the advertising plays and the
18 nonadvertising plays. All right.
19 So -- so you could come up with -- so I'm
20 not -- I'm not objecting to the benchmark approach.
21 I'm not -- I'm willing to take as given the, you know,
22 the best you can do is the -- is equate the ratio of

1 royalties to revenues. I'm just saying do it on the
2 real revenues, not the -- not the distorted view of
3 the revenues which is based on this assumption that
4 all the users are subscribers.
5 JUDGE ROBERTS: So he should have looked at
6 noninteractive services and not interactive services?
7 Is that what you're saying?
8 THE WITNESS: It was fine to use the
9 interactive services as a benchmark --
10 JUDGE ROBERTS: Yes.
11 THE WITNESS: -- even -- even if they're
12 entirely subscriber supported.
13 JUDGE ROBERTS: Okay.
14 THE WITNESS: Right. And so -- and so with
15 that there's a royalty per play and there's a revenue
16 per play, right, and you take that ratio and you're
17 going to get royalties as a fraction of revenues.
18 Okay.
19 With the not -- the fact that the
20 noninteractive services have a different mix of
21 subscribers and advertisers is not a barrier to coming
22 up with a royalty that would -- that would give you

1 the same ratio of -- of royalties to revenues. Right.
2 What -- what you need to figure out is what -- what's
3 the actual revenue per play that the -- that the
4 noninteractive services can get and then come up with
5 a royalty per play that will give you that same
6 47 percent ratio.
7 JUDGE ROBERTS: So you're saying he could
8 have done it, he just didn't do it?
9 THE WITNESS: Yes.
10 JUDGE ROBERTS: Okay. Thank you.
11 CHIEF JUDGE SLEDGE: Well, your answer
12 wasn't what I expected it to be. I thought you were
13 going to answer Judge Roberts' question by saying he
14 could have done it if he had considered the
15 ad-supported revenues as opposed to considering the
16 subscriber-supported revenues. But that isn't the
17 answer you gave.
18 THE WITNESS: Well, a lot of the Internet
19 radio -- a lot of the noninteractive services have
20 some subscribers and they have -- and they have some
21 nonsubscribers who are listening on an ad-supported
22 basis. Both of those are part of their revenue

1 stream. Right. So you want -- so you would want
2 to -- you would -- you would want to and you can as a
3 practical matter take both of those into account.
4 Just like with the airplane, there are some
5 first-class seats, right. And the economics of the
6 airplane business is that you do get to sell some of
7 those first-class seats, but you don't get to sell all
8 first-class seats. So there are -- there are a lot of
9 --
10 JUDGE WISNIEWSKI: That depends. There are
11 some all first-class carriers. But generally
12 speaking.
13 THE WITNESS: Fair enough. The -- I'm
14 sorry. Did I answer your question?
15 CHIEF JUDGE SLEDGE: Yes, sir, you did.
16 Thank you.
17 THE WITNESS: Okay.
18 BY MR. MacDONALD:
19 Q Dr. Salinger, picking up on some of the
20 questions asked by the judges, did you actually
21 undertake an effort to take into account the different
22 mix of ad-supported revenues and

1 subscription-supported revenues for the noninteractive
2 market?
3 A Yes, I provided, I characterize them as
4 illustrative calculations because I didn't -- I didn't
5 have available to me all of the data that I might have
6 liked. But I think I had enough data to -- so that I
7 was comfortable concluding that if you had all the
8 data, you would get a much different answer from the
9 one Dr. Pelcovits got.
10 Q In turning your attention to paragraph 26 of
11 your report, which is on page 10 -- do you see where
12 I'm at?
13 A Yes.
14 Q -- you have some calculations here that
15 continue on into page 11.
16 Do you see what I'm referring to?
17 A Yes.
18 Q What were you calculating here?
19 A Well, it's -- I was providing illustrative
20 calculations like the ones we've -- we've just been
21 talking about. So what I -- I have an estimate of
22 revenues per play for --

1 JUDGE ROBERTS: What page are you on?
2 MR. MacDONALD: I'm sorry, Judge Roberts.
3 It's pages 10 and 11, paragraph 26.
4 JUDGE ROBERTS: Thank you.
5 BY MR. MacDONALD:
6 Q Go ahead, Dr. Salinger.
7 A I have an estimate of -- of revenues per
8 play for the ad-supported -- for the ad-supported
9 users, right, and the estimate I came up with was
10 .0023 cents per play.
11 I took Dr. Pelcovits' estimate of .0073
12 cents per play for the subscriber -- for the
13 subscribers, right, and then I used SoundExchange data
14 to get a rough estimate of the mix of subscribers --
15 of subscribers and -- or nonsubscription uses and
16 subscription uses. And then I computed an average
17 revenue per play for the industry as an average of
18 what you -- of the revenue per play for subscribers
19 and the revenue per play for nonsubscribers, a
20 weighted average representing the fraction -- the
21 estimate of the fraction of plays to nonsubscribers
22 and subscribers, and came up with an estimate to get

1 an illustrative calculation of .0024 cents per play as
2 a more realistic number as to what Internet
3 noninteractive services are able to get. And of
4 course that's a much smaller number than the .0073
5 cents per play underlying Dr. Pelcovits' calculation.
6 So you could -- you would then take the
7 47 percent and apply it to the .0024 cents per play or
8 the more accurate number that -- that you would get
9 if -- if you had all the data that you wanted to
10 really pin that down.
11 Q And based on your calculation of .0024,
12 which is the revenue per play for the noninteractive
13 market, what did you conclude about the .0036 royalty
14 rate proposed by Dr. Pelcovits for the noninteractive
15 market?
16 A I believe it -- it's an estimate that's
17 based on ignoring a really fundamental fact about the
18 economics of the market that he was studying and
19 that -- and -- and I disagreed with his conclusion
20 that a -- that a willing buyer that was a
21 noninteractive Internet music service would -- would
22 agree to that rate.

1 Q And jumping back very briefly to paragraph
2 25, which starts on page 9, you have additional
3 calculations here with respect to Pandora, and my
4 question is what were you calculating here?
5 A Pandora had reported its revenues and from
6 -- and from SoundExchange data we could estimate
7 Pandora's plays. We had the actual data -- at the
8 time I did the report I had the actual data for 2008.
9 For 2009 we just had through October, so we had ten
10 months of data, but we could then -- I then projected
11 that to a year by multiplying by six-fifths, and so I
12 could compute a revenue per play for Pandora.
13 And I was particularly interested in Pandora
14 because in Dr. Pelcovits' section on the emerging
15 business models in the noninteractive music webcasting
16 industry he -- he takes Pandora as Exhibit 1, as one
17 of these new models, so -- and I was also interested
18 in Pandora because it has been so successful.
19 So the estimate there is that in 2008
20 Pandora had a revenue per play of only .00134 cents.
21 And then the estimate in '09, which was actually an
22 overestimate, right, because our projection of the

1 actual plays underestimated the actual plays, was that
2 it only got .00181 cents per play. And, again, that's
3 much less than the .0073 cents per play underlying
4 Dr. Pelcovits' calculation of the .0036 cents per
5 play.
6 Q And looking at this data what did you
7 conclude about Dr. Pelcovits' recommended rate of
8 .0036 per play?
9 A I concluded that Pandora would not pay that
10 rate.
11 Q Now, Dr. Pelcovits' --
12 JUDGE WISNIEWSKI: Let me see if I can get
13 you to be a bit more specific on that.
14 They would not pay the rate that
15 Dr. Pelcovits has suggested? Is that what you're
16 referring to?
17 THE WITNESS: They would not -- well, they
18 wouldn't pay .0036 --
19 JUDGE WISNIEWSKI: Right.
20 THE WITNESS: -- right, which is -- which
21 would be a royalty that was twice as much as their
22 revenue per play and didn't take account of any of

1 their other costs. Okay.
2 JUDGE WISNIEWSKI: But they wouldn't pay
3 that rate assuming that their revenues were the same
4 as what you had found them to be in 2008 and 2009?
5 THE WITNESS: That's -- that's correct.
6 JUDGE WISNIEWSKI: Okay.
7 THE WITNESS: That is, it is based on the --
8 on the data that we have, and I understand that these
9 are forward-looking rates.
10 One of the things I always tell my students
11 is that we want to be forward-looking and we want to
12 be databased and the problem is we don't have data on
13 the future. But Dr. Pelcovits' calculation was also
14 based entirely on existing data on the past.
15 JUDGE WISNIEWSKI: I understand that, and
16 there are limitations obviously --
17 THE WITNESS: Right.
18 JUDGE WISNIEWSKI: -- with what we can work
19 with. I'm just trying to understand --
20 THE WITNESS: Yeah, right.
21 JUDGE WISNIEWSKI: -- precisely what you
22 were talking about. That's all.

1 THE WITNESS: Yes.
2 BY MR. MacDONALD:
3 Q Dr. Pelcovits, just picking up --
4 A I'm Dr. Salinger.
5 Q Sorry. My apologies, Dr. Salinger.
6 How do you address this idea that
7 Dr. Pelcovits' recommended royalty rates are for the
8 next five years whereas the data that you have cited
9 is current or in the recent past?
10 A Well, Dr. Pelcovits' estimates are based on
11 the market as it has existed and one might argue that
12 well, there are -- I believe in the future the numbers
13 are going to change and so the -- and so, you know, so
14 on a forward-looking basis you need to set rates that
15 would -- that are different from what would be
16 appropriate for this past period. But Dr. Pelcovits
17 has -- has not done that, and so -- so I mean I'm --
18 I'm commenting on what he did.
19 Q And did Dr. Pelcovits also rely upon
20 historic data for his calculations?
21 A Yes.
22 Q Let's turn now --

1 A I'm sorry. I did have -- I had one other
2 thing I wanted to say. Dr. Pelcovits --
3 MR. HANDZO: Objection, Your Honor. There's
4 not a question pending.
5 THE WITNESS: I meant in response to the
6 question.
7 CHIEF JUDGE SLEDGE: You answered the
8 question.
9 BY MR. MacDONALD:
10 Q Let's move on, Dr. Salinger.
11 Let's turn to the next section of your
12 written testimony beginning at page 12.
13 Are you there, Dr. Salinger?
14 A Yes.
15 Q Now, in this section you identified several
16 methodological flaws and observations in
17 Dr. Pelcovits' analysis?
18 A Yes.
19 Q Let's briefly turn to these flaws and
20 observations starting with the subheading that reads
21 "Benchmark Analysis Is A Shortcut."
22 What's wrong with using a shortcut?

1 A There's nothing inherently wrong with using
2 a shortcut. So in this section the main points are
3 that while you may, as a practical matter, have to use
4 a shortcut, when you do it, you need to recognize that
5 you're using a shortcut and subject the answer you get
6 from the shortcut to some sort of reality check.
7 So the sort of reality check I think he
8 should have done is when he got an answer of a willing
9 buyer would pay .0036 cents per play, he should have
10 subjected that to a reality check against the --
11 against the, you know, against the fact of the
12 industry.
13 Q Do you believe that Dr. Pelcovits conducted
14 such a reality check?
15 A I'm not aware that he -- that he conducted
16 such a reality check and I believe that the proper
17 conclusion to draw from such a reality check is that
18 the .0036 estimate fails the test.
19 Q Now, on page 13 you have another heading
20 that refers to "Implicit And Incorrect Assumption" --
21 JUDGE WISNIEWSKI: Actually before you get
22 there, Mr. MacDonald, just one quick question related

1 back to page 12 that might save us a minute later, and
2 that is with respect to paragraph 29, which you were
3 just discussing, Dr. Salinger, you have a footnote
4 there, footnote 12.
5 THE WITNESS: Yes.
6 JUDGE WISNIEWSKI: And this is repeated a
7 couple of times in the course of that footnote, but
8 let's just take it in the context of the second
9 sentence where you conclude that those businesses that
10 cannot make a rate of profit available in other
11 activities will not stay in business.
12 I presume that you're talking about the long
13 run since that's the traditional outlook?
14 THE WITNESS: Yes.
15 JUDGE WISNIEWSKI: Okay. Thank you.
16 BY MR. MacDONALD:
17 Q Dr. Salinger, turning to the next section,
18 the one about the implicit and incorrect assumption,
19 what is the assumption that you're referring to here?
20 A The assumption that all users of
21 noninteractive Internet music services are
22 subscribers.

1 Q And why do you say that that's an incorrect
2 assumption?
3 A Because -- because the reality of a lot of
4 the services is that they have a mix of subscribers
5 and nonsubscribers and, in fact, for a lot of them the
6 nonsubscribers account for a much bigger fraction of
7 the plays than -- than the subscribers.
8 Q And turning your attention to paragraph 33,
9 which appears on page 14, you provide some
10 calculations.
11 What calculations did you do here?
12 A This is a calculation of what -- what
13 royalty rate you would get if you took Dr. Pelcovits'
14 logic of -- that the royalties should be .0 -- should
15 be 47 percent of revenues and you applied that logic
16 to the two services for which I had data, which were
17 Pandora and Live365. And if you did -- and, you know,
18 so that was another reality check on this. And you --
19 and you end up with a royalty rate of .00075 for the
20 2008 data, the .00090 for 2009 data. And, of course,
21 that's -- that's far below the.0036 in the -- that
22 Dr. Pelcovits got.

1 Q In your next section which begins on page 15
2 you provide the heading "Failure To Analyze
3 Independent Label Contracts And Performances."
4 Do you see that?
5 A Yes.
6 Q From your review, did Dr. Pelcovits analyze
7 contracts with independent labels in his interactive
8 services benchmark analysis?
9 A No.
10 Q Is that a problem?
11 A It could be a problem if Internet -- if
12 independent -- if music from independent labels
13 constitutes a substantial fraction of the plays on the
14 noninteractive services and if the -- and if the
15 independents would have charged a lower rate than --
16 than the major music labels, then -- then when you --
17 then you'd want to take account of the -- of the
18 contracts with the -- of the contracts that you would
19 expect with the independent labels in setting a single
20 rate for the entire industry.
21 JUDGE ROBERTS: Dr. Salinger, what do you
22 mean by "substantial"? I have that word circled here

1 in your testimony and I'm wondering precisely what are
2 you attaching to as being substantial.
3 THE WITNESS: With respect to the fraction
4 of plays?
5 JUDGE ROBERTS: Yes.
6 THE WITNESS: Well, I've seen estimates that
7 40 percent of the plays on some noninteractive
8 services are for independent labels, so I would say --
9 I would certainly say 40 percent is substantial, but
10 even --
11 JUDGE ROBERTS: Right. But you're looking
12 at it -- when you say that, "substantial," you're
13 looking at it across the industry, not focusing on
14 particular webcasters, correct?
15 THE WITNESS: I'm looking at -- so I think
16 what's important is looking --
17 JUDGE ROBERTS: The reason I'm asking is I
18 can recall testimony that roughly it breaks out to
19 about 80 percent comes from the major labels and
20 20 percent from the independents, but I'm wondering if
21 that's in your view substantial or you have some other
22 facts to give in terms of what constitutes a

1 substantial percentage.
2 THE WITNESS: So what's important is the
3 fact -- is the fraction.
4 JUDGE ROBERTS: Yes, because it then allows
5 me to determine exactly a weight to be given to your
6 criticism.
7 THE WITNESS: And what's also important is
8 the -- is the difference in the rates that will be
9 charged by -- by the independent labels compared to
10 the major labels.
11 There are -- my understanding is that there
12 are independent labels that are -- that are members of
13 SoundExchange and that Dr. Pelcovits could have --
14 JUDGE ROBERTS: Yes.
15 THE WITNESS: -- included that, and -- and
16 it's simply an observation on my part that -- that he
17 didn't. But without knowing what the rates are in
18 those contracts I can't know how big an effect it
19 would have.
20 JUDGE ROBERTS: Okay. I understand you
21 can't know what the effect is, but what constitutes
22 substantial where we have to begin to worry about the

1 effect because if --
2 THE WITNESS: Yeah.
3 JUDGE ROBERTS: -- independents only account
4 for 5 percent, then maybe we don't have to worry that
5 much about it?
6 THE WITNESS: If the -- I don't know the
7 exact number.
8 JUDGE ROBERTS: Okay.
9 THE WITNESS: And I would have -- I would
10 have counted 20 percent as substantial. I don't know
11 if I would count 5 percent as substantial. But I
12 don't have the -- I don't have any numbers other than
13 what's in my footnotes to -- to give you.
14 JUDGE ROBERTS: All right.
15 CHIEF JUDGE SLEDGE: Well, in addition to
16 not knowing that, I think it's curious that your last
17 sentence, which is the basis of all of that
18 discussion, has no citation at all.
19 THE WITNESS: So this is paragraph 35?
20 CHIEF JUDGE SLEDGE: Yes.
21 THE WITNESS: It's true that I don't -- that
22 I don't know the rates and so -- so I don't know

1 quantitatively how -- how big this is. I --
2 CHIEF JUDGE SLEDGE: Well, you don't know if
3 they're lower than the major labels?
4 THE WITNESS: That's correct, but that -- I
5 would have --
6 CHIEF JUDGE SLEDGE: So what's the point?
7 THE WITNESS: It's simply an observation
8 about Dr. -- about Dr. Pelcovits' report, that he's
9 coming up with a single rate that is supposed to apply
10 to -- for all purchases and all sales in this industry
11 and the -- and the sellers are -- they're different
12 kinds of sellers, and -- and he based his estimate of
13 the .02194 on just one type of seller.
14 CHIEF JUDGE SLEDGE: But you conclude that
15 it's biased upward based on facts that you don't know?
16 THE WITNESS: I agree that I don't -- I
17 don't know the facts.
18 BY MR. MacDONALD:
19 Q Dr. Salinger, did you have access to any of
20 these independent label contracts?
21 A I did not.
22 Q Do you know whether Dr. Pelcovits did?

1 A Well, because the -- because there are
2 independent labels that are members of SoundExchange,
3 I think that if -- I think if I had been an expert for
4 SoundExchange, I would have expected to be able to ask
5 for those contracts and to -- and to see them.
6 Q Going back to paragraph 35 with respect to
7 the percentages and data that you cite there, does
8 this data relate to the interactive services,
9 noninteractive services or something else?
10 A These data relate to the noninteractive
11 services. You're referring to the -- to the -- to the
12 fraction of -- of plays that are...
13 Q Turning your attention to paragraph 36,
14 still sticking with the same section, and specifically
15 the last sentence of paragraph 36 or the last couple
16 sentences. Did you see any contracts between a
17 noninteractive service and an independent label?
18 A I'm sorry. Did I see?
19 Q Correct. Or are you aware of any -- of the
20 royalty rate of any contracts between an independent
21 label and a noninteractive service?
22 A My understanding is, from -- from

1 Mr. Floater's testimony, is that there have been
2 some -- some independent labels that have offered
3 their -- their music on a royalty-free basis.
4 Q Thank you.
5 Let's turn to the next section that begins
6 on the bottom of page 16 which has the heading
7 "Downward Trend In The Effective Per Play Rates."
8 Do you see what I'm referring to?
9 A Yes.
10 Q What downward trend did you observe?
11 A Dr. Pelcovits has observations on contracts
12 that span -- they -- some of them start as early as
13 January 2007 and then they -- they go through some
14 portion of 2009. He takes an average -- to get to his
15 .02194 he takes an average over the entire period.
16 What I did was I broke out 2007, 2008 and
17 2009 separately, and what you see is that 2007 was --
18 was the highest, 2008 was -- was lower than 2007 and
19 then 2009 was still lower. And so on a
20 forward-looking basis I think it would have been
21 better to have just used the 2009 estimates rather
22 than the average over the entire period.

1 Q How would this downward trend that you
2 observed affect Dr. Pelcovits' interactive service
3 benchmark?
4 A It would have caused him to estimate a
5 somewhat lower rate.
6 Q Now, at the bottom of page 17 --
7 A About 10 percent.
8 Q Thank you, Dr. Salinger.
9 Near the bottom of page 17 do you see the
10 heading with the title "The Irrelevance Of, And
11 Problems With, Dr. Pelcovits' Regression Analysis"?
12 A Yes.
13 Q Why is Dr. Pelcovits' regression analysis
14 irrelevant?
15 A So remember that he gets the .0037 -- .0036,
16 and roughly that's 47 percent of -- of the .0073
17 and -- right, which is his estimate of the revenue per
18 play. And that .0073 under revenue per play is taken
19 by dividing revenue per subscriber, that is, the
20 average subscription rate, right, which is I think a
21 little over $4, and dividing it by plays per
22 subscriber. Right.

1 So -- right. And so -- so he could have
2 just done that, but instead what he did was he did
3 that calculation -- he did different versions of that
4 calculation three ways and averaged them together.
5 And the third way used -- he used regression
6 analysis as an input. And what he did was instead of,
7 you know, in calculating the -- the revenue per play,
8 instead of taking the actual average subscription
9 rate, right, which is -- I mean this is all using the
10 subscription rates, which is already a problem, but
11 even putting that aside, instead of using the actual
12 average subscription rate he uses this higher number,
13 right, $4 and 80 some cents I think it was. Right.
14 So -- so what's that $4 and 80 cents?
15 Well, that's his estimate of what the
16 interactive services would charge if they weren't
17 interactive but they, nonetheless, had all of the
18 other features that are systematically different
19 between the interactive and the noninteractive
20 services. Right. So the interactive services might
21 have a higher sound quality, there might be some
22 portability involved, but there's some other -- other

1 reasons why the average subscription price for, you
2 know, for the -- for the interactive services would be
3 higher.
4 So he's saying okay, I want to calculate
5 what the interactive services would charge if they
6 weren't interactive.
7 Well, that -- that's an irrelevant number.
8 Right. You're not -- this -- the purpose of this
9 proceeding is not to set the rates that would be paid
10 by the interactive services if they were not
11 interactive. The purpose of this proceeding is to set
12 the rates for the noninteractive services as they are.
13 He should have just stuck with the, you
14 know, with -- if he's going to make this assumption
15 that -- that it's a subscriber-based business, he
16 should have just stuck with the most -- the simplest
17 approach, which is to take that average -- that
18 average subscription fee.
19 Now, you know, that -- to be fair to him,
20 you know, that calculation is one of the three things
21 that enters his average. And to be fair to him, you
22 don't get -- the size of this is not huge, but it was

1 this huge complicated piece of the analysis which had
2 the effect of increasing the rate somewhat and which
3 was a complete diversion.
4 Q Sticking with your critique of
5 Dr. Pelcovits' regression analysis, you have another
6 heading on page 20 that reads "Fixed Effects Eliminate
7 Observations."
8 Do you see that?
9 A Yes.
10 Q First of all, what is a fixed effect as used
11 in econometrics?
12 A A fixed effect is a dummy variable. So a
13 dummy variable is a variable that's coded 01 and it's
14 often used in econometrics where there are -- within
15 the sample you have a lot of observations that -- that
16 have some common element that make those observations
17 not independent of each other and so -- so you might
18 put in a fixed effect. So it's almost -- so when you
19 use a fixed effect, it's -- you know, properly
20 understood it's done when the fixed effect applies to
21 more than one observation.
22 Q Did Dr. Pelcovits claim to use fixed

1 effects?
2 A He did.
3 Q Do you have an opinion as to whether
4 Dr. Pelcovits properly used fixed effects?
5 A My opinion is he used them improperly
6 because in some of the cases he used fixed effects for
7 observation -- fixed effects that applied to a single
8 observation. And the effect of using a fixed effect
9 on a single observation is simply to exclude the
10 observation and -- and -- which is something that
11 really you have to be very careful about doing as an
12 econometrician.
13 Q As an econometrician, does it cause you
14 concern when you see excluded observations?
15 A It is good econometric practice to look
16 carefully at the data and see whether the data are
17 good and to consider whether all -- all the
18 observations are good data. And on some occasions it
19 is appropriate to -- to exclude observations, but it's
20 something that you have to be very careful about doing
21 because -- because the -- if you're given free rein
22 in excluding observations, then you can often generate

1 whatever results you want to generate. And because
2 there is that risk of the misuse of excluding
3 observations, the justification -- there's a very high
4 standard for what justification you have to give to
5 exclude observations.
6 Q Do you believe that Dr. Pelcovits met that
7 high standard of justification to exclude
8 observations?
9 A No.
10 Q One final question about Dr. Pelcovits'
11 regression analysis.
12 JUDGE WISNIEWSKI: Are you moving past the
13 fixed effect?
14 MR. MacDONALD: I've moving to footnote 31,
15 which is part of the fixed effect discussion.
16 JUDGE WISNIEWSKI: Okay. Go ahead, please.
17 BY MR. MacDONALD:
18 Q In footnote 31, Dr. Salinger, at the bottom
19 of page 21 you have a discussion about confidence
20 intervals and you refer to Exhibit 6.
21 Do you see what I'm referring to?
22 A Yes.

1 Q Could you briefly summarize your
2 observations about what a 95 percent confidence
3 interval of Dr. Pelcovits' result would yield?
4 A Yes. So -- so Dr. Pelcovits computed the
5 .0036 by -- by taking the average of three numbers,
6 and just one of the numbers is based on this
7 regression analysis. But for the input, and I forget
8 whether it was .0039 or, you know, whatever it was,
9 the confidence interval on -- on that entry into the
10 estimate of the average was -- was huge. Right. It
11 ranged from, you know, as I see in the footnote, .0004
12 cents, right, which would be a royalty far below even
13 what Live365 is suggesting, to a rate of .008, which
14 of course is -- would be a rate far above what anyone
15 else is suggesting.
16 So even if it were right to use the
17 subscription fees, even if it were right to use the
18 regression analysis to begin with, the -- and even if
19 he should have used these fixed effects, right, and
20 none of those are true, the end result was something
21 that was so imprecise that that would have been
22 another reason for discarding it.

1 MR. MacDONALD: Judge Wisniewski, I was
2 about to move on.
3 JUDGE WISNIEWSKI: Thank you, Mr. MacDonald.
4 Going back to page 48 in this section,
5 Dr. Salinger, where you mentioned the services for
6 which Dr. Pelcovits used dummy variables --
7 THE WITNESS: Uh-huh.
8 JUDGE WISNIEWSKI: -- I guess my question to
9 you is given the nature of this industry, would it be
10 fair to consider these different services essentially
11 as brands?
12 THE WITNESS: Yes, I think the different
13 services are brands.
14 JUDGE WISNIEWSKI: And that being the case,
15 are you familiar with -- as you well know, BLS
16 typically does a great deal of research on hedonic key
17 functions because they use them so much in
18 constructing price indices.
19 THE WITNESS: Yes.
20 JUDGE WISNIEWSKI: Are you familiar with an
21 article by Ruder and To from 2004 on the use of brand
22 dummy variables and the problems that may be

1 associated with that?
2 THE WITNESS: I don't know that article
3 specifically.
4 JUDGE WISNIEWSKI: Thank you.
5 BY MR. MacDONALD:
6 Q Now, Dr. Salinger, I would like to turn your
7 attention to the next section of your report which
8 begins on page 22 regarding Dr. Pelcovits' WSA
9 agreement benchmark analysis.
10 You have this heading -- your first
11 subheading I should say in the section is
12 "SoundExchange Has Excluded Evidence" --
13 MR. HANDZO: Objection, Your Honor. This is
14 part of the testimony that was stricken.
15 MR. MacDONALD: My apologies, Your Honor,
16 that is correct. I'll move on.
17 BY MR. MacDONALD:
18 Q Let's turn to the next section beginning on
19 page 23, Dr. Salinger.
20 A Yes.
21 Q This is titled "The Precedential WSA
22 Agreements Enable The NAB And Sirius XM To Raise Their

1 Rival's Costs."

2 Do you see what I'm referring to?

3 A Yes.

4 Q Generally speaking, what does this principle

5 of raising rival's costs mean?

6 A In almost all cases businesses are made

7 worse off by an increase in their costs. But there is

8 one exception to the rule, and that is if there is

9 a -- something that's a cost for you as a business but

10 it's also a cost for your rivals and it's a more

11 important cost for your rivals than it is for you,

12 then you would actually benefit from an increase in

13 the price of that cost because even though it would

14 raise your cost, it would raise the cost of your

15 rivals more.

16 Q Could you summarize how the principle of

17 raising rival's costs applies here?

18 A Well, the basic conditions may -- may be --

19 may apply to this industry -- to these agreements. So

20 if you take NAB, they're representing broadcasters.

21 Broadcasters are primarily in the terrestrial radio

22 business where they -- where they get to use the music

1 royalty free. So they -- so they have to pay
2 royalties for -- for their webcasts, but the -- but
3 the webcasting is -- is not the -- is typically not
4 the most important part of their business.
5 Similarly, Sirius XM is primarily in the
6 business of satellite radio and they also -- and so
7 what they -- the royalties they pay for their
8 satellite radio transmission are not set by this
9 proceeding. And so this proceeding is setting the
10 rates for a relatively small -- for a relatively small
11 portion of their business.
12 To the extent that the rates they agreed to
13 would result in a higher rate being set in this
14 proceeding, then it could be worth it. And I -- and I
15 should also add with respect to both of those entities
16 that if you look at their annual reports, they
17 identify Internet radio as a major strategic threat to
18 their main -- to their main businesses.
19 So it may have been worth it to them to
20 agree to -- to agree to higher rates even though, all
21 else equal, they'd prefer to pay a lower rate. But
22 the -- but the combination of their paying a higher

1 rate and that causing the strategic threat to them to
2 also have to pay a higher rate, that could have been
3 worth it to them -- well, that could have been worth
4 it to them.
5 Q In discussion --
6 JUDGE ROBERTS: Dr. Salinger, with respect
7 to NAB's members and your theory about raising rivals'
8 costs, who are their rivals?
9 THE WITNESS: So the NAB members -- my
10 understanding is NAB --
11 JUDGE ROBERTS: Is representing terrestrial
12 broadcasters.
13 THE WITNESS: -- is representing terrestrial
14 broadcasters who also do webcasts, but there are also
15 companies that are exclusively Internet radio
16 companies that don't have terrestrial licenses.
17 JUDGE ROBERTS: Yes.
18 THE WITNESS: And that's -- and that's whose
19 rates are being determined in this proceeding.
20 JUDGE ROBERTS: Okay. I'm still not clear
21 as to, for purposes of this theory, who are their
22 rivals. Who are the NAB members concerned with that

1 are their rivals in the Internet business?
2 THE WITNESS: Noninteractive Internet music
3 services.
4 JUDGE ROBERTS: All of them?
5 THE WITNESS: Well, not necessarily every
6 one, but as a group, the emergence of those
7 businesses, particularly of -- if it can be set up so
8 that you can listen to them in your car, listen to
9 them in the ways that people listen to terrestrial
10 radio, that --
11 JUDGE ROBERTS: So is it a rival to the
12 terrestrial radio's Internet business or is it a rival
13 to their over-the-air terrestrial business?
14 THE WITNESS: To their --
15 JUDGE ROBERTS: Is that what you're talking
16 about?
17 THE WITNESS: To their -- the Internet --
18 the Internet radio is a strategic threat to their
19 terrestrial business.
20 JUDGE ROBERTS: Okay. So I'm still unclear
21 then as to, with respect to their terrestrial radio
22 business, who are their rivals in the Internet radio

1 business? Is it Pandora?
2 THE WITNESS: Pandora, Live365.
3 JUDGE ROBERTS: Is it really? I mean I just
4 see Pandora as being a very different model from the
5 terrestrial radio business and they may complement one
6 another, but are they really rival?
7 THE WITNESS: Their -- their 10-Ks say that
8 they are. The 10-Ks identify it as a major strategic
9 threat.
10 JUDGE ROBERTS: As to Pandora, for instance,
11 or Live365, or are they just saying in general that
12 Internet radio is a concern?
13 THE WITNESS: Yeah, I think it's typically
14 worded stronger than "a concern."
15 JUDGE ROBERTS: Okay.
16 THE WITNESS: But it's Internet radio and --
17 and the possibility --
18 JUDGE ROBERTS: Well, could it be their
19 other members though? For instance, you take one
20 terrestrial broadcaster and they're really worried
21 about a rival terrestrial broadcaster who offers
22 Internet service? Isn't that -- so isn't their

1 rivalries within the own group that is negotiating the
2 rate here?
3 THE WITNESS: I'm sure there are, or I'm
4 prepared to believe that there are rivalries within
5 the group, but the point I was making in my report was
6 that what's being set here is a rate that Internet
7 radio services such as Live365 --
8 JUDGE ROBERTS: Yes.
9 THE WITNESS: -- and others, which may be --
10 which may be substitutes for terrestrial radio, and
11 that the -- that the profitability of the terrestrial
12 radio business is going to be affected by how the --
13 how the -- how the Internet radio business evolves
14 and, right, because -- because it may evolve in a way
15 where you don't just listen to it on your computer,
16 right, but you might be able to listen to it on your
17 handheld and listen to it in -- instead of listening
18 to the radio in the car.
19 JUDGE ROBERTS: My concern here, as you may
20 be able to detect, is that if someone is in there
21 bargaining and negotiating for a royalty rate is
22 concerned about rivals and it wants to drive up or at

1 least create the potential to drive up their rival's
2 costs through a higher royalty, that in order to do
3 that they really need to know specifically who their
4 rivals are I would think as opposed to well, I'm
5 concerned about all Internet radio and I just want to
6 negotiate a rate in the hopes that I drive up the
7 price on all Internet radio.
8 THE WITNESS: Well, I think actually the
9 theory doesn't require that you know specifically
10 which Internet radio business is going to -- is going
11 to be successful and turn out to be the substitute
12 that stops people from listening to your terrestrial
13 broadcasts. You just need to know that there is this
14 model out there that is -- where someone might evolve
15 as a threat and -- and if you can raise a major cost
16 component for them, it will be less likely that those
17 business models will evolve as a threat to you.
18 JUDGE ROBERTS: Okay.
19 JUDGE WISNIEWSKI: Dr. Salinger, if we could
20 follow-up a little bit on this.
21 What this essentially requires is that the
22 terrestrial radio company subsidize their Internet

1 activities, doesn't it?
2 THE WITNESS: So the raising rival's cost
3 theory says that you take a hit -- something of a hit
4 on your webcasting business to benefit your
5 terrestrial business, so that's right.
6 JUDGE WISNIEWSKI: So, in effect, they're
7 subsidizing it.
8 Now, what is the impact -- isn't the
9 impact -- if they were successful under this theory,
10 wouldn't the impact be that they gain a larger market
11 share in the interactive market -- in the
12 noninteractive market essentially?
13 I mean if they succeed in driving out their
14 rivals, don't they get a larger market share? Doesn't
15 that logically follow --
16 THE WITNESS: So I'm --
17 JUDGE WISNIEWSKI: -- because they're the
18 only ones left?
19 THE WITNESS: So when I -- when I agreed
20 with you on the subsidized, I -- perhaps I shouldn't
21 have done so quite so quickly.
22 JUDGE WISNIEWSKI: Okay.

1 THE WITNESS: Right. Because the --
2 because --
3 JUDGE WISNIEWSKI: You're allowed to back
4 up.
5 THE WITNESS: Because if what you mean by
6 subsidized is they're going to take an absolute loss
7 on the Internet business as opposed to less of a loss
8 than -- or take less of a profit than they otherwise
9 would have, right, then I don't know that they're
10 going to take an absolute loss. But what I'm saying
11 is there is this trade-off that, you know, sure,
12 all -- holding everyone else's costs equal, they would
13 rather pay a lower rate, of course. But if they -- if
14 they can get a higher rate, it will help the
15 terrestrial business, and you might be right that it
16 would -- if it also helps their -- their webcasting
17 business, all that's being said here --
18 JUDGE WISNIEWSKI: Well, I mean isn't it
19 logical just as a matter of mathematics that, in fact,
20 if you raise your rival's cost, the object is to have
21 them be less successful in their business and perhaps
22 to even drive them out of business, and if that

1 happens and you're the only ones left in that
2 business, you have a larger market share? What's
3 wrong with that logic?
4 THE WITNESS: That's right. I agree with
5 that.
6 JUDGE WISNIEWSKI: Thank you.
7 BY MR. MacDONALD:
8 Q Dr. Salinger, you have a discussion on
9 paragraph 55 about -- this is on page 23 -- of 2009 to
10 2010 rates on one hand and 2011 to 2015 rates on the
11 other hand.
12 Do you see what I'm referring to?
13 A Yes.
14 Q Can you please summarize your observations
15 here?
16 A Yes. The agreement with NAB and Sirius XM
17 were for 2009 to 2015. The rates for 2009 to 2010
18 were below the statutory rates and, therefore, below
19 the rates that SoundExchange could have insisted on.
20 So SoundExchange gave something up in agreeing to
21 those lower rates, and so the question is what do they
22 get in return. And the only thing I can think of that

1 they got in return was they got higher prices for 2011
2 to 2015 than they otherwise would have. And that --
3 and under the raising rival's cost theory, even if the
4 theory isn't entirely correct in terms of making them
5 absolutely better off, making NAB and XM Sirius
6 absolutely better off with the higher rates, to the
7 extent that there was this -- there was some raising
8 rival's cost effect to having higher prices in the out
9 years that would serve as a precedent, then there
10 could have been a mutually beneficial -- then the quid
11 pro quo might have been look, you know, we'll -- we'll
12 pay you off with lower rates in 2009, 2010 in order
13 to -- if you'll give us somewhat higher rates in 2011
14 to 2015 and, incidentally, that's not going to hurt
15 you all that much because we're going to use these as
16 sort of precedent and that's going to raise the cost
17 of your rivals.
18 BY MR. MacDONALD:
19 Q Dr. Salinger, I'd like to turn your
20 attention to the next page of your statement which
21 begins on page 26. This is where you discuss
22 SoundExchange's incentive to demand higher royalties

1 than the members could negotiate individually.
2 My question is do you ascribe any
3 significance to the notion that a single collective
4 negotiated the rates in the WSA agreements on behalf
5 of sellers?
6 A Yes.
7 Q What significance do you ascribe?
8 A Well, if a single entity negotiating on
9 behalf of a group of sellers presumably trying to get
10 the rates that are in their mutual interest, it's a
11 very basic principle of economics that -- that the
12 rates that are in the mutual interest of competing
13 sellers is higher than you would expect to observe
14 under a more competitive rate-setting process.
15 Q Is this economic principle that you just
16 discussed something you relied upon while you were a
17 government official?
18 A Yes. One of the main activities of the
19 Federal Trade Commission is to share antitrust
20 enforcement with the Department of Justice, and I
21 would say the single principle underlying the
22 antitrust laws is that -- is that when competitors set

1 rates jointly either by illegally explicitly price
2 fixing or perhaps by merging, that that can result in
3 higher prices that harm consumers.
4 MR. MacDONALD: Thank you very much,
5 Dr. Salinger.
6 I have no further questions at this time,
7 Your Honors.
8 CHIEF JUDGE SLEDGE: Since we didn't recess
9 any during the morning and with this being a logical
10 place in the testimony, we'll go ahead and recess now
11 until 12:30.
12 (Whereupon, at 11:21 a.m., a
13 luncheon recess was taken.)
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1 A F T E R N O O N S E S S I O N

2 (12:30 p.m.)

3 CHIEF JUDGE SLEDGE: Thank you. We'll come

4 to order.

5 Mr. Malone, any cross examination?

6 MR. MALONE: No cross examination. Thank

7 you, Your Honor.

8 CHIEF JUDGE SLEDGE: Mr. Handzo?

9 MR. HANDZO: Yes, Your Honor. Thank you.

10 CROSS EXAMINATION BY COUNSEL FOR

11 SOUNDEXCHANGE

12 BY MR. HANDZO:

13 Q Good afternoon, Dr. Salinger.

14 A Good afternoon.

15 Q Dr. Salinger, prior to your engagement by

16 Live365 you've never had any involvement in the

17 webcasting industry, correct?

18 A Correct.

19 Q You mentioned in your direct examination

20 that you had two prior engagements in the music

21 business, right?

22 A Yes.

1 Q And the first one, remind me what that was.
2 A It was breach of contract case by Record
3 Club of America against United Artists.
4 Q And when were you involved in that case?
5 A Sometime in the '80s.
6 Q And the other case involved Turner
7 Broadcasting?
8 A Yes.
9 Q When were you involved in that case?
10 A It was in the late '90s.
11 Q And other than those two engagements, you've
12 never done any other work?
13 A I'm sorry, I believe it was in the early
14 2000s. I misspoke.
15 Q Other than those two engagements, you've
16 never done any work in the music business, correct?
17 A That's correct.
18 Q You've never published on the subject of
19 webcasting in the music business, correct?
20 A Correct.
21 Q You've never taught on the subject of
22 webcasting in the music business?

1 A That's correct.
2 Q In connection with this engagement you spent
3 about ten hours gathering information on Internet
4 radio; is that right?
5 A I think that's what I said in my deposition,
6 yes.
7 Q Did that include reading this court's
8 decision in the Web II case?
9 A I looked at it. I can't say that I read
10 every word, but I -- I read parts of it.
11 Q You didn't read the whole thing?
12 A No.
13 JUDGE ROBERTS: He probably didn't read the
14 part on the terms, Mr. Handzo.
15 THE WITNESS: Was that a joke at my expense?
16 JUDGE ROBERTS: No, it was at Mr. Handzo's
17 expense.
18 CHIEF JUDGE SLEDGE: It's an inside joke.
19 BY MR. HANDZO:
20 Q Dr. Salinger, turning to paragraph 16 of
21 your testimony, you'll see there in the first sentence
22 that you characterize a benchmark approach as a

1 conceptual shortcut.
2 Do you see that?
3 A Yes.
4 Q And so I take it you're saying that you
5 think a modeling approach is better?
6 A No.
7 Q And, in fact, in the Turner Broadcasting
8 case that you were involved in in the early 2000s, you
9 were involved in rate-setting procedures there, right?
10 A Yes.
11 Q And, in fact, in that case you adopted a
12 benchmark approach, correct?
13 A Yes.
14 Q Now, in order to undertake a modeling
15 approach, you would agree with me, wouldn't you, that
16 you would need cost and revenue data for at least a
17 representative sample of webcasters?
18 A You mean a modeling approach to determining
19 the rates in this case --
20 Q Yes.
21 A -- in which you would try to figure out the
22 derived demand curve for the music?

1 Yes, I think perhaps you're quoting my
2 deposition.
3 Q And you would stand by that statement,
4 correct?
5 A Yes.
6 Q And there comes a point, doesn't there,
7 where you actually simply don't have enough data to
8 undertake a valid modeling approach, correct?
9 A It's a judgment call because you never have
10 all the data available to you that -- that you would
11 like and it's better to use some data than to use no
12 data. But I'll agree with your characterization
13 that -- that there would come a point where the data
14 you have available to you wasn't sufficient, and that
15 was the reason why I told you that I didn't
16 necessarily think that -- when you said did I -- was I
17 criticizing the benchmark approach, I said no.
18 Q And you haven't undertaken any investigation
19 to know whether there's sufficient data available to
20 undertake a modeling approach in this case, correct?
21 A No. Well, yes, you're correct. No, I have
22 not.

1 Q Now, if we were adopting a modeling approach
2 here, you would agree with me, wouldn't you, that with
3 respect to the revenues of webcasters, a webcaster who
4 uses webcasting to promote sales in a related business
5 would consider their revenues from that related
6 business in deciding what royalty they were willing to
7 pay, right?
8 MR. MacDONALD: Your Honors, I object on the
9 grounds that this is outside of the scope of his
10 written and verbal testimony. I'm not sure that -- I
11 don't -- Dr. Salinger doesn't talk about any sort of
12 modeling approach or any sort of discussion about one
13 line of business subsidizing another line of business.
14 CHIEF JUDGE SLEDGE: Mr. Handzo?
15 MR. HANDZO: Your Honor, in the paragraph
16 that I was just directing Dr. Salinger to he says, "A
17 more thorough approach to determine what willing
18 buyers in the marketplace would pay is to examine
19 their business models." And so he is talking there
20 about the -- he then goes on to talk about how they
21 generate revenues and what costs they incur and he
22 faults Dr. Pelcovits for not performing such an

1 analysis. So I think I'm entitled to examine him on
2 whether that's practical and how one would go about
3 doing it and whether it's possible.
4 CHIEF JUDGE SLEDGE: Mr. MacDonald?
5 MR. MALONE: Dr. Pelcovits simply just
6 doesn't do anything of the sort that Mr. Handzo was
7 referring and Dr. Salinger is only here to rebut
8 Dr. Pelcovits.
9 It seems like Mr. Handzo is trying to
10 bootstrap the criticism of Dr. Fratrik through
11 Dr. Salinger.
12 CHIEF JUDGE SLEDGE: Except for the last
13 part of it, it sounded to me like you were agreeing
14 with Mr. Handzo. I'll overrule that objection.
15 BY MR. HANDZO:
16 Q And I'm not sure whether I actually got an
17 answer to my last question.
18 A Could I ask for the question to be read
19 back.
20 Q Why don't we just do this, why don't I just
21 restate it.
22 A Sure.

1 Q In the modeling approach when you're trying
2 to model the revenues of webcasters, you would agree
3 with me, wouldn't you, that a webcaster who uses
4 webcasting in order to promote sales in a related line
5 of business would consider the revenues they get from
6 that related line of business in deciding what
7 royalties they would pay, correct?
8 A Yes.
9 Q So if there's a relationship between the
10 webcasting business and another line of business such
11 that the webcasting business helps promote sales in
12 that other line of business, that's a factor you'd
13 have to consider in a model, correct?
14 A Yeah, understanding the business model of a
15 company that was -- that -- where the webcasting
16 business was part of a broader business model. Then
17 in understanding that company, I would want to
18 understand the relationship with the other part of the
19 business, yes.
20 Q But in this case you haven't given any
21 thought, I assume, to how you would go about doing
22 that if you adopted a modeling approach, correct?

1 A I think it would be an exaggeration to say I
2 haven't given it any thought, but -- but I don't -- I
3 haven't formulated an opinion for the purposes of this
4 proceeding as to exactly what you would have to do.
5 Q Okay. And you haven't investigated, for
6 example, whether the data would be available to figure
7 out how related lines of business would affect a
8 webcaster's willingness to pay royalties, right?
9 A No, I -- since I was asked to review
10 Dr. Pelcovits' testimony, I decided to accept his
11 benchmark approach, and my critique are of his
12 application of the benchmark approach.
13 Q So the answer to my question is no, you
14 haven't considered whether that data is available?
15 A That's correct.
16 Q Now, with respect to the costs of webcasters
17 it's fair to say that there are a number of different
18 business models with respect to the cost side of
19 webcasting?
20 A Yes.
21 Q And there's no one model that you would
22 identify as typical, right?

1 A There might be different services that
2 survive in the market with different costs, that's
3 correct.
4 Q Okay. But sitting here now you can't say
5 that you could identify a particular model that you
6 would regard as typical, right, that is a typical
7 business model?
8 A Well, you might have more than one
9 typically -- there's not necessarily a single typical
10 model. There -- there could be a couple models that
11 survive, all of which would be in some way typical.
12 Q Okay. Well, my question is simply is there
13 one business model for webcasting you would say is
14 typical?
15 A Not a single one, no.
16 Q Now, if you were to get the data to show
17 costs and revenues for webcasters across a
18 representative sample, you would expect, wouldn't you,
19 that that would show you that some webcasters have a
20 significant greater ability to pay royalties than
21 other webcasters, right?
22 A Yes.

1 Q And you would agree with me, wouldn't you,
2 that a market mechanism wouldn't necessarily set a
3 rate at a level that the webcasters would have the
4 least ability to pay could afford?
5 A What I would agree to is that the rate would
6 not -- that the rate would -- could exclude some
7 companies that would like to be in the business but
8 can't make it.
9 Q Well, let's put it this way: If we, from
10 the representative sample of webcasters, we found some
11 webcasters with a very high ability to pay and some
12 with a low ability to pay, without knowing more we
13 can't say where within that range the market would set
14 a rate, correct?
15 A Correct, and it could be at the low end of
16 the range because the companies that can survive with
17 a high ability to pay might be at a -- at a -- at a
18 very low volume and the companies with a low
19 willingness to pay per -- per play might be able to
20 get a very high volume. So -- so a price setter
21 forced to set a single rate might choose to go to the
22 low end of the range.

1 Q And, conversely, a price setter who is
2 forced to set a single rate might choose to set it at
3 the upper end of the range with ability to pay?
4 A It might.
5 Q For example, it would be a plausible
6 strategy for the sellers in this market to set rates
7 at a level that subscription services could afford and
8 not worry about whether free services could afford?
9 A Right, and it's possible that some sellers
10 would -- that if you had individual sellers instead of
11 a single seller, that some sellers would choose the
12 high end and some sellers would choose the low end.
13 Q And in a modeling approach, in order to
14 figure out where in this sort of range of ability to
15 pay the rate would actually wind up we would have to
16 know something about the cross elasticities within the
17 demand of the webcasting business, right?
18 A Well, that would be a relevant
19 consideration, yes.
20 Q And that's not an easy thing to figure out?
21 A I agree with that.
22 Q Now, lastly, in any modeling approach you'd

1 also want to know something about which webcasting
2 either promotes or substitutes for other markets in
3 which the sellers sell their music, right?
4 A That's correct.
5 Q Now, with respect to a benchmarking
6 approach, if that is the approach that the Court
7 adopts in this case, you don't have any objection to
8 using the interactive market as the benchmark market
9 in this case, do you?
10 A No. I've taken -- I've accepted
11 Dr. Pelcovits' assertion that that's an appropriate
12 benchmark.
13 Q But what you -- as I take it, you're sort
14 of -- one of your principal criticisms of
15 Dr. Pelcovits is you believe on your sort of reality
16 test that webcasters can't afford the rates that he's
17 proposing; am I repeating that correctly?
18 A Yes.
19 Q And you attempted to sort of figure that out
20 by looking at webcaster revenues on an industry-wide
21 basis, correct?
22 A Yes. I tried a couple of different ways,

1 but that's one of the ways.
2 Q That's one of the ways. And that's the way
3 where you came up with your .24 cents per play number?
4 A It was .0024 cents per play.
5 Q How about .0024 dollars per play? Anyway --
6 A We could say 2.40 per thousand plays, which
7 is the way I'd like to talk about it.
8 Q But in any event, that's where the 2 and the
9 4 comes from?
10 A Yes.
11 Q Now, in order to calculate that number for
12 the advertising revenues you used data from an
13 AccuStream report, right?
14 A Yes.
15 Q And you don't know how AccuStream collects
16 its data, right?
17 A Correct.
18 Q It's your understanding, isn't it, that
19 AccuStream actually doesn't have access to actual
20 numbers from webcasters?
21 A Not all of them, and I don't know for a fact
22 that they have the data from -- from anyone.

1 Q If they do have data from anyone, you don't
2 know who they get it from and how many they have it
3 for?
4 A That's correct.
5 Q And you're assuming that they have to make
6 some projections in order to come up with their data
7 for the industry?
8 A That's correct.
9 Q Now, there was another report available to
10 you, right, the ZenithOptimedia report?
11 A Yes.
12 Q And you decided not to use that?
13 A Yes.
14 Q And that report has more than twice the
15 revenues reported that the AccuStream report has,
16 correct?
17 A It has more than twice the revenues, but --
18 but not necessarily for the same universe.
19 Q You're aware, are you not, that Dr. Fratrik
20 used the ZenithOptimedia report in his analysis?
21 A Yes.
22 Q And you didn't speak with Dr. Fratrik about

1 why he chose to use that rather than the AccuStream
2 report, correct?
3 A Correct.
4 Q So you never discussed with him why he
5 apparently thought the ZenithOptimedia was a better
6 report?
7 A I never -- I don't know that he thought it
8 was a better report, and you're right, I did not
9 discuss it with him.
10 Q And you didn't talk to ZenithOptimedia
11 itself about how they collect their data, correct?
12 A That's correct.
13 JUDGE WISNIEWSKI: So maybe I missed it. So
14 what was your answer as to why you didn't choose to
15 use this latter source as opposed to AccuStream?
16 THE WITNESS: Because it covers what it
17 reports for Internet -- Internet radio advertising
18 revenues is for more than just music. It's all
19 Internet radio. So, for example, it would include
20 ESPN radio is my understanding.
21 BY MR. HANDZO:
22 Q And you were told that by Live365, correct?

1 A I was told it originally by Live365 and I
2 did subsequently have a discussion with Mr. Smallens
3 about it and he confirmed it.
4 Q And with respect to subscription revenues,
5 in your testimony you calculate subscription as being
6 2.4 percent of the plays in the webcasting market in
7 2009; is that right?
8 A In my illustrative calculation, yes, that's
9 the number I used.
10 Q And are you aware that Dr. Fratrik found
11 that subscription accounts for about 23 percent of
12 Live's plays?
13 A I hadn't recalled that Dr. Fratrik
14 specifically had -- had used that number, but -- but I
15 was aware of that as -- as a plausible number.
16 Q You know that the number for Live is
17 considerably higher than the number you're using?
18 A I do know that the number for Live is
19 higher.
20 Q And you're aware, are you not, that Dr.
21 Fratrik calculated the industry-wide percentage of
22 plays that are subscription at 10 percent for 2009?

1 A I hadn't been aware of it, but it doesn't
2 surprise me.
3 Q You never talked to Dr. Fratrik about that,
4 did you?
5 A I did not.
6 Q Now, the data that you used to calculate
7 this 2.4 percent is data that relates to a subset of
8 the webcasting industry, correct?
9 A That's correct.
10 Q It's not all webcasters?
11 A That's correct.
12 Q And you used that subset because that's the
13 only data you had, right?
14 A I was putting forward a single illustrative
15 calculation, and from my standpoint whether it was
16 2 percent or 24 percent didn't -- didn't affect the
17 substantive point that I was making. So I'm -- that
18 was one illustrative calculation. There could be
19 others.
20 Q So when you say "illustrative calculation,"
21 you weren't trying to be particularly accurate here it
22 sounds like.

1 A I wasn't trying to be accurate to the last
2 decimal point. We're looking at -- if you look at the
3 numbers involved here, you've got Dr. Pelcovits who's
4 estimating .0073 revenues per play for subscribers.
5 I had -- using the AccuStream data I have
6 estimated .0024 revenue or -- I'm sorry -- .0023
7 revenue per play for the nonsubscribers, and I had
8 other reasons to believe that that was
9 approximately -- approximately correct. So given that
10 disparity between the .0023 and the .0072 and given my
11 understanding that any way I did this there was likely
12 to be, you know, far more than half the plays would
13 be -- would be nonsubscription, that, my point, that
14 looking -- that basing the calculation just on
15 subscribers was going to way overstate the revenues
16 per play that Internet radio services -- that
17 noninteractive radio Internet services could expect
18 and, therefore, it would lead to an overestimate of an
19 appropriate royalty.
20 Q So it didn't bother you that you were
21 presenting a number in this report for the number of
22 subscription plays that were based on only partial

1 data?
2 A I was careful to say that this was an
3 illustrative calculation and -- and I don't think I
4 did anything to, you know, to hide that it was based
5 on a subset of the data or a subset of the data that
6 theoretically would be available.
7 MR. HANDZO: May I approach, Your Honor?
8 CHIEF JUDGE SLEDGE: Yes.
9 BY MR. HANDZO:
10 Q Dr. Salinger, I'm showing you what we've
11 marked as SoundExchange Trial Exhibit 38, which I
12 believe you also saw at your deposition.
13 When you prepared your testimony, you hadn't
14 seen this document, correct?
15 A I'm not sure -- I'm not sure I've seen it,
16 but I don't remember having seen it.
17 Q This is a document from which you could have
18 calculated the percentage of plays in the webcasting
19 industry for the whole webcasting industry for 2009,
20 correct?
21 A Yes, one could have.
22 Q And that would have shown you a much higher

1 percentage of plays per subscription, correct?
2 A Well, it would have been, my recollection,
3 on the order of -- of 20 percent as opposed to
4 2 percent. And while I said that I'm not sure whether
5 or not I personally had seen it, you know, LECG
6 were -- we were aware of this document and we -- and
7 there was some discussion as to whether or not we
8 should base the calculation on this. And it was our
9 understanding that there -- that there was some
10 question as to whether it was a reliable document.
11 But if you're willing to -- if you would have been
12 willing beforehand to tell me it was a reliable
13 document, I would have been happy to have based the
14 calculation on this.
15 Q Dr. Salinger, do you recall telling me at
16 your deposition that you had not seen this document at
17 the time you wrote your testimony?
18 A Yes.
19 Q And the documents that you relied on you got
20 from Live's counsel, correct?
21 A That's correct.
22 Q So you don't know that they gave you this

1 document, correct?
2 A Well, as you know, I had people working with
3 me on this and so whether or not -- so I was -- I
4 believe I was right when I said that I had not
5 physically seen the document. But that's different
6 from saying that we didn't have a discussion of what
7 we should use for the illustrative calculation.
8 Q And you don't know that anybody at LECG saw
9 this document, correct?
10 A Well, I don't know for a fact because I
11 haven't gone back and asked them this question. But
12 I'm -- I would be surprised if Mike McDonald had not
13 seen the document.
14 Q Well, Mike McDonald -- and, by the way, Mike
15 McDonald is your colleague at LECG, correct?
16 A Yes.
17 Q And he actually did a lot of the analysis of
18 the numbers that shows up in your report, correct?
19 A He supervised the calculations, yes.
20 Q And he would have only seen that document if
21 he got it from Live's lawyers, right?
22 A That's correct.

1 Q And you don't know whether he did?
2 A I've told you what I know and what I recall.
3 MR. HANDZO: May I approach?
4 CHIEF JUDGE SLEDGE: Yes.
5 BY MR. HANDZO:
6 Q Dr. Salinger, I'm showing what we've marked
7 as SoundExchange Trial Exhibit 39.
8 Do you know if you saw this document when
9 you prepared your testimony?
10 A I'm sure I did not.
11 Q Did anyone give it to you after you prepared
12 your testimony?
13 A Yes, I saw it yesterday. But this document
14 has data available -- that I know were not available
15 to me at the time because it has Pandora's plays
16 through -- through all of 2009, which I know I didn't
17 have -- I didn't have.
18 Q And looking at this document, which you
19 apparently did yesterday, it would certainly give you
20 a different number for percentage of plays that are
21 subscription than what you've got in your report,
22 correct?

1 A Well, first of all, the answer is it would
2 almost surely give me a somewhat different number and
3 I would observe that this is for, you know, for three
4 services. But glancing at it, yes, it would give --
5 it would give a different number, that's correct.
6 MR. HANDZO: Your Honor I'm going to take I
7 think a somewhat unusual step of moving Exhibit 38 and
8 39 into evidence. And when I say unusual, obviously
9 I'm cognizant of the fact that the witness is saying
10 he wasn't familiar with these documents and hadn't
11 seen them, but I think under the circumstances there
12 is a good cause to offer this without, in effect, a
13 sponsoring witness, which is permitted under the
14 regulations, because it seems clear that Dr. Salinger
15 was calculating his numbers here without the benefit
16 of complete information. And given that we are now in
17 the rebuttal phase, I have no other way to now offer a
18 witness to put this document into evidence and I doubt
19 there is any question about its authenticity.
20 CHIEF JUDGE SLEDGE: Any objections to
21 Exhibit 38 and 39?
22 MR. MacDONALD: Yes, Your Honor, I'm going

1 to object on authenticity grounds.

2 Dr. Salinger has testified that he had not

3 reviewed these documents at the time of preparing his

4 report.

5 CHIEF JUDGE SLEDGE: Objection sustained.

6 BY MR. HANDZO:

7 Q Now, when I asked you before about whether

8 your calculations of the number of subscription plays

9 related only to a subset of webcasters, not included

10 in that subset were Sirius XM, correct?

11 A That's correct.

12 Q And you now understand that Sirius XM offers

13 only subscription webcasting, correct?

14 A I understand that it offers only

15 subscription webcasting. I don't understand that it

16 offers subscription webcasting of just music.

17 Q But Sirius XM's service is purely a

18 subscription, correct?

19 A Yeah, that's correct.

20 Q And at the time you wrote your testimony no

21 one told you that Sirius XM was a subscription-only

22 service, correct?

1 A Not that I recall.
2 Q Now, in your testimony, Dr. Salinger, you
3 also calculated the ability to pay based on two
4 companies, Live and Pandora, correct?
5 A I calculated revenue per play combining
6 those data because those were the two companies for
7 which I had data.
8 Q Okay. That's your Exhibit 4?
9 A Yes.
10 Q You would agree with me that --
11 JUDGE WISNIEWSKI: This has to do with your
12 paragraph 33; is that correct? I'm just trying to
13 make sure what we're referring back to.
14 THE WITNESS: Yes.
15 JUDGE WISNIEWSKI: Thank you.
16 BY MR. HANDZO:
17 Q You would agree with me, would you not, that
18 using two companies is not a perfect set of data?
19 A Yes.
20 Q Now, the calculation of the combined
21 Live/Pandora revenues per play is a calculation that
22 was performed by your colleague Dr. McDonald, right?

1 A Yes.
2 Q And if we look at Exhibit 4 in your
3 testimony, in the presentation of that Dr. MacDonald
4 combined Live and Pandora into a single average
5 revenue per play number, right?
6 A That's correct.
7 Q In fact, the numbers for Pandora and Live
8 are very different from one another if we just
9 aggregated these numbers?
10 A That's correct.
11 Q The Live number is actually something more
12 like .0048 per play, right?
13 A That's correct.
14 Q Now, you didn't attempt to determine whether
15 Live could afford the rates that are being proposed by
16 SoundExchange, did you?
17 A Not -- not specifically, but I would observe
18 that the .0048 per play is substantially below the
19 .0073 per play that Dr. Pelcovits used for his
20 benchmark.
21 Q And above the rates that are being proposed
22 by Dr. Pelcovits?

1 A Yes, but Dr. Pelcovits says that the rate
2 should be 47 percent of the revenues, not a hundred
3 percent of the revenues.
4 Q And in coming up with this revenue per play
5 number for Live you did not include any of the
6 revenues that they obtained from broadcasters,
7 correct?
8 JUDGE WISNIEWSKI: That they obtained from
9 who?
10 MR. HANDZO: Broadcasters. I'm sorry, I'm
11 going to run afoul of the definition.
12 JUDGE WISNIEWSKI: Yes, you are.
13 BY MR. HANDZO:
14 Q Let me put it this way: The only revenues
15 you did include were advertising revenues and
16 subscription revenues, correct?
17 A That's correct.
18 Q You did not include any other revenues that
19 Live earns, correct?
20 A That's correct.
21 Q And there are other revenues that Live
22 earns?

1 A That's correct.
2 JUDGE WISNIEWSKI: Well, let me pursue that
3 a little bit if I can and muddy the waters further.
4 When you refer to these as webcasting
5 revenues for Live365, are they Live365 webcasting
6 revenues or are they a combination of Live365
7 webcasting revenues and revenues that they obtain from
8 aggregators who webcast on their platform but don't
9 use their license, in other words, from Live365's
10 aggregating activities?
11 THE WITNESS: So you're asking about the
12 other -- the other revenues?
13 JUDGE WISNIEWSKI: I'm just trying to figure
14 out what revenues we're actually talking about here --
15 THE WITNESS: Okay. Okay. So --
16 JUDGE WISNIEWSKI: -- that's my question --
17 for Live365.
18 THE WITNESS: So what I was -- my main --
19 I'm sure you'll tell me whether this is responsive.
20 JUDGE WISNIEWSKI: Oh, sure.
21 THE WITNESS: But my main critique of
22 Dr. Pelcovits was that he -- he assumed that all the

1 revenues were from subscribers and that he ignored the
2 fact that there was a lot of revenue -- that there
3 were a lot of users of these services that were --
4 that were doing so on an ad-supported basis. And so
5 in doing this calculation I wasn't specifically
6 focused on the business of Live365, which after all is
7 a pretty small part of the business and has a unique
8 business model, but I was trying to understand if we
9 look at the market as a whole where there's a mix of
10 subscribers and ad-supported users, how different
11 would the answer be.
12 And so what I -- so what I've taken from --
13 from Live365, because it speaks to this issue of
14 revenue per play from people doing ad -- doing so on
15 an ad-supported basis versus a subscriber basis, I've
16 taken -- Live365 has some subscribers at a pretty high
17 rate, but they also have ad-supported -- but they also
18 have advertising revenue that their -- that
19 advertisers pay for access to the audiences for the
20 people who subscribe, and those are the two that I've
21 included.
22 JUDGE WISNIEWSKI: And my question to you is

1 with respect to the revenues that you focused on for
2 Live365 only, okay, were those only both ad-supported
3 and subscription revenues related to activities for
4 which Live365 is using its license?
5 THE WITNESS: I believe the answer to that
6 is yes.
7 JUDGE WISNIEWSKI: Okay. Thank you.
8 CHIEF JUDGE SLEDGE: So that means that you
9 have seen data that divides their revenue that comes
10 from a license asserted by Live365 as the license
11 asserted by some other entity?
12 THE WITNESS: The data -- I -- I have seen
13 Live365's financials and they break out their revenue
14 into what they classify as two business segments.
15 CHIEF JUDGE SLEDGE: That doesn't answer the
16 question I asked you.
17 THE WITNESS: Okay. So -- so I mean if
18 you're asking me -- I mean you're asking me about
19 which license is being used to generate -- I'm sorry.
20 Can you -- can you ask the question again, make sure I
21 understand it?
22 JUDGE WISNIEWSKI: I'm basically trying to

1 figure out which license is being used in connection
2 with the revenue that you're seeing generated and
3 ascribing to them.
4 THE WITNESS: And so you're saying that they
5 have a license, but the people who are --
6 JUDGE WISNIEWSKI: But there are also some
7 people who they provide services to who opt for their
8 own license.
9 CHIEF JUDGE SLEDGE: And pay revenue to
10 Live365.
11 THE WITNESS: And -- I mean I guess I should
12 say I don't know.
13 JUDGE WISNIEWSKI: That's fine. I'm just
14 trying to figure it out. That's all.
15 CHIEF JUDGE SLEDGE: So you've made no
16 analysis of revenues of Live365 that are generated
17 from a license that it claims to exercise as opposed
18 to a license exercised by another entity that pays
19 them revenue?
20 THE WITNESS: That's correct. I wasn't
21 aware of the distinction of the licenses as being the
22 basis for how they divide up or they might divide up

1 revenues.

2 CHIEF JUDGE SLEDGE: All right.

3 BY MR. HANDZO:

4 Q Dr. Salinger, it was actually Dr. McDonald

5 who performed this calculation, correct?

6 A Well, yes, or a research assistant.

7 Q A research assistant under --

8 A Yes.

9 Q -- Dr. McDonald's supervision?

10 A Yes.

11 Q And so far as you know did Dr. McDonald just

12 use the same financial statements that Dr. Fratrik

13 used?

14 A So far as I know, yes.

15 Q And in calculating the revenue per play for

16 Live, do you know whether Dr. McDonald simply took all

17 of the advertising revenue and all of the subscription

18 revenue that shows up on those Live financials?

19 A That's my understanding.

20 Q And he did not use any other revenue from

21 Live365 that relates to its other line of business,

22 right?

1 A That's correct.
2 Q And you would agree that to the extent that
3 what Live characterizes as the webcasting side of the
4 business helps promote sales in their related line of
5 business, in setting a royalty for Live you would want
6 to take that into account?
7 A If we were setting a royalty just for Live
8 or if I believe that Live were typical of the industry
9 and didn't have this unique business model, then I
10 would -- I would -- I would take that into account,
11 yes.
12 Q Let me ask you to turn, Dr. Salinger, to
13 paragraph 35 of your testimony. And I'm correct, am I
14 not, that in paragraph 35 you fault Dr. Pelcovits for
15 not looking at the content between on-demand services
16 and indies?
17 A Correct.
18 Q You do not know what the percentage of indie
19 music that is played on on-demand services, correct?
20 A That's both correct and not -- and -- but
21 also something that was not of particular concern to
22 me.

1 Q Okay. But you did say that Dr. Pelcovits
2 was wrong for not looking at indie contracts on
3 on-demand services, right?
4 A Yes.
5 Q And you don't know what percentage of
6 on-demand services indies make up, right?
7 A I'm sorry. Ask the question -- were you
8 asking about the interactive services or not?
9 Q Yes, interactive services.
10 A Yes, I -- I don't know other than what you
11 represented in the deposition.
12 Q And you do not, or at least at the time of
13 your deposition did not know how the indies
14 distributed their music, right?
15 A That's correct.
16 Q So you don't know, for example, whether
17 indies or some of them distribute their music through
18 the majors?
19 A That's correct.
20 Q Now, we talked about this, or you talked
21 about this a little bit this morning, but you
22 testified I think in paragraph 36 that there could be

1 some possibility that indies may charge less than the
2 majors?
3 A Yes.
4 Q And you refer in the last sentence there to
5 some evidence provided by Live during the direct
6 phase.
7 A Yes.
8 Q Do you see that?
9 A Yes.
10 Q Now, you have not actually read any of the
11 contracts that Live refers to where it claims that
12 indies have provided royalty-free licenses, right?
13 A That's correct.
14 Q And you don't know what the dates of those
15 contracts are?
16 A I don't.
17 Q And you don't know how many there are?
18 A That's correct.
19 Q And your information about those contracts
20 came from your conversations with Live's lawyers,
21 correct?
22 A That's correct.

1 Q And as you sit here today, you don't have an
2 opinion about whether indies would charge more or less
3 for their music than the majors, right?
4 A Other than the evidence that some indies did
5 at least at one point offer the music on -- offer the
6 music on a royalty-free basis.
7 Q The answer is other than that, you do not
8 have an opinion on whether the indies would charge
9 more or less?
10 A That's correct.
11 Q Let me ask you to look at footnote 20,
12 Dr. Salinger, on page 17.
13 A Yes.
14 Q And do I correctly understand you to be
15 stating there that there are other interactive
16 services that Dr. Pelcovits should have looked at?
17 A Well, he -- he could have looked at more.
18 He doesn't say why he limited -- I would make the
19 observation that he didn't say why he limited his --
20 his data to -- to those six.
21 Q What other ones do you think he should have
22 looked at?

1 A My understanding is -- is that there are
2 more.
3 Q And you got that understanding from Live's
4 lawyers?
5 A Yes.
6 Q Can you tell me what those other ones are?
7 A No.
8 Q So you, as you sit here today, don't know
9 from your own knowledge that there are any more?
10 A I believe there are more, but --
11 Q Based only on what Live's lawyers told you?
12 A I'd say that's right.
13 Q Just a few questions about your criticism
14 about the regression analysis.
15 A Yes.
16 Q Some place that I dear tread, so let me just
17 ask you this: I think you said in your testimony that
18 Dr. Pelcovits actually had three ways of doing this
19 interactivity adjustment, correct?
20 A Yes.
21 Q And the regression analysis was just one of
22 them, right?

1 A Yes.
2 Q And so if he had just done it with those
3 other two and not had the third one, you wouldn't have
4 had a problem with that?
5 A Well, I -- I had a series of problems
6 leading up to that, but I wouldn't have had the
7 further objection that -- that the regression analysis
8 was irrelevant.
9 Q All right. Just to be clear, I understand
10 that you have other criticisms of this --
11 A Yes.
12 Q -- benchmark model besides the regression,
13 but just with respect to the regression, if
14 Dr. Pelcovits had just done it the other two ways and
15 not used the regression, that would have been fine?
16 A Right. If you're -- if you're going to use
17 the subscription rates, then I would have just used
18 the average subscription rate. I wouldn't have done
19 this fancy thing that was --
20 Q And Dr. Pelcovits did use the average
21 subscription rate, right?
22 A Yes.

1 Q Let me ask you to look at paragraph 51 of
2 your testimony, Dr. Salinger.
3 CHIEF JUDGE SLEDGE: Well, I'm not clear on
4 that list answer.
5 Do I understand you to say that the answer
6 to Mr. Handzo's question is no, that he should not
7 have made any adjustment and, therefore, his question
8 to you that it would be okay to make the adjustment
9 two other ways, the answer is no?
10 THE WITNESS: The .0036 that he gets, it's
11 an average of three numbers. They are all sort of
12 close to .0036. All right. One of those numbers
13 is -- is a -- is somewhat higher and it's based on
14 this regression technique. And I understood
15 Mr. Handzo's question to be well, could he have
16 just -- could he have taken the average of two, thrown
17 out the regression technique. And I'm saying yeah, it
18 would have been better -- better to use the two and
19 throw -- and throw out the third part of the average
20 than what he did.
21 CHIEF JUDGE SLEDGE: Well, doesn't that
22 conflict with your statement that he should have used

1 only the average of the subscription and made no
2 adjustment?
3 THE WITNESS: Oh. The other two both use
4 the -- both use the average, and there's some other
5 detail that -- that is different between the two and
6 it's very small.
7 CHIEF JUDGE SLEDGE: I'm not getting an
8 answer to my question.
9 Are you saying that there should have been
10 an adjustment or not?
11 THE WITNESS: There should not have been an
12 adjustment to the average subscription price. And the
13 difference between the other -- between the other two
14 doesn't concern that adjustment.
15 CHIEF JUDGE SLEDGE: Uh-huh.
16 BY MR. HANDZO:
17 Q Dr. Salinger, if you could look at paragraph
18 51 of your testimony.
19 A Uh-huh.
20 Q And at the end of that paragraph in the last
21 sentence I will paraphrase a little bit, but you say
22 the judges should disregard the methodology because

1 it's inherently subject to manipulation to obtain a
2 desired result, which is what appears to have happened
3 here.
4 Do you see that?
5 A Yes.
6 Q You are not suggesting, are you, that
7 Dr. Pelcovits purposely manipulated his results, are
8 you?
9 A What I'm suggesting is that he did what --
10 what one would do if one wanted to manipulate the
11 results. But I don't know why he did it and -- and
12 really my point is that because there -- because he
13 did what one would do if one were trying to manipulate
14 the results, it's particularly important that he
15 provide a very strong justification for doing what he
16 did, which he did not do.
17 MR. HANDZO: May I approach, Your Honor?
18 CHIEF JUDGE SLEDGE: Yes.
19 BY MR. HANDZO:
20 Q Dr. Salinger, I'm showing you what we've
21 marked as SoundExchange 30 and I would ask you to turn
22 to page 133.

1 A Yes.
2 Q And do you recall that in your deposition I
3 was asking you whether you were accusing Dr. Pelcovits
4 of purposely manipulating his results?
5 A That's correct.
6 Q Okay. And I asked you the following
7 question and you gave me the following answer:
8 "QUESTION: Okay. You're not suggesting
9 that he purposely manipulated his results, are you?
10 "ANSWER: No."
11 A That's correct, and that's still my answer.
12 Q Thank you.
13 Dr. Salinger, turn if you would to
14 paragraphs 38 and 39 of your testimony which addresses
15 what you referred to as the downward trend in the
16 effective per play rate.
17 A Yes.
18 Q And I believe you testified this morning
19 that in your view what Dr. Pelcovits should have done
20 was he should have used the effective per play rate
21 from 2009 rather than an average of over a three-year
22 period; is that fair?

1 A Yes, I -- I believe that would have been
2 superior.
3 Q And the average that Dr. Pelcovits came up
4 with was .2194; is that right?
5 A It was .02194.
6 Q .02194.
7 A I know you told me you were a history major.
8 Q And now you'll believe me if you didn't
9 before.
10 And the number for 2009 is .0917, right?
11 A No. It's .01917.
12 Q If the Court were to accept your criticism,
13 the fix to the proposed rate would be to multiply --
14 let me see if I can get this right -- Dr. -- to
15 multiply Dr. Pelcovits' rate by .01917 over .02610,
16 right?
17 A No.
18 Q All right. Tell me what the fix is.
19 A You would multiply it by .01917 divided by
20 .02194. All right. So you -- you should like that
21 answer. That's better for you.
22 So if the Court were to decide that that was

1 the only problem and they just needed to do the one
2 fix, that's -- that's what it should be.
3 Q Thank you.
4 Now, looking at paragraph 61 and the
5 following couple of paragraphs of your testimony,
6 Dr. Salinger, would you agree with me that if the
7 buyers in this market view the record companies as
8 complements rather than substitutes, then the effect
9 of having SoundExchange negotiate on behalf of all of
10 the record companies would be actually a lower rate on
11 average than what the record companies would negotiate
12 themselves?
13 A Yes.
14 Q And when we look at market power issues,
15 there are circumstances where buyers have market
16 power, right?
17 A That's correct.
18 Q And you understand that in this case the NAB
19 was negotiating on behalf of a large group of
20 broadcasters, correct?
21 A That's correct.
22 Q And you have not looked into the question of

1 whether the buyers in the NAB deal were able to
2 exercise market power here, correct?
3 A That's correct.
4 Q Now, if the negotiations between the NAB and
5 SoundExchange had been unsuccessful, the result would
6 have been that this Court would have set a rate,
7 right?
8 A That's correct, or that's my understanding.
9 Q All right. And when you're negotiating in
10 that context where if there's a failure to negotiate a
11 deal there will be a court that sets the rate, as the
12 buyer, if you anticipate that the Court is going to
13 set a rate that reasonably approximates a market rate,
14 you're unlikely to agree to a rate higher than that,
15 correct?
16 A That's correct, unless you have a reason to
17 raise rival's costs. But as a general rule, yes.
18 Q Well, let's talk about that. As I
19 understand your raising rival's costs theory, the
20 theory is that the NAB companies wanted to raise the
21 rates of the webcasters in order to protect the
22 broadcasters' terrestrial radio market; is that

1 correct?
2 A That's correct.
3 Q Now, obviously when in this context if you
4 are raising your rival's cost, you're also raising
5 your own costs, right?
6 A That's correct.
7 Q So your theory here is that by raising costs
8 for everyone, including the NAB companies, the NAB
9 companies would drive some or all of the commercial
10 webcasters out of business, right?
11 A Either drive them out of business or cause
12 them to -- to operate in some different way where they
13 would be a smaller part of the market.
14 It doesn't require that you drive them out
15 of business, but they would have to shrink in some
16 way.
17 Q So that if the strategy were successful and
18 the commercial webcasters shrink, the NAB companies, I
19 take it under this theory, would preserve their
20 terrestrial markets from encroachment by webcasters
21 and increase their webcasting market, correct?
22 A That's correct.

1 Q Now, in order for that strategy to work,
2 SoundExchange would have to agree to go along with it,
3 right?
4 A That's correct.
5 Q Because if the NAB companies negotiated a
6 rate with SoundExchange and then SoundExchange gave
7 somebody a better rate, it would be a
8 counterproductive strategy for the NAB companies,
9 right?
10 A That's correct.
11 Q Now, is it your testimony -- well, let me
12 back up.
13 You understand that the record companies,
14 SoundExchange, do not collect any royalties for the
15 performances on terrestrial radio, right?
16 A That's my understanding.
17 Q So is it your testimony that SoundExchange
18 would have gone along with this strategy which would
19 have the effect of helping the terrestrial
20 broadcasters preserve their terrestrial market where
21 SoundExchange gets no royalties and drive commercial
22 webcasters out of business who do pay royalties to

1 SoundExchange?
2 A Well, I didn't say that they had to drive
3 all the webcasters out of business. My -- what I'm
4 assuming about SoundExchange was it has a
5 representative of the entire industry and, therefore,
6 it's trying to set a monopoly rate. So it -- it would
7 like -- it would like to set a monopoly rate as
8 opposed to a more competitive rate, and the
9 broadcasters would benefit from that.
10 Q And the broadcasters would benefit in your
11 theory in a way which would hurt SoundExchange and the
12 record companies, right?
13 A No.
14 Q Well, to the extent that you are protecting
15 terrestrial markets where no royalty is paid from
16 competition with markets where a royalty is paid,
17 that's not helping the record companies, is it?
18 A The benefit to the record companies is that
19 they get more like the monopoly price, which is their
20 objective or, alternatively, that they get a rate
21 that's so high but then they get to practice price
22 discrimination by negotiating lower.

1 Q My question is this: It does not help
2 SoundExchange to protect the terrestrial market where
3 it gets no performance rates, correct?
4 A By itself it doesn't help SoundExchange to
5 protect the terrestrial market, but that's not what
6 I'm saying is the benefit that SoundExchange got.
7 Q Now, in order for this theory to be viable
8 it would also have to be the case that the NAB
9 companies would have to believe that this Court would
10 not set a lower rate than what the NAB has negotiated?
11 A That's right. Well, for the theory to be
12 viable what's necessary is that -- that NAB would
13 believe that -- that the rate it set would -- would
14 cause this Court to set a higher price than it would
15 otherwise set.
16 Q Because if the NAB did attempt the strategy
17 that you're suggesting and this Court set a lower
18 rate, the NAB companies would have saddled themselves
19 with a higher rate than their competitors are paying,
20 right?
21 A That's correct. For their -- for the
22 webcasting -- for the webcasting part of their

1 business, that's correct.
2 Q Wouldn't you expect if buyers were engaging
3 in that strategy that they would want a
4 most-favored-nation's clause in their contract?
5 A I don't know.
6 Q You're aware that there is no
7 most-favored-nation's clause in the NAB agreement?
8 A I'm not, but I certainly wasn't aware
9 that -- I didn't know one way or the other.
10 Q Now, you were asked some questions about
11 this this morning, but let me just pursue it a little
12 further. In the strategy, if it worked, you would
13 expect the broadcaster's webcasting business to grow
14 as well, right?
15 A Yes.
16 Q And that is now a part of the business, as
17 you discussed this morning, where the broadcasters
18 will be paying higher rates than, according to you,
19 they would have otherwise been able to get, right?
20 A Yes.
21 Q And if those rates made their webcasting
22 business actually unprofitable, growing that business

1 would actually be a problem, right?
2 A The music part of the business, yes.
3 Assuming that the rates made -- made it
4 unprofitable -- you know, recognizing that the -- the
5 costs for the broadcasters of webcasting -- it's a
6 joint effort possibly to do broad -- likely it's a
7 joint effort to do broadcasting and webcasting. So --
8 so the rates might -- you could have rates that would
9 be unprofitable for pure-play webcasters and -- and --
10 unprofitable for the pure-play webcasters but
11 profitable for -- for the broadcasters.
12 MR. HANDZO: May I have a moment, Your
13 Honor?
14 CHIEF JUDGE SLEDGE: Yes.
15 (Brief pause.)
16 BY MR. HANDZO:
17 Q Dr. Salinger, you don't have an opinion
18 about whether the judges in this matter should set one
19 rate for all webcasters or different rates for
20 different webcasters, right?
21 A That's correct. I was asked to critique
22 Dr. Pelcovits' report and there was an assumption

1 underlying Dr. Pelcovits' report that there will be a
2 single rate.
3 Q But you don't have an opinion on that one
4 way or the other?
5 A I don't.
6 Q And you don't have an opinion about what
7 rate or rates the Court should set in this case,
8 correct?
9 A No, I -- I don't have a specific rate.
10 Dr. Pelcovits has said that the -- that the WSA
11 agreements are lower bound, and -- and I disagreed
12 with that because I think there are various upward
13 biases in that rate. So to the extent that there are
14 upward biases, I think it -- there's an argument for
15 why the Court should set a lower rate than that, but I
16 don't have a specific number.
17 MR. HANDZO: Thank you. That's all I have.
18 CHIEF JUDGE SLEDGE: Mr. MacDonald,
19 redirect?
20 MR. MacDONALD: Yes, Your Honor.
21 REDIRECT EXAMINATION BY COUNSEL FOR LIVE365
22 BY MR. MacDONALD:

1 Q Good afternoon, Dr. Salinger.
2 A Good afternoon.
3 Q Do you recall the questioning by Mr. Handzo
4 about the subscription versus nonsubscription
5 performance data that you relied upon in paragraph 26
6 of your report?
7 A Yes.
8 Q And you recall that Mr. Handzo asked whether
9 that represented a subset of the total noninteractive
10 webcasting performances? Do you recall that question
11 and answer?
12 A Was he asking that with respect to 26 or
13 with respect -- 26 is reporting the AccuStream data,
14 and there's the other paragraph that -- that's
15 reporting the calculations on Pandora and Live365. I
16 thought he was asking about the Pandora and Live365.
17 Q Well, let's turn your attention to actually
18 the end of paragraph 26, more focused on page 11, and
19 you have --
20 A I -- I recall now. I -- I misspoke.
21 Q Okay. With respect to the data that you did
22 rely upon for your subscription versus nonsubscription

1 performance data, do you recall approximately what
2 percentage of the total performances is the
3 nonsubscription versus subscription data that you
4 relied upon, what percentage of the overall statutory
5 market did that account for?
6 A My recollection is it's over half.
7 Q Now I'd like to turn your attention to
8 SoundExchange Trial Exhibit 38, which should be in
9 front of you. And just turning your attention to the
10 2009 data, do you see that under the "Reported
11 Performances" column there are numbers that purport to
12 represent subscription and nonsubscription
13 performances?
14 Do you see that?
15 A Yes.
16 Q Can you provide an eyeball estimate of what
17 percentage of the overall total performances for 2009
18 accounts for subscription performances in 2009?
19 A Appears to be less than 20 percent.
20 Q What about with respect to the data in 2007?
21 A I'm -- well, I might have been off by a
22 decimal point.

1 Q How about this, Dr. Salinger --
2 A Oh, oh, oh, I'm sorry. I was looking at the
3 wrong -- I was looking at the wrong numbers. Can I
4 just do that again?
5 Q How about we do this: What is the reported,
6 according to this document, the reported performances
7 for 2009 subscription?
8 MR. HANDZO: Your Honor, if I may, I'm going
9 to object only because the document wasn't admitted
10 into evidence, so...
11 MR. MacDONALD: Your Honor, my response to
12 that is Mr. Handzo elicited testimony about this
13 document. I'm not seeking to enter it into evidence.
14 I'm merely seeking to rebut the assertions that Mr.
15 Handzo sought and, in fact, elicited from
16 Dr. Salinger.
17 CHIEF JUDGE SLEDGE: Dr. Salinger says on
18 Exhibit 38 that it gives the total revenues that could
19 have been used in his report but were not used in his
20 report, so the accuracy of any numbers were objected
21 by you and sustained.
22 MR. MacDONALD: Your Honor, I'm not seeking

1 to elicit testimony about the accuracy of the number.
2 I'm instead seeking to elicit testimony about whether
3 any of these numbers would have any impact on
4 Dr. Salinger's, any of his conclusions.
5 JUDGE ROBERTS: Why try to redirect the
6 number into the record?
7 CHIEF JUDGE SLEDGE: Sustained unless you
8 want to admit the document.
9 BY MR. MacDONALD:
10 Q Well, I'll try it this way without referring
11 to the document: Dr. Salinger, if subscription
12 performances represented 10 percent or even 20 percent
13 of the overall statutory market, would that impact any
14 of the conclusions or the points in your report?
15 A It would affect the precise numerical
16 calculations, but it would not affect the substance of
17 the conclusions that -- that I drew.
18 Q Thank you.
19 Now, do you recall the testimony with
20 respect to footnote 20 on page 17 about Dr. Pelcovits'
21 reliance upon six interactive services for its
22 effective per play rate?

1 Do you recall the questioning?
2 A Yes.
3 Q Do you recall ever seeing the appendices
4 attached to Dr. Pelcovits' written direct testimony in
5 this case?
6 A I did see them.
7 Q And do you recall an appendix that listed
8 out various contracts that Dr. Pelcovits purported to
9 review in connection with his report?
10 A Yes.
11 Q Do you recall seeing more than -- well,
12 first of all, do you recall seeing more than six
13 interactive services listed in those appendices?
14 MR. HANDZO: Object to leading, Your Honor.
15 CHIEF JUDGE SLEDGE: Overruled.
16 THE WITNESS: Yes.
17 CHIEF JUDGE SLEDGE: So you just got him to
18 state a fact that conflicts with what he said in his
19 footnote 20?
20 MR. MacDONALD: No, Your Honor.
21 CHIEF JUDGE SLEDGE: It says in footnote 20
22 he relies on six interactive services and now you're

1 saying that he remembers from reading the report that
2 he relied on more services.
3 MR. MacDONALD: No, Your Honor, that's not
4 the thrust of my questioning -- what the thrust of my
5 questioning is.
6 CHIEF JUDGE SLEDGE: One of us didn't
7 understand your question.
8 MR. MacDONALD: Okay. May I try to ask
9 Dr. Salinger some questions to try to clarify?
10 CHIEF JUDGE SLEDGE: All right.
11 BY MR. MacDONALD:
12 Q What was the overall concern that you were
13 trying to convey in footnote 20?
14 A Dr. Pelcovits lists a large number of
15 contracts to which he had access, and then when you
16 look at what he actually relied on, it was a
17 relatively small subset of -- of those. And that
18 was -- so that was the basis of the criticism, that he
19 claimed to have had access to -- to more than he used
20 and he doesn't explain the -- he doesn't explain why
21 he chose the sample that he chose.
22 MR. MacDONALD: I'm going to move on, Your

1 Honor, from footnote 20.
2 BY MR. MacDONALD:
3 Q Dr. Salinger, was the purpose of your
4 analysis to set a rate for this proceeding?
5 A No.
6 Q Was the purpose of your analysis to show the
7 errors in Dr. Pelcovits' analysis?
8 A Well, it was to comment on the analysis and
9 to point out errors where there were and -- and where
10 I agreed with it where I agreed with it.
11 Q Did Dr. McDonald --
12 CHIEF JUDGE SLEDGE: I'm glad you agreed
13 that you wouldn't have been party to some arrangement,
14 as the question asked you, that you would have been a
15 hired gun to give a result for which you were hired as
16 opposed to what you decided.
17 I hope that's never the case, Mr. MacDonald,
18 as your question indicated.
19 MR. MacDONALD: Yes, Judge. Thank you.
20 BY MR. MacDONALD:
21 Q Did Dr. McDonald act under your direction?
22 A Yes.

1 Q Did you oversee his work?
2 A Yes.
3 Q Was Dr. McDonald carrying out calculations
4 under your direction?
5 A Yes.
6 MR. MacDONALD: Your Honors, I have no
7 further questions.
8 CHIEF JUDGE SLEDGE: Mr. Malone, any
9 questions?
10 MR. MALONE: Yes, please, Your Honor.
11 CROSS EXAMINATION BY COUNSEL FOR IBS
12 BY MR. MALONE:
13 Q Good afternoon, Dr. Salinger.
14 A Good afternoon.
15 Q At the beginning or near the beginning of
16 Mr. Handzo's cross-examination the discussion with
17 Mr. Handzo centered on paragraph 16 and modeling as a
18 conceptual shortcut.
19 A Yes.
20 Q And you got into some of the details of that
21 and eventually spoke of different models of businesses
22 in the market.

1 Is the underlying assumption of your answer
2 that there is a single market as opposed to subsets of
3 the market or market segments?
4 A When you ask an antitrust economist about
5 what I've concluded about a market, that's a loaded
6 question.
7 There are different business models out
8 there and they -- and the question of exactly where
9 you would draw the boundaries of the markets and
10 whether there are multiple markets is -- is a
11 complicated question and I haven't assessed that.
12 MR. MALONE: Thank you.
13 CHIEF JUDGE SLEDGE: Mr. Handzo, any further
14 questions?
15 MR. HANDZO: No, Your Honor.
16 CHIEF JUDGE SLEDGE: Any questions of the
17 bench?
18 JUDGE WISNIEWSKI: Just perhaps one or two.
19 Dr. Salinger, I'm looking back at your
20 paragraph 25 and perhaps even 33 where you make
21 estimates of Pandora's total revenues per play in 2008
22 and 2009.

1 THE WITNESS: Yes.
2 JUDGE WISNIEWSKI: And I guess my question
3 for you is have you looked at Pandora's revenue
4 estimates for 2010?
5 THE WITNESS: No, I haven't.
6 JUDGE WISNIEWSKI: And in paragraph 33 you
7 combine Pandora and Live365 for purposes of making an
8 estimate for webcasters.
9 I guess the question -- but at another point
10 in your testimony you had indicated something to the
11 effect that Live365 had a unique business model. So I
12 guess my question to you is what makes them comparable
13 for purposes of combining them the way you did?
14 THE WITNESS: What -- in my mind what made
15 them comparable was that they both had a mix of -- of
16 subscribers and people listing on an
17 advertising-supported basis.
18 JUDGE WISNIEWSKI: And part of that has to
19 do with the fact that they are competitors? Aren't
20 they competing for the same --
21 THE WITNESS: Yes.
22 JUDGE WISNIEWSKI: -- sources of revenue?

1 THE WITNESS: Yes, I think that's right.
2 JUDGE WISNIEWSKI: Thank you. That's all.
3 CHIEF JUDGE SLEDGE: Judge Roberts?
4 Thank you, sir. You're excused.
5 THE WITNESS: Thank you.
6 (Witness excused.)
7 MR. OXENFORD: Your Honor, might this be an
8 appropriate time to take a quick recess before we
9 start?
10 CHIEF JUDGE SLEDGE: It makes for a long
11 afternoon. Do you want to take a recess now? Is that
12 what you're saying?
13 MR. OXENFORD: Yes, please, Your Honor.
14 CHIEF JUDGE SLEDGE: Court will recess for
15 ten minutes.
16 MR. OXENFORD: Thank you.
17 (Brief recess 1:52 p.m. to 2:05 p.m.)
18 CHIEF JUDGE SLEDGE: Thank you. We'll come
19 to order.
20 MR. OXENFORD: Yes, Your Honor. As our next
21 witness Live365 calls Alexander Sandy Smallens.
22 WHEREUPON,

1 ALEXANDER SANDY SMALLENS
2 called as a witness, and having been first duly
3 sworn, was examined and testified as follows:
4 MR. OXENFORD: Thank you, Your Honor.
5 DIRECT EXAMINATION BY COUNSEL FOR LIVE365
6 BY MR. OXENFORD:
7 Q Mr. Smallens, would you please state and
8 spell your full name for the record?
9 A Yes. My name is Alexander Sandy Smallens,
10 A-L-E-X-A-N-D-E-R, Sandy, S-A-N-D-Y, Smallens,
11 S-M-A-L-L-E-N-S.
12 Q And where are you currently employed?
13 A I am currently employed by Audiation.
14 Q And can you tell us a little bit about what
15 Audiation does?
16 A Sure. Audiation is a digital media
17 consultancy, which I run, which advises startup
18 companies and media companies on digital media, sales,
19 business development, strategy and webcasting.
20 Q And how is Audiation involved in the
21 webcasting industry?
22 A In the case of Audiation I have one current

1 client and one previous client for whom I've advised
2 on how to set up their webcasting operations and how
3 to attempt to derive revenue from them.
4 Q And who started Audiation?
5 A It is my company. I started it.
6 Q And when did you start that company?
7 A I started it in June of last year.
8 Q And let's start with your educational
9 background. Where did you go to college?
10 A Oh. I attended Yale University and
11 graduated in 1967 with a B.A. in Political Philosophy.
12 Q And while you were at Yale were you involved
13 in the music industry?
14 A Yes, I was. I -- I started my own band
15 there, rock band, and I also was the editor-in-chief
16 for the student-run music paper called Nadine. I also
17 was Spin Magazine's first intern from college, and
18 during that time I -- I was fortunate to author some
19 articles for Spin as well.
20 Q Can you explain for the Court what Spin
21 Magazine is?
22 A Sure. Spin Magazine was at the time one of

1 the preeminent music journals and -- and still is a
2 big coverage of underground and mainstream music.
3 Q And then after college, what was your first
4 employment position following college?
5 A My first position following college was
6 actually full-time becoming a performing, recording
7 musician. I formed a band with three friends from
8 high school, which was called Too Much Joy, T-O-O Much
9 Joy. And from 1987 through 1994 we -- we began as a
10 self recordist and then we were signed by an
11 independent label named by Warner Brothers Records.
12 So we toured and recorded and, you know, made our
13 living playing music and selling music.
14 Q Okay. And after touring with the band, what
15 was your next employment position?
16 A My first full-time job was with Atlantic
17 Records. I had been doing a lot of freelance writing
18 for them and other major record labels, artist bios
19 and press releases, and so I applied for a position at
20 Atlantic where I would be a staff writer, where I'd
21 also proposed that they create multimedia marketing
22 materials for artists. This was in 1993 and it was

1 before the worldwide web had really taken shape,
2 before there was a, you know, the worldwide web. But
3 I thought that perhaps using multimedia assets to
4 promote artists would be a good direction for the
5 company to go in.
6 Q And did, in fact, that position evolve in --
7 for Atlantic Records?
8 A Absolutely. In 1994 I received the green
9 light to start what became the record industry's first
10 fully staffed multimedia department, where we created
11 enhanced CD products, CD-ROM products and, you know,
12 initial websites for music artists.
13 Q And was the Internet delivery of music
14 involved in your position at Atlantic Records?
15 A Absolutely. Atlantic was fortunate to be
16 one of -- we were the first major label to stream a
17 full-length track by a major artist. That was Tori
18 Amos. It was a big deal. We did it with
19 RealNetworks. And we conducted a lot of webcasts and
20 artist chats online as well, so there was a lot of
21 Internet delivery of music and artist content.
22 Q And after Atlantic Records what was your

1 next position?
2 A After that I -- I began my career in the
3 digital industry directly. I went to Prodigy
4 Internet, which at the time was one of the leading
5 online service providers, and I ran -- I was vice
6 president of content for them and responsible for
7 music and entertainment content for the service.
8 Q And when were you at Prodigy?
9 A I was at Prodigy from 1996 to 1998.
10 Q And, again, was the Internet delivery of
11 music involved in your position with Prodigy?
12 A Very much so. We would conduct deals with
13 major labels, independent labels, and provide
14 on-demand streaming of artists and also artist chats.
15 Q And after Prodigy what was your next
16 position?
17 A After Prodigy I actually went to become
18 senior vice president of SonicNet, which was a company
19 that had a partnership with Prodigy. They were a New
20 York based music -- what was known as a BBS or a
21 bulletin board service. This was, again, right before
22 the Web had really become the way in which people

1 consumed Internet content. And over the course of my
2 years at SonicNet we took a very underground music
3 site and turned into a company that MTV Interactive
4 decided to acquire.
5 Q And when was it acquired by MTV?
6 A That was in 1999.
7 Q And did you stay on with the company after
8 that position?
9 A I stayed on MTV for about another seven
10 months or so at MTV Interactive as senior vice
11 president, where we conducted a lot of on-demand
12 streaming and webcasts with major artists. Now that
13 we had the MTV name behind us we were able to conduct
14 events with people like Alanis Morisette and the Foo
15 Fighters, webcasts of their performances, interviews,
16 music videos on demand, that sort of stuff.
17 Q And after SonicNet what was year next
18 position?
19 A My next position after SonicNet was a
20 company called GetMusic. GetMusic was a joint venture
21 music content site and it was a venture between BMG,
22 Bertelsmann Music Group, and Universal Music Group. I

1 was executive vice president there. And we launched
2 several music based entertainment products that were
3 first in the industry.
4 Q And, again, was Internet delivery of music
5 involved in connection with your position at GetMusic?
6 A Absolutely. In addition to doing like live
7 webcasts of artists performing on the Internet and
8 some of the first video webcasts that were done, we
9 also launched GetMusic Karoke, which was the first
10 ever online karoke platform.
11 The technology that powered that platform is
12 now actually the -- the same platform that MySpace
13 uses for their karoke. So we negotiated with
14 publishers and in some cases with record labels when
15 we used the actual masters.
16 We also launched Videolab, which was a site
17 where our users could come to the website and actually
18 mix their own music videos with, you know, using
19 assets that we had licensed from the major labels, and
20 also users could add their own photos and assets and
21 mix them all up.
22 Q When you talk about "we," what was your

1 personal role in this company?
2 A Oh. Sorry. At GetMusic I was executive
3 vice president, so I oversaw all of the content and
4 content programming and marketing, and I also worked
5 closely with the sales team and -- and kind of rode
6 herd with them on sales calls.
7 Q And the years for SonicNet?
8 A That was GetMusic.
9 Q I'm sorry.
10 A Was 1999 to 2001, the end of 2001.
11 Q And then following GetMusic what was your
12 next position?
13 A From 2002 through the end of 2004 I served
14 as president and chief operating officer of Oddcast.
15 Oddcast, O-D-D-C-A-S-T, is a social marketing agency.
16 They had built the technology that some of the
17 videolab and karoke applications I mentioned, you
18 know, empowered them and so at Oddcast I oversaw all
19 the sales and marketing of their technology to the
20 advertising agencies and marketers.
21 Q And, again, was Internet delivery of music
22 involved with your position at Oddcast?

1 A We continued to license a lot of karoke
2 platforms, so there was a lot of karoke licensing,
3 and, you know, we worked closely with music labels in
4 promoting their artists. We did little applications
5 for them to promote artists.
6 Q And following Oddcast what was your next
7 position?
8 A After -- well, at the sort of end of my
9 stint with Oddcast I partnered with CBS Radio to
10 present an Internet marketing opportunity to Chrysler,
11 and it was very successful. It was a multi-million
12 dollar deal, very successful. And based on that, CBS
13 Radio brought me in to become vice president of
14 interactive sales and marketing for all of the CBS
15 Radio digital assets.
16 So in that capacity I ran the corporate
17 sales effort for driving revenue or, to use a jargon
18 term, monetizing all the inventory that the stations
19 have -- their websites, their streams, their podcasts,
20 e-mails, any sort of online campaigns, mobile
21 campaigns -- and, you know, working -- in addition to
22 putting together my own packages of digital assets,

1 also working and training and, you know, cheerleading
2 or we say evangelizing to the stations around digital
3 assets and teaching them how to sell it.
4 Q And the years that you were at Oddcast, I
5 mean -- I'm sorry -- at CBS?
6 A CBS Radio. I was there from 2005 through
7 2006.
8 Q And then after CBS Radio what was your next
9 position?
10 A My next position was with Entercom
11 Communications. Entercom is a top five radio
12 broadcaster. CBS was top two. And at Entercom I was
13 senior vice president of digital for the company.
14 That role entailed having complete oversight
15 and responsibility for the P&L of the entire digital
16 division. So not only selling the assets but also
17 strategizing, making all strategic decisions about the
18 company, the products, hiring the staff both
19 corporately and locally in each of the markets to
20 both, you know, webmasters and also digital sellers,
21 training them, and a lot of time was actually on sales
22 calls with big corporate initiatives and myself.

1 Q And the time that you were there?
2 A From 2006 to 2009.
3 Q And then after Entercom?
4 A Was Audiation.
5 Q Now, during your employment period did you
6 become familiar with a company called TargetSpot?
7 A Yes. TargetSpot was a -- actually initiated
8 when I was still at Oddcast, who built the technology
9 that powers it. It was the -- it was actually the
10 brainchild of David Goodman, who was my boss at CBS
11 Radio and continues to be the president of CBS Radio
12 Interactive Music Group. So I worked very closely in
13 they development of TargetSpot, the testing of
14 TargetSpot with David. He and I presented it to the
15 sort of upper tiers of the CBS broadcasting world, Les
16 Moonves and his direct team.
17 And once I went to Entercom, Entercom became
18 the second radio group to make their inventory
19 available to TargetSpot after CBS, who were part
20 owners.
21 Q Could you explain for the Court what
22 TargetSpot is?

1 A Sure. TargetSpot is analogous to what
2 Google does with search with their ad words. So it's
3 meant to make the buying of streaming radio inventory
4 simple and to create a marketplace, an electronic
5 marketplace for marketers and advertisers to easily
6 buy targeted streaming radio avails. So it's an ad --
7 it's streaming ad network would be the best way to
8 describe it.
9 Q And, Mr. Smallens, do you speak on industry
10 panels for the webcasting industry?
11 A Absolutely. I've spoken at Convergence for
12 several years. Convergence is considered one of the
13 sort of top radio industry innovation conclaves put on
14 by one of the radio -- one of the big radio trades,
15 and I've also spoken a couple of times at Adtech,
16 which is an interactive advertising technology
17 conference, Streaming Media East, which is a
18 conference that began more than ten years ago, and
19 talked about webcasting and streaming media, as well
20 as Digital Hollywood and a few NAB and -- National
21 Association of Broadcaster boards, and RAB events as
22 well, Radio Advertising Bureau.

1 MR. OXENFORD: All right. Your Honor, at
2 this time I would like to proffer Mr. Smallens as an
3 expert in the webcasting industry with specific
4 expertise in online advertising.
5 CHIEF JUDGE SLEDGE: Any objection to the
6 proffer?
7 MR. FREEDMAN: Yes, Your Honor, and it may
8 be simply a matter of asking for clarification from
9 Mr. Oxenford.
10 I understood him to say he was offering
11 Mr. Smallens as an expert in the webcasting industry
12 and then he said with expertise in online advertising.
13 I don't have any objection to offering him
14 as an expert in online advertising or even to online
15 advertising in the webcasting industry.
16 Offering someone as an expert in the
17 webcasting industry generally struck me as broad. I
18 wasn't sure what the nature of the proffer was.
19 CHIEF JUDGE SLEDGE: Mr. Oxenford?
20 MR. OXENFORD: Yes, Your Honor.
21 Mr. Smallens has been involved in all
22 aspects, as he testified, of the webcasting industry

1 starting essentially when the webcasting industry
2 started, in the mid '90s: Programming, overseeing
3 simulcasters, overseeing companies that have been
4 offering digital music services, including programming
5 as well as sales. So, again, I think it's --
6 essentially he's a pioneer in the industry.
7 MR. FREEDMAN: Based on the testimony we've
8 heard from Mr. Smallens, I would object to the proffer
9 of him as an expert in the webcasting industry as
10 overbroad.
11 MR. OXENFORD: Your Honor, if I may.
12 CHIEF JUDGE SLEDGE: Yes, sir.
13 MR. OXENFORD: Mr. Smallens is really being
14 offered in the equivalent position of Jim Griffin, who
15 was offered in the Web II proceeding, who had similar
16 experience working with various online media, very
17 familiar with the webcasting industry, as is
18 Mr. Smallens, who was offered as a webcasting industry
19 expert.
20 JUDGE ROBERTS: This witness isn't going to
21 start talking about Tarzan economics, is he?
22 MR. OXENFORD: No, Your Honor. At least not

1 during my questioning.

2 CHIEF JUDGE SLEDGE: Mr. Oxenford, tell me

3 what I'm missing. The testimony says, "I will discuss

4 the challenges that statutory webcasters face in

5 attempting to maximize revenues from their product."

6 MR. OXENFORD: Correct.

7 CHIEF JUDGE SLEDGE: Why is that different

8 than an expert in online advertising in webcasting?

9 MR. OXENFORD: I think there will be

10 discussions of operations and programming tied in with

11 those discussions of advertising. It's not going to

12 be exclusively a discussion of advertising.

13 CHIEF JUDGE SLEDGE: All right. I'll

14 overrule the objection. The proffer is accepted.

15 MR. OXENFORD: Thank you, Your Honor.

16 Your Honor, if I may approach the bench and

17 the witness.

18 (Live365 Rebuttal Exhibit Number 2 was

19 marked for identification.)

20 BY MR. OXENFORD:

21 Q Mr. Smallens, I've handed you what we've

22 marked for identification as Live365 Rebuttal Exhibit

1 Number 2.
2 Do you recognize this document?
3 A Yes.
4 Q Can you tell us what it is?
5 A This is the statement that I prepared on my
6 rebuttal testimony.
7 Q And this statement was, in fact, prepared by
8 you?
9 A Yes.
10 Q Can you turn to page number -- the page that
11 is following the page number 26?
12 A Yes.
13 Q Do you recognize the signature on that page?
14 A Yes. That is my signature.
15 Q Is there anything in this report that you
16 need to correct here today?
17 A No.
18 Q Is this report true and correct to the best
19 of your knowledge and belief?
20 A Yes.
21 Q I refer you to Exhibit Number 1 following --
22 CHIEF JUDGE SLEDGE: I have to interrupt

1 you. That last question was incorrect. The question
2 should have been to you is this information true and
3 correct without any limitation to your knowledge,
4 information and belief.
5 THE WITNESS: Yes, it is I think.
6 MR. OXENFORD: Thank you, Your Honor.
7 BY MR. OXENFORD:
8 Q Again, Mr. Smallens, would you look behind
9 Tab Number 1 and identify the document behind Tab
10 Number 1?
11 A This is my resume.
12 Q And is this your current resume?
13 A Yes.
14 Q Now I'd refer you to Tab Number 2. Can you
15 identify the document behind Tab Number 2?
16 A Yes. This is a report from Forrester
17 regarding online advertising and audience growth.
18 Q And did you rely on this report in
19 connection with your testimony here today?
20 A Yes, I did.
21 Q And is Forrester Research generally reviewed
22 as reliable in the digital media industry?

1 A Yes, it is.
2 Q Let me refer you to Tab Number 3. Can you
3 tell me what the document behind Tab Number 3 is?
4 A Yes. This is an article from Advertising
5 Age that was reporting on CBS Interactive's desire to
6 dump -- dump ad networks.
7 Q And did you rely on this article in
8 connection with your report?
9 A Yes, I did.
10 Q Is Advertising Age generally relied on as a
11 reliable source in the digital advertising
12 marketplace?
13 A Yes, it is.
14 Q Then I refer you to the document following
15 Tab Number 4.
16 Can you identify that?
17 A Yes. This is a printout from an online
18 publication paidContent.org, which is a leading sort
19 of chronicler of digital media regarding the sort of
20 story of iMeem, which is a music service that was sold
21 off to MySpace.
22 Q And, again, is paidContent generally relied

1 on as a reliable source in the digital media
2 marketplace?
3 A It is.
4 JUDGE WISNIEWSKI: By whom?
5 THE WITNESS: I would say they're quoted
6 frequently in traditional press as sources for
7 stories. PaidContent, you know, they cover the entire
8 digital media realm, they get interviews with folks
9 like --
10 JUDGE WISNIEWSKI: So is Wikileagues.
11 THE WITNESS: True, although they're not in
12 here. But they are, you know, they're a journalistic
13 source that gets interviews of people like Rupert
14 Murdoch and Sumner Redstone and folks like that. So I
15 think they have great, you know, media credentials I
16 would say.
17 JUDGE WISNIEWSKI: Okay.
18 BY MR. OXENFORD:
19 Q And just to expedite this, Tabs 5 through
20 14, can you explain what those documents are in Tabs 5
21 through 14?
22 A These are additional reports that I reviewed

1 or relied upon as I was preparing my statement from
2 similarly well-credentialed outlets, some traditional,
3 some online.
4 Q And are all the resources that you include
5 in these tabs sources that are generally considered
6 reliable in the digital media industry?
7 A Yes, they are.
8 MR. OXENFORD: Now at this time I would like
9 to offer Live365 Rebuttal Exhibit Number 2 into
10 evidence.
11 CHIEF JUDGE SLEDGE: Any objection?
12 MR. FREEDMAN: Yes, Your Honor, I have three
13 objections to portions of this exhibit.
14 The first objection is to the last sentence
15 of paragraph 31. Most of paragraph 31 discusses
16 whether Pandora could afford the statutory webcasting
17 rates. The last sentence of paragraph 31 to which I'm
18 objecting refers to the Pureplay/WSA agreement that is
19 a nonprecedential agreement and asks this court to
20 make an inference about what the rates in that
21 nonprecedential agreement are. So under Section
22 114(f)(C)(5) (sic) of the WSA, I would object to that

1 sentence.

2 CHIEF JUDGE SLEDGE: Mr. Oxenford?

3 MR. OXENFORD: Your Honor, it's not

4 referring to the rates or the terms or any of the

5 specific conditions of the Pureplay agreement. It's

6 merely confirming the material that goes on before

7 that says if they had to pay the rates that were in

8 place, as the witness has testified, it wouldn't be in

9 business. So it's just confirming the factual

10 statements before. And it's not offered for purposes

11 of reliance as to what Pureplay agreements may or may

12 not have been.

13 JUDGE WISNIEWSKI: Isn't it hearsay?

14 MR. OXENFORD: This is an expert witness

15 who's relying on the cited publication dealing with

16 the status of Pandora. This is also an administrative

17 hearing where reliable hearsay can be admitted.

18 JUDGE WISNIEWSKI: I don't know if that last

19 statement is necessarily correct, but we can admit

20 hearsay, I agree with you about that.

21 MR. OXENFORD: Yes.

22 JUDGE WISNIEWSKI: I don't know whether

1 reliable and hearsay go together. It may be an
2 oxymoron, but...
3 CHIEF JUDGE SLEDGE: The objection is
4 sustained.
5 MR. FREEDMAN: Your Honor, my second
6 objection was also the subject of a motion to be filed
7 which relates to information from Entercom documents.
8 Mr. Smallens reviewed and relied upon some
9 Entercom documents when he prepared his written
10 testimony. Live365 has not been willing to produce
11 those documents in discovery. Instead they agreed to
12 strike two sentences and a snippet of a third sentence
13 from Mr. Smallens' written rebuttal testimony.
14 We, of course, haven't seen the documents
15 that Mr. Smallens relied upon. Live365 has stated
16 that they went through the testimony and they struck
17 the sentences that they believe were informed by those
18 documents, but there are several other sentences that
19 we identified in our motion that I can identify for
20 the Court now as well that are similar to the
21 sentences that Live struck and appear to relate to the
22 way in which Mr. Smallens characterized the documents

1 that were not produced such that we think it would be
2 only fair and reasonable to strike the other sentences
3 in his testimony that relate to the same subject
4 matter. The sentences I'm referring to are the first
5 sentence of paragraph 16.
6 The next sentence I was referring to is
7 actually a snippet of the second sentence in paragraph
8 18. It's the portion of the second sentence in
9 paragraph 18 beginning with "which can drive" and
10 ending with "U.S."
11 And there's one other paragraph -- I don't
12 want to get ahead of everyone, but there's one other
13 paragraph as well.
14 CHIEF JUDGE SLEDGE: All right.
15 MR. FREEDMAN: And in paragraph 39 there are
16 three sentences. The first sentence of paragraph 39
17 and the sixth and seventh sentences. Obviously you
18 can see the first sentence. The sixth sentence begins
19 "NAB simulcasters' selling." So it would be that
20 sentence and the one following it, the sixth and the
21 seventh.
22 CHIEF JUDGE SLEDGE: And the next sentence

1 is "Statutory webcasters"?
2 MR. FREEDMAN: Yes, Your Honor. And I
3 should add, Your Honor, that under Section 351.10(f)
4 of this Court's regulations the parties are entitled
5 to object to evidence including on the ground that an
6 opposing party has not furnished unprivileged
7 underlying documents, and in this case I think that's
8 exactly what has happened.
9 JUDGE ROBERTS: Mr. Freedman, I haven't
10 heard you say exactly how the Entercom documents would
11 support these sentences.
12 MR. FREEDMAN: Well, I've never, of course,
13 seen the documents.
14 JUDGE ROBERTS: Yeah.
15 MR. FREEDMAN: So I don't know exactly what
16 is in them. Here's what I do know --
17 JUDGE ROBERTS: You described it in your
18 motion as being the sentences were most likely
19 informed by those documents; is that correct?
20 MR. FREEDMAN: That is correct, Your Honor.
21 Based on what Mr. Smallens said at his deposition is
22 that he withheld documents, including retail revenue

1 documents, historic documents from Entercom related to
2 advertising and CPMs and reports of payments to
3 Entercom by advertising networks such as TargetSpot.
4 The sentences that I've identified I think
5 reasonably relate to those categories -- those subject
6 matters. That's my second objection.
7 CHIEF JUDGE SLEDGE: I thought that was your
8 third objection.
9 MR. FREEDMAN: It was my second, Your Honor.
10 CHIEF JUDGE SLEDGE: Your second is
11 paragraph 16?
12 MR. FREEDMAN: I'm sorry. Correct, Your
13 Honor. I don't mean to be confusing. My first
14 objection was on the WSA grounds. This generally is
15 the second.
16 CHIEF JUDGE SLEDGE: Oh, I see.
17 MR. FREEDMAN: Yes. I'm sorry.
18 CHIEF JUDGE SLEDGE: Mr. Oxenford?
19 MR. OXENFORD: Your Honor, if Mr. MacDonald
20 could address this, as he handled the production of
21 documents.
22 CHIEF JUDGE SLEDGE: All right, sir.

1 MR. MacDONALD: Your Honors, all documents
2 that inform any part of Dr., or -- sorry --
3 Mr. Smallens' corrected rebuttal testimony have been
4 produced to SoundExchange.
5 What I hear from Mr. Freedman is that he
6 thinks that it is reasonable to believe that other
7 statements have also been informed by the withheld
8 documents. And as a preliminary matter, Your Honors,
9 I would note that, for example, the first couple of
10 passages that he cited, Mr. Freedman cited, including
11 on paragraph 16 the first sentence which specifically
12 starts off, "In my experience with terrestrial
13 broadcasters," there's no reference to any documents.
14 The documents that were identified that had not been
15 produced in his deposition a few weeks ago only was
16 with respect to one paragraph. Mr. Freedman's
17 questions related to paragraph 19, and specifically
18 the last couple of sentences in paragraph 19, and that
19 was taken out.
20 We have gone back and asked Mr. Smallens a
21 few times to confirm that there are no other portions
22 of his testimony that were in any way informed, and to

1 the extent that Mr. Freedman or the Court doesn't
2 accept my representation, Mr. Freedman is free to voir
3 dire Mr. Smallens to confirm whether there are other
4 sections of his report that are in any way informed by
5 the documents that -- the Entercom-related documents
6 that have not yet been produced.
7 JUDGE ROBERTS: Mr. MacDonald, is there a
8 reason why the witness consulted these documents in
9 preparing his testimony when it was known that they
10 could not be produced?
11 MR. MacDONALD: Your Honor, in all candor, I
12 was actually not even aware that Mr. Smallens had
13 reviewed -- none of Live's defense counsel were aware
14 that he had consulted documents.
15 Mr. Smallens had free rein to review
16 documents. And my understanding from Mr. Smallens is
17 that he did review these documents merely to confirm
18 the assertions that he made in his statement and it's
19 only those snippets that were taken out of his
20 corrected rebuttal statement. So we produced
21 everything at the time that we had our initial
22 disclosures due. It was our understanding that we

1 produced everything that was related to his report.
2 It wasn't until his deposition that I found
3 out for the first time that there were other documents
4 that were not produced, and we took corrective
5 measures as soon as possible.
6 CHIEF JUDGE SLEDGE: All right. We'll
7 recess to discuss it.
8 (Brief recess 2:41 p.m. to 2:45 p.m.)
9 CHIEF JUDGE SLEDGE: Thank you. We'll come
10 to order.
11 The objection to portions of paragraphs 16,
12 18 and 39 are overruled.
13 MR. OXENFORD: Thank you, Your Honor.
14 MR. FREEDMAN: And my third objection, Your
15 Honor is to Exhibits 2 through 14. One global
16 objection is that they are hearsay.
17 With respect to each one I have some
18 additional objections. Exhibit 2, if you look at it,
19 is just another person's opinions. It's not even an
20 article largely about facts. It's mostly someone
21 else's opinion that's being offered to bolster
22 Mr. Smallens' opinion.

1 With regards to Exhibits 4, 5 and 6, they
2 relate to the webcasting service iMeem. That was
3 largely an on-demand service. I believe Mr. Smallens
4 is offering it up to support his claim that statutory
5 rates forced webcasters out of business. I don't
6 think that's the case and I don't think that's what's
7 said at least in Exhibit 4. Given that it was an
8 on-demand service by and large, I don't think the
9 articles of iMeem are relevant.
10 With regard to Exhibits 7, 8 and 9, they
11 relate to Last.FM. Exhibit 7, if you look at it, says
12 the Last.FM will stop streaming on-demand songs to
13 users. Again, I don't think that streaming on-demand
14 songs is relevant. It also says it relates to
15 streaming in territories outside the U.S. Again, I
16 don't think that's relevant.
17 Similarly, Exhibit 12 is largely about
18 on-demand services and, again, I think that's not
19 relevant to the testimony or the matters here.
20 And with respect to all of them,
21 Mr. Smallens has for the most part quoted from them
22 the parts he cares about. I don't see why we need

1 these exhibits in the record as well, so I would
2 object to Exhibits 2 through 14.
3 CHIEF JUDGE SLEDGE: Mr. Oxenford?
4 MR. OXENFORD: Yes, Your Honor. First of
5 all, I think it's a general premise that experts can
6 rely on hearsay testimony. Mr. Smallens has provided
7 testimony that each of these --
8 CHIEF JUDGE SLEDGE: We're talking about the
9 admissibility.
10 MR. OXENFORD: Admissibility.
11 CHIEF JUDGE SLEDGE: We're not talking about
12 his ability to rely.
13 MR. OXENFORD: Yes. Your Honor, also though
14 Mr. Smallens has provided the basis of his testimony,
15 he's provided that these are reliable sources used in
16 the industry. We can talk about some of the specific
17 characterizations of Mr. Freedman if we need to get
18 into that level of detail, but these are documents
19 that he's authenticated as coming from reliable
20 sources that support the hypotheses that he, and the
21 statements that he has made during the course of his
22 testimony and, therefore, are reliable and probative

1 documents to be in evidence in this proceeding.
2 JUDGE ROBERTS: Are stories about the
3 on-demand business relevant?
4 MR. OXENFORD: Yes, actually, Your Honor, we
5 will be talking about iMeem and Lala, two of the
6 on-demand services, and one of the questions that I
7 propose to ask Mr. Smallens is why is that relevant to
8 this proceeding.
9 CHIEF JUDGE SLEDGE: In other words, it's
10 probably beyond what we're going to do on this motion
11 or this objection, but the historic evidentiary rule
12 of permitting written material into evidence based on
13 testimony that it's reliable in the industry is more
14 and more suspect with all publications and especially
15 online publications.
16 It doesn't appear that online publications
17 have editors or reviewers to determine levels of
18 journalism or even that journalism applies in these
19 publications. It appears that they publish anything
20 that anybody wants to say. And you really don't have
21 that historic sense of confidence any longer that
22 there is an editor somewhere determining that this has

1 been checked, it's authentic, it's something that they
2 can present to their readers as accurate. And I
3 certainly don't have a sense any longer that
4 publications deserve the respect that they have had on
5 which the rules of evidence were developed, but I
6 don't think that is part of this ruling other than
7 Mr. Freedman did refer to one exhibit as being simply
8 someone's opinion, which would be consistent with what
9 I stated.
10 Any other questions? All right. We'll
11 recess to review 2 through 14.
12 (Brief recess 2:52 p.m. to 2:59 p.m.)
13 CHIEF JUDGE SLEDGE: Thank you. We'll come
14 to order.
15 In reviewing Exhibits 2 through 14, as to
16 whether they can be evidence on their own as opposed
17 to the support for the testimony of the witness, the
18 judges are not satisfied either that the information
19 stated in these exhibits is accurate, it is reliable
20 or that it is prepared in a way on which you can
21 depend. Some of these exhibits are what they call
22 blogs, which appears to be a type of publication that

1 has no editors or no review prior to publication.
2 The objection is sustained.
3 MR. OXENFORD: I don't believe there are any
4 further objections, Your Honor.
5 CHIEF JUDGE SLEDGE: Yes, sir, that's
6 correct.
7 MR. OXENFORD: We had offered the exhibit.
8 CHIEF JUDGE SLEDGE: Thank you.
9 With the ruling on the specific objections,
10 are there any other objections to the exhibit?
11 MR. FREEDMAN: No, Your Honor.
12 CHIEF JUDGE SLEDGE: The remaining exhibit
13 without objection is admitted.
14 (Live365 Rebuttal Exhibit Number 2 was
15 received into evidence.)
16 MR. OXENFORD: Thank you, Your Honor.
17 MR. FREEDMAN: Your Honor, at this time I
18 would move for application of the protective order to
19 a limited amount of information that is in
20 Mr. Smallens' testimony. It was marked as restricted
21 by Live365 when it submitted this. In the version
22 that I have they've highlighted it. The highlighting

1 is fairly light, but there are four pages on which
2 information I would move for application of the
3 protective order appear.
4 The first is on page seven where it refers
5 with respect to Pandora and then it gives a number,
6 and the same for CBS Radio, Clear Channel and Sirius
7 XM.
8 The basis for my motion is the same for all
9 of the information. I thought I would identify it and
10 then give the basis if that's acceptable.
11 The second set of information appears on
12 page 18 and it is the information in Table 2 relating
13 to Pandora's aggregate monthly performances. And then
14 on pages 19 and 20 it gives, again, information about
15 Pandora's -- it gives the numbers related to Pandora's
16 performances. Three of those appear on page 19 and
17 then at the top of page 20.
18 Under Section 380.5(a) confidential
19 information is defined to include statements of
20 account and information included in them, which would
21 include the number of performances reported by a
22 webcaster, and under Section 380.5(d) that information

1 can be used in a proceeding if it is used under an
2 appropriate protective order such as the one as we
3 have in this proceeding. So I would move for
4 application of the protective order for that
5 information.
6 CHIEF JUDGE SLEDGE: Any objection?
7 MR. OXENFORD: No objection.
8 CHIEF JUDGE SLEDGE: Without objection the
9 motion is granted.
10 MR. OXENFORD: Thank you, Your Honor.
11 BY MR. OXENFORD:
12 Q Mr. Smallens, good afternoon, and are you
13 ready to talk about some other issues?
14 What was the scope of your retention in this
15 proceeding?
16 A The scope of my retention was to offer a
17 rebuttal to the rosy assessment that was painted by
18 SoundExchange and -- and the statements specifically
19 of Dr. Pelcovits.
20 Q Could I refer you first to page six of your
21 direct case testimony where there's the headline
22 "Webcasting Listenership Has Flattened Over the Last

1 Year"?
2 Do you see that?
3 A Yes.
4 Q Is it your understanding that webcasting
5 listening has, in fact, leveled off?
6 A It is my understanding.
7 Q And what is the basis for that
8 understanding?
9 A The basis for that understanding is my
10 general industry knowledge as well as specific polls
11 that were -- were conducted and relied upon by
12 Dr. Pelcovits, specifically an Arbitron/Edison
13 research study called the Infinite Dial in which it
14 portrayed the listenership as flat from 2009 to 2010
15 at about 43 million people weekly.
16 Q And can you tell us about the
17 Arbitron/Edison group and their studies?
18 A Sure. They've -- the -- Arbitron is one of
19 the leading measurers of media consumption in the
20 country and Edison is a leading researcher, and they
21 joined together to publish an annual survey called the
22 Infinite Dial which talks about digital audio and

1 intranet absorption rates and broadband penetration.
2 And it's considered -- they've been doing it for at
3 least seven or eight years now and it's considered an
4 authoritative study.
5 It's a poll that they conducted over a
6 thousand people and they offer a lot of good data.
7 Q Can I refer you to the table on the top of
8 page seven?
9 A Yes.
10 JUDGE ROBERTS: Before you get to that,
11 Mr. Oxenford, the third sentence of that section,
12 paragraph 11 on page 6 you say, "In my experience, for
13 many terrestrial simulcasters, their online
14 listenership is driven by nonmusic formats."
15 Who are we talking about here?
16 THE WITNESS: Both at CBS Radio and at
17 Entercom if you were to look at a list of the top ten
18 streaming stations in terms of both listeners and
19 revenues, the majority of them would be news, sports
20 and talk formats.
21 JUDGE ROBERTS: And approximately how much
22 of that two services that you mentioned comprises the

1 simulcaster market?

2 THE WITNESS: Well, CBS is the number two

3 largest simulcaster after Clear Channel. Entercom is

4 number five. You know, Clear Channel is the biggest.

5 I would say those -- those guys themselves probably

6 are about 40 percent.

7 JUDGE ROBERTS: 40 percent --

8 THE WITNESS: Of the --

9 JUDGE ROBERTS: -- music?

10 THE WITNESS: -- of the terrestrial market.

11 I'm sorry, Your Honor. I misunderstood your

12 question.

13 JUDGE ROBERTS: Okay. You were mentioning

14 Clear Channel. There is about 40 percent of the

15 market; is that what you're saying, for simulcasters?

16 THE WITNESS: Are you talking total

17 simulcasting or music --

18 JUDGE ROBERTS: Yes.

19 THE WITNESS: -- simulcasting?

20 JUDGE ROBERTS: You just mentioned

21 40 percent and I --

22 THE WITNESS: I would say -- well, at this

1 point CBS is the largest now because some of the --
2 they've -- they've merged with Yahoo! and AOL Radio.
3 But under them is Clear Channel in terms of
4 simulcasting. So CBS now is the biggest -- Clear
5 Channel is the largest terrestrial broadcaster outside
6 of simulcasting in terms of stations and listeners.
7 JUDGE ROBERTS: All right. Thank you.
8 BY MR. OXENFORD:
9 Q Can I refer you, Mr. Smallens, to the bar
10 graph on the top of page seven that's been labeled
11 Table 1?
12 A Yes.
13 Q Can you explain what that graph shows?
14 A Yes. This graph is showing the growth
15 trajectory of online radio listeners when looked at in
16 a week snapshot year over year from 2000 to 2010.
17 Q And what is its relevance to your
18 discussion?
19 A Well, this -- this study, which comes out in
20 April of the year, generally is -- and, again, is
21 considered authoritative, states that the total number
22 of people tuning into Internet radio on a weekly basis

1 from 2009 to 2010 has been relatively flat, which, you
2 know, contradicts some of the assertions made by
3 Dr. Pelcovits about the growth of the audience.
4 Q And moving down to the next section under
5 the subheading "Consolidation of Listenership" --
6 CHIEF JUDGE SLEDGE: Let me interrupt before
7 you move from there.
8 MR. OXENFORD: Sure.
9 CHIEF JUDGE SLEDGE: I'm a little surprised
10 and amused the way you have organized this paragraph
11 11.
12 Your headline says "Listenership Has
13 Flattened Over The Last Year," but then you give us a
14 table that shows that listenership has grown steadily
15 in the last decade and that each time it's grown it
16 stays stable for a few years and then grows again. So
17 your table indicates to me that the listenership has
18 been very consistent over the last decade in a growth
19 pattern and yet your headline says listenership has
20 flattened and it seems like you present exactly
21 opposite of what your headline is proclaiming.
22 Why did you do that?

1 THE WITNESS: Your Honor, it's my contention
2 that the growth that Internet radio saw from 2000 to
3 2009, a lot of that was bolstered by the growth in
4 broadband penetration both at home and at work.
5 What -- what we're seeing and what this
6 survey and others have basically indicated is that
7 that broadband penetration is starting to level off.
8 And I'm -- I'm suggesting that this is evident in the
9 resulting, you know, lack of growth from 2009 to 2010
10 because the, you know, the webcasting cases are
11 relevant to the last several years.
12 I think it's helpful to look at, you know,
13 the more recent years, 2007 to 2010, perhaps as we
14 look at this.
15 CHIEF JUDGE SLEDGE: Well, is that all? I
16 mean looking at your -- your table doesn't support
17 you. Your table says opposite of what you're saying.
18 So is there something else that I'm missing here in
19 your testimony that supports your conclusion that the
20 last year should be considered differently than all
21 the rest of the decade when your table shows that it's
22 very consistent with the rest of the decade?

1 THE WITNESS: As I said, beyond the fact
2 that these proceedings relate to, you know, webcasting
3 royalty setting from, you know, in the last several
4 years, that's -- that's why I'm kind of focusing on
5 that in this graph. But, you know, the graph
6 obviously has the whole thing. I mean it started from
7 zero in 2000. Pandora began in 2000.
8 CHIEF JUDGE SLEDGE: So you get flat growth
9 for three years from 2003 to 2005, you get virtually
10 flat growth for three years from '06 through '08, and
11 now you're getting the same thing through '09 and '10,
12 exactly the same as it's been the whole decade. So
13 you're trying to present that as something different?
14 THE WITNESS: No, Your Honor. I'm sorry if
15 my headline is misleading. I'm really just -- I'm not
16 looking at the whole decade in my headline or in the
17 paragraph. I'm really speaking relative to the last
18 year.
19 CHIEF JUDGE SLEDGE: So we should take from
20 this that the listenership of online radio has
21 steadily grown over the last decade and that the
22 information is that we've had a fairly large jump in

1 growth in '09 and based on the graph we should expect
2 another fairly large jump in growth in 2012 if it
3 stays flat for three years after it has a big jump in
4 growth? Is that what we take from this table?
5 THE WITNESS: Your Honor, if I were to look
6 at this table, that would be, you know, one way to
7 project out on it, but I'm, you know, again in this
8 paragraph I'm speaking specifically in rebuttal to
9 Dr. Pelcovits' period that he's considering.
10 CHIEF JUDGE SLEDGE: All right.
11 Mr. Oxenford?
12 BY MR. OXENFORD:
13 Q Do you expect there will be another large
14 jump in growth in 2012?
15 A I think there will be iterative growth,
16 absolutely. I'm not -- I don't mean to suggest there
17 won't be growth, but I think it will be iterative.
18 Q Do you think the growth would be at the
19 levels that it was in the past?
20 A I don't think so and, again, I think that's
21 based on broadband penetration hitting sort of mass.
22 You'll see a spike from some more mobile adoption, but

1 I don't think it will be to the levels that we're
2 seeing here.
3 Q In your next section under the topic
4 "Consolidation of Listenership" --
5 A Right.
6 Q -- what is the significance of the
7 consolidation of listenership?
8 A Well, I believe that the significance of the
9 consolidation of listenership is that there are, you
10 know, a few very large players which are really
11 driving this listenership growth and -- I mean later
12 in my report I look at, for instance, you know, the
13 impact that Pandora itself, which was heavily relied
14 upon by Dr. Pelcovits, has on assessing the overall
15 growth of the marketplace. And, you know, obviously
16 consolidation is something you'd expect to happen as
17 an industry matures. And clearly Pandora has had a,
18 you know, continues to grow and, you know, has good
19 success, but, you know, what -- I think what it shows
20 is that, you know, more and more performances are
21 concentrated in fewer and fewer players and so we
22 don't have as much diversity. It's a more difficult

1 market for new webcasting entities to enter into and
2 to try to, you know, survive.
3 Q In your next section --
4 CHIEF JUDGE SLEDGE: Does that pattern
5 mirror what happened in terrestrial radio?
6 THE WITNESS: To a certain degree with
7 the -- with the consolidation and when -- when groups
8 like Clear Channel and -- and Entercom began, you
9 know, consolidating and were able to, because of the
10 relaxation of federal laws, were able to amass more
11 properties in major markets, it did happen a bit, but,
12 you know, it's -- it also led to a lot of big
13 companies carrying a lot of debt and -- and created a
14 lot of sort of disease in the radio industry, which
15 it's still reeling from a bit, but only recently
16 starting to recover.
17 BY MR. OXENFORD:
18 Q On page eight you talk about "Audience
19 Growth Does Not Equate To Increased Revenues." Why is
20 that?
21 A Well, this is key. In digital media in
22 general there's a phenomenon called the paradox of

1 success. Essentially even as you add audience, which
2 in traditional media would, you know, have a very
3 direct relationship on increasing revenues, because of
4 the additional costs and the infinite amount of
5 advertising inventory that more listeners creates,
6 unless you're able to derive revenue from or monetize
7 that new listenership in a way that keeps pace with
8 your increases, you know, it -- it actually puts you
9 in a disadvantageous place.
10 So when you factor in a per performance cost
11 such as royalties, you know, every time a song is
12 performed SoundExchange gets paid, and that's on a per
13 performance basis. But, you know, so that -- that
14 cost increases steadily, but yet unless a webcaster is
15 able to monetize their inventory on that same sort of
16 trajectory, they'll actually be suffering or, you
17 know, feeling the weight of both the royalty payments,
18 increased bandwidth and hosting costs and all the sort
19 of costs of doing business. So that's why they call
20 it the paradox of success.
21 MySpace has frequently been cited as another
22 entity suffering from the paradox of success. They --

1 they had so many users they weren't able to monetize
2 them at a high rate.
3 If you go to MySpace now, you'll see, you
4 know, ad banners that are not relevant at all and very
5 low -- low-priced banners. And so they're struggling
6 with that same issue.
7 Q In fact, in the webcasting market are you
8 familiar with other ad-based services that have had
9 healthy degrees of listenership but were not
10 financially successful?
11 A Well, yeah. Two of the largest online
12 entities, AOL Radio and Yahoo! Radio.
13 JUDGE WISNIEWSKI: Isn't that simply
14 analogous to too much capacity just like you have in
15 the airline industry after deregulation?
16 THE WITNESS: It's quite -- it's quite
17 possible it could be. You know, I'm not sure that I
18 know enough about the airline industry to comment in
19 detail. I apologize.
20 JUDGE WISNIEWSKI: Okay. Thank you.
21 JUDGE ROBERTS: Mr. Smallens, when you say
22 it's a paradox of success, too much listenership

1 driving up the cost, is that success being measured
2 relative to the terrestrial broadcast industry, which
3 of course has lower availability, higher CPMs as a
4 result?
5 THE WITNESS: Your Honor, I think you stated
6 it perfectly. I mean in a terrestrial media world you
7 have a finite amount of ad inventory. And -- and,
8 again, I'm not -- I wouldn't claim to be an economist,
9 but it's basic, you know, business principles when you
10 add more listeners and there's a finite amount of ad
11 inventory, you know, it's a very direct correlation to
12 driving up the CPMs and the value of that inventory.
13 JUDGE ROBERTS: So ranking something as
14 successful or not is meaning successful relative to
15 what's done in the terrestrial broadcast business?
16 THE WITNESS: I would say, again, if you're
17 looking at digital media companies as a whole, both
18 webcasters, again, people like YouTube, even
19 Huffington Post, although it's a blog, I would say
20 that, you know, this is -- this is an issue with a lot
21 of digital media companies. But because there is this
22 factor of per performance costs, you know, fixed per

1 performance costs in, you know, in every -- every
2 listening session, I think it's especially weighty on
3 the webcasting industry.
4 JUDGE ROBERTS: Okay.
5 BY MR. OXENFORD:
6 Q On the bottom of page eight, Mr. Smallens,
7 you have the headline "Dr. Pelcovits Disregards The
8 Decline In Advertising Rates And Its Impacts On The
9 Economic Health Of The Statutory Webcasting Industry."
10 Can you explain what you meant by that?
11 A Yes. I think, you know, audience size,
12 which is frequently one of the key factors that
13 Dr. Pelcovits cites in his analysis of the industry,
14 is obviously an important factor in determining the
15 health of a market. But when -- you know, as I was
16 operating both Entercom and CBS and running digital
17 sales for both companies, the factors that we looked
18 at at a daily, even hourly basis were, you know, what
19 sort of rates were we getting, what sort of CPMs were
20 we able to derive and what sort of sellout rate, how
21 effective were we at selling the inventory. And I --
22 I think not having those not more directly addressed

1 in Dr. Pelcovits' testimony doesn't give us a full
2 picture of the marketplace.
3 You know, it's -- it's basic advertising 101
4 stuff. Cost -- CPM stands for cost per thousand. So,
5 you know, generally rates are, you know, calculated on
6 how many -- how many -- a thousand people being
7 exposed to one ad, which is also called an impression.
8 So a thousand people being exposed to a streaming ad
9 means a thousand people being, you know, being present
10 when that streaming ad triggers. Those rates are, you
11 know, low and -- and not -- and not getting higher
12 in -- in the webcasting world and -- but it's, you
13 know, that's -- and also the ability to sell out all
14 the inventory, it remains a challenge even for
15 terrestrial broadcasters who have, as they say, feet
16 on the street, local salespeople, but especially for
17 webcasters who are on ad networks.
18 Q You mentioned that CPMs are low and not
19 getting higher. What do you base that conclusion on?
20 A Well, primarily it was based on my own
21 experience at both CBS and Entercom. I -- I left
22 Entercom a year ago, but I stay in close contact with

1 people who essentially hold the same position I do at
2 a variety of simulcasters and, you know, we've
3 conferred and -- and, you know, we -- and the
4 indications I've heard are, you know, it hasn't --
5 things haven't gotten better and, you know, it's still
6 very much a struggle for them to monetize.
7 There's also -- obviously I cite Johnie
8 Floater from Live365, who cites specific rates and
9 data both from his company, and as well as what Mark
10 Fratrik said.
11 CHIEF JUDGE SLEDGE: We have had many
12 witnesses, marketing witnesses describe a change in
13 the last couple of years of increases in budgets for
14 advertising online, that advertising agencies are
15 beginning to expand the budget that they are willing
16 to put online as opposed to other traditional sources
17 that they have used.
18 Now, that's not inconsistent with what you
19 just said, that the CPMs are not going up, but have
20 you observed that the overall budget, advertising
21 budgets for marketing for online has been going up?
22 THE WITNESS: Oh, Your Honor, absolutely.

1 Ad agencies are shifting more of their budget to
2 digital assets versus the traditional and real-life
3 stories about it. They're launching products on
4 FaceBook, a social network, you know, and in -- in a
5 lot of my consulting work with Audiation I consult
6 companies that do viral campaigns and viral
7 advertising and are the beneficiaries of the shift.
8 Unfortunately in that shift it hasn't
9 necessarily come to bear that that shift to digital
10 is -- is still showing up in the budgets of the
11 agencies for -- for webcasters. And one of the -- you
12 know, I cite a couple of reasons, but primarily
13 it's -- it's still a, you know, it's still a new world
14 for them.
15 In some cases an advertiser is more
16 comfortable creating a viral video like Old Spice
17 recently did and it was like a headline story and they
18 got a huge response. They're more comfortable because
19 they understand video and how to create the right
20 video content. They don't necessarily know how to
21 create an impactful audio ad in a -- in a webcasting
22 environment. It's still definitely a hurdle.

1 So I agree the money is shifting to digital,
2 and on behalf of my clients who want to webcast I
3 would like to see more of it go into the actual
4 streaming audio category.
5 CHIEF JUDGE SLEDGE: So it's evolving --
6 THE WITNESS: The whole marketplace is
7 evolving, yes, sir.
8 CHIEF JUDGE SLEDGE: -- but the acceptance
9 of digital is growing?
10 THE WITNESS: I would say overall yes, I
11 mean, you know, absolutely.
12 CHIEF JUDGE SLEDGE: Thank you.
13 BY MR. OXENFORD:
14 Q Mr. Smallens, if I could refer you to page
15 ten where your headline states, or the caption heading
16 states: "Statutory Webcasters' Necessary Reliance On
17 Ad Networks Results In Lower Yields And Higher Cost Of
18 Sale."
19 A Right.
20 Q First of all, what is an ad network?
21 A An ad network is a company that amasses
22 advertising inventory, what they -- what many people

1 refer to as remnant, leftover advertising inventory
2 from a variety of different companies. They could be
3 webcasters, they could be online publishers like CNN
4 or whatnot. And then it bundles it up and then tries
5 to sell that bundled inventory to marketers and
6 agencies.
7 It's considered in the digital media world
8 somewhat of a necessary evil. If they have inventory
9 that they haven't been able to sell with their inhouse
10 sales team, they'll like, you know, sort of at a last
11 resort they'll go okay, you know, we will make that
12 available to an ad network.
13 But based on the nature of this inventory,
14 because it's not premium content, it's not, you know,
15 it's not necessarily -- you won't get the home page of
16 Google through an ad network or even a home page of
17 Time.com or whatever the publication suggests. The
18 expectation is that that is less valuable inventory,
19 and ad networks, because they sort of take the problem
20 off your hands, they charge higher commissions than an
21 inhouse salesperson would be paid.
22 Q Are there ad networks that specialize in

1 webcasting?
2 A Well, there are a few. TargetSpot, which we
3 spoke about before, is a leading streaming ad network.
4 Katz Media Group, which is one of the largest media
5 groups in the country, has a division called Katz 360
6 that sells digital and streaming inventory and also
7 website inventory.
8 Q And why are they used by webcasters?
9 A I think they're used by webcasters because
10 in many cases webcasters can't afford or haven't, you
11 know, haven't been able to hire an inhouse sales team
12 and because they lack the sort of local relevance that
13 some of the terrestrial simulcasters have. Or even in
14 the case of a satellite sat, you know, selling Howard
15 Stern or selling Oprah's radio channel, that, you
16 know, name brand talent is a much easier challenge
17 even on a national level than selling more -- some of
18 the more niche formats that you see in a lot of
19 webcasting.
20 Q And is there a difference in reliance, the
21 degree of reliance on ad networks between simulcasters
22 and webcasters?

1 A Yeah. Yes. In my experience both at CBS
2 and Entercom, you know, we, again, we resorted to ad
3 networks sort of as a last resort when the local team
4 couldn't get it done, when Boston couldn't sell out
5 all their inventory on WAAF.
6 In the case of webcasters I think it's a
7 primary reliance for those reasons that we've spoken
8 about; they don't have the local advantage and their
9 niche formats don't attract a big enough audience to,
10 you know, sell them in and of themselves.
11 Q Now, you mentioned that ad networks you'd
12 characterize by having lower prices --
13 A Yes.
14 Q -- for their advertising.
15 Why is that?
16 A Again, the -- the inventory is considered
17 less valuable because it's sort of some from here and
18 some from there and it's people who go to ad networks,
19 they're going -- you know, a savvy marketer knows that
20 they can go to an ad network and -- and get inventory
21 on, you know, even premium sites that's cheaper
22 because it's through a network versus it's like

1 they're sponsoring that specific page. Like in the
2 case of, you know, CNN to get on the Anderson Cooper
3 home page would have a much higher value and would not
4 be inventory that would be made available to an ad
5 network, but to get on the classifieds page or, you
6 know, maybe a high school sports page would be easier,
7 and you could do that through an ad network.
8 Q And then for webcasters you mentioned a
9 commission. What's the issue with commissions with ad
10 networks?
11 A In my experience at both CBS and Entercom ad
12 networks charge commissions anywhere from 20 to 40 or
13 50 percent in some cases. Because Entercom is a
14 terrestrial simulcaster, they were able to secure some
15 lower commission rates than I think a webcaster might
16 be able to.
17 Q Now, do the advertising sales from these --
18 JUDGE WISNIEWSKI: Why is that?
19 THE WITNESS: Because there's more prestige
20 for -- for an ad network to be selling inventory for
21 Entercom than there is, again, for a smaller, less
22 branded niche channel on a webcaster.

1 JUDGE WISNIEWSKI: I thought you said that
2 the terrestrial radio station was less likely to use
3 the ad network than any of them.
4 THE WITNESS: They were because they didn't
5 need to as much. More of their inventory was sold by
6 their local team. The vast majority in my experience
7 in both CBS and Entercom, to the degree that they were
8 able to sell out, you know, their streaming inventory,
9 the vast majority of it was sold by the local sales
10 team and only a small percentage, under 10 percent,
11 was sold -- went -- went out through ad networks.
12 JUDGE WISNIEWSKI: And that local sales
13 team, how do they work? Is it on commission?
14 THE WITNESS: They do work on commission.
15 If they're really senior people, they'll have, you
16 know, they'll have like a base and then they'll get
17 bonused or a commission on everything they sell.
18 There's also different models. The radio
19 industry has honestly struggled a bit with how to
20 structure that.
21 JUDGE WISNIEWSKI: Do you find much
22 crossover, that is, if you have your local sales force

1 and they're going out and they're selling for
2 terrestrial radio or essentially trying to get ads for
3 terrestrial radio, do you find that they also
4 crossover and will try to sell to the same customers
5 with respect to their simulcasting?
6 THE WITNESS: That's a very good question.
7 Your Honor, I mean that was the focus of -- much of my
8 work at Entercom and CBS was to train the terrestrial
9 sales team on how to sell digital.
10 They have an innate, you know, advantage.
11 Well, maybe it's not an advantage. But they --
12 they're not starting from scratch because they're
13 selling audio, so streaming ads are audio, they're
14 selling to the same local and regional advertisers
15 that they have sold to in many cases, you know, for
16 20, even 30 years. So they, you know, they have that
17 sort of, you know, they -- they have a running start.
18 And a lot of the bigger deals that I presided over
19 both at Entercom and CBS were blended deals which
20 combined terrestrial on-air inventory with streaming
21 inventory, but the streaming inventory was usually a
22 smaller piece of it, much smaller.

1 JUDGE WISNIEWSKI: Thank you.
2 BY MR. OXENFORD:
3 Q Are these advertising networks able to fill
4 all the inventory from a webcaster?
5 A In my experience they haven't been. I mean
6 I know that it's -- there aren't -- simply aren't
7 enough people seeking out streaming inventory yet even
8 at the low -- what we call low bucket rates to fulfill
9 it, so sometimes you end up with unsold inventory or
10 you end up, you know, rotating a lot more house
11 promotional station specific spots in the ad
12 inventory.
13 CHIEF JUDGE SLEDGE: All of your description
14 about ad networks sounds to me like an argument in
15 favor of consolidation. That would be -- those
16 problems would be something that would be driving
17 consolidation so that you could avoid those problems
18 or I guess, I don't know why not, why it would make
19 Live365 more profitable that it will sell their
20 services to people that were webcasting and having to
21 deal with ad networks, sell a service of Live365 to
22 them so that they would have more prestige of selling

1 advertising.

2 THE WITNESS: It's -- it's a very good

3 point, Your Honor.

4 The -- the ad networks for someone who's

5 like the hobbyist webcaster, who if I wanted to start

6 a webcasting and start playing, you know, statutory

7 music and -- and putting myself online and doing all

8 that, you know, having -- being able to capture and

9 monetize some of your streaming inventory is certainly

10 preferable to not monetizing at all. So I guess --

11 and I do believe that, you know, that is the

12 philosophy behind it. But it's hard to --

13 consolidation in the streaming world wouldn't look a

14 lot like consolidation in the terrestrial world

15 because of the vast differences even as you cite with

16 Live365's model from -- as compared to, say, Pandora

17 as compared to, say, Slacker. Their business models,

18 their technology and their -- their user experience

19 are so different that it -- it wouldn't be -- you

20 know, there wouldn't be a -- there would be a lot more

21 friction than there would be if, you know, Entercom

22 goes and buys another station in Boston.

1 BY MR. OXENFORD:

2 Q Mr. Smallens, can I refer you to page 14 of

3 your statement where you state in the caption "Far

4 From Dr. Pelcovits' 'Robust And Evolving Market,' The

5 Ad-Supported Music Space Is Withering Under The Weight

6 Of Royalty Payments To Record Labels."

7 Now, why is it that you say that?

8 A There's a couple of different examples here

9 in this paragraph. Two of them were primarily

10 interactive services but ad-supported services, and

11 those are iMeem mean and Lala Media. And two of them

12 were two of the biggest statutory webcasters through

13 2007, maybe into 2008, and that's Yahoo! LAUNCHcast

14 and AOL Radio. But all four of them shared in the

15 business model of using ads and sponsorships to, you

16 know, build the business.

17 At one point iMeem was valued at, you know,

18 $200 million is a number that has been cited

19 frequently and, you know, at the end of the day they

20 ended up selling to MySpace for a million dollars in

21 cash.

22 Lala was considered another hot starter, a

1 big starter, and they ended up, you know, being sold
2 to Apple. Apple hasn't done anything with them yet.
3 I think they -- they bought them for a couple of their
4 engineers so that they could do one of their own
5 services, but at the end of the day they couldn't make
6 a go of it.
7 They -- they did negotiate their own deals
8 with -- with rights holders, but -- and I think they
9 did so under the assumption that the ad market would
10 bolster them and -- and be able to, you know, drive
11 them to profitability, but that didn't materialize.
12 Q If I may ask you what is the relevance of
13 these interactive advertising-supported services to
14 our discussion here today about the noninteractive
15 services?
16 A Well, primarily the -- primarily
17 noninteractive services are by nature going to be ad
18 supported. There's very few examples extant of -- of
19 subscription-based noninteractive services and
20 people -- in fact, people have moved away from that
21 model and a lot of the companies cited in
22 Dr. Pelcovits' report have, you know, have very lack

1 luster subscriber levels.

2 In the case of Yahoo! and AOL it's directly

3 relevant because they were statutory webcasters, and

4 although you can still bring up a web browser that

5 says you're on AOL Radio or Yahoo! LAUNCHcast, it's

6 essentially just a coat of paint on a CBS Radio entity

7 that they are -- they pay for, they stream, they pay

8 for all the royalties and they attempt to monetize all

9 the inventory.

10 Q Now, Dr. Pelcovits also talked about Last.FM

11 in his statements --

12 A Yes.

13 Q -- and we talked about Last.FM in your

14 statement.

15 Why did you include a discussion of Last.FM

16 in your statement?

17 A Last.FM was an example cited by

18 Dr. Pelcovits as a success story in the webcasting

19 space. It's a company I'm very familiar with

20 through -- it is now a division of CBS Radio's

21 Interactive Music Group. And, you know, essentially

22 they were -- they were a big story because they were

1 acquired for $280 million in 2007. It was like, you
2 know, the second sort of big Internet bubble. So
3 there was -- it was an exciting story, but at the end
4 of the day when you look at 2010, you know, they're
5 only attracting tens of thousands of subscribers
6 despite having over 10 million subscribers a month --
7 10 million visitors a month and they haven't turned a
8 profit yet. And CBS is, by their own admission and by
9 my own observation, is still figuring out what to do
10 with the company. They've also turned off some of
11 their ad-supported streaming because they couldn't
12 afford to sustain it in smaller markets.
13 Q Now, on the bottom of page 15 you talk about
14 "Demographic Targeting Has Not Materialized In An
15 Impactful Way."
16 First of all, can you explain demographic
17 targeting?
18 A Sure. Demographic targeting in advertising
19 implies the ability for an advertiser to reach only a
20 segment of the audience that he wants to reach. In
21 the most base level you could say geo-targeting,
22 targeting by geography, and that's something that's

1 relatively doable these days.

2 Most publications and webcasters know where

3 the user is coming from based on the IP address of the

4 computer and it's 70 to 80 percent accurate. So there

5 is some geo-targeting that goes on today.

6 But a lot of the promise that Dr. Pelcovits

7 refers to and, in fact, a lot of the promise that, you

8 know, it would be -- it would be nice to see come to

9 fruition is that if you could have more demographic

10 information about your webcast listening audience,

11 even, you know, aggregated information: Age, gender,

12 you know, ZIP code, preferences, hobbies, all that

13 sort of information. You'd be able to target ads to

14 them and, therefore, drive up the CPM because target

15 audiences get a higher CPM.

16 One of the reasons simulcasters get higher

17 CPMs is because we know for the most part, even though

18 they're listening online, 95 percent of the people who

19 listen to, you know, WAAF in Boston are in Boston, in

20 the Boston market.

21 So the promise of demographic targeting

22 is -- is, you know, it's a good concept and

1 Dr. Pelcovits' cites it, but it hasn't come to
2 fruition.
3 One of the main reasons is that none of the
4 terrestrial simulcasters require a user to register
5 when they stream a station. So I can go and listen to
6 KROC in L.A., the biggest rock station in America, or
7 it was as of a year ago. I think it still is. I can
8 go listen to KROC, just click and start listening. I
9 don't have to fill out a form, I don't have to give
10 them an e-mail address, I don't have to give them any
11 information. I can go listen to the biggest stations
12 on Entercom, Clear Channel, MS, all these big stations
13 and there's no registration. And the reason is, and
14 this is a discussion we had a million times at
15 Entercom, is no one wants to be the first one to
16 blink, interrupt the terrestrial simulcasters because
17 if Clear Channel puts up a reg form, which they used
18 to have, then people can go okay, I won't listen to
19 Hot 97.5 station on air, I'll just go and listen to
20 Entercom's hip-hop station. There's no reg form.
21 It's quicker.
22 So because there is sort of competitive

1 reluctance to insist on registration or require
2 registration for streaming, the -- there isn't a big
3 mass of demographic data yet to target against.
4 Q Does the lack of registration --
5 CHIEF JUDGE SLEDGE: You haven't mentioned
6 the thing that we read about weekly here of our
7 neighbors across the street being very concerned about
8 people gathering personal information on the public
9 and violations of privacy and whether the congress is
10 going to restrict the ability to gather that
11 information.
12 THE WITNESS: Absolutely. I think that's
13 going to auger against being able to demographically
14 target. A lot of it's done invisibly too, which is,
15 you know...
16 CHIEF JUDGE SLEDGE: That's what they're mad
17 about.
18 THE WITNESS: It's scary. They should be.
19 BY MR. OXENFORD:
20 Q What about webcasters, do they routinely
21 require a registration?
22 A Some do, some don't. It's a mixed bag.

1 Like many digital media companies, they're frequently
2 changing their model around.
3 Recently Pandora started insisting on a base
4 level of demographic information. But you can still,
5 you know, once you've filled it out, it's not detailed
6 enough to allow for enhanced targeting, and you could
7 also fill it out -- what happens a lot, because they
8 don't do what's called a double opt-in confirmation.
9 So in other words, I can fill out Pandora's
10 registration form. They don't e-mail me to my account
11 to confirm that it was me filling it out. So I could
12 put in -- we used to get a lot of --
13 JUDGE WISNIEWSKI: Bugs Bunny.
14 THE WITNESS: -- useless data. Bugs Bunny
15 or even, you know, something less wholesome.
16 (Laughter.)
17 THE WITNESS: We'd -- we'd get a lot of
18 useless data with the terrestrial -- that's one of the
19 reasons we -- we experimented with registration and we
20 just always took it down because people would just
21 blow it off.
22 If you insist on someone receiving an e-mail

1 before they can listen to your station, you've just
2 lost a listener.
3 BY MR. OXENFORD:
4 Q And you mentioned geo-targeting. Why is
5 that not raising revenue for webcasters?
6 A Well, I think to raise revenue for
7 webcasters with geo-targeting you have to have a huge
8 audience in that geo and I think, you know, the nature
9 of webcasting, again, is that the audience growth
10 is -- is all over the map.
11 I also think geo-targeting is also kind of
12 baked into the CPMs as they are. It's kind of taken
13 as a given right now, that -- that base level, IP base
14 geo-targeting is kind of the norm now.
15 Q On the bottom of page 16 your heading is
16 "Dr. Pelcovits Ignores The Costs Associated With New
17 Platform Launches, And Overestimates The Profit
18 Potential."
19 Why do you say he overestimates the profit
20 potential?
21 A Well, it's still a struggle. Okay. Mobile
22 stream has definitely grown in the last couple of

1 years. People streaming on their iPhones, streaming
2 on their Blackberries -- I stream sometimes on my
3 Blackberry -- that's grown. But it's still a slice of
4 a slice. So it's -- first of all, it's -- in some
5 ways it's cannibalistic of the webstreaming for
6 simulcasters and some others. So it's not like, you
7 know, the mobile audience is like a brand-new set of
8 ears that you weren't reaching before. It's like the
9 same folks moved to a device which has a smaller
10 screen where you can't really sell effectively major,
11 you know, video ads because video ads on phones -- a
12 lot of the phone listening is audio based and people
13 aren't necessarily looking at their phones as they're
14 streaming, you know, their station when they're in
15 their car on the way to work.
16 So it's -- it's a tough -- it's tough
17 inventory to sell. It's still a small piece and there
18 are costs associated with -- with developing these
19 mobile apps.
20 I mean the iPad, which is probably one of
21 the most successful new product launches over the last
22 20 years, simulcasters, webcasters have to recode, in

1 other words start from scratch and recode their --
2 their web-based players because most of them are --
3 most of the web-based players on the Internet that you
4 see are built-in flash, which is a, you know, a
5 multimedia technology that Steve Jobs happens to
6 dislike and -- and doesn't support on the iPad. So,
7 you know, all the streamers had to go back and recode.
8 And, you know, if you're Pandora, you've got a team of
9 ten people doing it, you're in good shape, but if
10 you're, you know, a smaller company that doesn't have
11 those development resources it's expensive.
12 Q Do you know if Dr. Pelcovits took those
13 costs into account in his report?
14 A Not to my -- not in my read of his report.
15 Q Mr. Smallens, can you identify the term
16 "gateway ad"?
17 A Sure. A gateway ad is an ad that
18 involuntary plays -- frequently they're videos,
19 sometimes they're a banner with audio behind it. They
20 have involuntary plays when you click to watch
21 something. So if you're familiar with Hulu or YouTube
22 or most terrestrial streamers and many webcasters,

1 when you first click to enter the stream and listen to
2 it, a gateway ad comes up, and it's a fifteen-second
3 ad and it's -- it's highly valued inventory because
4 it's disruptive. Like you can't get to your radio
5 station until you watch this fifteen-second ad.
6 Generally there's no way to skip them. And they do
7 demand higher CPMs than the streaming ads inside like
8 that are stitched into the broadcast.
9 Q And do they work on mobile platforms?
10 A Generally, no. They're less effective. A
11 lot of phones won't accommodate the video formats.
12 Again, when people start the streams, they
13 are frequently in like a portable setting and they're
14 not staring at their phone. They're less effective --
15 I mean I'm not to say they would never work, but
16 they're not -- you cannot command the same CPMs for
17 them in a mobile format that you can on a web-based
18 streaming format.
19 Q Now, on the bottom of page 17 you have a
20 discussion, continuing on after that you have a
21 discussion of Pandora?
22 A Yes.

1 Q Why did you include a discussion of Pandora
2 in this report?
3 A Pandora is the biggest player in the
4 webcasting game and it was also the focus of a lot of
5 Dr. Pelcovits' attention. You know, I think it would
6 be doing this proceeding a disservice not to focus on
7 it and also focus on how he looked at it and its
8 impact.
9 Q I refer you to Table 2 on page 18. What
10 does that table show?
11 A This is a table that shows Pandora's overall
12 impact and the total monthly performances,
13 SoundExchange performances from 2006 to 2009, and I
14 think it shows, you know, sort of the vast role that
15 Pandora plays in this growth.
16 Q In the growth of what?
17 A Of overall webcast performances.
18 Q And the table on page three -- Table Number
19 3 -- oh, I'm sorry -- on page 19 --
20 A Sure.
21 Q -- Table 3, what does that table show?
22 A This is a bar graph that addresses what that

1 year-over-year growth in SoundExchange performances
2 would look like if you took Pandora out of the
3 equation.
4 There seems, you know, in the last couple of
5 years there seems to have been -- well, it flattens in
6 2008 and in 2009 it actually comes down.
7 Q And in paragraph 31 you've done some
8 calculations, and what is it that you've calculated in
9 paragraph 31?
10 A In paragraph 31 I'm looking at what
11 Pandora's royalty obligation for 2009 would have been
12 under the Web II rates and comparing it to what was
13 both reported as and then confirmed to me through some
14 of the media files that were received as part of this
15 case would be Pandora's 2009 revenues.
16 The, you know, the outcome is that every
17 single dollar they would have made in 2009 would have
18 gone to a single cost, which is the royalty
19 obligation.
20 Q And where did you derive the performance
21 data that you used in paragraph 31?
22 A This data -- at the time of preparing the

1 report we had data from SoundExchange that was
2 provided as part of this proceeding through October.
3 What we did is then we derived what the monthly
4 average of January through October was and, you know,
5 and then added two additional months based on that
6 average.
7 It was actually a conservative estimate at
8 the end of the day because after this was submitted we
9 received the accurate information which was the
10 performances were actually higher, and that's because
11 generally around the holiday season webcasting tends
12 to go up, people listen longer, they spend more time
13 listening, maybe they're not working as much. There's
14 a lot of holiday streaming that goes on.
15 MR. FREEDMAN: Your Honor, I'm going to move
16 to strike his testimony about information that's not
17 in his direct testimony. He just testified about
18 information that he saw later. It's not information
19 presented in his testimony. It's outside the scope of
20 what's here and I want to strike that portion of his
21 testimony.
22 CHIEF JUDGE SLEDGE: Overruled.

1 MR. OXENFORD: Thank you, Your Honor.
2 BY MR. OXENFORD:
3 Q On the bottom of page -- well, just again,
4 why did you decide to do this calculation only for
5 Pandora?
6 A Again, because, you know, Pandora is the
7 biggest player in the game and, by all means, if -- if
8 they're not going to make a penny at their size and
9 scale of listenership, it doesn't bode well for the
10 smaller players.
11 Q Now, on page 20 you have a headline
12 "Interactive And Noninteractive Markets are Highly
13 Different."
14 What are the principal differences between
15 those two markets?
16 A I mean the principal difference is that an
17 interactive listener is looking for a music service
18 where they can pinpoint and listen to exactly what
19 they want to hear at a given moment. It's -- you
20 know, my friends who are still rock critics and stuff
21 are more likely to be interactive service subscribers
22 and, in fact, they -- they are.

1 In the case of the noninteractive market I
2 think that's more in line with the mass music
3 listeners who are not -- don't spend more than $50 a
4 year on CDs or downloads and are not as, you know,
5 picky about what they listen to. They want -- they
6 want music for a specific purpose. They want to
7 click -- click, listen and lean back.
8 Primarily the interactive services are
9 subscription based because, you know, that's --
10 that's -- that's the model that's worked in the
11 interactive setting. If you're going to pay a monthly
12 subscription, well, by golly, you expect to hear the
13 song you want to hear when you want to hear it. And
14 as we've said before -- as I've said before, the
15 statutory -- the noninteractive listening is primarily
16 ad based and the -- in the cases in which it is
17 subscription based it's a very small piece of the
18 overall threat in the pie.
19 Q Do you anticipate that it will continue to
20 be, the noninteractive market will continue to be
21 primarily ad based?
22 A I believe it will be. There's a -- there's

1 a phenomenon known as "freeium," which is another
2 made-up word, and I apologize for that but it's a good
3 one.
4 It's essentially a lot of media providers,
5 be they, you know, Hulu or -- or other kind of major
6 media providers, will give, you know, free
7 ad-supported access to their service and with the
8 hopes that they'll be able to convert them to
9 subscribers for premium futures.
10 Well, in the case of a lean back,
11 noninteractive, passive music listener, you know, they
12 might never get to the freeium part of it. They might
13 just remain ad based. And that is the landscape of
14 digital media right now. So if you're starting a new
15 interactive music service and you -- and it's not
16 interactive and you're starting from a subscription
17 basis, you're going to have a big hill to climb.
18 CHIEF JUDGE SLEDGE: It sounds like you're
19 describing the cable television evolution.
20 THE WITNESS: It's -- it's very analogous,
21 Your Honor.
22 BY MR. OXENFORD:

1 Q On the bottom of page 20 -- I'm sorry.
2 Let's turn to page 22.
3 You have a discussion about the "NAB And
4 Satellite Simulcasters Have Significant Advantages
5 Over Non-NAB Statutory Webcasters."
6 At a high level what advantages do you see
7 for simulcasters over nonsimulcast webcasters?
8 A Yeah, this is a topic that I've considered a
9 lot in my capacities. Primarily there's advantages
10 both on the cost savings and on the revenue
11 generation -- I'm sorry -- the cost side and the
12 revenue generation side.
13 On the cost side simulcasters, you know,
14 have more than a running start. They have station
15 brands that have been established in their local
16 markets for, you know, in some cases 30, 40, 50 years.
17 They have personalities on air that are already, you
18 know, popular in many cases and, you know, they're to
19 have a very robust business with that terrestrial
20 business. So they -- they have a sales team and bring
21 in a sales team who, again, has, you know,
22 relationships locally and is able to sell all that

1 inventory. So for them getting into simulcasting is a
2 much lower hurdle. There's some investment or leasing
3 of servers and bandwidth and then, of course, there's
4 the royalty obligations.
5 On the revenue generation side, again, they
6 have their own sales team, they have, you know, years
7 and years of marketing these -- these call letters.
8 So, you know, KROC in L.A. is -- they call themselves
9 World Famous KROC. They're the most famous rock
10 station in the country. There's not a media buyer in
11 Los Angeles or New York who wouldn't take a phone call
12 from the guy who's selling streaming for KROC, as I
13 was. You know, it's -- it's -- it's to some degree
14 night and day. It's not to say there aren't
15 challenges, but they have a lot of advantages.
16 Q Now, you talk about the cost side and you
17 used the phrase "running start in getting into
18 webcasting."
19 Are those cost savings just at the initial
20 phase or they will continue into later phases of
21 operation of simulcasters?
22 A Well, no, they have an inherent advantage of

1 the ongoing marketing on the terrestrial signal. So,
2 you know, if you listen to any sort of major radio
3 station now, every half hour they're promoting,
4 they're streaming their mobile assets, they're --
5 they're, you know, podcasting should they do that. So
6 they -- they have a cluster of marketing savings
7 through a very relevant audience to a very relevant
8 audience.
9 Q Are there any savings in infrastructure for
10 a simulcaster versus a webcaster?
11 A I mean in most cases, yes. It's -- in many
12 cases it's -- it's the shared -- shared -- they
13 already have the studios, they already have the people
14 to support the effort. Occasionally they hire new
15 people, but for the most part it's used by -- it's
16 essentially taking an existing staff person and giving
17 them more responsibilities. They love to do that in
18 radio.
19 When you get a PD who's, you know,
20 programming a station, does a shift on the show,
21 writes the blog for the website and puts together
22 streams as well, there's a lot of, you know, sort of

1 taking -- rejigger a lot of their existing staff and
2 facilities.
3 They have servers already, they -- they have
4 relationships with hardware and bandwidth companies,
5 you know, maybe they give them some free -- this
6 happened a lot. You'd get free on-air promotions if
7 you just gave all the servers and -- and the hosting
8 bandwidth to us to do a stream.
9 Q And how is that different for a pure
10 webcaster?
11 A Oh, for the pure webcasters, you know,
12 they're starting from scratch for the most part.
13 They're -- you know, they have to go out and buy their
14 own machines. They don't have name brand talent, they
15 don't have any talent. Many -- most of the webcasters
16 can't afford to pay a dedicated on-air talent.
17 Some -- some have them. There are some examples,
18 but -- so they don't have any of those advantages.
19 It's -- it's -- it's definitely a significant
20 difference.
21 CHIEF JUDGE SLEDGE: To make it more fair
22 are you suggesting that our regulations ought to

1 restrict the number of licenses available to a very
2 small number so that they would sell on auctions for
3 millions of dollars like terrestrial radio licenses?
4 THE WITNESS: No, Your Honor, I'm not
5 suggesting that.
6 CHIEF JUDGE SLEDGE: I thought you wanted it
7 to be fair with Internet and terrestrial.
8 THE WITNESS: Your Honor, I would say that I
9 would think that webcasters should be -- the
10 webcasting rate should be looked at as what would be
11 at the lower end of the scale, not the simulcaster
12 rate.
13 CHIEF JUDGE SLEDGE: They've got a huge cost
14 there that Internet doesn't have.
15 THE WITNESS: Absolutely right. They also
16 have a very thriving business with very high margins,
17 40 to 50 percent in some cases.
18 BY MR. OXENFORD:
19 Q For the simulcast operations do simulcasters
20 have any revenue generation advantages over the pure
21 webcaster?
22 A Yes. The inhouse sales team, the ability to

1 monetize at a higher CPM because they're selling
2 locally in most cases. They -- they don't have that
3 same reliance on ad networks that the webcasters have.
4 And they can walk in, again, you know, you can walk in
5 the door to the media buyer in L.A. and put in front
6 of him a beautiful package that bundles KROC's on-air
7 inventory with KROC's stream inventory and sell the
8 whole thing because they love KROC. So if you're a
9 webcaster without that name-brand recognition, you're
10 not going to able to make that same deal.
11 JUDGE WISNIEWSKI: Well, are we talking
12 local advertising or national advertising?
13 THE WITNESS: In both cases. Home Depot
14 loves to buy blended packages -- I sold many of
15 them -- to terrestrial simulcasters across the
16 country, but also, you know, Ed's Tires in Portland --
17 you know, sometimes those, you know, the car dealers
18 and the tire companies are like the biggest local
19 categories. You know, they'll pay -- let's add
20 another 10 percent to the buy and give us your stream.
21 JUDGE WISNIEWSKI: But in the latter case
22 that would tend to be a local advertisement?

1 THE WITNESS: Uh-huh, it is. Correct.
2 JUDGE WISNIEWSKI: So it's not like you're
3 looking for ears nationally?
4 THE WITNESS: In that case, no.
5 BY MR. OXENFORD:
6 Q Mr. Smallens, if I could refer you to the
7 bottom of page 24 where your heading is "Statutory
8 Webcasting Provides Promotional Benefits To Copyright
9 Holders."
10 A Yes.
11 Q Can you summarize your observations about
12 the benefits to copyright holders?
13 A I can. As the -- as a composer and
14 songwriter and former Warner Brothers recording
15 artist, you know, I've seen firsthand, I mean before
16 we even talk about industry analysis, the impact of
17 statutory webcasting.
18 There might have been a small cult following
19 over the course of our career with a couple hundred
20 thousand albums back in the late '80s, early '90s, but
21 these days the only mentions you see of them, you
22 know, are on the Internet or social networks or when

1 I, you know, I get calls from people and they say oh,
2 you guys just popped up on Pandora or I just heard you
3 on Houndstooth Radio.
4 I never get the phone call hey, KROC just
5 played your Crush Story from 1991 again. So I mean
6 that's more of a personal experience as -- as a
7 performer and a recording artist. But, you know, just
8 generally it stands to reason that noninteractive
9 plays will spur more sales, and Russ Crupnick
10 confirmed that. He said that, you know, there's a 41
11 percent increase in downloads.
12 Pandora has talked about how they're selling
13 over a million dollars a month of -- of MP3s from
14 their statutory webcasting.
15 My former band-mate and Real Rhapsody's vice
16 president of programming made the same point, that
17 the -- although the majority of the listening on
18 Rhapsody was interactive, the noninteractive listeners
19 bought the -- bought the plurality -- not -- not the
20 majority, but they were the biggest buyers of MP3s
21 through Rhapsody. So there's just a lot of evidence
22 about this.

1 Q Is there a reason that the interactive
2 market might be different than the noninteractive
3 market in terms of generating sales?
4 A No. Absolutely. I think to a certain
5 degree being able to click and stream the MIA song is
6 substitutional for buying the MP3. So if you're
7 paying a subscription, you know, after servicing you
8 can actually go in and hear it right away, that might
9 prevent you from actually buying the MP3 unless you
10 just love the song and need to own it.
11 MR. OXENFORD: I have no further questions.
12 CHIEF JUDGE SLEDGE: Mr. Malone, any
13 questions?
14 MR. MALONE: No, Your Honor.
15 CHIEF JUDGE SLEDGE: Mr. Freedman?
16 MR. FREEDMAN: Yes, Your Honor.
17 CROSS EXAMINATION BY COUNSEL FOR
18 SOUNDEXCHANGE
19 BY MR. FREEDMAN:
20 Q Good afternoon, Mr. Smallens. How are you?
21 I'll be asking you some questions on behalf
22 of SoundExchange today.

1 Now, currently you operate a consulting
2 business called Audiation; is that right?
3 A Yes.
4 Q And Audiation does not have any employees,
5 correct?
6 A Correct. I'm the sole proprietor. I hire
7 subcontractors from time to time.
8 Q And you started that company in June of
9 2009; is that correct?
10 A Yes.
11 Q And since that time Audiation has had eight
12 clients; is that correct?
13 A Yes.
14 Q And two of those clients are currently
15 webcasting, right?
16 A One is currently and one prior client is
17 doing some web -- actually -- I'm sorry -- two are --
18 one is currently webcasting, Live365. One is getting
19 into the webcasting space, and that's Vibe, and one
20 prior client, MyNet, has webcasted and will be
21 webcasting hopefully in the future.
22 JUDGE WISNIEWSKI: Did I hear you say that

1 Live365 is a client of yours?
2 THE WITNESS: Only with regard to this
3 proceeding, Your Honor.
4 JUDGE WISNIEWSKI: Oh, okay.
5 BY MR. FREEDMAN:
6 Q You anticipated my next question, so with
7 respect to Live, do you work for them other than in
8 providing testimony in this case?
9 A No.
10 Q Now, you mentioned another client that I
11 believe is currently webcasting. Is that a Turkish
12 portal?
13 A Yes, it is. MyNet is a Turkish portal.
14 They -- they're not a current client. We haven't
15 engaged yet.
16 MyNet is essentially the Yahoo! of Turkey.
17 I have some relationships there. And they -- they do
18 some statutory webcasting, primarily Turkish music,
19 and they also do on-demand music and video.
20 Q So you consulted for them, but that hasn't
21 come to fruition, an actual engagement?
22 A They actually halted the engagement because

1 they're having licensing concerns of their own in
2 Turkey.
3 Q And you said at Audiation one of your
4 current clients is a U.S. company considering starting
5 to offer a webcasting service, right?
6 A Correct. That's Vibe Media.
7 Q Vibe Media?
8 A Vibe, V-I-B-E.
9 Q And it's considering offering statutory
10 webcasting, correct?
11 A Yes.
12 Q And Vibe is not currently offering statutory
13 webcasting, right?
14 A No. They're doing some on-demand
15 performances.
16 Q And it's considering offering an
17 Internet-only webcasting service as opposed to
18 simulcast; is that right?
19 A Yes.
20 Q And one service you provide to Vibe is to
21 advise them about how to make statutory webcasting a
22 viable business, correct?

1 A The primary scope of my engagement with them
2 is to advise them how they could launch a statutory
3 webcasting service that when sold in conjunction with
4 their other digital assets could make a good
5 sponsorship package for people, for marketers.
6 Q And you have not discouraged Vibe from
7 entering into the statutory webcasting business,
8 correct?
9 A They came to me when they were already
10 considering it, so I'm giving them sort of the
11 overview of how best to do it.
12 Q And you have not discouraged them from doing
13 it, right?
14 A No.
15 Q You haven't told them that they won't be
16 able to make money in the statutory webcasting
17 business, correct?
18 A That would be a bad thing for my business if
19 I tell me clients that. But with respect to Vibe,
20 because they are analogous to a simulcaster, Vibe is
21 the biggest urban media brand and they have special
22 access to content and talent, and if they did it

1 right, they might be able to put together an
2 attractive sponsorship.
3 Q And so you have not told them that if they
4 start statutory webcasting they can't make money,
5 right?
6 A Not in those words, no.
7 Q You haven't told Vibe that it won't be
8 profitable in the statutory webcasting business,
9 correct?
10 A No.
11 Q In fact, you told Vibe that statutory
12 webcasting would be a good asset to add to its
13 portfolio, correct?
14 A If they're able to sell it, correct.
15 Q And you think that Vibe will be able to make
16 statutory webcasting financially a viable business,
17 correct?
18 A We haven't considered it as a standalone
19 feature. My engagement with them currently is to
20 assemble the sponsorship package and go on sales
21 meetings with them and sell it to marketers. Until we
22 do so they will not launch the -- the -- the actual

1 station.
2 Q Let me ask you this: In advising Vibe about
3 starting a statutory webcasting service, you
4 considered statutory royalty rates of sound
5 importance, correct?
6 A I factored in. I -- I did a high-level cost
7 and revenues analysis for them and I factored in the
8 royalty costs and I told them that they're
9 significant.
10 Q And that didn't, nonetheless, that analysis
11 did not cause you to tell them that they should not
12 enter the statutory webcasting space, right?
13 A No, it did not.
14 Q And you provided Vibe with a plan on how to
15 offer statutory webcasting, correct?
16 A A high-level creative plan, yes.
17 Q Now, one of the keys to Vibe's decision to
18 offer statutory webcasting is whether it can find
19 advertisers or sponsors; is that right?
20 A For -- for an entire package. They're not
21 contemplating selling statutory webcasting as a
22 standalone product.

1 Q But in terms of launching statutory
2 webcasting, one of the keys to that decision is
3 whether or not Vibe can find advertisers or sponsors
4 for the package that it's going to offer; is that
5 right?
6 A It would be a blended package. They're
7 packaging live events, pages in their magazine --
8 they're an urban music magazine -- pages on their --
9 banners on their website. So it would be part of a
10 bigger package.
11 Q And you submitted a written proposal to
12 Vibe; is that correct?
13 A Yes, I did.
14 Q And in that written proposal you told Vibe
15 that there's a large audience for online radio,
16 correct?
17 A Yes.
18 Q And you characterized the online radio
19 audience as desirable, a desirable audience for
20 advertisers, correct?
21 A Yes.
22 Q And in that written proposal you told Vibe

1 that the mobile radio audience is growing by
2 double-digit percentages monthly, correct?
3 A At the time when I wrote the proposal that
4 was the case, yes.
5 Q And you gave them the proposal in April of
6 2010, correct?
7 A Yeah. That was a look-back number for the
8 prior few months, yes.
9 When you're going from zero, double digits
10 is easy to attain.
11 Q I want to ask you about paragraph ten, if I
12 could please, of your written testimony.
13 A Yes.
14 Q Is one of your criticisms of Dr. Pelcovits
15 that he didn't speak to any executives at webcasting
16 companies?
17 A Yes.
18 Q Is it your view that an expert's testimony
19 in this proceeding is flawed if an expert didn't speak
20 to webcasting executives?
21 A I believe it depends on the nature of his
22 expertise.

1 Q Meaning what? What do you mean by that?
2 A Meaning that if he's going to assess the
3 reality of the webcasting marketplace, if he hasn't
4 had some degree of immersion or hands-on involvement
5 in the business or some engagement in conversations
6 with people who do that for a living, it, you know, it
7 could be considered a deficit of his rapport.
8 Q Is it your view an expert's testimony in
9 this proceeding is flawed if he doesn't speak to the
10 record company executives?
11 A If that expert has no knowledge of the
12 record industry and doesn't have a, you know, a sense
13 of how that works.
14 Q Let me ask you about paragraph 11. You
15 say -- towards the bottom of paragraph 11 you say,
16 it's a considerable flaw in Dr. Pelcovits' testimony
17 that he did not consider the allocation of
18 listenership attributable to news, talk and sports
19 formats.
20 Do you see that?
21 A Yes.
22 Q And you say in your written testimony that's

1 based on your -- based on your experience, those
2 nonmusic formats are dominant for terrestrial
3 simulcasters; is that right?
4 A Yes.
5 Q Now, in preparing your written testimony you
6 didn't review any documents to confirm that view, did
7 you?
8 A This is based on my own direct experience at
9 CBS and Entercom. And then, you know, I had
10 subsequent conversations with a couple folks who are
11 still in the -- in the space now at the companies and
12 they affirmed that the situation hadn't changed.
13 Q So is the answer to my question no, you did
14 not review any documents?
15 A Specific to that phrase, no.
16 Q In preparing your written testimony you
17 didn't try to quantify the allocation of listenership
18 attributable to the nonmusic formats, correct?
19 A No, because, again, it was, you know, from
20 my own experience in -- in the -- six years in the
21 webcasting industry.
22 Q And the point you're making here is limited

1 to simulcasters; is that right?
2 A Yes. Let me consider that. That is the --
3 my expertise around this allocation between news, talk
4 and sports and music is, you know, directly derived
5 from my experience in simulcasting in the terrestrial
6 industry, which isn't to say that webcasters and --
7 don't also have a lot of talk formats outside of
8 simulcasters, but I don't have as much direct
9 knowledge about what that proportion would be.
10 Q You're not suggesting that nonmusic formats
11 dominate listening for Internet-only webcasters; is
12 that right?
13 A I'm not suggesting that.
14 Q Looking at Table 1, which is on the next
15 page, so this is based on one page from an Arbitron
16 report; is that right?
17 A Yes.
18 Q And it's showing -- the part that you're
19 highlighting is that the percentage of people who
20 listen to online radio in the past week remain steady
21 from 2009 to 2010; is that right?
22 A Yes.

1 Q But you agree that even though the
2 percentage of people listening is the same, the total
3 number of performances might be higher in 2010, right?
4 A It's possible.
5 Q And that would occur at the same percentage
6 if people were listening, that they were listening to
7 more performances, right?
8 A Yes, the time spent listening was higher.
9 Q And if you wanted to measure whether total
10 listening to webcasting increased from one year to the
11 next, better data to look at would be whether total
12 performances increased, right?
13 A Well, the problem with that is that this is
14 a blended graphic. It -- it conflates music and news,
15 talk and sports audiences. So the TL -- the time
16 spent listening, TSL, which is a traditional radio
17 measurement, it's also used online, that growth could
18 come from nonmusic performance as well as music
19 performance.
20 Q My question is whether a better indicator of
21 whether total listening to webcasting was increasing
22 from one year to the next would be to look at whether

1 total performances of sound recordings increased.
2 A Total -- total listening to music
3 webcasting. That would be a good indication. I -- I
4 think they both have their merits in both ways of
5 looking at them.
6 Q Well, you would agree that the total number
7 of statutory webcasting performances in 2009 was
8 higher than in 2007? Would you agree with that?
9 A Yes.
10 Q Turning you to page 16 -- paragraph --
11 excuse me -- 16, you say in this paragraph that CPMs
12 for online audio ads have generally been stagnated or
13 declining.
14 Do you see that?
15 A Yes.
16 Q That's based primarily on your experience
17 with broadcasters, right?
18 A Yes, and it's confirmed in conversations
19 more recently since I left Entercom as well.
20 Q And other than the testimony from Live365's
21 witnesses, you didn't review any documents that
22 support that assertion, correct?

1 A Not specific to this statement.
2 Q If I could have you turn, please, to
3 paragraph 17.
4 A Sure.
5 Q And you're discussing CPMs for various kinds
6 of ads in paragraph 17; is that correct?
7 A Yes.
8 Q You rely on information from Johnie Floater
9 --
10 A Yes.
11 Q -- among others?
12 A From his statement, yes.
13 Q And you also refer to some figures cited by
14 Dr. Fratrik, correct?
15 A Yes.
16 Q You didn't review the underlying data that
17 they're referring to, did you?
18 A No.
19 Q You're just repeating what they said, right?
20 A Yes. In the context of, you know, my own
21 experience.
22 Q I'd like to ask you about paragraph 24.

1 A Yes.
2 Q In the section heading which is Section D
3 you say that "Ad-Supported Music Space Is Withering
4 Under The Weight Of The Royalty Payments To Record
5 Labels."
6 Do you see that?
7 A Yes.
8 Q And you give some examples of what you
9 called failed and shuttered ad-supported music
10 services?
11 A Right.
12 Q And you cite SpiralFrog, Ruckus Network,
13 iMeem and Lala Media; is that right?
14 A Yes.
15 Q And those four services are all primarily
16 interactive on-demand services, right?
17 A They are ad-supported, or were ad-supported
18 interactive on-demand services primarily.
19 Q And so when you say that the ad-supported
20 music space is withering under the weight of royalty
21 payments, you weren't referring to the statutory
22 royalty payments, correct?

1 A That first statement is reflecting the
2 overall state of the ad-supported industry. I
3 would -- I would suggest that the statutory
4 broadcasters, webcasters that I allude to below, AOL
5 and Yahoo! LAUNCH both essentially closed up their
6 webcasting shop and outsourced their operations and it
7 sort of -- it timed pretty close to the Web II
8 consideration.
9 Q And with respect to the four services that I
10 was asking about --
11 A Yes.
12 Q -- you're not suggesting that the statutory
13 royalty rates was what -- that they were withering
14 under the weight of the statutory royalty payments,
15 were you?
16 A I'm suggesting that their -- their
17 self-negotiated relationships with the labels were a
18 big factor. They -- they -- they put together
19 agreements and had agreements in place that they
20 thought they'd be able to support through ads and they
21 were not able to and had to either close or sell
22 themselves in a fire sale.

1 Q So the statutory royalty rates are not what
2 caused them to whither as you say, right?
3 A Not specifically.
4 Q Now, you also refer, as you mentioned, to
5 Yahoo! and AOL Radio exiting the webcasting business;
6 is that correct?
7 A Yes.
8 Q And they're now powered by CBS Radio, right?
9 A I mean they're completely run by CBS Radio,
10 yes. Powered is sometimes a vague term. But CBS
11 Radio pays for their royalties, pays for all the
12 bandwidth and hosting and sells all their inventory.
13 Q I think "powered" may be the verb that CBS
14 Radio uses on its own website.
15 A It is. It is, but it's misleading.
16 Q It's misleading?
17 A I think it doesn't exactly explain what the
18 relationship is.
19 Q In any event, a member of the public can
20 listen to Yahoo! streaming and AOL Radio, right?
21 A A member of the public can go to a -- one
22 web page that says it's Yahoo! Radio or AOL and the

1 minute they click to stream it changes to a CBS-hosted
2 environment and page, so I guess.
3 Q Now, in paragraph 25 you discuss Last.FM?
4 A Yes.
5 Q And you testified in paragraph 25 that
6 Last.FM is a good example of how hard it is to make an
7 ad-supported service successful; is that right?
8 A Yes.
9 Q And then you quote this Forrester Research
10 report.
11 Do you see that?
12 A Yes.
13 Q And it refers to Last.FM having turned off
14 free streaming outside the major territories.
15 Do you see that?
16 A Yes.
17 Q So that is referring to Last.FM turning off
18 free streaming outside of the United States, correct?
19 A I believe so, yes, it is. Smaller
20 territories.
21 Q And the article that you were citing,
22 although you don't say it here, actually said that

1 Last.FM was stopping streaming full on-demand songs to
2 users.
3 Do you recall that?
4 A Yes.
5 Q The article did not say that Last.FM was
6 turning off all of its noninteractive streaming,
7 right?
8 A No, it did not say that.
9 Q I'd like to ask you about paragraph 34.
10 Now -- are you there? I'm sorry.
11 A Yes, I am.
12 Q In paragraph 34 you say, "The vast majority
13 of statutory webcasting listening is not based on
14 subscription listening"; is that right?
15 A Correct.
16 Q And you say subscription levels for
17 statutory webcasters are not growing; is that right?
18 A That's correct.
19 Q And you referred to a figure for Live365.
20 You say that it reports that fewer than 2 percent of
21 its users are subscribers.
22 Do you see that?

1 A Yes.
2 Q But you'd agree that Live365's revenues from
3 its subscribers is much greater than 2 percent of its
4 total revenues, right?
5 A I believe that's the case.
6 Q Do you know what the percentage is?
7 A I don't know off the top of my head, but I
8 believe that was -- that your assertion is correct.
9 Q Now, you also refer to Last.FM's
10 subscription users in the same paragraph.
11 Do you see that?
12 A Yes.
13 Q And in the sentence about Last.FM you say,
14 "As previously stated."
15 Are you referring back to the end of
16 paragraph 25? Is that what you're referring to?
17 A Let me just check. Yes.
18 Q And at the end of paragraph 25 there's
19 footnote 22 and it was citing an article, right?
20 A Correct.
21 Q And that was an article that was an
22 interview with someone named David Goodman?

1 A No. Actually I believe it was an interview
2 with Fred McIntyre.
3 Q Well, this is Exhibit 9 that was not
4 admitted but attached to your testimony, right?
5 A Yes, that's Fred.
6 Q Pardon me?
7 A This is Fred McIntyre.
8 Q Fred McIntyre?
9 A Oh, I'm sorry. David Goodman is quoted as
10 well.
11 Q And --
12 A But that tens of thousands number is from
13 Fred McIntyre.
14 Q Remind me, who is David Goodman?
15 A David Goodman is the president of CBS
16 Interactive Music Group.
17 Q And he was your boss I think you said,
18 wasn't he?
19 A At CBS, yes, in his capacity as president of
20 CBS Radio.
21 Q And he says in that article that the
22 subscription business is about a quarter of Last.FM's

1 business.
2 Do you recall that?
3 A Where -- does David say that? I mean if
4 David said that -- yes.
5 Q And he said, "We're very bullish on the
6 subscription service."
7 Do you recall that?
8 A Yes, I do. These are -- if I may, I believe
9 these are quotes attributable to Fred. They don't
10 come under -- "The unit's product VP Fred McIntrye
11 offered some new insight," and that's where all the
12 quotes comes from.
13 Q And remind me who's Fred McIntyre?
14 A He's the vice president of products for CBS
15 Interactive Music Group and I think he has operational
16 responsibility for Last.FM under David.
17 Q So he's the one who published on their
18 subscription?
19 A Yes.
20 Q Now, you also in paragraph 34 --
21 A Yes, sir.
22 Q -- refer to Rhapsody, right?

1 A Yes.
2 Q And you point or report on the recent
3 decrease in Rhapsody subscribers.
4 Do you see that?
5 A Yes.
6 Q Those are subscribers to Rhapsody's
7 on-demand service, right?
8 A Yes, because they had to -- yes. That's the
9 answer.
10 Q Let me ask you about Section 36 of your
11 testimony which is on page 22.
12 A Thank you.
13 Q Now, one thing you say is the
14 simulcasters -- one advantage the simulcasters have
15 over Internet-only webcasters is that they have some
16 cost savings; is that right?
17 A Yes.
18 Q In preparing your testimony you didn't try
19 to quantify those cost savings, correct?
20 A Not in any sequential way. It's based on my
21 experience of having started both webcasting --
22 pure-play webcasting services and simulcaster

1 services.
2 Q I don't know what you mean by a sequential
3 way.
4 Did you try to quantify those cost savings
5 in any way?
6 A In my head based on my experience I'm very
7 familiar with the process.
8 Q Did you try to quantify them in preparing
9 your written testimony?
10 A No, not specifically. Sorry.
11 Q And would you agree that the biggest costs
12 associated with webcasting are hardware, bandwidth and
13 royalties?
14 A Not in that order, but yes, I would agree.
15 Q Those are the three biggest but not in that
16 order; is that right?
17 A Yes.
18 Q And simulcasters incur all of those costs,
19 right?
20 A In some cases they re-purpose machines, the
21 hardware is already provided for, in some cases they
22 already have a bandwidth provision. So it's not

1 necessarily the case that they have to go out and buy
2 machines and buy bandwidth. They frequently have it
3 as part of their cluster.
4 Q I see. They incur the cost, but in some
5 cases they already incurred it before they start
6 streaming?
7 A Right. It's a sunk -- it's a previously
8 sunk cost.
9 Q And you would agree that broadcasters incur
10 costs that Internet-only webcasters do not incur,
11 right?
12 A For their primary business?
13 Q Yes.
14 A Yes.
15 Q An SEC license, for example?
16 A Yes.
17 Q Broadcast towers; is that right?
18 A Yes.
19 Q Now, in paragraph 15 of your written
20 testimony --
21 A I'm sorry, 15?
22 Q Yes, 15 -- you say that one useful metric in

1 analyzing the statutory webcasting is the sellout rate
2 for advertising inventory; is that right?
3 A Yes.
4 MR. FREEDMAN: Your Honor, while I wait for
5 two exhibits I would like to show the witness, I know
6 it's just about 4:30, I would estimate I have five to
7 ten minutes left of cross-examination. I'm glad to
8 continue or not as you prefer.
9 CHIEF JUDGE SLEDGE: We'll continue.
10 MR. FREEDMAN: Thank you. Your Honor, may I
11 approach?
12 BY MR. FREEDMAN:
13 Q Mr. Smallens, I've put in front of you two
14 documents. If you will take a look at them, please.
15 And if can take SoundExchange Trial Exhibit 41 --
16 A Yes.
17 Q -- have you seen this document before?
18 A Yes.
19 Q What is it?
20 A It's a feature from the Audio-4cast blog
21 which cites some data from AccuStream regarding
22 projections for audience growth and revenue growth for

1 online listening.
2 Q And this is a document you reviewed and
3 relied upon in preparing your testimony, correct?
4 A Yes.
5 Q In the first paragraph the document says
6 that according to AccuStream, "Total listening hours
7 to Internet radio are forecast to expand in 2011."
8 Do you see that?
9 A Yes.
10 Q Do you agree that total listening hours will
11 expand in 2011?
12 A I agree that it will expand. I'm not sure
13 if I agree to the extent that they do.
14 JUDGE ROBERTS: When we're talking about an
15 expansion here, are we talking about an expansion to
16 not interactive, interactive or both?
17 THE WITNESS: Your Honor, that's a good
18 question. I believe in this report it's conflating
19 both. I'm sorry. This is unclear. It's unclear in
20 the report. I don't recall.
21 BY MR. FREEDMAN:
22 Q If I could have you look at the paragraph

1 that begins "However."
2 A Yes.
3 Q It says there that inventory sellout rates
4 are going to continue to rise.
5 Do you see that?
6 A Yes, I do.
7 Q Do you agree that inventory sellout rates
8 are going to continue to rise?
9 A I believe they will rise incrementally. I
10 don't believe they'll rise to the extent that they say
11 they will.
12 Q Do you believe they will continue to rise
13 incrementally for statutory webcasting?
14 A I believe they will continue to rise for the
15 entire online radio. This -- this report also
16 includes both news, talk, sports and music programs.
17 So the whole pie will incrementally rise.
18 Q And do you think it will continue to rise
19 for statutory webcasting?
20 A Yeah, incrementally.
21 Q If I could then have you look, please, at
22 SoundExchange Trial Exhibit 42.

1 A Yes.
2 Q Have you seen this document before?
3 A I have.
4 Q And what is it?
5 A It's a blog post from Audio-4cast which
6 cites a Bridge Ratings study.
7 Q And this is also a document that you've
8 reviewed and relied upon in preparing your testimony,
9 correct?
10 A Yes.
11 Q And this document is reporting on some data
12 from Bridge Ratings.
13 Do you see that?
14 A Yes.
15 Q And then it says that Bridge Ratings
16 projects that Internet radio revenues will increase
17 12 percent in 2010 to $324 million.
18 Do you see that?
19 A Yes.
20 Q Do you agree with that?
21 A I think this is a very optimistic and
22 aggressive projection.

1 Q Do you agree that --
2 JUDGE ROBERTS: I have the same question for
3 you, Mr. Smallens. Is this interactive,
4 noninteractive, both, or you don't know?
5 THE WITNESS: It's blended. I don't know.
6 I don't know.
7 BY MR. FREEDMAN:
8 Q Do you think that ad revenues for Internet
9 radio will increase this year?
10 A Yes.
11 Q Do you think ad revenues for statutory radio
12 will increase this year?
13 A I think total ad revenues will increase. I
14 don't know if you break it down by service or take
15 Pandora out of the equation, it's going to be a
16 much -- a massive increase.
17 Q I had trouble hearing you. I'm sorry.
18 A I'm saying the total revenues will increase
19 incrementally I believe, but I think if you take
20 certain --
21 JUDGE WISNIEWSKI: Total revenues for whom?
22 THE WITNESS: Total revenues for statutory

1 webcasting. Sorry, Your Honor. But I believe if you
2 take some of the big players out of the picture like
3 Pandora, that the increase will be much smaller.
4 BY MR. FREEDMAN:
5 Q And you think that ad revenues for statutory
6 webcasting will continue to grow until 2015, right?
7 A I think it will incrementally grow. I don't
8 think in 2015 you're going to have 240 -- you're not
9 going to see 240 percent growth over five years.
10 Q In your opinion advertising revenues for
11 statutory webcasting will be somewhere between 600 and
12 $700 million --
13 A Yes.
14 Q -- by 2015, correct?
15 A That's -- I have stated that, yes.
16 Q Well, do you think that's true?
17 A Yes.
18 Q I'd like to ask you about Section VII of
19 your written testimony. You discuss in this section
20 the alleged promotional benefits of statutory
21 webcasting; is that right?
22 A Yes.

1 Q Now, in preparing your written testimony you
2 did not try to quantify the promotional value of
3 statutory webcasting, right?
4 A No, not beyond the comments I put in here
5 and what I stated earlier.
6 Q Now, in paragraph 40, you say that NPD
7 Group's Russ Crupnick was saying that online radio
8 services lead to a 41 percent increase in paid
9 downloads.
10 Do you see that?
11 A Yes.
12 Q With respect to that so-called 41 percent
13 increase, 41 percent over what?
14 A That's a very good question. What he's
15 stating is that not having online radio service -- an
16 online radio service can prompt a 41 percent growth in
17 paid downloads from -- versus not having online
18 statutory webcasting. I think he's looking at it from
19 an artist's -- from a record label's perspective.
20 The number of downloads that an artist would
21 sell in the absence of, or the total market of sold
22 MP3 music, MP3s grows with the introduction of

1 statutory webcasting. They spike growth of MP3s.
2 Q Are you sure that's what he means?
3 A That is how I read it.
4 Q Did you look at the underlying data and
5 study that he's looking at?
6 A No.
7 Q So you're just relying on some snippets of
8 what he said in the article; is that right?
9 A Yes.
10 Q And you'd agree that even if a listener to a
11 statutory webcasting service clicks through to buy a
12 download, that person could be a substitution for CD
13 sales, right?
14 A I don't actually quite understand that
15 argument. If -- if I'm an artist and I want to sell
16 music and it's the difference either someone wants to
17 buy just one of my songs and doesn't want to buy my
18 album, I'd rather sell them download than zero CDs, so
19 I -- I don't understand the substitutional argument.
20 Q I guess I'm not asking about you an
21 argument. Maybe what I'm asking about is are you
22 aware of any evidence, empirical data one way or the

1 other --
2 A Not in terms of -- not in the scope of
3 statutory webcasting, if that's what you're asking me.
4 Q It is and let me just clean that up and make
5 sure we're on the same page.
6 A Sorry.
7 Q Are you aware of any evidence other than
8 this -- what you cite here in Section VII that shows
9 one way or the other whether statutory webcasting
10 actually is either promotional or substitutional in
11 sales?
12 A The -- the evidence I cite in this paragraph
13 is -- is -- you know, I think it paints the picture
14 correctly of the impact of statutory webcasting on
15 sales, but I do not have purview about the
16 substitutional issue that you're addressing. I was
17 speaking at from -- as a former record label
18 executive.
19 Q And you don't know whether any of the
20 sources that you cite considered whether or not the
21 alleged increase in digital sales would cannibalize CD
22 sales, right?

1 A I do not know if they considered that.
2 MR. FREEDMAN: Your Honor, may I have the
3 court's indulgence?
4 (Brief pause.)
5 MR. FREEDMAN: I have no further questions,
6 Your Honor.
7 CHIEF JUDGE SLEDGE: Any redirect?
8 MR. OXENFORD: Your Honor, no further
9 questions.
10 CHIEF JUDGE SLEDGE: Any questions from the
11 bench?
12 Thank you, sir. You're excused.
13 THE WITNESS: Thank you very much, Your
14 Honors.
15 (Witness excused.)
16 CHIEF JUDGE SLEDGE: We'll recess until 9:30
17 in the morning.
18 (Whereupon, the hearing was adjourned at
19 approximately 4:39 p.m., to reconvene
20 Thursday, July 29, 2010, at 9:30 a.m.)
21 * * * * *
22

1 CERTIFICATE OF NOTARY PUBLIC

2 I, SHARI R. BROUSSARD, the officer before whom
3 the foregoing hearing was taken, do hereby certify
4 that the testimony appearing in the foregoing pages
5 was taken by me in stenotypy and thereafter reduced to
6 typewriting under my direction; that said
7 transcription is a true record of the testimony given
8 by said parties; that I am neither counsel for,
9 related to, nor employed by any of the parties to the
10 action in which this hearing was taken; and, further,
11 that I am not a relative or employee of any counsel or
12 attorney employed by the parties hereto, nor
13 financially or otherwise interested in the outcome of
14 this action.
15
16
17
18 SHARI R. BROUSSARD
Notary Public in and for the
19 District of Columbia
20
21 My commission expires:
22 July 14, 2015

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$200 210:18
$280 213:1
$324 265:17
$4 63:21 64:13,14
$50 226:3
$700 267:12

0

0 55:14
0004 69:11
00075 55:19
00090 55:20
00134 48:20
00175 36:14
00181 49:2
0023 46:10 103:6,10
0024 47:1,7,11 98:4,5 103:6
00245 36:15
0036 36:6,21 38:9,10 39:2,4 47:13 49:4,8,18 53:9,18 63:15 69:5 124:10,12
0037 63:15
0039 69:8
0048 111:12,18
0072 103:10
0073 38:2,7 46:11 47:4 49:3 63:16,18 103:4 111:19
008 69:13
01 66:13
01917 128:11,15,19
021 37:8
02194 60:13 62:15 128:5,6,20
02610 128:15
06 190:10
08 190:10
09 48:21 190:11 191:1
0917 128:10

1

1 1:6 4:9 12:19 13:2,22 15:13,15 34:12,13 48:16 164:21 165:9,10 187:11 247:14
1:52 148:17
10 45:11 46:3 63:7 101:22 141:12 190:11 206:10 213:6,7 233:20
10:09 33:12
10:14 33:12
1000 3:9
101 1:12 2:5 198:3
1099 2:10
10-Ks 76:7,8
11 45:15 46:3 138:18 185:12 188:11 245:14,15
11:21 84:12
1120 3:9
114 29:21
114(5)(c 26:12
114(f)(5)(C 29:22
114(f)(C)(5 168:22
12 4:9 52:12 54:1,4 177:17 265:17
12:30 84:11 85:2
13 53:19
133 126:22
137 4:3
14 21:6 55:9 167:20,21 176:15 178:2 180:11,15 210:2 272:22
145 4:3
149 4:4
15 56:1 213:13 261:19,21,22
1550 3:4
16 62:6 87:20 145:17 171:5 173:11 174:11 176:11 218:15 249:10,11
163 4:10
16th 15:19
17 63:6,9 121:12 141:20 221:19 250:3,6
18 171:8,9 176:12 182:12 222:9
181 4:10
19 174:17,18 182:14,16 222:19
1919 2:15
1967 150:11
1982 8:1
1987 151:9
1990 8:1
1991 235:5
1993 151:22
1994 151:9 152:8
1996 153:9
1998 153:9
1999 154:6 156:10

2

2 4:10 14:2 98:8 102:16 105:4 163:18 164:1 165:14,15 168:9 176:15,18 178:2 180:11,15 181:14 182:12 222:9 255:20 256:3
2.4 101:6 102:7
2.40 98:6
2:05 148:17
2:41 176:8
2:45 176:8
2:52 180:12
2:59 180:12
20 9:2,12 12:3,4 15:22 21:6 34:1 57:20 59:10 66:6 105:3 121:11 139:19 141:12,20 142:19,21 143:13 144:1

© 2010

182:14,17 205:12 207:16 219:22 225:11 228:1

200 2:15

2000 187:16 189:2 190:7

20001 2:11

20006 2:16

2000s 86:14 88:8

2001 156:10

2002 156:13

2003 190:9

20036 3:10

2004 70:21 156:13

2005 8:16 158:6 190:9

2006 158:7 159:2 222:13

2007 8:16 62:13,16,17,18 139:20 189:13 210:13 213:1 249:8

2008 48:8,19 50:4 55:20 62:16,18 146:21 210:13 223:6

2009 48:9 50:4 55:20 62:14,17,19,21 81:9,17 82:12 101:7,22 104:19 107:16 127:21 128:10 139:10,17,18 140:7 146:22 159:2 184:14 188:1 189:3,9 222:13 223:6,11,15,17 237:9 247:21 249:7

2009-1 1:4

2010 1:8 81:10,17 82:12 147:4 184:14 187:16 188:1 189:9,13 213:4 244:6 247:21 248:3 265:17 271:20

2011 36:14 81:10 82:1,13 263:7,11

2012 191:2,14

2015 36:15 81:10,17 82:2,14 267:6,8,14 272:22

202 2:11,16 3:10

20540 2:6

21 68:19

2194 128:4

22 71:8 228:2 256:19 259:11

23 71:19 81:9 101:11

236 4:4

24 98:3 102:16 234:7 250:22

240 267:8,9

25 48:2 146:20 254:3,5 256:16,18

26 45:10 46:3 82:21 138:5,12,13,18 164:11

272 1:6

28 1:8 13:11

29 54:2 271:20

3

3 14:11 166:2,3 222:19,21

30 126:21 207:16 228:16

301 2:20

31 68:14,18 168:15,17 223:7,9,10,21

33 55:8 110:12 146:20 147:6

34 4:9 255:9,12 258:20

345-7400 3:5

35 59:19 61:6 118:13,14

351.10(f 172:3

36 61:13,15 119:22 259:10

360 203:5

38 104:11 108:7,21 127:14 139:8 140:18

380.5(a 182:18

380.5(d 182:22

39 107:7 108:8,21 127:14 171:15,16 176:12

4

4 14:20 98:9 110:8 111:2 166:15 177:1,7

4:30 262:6

4:39 271:19

40 57:7,9 186:6,7,14,21 205:12 228:16 232:17 268:6

41 235:10 262:15 268:8,12,13,16

42 264:22

43 184:15

47 37:10,11,15 38:4 43:6 47:7 55:15 63:16 112:2

48 70:4

5

5 4:3 15:1 59:4,11 167:19,20 177:1

50 205:13 228:16 232:17

51 124:1 125:18

514 2:20

54 15:22 17:16 24:16 32:5,14 33:22

55 81:9

6

6 15:5 68:20 177:1 185:12

600 267:11

61 129:4

626 2:21

649-6000 2:11

© 2010

65 15:22 34:2
650 3:5

7

7 177:10,11
70 214:4
737-7288 2:21
785-0600 3:10

8

8 177:10
80 57:19 64:13,14 214:4
80s 8:13 86:5 234:20
85 4:3

9

9 48:2 177:10 257:3
9:30 271:16,20
9:36 1:16
900 2:10
90s 86:10 162:2 234:20
91101 2:20
94404 3:5
95 69:2 214:18
950 3:4
97.5 215:19
973-5256 2:16

A

a.m 1:17 33:12 84:12 271:20
ability 94:20 95:4,11,12,17 96:3,14 110:3 178:12 198:13 213:19 216:10 232:22
able 21:19,20 31:21 39:6 47:3 61:4 77:16,20 95:19 130:1 135:19 154:13 193:9,10 194:6,15 195:1 197:20 202:9 203:11 205:14,16 206:8 208:3 209:8 211:10 214:13 216:13 227:8 228:22 233:10 236:5 240:16 241:1,14,15 252:20,21
above-captioned 1:11
ABRAHAM 2:19
absence 268:21
absolute 80:6,10
absolutely 82:5,6 152:8,15 155:6 160:11 191:16 199:22 201:11 216:12 232:15 236:4
absorption 185:1
academic 6:19 8:20 9:3,8
accept 39:3 93:10 128:12 175:2
acceptable 182:10
acceptance 201:8
accepted 12:14 97:10 163:14
access 60:19 98:19 114:19 143:15,19 227:7 240:22
accommodate 221:11
according 135:18 140:6 263:6
account 21:16 33:3 40:9,11 41:17 44:3,21 49:22 55:6 56:17 59:3 118:6,10 139:5 182:20 217:10 220:13
accounts 101:11 139:18
accuracy 140:20 141:1
accurate 47:8 102:21 103:1 180:2,19 214:4 224:9
accusing 127:3
AccuStream 98:13,15,19 99:15 100:1,15 103:5 138:13 262:21 263:6
acquire 154:4
acquired 154:5 213:1
across 57:13 94:17 216:7 233:15
act 29:2 144:21
action 28:20 29:9 272:10,14
activities 54:11 79:1 83:18 113:10 115:3
actual 16:6 41:15 43:3 48:7,8 49:1 64:8,11 98:19 155:15 201:3 238:21 241:22
actually 16:6 17:22 19:13 30:22 37:1 39:10,17 44:20 48:21 53:21 72:12 78:8 89:7 91:16 96:15 98:19 106:17 111:11 113:14 117:4 120:10 122:18 129:10 135:22 136:1 138:17 143:16 151:6 153:17 155:12,17 158:21 159:7,9 171:7 175:12 179:4 194:8,16 223:6 224:7,10 236:8,9 237:17 238:22 254:22 257:1 269:14 270:10
ad 114:14 160:2,6,7 166:6 195:4 196:7,10 198:7,8,10,17 200:1,21 201:17,20,21 202:12,16,19,22 203:3,21 204:2,11,18,20

© 2010

205:4,7,9,11,20 206:3,11 208:11,14,21 209:4 211:9,17 220:16,17 221:2,3,5 226:16,21 227:13 233:3 266:8,11,13 267:5

ad-based 195:8

add 73:15 155:20 172:3 194:1 196:10 233:19 241:12

added 224:5

addition 59:15 155:6 157:21

additional 48:2 167:22 176:18 194:4 224:5

address 41:1 51:6 173:20 214:3 215:10

addressed 197:22

addresses 127:14 222:22

addressing 270:16

adjourned 271:18

adjustment 41:1,7 122:19 124:7,8 125:2,10,12,14

adjusts 36:2

administrative 169:16

admissibility 34:8 178:9,10

admissible 16:4 21:9 25:9 27:6,20 28:8,9,13,17 30:13

admission 22:6 30:21 31:3 213:8

admit 23:3,20 24:15 25:6,10 26:6 28:16 141:8 169:19

admitted 11:19 16:17 17:22 18:5,7 20:14,19 21:1,7,15 22:6,13,22 23:6 24:14 25:3,16 31:4,13 33:22 34:12 140:9 169:17 181:13 257:4

adopted 88:11 92:22

adopting 90:1

adoption 191:22

adopts 97:7

ads 207:2,13 210:15 214:13 219:11 221:7 249:12 250:6 252:20

ad-supported 40:15 43:15,21 44:22 46:8 114:4,10,15,17 115:2 210:5,10 213:11 227:7 251:3,9,17,19 252:2 254:7

Adtech 160:15

advance 33:16

advantage 204:8 207:10,11 229:22 259:14

advantages 228:4,6,9 229:15 231:18 232:20

advertisement 233:22

advertiser 200:15 213:19

advertisers 42:21 114:19 160:5 207:14 242:19 243:3,20

advertising 41:17 98:12 100:17 112:15 114:18 117:17 156:20 160:16,22 161:4,12,14,15 163:8,11,12 165:17 166:4,10,11 173:2,3 194:5 197:8 198:3 199:14,20 200:7 201:22 202:1 204:14 205:17 208:3 209:1 213:18 233:12 262:2 267:10

advertising-supported 39:19,20 147:17 211:13

advise 239:21 240:2

advised 150:1

advises 149:17

advising 242:2

affect 63:2 93:7 102:16 141:15,16

affected 77:12

affirm 13:16

affirmed 246:12

afford 95:4 96:7,8 97:16 111:15 168:16 203:10 213:12 231:16

afoul 112:11

afternoon 85:13,14 138:1,2 145:13,14 148:11 183:12 236:20

against 30:19 53:10,11 86:3 216:3,13

Age 166:5,10 214:11

agencies 156:20 199:14 200:1,11 202:6

agency 156:15

agent 26:14 28:12 30:12,18

aggregate 182:13

aggregated 111:9 214:11

aggregating 113:10

aggregators 113:8

aggressive 265:22

ago 11:3 160:18 174:15 198:22

© 2010

215:7
agreed 23:3 27:19 73:12 79:19 144:10,12 170:11
agreeing 81:20 91:13
agreement 19:12 22:1 23:21 25:15,19 26:15 71:9 81:16 135:7 168:18,19,21 169:5
agreements 16:4,7,14,20 17:19,21 18:4,7,13,20,21 20:13,16,18,20,21 21:7,11,17,22 22:7,8,13,14,22 23:2,11,15,17,22 24:13,14,18 25:1,2,7,11,14 26:7,17 27:7,19 28:2,4,8,9 31:4,5,8,12,14,17 32:8,17,18,21,22 33:4 35:21 36:3,8,12 37:5 71:22 72:19 83:4 137:11 169:11 252:19
ahead 5:11 46:6 68:16 84:10 171:12
air 215:19 228:17
airline 40:3,8 195:15,18
airplane 44:4,6
Alanis 154:14
album 269:18
albums 234:20
Alexander 4:4 148:21 149:1,9
A-L-E-X-A-N-D-E-R 149:10
alleged 267:20 270:21
allocation 245:17 246:17 247:3
allow 217:6
allowed 80:3
allows 58:4
allude 252:4
already 64:10 228:17 230:13 231:3 240:9 260:21,22 261:5
alternatively 133:20
Alvin 6:4
A-L-V-I-N 6:5
am 6:10 97:17 118:13 149:13 255:11 272:8,11
amass 193:10
amasses 201:21
amended 21:5
America 11:3 86:3 215:6
among 250:11
Amos 152:18
amount 181:19 194:4 196:7,10
amused 188:10
analogous 160:1 195:14 227:20 240:20
analysis 38:14 52:17,21 56:8 63:11,13 64:6 66:1,5 68:11 69:7,18 71:9 91:1 99:20 106:17 116:16 122:14,21 123:7 144:4,6,7,8 197:13 234:16 242:7,10
analyze 56:2,6
analyzing 262:1
Anderson 205:2
Angeles 229:11
ANGUS 2:18
annual 73:16 184:21
answer 39:8,10 43:11,13,17 44:14 45:8 53:5,8 91:17 93:13 100:14 108:1 114:11 115:5,15 121:7 124:4,5,9 125:8 127:7,10,11 128:21 138:11 146:1 246:13 259:9
answered 52:7
anticipate 130:12 226:19
anticipated 238:6
antitrust 9:9
83:19,22 146:4
anybody 106:8 179:20
anyone 69:14 98:22 99:1 107:11
anything 20:4 36:17 91:6 104:4 164:15 179:19 211:2
Anyway 98:5
anywhere 31:20 205:12
AOL 187:2 195:12 210:14 212:2,5 252:4 253:5,20,22
apologies 51:5 71:15
apologize 195:19 227:2
apparently 100:5 107:19
appear 170:21 179:16 182:3,16
appeared 11:12
appearing 272:4
appears 13:11 34:5 38:21,22 39:4,21 55:9 126:2 139:19 179:19 180:22 182:11
appendices 142:3,13
appendix 142:7
Apple 211:2
application 93:12

© 2010

181:18 182:2 183:4
applications 156:17 157:4
applied 55:15 67:7 151:19
applies 66:20 72:17 179:18
apply 26:14 30:20 37:13 38:6 41:15 47:7 60:9 72:19
appreciate 34:16
approach 12:15 41:10,20 65:17 87:22 88:5,12,15,18 89:8,17,20 90:1,12,17 92:1,22 93:11,12 96:13,22 97:6 104:7 107:3 126:17 163:16 262:11
appropriate 17:7 37:13 51:16 67:19 97:11 103:19 148:8 183:2
approximately 1:16 9:1,6,11 12:4 37:11 38:9 103:9 139:1 185:21 271:19
approximates 130:13
apps 219:19
April 187:20 244:5
Arbitration 11:17
Arbitron 184:18 247:15
Arbitron/Edison 184:12,17
aren't 18:7 147:19 208:6 219:13 229:14
argue 51:11
argues 16:8
arguing 21:18
argument 21:13,19,20 31:10 137:14 208:14 269:15,19,21
arguments 33:16
arrangement 144:13
arrive 39:10
arrived 36:21 38:21 39:8
arriving 35:15
article 70:21 71:2 166:4,7 176:20 254:21 255:5 256:19,21 257:21 269:8
articles 8:20 9:1,3,6,8 150:19 177:9
artist 151:18 152:17,20,21 153:14 234:15 235:7 268:20 269:15
artists 151:22 152:4,12 153:14 154:12 155:7 157:4,5
artist's 268:19
Artists 11:3 86:3
ASCAP 11:6
ascertains 37:9
ascribe 83:2,7
ascribing 116:3
aside 64:11
aspects 161:22
assemble 241:20
asserted 115:10,11
assertion 97:11 249:22 256:8
assertions 140:14 175:18 188:2
assess 245:2
assessed 146:11
assessing 21:16 192:14
assessment 183:17
asset 241:12
assets 152:3 155:19,20 157:15,22 158:3,16 200:2 230:4 240:4
assistant 117:6,7
associated 71:1 218:16 219:18 260:12
Association 160:21
assume 92:21
assumed 24:8 39:13 113:22
assuming 50:3 99:5 133:4 136:3
assumption 41:11 42:3 53:20 54:18,19,20 55:2 65:14 136:22 146:1 211:9
Atlantic 151:16,20 152:7,14,15,22
attach 17:11
attached 13:20 142:4 257:4
attaching 57:2
attachments 13:10
attacked 25:1,5,18 27:22
attain 244:10
attempt 111:14 134:16 150:3 212:8
attempted 97:19
attempting 163:5
attended 150:10
attention 20:12 45:10 55:8 61:13 71:7 82:20 138:17 139:7,9 222:5
attorney 272:12
attract 204:9
attracting 213:5
attractive 241:2
attributable 245:18 246:18 258:9
auctions 232:2
Audiation

© 2010

149:13,15,16,20, 22 150:4 159:4 200:5 237:2,4,11 239:3

audience 165:17 188:3 193:18 194:1 197:11 204:9 213:20 214:10 218:8,9 219:7 230:7,8 243:15,19 244:1 262:22

audiences 114:19 214:15 248:15

audio 184:22 200:21 201:4 207:13 219:12 220:19 249:12

Audio-4cast 262:20 265:5

auger 216:13

authentic 180:1

authenticated 178:19

authenticity 108:19 109:1

author 9:16 150:18

authored 9:18

authoritative 185:4 187:21

authority 14:18

authorize 30:18,20 31:2

authorized 31:1

authorizes 26:16

availability 196:3

available 45:5 54:10 89:10,14,19 93:6,14 99:9 104:6 107:14 159:19 202:12 205:4 232:1

avails 160:6

Avenue 1:13 2:5,10,15 3:9

average 37:7 46:16,17,20 62:14,15,22 63:20 64:8,12 65:1,17,18,21 69:5,10 111:4 123:18,20 124:11,16,19 125:1,4,12 127:21 128:3 129:11 224:4,6

averaged 64:4

avoid 35:5 208:17

aware 53:15 61:19 99:19 101:10,15,20 102:1 105:6 116:21 135:6,8 175:12,13 269:22 270:7

away 211:20 236:8

B

B.A 150:11

background 6:15 150:9

bad 240:18

bag 216:22

baked 218:12

balance 34:8

band 150:14,15 151:7,14

band-mate 235:15

bandwidth 194:18 229:3 231:4,8 253:12 260:12,22 261:2

banner 220:19

banners 195:4,5 243:9

bar 187:9 222:22

bargaining 77:21

barrier 42:21

base 105:8 198:19 206:16 213:21 217:3 218:13

based 16:12 34:2 35:21 40:21 41:2 42:3 47:11,17 50:7,14 51:10 60:12,15 69:6 103:22 104:4 105:13 110:3 122:11 124:13 153:20 155:2 157:12 162:7 172:21 179:12 191:1,21 198:20 202:13 214:3 219:12 224:5 226:9,16,17,21 227:13 246:1,8 247:15 249:16 255:13 259:20 260:6

basic 40:10 72:18 83:11 196:9 198:3

basically 115:22 189:6

basing 103:14

basis 14:9 16:2 33:20 40:15 43:22 51:14 59:17 62:3,20 97:21 114:4,15 116:22 121:6 143:18 147:17 178:14 182:8,10 184:7,9 187:22 194:13 197:18 227:17

BBS 153:20

bear 200:9

beautiful 233:6

became 152:9 159:17

become 28:17 153:17,22 157:13 159:6

becomes 19:19 30:13

becoming 151:6

beforehand 105:12

begin 58:22 69:18

beginning 1:16 52:12 71:18 145:15 171:9 199:15

begins 56:1 62:5 71:8 82:21 171:18 264:1

behalf 1:17 2:7,13 3:2,7 10:15 83:4,9 129:9,19 201:2 236:21

© 2010

behind 22:6 154:13 165:8,9,15 166:3 209:12 220:19

belief 164:19 165:4

believe 16:15 25:9 26:2 28:11 34:3 47:16 51:12 53:13,16 68:6 77:4 86:13 97:15 103:8 104:12 106:4 115:5 118:8 122:10 127:18 128:1,8 134:9,13 170:17 174:6 177:3 181:3 192:8 209:11 226:22 238:11 244:21 254:19 256:5,8 257:1 258:8 263:18 264:9,10,12,14 266:19 267:1

bells 37:2 38:11

bench 12:16 146:17 163:16 271:11

benchmark 35:20 36:7 37:13 38:14 41:4,10,20 42:9 52:21 56:8 63:3 71:9 87:22 88:12 89:17 93:11,12 97:8,12 111:20 123:12

benchmarking 97:5

benchmarks 35:19,21 36:11,16

beneficial 82:10

beneficiaries 200:7

benefit 72:12 79:4 108:15 133:9,10,18 134:6

benefits 234:8,12 267:20

Bertelsmann 154:22

besides 123:12

best 35:5 41:22 160:7 164:18 240:11

better 62:21 82:5,6 88:5 89:11 100:5,8 124:18 128:21 132:7 199:5 248:11,20

beyond 19:6 179:10 190:1 268:4

bias 23:1,5

biased 60:15

biases 137:13,14

bigger 55:6 207:18 243:10

biggest 186:4 187:4 210:12 215:6,11 222:3 225:7 233:18 235:20 240:21 260:11,15

bios 151:18

bit 19:1 36:20 40:1 49:13 78:20 113:3 119:21 125:21 149:14 193:11,15 206:19

Blackberries 219:2

Blackberry 219:3

blended 207:19 233:14 243:6 248:14 266:5

blink 215:16

Block 2:9

blog 196:19 230:21 262:20 265:5

blogs 180:22

blow 217:21

BLS 70:15

BMG 154:21

board 10:2 11:12,17 153:21

boards 9:13,22 160:21

bode 225:9

bolster 176:21 211:10

bolstered 189:3

bonused 206:17

bootstrap 91:10

boss 159:10 257:17

Boston 6:7 7:12,15 204:4 209:22 214:19,20

bother 103:20

bottom 62:6 63:6,9 68:18 197:6 213:13 218:15 221:19 225:3 228:1 234:7 245:15

bought 211:3 235:19

Boulevard 2:20

bound 137:11

boundaries 34:22 146:9

brainchild 159:10

brand 70:21 203:16 231:14 240:21

branded 205:22

brand-new 219:7

brands 70:11,13 228:15

breach 86:2

break 115:13 266:14

breaks 57:18

Bridge 265:6,12,15

Brief 33:12 136:15 148:17 176:8 180:12 271:4

briefly 6:14 35:15 48:1 52:19 69:1

bring 212:4 228:20

broad 136:6 161:17

broadband 185:1 189:4,7 191:21

broadcast 11:15

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196:2,15 221:8 261:17

broadcaster 76:20,21 158:12 160:21 187:5

broadcasters 22:1 36:10 72:20 74:12,14 112:6 129:20 130:22 132:20 133:9,10 135:17 136:5,11 174:13 198:15 249:17 252:4 261:9

broadcaster's 135:13

Broadcasters 72:21 112:10

broadcasting 3:7 11:5 34:19 35:2 86:7 88:7 136:7 159:15

broadcasts 78:13

broader 92:16

broke 62:16

Brothers 151:11 234:14

brought 157:13

Broussard 1:14 272:2,18

browser 212:4

bubble 213:2

bucket 208:8

budget 14:4,5 199:15,20 200:1

budgets 199:13,21 200:10

Bugs 217:13,14

build 210:16

Building 1:12 2:5

built 156:16 159:8

built-in 220:4

bulletin 153:21

bullish 258:5

bundled 202:5

bundles 202:4 233:6

Bunny 217:13,14

Bureau 8:16 160:22

business 8:2 39:16 44:6 48:15 54:11 65:15 72:9,22 73:4,6,11 75:1,12,13,19,22 76:1,5 77:12,13 78:10,17 79:4,5 80:7,15,17,21,22 81:2 85:21 86:16,19,22 90:4,6,13,19 92:5,6,10,11,12, 14,16,19 93:7,18 94:7,13 95:7 96:17 114:6,7,8 115:14 117:21 118:4,5,9 131:10,11,15 132:22 133:3 135:1,13,16,22 136:2 146:7 147:11 149:19 169:9 177:5 179:3 194:19 196:9,15 209:17 210:15,16 228:19,20 232:16 237:2 239:22 240:7,17,18 241:8,16 245:5 253:5 257:22 258:1 261:12

businesses 54:9 72:6 73:18 75:7 145:21

buy 160:6 231:13 233:14,20 261:1,2 269:11,17

buyer 36:19 39:3 47:20 53:9 130:12 229:10 233:5

buyers 90:18 129:7,15 130:1 135:2 235:20

buying 160:3 236:6,9

buys 209:22

C

cable 10:12,17 11:6,14 227:19

calculate 65:4 98:11 101:5 102:6

calculated 101:21 104:18 110:3,5 198:5 223:8

calculating 45:18 48:4 64:7 108:15 117:15

calculation 14:22 15:4,7 37:2,4 38:9,12 47:1,5,11 49:4 50:13 55:12 64:3,4 65:20 101:8 102:15,18,20 103:14 104:3 105:8,14 106:7 110:20,21 114:5 117:5 225:4

calculations 14:10 45:4,14,20 48:3 51:20 55:10,11 106:19 109:8 138:15 141:16 145:3 223:8

California 2:20 3:5

campaigns 157:20,21 200:6

candor 175:11

cannibalistic 219:5

cannibalize 270:21

capacities 8:11 228:9

capacity 7:12 157:16 195:14 257:19

Capital 1:14

caption 201:15 210:3

capture 209:8

car 75:8 77:18 219:15 233:17

career 153:2 234:19

careful 67:11,20 104:2

© 2010

carefully 67:16
cares 177:22
CARP 11:20
carriers 44:11
carrying 145:3 193:13
case 13:6 19:3,4,5 21:5,6 70:14 86:2,4,6,9 87:8 88:8,11,19 89:20 92:20 97:7,9 129:18 134:8 137:7 142:5 144:17 149:22 172:7 177:6 183:21 203:14 204:6 205:2 212:2 223:15 226:1 227:10 233:21 234:4 238:8 244:4 256:5 261:1
cases 67:6 72:6 155:14 189:10 200:15 203:10 205:13 207:15 226:16 228:16,18 230:11,12 232:17 233:2,13 260:20,21 261:5
cash 210:21
categories 9:19 173:5 233:19
category 201:4
cause 67:13 108:12 131:11 134:14 242:11
caused 63:4 253:2
causing 74:1
CBS 157:9,12,14 158:5,6,8,12 159:10,11,15,19 166:5 182:6 185:16 186:2 187:1,4 197:16 198:21 204:1 205:11 206:7 207:8,19 212:6,20 213:8 246:9 253:8,9,10,13 257:15,19,20 258:14
CBS-hosted 254:1
CD 152:11 269:12 270:21
CD-ROM 152:11
CDs 226:4 269:18
centered 145:17
cents 38:2 46:10,12 47:1,5,7 48:20 49:2,3,4 53:9 64:13,14 69:12 98:3,4
certain 193:6 236:4 266:20
certainly 23:18 35:5 57:9 107:19 135:8 180:3 209:9
CERTIFICATE 272:1
certify 272:3
cetera 34:19 35:2
challenge 198:14 203:16
challenges 163:4 229:15
change 38:11 51:13 199:12
changed 246:12
changes 254:1
changing 217:2
channel 182:6 186:3,4,14 187:3,5 193:8 203:15 205:22 215:12,17
characterization 89:12
characterizations 178:17
characterize 45:3 87:22 204:12
characterized 170:22 243:18
characterizes 118:3
charge 64:16 65:5 120:1 121:2,8 202:20 205:12
charged 56:15 58:9
chats 152:20 153:14
cheaper 204:21
check 53:6,7,10,14,16, 17 55:18 256:17
checked 180:1
cheerleading 158:1
Chertkof 3:13
chief 2:3 5:2,11 8:17,18 12:11,13,17 15:14 19:22 20:3,9 24:6,21 25:5,12,18,22 26:5,11 27:10,13,17,21 28:7,14 29:13,15,18 30:1,9 33:8,10,13 34:11 43:11 44:15 52:7 59:15,20 60:2,6,14 84:8 85:3,8 87:18 90:14 91:4,12 104:8 107:4 108:20 109:5 115:8,15 116:9,15 117:2 124:3,21 125:7,15 126:18 136:14 137:18 140:17 141:7 142:15,17,21 143:6,10 144:12 145:8 146:13,16 148:3,10,14,18 156:14 161:5,19 162:12 163:2,7,13 164:22 168:11 169:2 170:3 171:14,22 173:7,10,16,18,22 176:6,9 178:3,8,11 179:9 180:13 181:5,8,12 183:6,8 188:6,9 189:15 190:8,19 191:10 193:4 199:11

© 2010

201:5,8,12 208:13 216:5,16 224:22 227:18 231:21 232:6,13 236:12,15 262:9 271:7,10,16

choose 95:21 96:2,11,12 100:14

chose 100:1 143:21

chronicler 166:19

Chrysler 157:10

circled 56:22

circumstances 108:11 129:15

citation 59:18

cite 61:7 199:7 200:12 209:15 251:12 270:8,12,20

cited 14:18 51:8 169:15 174:10 194:21 210:18 211:21 212:17 250:13

cites 197:13 199:8 215:1 262:21 265:6

citing 29:13,15,19,20 254:21 256:19

City 3:5

claim 66:22 177:4 196:8

claimed 143:19

claiming 26:22 28:19,20

claims 116:17 120:11

clarification 34:18 161:8

clarify 143:9

classifieds 205:5

classify 115:14

clause 135:4,7

clean 270:4

clear 74:20 108:14 123:9 124:3 182:6 186:3,4,14 187:3,4 193:8 215:12,17

clearly 16:19 192:17

click 215:8 220:20 221:1 226:7 236:5 254:1

clicks 269:11

client 150:1 237:16,20 238:1,10,14

clients 201:2 237:12,14 239:4 240:19

climb 227:17

close 124:12 198:22 252:7,21

closed 252:5

closely 156:5 157:3 159:12

Club 11:3 86:3

cluster 230:6 261:3

CNN 202:3 205:2

coach 40:6

coat 212:6

co-author 9:16

co-authored 9:18

code 214:12

coded 66:13

cognizant 108:9

Colin 3:13

colleague 106:15 110:22

collect 100:11 132:14

collective 83:3

collects 98:15

college 150:9,17 151:3,4,5

colleges 7:22

Colorado 2:20

Columbia 1:16 8:2,14 272:19

column 139:11

combination 73:22 113:6

combine 147:7

combined 110:20 111:4 207:20

combining 110:5 147:13

comes 36:5,11 57:19 89:6 98:9 115:9 187:19 221:2 223:6 258:12

comfortable 45:7 200:16,18

coming 42:21 60:9 112:4 178:19 214:3

command 221:16

comment 35:11 144:8 195:18

commenting 51:18

comments 35:13 268:4

commercial 131:9,18 132:21

commission 8:12 10:15 83:19 205:9,15 206:13,14,17 272:21

commissions 202:20 205:9,12

common 66:16

Communications 158:11

companies 74:15,16 95:7,16,18 110:4,6,18 129:7,10,11 130:20 131:8,9,18 132:5,8,13 133:12,17,18 134:9,18 149:18 162:3 193:13 196:17,21 197:17 200:6 202:2 211:21 217:1 231:4 233:18 244:16 246:11

company 1:15 78:22 92:15,17

© 2010

150:5,6 152:5 153:18 154:3,7,20 156:1 158:13,18 159:6 199:9 201:21 212:19 213:10 220:10 237:8 239:4 245:10

comparable 36:4 147:12,15

compared 58:9 209:16,17

comparing 223:12

competing 83:12 147:20

competition 6:11 10:5 133:16

competitive 83:14 133:8 215:22

competitors 83:22 134:19 147:19

complement 76:5

complements 129:8

complete 66:3 108:16 158:14

completed 5:6

completely 253:9

complicated 66:1 146:11

component 78:16

composer 234:13

comprises 185:22

compute 48:12

computed 46:16 69:4

computer 77:15 214:4

computes 37:7,18

concentrated 192:21

concept 214:22

conceptual 88:1 145:18

concern 67:14 76:12,14 77:19 118:21 125:14 143:12

concerned 74:22 77:22 78:5 216:7

concerns 239:1

conclaves 160:13

conclude 47:13 49:7 54:9 60:14

concluded 49:9 146:5

concludes 36:3 39:3

concluding 45:7

conclusion 38:21 47:19 53:17 189:19 198:19

conclusions 141:4,14,17

conditions 72:18 169:5

conduct 153:12 154:13

conducted 53:13,15 152:19 154:11 184:11 185:5

conference 160:17,18

conferred 199:3

confidence 68:19 69:2,9 179:21

confidential 182:18

confirm 34:4 174:21 175:3,17 217:11 246:6

confirmation 217:8

confirmed 101:3 223:13 235:10 249:18

confirming 169:6,9

conflates 248:14

conflating 263:18

conflict 124:22

conflicts 142:18

confusing 173:13

confusion 35:2,6

congress 1:1,12 2:4 10:7 216:9

conjunction 240:3

Connecticut 3:9

connection 14:5 15:10 87:2 116:1 142:9 155:5 165:19 166:8

consent 28:3

conservative 224:7

consider 33:11 67:17 70:10 90:5 92:5,13 245:17 247:2

considerable 245:16

considerably 101:17

consideration 96:19 252:8

considered 43:14 93:14 160:12 168:5 185:2,3 187:21 189:20 202:7 204:16 210:22 228:8 241:18 242:4 245:7 270:20 271:1

considering 43:15 191:9 239:4,9,16 240:10

consistent 180:8 188:18 189:22

consolidating 193:9

consolidation 188:5 192:4,7,9,16 193:7 208:15,17 209:13,14

constitute 1:10 37:10

constitutes 56:13 57:22 58:21

constructing 70:18

consult 200:5

consultancy 149:17

consulted 175:8,14 238:20

consulting 6:8,12 14:12 200:5

© 2010

237:1
consumed 154:1
consumers 84:3
consumption 184:19
contact 198:22
contained 15:22 26:3
contemplating 242:21
content 11:11 118:15 152:21 153:6,7 154:1,21 156:3,4 200:20 202:14 240:22
contention 24:5 189:1
context 18:2,18 54:8 130:10 131:3 250:20
continue 34:16 45:15 226:19,20 229:20 262:8,9 264:4,8,12,14,18 267:6
continued 3:2 157:1
continues 159:11 192:18
continuing 221:20
contract 86:2 135:4
contracts 56:3,7,18 58:18 60:20 61:5,16,20 62:11 119:2 120:11,15,19 142:8 143:15
contradicts 188:2
control 23:16,20
Convergence 160:11,12
conversations 120:20 245:5 246:10 249:18
conversely 96:1
convert 227:8
convey 143:13
Cooper 205:2
copies 15:9
copyright 1:1 2:2 11:13,17 234:8,12
copyrighted 11:10
core 7:19 8:6 37:1,4
corporate 157:16 158:22
corporately 158:19
correct 13:17 15:8 25:4,17,21 27:12 34:4,10 50:5 57:14 60:4 61:19 71:16 82:4 85:17,18 86:16,17,19,20 87:1 88:12 89:4,8,20,21 92:7,13,22 93:15 94:3 95:14,15 97:4,21 98:17 99:4,8,16 100:2,3,11,12,22 102:8,9,11 103:9 104:14,20 105:1,20,21 106:1,9,15,18,22 107:22 108:5 109:10,11,13,18, 19,22 110:4,12 111:6,10,13 112:7,16,17,19,2 0 113:1 116:20 117:5 118:1,13,17,19,2 0 119:15,19 120:13,18,21,22 121:10 122:19 127:5,11 129:17,20,21 130:2,3,8,15,16 131:1,2,6,21,22 132:4,10 134:3,21 135:1 136:21 137:8 163:6 164:16,18 165:3 169:19 172:19,20 173:12 181:6 234:1 237:5,6,9,12 239:6,10,22 240:8,17 241:9,13,14,17 242:5,15 243:12,16,20 244:2,6 246:18 249:22 250:6,14 251:22 253:6 254:18 255:15,18 256:8,20 259:19 263:3 265:9 267:14
corrected 174:3 175:20
corrective 176:4
correctly 97:17 121:14 270:14
correlation 196:11
corresponding 13:20
cost 72:9,10,11,13,14 78:15 79:2 80:20 82:3,8,16 88:16 93:18 131:4 194:10,14 196:1 198:4 201:17 223:18 228:10,11,13 229:16,19 232:13 242:6 259:16,19 260:4 261:4,8
costs 50:1 72:1,5,7,17 74:8 78:2 80:12 90:21 93:16 94:2,17 130:17,19 131:5,7 136:5 194:4,18,19 196:22 197:1 218:16 219:18 220:13 242:8 260:11,18 261:10
counsel 5:20 85:10 105:20 137:21 145:11 149:5 175:13 236:17 272:8,11
count 59:11
counted 59:10
counterproductive 132:8
country 184:20 203:5 229:10

© 2010

233:16

couple 54:7 61:15 94:10 97:22 129:5 160:15 174:9,18 199:13 200:12 210:8 211:3 218:22 223:4 234:19 246:10

course 8:7,8 22:15 47:4 54:7 55:20 69:14 80:13 154:1 170:14 172:12 178:21 196:3 229:3 234:19

courses 7:19 8:5

court 16:7,8,13 17:9,13 33:2 97:6 128:12,22 130:6,11,12 134:9,14,17 137:7,15 148:14 150:20 159:21 168:19 170:20 175:1

court's 87:7 172:4 271:3

cover 167:7

coverage 151:2

covers 100:16

CPM 198:4 214:14,15 233:1

CPMs 173:2 196:3,12 197:19 198:18 199:19 214:17 218:12 221:7,16 249:11 250:5

CRB 1:4 11:20

create 78:1 151:21 160:4 200:19,21

created 152:10 193:13

creates 194:5

creating 200:16

creative 242:16

credence 16:21

credentials 167:15

credit 16:14

criticism 39:11 58:6 91:10 122:13 128:12 143:18

criticisms 38:18 97:14 123:10 244:14

criticizing 89:17

critics 225:20

critique 66:4 93:11 113:21 136:21

critiques 35:14

cross 4:2 85:5,6,10 96:16 145:11 236:17

cross-examination 145:16 262:7

crossover 206:22 207:4

Crupnick 235:9 268:7

Crush 235:5

CSR 1:14

cult 234:18

curious 59:16

current 51:9 149:22 165:12 238:14 239:4

currently 10:4 149:12,13 237:1,14,16,18 238:11 239:12 241:19

curve 88:22

customers 207:4

CV 14:1

D

D.C 1:2,7,13 2:6,11,16 3:10

daily 197:18

data 14:9 45:5,6,8 46:13 47:9 48:6,7,8,10 49:6 50:8,12,14 51:8,20 55:16,20 61:7,8,10 67:16,18 88:16 89:7,10,11,12,13,19 93:6,14 94:16 98:12,16,22 99:1,6 100:11 102:6,7,13 103:5 104:1,5 107:14 110:6,7,18 115:9,12 121:20 138:5,13,21 139:1,3,10,20 185:6 199:9 216:3 217:14,18 223:21,22 224:1 248:11 250:16 262:21 265:11 269:4,22

databased 50:12

dates 120:14

David 2:9,14 3:3 159:10,14 256:22 257:9,14,15 258:3,4,16

Davis 2:14

day 17:5 210:19 211:5 213:4 224:8 229:14

days 214:1 234:21

deal 70:16 130:1,11 152:18 157:12 208:21 233:10

dealers 233:17

dealing 169:15

deals 16:9,10,11,13,17,22 17:3 29:21 153:12 207:18,19 211:7

dear 122:16

debt 193:13

decade 188:15,18 189:21,22 190:12,16,21

decide 128:22 225:4

decided 23:20 33:1 93:10 99:12 144:16 154:4

deciding 27:14 90:6 92:6

decimal 103:2

© 2010

139:22
decision 24:19 87:8 242:17 243:2
decisions 158:17
Decline 197:8
declining 249:13
decrease 259:3
dedicated 231:16
defense 175:13
deficit 245:7
defined 182:19
definitely 200:22 218:22 231:19
definition 112:11
degree 6:16 193:6 203:21 206:7 229:13 236:5 245:4
degrees 195:9
delivery 152:13,21 153:10 155:4 156:21
demand 82:22 88:22 96:17 154:16 221:7
demographic 213:14,16,18 214:9,21 216:3 217:4
demographically 216:13
department 83:20 152:10
depend 180:21
depends 44:10
244:21
deposition 87:5 89:2 104:12 105:16 119:11,13 127:2 172:21 174:15 176:2
Depot 233:13
deregulation 195:15
derive 150:3 194:6 197:20 223:20
derived 88:22 224:3 247:4
describe 160:8 199:12
described 172:17
describing 227:19
description 208:13
deserve 180:4
desirable 243:19
desire 166:5
desired 126:2
despite 213:6
detail 36:21 125:5 178:18 195:19
detailed 38:17 217:5
details 14:21 15:3,6 22:14 24:5 145:20
detect 77:20
determination 24:1
determine 11:5 25:10 35:18 58:5 90:17 111:14 179:17
determined 12:5 23:2 74:19
determining 88:18 179:22 197:14
developed 180:5
developing 219:18
development 149:19 159:13 220:11
device 219:9
Dial 184:13,22
difference 58:8 125:13 203:20 225:16 231:20 269:16
differences 209:15 225:14
different 7:18 25:7,22 27:13 30:6,8,11 36:12,13 42:20 44:21 45:8 51:15 60:11 64:3,18 70:10,12 76:4 93:17 94:1,2 97:22 106:5 107:20 108:2,5 111:8 114:10 125:5 131:12 136:19,20 145:21 146:7 163:7 190:13 202:2 206:18 209:19 210:8 225:13 231:9 236:2
differently 24:22
189:20
difficult 192:22
digital 1:5 149:16,18 153:3 157:15,22 158:2,13,15,20 160:20 162:4 165:22 166:11,19 167:1,8 168:6 184:22 193:21 196:17,21 197:16 200:2,9 201:1,9 202:7 203:6 207:9 217:1 227:14 240:4 270:21
digits 37:9 244:9
diminish 21:10
dire 20:1,5 33:18 175:3
direct 4:2 5:20 21:5 85:19 120:5 142:4 149:5 159:16 183:21 194:3 196:11 224:17 246:8 247:8
directing 90:16
direction 144:21 145:4 152:4 272:6
directly 21:3 153:3 197:22 212:2 247:4
director 6:10 8:15
disadvantageous 194:9
disagree 20:10

© 2010

disagreed 47:19 137:11
discarding 69:22
discipline 7:6
disclosures 175:22
discount 40:6
discouraged 240:6,12
discovery 170:11
discrimination 133:22
discuss 82:21 100:9 163:3 176:7 254:3 267:19
discussed 17:18 83:16 100:4 135:17
discusses 168:15
discussing 54:3 250:5
discussion 18:3 59:18 68:15,19 74:5 81:8 90:12 101:2 105:7 106:6 145:16 163:12 187:18 211:14 212:15 215:14 221:20,21 222:1 228:3
discussions 163:10,11
disease 193:14
dislike 220:6
disparity 103:10
disregard 125:22
Disregards 197:7
disruptive 221:4
disservice 222:6
distant 11:14
distinct 7:10
distinction 116:21
Distinguished 7:14
distorted 42:2
distribute 119:17
distributed 119:14
distribution 11:13
District 1:16 272:19
diversion 66:3
diversity 192:22
divide 116:22
divided 128:19
divides 115:9
dividing 37:22 63:19,21
division 158:16 203:5 212:20
doable 214:1
Docket 1:4
doctoral 6:21
document 13:3,5,22 14:2,11,16,20 15:1,2,5 104:14,17 105:6,10,13,16 106:1,5,9,13,20 107:8,13,18 108:18 140:6,9,13 141:8,11 164:2 165:9,15 166:3,14 262:17 263:2,5 265:2,7,11
documents 13:19 15:9 22:5 105:19 108:10 109:3 167:20 170:7,9,11,14,18,22 172:7,10,13,19,22 173:1,21 174:1,8,13,14 175:5,8,14,16,17 176:3 178:18 179:1 246:6,14 249:21 262:14
dollar 157:12 223:17
dollars 98:5 210:20 232:3 235:13
dominant 246:2
dominate 247:11
done 10:17 43:8,14 51:17 53:8 64:2 66:20 79:21 86:12,16 123:2,14,18 127:19 155:8 196:15 204:4 211:2 216:14 223:7
doom 41:4,9
door 233:5
double 10:18 217:8 244:9
double-digit 244:2
doubt 108:18
download 269:12,18
downloads 226:4 235:11 268:9,17,20
downward 62:7,10 63:1 127:15
Dr 5:18,22 12:9,22 15:19 16:3,19 17:16 20:17 21:2,4,12 22:9,11,12 23:5 24:16 31:11 32:16 35:9,12,14,15,19 36:21 38:13,15,18 40:16,17,19 44:19 45:9 46:6,11 47:5,14 48:14 49:4,7,11,15 50:13 51:3,4,5,7,10,16,19 52:2,10,13,17 53:13 54:3,17 55:13,22 56:6,21 58:13 60:8,19,22 62:11 63:2,8,11,13 66:5,22 67:4 68:6,10,18 69:3,4 70:5,6 71:6,8,19 74:6 78:19 81:8 82:19 84:5 85:13,15 87:20 90:11,16,22 91:5,7,8,10,11 93:10 97:11,15 99:19,22

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101:10,13,20 102:3 103:3 104:10 105:15 107:6 108:14 109:2 110:2,22 111:3,19,22 112:1 113:22 117:4,9,11,12,16 118:12,14 119:1 121:12,16 122:18 123:14,20 124:2 125:17 126:7,20 127:3,13,19 128:3,14,15 129:6 136:17,22 137:1,10 138:1 140:1,16,17 141:4,11,20 142:4,8 143:9,14 144:3,7,11,21 145:3,13 146:19 174:2 183:19 184:12 188:3 191:9 192:14 197:7,13 198:1 210:4 211:22 212:10,18 214:6 215:1 218:16 220:12 222:5 244:14 245:16 250:14

draw 18:9,12 20:12 24:7 53:17 146:9

drawing 24:8

drew 141:17

drive 77:22 78:1,6 80:22 131:9,11,14 132:21 133:2 171:9 211:10 214:14

driven 185:14

driving 79:13 157:17 192:11 196:1,12 208:16

due 175:22

duly 5:14 149:2

dummy 66:12,13 70:6,22

dump 166:6

during 84:9 120:5 150:18 159:5 163:1 178:21

E

earlier 10:16 11:16 268:5

early 62:12 86:13 88:8 234:20

earns 112:19,22

ears 219:8 234:3

easier 203:16 205:6

easily 160:5

East 160:17

easy 96:20 244:10

econometric 67:15

econometrician 67:12,13

econometrics 6:20 7:1 66:11,14

economic 7:8 14:14 39:15 83:15 197:9

economics 6:17,18 7:5,13,19 8:6,8,16 10:3 12:10 24:18 33:1 40:7,11 44:5 47:18 83:11 162:21

economist 8:13,17,18 146:4 196:8

economy 7:10

Edison 184:20

editor 10:4 179:22

editorial 9:13,22 10:2

editor-in-chief 150:15

editors 179:17 181:1

Ed's 233:16

educational 6:15 150:8

effect 21:18 58:18,21 59:1 66:2,10,12,18,19 ,20 67:8 68:13,15 79:6 82:8 108:12 129:8 132:19 147:11

effective 62:7 127:16,20 141:22 197:21 221:10,14

effectively 23:3 28:6 219:10

effects 66:6 67:1,4,6,7 69:19

effort 44:21 136:6,7 157:17 230:14

eight 185:3 193:18 197:6 237:11

either 28:6,16 84:1 97:2 131:11 180:18 252:21 269:16 270:10

elasticities 96:16

electronic 160:4

element 66:16

elicit 141:1,2

elicited 140:12,15

Eliminate 66:6

else 20:4 61:9 69:15 73:21 189:18

else's 80:12 176:21

e-mail 215:10 217:10,22

e-mails 157:20

emergence 75:6

emerging 48:14

empirical 269:22

employed 6:6 7:11 149:12,13 272:9,12

employee 272:11

employees 237:4

employment 151:4,15 159:5

empowered 156:18

Enable 71:22

encourage 34:20

encroachment

© 2010

131:20
enforcement 83:20
engaged 238:15
engagement 85:15 87:2 238:21,22 240:1 241:19 245:5
engagements 85:20 86:11,15
engaging 135:2
engineers 211:4
enhanced 152:11 217:6
entail 7:7
entailed 158:14
enter 140:13 193:1 221:1 242:12
Entercom 158:10,11,12 159:3,17 170:7,9 172:10 173:1,3 185:17 186:3 193:8 197:16 198:21,22 204:2 205:11,13,21 206:7 207:8,19 209:21 215:12,15 246:9 249:19
Entercom-related 175:5
Entercom's 215:20
entered 26:15
entering 240:7
enters 65:21
entertainment 153:7 155:2
entire 56:20 62:15,22 133:5 158:15 167:7 242:20 264:15
entirely 39:14 42:12 50:14 82:4
entirety 19:14
entities 73:15 193:1 195:12
entitled 91:1 172:4
entity 19:2 83:8 115:11 116:18 194:22 212:6
entry 69:9
environment 200:22 254:2
EPHEMERAL 1:6
equal 73:21 80:12
equally 16:22
equate 41:22 193:19
equation 223:3 266:15
equivalent 162:14
errors 144:7,9
especially 179:14 197:2 198:16
ESPN 100:20
ESQUIRE 2:8,9,14,18,19 3:3,8
essentially 15:21 17:1 28:22 70:10 78:21 79:12 162:1,6 194:1 199:1 207:2 212:6,21 227:4 230:16 238:16 252:5
established 228:15
estimate 37:22 38:7 45:21 46:7,9,11,14,21, 22 47:16 48:6,19,21 53:18 60:12 63:4,17 64:15 69:10 139:16 147:8 224:7 262:6
estimated 39:1 103:6
estimates 51:10 57:6 62:21 146:21 147:4
estimating 103:4
et 34:19 35:2
evangelizing 158:2
event 17:5 98:8 253:19
events 154:14 160:21 243:7
eventually 145:21
Everett 7:14
everyone 80:12 131:8 171:12
everything 18:18 175:21 176:1 206:17
evidence 15:13 16:18 19:2,3,4,18 20:14 22:4 23:12 26:9 27:2 28:2,5,10 29:12 31:9,20,22 34:14 71:12 108:8,18 120:5 121:4 140:10,13 168:10 172:5 179:1,12 180:5,16 181:15 235:21 269:22 270:7,12
evident 189:8
evidentiary 179:11
evil 202:8
evolution 227:19
evolve 77:14 78:14,17 152:6
evolves 77:13
evolving 201:5,7 210:4
exact 59:7
exactly 17:13 23:4 38:10 58:5 93:4 146:8 172:8,10,15 188:20 190:12 225:18 253:17
exaggeration 93:1
examination 5:20 85:5,6,10,19 137:21 145:11 149:5 236:17
examine 90:18 91:1
examined 5:15 149:3
examining 40:19
example 93:6 96:5 100:19 119:16 174:9 212:17

© 2010

254:6 261:15

examples 210:8 211:18 231:17 251:8

Except 91:12

exception 72:8

exciting 213:3

exclude 31:8 67:9,19 68:5,7 95:6

excluded 20:12 31:6,17,18,19 32:8,20 67:14 71:12

excluding 67:22 68:2

exclusions 34:11

exclusively 6:12 74:15 163:12

excuse 249:11

excused 148:4,6 271:12,15

executive 155:1 156:2 270:18

executives 244:15,20 245:10

exercise 29:1,4 116:17 130:2

exercised 27:6 116:18

exercising 27:1

exhibit 12:16,19 13:1 15:13,15 34:9,12,13 48:16 68:20 104:11 107:7 108:7,21 110:8 111:2 139:8 140:18 163:18,22 164:21 168:9,13 176:18 177:7,11,17 180:7 181:7,10,12,14 257:3 262:15 264:22

exhibits 4:8,22 15:8 176:15 177:1,10 178:1,2 180:15,19,21 262:5

exist 20:16,21

existed 51:11

existing 50:14 230:16 231:1

exiting 253:5

expand 199:15 263:7,11,12

expansion 263:15

expect 56:19 83:13 94:18 103:17 135:2,13 191:1,13 192:16 226:12

expectation 202:18

expected 43:12 61:4

expedite 167:19

expense 87:15,17

expensive 220:11

experience 162:16 174:12 185:12 198:21 204:1 205:11 206:6 208:5 209:18 235:6 246:1,8,20 247:5 249:16 250:21 259:21 260:6

experimented 217:19

expert 11:19 12:1,6,9 17:7 19:20 22:9,18 27:3 33:6,22 61:3 161:3,11,14,16 162:9,19 163:8 169:14 244:19 245:11

expertise 161:4,12 244:22 247:3

experts 178:5

expert's 244:18 245:8

expires 272:21

explain 143:20 150:20 159:21 167:20 187:13 197:10 213:16 253:17

explicitly 84:1

exposed 198:7,8

expressly 26:16 30:18,20,22 31:2

extant 211:18

extent 20:17 26:14 73:12 82:7 118:2 133:14 137:13 175:1 263:13 264:10

eyeball 139:16

F

face 38:22 39:1 163:4

FaceBook 200:4

facilities 231:2

fact 16:9 18:3 21:8,13,14,21 23:8,10,19 24:8,9,13,14 25:8 26:5,8,20,21 28:17,19 29:1,2,11 31:8,20 33:1 40:5,12,20 41:1 42:19 47:17 53:11 55:5 58:3 80:19 88:7,11 98:21 106:10 108:9 111:7 114:2 140:15 142:18 147:19 152:6 164:7 184:5 190:1 195:7 211:20 214:7 225:22 241:11

factor 92:12 194:10 196:22 197:14 252:18

factored 242:6,7

factors 197:12,17

facts 18:8 24:5 25:7,13 26:1,2,4,20 33:21 34:2 57:22 60:15,17 176:20

factual 169:9

faculty 7:14,21 8:1

failed 251:9

© 2010

fails 53:18
failure 56:2 130:10
fair 44:13 65:19,21 70:10 93:17 127:22 171:2 231:21 232:7
fairly 182:1 190:22 191:2
familiar 70:15,20 108:10 159:6 162:17 195:8 212:19 220:21 260:7
famous 229:9
fancy 123:19
fare 40:4
fault 118:14
faults 90:22
favor 208:15
favorable 18:13,19
feature 241:19 262:20
features 64:18
federal 8:12 83:19 193:10
fee 65:18
feeling 194:17
fees 69:17
feet 198:15
fewer 192:21 255:20
field 7:2
fields 6:22
fifteen-second 221:2,5
Fighters 154:15
figure 40:2 43:2 88:21 93:6 96:14,20 97:19 113:13 116:1,14 255:19
figures 250:13
figuring 213:9
filed 15:18 170:6
files 223:14
fill 208:3 215:9 217:7,9
filled 217:5
filling 217:11
final 68:10
financial 117:12
financially 195:10 241:16 272:13
financials 115:13 117:18
fine 42:8 116:13 123:15
finite 196:7,10
fire 252:22
firm 6:8 14:12
first 5:5,14,18 26:19 30:2,4,10 32:10,13 34:16 38:20 66:10 71:10 86:1 87:21 108:1 142:12 149:2 150:17 151:3,5,16 152:9,16 155:3,8,9 168:14 171:4,16,18 173:13 174:9,11 176:3 178:4 182:4 183:20 201:20 213:16 215:15 219:4 221:1 252:1 263:5
first-class 40:4 44:5,7,8,11
firsthand 234:15
five 21:4 51:8 158:11 186:4 262:6 267:9
fix 128:13,18 129:2
fixed 66:6,10,12,18,19 ,20,22 67:4,6,7,8 68:13,15 69:19 196:22
fixing 84:2
flash 220:4
flat 184:14 188:1 190:8,10 191:3
flattened 183:22 188:13,20
flattens 223:5
flaw 245:16
flawed 244:19 245:9
flaws 52:16,19
Floater 199:8 250:8
Floater's 62:1
focus 6:19 37:3 207:7 222:4,6,7
focused 114:6 115:1 138:18
focusing 57:13 190:4
folks 167:8,14 219:9 246:10
follow-up 78:20
Foo 154:14
footnote 30:16 54:3,4,7 68:14,18 69:11 121:11 141:20 142:19,21 143:13 144:1 256:19
footnotes 59:13
force 206:22
forced 95:21 96:2 177:5
forecast 263:7
foregoing 272:3,4
forget 37:8 69:7
form 36:16 215:9,17,20 217:10
format 20:22 221:17,18
formats 185:14,20 203:18 204:9 221:11 245:19 246:2,18 247:7,10
formed 14:9 151:7
former 234:14 235:15 270:17
formulated 93:3
Forrester 165:16,21 254:9

© 2010

forth 35:16
fortunate 150:18 152:15
forward 35:19 102:14
forward-looking 50:9,11 51:14 62:20
Foster 3:5
fraction 38:5 39:18 42:17 46:20,21 55:6 56:13 57:3 58:3 61:12
Fratrik 91:10 99:19,22 101:10,13,21 102:3 117:12 199:10 250:14
Fred 257:2,5,7,8,13 258:9,10,13
free 40:14 67:21 73:1 96:8 175:2,15 227:6 231:5,6 254:14,18
Freedman 2:8 161:7 162:7 168:12 170:5 171:15 172:2,9,12,15,20 173:9,12,17 174:5,10 175:1,2 176:14 178:17 180:7 181:11,17 224:15 236:15,16,19 238:5 262:4,10,12 263:21 266:7 267:4 271:2,5
Freedman's 174:16
freeium 227:1,12
freelance 151:17
frequently 167:6 194:21 197:12 210:19 217:1 220:18 221:13 261:2
friction 209:21
friends 151:7 225:20
front 139:9 233:5 262:13
fruition 214:9 215:2 238:21
FTC 8:17 10:14
fulfill 208:8
full 40:4 149:8 198:1 255:1
full-length 152:17
full-time 151:6,16
fully 152:10
functions 70:17
fundamental 47:17
funds 11:13
furnished 172:6
future 50:13 51:12 237:21
futures 227:9

G

gain 79:10
game 222:4 225:7
GARRETT 2:8
gateway 220:16,17 221:2
gather 216:10
gathering 87:3 216:8
gender 214:11
general 76:11 130:17 178:5 184:10 193:22
generally 44:11 72:4 161:17 165:21 166:10,22 168:5 173:14 187:20 198:5 221:6,10 224:11 235:8 249:12
generate 37:15 39:17 41:12 67:22 68:1 90:21 115:19
generated 116:2,16
generating 236:3
generation 228:11,12 229:5 232:20
geo 218:8
geography 213:22
geo-targeting 213:21 214:5 218:4,7,11,14
GetMusic 154:20 155:5,9 156:2,8,11
gets 38:2 39:1 63:15 124:10 132:21 134:3 167:13 194:12
getting 17:3 35:13 125:7 190:11 197:19 198:11,19 229:1,17 237:18
given 19:14 21:17 22:7 24:1 30:5 33:3 41:21 58:5 67:21 70:9 92:20 93:2 103:9,10 108:16 177:7 218:13 225:19 272:7
gives 37:21 140:18 182:5,14,15
giving 230:16 240:10
glad 144:12 262:7
glancing 108:4
global 6:11 176:15
golly 226:12
gone 106:11 132:18 174:20 223:18
Goodman 159:10 256:22 257:9,14,15
Google 160:2 202:16
gotten 199:5
government 8:9 83:17
Graduate 8:2
graduated 150:11
granted 33:19

© 2010

183:9
graph 187:10,13,14 190:5 191:1 222:22
graphic 248:14
great 70:16 167:15
greater 94:20 256:3
green 152:8
Griffin 162:14
ground 172:5
grounds 19:10 22:8,17 90:9 109:1 173:14
group 14:13 75:6 77:1,5 83:9 129:19 154:22 159:12,18 184:17 203:4 212:21 257:16 258:15
groups 193:7 203:5
Group's 268:7
grow 135:13 192:18 267:6,7
growing 135:22 201:9 244:1 255:17
grown 188:14,15 190:21 218:22 219:3
grows 188:16 268:22
growth 165:17 187:14 188:3,18 189:2,3,9 190:8,10 191:1,2,4,14,15, 17,18 192:11,15 193:19 218:9 222:15,16 223:1 248:17 262:22 267:9 268:16 269:1
guess 70:8 116:11 147:2,9,12 208:18 209:10 254:2 269:20
gun 144:15
guts 38:12
guy 229:12
guys 186:5 235:2

H

half 103:12 139:6 230:3
halted 238:22
hand 81:10,11
handed 12:22 163:21
handheld 77:17
handled 173:20
hands 202:20
hands-on 245:4
Handzo 2:9 12:12 15:16 17:15 18:1,16 19:13,22 20:2,10 21:18 24:17 34:3,10 52:3 71:13 85:8,9,12 87:14,19 90:14,15 91:6,9,14,15 100:21 104:7,9 107:3,5 108:6 109:6 110:16 112:10,13 117:3 125:16 126:17,19 136:12,16 137:17 138:3,8 140:8,12,15 142:14 145:17 146:13,15
Handzo's 87:16 124:6,15 145:16
happen 192:16 193:11
happened 126:2 172:8 193:5 231:6
happens 81:1 217:7 220:5
happy 105:13
hard 209:12 254:6
hardware 231:4 260:12,21
harm 84:3
haven't 89:18 92:20 93:2,3,5,14 106:11 146:11 147:5 170:14 172:9 199:5 202:9 203:10,11 208:5 213:7 216:5 238:14 240:15 241:7,18
having 5:14 31:7 33:15 82:8 104:16 129:9 149:2 158:14 197:22 204:12 208:20 209:8 213:6 239:1 254:13 259:21 268:15,17
head 6:11 256:7 260:6
heading 53:19 56:2 62:6 63:10 66:6 71:10 201:15 218:15 234:7 251:2
headline 183:21 188:12,19,21 190:15,16 197:7 200:17 201:15 225:11
health 197:9,15
healthy 195:9
hear 24:10 174:5 225:19 226:12,13 236:8 237:22
heard 24:7 162:8 172:10 199:4 235:2
hearing 33:16 169:17 266:17 271:18 272:3,10
hearsay 169:13,17,20 170:1 176:16 178:6
heavily 192:13
hedonic 70:16
help 32:3 80:14 134:1,4
helpful 189:12
helping 132:19 133:17

© 2010

helps 80:16 92:11 118:4
herd 156:6
hereby 23:12 272:3
Here's 172:16
hereto 272:12
he's 19:6,17 20:19 22:21 24:4 32:17 60:8 65:4,14 97:16 162:6 178:15,19 191:9 245:2 258:14,17 268:14,18 269:5
hey 235:4
hide 104:4
high 38:15 68:3,7 95:11,17,20 96:12 114:16 133:21 151:8 195:2 205:6 228:6 232:16
higher 31:13 64:12,21 65:3 73:13,20,22 74:2 78:2 80:14 82:1,6,8,13,22 83:13 84:3 101:17,19 104:22 124:13 130:14 134:14,19 135:18 196:3 198:11,19 201:17 202:20 205:3 214:15,16 221:7 224:10 233:1 248:3,8 249:8
highest 62:18
high-level 242:6,16
highlighted 17:12,17 181:22
highlighting 181:22 247:19
highly 221:3 225:12
hill 227:17
hip-hop 215:20
hire 203:11 230:14 237:6
hired 144:15
hiring 158:18
historic 51:20 173:1 179:11,21
history 128:7
hit 79:3
hitting 191:21
hobbies 214:12
hobbyist 209:5
hold 199:1
holders 211:8 234:9,12
holding 80:12
holiday 224:11,14
Hollywood 160:20
home 189:4 202:15,16 205:3 233:13
honestly 206:19
Honor 5:9 12:12,15 15:12,16 18:17 20:2,6 30:7,15 34:10 35:4 52:3 71:13,15 85:7,9 90:15 104:7 108:6,22 126:17 136:13 137:20 140:8,11,22 142:14,20 143:3 144:1 145:10 146:15 148:7,13,20 149:4 161:1,7,20 162:11,22 163:15,16 165:6 168:12 169:3 170:5 172:2,3,20 173:9,13,19 175:11 176:13,15 178:4,13 179:4 181:4,11,16,17 183:10 186:11 189:1 190:14 191:5 196:5 199:22 207:7 209:3 224:15 225:1 227:21 232:4,8 236:14,16 238:3 262:4,10 263:17 267:1 271:2,6,8
Honors 5:16 12:8 84:7 90:8 145:6 174:1,8 271:14
hope 144:17
hopefully 237:21
hopes 78:6 227:8
hosting 194:18 231:7 253:12
hot 210:22 215:19
Houndstooth 235:3
hour 230:3
hourly 197:18
hours 87:3 263:6,10
house 208:10
Hovanesian 2:19
Howard 203:14
Huffington 196:19
huge 65:22 66:1 69:10 200:18 218:7 232:13
Hulu 220:21 227:5
hundred 112:2 234:19
hurdle 200:22 229:2
hurt 82:14 133:11
hypotheses 178:20
hypothetical 31:13 32:18 33:6
hypothetically 20:20 32:21

I

IBS 5:6 145:11
I'd 9:2 82:19 98:7 122:12 139:7 151:20 165:14 250:22 255:9 267:18 269:18
idea 51:6
identification 12:20 13:1 163:19,22
identified 34:1 52:15 170:19

© 2010

173:4 174:14
identify 11:1 73:17 76:8 93:22 94:5 165:9,15 166:16 170:19 182:9 220:15
ignored 114:1
Ignores 218:16
ignoring 40:5 47:17
II 87:8 162:15 223:12 252:7
III 1:4 5:4
I'll 71:16 89:12 91:14 141:10 163:13 215:19 236:21
illegally 84:1
illustrative 45:4,19 47:1 101:8 102:14,18,20 104:3 106:7
I'm 10:4 13:12 24:2 29:14 30:1,3,9 34:3 37:8 40:3 41:19,20,21 42:1 44:13 45:12,16 46:2 50:19 51:4,17,18 52:1 53:15 57:1,15,17,20 61:18 62:8 68:21 72:2 74:20 75:20 77:3 78:4 79:16 80:10 81:12 86:13 90:10 91:1,16 102:17 103:6 104:10,15 105:4 106:12 107:6,10 108:6,9,22 110:12 112:10 113:13,19 115:19,22 116:13 118:13 119:7 124:3,17 125:7 126:9,20 133:3 134:6 135:8 139:21 140:2,8,13,14,22 141:2 143:22 144:12 146:19 156:9 158:5 163:3 168:17 171:4 173:12,17 186:11 188:9 189:8,18 190:4,14,15,17 191:7,8,16 195:17 196:8 212:19 221:15 222:19 223:10 224:15 228:1,11 232:4 237:6,17 240:10 247:13 252:16 255:10 257:9 260:6 261:21 262:7 263:12,19 266:17,18 269:15,20,21
iMeem 166:20 177:2,9 179:5 210:11,17 251:13
immersion 245:4
impact 34:8 79:8,9,10 141:3,13 192:13 222:8,12 234:16 270:14
impacted 24:18
impactful 200:21 213:15
Impacts 197:8
impermissible 23:19
implicit 53:20 54:18
implies 213:19
implying 23:13,14
importance 242:5
important 37:3 38:19 57:16 58:2,7 72:11 73:4 126:14 197:14
imprecise 69:21
impression 198:7
improper 16:22
improperly 67:5
Inc 2:7,13 3:2,3
incentive 82:22
incidentally 82:14
include 6:19 14:16 24:20 25:1,15 33:1 87:7 100:19 112:5,15,18 168:4 182:19,21 212:15 222:1
included 17:19 58:15 109:9 114:21 182:20
includes 264:16
including 17:7 131:8 162:4 172:5,22 174:10
inconsistent 199:18
incorrect 53:20 54:18 55:1 165:1
increase 72:7,12 131:21 235:11 265:16 266:9,12,13,16,18 267:3 268:8,13 270:21
increased 193:19 194:18 248:10,12 249:1
increases 194:8,14 199:13
increasing 66:2 194:3 248:21
incrementally 264:9,13,17,20 266:19 267:7
incur 90:21 260:18 261:4,9,10
incurred 261:5
Independence 1:13 2:5
independent 56:3,7,12,19 57:8 58:9,12 60:20 61:2,17,20 62:2 66:17 151:11 153:13
independents 56:15 57:20 59:3
indicated 144:18 147:10 189:6
indicates 188:17
indication 249:3

© 2010

indications 199:4
indicator 248:20
indices 70:18
indie 118:18 119:2
indies 118:16 119:6,13,17 120:1,12 121:2,4,8
individual 7:9 96:10
individually 83:1
indulgence 271:3
industrial 7:4,6 8:7,21 10:3,4 12:9
industries 7:9
industry 10:13,18,21 11:9 40:8 46:17 48:16 53:12 56:20 57:13 60:10 70:9 72:19 85:17 99:7 102:8 104:19 118:8 133:5 149:21 150:13 153:3 155:3 160:9,10,13 161:3,11,15,17,22 162:1,6,9,17,18 165:22 168:6 178:16 179:13 184:10 192:17 193:14 195:15,18 196:2 197:3,9,13 206:19 234:16 245:12 246:21 247:6 252:2
industry's 152:9
industry-wide 97:20 101:21
infer 16:7,8 17:2 18:19
inference 16:12 18:11 24:7,8 168:20
inferences 18:8
infinite 184:13,22 194:4
inform 174:2
information 87:3 108:16 120:19 165:2,4 170:7 180:18 181:19 182:2,9,11,12,14,19,20,22 183:5 190:22 214:10,11,13 215:11 216:8,11 217:4 224:9,16,18 250:8
informed 170:17 172:19 174:7,22 175:4
infrastructure 230:9
inherent 229:22
inherently 53:1 126:1
inhouse 202:9,21 203:11 232:22
initial 152:12 175:21 229:19
initiate 5:3
initiated 159:7
initiatives 158:22
innate 207:10
innovation 160:13
input 64:6 69:7
inside 87:18 221:7
insight 258:11
insist 216:1 217:22
insisted 81:19
insisting 217:3
instance 76:10,19 192:12
instead 64:2,6,8,11 77:17 96:10 141:2 170:11
interactive 35:20 36:1 37:6,12 38:6,13 40:19 41:5,14 42:6,9 56:7 61:8 63:2 64:16,17,19,20 65:2,5,6,10,11 79:11 97:8 119:8,9 121:15 141:21 142:13,22 154:3,10 157:14 159:12 160:16 210:10 211:13 212:21 225:12,17,21 226:8,11 227:15,16 235:18 236:1 251:16,18 257:16 258:15 263:16 266:3
Interactive's 166:5
interactivity 122:19
Intercollegiate 3:7
interest 83:10,12
interested 48:13,17 272:13
intern 150:17
International 10:6
Internet 36:1,4 40:11 43:18 47:2,21 54:21 56:11 73:17 74:15 75:1,2,12,17,18,22 76:12,16,22 77:6,13 78:5,7,10,22 80:7 87:3 100:17,19 103:16,17 152:13,21 153:4,10 154:1 155:4,7 156:21 157:10 187:22 189:2 213:2 220:3 232:7,14 234:22 263:7 265:16 266:8
Internet-only 239:17 247:11 259:15 261:10
interrupt 164:22 188:6 215:16
interval 69:3,9
intervals 68:20
interview 256:22 257:1
interviews 154:15 167:8,13
intranet 185:1
introduction

© 2010

268:22
inventory 157:18 159:18 160:3 194:5,15 196:7,11,12 197:21 198:14 201:22 202:1,5,8,13,18 203:6,7 204:5,16,20 205:4,20 206:5,8 207:20,21 208:4,7,9,12 209:9 212:9 219:17 221:3 229:1 233:7 253:12 262:2 264:3,7
investigated 93:5
investigation 89:18
investment 229:2
invisibly 216:14
involuntary 220:18,20
involved 64:22 86:4,6,9 88:8,9 103:3 149:20 150:12 152:14 153:11 155:5 156:22 161:21
involvement 85:16 245:4
IP 214:3 218:13
iPad 219:20 220:6
iPhones 219:1
Irrelevance 63:10
irrelevant 63:14 65:7 123:8
isn't 18:10,14 23:13,14 24:3 43:16 76:22 79:8 80:18 82:4 98:18 162:20 169:13 195:13 216:2 247:6
issue 114:13 195:6 196:20 205:9 270:16
issues 129:14 183:13
iterative 191:15,17
it's 7:8 8:18 9:17 13:6,10 14:1,3,12,18 16:22 17:3,5 18:18 19:2 24:7 26:10 31:1,12,18 37:1,3 39:11 40:12 41:3 45:19 46:3 47:16 58:16 59:16,21 60:7,15 65:15 66:13,18,19,20 67:19 72:10 76:13,16 83:10 87:18 89:9,11 91:3 93:17 96:9 98:18 100:18 102:10 124:10,13 125:6 126:1,14 128:11 133:6 136:5,6 139:6 160:2,6,7 162:5 163:11 169:3,5,9,10 171:8 175:18 176:19,20 178:5 179:9,13 180:1 185:2,3,5 188:15 189:1,12,21 190:12 192:22 193:12,15 195:16,22 196:9,11,19 197:2 198:3,12 199:5 200:13,22 201:5 202:7,14,15 204:6,17,18,22 207:11 208:6 209:2,12 212:2,5,19 214:4,22 215:21 216:14,18,22 217:5 218:12,21 219:3,4,5,6,8,16,17 220:11 221:2,3,4 224:18,19 225:19 226:17 227:2,4,15,20 229:13,14 230:11,12,15 231:19 234:2 239:9,16 243:4 245:16 247:18 248:4,17 249:18 253:15,16,22 259:20 260:22 261:7 262:6,20 263:18,19 265:5 266:5,15 269:16
I've 7:17 12:22 24:12 57:6 68:14 97:10 104:15 107:2 114:12,15,20 146:5 150:1 160:11,15 163:21 172:12 173:4 199:4 226:14 228:8 234:15 262:13

J

JAMES 2:3
January 62:13 224:4
JARED 2:8
jargon 157:17
Jenner 2:9
Jim 162:14
job 151:16
Jobs 220:5
Johnie 199:7 250:8
joined 184:21
joint 136:6,7 154:20
jointly 84:1
joke 87:15,18
journal 10:3,5
journalism 179:18
journalistic 167:12
journals 8:19,20 9:4,9 10:1 151:1
Joy 151:8,9
Judge 2:3,4 5:2,11 9:15,20 12:11,13,17 15:14 17:15 18:10 19:8,21,22 20:3,9 22:10 23:8,13 24:2,6,10,21 25:5,12,18,22 26:5,8,11,19,20 27:9,10,13,17,21 28:7,14,18

© 2010

29:3,7,11,13,15,18 30:1,9,22 31:3,15 32:3,6,9,12,15 33:5,8,9,10,13 34:11,15 35:7 40:17 41:7 42:5,10,13 43:7,10,11,13 44:10,15 46:1,2,4 49:12,19 50:2,6,15,18,21 52:7 53:21 54:6,15 56:21 57:5,11,17 58:4,14,20 59:3,8,14,15,20 60:2,6,14 68:12,16 70:1,3,8,14,20 71:4 74:6,11,17,20 75:4,11,15,20 76:3,10,15,18 77:8,19 78:18,19 79:6,17,22 80:3,18 81:6 84:8 85:3,8 87:13,16,18 90:14 91:4,12 100:13 104:8 107:4 108:20 109:5 110:11,15 112:8,12 113:2,13,16,20 114:22 115:7,8,15,22 116:6,9,13,15 117:2 124:3,21 125:7,15 126:18 136:14 137:18 140:17 141:5,7 142:15,17,21 143:6,10 144:12,19 145:8 146:13,16,18 147:2,6,18,22 148:2,3,10,14,18 161:5,19 162:12,20 163:2,7,13 164:22 167:4,10,17 168:11 169:2,13,18,22 170:3 171:14,22 172:9,14,17 173:7,10,16,18,22 175:7 176:6,9 178:3,8,11 179:2,9 180:13 181:5,8,12 183:6,8 185:10,21 186:7,9,13,18,20 187:7 188:6,9 189:15 190:8,19 191:10 193:4 195:13,20,21 196:13 197:4 199:11 201:5,8,12 205:18 206:1,12,21 208:1,13 216:5,16 217:13 224:22 227:18 231:21 232:6,13 233:11,21 234:2 236:12,15 237:22 238:4 262:9 263:14 266:2,21 271:7,10,16

judges 1:1 21:10 22:8 33:20 44:20 125:22 136:18 180:18

judging 33:3

judgment 89:9

judicial 12:1

July 1:8 15:19 271:20 272:22

jump 190:22 191:2,3,14

jumping 48:1

June 150:7 237:8

Justice 83:20

justification 68:3,4,7 126:15

K

karoke 155:9,10,13 156:17 157:1,2

Katz 203:4,5

key 70:16 193:21 197:12

keys 242:17 243:2

kinds 60:12 250:5

knew 23:6

knowledge 122:9 164:19 165:3 184:10 245:11 247:9

known 153:20 175:9 227:1

KROC 215:6,8 229:8,9,12 233:8 235:4

KROC's 233:6,7

L

L.A 215:6 229:8 233:5

L.L.P 2:9,14

label 56:3 60:20 61:17,21 151:11 152:16 270:17

labeled 187:10

labels 35:22 37:6 56:7,12,16,19 57:8,19 58:9,10,12 60:3 61:2 62:2 151:18 153:13 155:14,19 157:3 252:17

label's 268:19

Labels 210:6 251:5

lack 189:9 203:12 211:22 216:4

Lala 179:5 210:11,22 251:13

landscape 227:13

Lane 3:4

large 129:19 143:14 177:8 190:22 191:2,13 192:10 243:15

largely 176:20 177:3,17

larger 79:10,14 81:2

largest 186:3 187:1,5 195:11 203:4

last 13:9 24:6 26:13 29:20

© 2010

30:15 37:8 59:16 61:15 91:12,17 103:1 120:4 125:20 150:7 165:1 168:14,17 169:18 174:18 183:22 188:13,15,18 189:11,20 190:3,17,21 199:13 202:10 204:3 218:22 219:21 223:4

Last.FM 177:11,12 212:10,13,15,17 254:3,6,13,17 255:1,5 256:13 258:16

Last.FM's 256:9 257:22

lastly 96:22

late 86:10 234:20

later 54:1 192:11 224:18 229:20

latter 100:15 233:21

Laughter 217:16

launch 240:2 241:22 252:5

LAUNCHcast 210:13 212:5

launched 155:1,9,16

launches 218:17 219:21

launching 200:3 243:1

law 26:10 28:8,11

laws 83:22 193:10

lawyers 106:21 120:20 122:4,11

lead 103:18 268:8

leading 123:6 142:14 153:4 166:18 184:19,20 203:3

leads 39:11

lean 226:7 227:10

leasing 229:2

least 15:16 78:1 88:16 95:4 119:12 121:5 162:22 177:7 185:3

leave 20:7

LECG 6:8,9 105:5 106:8,15

led 193:12

leftover 202:1

legal 10:20 11:9

Les 159:15

less 49:3 78:16 80:7,8,21 120:1 121:2,9 139:19 202:18 204:17 205:21 206:2 217:15 221:10,14

let's 51:22 52:10,11,19 54:8 62:5 71:18 95:9 130:18 138:17 150:8 228:2 233:19

letters 229:7

level 38:15 95:3 96:7 178:18 189:7 203:17 213:21 217:4 218:13 228:6

leveled 184:5

levels 179:17 191:19 192:1 212:1 255:16

LEVIN 2:8

Library 1:1,12 2:4

license 11:7 113:9 115:4,10,19 116:1,5,8,17,18 157:1 261:15

licensed 155:19

licenses 14:15 74:16 116:21 120:12 232:1,3

licensing 157:2 239:1

light 152:9 182:1

likely 41:12 78:16 103:11 136:6 172:18 206:2 225:21

Limine 20:8 34:5,12

limitation 165:3

limitations 50:16

limited 121:18,19 181:19 246:22

line 90:13 92:4,6,10,12 117:21 118:4 226:2

lines 24:16 93:7

list 124:4 185:17

listed 142:7,13

listen 75:8,9 77:15,16,17 214:19 215:5,8,11,18,19 218:1 221:1 224:12 225:18 226:5,7 230:2 247:20 253:20

listener 218:2 225:17 227:11 269:10

listeners 185:18 187:6,15 194:5 196:10 226:3 235:18

listenership 183:22 184:14 185:14 188:5,12,14,17,19 190:20 192:4,7,9,11 194:7 195:9,22 225:9 245:18 246:17

listening 43:21 77:17 78:12 184:5 197:2 214:10,18 215:8 219:12 224:13 226:15 235:17 247:11 248:2,6,8,10,16,21 249:2 255:13,14 263:1,6,10

listing 147:16

lists 143:14

little 19:1,6 36:20 38:11 40:1 63:21 78:20 113:3

© 2010

119:21 125:21 135:11 149:14 157:4 188:9

live 19:4 101:16,18 110:4 111:4,7,11,15 112:5,19,21 117:16,18 118:3,5,7,8 120:5,11 155:6 170:21 238:7 243:7

Live/Pandora 110:21

Live365 2:13 3:2,3 4:8 5:5,8,17,20 12:8,19 13:1 15:13,20 34:13,18 35:3 55:17 69:13 76:2,11 77:7 85:16 100:22 101:1 113:5,6,17 114:6,13,16 115:2,4,10 116:10,16 117:21 137:21 138:15,16 147:7,11 148:21 149:5 163:18,22 168:9 170:10,15 181:14,21 199:8 208:19,21 237:18 238:1 255:19

Live365's 113:9 115:13 209:16 249:20 256:2

Live's 101:12 105:20 106:21 120:20 122:3,11 175:13

living 151:13 245:6

loaded 146:5

loan 8:14

local 198:16 203:12 204:3,8 206:6,9,12,22 207:14 228:15 233:12,18,22

locally 158:19 228:22 233:2

logic 41:15 55:14,15 81:3

logical 80:19 84:9

logically 79:15

long 11:3 54:12 148:10

longer 179:21 180:3 224:12

look-back 244:7

loosely 35:1

Lord 7:14

Los 229:11

loss 80:6,7,10

lost 218:2

lot 7:17 23:13 37:2 38:17 43:18,19 44:8 55:3,5 66:15 106:17 114:2,3 151:17 152:19,20 154:11 157:1,2 158:21 185:6 189:3 193:12,13,14 196:20 200:5 203:18 207:18 208:10 209:14,20 211:21 214:6,7 216:14 217:7,12,17 219:12 221:11 222:4 224:14 227:4 228:9 229:15 230:22 231:1,6 235:21 247:7

love 230:17 233:8 236:10

loves 233:14

low 95:12,15,18,22 96:12 195:5 198:11,18 208:8

lower 16:10 31:12 32:19 56:15 60:3 62:18,19 63:5 73:21 80:13 81:21 82:12 129:10 133:22 134:10,17 137:11,15 196:3 201:17 204:12 205:15 229:2 232:11

low-priced 195:5

luncheon 84:13

luster 212:1

M

macdonald 2:18 5:16,21 9:21 12:8,15,18,21 15:12 35:4,8 44:18 46:2,5 51:2 52:9 54:16 60:18 68:14,17 70:1 71:5,15,17 81:7 82:18 84:4 90:8 108:22 137:20,22 140:11,22 141:9 142:20 143:3,8,11,22 144:2,19,20 145:6 174:1 175:11

MacDonald 34:15 53:22 70:3 91:4 111:3 137:18 144:17 173:19 175:7

machines 231:14 260:20 261:2

mad 216:16

made-up 227:2

Madison 1:12 2:5

magazine 150:21,22 243:7,8

Magazine's 150:17

main 38:18 53:2 73:18 83:18 113:18,21 215:3

mainstream 151:2

major 6:17,22 7:2 35:22 37:6 56:16 57:19 58:10 60:3 73:17 76:8 78:15 128:7 151:18 152:16,17 153:13 154:12 155:19 193:11 219:10 227:5 230:2 254:14

majority 185:19 206:6,9 235:17,20

© 2010

255:12
majors 119:18 120:2 121:3
Malone 3:8 85:5,6 91:5 145:8,10,12 146:12 236:12,14
Management 6:8 8:4
managerial 7:19 8:6
managing 6:10
manipulate 126:10,13
manipulated 126:7 127:9
manipulating 127:4
manipulation 126:1
map 218:10
marginalization 10:18
margins 232:16
Mark 199:9
marked 4:8 12:20 13:1 104:11 107:6 126:21 163:19,22 181:20
market 18:20 40:19 41:3 45:2 47:13,15,18 51:11 79:10,11,12,14 81:2 94:2 95:2,13 96:6 97:8 101:6 114:9 129:7,14,15 130:2,13,22 131:13,21 132:20 134:2,5 139:5 141:13 145:22 146:2,3,5 186:1,10,15 193:1 195:7 197:15 210:4 211:9 214:20 226:1,20 236:2,3 268:21
marketer 204:19
marketers 156:20 160:5 202:5 240:5 241:21
marketing 151:21 156:4,15,19 157:10,14 199:12,21 229:7 230:1,6
marketplace 90:18 160:4,5 166:12 167:2 192:15 198:2 201:6 245:3
markets 7:9 97:2 131:20 133:15,16 146:9,10 158:19 193:11 213:12 225:12,15 228:16
mass 191:21 216:3 226:2
massive 266:16
masters 155:15
material 15:21 169:6 179:12
materialize 211:11
Materialized 213:14
materials 151:22
mathematics 80:19
matter 1:4,11 24:18 26:10 32:18,22 35:10 44:3 53:3 80:19 136:18 161:8 171:4 174:8
matters 9:9 173:6 177:19
matures 192:17
maximize 163:5
may 12:15 20:6 25:3 53:3 70:22 72:18,19 73:19 76:5 77:9,10,14,19 104:7 107:3 120:1 126:17 136:12 140:8 143:8 161:7 162:11 163:16 169:11 170:1 211:12 253:13 258:8 262:10 271:2
maybe 59:4 100:13 205:6 207:11 210:13 224:13 231:5 269:21
MBAs 7:20 8:7,8
McDonald 106:12,14,15 110:22 117:4,11,16 144:11,21 145:3
McDonald's 117:9
McIntrye 258:10
McIntyre 257:2,7,8,13 258:13
mean 18:22 28:22 51:17 56:22 64:9 72:5 76:3 79:13 80:5,18 88:18 115:17,18 116:11 158:5 173:13 189:16 190:6 191:16 192:11 196:6 201:11 207:7 208:5 210:11 219:20 221:15 225:16 230:11 234:15 235:5 245:1 253:9 258:3 260:2
meaning 19:11 196:14 245:1,2
means 33:2 115:8 198:9 225:7 269:2
meant 52:5 160:3 197:10
measure 248:9
measured 196:1
measurement 248:17
measurers 184:19
measures 176:5
mechanism 95:2
media 149:16,18 160:17,19 162:16 165:22 166:19

© 2010

167:1,8,15 168:6 184:19 193:21 194:2 196:6,17,21 202:7 203:4 210:11 217:1 223:14 227:4,6,14 229:10 233:5 239:6,7 240:21 251:13

meet 36:18

meeting 29:8

meetings 241:21

member 253:19,21

members 58:12 61:2 74:7,9,22 76:19 83:1

mentioned 7:11 70:5 85:19 156:17 185:22 186:20 198:18 204:11 205:8 216:5 218:4 238:10 253:4

mentioning 186:13

mentions 234:21

mere 21:21 23:10 33:1

merely 140:14 169:6 175:17

merged 187:2

merging 84:2

merits 249:4

met 68:6

methodological 52:16

methodology 39:7 125:22

metric 261:22

MIA 236:5

Michael 4:3 5:13,18 6:4

M-I-C-H-A-E-L 6:4

mid 8:13 162:2

Mike 106:12,14

Miller 3:8

million 184:15 210:18,20 213:1,6,7 215:14 235:13 265:17 267:12

millions 232:3

mind 147:14

minds 29:8

minute 18:10 54:1 254:1

minutes 148:15 262:7

mirror 193:5

misleading 190:15 253:15,16

missed 100:13

missing 163:3 189:18

misspoke 86:14 138:20

misspoken 24:13

misunderstood 186:11

misuse 68:2

MIT 6:18 8:4,5

mix 9:17 40:13 42:20 44:22 46:14 55:4 114:9 147:15 155:18,21

mixed 216:22

mobile 157:20 191:22 218:21 219:7,19 221:9,17 230:4 244:1

model 39:15 76:4 78:14 92:2,13,14,16 93:21 94:5,7,10,13 114:8 118:9 123:12 147:11 209:16 210:15 211:21 217:2 226:10

modeling 7:8 88:5,14,18 89:8,20 90:1,12 92:1,22 96:13,22 145:17

models 48:15,17 78:17 90:19 93:18 94:10 145:21 146:7 206:18 209:17

moment 136:12 225:19

monetize 194:6,15 195:1 199:6 209:9 212:8 233:1

monetizing 157:18 209:10

money 201:1 240:16 241:4

monopoly 133:6,7,19

month 213:6,7 235:13

monthly 182:13 222:12 224:3 226:11 244:2

months 48:10 154:10 224:5 244:8

Moonves 159:16

Morisette 154:14

morning 5:16,22 6:1 84:9 119:21 127:18 135:11,17 271:17

most-favored-nation's 135:4,7

mostly 176:20

motion 15:18 16:2 17:11 20:8 30:2,3,4,17 33:11,18 34:5,6,12 170:6,19 172:18 179:10 182:8 183:9

motions 33:15

move 52:10 70:2 71:16 143:22 181:18 182:2 183:3 188:7 224:15

moved 211:20 219:9

moving 68:12,14

© 2010

108:7 188:4
MP3 236:6,9 268:22
MP3s 235:13,20 268:22 269:1
MTV 154:3,5,9,10,13
muddy 113:3
multimedia 151:21 152:3,10 220:5
multi-million 157:11
multiple 146:10
multiply 128:13,15,19
multiplying 48:11
Murdoch 167:14
music 10:21 11:9 36:1,4 37:6,12,19 39:18 47:21 48:15 54:21 56:12,16 62:3 72:22 75:2 85:20 86:16,19,22 88:22 97:3 100:18 109:16 118:19 119:14,17 121:3,5,6 136:2 150:13,16 151:1,2,13 152:12,13,21 153:7,11,20 154:2,16,21,22 155:2,4,18 156:21 157:3 159:12 162:4 166:20 186:9,17 209:7 210:5 212:21 225:17 226:2,6 227:11,15 238:18,19 243:8 247:4 248:14,18 249:2 251:3,9,20 257:16 258:15 264:16 268:22 269:16
musician 151:7
mutual 83:10,12
mutually 82:10
MyNet 237:20 238:13,16
myself 158:22 209:7
MySpace 155:12 166:21 194:21 195:3 210:20

N

NAB 16:11 36:10 71:22 72:20 74:9,10,22 81:16 82:5 129:18 130:1,4,20 131:8,18 132:5,8 134:8,10,12,16,18 135:7 160:20 171:19 228:3
NAB's 74:7
Nadine 150:16
name-brand 233:9
narrow 19:16
national 160:20 203:17 233:12
nationally 234:3
nature 70:9 161:18 202:13 211:17 218:8 244:21
necessarily 75:5 89:16 94:9 95:2 99:18 169:19 200:9,20 202:15 219:13 261:1
necessary 134:12 201:16 202:8
negotiate 78:6 83:1 129:9,11 130:10 211:7
negotiated 22:3 23:15 83:4 132:5 134:10 155:13
negotiating 77:1,21 83:8 129:19 130:9 133:22
negotiations 130:4
neighbors 216:7
neither 272:8
network 160:7 200:4 201:20,21 202:12,16 203:3 204:20,22 205:5,7,20 206:3 251:12
networks 11:6 166:6 173:3 198:17 201:17 202:19,22 203:21 204:3,11,18 205:10,12 206:11 208:3,14,21 209:4 233:3 234:22
news 185:19 245:18 247:3 248:14 264:16
nice 214:8
niche 203:18 204:9 205:22
night 229:14
non 19:1
nonadmitted 22:14
nonadvertising 41:18
none 69:20 175:13 215:3
nonetheless 64:17 242:10
noninteractive 36:4 37:14,17,19 38:1,8 39:5,13,18 41:3,14,16 42:6,20 43:4,19 45:1 47:3,12,14,21 48:15 54:21 56:14 57:7 61:9,10,17,21 64:19 65:12 75:2 79:12 103:17 138:9 211:14,17,19 225:12 226:1,15,20 227:11 235:8,18 236:2 255:6 266:4
nonmusic 185:14 246:2,18 247:10 248:18

© 2010

Non-NAB 228:5
nonprecedential 16:3,9,13,17 17:3 168:19,21
nonsimulcast 228:7
nonsubscribers 43:21 46:19,21 55:5,6 103:7
nonsubscription 46:15 103:13 138:4,22 139:3,12
nor 272:9,12
norm 218:14
normal 22:11
Northwest 2:10,15 3:9
Notary 1:15 272:1,18
note 174:9
nothing 53:1
notion 83:3
NPD 268:6
numerical 141:15

O

oath 13:16
object 80:20 90:8 109:1 140:9 142:14 162:8 168:22 172:5 178:2
objected 140:20
objecting 19:10 41:20 168:18
objection 12:11,12,13 15:14 33:18 34:6,7 52:3 71:13 91:14 97:7 109:5 123:7 161:5,13 163:14 168:11,14 170:3,6 173:6,8,14 176:11,14,16 179:11 181:2,13 183:6,7,8
objections 108:20 168:13 176:18 181:4,9,10
objective 133:20
obligation 223:11,19
obligations 229:4
observation 34:4 58:16 60:7 66:21 67:7,8,9,10 121:19 213:9
observations 52:16,20 62:11 66:7,15,16 67:14,18,19,22 68:3,5,8 69:2 81:14 234:11
observes 36:2
obtain 113:7 126:1
obtained 112:6,8
obverse 21:13 28:18
obviously 18:22 19:1 50:16 108:8 131:3 171:17 190:6 192:15 197:14 199:7
Occasionally 230:14
occasions 10:9 67:18
occur 248:5
October 48:9 224:2,4
Oddcast 156:14,15,18,22 157:6,9 158:4 159:8
O-D-D-C-A-S-T 156:15
offensive 17:20
offer 15:13 108:12,17 121:5 168:9 183:16 185:6 239:5 242:15,18 243:4
offered 22:12 23:17 62:2 162:14,15,18 169:10 176:21 181:7 258:11
offering 34:17 161:10,13,16 162:4 177:4 239:9,12,16
offers 76:21 109:12,14,16
officer 156:14 272:2
official 83:17
oh 29:20 113:20 125:3 140:2 150:10 156:2 173:16 199:22 222:19 231:11 235:1 238:4 257:9
oil 10:13
Old 200:16
on-air 207:20 231:6,16 233:6
on-demand 118:15,19 119:3,6 153:14 154:11 177:3,8,12,13,18 179:3,6 238:19 239:14 251:16,18 255:1 259:7
ones 20:19 38:18 45:20 79:18 81:1 121:21 122:6
ongoing 230:1
online 152:20 153:5 155:10 157:20 161:4,12,14 162:16 163:8 165:17 166:17 168:3 179:15,16 185:13 187:15 190:20 195:11 199:14,16,21 202:3 209:7 214:18 243:15,18 247:20 248:17 249:12 263:1 264:15 268:7,15,16,17
operate 131:12 237:1
operating 156:14 197:16
operation 34:18

© 2010

229:21
operational 258:15
operations 35:3 150:2 163:10 232:19 252:6
opinion 27:4 33:6 40:22 67:3,5 93:3 121:2,8 136:17 137:3,6 176:21,22 180:8 267:10
opinions 33:22 176:19
opportunity 157:10
opposed 24:8 43:15 78:4 80:7 100:15 105:3 116:17 133:8 144:16 146:2 180:16 199:16 239:17
opposing 172:6
opposite 23:4 188:21 189:17
opposition 30:4 33:15
Oprah's 203:15
opt 116:7
optimistic 265:21
opt-in 217:8
option 25:6,10,19 26:6 27:1,6 28:1 31:7
order 5:3,5 33:14 34:7 78:2 82:12 85:4 88:14 92:4 96:13 98:11 99:6 105:3 130:21 132:1 134:7 148:19 176:10 180:14 181:18 182:3 183:2,4 260:14,16
organization 7:4,7 10:4
organizations 8:21
organized 188:10
originally 101:1
others 77:9 102:19 189:6 219:6 250:11
otherwise 18:22 80:8 82:2 134:15 135:19 272:13
ought 231:22
outcome 223:16 272:13
outlets 168:2
outlook 54:13
outside 90:9 177:15 187:5 224:19 247:7 254:14,18
outsourced 252:6
overall 11:22 139:4,17 141:13 143:12 192:14 199:20 201:10 222:11,17 226:18 252:2
overbroad 162:10
overestimate 48:22 103:18
overestimates 218:17,19
overlay 21:8,14
overrule 91:14 163:14
overruled 142:15 176:12 224:22
oversaw 156:3,18
oversee 145:1
overseeing 162:2,3
oversight 158:14
overstate 103:15
over-the-air 75:13
overview 240:11
owners 159:20
Oxenford 2:14 5:9 20:6,10 22:10,20 23:10,18 24:11,12 25:4,8,17,21 26:2,9,10,12 27:5,12,15,18 28:3,11,15,22 29:6,10,14,16,20 30:7,14 31:10 32:2,4,7,10,13,16 33:7 148:7,13,16,20 149:4,6 161:1,9,19,20 162:11,13,22 163:2,6,9,15,20 165:6,7 167:18 168:8 169:2,3,14,21 173:18,19 176:13 178:3,4,10,13 179:4 181:3,7,16 183:7,10,11 185:11 187:8 188:8 191:11,12 193:17 197:5 201:13 208:2 210:1 216:19 218:3 225:1,2 227:22 232:18 234:5 236:11 271:8
oxymoron 170:2

P

P&L 158:15
P.C 2:19
P.L.L.C 3:8
p.m 85:2 148:17 176:8 180:12 271:19
pace 194:7
package 233:6 240:5 241:20 242:20 243:4,6,10
packages 157:22 233:14
packaging 243:7
page 13:9,11 30:2,4,10,16 45:11,15 46:1 48:2 52:12 53:19 54:1 55:9 56:1 62:6 63:6,9 66:6 68:19 70:4 71:8,19 81:9 82:20,21 121:12 126:22 138:18 141:20 164:10,11,13 182:4,12,16,17 183:20 185:8,12

© 2010

187:10 193:18 197:6 201:14 202:15,16 205:1,3,5,6 210:2 213:13 218:15 221:19 222:9,18,19 225:3,11 228:1,2 234:7 247:15 249:10 253:22 254:2 259:11 270:5

pages 1:6,10 17:11 21:4,6 46:3 182:1,14 243:7,8 272:4

paid 11:13 40:14 65:9 133:15,16 194:12 202:21 268:8,17

paidcontent 167:7

paidContent 166:22

paidContent.org 166:18

paint 212:6

painted 183:17

paints 270:13

Pandora 48:3,5,12,13,16, 18,20 49:9 55:17 76:1,2,4,10 110:4 111:4,7 138:15,16 147:7 168:16 169:16 182:5 190:7 192:13,17 209:16 217:3 220:8 221:21 222:1,3,15 223:2 225:5,6 235:2,12 266:15 267:3

Pandora's 48:7 107:15 146:21 147:3 182:13,15 217:9 222:11 223:11,15

Panel 11:17

panels 160:10

paper 150:16

paradox 193:22 194:20,22 195:22

paragraph 17:16 24:16 29:21 31:16 32:5,11,14 33:22 45:10 46:3 48:1 54:2 55:8 59:19 61:6,13,15 81:9 87:20 90:15 110:12 118:13,14 119:22 124:1 125:17,20 129:4 138:5,14,18 145:17 146:20 147:6 168:15,17 171:5,7,9,11,13, 15,16 173:11 174:11,16,17,18 185:12 188:10 190:17 191:8 210:9 223:7,9,10,21 244:11 245:14,15 249:10,11 250:3,6,22 254:3,5 255:9,12 256:10,16,18 258:20 261:19 263:5,22 268:6 270:12

paragraphs 15:22 16:3 127:14 129:5 176:11

paraphrase 125:21

Pardon 257:6

partial 103:22

particular 21:2 31:16 57:14 94:5 118:21

particularly 18:19 48:13 75:7 102:21 126:14

particulars 24:4

parties 1:18 21:15 22:3 23:2,6,11 24:15 25:2,14 27:7,9,10,16,17 28:5 29:8 172:4 272:8,9,12

partnered 157:9

partnership 153:19

party 25:19 26:15 27:19 28:6,16 29:9 144:13 172:6

Pasadena 2:20

passages 174:10

passive 227:11

past 50:14 51:9,16 68:12 191:19 247:20

pattern 188:19 193:4

pause 136:15 271:4

pay 11:6 49:9,14,18 50:2 53:9 73:1,7,21 74:2 80:13 82:12 90:7,18 92:7 93:8 94:20 95:4,11,12,17,19 96:3,15 110:3 114:19 116:9 132:22 169:7 212:7 226:11 231:16 233:19

paying 73:22 134:19 135:18 236:7

payments 173:2 194:17 210:6 251:4,21,22 252:14

pays 116:18 253:11

PD 230:19

Pelcovits 21:4 22:12 23:5 35:12,14,15,19 36:21 38:13,15,18 40:19 45:9 46:11 47:5,14 48:14 49:4,7,11,15 50:13 51:3,7,10,16,19 52:2,17 53:13 55:13,22 56:6 58:13 60:8,22 62:11 63:2,11,13 66:5,22 67:4 68:6,10 69:3,4 70:6 71:8 90:22 91:5,8 93:10

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97:11,15 103:3 111:19,22 112:1 113:22 118:14 119:1 121:16 122:18 123:14,20 126:7 127:3,19 128:3,15 136:22 137:1,10 141:20 142:4,8 143:14 144:7 183:19 184:12 188:3 191:9 192:14 197:7,13 198:1 210:4 211:22 212:10,18 214:6 215:1 218:16 220:12 222:5 244:14 245:16

pending 52:4

penetration 185:1 189:4,7 191:21

Pennsylvania 2:15

penny 225:8

people 75:9 78:12 106:2 114:14,20 116:5,7 147:16 153:22 154:14 167:13 184:15 185:6 187:22 196:18 198:6,8,9 199:1 201:22 204:18 206:15 208:7,20 211:20 214:18 215:18 216:8 217:20 219:1,12 220:9 221:12 224:12 230:13,15 235:1 240:5 245:6 247:19 248:2,6

per 36:6,14,15,22 37:9,19,21,22 38:1,3,7 39:2,5,20,22 40:2 42:15,16 43:3,5 45:22 46:7,10,12,17,18 ,19 47:1,5,7,12 48:12,20 49:2,3,4,8,22 53:9 62:7 63:17,18,19,21 64:7 95:19 98:3,4,5,6 103:4,7,16 105:1 110:5,21 111:5,12,18,19 112:4 114:14 117:15 127:16,20 141:22 146:21 194:10,12 196:22 198:4

percent 37:10,11,15 38:4 41:13 43:6 47:7 55:15 57:7,9,19,20 59:4,10,11 63:7,16 69:2 101:6,11,22 102:7,16 105:3,4 112:2,3 139:19 141:12 186:6,7,14,21 205:13 206:10 214:4,18 232:17 233:20 235:11 255:20 256:3 265:17 267:9 268:8,12,13,16

percentage 38:5 58:1 101:21 104:18 105:1 107:20 118:18 119:5 139:2,4,17 206:10 247:19 248:2,5 256:6

percentages 61:7 244:2

perfect 110:18

perfectly 22:8 196:6

performance 1:5 134:3 138:5 139:1 194:10,13 196:22 197:1 223:20 248:18,19

performances 56:3 132:15 138:10 139:2,11,13,17,1 8 140:6 141:12 154:15 182:13,16,21 192:20 222:12,13,17 223:1 224:10 239:15 248:3,7,12 249:1,7

performed 110:22 117:5 194:12

performer 235:7

performing 90:22 151:6 155:7

perhaps 24:12 40:6 79:20 80:21 84:2 89:1 146:18,20 152:3 189:13

period 51:16 62:15,22 127:22 159:5 191:9

permissible 22:8

permitted 108:13

permitting 179:12

person 230:16 269:12

personal 156:1 216:8 235:6

personalities 228:17

personally 105:5

person's 176:19

perspective 268:19

Ph.D 6:17

phase 1:5,11 5:4,5,18 34:20 108:17 120:6 229:20

phases 229:20

phenomenon 193:22 227:1

philosophy 150:11 209:12

phone 219:12 221:14 229:11 235:4

phones 219:11,13 221:11

photos 155:20

phrase 229:17 246:15

phrased 24:21 34:6

physically 106:5

picking 44:19 51:3

© 2010

picky 226:5
picture 198:2 267:2 270:13
pie 226:18 264:17
piece 19:18 66:1 207:22 219:17 226:17
pin 47:10
pinpoint 225:18
pioneer 162:6
places 6:7 34:1
plan 242:14,16
plane 40:5
platform 113:8 155:10,11,12 218:17
platforms 157:2 221:9
plausibility 39:7
plausible 96:5 101:15
play 36:6,14,15,22 37:9,19 38:1,3,7 39:2,5,20,22 42:15,16 43:3,5 45:22 46:8,10,12,17,18 ,19 47:1,5,7,12 48:12,20 49:2,3,5,8,22 53:9 62:7 63:18 64:7 95:19 98:3,4,5 103:4,7,16 110:5,21 111:5,12,18,19 112:4 114:14 117:15 127:16,20 141:22 146:21
played 118:19 235:5
player 222:3 225:7
players 192:10,21 220:2,3 225:10 267:2
playing 151:13 209:6
plays 37:22 41:17,18 46:21 48:7 49:1 55:7 56:13 57:4,7 61:12 63:21 98:6 101:6,12,22 103:12,22 104:18 105:1 107:15,20 109:8 220:18,20 222:15 235:9
pleadings 30:5,10
please 6:2,14 13:9 68:16 81:14 145:10 148:13 149:7 244:12 250:2 262:14 264:21
plurality 235:19
podcasting 230:5
podcasts 157:19
point 18:6 19:6 31:21,22 40:18 60:6 77:5 89:6,13 102:17 103:2,13 121:5 126:12 139:22 144:9 147:9 187:1 209:3 210:17 235:16 246:22 259:2
pointing 23:8 24:4
points 14:19 53:2 141:14
Policy 10:5
Political 150:11
poll 185:5
polls 184:10
popped 235:2
popular 228:18
portability 64:22
portable 221:13
portal 238:12,13
portfolio 241:13
portion 15:17 17:17 62:14 73:11 171:8 224:20
portions 15:18 17:10 168:13 174:21 176:11
Portland 233:16
portrayed 184:14
position 8:14,18 18:14 151:4,5,15,19 152:6,14 153:1,11,16 154:8,18,19 155:5 156:12,22 157:7 158:9,10 162:14 199:1
positive 28:20 29:2
positively 29:4
possibility 20:18 76:17 120:1
possible 91:3 96:9 176:5 195:17 248:4
possibly 136:6
post 196:19 265:5
potential 78:1 218:18,20
power 31:1 129:14,16 130:2
powered 155:11 253:8,10,13
powers 159:9
practical 44:3 53:3 91:2
practice 6:11 67:15 133:21
precedent 82:9,16
precedential 16:11,14,22 21:22 71:21
precise 141:15
precisely 50:21 57:1
predecessor 11:16
preeminent 151:1
prefer 73:21 262:8
preferable 209:10
preferences 214:12
preliminary 174:8
premise 178:5
premium 202:14 204:21 227:9
prepared 13:7 14:12 77:4 104:13 107:9,11

© 2010

164:5,7 170:9 180:20
preparing 14:6 15:10 109:3 168:1 175:9 223:22 246:5,16 259:18 260:8 263:3 265:8 268:1
present 1:17 3:12 20:5 157:10 180:2 188:20 190:13 198:9
presentation 111:3
presented 159:14 224:19
presenting 10:15 103:21
preserve 131:19 132:20
presided 207:18
president 153:6,18 154:11 155:1 156:3,14 157:13 158:13 159:11 235:16 257:15,19 258:14
press 151:19 167:6
prestige 205:19 208:22
presumably 83:9
presume 54:12
pretty 114:7,16 252:7
prevent 236:9
prevents 22:15
previous 150:1
previously 256:14 261:7
price 65:1 70:18 72:13 78:7 84:1 95:20 96:1 125:12 133:19,21 134:14
prices 82:1,8 84:3 204:12
Pricing 14:13
primarily 15:22 39:19 72:21 73:5 198:20 200:12 210:9 211:16 226:8,15,21 228:9 238:18 249:16 251:15,18
primary 204:7 240:1 261:12
principal 97:14 225:14,16
principally 40:20 41:2
principle 72:4,16 83:11,15,21
principles 7:8 196:9
printout 166:17
prior 11:20 85:15,20 181:1 237:16,20 244:8
privacy 216:9
pro 82:11
probably 18:13 87:13 179:10 186:5 219:20
probative 178:22
problem 10:18 50:12 56:10,11 64:10 123:4 129:1 136:1 202:19 248:13
problems 63:11 70:22 123:5 208:16,17
procedures 88:9
proceed 5:8,10
proceeding 5:6 11:2,5,16,20 12:2 16:5 17:19,22 21:8,9,14,16 22:4 23:7 24:20 26:17 65:9,11 73:9,14 74:19 93:4 144:4 162:15 179:1,8 183:1,3,15 222:6 224:2 238:3 244:19 245:9
proceedings 10:20 11:1,8,10,20 12:4 190:2
process 83:14 260:7
proclaiming 188:21
Prodigy 153:3,8,9,11,15, 17,19
produce 170:10
produced 171:1 174:4,15 175:6,10,20 176:1,4
product 163:5 219:21 242:22 258:10
production 173:20
products 152:11 155:2 158:18 200:3 258:14
professor 7:13 8:3
proffer 12:14 161:2,6,18 162:8 163:14
proffers 12:9
profit 54:10 80:8 213:8 218:17,19
profitability 77:11 211:11
profitable 136:11 208:19 241:8
programming 156:4 162:2,4 163:10 230:20 235:16
programs 264:16
project 191:7
projected 48:10
projection 48:22 265:22
projections 99:6 262:22
projects 265:16
promise 214:6,7,21
promote 90:4 92:4,11 118:4 152:4 157:5
promotes 97:2
promoting 157:4

© 2010

230:3
promotional 208:11 234:8 267:20 268:2 270:10
promotions 231:6
prompt 268:16
proper 19:20 53:16
properly 66:19 67:4
properties 193:11
proportion 247:9
proposal 243:11,14,22 244:3,5
propose 179:7
proposed 47:14 111:15,21 128:13 151:21
proposing 97:17
proprietor 237:6
protect 130:21 134:2,5
protecting 133:14
protective 181:18 182:3 183:2,4
provide 36:20 55:9 56:2 116:7 126:15 139:16 153:13 239:20
provided 20:11 45:3 120:5,12 178:6,14,15 224:2 242:14 260:21
providers 153:5
227:4,6
Provides 234:8
providing 45:19 238:8
provision 22:2 23:11 25:2,15 27:7 260:22
provisions 16:15,16 17:2 24:15
public 1:15 216:8 253:19,21 272:1,18
publication 166:18 169:15 180:22 181:1 202:17
publications 179:14,15,16,19 180:4 214:2
publish 179:19 184:21
published 8:19 9:3,8,15 86:18 258:17
publishers 155:14 202:3
purchases 60:10
pure 231:9,11 232:20
purely 109:17
pure-play 136:9,10 259:22
Pureplay 169:5,11
Pureplay/WSA 168:18
purport 139:11
purported 142:8
purpose 16:18 20:11 65:8,11 144:3,6 226:6
purposely 126:7 127:4,9
purposes 74:21 93:3 147:7,13 169:10
pursuant 26:16
pursue 113:2 135:11
purview 270:15
puts 19:2 194:8 215:17 230:21
putting 18:8 19:2 64:11 102:14 157:22 209:7

Q

qualified 12:5 22:18
quality 64:21
quantify 246:17 259:19 260:4,8 268:2
quantitatively 60:1
quarter 257:22
question 23:21 40:18 43:13 44:14 48:4 52:4,6,8 53:22 68:10 70:8 81:21 83:2 91:17,18 93:13 94:12 105:10 106:11 108:19 113:16 114:22 115:16,20 119:7 124:6,7,15 125:8 127:7,8 129:22 134:1 138:10 143:7 144:14,18 146:6,8,11 147:2,9,12 165:1 186:12 207:6 238:6 246:13 248:20 263:18 266:2 268:14
questioning 33:17 138:3 142:1 143:4,5 163:1
questions 33:8 44:20 84:6 122:13 135:10 143:9 145:7,9 146:14,16 174:17 179:6 180:10 236:11,13,21 271:5,9,10
quick 53:22 148:8
quicker 215:21
quickly 79:21
quid 82:10
quite 79:21 195:16 269:14
quo 82:11
quote 254:9
quoted 167:5 177:21 257:9
quotes 30:10 258:9,12
quoting 89:1

R

RAB 160:21

© 2010

radio 40:11 43:19 72:21 73:6,8,17 74:15 75:10,18,21,22 76:5,12,16 77:7,10,12,13,18 78:5,7,10,22 87:4 100:17,19,20 103:16,17 130:22 132:15 157:9,13,15 158:6,8,11 159:11,18 160:3,6,13,14,22 182:6 185:16 187:2,15,22 189:2 190:20 193:5,14 195:12 203:15 206:2,18 207:2,3 210:14 212:5,6 221:4 230:2,18 232:3 235:3 243:15,18 244:1 247:20 248:16 253:5,8,9,11,14, 20,22 257:20 263:7 264:15 265:16 266:9,11 268:7,15,16

radio's 75:12 212:20

raise 27:3 71:22 72:14 78:15 80:20 82:16 130:17,20 218:6

raising 72:5,17 74:7 79:2 82:3,7 130:19 131:4,7 218:5

ran 153:5 157:16

range 35:16,18 36:16,17 95:13,16,22 96:3,14

ranged 69:11

rank 17:6

ranking 196:13

rapport 245:7

rate 36:3,22 37:7,14 39:4 41:12 47:14,22 49:7,10,14 50:3 54:10 55:13,19 56:15,20 60:9 61:20 63:5,20 64:9,12 66:2 69:13,14 73:13,21 74:1,2 77:2,6,21 78:6 80:13,14 95:3,5,6,14,21 96:2,15 112:1 114:17 123:18,21 127:16,20 128:13,15 129:10 130:6,11,13,14 132:6,7 133:6,7,8,20 134:10,13,18,19 136:19 137:2,7,9,13,15 141:22 144:4 195:2 197:20 232:10,12 262:1

rates 11:6 16:10,12,14 18:20 20:15 23:1 35:16,18 36:2,12,13,18 37:20 50:9 51:7,14 58:8,17 59:22 62:7 64:10 65:9,12 73:10,12,20 74:19 81:10,17,18,19,2 1 82:6,12,13 83:4,10,12 84:1 88:19 96:6 97:16 111:15,21 123:17 130:21 134:3 135:18,21 136:3,8,19 137:7 168:17,20 169:4,7 177:5 185:1 197:8,19 198:5,10 199:8 205:15 208:8 223:12 242:4 252:13 253:1 264:3,7

rate-setting 83:14 88:9

rather 62:21 80:13 100:1 127:21 129:8 269:18

Ratings 265:6,12,15

ratio 41:22 42:16 43:1,6

rationale 31:18

reach 33:5 213:19,20

reached 25:14 32:19,22

reaching 219:8

readers 180:2

reading 30:1,3,9 87:7 143:1

reads 52:20 66:6

ready 5:8,9 183:13

real 42:2 235:15

realistic 47:2

reality 40:8 53:6,7,10,14,16, 17 55:3,18 97:15 245:3

real-life 200:2

really 17:3,6 22:21 39:11 41:3 47:10,17 67:11 76:3,6,20 78:3 126:12 152:1 153:22 162:13 179:20 190:15,17 192:10 206:15 219:10

realm 167:8

RealNetworks 152:19

reason 22:5 38:22 57:17 69:22 89:15 130:16 175:8 215:13 235:8 236:1

reasonable 35:16 171:2 174:6

reasonably 130:13 173:5

reasoning 33:6

reasons 17:9 21:1 65:1 103:8 200:12 204:7 214:16 215:3 217:19

rebut 21:20 91:7

© 2010

140:14
rebuts 21:3
rebuttal 1:5,11 4:8 5:3,18 12:19 13:1,6,17 15:13 22:12 34:12,13,17,20 108:17 163:18,22 164:6 168:9 170:13 174:3 175:20 181:14 183:17 191:8
recall 36:14 57:18 105:15 107:2 110:1 127:2 138:3,8,10,20 139:1 141:19 142:1,3,7,11,12 255:3 258:2,7 263:20
recalled 101:13
received 4:8 20:3 34:14 152:8 181:15 223:14 224:9
receiving 26:14 28:12 30:12,18 217:22
recent 51:9 189:13 259:2
recently 8:15 11:4 193:15 200:17 217:3 249:19
recess 33:11,12 84:8,10,13 148:8,11,14,17 176:7,8 180:11,12 271:16
recite 16:6
recode 219:22 220:1,7
recognition 233:9
recognize 13:3 53:4 164:2,13
recognizing 136:4
recollection 105:2 139:6
recommended 49:7 51:7
reconvene 271:19
record 6:2 11:2 22:2 35:22 37:6 86:2 129:7,10,11 132:13 133:12,17,18 141:6 149:8 151:18 152:9 155:14 178:1 210:6 245:10,12 251:4 268:19 270:17 272:7
recorded 151:12
recording 151:6 234:14 235:7
recordings 1:5,6 249:1
recordist 151:10
Records 151:11,17 152:7,14,22
recover 193:16
RECROSS 4:2
redacted 14:3
redactions 17:12
redirect 4:2 137:19,21 141:5 271:7
Redstone 167:14
reduced 272:5
reeling 193:15
refer 68:20 113:4 120:4 164:21 165:14 166:2,14 180:7 183:20 185:7 187:9 201:14 202:1 210:2 222:9 234:6 250:13 253:4 256:9 258:22
reference 174:13
referenced 34:1
referred 26:20 127:15 255:19
referring 32:10,12,13 34:6 45:16 49:16 54:19 61:11 62:8 68:21 72:2 81:12 91:7 110:13 141:10 169:4 171:4,6 250:17 251:21 254:17 256:15,16
refers 16:3 53:20 120:11 168:18 182:4 214:7 254:13
reflect 18:20
reflecting 252:1
reg 215:17,20
regard 94:6 177:10 238:2
regarding 71:8 165:17 166:19 262:21
regards 177:1
regional 207:14
register 215:4
registration 215:13 216:1,2,4,21 217:10,19
regression 63:11,13 64:5 66:5 68:11 69:7,18 122:14,21 123:7,12,13,15 124:14,17
regulations 108:14 172:4 231:22
regulatory 21:8,14
rein 67:21 175:15
rejigger 231:1
relate 61:8,10 170:21 171:3 173:5 177:2,11 190:2
related 10:18,21 11:8,10 53:22 90:4,5 92:4,6 93:7 109:9 115:3 118:4 173:1 174:17 176:1 182:15 272:9
relates 102:7 117:21 170:7 177:14
relating 8:20 9:4,9 182:12
relationship 6:9 92:9,18 194:3

© 2010

253:18
relationships 228:22 231:4 238:17 252:17
relative 190:17 196:2,14 272:11
relatively 73:10 143:17 188:1 214:1
relaxation 193:10
releases 151:19
relevance 18:2 187:17 203:12 211:12
relevant 21:3,7 96:18 177:9,14,16,19 179:3,7 189:11 195:4 212:3 230:7
reliable 105:10,12 165:22 166:11 167:1 168:6 169:17 170:1 178:15,19,22 179:13 180:19
reliance 141:21 169:11 201:16 203:20,21 204:7 233:3
relied 15:9 83:16 105:19 138:5 139:4 143:2,16 166:10,22 168:1 170:8,15 184:11 192:13 263:3 265:8
relies 142:22
reluctance 216:1
rely 51:19 138:22 165:18 166:7 178:6,12 250:8
relying 169:15 269:7
remain 227:13 247:20
remaining 181:12
remains 198:14
remember 63:15 104:16
remembers 143:1
remind 86:1 257:14 258:13
remnant 202:1
repeated 54:6
repeating 97:17 250:19
report 13:20 14:6,12,17,18,22 15:4,7 35:12 45:11 48:8 60:8 71:7 77:5 98:13 99:9,10,14,15,20 100:2,6,8 103:21 106:18 107:21 109:4 136:22 137:1 138:6 140:19,20 141:14 142:9 143:1 164:15,18 165:16,18 166:8 175:4 176:1 192:12 211:22 220:13,14 222:2 224:1 247:16 254:10 259:2 263:18,20 264:15
reported 14:22 48:5 99:15 139:10 140:5,6 182:21 223:13
reporting 1:15 138:13,15 166:5 265:11
reports 14:21 15:3,6 73:16 100:17 167:22 173:2 255:20
represent 139:12
representation 175:2
representative 40:4 88:17 94:18 95:10 133:5
represented 36:10 119:11 138:9 141:12
representing 46:20 72:20 74:11,13
re-purpose 260:20
require 78:9 131:14 215:4 216:1,21
requires 29:8 78:21
research 10:17 70:16 117:6,7 165:21 184:13 254:9
researcher 184:20
resort 202:11 204:3
resorted 204:2
resources 168:4 220:11
respect 11:13 34:19 40:18 41:4 48:3 54:2 57:3 61:6 73:15 74:6 75:21 90:3 93:16,18 97:5 101:4 115:1 123:13 138:12,13,21 139:20 141:20 174:16 176:17 177:20 180:4 182:5 207:5 238:7 240:19 252:9 268:12
respective 1:17
responded 15:20
response 20:4,7 24:6 52:5 140:11 200:18
responsibilities 230:17
responsibility 158:15 258:16
responsible 153:6
responsive 113:19
rest 18:3 189:21,22
restate 91:21
restrict 216:10 232:1
restricted 181:20
restriction 30:19
result 69:3,20 73:13 84:2 126:2 130:5 144:15 196:4

© 2010

resulting 189:9
results 68:1 126:7,11,14 127:4,9 201:17
resume 165:11,12
retail 172:22
retained 4:22 12:1
retention 35:10 183:14,16
retransmission 11:14
return 5:3 81:22 82:1
revenue 37:19,21 38:1 39:17,20,21 40:2,12 42:15 43:3,22 46:17,18,19 47:12 48:12,20 49:22 63:17,18,19 64:7 88:16 103:6,7 110:5 111:5 112:4 114:2,14,18 115:9,13 116:2,9,19 117:15,17,18,20 147:3,22 150:3 157:17 172:22 194:6 218:5,6 228:10,12 229:5 232:20 262:22
revenues 37:11,16 38:6,7 39:5 41:13,16 42:1,2,3,17 43:1,15,16 44:22 45:1,22 46:7 48:5 50:3 55:15 90:3,5,21 92:2,5 94:17 97:20 98:12 99:15,17 100:18 101:4 103:4,15 110:21 112:2,3,6,14,15, 16,18,21 113:5,6,7,12,14 114:1 115:1,3 116:16 117:1 140:18 146:21 163:5 185:19 193:19 194:3 223:15 242:7 256:2,4 265:16 266:8,11,13,18,2 1,22 267:5,10
review 10:3 14:5 35:11 56:6 93:9 142:9 175:15,17 180:11 181:1 246:6,14 249:21 250:16
reviewed 15:9 33:15 109:3 165:21 167:22 170:8 175:13 263:2 265:8
reviewers 179:17
reviewing 180:15
Rhapsody 235:18,21 258:22 259:3
Rhapsody's 235:15 259:6
rights 211:8
rise 264:4,8,9,10,12, 14,17,18
rising 36:14
risk 68:2
rival 75:11,12 76:6,21
rivalries 77:1,4
rivals 72:10,11,15 74:7,8,22 75:1,22 77:22 78:4 79:14 82:17
rival's 72:1,5,17 78:1 79:2 80:20 82:3,8 130:17,19 131:4
Roberts 2:3 17:15 18:10 19:8,21 22:10 23:8,13 24:2,10 34:15 35:7 40:17 41:7 42:5,10,13 43:7,10,13 46:1,2,4 56:21 57:5,11,17 58:4,14,20 59:3,8,14 74:6,11,17,20 75:4,11,15,20 76:3,10,15,18 77:8,19 78:18 87:13,16 141:5 148:3 162:20 172:9,14,17 175:7 179:2 185:10,21 186:7,9,13,18,20 187:7 195:21 196:13 197:4 263:14 266:2
robust 210:4 228:19
rock 150:15 215:6 225:20 229:9
rode 156:5
role 156:1 158:14 222:14
ROSENBERG 3:3
rosy 183:17
rotating 208:10
rough 46:14
roughly 57:18 63:16
routinely 216:20
royalties 37:10,16 41:13 42:1,17 43:1 55:14 73:2,7 82:22 92:7 93:8 94:20 132:14,21,22 194:11 212:8 253:11 260:13
royalty 1:1 2:2 11:17 37:7,14 38:4,5 41:12 42:15,22 43:5 47:13 49:21 51:7 55:13,19 61:20 69:12 73:1 77:21 78:2 90:6 103:19 118:5,7 133:15,16 190:3 194:17 210:6 223:11,18 229:4 242:4,8 251:4,20,22 252:13,14 253:1
royalty-free 62:3 120:12 121:6
RPR 1:14
Ruckus 251:12
Ruder 70:21
rule 72:8 130:17

© 2010

179:11
rules 180:5
ruling 180:6 181:9
run 54:13 112:11 149:17 253:9
running 197:16 207:17 228:14 229:17
Rupert 167:13
Rushing 3:13
Russ 235:9 268:7

S

saddled 134:18
sale 201:18 252:22
sales 60:10 90:4 92:4,11 118:4 149:18 156:5,6,19 157:14,17 158:21 162:5 197:17 202:10 203:11 205:17 206:9,12,22 207:9 228:20,21 229:6 232:22 235:9 236:3 241:20 269:13 270:11,15,21,22
salespeople 198:16
salesperson 202:21
Salinger 4:3 5:13,19,22 6:4 12:9,22 16:3,19 21:2,12 22:9,11 24:16 31:11 32:16 35:9 40:16,17 44:19 46:6 51:4,5 52:10,13 54:3,17 56:21 60:19 63:8 68:18 70:5 71:6,19 74:6 78:19 81:8 82:19 84:5 85:13,15 87:20 90:11,16 91:7,11 104:10 105:15 107:6 108:14 109:2 110:2 117:4 118:12 121:12 124:2 125:17 126:20 127:13 129:6 136:17 138:1 140:1,16,17 141:11 143:9 144:3 145:13 146:19
S-A-L-I-N-G-E-R 6:5
Salinger's 15:19 17:16 20:17 141:4
sample 66:15 88:17 94:18 95:10 143:21
Sandy 148:21 149:1,9,10
S-A-N-D-Y 149:10
sat 203:14
satellite 73:6,8 203:14 228:4
satisfied 180:18
save 54:1
savings 228:10 229:19 230:6,9 259:16,19 260:4
savvy 204:19
saw 104:12 106:8 107:8,13 189:2 224:18
scale 225:9 232:11
scary 216:18
scenario 22:16,20
scenarios 22:19
scheduling 5:4
Scholar 7:14
school 6:7 8:2,4 151:8 205:6
scope 35:9 90:9 183:14,16 224:19 240:1 270:2
scratch 207:12 220:1 231:12
screen 219:10
search 160:2
season 224:11
seats 40:4,5,6 44:5,7,8
SEC 261:15
second 25:8 32:2,4,6,7 39:11 40:18 54:8 159:18 170:5 171:7,8 173:6,9,10,15 182:11 213:2
section 26:12 29:21 48:14 52:11,15 53:2 54:17 56:1 61:14 62:5 70:4 71:7,11,18 168:21 172:3 182:18,22 185:11 188:4 192:3 193:3 251:2 259:10 267:18,19 270:8
sections 175:4
sector 6:11
secure 205:14
seeing 116:2 142:3,11,12 189:5 192:2
seeking 140:13,14,22 141:2 208:7
seems 18:22 21:21 39:8 91:9 108:14 188:20 223:4,5
seen 57:6 104:14,15,16 105:5,16 106:5,13,20 108:11 115:9,12 170:14 172:13 234:15 262:17 265:2
segment 213:20
segments 115:14 146:3
selected 22:22
self 151:10
self-negotiated 252:17
sell 44:6,7 97:3 158:3 198:13 202:5,9 204:4,10 206:8,17 207:4,9 208:19,21 219:10,17 228:22 232:2

© 2010

233:7 241:14,21 252:21 268:21 269:15,18

seller 36:19 60:13 96:11

sellers 60:11,12 83:5,9,13 96:6,9,10,11,12 97:3 158:20

selling 151:13 158:16 171:19 197:21 203:14,15,17 205:20 207:1,13,14 208:22 210:20 229:12 233:1 235:12 242:21

sellout 197:20 262:1 264:3,7

sells 203:6 253:12

senior 153:18 154:10 158:13 206:15

sense 179:21 180:3 245:12

sentence 17:18,20,21 18:2,11,15 19:8 26:13 29:21 30:15,16 32:4,6,7,14 54:9 59:17 61:15 87:21 120:4 125:21 168:14,17 169:1 170:12 171:5,6,7,8,16,18,20,22 174:11 185:11 256:13

sentences 61:16 170:12,17,18,21 171:2,4,16,17 172:11,18 173:4 174:18

separately 62:17

sequential 259:20 260:2

sequitur 19:1

series 123:5

serve 82:9

served 7:21 9:13,22 156:13

servers 229:3 231:3,7

service 38:6 40:19 47:21 61:17,21 63:2 76:22 109:17,22 153:5,7,21 166:20 177:2,3,8 208:21 225:17,21 227:7,15 239:5,17,20 240:3 242:3 254:7 258:6 259:7 266:14 268:15,16 269:11

services 35:20 36:1,5 37:6,12,15,17,20 38:2,8,14 39:5,13,14,19,21 41:5,15,16 42:6,9,20 43:4,19 47:3 54:21 55:4,16 56:8,14 57:8 61:8,9,11 64:16,20 65:2,5,10,12 70:5,10,13 75:3 77:7 94:1 96:7,8 103:16,17 108:4 114:3 116:7 118:15,19 119:3,6,8,9 121:16 141:21 142:13,22 143:2 162:4 177:18 179:6 185:22 195:8 208:20 210:10 211:5,13,15,17,19 226:8 251:10,15,16,18 252:9 259:22 260:1 268:8

servicing 236:7

session 197:2

sets 18:6 36:9 130:11

setter 95:20 96:1

setting 22:11 56:19 73:9 118:5,7 190:3 221:13 226:11

seven 154:9 182:4 185:3,8 187:10

seventh 171:17,21

several 52:15 155:2 160:12 170:18 189:11 190:3

shape 152:1 220:9

share 79:11,14 81:2 83:19

shared 210:14 230:12

Shari 1:14 272:2,18

shift 200:7,8,9 230:20

shifting 200:1 201:1

shop 252:6

shortcut 52:21,22 53:2,4,5,6 88:1 145:18

showing 104:10 107:6 126:20 187:14 200:10 247:18

shown 17:12 104:22

shows 106:18 117:18 187:13 188:14 189:21 192:19 222:11,14 270:8

shrink 131:15,18

shuttered 251:9

sic 168:22

signal 230:1

signals 11:15

signature 13:14 164:13,14

signed 151:10

significance 83:3,7 192:6,8

significant 94:20 228:4 231:19 242:9

similar 162:15 170:20

© 2010

similarly 73:5 168:2 177:17

simple 37:2 39:12 160:4

simplest 65:16

simply 58:16 60:7 67:9 89:7 91:5 94:12 117:16 161:8 180:7 195:13 208:6

simulcast 232:19 239:18

simulcaster 186:1,3 205:14 230:10 232:11 240:20 259:22

simulcasters 162:3 171:19 185:13 186:15 199:2 203:13,21 214:16 215:4,16 219:6,22 228:4,7,13 229:21 232:19 233:15 246:3 247:1,8 259:14 260:18

simulcasting 186:17,19 187:4,6 207:5 229:1 247:5

single 29:9 56:19 60:9 67:7,9 83:3,8,21 94:9,15 95:21 96:2,11 102:14 111:4 137:2 146:2 223:17,18

sir 12:17 44:15 148:4 162:12 173:22 181:5 201:7 258:21 271:12

Sirius 16:11 21:22 36:11 71:22 73:5 81:16 82:5 109:10,12,17,21 182:6

sit 16:19 121:1 122:8

site 154:3,21 155:16

sites 204:21

sitting 94:4

situation 23:14 24:3,22 246:12

six 13:20 21:4 121:20 141:21 142:12,22 183:20 246:20

six-fifths 48:11

sixth 171:17,18,20

size 65:22 197:11 225:8

skip 221:6

Slacker 209:17

Sledge 2:3 5:2,11 12:11,13,17 15:14 19:22 20:3,9 24:6,21 25:5,12,18,22 26:5,11,20 27:10,13,17,21 28:7,14 29:13,15,18 30:1,9 33:8,10,13 34:11 43:11 44:15 52:7 59:15,20 60:2,6,14 84:8 85:3,8 87:18 90:14 91:4,12 104:8 107:4 108:20 109:5 115:8,15 116:9,15 117:2 124:3,21 125:7,15 126:18 136:14 137:18 140:17 141:7 142:15,17,21 143:6,10 144:12 145:8 146:13,16 148:3,10,14,18 161:5,19 162:12 163:2,7,13 164:22 168:11 169:2 170:3 171:14,22 173:7,10,16,18,22 176:6,9 178:3,8,11 179:9 180:13 181:5,8,12 183:6,8 188:6,9 189:15 190:8,19 191:10 193:4 199:11 201:5,8,12 208:13 216:5,16 224:22 227:18 231:21 232:6,13 236:12,15 262:9 271:7,10,16

slice 219:3,4

Sloane 8:4

small 73:10 114:7 125:6 143:17 206:10 219:17 226:17 232:2 234:18

Smallens 4:4 34:21 101:2 148:21 149:1,7,9,10 160:9 161:2,11,21 162:8,13,18 163:21 165:8 170:8,13,15,22 172:21 174:3,20 175:3,12,15,16 176:22 177:3,21 178:6,14 179:7 181:20 183:12 187:9 195:21 197:6 201:14 210:2 220:15 234:6 236:20 262:13 266:3

S-M-A-L-L-E-N-S 149:11

smaller 47:4 131:13 205:21 207:22 213:12 219:9 220:10 225:10 254:19 267:3

snapshot 187:16

snippet 170:12 171:7

snippets 175:19 269:7

so-called 268:12

social 156:15 200:4 234:22

sold 40:6 166:20 206:5,9,11 207:15 211:1 233:14 240:3 268:21

© 2010

sole 9:16,17 237:6
somebody 132:7
someone 23:15 77:20 78:14 161:16 176:20 209:4 217:22 256:22 269:16
someone's 180:8
someplace 32:1
Sometime 86:5
somewhat 63:5 66:2 82:13 108:2,7 124:13 202:8
somewhere 179:22 267:11
song 194:11 226:13 236:5,10
songs 177:12,14 255:1 269:17
songwriter 234:14
SonicNet 153:18 154:2,17,19 156:7
sorry 8:20 29:14 44:14 46:2 51:5 52:1 61:18 86:13 103:6 112:10 115:19 119:7 140:2 156:2,9 158:5 173:12,17 174:2 186:11 190:14 222:19 228:1,11 237:17 255:10 257:9 260:10 261:21 263:19 266:17 267:1 270:6
sort 18:17 19:16 53:6,7 82:16 90:11,12 91:6 96:14 97:13,15,19 124:11 154:16 157:8,20 159:15 160:13 166:18,19 191:21 193:14 194:15,18 197:19,20 202:10,19 203:12 204:3,17 207:17 213:2 214:13 215:22 222:14 230:2,22 240:10 252:7
sought 140:15
sound 1:5 64:21 242:4 249:1
sounded 91:13
SoundExchange 2:7 5:7 18:12 25:6,9 26:6 27:1,5,14,15,16, 18 28:1,4,21 31:7,19 33:19 36:8 46:13 48:6 58:13 61:2,4 71:12 81:19,20 85:11 104:11 107:7 111:16 126:21 129:9 130:5 132:2,6,14,17,21 133:1,4,11 134:2,4,6 139:8 174:4 183:18 194:12 222:13 223:1 224:1 236:18,22 262:15 264:22
SoundExchange's 14:3 18:14 30:3,17 82:22
sounds 102:22 208:14 227:18
source 100:15 166:11 167:1,13
sources 147:22 167:6 168:5 178:15,20 199:16 270:20
Southeast 1:13 2:5
space 210:5 212:19 237:19 242:12 246:11 251:3,20
span 62:12
speak 20:7 99:22 160:9 244:15,19 245:9
speaking 20:19 44:12 72:4 190:17 191:8 270:17
speaks 114:13
special 240:21
specialize 202:22
specific 17:11 32:20 35:14 49:13 137:9,16 161:3 169:5 178:16 181:9 184:10 199:8 205:1 208:11 226:6 246:15 250:1
specifically 22:3 32:17 61:14 71:3 78:3,9 101:14 111:17 114:5 174:11,17 183:18 184:12 191:8 253:3 260:10
specifics 20:15 22:14 38:15
speculate 17:8
speculated 34:2
speculating 19:11 22:16,18,21 24:3 31:6
speculation 17:6 19:19 33:21
spell 6:3 149:8
spend 224:12 226:3
spent 8:3 21:4 87:2 248:8,16
Spice 200:16
spike 191:22 269:1
Spin 150:17,19,20,22
SpiralFrog 251:12
spoke 145:21 203:3
spoken 5:17 22:11,13 160:11,15 204:7
sponsoring 108:13 205:1
sponsors 242:19 243:3
sponsorship 240:5 241:2,20
sponsorships 210:15

© 2010

sports 185:19 205:6 245:18 247:4 248:15 264:16

spots 208:11

spur 235:9

stable 188:16

staff 8:13 151:20 158:18 230:16 231:1

staffed 152:10

stagnated 249:12

stand 89:3

standalone 241:18 242:22

standard 36:18 68:4,7

standpoint 102:15

stands 198:4 235:8

STANLEY 2:4

staring 221:14

start 36:13 41:11 62:12 148:9 150:6,8 152:9 162:21 207:17 209:5,6 215:8 220:1 221:12 228:14 229:17 241:4 261:5

started 150:4,5,7,14 162:2 190:6 217:3 237:8 259:21

starter 210:22 211:1

starting 52:20 162:1 189:7 193:16 207:12 227:14,16 231:12 239:4 242:3

starts 48:2 174:12

startup 149:17

state 6:2 142:18 149:7 210:3 252:2

stated 170:15 180:9,19 196:5 256:14 267:15 268:5

statement 82:20 89:3 124:22 164:5,7 168:1 169:19 175:18,20 210:3 212:14,16 250:1,12 252:1

statements 117:12 169:10 174:7 178:21 182:19 183:18 212:11

states 1:1 30:17 187:21 201:15,16 254:18

stating 121:15 268:15

station 206:2 208:11 209:22 215:5,6,19,20 218:1 219:14 221:5 228:14 229:10 230:3,20 242:1

stations 157:18 158:2 185:18 187:6 215:11,12

statistics 7:19 9:4 12:10

status 169:16

statutory 14:14 36:18 81:18 139:4 141:13 163:4 168:16 172:1 177:4 197:9 201:16 209:6 210:12 212:3 226:15 228:5 234:7,17 235:14 238:18 239:9,12,21 240:2,7,16 241:4,8,11,16 242:3,4,12,15,18 ,21 243:1 249:7 251:21 252:3,12,14 253:1 255:13,17 262:1 264:13,19 266:11,22 267:5,11,20 268:3,18 269:1,11 270:3,9,14

stay 54:11 154:7 198:22

stayed 154:9

stays 188:16 191:3

steadily 188:14 190:21 194:14

steady 247:20

stenotypy 272:5

step 108:7

Stern 203:15

Steve 220:5

sticking 38:13 61:14 66:4

stint 157:9

stitched 221:8

stop 177:12

stopping 255:1

stops 78:12

stories 167:7 179:2 200:3

story 166:20 200:17 212:18,22 213:3 235:5

strategic 14:13 73:17 74:1 75:18 76:8 158:17

strategizing 158:17

strategy 96:6 131:17 132:1,8,18 134:16 135:3,12 149:19

stream 40:13 44:1 152:16 212:7 215:5 218:22 219:2 221:1 231:8 233:7,20 236:5 254:1

streamers 220:7,22

streaming 153:14 154:12 160:3,6,7,17,19 177:12,13,15 185:18 198:8,10 201:4 203:3,6 206:8 207:13,20,21 208:7 209:9,13

© 2010

213:11 216:2 219:1,14 221:7,18 224:14 229:12 230:4 253:20 254:14,18 255:1,6 261:6

streams 157:19 221:12 230:22

street 198:16 216:7

stricken 71:14

strike 15:18,21 17:10,14 24:17 170:12 171:2 224:16,20

strong 126:15

stronger 76:14

strongly 34:20

struck 17:18 161:17 170:16,21

structure 206:20

struggle 199:6 218:21

struggled 206:19

struggling 195:5

stuck 65:13,16

student 6:21

student-run 150:16

students 50:10

studied 7:3

studies 6:19 184:17

studios 230:13

studying 47:18

stuff 154:16 198:4 225:20

subcontractors 237:7

subheading 52:20 71:11 188:5

subject 53:5 86:18,21 126:1 170:6 171:3 173:5

subjected 53:10

subjects 7:15,18 10:11

submission 26:17 30:19

submitted 19:12 181:21 224:8 243:11

subparagraph 26:13,16

subscribe 114:20

subscriber 37:21,22 39:22 42:12 46:12 63:19,22 114:15 212:1

subscriber-based 65:15

subscribers 40:13 42:4,21 43:20 46:13,14,15,18,22 54:22 55:4,7 103:4,15 114:1,10,16 147:16 213:5,6 225:21 227:9 255:21 256:3 259:3,6

subscriber-supported 39:14 43:16

subscription 37:20 40:20 41:2 46:16 63:20 64:8,10,12 65:1,18 69:17 96:7 101:4,5,11,22 103:22 105:1 107:21 109:8,13,15,16,18 112:16 115:3 117:17 123:17,18,21 125:1,12 138:4,22 139:3,12,18 140:7 141:11 226:9,12,17 227:16 236:7 255:14,16 256:10 257:22 258:6,18

subscription-based 211:19

subscription-only 109:21

subscription-supported 45:1

subsection 26:18

subsequent 246:10

subsequently 101:2

subset 102:7,12 104:5 109:9,10 138:9 143:17

subsets 146:2

subsidize 78:22

subsidized 79:20 80:6

subsidizing 79:7 90:13

substance 141:16

substantial 39:18 56:13,22 57:2,9,12,21 58:1,22 59:10,11

substantially 39:21 111:18

substantive 102:17

substitute 78:11

substitutes 77:10 97:2 129:8

substitution 269:12

substitutional 236:6 269:19 270:10,16

succeed 79:13

success 192:19 194:1,20,22 195:22 196:1 212:18

successful 48:18 78:11 79:9 80:21 131:17 157:11,12 195:10 196:14 219:21 254:7

suffering 194:16,22

sufficient 89:14,19

suggest 191:16 252:3

suggested 49:15

suggesting

© 2010

69:13,15 126:6,9 127:8 134:17 189:8 231:22 232:5 247:10,13 252:12,16

suggests 20:13 202:17

Suite 2:10,15,20 3:4,9

summarize 6:14 35:15 69:1 72:16 81:14 234:11

Sumner 167:14

sunk 261:7,8

superior 128:2

supervised 106:19

supervision 117:9

support 23:9 24:5 172:11 177:4 178:20 180:17 189:16 220:6 230:14 249:22 252:20

supported 19:5 42:12 211:18

supporting 40:13

supports 19:3,18 189:19

supposed 60:9

sure 77:3 80:11 90:10 91:16,22 104:15 105:4 107:10 110:13 113:19,20 115:20 149:16 150:22 160:1 161:18 184:18 188:8 195:17 213:18 220:17 222:20 250:4 263:12 269:2 270:5

surely 108:2

surprise 102:2

surprised 106:12 188:9

survey 184:21 189:6

survive 94:2,11 95:16 193:2

Susan 3:13

suspect 179:14

sustain 213:12

sustained 33:18 109:5 140:21 141:7 170:4 181:2

sustaining 34:7

sworn 5:15 149:3

System 3:7

systematically 64:18

systems 11:14

T

Tab 13:22 14:2,11,20 15:1,5 165:9,14,15 166:2,3,15

table 182:12 185:7 187:11 188:14,17 189:16,17,21 191:4,6 222:9,10,11,18,21 247:14

tabs 13:20 167:19,20 168:5

taking 21:12 37:20 41:16 64:8 69:5 230:16 231:1

talent 203:16 231:14,15,16 240:22

talk 90:11,20 98:7 100:10 130:18 155:22 178:16 183:13 185:20 193:18 213:13 229:16 234:16 245:18 247:3,7 248:15 264:16

talked 20:14 102:3 119:20 160:19 212:10,13 235:12

talking 17:21 18:3 21:6 31:5,16,17 32:8,17 45:21 50:22 54:12 75:15 90:19 113:14 162:21 178:8,11 179:5 185:15 186:16 233:11 263:14,15

talks 20:18 24:17 184:22

target 214:13,14 216:3,14

targeted 160:6

targeting 213:14,17,18,22 214:21 217:6

TargetSpot 159:6,7,13,14,19 ,22 160:1 173:3 203:2

Tarzan 162:21

taught 7:17 8:6,7 86:21

teach 7:15 8:5

teaching 7:18 158:3

team 156:5 159:16 202:10 203:11 204:3 206:6,10,13 207:9 220:8 228:20,21 229:6 232:22

technique 124:14,17

technology 155:11 156:16,19 159:8 160:16 209:18 220:5

television 10:12,17 227:19

ten 9:7 48:9 87:3 148:15 160:18 185:17 201:15 220:9 244:11 262:7

tend 233:22

tends 224:11

tens 213:5 257:12

term 157:18 220:15 253:10

terms 16:6,17,20 20:15 35:1 57:22 82:4 87:14 169:4 185:18 187:3,6 236:3 243:1

© 2010

270:2

terrestrial 72:21 74:11,13,16 75:9,12,13,19,21 76:5,20,21 77:10,11 78:12,22 79:5 80:15 130:22 131:20 132:15,19,20 133:15 134:2,5 174:12 185:13 186:10 187:5 193:5 196:2,6,15 198:15 203:13 205:14 206:2 207:2,3,8,20 209:14 215:4,16 217:18 220:22 228:19 230:1 232:3,7 233:15 246:2 247:5

territories 177:15 254:14,20

test 53:18 97:16

testified 5:15 10:7,20 11:2,9,15 109:2 119:22 127:18 149:3 161:22 169:8 224:17 254:5

testify 10:16 22:9 27:3

testifying 29:12

testimony 10:15 13:6,7,10,17 15:10,19 16:1,5 17:10,12,16 19:15,19 20:11,17 21:2,3,5,6 23:4,9 24:22 25:5,18 26:3 27:22 33:21 34:17 35:17 52:12 57:1,18 62:1 71:14 84:10 87:21 90:10 93:10 101:5 104:13 105:17 107:9,12 109:20 110:2 111:3 118:13 122:17 124:2 125:18 127:14 129:5 132:11,17 140:12 141:1,2,19 142:4 147:10 162:7 163:3 164:6 165:19 170:10,13,16 171:3 174:3,22 175:9 177:19 178:6,7,14,22 179:13 180:17 181:20 183:21 189:19 198:1 224:16,17,19,21 238:8 244:12,18 245:8,16,22 246:5,16 249:20 257:4 259:11,18 260:9 261:20 263:3 265:8 267:19 268:1 272:4,7

testing 159:13

Thank 5:2 9:20 12:18 33:13 35:4 40:16 43:10 44:16 46:4 54:15 62:4 63:8 70:3 71:4 81:6 84:4 85:3,6,9 110:15 115:7 127:12 129:3 137:17 141:18 144:19 146:12 148:2,4,5,16,18 149:4 163:15 165:6 176:9,13 180:13 181:8,16 183:10 187:7 195:20 201:12 208:1 225:1 259:12 262:10 271:12,13

that's 14:13 15:4,7 17:21 18:18 20:11 23:16,19 24:3,10 25:12 27:13,21 28:7,18 29:11 30:2,11 31:3,8,10,15 38:12 40:8,20 47:4,16 49:2 50:5,22 54:13 55:1,21 57:21 60:4 63:16 64:15 65:7 66:13 72:9 74:18 79:5 80:17 81:4 82:14,16 86:17 87:1,5 91:2 92:12 93:15 94:2 96:20 97:4,11 98:1,2,8 99:4,8 100:12 101:8 102:9,11,12 105:21 106:5,22 108:5 109:11,19 110:8 111:6,10,13 112:17,20 113:1,16 116:13,14,20 117:19 118:1,20 119:15,19 120:13,18,22 121:10 122:12 127:5,11 128:21 129:2,17,21 130:3,8,16 131:2,6,22 132:4,10,16 133:17,21 134:5,11,21 135:1 136:21 137:17 138:14 143:3 144:17 146:5 148:1,2 172:7 173:6 176:21 177:6,16,18 181:5 182:10 187:10 190:4 191:20 194:12,19 198:13 199:18 204:21 207:6 210:13 213:22 216:12,16 217:18 219:3 224:10,16 226:2,9,10 235:6 237:19 239:6 245:22 249:16 255:18 256:5 257:5 258:11 259:8 263:17 267:15,16 268:14 269:2 270:3

the.0036 55:21

themselves 129:12 134:18 186:5 204:10 229:8 252:22

© 2010

theoretically 104:6
theories 22:6
theory 41:4 74:7,21 78:9 79:3,9 82:3,4 130:19,20 131:7,19 133:11 134:7,11
thereafter 272:5
therefore 16:21 27:3 29:7 81:18 103:18 124:7 133:5 178:22 214:14
there's 18:6 23:5 39:10 42:15 52:3 53:1 64:22 68:3 89:19 92:9 93:21 94:9 114:9 125:4 130:10 137:14 138:14 171:11,12 174:13 183:21 193:22 196:10 199:7 205:19 206:18 210:8 211:18 215:13,20 221:6 224:13 226:22 228:9 229:2,3,10 230:22 235:10,21 243:15 256:18
they'd 73:21 252:20
they'll 194:16 202:10,11 206:15,16 227:8 233:19 264:10
they're 18:13 31:18 42:11 60:3,11 72:20 76:20 79:6,17 80:6,9 167:5,11,12 195:5 200:3,18 203:9 204:19 205:1 206:15 207:1,12,13 213:4 214:18 216:16 217:1 219:13,14 220:18,19 221:10,13,14,16 224:13 225:8 228:18 229:9 230:3,4,5 231:12,13 233:1 235:12 238:14 239:1,14 241:14 242:8,20 243:6,8 250:17 253:8,9
they've 181:22 184:18 185:2 187:2 213:10 232:13
third 17:18 64:5 123:3 124:19 170:12 173:8 176:14 185:11
thorough 90:17
thousand 98:6 185:6 198:4,6,8,9 234:20
thousands 213:5 257:12
threat 73:17 74:1 75:18 76:9 78:15,17 226:18
three-year 127:21
thriving 232:16
throw 124:19
thrown 124:16
thrust 143:4
Thursday 271:20
tied 163:10
tiers 159:15
Time.com 202:17
tire 233:18
Tires 233:16
title 6:10 7:13 63:10
titled 71:21
TL 248:15
today 5:3 10:19 33:16 121:1 122:8 164:16 165:19 211:14 214:5 236:22
T-O-O 151:8
top 158:11,12 160:13 182:17 185:7,17 187:10 256:7
topic 192:3 228:8
Tori 152:17
total 138:9 139:2,17 140:18 146:21 186:16 187:21 222:12 248:2,9,11,21 249:1,2,6 256:4 263:6,10 266:13,18,21,22 268:21
tough 219:16
toured 151:12
touring 151:14
towards 245:15
Tower 3:4
towers 261:17
track 152:17
Trade 8:12 83:19
trade-off 80:11
trades 160:14
traditional 54:13 167:6 168:2 194:2 199:16 200:2 248:16
train 207:8
training 158:1,21
trajectory 187:15 194:16
transcription 272:7
transmission 73:8
tread 122:16
Tremaine 2:14
trend 62:7,10 63:1 127:15
Trial 104:11 107:7 139:8 262:15 264:22
Tribunal 2:2
tried 97:22
tries 202:4
triggers 198:10
trouble 266:17
true 13:17 15:8 28:7 59:21 69:20 164:18 165:2

© 2010

167:11 267:16 272:7

try 88:21 141:5,10 143:8,9 193:2 207:4 246:17 259:18 260:4,8 268:2

trying 40:2 50:19 83:9 91:9 92:1 102:21 103:1 110:12 113:13 114:8 115:22 116:14 126:13 133:6 143:13 190:13 207:2

TSL 248:16

tuning 187:22

Turkey 238:16 239:2

Turkish 238:11,13,18

turn 13:9 51:22 52:11,19 62:5 71:6,18 78:11 82:19 118:12 126:21 127:13 138:17 139:7 164:10 228:2 250:2

turned 154:3 213:7,10 254:13

Turner 11:4 86:6 88:7

turning 45:10 54:17 55:8 61:13 87:20 139:9 249:10 254:17 255:6

twice 8:10 10:12 11:18 49:21 99:14,17

type 60:13 180:22

typewriting 272:6

typical 93:22 94:6,9,11,14 118:8

typically 70:16 73:3 76:13 94:9

U

U.S 171:10 177:15 239:4

Uh-huh 70:7 125:15,19 234:1

unclear 75:20 263:19

underestimated 49:1

undergraduate 6:16

undergraduates 7:20

underground 151:2 154:2

underlying 47:5 49:3 83:21 137:1 146:1 172:7 250:16 269:4

understand 7:9 30:8 39:16 40:7,10 50:8,15,19 58:20 92:18 109:12,14,15 114:8 115:21 121:14 123:9 124:5 129:18 130:19 132:13 143:7 200:19 269:14,19

understanding 58:11 61:22 74:10 92:14,17 98:18 100:20 103:11 105:9 117:19 122:1,3 130:8 132:16 175:16,22 184:4,6,8,9

understood 66:20 124:14 161:10

undertake 44:21 88:14 89:8,20

undertaken 89:18

Unfortunately 200:8

unique 114:7 118:9 147:11

United 1:1 11:3 86:3 254:18

unit's 258:10

Universal 154:22

universe 99:18

universities 7:22

University 6:7 7:12,16 150:10

unless 130:16 141:7 194:6,14 236:9

unlikely 130:14

unprivileged 172:6

unprofitable 135:22 136:4,9,10

unsold 208:9

unsuccessful 130:5

unusual 108:7,8

upon 15:9 35:11 51:19 83:16 138:5,22 139:4 141:21 168:1 170:8,15 184:11 192:14 263:3 265:8

upper 96:3 159:15

upward 23:1 60:15 137:12,14

urban 240:21 243:8

useful 261:22

useless 217:14,18

user 40:2 209:18 214:3 215:4

users 40:14 42:4 46:9 54:20 114:3,10 155:17,20 177:13 195:1 255:2,21 256:10

usually 207:21

V

vague 253:10

valid 89:8

valuable 202:18 204:17

value 11:10 14:14 196:12 205:3 268:2

valued 210:17 221:3

VanEaton 3:8

© 2010

variable 66:12,13
variables 70:6,22
variety 199:2 202:2
various 137:12 142:8 162:16 250:5
vast 206:6,9 209:15 222:14 255:12
venture 154:20,21
verb 253:13
verbal 90:10
version 14:3 181:21
versions 64:3
versus 114:15 138:4,22 139:3 200:2 204:22 230:10 268:17
veto 28:6,17,21 29:1,5 31:1
viable 134:7,12 239:22 241:16
Vibe 237:19 239:6,7,8,12,20 240:6,19,20 241:7,11,15 242:2,14 243:3,12,14,22
V-I-B-E 239:8
Vibe's 242:17
vice 153:5,18 154:10 155:1 156:3 157:13 158:13 235:15 258:14
video 155:8 200:16,19,20 219:11 221:11 238:19
videolab 155:16 156:17
videos 154:16 155:18 220:18
view 19:9,17 42:2 57:21 127:19 129:7 244:18 245:8 246:6
VII 267:18 270:8
violate 19:15
violates 16:15
violations 216:9
violative 19:9
viral 200:6,16
virtually 190:9
visiting 8:3
visitors 213:7
voir 20:1,5 33:17 175:2
volume 1:6 95:18,20
VP 258:10

W

WAAF 204:5 214:19
wait 18:10 262:4
walk 233:4
Warner 151:11 234:14
Washington 1:2,7,13 2:6,11,16 3:10
wasn't 43:12 89:14 103:1 108:10 114:5 116:20 135:8 140:9 161:18 176:2 257:18
watch 220:20 221:5
waters 113:3
ways 64:4 75:9 97:22 98:1,2 122:18 123:14 124:9 219:5 249:4
web 87:8 152:1,2 153:22 162:15 212:4 223:12 237:17 252:7 253:22
web-based 220:2,3 221:17
webcast 113:8 201:2 214:10 222:17
webcasted 237:20
webcaster 14:14 26:15 28:12 30:13,18 90:3 92:3 97:20 182:22 194:14 205:15,22 208:4 209:5 230:10 231:10 232:21 233:9
webcasters 36:9 57:14 88:17 90:3 92:2 93:16 94:17,19,21 95:3,10,11 97:16 98:20 102:10 109:9 130:21 131:10,18,20 132:22 133:3 136:9,10,19,20 147:8 163:4 172:1 177:5 196:18 198:17 200:11 202:3 203:8,9,10,22 204:6 205:8 210:12 212:3 214:2 216:20 218:5,7 219:22 220:22 228:7 231:11,15 232:9 233:3 247:6,11 252:4 255:17 259:15 261:10
webcaster's 93:8
Webcasters 201:16 228:5
webcasting 1:4 5:4 34:19 35:2 48:15 73:3 79:4 80:16 85:17 86:19,22 90:4 92:4,10,11,15 93:19 94:13 96:17 97:1 101:6 102:8 104:18,19 109:13,15,16 113:4,5,7 118:3 131:21 134:22 135:13,21 136:5,7 138:10 149:19,21 150:2 160:10,19 161:3,11,15,17,22 162:1,9,17,18 163:8 168:16 177:2 183:22 184:4 189:10

© 2010

190:2 193:1 195:7 197:3,9 198:12 200:21 203:1,19 208:20 209:6 212:18 218:9 222:4 224:11 229:18 232:10 234:8,17 235:14 237:15,18,19,21 238:11,18 239:5,10,13,17,21 240:3,7,16 241:4,8,12,16 242:3,12,15,18,21 243:2 244:15,20 245:3 246:21 248:10,21 249:3,7 252:6 253:5 255:13 259:21,22 260:12 262:1 264:13,19 267:1,6,11,21 268:3,18 269:1,11 270:3,9,14

webcasts 73:2 74:14 152:19 154:12,15 155:7,8

webmasters 158:20

website 155:17 203:7 230:21 243:9 253:14

websites 152:12 157:19

webstreaming 219:5

we'd 217:17

Wednesday 1:8

week 187:16 247:20

weekly 184:15 187:22 216:6

weeks 174:15

weight 21:10,17 22:7 23:22 33:3 58:5 194:17 210:5 251:4,20 252:14

weighted 46:20

weighty 197:2

we'll 5:2 33:10,13 82:11 84:10 85:3 148:18 176:6,9 180:10,13 262:9 271:16

well-credentialed 168:2

we're 15:21 17:13 26:21 27:2 82:15 103:2 110:13 113:14 178:8,11 179:10 189:5 192:1 258:5 263:14 270:5

we've 20:14 45:20 104:10 107:6 126:20 162:7 163:21 190:22 199:2 204:7 226:14

whatever 21:1 39:6 68:1 69:8 202:17

what-if 22:16,18,20

whatnot 202:4

whereas 41:2 51:8

Whereupon 5:12 84:12 148:22 271:18

whether 20:21 23:20,21 24:19 25:10 60:22 67:3,16,17 69:8 89:19 91:2,3,16 93:6,14 96:8 102:15 105:4,7,10 106:3 107:1 109:7 111:14 113:19 117:16 119:16 121:2,8 127:3 130:1 136:18 138:8 141:2 146:10 168:16 169:22 175:3 180:16 216:9 242:18 243:3 248:9,11,20,21,22 270:9,19,20

whistles 37:3 38:11

whither 253:2

whole 7:10 18:6 19:5 87:11 104:19 114:9 190:6,12,16 196:17 201:6 233:8 264:17

wholesome 217:15

whom 150:1 167:4 266:21 272:2

who's 23:19,20 103:3 169:15 209:4 229:12 230:19 258:13

whose 74:18

Wikileagues 167:10

WILLIAM 2:3 3:8

willing 36:19 39:3 41:21 47:20 53:8 90:6,17 105:11,12 170:10 199:15

willingness 93:8 95:19

wind 96:15

wish 17:17 20:4

Wisniewski 2:4 9:15,20 26:8,19 27:9 28:18 29:3,7,11 30:22 31:3,15 32:3,6,9,12,15 33:5,9 44:10 49:12,19 50:2,6,15,18,21 53:21 54:6,15 68:12,16 70:1,3,8,14,20 71:4 78:19 79:6,17,22 80:3,18 81:6 100:13 110:11,15 112:8,12 113:2,13,16,20 114:22 115:7,22 116:6,13 146:18 147:2,6,18,22 148:2 167:4,10,17 169:13,18,22 195:13,20 205:18

© 2010

206:1,12,21 208:1 217:13 233:11,21 234:2 237:22 238:4 266:21

withering 210:5 251:3,20 252:13

withheld 172:22 174:7

witness 4:2 5:14,18 9:17 12:1,6,16 17:7 19:10 22:17 29:6,10,12,17 33:17 34:21 41:6,9 42:8,11,14 43:9,18 44:13,17 49:17,20 50:5,7,17,20 51:1 52:5 54:5,14 57:3,6,15 58:2,7,15 59:2,6,9,19,21 60:4,7,16 70:7,12,19 71:2 74:9,13,18 75:2,5,14,17 76:2,7,13,16 77:3,9 78:8 79:2,16,19 80:1,5 81:4 87:15 100:16 108:9,13,18 110:14 113:11,15,18,21 115:5,12,17 116:4,11,20 124:10 125:3,11 142:16 147:1,5,14,21 148:1,5,6,21 149:2 162:20 163:17 165:5 167:5,11 169:8,14 175:8 180:17 185:16 186:2,8,10,16,19 ,22 189:1 190:1,14 191:5 193:6 195:16 196:5,16 199:22 201:6,10 205:19 206:4,14 207:6 209:2 216:12,18 217:14,17 227:20 232:4,8,15 233:13 234:1,4 238:2 262:5 263:17 266:5,22 271:13,15

witnesses 199:12 249:21

wondering 57:1,20

worded 76:14

work 50:18 86:12,16 132:1 145:1 189:4 200:5 206:13,14 207:8 219:15 221:9,15 238:7

worked 8:9 11:4 20:7 135:12 156:4 157:3 159:12 226:10

working 106:2 157:21 158:1 162:16 224:13

works 245:13

world 159:15 196:6 198:12 200:13 202:7 209:13,14 229:9

worldwide 152:1,2

worried 76:20

worry 58:22 59:4 96:8

worse 72:7

worth 73:14,19 74:3

Wright 2:14

writer 151:20

writes 230:21

writing 15:20 151:17

written 13:10,16 15:10,19 52:12 90:10 142:4 170:9,13 179:12 243:11,14,22 244:12 245:22 246:5,16 260:9 261:19 267:19 268:1

wrong 38:16,22 39:1,8,10 52:22 53:1 81:3 119:2 140:3

wrote 105:17 109:20 244:3

WSA 16:4,16 19:9,15 20:12,13,21 21:7 22:15 71:8,21 83:4 137:10 168:22 173:14

X

XM 16:11 22:1 36:10 71:22 73:5 81:16 82:5 109:10,12,21 182:7

XM's 109:17

Y

YACOBIAN 2:19

Yahoo 187:2 195:12 210:13 212:2,5 238:16 252:5 253:5,20,22

Yale 6:17 150:10,12

y'all 30:5

year-over-year 223:1

yesterday 107:13,19

yet 15:6 39:14 175:6 188:19 194:14 208:7 211:2 213:8 216:3 238:15

yield 69:3

Yields 201:17

York 2:10 153:20 229:11

you'll 82:13 87:21 113:19 128:8 191:22 195:3

yours 238:1

YouTube 196:18 220:21

you've 25:12 31:20 85:16 86:11,15,18,21 103:3 107:21

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116:15 217:5
218:1 220:8
223:7,8 265:7

Z

ZenithOptimedia
99:10,20
100:5,10

zero 190:7 244:9
269:18

ZIP 214:12

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Complimentary MiniCD

CAPITAL REPORTING COMPANY

Attached is your MiniCD, containing your ASCII, .PDF and .VDF files, which are complimentary with every Capital Reporting Company transcript.

(Works in regular CD drive.)

Instructions for using your Visionary .VDF Transcript Viewer:

1) Insert the MiniCD in your disk drive.

2) Open the disk on your computer and you will see a folder with the deponent's name and the deposition date. Open this folder.

3) Click on the "Viewer Start" file to begin installation of the Visionary Viewer to your computer. It will take less than two minutes.

4) Once installation is complete, open the "data" folder to find your .VDF, .TXT and .PDF files. You can now open the .VDF file in the Visionary Viewer.

Please call us if you have any questions!