



ORIGINAL

LIBRARY OF CONGRESS

UNITED STATES COPYRIGHT ROYALTY JUDGES

The Library of Congress

-----X

IN THE MATTER OF:)

)

DETERMINATION OF RATES) Docket No.

AND TERMS FOR MAKING AND) 16-CRB-0003-PR

DISTRIBUTING PHONORECORDS) (2018-2022)

(PHONORECORDS III),)

-----X

OPEN SESSION

Pages: 3302 through 3610 (with excerpts)

Place: Washington, D.C.

Date: March 28, 2017

HERITAGE REPORTING CORPORATION

Official Reporters

1220 L Street, N.W., Suite 206

Washington, D.C. 20005

(202) 628-4888

contracts@hrcourtreporters.com

1 UNITED STATES COPYRIGHT ROYALTY JUDGES
2 The Library of Congress
3 -----X
4 IN THE MATTER OF:)
5)
6 DETERMINATION OF RATES) Docket No.
7 AND TERMS FOR MAKING AND) 16-CRB-0003-PR
8 DISTRIBUTING PHONORECORDS) (2018-2022)
9 (PHONORECORDS III),)
10 -----X
11 BEFORE: THE HONORABLE SUZANNE BARNETT
12 THE HONORABLE JESSE M. FEDER
13 THE HONORABLE DAVID R. STRICKLER
14 Copyright Royalty Judges
15
16 Library of Congress
17 Madison Building
18 101 Independence Avenue, S.E.
19 Washington, D.C.
20
21 March 28, 2017
22 9:20 a.m.
23 VOLUME XII
24 Reported by:
25 Karen Brynteson, RMR, CRR, FAPR

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

2 Counsel for National Music Publishers Association,

3 Nashville Songwriters Association International:

4 DAVID ZAKARIN, ESQ.

5 BENJAMIN K. SEMEL, ESQ.

6 FRANK SCIBILIA, ESQ.

7 LISA M. BUCKLEY, ESQ.

8 JAMES A. JANOWITZ, ESQ.

9 JOSH WEIGENSBERG, ESQ.

10 MARION HARRIS, ESQ.

11 WILLIAM L. CHARRON, ESQ.

12 KAVERI B. ARORA, ESQ.

13 Pryor Cashman, LLP

14 Seven Times Square

15 New York, New York 10036

16 212-421-4100

17 Counsel for Apple Music, Inc.:

18 DALE CENDALI, ESQ.

19 CLAUDIA RAY, ESQ.

20 MARY MAZZELLO, ESQ.

21 PHILLIP A.L. HILL, ESQ.

22 JOHANNA SCHMITT, ESQ.

23 Kirkland & Ellis, LLP

24 601 Lexington Avenue

25 New York, New York 10022

1 APPEARANCES (Continued):

2 Counsel for Pandora Media, Inc.:

3 PETER D. ISAKOFF, ESQ.

4 Weil Gotshal & Manges, LLP

5 1900 Eye Street, N.W.

6 Suite 900

7 Washington, D.C. 20005

8 202-882-7155

9

10 BENJAMIN E. MARKS, ESQ.

11 JENNIFER RAMOS, ESQ.

12 JACOB B. EBIN, ESQ.

13 Weil, Gotshal & Manges, LLP

14 767 Fifth Avenue

15 New York, New York 10153-0119

16 212-310-8029

17

18 DAVID SINGH, ESQ.

19 HONG-AN TRAN, ESQ.

20 Weil, Gotshal & Manges LLP

21 201 Redwood Shores Parkway

22 Redwood Shores, CA 94065

23 650-802-3000

24

25

1 APPEARANCES (Continued):

2 Counsel for Spotify USA, Inc.:

3 A. JOHN P. MANCINI, ESQ.

4 Mayer Brown LLP

5 1221 Avenue of the Americas

6 New York, New York 10020

7 212-506-2295

8

9 RICHARD M. ASSMUS, ESQ.

10 KRISTINE M. YOUNG, ESQ.

11 Mayer Brown LLP

12 71 S. Wacker Drive

13 Chicago, Illinois 60606

14 312-782-0600

15

16 PETER O. SCHMIDT, ESQ.

17 ANITA Y. LAM, ESQ.

18 Mayer Brown LLP

19 1999 K Street, N.W.

20 Washington, D.C. 20006

21 202-263-3000

22

23

24

25

1 APPEARANCES (Continued):

2 Counsel for Amazon Prime Music:

3 MICHAEL S. ELKIN, ESQ.

4 THOMAS PATRICK LANE, ESQ.

5 DANIEL N. GUISBOND, ESQ.

6 STACEY FOLTZ STARK, ESQ.

7 SCOTT M. AHMAD, ESQ.

8 Winston & Strawn, LLP

9 200 Park Avenue

10 New York, New York 10166

11 212-294-6700

12

13 Counsel for Google, Inc.:

14 KENNETH STEINTHAL, ESQ.

15 JOSEPH WETZEL, ESQ.

16 DAVID P. MATTERN, ESQ.

17 KATHERINE E. MERK, ESQ.

18 JASON BLAKE CUNNINGHAM, ESQ.

19 King & Spalding, LLP

20 101 Second Street, Suite 2300

21 San Francisco, CA 94105

22 415-318-1211

23

24

25

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

2 (9:20 a.m.)

3 JUDGE BARNETT: I offer my apologies.

4 This late start is solely my responsibility. I was
5 having so much fun at my desk, you'd have thought I
6 was an economist talking about Shapley.

7 (Laughter)

8 JUDGE BARNETT: We're still interrogating
9 Mr. Kokakis, correct?

10 MR. MANCINI: Yes, Your Honor.

11 JUDGE BARNETT: Oh, Mr. Mancini.

12 MR. SEMEL: Quick housekeeping matter?

13 JUDGE BARNETT: Yes.

14 MR. SEMEL: And all the participants have
15 spoken on this, so I think I'm speaking for
16 everyone, but I'm sure they will interrupt me if I'm
17 not. It has to do with the timing on the schedule.

18 So Your Honors, at the beginning, at the
19 outset of the case, gave us 20 days, estimating six
20 hours a day. That's 120 hours, and you allotted us
21 110 hours.

22 Over the course of the Services' direct
23 case, those ten hours with snow delays and gaps
24 have -- are gone. So now we have nine days left; at
25 six hours a day, is 54 hours. There are almost

1 exactly 54 hours allotted to the parties.

2 So we noted that -- I think last week or
3 the week before, you noted that in order to get a
4 reporter or adjust the schedule, we've got to do
5 something and we need advance notice. So we wanted
6 to raise the idea of provisionally holding Friday,
7 the 7th, for a court reporter, at least getting a
8 court reporter available in case there's some other
9 delay. It seems like running out of days before --
10 before time would be a problem. So that would just
11 be a back-stop measure.

12 JUDGE BARNETT: It is a problem, and we
13 will certainly run that up the flag pole and see
14 what we can do. And we'll let you know as soon as
15 we hear back on our status with regard to that.

16 MR. SEMEL: Great.

17 JUDGE BARNETT: Oh, and we also need to
18 look at our calendar. Would it -- would it be the
19 morning only on that Friday or --

20 MR. SEMEL: I think no one thinks we
21 necessarily would need to use it, but like we're
22 literally right now, and if we have to do six hours
23 a day every day, we'll end at 5:00 o'clock on the
24 last day.

25 JUDGE BARNETT: And that's the nicest way

1 I've ever been told to be on time.

2 MR. SEMEL: And, you know, obviously, we
3 can go over but, again, it's more just, you know,
4 what if we get another snow day, what if we have
5 something that comes up that's unanticipated?

6 JUDGE BARNETT: Bite your tongue.
7 Mr. Mancini?

8 MR. MANCINI: Thank you, Your Honor. We
9 can begin in open session, Your Honors.

10 JUDGE BARNETT: Thank you.

11 MR. MANCINI: We may switch to restricted
12 at some point.

13 Whereupon--

14 DAVID KOKAKIS,
15 a witness, called for examination, having previously
16 been duly sworn, was examined and testified further
17 as follows:

18 CROSS EXAMINATION -- RESUMED

19 BY MR. MANCINI:

20 Q. Good morning, Mr. Kokakis.

21 A. Good morning.

22 Q. I have only a few questions, and then the
23 other Services may have a few more.

24 Is Michael Sammis the chief financial
25 officer of Universal Music Publishing Group?

1 A. Yes, he is.

2 Q. And is JW Beekman the senior vice
3 president of finance for Universal Music Publishing
4 Group?

5 A. I can't recall his specific title, but I
6 believe he is the head of North American finance.

7 Q. And does Mr. Beekman report to
8 Mr. Sammis?

9 A. Yes, he does.

10 MR. MANCINI: Your Honors, at this time,
11 I'd like to cede my time to Mr. Marks.

12 JUDGE BARNETT: Thank you.

13 JUDGE FEDER: Will the gentleman yield?

14 CROSS-EXAMINATION

15 BY MR. MARKS:

16 Q. Good morning, Mr. Kokakis.

17 A. Good morning.

18 Q. Yesterday you testified about a winter
19 holiday being canceled as a result of Judge
20 Stanton's ruling in the BMI rate court that partial
21 withdrawals were not allowed under the BMI consent
22 decree.

23 Do you recall that testimony?

24 A. I do recall that, yes.

25 Q. And just to put a time frame on that,

1 that was the winter holiday at the end of 20 --
2 sorry, 2013 into 2014?

3 A. Yes, I believe that's correct.

4 Q. And the period for which Universal Music
5 Publishing was fully withdrawn from BMI was -- was
6 following that ruling for about a month, as you
7 explained yesterday?

8 A. Following the ruling, commencing as of
9 January 1st, 2014.

10 Q. And then at some point, Universal Music
11 Publishing suspended its withdrawal to rejoin BMI;
12 is that correct?

13 A. That is accurate, yes.

14 Q. And I'd like to turn your attention to
15 footnote 1 on page 15 of your written direct
16 testimony, in which you cite the Register's 2015
17 report on copyright and the music marketplace.

18 A. Would you please give me the reference
19 once more?

20 Q. Yeah, I'm sorry, it's footnote 1 on page
21 15 of your written direct testimony.

22 A. Yes, I see it.

23 Q. You're -- you're aware that the Copyright
24 Office undertook extensive fact gathering in
25 connection with the preparation of that report,

1 correct?

2 A. I believe that's accurate, yes.

3 Q. And the Copyright Office held a series of
4 public roundtables with participants representing
5 various aspects of the music industry?

6 A. Yes, I recall that.

7 Q. And, in fact, you participated in the
8 public roundtable held in June 2014 at the UCLA
9 School of Law?

10 A. Yes, I did.

11 Q. And at the time, you were the head of
12 business and legal affairs and business development
13 for Universal Publishing?

14 A. Yes, that's accurate.

15 Q. And you identified yourself as such
16 during the introductions?

17 A. I believe that's accurate, yes.

18 Q. And you stated at that public roundtable
19 that Universal Music Publishing was prepared to
20 fully withdraw from ASCAP and BMI, correct?

21 A. I believe that's accurate, yes.

22 Q. And you stated that the point of
23 withdrawing from ASCAP and BMI would be to get out
24 from under the thumb of the oppressive consent
25 decrees, right?

1 A. I don't recall the specific language that
2 I used, but that was likely the gist of it.

3 Q. And you stated that it was Universal's
4 intention to get out from under the -- the thumb of
5 the ASCAP and BMI consent decrees and that Universal
6 was prepared for that, right?

7 A. I don't recall the specific language, but
8 I know that was the general sentiment, yes.

9 Q. You stated that Universal could withdraw
10 tomorrow and it would be seamless, right?

11 A. That's being taken out of context. What
12 I referred to is that there wouldn't be that much
13 disruption in the marketplace as a result of a
14 publisher's withdrawal, meaning that the doomsday
15 scenario that was being predicted by several of the
16 licensees and other interested parties was not
17 realistic and a bit disingenuous in that there was a
18 lot of fear-mongering going on at the time that I
19 didn't think was warranted. So the point of me
20 saying that it would be seamless is to point out
21 that there wouldn't be that much disruption in the
22 marketplace. If I recall correctly, my testimony
23 was that there wouldn't be dozens upon dozens of
24 players in the performance space but, rather, six or
25 seven perhaps, would be existing societies and maybe

1 a few of the majors that might withdraw.

2 Q. Right. You didn't think the PROs would
3 go away if the publishers with the resources to
4 create the infrastructure to deal with licensing and
5 data management like Universal withdrew. They would
6 still exist for smaller publishers, but Universal
7 and other major publishers might withdraw?

8 A. I recall that being my testimony, yes.
9 What I said is that the existing societies would
10 continue on perhaps representing a smaller segment
11 of the marketplace and adjusting to changing market
12 conditions and that the -- the larger publishers who
13 had the resources to build out the infrastructure to
14 deal with direct licensing on a broad scale would
15 likely be the only parties that would be able to
16 withdraw from the societies completely.

17 Q. And there had been concerns expressed by
18 songwriters about the idea of publishers fully
19 withdrawing from ASCAP and BMI, correct?

20 A. That is accurate, yes.

21 Q. And Universal had considered the
22 songwriter concerns as part of its preparations to
23 fully withdraw, right?

24 A. We considered those concerns, but quite
25 candidly, we didn't consider them enough because

1 when we eventually did withdraw from BMI and did
2 engage in direct licensing, and had effectuated some
3 of the partial withdrawals that were eventually
4 overturned as a result of the rate court decisions,
5 many more songwriters came out to object than I had
6 anticipated. I had to meet with many of them. I
7 believe I met with about half a dozen writer trade
8 organizations at the time. And that is one of the
9 several reasons we ultimately decided to reaffiliate
10 with BMI because the opposition from the songwriter
11 community was overwhelming, despite our best
12 intentions and despite calming their -- their nerves
13 and -- and addressing some of their concerns.

14 Q. And -- and at the point in time of the
15 Copyright Office roundtable in June 2014 when you
16 said that Universal was prepared to fully withdraw,
17 as part of that, you said that you had fully
18 considered the songwriter concerns, right?

19 A. I had a new appreciation for the
20 songwriter concerns, and that is something that we
21 would take very seriously if we were ever to
22 reconsider our position on withdrawing from the
23 societies.

24 Q. And in response to concerns expressed by
25 songwriters about publisher withdrawals from ASCAP

1 and BMI, you stated that, if anything, withdrawal
2 would increase the value for the publishing
3 community and the writer community, right?

4 A. I believe that to be the case, not
5 necessarily because we would get higher rates from
6 the licensees, although that might be a hope to get
7 marginally better rates, but, rather, because there
8 would be a tremendous amount of cost savings at the
9 society level because there's a lot of waste, a lot
10 of fat to cut at the society level.

11 I think I even stated in my testimony
12 that there was corruption at the society level,
13 which I do believe to be the case, perhaps not in
14 the U.S. as much as outside of the U.S., but
15 certainly they take liberties that I -- I think are
16 a bit questionable. And part of getting out of the
17 societies, a great part, was to streamline the
18 licensing process to make it easier for Services to
19 go to market, to cut a lot of the fat, to engage in
20 cost savings measures -- measures.

21 And if you look at many of the direct
22 licenses that -- that we did in the performance
23 space, you'll see that rates did not actually
24 increase. We didn't gouge the licensees as many
25 feared we would. What we were looking to do was

1 save costs and get out from the thumb of the
2 societies as much as the -- the thumb of the consent
3 decrees.

4 MR. MARKS: At this point, we need to go
5 into restricted session. It's very brief.

6 JUDGE BARNETT: We will briefly -- we
7 will briefly close the hearing room for those who
8 are not permitted to hear this information.

9 Thank you.

10 (Whereupon, the trial proceeded in
11 confidential session.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 O P E N S E S S I O N

2 REDIRECT EXAMINATION

3 BY MR. SCIBILIA:

4 Q. Good morning, Mr. Kokakis.

5 A. Good morning.

6 Q. A few quick questions. Mr. Marks was
7 speaking with you earlier about some statements made
8 in 2014 regarding withdrawals. Does Universal Music
9 Publishing Group have any current intention to fully
10 withdraw from PROs?

11 A. No, for the reasons that I stated
12 yesterday.

13 Q. Right. And are the songwriter concerns
14 that Mr. -- Mr. Marks mentioned one of those
15 reasons?

16 A. Certainly. It's a big reason. I -- I
17 wouldn't want to do something that would alienate
18 our clients to the extent that I think a full
19 withdrawal would.

20 We have a new appreciation for how
21 sensitive we have to be to that issue. I think we
22 made some assumptions because we had good intentions
23 and -- and the intent of -- of withdrawal at the
24 time we were considering it was for the benefit not
25 only of ourselves but for the songwriters. That's

1 the primary driver for -- for why we were looking to
2 potentially withdraw.

3 And we simply didn't fully appreciate the
4 backlash in the writer community that we would
5 experience. So, yes, that was a huge deterrent to
6 us reconsidering withdrawal. And it's a huge
7 deterrent today.

8 Q. And -- and are costs also a factor that
9 was considered in considering or reconsidering
10 withdrawal?

11 A. Certainly, costs are a primary concern.
12 As I believe I testified yesterday, we would have to
13 invest likely tens of millions of dollars into
14 building out the infrastructure to cover all of the
15 licensing points that the societies currently cover
16 and staff up with dozens of new licensing
17 executives.

18 And one thing I didn't mention, which I
19 -- I think is relevant, which came out of
20 discussions with the writer groups and their
21 representatives, is that the legal basis upon which
22 we could potentially withdraw is questionable. And
23 I would expect there to be litigation around an
24 attempt at withdrawal.

25 So lots of reasons why we would have to

1 think very carefully about revisiting this issue.

2 Q. Okay. And Mr. Mancini asked you
3 yesterday -- I was a little bit confused by your
4 testimony and I wanted to see if you can clarify it.

5 He asked you would you agree that, absent
6 an alternative to piracy, the users would continue
7 to return to pirate sites like BitTorrent and other
8 music pirate sites. And you said, "I recall that
9 being discussed."

10 I want to ask you, where was that
11 discussed?

12 A. In my deposition, I recall that question,
13 that same question, being asked in my deposition.

14 Q. Oh, okay.

15 And then Mr. Mancini also asked you
16 whether you knew when on-demand streaming services
17 launched in the United States, and you referenced
18 working at Greenberg Traurig and doing a deal with
19 Apple.

20 Do you know whether that deal with Apple
21 was for streaming or for something else?

22 A. I -- I must have been confused about the
23 question. I thought the question was specifically
24 concerning Apple launching its digital service,
25 which I thought was a reference to the download

1 service, which launched in around 2001. So I recall
2 being in private practice at Greenberg Traurig at
3 the time representing several record labels and
4 Apple coming to me for licenses for sound recording
5 rights for its download service.

6 The Apple streaming service didn't launch
7 until maybe 2013, end of 2013. Streaming in general
8 prior to that with services like Spotify -- I can't
9 recall the exact year that Spotify launched.

10 Q. Okay.

11 MR. SCIBILIA: I have no further
12 questions. I just wanted to move into evidence the
13 remaining exhibits to Mr. Kokakis's written direct
14 testimony and his rebuttal testimony. And I believe
15 he testified, you know, earlier that he worked on
16 all those agreements, he negotiated them or was
17 involved in the negotiation of them. So I'd like to
18 move them into evidence at this time.

19 JUDGE BARNETT: Could you give us the
20 numbers?

21 MR. SCIBILIA: Sure. Exhibits 181, 757,
22 804, 805, 806, 807, 1094. And then there's a range.
23 That would save time in giving you a range, which is
24 2504 through 2529, inclusive, and the range 2605
25 through 2608, inclusive.

1 JUDGE BARNETT: Okay.

2 MR. ELKIN: Objection with respect to the
3 pending motion in limine.

4 JUDGE BARNETT: Okay. Thank you,
5 Mr. Elkin. And thank you, Mr. Scibilia.

6 MR. SCIBILIA: Thank you, Your Honors.

7 JUDGE BARNETT: They are admitted,
8 subject to pending motion in limine.

9 (Amazon Exhibit Number 181 was marked and
10 received into evidence.)

11 (Google Exhibit Numbers 757, 804, 805,
12 806, and 807 were marked and received into
13 evidence.)

14 (Pandora Exhibit Number 1094 were marked
15 and received into evidence.)

16 (Copyright Owners Exhibit Numbers 2504
17 through 2529 and 2605 through 2608 were marked and
18 received into evidence.)

19 JUDGE BARNETT: Mr. Kokakis, you may be
20 excused.

21 THE WITNESS: Your Honors, thank you very
22 much.

23 JUDGE BARNETT: Would the Copyright
24 Owners like to call another witness?

25 MR. CHARRON: Mr. Jim Timmins is coming

1 up in a moment.

2 JUDGE BARNETT: Before you are seated,
3 Mr. Timmins, will you please raise your right hand.
4 Whereupon--

5 JAMES DONALD TIMMINS,
6 having been first duly sworn, was examined and
7 testified as follows:

8 JUDGE BARNETT: Please be seated.

9 MR. CHARRON: Good morning, Your Honors.
10 Again, William Charron from Pryor Cashman.

11 DIRECT EXAMINATION

12 BY MR. CHARRON:

13 Q. And good morning, Mr. Timmins. Would you
14 please state and spell your name for the record.

15 A. James Donald Timmins, T-i-m-m-i-n-s, but
16 I go by Jim.

17 Q. Where did you graduate from college?

18 A. The University of Toronto in Canada.

19 Q. And do you hold any postgraduate degrees?

20 A. I do. I have a Master's in business
21 administration from Stanford University.

22 Q. Do you have any experience working with
23 emerging growth technology-based companies?

24 A. For the bulk of my more than 35-year
25 career, that's exactly what I've done, is work with

1 emerging growth companies.

2 Q. Would you please walk the Judges through
3 your employment history since receiving your MBA and
4 explain that experience.

5 A. I graduated in 1981, and I went to Wall
6 Street working for a large investment banking firm,
7 Salomon Brothers, helping with financings and merger
8 and acquisition transactions. After a short time
9 there, a few years, I decided that I really liked
10 working with technology-based companies, so I moved
11 to Hambrecht & Quist in San Francisco. And that is
12 a firm that's famous for having backed such
13 companies originally as Apple, Genentech, Adobe, and
14 a host of other technology-driven businesses.

15 After about a decade of investment
16 banking, I moved into venture capital investing, and
17 I was with a Sand Hill -- Sand Hill Road firm
18 investing in emerging growth companies, funding
19 them, sitting on boards of directors, helping them
20 through to an initial public offering or a merger
21 acquisition event.

22 And, finally, for about the last decade,
23 I've been doing financial advisory work, primarily
24 business valuation, at a firm I founded nine years
25 ago by the name of Teknos Associates.

1 JUDGE STRICKLER: How long were you with
2 the venture capital firm that you spoke of?

3 THE WITNESS: 15 years.

4 BY MR. CHARRON:

5 Q. What does it mean to do business
6 valuation work?

7 A. So my firm, which has about 20 employees,
8 is providing valuations to help companies and
9 investors with tax compliance, financial reporting,
10 transactions, and sometimes with litigation.

11 Q. Do you also have experience evaluating
12 markets?

13 A. I do. For basically every valuation
14 includes an evaluation of the market in which that
15 company is operating. So looking at supply, looking
16 at demand, seeing if there are constrictions of any
17 sort operating in that market.

18 Q. Have you earned any credentials in your
19 field?

20 A. I have. I have four that are related to
21 valuation in one way or another. Two from the
22 American Society of Appraisers. I'm an accredited
23 senior appraiser in both business valuation and in
24 intangible assets. I'm a master analyst in
25 forensics, and I'm a certified equity professional.

1 Q. Do you do any teaching or lecturing on
2 the subject of emerging growth companies?

3 A. I have. I've taught at my alma mater, at
4 the business school at Stanford, and across the bay
5 at the University of California, Berkeley, both the
6 law school and the business school there, at the law
7 school at Santa Clara University, and the Wharton
8 School, the business school, at the University of
9 Pennsylvania.

10 Plus I've taught some classes for the
11 American Society of Appraisers in valuation in the
12 litigation context. And for the Practicing Law
13 Institute, I've taught classes to attorneys about
14 term sheets and such things.

15 Q. Have you ever testified at trial as an
16 expert witness on the subject of valuing emerging
17 growth technology-driven businesses or markets?

18 A. I have.

19 Q. About how many times?

20 A. Ten to 15 times.

21 Q. Have you ever testified on behalf of any
22 governmental bodies?

23 A. Yes. On behalf of the Internal Revenue
24 Service.

25 Q. Was that in connection with a business

1 valuation matter?

2 A. It was. It was the case of Amazon.com
3 versus Commissioner.

4 Q. Have you ever served as a special master
5 for any court?

6 A. I'm currently a special master in a case
7 which is being heard in Delaware Chancery Court.
8 It's a consolidation of a number of cases that
9 involve a series of cellular partnerships and AT&T.

10 MR. CHARRON: Your Honors, at this time,
11 the Copyright Owners would offer Mr. Timmins as an
12 expert in the area of valuing emerging growth
13 technology-driven businesses and markets.

14 MR. STEINTHAL: We will reserve our
15 questioning for cross and not challenge this.

16 JUDGE BARNETT: Thank you, Mr. Steintal.
17 Mr. Timmins is so qualified.

18 BY MR. CHARRON:

19 Q. Mr. Timmins, in that binder in front of
20 you, would you please turn to Exhibit 2689. That's
21 the written testimony of David Pakman.

22 A. I have it before me.

23 Q. Have you ever seen this report before?

24 A. I have.

25 JUDGE BARNETT: Mr. Charron, this has

1 already been admitted?

2 MR. CHARRON: It has, Your Honor.

3 BY MR. CHARRON:

4 Q. Were you asked to offer any opinions
5 about Mr. Pakman's report?

6 A. I was. I was retained as a rebuttal
7 expert in connection with Mr. Pakman's report.

8 Q. Okay. Would you now turn to tab 3036 in
9 the binder.

10 A. I have that before me.

11 Q. Okay. Do you recognize this document?

12 A. I have.

13 Q. And what is it?

14 A. It's a rebuttal report which I prepared.

15 Q. Could you turn to the last page before
16 the appendix. Is that your signature?

17 A. It is.

18 MR. CHARRON: Your Honors, I move for the
19 admission of Exhibit 3036.

20 MR. STEINTHAL: No objection.

21 JUDGE BARNETT: 3036 is admitted.

22 (Copyright Owners Exhibit Number 3036 was
23 received into evidence.)

24 BY MR. CHARRON:

25 Q. All right. I'm sorry to do a little bit

1 of back and forth with you right now, but I have to
2 ask you first to look again at Mr. Pakman's report.
3 I'm sorry.

4 A. Would you remind me of the number?

5 Q. All right. So I'm told that the report
6 of David Pakman that you looked at was actually from
7 the Web IV proceeding. His report in this
8 proceeding is Exhibit 696 in your tab, which is in
9 the front -- front part.

10 MR. CHARRON: That has also been
11 admitted, Your Honor. I don't know if his Web IV
12 report was admitted.

13 THE WITNESS: I'm sorry, the number
14 again?

15 BY MR. CHARRON:

16 Q. 696. Apologize for the confusion.

17 JUDGE BARNETT: Ms. Whittle, was the
18 other Pakman report admitted earlier?

19 THE CLERK: It has not been admitted --
20 696 was admitted, right.

21 JUDGE BARNETT: Are you going to be
22 asking that the Web IV report be admitted?

23 MR. CHARRON: No.

24 JUDGE BARNETT: No? Okay. So 2689 is
25 not admitted. Okay. Thank you.

1 BY MR. CHARRON:

2 Q. Sorry about that. Okay. Looking at 696,
3 Mr. Pakman's report in this proceeding, if I could
4 ask you to turn to page 4 and paragraph 13A.

5 JUDGE STRICKLER: What's the reference
6 again?

7 MR. CHARRON: 13A on page 4.

8 JUDGE STRICKLER: Thank you.

9 THE WITNESS: I have it before me.

10 BY MR. CHARRON:

11 Q. Mr. Pakman takes the position that "the
12 digital music service industry has fared poorly,
13 that "there is a high failure rate" for digital
14 music services and that there is a "low level of
15 investment" in digital music services that is
16 "stifling growth" in this industry.

17 Do you agree with those positions?

18 A. I do not.

19 Q. Why not?

20 A. Because they are contradicted by evidence
21 from the marketplace, which I can see.

22 Q. What do you mean by that?

23 A. On the demand side, there is a large and
24 accelerating growth in the number of subscribers.
25 On the supply side, there is a significant number of

1 companies which have entered the marketplace and are
2 supplying streaming music to those would-be
3 subscribers.

4 And there is a large amount of capital
5 that has been devoted to this marketplace as well.
6 The disclosed capital, which I could readily find,
7 totalled about 2 billion dollars in recent years.
8 And, of course, there's undisclosed capital that's
9 coming from the large diversified companies that are
10 investing in the segment as well.

11 JUDGE STRICKLER: Excuse me. You say "as
12 well." Have you seen a change in the composition of
13 those who are interested in entering this market on
14 the supply side?

15 THE WITNESS: I have. The -- the large
16 diversified companies have grown to include more
17 than Apple, which was historically involved in paid
18 digital downloads, to include Amazon and Google.

19 JUDGE STRICKLER: Have you seen a -- an
20 increase at all with regard to what has been
21 described here as pure-play interactive streamers as
22 opposed to the diversified ones you just spoke of?

23 THE WITNESS: I think that most of the
24 pure-play streamers which are in the market now have
25 been in the market for a few years. So I have not

1 seen the entrance of any new startup pure-play
2 streamers in the last year or two.

3 JUDGE STRICKLER: Thank you.

4 BY MR. CHARRON:

5 Q. All right. Now I'm going to ask you to
6 turn back to your report, which is Exhibit 3036.
7 And, in particular, to the table of contents.

8 A. I have it before me.

9 Q. Using your table of contents as a guide,
10 I'd like you to summarize for the Judges what
11 analysis you did in each main section of your
12 report, starting with Roman numeral III, titled The
13 Market For Streaming Music is Growing and
14 Prospering.

15 Can you explain what you meant by that
16 statement?

17 A. As I said a moment ago, there is a large
18 number of subscribers, and the rate of growth of
19 subscribers is not only increasing; it's actually
20 accelerating in the last couple of years. And the
21 number of subscribers passed the 100 million mark
22 recently.

23 There are a significant number of market
24 participants who are providing, and many of them are
25 large companies, household names. There is a very

1 substantial amount of money that has been made
2 available to the marketplace, both the disclosed and
3 undisclosed amounts. There have been acquisitions
4 that also indicate that substantial funds are being
5 deployed in the marketplace.

6 Q. In Roman numeral III-C, you say large
7 diversified companies reap other benefits from
8 streaming operations. What do you mean by that?

9 A. To cite just a few examples, some of the
10 large diversified companies have hardware
11 operations, which are apparently also benefitting
12 from music streaming. I'm thinking here of Amazon
13 with its iPhones that are used as a platform. I'm
14 sorry, did I say Amazon? I meant Apple.

15 And I'm also thinking of Amazon with its
16 Echo, and the most frequent use of that is for
17 streaming in the household. In addition, Google has
18 substantial social media operations, and there's a
19 good deal of cross-fertilization between streaming
20 music and social media.

21 JUDGE STRICKLER: Excuse me. Thank you,
22 counsel.

23 A question for you. You -- in your
24 summary, you were going through Roman III, which
25 begins on page 5 of your written rebuttal testimony.

1 THE WITNESS: The actual --

2 JUDGE STRICKLER: The actual -- well,
3 will you actually look at the table of contents for
4 the moment, I guess, because the -- the Roman III is
5 captioned "the market for streaming music is growing
6 and prospering." And I see that -- you know, some
7 subsections within that. And the first one is A,
8 "the streaming music market is growing, drawing in
9 new participants and investors."

10 Do you see that?

11 THE WITNESS: I do.

12 JUDGE STRICKLER: So I was looking for
13 another section that would get to the other part of
14 your Roman numeral title, which is that the
15 streaming market -- streaming music is prospering.
16 Now, I note that you didn't use the word
17 "prospering" in any of the headings in B and C, so I
18 was wondering if you could draw my attention to
19 where in Roman III you discuss the fact that the
20 market for streaming music is prospering.

21 THE WITNESS: The -- the evidence that I
22 took for that, Your Honor, was the large number of
23 subscribers, the accelerating rate of growth of the
24 subscribers, the -- the large number of market
25 participants, and the amount of capital being

1 devoted to the market.

2 JUDGE STRICKLER: That's what you meant
3 by "prospering"?

4 THE WITNESS: It is.

5 JUDGE STRICKLER: Thank you.

6 BY MR. CHARRON:

7 Q. Mr. Timmins, when you testified earlier
8 about what's involved in evaluating a market, you
9 said you looked for constrictions in the market.
10 What do you mean by that?

11 A. Venture capital firms like to find
12 markets where there is something that is restricting
13 access, whether it's a restriction in demand or more
14 commonly a restriction in supply. A technology
15 problem, a problem with the expense of a product or
16 something of that sort.

17 And venture capitalists like to deploy
18 their dollars to a solution that will remove that
19 restriction, thereby increasing the flow of supply
20 to demand and enabling them to generate a profit.

21 Q. In an emerging growth market context, are
22 you looking for the existence of accounting profits
23 by existing suppliers within that market?

24 A. Well, not at the time of the investment,
25 no.

1 Q. Why not?

2 A. Because it's commonly understood that in
3 an emerging market, a large upfront investment must
4 be made to fund the operating losses that will
5 necessarily flow from developing product, developing
6 markets, access to consumers, things of that sort.

7 Q. Can a market be prospering, to use your
8 word, if the businesses within that market are not
9 showing GAAP or accounting profits?

10 A. Yes, it can.

11 Q. How so?

12 A. As I said before, if there is demand and
13 the market is capable of providing supply, if
14 capital recognizes that and is being deployed in the
15 market, then the conditions are ripe for that market
16 to grow and prosper.

17 Q. Looking, again, at your table of
18 contents, Roman numeral IV, the point heading says
19 "most venture capital investments are unsuccessful,
20 and Mr. Pakman fails to show that investments in
21 digital music companies have fared any worse than
22 investments in comparable companies."

23 I'm going to break that into two pieces.
24 Could you please tell the Judges what you meant by
25 the first part, where you say "most venture capital

1 investments are unsuccessful"?

2 A. So I've been watching the venture capital
3 market for more than 30 years, and I've come to
4 understand that most investments in companies by
5 venture capital firms will not generate a positive
6 return.

7 There are long-term studies across the
8 entirety of the venture capital business done by
9 reputable authorities that show about 50 percent,
10 slightly less than 50 percent of all companies in
11 which venture capitalists make an investment do not
12 return any capital. Zero.

13 And, furthermore, a total of about
14 75 percent of all companies in which venture capital
15 firms invest, in other words, in an additional
16 25 percent of all companies, barely return capital.
17 So 75 percent of all companies don't return capital,
18 of which two-thirds, 50 percent, don't return even a
19 penny.

20 And that is an experience across all
21 sectors of venture capital investing, across
22 multiple decades.

23 Q. And what did you mean by the other part
24 of your statement in Roman numeral IV, that
25 Mr. Pakman fails to show that investments in digital

1 music companies have fared any worse than
2 investments in comparable companies?

3 A. Mr. Pakman performed an analysis, which I
4 found wanting in a number of ways, and the end
5 result of that was that he did not demonstrate that
6 there were greater rates of failure for digital
7 music companies.

8 Q. Mr. Pakman worked with data reported by
9 PitchBook and took the position that venture
10 capitalists have fared more poorly in the digital
11 music sector than in other sectors.

12 Do you have any criticisms of
13 Mr. Pakman's analysis?

14 A. I do. Setting as a benchmark what a good
15 study looks like, a good, reliable study lays out
16 all of its data in totality and then measures its
17 results by objective and unchanging standards.

18 And the purpose of this is so that a
19 later observer can replicate the work to
20 authenticate the results. Mr. Pakman's analysis did
21 not lay out all of the data. He didn't even give a
22 date range for the data.

23 And he used changing standards within his
24 analysis and, in some instances, excluded companies
25 simply based on what we think to have been about

1 30-second observations and his own judgment and
2 experience. The end result is something that I
3 would not consider reliable.

4 Q. Does the success of venture capitalists
5 within the digital music sector indicate the health
6 of the digital music market?

7 A. I don't think so.

8 Q. Why not?

9 A. I think that there are adequate amounts
10 of capital being provided, whether from venture
11 capital sources, other forms of institutional
12 investors or corporate investors. That's what one
13 ought to look at. And I find that there are large
14 amounts of capital being deployed by institutional
15 investors and in all likelihood by corporate
16 investors.

17 Q. One more back and forth, if you could
18 turn, again, to Mr. Pakman's report, Exhibit 696.
19 In particular, to page 19, paragraph 38.

20 A. Now I've done it.

21 Q. Don't worry about it.

22 MR. CHARRON: Can I approach him for a
23 minute, Judge?

24 THE WITNESS: Did you say page 8?

25 BY MR. CHARRON:

1 Q. Page 19, paragraph 38.

2 A. I'm there.

3 Q. Mr. Pakman says in that paragraph, "It is
4 important to create a market whereby scores of
5 digital music services can prosper and pay
6 rightsholders for their works."

7 Do you agree that the digital music
8 market needs to include scores of providers to be a
9 healthy market?

10 A. I do not.

11 Q. Why not?

12 A. I think that it's sufficient if the
13 market has a number of different providers, enough
14 to stimulate healthy competition. It doesn't need
15 20, 40, 60, whatever "scores" means.

16 Q. Do you consider the digital music market
17 to be an established market or a relatively new
18 market?

19 A. It's a relatively new market. I know
20 that there were -- there was a company operating in
21 it as far back as 2001, but the bulk of the
22 companies have entered the market with these product
23 offerings in the last few years, especially in the
24 last two or three years.

25 JUDGE STRICKLER: Does the fact that it's

1 a relatively new market indicate that the
2 possibilities of success and ultimate profitability
3 are -- are less certain than in a more mature
4 industry?

5 THE WITNESS: Well, I guess the market
6 skeptic in me would be not comfortable assuming that
7 there would be certain products even in a mature
8 industry.

9 JUDGE STRICKLER: Fair enough. But all
10 other things being held constant, is a more mature
11 market more likely to exhibit profitability than a
12 relatively new market?

13 THE WITNESS: Yes, under that set of
14 circumstances, absolutely.

15 JUDGE STRICKLER: Thank you.

16 BY MR. CHARRON:

17 Q. Last time flipping back to your report,
18 to your table of contents, your final substantive
19 point heading, Roman numeral Number V.

20 A. I don't know. I think that the table of
21 contents was spirited away with the --

22 Q. I'll give you my copy.

23 A. Thank you.

24 (Whereupon, the trial proceeded in
25 confidential session.)

1 O P E N S E S S I O N

2 BY MR. CHARRON:

3 Q. One last question, Mr. Timmins. Last
4 week, Mr. Pakman said that he viewed the terms of
5 the 1 billion dollar Spotify convertible debt
6 financing as "severe."

7 Do you agree with that view?

8 A. I do not.

9 Q. Why not?

10 A. I examined the terms as they were
11 disclosed in the press, and the starting interest
12 rate for the convertible debt offering was
13 5 percent. A market rate for a non-investment grade
14 company, which I presume that Spotify is, based on
15 my examination of market rates would be 8 to
16 10 percent.

17 So 5 percent is considerably below
18 market. Now, that -- that in and of itself is
19 justified by the fact that there is a call option
20 which the investors hold into the stock of Spotify
21 in the form of the conversion feature. And so I
22 then looked at the conversion feature, and the
23 initial conversion discount is 20 percent from the
24 eventual IPO price.

25 And that, again, is relatively close to a

1 market standard term. The terms do ratchet up, the
2 interest rate increases, and the size of the
3 discount increase with the passage of time at the --
4 after the passage of one year, they begin to
5 increase at a -- in a stair-step fashion.

6 And by my estimation -- and this seems to
7 be the consensus in the press as well -- that's
8 designed to put some pressure on Spotify to move
9 towards a public offering.

10 JUDGE STRICKLER: You wouldn't define
11 that staircase escalation as onerous?

12 THE WITNESS: Not from the terms that I
13 saw, Your Honor. The interest rate seemed to be
14 capped at 10 percent, which I outlined a moment ago
15 would seem to be a about a market rate for a
16 non-investment grade credit such as Spotify.

17 I don't know what the limit is on the --
18 the conversion discount. That was not in the press
19 reports anywhere. But the rate at which it changed
20 did not seem to be abnormally large.

21 JUDGE STRICKLER: We -- we explored,
22 counsel did and also from the bench, we explored
23 some of those issues with Mr. Pakman. And when he
24 was asked about the interest rate in particular, he
25 made the point that because it's not strictly

1 speaking debt financing, but it's convertible, the
2 interest rate is really not the item that you want
3 to focus on; it's -- I don't know if he said it.
4 You just said it. It's the -- it's the
5 convertibility features that are more important.

6 Do you have an opinion on that?

7 THE WITNESS: When investors -- when -- I
8 worked at Salomon Brothers, as I said, early in my
9 career, and there and at Hambrecht & Quist, I did
10 participate in offering convertible debt offerings.
11 And what I learned about convertible debt offerings
12 from that, albeit 30 some years ago, was that they
13 -- they do very much want to know that they're
14 getting a good price on the equity security into
15 which they have the call option.

16 But they're mindful of the current yield
17 in the meantime. So they never put the yield out of
18 their mind entirely.

19 JUDGE STRICKLER: So the convertibility
20 discount is -- is more important, but the -- the
21 interest rate on the debt prior to conversion
22 remains of some importance?

23 THE WITNESS: Exactly.

24 JUDGE STRICKLER: Thank you.

25 MR. CHARRON: I have no further questions

1 on direct. I understand I do need to move in the
2 exhibits by number that Mr. Timmins relied upon in
3 his report. Should I just read those through now?

4 JUDGE BARNETT: Are those part of that
5 chunk of pages you took out of the notebook?

6 MR. CHARRON: That -- that's right.

7 JUDGE BARNETT: And they will go back
8 into the --

9 MR. CHARRON: They will.

10 JUDGE BARNETT: -- before the clerk has a
11 heart failure incident. Okay. Then let's hear the
12 exhibit numbers that you're offering.

13 MR. CHARRON: The numbers are 19, 21, 30,
14 302, 1437 --

15 MR. STEINTHAL: These are all in the
16 binder?

17 MR. CHARRON: Yes. They're all what he
18 relied on in his report.

19 MR. STEINTHAL: Excuse me?

20 MR. CHARRON: They're all part of his
21 report, what he cited to in his report, same
22 exhibits. 1438, 1474, 1548, 2617, 2620, 2621
23 through 2643, 2646 through 2668, 2670 through 2673,
24 2680, 2681, 2684, 2685, 2688, 2689, 2752, 2764, and
25 2974.

1 JUDGE BARNETT: And, Mr. Charron, you're
2 offering these as -- not for the truth of the matter
3 but as documents upon which this witness relied in
4 forming his opinions?

5 MR. CHARRON: Correct.

6 JUDGE BARNETT: Okay. Mr. Marks.

7 MR. MARKS: I just wanted to clarify
8 that. On that basis, we don't object, but we would
9 otherwise.

10 JUDGE BARNETT: Okay.

11 MR. STEINTHAL: Same here.

12 JUDGE BARNETT: The enumerated exhibits
13 are admitted.

14 (Amazon Exhibit Numbers 19, 21, 30, and
15 302 were marked and received into evidence.)

16 (Apple Exhibit Numbers 1437, 1438, 1474,
17 and 1548 were marked and received into evidence.)

18 (Copyright Owners Exhibit Numbers 2617,
19 2620, 2621 through 2643, 2646 through 2668, 2670
20 through 2673, 2680, 2681, 2684, 2685, 2688, 2689,
21 2752, 2764, and 2974 were marked and received into
22 evidence.)

23 MR. CHARRON: Thank you.

24 MR. ZAKARIN: I'm going to fix the
25 binder, and you can deal with cross-examine.

1 JUDGE BARNETT: We're going to take our
2 morning recess to give you that opportunity.

3 MR. ZAKARIN: Thank you, Your Honor.

4 JUDGE BARNETT: 15 minutes.

5 (A recess was taken at 10:16 a.m., after
6 which the hearing resumed at 10:39 a.m.)

7 JUDGE BARNETT: Please be seated.
8 Mr. Steinthal?

9 MR. STEINTHAL: Thank you.

10 CROSS-EXAMINATION

11 BY MR. STEINTHAL:

12 Q. Good morning, Mr. Timmins.

13 A. Good morning.

14 Q. Now, the primary point of your engagement
15 in this matter was to rebut Mr. Pakman's findings
16 regarding the lack of venture capital investments in
17 digital music companies, correct?

18 A. No, it was slightly larger than that. It
19 was also to rebut his statements about the condition
20 of the market.

21 Q. But it was to rebut Mr. Pakman, right?

22 A. It was to rebut Mr. Pakman.

23 Q. And you specifically disagree that
24 venture capital-backed digital music companies have
25 lower success rates compared to the other markets he

1 looked at, correct?

2 A. I don't agree with any of his analysis.
3 And as a consequence, I can't come to a conclusion
4 about whether digital music companies succeed or
5 fail at different rates from the other three
6 categories which he chose.

7 Q. So you formed no conclusion as to that
8 question, correct?

9 A. I -- I presented a conclusion that his
10 results were so unreliable that it's not possible to
11 draw a specific conclusion from them.

12 Q. You didn't answer my question. You
13 reached no conclusion and expressed no opinion on
14 the issue of whether venture capital-backed
15 investment in digital music companies fail or
16 succeed more or less than the three other sectors he
17 looked at, right?

18 A. I did not.

19 Q. Now, in making the criticisms that you
20 make of Mr. Pakman's report, you did not undertake
21 your own quantitative analysis regarding whether
22 venture-backed digital music services have a lower
23 or a higher success rate than the three other
24 markets that he looked at, correct?

25 A. I did not. It was not necessary for me

1 to do that.

2 Q. Now, you are familiar with the PitchBook
3 Platform used by Mr. Pakman, correct?

4 A. I have been marketed by the PitchBook
5 company, yes.

6 Q. And you agree, do you not, that you could
7 have gained access to PitchBook in order to
8 replicate Mr. Pakman's analysis by subscribing to
9 the PitchBook Platform?

10 A. I could have done so.

11 Q. And you mentioned in your testimony on
12 direct that Mr. Pakman had not provided the date
13 parameters for his searches, but you were here in
14 the courtroom, weren't you, when Mr. Pakman
15 testified that he did not date-limit his searches,
16 correct?

17 A. I was not here in the courtroom.

18 Q. You don't dispute that he so testified?

19 A. I don't recall whether he so testified.

20 Q. Now, in submitting your testimony, it is
21 true, is it not, that other than your personal
22 experience, you relied solely on the one-page list
23 in Appendix B to your report, which I'd like to put
24 up, of the testimony and briefs and a handful of
25 case documents that are listed on Appendix B,

1 correct, plus the many, many articles you cite in
2 the text and footnotes of your report?

3 A. I can't see the entirety of this page.

4 Q. I can give you Appendix B. It's the last
5 page of your report, which I think you have up
6 there.

7 A. Thank you. Yes, I have it before me.
8 And that is the material upon which I relied beyond
9 my own experience.

10 Q. Thank you.

11 A. And beyond what's noted in the footnotes.

12 Q. Yes. And there are many, many newspaper
13 articles and other materials cited in your
14 footnotes, correct?

15 A. There are, and also the National Venture
16 Capital Association Yearbook and some scholarly
17 books.

18 Q. Right. And you mentioned in your direct
19 testimony -- and I was a little confused by it --
20 studies of venture capital investments you may have
21 done. It's true, is it not, that you didn't perform
22 any studies in connection with your written rebuttal
23 testimony, other than as reported in your written
24 direct testimony, correct?

25 A. That is correct. I've been an observer

1 of the market and I've, in particular, looked at the
2 studies performed by other reputable sources.

3 Q. Now, you list, in your written testimony
4 in paragraph 3, eight companies in the consumer
5 entertainment and related infrastructure industry
6 for which you have performed advisory or
7 fund-raising services and/or sat on their boards,
8 correct?

9 A. That is correct.

10 Q. And of the eight companies listed, only
11 three of them, imeem, Stitcher, and TouchTunes, were
12 engaged in music distribution of any kind, correct?

13 A. That is correct.

14 Q. And you performed valuation services for
15 those companies, did you not?

16 A. For those three companies. Other
17 services for the other companies.

18 Q. And other than to the limited extent that
19 you came into contact with the cost structures of
20 the companies you identified for which you've
21 performed valuation services, you've not before this
22 case had any experience dealing with music rights
23 and royalty structures, correct?

24 A. Just checking back through my experience.
25 Yes, that is correct.

1 Q. Let's talk about the company imeem that
2 you mentioned for a moment. Imeem operated a
3 free-to-user interactive music streaming service in
4 the mid-2000s, did it not?

5 A. That's my recollection.

6 Q. And it raised funding of approximately
7 100 million dollars, correct?

8 A. That's what published accounts say.

9 Q. And it's true, is it not, that imeem
10 ultimately was sold in -- in 2009 to MySpace for
11 less than 1 million dollars, right?

12 A. I do not know that for a fact.

13 Q. You know it has been reported in the
14 press, however, correct?

15 A. I have seen that press report. You
16 presented it at my deposition.

17 Q. And you have no basis to dispute the fact
18 that imeem sold for less than a million dollars and
19 will agree with me that it was shown in a press
20 report, right?

21 A. I agree with you that it was shown in a
22 press report. I have no way of knowing whether that
23 was the actual outcome.

24 JUDGE STRICKLER: And when you testified
25 on direct, when you were talking about the Spotify

1 IPO, you got your information from press reports
2 there, correct?

3 THE WITNESS: I did.

4 JUDGE STRICKLER: Thank you.

5 BY MR. STEINTHAL:

6 Q. Let me have you take a look at Google
7 Trial Exhibit 1703. It's in your binder.

8 JUDGE STRICKLER: What's the number
9 again, counsel?

10 MR. STEINTHAL: 1703.

11 JUDGE STRICKLER: Thank you.

12 THE WITNESS: Is it in the large binder
13 or the small binder?

14 BY MR. STEINTHAL:

15 Q. It's in the binder called
16 cross-examination exhibits, Jim Timmins.

17 A. 1703?

18 Q. 1703.

19 JUDGE BARNETT: It's near the back --

20 MR. STEINTHAL: It's 1704. Wait. It's
21 the article entitled "MySpace Imeem Deal Leaves
22 Thousands of Artists Unpaid." Yeah, I was correct.
23 It's 1703.

24 THE WITNESS: I found it.

25 JUDGE BARNETT: Mr. Charron?

1 MR. CHARRON: We do have an objection to
2 this on hearsay grounds. It's not something that
3 Mr. Timmins relied upon, and the article is hearsay.

4 MR. STEINTHAL: Well, I'm not proposing
5 it for the truth of the matter, but that it was
6 publicly reported and that Mr. Timmins didn't see
7 it.

8 JUDGE BARNETT: For impeachment?

9 MR. STEINTHAL: Yes.

10 JUDGE BARNETT: Overruled.

11 BY MR. STEINTHAL:

12 Q. This is an article that you had not
13 reviewed before your deposition, correct? And it
14 does report that imeem was sold to MySpace for less
15 than a million dollars, correct?

16 A. That's my recollection from the
17 deposition.

18 MR. STEINTHAL: We'd move 1703 into
19 evidence.

20 MR. CHARRON: Same objection.

21 MR. STEINTHAL: Not for the truth of the
22 matter.

23 JUDGE BARNETT: 1703 is admitted as an
24 impeachment exhibit.

25 (Google Exhibit Number 1703 was marked

1 and received into evidence.)

2 JUDGE STRICKLER: Just so the record is
3 clear, at least looking at the document now, it
4 refers to certain assets were bought. And you asked
5 the witness whether or not it was purchased by --
6 the company was purchased by MySpace? Did you --
7 you didn't specify assets or stock, did you?

8 MR. STEINTHAL: I did not.

9 BY MR. STEINTHAL:

10 Q. Are you aware that there was a public
11 report that MySpace paid less than a million dollars
12 for imeem or its assets?

13 A. I was not. I was -- I referred in my
14 deposition to conversations, two of which that I had
15 with the former CFO of the company, in attempting to
16 ascertain the purchase price, and I was not able to
17 do so in either of those conversations.

18 JUDGE BARNETT: Mr. Charron?

19 MR. CHARRON: I just don't know what
20 Mr. Steinthal is impeaching, since this is not part
21 of his report or his analysis. He didn't look at
22 it, wasn't aware of it, and it doesn't factor in.
23 So I just want to understand what it is we're
24 impeaching.

25 MR. STEINTHAL: I'm happy to explain.

1 JUDGE STRICKLER: Well, didn't you just
2 explain it to us already? You said that -- you said
3 you were impeaching him because he didn't look at
4 it, not because he did, so --

5 MR. STEINTHAL: Exactly.

6 JUDGE STRICKLER: -- he's saying it's a
7 feature; you're saying it's a bug.

8 MR. CHARRON: Yeah, I mean, he didn't
9 look at, you know, Larry Bird's biography either,
10 so --

11 JUDGE STRICKLER: Then you'd have a
12 relevance argument, wouldn't you?

13 MR. CHARRON: It's the same relevance
14 objection, since it's not -- he didn't look at
15 things that weren't material to his report. And so
16 -- I -- really, I'm looking for guidance going
17 forward. If there's going to be more like this, I
18 don't want to belabor the point, but I do think that
19 there is a disconnect between saying that he's
20 impeaching something when he's really saying you
21 didn't look at something that didn't matter.

22 JUDGE BARNETT: Overruled.

23 BY MR. STEINTHAL:

24 Q. Let me ask you to take a look -- now,
25 we're going to do the -- the Wiki article on imeem.

1 Let me ask you to take a look, since you have a
2 problem with this exhibit, at a printout from
3 Wikipedia on imeem, which we'll mark as Impeachment
4 Exhibit 6004.

5 THE CLERK: We did do 6004, so this is
6 6006 -- 6004 was -- actually, I marked a document
7 that no one has used yet. So this one will be 6006.

8 (Google Exhibit 6006 was marked for
9 identification.)

10 MR. STEINTHAL: This is going to be
11 Impeachment Exhibit 6006.

12 BY MR. STEINTHAL:

13 Q. You're familiar with Wikipedia, the
14 on-line encyclopedia, Mr. Timmins?

15 A. I am.

16 Q. Okay. In the listing on imeem that we
17 printed out, there's a reference to imeem and it --
18 it having been bought out by MySpace Music in a fire
19 sale for an amount reported to be less than a
20 million dollars. You have no reason to dispute
21 that, do you?

22 A. I do, actually. I teach all of the
23 incoming analysts and associates at my firm how we
24 perform research in my organization, and one of the
25 first things I tell them, certainly in the first 10

1 or 15 minutes, is that we do not rely upon Wikipedia
2 because of its unknown provenance and it's
3 unreliable.

4 Q. Well, other than not relying on
5 Wikipedia, as you sit here today, you have no basis
6 to say that imeem was sold for anything more than a
7 million dollars, right?

8 A. I told you I made inquiries. I did not
9 come up with an answer. I don't have any reason to
10 believe or disbelieve this.

11 Q. Now, imeem's investors, you are aware,
12 ultimately included Fox, MySpace, and Warner Music
13 Group?

14 A. I'm sorry, I couldn't hear your question.

15 Q. Are you familiar with the fact that the
16 investors in imeem, before it sold ultimately, were
17 Warner Music Group and then Fox/MySpace Music?

18 A. I was familiar that Warner had invested.
19 I did not know that the other had invested.

20 Q. Now, another one of the companies you
21 performed valuation services for was Stitcher,
22 correct?

23 A. Yes.

24 Q. And Stitcher's business model was
25 actually focused on streaming news and talk

1 podcasts, rather than music, correct?

2 A. That is correct.

3 Q. And Stitcher also raised a lot more money
4 than it ultimately sold for, correct?

5 A. That's my recollection.

6 Q. Is it your recollection that they raised
7 around 25 million and sold for less than 5 million?

8 A. I don't have exact recollections of
9 either number.

10 Q. Does that ring a bell?

11 A. From your deposition -- from the
12 deposition, but otherwise, no.

13 Q. And the only other company that you were
14 involved with concerning the distribution of music
15 was TouchTunes, and that's a company that is
16 involved in the distribution of jukeboxes, correct,
17 jukebox music?

18 A. That was its business at the time, yes.

19 Q. And their music -- their business model
20 was not streaming, correct?

21 A. It was downloads, I recall.

22 Q. Now, let's shift to another topic now,
23 Mr. Timmins. You testified that an increase in
24 mechanical royalties will not cause disruption in
25 the streaming market, correct?

1 A. I did.

2 Q. Now, obviously, you didn't mean an
3 increase of any amount, no matter what size,
4 correct?

5 A. I did not. I meant an amount proposed by
6 the -- the Copyright Owners.

7 Q. So in giving your opinion, you had in
8 mind the Copyright Owners' rate proposal in this
9 proceeding, correct?

10 A. I did, in general, yes.

11 Q. But you did no analysis regarding how
12 much of a fee increase the Copyright Owners'
13 proposal would generate, compared to the payments
14 under the existing royalty structure, correct?

15 A. I -- I did not do that analysis.

16 JUDGE STRICKLER: Did you determine what
17 level of rate increase would be such that it would
18 interfere with the ability of these streaming
19 services to prosper?

20 THE WITNESS: No, as part of my rebuttal
21 analysis, I did not do that.

22 JUDGE STRICKLER: Thank you.

23 BY MR. STEINTHAL:

24 Q. You just concluded that the five Services
25 participating in this case could afford to pay the

1 rates proposed by the Copyright Owners, correct?

2 A. Well, I didn't select them because they
3 are the cases -- the parties in the case. I
4 selected them because they were the parties for
5 which financial information was available.

6 Q. But your conclusion -- let me -- let me
7 walk back a second. The opinion you've reached was
8 simply that those five companies could afford to pay
9 the increase in royalties sought by the Copyright
10 Owners, right?

11 A. In the grand scheme of things, that was
12 my conclusion, yes.

13 Q. And you did that without even calculating
14 what the increased royalties would be, yes?

15 A. I did.

16 JUDGE STRICKLER: You did or did not?

17 THE WITNESS: I was agreeing with him.

18 JUDGE STRICKLER: Thank you.

19 BY MR. STEINTHAL:

20 Q. Indeed, in paragraph 75, you testified
21 that you reached your opinion based on your view
22 that, and I quote, "musical work royalty payments
23 are small cost items for the large diversified
24 companies in the streaming space, as measured
25 against the total revenues and balance sheets for

1 these companies." Right?

2 A. That is correct.

3 Q. And you did no analysis of whether, under
4 the current rate structure or the Copyright Owners'
5 proposal, standalone music streaming companies could
6 ever make a profit, correct?

7 A. I did not have -- that is correct, I did
8 not have access to that information.

9 Q. You made a statement in your direct
10 testimony that some of the large diversified
11 companies that are Services participating --
12 participating in this proceeding focus on user
13 participation more than profitability. Do you
14 remember making that statement?

15 A. I don't know that I narrowed it just to
16 the large diversified companies, but I did make that
17 statement.

18 Q. And, again, you did no analysis of data
19 to support that; you just -- whatever analysis of
20 the marketplace you did, you reported in your
21 written testimony, correct?

22 A. I did no analysis of data. However, I
23 did look to statements by executives and investors
24 in those companies.

25 Q. Public press reports?

1 A. That is correct. Well -- yes, that is
2 correct.

3 Q. Now, you testified that the market for
4 digital music is prospering, correct?

5 A. I did.

6 Q. And your testimony is not that any one
7 company is prospering; it is that the market as a
8 whole is prospering, correct?

9 A. That is correct. I don't think that the
10 fate of any one individual company is an indicator
11 of whether a market is prospering or not. It's the
12 totality of the whole marketplace.

13 Q. And as part of your effort to show the
14 industry as prospering, you cited numerous press
15 reports about investments during the last few years
16 that have been made in companies engaged in
17 interactive streaming, correct?

18 A. I cited those and a number of other press
19 reports about other factors that indicated a
20 prospering market.

21 Q. But you -- you did cite a number of press
22 reports about investments that had been made
23 recently in companies engaged in interactive
24 streaming in support of your conclusion, correct?

25 A. I did.

1 Q. And in paragraph 18 of your written
2 testimony, you cite as an example an article saying
3 that streaming has piqued investors' interest,
4 correct?

5 A. Piqued as in p-i-q-u-e-d?

6 Q. Yes.

7 A. Yes, I did.

8 Q. And you point to Spotify's impending IPO
9 in paragraph 18, do you not?

10 A. Well, in quoting this observer, I do.

11 Q. And you're relying in your report on the
12 fact that the marketplace was such that Spotify had
13 an impending IPO, right?

14 A. That was -- there were considerable
15 number of press reports about that and the structure
16 of the convertible debt it took on a year -- in
17 2016, indicated that as well.

18 Q. Now, in paragraph 30-C, you refer, do you
19 not, to an expectation, to use your word, that
20 Spotify will proceed with an IPO based on the
21 reports you had read, right?

22 A. Again, based on the reports which I had
23 read and on the terms of the financing.

24 Q. Well, the terms of the financing that you
25 had read in the press about, right?

1 A. That's correct.

2 Q. But the fact is you don't know if there
3 will ever be a Spotify IPO, do you?

4 A. I don't think anyone in this room knows
5 whether there will ever be a Spotify IPO. So I do
6 not.

7 Q. And while you have cited many press
8 reports in your written testimony about Spotify's
9 financing rounds and so-called impending IPO, when I
10 took your deposition ten days ago, you were totally
11 unaware of any press reports that spoke of delays
12 encountered by Spotify in bringing an IPO to market,
13 correct?

14 A. I don't know that I was totally unaware.

15 Q. Well, you couldn't cite any, right?

16 A. I couldn't cite them, no.

17 Q. And you were also unaware of reports that
18 Spotify's financial situation was so dire that it
19 might have to file for bankruptcy, correct?

20 A. No, I was not at all aware of that. Nor
21 did my review of the testimony of Mr. McCarthy
22 indicate any such condition.

23 Q. I asked you about press reports, whether
24 you had read any press reports either about the --
25 well, we'll get to that.

1 Let me ask you to take a look at two
2 press reports that apparently you've never seen
3 before, given the answers to the questions that I
4 just asked. These will be marked as Impeachment
5 Exhibits 2007 and 2008. I'm sorry, 6007 and 6008.

6 (Google Exhibits 6007 and 6008 were
7 marked for identification.)

8 BY MR. STEINTHAL:

9 Q. Let me identify 6007 and 6008 for the
10 record. 6007 is an article from Forbes dated
11 February 22, 2016. The title of which is "The IPO
12 Slump Drags on. Will It Last?"

13 And 6008 -- 6008 is a Digital Music
14 News -- a printout of a Digital Music News article
15 dated February 2, 2017 entitled: Is Spotify Going
16 Bankrupt in 2017? Wall Street Delivers Another Red
17 Flag."

18 JUDGE STRICKLER: Did you indicate -- I'm
19 sorry. Did you indicate that both of these articles
20 made reference to potential bankruptcy?

21 MR. STEINTHAL: One of them does.

22 JUDGE STRICKLER: Which -- which one?

23 MR. STEINTHAL: 6007 refers to the IPO
24 delay, as we'll get to in a minute, and 6008 refers
25 both to the IPO as well as, you know, a report about

1 whether Spotify might go bankrupt in 2017.

2 JUDGE STRICKLER: And what was the date
3 of 6008, the article? February 2nd, 2017?

4 MR. STEINTHAL: February 2, 2017.

5 JUDGE STRICKLER: After -- after the date
6 of the written rebuttal report?

7 MR. STEINTHAL: No, before the date of
8 the written rebuttal report.

9 JUDGE STRICKLER: You are correct, 11
10 days before.

11 MR. STEINTHAL: So these are both from
12 before his rebuttal report.

13 MR. CHARRON: Your Honor, could I ask
14 that the witness have an opportunity to actually
15 read these? These were not offered in his
16 deposition. I'm not sure they would constitute
17 impeachment, once again. I'm sure they're hearsay,
18 but I think it would be fair to allow him to read
19 these.

20 JUDGE BARNETT: Yes.

21 MR. CHARRON: Thank you.

22 JUDGE BARNETT: Mr. Timmins, take the
23 time you need to read through these.

24 BY MR. STEINTHAL:

25 Q. I can tell you, Mr. Timmins, the place

1 I'm going to ask you to focus on, so, you know, if
2 -- if you'd like, have a question in mind as you
3 review it. My question to you, as to the Forbes
4 article, was whether, in fact, this was an article
5 that reported in 2016 -- if you look at the second
6 to last page, which refers to anticipated public
7 offerings never to happen in the last year and
8 referring to Uber and Spotify, whether this is just
9 an article you missed that referred to the delay in
10 bringing to market of an IPO for Spotify.

11 A. Would you like me to do these one at a
12 time or do you want to deal with them both at once?

13 Q. One at a time, please.

14 A. Okay.

15 Q. My simple question is --

16 A. Well, then I will need a moment to read
17 the other when we get to it.

18 Q. Okay.

19 A. Okay?

20 Q. Fair enough. But you don't dispute that
21 Exhibit 6007 is a published press report that refers
22 to an anticipated IPO of Spotify and then
23 ultimately, in the last paragraph, says that these
24 companies delayed their IPO, correct?

25 MR. CHARRON: Can the witness have an

1 opportunity to read it?

2 MR. STEINTHAL: Yeah.

3 THE WITNESS: The sentence to which I
4 think you're referring says, "but these companies"
5 -- which include Spotify -- "only delayed their IPO
6 and didn't call them off for good." And at the same
7 time that I was preparing my written rebuttal
8 report, there were a number of other companies that
9 were in registration, including Snap, which has
10 subsequently completed a highly successful IPO that
11 has touched off a wave of new interest, and there
12 have been several emerging growth companies IPOs
13 since that date. I saw one just yesterday.

14 BY MR. STEINTHAL:

15 Q. Thank you, sir. Snap doesn't engage in
16 interactive music streaming, does it?

17 A. It's an emerging growth company. And it
18 is the overall turn -- tone of the emerging growth
19 company marketplace which determines whether initial
20 public offerings get done or not.

21 Q. I appreciate that. The fact of the
22 matter is that when you submitted your report, it's
23 true, is it not, that there were published reports
24 that Spotify's IPO had been delayed and you did not
25 see those press reports, correct?

1 A. There were --

2 Q. Yes or no.

3 A. There were such published reports. I did
4 not see this report.

5 MR. STEINTHAL: I would offer 6007 not
6 for the truth of the matter.

7 MR. CHARRON: Same objections. I'm not
8 even sure why it would be offered.

9 JUDGE BARNETT: I'm not sure impeachment
10 exhibits need to even be admitted.

11 MR. STEINTHAL: Okay. Fair enough.

12 BY MR. STEINTHAL:

13 Q. Now, let's go to 6008.

14 A. Which I've not had a chance to read.

15 Q. Okay. Tell me when you're ready,
16 Mr. Timmins.

17 A. I've read it.

18 Q. Okay. Now, this was a published report,
19 was it not, before you submitted your written
20 testimony, which, among other things, reported that
21 Spotify was postponing its long awaited IPO again,
22 correct?

23 A. It is.

24 Q. And it actually goes so far as to suggest
25 that 2017 is a boom or bust year, and if it doesn't

1 go the way Spotify would like, the bust could be
2 bankruptcy, right?

3 A. It mentions that. And it mentions the
4 wild card of the SnapChat IPO as well.

5 Q. But, again, this is just one of the
6 articles that you didn't have a chance to read,
7 correct?

8 A. That is correct.

9 Q. And, actually, leading into my next
10 question, you testified on your direct examination
11 that -- I believe I wrote it down correctly -- the
12 consensus in the press is that the terms of
13 Spotify's debt offering were not onerous, right? I
14 think those were your words, they were not onerous.

15 A. I don't recall my testimony on that.

16 Q. Well, do you believe that the billion
17 dollar offering that Spotify received that you
18 talked about in your direct testimony were not on
19 onerous terms?

20 A. I don't believe that those terms were
21 onerous. I think that they were market terms.

22 Q. And you said that the consensus in the
23 press was that the terms were not onerous, right?

24 A. I don't recall whether I said that or
25 not.

1 Q. I think the -- the record will so
2 reflect. Let me ask you, the article we just looked
3 at, Exhibit 6008, actually refers to the debt
4 structure as a ticking time bomb, does it not?

5 A. Yes, because of the stairstep of the
6 interest rate and the change in conversion price.

7 Q. And that article -- well, let me ask you
8 to take a look at another article, which we'll mark
9 as Exhibit 6009, which is from
10 MusicBusinessWorldwide.Com under the caption "if
11 Spotify delays its IPO into 2018, it faces some
12 serious financial pain."

13 (Google Exhibit 6009 was marked for
14 identification.)

15 MR. CHARRON: Your Honor, I would object.
16 I think that unless Mr. Steinthal is going to offer
17 every article by every not only press outlet but
18 he's citing blogs, every blog that has had something
19 to say and we're going to weigh what they've said
20 about an IPO, putting aside the fact that Spotify
21 itself is a participant and their own CFO testified,
22 and didn't say anything about this, I think we're
23 just wasting a lot of time. And it's not being
24 offered for the truth. It's not even really
25 impeachment. It's not going to be admitted into

1 evidence.

2 JUDGE BARNETT: Is your objection
3 improper impeachment?

4 MR. CHARRON: Improper impeachment and
5 undue waste.

6 (Laughter)

7 JUDGE BARNETT: Mr. Steinthal?

8 MR. STEINTHAL: I will move on quickly.
9 I just want the record to reflect yet another
10 example of Mr. Timmins saying there's a consensus in
11 the press about something, and simply not doing a
12 comprehensive search of what he's talking about.

13 MR. CHARRON: Well, I don't think that
14 Mr. Steinthal --

15 JUDGE BARNETT: Okay. Is this the press
16 or is this --

17 MR. STEINTHAL: No, that he has testified
18 that his opinion is based on what he has read in the
19 press.

20 JUDGE BARNETT: Exactly. And so I'm
21 asking you whether 6009, is that the press?

22 MR. STEINTHAL: It is a --

23 JUDGE BARNETT: Did you refer to that as
24 the press?

25 MR. STEINTHAL: I -- I refer to it as

1 MusicBusinessWorldwide.Com, as part of the news
2 media, yes.

3 MR. CHARRON: And, again, Mr. Steinthal
4 isn't offering anything to support -- he says that
5 this is about impeaching, supposedly consensus, but
6 that's not what he's doing. He's picking a couple
7 of blogs and then --

8 JUDGE BARNETT: Okay. Speaking of
9 wasting time, let's just let him finish this one and
10 be done with it, okay?

11 MR. CHARRON: Yeah. Thank you, Your
12 Honor.

13 JUDGE STRICKLER: Is this your last one
14 in this regard?

15 MR. STEINTHAL: Yes, for Spotify. I may
16 have one or two coming up later, depending on what
17 he says.

18 BY MR. STEINTHAL:

19 Q. Fair to say, Mr. Timmins, this is another
20 media report that you had not seen before giving
21 your direct testimony today?

22 A. I have not reviewed this previously or
23 even now.

24 Q. Excuse me?

25 A. I have not reviewed this previously, nor

1 even now.

2 Q. And you don't quarrel with the fact upon
3 reviewing --

4 A. I have not had a chance to read this.

5 Q. Okay. In reviewing it, you would agree,
6 would you not, that it is critical of the onerous
7 terms associated with Spotify's debt offering?

8 MR. STEINTHAL: We could simplify it by
9 simply moving it into evidence, not for the truth of
10 the matter asserted, and then whatever arguments
11 either party wants to make about what's reported and
12 what's not.

13 JUDGE BARNETT: If it's being offered for
14 impeachment, it's not going to be admitted. It's
15 marked for identification --

16 MR. STEINTHAL: Okay.

17 JUDGE BARNETT: -- and you can talk to
18 the D.C. Circuit about it.

19 THE WITNESS: I've had a chance to go
20 through it rather quickly.

21 BY MR. STEINTHAL:

22 Q. And does it talk about the terms of
23 Spotify's debt offering and refer to it as an
24 onerous undertaking from Spotify?

25 A. There are two parts to that. It does

1 talk about the terms, although the terms that are
2 mentioned here seem to disagree with what I saw in
3 the Wall Street Journal. And, secondly, it does use
4 the word "onerous" once.

5 Q. Thank you. Let's shift to a different
6 topic. You also refer in paragraph 30, for your
7 opinion regarding the state of the interactive
8 streaming marketplace, on an investment round in the
9 company Deezer, right?

10 A. I did.

11 Q. And that's the service of very limited
12 United States distribution, correct?

13 A. That's my understanding.

14 Q. Deezer has not been launched a
15 full-fledged basis in the United States and is
16 currently only available to owners of certain
17 speaker systems and some mobile subscribers,
18 correct?

19 A. That is my understanding.

20 Q. You also cited, in discussing the
21 prosperous digital streaming market for investment,
22 Apple's investment in Beats, do you not?

23 A. Apple acquired Beats, not made an
24 investment in it.

25 Q. Okay. But you refer to that in your

1 written testimony as an example of the prosperous
2 market that you were looking at, right?

3 A. It was a 3 billion dollar acquisition,
4 the largest that Apple ever has made, and I took it
5 as being an indicator of considerable interest in
6 the market.

7 Q. But Beats was primarily and is primarily
8 a thriving headphone and hardware business, correct?

9 A. It had several lines of business, one of
10 which was the headphones and hardware. There also
11 was a streaming music line.

12 Q. You don't dispute that the headphone and
13 hardware business was the market leader in the
14 headphone market, do you?

15 A. That's my understanding from press
16 reports.

17 Q. And an important factor in the
18 acquisition of Beats by Apple was that Apple
19 acquired the services of two iconic music industry
20 executives, Dr. Dre and Jimmy Iovine, correct?

21 A. I believe Mr. Cook said that, yes.

22 Q. And you made no effort to analyze how
23 much of the Beats acquisition value was attributable
24 to the small Beats Music service as distinguished
25 from the Beats headphone business and the

1 acquisition of the services of Dr. Dre and
2 Jimmy Iovine, correct?

3 A. I did not, because I did not have access
4 to that financial information.

5 Q. Now, you also mention in your report,
6 regarding what you believe to be evidence of a
7 prospering interactive streaming market, an
8 investment made by Twitter in a company called
9 SoundCloud, correct?

10 A. I did.

11 Q. But you were aware that SoundCloud has
12 had difficulty in obtaining funding and might run
13 out of cash in 2017, correct?

14 A. That might come as a surprise to
15 SoundCloud, given that it raised 70 million dollars
16 a few days ago.

17 Q. Is it your testimony that there hasn't
18 been reports about SoundCloud potentially running
19 out of cash in 2017?

20 A. There have been reports to that fact, and
21 then subsequently SoundCloud raised another 70
22 million dollars last week.

23 Q. Do you know what the terms of that debt
24 offering were?

25 A. I don't. There's an article about it by

1 Forbes, and I believe that it cites a business
2 publication as its source.

3 JUDGE STRICKLER: Counsel referred to it
4 as debt financing. I didn't -- I don't know. That
5 was -- are you agreeing with him that it was debt
6 financing?

7 THE WITNESS: I'm sorry, which, the BY
8 MR. STEINTHAL:

9 Q. SoundCloud. The one that you just
10 mentioned.

11 JUDGE STRICKLER: The most recent one.
12 He referred to it as debt financing, but I don't
13 think you had referred to it as debt financing.

14 THE WITNESS: I don't recall the terms of
15 it.

16 BY MR. STEINTHAL:

17 Q. Now, you also mention in paragraph 30, as
18 evidence of the prospering interactive streaming
19 market, certain investments in a company called
20 Vevo, correct?

21 A. I do, yes.

22 Q. And Vevo is not a digital audio streaming
23 service, is it?

24 A. It's over the top. It's a -- it's video
25 and over the top.

1 Q. It's an over-the-top music video service
2 with a very different royalty and rate structure
3 than interactive audio-only music services, correct?

4 A. That is correct.

5 Q. Now, you also refer to Pandora's
6 investment in Rdio in discussing the state of
7 investment activity in the interactive streaming
8 marketplace, correct?

9 A. No, I do not. I refer to Pandora's
10 acquisition of Rdio's assets through the bankruptcy
11 process.

12 Q. Okay. You refer to that in paragraph 83
13 of your testimony, correct, that Pandora agreed to
14 purchase certain key assets of Rdio out of
15 bankruptcy?

16 A. That is correct.

17 Q. It's true, is it not, that Rdio launched
18 in the United States in 2010?

19 A. That's my understanding.

20 Q. And it accumulated over 200 million
21 dollars in debt, according to the article that you
22 cite in your report, which would be Copyright Owner
23 Exhibit H-2643?

24 A. That's my recollection.

25 Q. And Rdio struggled in the market and

1 eventually filed for bankruptcy, as you noted,
2 right?

3 A. That's correct.

4 Q. And before the asset acquisition by
5 Pandora, Cumulus Radio, a major radio group, had
6 made a substantial equity investment in Rdio,
7 correct?

8 A. Again, that's my understanding from the
9 press accounts.

10 Q. And according to the article you cite,
11 Cumulus ultimately had to make a 19 million dollar
12 write-down in that investment, correct?

13 A. I don't believe that I cited that.

14 Q. Take a look at Copyright Owner
15 Exhibit H-2667, which would be in the
16 cross-examination binder.

17 A. Oh. Sorry, the number again?

18 Q. H-2667, Copyright Owner CO-H-2667.

19 A. Oh, from an article, yes.

20 Q. This is one of the articles you cited,
21 right?

22 A. Yes, I cited it.

23 Q. And the very last line on the fifth page,
24 the one that has pictures of two phones, says,
25 "Cumulus wrote down its investment in Rdio by 19

1 million"?

2 A. I see that, yes.

3 Q. You don't dispute that, do you?

4 A. I do not.

5 Q. Mr. Timmins, in your analysis, you rely
6 in part on your observation that you have never seen
7 so much large company investment in a new market
8 happen so quickly, correct? That's in paragraph 25.

9 A. I said over the course of my 35-year
10 career, that I have not seen so much new -- of that
11 activity, yes.

12 Q. So much, as you put it, large company
13 investment in a new market so quickly, right?

14 A. That is correct.

15 Q. In fact, you make this observation based
16 on your belief that the large company investments
17 that you discuss in your written testimony occurred
18 within fewer than a handful of years since the
19 advent of the interactive music streaming
20 marketplace, correct?

21 A. That several of them did so, yes.

22 Q. And you contrast that to industries such
23 as the PC market, the cellular phone market, and
24 development of the World Wide Web, where you
25 observed that it took 15 to 20 years before large

1 companies came in, correct?

2 A. There were some large company entrants.
3 For instance, in personal computers, IBM entered
4 earlier than that. But, by and large, there were
5 long delays before a significant number of large
6 companies entered these markets.

7 Q. And you contrast those markets to the
8 interactive streaming market that you're giving your
9 opinion about, correct?

10 A. Just by way of contrast, yes.

11 Q. And you even assert that this large
12 company investment surge in the interactive music
13 streaming market that you rely on has occurred in
14 the last two to three years, right?

15 A. That some part of it has, yes.

16 Q. Well, that -- that's what you're focused
17 on in your report, right?

18 A. That -- that there had been an upsurge,
19 an increase in the last several years, yes.

20 Q. Two to three years, as you said in the
21 deposition?

22 A. Two to three years, yes.

23 Q. Now, Mr. Timmins, you have to acknowledge
24 that the interactive streaming market has been
25 around not for less than a handful of years, but

1 instead for over 15 years, correct?

2 A. I have acknowledged that. In my report,
3 I cited Rhapsody beginning in 2001, but the large
4 bulk of the activity has been in recent years.

5 Q. But -- but the interactive streaming
6 business itself is not just less than a handful of
7 years old; it actually started in the late '90s and
8 is more than 15 years old; isn't that right?

9 A. There was one company in the 2000s, but
10 the bulk of the activity has taken place in the
11 teens.

12 Q. So if, in fact, there was a history of
13 large company investments in interactive streaming
14 well before 2010, that would simply be inconsistent
15 with what you just testified to and what you
16 testified to in your written testimony, correct?

17 A. If -- if there were companies that were
18 opening services as opposed to investing, it would
19 be inconsistent, but the fact that they were
20 investing is not inconsistent.

21 Q. Well, let's -- let's take a look, then.
22 Are you familiar with the company called Yahoo?

23 A. Yes.

24 Q. It's a major media company, one of the
25 two largest Internet portals in the 2000s, right?

1 A. Yes.

2 Q. And you're familiar with a company AOL?

3 A. I am.

4 Q. And that's the other major Internet
5 portal of the 2000s, right?

6 A. It is. Was.

7 Q. It's true, is it not, that both Yahoo and
8 AOL actually made acquisitions of companies, and
9 operated with significant investment, interactive
10 music streaming services in the mid-2000s, right?

11 A. I recall AOL doing so. I believe that it
12 was -- that it switched sources at one point to
13 Slacker. I don't have an exact recollection of what
14 Yahoo did, but I believe it dipped a toe in the
15 water.

16 Q. Let me ask you to look at what we'll mark
17 as Impeachment Exhibit 2009, which is a decision
18 from Judge Conner in the ASCAP rate court dated
19 April 30, 2008.

20 JUDGE STRICKLER: And -- oh, go ahead.

21 THE CLERK: Do you mean 6010?

22 MR. STEINTHAL: I'm sorry, I keep on
23 doing that. 6010.

24 (Google Exhibit 6010 was marked for
25 identification.)

1 JUDGE STRICKLER: While we're waiting on
2 that, a quick question for you, Mr. Timmins.

3 THE WITNESS: Yes.

4 JUDGE STRICKLER: Counsel is asking you
5 about investment that happened in -- in the 2000s,
6 and you're talking about the recent wave of -- of
7 investment activity.

8 Are they mutually exclusive or could
9 there have been -- are they, in fact, coming in
10 waves where there was an earlier wave of investment
11 in the interactive market, as counsel has just
12 suggested in his questions, Yahoo and AOL, and now
13 you're identifying a new wave of entrants in terms
14 of Amazon, Apple, and Google?

15 THE WITNESS: They're certainly not
16 mutually exclusive. However, Amazon, Apple, and
17 Google are known as platform companies, technology
18 platform companies, which means that they're
19 attempting to get a toe in a lot of different ponds
20 of water.

21 And while AOL and Yahoo were diversified
22 at the time, they were nowhere near as broad
23 reaching as those three companies are today.

24 JUDGE STRICKLER: Well, notwithstanding
25 that there may be different reasons why the

1 investments occurred back then by AOL and Yahoo and
2 the platform-based, as you -- as you testified to,
3 reasoning for Apple, Amazon, and Google, do you
4 agree that there are -- are sequential waves and
5 these are two that have been identified, the ones in
6 the mid-2000s, as counsel has suggested, and the
7 ones that you've identified in paragraph -- or
8 described in paragraph 25 of your written rebuttal
9 testimony?

10 THE WITNESS: I don't disagree with that
11 thesis.

12 JUDGE STRICKLER: Thank you.

13 BY MR. STEINTHAL:

14 Q. Take a look, if you will, at two
15 different sections of this. I just want to ask you
16 whether it -- it refreshes your recollection that
17 each of AOL and Yahoo operated and had invested in
18 on-demand streaming services in the mid-2000s, as
19 reported in this decision after trial in a lawsuit
20 between ASCAP, on the one hand, and Yahoo, AOL, and
21 RealNetworks on the other.

22 So paragraph 125 of the decision, which
23 is on page 352, talks about a company called AOL
24 Music Now. It says AOL owned and operated AOL Music
25 Now between November 2005 and March 2007. For one

1 flat monthly fee, an AOL Music Now subscriber had
2 unlimited access to streaming on-demand audio, music
3 and music videos, et cetera. Do you see that?

4 A. I do.

5 Q. You don't have any reason to dispute that
6 AOL had acquired and then run the Music Now service
7 during the mid-2000s?

8 A. I do not.

9 Q. And then if you look at paragraphs 233 to
10 234 on page 366 of the decision, this talks about
11 Yahoo having purchased a company called Musicmatch,
12 and that operated an on-demand music streaming
13 service, subscription service during the 2000s.

14 Do you have any reason to doubt the fact
15 findings in those paragraphs of Judge Conner's
16 decision?

17 A. I do not. And I was familiar with the
18 AOL history because it dropped its own service and
19 picked up Slacker in 2011.

20 Q. And Microsoft also invested in and
21 operated an interactive music subscription service
22 in the mid-2000s, correct?

23 A. It was doing something of that sort to
24 attempt to work with its Zune, Z-u-n-e, product.

25 Q. And Zune was the name of its interactive

1 music service, was it not?

2 A. That's my recollection.

3 Q. And Zune -- Zune's name changed at some
4 point to Xbox Music; is that right?

5 A. That's my recollection.

6 Q. And it's actually still in existence and
7 has been since the late 2000s but under the name
8 Groove; is that not right?

9 A. Yes. One of the functions provided on
10 the Xbox is the ability to stream music.

11 Q. And are you aware as well, Mr. Timmins,
12 that CBS made a major acquisition in the mid-2000s
13 to acquire an interactive music service known as
14 last.fm?

15 A. I recall that. I know a number of the
16 radio networks made forays into this.

17 Q. And do you know that it was publicly
18 reported that they invested 280 million dollars in
19 Last.fm but then ultimately within a few years
20 closed and shuttered that business?

21 A. I'm not familiar with those numbers.

22 Q. So now, since we've seen in the last few
23 minutes that large media companies including CBS,
24 Cumulus Radio, AOL, Yahoo, and Microsoft, had all
25 made significant investments in the interactive

1 music industry and operated interactive music
2 services throughout the mid-2000s to the late 2000s,
3 but, with the exception of what's left of the Groove
4 service with Microsoft, all those other ventures are
5 no longer operating, it's fair to say, isn't it,
6 that large company investment in an industry in and
7 of itself is hardly an indicator of a prosperous
8 market?

9 A. Well, you said it correctly yourself, in
10 and of itself is not enough.

11 Q. Now, you also misstated the history of
12 the evolution of the streaming music marketplace in
13 the context of your deposition testimony relating to
14 Launch Media's IPO in April 1999; isn't that
15 correct?

16 A. I -- I don't know one way or the other.

17 Q. Well, let's take a look at paragraph 61
18 of your written testimony. You refer to that IPO,
19 do you not?

20 JUDGE STRICKLER: What paragraph?

21 MR. STEINTHAL: 61.

22 THE WITNESS: I -- I do refer to it, yes.

23 BY MR. STEINTHAL:

24 Q. In paragraph 61, you accuse Mr. Pakman of
25 not including in his results other venture-backed

1 digital music companies that also completed IPOs and
2 you refer to Launch Media, correct?

3 A. I do.

4 Q. But you conceded at your deposition, did
5 you not, that that statement was in error since
6 Launch Media in 1999 was not a digital music
7 streaming company, right?

8 A. I don't recall.

9 Q. Could you take a look at paragraph 164 of
10 your deposition.

11 A. Where would I find that?

12 Q. Do you see on --

13 A. Sorry, where -- where would I find that,
14 please?

15 Q. Excuse me?

16 A. Where would I find that?

17 Q. It's handed out.

18 JUDGE STRICKLER: Is this the March 17th
19 deposition?

20 MR. STEINTHAL: It is.

21 JUDGE STRICKLER: So we already have it?

22 MR. STEINTHAL: Yes. Yes.

23 MS. MERK: It should be inside your
24 binder.

25 MR. STEINTHAL: Yeah.

1 JUDGE STRICKLER: What -- what page?

2 MR. STEINTHAL: Page 164, Your Honor.

3 BY MR. STEINTHAL:

4 Q. Do you have it in front of you,
5 Mr. Timmins?

6 A. I do not.

7 MR. CHARRON: I don't see it in our
8 binder.

9 JUDGE BARNETT: It's in the pocket of the
10 one that's marked Amazon cross-examination of
11 Mr. Timmins.

12 JUDGE STRICKLER: I think it needs a
13 number.

14 JUDGE BARNETT: Can you identify it for
15 the record?

16 THE CLERK: 6011.

17 JUDGE BARNETT: 6011.

18 (Google Exhibit 6011 was marked for
19 identification.)

20 BY MR. STEINTHAL:

21 Q. Now, in paragraph 61 of your --

22 A. I'm sorry, I do not have this in front of
23 me.

24 Q. Frustration.

25 JUDGE BARNETT: Did you have a binder

1 that has Amazon's logo on the front?

2 THE WITNESS: I do not.

3 MR. AHMAD: He has not been presented --

4 MR. ELKIN: It hasn't happened yet. We
5 can do it now.

6 JUDGE BARNETT: Okay. That would be
7 good.

8 THE WITNESS: I'm sorry to be so
9 dramatic, but --

10 MR. ZAKARIN: He's innocent of all
11 charges.

12 JUDGE BARNETT: This is not a test of
13 your clairvoyance, Mr. Timmins.

14 MR. STEINTHAL: I thought we were
15 delivering him a separate copy of his deposition,
16 but I guess not. Sorry.

17 THE WITNESS: Where would I turn?

18 MR. AHMAD: Inside the booklet, there's a
19 copy of your deposition. It's right there.

20 THE WITNESS: Thank you. And to what
21 page are we turning?

22 BY MR. STEINTHAL:

23 Q. 164.

24 A. I have it.

25 Q. I had -- I had asked you a question on

1 line 5 about paragraph 61 and the reference to the
2 IPO of Launch Media. And I asked you did you see
3 that, on line 9? And you said yes.

4 And I asked you on line 11, "Question:
5 Do you know whether launch media at the time of its
6 IPO was engaged in the streaming of music as opposed
7 to the CD-ROM business?

8 "Answer: I don't believe that streaming
9 was available at that time. So I don't think it
10 was."

11 A. Right. It was not. I had included it in
12 my written testimony because it was a digital music
13 company.

14 Q. It was not -- it was a print company, was
15 it not, a print and CD-ROM company?

16 A. It -- it defined itself as digital music
17 at the time.

18 Q. Now, you're -- you're confusing me,
19 Mr. Timmins. You just said in your sworn testimony
20 that digital streaming didn't even exist in 1999,
21 right?

22 A. That's correct. There were other forms
23 of digital music at that time.

24 Q. And, in fact, digital streaming did exist
25 in 1999, did it not? You're just wrong?

1 A. It may have been on an experimental
2 basis, but it was not out there on a commercial
3 basis.

4 Q. Are you familiar with something called
5 the Digital Performing Rights Sound Recording Act,
6 which actually created the compulsory license under
7 Section 114 for streaming music?

8 A. I am. I've heard of it.

9 Q. That was passed in November 1995,
10 correct?

11 A. That's my recollection.

12 Q. So you don't dispute that digital
13 streaming existed in the mid-1990s; otherwise, we
14 wouldn't have had a 1995 act, correct?

15 A. That's correct.

16 Q. Two more quick things. One of the
17 materials you cite in your binder is Copyright Owner
18 Exhibit H-2649. It's in the binder you were
19 provided by your counsel.

20 A. Oh. These all are labeled CO.

21 MR. STEINTHAL: Can somebody help him
22 out? It's CO-H-2649.

23 JUDGE BARNETT: It's about two-fifths of
24 the way down.

25 THE WITNESS: I have it before me.

1 BY MR. STEINTHAL:

2 Q. So this is one of the documents you
3 relied upon, this IFPI Digital Music Report, 2015?

4 A. It is.

5 Q. And the IFPI is the international version
6 of the RIAA, correct?

7 A. That's my understanding, yes.

8 Q. And this document shows annual global
9 digital sales information and, in particular, if you
10 look at -- let's see if there are pages here -- page
11 8 of the document. It's very hard to -- I'm trying
12 to -- can you get to page 8 and 9 of the document?

13 A. I have it before me.

14 Q. And do you see there's a -- there's
15 actually a chart -- no, we have it up on the screen,
16 good.

17 So the chart on the right, the bottom
18 right, refers, does it not, to an increase in annual
19 revenues for subscription streaming of 39 percent?

20 A. It does.

21 Q. And an increase in annual revenues from
22 ad-supported streaming of 38.6 percent, correct?

23 A. It does.

24 Q. And it refers to only an 8 percent
25 decrease in the annual revenues from permanent

1 downloads as against that, correct?

2 A. That's correct.

3 Q. One more thing, Mr. Timmins. I just want
4 to make sure of something, in light of your direct
5 testimony about accounting profit. Do you remember
6 saying that you don't think accounting profit is
7 something that is important in assessing the health
8 of a given marketplace?

9 A. For an emerging growth marketplace, yes.

10 Q. But you agree with the proposition, do
11 you not, that the ability of a company to generate
12 profits on a GAAP basis is a factor that potential
13 investors in such a company would consider in
14 weighing whether to make an investment, correct?

15 A. I don't agree with that.

16 Q. Let's take a look at your deposition,
17 then, on page 161. On line 18, do you see I asked
18 you the question: "In paragraph 54, you make the
19 statement at the top of page 21 that, 'accounting
20 profits are only one of several factors that are
21 considered by companies and investors weighing the
22 costs and benefits of entering an immense and
23 rapidly growing market such as music streaming.'

24 "Do you stand by that?

25 "Answer: I do."

1 A. Yes.

2 Q. That testimony was correct?

3 A. It's one of the factors, yes.

4 MR. STEINTHAL: Thank you. I have
5 nothing further.

6 JUDGE BARNETT: Thank you. Just to undo
7 and correct the record, Exhibit 6006, which was
8 offered for impeachment, I think I said was admitted
9 and it cannot be admitted.

10 MR. STEINTHAL: One second to clean up
11 here.

12 CROSS-EXAMINATION

13 BY MR. AHMAD:

14 Q. Good afternoon, Mr. Timmins. As you'll
15 recall from your deposition, my name is Scott Ahmad,
16 and I represent Amazon.

17 As you'll recall from a few moments ago,
18 we provided you with a small cross-examination
19 binder -- binder, so the record reflects that you
20 have that in front of you. Could you please turn to
21 paragraph 33 of your direct testimony, sir.

22 A. I have it before me.

23 Q. Sir, you make the statement in paragraph
24 33 in relation to your testimony about the
25 prosperity of the market, that for a number of

1 companies, including some that are participants in
2 this proceeding, music helps drive sales of hardware
3 and other services.

4 Do you see that, sir?

5 A. I do.

6 Q. After describing the Amazon Music
7 Unlimited feature, you go on to say that "while
8 there are many uses for the Echo, from controlling
9 the lights to setting a timer to ordering products
10 from Amazon.com, it has been reported that the most
11 common recurring use is streaming music."

12 Do you see that, sir?

13 A. I do.

14 Q. And you refer to a footnote 30 as the
15 proposition for that. Is that correct?

16 A. As the support for it, yes.

17 Q. You don't cite anything else there; is
18 that correct?

19 A. I do not.

20 Q. And you believe that those two exhibits
21 establish the statements that you've made with
22 respect to recurring use of streaming there; is that
23 correct?

24 A. I'm sorry, I didn't hear one of the words
25 in your sentence. Would you repeat it, please?

1 Q. Yes. You said that it has been reported
2 that the most common recurring use is ordering
3 products from Amazon.com. It had been reported that
4 the most common recurring use is streaming music.
5 Do you see that?

6 A. That's what was reported, yes.

7 Q. Okay. And you believe that those
8 exhibits establish that proposition; is that
9 correct?

10 A. I simply said that it was reported.

11 Q. Okay. All right. So let's please turn
12 for a moment to the first cite you gave there, which
13 is Exhibits 138. It's actually Exhibit 2644 as part
14 of the trial exhibit list.

15 A. Yes, it is before me.

16 Q. Sir, this is a May 26 article titled Here
17 Is the Most Popular Feature on the Amazon Echo; is
18 that correct?

19 A. It is.

20 Q. Sir, am I correct that this article does
21 not state anywhere that streaming music is the most
22 common recurring use of the Amazon Echo?

23 A. It says that the most popular function is
24 listening to music. It does not say whether that is
25 streaming music.

1 Q. But the article does not take a position
2 as to whether -- as to the recurring uses of the
3 Amazon Echo; is that correct?

4 A. Well, I don't believe it uses the word
5 "recurring." It just says that it's the most
6 popular feature.

7 Q. And the actual article, if you look at
8 the article, is discussing a quote that was given at
9 a conference. Do you see that, sir?

10 A. Yes, by Amazon's VP of Echo, is that the
11 passage to which you're referring?

12 Q. Yes. Is that -- is that what you're
13 referring to when you cite -- when you cited that in
14 paragraph -- footnote 30?

15 A. Yes.

16 Q. Okay. There is no statistics that are
17 cited there; is that correct?

18 A. That's correct.

19 Q. This is only a copied statement from an
20 Amazon VP at a conference, right?

21 A. That is correct.

22 Q. You didn't review the transcript from the
23 conference?

24 A. I don't know that there was a transcript
25 available from TechCrunch. I did not.

1 Q. You didn't attend the conference?

2 A. I did not.

3 Q. You only read the article, right?

4 A. That is correct.

5 Q. Now, you don't know what Mr. George, the
6 Amazon VP, meant when he was referring to listening
7 to music; is that correct?

8 A. Other than listening to music, no, I do
9 not.

10 Q. So while you say that this article
11 reports that streaming is the most common use of the
12 Echo, you don't actually know what portion of his
13 statement might refer to playing streaming as
14 opposed to playing permanent digital downloads, for
15 example?

16 A. I think I said as much a moment ago, yes.

17 Q. Now, even assuming that Mr. George was
18 talking about streaming, you actually don't know
19 what portion of his statement applied to
20 non-interactive streams such as Pandora radio; is
21 that right?

22 A. That is correct.

23 Q. And am I correct also that this article
24 makes no statements, and you don't actually know how
25 many Echo users actually listen to Amazon streaming

1 and other music offerings of Amazon as opposed to
2 other streaming services on the Echo?

3 A. Well, the Amazon streaming service comes
4 integrated with the Echo, and I believe that there's
5 a price break to subscribe to the Amazon service, if
6 one has an Echo. So my inference was that most
7 users would take advantage of that price break and
8 the natural integration.

9 Q. But you don't know that for sure, and
10 you've conducted no studies on that; is that right?

11 A. No, it's my inference. I do not know it
12 for certain.

13 Q. And this article does not establish
14 whether the music offerings through the Echo are
15 driving sales of the Echo or vice versa; is that
16 right?

17 A. I cannot establish a direct linkage.

18 Q. I need to very briefly turn into
19 restricted territory.

20 JUDGE BARNETT: Okay. We need to close
21 the hearing room.

22 (Whereupon, the trial proceeded in
23 confidential session.)

24

25

1 O P E N S E S S I O N

2 JUDGE BARNETT: Could you state your
3 name, counsel?

4 MS. LAM: Sure. I was going to.

5 CROSS-EXAMINATION

6 BY MS. LAM:

7 Q. Good morning, Mr. Timmins. My name is
8 Anita Lam. I am an associate at Mayer Brown, and
9 I'm representing Spotify USA.

10 A. Good morning.

11 Q. Good morning. And I will be conducting a
12 very brief cross-examination. Mr. Timmins, you
13 conclude that the market for digital music is
14 prospering, correct?

15 A. That is my conclusion, yes.

16 Q. And one factor that led you to that
17 conclusion, that the digital music market is
18 prospering, is that demand is expanding and more
19 music is being consumed; is that correct?

20 A. That is correct.

21 Q. And another factor is that supply is
22 expanding and more music is being provided; is that
23 correct?

24 A. There are more providers, yes.

25 Q. So when you -- what -- so when you said

1 supply is expanding, you didn't mean that there were
2 more songs being provided?

3 A. No, I meant that there were more
4 providers, more sources to whom a consumer could
5 turn as a source of music -- of streaming music.

6 Q. Spotify does not use music to help drive
7 sales of hardware and other services; is that
8 correct?

9 A. That's my understanding.

10 Q. And this is because Spotify does not
11 currently offer hardware or other services; is that
12 correct?

13 A. Again, that's my understanding.

14 Q. And you would not consider Spotify a
15 large diversified company transforming the market as
16 you've described in paragraphs 80 to 81 of your
17 written rebuttal report; is that correct?

18 A. I'm sorry, I didn't hear all of that.

19 JUDGE FEDER: Ms. Lam, can you just move
20 a little closer to the microphone and make sure it's
21 switched on?

22 JUDGE BARNETT: It's always switched on.

23 JUDGE FEDER: Okay.

24 MS. LAM: Sure. I'll repeat the
25 question.

1 BY MS. LAM:

2 Q. And you would not consider Spotify a
3 large diversified company transforming the market as
4 you have described in paragraph 80 to 81 of your
5 written rebuttal report; is that correct?

6 A. That's correct.

7 JUDGE STRICKLER: In fact, in the second
8 line of paragraph 80, you refer to a group of
9 companies "as pure-play streaming services." Would
10 you include Spotify in that category of pure-play
11 streaming services?

12 THE WITNESS: I would, Your Honor.

13 JUDGE STRICKLER: Thank you.

14 BY MS. LAM:

15 Q. And Spotify is -- is not currently
16 profitable; is that correct?

17 A. That's my understanding from press
18 reports.

19 Q. And do you know if Spotify was ever
20 profitable?

21 A. I don't have an understanding of that.

22 Q. Thank you, Mr. Timmins. That's all I
23 have.

24 JUDGE BARNETT: Anything further?

25 MR. CHARRON: No redirect.

1 JUDGE STRICKLER: I have a quick
2 question, just based on the very last answer you
3 gave. You said Spotify has not been profitable. Do
4 you think Spotify is prospering? That's another
5 word you used.

6 THE WITNESS: I think in the -- well,
7 first off, my analysis did not focus on any
8 individual company, other than the financial part
9 which we've just gone through.

10 But I -- I do think that in a terms of
11 the number of subscribers and, therefore, the
12 revenue it's generating from subscribers, it is
13 flourishing. Whether it will prosper is a question
14 to be seen over time.

15 JUDGE STRICKLER: So we've got three sort
16 of very shadowy metrics here. We have
17 profitability, which is not so shadowy; flourishing;
18 and prospering. Can you distinguish between
19 flourishing and prospering?

20 THE WITNESS: For the purpose of this
21 answer I did, yes, Your Honor.

22 JUDGE STRICKLER: You're going to have to
23 help me because it escaped me. What's the
24 difference between flourishing and prospering?

25 THE WITNESS: Well, flourishing is rapid

1 growth. Prospering is accessing the fruits of that
2 growth.

3 JUDGE STRICKLER: Thank you.

4 JUDGE BARNETT: Thank you very much,
5 Mr. Timmins. You may be excused.

6 And I think we're close enough to the
7 noon hour that we can go ahead and take our break at
8 this time and we will reconvene at 12:55.

9
10 (Whereupon, at 11:58 a.m., a lunch recess
11 was taken.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 AFTERNOON SESSION

2 (1:12 p.m.)

3 JUDGE BARNETT: Good afternoon. Please
4 be seated.

5 Whereupon--

6 CHRISTOPHER C. BARRY,
7 having been first duly sworn, was examined and
8 testified as follows:

9 JUDGE BARNETT: Please be seated.

10 MR. HARRIS: Good afternoon, Your Honors.
11 My name is Marion Harris from Pryor Cashman. I'm
12 appearing here today on behalf of the Copyright
13 Owners.

14 DIRECT EXAMINATION

15 BY MR. HARRIS:

16 Q. Good afternoon, Mr. Barry.

17 A. Good afternoon.

18 Q. Can you please state your name and spell
19 your last name for the Judges?

20 A. Sure. It's Christopher C. Barry,
21 B-a-r-r-y.

22 Q. Mr. Barry, are you currently employed?

23 A. Yes.

24 Q. Where are you employed?

25 A. I'm with PriceWaterhouseCoopers.

1 Q. Can you please describe your educational
2 background for the panel?

3 A. Sure. I have a Bachelor's degree in
4 accounting from Franklin & Marshall College, and I
5 also have a Master's in business administration from
6 the University of California at Berkeley.

7 Q. Mr. Barry, do you hold any professional
8 licenses or certifications?

9 A. I do. I'm a CPA, licensed in California
10 as well as Massachusetts.

11 Q. Have you ever previously served as an
12 expert witness?

13 A. Yes, I have. About 65 times in court or
14 arbitrations.

15 Q. In what areas have you served as an
16 expert witness?

17 A. Generally it is something in a dispute of
18 some kind. It can be a litigation, a wide variety
19 of case types. It can be an investigation on a
20 fraud or financial reporting misstatement. So it is
21 things that we label in our practice as forensic
22 accounting assignments.

23 Q. And in your experience as an expert
24 witness, has any court or arbitral body ever refused
25 to recognize your expertise?

1 A. No.

2 MR. HARRIS: Your Honor, the Copyright
3 Owners offer Mr. Barry as an expert in the field of
4 forensic accounting and financial accounting.

5 JUDGE BARNETT: No objection?

6 MR. ISAKOFF: We don't have any
7 objection.

8 JUDGE BARNETT: Okay. Mr. Barry is so
9 qualified.

10 BY MR. HARRIS:

11 Q. Mr. Barry, did you prepare rebuttal
12 testimony in this proceeding?

13 A. Yes, I did.

14 Q. If you could, I would like you to turn to
15 the tab marked CO-EX-H-3037, which should be the
16 last tab in Volume 1 of the binders before you. Let
17 me know when you are there.

18 A. I am there.

19 Q. Is the document behind Tab CO-EX-H-3037 a
20 copy of the rebuttal testimony you submitted in this
21 proceeding?

22 A. Yes.

23 Q. Can you please turn to page 15 of
24 Exhibit 3037.

25 A. Okay.

1 Q. Does page 15 contain a copy of your
2 signature?

3 A. Right, it does. It is actually not
4 paginated but it is the page that follows 14.

5 Q. Thank you.

6 MR. HARRIS: Your Honors, the Copyright
7 Owners offer Exhibit 3037, the written rebuttal
8 testimony of Christopher C. Barry and the exhibits
9 thereto into evidence.

10 MR. ISAKOFF: No objection.

11 MR. AHMAD: No objection.

12 JUDGE BARNETT: 3037 is admitted.

13 (Copyright Owners Exhibit Number 3037 was
14 marked and received into evidence.)

15 BY MR. HARRIS:

16 Q. Mr. Barry, did you prepare slides today
17 to assist with your testimony?

18 A. Yes.

19 Q. And is what is currently displayed on the
20 screen in front of us a copy of those slides?

21 A. Yes, it is page 3 of them, yes.

22 Q. Great. Mr. Barry, what was your
23 assignment in preparing your rebuttal testimony in
24 this proceeding?

25 A. Essentially to review statements made by

1 the four Services, which we have defined as Amazon,
2 Google, Pandora, and Spotify about their financial
3 condition with respect to providing streamed music
4 services and as well as address certain specific
5 financial reporting done by Pandora and Spotify.

6 Q. And in your assignment did you have the
7 opportunity to review certain documents?

8 A. Yes, I did.

9 Q. And what were those documents?

10 A. So one important document I reviewed was
11 the Services' initial or introductory memorandum. I
12 also reviewed certain reports by Dr. Marx and
13 Dr. Katz. I reviewed the deposition testimony of
14 Michael Herring from Pandora.

15 I also looked, as I said, at Pandora and
16 Spotify financial documents that were germane to
17 this -- to my analysis, my scope.

18 So that was essentially what I looked at.

19 Q. Thank you. Aside from what you described
20 as the introductory memoranda for Google and Amazon,
21 did you review any other documents from Google and
22 Amazon in forming the opinions expressed in your
23 rebuttal testimony?

24 A. I don't believe so, no.

25 Q. On this slide do you also list that you

1 reviewed Pandora and Spotify financial documents?

2 A. Yes.

3 Q. Are those the documents listed in
4 Exhibit 2 of your written rebuttal testimony,
5 Exhibit 3037?

6 A. Correct, the last two pages of that
7 document.

8 Q. Under the heading "Documents Produced by
9 the Services"?

10 A. I think it is under the heading
11 "Documents Relied Upon."

12 Q. I believe if we turn to the second page
13 of that exhibit, I am specifically referring to a
14 subsection. If you can just confirm that those are
15 the Spotify and Pandora financial documents?

16 A. Oh, yes, correct.

17 Q. Thank you. We can turn to slide 4. Can
18 you please summarize the conclusions of your
19 analysis for the panel?

20 A. Sure. And there are five indented bullet
21 points here but I think it really boils down to a
22 few points.

23 First, most of the Services, if not all,
24 have indirect revenues that they enjoy some
25 collateral benefit from providing streamed music

1 services from. And despite that, measuring the
2 contribution or the attribution of indirect revenues
3 to the music service is a very subjective exercise.
4 In fact, there are no financial accounting standards
5 around how to do that. So that would be my first
6 opinion.

7 Additionally, there are concepts of
8 profitability that the Services have entered in
9 their initial memorandum, which I don't think fully
10 take account of all the dynamics that would reflect
11 the success or lack thereof of the Services.

12 And related to that focusing on past
13 financial performance is not necessarily indicative
14 of what will happen in the future, especially in the
15 context of high-growth startup companies.

16 And I recognize not all of these
17 companies -- Apple wouldn't be considered a
18 high-growth startup company -- but certainly
19 operations like Pandora and Spotify would be.

20 Q. Thank you.

21 A. And then finally the third essential
22 opinion, I think, is that the Copyright Owners'
23 proposed rate structure, given this complexity
24 around measuring indirect revenues, is a more
25 practical and workable solution in terms of just

1 applying a rate per stream or a minimum per month
2 per sub.

3 Q. Thank you. If we can turn to slide 5,
4 please.

5 JUDGE STRICKLER: Just a question first
6 and we can probably get to it as we go deeper into
7 your report.

8 If we go back to the one before, thank
9 you, your second bullet point is "there is no
10 standard accounting methodology for quantifying
11 indirect revenues."

12 Notwithstanding the absence of a standard
13 accounting methodology, do accountants attempt to
14 quantify such indirect revenues for various lines of
15 business in certain circumstances?

16 THE WITNESS: Not for financial
17 accounting reporting. Management accountants might
18 try to do that.

19 JUDGE STRICKLER: Are you familiar with
20 how that is done by management accountants?

21 THE WITNESS: I am familiar with some
22 approaches that try to get at that in some rough
23 fashion, you know, things like conjoint studies and
24 the like, but they are not very precise and they are
25 subject to a lot of subjectivity, frankly.

1 JUDGE STRICKLER: Do you address that
2 issue in your report, that issue of management
3 accounting?

4 THE WITNESS: I don't believe I did, no.

5 JUDGE STRICKLER: Thank you.

6 BY MR. HARRIS:

7 Q. We can return to slide 5. Mr. Barry, in
8 forming the opinions expressed in your written
9 rebuttal testimony, did you have an opportunity to
10 review the financial statements for certain of the
11 participants in this proceeding?

12 A. Yes.

13 Q. Which participants?

14 A. As far as the music streaming business,
15 really just Spotify and Pandora.

16 Q. Were the financial statements you
17 reviewed sufficient to conclude in your opinion that
18 Spotify and Pandora services are unprofitable?

19 A. Not from the holistic definition of
20 profitable. If you limit yourself strictly to
21 historical GAAP profits, then I could conclude that
22 they haven't yet been profitable.

23 But when viewed from the larger lens of
24 profitability measured in different ways, I can't
25 conclude that from those statements.

1 JUDGE STRICKLER: Are you going to be
2 testifying later as to the various other ways of
3 looking at profitability?

4 THE WITNESS: Yes.

5 JUDGE STRICKLER: Thank you.

6 BY MR. HARRIS:

7 Q. And with respect to the larger lens about
8 which you just testified, why are these GAAP
9 financial statements insufficient to evaluate
10 profitability for Spotify and Pandora?

11 A. Well, there are a couple reasons. One is
12 they don't necessarily adjust for non-recurring
13 expenses that may have occurred in the past,
14 especially as a company is building its market and
15 its products.

16 They also don't take account of expenses
17 that are booked from a GAAP accounting perspective
18 that really don't cost the company anything in cash
19 or actually in true earnings, such as stock-based
20 compensation, which in Pandora's case has been a
21 very large deduction, and it is an add-back to their
22 distributed or what they acknowledge as non-GAAP
23 income or adjusted EBITDA.

24 So that's the main reason, is that there
25 is non-recurring expenses and there is non-cash

1 items in the historical GAAP reporting.

2 MR. HARRIS: Your Honors, we're now going
3 to turn to some restricted material. I would ask
4 that we close the courtroom to those not eligible to
5 hear it.

6 JUDGE BARNETT: The back part of the
7 room; anyone who has not signed the nondisclosure
8 statement or agreement, or certificate.

9 (Whereupon, the trial proceeded in
10 confidential session.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 O P E N S E S S I O N

2 BY MR. AHMAD:

3 Q. And just so we're on the same page, the
4 Copyright Owners' proposal is to have royalties
5 based on the greater of a per-play penny rate or a
6 monthly per-user rate; is that correct?

7 A. Yes.

8 Q. You know what the per-play penny rate is,
9 correct?

10 A. I do.

11 Q. But you do not know how that number was
12 arrived at; is that correct?

13 A. Correct.

14 Q. You do not know how long a play minimum
15 is under the CO's proposal either, is that correct?

16 A. Correct.

17 Q. You know what the monthly per-user rate
18 is?

19 A. Yes.

20 Q. But you don't know how that figure was
21 arrived at; is that correct?

22 A. That's correct.

23 Q. When comparing the Copyright Owners'
24 proposal to the service provider's proposal, am I
25 correct that you're only focused on the revenue

1 prong or component of that proposal?

2 A. I think that's correct, yes.

3 Q. So you are only focused on calculating a
4 royalty based solely on revenue; is that correct?

5 A. With respect to the services' proposal,
6 yes.

7 Q. And I think you just said it a couple
8 minutes ago, but am I correct that the assumption
9 underlying your opinion that the CO's proposal
10 should be adopted is just that it is simply more
11 easy to calculate?

12 MR. HARRIS: Objection, Your Honor,
13 misstates prior testimony. I am happy to elaborate
14 if it is unclear, Your Honor.

15 JUDGE BARNETT: I think he asked a
16 yes-or-no question. He asked if he was correct.

17 MR. HARRIS: Embedded in that question
18 was a misstatement of his opinion.

19 JUDGE BARNETT: Then the witness can
20 answer in the negative.

21 THE WITNESS: Yeah, it is not as simple
22 as that. The full answer is that the service
23 providers' proposal in my view is unworkable because
24 of the indirect revenue complication.

25 BY MR. AHMAD:

1 Q. Can you please turn to paragraph or page
2 42 of your deposition, line 6, sir.

3 A. I thought you were not going to go there.
4 Excuse me.

5 JUDGE STRICKLER: Before you -- grab the
6 book and sit down first.

7 JUDGE BARNETT: Did you say deposition?

8 MR. AHMAD: Yes.

9 THE WITNESS: Okay.

10 JUDGE STRICKLER: May I? Wait until they
11 get settled down on the documents and then I will
12 ask you, I will ask the witness a question. I just
13 didn't want to interrupt you getting to the
14 documents.

15 You said the percentage-of-revenue
16 approach on the Services is, I think the word you
17 just used is unworkable. But you also testified
18 before when you and I were having back and forth
19 that you think from a managerial accounting point of
20 view, these type of issues may be dealt with.

21 So when you say unworkable, are you
22 saying that it does not -- this type of issue does
23 not get resolved in the marketplace one way or the
24 other even though there is no GAAP way of resolving
25 the problem?

1 THE WITNESS: There are some mechanisms
2 to try to tease out these relationships and the
3 attribution, but in my view they are very subjective
4 and they are very imprecise and they are generally
5 hard to apply.

6 They require a lot of effort done on a
7 periodic basis. And at the end of all of that, they
8 don't even result in something that is really
9 objectively quantifiable.

10 JUDGE STRICKLER: What are those
11 mechanisms?

12 THE WITNESS: One is a so-called conjoint
13 study.

14 JUDGE STRICKLER: You did mention that,
15 yes.

16 THE WITNESS: Another method would be --
17 conjoint was really a flavor of a survey. I really
18 don't know any other method for it than the conjoint
19 survey.

20 JUDGE STRICKLER: And you say the
21 conjoint survey results themselves are subjective?

22 THE WITNESS: Yes.

23 JUDGE STRICKLER: Are they --

24 THE WITNESS: Because the way the
25 questions are framed and the different choices that

1 are given are, in my experience with doing surveys,
2 notoriously ambiguous and subject to slanting. And
3 if -- unless they are extremely carefully designed,
4 they will result in dubious answers.

5 JUDGE STRICKLER: And if they are
6 carefully designed?

7 THE WITNESS: I don't know. I suppose
8 there is instances where they have been adequately
9 designed so that they give objective results, but I
10 still -- my experience with them, they are very
11 subjective, very complicated to implement, and
12 costly to update periodically.

13 JUDGE STRICKLER: Do you have any
14 experience whereby such a conjoint survey is
15 utilized at both sides, that is, the payor and the
16 payee, if you will, are jointly responsible for
17 creating and funding the conjoint study?

18 THE WITNESS: I don't know of any such
19 situation but, yeah, I can't cite anything.

20 JUDGE STRICKLER: Do you think that would
21 mitigate the slanted subjectivity of such an
22 approach?

23 THE WITNESS: Yeah, it may. It may.

24 JUDGE STRICKLER: Thank you.

25 THE WITNESS: Yeah.

1 BY MR. AHMAD:

2 Q. So focusing back on your deposition
3 testimony at page 42, and I am focusing on line
4 6:15.

5 MR. HARRIS: Your Honor, we're in public
6 session. This is a restricted deposition
7 transcript. So if counsel can point me to where
8 we're going, we might be able to resolve this
9 without re-closing the courtroom, but this is
10 restricted.

11 MR. AHMAD: As I said, we're on page 42,
12 line 6 to 15.

13 MR. HARRIS: I think we can proceed
14 without closing the room.

15 JUDGE BARNETT: Thank you.

16 BY MR. AHMAD:

17 Q. Sir, do you see beginning on line 6 I
18 asked you, I said:

19 "Question: Am I correct that the
20 assumption or at least the primary assumption
21 underlying your opinion here, then, is that because
22 indirect revenue is more difficult to calculate than
23 a per-play penny rate or a monthly per-user rate,
24 then a per-play penny rate or monthly user rate is a
25 better metric than indirect revenue?" And you said

1 "yes." Do you see that answer, sir?

2 A. I do.

3 MR. HARRIS: I would just like to note
4 for the record that there was an objection lodged
5 and it is repeated here as well.

6 JUDGE BARNETT: It is there in the
7 transcript. Thank you.

8 BY MR. AHMAD:

9 Q. Sir, you would agree with me that just
10 because a payment proposal is simpler to calculate
11 does not necessarily mean that it is better; is that
12 correct?

13 A. Yes.

14 Q. Am I correct that a per subscriber
15 minimum would be easy to calculate?

16 A. I think so, yes.

17 Q. In fact, a per subscriber minimum would
18 be equally easy to calculate when compared to the
19 CO's proposal; is that correct?

20 A. Yes.

21 Q. You referred in your testimony, one of
22 the parts of the revenue proposal of the Services is
23 a 15 percent at cost associated with revenue?

24 A. Correct.

25 Q. That's also easy to calculate; isn't that

1 correct, sir?

2 A. Well, if the elements of cost that are
3 allowable as an offset are delineated and agreed
4 upon, it should be an easy thing to measure, yes.

5 JUDGE STRICKLER: Sir, excuse me. Do you
6 have any experience in dealing with this type of
7 problem in indirect revenue as it relates to patents
8 and individual patents within a larger product?

9 THE WITNESS: Yes, actually.

10 JUDGE STRICKLER: Isn't there a smaller
11 salable unit approach in the patent field to try to
12 allocate revenues towards individual components of a
13 patent?

14 THE WITNESS: There is. It is the
15 doctrine that has sort of been accepted in the last
16 decade or so, and it tries to get at that smallest
17 element, which is, again, it can be observed as sold
18 in the marketplace so that a royalty can be applied
19 to just that and not, for example, the whole
20 computer, but, rather, just the screen or the memory
21 or the keyboards or the thing that is subject to the
22 patents at dispute.

23 JUDGE STRICKLER: Would you say that
24 problem is analogous to the problem we're talking
25 about here?

1 THE WITNESS: No.

2 JUDGE STRICKLER: Why not?

3 THE WITNESS: That -- that problem is
4 trying to disaggregate the components of an overall
5 apparatus. This problem that we're dealing with
6 here is trying to attribute or relate parts of a
7 ancillary business to the core. So, let's say, in
8 Pandora's situation, you are trying to relate the
9 Ticketfly revenues to the streamed music business.

10 So they are separately identified revenue
11 streams but one arguably is enhanced by the other.
12 And it is this attribution and what portion of the
13 ticket revenue should be attributed over to music
14 which is the problem here.

15 It is different than taking a computer
16 and parsing out how much of it relates to one
17 particular feature or benefit.

18 JUDGE STRICKLER: I appreciate there is a
19 difference, but your testimony is that it is not
20 even analogous?

21 THE WITNESS: I don't think it is
22 analogous, no.

23 JUDGE STRICKLER: Are there subjectivity
24 problems in both of these issues?

25 THE WITNESS: Yes.

1 JUDGE STRICKLER: So in that limited
2 sense, perhaps?

3 THE WITNESS: In that sense it's
4 analogous, yes.

5 JUDGE STRICKLER: Thank you.

6 THE WITNESS: Okay.

7 BY MR. AHMAD:

8 Q. Sir, I would like to focus back on the
9 Copyright Owners' proposal. Am I correct that in
10 connection with your opinion you did not consider
11 who would be considered a user under the monthly
12 per-user rate prong?

13 A. I know the details of whether it is an
14 active user or an inactive, for example, which I
15 think is some of the questioning that you brought
16 up, are beyond the scope of my opinion, but the
17 tabulation of those head counts is an
18 easily-gathered data point.

19 Q. And you also understand that there are
20 different types of streams, in particular
21 interactive streams and non-interactive streams; is
22 that correct?

23 A. Yes, I do.

24 Q. And you are not suggesting that the CO's
25 proposal should apply to the non-interactive

1 streams; is that correct?

2 A. Well, that's a statutory interpretation
3 and I think -- I guess I don't know if there is
4 disagreement about that, but I presume that what
5 we're here to talk about is the interactive streams.

6 Q. And you do not know what would be
7 considered a stream or a skip under the CO's
8 proposal; is that correct?

9 A. No, I don't have visibility to that level
10 of granularity on their proposal, no.

11 Q. And you do not know what the CO's
12 proposal does to address defining streams and skips;
13 is that correct?

14 A. Correct.

15 Q. And you have not seen any analysis from
16 the CO's addressing that issue, right?

17 A. That's correct.

18 Q. Can we, if we can bring it up on the
19 screen, sir, your demonstrative page number 6, I
20 believe it is.

21 MR. MANCINI: Sorry?

22 MR. AHMAD: Sorry, that is not 6. It is
23 5.

24 MR. MANCINI: Thank you.

25 BY MR. AHMAD:

1 Q. In the title of this demonstrative, you
2 say that financial statements are an incomplete
3 picture of the services' capacity to pay royalties.

4 Do you see that, sir?

5 A. I do.

6 Q. And you and I discussed the concept of
7 ability or capacity to pay royalties at your
8 deposition. Do you recall that?

9 A. Vaguely.

10 Q. In any event, your report states that you
11 have not analyzed whether the service providers
12 could, in fact, afford to pay higher royalty rates;
13 is that correct?

14 A. Yes.

15 Q. And you define, when we're talking about
16 ability to pay or capacity to pay, you are defining
17 that as merely the ability to pay without going out
18 of business or having to extensively borrow; is that
19 correct?

20 A. Is that what I said in deposition?

21 Q. I would be happy to show you your
22 testimony.

23 A. I bet you would. If I said it there,
24 then it is still true.

25 Q. But I am correct that if the CO's

1 proposal is adopted, it is your opinion that the
2 service providers would still have to make a
3 business decision as to whether or not to continue
4 offering streaming music; is that correct?

5 A. Yes.

6 Q. And it is possible that the CO's proposal
7 could lead to scenarios where it would be
8 uneconomical for the service providers to continue
9 their streaming offerings; is that correct?

10 A. At the current rate structure, I suppose
11 that is possible, yes.

12 Q. And --

13 A. When I say rate structure, I'm sorry, to
14 be precise, at the current market price that they
15 charge subscribers.

16 Q. And having the impact of the CO's
17 proposal could lead to scenarios where the COs -- or
18 the service providers would either exit the business
19 or discontinue perhaps certain features of their
20 businesses with respect to streaming?

21 A. Or perhaps raise their prices to the
22 marketplace, correct. One of those two.

23 Q. And you have not analyzed the financial
24 impact to the CO's proposal; is that correct?

25 A. Correct.

1 MR. AHMAD: I have no further questions
2 for the witness.

3 JUDGE BARNETT: Thank you, Mr. Ahmad.
4 Any other questions from other Services?

5 MR. MANCINI: Yes, Your Honor.

6 MS. YOUNG: Good morning, Your Honors, or
7 good afternoon, Your Honors. Kristine Young from
8 Mayer Brown representing Spotify USA.

9 CROSS-EXAMINATION

10 BY MS. YOUNG:

11 Q. Good afternoon, Mr. Barry.

12 A. Good afternoon.

13 Q. We met at your deposition, you might
14 remember.

15 A. I do.

16 Q. If you turn to paragraph 7 of your
17 written rebuttal testimony.

18 A. This seems to be the favorite paragraph.
19 Go ahead.

20 Q. If you look at that paragraph you will
21 see that you state that the Services interactive
22 music services provide significant cross-selling
23 benefits to the Services other business lines and
24 ecosystems; right?

25 A. Yes.

1 Q. And for examples of cross-selling, I
2 think you touched on this before in your testimony,
3 you list iPhones, Echo smart speakers, Amazon Prime
4 membership fees, Pandora ticket sales for events
5 advertised on its music streaming services. Do you
6 see that?

7 A. And also Amazon Red -- I'm sorry, it does
8 say Prime, yes, that's what I said, yes. Those are
9 just examples. There is many other that we could
10 cite, of course.

11 Q. And you refer to all of those examples of
12 cross-selling that you name as indirect revenues,
13 correct?

14 A. Yes.

15 Q. Have you seen any evidence that Spotify
16 is using its interactive streaming services to
17 cross-sell other services that are unrelated to
18 interactive streaming?

19 A. Not yet, correct. I mean, I should be
20 more precise. I haven't seen any evidence that they
21 are doing that to date, just that they are planning
22 to do it has been indicated.

23 Q. And you have not seen any documents or
24 anything suggesting that it is probable that Spotify
25 will enter into additional business lines unrelated

1 to interactive streaming, correct?

2 A. I don't have anything that concrete about
3 Spotify's plans. I just have some -- I think there
4 was an investor presentation where a line item was
5 put in it that talked about expanding the -- or
6 continuing to expand the eco structure, and that's a
7 buzzword for businesses that surround the core and
8 are mutually beneficial.

9 Q. And you are not aware of any indirect
10 revenues currently that Spotify earns, right?

11 A. Correct.

12 Q. Interactive streaming is Spotify's core
13 business, right?

14 A. Yes.

15 Q. And as part of interactive streaming's
16 business, Spotify offers an ad-supported tier and a
17 paid subscription tier, right?

18 A. Correct.

19 Q. If I can ask you to turn to paragraph 1
20 of your report.

21 A. Okay.

22 Q. In that paragraph you define the term
23 four services as Amazon, Google, Pandora, and
24 Spotify, right?

25 A. Yes.

1 Q. When you say in paragraph 7 of your -- if
2 you go back to paragraph 7 of your report. Sorry.
3 Flip back.

4 If you look at paragraph 7 you say that
5 the four services exclude indirect revenues from
6 their service revenue used to compute the headline
7 rate of 10.5 percent of service revenue.

8 Do you see that part of the sentence?

9 A. I do. I do.

10 Q. So that is not true with respect to
11 Spotify, correct?

12 A. Well, it is literally true, but the
13 caveat is that Spotify doesn't yet have any indirect
14 revenue to be excluded, so.

15 Q. So as far as Spotify is concerned,
16 sitting here today and at the time your report was
17 written, that paragraph was based on speculation
18 that Spotify might enter into other business
19 ventures in the future. Correct?

20 A. Yes.

21 Q. And you have not seen any evidence
22 suggesting that Spotify will definitively do this,
23 correct?

24 A. Yes, that's correct.

25 Q. I will ask you to turn to paragraph 9 of

1 your report.

2 A. Okay. I am already there.

3 Q. Great. In that paragraph you state: "I
4 have not analyzed and take no position on whether
5 the Services can afford to pay higher royalties.
6 Rather, my report explains why historical accounting
7 profits fail to provide a full picture of a
8 company's ability to make future mechanical royalty
9 payments."

10 Do you see that?

11 A. I do.

12 Q. By ability to make future mechanical
13 royalty payments, you mean without going out of
14 business or disrupting normal business operations,
15 correct?

16 A. Yes.

17 Q. And disruption means a discontinuity of
18 the status quo, right?

19 A. Yes.

20 Q. From a business perspective, wouldn't it
21 be disruptive if a company had to exit a line of
22 business because they were forced to make royalty
23 payments that it could not afford to pay?

24 MR. HARRIS: Objection, Your Honor. This
25 expert is here as a financial accountant, not a

1 manager of a business or offering a business
2 perspective.

3 JUDGE BARNETT: Sustained.

4 BY MS. YOUNG:

5 Q. Mr. Barry, would you agree that less
6 competition means less choice for consumers?

7 A. Generally, yes.

8 MS. YOUNG: I am now going to get into
9 restricted testimony.

10 JUDGE BARNETT: We're going to have a
11 little restricted session. Please wait outside.

12 (Whereupon, the trial proceeded in
13 confidential session.)

14

15

16

17

18

19

20

21

22

23

24

25

1 O P E N S E S S I O N

2 CROSS-EXAMINATION

3 BY MR. ISAKOFF:

4 Q. Now, could you put up slide 3 of Mr.
5 Barry's slides. The last bullet point on this slide
6 says that you are going to be -- were going to be
7 addressing certain statements as to whether or not
8 the streaming services were profitable from a GAAP
9 perspective. Do you see that?

10 A. I do.

11 Q. You are not suggesting that Pandora has
12 been profitable from a GAAP perspective, are you?

13 A. No, I'm not.

14 Q. And, In fact -- well, in your work in
15 this case, you have not reviewed the written direct
16 testimony or written rebuttal testimony of any of
17 the Services' witnesses, correct?

18 A. I believe -- when I say I, expanding that
19 to include the we of my staff, looked at Dr. Katz'
20 and Dr. Marx's written testimony.

21 Q. Okay. Well, let me -- let's exclude
22 experts. You haven't read any of the written direct
23 or rebuttal testimony of any of the Services' fact
24 witnesses, have you?

25 A. Let me take a peek. I don't think so but

1 let me just confirm.

2 Q. For the record you are looking at
3 Exhibit 2 to your report?

4 A. Yes.

5 Q. Where none are listed?

6 A. That looks to be correct. I did review
7 testimony transcripts of Mr. Herring from Pandora
8 but not -- and as well as a rebuttal report that he
9 wrote and issued on February 15th, I believe.

10 Q. Oh, okay, because I didn't see that
11 rebuttal report listed in your report.

12 A. Well, how could it be? It was issued
13 concurrent with mine.

14 Q. Okay. All right.

15 And the parts of the depositions that you
16 read were actually chosen by counsel for the
17 Copyright Owners, correct?

18 A. The parts that -- I can't remember if we
19 were -- we certainly weren't limited to that, but
20 maybe they indicated certain pages that might be
21 more relevant to us, but we got -- we had the whole
22 transcript.

23 Q. Would you please put up Mr. Barry's
24 deposition, page 94. If you look, starting at line
25 23:

1 "Question: How did you decide which
2 depositions to read or not read?

3 "Answer: Well, where we cite things
4 about Katz and Marx, I believe we probably pointed
5 to the section of the deposition that was relevant."

6 "Question: So you were just pointed to
7 that by counsel?

8 "Answer: Yes."

9 Were you asked those questions and did
10 you give those answers?

11 A. Yeah, I did. Yes, I was asked and I did
12 give those answers.

13 Q. Now, you would not hold yourself out as a
14 music industry expert in any sense, would you?

15 A. I like music, but --

16 Q. You would not hold yourself out as a
17 music industry expert? And I appreciate the levity,
18 but this is not a funny business.

19 A. And I admitted in my deposition I'm not
20 an expert in the music industry. I am an expert in
21 financial or forensic and financial accounting,
22 though, and that's what I'm here to talk about.

23 Q. You have not reviewed any music industry
24 agreements and you are unaware of, for example,
25 whether the agreements between the Services and the

1 record labels are on a percentage-of-revenue basis,
2 are you?

3 A. I am aware that some of those agreements,
4 the direct agreements are on a percent of revenue
5 basis.

6 Q. You have not reviewed any of them,
7 correct?

8 A. That's correct.

9 Q. And you are unaware of any administrative
10 or judicial tribunal choosing a
11 percentage-of-revenue metric for music industry
12 rates other than the one that is currently in effect
13 here today, correct?

14 A. Correct.

15 Q. Can we go to your slide 11.

16 MR. ISAKOFF: Yeah, I think we have to be
17 in restricted session now.

18 JUDGE BARNETT: I hope you didn't get too
19 comfortable.

20 MR. ISAKOFF: I promised that it wasn't
21 going to be long.

22 JUDGE BARNETT: You did, and you kept
23 your promise. Thank you.

24 (Whereupon, the trial proceeded in
25 confidential session.)

1 O P E N S E S S I O N

2 JUDGE BARNETT: Please be seated, all
3 except the witness. Please raise your right hand.
4 Whereupon--

5 LEE THOMAS MILLER,
6 having been first duly sworn, was examined and
7 testified as follows:

8 JUDGE BARNETT: Please be seated.

9 DIRECT EXAMINATION

10 BY MS. BUCKLEY:

11 Q. Good afternoon, Mr. Miller. Would you
12 introduce yourself to the Judges in terms of a
13 little bit of your background.

14 A. I am Lee Thomas Miller. I am a
15 professional songwriter from Nashville, Tennessee.
16 I am also the current president of the Board for the
17 Nashville Songwriters Association International.

18 Q. Thank you. I would like to direct your
19 attention to the second document in the binder
20 before you. And I'm going to ask you if that is
21 your written direct statement provided in this rate
22 proceeding?

23 A. It is.

24 Q. And would you mind turning to the very
25 last page and let me know if that is your signature?

1 A. It is.

2 Q. Thank you. And now turning to the first
3 exhibit, can you tell me whether this is your
4 official bio?

5 A. Yes.

6 Q. Thank you.

7 MS. BUCKLEY: Your Honor, I would like to
8 introduce into evidence Copyright Owners 2558 and
9 3023.

10 MS. RAMOS: Good afternoon, Your Honors.
11 Once again, this is one of the written direct
12 testimonies that is subject to the motion in limine.
13 As we did yesterday with Mr. Bogard, we're
14 requesting that it only be provisionally admitted
15 while the motion in limine is decided.

16 JUDGE BARNETT: Thank you, Ms. Ramos.
17 Any other response?

18 MR. ELKIN: We join in that.

19 JUDGE BARNETT: Thank you. 3023 and 2558
20 are admitted provisionally, pending resolution of
21 the motion in limine.

22 (Copyright Owners Exhibit Numbers 2558
23 and 3023 were marked and received into evidence.)

24 BY MS. BUCKLEY:

25 Q. Mr. Miller --

1 JUDGE BARNETT: I have to -- I'm sorry.
2 I'm going to act like a googly-eyed fan. You wrote
3 "You're Gonna Miss This"?

4 THE WITNESS: Yes, ma'am. Do you have
5 children?

6 JUDGE BARNETT: I do.

7 THE WITNESS: Have you cried to that
8 song?

9 JUDGE BARNETT: I have cried to it many
10 times.

11 THE WITNESS: I love that score. I have
12 teenagers, so it is kind of hard for me to grasp
13 right now, but you are going to tell me I'm going to
14 miss that too, right?

15 JUDGE BARNETT: My kids are teenagers. I
16 can't tell you that yet.

17 BY MS. BUCKLEY:

18 Q. Mr. Miller, how long have you been a
19 songwriter?

20 A. Well, professionally this would be my
21 21st year.

22 Q. And how many of your songs have been
23 recorded over the course of your career?

24 A. I would guess somewhere between 100 and
25 150.

1 Q. Can you tell us some of the recording
2 artists who have recorded your songs?

3 A. Brad Paisley, Tim McGraw, Trace Adkins,
4 George Strait. I have been doing it a long time.

5 Q. Have any of your songs hit Number 1 on
6 the charts?

7 A. They have.

8 Q. How many, would you say?

9 A. Seven.

10 Q. Do you recall the names and the recording
11 artist who recorded them, for at least some of them?

12 A. I can tell you where I was the day they
13 went Number 1. "You're Gonna Miss This" song with
14 Tim McGraw, "Southern Girl," Brad Paisley, "Perfect
15 Storm" and "I'm Still a Guy." Those are some of
16 them.

17 Q. And have any of your songs hit the top 10
18 on the charts?

19 A. Yes.

20 Q. Do you know roughly how many?

21 A. Probably three or four, "In Color," the
22 Tim McGraw song called "Nothing to Die For," a
23 Brandon Heath Christian song called "Jesus in
24 Disguise."

25 Q. Have you received any awards or

1 professional accolades for your work as a
2 songwriter?

3 A. I have. I think I have had 11 BMI
4 performance awards as the top songs performed for
5 those particular years on terrestrial radio. I have
6 won Song of the Year at the ACM Awards and the CMA
7 Awards.

8 Q. Would you mind telling the Judges what
9 those acronyms stand for?

10 A. The Academy of Country Music Awards and
11 the Country Music Association. And I have been
12 nominated for the Grammy three times.

13 Q. And are you currently the president of
14 the Nashville Songwriters Association as well?

15 A. I am.

16 Q. For how long have you been president?

17 A. Going on five years.

18 Q. Are you compensated for your work as
19 president of NSAIA?

20 A. I am not.

21 Q. NSAI, rather?

22 A. I am not.

23 Q. And why do you do it?

24 A. Well, I had the opportunity to start
25 coming to Washington doing some legislative work on

1 behalf of songwriters, on behalf of my own
2 profession, a little over ten years ago on a tax
3 bill. And I found it fascinating that we could walk
4 into the halls of Congress and represent ourselves
5 and our own business and we could be effective doing
6 it.

7 And I felt like every one of us that had
8 the opportunity to do that should. So we go, we
9 take our guitars, we sing them the songs. We tell
10 them our own stories. We explain our business to
11 them. And we found that it is the most effective
12 way we can possibly get our story out.

13 And my peers trust me with this task.
14 And I -- I keep coming back until I'm told that I'm
15 no longer allowed to.

16 Q. Can you tell the Judges sort of a little
17 bit about how you got into the business of
18 songwriting?

19 A. Well, I grew up on a little farm in
20 Kentucky and nobody in my family really played,
21 except this one uncle, and my parents were very
22 non-musical. And I started playing, fell in love
23 with music.

24 I think most musicians once they start
25 playing, they kind of dabble with writing songs

1 because you start mimicking that which you love.
2 And so I did that. And it got more serious and more
3 serious. And by the time I was about a junior in
4 high school, I knew that I wanted to move to
5 Nashville, I wanted to be a professional musician, I
6 wanted to be a professional songwriter. And I began
7 seeking out whatever path it is that would prepare
8 me for that.

9 Q. Did you attend university?

10 A. I did. My mother wanted me to go do
11 something sensible like business, and I got a
12 Bachelor's degree in music theory composition at
13 Eastern Kentucky University to her absolute horror.

14 Q. Can you describe briefly the songwriting
15 process?

16 A. Well, I think there is a lot of myths out
17 there about, you know, you sit around and wait for
18 inspiration to strike. We don't. Once your
19 assigned as a full-time songwriter, it is on you to
20 make a living, you are now a self-employed
21 contractor.

22 And we get up every day with a schedule
23 that has been preset, you know, by myself and my
24 publisher for probably eight to ten weeks at a time.
25 And I go in every day, you know, 10-ish, and I have

1 a cowrite. And I sit with another songwriter and we
2 talk about our weekend. And we talk about our
3 wives. And we talk about our kids and the struggles
4 and the goods and the bads. And all of us are
5 sitting around every day listening to other people's
6 lives and we're scribbling down anecdotes and
7 phrases and things that sound like a song.

8 You know, we will carry around thousands
9 of these, just these titles and pieces and things.
10 And we look at each other and kind to come to some
11 agreement that day on what we think the best song in
12 the room is for that day. And then: Okay, well,
13 how do you think it goes? Who is cutting? Well,
14 Tim McGraw is cutting. How do you think he would
15 say it?

16 You know, what does it mean? Is it sad?
17 Is it happy? Is it -- is it up-tempo? Well, Dierks
18 Bentley is looking for a power ballad, so let's make
19 it that. There is some of that. But then you take
20 some nugget of whatever the inspiration was, that
21 thing that your child said that happened at recess
22 and we try to make something emotional that we can
23 tell you in three minutes and make you feel
24 something. And we do that every day.

25 Q. How did you hone your craft?

1 A. Well, a lot of practice. Like I said, I
2 took maybe the non-conventional road for the
3 commercial songwriter. I did -- I went to music
4 school. I became classically trained. I'm the
5 worst classically trained pianist you will ever have
6 before you, I promise you.

7 But every day I did music and every day I
8 did music. And every day I studied and I studied
9 classical composers. And I studied -- with that, I
10 took that and applied it to, you know, the
11 honky-tonk music that I was listening to and the
12 people and the rock music that I loved. And I just
13 did everything I could to absorb and be the best
14 possible musician that I could be.

15 And then I packed everything I had, I
16 took \$1,000 in cash that I had I saved and moved to
17 Nashville. And I submersed myself in the country
18 music capital of the world. And I starved and I
19 waited tables and did what I had to do to meet the
20 people that were making the music that was on the
21 radio.

22 And every little step I could get, I
23 would find somebody and I would learn from them and
24 learn from them and learn from them. And most
25 importantly I wrote songs and songs, bad songs,

1 terrible songs. But they just kept getting better,
2 I think.

3 Q. Judge Barnett attests to it.

4 How many songs do you write before you
5 get a hit, generally speaking?

6 A. You know, it is an impossible question to
7 answer. I remember when I first started in
8 Nashville, the first thing that I was told: Don't
9 ever tell anybody you went to music school. People
10 aren't going to be impressed by that.

11 And then I started having people say
12 yeah, that's cute, you write songs, the first 500
13 don't count, you know.

14 So I don't know. I mean, I know that,
15 you know, I was there for about five years every day
16 before I got a legitimate publishing deal. And then
17 it was another seven years before I had a hit. And
18 so I was writing at least 80 to 120 songs a year.

19 Q. How were you sustaining yourself for that
20 period of time, at least financially?

21 A. I took a lot of jobs as a musician. I
22 traveled a little bit as a musician. I moved to
23 Nashville June 1st, and on July 3rd I got on the bus
24 as Tom T. Hall's fiddle player. And on July 6th he
25 fired me, which was the first indication that

1 playing fiddle for a living wasn't going to go well.

2 But I did any of those -- anybody that
3 would hire me to play music. And then I did temp
4 service jobs, anything that I could. That's what
5 all of us do, just for the opportunity to get a
6 break.

7 Q. What was the primary source of
8 songwriter's income at the time you started in this
9 business, approximately 21 years ago, at least on a
10 professional level?

11 A. Well, there were multiple income streams.
12 At the time album sales were tremendous. And there
13 were so many records being made and people were
14 buying these records, absolutely. Record sales were
15 huge.

16 I distinctly remember there was one point
17 about 1998 where there was a relatively well-known
18 artist from RCA Records and she got dropped because
19 she only went gold. And I remember at the time
20 thinking: Wow, that is pretty tough, you know. We
21 used to think a gold record was a pretty good deal.

22 So at the time, especially when I signed
23 to a publisher, I'm the new guy, right? So I'm
24 scrambling and just trying to get cuts and then I
25 did. I started getting cuts. And pretty much if

1 you had, you know, a record deal and a couple of
2 hits at that time, your album was selling.

3 So the mechanicals were enough that I'm
4 taking an advance from my publisher, and I'm getting
5 enough album cuts a year that it is paying back my
6 advance, and everyone is happy. I'm learning. I'm
7 getting better. I'm making money for the company.
8 And everything is good.

9 And sometimes it takes a long time for
10 one of those to be the hit. You know, there is 10
11 or 12 songs on an album and there is only going to
12 be three singles, so you are holding out for that.
13 And it took years for me to -- I would get a single,
14 but it didn't work. I mean you get the single, but
15 then it has to be a hit, you know.

16 So seven years in, the publisher has
17 invested quite a lot in my career and in me, and
18 they have seen growth and been able to give me the
19 opportunity to have the time to get better and
20 figure this out. And then I had a hit.

21 Well, by the time I had a hit, you know,
22 I had been paying my way, you know. Albums were
23 paying my -- paying my debts as we went along. And
24 then once you had a hit the performance royalties,
25 that was kind of the carrot at the end of the stick,

1 you know, and then things were great.

2 Q. How do your mechanical, how does your
3 mechanical income compare now with the way it was
4 when you first started as a songwriter?

5 A. It is virtually irrelevant to the point
6 that we very rarely talk about it any more. I mean,
7 there are so few people that sell a million records,
8 they're going to have to sell a million records for
9 you to really have a enough to discuss anyway. And
10 then it takes so long to get the money anyway.

11 So I have friends, dear recording
12 artists, wonderful super stars who not that long ago
13 were double platinum artists. And they are still on
14 the radio and they are still having hits. And I
15 have cuts on these albums and they are selling 2-
16 and 300,000 units.

17 That -- that -- it is never even, you
18 know, we don't even think about it any more. You
19 certainly don't budget around mechanical checks any
20 more.

21 Q. What type of mechanical income do you
22 earn from on-demand streaming?

23 A. It is so insignificant that we rarely
24 even scroll down and look at the line items. I
25 mean, it is -- you look at these numbers of millions

1 of spins and then you look at tens of dollars that
2 they pay. First of all, we can't comprehend that
3 many spins. I mean, we looked at making a living
4 on, you know, these terrestrial spins. And, you
5 know, if we get a million spins on a terrestrial
6 song, we get certificates for it, you know, and we
7 will see these numbers of 8 and 10 and 20 and 30
8 million spins and it is just 2- or 300 dollars and
9 it is nothing.

10 Q. And are songwriters earning anything
11 significant on music sales, whether CD sales or
12 permanent digital downloads?

13 A. Maybe if you are on a Taylor Swift album,
14 but in country music right now, no, not to speak of.

15 Q. How would you describe the songwriter's
16 contribution to the music industry?

17 A. Well, I mean, I speak of Nashville,
18 because Nashville is a true song town. And people
19 come from all over the world to live there and be a
20 part of our culture. And we're all kind of in a
21 tight-knit community. It happens in the same little
22 part of town.

23 So you kind of -- for the most part, the
24 music business, everybody kind of knows everybody.

25 And we watch the songwriting community,

1 you know, the new people come and if they can hang
2 in there and stay long enough to learn and they
3 start having cuts, you start seeing -- because we
4 all kind of know what everybody wrote.

5 And when the songs come on the radio, we
6 know if the artist wrote them or we know if we wrote
7 them.

8 And we're virtually on every song that's
9 on the radio. I just -- in preparation for this, I
10 looked at, you know, a Billboard chart a couple
11 weeks ago of the top 50 country songs. This was
12 like March 11th. And I kind of scrolled down the
13 top 50 and counted. 22 of the top 50 songs on
14 country radio were written by somebody other than
15 the person singing them, you know.

16 And of the remaining 28 songs, almost all
17 of them were written by the person singing them with
18 one or more of us, so the professional songwriter.
19 And understand, it took a long time for people to
20 get to our level. You don't just learn how to do
21 this overnight. And we're craftsmen that spent our
22 youth and our 20s figuring out how to be competitive
23 and how to make it in this business and how to hone
24 a craft to the point that we are the best in the
25 business.

1 And the artists write those songs with us
2 or they take our songs and record them. It is our
3 job to understand the trends. And when the music
4 changes, we change. We're professionals. That's
5 what we do. We know when that sounds like two years
6 ago because we're thinking about next year already.
7 You know? That's part of being a professional in
8 what we do.

9 So we're absolutely critical. If you
10 took the songs that the songwriters, the
11 professional songwriters contributed to off of the
12 radio, there would be no radio in country music.

13 Q. How would you describe the value of your
14 work as a professional songwriter?

15 A. I think this is where we start having
16 trouble in Washington and in any forum where we
17 stand up and we talk about a tangible value. I know
18 I have songs that are played at funerals and I have
19 songs played at graduations. And we do a little
20 songwriter show and we sing songs and I watch people
21 cry at my bad version of a song because the words
22 hit them.

23 I had somebody come up to me one time in
24 one of the most profound moments after a writer's
25 night, and there is this song that I had and it had

1 this thing about a grandfather that had been in the
2 war. And it was just kind of a passing line. And
3 this guy comes up and tells me a story that his
4 father had had severe dementia for years and hadn't
5 spoken, and one day listening to my song started
6 crying. And when he asked his father, he says:
7 What is wrong? He says: I was there.

8 That one line in the song took him back
9 to World War II. And I said: Wow, you know, we sit
10 in a room and we wrote that. You know? I mean,
11 what's the value? I don't know. Take the music off
12 of movies. Take music out of the skating rink, you
13 know, let's see what the value is.

14 I know that it is hard to write a hit
15 song. And I know that after I write the hit song, a
16 lot of stuff happens and a lot of jobs are created,
17 and there is a lot of people making money somewhere,
18 because there is a lot of really expensive trials
19 going on where people are fighting about where the
20 money is going to go. To me, it sounds like the
21 music has a great value to somebody.

22 Q. Is it paying off for you right now in the
23 current climate of the music industry?

24 A. Well, I have been very fortunate. I have
25 a good career. I continue to have a good career.

1 But the money is scary. I have to have a hit every
2 so often. I am absolutely not independently
3 wealthy. I am not close to -- you know, it is --
4 I'm scratching and digging, just like everybody else
5 trying to have the next single on whoever.

6 And that's -- I think I would be
7 considered extremely successful in Nashville as a
8 songwriter, as a professional songwriter. And I'm
9 here to tell you it is hard every day.

10 And the current state of where we're
11 headed with technology and the way the rates are
12 paid based on these government restrictions, the
13 writers rooms, I would say a third of the day is
14 spent where we're sitting there discussing with each
15 other how it is working, where it is headed, is
16 there any relief, does it look any better?

17 And everyone that writes the songs is
18 scared, more so than any time I have ever seen them.
19 Because I'm talking about people who are writing
20 songs that the Carrie Underwood's of the world are
21 cutting. You know, they are the best of the best.

22 And we're looking at each other saying:
23 We're almost to the point where being better than
24 everybody else in the world at this doesn't matter.
25 We're not going to be able to make a living.

1 Q. You must have known when you decided to
2 become a professional songwriter that there was a
3 certain amount of risk associated with that career
4 path, as it appears your mom recognized.

5 What did you perceive the risks to be at
6 that time?

7 A. Well, I don't think anyone goes into the
8 world wanting to be a professional musician,
9 assuming that it is going to be easy. I am
10 absolutely not the best musician, and I am not the
11 best songwriter.

12 But it was what I wanted to learn how to
13 do. I knew from the beginning the competition would
14 be brutal. And I knew my own limitations. And I
15 have always accepted that. I accept the fact when
16 somebody else gets the cut and I don't. That's just
17 the way it works. You go in and you work harder for
18 the next time.

19 I don't think any of us, you know, look
20 at that part and we have any issue with it. We all
21 went into it understanding that. What we never
22 considered was that the system itself would flush us
23 out, especially with music itself being consumed at
24 the highest rate it has ever been in history.

25 It is not like we're making something

1 that's obsolete. Everyone wants music and everybody
2 is getting music. I mean, everyone is getting
3 music.

4 We're on vacation last year with my
5 family and we were walking through Philadelphia.
6 And I pointed to my wife and I said: Hey, look
7 around, find me how many people do not have ear buds
8 in right now walking through this park. Everyone
9 was listening to music. You know?

10 So we never, ever considered the fact
11 that making it, the creating of it out of thin air
12 would become obsolete as a profession.

13 Q. Some of the Services have indicated that
14 if the mechanical rates are increased, ad-supported
15 on-demand services might not fare very well.

16 Do you have anything to -- in response to
17 that sentiment?

18 MS. RAMOS: Objection, Your Honor, this
19 is beyond the scope of his written direct testimony,
20 and it would be speculation.

21 JUDGE BARNETT: Sustained.

22 BY MS. BUCKLEY:

23 Q. Do you believe you are being paid fairly
24 for your songs being streamed on interactive
25 services?

1 A. No, I don't feel like we're being paid at
2 all.

3 Q. What would you like the Judges to
4 consider, if anything, if there is anything further
5 in contemplating the appropriate mechanical rates in
6 this proceeding?

7 A. Speaking for myself, I guess I struggle
8 with -- I can't think of another business that is
9 under the dated restrictions that we are. The
10 system seems so archaic. We have no negotiating
11 power for any of this. I mean, this isn't
12 negotiations. This is me fighting for our careers.

13 I mean, all I can do is I come and I
14 listen to how complicated this licensing is and
15 compulsory license and I hear all about technology
16 and these things, and, you know, my role today is
17 just to say songwriting is a well-worn, timeless
18 craft that is hard to do.

19 And there aren't as many of us as there
20 used to be. I have been there long enough to see
21 that happen because the publishers cannot afford to
22 give us time to learn the way I had the amazing
23 opportunity to do.

24 And I don't think that's fair. I think
25 that what we make drives culture. And it changes

1 culture. And I think if we're good enough at it to
2 survive in the climate of competition against our
3 peers, we should be compensated at a higher rate.

4 We shouldn't have to be so even beneath
5 what the sound recording -- I mean, the sound
6 recording, it doesn't get paid enough, but how does
7 the sound recording get paid that much more than the
8 guy that writes the words -- the guy that writes the
9 words and the notes and pulls it out of the air
10 based on a story about his kids or a love song to
11 his wife?

12 I just -- I passionately ask you to
13 remember that we are a profession. We're a real
14 profession. We are a real job. We work really hard
15 at what we do. We're really good at what we do, and
16 people love what we do. And someone is making a lot
17 of money off of what we do. And it is not us.

18 JUDGE STRICKLER: Mr. Miller, good
19 afternoon. A question for you. It may seem a
20 little bit off point, but it is an economic-type
21 question addressed to a songwriter, so bear with me
22 for a second.

23 If you were not a songwriter, what would
24 you have done instead? I know you have a degree.
25 What would you have done instead?

1 THE WITNESS: Well, I guess I would have
2 to ask you this: At what point did I realize I
3 wasn't going to be a songwriter or what are the
4 circumstances that told me I couldn't be?

5 JUDGE STRICKLER: I am going to leave it
6 open ended for you. You are here as an individual.
7 It is hard to speak for anybody else, of course. So
8 you can answer that any way you want based on any
9 particular point in time in your life when you had
10 to wrestle with the question of whether you wanted
11 to begin being a songwriter, continue being a
12 songwriter, given the options you had.

13 You can answer that in whatever narrative
14 form you think is responsive.

15 THE WITNESS: Sir, I would have to say I
16 really don't remember struggling with whether or not
17 I wanted to do it. I mean, I guess in youth when
18 you are kind of terrified about what you are going
19 to do, no one had ever left the farm. No one in my
20 family had ever gone anywhere, so they all thought I
21 was crazy, but the last thing I ever remember
22 wanting to do was play major league baseball. And I
23 would have done it but I wasn't very good.

24 So that kind of went away on its own.
25 And after that, the next obsession was that as my

1 mother would say, that stupid guitar and that stupid
2 piano. And I never even really contemplated what I
3 would have done. It is all I remember wanting to
4 do.

5 JUDGE STRICKLER: How about once you
6 became a songwriter, was there ever a time where you
7 thought this is just not paying me enough, maybe I
8 should go do something else? If so, what it was you
9 were contemplating doing?

10 THE WITNESS: Well, when I got my first
11 publishing deal, what I call my break, it was at a
12 great company and the music business was healthy.
13 And it was very exciting.

14 So I was able to establish myself in the
15 business as a legitimate songwriter, as a
16 professional songwriter. And, you know, I was poor,
17 you know. So when it started paying, it certainly
18 -- it compensated to the degree that I would have
19 hoped it would have been. So, no, it paid well. It
20 paid well up until the current situation, until we
21 saw piracy -- piracy quickly hurt us badly, but we
22 adjusted.

23 And we kept going forward, knowing that
24 if we can just hang in there long enough to be on
25 the radio, we can be okay. I would say that we have

1 just recently gotten to the point where I'm sitting
2 there having to ask the question: What else will I
3 do now if I have to? But until now, I have never
4 really considered it.

5 JUDGE STRICKLER: And now that you are in
6 a place where you need to consider it or chosen to
7 consider it, what are you considering?

8 THE WITNESS: I can honestly tell you I
9 don't know. I have four kids and I'm in my late
10 40s. And I was pretty good at plan A. And I have
11 not really thought much about -- I fear what it
12 would be because my resume, sir, looks really bad.
13 And that's just being honest. I don't know.

14 JUDGE STRICKLER: Thank you.

15 JUDGE FEDER: Mr. Miller, when you first
16 broke into the industry and started making a living
17 at it, what was the, roughly speaking, if you can
18 recall, what was the split between mechanical
19 royalties, performance royalties, and other sources
20 of income, maybe synch royalties or whatever that
21 was coming in?

22 THE WITNESS: Well, I mean, it is almost
23 -- it would be almost statement-specific because if
24 you, if you have a quarter in which a hit is being
25 paid out, then we would have, you know, it would

1 have been heavy on performance because -- for
2 obvious reasons.

3 I think the difference was there was kind
4 of a floor for mechanical royalties. They were only
5 going to go below a certain point. I would say --
6 I'm bad with percentages, but I would say, you know,
7 in the first part of my career, I was making a
8 living with 100 percent mechanicals because there
9 were no performance royalties, you know, and that
10 sustained me for seven years.

11 And then there was a very short window
12 where I would have had both, but it wouldn't have
13 lasted long enough to really see a trend because
14 they started going away so quickly.

15 JUDGE FEDER: And at this point in time,
16 what is the division?

17 THE WITNESS: Well, I think it is the
18 same as far as -- are we talking about a quarter in
19 which a hit is paying out? Again, I think -- I
20 think on a good year, I don't know. I'm going to
21 guess mechanicals might be 20 or 30 percent of an
22 average year.

23 JUDGE FEDER: And clearly there is a
24 downward trend there. Did it happen all at once or
25 did it happen over time, the decline of the

1 mechanical royalties?

2 THE WITNESS: It happened a little over
3 time, but I feel like that the piracy kind of bled
4 into the streaming. I don't know the year that any
5 of these things started happening, but I think that
6 once it started happening, it got bad fast. I felt
7 like there were so many contributing factors that
8 hit us all at once.

9 The problem was by the time we got to the
10 point where streaming seemed to be the future, we
11 knew we had a problem. Piracy, maybe somebody could
12 have come along and finally done a watermark or
13 something that would have stopped them from stealing
14 the music. Streaming, you knew was here to stay.

15 And piracy was illegal. And they were
16 taking the music for free. Streaming is legal. It
17 is just an unsustainably low rate.

18 JUDGE FEDER: What have you seen happen
19 with performance royalties over that same period of
20 time? Is it -- is the picture similar to what it
21 was early in your career or has that changed over
22 time?

23 THE WITNESS: I think it is hard to go
24 apples-to-apples on a hit song. Some songs just
25 spin more than others. I think the performance

1 royalties as a whole are down to some degree, but
2 not enough that we spend a lot of time fretting
3 about it or looking at it as a demise, because if
4 you have a hit, it is still a substantial, you know,
5 it is good.

6 I would, again, I would not dare put a
7 percentage on the difference in performance now than
8 it was ten years ago. I certainly had a hit or two
9 ten years ago that paid shockingly well, but then I
10 had a couple that paid average. And I think that's
11 always kind of been the case.

12 JUDGE FEDER: Thank you.

13 MS. BUCKLEY: Thank you, Mr. Miller.

14 JUDGE BARNETT: Cross-examination?

15 MS. RAMOS: No questions, Your Honor.

16 MR. ELKIN: No questions.

17 MS. MERK: No questions.

18 MR. MANCINI: No questions, Your Honor.

19 MS. MAZZELLO: No questions.

20 JUDGE BARNETT: Thank you, Mr. Miller.

21 You may be excused.

22 THE WITNESS: Thank you.

23 JUDGE BARNETT: Before you sit down,
24 please raise your right hand.

25 Whereupon--

1 LIZ ROSE,
2 having been first duly sworn, was examined and
3 testified as follows:

4 JUDGE BARNETT: Please be seated.

5 DIRECT EXAMINATION

6 BY MS. BUCKLEY:

7 Q. Good afternoon. Good afternoon, Ms.
8 Rose.

9 A. Hi.

10 Q. Would you mind just introducing yourself
11 to the Judges very briefly.

12 A. My name is Liz Rose, and I am a
13 songwriter in Nashville. And -- oh, I am on the
14 Board at NSAI recently. I am really nervous.

15 Q. Ms. Rose, sitting right in front of you
16 is a binder. And I would like you to open it under
17 the tab CO-3024. I am going to ask you whether you
18 recognize that document as the witness statement you
19 submitted in this rate proceeding?

20 A. Yes.

21 Q. And would you go to the last page of the
22 document and tell me whether that is your signature
23 there?

24 A. Yes.

25 Q. Thank you.

1 MS. BUCKLEY: Your Honor, I move for
2 admission of CO-3024.

3 MR. ELKIN: Objection, based on the
4 motion in limine that is pending before the Court.

5 MS. MERK: We join the objection.

6 JUDGE BARNETT: Exhibit 3024 is admitted,
7 subject to the pending motion in limine.

8 (Copyright Owners Exhibit Number 3024 was
9 marked and received into evidence.)

10 BY MS. BUCKLEY:

11 Q. Ms. Rose, when did you start writing
12 songs for a living?

13 A. About 20 years ago.

14 Q. What did you do before then? Did you
15 work in the music industry?

16 A. Not really. I was a part-time song
17 plugger, independent song plugger. I was mainly
18 just a stay-at-home -- I was a stay-at-home mom,
19 which was full time.

20 JUDGE FEDER: Explain what song plugger
21 is, please.

22 THE WITNESS: A song plugger is someone
23 that works with the songwriters and the publishers.
24 And they take the songwriter's song around to the
25 record labels and the artists and try and get

1 someone to record it.

2 JUDGE FEDER: Thank you.

3 BY MS. BUCKLEY:

4 Q. Ms. Rose, can you tell the Judges the
5 names of some of the artists who have recorded your
6 songs?

7 A. Taylor Swift, Little Big Town, Eli Young
8 Band, Bonnie Raitt, Lee Ann Womack, Tim McGraw.

9 Q. And how did you come to write songs with
10 Taylor Swift?

11 A. I just -- I met her at a writer's round
12 that I was playing at. And she was about 14, barely
13 14, I think. And she heard me do a song and asked
14 me if I would write with her in the very beginning
15 of her career.

16 Q. And how many songs did you ultimately
17 cowrite with Taylor Swift?

18 A. Oh, wow. I have no -- maybe 40.

19 Q. Thank you. And have any of your songs
20 hit Number 1 on the charts?

21 A. We -- "You Belong With Me" was with
22 Taylor. That was a Number 1. And "White Horse"
23 went to Number 1 somewhere. And those are the
24 Taylor songs. And then a song called "Crazy Girl"
25 with Eli Young Band was a Number 1.

1 Q. Have you received any awards or
2 professional accolades for the songs you have
3 written?

4 A. Um-hum. Taylor and I won a Grammy for
5 Country Song of the Year for "White Horse." "Girl
6 Crush" won for Country Song of the Year for "White
7 Horse." And also I won a CMA Award for Song of the
8 Year. And "Crazy Girl" was a CMA Song of the Year.
9 And I was at SESAC, forgive me, my years,
10 I get confused, but I think 2009 I was SESAC
11 Songwriter of the Year.

12 Q. Does songwriting require the investment
13 of time and effort?

14 A. Yeah, a lot. I think it looks like, you
15 know, I worked for a while to get the songs with
16 Taylor, not knowing if I would -- if they would ever
17 be recorded and if she would ever even have a record
18 deal. She was a kid.

19 And so I spent a lot of time with her
20 just because I enjoyed the process and I enjoyed
21 writing with her and being around her, but there was
22 no guarantee, you know.

23 I spent years with, you know, raising
24 kids and coming home to, you know, the lights being
25 turned off and, you know, you get -- you live on

1 credit cards. We live on borrowed money. It is an
2 advance. So it has all got to be paid back before
3 we see anything.

4 And I can remember many times of having
5 no lights on and my kids saying: Mom, where is the
6 electricity? And there's no cable on, and, you
7 know, waking up in the morning and your car is not
8 in the driveway because you didn't -- couldn't pay
9 your car payment.

10 Literally, I mean, that's embarrassing to
11 say but, you know, you do. You go through those
12 sacrifices and young mothers, they get babysitters
13 to show up on the road, write a song, you know, and
14 so it is a huge sacrifice. And it is -- it is a
15 gamble that we choose, you know, but it is a lot of
16 hard work. And we write a lot of songs to get that
17 one single now, you know.

18 Today I just got a message that I'm
19 getting a cut today in the studio. And we used to
20 go: Yeah. What are we going to buy? You know?
21 And now we go: Oh, cool, hope it's a single.

22 Q. And why, Ms. Rose, why has your response
23 to getting a cut changed as you have just described?

24 A. Well, because album cuts are -- it is a
25 single's market now. It is -- album cuts don't

1 really make money any more. People don't buy a
2 whole record.

3 So it just -- there is not -- the money
4 doesn't come in from them any more. The mechanicals
5 are not -- they are just not there any more from
6 album sales.

7 Q. Well, how would you describe the value of
8 songs?

9 A. I don't know if you can put a value on a
10 song. When you start, you say -- you know, we're
11 all here, if there is no song, there is no musician.
12 If there is no song, there is no artist. If there
13 is no song, there is no record label. If there is
14 no song, there is no music industry.

15 You know, you listen to songs when you
16 are sad. You listen to songs at your wedding. I
17 mean, you listen to songs when you are happy, when
18 you want to dance.

19 And I don't know how you value that. It
20 is pretty invaluable, I think.

21 Q. Let me ask you, do you believe that you
22 are being fairly compensated by the mechanical
23 royalties from interactive streaming currently?

24 A. No, no. It is -- it is -- it is
25 depressing. I don't think -- I don't -- I don't

1 think it is fair at all.

2 Q. Can you explain why?

3 A. Well, millions, millions of streams go
4 out and millions of people enjoy something that I
5 worked really hard to do. And I don't understand
6 why we're arguing over whether the songwriter should
7 get paid fairly or not. I can't even understand why
8 this is a conversation.

9 We're the first to create the song.
10 We're the last to get paid. We live on borrowed
11 money. We pay back what we borrow. It is just --
12 it is just -- it is -- it does not make sense to me
13 that we're even arguing over this.

14 And I -- I'm worried about the future of
15 songwriters. I'm worried about the future of
16 songwriting. I have a publishing company, and we
17 used to -- and it is small, independent, and we used
18 to sign young writers that would come to town and
19 invest in them and give them time. And we just
20 can't do that any more.

21 There is no time to help a songwriter
22 because there are no royalties any more. There is
23 no -- there is not enough to -- an album cut doesn't
24 keep you going any more, if that makes sense. I
25 know I'm --

1 Q. Is it related -- is this change in at
2 least the publishing company that you own
3 independently in any way related to mechanical
4 royalties?

5 A. Well, honestly, it is streaming. It is
6 killing the songwriter. Downloads, you know, first
7 it was the CDs go away because of downloading. Now
8 streaming is taking over downloading.

9 If we're not paid fairly, we can't keep
10 writing songs. If we can't make a living at it, I
11 have watched, you know, my -- you know, writers
12 struggle. It is just -- we're -- streaming is not
13 paying the songwriter enough money to live on to
14 continue the art of songwriting, we have got to
15 figure out what the solution is.

16 JUDGE STRICKLER: You started to say
17 before -- good afternoon, by the way.

18 THE WITNESS: Hi.

19 JUDGE STRICKLER: -- that if you can't
20 make a living then, and then you stayed with the
21 same thought, but you sort of trailed off there.
22 What would your alternative be?

23 THE WITNESS: Well, I'm old, so I'm
24 scared of what my alternative is.

25 JUDGE STRICKLER: Old is relative. You

1 don't seem old.

2 THE WITNESS: Well, thank you, thank you.

3 What would I do? I don't know. I would
4 find a job, you know, but I wouldn't write songs.
5 Like just take, for instance, songwriters, there is
6 this great myth that they stay up all night and they
7 drink whiskey and they sweep floors and they write
8 the song of the year.

9 And maybe if they are lucky, but you
10 can't write as many songs as we write to get one hit
11 if you are working at Home Depot or you are waiting
12 tables, which is fine, you know, when you are
13 starting out, you have got to pay your dues, but
14 those -- it takes us -- we have to write hundreds of
15 songs.

16 We go to work and we walk in and we write
17 all day long and walk away and hopefully you wrote
18 something that someone will love, but it is a lot of
19 time investment and a lot of -- you know, it is
20 romantic and songwriters, you know, we write from
21 our heart and our soul and we do and we write from
22 our broken hearts and other people's broken hearts
23 much to, you know -- and -- but we do it -- we work
24 really hard.

25 And it is a passion, but it is also a

1 job. And I just -- we should be paid fairly, and we
2 should be considered in the equation.

3 JUDGE STRICKLER: When you try to figure
4 out what would be a fair -- being paid fairly, do
5 you compare it to other jobs that other people have,
6 people you know? What is your frame of reference?

7 THE WITNESS: I can't -- you can't really
8 do that. I mean, we can't be paid by the hour and
9 we can't -- it is hard. That's why we have you.
10 That's why we have you, and why everybody has
11 attorneys and there has got -- I don't understand
12 it. If I -- I do understand it just enough to sit
13 here and talk to you and say that this is killing
14 the songwriter, but I do understand common sense
15 that if there is a piece of pie, everybody that is
16 putting in work should get their fair share of the
17 pie, if that makes sense.

18 And I don't think we should be paid more
19 than everybody. I am just saying that we should --
20 we should be considered and shouldn't -- that what
21 is being paid now is not fair. It is -- it is just
22 not working.

23 And I'm not going to sit here and try to
24 figure out how much. I am just saying that we do
25 know that when we look at millions and millions and

1 millions of streams and you get your statement and
2 you have, you know, like 9 million streams and, you
3 know, you get 300 dollars, somebody listened to that
4 song that many times? Why -- why is the money so
5 low for us when, you know, I just -- I don't want to
6 get into all that because I don't understand --

7 JUDGE STRICKLER: You may be under the
8 mistaken assumption that somebody does know the
9 answer to that question.

10 THE WITNESS: Well, I know that no one
11 does, but I -- somebody knows. I don't believe it.
12 Somebody knows the answer.

13 JUDGE STRICKLER: I wasn't being
14 facetious. But, in any event, that's why we have
15 these proceedings, to try to figure it out.

16 But do you have a sense -- I mean, you
17 mentioned 9 million streams, take that hypothetical.

18 THE WITNESS: That was a hypothetical.

19 JUDGE STRICKLER: I understand. What is
20 your sense? I understand you are not an economist,
21 you are not an attorney, you are not a business
22 professional.

23 But what is your sense of what you think
24 that should be worth and how do you sort of come to
25 that? And I understand --

1 THE WITNESS: I just couldn't. I would
2 just make a fool of myself if I tried to do that.

3 JUDGE STRICKLER: Then don't if you don't
4 want to answer the question. That's fine. So you
5 feel that it needs to be more, but how much more is
6 not something you can necessarily express in forms
7 of an estimate?

8 THE WITNESS: No, sir, because I depend
9 on the other people in this room and people around
10 me to work that out. I'm sorry. I am a songwriter.
11 I just know that the streaming rates are terribly
12 low.

13 JUDGE BARNETT: If you had written an
14 album cut on an album that sold 9 million copies,
15 what would your income have been?

16 THE WITNESS: 9 million, let's see, ten
17 years ago?

18 JUDGE BARNETT: Yes. I mean, in a cut.
19 I am not talking about a single. I am talking about
20 a cut.

21 THE WITNESS: Okay. I'm guessing, but I
22 believe I got -- I had a Tim McGraw cut about ten
23 years ago.

24 JUDGE STRICKLER: When you are saying a
25 cut so we understand, you mean a single or --

1 THE WITNESS: No, just a cut, just an
2 album cut on a record. And it was an album cut, it
3 wasn't a single, and it made enough money -- and,
4 God, I hate to do this because I'm -- but it may
5 have been maybe \$30,000 on a million.

6 JUDGE STRICKLER: What year was that?

7 THE WITNESS: Probably ten years ago. So
8 --

9 JUDGE BARNETT: That was a million sales?

10 THE WITNESS: A million sales. And I'm
11 just -- this is -- I am so throwing this out there.
12 But I will tell you that it was enough that my
13 publisher picked up my deal again that year.

14 Now an album cut would not -- the
15 songwriter wouldn't -- they would get dropped the
16 next year, probably.

17 But I do know that ten years ago, a
18 million selling album cut would keep your publishing
19 deal for a year. They would probably recoup you.

20 JUDGE STRICKLER: So the \$30,000 is
21 before recoupment?

22 THE WITNESS: The \$30,000 is before
23 recoupment.

24 JUDGE STRICKLER: Do you remember how
25 much was recouped out of that? I know it is ten

1 years ago or approximately.

2 THE WITNESS: Oh, God. Well, it depends
3 if I owed \$30,000 --

4 JUDGE STRICKLER: I know. That's why I
5 am asking.

6 THE WITNESS: Yes, they recouped off my
7 mechanicals and I probably had a full pub deal, no
8 co-publishing, so it kept my deal, kept me in the
9 game so I could meet Taylor Swift and write with her
10 the next year.

11 JUDGE STRICKLER: You say out of that
12 30,000 100 percent of it was recouped back by the
13 publisher?

14 JUDGE BARNETT: You need to answer
15 audibly.

16 THE WITNESS: Oh, I'm sorry.

17 JUDGE BARNETT: The court reporter can't
18 write that down.

19 JUDGE STRICKLER: You were nodding your
20 head "yes." Is your answer yes?

21 THE WITNESS: Yes.

22 JUDGE STRICKLER: Thanks.

23 MS. BUCKLEY: Thank you, Ms. Rose.

24 THE WITNESS: Thank you.

25 JUDGE FEDER: Stay where you are.

1 THE WITNESS: Okay.

2 JUDGE FEDER: Let's take you back a
3 little bit to early in your career when you first
4 started making money as a songwriter. If you can
5 recall, tell me what the mix was, roughly
6 percentage-wise, between what you got for
7 mechanicals and what you got for performances, and
8 what you got for other stuff like synch rights?

9 THE WITNESS: Well, I didn't have any
10 synch rights. It was a long time before I got any
11 synch rights. And I still don't really get much.
12 It is -- I lived on my draw for many years. I think
13 that about two years in, around there, I got -- I am
14 trying to think of what it was -- oh, I know what it
15 was, it was a Gary Allen single, called "Songs About
16 Rain." And I believe it went to 11.

17 And so I did get some radio performance
18 royalties, which went to paying off credit cards and
19 things like that. So I didn't have another single,
20 I got little cuts here and there, but I didn't have
21 another single until probably Taylor.

22 JUDGE FEDER: So you were living off your
23 draw. Was enough mechanical royalty coming in to
24 recoup that?

25 THE WITNESS: Yes, yeah. Well, no. No,

1 because it took years to pay off those mechanicals
2 but when you are with Taylor, it paid them off
3 pretty fast.

4 JUDGE FEDER: So would you say that at
5 least at that point in your career the bulk of the
6 money that the -- the majority of it was coming
7 through the mechanical route?

8 THE WITNESS: I never saw my mechanicals.

9 JUDGE FEDER: Well, but I am including
10 your draw, which was recoupable against mechanicals.

11 THE WITNESS: Right. But I didn't see
12 mechanicals, those recouped me. So I didn't live
13 off my mechanicals.

14 And the draw was not a lot of money. So,
15 yes, I was living on my draw, and my credit cards.

16 JUDGE FEDER: And how has that changed
17 over the remainder of your career?

18 THE WITNESS: Well, it changed because --

19 JUDGE FEDER: I am not asking the why. I
20 am asking actually --

21 THE WITNESS: How I live off that?

22 JUDGE FEDER: Describe how that changed,
23 how the mix of revenue coming to you.

24 THE WITNESS: Between singles and
25 mechanicals or -- I'm sorry.

1 JUDGE FEDER: Between early in your
2 career and now.

3 THE WITNESS: It is about the same. I
4 haven't had a single in a year. And -- which was
5 "Girl Crush." And it was, you know, it was -- that
6 money is gone. You know, usually you can see that
7 money coming in years and years when you have a big
8 hit like that, and then it has continued to be
9 downloaded and it has continued to, you know, play
10 on the radio.

11 But with streaming, you know, that money
12 is -- it is gone. So I am not really seeing much
13 from "Girl Crush" any more.

14 JUDGE FEDER: Thank you.

15 THE WITNESS: Thank you.

16 MS. BUCKLEY: If Your Honors have nothing
17 further, I'm finished with Ms. Rose's direct.

18 JUDGE BARNETT: Thank you. Any
19 cross-examination?

20 MR. ELKIN: No questions.

21 MS. MERK: No questions.

22 JUDGE BARNETT: Did you have a question?

23 JUDGE STRICKLER: No, I don't.

24 JUDGE BARNETT: Thank you, Ms. Rose. You
25 may be excused.

1 THE WITNESS: Thank you.

2 JUDGE STRICKLER: Thank you.

3 JUDGE BARNETT: Do the Copyright Owners
4 have another witness?

5 MR. ZAKARIN: We do.

6 JUDGE BARNETT: Let's have him.

7 MR. ZAKARIN: We call David Israelite.

8 JUDGE BARNETT: Please raise your right
9 hand.
10 Whereupon--

11 DAVID ISRAELITE,
12 having been first duly sworn, was examined and
13 testified as follows:

14 DIRECT EXAMINATION

15 BY MR. ZAKARIN:

16 Q. Good afternoon, Mr. Israelite. Could you
17 tell the Judges what your present position is?

18 A. I'm the president and CEO of the National
19 Music Publishers Association.

20 JUDGE BARNETT: Before you go further,
21 could you state your full name and spell your last
22 name for us.

23 THE WITNESS: Sure. It is David Mark
24 Israelite, I-s-r-a-e-l-i-t-e.

25 JUDGE BARNETT: Thank you.

1 BY MR. ZAKARIN:

2 Q. How long have you occupied that position
3 at the NMPA?

4 A. I'm in my 13th year.

5 Q. Could you briefly tell the Judges your
6 educational and employment background.

7 A. I went to a small liberal arts college in
8 Liberty, Missouri called William Jewell College. I
9 then attended the law school at the University of
10 Missouri. From there I went and practiced at
11 Missouri's largest law firm called Bryan Cave where
12 I served as a litigation associate for three years.

13 I then moved to Washington, D.C. to serve
14 Missouri's senior United States Senator, Christopher
15 Bond, as his administrative assistant, which is
16 another word for chief of staff.

17 And I did that for two years. I then
18 came back to Missouri to run his reelection campaign
19 in 1998. I then came back to Washington and was
20 hired as the political and government affairs
21 director at the Republican National Committee for
22 the 2000 presidential cycle, where I served for
23 those two years during that cycle.

24 And at the conclusion of that election, I
25 was asked by the newly-appointed attorney general,

1 John Ashcroft, to join the Justice Department where
2 I served him as deputy chief of staff and chief
3 counsellor. And while there also was appointed by
4 him to chair a task force on intellectual property.
5 And I served with him for the four years that he was
6 attorney general.

7 And then when I left that position, I was
8 hired at NMPA.

9 Q. And I ask you to turn in your book, I
10 think it is Exhibit 3014, which is your direct
11 witness statement or, stated more properly, your
12 witness direct statement. And I ask you if you can
13 identify that document?

14 A. Yes. This was my witness statement for
15 this proceeding.

16 Q. Please look at, I think it is page 42,
17 and ask you if you can identify the signature.

18 A. Yes. That's my signature.

19 Q. Mr. Israelite, was your statement
20 accurate and truthful to the best of your belief
21 when you submitted it?

22 A. Yes.

23 Q. Does it remain accurate and truthful to
24 the best of your belief today?

25 A. It does.

1 MR. ZAKARIN: Okay. I offer 3014 in
2 evidence.

3 MR. ELKIN: Objection, based on the
4 reasons set forth in the motion in limine.

5 JUDGE BARNETT: Thank you.

6 MR. STEINTHAL: Google joins in that
7 objection.

8 MR. ISAKOFF: We also join.

9 MR. MANCINI: We join.

10 JUDGE BARNETT: Thank you. 3014 is
11 admitted, subject to review pursuant to the pending
12 motion in limine, preliminary motion.

13 (Copyright Owners Exhibit Number 3014 was
14 marked and received into evidence.)

15 BY MR. ZAKARIN:

16 Q. Mr. Israelite, I am not going to go
17 through in any great detail the paragraphs of your
18 witness statement, but what I want to do is
19 summarize some of them.

20 As set forth in paragraphs 8 through 14
21 of your statement, you can turn to them if you want
22 to to refresh your recollection, can you briefly
23 explain to the panel what the NMPA is and what it
24 does?

25 A. NMPA is a trade association that

1 represents the music publishing industry and their
2 songwriter partners. We're celebrating our 100th
3 year this year, our centennial.

4 As a trade association we provide many
5 different types of services to our membership. The
6 one that is probably most traditionally thought of
7 is as a trade association, we lobby on behalf of our
8 industry before the Federal Government, mostly.

9 JUDGE STRICKLER: Mr. Israelite, quick
10 question for you. In paragraph 8 you say you
11 represent American music publishers and their
12 songwriting partners. The phrase "songwriting
13 partners," does that simply mean songwriters?

14 THE WITNESS: Yes, sir.

15 JUDGE STRICKLER: Thank you.

16 THE WITNESS: So we lobby Congress on
17 behalf of the songwriting industry and music
18 publishing industry. We lobby other government
19 agencies, Federal Government. We also represent the
20 industry in rate proceedings, obviously, and this is
21 our -- my third one.

22 We bring quite a bit of litigation on
23 behalf of the industry. And so we often are
24 representing the industry in litigation. We also
25 end up doing quite a bit of what we call model

1 business deals, which sometimes comes from the
2 litigation and sometimes comes from direct
3 interaction, but we have tried to serve a function
4 of helping the business work in many areas where it
5 is challenged.

6 We also do a lot of public relations and
7 communication-type functions. The one that probably
8 we're most known for is we're the ones that certify
9 songwriters as reaching gold or platinum status and
10 designate them and give out awards for gold and
11 platinum achievements.

12 And we hold public meetings. I speak
13 often, write often on behalf of the industry. And
14 that generally summarizes what a trade association
15 does.

16 BY MR. ZAKARIN:

17 Q. I ask you to turn to what was attached to
18 your written direct statement but are separately
19 marked as Trial Exhibits 306, 2500, 2501, and 2502.
20 And they should be attached, I believe, as I said,
21 they are separately in the binder, but they are also
22 attached to your witness statement.

23 Can you identify these documents, dealing
24 first with 306?

25 A. Document 306 is a document that was

1 prepared by my staff that analyzes revenue
2 information for our members.

3 Q. I will come back to that document
4 momentarily. Can you go through Exhibits -- what
5 are 2500, 2501, and 2502 as well?

6 A. Yes. 2500 is also a document that was
7 prepared by my staff that goes through an analysis
8 of 2014's revenue and explains how we went from the
9 raw data that we collected to the conclusion that I
10 believe I announced at our annual meeting in that
11 year or it would be the next year.

12 Q. Now, dealing with Exhibit 306, and it may
13 apply to 2500 through 2502 as well, what is the
14 source of the information that is embodied in those
15 exhibits?

16 A. The source of the information is that our
17 membership very recently started turning into NMPA
18 their revenue information. And they did it for the
19 purpose of us being able to administer a new program
20 of collecting dues from our members.

21 And in the past, NMPA never collected
22 real dues from our members. We were funded almost
23 exclusively from a subsidiary that we owned called
24 the Harry Fox Agency.

25 And that agency was profitable enough to

1 fund the parent trade association. And, as a
2 result, our members paid nominal dues of -- I think
3 it was \$100 per member. That's very different than
4 most trade associations which charge actual dues.

5 A few years ago when it became clear that
6 the Harry Fox Agency could no longer financially
7 support its parent trade association, I had to
8 transition the trade association into a
9 dues-collecting trade association, which is the more
10 typical type.

11 And so my membership started to have to
12 turn in to me their revenue information because that
13 became the basis of how much dues they each paid,
14 because it was proportional.

15 And one of the by-products of collecting
16 that information for the first time is that I was
17 able to then actually analyze industry data that
18 never really existed in this form before. And it
19 was one of the positive by-products of this other
20 dues collection process that I started to do some
21 analysis and share some of that analysis with my
22 membership.

23 Q. Okay. You talked about the Harry Fox
24 Agency. What type of income was it that Harry Fox
25 collected?

1 A. The Harry Fox Agency was a company that
2 was in the business of licensing mechanical rights
3 and collecting the money for mechanical rights and
4 then distributing that to publishers. It was used
5 by a very large segment of the industry as kind of
6 an aggregator of that process of mechanical rights.

7 So even though a licensee would have an
8 option of going through the compulsory process to
9 get a license, very few people actually did that.
10 But what most licensees would do was take the
11 license from the Harry Fox Agency and then pay the
12 Harry Fox Agency.

13 And the Harry Fox Agency took a
14 commission for that activity. And that commission
15 was sufficient for a time to fund itself and to also
16 fund NMPA, which owned it.

17 Q. Is it fair to say that the diminution in
18 mechanical income led to the divestment, if you
19 will, of the Harry Fox Agency?

20 MR. ELKIN: Objection, Your Honor. This
21 goes beyond the scope of the witness testimony.

22 MR. ZAKARIN: I will withdraw the
23 question. I am going to offer Exhibits 306, 2500,
24 2501 and 2502 in evidence.

25 MR. ELKIN: I don't have any objections

1 at all. I would note that he hasn't yet laid a
2 foundation for 2501 or 2502, but we're fine with
3 that.

4 JUDGE BARNETT: Thank you. 306, 2500,
5 2501, and 2502 are admitted, I presume you mean
6 subject to the pending motion in limine or is there
7 nothing in the motion that affects these exhibits?

8 MR. ELKIN: We actually have no
9 objections to these four documents at all.

10 JUDGE BARNETT: Okay, thank you. Then
11 they are admitted outright.

12 (Amazon Exhibit Number 306 was marked and
13 received into evidence.)

14 (Copyright Owners Exhibit Number 2500,
15 2501, 2502 were marked and received into evidence.)

16 BY MR. ZAKARIN:

17 Q. Mr. Israelite, looking at the first page
18 of Exhibit 306, in the second, sort of the second
19 category down you have a top box and there is a
20 second box which deals with total industry actual
21 revenue 2013, '14, and '15.

22 Do you see that?

23 A. Yes.

24 Q. I would ask you to look across. You have
25 categories of income; mechanical, performance,

1 synch, other, and then a total. First of all, is
2 that U.S. income?

3 A. Yes, this only measures U.S. revenue.

4 MR. ZAKARIN: This may be restricted
5 material now that I'm looking at it, so I think we
6 may have to --

7 JUDGE BARNETT: If you are going to get
8 into the numbers, yes.

9 MR. ZAKARIN: I think we have to.

10 JUDGE BARNETT: If you are in the hearing
11 room and you have not signed a nondisclosure
12 certificate, please wait outside.

13 JUDGE STRICKLER: Which exhibit again,
14 counsel?

15 MR. ZAKARIN: I am in 306.

16 MR. HARRIS: Your Honor, with the Court's
17 indulgence, this material is NMPA's restricted
18 material. Is it fine if they stay in for this
19 examination?

20 JUDGE BARNETT: Yes. NMPA -- we're
21 holding to NMPA confidential information, correct?

22 MR. ZAKARIN: Yes, that's the only thing
23 I am dealing with in this exhibit. In fact, I don't
24 think I am going to get into much else.

25 JUDGE BARNETT: Okay.

1 MR. ZAKARIN: That's restricted. At
2 least I hope not.

3 JUDGE BARNETT: Thank you.

4 (Whereupon, the trial proceeded in
5 confidential session.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 O P E N S E S S I O N

2 BY MR. ZAKARIN:

3 Q. I have to be more sensitive to that. Any
4 way, Mr. Israelite, I want to turn to the current
5 Subpart A settlement that the NMPA reached with the
6 record labels. And I think it was even published
7 today, perhaps.

8 Is it a fair characterization to say that
9 the Subpart A settlement essentially rolls forward
10 the per unit basic mechanical rate of 9.1 cents for
11 each physical recording and digital download
12 manufactured and sold?

13 A. Yes.

14 Q. And it rolls forward as well the 1 and a
15 half percent per month late fee?

16 A. Yes.

17 Q. What was the purpose of the late fee?

18 A. Well, the purpose of the late fee from
19 Phono I was something that the Copyright Owners
20 requested from the Court and that the Court granted.

21 JUDGE BARNETT: Excuse me. It is your
22 bag that is blocking the door. Your body was fine
23 once you got out of the path. Thank you. I
24 apologize.

25 Could you ask the question again, please,

1 Mr. Zakarin?

2 BY MR. ZAKARIN:

3 Q. I think I said what is the purpose of the
4 late fee? Is that where I was?

5 A. Yes. The purpose of the late fee that we
6 requested and that the Court granted in Phono I was
7 to give appropriate compensation for the songwriters
8 and copyright owners, if they were paid late.

9 Q. And at the time that it was adopted, did
10 you intend that it would be applied only to Subpart
11 A?

12 A. No. I believe that the late fee applies
13 to the totality of a Section 115 license.

14 Q. Now, moving forward, are you aware that
15 the Services in this proceeding have argued that the
16 settlement of the Subpart A should be a benchmark to
17 be considered by the panel as justifying rolling
18 forward the existing B and C rates, albeit their
19 proposals do not actually roll them forward? Are
20 you aware of that?

21 A. I'm aware that they have made arguments
22 to that effect, yes.

23 Q. Okay. And in paragraphs 38 through 49 of
24 your rebuttal statement, you explain why the Subpart
25 A settlement is not an appropriate benchmark for

1 setting Subpart B and C rates in this proceeding.

2 And rather than going through each of
3 those paragraphs, I would ask for the panel if you
4 can summarize the reasons that you set forth in
5 those paragraphs?

6 A. Sure. First, I don't think that
7 settlement should be used as benchmarks or weapons
8 against the parties who settle because I think there
9 is a strong public policy interest in encouraging
10 settlements. In fact, I think the Copyright Act
11 does encourage those settlements.

12 And if the parties are then punished in
13 some way by those settlements being used as
14 benchmarks where the parties don't feel that's
15 appropriate, then I think that would discourage
16 settlements, and I think that's a bad outcome.

17 JUDGE STRICKLER: Are you familiar with
18 the settlements that occurred in the Webcaster
19 settlements, the Webcaster Settlement Act?

20 THE WITNESS: I am somewhat familiar with
21 those, yes.

22 JUDGE STRICKLER: Are you aware in those
23 settlements there was language to the effect that
24 none of the terms or the provisions of this, of the
25 settlements shall be usable as evidence -- I am

1 paraphrasing here -- usable as evidence or precedent
2 in a future proceeding? Are you aware of that?

3 THE WITNESS: I am not familiar with the
4 language that was used, but I understood that was
5 the intent when they offered it to Congress.

6 JUDGE STRICKLER: And were you aware of
7 that when you entered into the 2008 settlement?

8 THE WITNESS: Yes. When we entered into
9 the 2008 settlement, we specifically negotiated that
10 they would be non-precedential.

11 JUDGE STRICKLER: It says that in the
12 settlement?

13 THE WITNESS: I believe that we agreed to
14 language to that effect, yes.

15 JUDGE STRICKLER: There is language in
16 the regulations that says the new rates will be
17 established de novo. Is that what you are referring
18 to?

19 THE WITNESS: Yes.

20 JUDGE STRICKLER: And only that language,
21 that's the language you are referring to?

22 THE WITNESS: I -- I am aware that it
23 says that the new rates would be set de novo, but I
24 also believe that we had agreed upon
25 non-precedential language in the settlement itself

1 is my recollection from ten years ago.

2 JUDGE STRICKLER: Will you be pointing to
3 that in your testimony?

4 THE WITNESS: I don't believe that is in
5 my testimony, no, Judge.

6 JUDGE STRICKLER: Thank you.

7 BY MR. ZAKARIN:

8 Q. I think that you were summarizing at this
9 point why the -- why you believed that the Subpart
10 A, Subpart A settlement should not be used as a
11 benchmark in this proceeding.

12 A. Sure. My first reason, again, was
13 philosophically, I think it wouldn't be proper to
14 use settlements against parties because it would
15 discourage the public policy purpose of encouraging
16 settlement.

17 Secondly, specific to this settlement,
18 this settlement was in large part consistent with my
19 philosophy about CRB trials and with settlements,
20 which is that I believe now in all three of the
21 proceedings that I have tended to not want to
22 litigate the rates that will not be economically
23 important in the upcoming period.

24 And so when I look to this next five-year
25 period that begins in January of 2018, I don't

1 believe that the Subpart A categories are going to
2 be economically important to my industry.

3 And, as a result, I was highly encouraged
4 to get those settled and out of the trial because I
5 wanted this trial to focus on the categories that I
6 thought would be economically significant, which are
7 the interactive streaming categories.

8 That same philosophy is what drove the
9 settlement in Phono I with the Subpart B categories,
10 which I know you didn't ask me about, but it is the
11 same philosophy about our settlements.

12 And so I don't think that the A
13 roll-forward should be used as a benchmark because
14 our agreement to roll forward those rates was not in
15 any way our commentary on we thinking that those
16 were the appropriate values of our Subpart A rights
17 but, rather, we don't think economically they are
18 going to make much difference in the next five years
19 and, therefore, we didn't want them cluttering the
20 focus of this trial. We would rather have that
21 focus on the business models that we think will be
22 economically important.

23 MR. ASSMUS: Your Honor, Mr. Zakarin is
24 eliciting testimony from the witness regarding the
25 nature and basis of the Subpart A settlement.

1 And you will recall we filed with Your
2 Honor a motion to compel documents related to that
3 settlement, and the original ruling, which of course
4 we accepted, was denied, but on that basis we object
5 to Mr. Israelite further explicating the reasons for
6 and nature of the settlements, if we do not have
7 access to the documents that would allow us to
8 cross-examine him on that topic.

9 JUDGE BARNETT: Sustained.

10 MR. MARKS: And we would move to strike
11 the last answer on that basis.

12 JUDGE BARNETT: Yes. The -- the answer
13 will be stricken.

14 MR. ZAKARIN: I -- what they asked for
15 was documents relating to negotiations. I didn't
16 ask the witness a question about negotiations. And
17 the witness didn't testify about negotiations.

18 What he testified to was his reasons for
19 entering into the settlement, why he doesn't believe
20 the Subpart A settlement is a benchmark. But it
21 didn't deal at all with his negotiations with the
22 other side. And I didn't ask him a single question
23 about it. And he didn't offer anything in his
24 answer about it.

25 JUDGE BARNETT: He talked about why he

1 was willing to settle and so forth. That's part of
2 the negotiation equation. So the objection is
3 sustained.

4 MR. ZAKARIN: I understand that, Your
5 Honor. And respectfully, we accept the ruling on
6 that.

7 BY MR. ZAKARIN:

8 Q. Mr. Israelite, the panel is aware of the
9 Copyright Owners' proposal of rates and terms in
10 this proceeding, and it is set forth in paragraph 32
11 of your written direct statement.

12 Can you explain to the Judges how the
13 Copyright Owners formulated their proposal?

14 A. I think we thought about it in two parts.
15 The first was what was the structure that we were
16 going to propose and then, secondly, what would the
17 numbers be that we plugged into that structure.

18 For the first part, we felt strongly that
19 we wanted to have a structure that paid songwriters
20 and music publishers on a per-stream basis. And so
21 that became the driving force behind what our
22 structure became.

23 The only flaw that we felt existed with
24 that model was the potential that because, while we
25 would get paid on a per-stream basis, that the

1 Services would not be charging their customers
2 oftentimes on a per-stream basis and, in fact, the
3 potential existed that they would use our songs to
4 entice a consumer to agree to a monthly payment, and
5 then if that consumer didn't use the service, they
6 would still be collecting the money based on the
7 availability of our songs, but we wouldn't see any
8 of that because there might not have been any
9 activity.

10 And, thus, the second part of the
11 structure became very important, which was the per
12 subscriber per month number, so that we would be
13 protected if there was economic activity based on
14 the value of our songs but no streaming that
15 occurred.

16 So that became the two-part structure
17 that formed the basis of our proposal. And then the
18 numbers that were plugged in became an exercise,
19 quite honestly, of retaining experts who gave
20 opinions, giving us ranges of what they thought were
21 reasonable given the standards and given the factors
22 of this trial; and my membership, taking into
23 consideration all of the different factors involved
24 in making a proposal and coming to a conclusion on a
25 number that they felt comfortable with that they

1 thought was reasonable.

2 BY MR. ZAKARIN:

3 Q. Now, the Services have offered testimony
4 about the advantages of discounts provided by
5 student plans and family plans, including benefits
6 or supposed benefits to the Copyright Owners.

7 Can you explain to the panel why in your
8 view including such discounts in the compulsory rate
9 structure is inappropriate?

10 A. I feel very strongly that it would not be
11 appropriate for the government through the
12 compulsory process to force property owners to give
13 these types of discounts. That's regardless of
14 whether they are good for us or not.

15 I don't think it is the appropriate role
16 of the rate-setting to make those decisions for the
17 property owners. And so we believe that the
18 compulsory rate process should just set the value of
19 our intellectual property, and that if the property
20 owners and the licensees jointly agreed that
21 discounts makes sense, they can do that outside of
22 the statute, which is exactly what has happened with
23 some of the services.

24 But we violently object to the idea that
25 that would be forced upon us in the rate-setting

1 process.

2 Q. There has also been testimony about the
3 supposed funnel effects of Spotify's ad-supported
4 service and how the Copyright Owners' proposal might
5 negatively affect Spotify's free service.

6 Do you have a view about Spotify's free
7 service?

8 A. I do. I think our proposal was agnostic
9 to how the Services decide to charge their
10 customers. Our proposal is designed to set an
11 appropriate value every time that you stream a song.

12 And we have no control over how a
13 licensee might then choose to monetize that
14 activity. The Spotify Free service today, I would
15 tell you, I think, is very harmful to songwriters.
16 It is paying a very tiny fraction per activity as
17 the paid services are paying.

18 There was a period, I believe last year,
19 where about 30 percent of their customers paid for
20 the Spotify service, about 70 percent used the free
21 service, but those 30 percent who paid were
22 generating more than 90 percent of the revenue for
23 the company.

24 And so we look at the free service as
25 something that we didn't have any ability to make

1 decisions about in terms of how many ads they run,
2 whether it is an unlimited amount of time that a
3 customer can use the free service, whether the same
4 content is available on the free service or not, and
5 our experience now looking at how it has been used
6 by Spotify is that the free service has been very
7 harmful, that the conversion is not working as
8 promised, and it is not something that we feel that
9 there should be a different rate structure if a
10 licensee chooses to want to give it away with an
11 ad-based model versus a paid-based model. We think
12 the rate structure should reflect just the value.

13 JUDGE STRICKLER: Mr. Israelite, I have a
14 question for you. It goes back to the testimony you
15 gave just a moment ago, where you talked about how
16 -- about family and student discounts.

17 And you said, correct me if I get it
18 wrong, I thought you testified that that may be
19 something that the Copyright Owners would be willing
20 to do, but it is not something that government
21 regulators should impose, if the parties can get
22 together, the Copyright Owners and the Services, to
23 agree to such discounts, then they will do that in
24 the marketplace, but the government should not
25 require that as part of the compulsory rate. Is

1 that a fair statement of your testimony?

2 THE WITNESS: That's saying it better
3 than I probably said it, yes.

4 JUDGE STRICKLER: Yeah. I soft pedaled
5 it. I didn't use the word "violently."

6 But let me ask you about that philosophy,
7 if you will, with regard to percentage-of-revenue
8 rates. Do you feel the same way about that, which
9 is that the Copyright Owners have a right to be paid
10 for their copyrighted material on a per-stream basis
11 and that's all the regulators should do, and if the
12 Copyright Owners and the Services want to meet in
13 the marketplace and modify that in some way and go
14 to any extent to a percentage-of-revenue rate, they
15 are free to do that but it should not be imposed
16 upon the Copyright Owners?

17 THE WITNESS: That's exactly right and
18 that's actually happened, Judge. So if we're forced
19 to accept just a percent of revenue, then if the
20 Service chooses to give discounts, we're forced
21 along into that choice too because the revenue will
22 be based on the discounting.

23 If we're paid on a per-stream basis,
24 which we think is more reflective of the inherent
25 value of our property being used, then if there is

1 going to be discounting and we're not part of the
2 decision-making, then we're not being asked to
3 subsidize that decision-making.

4 And, for example, that's exactly what's
5 happened in the marketplace already. It is not a
6 theory. It has, in fact, happened. I believe that
7 one of the Services here today offers family and
8 student discounting and it is done completely with
9 the agreement of the Copyright Owners through
10 different direct terms separate from the compulsory
11 terms that exist in Section 115. So it has been
12 proven to work already.

13 JUDGE STRICKLER: So if we were to set a
14 per-stream rate in our determination, we should not
15 be surprised to see after the rate period begins in
16 2018 percentage-of-revenue deals voluntarily struck
17 between the Copyright Owners and the Services?

18 THE WITNESS: I don't know whether the
19 Copyright Owners would agree to
20 percentage-of-revenue models in general. I know
21 they generally don't like them.

22 I know that if there is a meeting of the
23 minds between someone who actually owns and controls
24 the copyrights and someone who wants to license
25 them, they can agree to any term they want. And I'm

1 fine with that if it is by their agreement.

2 In the case of the one company here today
3 who has done a direct deal for student and family
4 discounts, it is worth noting that they offered
5 rates that were above the statutory structure in
6 order to get those concessions from the property
7 owners. And so if that occurs in a marketplace, I
8 welcome it.

9 I would not have a problem with any
10 property owner who makes a decision for his or her
11 property. What I object to is the government
12 imposing those types of decisions on property owners
13 under some theory that it is good for them.

14 I think that they are perfectly capable
15 of deciding what is good for them, and if they think
16 it is good for them, it will be licensed outside of
17 a 115 structure.

18 JUDGE BARNETT: Mr. Israelite, how do you
19 respond to the Services' position that offering
20 these discount plans entices into a paid platform
21 people who otherwise might not have a willingness or
22 ability to pay for the going rate or, in the case of
23 students, getting them in my words hooked on the
24 service, so that when they grow up, they will buy
25 the full price service? How do you respond to that

1 logic?

2 THE WITNESS: I will try not to take too
3 much time because this is a topic I feel
4 passionately about because we see it in other areas
5 as well.

6 The theory of the Services is that they
7 want to discount our property because it is good for
8 us. Their argument is if we discount it, we will
9 bring in more users who will get hooked and that
10 will lead to them ultimately either paying when they
11 were using it for free or paying a full service
12 after they are no longer a student or potentially
13 buying a family plan when they wouldn't have bought
14 four separate plans, and that it was good for us.

15 JUDGE BARNETT: Or buying a service,
16 period, when they were not otherwise willing to pay
17 anything for music.

18 THE WITNESS: Sure. And --

19 JUDGE BARNETT: Which means there would
20 have been zero for the Copyright Owners.

21 THE WITNESS: It is part of their
22 argument of why it is good for us. It is because
23 they are generating revenue for us that we should
24 appreciate, that we wouldn't have otherwise gotten
25 but for the discounting.

1 Whether that's true or not, I don't
2 believe it is the appropriate place in a compulsory
3 license to make that decision for us. If we think
4 it is good for us, we're perfectly capable of
5 allowing that activity to happen through a direct
6 license.

7 That's exactly how Apple got licensed for
8 these activities. And so --

9 MS. MAZZELLO: Your Honor, if we're going
10 to name specifics, if we can go into restricted,
11 please.

12 JUDGE BARNETT: Well, yes. And I'm not
13 sure Mr. Israelite was even involved in the
14 negotiations.

15 THE WITNESS: I was not.

16 JUDGE BARNETT: Okay.

17 MR. STEINTHAL: I was going to raise the
18 foundational objection to that testimony.

19 JUDGE BARNETT: Okay. So I'm sorry I
20 sparked your passion. We will just go back to
21 having Mr. Zakarin ask the questions.

22 JUDGE STRICKLER: Less passion from you.

23 JUDGE FEDER: Actually I would like to
24 ask a question.

25 You said just a moment ago that the

1 Spotify Free service has harmed songwriters. Can
2 you explain what you mean by that? Are you talking
3 about substitution that the Spotify Free service is
4 substituting for other paid services or are you
5 talking about some other notion of harm?

6 THE WITNESS: When the Subpart B-5
7 category was created, approximately ten years ago,
8 it was a theoretical category. We now see the one
9 company that is taking advantage of that category,
10 which is Spotify, and their general argument to me
11 personally and in general has been --

12 JUDGE STRICKLER: Is this going to be
13 confidential?

14 THE WITNESS: I don't believe so.

15 JUDGE STRICKLER: You are talking about
16 negotiations?

17 THE WITNESS: No, it is not about
18 negotiations.

19 MR. MANCINI: If he said he is going to
20 be discussing anything with Spotify, that would be
21 restricted.

22 JUDGE STRICKLER: Sounds like it might
23 be.

24 MR. ZAKARIN: This one is not my fault.

25 JUDGE STRICKLER: Not yet.

1 THE WITNESS: I can try to avoid maybe
2 what would trigger this concern.

3 JUDGE FEDER: Just a second. Mr.
4 Zakarin, are you going into restricted at any point?

5 MR. ZAKARIN: I am going to be going
6 mostly back in history to 2008 and 2012, so I don't
7 think I will be in restricted. I think that's past
8 tense. So I wasn't planning on it, but I am the
9 worst person to ask.

10 JUDGE FEDER: We can save this until the
11 end of his testimony and then either have a brief
12 restricted session or figure it out at that point.

13 MR. ZAKARIN: Or we're close to 5:00. If
14 you want to do it now, we're here anyway. I don't
15 want to cut off when it is fresh in your mind.

16 JUDGE BARNETT: Very wise decision.

17 JUDGE FEDER: Good point.

18 JUDGE BARNETT: At this point we will go
19 into restricted session, and those of you who are
20 not privy to restricted information, if you will
21 please wait outside. We're going to adjourn at 5:00
22 o'clock or recess at 5:00 o'clock anyway, so I think
23 that means you are free to go.

24 (Whereupon, the trial proceeded in
25 confidential session.)

1	C O N T E N T S				
2	WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
3	DAVID KOKAKIS				
4			3309		
5			3310	3323	
6	JAMES TIMMINS				
7		3328	3357		
8			3408		
9			3418		
10	CHRISTOPHER BARRY				
11		3423	3445		
12			3467		
13			3482	3497	
14	LEE THOMAS MILLER				
15		3505			
16	LIZ ROSE				
17		3533			
18	DAVID ISRAELITE				
19		3550			
20					
21	AFTERNOON SESSION: 3423				
22					
23	CONFIDENTIAL SESSIONS: 3318-3322, 3347-3351,				
24	3414-3417, 3734-3453, 3473-3481, 3486-3504,				
25	3562-3582, 3602-3605				

1		E X H I B I T S	
2	EXHIBIT NO:	MARKED/RECEIVED	REJECTED
3	AMAZON		
4	19	3356	
5	21	3356	
6	30	3356	
7	181	3327	
8	302	3356	
9	306	3559	
10	GOOGLE	MARKED FOR ID ONLY	
11	6006	3367	
12	6007	3370	
13	6008	3370	
14	6009	3382	
15	6010	3395	
16	6011	3402	
17	GOOGLE	MARKED/RECEIVED	REJECTED
18	757	3327	
19	804	3327	
20	805	3327	
21	806	3327	
22	807	3327	
23	1703	3364	
24	PANDORA		
25	1094	3327	

1	EXHIBIT NO:	MARKED/RECEIVED	REJECTED
2	APPLE		
3	1437	3356	
4	1438	3356	
5	1474	3356	
6	1548	3356	
7	COPYRIGHT OWNERS		
8	2500	3559	
9	2501	3559	
10	2502	3359	
11	2504-2529	3327	
12	2558	3506	
13	2606-2608	3327	
14	2617	3356	
15	2620-2643	3356	
16	2646-2668	3356	
17	2670-2673	3356	
18	2680	3356	
19	2681	3356	
20	2684	3356	
21	2685	3356	
22	2688	3356	
23	2689	3356	
24	2695	3444	
25	2700-2703	3444	

1	EXHIBIT NO:	MARKED/RECEIVED	REJECTED
2	COPYRIGHT OWNERS		
3	2752	3356	
4	2764	3356	
5	2974	3356	
6	3014	3553	
7	3023	3356	
8	3024	3534	
9	3030	3582	
10	3036	3333	
11	3037	3426	
12	3040	3444	
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			

1 CERTIFICATE

2

3 I certify that the foregoing is a true and
4 accurate transcript, to the best of my skill and
5 ability, from my stenographic notes of this
6 proceeding.

7

8

9

3/29/17



10 Date

Signature of the Court Reporter

11

12

13

14

15

16

17

18

19

20

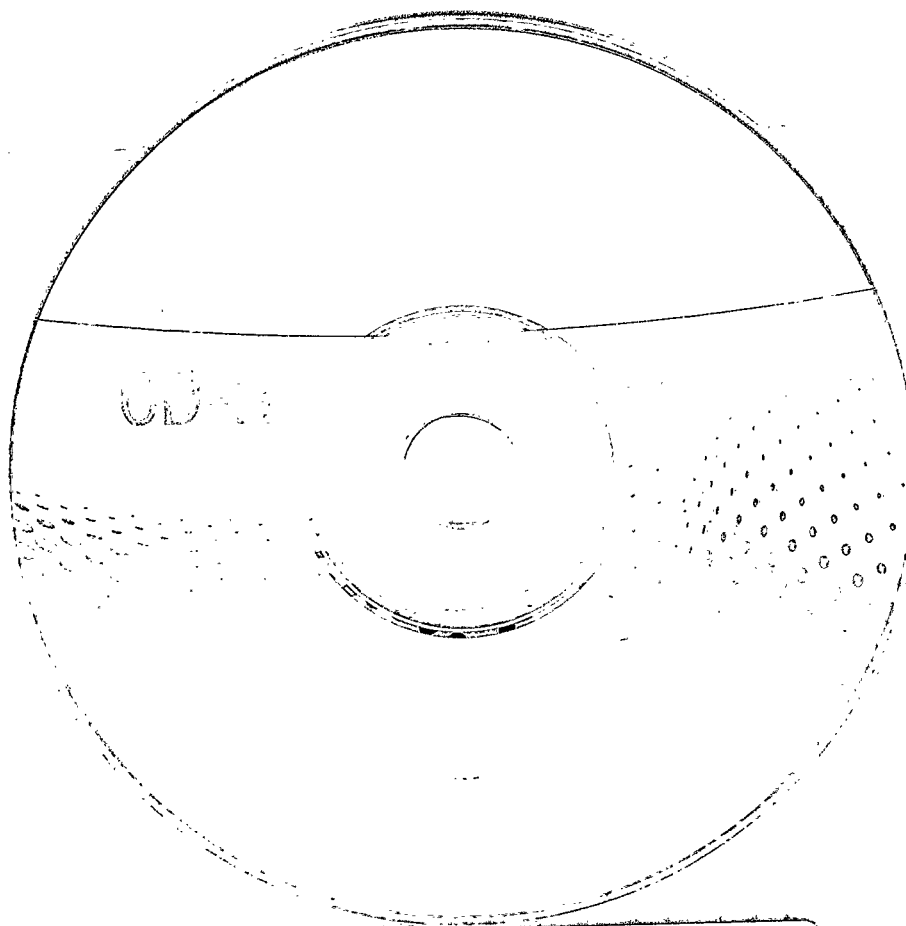
21

22

23

24

25



Heritage Reporting Corp.
1220 L Street, NW; Ste 206
Wash DC 20005
Client: LOC Date: 3/28/17
Case: Rates and Terms (Phonorecords III)
Pages: 3302 through 3610
Place: Washington, D.C. PDF
OPEN SESSION