TRANSCRIPT OF PROCEEDINGS

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IN THE MATTER OF:               )

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DETERMINATION OF RATES AND TERMS)  Docket No.

FOR DIGITAL PERFORMANCE OF SOUND) 19-CRB-0005-WR

RECORDINGS AND MAKING OF        )  (2021-2025)

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THOSE PERFORMANCES (WEB V)      )

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6 DETERMINATION OF RATES AND TERMS) Docket No.

7 FOR DIGITAL PERFORMANCE OF SOUND) 19-CRB-0005-WR

8 RECORDINGS AND MAKING OF   ) (2021-2025)

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10 THOSE PERFORMANCES (WEB V))

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12 BEFORE: THE HONORABLE JESSE M. FEDER

13   THE HONORABLE DAVID R. STRICKLER

14   THE HONORABLE STEVE RUWE

15

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 2         ** All Appearances by Zoom Webinar **

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 5    Actors Guild and American Federation of Television

 6    and Radio Artists (SAG-AFTER), American Association

 7    of Independent Music (A2IM), Universal Music Group

 8    (UMG), Warner Music Group, Sony Music Entertainment,

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11   ** Index appears at end of transcript.

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

2   (10:30 a.m.)

3   THE CLERK: Let's raise the curtain.

4   MR. SACK: The curtain is raised.

5   CHIEF JUDGE FEDER: Good morning. When we

6   concluded yesterday, SoundExchange was conducting its

7   direct examination of Mr. Orszag.

8   Mr. Handzo, are you ready to proceed and

9   continue the direct examination?

10   MR. HANDZO: We are, Your Honor, assuming

11 Mr. Orszag is there.

12   CHIEF JUDGE FEDER: Can you -- can the host

13 please promote Mr. Orszag to a panelist?

14   MR. TOTH: Yes, there he is.

15   CHIEF JUDGE FEDER: Very good. All right.

16   MR. HANDZO: There he is.

17   CHIEF JUDGE FEDER: You may proceed.

18 Whereupon--

19   JONATHAN ORSZAG,

20 a witness, called for examination, having previously

21 been duly sworn, was examined and testified further

22 as follows:

23   DIRECT EXAMINATION -- RESUMED

24 BY MR. HANDZO:

25   Q.   Good morning, Mr. Orszag.

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 1        A.    Good morning, Mr. Handzo.

 2        Q.    When we finished up yesterday, we were still

 3   on your summary of conclusions, and I believe this

 4   was going to be the next slide that we were getting

 5   to, which is a summary of your conclusions with

 6   respect to Dr. Peterson's benchmarking methodologies.

 7              So with respect to Dr. Peterson, your first

 8   bullet point talks about, again, Spotify's

 9   ad-supported service is not an ideal benchmark.  Is

10   that one that Dr. Peterson also uses?

11        A.    That is correct.

12        Q.    And you talked about that with respect to

13   Professor Shapiro yesterday.  Is it the same concerns

14   you have with respect to Dr. Peterson?

15        A.    Yes.  And just so that we're clear, where I

16   described yesterday in terms of the different

17   benchmarks, Professor Shapiro puts forward a

18   benchmark for both the subscription non-interactive

19   market in the ad-supported non-interactive market.

20   Dr. Peterson focuses only on the ad-supported

21   non-interactive market.

22              And he uses, as his benchmark, the Spotify

23   ad-supported tier.  The problems with this benchmark,

24   as I described yesterday, are that there are

25   discounts associated with it due to the fact that
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1   Spotify is -- excels at converting its free

2   subscribers into paid subscribers.

3   And so its rates reflect those discounts,

4   and so the benchmark that Dr. Peterson has put

5   forward is depressed, is lower than it should be, if

6   we were focused on the target market, which does not

7   have -- in Section 114, the statutory services do not

8   have those same premium tiers to convert to, and so

9   the -- the statutory rate should not take into

10   account the discounts associated with improved

11   conversion.

12   JUDGE STRICKLER: Mr. Orszag, good morning.

13   THE WITNESS: Good morning to you, sir.

14   JUDGE STRICKLER: Question for you. These

15   discounts on the Spotify rate because it serves as an

16   ad-supported funnel, if you will, are they just

17   general in nature or are they actually -- can you

18   actually identify them precisely?

19   THE WITNESS: In the Spotify agreement,

20   there's different --

21   JUDGE STRICKLER: Without actually naming

22   them, because we're not in restricted session.

23   THE WITNESS: Yes, I will --

24   MR. HANDZO: Yeah, I was going to say I --

25   we have to be a little careful. We'll get into this

1   in more detail certainly, and I'm happy to have

2   Mr. Orszag answer to the extent that he can without

3   going into restricted information.

4   JUDGE STRICKLER: Thank you.

5   THE WITNESS: What I -- I think is fair to

6   say that the -- the details with regard to the -- the

7   discounts being tied to the ability to convert is

8   different for each of the labels and the services.

9   The most explicit discounting is in the

10   relationship, say, with the Amazon agreement. And I

11   will talk about that. But there's other agreements

12   where there is explicit provisions. Sometimes those

13   targets for, say, a Spotify were met long ago or were

14   not set at very high levels, so that on day one of

15   the new agreement, they were already meeting those

16   thresholds.

17   So we can get into this in more detail, but

18   it depends on each of the agreements. And,

19   obviously, there's lots of details, some of which

20   I've committed to memory; others, I have not.

21   JUDGE STRICKLER: Thank you, Mr. Orszag.

22   BY MR. HANDZO:

23   Q.   Mr. Orszag, I'm going to skip the second

24   sub-bullet for a moment. Don't worry, I'll come back

25   to it. But let's talk for a moment about

1   Dr. Peterson's interactivity adjustment.

2   Does he do that the same way that Professor

3   Shapiro does?

4   A.   No, he does not.

5   Q.   Okay. But what's your view of the way

6   Dr. Peterson does it?

7   A.   Well, let's -- let's just level-set first,

8   because I think that's important. Where I described

9   yesterday that Professor Shapiro includes a

10   63 percent discount for his views about the

11   differences in interactivity, Dr. Peterson includes a

12   12.7 percent. So his adjustment is 12.7 percent

13   down, instead of, as for Professor Shapiro, of

14   63 percent.

15   And what Dr. Peterson does is he looks at

16   the rate that Pandora is paying in its deal with the

17   majors relative to the statutory rate, and he takes

18   that ratio and he uses that ratio as his adjustment.

19   There are two problems with that. One is it

20   doesn't reflect the consumer value, the value to

21   downstream users, of that increased functionality,

22   and it is not free from statutory influence. He's

23   introducing the statutory rate directly into the

24   calculation.

25   JUDGE STRICKLER: Mr. -- Mr. Orszag, I just

1   want to clarify again, just so I understand the --

2   the lay of the land here.

3   Are you saying that Professor Shapiro's

4   63 percent discount is purely for interactivity -- an

5   interactivity adjustment?

6   THE WITNESS: That is correct.

7   JUDGE STRICKLER: Thank you.

8   BY MR. HANDZO:

9   Q.   Now let's go back up one bullet to the

10   efficient -- effective competition adjustment.

11   Again, you talked about that yesterday with respect

12   to Professor Shapiro.

13   Does Dr. Peterson make an effective

14   competition adjustment -- well, let's start with

15   that. He makes an effective competition adjustment,

16   right?

17   A.   That is correct.

18   Q.   But does he do it in the same way that

19   Professor Shapiro does?

20   A.   No, he does not. Whereas Professor

21   Shapiro --

22   Q.   And --

23   A.   Whereas Professor Shapiro used the

24   difference between what he measured was -- and I'll

25   be -- I have to be careful here because we're not in

1   restricted session -- he used the difference between

2   the average rates for a number of subscription

3   services and the rate that Amazon pays on a per-play

4   basis for its Amazon Prime service.

5   And he -- this is Professor Shapiro -- he

6   assumed that difference was equal to the effective

7   competition, an effective competition adjustment.

8   And ballpark, I think it was around 30 percent as an

9   adjustment, 32 percent. We can get into the precise

10   numbers.

11   Dr. Peterson just uses the 12 percent

12   adjustment factor that was used in the Web IV

13   decision as his adjustment for effective competition.

14   Q.   And what's your reaction to Dr. Peterson's

15   approach?

16   A.   I -- I have a number of reactions. Most

17   particularly since Web IV, since the Web IV decision,

18   rates have come down. And rates have come down

19   significantly for Spotify. Rates have come down

20   significantly for Apple. And also relative to the

21   Spotify benchmark, Spotify obtaining the best prices

22   in the -- in the market or among the best prices in

23   the market, to just be more general, it's then

24   inappropriate to make an additional adjustment on top

25   of that.

1   And to be more precise, in Web IV as I read

2   the record, the 12 percent adjustment applied to all

3   the services that were analyzed, not the lowest price

4   service. So when they -- when the analysis was done,

5   it started with all and subtracted 12 percent. I'm

6   starting with a rate, Spotify here, that is

7   already -- again, to be vague, already significantly

8   below the rates for other services.

9   So much below that no additional effective

10 competition adjustment is necessary. And one can

11 just look at Professor Shapiro's analysis, which he

12 called the Amazon Prime rate effectively competitive,

13 and the Spotify rate is with -- is very close to that

14 same rate.

15   Q.   Okay. Now, the last bullet relates to

16 Dr. Peterson's skips adjustment. Can you just tell

17 us -- first of all, what's the skips adjustment and

18 why is the way Dr. Peterson does it a problem?

19   A.   Sure. He -- he makes two adjustments. He

20 -- he makes two proposals. The first, he -- he

21 proposes to use the rate of skips for Spotify. And,

22 roughly speaking, that's about a 25 percent

23 adjustment. And so he uses that as approach number

24 1.

25   And then approach number 2, he uses the

1   Pandora skips rate of roughly 11 percent as his

2   measure to adjust by. So those are his two --

3   Q.   Let me -- okay. Just so we all are on the

4   same page, I'm sure everybody knows this, but what's

5   the rationale for doing a skips adjustment in the

6   first place?

7   A.   Well, to the extent that the statutory

8   services do not -- that you have to pay for skips,

9   one would want to ensure that one is matching the

10   benchmark in the target markets, and so in the

11   statutory world, the statutory services are paying

12   for skips, so one wants to make sure you're matching

13   up correctly.

14   Q.   Okay. So is your -- your objection to what

15   Dr. Peterson does that he shouldn't be making a skips

16   adjustment or just the way he does it and the data he

17   uses?

18   A.   I -- one has to control for skips. There

19   are multiple ways to do it. One has to -- he looks

20   at just the benchmark market without taking into

21   account the target market. That's why his Spotify

22   rate is so overstated.

23   And I deal with this much more directly.

24   Pandora today pays for skips. Pandora is the vast

25   majority of observations. It -- it's a significant

1   weight in my calculation.

2   So by using the plays that are paid for by

3   Pandora, I am directly controlling for skips in my

4   analysis and ensuring that the target rate here, the

5   statutory rate, the one that I propose, is

6   appropriate, taking into account the fact that skips

7   will be compensatory.

8   Q.   Okay. Thank you.

9   So next we'll talk about Dr. Leonard, who,

10   as I think everyone will recall, is an expert for the

11   NAB.

12   Do you recall that Dr. Leonard uses as a

13   benchmark certain direct licenses between iHeart and

14   Indie labels?

15   A.   That is correct.

16   Q.   And your first bullet point says that's not

17   an appropriate benchmark. Why is that?

18   A.   I mean, there's a long list. I detail this

19   in my written rebuttal testimony. But to just

20   highlight a number of them, if I may.

21   They represent a very small share of the

22   overall number of plays of iHeart. So I don't know

23   if that's a -- the number is confidential here, so I

24   will just be vague until we get into -- into

25   restricted session, but it's a very small percentage

1   of overall plays.

2   And it's dominated by one of -- one

3   particular label represents somewhere between 35 and

4   45 percent of those plays. And there are a wide

5   variety of reasons -- and this was covered as well in

6   the SDARS case -- for why these labels enter into

7   direct deals.

8   And those reasons motivate their decisions,

9   not steering, not trying to get more plays

10   necessarily, but there are a wide variety of those

11   reasons that factor into their analysis. For

12   example, one of the labels -- and, again, without

13   getting into details -- found it very important to

14   get paid for terrestrial plays.

15   And that was something that was idealogical

16   to them. They wanted to be able to go to their

17   artists and explain that they were now getting paid

18   for something they previously were not. And so one

19   of the benefits of a direct deal to that label was

20   that benefit, which was, in their opinion, very

21   significant in the long run.

22   And other labels had other motivations that

23   go beyond just steering or getting more plays.

24   Q.   And, again, just in case not everybody has

25   gotten to the point of reading Dr. Leonard's

1   testimony, in those direct licenses was there a

2   terrestrial royalty for the record -- for the Indies?

3   A.   Yes, there was.

4   Q.   I think you said that another issue with

5   respect to this direct license benchmark was the size

6   of -- or the percentage of the market that is

7   represented. And, again, I'm not asking you to say

8   the number, but does that cause you concern?

9   A.   Yes, it does.

10   Q.   And then your last bullet point, do you

11   recall that Dr. Leonard argues that simulcasting is

12   just economically different from the rest of

13   webcasting and, therefore, it is -- the Judges, at

14   least, need to consider a separate rate for it?

15   A.   That is his argument. He suggests that

16   simulcasts -- simulcasters are different and should

17   get a differential rate. This is an issue -- I've

18   analyzed radio competition, and these simulcasters

19   are part of radio stations, for a number of years

20   now, and the competition between custom radio, radio,

21   simulcasters, and other forms of streaming services

22   is very significant.

23   And it's viewed significantly both by radio

24   stations and also by custom radio -- by streaming

25   entities as well. Pandora has made it very clear

1   that they have a desire to take on traditional radio.

2   And traditional radio wants to defend itself against

3   the incursions that have occurred from streaming

4   services. This has been part of competition

5   analyses, something that's reflected by the NAB, and

6   in their work that they have done about competition

7   in the radio space.

8   And so when firms are competing and they're

9   in the same competitive space, it does not make sense

10   to have such significant differences as Dr. Leonard

11   proposes in the rates that they would pay because

12   that would tilt the playing field to one player over

13   another.

14   And that's not what would occur in a willing

15   buyer/willing seller framework because, for obvious

16   purposes -- obvious reasons, a willing seller in that

17   -- in that circumstance would recognize the costs to

18   it of diversion from one to another.

19   Q.   All right. So we've -- we've played the

20   prelude, and this is the roadmap to the rest of your

21   testimony. I'm not sure there's really anything to

22   cite here before we move into the main event, unless

23   there's something, Mr. Orszag, that you want to add.

24   A.   No, let's just -- I think let's just get to

25   it.

1   Q.   All right. So let's go back to your

2   benchmarking analysis. And I think at the outset you

3   said that the first step is to find the appropriate

4   benchmark.

5   So first bullet point, interactive services

6   is what you use, right? And why do you think that is

7   appropriate?

8   A.   Well, it's -- there are a number of reasons.

9   And I don't think there's much disagreement here.

10   The only two experts who are proposing a rate for the

11   subscription non-interactive services are Professor

12   Shapiro and myself.

13   And we both use the interactive subscription

14   services as a benchmark. The difference being that I

15   use the Spotify rate and he uses 11 services. So

16   that's Number 1. And then, obviously, there's

17   differences about adjustments, which we will get to.

18   On the ad-supported side, Professor Shapiro

19   and Dr. Peterson and myself all use the interactive

20   services benchmark as well. The difference being

21   that I'm using the Spotify paid service, whereas

22   Professor Shapiro and Dr. Peterson are using the

23   ad-supported tier.

24   And so we're all agreeing to start with

25   interactive services as the benchmark. And there are

1   a number of -- we've all gone in this direction

2   because it -- there are lots of licenses that have

3   been negotiated and it reflects the -- a market

4   price, between a willing buyer and a willing seller,

5   that there's a significant comparability between what

6   is offered in the interactive service market and the

7   non-interactive service. You have the same music at

8   issue, and in many respects, you know, the -- they're

9   the same or very similar buyers.

10   And there's another reason, which is

11   certainly more prevalent today than was five years

12   ago, is that the interactive services have -- the

13   differences between the interactive -- interactive

14   services and the non-interactive services have

15   converged over time. There has been an increased use

16   of lean-back functionality on the interactive

17   services over time, so there is more elements to the

18   interactive services that look like the

19   non-interactive services than five years ago.

20   Q.   Has there been any, I'll call it,

21   convergence between the interactive subscription

22   services and non-interactive subscription services in

23   terms of price?

24   A.   Yes, there has. The -- there has been a

25   sharp increase in the use of discount plans, family

1   plans, in particular, for the interactive services.

2   And, again, without getting into numbers, that sharp

3   increase in the number of -- and we can do this in

4   restricted session -- the sharp increase in the use

5   of those family plans has caused ARPU of the

6   interactive services to fall, which would have it

7   converge with the prices of the non-interactive

8   services.

9   There is still a gap, for sure, but that gap

10 is not as significant as it was a number of years

11 ago.

12   JUDGE STRICKLER: Mr. Orszag, when you talk

13 -- and I know we're talking generally now without the

14 specific numbers -- when you talk about the ARPU,

15 average revenue per user, and you're relating it to a

16 family plan, are you relating it to the family as the

17 user or the user represents the number of individuals

18 actually on that plan?

19   THE WITNESS: So there's standard metrics

20 that the -- the record labels use. And you --

21 whether you do it in terms of the family as a unit or

22 you do it as the family -- I'm just being -- trying

23 to be careful here because of the numbers.

24   I believe I can -- let's just say that

25 there's a pretty standard metric that the labels use

1   for consideration of what a family plan is. And if I

2   use that metric, that obviously results in even lower

3   ARPU. And so it depends on what assumption one wants

4   to make about precisely that issue.

5   But there has been a significant increase in

6   the number of family plans, and if you use the

7   standard metric that the labels use, it -- it's -- it

8   means that the difference between these prices is

9   much less than it was a number of years ago.

10   JUDGE STRICKLER: Just so -- just so I'm

11   understanding this -- I'll use numbers that are

12   completely fanciful, so this has nothing to do --

13   THE WITNESS: Sure.

14   JUDGE STRICKLER: -- with what's in the

15   record. If a family plan was $50 a month and there

16   were five individuals on the family plan, two

17   parents, three children, is there a standard way in

18   which the industry measures ARPU? In other words,

19   would it be $50 ARPU because the subscriber is the

20   family unit, or would it be $10 per user because

21   there's five members in that family?

22   THE WITNESS: It would be -- to use the

23   hypotheticals -- by the way, the public -- there's

24   public information about what the price of a family

25   plan is, which is basically, you know, roughly $15.

1   It depends on the -- the --

2   JUDGE STRICKLER: That's why -- that's why I

3   used 50. I wanted to be completely fanciful on this.

4   THE WITNESS: Okay, but we can be completely

5   fanciful, but yes, you are dividing by the number of

6   users. They make an assumption about the number of

7   users.

8   Oftentimes in these agreements, if the

9   number of actual users goes above a threshold, this

10   is a heavily negotiated provision, the rate at which

11   they pay increases. So there's one rate as long as

12   the number of users is below a threshold and another

13   rate if it goes above that threshold.

14   And their standard, to use in terms of the

15   number of users, is below that threshold.

16   JUDGE STRICKLER: I see. And -- and does

17   this vary among the majors?

18   THE WITNESS: I don't think significantly,

19   but there are some differences between how they view

20   these issues.

21   JUDGE STRICKLER: Thank you, Mr. Orszag.

22   JUDGE RUWE: Mr. Orszag, I have a question

23   to follow up on Judge Strickler's. Is it the window

24   within which how many users can be on a particular

25   plan that determines the average revenue per user or

1   is it the actual users? So if I had a plan that

2   allowed five users but I only had three, how is that

3   actually being worked out?

4   THE WITNESS: It's the number that sign up.

5   So if I have a family plan, it may allow for up to

6   five users, but I have to go in and each person signs

7   up separately, so there's -- and so -- but it's under

8   the family plan.

9   So I -- personally, I actually have a family

10   plan, and for -- and each user is an additional

11   e-mail address, effectively. And so that is the user

12   under the -- under the standard.

13   JUDGE RUWE: So it is based on the accounts

14   signed up, not users on multiple devices, that it's

15   not as tracked with as much granularity?

16   THE WITNESS: It's based on the number of

17   signed-up users, is my understanding. So if -- if I

18   -- if I use my Spotify account on three -- three

19   devices, I'm treated as one user because that is me

20   individually using it in different places.

21   JUDGE RUWE: Thank you.

22   JUDGE STRICKLER: Mr. Orszag, just to follow

23   up, do you understand the use of these discount

24   family -- we're talking about the discount family

25   plan -- as an example of bundling, economic bundling?

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1            THE WITNESS:  It's a form of bundling.  For
2    -- for my family, for example, I get a discount
3    because, instead of having to buy three services, I
4    buy one, and that one is cheaper for me buying it as
5    a bundle than buying it each separately.
6            JUDGE STRICKLER:  And do you understand such
7    bundling to be a form of price discrimination?
8            THE WITNESS:  I mean, technically speaking,
9    yes, it is a form of -- of -- you're pricing
10   differently to different groups of people, so it is a
11   form of price discrimination.
12           JUDGE STRICKLER:  Thank you, sir.
13   BY MR. HANDZO:
14      Q.   Just to finish off this slide, Mr. Orszag,
15   at the bottom, you talk about having sufficient data
16   to calculate reliable benchmark rates.
17           So just tell us what data you used.
18      A.   So I have the royalty statements for a
19   number of services and Spotify and their agreements
20   with a number of labels, the major labels, as well as
21   Merlin, and then I have this data going back till --
22   on a monthly basis, back to at least 2015.  This is
23   very complex to process on a monthly basis and has
24   become much more complex over time, as -- as the
25   services have introduced these additional different
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1   plans and different -- the way that they treat them.

2   And so that explains why there is some

3   modest difference between, say, Dr. Peterson's

4   calculation of the royalty rate and mine, is because

5   of how one processes some of the details can be very

6   different.

7   I should note that the differences between

8   what Dr. Peterson and I do are very small and

9   technical. And I would not say that -- would stand

10   here and testify that one is necessarily more right

11   than another, but the differences between us are

12   extremely, extremely small, unlike the difference

13   between Dr. Peterson and myself and Professor

14   Shapiro, who has fundamentally just not calculated

15   the Warner true-up correctly.

16   Q.   Okay. So in terms of the royalty statements

17   that you had, what record company or companies does

18   that cover?

19   A.   Universal, Sony, Warner, and Merlin. And

20   then I have it for a number of others, and I looked

21   at those as well, but my primary analyses are focused

22   on Universal, Warner, Sony, and Merlin.

23   JUDGE STRICKLER: Mr. Orszag, where do the

24   -- excuse me, sir. Mr. Orszag, why did you use

25   Merlin as your independent label source?

1   THE WITNESS: Because for -- there are --

2 and, again, this is detailed in my -- in my report,

3 and I can pull up the precise numbers. They cover a

4 very significant number of independents in terms of

5 the rates that the independents can receive.

6   JUDGE STRICKLER: I'm assuming that

7 percentage or that number are confidential

8 information?

9   THE WITNESS: I will defer to others on

10 that.

11   MR. HANDZO: We'll -- we'll have to check.

12 Actually, I suspect that it is not, but we'll check

13 and we'll, assuming it is -- well, one way or the

14 other, we'll let you know, either in restricted or

15 unrestricted session.

16   JUDGE STRICKLER: Very good. Thank you,

17 Mr. Handzo.

18 BY MR. HANDZO:

19   Q.   And with respect to license agreements,

20 Mr. Orszag, did you have the license agreements

21 between each of the majors and Merlin with each of

22 the on-demand services?

23   A.   Yes, I did.

24   Q.   Now, for this next slide, I believe I need

25 to go into restricted session. I apologize for that.

 1   I think it's just going to be this slide, so I think

 2   we're talking about five minutes.

 3   CHIEF JUDGE FEDER: Okay. We will go into

 4   restricted session briefly. Will the host please

 5   clear the virtual hearing room.

 6   MR. SACK: Your Honors, please stand by.

 7   We are beginning to clear the room now. If

 8   you are an attendee in the Zoom meeting who is not

 9   allowed to attend restricted session, please leave

10   the session by clicking the red Leave button on the

11   bottom right-hand side of your screen or click the X

12   at the top right-hand side. Your counsel will inform

13   you when you are allowed to return to the proceeding.

14   Please stand by, Your Honors and counsel,

15   while we clear the room.

16   (Whereupon, the trial proceeded in

17   confidential session.)

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

2   MR. SACK: The room is open.

3   CHIEF JUDGE FEDER: Thank you, Mr. Sack. We

4   are back in open session.

5   Mr. Handzo, you may proceed.

6   MR. HANDZO: Thank you.

7   BY MR. HANDZO:

8   Q.   All right. So at the outset yesterday,

9   Mr. Orszag, I think you talked about the fact that

10   any benchmarking analysis typically involves

11   adjusting for differences between the benchmark

12   market and the target market.

13   So can you just walk us through here the

14   adjustments that you considered making and which ones

15   you actually made?

16   A.   Sure. I -- there are -- they fall into five

17   broad buckets. The first -- and we've talked about

18   three of these already, so the first is

19   interactivity. And I control for interactivity

20   directly by the differences in the revenues that are

21   earned in the -- from the various products at issue,

22   looking at the differences between the benchmark and

23   the target market.

24   There is effective competition, that is,

25   should one control for any differences between the

1   rates that one observes and an effectively

2   competitive marketplace. That's second.

3   The third is controlling for any differences

4   in the propensity or -- or the need for compensatory

5   skips in the benchmark and the target markets.

6   One should then -- the fourth one is looking

7   at any differences between promotion and substitution

8   effects between the benchmark and target markets.

9   And, lastly, is a consideration of

10   non-royalty benefits between the benchmark and target

11   markets. For example, and just to put -- we'll talk

12   about -- we'll talk about this some more -- data has

13   become an increasingly important part of the music

14   industry. And so as part of the agreements, the

15   interactive agreements, for example, the labels

16   obtain data from the interactive services.

17   However, as part of the statutory services,

18   that type of data, that very granular data that can

19   be extremely helpful to make business decisions, is

20   not part of those agreements. So one needs to

21   consider -- I do not make an adjustment for that, but

22   if one were to, it would be to increase the rates for

23   the target market.

24   But that is the type of issue in non-royalty

25   benefits.

1   JUDGE STRICKLER: Mr. Orszag, when we do get

2   into it and we talk about the value of data, will you

3   be giving some estimates as to the value of the data

4   that -- that is garnered by the labels or are you

5   just pointing towards it directionally?

6   THE WITNESS: I'm pointing to it

7   directionally. I have tried very hard, Your Honor,

8   to figure out a way to value that data and to see if

9   there's any market-based way to assign a value to it.

10   We know it's important. We know it's

11   valuable. But we do not know and we do not have an

12   ability to tease out how valuable and how much one

13   should adjust the rates. And given that I don't have

14   an empirical basis to make an adjustment, I just

15   discuss that empirically. That would suggest that

16   the rates should be higher for the statutory

17   services, but I do not make any incremental

18   adjustment because I don't have an empirical basis to

19   do so.

20   JUDGE STRICKLER: Thank you.

21   BY MR. HANDZO:

22   Q.   But it wasn't for lack of trying.

23   A.   No. It was not from a lack of trying. I

24   looked at whether we could test between the different

25   data and the different agreements. I looked at

1   whether they had ever sold the data or -- to a third

2   party. I tried to find any source that would give an

3   insight to the value of this.

4   And other than the fact that the

5   businesspeople talk about the value of the data, I

6   have not been able to tease out an estimate,

7   unfortunately.

8   JUDGE STRICKLER: I guess that dissertation

9   has yet to be written.

10   THE WITNESS: There's -- there is a paper

11   one day for somebody here.

12   BY MR. HANDZO:

13   Q.   All right. So let's -- let's talk in the

14   next few slides about your interactivity adjustment

15   and how you went about that.

16   So on this next slide, we have the reference

17   to ratio equivalency and an equation that we pulled

18   from the Web IV determination. So can you explain

19   what's -- what's happening here and how you used

20   this?

21   A.   So I get to give credit where credit is due,

22   to the Judges in Web IV for putting forward this idea

23   of ratio equivalency, in -- in presenting it here.

24   So the ratio is that the -- in essence, the royalty

25   rate as a share of price or presented here, it's

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1    really price over royalty, will be equal in the
2    interactive market and the non-interactive market.
3         Q.    Which would imply, I take it, that if the
4    price in the interactive market is higher than the
5    price in the non-interactive market, the royalty in
6    the interactive market will be proportionately higher
7    than the royalty in the non-interactive market?
8         A.    That's --
9         Q.    Did I say that right?
10        A.    Yes, I believe you did --
11        Q.    Okay.  Okay.
12        A.    -- but, yes.
13        Q.    All right.  So that is the general principle
14   that you applied in making your interactivity
15   adjustment?
16        A.    That is correct.
17        Q.    All right.  Let me just pause here.  My next
18   slide has restricted information on it.  I think we
19   can navigate through it without actually speaking
20   about the numbers, but I do think there was one
21   person listed as being an attendee on the webcast who
22   isn't allowed to see it.  So -- it was a
23   representative of NAB.
24             So if that person is still on the webcast,
25   we're going to need to remove them before I move to
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1   the next slide.

2   CHIEF JUDGE FEDER: Was that -- that's not

3   how I had read the e-mail this morning. I had read

4   it that there was one person who could see it. I may

5   be mistaken on that.

6   MR. HANDZO: I think that person can only

7   see restricted information if it relates to NAB.

8   CHIEF JUDGE FEDER: Okay, thank you. So

9   would NAB's counsel please instruct that individual

10   to remove him- or herself from the virtual hearing

11   room -- for about how long, Mr. Handzo?

12   MR. HANDZO: I'd say it's going to be at

13   least half an hour.

14   CHIEF JUDGE FEDER: For about half an hour.

15   And counsel can inform that person when he or she may

16   rejoin.

17   MR. HUSENY: Thank you, Your Honor. Sadik

18   Huseny for NAB. We understand the individual from

19   NAB is not in the room, but we will make sure that

20   that continues.

21   CHIEF JUDGE FEDER: Thank you. You may

22   proceed, Mr. Handzo.

23   MR. HANDZO: Thank you.

24   BY MR. HANDZO:

25   Q.   Okay. Now, Mr. Orszag, on this slide, I

1   think we have the numbers that you used. I'm hoping

2   that we can walk through this without you actually

3   saying the numbers. So let's just keep that in mind.

4   But with -- with that in mind, if I haven't

5   hamstrung you too much, just tell me where those

6   numbers are coming from.

7   A.   So A is the equal to -- and without saying

8   the number, it's the revenue of Spotify's interactive

9   subscription service. So revenue will obviously be,

10   you know, price times quantity. So that will be the

11   revenue that Spotify earns for an interactive -- its

12   interactive services. Interactive services --

13   Q.   And -- and let me pause you there for a

14   moment. Where do you get those -- that information

15   from?

16   A.   From the royalty statements.

17   Q.   Okay. Thank you.

18   JUDGE STRICKLER: Mr. Orszag, just a

19   question for you. In the demonstrative right before

20   that, you -- you define A, referencing Web IV, as the

21   average retail interactive subscription price. And

22   the A you have here on the next benchmark -- on the

23   next demonstrative, excuse me, is the interactive

24   subscription revenue, as opposed to a price.

25   Is that -- I'm trying to recall, is that a

 1   matter of dispute between you and Professor Shapiro?

 2   THE WITNESS: We are all using effective

 3   prices. So I don't think this issue is a matter of

 4   dispute between us, and really because there is no

 5   longer a single price to use, and so there's -- one

 6   could easily convert this into an average price, if

 7   one wanted to, and average royalties. You're just

 8   dividing by the same number.

 9   So I don't think this is an area of dispute

10   between us.

11   JUDGE STRICKLER: Thank you.

12   BY MR. HANDZO:

13   Q.   All right. And then your next for B, you've

14   got interactive subscription royalty payment. Again,

15   where does that come from?

16   A.   That comes from the royalty statements

17   themselves.

18   Q.   And, last, your C, non-interactive

19   subscription revenue. Where does that come from?

20   A.   Again, that comes from the royalty

21   statements as well. And in this case, I am using the

22   non-interactive subscription revenues for Pandora,

23   Rhapsody, and iHeart.

24   Q.   And do you have royalty statements for those

25   entities?

1   A.   Yes, I do.

2   Q.   Now, in the next bullet below, you show how

3   you do the calculation and you've essentially

4   rearranged the equation. I don't understand how that

5   works, but I think you can probably explain it.

6   A.   It -- it's a simple rearrangement. If -- I

7   think the simplest way to think about it is if you're

8   trying to solve for D, you move D to the left-hand

9   side, which means that you have to move B and A to

10   the other side, which means they flip upside down,

11   and multiplied by C. This is basic math.

12   I don't think there is much disagreement

13   about the implementation of that conversion.

14   Q.   Okay. And so solving the equation the way

15   you do, you wind up with a percentage of revenue,

16   effective percentage of revenue that is paid by

17   Spotify in this case, right? And we see -- we're not

18   going to say it -- but we see that percentage that

19   you reflect in the bottom bullet point, right?

20   A.   That is correct.

21   Q.   Okay. So just to follow up on a question

22   that Judge Strickler asked, let's say for A and B,

23   you converted both of those into effective revenue

24   per play and effective royalty per play.

25   Would that change the percentage at all?

1   A.   If I can -- if I can divide A and B by the

2 same number, the percentage will stay the same.

3   Q.   Right. So you would be dividing by the same

4 number of plays, right?

5   A.   That is correct.

6   Q.   And same thing with if you wanted to do it

7 on a per-sub basis, you just divide both numbers by

8 the number of subscribers, you come out with the same

9 percentage?

10   A.   That is correct.

11   Q.   Now, I see in this equation you multiply

12 that percentage -- I'm sorry, you multiply C, the

13 non-interactive subscription revenue, by that

14 percentage. And that gives you the number reflected

15 on this slide.

16   So what -- after doing these calculations,

17 what is the next step?

18   A.   After doing these calculations, the next

19 step that I undertake is to put -- convert these into

20 a per-play rate.

21   Q.   All right. So I --

22   A.   Okay.

23   Q.   I -- I think we have a slide, so let's go

24 there. We're out of order a little bit. I'm going

25 to skip to -- skip a slide, and we'll come back to

1   it, I promise.

2   There we go. Okay. Is this where you then

3   convert to a per-play rate?

4   A.   That is correct.

5   Q.   Okay.

6   JUDGE STRICKLER: How many -- how many

7   demonstratives forward is that, Mr. Handzo?

8   MR. HANDZO: I'm sorry, it's -- we just

9   skipped one slide.

10   JUDGE STRICKLER: I -- I've got it. Thank

11   you.

12   BY MR. HANDZO:

13   Q.   Now, again without saying numbers, other

14   than, of course, the rate you derive, where do you

15   get the number of -- well, first of all, I take it

16   what you're doing is just dividing the number we got

17   in the prior slide by the number of plays in the

18   non-interactive market; is that fair?

19   A.   That is correct.

20   Q.   All right. And where do you get that number

21   of plays from?

22   A.   Again from the royalty statements.

23   Q.   Now, in the next bullet below, you explain

24   why that addresses the question of -- of the

25   benchmark market not paying for skips and the target

1   market paying for skips, but just can you walk us

2   through that thought process?

3   A.   Sure. The -- the vast majority of these

4   plays that -- of the number that is starting with 3,

5   I can say because I don't think that reveals very

6   much, is from Pandora. And Pandora pays for skips,

7   just as a statutory service pays for skips.

8   So by using that number, I am controlling

9   for and taking into account the fact that interactive

10   services do not pay for skips but statutory services

11   do. So I'm including that in my analysis and

12   directly, so I don't need an incremental skips

13   adjustment with regard to Pandora, which represents

14   the vast majority of -- of these estimates.

15   And so that's why I do not do an incremental

16   skips analysis.

17   Q.   All right. So just for the math-challenged

18   among us, I take it by including -- because skips are

19   included in the Pandora numbers, that gives you a

20   higher number of plays than if they didn't include

21   skips, right?

22   A.   That is correct.

23   Q.   Okay. Good.

24   And using the higher number of plays means

25   you wind up with a lower effective per-play rate for

1   your proposed rate?

2   A.   That is correct.

3   Q.   Good. All right.

4   Now, you mentioned earlier, I believe, that

5   your data for the non-interactive market, both

6   revenue and plays, comes from Pandora, iHeart, and

7   Rhapsody/Napster. You said Pandora pays for skips

8   and reports them. What about iHeart and Napster?

9   A.   They do not.

10   Q.   Okay. And how would that affect your

11   calculation if you were able to include skipped plays

12   for iHeart and Rhapsody/Napster?

13   A.   If I accept blindly the skips rate that

14   Professor Shapiro puts forward of 11 percent, it does

15   not change my proposal at all. And I've already

16   described the reasons why I think that that

17   11 percent is overstated in both how one would both

18   calculate it and then implement it. I did that

19   yesterday.

20   And I'm more than happy to explain again,

21   but if one were to implement that, it would not

22   change my estimate from point -- well, I can't say

23   the number, but my proposed rate here.

24   Q.   Okay. And, again, just to make sure we

25   understand how this all works, in the way you did

1   this analysis, you figured out the -- in a sense, the

2   total revenue that should be -- sorry -- total

3   royalty that should be paid by the non-interactive

4   services, and then divided by the number of plays,

5   right?

6   A.   That is correct.

7   Q.   Okay. But you could have done it the other

8   way around, first divided the revenue for the

9   non-interactive services by the number of plays and

10   then multiplied it by your interactivity adjustment;

11   is that fair?

12   A.   That -- that is fair, if you're using the

13   correct number of plays, yes. Yes.

14   Q.   Okay. So then let's just go back to the

15   prior slide. In your testimony a few minutes ago,

16   you talked about the fact that interactive services

17   generally pay on a percentage-of-revenue basis and

18   sometimes on a per-sub basis.

19   Why, then, are you proposing a per-play rate

20   here?

21   A.   It's a very good question. And -- and there

22   are a number of reasons why it makes sense to

23   convert, once one has analyzed the appropriate

24   percentage-of-revenue to use, convert it into a

25   per-play rate, because it's often difficult to

1   measure revenue, especially for services that are

2   bundled.

3   As we know from SDARS III, for example, the

4   split between non-music and music content can often

5   be a challenge to calculate. And so that becomes --

6   when you have multiple services, that becomes -- that

7   issue becomes compounded. And then you have the

8   issue that you have folks who are using music with

9   different intensities, so one would have to, you

10   know, adjust for that issue.

11   And then you have difficulties in measuring

12   revenue for, let's imagine, a -- I use this example

13   in either my written direct or my written rebuttal

14   testimony -- social media service that decides to

15   launch a music service.

16   If I left it with a percentage of revenue,

17   what is the appropriate measure of revenue to use for

18   that service that the social media, my hypothetical

19   social media company, is offering music for? They

20   may claim it's zero. And it may be very difficult to

21   disentangle the revenue associated with this

22   incremental music service.

23   So by converting it into a per-play rate, it

24   has the benefits of being administratively far easier

25   to implement for the services and the labels on a

1   going-forward basis. So there are benefits to doing

2   this, and that's why I propose a per-play rate, even

3   though that is not the governing rate in the

4   marketplace today.

5   Q.   And it says this on the slide, but just to

6   make sure we get it into the record, when you say

7   that interactive services almost always pay on a

8   percentage-of-revenue basis, is that true for Spotify

9   Free, as well as the Spotify subscription service?

10   A.   That is correct.

11   CHIEF JUDGE FEDER: Mr. Orszag, is the --

12   the difference between the Web IV time frame and now,

13   is this a difference in the way the agreements have

14   been constructed or is it a change in the underlying

15   economics of the industry?

16   THE WITNESS: I would say it is a

17   combination of both. At the time of the SDARS case,

18   the -- the agreements tended --

19   CHIEF JUDGE FEDER: Do you mean Web IV?

20   THE WITNESS: -- are we in restricted

21   session? I just want to make sure I can --

22   CHIEF JUDGE FEDER: We are not in restricted

23   session. We are in open session.

24   THE WITNESS: Okay. That's fine. I will

25   talk -- I will talk, taking that into account. At

 1   that time, the agreements tended to be greater of a

 2   per-play or a percentage-of-revenue. And the

 3   per-play rate often governed at that time.

 4   As the market changed and the

 5   percentage-of-revenue was the rate that governed far

 6   more often, the agreements were updated to reflect

 7   that market reality that the new -- so the new

 8   agreements now focus far more on percentage of

 9   revenue in per subscriber and have displaced per

10   play, as best I can tell, because the per-play prong

11   was becoming less and less relevant in the

12   agreements.

13   So it's a combination of both the market

14   changing and then the agreements reflecting the

15   marketplace.

16   CHIEF JUDGE FEDER: Thank you.

17   JUDGE STRICKLER: Mr. Orszag, I have a

18   question for you on this -- this demonstrative.

19   In the penultimate bullet point, you write

20   "Percentage-of-revenue is difficult to apply to

21   services offered as part of a bundle of other

22   services."

23   In order to avoid that, as you point out,

24   you convert to a per-play rate. By converting to a

25   per-play rate, does that mean that whatever the value

1   in the bundle may have been for -- for non-music is

2   now incorporated in the music anyway in the form of

3   the per-play rate?

4   THE WITNESS: I don't think so because I'm

5   using per-play -- I'm using pure play services, pure

6   music play services, as my benchmark.

7   The Spotify is -- is a music service. So

8   I'm obtaining the value of music from the Spotify

9   agreement, and then that is the governing rate. So I

10   don't think that runs into a -- taking the non-music

11   content into that.

12   It allows for the music to be appropriately

13   priced, and then whatever incremental value that

14   service can get from non-music content will be

15   reflected in their overall profitability in their

16   financial performance.

17   JUDGE STRICKLER: I see. Thank you.

18   BY MR. HANDZO:

19   Q.   All right. We can skip the next slide

20   because we just talked about it. And now we are

21   talking about your analysis for non-interactive

22   ad-supported. And just to confirm, everything we've

23   been talking about up to this point was your analysis

24   of subscription, correct?

25   JUDGE STRICKLER: Excuse me, Mr. Handzo.

 1   I'm sorry to interrupt, but I want to just go back to

 2   my question, because I guess I'm on a bit of a delay

 3   here as I try to -- mentally as I try to synthesize

 4   this.

 5   So when you -- the reason you have to

 6   convert to a per-play rate is because in the -- not

 7   in the target market but in the benchmark market, you

 8   may have -- you may have a bundling of revenue; is

 9   that the point?

10   THE WITNESS: No. In -- in the benchmark

11   market, we haven't -- there's no bundling of revenue

12   issue at all, because I'm using -- my benchmark is

13   Spotify. The issue is it would not be appropriate to

14   -- let's -- hypothetically -- a hypothetical may help

15   us here.

16   We have the percentage of revenue, which has

17   been on the screen for Spotify. It would be

18   inappropriate if we applied that percentage of

19   revenue, say, to Facebook's entire business, as an

20   example, if Facebook offered a statutory service, or

21   to SiriusXM. One would have to adjust for the -- the

22   contributions that the music adds.

23   But since music is a -- is what is driving

24   Spotify, we're getting the value of music from that,

25   so that's the benchmark market. And we need to

1   ensure that the target market matches the benchmark

2   market, and that's what we're doing by converting it

3   into a per-play rate. And it avoids the issues of

4   all of the other content that a target service can

5   have.

6   And, actually, let me be clearer here. If

7   it's -- if a target service is adding this onto

8   something they already have, so imagine a Sirius

9   adding a statutory service prong, that -- that's what

10   we are concerned about. That's what we need to make

11   sure that they are not overpaying.

12   JUDGE STRICKLER: Okay. So if I understand

13   this correctly, so your benchmark market, as you

14   point out, is Spotify, which is -- in essence, you're

15   describing it as pure play, and you're applying the

16   rates in the -- that benchmark market to another pure

17   play market, which is the non-interactive.

18   So if we're doing that kind of apples to

19   apples pure play to pure play, that doesn't -- would

20   not necessitate going to a per-play rate; you could

21   have just kept it as a percentage-of-revenue rate,

22   couldn't you?

23   THE WITNESS: That -- if all of the

24   statutory services were pure -- pure plays, then the

25   answer is yes. If there was no potential issues with

1   allocating revenue, then the answer would be

2   absolutely one could do it as a percentage of

3   revenue.

4   We just know from a variety of different

5   points that the statutory services could be an add-on

6   to another service, so finding the appropriate

7   percentage -- revenue to use can then -- just adds a

8   element of complication.

9   And by converting it to per play, you avoid

10   the transactions cost associated with figuring out

11   the revenue more precisely.

12   JUDGE STRICKLER: Thank you, Mr. Orszag.

13   BY MR. HANDZO:

14   Q.   And just to -- we'll get to this later, but

15   just for example, Mr. Orszag, are you familiar with

16   the fact that the NAB argues here that their

17   simulcasters use music less intensely than a

18   pure-play webcaster?

19   A.   Correct, so they're using -- their

20   simulcasters may have both music and, say, talk or

21   weather or news on a station in a particular hour.

22   And so if one -- this is a good example. If one were

23   to take the percentage of revenue for that

24   simulcaster, say, for that hour, one -- some of the

25   value that consumers get from news/talk/weather would

1   then be paid to the labels, and that would be

2   overpaying the labels, which is not what we are

3   trying to do.

4   We're trying to ensure that the labels are

5   fairly compensated, not overcompensated.

6   Q.   So under the per-play metric, if the

7   simulcaster is using 10 songs an hour and the

8   webcaster is using 15, they're going to pay a

9   different total amount, correct?

10   A.   They're going to pay -- under my proposal,

11   they pay the same per-play amount. They pay a

12   different total amount, that is correct.

13   Q.   So let's -- let's talk about your analysis

14   for ad-supported services. And you say here in the

15   top of this bullet that you used the

16   percentage-of-revenue effective rate for Spotify's

17   subscription tier.

18   So tell us why you chose to do it that way.

19   A.   Well, I start with this from the -- the

20   benchmark of the subscription service for Spotify

21   because it's not infected with the challenges, the

22   problems that I identified earlier with regard to the

23   Spotify ad-supported tier.

24   And so I start with the subscription tier

25   because, in my opinion, it's a more appropriate

1   benchmark. With that said, as a percentage of

2   revenue, the differences between the two are quite

3   modest and would have a very small effect on my

4   proposal, so on my benchmark.

5   Q.   In terms of your -- your choice to use the

6   subscription Spotify as the benchmark, you say in the

7   first sub-bullet here that "ad-supported users are

8   increasingly willing to pay for interactive

9   services." And what's your basis for saying that?

10   A.   There's a host of data, and it's in my

11   various reports, about how -- and really my written

12   rebuttal testimony, to be precise, about how

13   consumers have increasingly converted from

14   ad-supported services to interactive services and

15   that the services have gotten better at converting

16   subscribers from an ad-supported tier to an

17   interactive tier.

18   And so that's showing the -- that the

19   ad-supported users are increasingly willing to

20   convert because the conversion rates have increased.

21   Q.   And you also say here that users who remain

22   on the ad-supported tier pay with their time. So

23   what's the point there?

24   A.   It's obviously free to be on an ad-supported

25   tier in terms of the monetary costs, but what you

1   suffer, instead of being out-of-pocket money, is you

2   have to listen to ads. So the cost to a consumer of

3   an ad-supported service is not a monetary fee but,

4   rather, the time spent listening to advertisements.

5   And that has costs. So it's the cost of not

6   having music during that time but, rather, listening

7   to advertisement.

8   JUDGE STRICKLER: Mr. Orszag, but why is

9   that cost, that is to say, the opportunity cost or

10   the nuisance cost, perhaps, of listening to

11   advertisement relevant when we're trying to set an

12   upstream royalty rate? They don't spend their time

13   doing volunteer work for the majors; they spend their

14   time either trapped in annoying ads or listening to

15   helpful ads or going to the bathroom or making a

16   sandwich and doing whatever else they're going to do,

17   while the advertisement is on.

18   So the fact that they incur that cost may

19   have implications for their own determination and

20   willingness to pay for a subscription service, but

21   what does that have to do with regard to the upstream

22   royalty calculation?

23   THE WITNESS: Well, so what we're trying to

24   understand is consumer -- differences in consumers'

25   willingness to pay. And so consumers are willing to

1   pay for an ad-supported tier with their time.

2   Consumers are willing to pay to a subscription tier

3   with their money.

4   And so the -- the price in some sense here

5   is time. And then the question is how do we

6   approximate the value of that time? I use the ad

7   dollars that are earned by the service as my estimate

8   of the value for -- for the willingness to pay. And

9   it reflects and it actually turns out that the

10   ad-supported tier, consistent with ratio equivalency,

11   the revenue per -- the royalty per revenue, the ratio

12   of the percentage of revenue is the same across those

13   two tiers or very similar. It's obviously not

14   precisely the same, but it's very close.

15   JUDGE STRICKLER: Well, they're paying --

16   MR. HANDZO: Well, why don't --

17   JUDGE STRICKLER: Excuse me, Mr. Handzo.

18   They're making a determination to forgo paying with

19   their time and paying instead with their money, but

20   the product that they're buying, the -- the

21   subscription service, if we were talking about

22   Spotify ad-supported versus Spotify subscription, is

23   a modified product.

24   And one of the -- one of the basic points of

25   price discrimination, which Spotify follows very

1 well, is to degrade the ad-supported service relative

2 to the subscription service. So not only do you not

3 want to pay the time in time for listening to

4 advertisement, but you get a better product as well.

5   So aren't you really paying both for higher

6 functionality and the loss of the -- of the payment

7 by use of your time?

8   THE WITNESS: There are some component --

9 the difference in the revenue will reflect the

10 difference in both -- that you have improved

11 functionality, as well as no ads. Those are both

12 functional differences between the ad-supported tier

13 and the fully -- the fully on-demand tier. You are

14 correct.

15   JUDGE STRICKLER: Thank you, Mr. Orszag.

16   MR. HANDZO: Let me just -- I was just going

17 to say, I think, Judge Strickler, your questions led

18 us nicely into the next slide, so we may actually

19 talk a little bit more about this. So --

20   JUDGE STRICKLER: Now I'm doing volunteer

21 work for the labels.

22   MR. HANDZO: And we appreciate it.

23 BY MR. HANDZO:

24   Q.   The -- you were talking, Mr. Orszag, about

25 the consumers paying with their time, but ultimately

1   that does translate into dollars, does it not, for

2   the service?

3   A.   That is correct.

4   Q.   And it translates into advertising revenues?

5   Is that right?

6   A.   That is -- the role of an ad-supported

7   service is to attract listeners on one side and

8   attract advertisers on the other. And they are

9   selling the advertisers on the ears that they will

10   get and the benefits that then accrue, obviously, to

11   those advertisers.

12   JUDGE STRICKLER: Mr. Orszag, would you say,

13   therefore, that the ad-supported services,

14   non-interactive -- well, let's not distinguish

15   non-interactive from interactive.

16   Would you say that the non-interactive --

17   let me try this again -- the ad-supported streaming

18   services are in the nature of platforms more so than

19   the subscription services?

20   THE WITNESS: I mean, they're both forms of

21   -- I would say they're both platforms, but there --

22   what they're -- who they're selling to and how

23   they're selling are slightly different. In the

24   subscription world, they're -- they're a platform in

25   the sense that they're bringing music on the one side

1   and consumers on the other side together. And the

2   platform is forming that element of the platform.

3   In the ad-supported, they've added another

4   complication to it. Not only are you bringing music

5   and users together; you're now bringing advertisers

6   into it. So they're both platforms. It's just the

7   ad-supported platform has -- they were trying to

8   bring three parties to the table instead of really

9   two.

10   JUDGE STRICKLER: Exactly. So it's a

11   three-sided platform for ad-supported versus arguably

12   a two-sided platform in the subscription world?

13   THE WITNESS: That is correct.

14   JUDGE STRICKLER: Thank you.

15   BY MR. HANDZO:

16   Q.   Okay. So I think what we were saying before

17   is that the consumer's willingness to listen

18   translates into ad dollars for the service; am I

19   right so far?

20   A.   That is correct.

21   Q.   All right. And does the service's

22   willingness to pay for the music relate to the ad

23   revenues that it then generates from the consumer's

24   willingness to listen?

25   A.   Yes, and they're trying to balance these

 1   different competing concerns. So they're trying to

 2   have good music to attract users that then attracts

 3   advertisers.

 4   Q.   So when you do your interactivity adjustment

 5   for non-interactive ad-supported, what are you using

 6   to do that interactivity adjustment?

 7   A.   I'm using the -- the revenues of Pandora's

 8   ad-supported service and iHeart's ad-supported

 9   service.

10   Q.   And you say here in this bullet that you

11   feel that that addresses the Judges' concerns in Web

12   IV, about willingness to pay of ad-supported users.

13   I think we covered that, but is there anything more

14   that you want to say about that?

15   A.   No. I think I actually -- it's probably

16   important to just note that, prior to entering into

17   adjustments, and we're going to talk about

18   adjustments, there's no -- Dr. Peterson and I's

19   estimate of the per-play rate, the per-play benchmark

20   is basically the same.

21   And so I think this helps to alleviate

22   potential concerns here and for -- to show that there

23   is some comparability in terms of analysis. He

24   proposes, I believe it's .002 -- well, actually, I

25   have to be careful about -- are we --

1   Q.   Yes. I think we are still in open session.

2   A.   Okay. So he proposes a rate, whether you

3   include -- he has a -- he increases his rate for

4   advertisement credits that bound my rate. So it's

5   basically we are within a very, very small amount of

6   each other.

7   Professor Shapiro's rate, before he makes

8   adjustments, is quite different because he doesn't

9   make the true-up for Warner Music. And so I'm going

10   to discount that because he hasn't even proposed one

11   that is based on the actual data. But the point is

12   that we're all sort of -- when we start with a

13   benchmark, the differences here are really not the

14   benchmark but really the adjustments.

15   And that is what the focus in some sense

16   will end up, I think, we need to focus on, whether

17   those adjustments are appropriate and needed, given

18   how the calculations are actually done. And as I

19   think I've described, the adjustments I make, I

20   think, are appropriate, whereas the ones I think they

21   have done are -- are not.

22   Q.   Okay. I'm going to advance the slide. This

23   slide does have confidential information on it, so,

24   again, I would -- in staying in open session,

25   Mr. Orszag, if you just don't say the numbers.

1   And I understand that NAB has confirmed that

2   their -- the individual who can't see this stuff

3   isn't on. So we don't -- I don't think we need to do

4   anything there.

5   Oops. Went one too far. Here we go. All

6   right. So, Mr. Orszag, can you again walk us through

7   how you did this calculation? It looks like the same

8   equation that you used for subscription. Is that

9   right?

10   A.   That is correct. So this, hopefully, looks

11   a little bit familiar. A and B have not changed.

12   Those are the same numbers as we had before.

13   C has changed. C is now -- instead of being

14   the non-interactive subscription revenue, it's

15   non-interactive ad-supported revenues. And so I use

16   that number and then run through the calculations

17   that you can see in the bottom part. And that

18   produces my estimate.

19   Q.   Okay. And, by the way, doing it this way

20   where you're using, for A and B, the information from

21   the subscription interactive service, does that mean

22   you're interactivity adjustment is the same for

23   ad-supported and subscription or -- or not?

24   A.   No, it's not. Because I'm taking --

25   Q.   Because your --

1   A.   I'm taking directly into account the way

2   that consumers would value that as reflected in the

3   revenue data.

4   Q.   Right. So to the extent that the

5   ad-supported revenue is lower than it would be for

6   subscription, that's going to be reflected in the

7   interactivity adjustment?

8   A.   That is correct. Well, it's reflected in

9   the actual calculation.

10   Q.   And what you're calculating here is the

11   interactivity adjustment?

12   A.   That is correct.

13   Q.   Okay. And then once again, Mr. Orszag, you

14   turn this into a per-play rate. Anything different

15   here about the process compared to what you did for

16   the subscription side?

17   A.   No. I take the plays from the royalty

18   statements for Pandora and iHeart. It's a much

19   bigger number here, and, as a result, we have -- and,

20   obviously, the -- the revenue number is very

21   different as well -- and it then produces an estimate

22   on a per-play basis that reflects my proposal.

23   Q.   And, again, you say that you -- that you've

24   taken skips into account in the way that you perform

25   this calculation. Again, is there any difference in

1   the analysis here than there was with respect to the

2   subscription market?

3   A.   No, it's identical. That there's no

4   additional incremental skips adjustment that's

5   necessary, since Pandora already pays for skips. So

6   my estimate is reflective of that adjustment already.

7   If one were to add a -- a skips adjustment for

8   iHeart, it would not change my estimate from .0025.

9   Q.   I'm going to move on, then, Mr. Orszag, to

10   your conclusions with respect to whether you felt you

11   needed to make an effective competition adjustment.

12   And, unfortunately, that does require me to move into

13   restricted session, at least for probably about five

14   minutes.

15   CHIEF JUDGE FEDER: Okay. We will enter

16   restricted session for about five minutes, after

17   which we will take our morning break for another 15

18   minutes.

19   Will the host please clear the virtual

20   hearing room.

21   MR. SACK: Thank you, Your Honor. Please

22   stand by. We are beginning to clear the room now.

23   If you're an attendee in the Zoom meeting who is not

24   allowed to attend restricted, please leave the

25   session by clicking the red Leave button on the

 1   bottom right-hand of your screen or the X at the top

 2   of the right-hand side of your screen. Your counsel

 3   will inform you when you are allowed to return to the

 4   proceeding.

 5   Please stand by, Your Honors and counsel,

 6   while we work to clear the room.

 7   (Whereupon, the trial proceeded in

 8   confidential session.)

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

2   CHIEF JUDGE FEDER: Okay. If the host will

3   please reestablish the public feed, we can begin.

4   MR. SACK: Thank you, Your Honor. Please

5   stand by.

6   The feed is live, Your Honor.

7   CHIEF JUDGE FEDER: Thank you, Mr. Sack. We

8   are back in open session.

9   Mr. Handzo, please proceed.

10   MR. HANDZO: Thank you, Your Honors.

11   BY MR. HANDZO:

12   Q.   Now, Mr. Orszag, when we broke we were

13   talking about effective competition and whether you

14   thought there was a need to make an adjustment there.

15   And one of the things you were talking about

16   was whether the services, some of them in particular,

17   might be now must-haves for the record companies.

18   So, first of all, let's just set this sort

19   of theoretical stage. Why does that matter? Why is

20   that important?

21   A.   Because we are looking for prices that

22   reflect workable competition and/or effective

23   competition, and we are assuming that the labels are

24   must-haves, so we're taking that as a given.

25   And the question is has the market position

1   of a Spotify, for example, which is the basis of my

2   benchmark, changed in recent years such that Spotify

3   has the type of market position that allows it to

4   obtain prices that are consistent with workably

5   competitive markets.

6   I include a quote here, which is in my, I

7   believe, my written direct testimony, but it could be

8   in the written rebuttal testimony, that the Judges

9   observed in Web II that, if you have two firms with

10   significant market power or bargaining power, those

11   prices will reflect effective competition.

12   And so the goal -- the question here is has

13   Spotify obtained that type of position in the

14   marketplace, such that its rates are different from

15   other players in the market and reflect the workings

16   of workable competition.

17   Q.   And your conclusion?

18   A.   My conclusion is that they have.

19   Q.   Okay. And you say here that headline rates

20   and effective rates have fallen since the operative

21   agreements in Web IV.

22   First question, I guess, had there been rate

23   decreases before Web IV?

24   A.   Yes, there had.

25   Q.   But there have been further decreases since

1 Web IV?

2   A.   According to my analysis, both of the data

3 and the agreements, yes, there have been.

4   Q.   Since we're talking --

5   JUDGE STRICKLER: Excuse me, Mr. Handzo.

6 I'm sorry.

7   Mr. Orszag, are you familiar with the

8 economic concept of contestable markets?

9   THE WITNESS: Yes, I was a -- when I was

10 much younger I was a student of Dr. Willig, and so he

11 is the -- has written extensively on contestable

12 markets. And so I obviously was taught that at a

13 very young age.

14   JUDGE STRICKLER: So let me ask you, do you

15 consider the interactive streaming market to be a

16 contestable market? And first maybe you can define

17 that term for the record, as you understand it.

18   THE WITNESS: So I'm going to first answer,

19 so contestable markets are markets in which the

20 possibility that you don't actually necessarily need

21 entry for competitive rates to occur because the

22 market players know that, if they did not respond

23 accordingly, that that would just make the market --

24 somebody would enter and that would be -- make them

25 worse off.

1   So they are better off pricing efficiently,

2   competitively, to reflect the contestability of the

3   marketplace. And so there's definitely elements of

4   that here because, you know, as we see, Apple found a

5   market opportunity for it to enter.

6   And the businesspeople fully understand the

7   nature of how competitive this marketplace is for

8   them in terms of obtaining music and what they have

9   to do in terms of succeeding in obtaining positive

10   rates and good rates in the downstream market.

11   JUDGE STRICKLER: Does the contestability of

12   the market for Apple -- or that Apple and Spotify are

13   in now with regard to either potential competitors,

14   which is what the contestable market theory is about,

15   or the actual competitors, who have smaller market

16   shares, such as Google and Amazon, for example, does

17   that put a limit on the -- on the market power of

18   Spotify and Apple with regard to their negotiations

19   with their upstream suppliers; that is to say, the

20   major record companies?

21   THE WITNESS: I -- I haven't conducted that

22   analysis in that way and so I can't give you a

23   precise answer. And the nature of how entry and

24   potential entry and smaller competitors impact

25   pricing is, in the downstream market, is not an

1   analysis that I have undertaken. But let me make a

2   few observations, if I may.

3   JUDGE STRICKLER: Well, just before you do,

4   before you do, and I want to hear your observations

5   in response to my question, but my question was with

6   regard to does the existence of actual competitors

7   with smaller market shares, not small competitors,

8   but smaller market shares, like Apple or Google,

9   impact the market power that Spotify and/or Apple

10   have vis-α-vis their negotiations with their upstream

11   suppliers, not in the down -- I'm not asking you

12   about the downstream market?

13   THE WITNESS: Okay. Sorry. I misunderstood

14   your question.

15   So, well, the answer is it must have an

16   effect for a variety of reasons. And let me explain.

17   Imagine a world without Spot -- say, those

18   other competitors, say a Google or other subscription

19   services or an Amazon. That may embolden a Spotify

20   even more.

21   But that also plays into the calculus here

22   as well, if we think about what would happen if a

23   label cut off a service. And this is, you know, part

24   of the calculation as well in that negotiation.

25   So let's suppose a Universal walked into

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 1   Spotify and said:  Look, if you don't give me a high

 2   rate, I am not going to license my music to you.

 3           Universal would have to assume, make some

 4   assumption of what would happen eventually as

 5   subscribers to Spotify peeled off.  And Professor

 6   Shapiro has done some research in this area, where he

 7   assumes that the peeling off -- not in the music

 8   industry, but in more generally about economic theory

 9   in terms of merger analysis -- assumes in his upward

10   price pressure model that you have proportional

11   diversion.

12           So that diversion goes to other services in

13   proportional to their residual share.  So what is

14   that?  So if we take, say -- let's just use round

15   numbers for a second to make it -- I am not using

16   these as actuals, but I am just using them as round

17   numbers -- if Spotify were 50 percent of the market,

18   Apple were 25 percent of the market, and there were

19   25 other services that had 1 percent of the market --

20   I'm making my math easier for myself -- when you

21   think about residual share, you take Apple -- I mean,

22   Spotify out of the market, take their 50 percent, you

23   ask of the remaining 50 percent how do the market

24   shares get allocated.

25           And basically Apple would become 50 percent
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1   and everybody else would become 2 percent, the other

2   25 services, and you assume that the subscribers

3   would divert in that proportion.

4   But if that were to happen, that would just

5   strengthen Apple's hand. And strengthening Apple's

6   hand, having one sort of large service, would be a

7   potentially big issue and potentially detrimental to

8   the labels as well because then they are highly

9   reliant on that one service instead of two larger

10   services.

11   So there's multiple elements to this that

12   are playing in different directions. So I agree with

13   the proposition that the presence of those smaller

14   streaming services certainly have a competitive

15   impact on Spotify in the upstream negotiation, but so

16   does the structure of that market have an impact on

17   the labels as well in their negotiation with -- with

18   Spotify and Apple.

19   JUDGE STRICKLER: Thank you, Mr. Orszag.

20   BY MR. HANDZO:

21   Q.   Mr. Orszag, just to sort of complete this,

22   and then we will -- well, we will keep talking about

23   it.

24   But as we talk about effective competition,

25   is there some bright line test that we can apply to,

1   say, this market is workably or effectively

2   competitive and this other one isn't?

3   A.   No.   These are shades of gray. And markets,

4   markets -- the textbook models of perfect competition

5   are few and far between. And so these are areas of

6   gray. And markets can be less workably competitive

7   or less effectively competitive and more effectively

8   competitive.

9   It's pretty rare where you find one that

10   goes on the other -- keeps going along the spectrum

11   to a form of perfect competition.

12   That usually is more for economics textbooks

13   than the real world.

14   Q.   Now, let's just flip to the next slide here.

15   We have been talking about the growing importance of

16   on-demand services, Apple and Spotify in particular.

17   So can you give us the soundbite takeaway of

18   what this is showing us?

19   A.   I mean, I think it's something that is

20   obvious to anyone who has been focused on the music

21   industry, that the sources of revenue for the record

22   labels have fundamentally changed in the past five

23   years.

24   Where digital downloads was an important

25   element, and still CDs and physical copies were

1   important in 2015, and paid subscriptions were a

2   relatively modest percentage, 17 percent, now paid

3   subscription is a majority of the revenue that the

4   U.S. recording industry earns.

5   And, you know, especially if you include the

6   mid-tier services. It's now -- it would be

7   62 percent.

8   And the other forms of compensation that

9   they receive, digital downloads and physical, have

10   plummeted. It's no longer 34 percent of revenue for

11   digital downloads. It's now 9 percent. And physical

12   is, instead of being 28 percent, is now 9, 9 percent.

13   So the paid subscription segment, that

14   distribution channel has increased dramatically and

15   significantly in the last five years.

16   Q.   Okay. And this appears to be more of the

17   same, but anything else we should take away here?

18   A.   This now focuses on two companies within

19   that paid subscription segment, distribution channel,

20   which is -- which are Spotify and Apple. And I think

21   the two takeaways are Spotify has grown very rapidly

22   and has a very significant worldwide presence.

23   And the second element is Apple, which

24   launched in June of 2014, with obviously zero

25   subscribers on day one, is now a significant player

1   and quite large, relatively larger in the United

2   States and relatively weaker overseas than Spotify,

3   which is very strong, especially in the Nordic

4   countries and the Latin American countries.

5   Q.   Now, I think that this is a restricted slide

6   and, again, I believe we don't have anyone watching

7   who can -- who is not allowed to see this, but so

8   that we don't go into restricted session just tell us

9   what this is showing us, but don't use the actual

10   numbers.

11   A.   Sure. It is basically showing different

12   measures for subscribers, gross revenues, plays in

13   royalties for Spotify and Apple. And what it shows

14   is very sharp increases in all these metrics.

15   I should just note, given that Apple

16   launched in 2015, the far right column looks at the

17   percentage change from '16 to '18 for Apple, but '15

18   to '18 for Spotify, because for Apple 2015 was not a

19   full year of data.

20   And so what this shows is very significant

21   increases in every metric. And when a number is

22   above 100 percent, that means it's more than doubled

23   in a very short time period.

24   MR. HANDZO: For my next slide, Judge Feder,

25   I do think I am going to need to go into restricted

1   session, if I may.

2   CHIEF JUDGE FEDER: For about how long?

3   MR. HANDZO: I think this will just be seven

4   or eight minutes, and then we will be able to come

5   back out for a little bit.

6   CHIEF JUDGE FEDER: Thank you. We will go

7   into restricted session for seven or eight minutes.

8   Will the host please clear the virtual hearing room.

9   MR. SACK: Thank you, Your Honor. Please

10   stand by. We are beginning to clear the room now.

11   If you are an attendee in the Zoom meeting

12   who is not allowed to attend restricted session,

13   please leave the session by clicking the red leave

14   button on the bottom right-hand of your screen or

15   click the X at the top right-hand side.

16   Your counsel will inform you when you are

17   allowed to return to the proceeding.

18   Please stand by, Your Honors and counsel,

19   while we work to clear the room.

20   (Whereupon, the trial proceeded in

21   confidential session.)

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

2   MR. SACK: The room is unlocked and the

3   session is live, Your Honor.

4   CHIEF JUDGE FEDER: Okay. We are back in

5   open session. Mr. Handzo, you may continue.

6   MR. HANDZO: Thank you.

7   BY MR. HANDZO:

8   Q.   Mr. Orszag, on this slide you're talking

9   about Spotify's ability to curate and manipulate

10   content consumption and how that has changed and how

11   that affects their bargaining power.

12   So, first of all, let's start with Spotify

13   controls certain playlists and algorithmic streaming,

14   does it not?

15   A.   That is correct.

16   Q.   And the extent of those Spotify-controlled

17   playlists and algorithmic streams, has that changed

18   since the time of Web IV?

19   A.   Yes. And those playlists were, the

20   service-generated playlists, basically, launched

21   sometime at the end of 2013 or '14.

22   And Discover Weekly, one that is used for a

23   new artist, launched in 2015. I mean, Spotify just

24   put out a factoid about Discover Weekly that it had

25   been played for 2.3 billion hours at this point

1   worldwide. Billion hours. Not songs, not -- hours.

2   So it's a very significant -- these playlists are

3   very significant.

4   They, at the end of 2017, they represented

5   32 percent of plays. And Spotify has said publicly

6   that that rate has continued to grow since that time.

7   They haven't released specific numbers but they have

8   said that it continues to grow in importance.

9   One can observe their top playlists. And

10   their top playlists are overwhelmingly their

11   service-generated ones.

12   CHIEF JUDGE FEDER: Mr. Steinthal?

13   MR. STEINTHAL: Yes, Ken Steinthal for King

14   & Spalding for Google. I'm going to object to the

15   last answer as being totally hearsay.

16   There is no cite to what this more recent

17   information is. And it's clearly something he says

18   Spotify said.

19   CHIEF JUDGE FEDER: I just want to go back

20   and read that response. Mr. Handzo?

21   MR. HANDZO: Your Honor, I'm -- I'm fine

22   with just -- let me reframe the question and just we

23   will go with that answer, which is simply this, Mr.

24   Orszag.

25   BY MR. HANDZO:

1   Q.   Has prevalence of Spotify-controlled

2   playlists and algorithmic streaming grown since the

3   time of Web IV?

4   A.   Yes.

5   Q.   Based on your reading of the written

6   testimony --

7   MR. STEINTHAL: Your Honor.

8   CHIEF JUDGE FEDER: One moment, Mr. Handzo.

9   MR. STEINTHAL: Your Honor, I just press the

10   objection. There is no citation to evidence that's

11   not hearsay.

12   MR. HANDZO: Let me just ask Mr. Orszag what

13   he was referring to in the answer before this one.

14   Perhaps that will help us figure it out.

15   THE WITNESS: Sure. So in 2014 these

16   playlists were launched. There's that information

17   that by 2017 they represented 32 percent. By the --

18   at the time that they launched, they obviously were

19   zero.

20   And Dr. Waldfogel, who submitted an expert

21   report in this case, cited to back then August of

22   2019, I believe it was 95 percent of the top 100

23   playlists, so this is August 2019, 95 percent of the

24   top 100 playlists on Spotify were Spotify-generated

25   playlists. So --

1   BY MR. HANDZO:

2   Q.   Okay. Let me just stop you there, because I

3   think Mr. Steinthal was referring to a particular

4   article or something that you cited about Spotify

5   saying how many people listened to its Discover

6   playlists. Do you recall that?

7   A.   Yes.

8   Q.   Okay. What were you -- what piece of

9   evidence were you referring to there?

10   A.   That's something that they have put out

11   recently as a press release with that, with that

12   piece of information.

13   Q.   Okay.

14   MR. STEINTHAL: I would press the objection,

15   Your Honor.

16   CHIEF JUDGE FEDER: Is the press release in

17   evidence, or is it cited --

18   MR. HANDZO: I don't believe so.

19   CHIEF JUDGE FEDER: Is it cited in Mr.

20   Orszag's testimony?

21   MR. HANDZO: I don't believe so, but let me

22   just check.

23   BY MR. HANDZO:

24   Q.   Mr. Orszag, is that something we put in your

25   testimony or is that more recent?

1   A.   That is not. I did not -- that was

2 something that they released in the last few days. I

3 was just using it as an anecdote about how popular

4 Discover Weekly is, but I don't need to cite to that.

5   I can just point to the Waldfogel

6 information that from August, in August 2019,

7 95 percent of their top 100 playlists were

8 Spotify-generated playlists.

9   MR. LARSON: Your Honor, Todd Larson for

10 SiriusXM. That article is not in evidence either.

11 And there's been some extensive briefing as to

12 whether it will end up in evidence.

13   So I would object to -- to that, to the

14 extent he's trying to establish facts through

15 citation of the Waldfogel article.

16   MR. HANDZO: Well, we have got sort of two

17 different objections. I don't have a problem with

18 striking the -- the portion that I understand Mr.

19 Steinthal to be objecting to, which is the reference

20 to a press release that came out two days ago.

21   So I agree that's not in Mr. Orszag's

22 testimony.

23   CHIEF JUDGE FEDER: Okay. So for the

24 record, that objection is sustained.

25   Continue, Mr. Handzo.

1   MR. HANDZO: With respect -- with respect to

2   the Waldfogel article, I actually was going to ask

3   Mr. Orszag a few questions about that, in part on a

4   foundational basis.

5   So I would ask to ask those questions and

6   then we can address Mr. Larson's objection, if that's

7   acceptable to the Judges.

8   CHIEF JUDGE FEDER: Please proceed, Mr.

9   Handzo. And, Mr. Steinthal, unless you have a

10   further objection, please turn your camera off.

11   BY MR. HANDZO:

12   Q.   All right. So at the bottom of this slide,

13   Mr. Orszag, you do refer to, and you quote from, an

14   article or a paper by Aguiar and Waldfogel. Do you

15   see that?

16   A.   Yes, sir.

17   Q.   And you cite that in your testimony, do you

18   not?

19   A.   Both in my written direct and my written

20   rebuttal testimony.

21   Q.   Okay. And is there more than one version of

22   this paper, do you know?

23   A.   There appears to be two versions.

24   Q.   And does the quote that you rely on appear

25   in both?

1   A.   Yes, it does.

2   Q.   Are there any -- have you reviewed both

3   versions of the paper?

4   A.   Yes, I have.

5   Q.   For your purposes, are there any material

6   differences between them?

7   A.   Not for the purposes that I'm citing them,

8   no.

9   Q.   And are you aware that Professor Waldfogel

10   was until recently being offered by -- as an expert

11   by Pandora?

12   A.   Yes, in that he cites this same version of

13   the article that I cite in his testimony.

14   Q.   Okay.

15   MR. HANDZO: Your Honors, I asked those

16   questions because as Mr. Larson, I think, has noted,

17   what happened here was Pandora withdrew Professor

18   Waldfogel as an expert witness.

19   SoundExchange then filed a motion saying,

20   well, if you're going to withdraw him, we want this

21   paper in, which we would have examined him about and

22   which, indeed, he cited in his written testimony, so

23   we would have been perfectly entitled to do that.

24   Pandora objected. So that motion is still

25   pending, and it has been briefed. I don't propose

1   that we argue it now, but I -- and so I think that I

2   would ask the Judges to accept Mr. Orszag's testimony

3   with respect to that paper, subject to that

4   objection.

5   The objection, if our motion to put the

6   Waldfogel paper into evidence is accepted, then

7   there's no problem. If it's not, then you will

8   presumably strike part of this testimony.

9   But I would ask you to accept this testimony

10   now on the basis that we have, with other things in

11   the past, which is where there is testimony that is

12   objected to and has been briefed and the Judges

13   haven't ruled on it yet, you take it for now and then

14   you rule on the motion later.

15   CHIEF JUDGE FEDER: Is that acceptable, Mr.

16   Larson?

17   MR. LARSON: Yeah, that's acceptable. Thank

18   you, Your Honor.

19   CHIEF JUDGE FEDER: Thank you. We will

20   proceed on that basis.

21   MR. HANDZO: Thank you.

22   BY MR. HANDZO:

23   Q.   So, Mr. Orszag, in this quote from Professor

24   Waldfogel -- well, just summarize for us what you

25   understand Professor Waldfogel to be doing and what

1   his analysis found.

2   A.   Well, let's -- Professor Waldfogel is an

3   economist who has written extensively on content

4   markets. He has written extensively on music and

5   sort of is one of the people that folks turn to when

6   there are matters involving the music industry. So

7   it's perhaps not surprising that Pandora had him as

8   an expert in this case.

9   And he has written a paper with a colleague

10   looking at the importance of Spotify's playlists to

11   consumer behavior, and focused in on the Spotify

12   own -- their own playlist, not user-generated ones;

13   the ones controlled by Spotify.

14   And what he finds and what he and his

15   co-author find -- and these are his words -- that the

16   platform, Spotify has the power to influence

17   consumption decisions, that the placement of music on

18   the Spotify-controlled playlists have large,

19   significant causal impacts on streaming.

20   He then goes and estimates those impacts

21   empirically in finding that the placement on Today's

22   Top Hits, which is one of the top playlists for

23   Spotify, raises the song's eventual streams by 20

24   million, 20 million streams.

25   And so he, as he notes, that's a very

1   significant amount. In the different estimates of

2   the paper, he then quantifies what the value of that

3   20 million is. That's not critical for the purposes

4   of the analysis.

5   The analysis that matters here is exactly

6   what I have been saying, exactly what's reflected in

7   the testimony of the record executives, that these

8   Spotify-controlled playlists are an extremely

9   important part of how consumers listen to music and

10   discover music and have effects in the market that

11   are real and significant that were not present a

12   number of years ago because, guess what, those

13   playlists did not exist at that time.

14   And so Spotify-generated playlists, as

15   Professor Waldfogel, I think, actually in his expert

16   testimony in this case said, that in August of 2019,

17   95 percent of the top 100 playlists on Spotify were

18   service-generated playlists. And --

19   MR. LARSON: Your Honor, I have to

20   interrupt. I would object to the recitation of

21   Professor Waldfogel's testimony, which has been

22   withdrawn and is not in evidence.

23   CHIEF JUDGE FEDER: Sustained. Please do

24   not refer to Professor Waldfogel's testimony. It is

25   not in evidence and has been withdrawn.

1   THE WITNESS: I apologize. Sorry.

2   BY MR. HANDZO:

3   Q.   So with respect to Professor Waldfogel's

4   conclusions about the ability of Spotify to influence

5   what consumers listen to, and what they choose to

6   listen to, based on your reading of the written

7   testimony from the record company executives in this

8   case and your conversations with them, are their

9   views about Spotify's ability to influence consumers

10   consistent with Professor Waldfogel's?

11   A.   Yes. In fact, they spend a lot of time

12   focused on getting plays on their -- on the

13   Spotify-controlled playlists. That's something that

14   is very important to them.

15   Q.   Okay. So is Spotify's ability to choose

16   content for the service for Spotify's playlists

17   relevant to the label's share of music on playlists

18   not controlled by the service, not controlled by

19   Spotify?

20   A.   Yes.

21   Q.   And, you know, we sometimes talk in this

22   case about whether things are lean-back or

23   lean-forward listening. But a user-created playlist,

24   would you consider that lean-back or lean-forward?

25   A.   Well, it can have different -- it can have

1   both characteristics. If I'm listening to a

2   playlist, say, that Mr. Larson created, that would be

3   lean-back, because I have just hit the play button,

4   and now he has generated, he has made it a public,

5   and I'm listening to it, so it's a lean-back

6   functionality for me.

7   The act of putting songs into a playlist for

8   myself is obviously a lean-forward activity. And so

9   user-generated playlists can take on both forms and

10   we don't have precise information to be able to sort

11   user-generated playlists, that portion of overall

12   plays, into a lean-back or lean-forward

13   functionality, although it takes on characteristics

14   of both depending upon how it is being used.

15   Q.   Regardless of whether we characterize a

16   subscriber playlist or user playlist as lean-back or

17   lean-forward, does Spotify have the ability to

18   influence what gets put on those playlists?

19   A.   Well, their behavior influences it in a

20   variety of ways. They can, just as Professor

21   Waldfogel notes, or analyzes empirically, a play on a

22   Spotify-controlled playlist has the effect of, in his

23   words here, his analysis and his empirical analysis,

24   it raises eventual streams by 20 million.

25   Well, those streams are above and beyond

1   what it comes from being on that playlist, that is,

2   because it is now put on user-generated playlists or

3   because it is played more on demand. So in that way

4   the Spotify-controlled playlists have follow-on

5   effects to the non-Spotify-controlled playlist part

6   of streaming.

7   Q.   Okay. And I think you just said this, but

8   can placement on a Spotify playlist affect what users

9   request on-demand?

10   A.   Yes.

11   Q.   So is Spotify's effect on marketing or

12   market share limited to placement on a playlist?

13   A.   No. There's a variety of other ways that

14   they can have important effects on how consumers

15   respond. Not only does it matter about whether

16   you're on the playlist, it matters where you are on

17   the playlist.

18   I mean, I think it's pretty obvious if

19   you're the first song -- and this is part of work

20   that Professor Waldfogel has done as well -- you have

21   a higher propensity of being played than if you're,

22   say, song number 20 on a list.

23   It matters how they make decisions about how

24   shuffled -- the randomness, because there is a lot of

25   people who hit shuffle. They can influence those

1   decisions. They can influence consumer behavior in

2   terms of what songs or artists they put up on the

3   tiles that are present on the home page of -- if

4   you're going to it via a website or within the app.

5   So that real estate has implications as well.

6   And then there is other ways in which

7   Spotify can promote an artist or artists, either from

8   off-platform services or their e-mail campaigns, et

9   cetera. They have information that is, given their

10   lists of subscribers, that is valuable to labels.

11   JUDGE STRICKLER: Mr. Orszag, do the labels

12   engage in any activity in an attempt to influence

13   what -- whether their music is on a Spotify or other

14   service's label -- service playlist?

15   THE WITNESS: Absolutely. It's a very

16   important part of what they do. It has become

17   increasingly important. And they negotiate over

18   issues with regard to the platform real estate.

19   And so these become elements of the

20   negotiations and important elements, as they have

21   said in both their documents and then also in their

22   testimony, to how they operate their business.

23   JUDGE STRICKLER: So what do they do to try

24   to get on the playlist, according to what you have in

25   your -- in your written testimony? Do they promote

1   the music? Do they make payments outright to the

2   services to get on the playlists? What do they do?

3   THE WITNESS: No, they -- I think this is

4   more in testimony from the executives than in my

5   testimony so I am going to be parroting their lines.

6   They -- what they say, and it's probably

7   better to go right to their language, what they will

8   do is they will be trying to get in front of, say,

9   whoever is curating that playlist, they will be

10   trying to get their songs played in making sure that

11   being in front of those people is important to them.

12   So they are trying to get to the relevant

13   Spotify executives who are curating those playlists.

14   JUDGE STRICKLER: So they try to convince

15   them by the quality of the product, not by any kind

16   of negotiated direct side payment that relates to

17   royalties or anything else?

18   THE WITNESS: No, although these -- how much

19   they get, there's, as part of the negotiations, they

20   often have like a home page takeover. And so that

21   becomes a negotiating position or deal term.

22   So it may be that a label gets a certain

23   number of times a year that they get to take over the

24   front page of Spotify, and they -- and for the

25   obvious reason that that has a significant effect on

1   what consumers listen to.

2   JUDGE RUWE: Mr. Orszag, did you consider

3   the impact on the non-Spotify playlists on the

4   Spotify playlists?

5   THE WITNESS: So that is what -- so if I

6   understand, the question is what impact does, say, a

7   user-generated playlist have on the Spotify-generated

8   playlists?

9   JUDGE RUWE: Yes. And I am seeing there was

10   a suggestion that, well, that 32 percent of Spotify

11   playlists generated more than 32 percent of the

12   listenership. The non-Spotify playlists seems to

13   generate a little bit more of the play hours.

14   And I am wondering, of that 32 percent --

15   you have the question right. What is the impact or

16   did you consider the impact of a user-generated

17   playlist in general, not a specific one, but in

18   general the user-generated playlists, on what makes

19   it onto the Spotify playlists?

20   THE WITNESS: So let me -- I will make two

21   observations, if I may. And so Spotify started as

22   one of the things that it was known for was having

23   user-generated playlists.

24   So if we look back in time, user-generated

25   playlists were the most important playlists on

1   Spotify five plus years ago because at that point

2   there weren't service-generated playlists.

3   So by definition then, any playlists were

4   user-generated, or were generated by non-Spotify

5   entities. Let's put it that way.

6   Over time what's happened is Spotify

7   playlists have taken off, crowding out the other

8   playlists. And so user-generated playlists have

9   become a less important feature of Spotify over time.

10   That's point number 1.

11   To directly answer your question, the

12   user-generated playlists will factor into certain of

13   the playlists very directly. For example, an

14   algorithmic, an algorithmic playlist may be

15   influenced by the service-generated ones because it's

16   picking up on listening behavior and using that

17   information to make decisions.

18   But I have not analyzed directly that

19   question. And I am not aware of literature that goes

20   to the question of the causal impact between

21   user-generated lists on the Spotify-generated lists.

22   I'm only aware of the Waldfogel analyses, which have

23   looked at Spotify playlists on other listening.

24   JUDGE RUWE: Thank you. I am curious, in

25   follow-up, that you mentioned algorithmic playlists

1   on the user end.

2   Are you aware of algorithmic-generated

3   playlists on the Spotify-generated playlist end?

4   THE WITNESS: Well, Spotify has lists that

5   are -- some are curated and some are more

6   computer-driven. And so it will depend on the lists

7   that you want to focus on.

8   JUDGE RUWE: But the computer-driven ones, I

9   guess, are you aware of them being driven by

10   analytics of user listenership on Spotify?

11   THE WITNESS: I'm not aware of Spotify --

12   JUDGE RUWE: I mean, it could be any -- I'm

13   sorry. Go ahead, please.

14   THE WITNESS: I'm not aware of the analytics

15   that Spotify -- they make public some information

16   about the algorithms. But the precise nature of

17   those algorithms are beyond the scope of my

18   knowledge. So I can't give you a firm answer there.

19   But those are algorithms controlled by Spotify.

20   JUDGE RUWE: Thank you.

21   BY MR. HANDZO:

22   Q.   So the last point on this page, Mr. Orszag,

23   you talk about Spotify pushing non-music content or

24   non-label content.

25   So what are you talking about there and why

1   does it matter?

2   A.   Because anything that pushes -- I think

3   there are sort of two points here. They have been

4   pushing non-music content for a period of time. This

5   has become an issue in the deal negotiations.

6   And there are certain caps in place in terms

7   of the limits on what Spotify can do in terms of its

8   non-music content. There has been back and forth in

9   the negotiations about what those caps should be.

10   The labels would rather the caps to be lower

11 non-music content and Spotify has pushed for a higher

12 percentage. And we have seen some growth in those

13 numbers. And we can't lose sight of the fact -- and

14 I cite this in my testimony -- that even small

15 movements in share on Spotify are very significant.

16   One of the analyses that was done by one of

17 the record executives said that, if their share on

18 Spotify drops by 1 percentage point, that is

19 equivalent -- or 1 percent, that that's equivalent to

20 a 3 percent drop in the headline rate.

21   So in terms of dollars at stake here, these

22 are -- small movements in share reflect very big

23 dollars to the labels and so they care a lot -- and

24 this has become a point of negotiation -- over the

25 fact that Spotify has pushed some of this non-music

1   content, which is a small percentage, but it has been

2   pushed up, which has an adverse effect on their

3   business, adverse effect on the label's business.

4   Q.   And, lastly, before we move to the next

5   slide or perhaps break for lunch, how does, if you

6   know, does Spotify compare to a service like Pandora

7   with respect to its ability to affect market share

8   and the impact of that on the record companies?

9   A.   I haven't seen the same ability in the

10   evidence that I have reviewed of Pandora, I mean, to

11   move share in the same ways at Spotify. That's not

12   to say that Pandora's own can't have an effect. It

13   is just they don't have the same magnitude of an

14   effect that Spotify has.

15   JUDGE RUWE: Mr. Orszag --

16   BY MR. HANDZO:

17   Q.   When you say magnitude --

18   JUDGE RUWE: Sorry. I want to turn back to

19   the caps on non-music content. Is that a cap on

20   overall on-demand usage or is it a cap somehow on the

21   extent to which non-music content is being pushed to

22   the listeners?

23   THE WITNESS: It's a -- I think it's a cap,

24   and I think each of the agreements deals with this

25   slightly differently. And I don't have the language

1   fresh in my mind, but I believe it's a cap on how

2   they are paid.

3   So one could -- it basically -- which

4   obviously then influences Spotify's behavior. But I

5   believe it's structured in that way. But I would

6   rather look at the actual agreements. And maybe

7   after the lunch break, whenever that occurs, I could

8   come back to you on that point.

9   JUDGE RUWE: Thank you.

10   BY MR. HANDZO:

11   Q.   And then you mentioned the sort of

12   difference in sort of magnitude or effect of steering

13   or changing market share by Spotify versus Pandora.

14   Are you talking about effect on dollars or

15   market share or both?

16   MR. LARSON: Your Honor, I object to this.

17   This is outside the scope of the written testimony.

18   CHIEF JUDGE FEDER: Mr. Handzo?

19   MR. HANDZO: I will let it go.

20   And with that, Your Honors, I am ready to

21   move on to the next slide, but it is 1:40, so I'm

22   wondering whether the Judges would like to take the

23   lunch break.

24   CHIEF JUDGE FEDER: At least this Judge

25   would like to take the lunch break right now. We

 1   will go into recess. We will reconvene in one hour.

 2   (Whereupon, at 1:40 p.m. EST, a lunch recess

 3   was taken.)

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1	AFTERNOON SESSION
2	(2:42 p.m. EST)
3	CHIEF JUDGE FEDER: If the host will please
4	reestablish the public feed, we are ready to begin.
5	MR. SACK: Thank you, Your Honor. Please
6	stand by.
7	MR. TOTH: We are live. Your Honor, we are
8	live, but I think Mr. Handzo is going to want to go
9	into restricted session.
10	MR. HANDZO: That -- that is correct.
11	CHIEF JUDGE FEDER: Okay. We are back in
12	open session. Mr. Handzo, for how long do you
13	estimate we will be in restricted session?
14	MR. HANDZO: I believe it will be about a
15	half an hour.
16	CHIEF JUDGE FEDER: Okay. So we will go
17	into restricted session for about half an hour. Will
18	the host please clear the virtual hearing room.
19	MR. SACK: Thank you, Your Honor. We were
20	notified by the parties that there was no one in the
21	room who is not allowed to hear this material, but we
22	will lock the room and we will now take down the
23	stream.
24	CHIEF JUDGE FEDER: Thank you.
25	MR. SACK: The stream is now restricted.

 1   Thank you, Your Honor.

 2   (Whereupon, the trial proceeded in

 3   confidential session.)

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

2   CHIEF JUDGE FEDER: Thank you. We have

3   returned at least briefly to open session.

4   Mr. Handzo, you may continue.

5   BY MR. HANDZO:

6   Q.   All right. So, Mr. Orszag, when we began

7   talking this morning about possible adjustments to

8   the benchmarks, one of the possible adjustments that

9   you mentioned was an adjustment for promotion and

10   substitution.

11   So first question: Did you make such an

12   adjustment to your benchmark rates?

13   A.   No, I did not.

14   Q.   Why not?

15   A.   There is no empirical evidence that I have

16   seen to support that there are differences between

17   the benchmark and the target markets in the net

18   effects of promotion and substitution, which would

19   support making an adjustment to the rates.

20   Q.   Why do you focus on a -- a net adjustment?

21   A.   Because what matters here isn't the absolute

22   promotion effect of a service or the absolute

23   substitution effect. It's the relative effect of

24   between the benchmark market and the target market.

25   So I'm just looking -- so the question is,

1   is there a significant difference between the

2   benchmark market -- the benchmark market and the

3   target market in terms of the relative effects of

4   promotion and substitution? And I have seen no

5   empirical evidence to support adjustments to take

6   into account those relative effects, and neither

7   Professor Shapiro nor Dr. Peterson proposes an

8   adjustment for -- for those factors either.

9   Q.   Now, you also talk here about non-rate

10   benefits. I think you told us earlier that you

11   didn't actually make any adjustments for non-rate

12   benefits. And I think you told us before that --

13   that you tried but weren't able to quantify the --

14   the value of data.

15   What about any other benefits, non-rate

16   benefits?

17   A.   I -- I do not include any other benefits in

18   non-rate benefits. Dr. Shapiro -- Drs. Shapiro,

19   Leonard, and Peterson all add advertising credits

20   into their analysis. If I were to have done so, it

21   would raise my estimate by about 1.5 pennies, so that

22   would take me from -- my estimate from basically,

23   roughly 25 cents to -- because of rounding, it would

24   take it to 26 cents.

25   They -- they each do it a little bit

1   differently, but it adds somewhere around .00015

2   to .00017. And so if I were to add those advertising

3   credits as Drs. Shapiro, Leonard, and Peterson do, I

4   would have an estimate that is roughly a penny higher

5   than my current estimate.

6   Q.   Okay. So I want to switch gears now and

7   we're going to talk about the services' benchmarking

8   analyses. And I think my first slide takes us into

9   restricted session.

10   CHIEF JUDGE FEDER: Okay. We will go into

11   restricted session for about how long do you

12   estimate?

13   MR. HANDZO: It will be at least a half an

14   hour.

15   CHIEF JUDGE FEDER: We will go into

16   restricted session for at least a half an hour. Will

17   the host please clear the virtual hearing room.

18   MR. SACK: Thank you, Your Honor. Please

19   stand by.

20   We are beginning to clear the room now. If

21   you are an attendee in the Zoom meeting who is not

22   allowed to attend restricted session, please leave

23   the session by clicking the red Leave button on the

24   bottom right-hand side of your screen or click the X

25   on the top right-hand side. Your counsel will inform

1   you when you are allowed to return to the proceeding.

2   Please stand by, Your Honors, counsel, while

3   we work to clear the room.

4   (Whereupon, the trial proceeded in

5   confidential session.)

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

2   MR. SACK: The room is open, Your Honor, and

3   the stream is live.

4   CHIEF JUDGE FEDER: Thank you. Mr. Handzo,

5   you may want to move to the next slide.

6   MR. HANDZO: Sorry. I am there.

7   CHIEF JUDGE FEDER: We have returned to open

8   session. Mr. Handzo, please proceed.

9   MR. HANDZO: Thank you.

10   BY MR. HANDZO:

11   Q.   Now, Mr. Orszag, do you recall that

12   Dr. Leonard in his testimony suggests that

13   simulcasting is different from webcasting for, among

14   other reasons, that simulcast listeners value music

15   less?

16   A.   Yes.

17   Q.   Can you --

18   A.   I think so.

19   Q.   Can you respond to that, please?

20   A.   Yeah. So Dr. Leonard's analyses fall short

21   here. The first claim he sort of -- he puts forward

22   is that simulcasters play less music, and the

23   implication is that so they should pay less. That's

24   the first argument.

25   Ignoring, obviously, the obvious fact here

1   that they are paying on a per-play basis. So if you

2   play less music, you pay less in total than if you

3   play more music.

4   So there's a whole slew of analyses that he

5   has that don't go to the issue of what the per-play

6   rate should be but, rather, the total payment, but

7   doing things on a per-play basis solves that issue.

8   He then has an analysis that appears to

9   confuse correlation and causation. He looks at ad

10   rates and claims that ad rates are higher during the

11   windows when there are -- is less music and lower

12   when there is more music.

13   And he is using this to suggest, it would

14   appear, that music is less valuable and, thus, the

15   rate should be lower for -- the per-play rate should

16   be lower. But his analysis falls short in two

17   critical respects.

18   One -- and I haven't seen a good explanation

19   of this -- he mismatches the data, so he's using song

20   logs for February 2019, but he is using revenue for

21   June 2019. Given that there could be differences

22   over time, it's not clear to me why he did not use

23   the same time period to do this.

24   But that's just an implementation error, not

25   a conceptual error. The conceptual error here is

1   that it's a classic example of correlation and not

2   causation. It's precisely when there are larger

3   audiences that you have higher rates, and those are

4   precisely the times that radio stations have less

5   music, more news, traffic, weather, and so he doesn't

6   in his analysis at any place control for the audience

7   size.

8   And so it's -- it's not clear to me that the

9   sort of real purpose here -- I mean, he is trying to

10 suggest that listeners somehow value music less than

11 other webcasters, but the analysis -- webcasting

12 listeners -- but the analysis doesn't go to support

13 that given the flaws that are inherent in it.

14   And so, as a result, I do not find those

15 analyses to be reliable.

16   Q.   So, for example, let's just take drive time.

17 Is that a higher -- a time when there are more people

18 likely to be listening to radio?

19   A.   Usually. I sort of all bets are off in a

20 COVID world. But --

21   Q.   Pre-COVID.

22   A.   Pre-COVID world, the answer is, yes, I've

23 been involved in a number of radio mergers or looked

24 at a wide variety of major radio mergers, so I have

25 analyzed advertising rates in the context of that

1   work for many years now.

2   And the issue of drive times and the rates

3   that radio stations can obtain, it's clear that they

4   obtain higher rates when they have bigger audiences.

5   Q.   And so in your opinion, again, if we, let's

6   say, look at drive time where the ad rates may be

7   higher, is that related to the use of music or is

8   that related to the audience size because it's drive

9   time?

10   A.   There's not any evidence that I saw in the

11   analyses that Dr. Leonard conducted to suggest -- to

12   support a conclusion that it had anything to do with

13   music.

14   In fact, the rate cards that I cite

15   consistently seem to show or more often show that the

16   rates that music stations earn are greater than the

17   rates that are earned by other stations, even in the

18   same markets.

19   Q.   And your next bullet here was that music

20   format stations make more money for broadcasters.

21   Let's start with the obvious question: What is the

22   implication of that fact?

23   A.   I mean, the implication would be that it

24   would tend to be that actually it's the music that is

25   more valuable to a broadcaster, rather than other

1   forms of radio content.

2   Q.   And how do you know that music format

3   stations make more money?

4   A.   Well, I cite in my written rebuttal

5   testimony a whole slew of documents and financial

6   analyses from radio stations showing that music

7   format stations tend to make -- do better than

8   non-music format stations.

9   And I cite to testimony from witnesses in

10   this case who explain that they often -- I think it

11   was Mr. Wheeler, who is the owner of a variety of

12   radio stations, who explained that he often uses his

13   music stations to subsidize his non-music stations.

14   Q.   Okay. So you mentioned that you saw, you

15   know, financial information and you mentioned in an

16   earlier answer rate cards, which you cite in your

17   written testimony.

18   And with apologies to anyone who is

19   listening, even though those documents were produced

20   by broadcasters who are members of the NAB, NAB has

21   objected to the admission of those exhibits in their

22   objections to exhibit list.

23   And since we don't actually have witnesses

24   from those particular broadcasters, I am now going to

25   go through a process of admitting them through Mr.

1   Orszag.

2   So I am just apologizing in advance for the

3   tedium of what might follow for about five minutes.

4   But if we could bring up --

5   MR. HUSENY: Objection, Your Honor. I mean,

6   since Mr. Handzo discussed and laid out what he is

7   going to do, I think it's the right time to talk

8   about our objections that's currently pending in a

9   motion to him admitting through this witness

10   non-participant documents that we have multiple

11   objections to, not only from a sponsoring witness

12   perspective, but from a hearsay perspective.

13   We can do this in the course of Mr. Handzo

14   putting the first document forth or -- or now, Your

15   Honors, but this is a part of a motion that's

16   currently pending and we think it's appropriate to

17   address now since Mr. Handzo is about to introduce

18   them en masse, apparently.

19   MR. HANDZO: Let me just respond quickly. I

20   hadn't necessarily intended to do it en masse. What

21   I ultimately want to do -- and it is correct, of

22   course, there is a motion pending -- to the extent

23   that there is some foundation to be laid with Mr.

24   Orszag, I want to provide that foundation to the

25   Judges.

1   Whether the Judges choose to rule on whether

2   those exhibits are admissible now or consider the

3   motion at a later time in light of the foundation

4   that I'm about to make, I'm fine either way. But I

5   do want to at least lay the foundation through Mr.

6   Orszag since I won't have a witness from these

7   broadcasters.

8   CHIEF JUDGE FEDER: Please lay your

9   foundation, Mr. Handzo.

10   MR. HANDZO: Thank you.

11   BY MR. HANDZO:

12   Q.   Can we bring up Mr. Orszag's written

13   rebuttal testimony, which is 5603, and go to

14   paragraph 31. All right. We may need to go down a

15   little bit further. All right.

16   Mr. Orszag, right in the middle of the

17   screen, do you see a sentence that says "to the

18   contrary, financial information produced for certain

19   broadcasters by NAB in this proceeding shows that

20   these broadcasters derive most of their revenues from

21   music-format stations," and then you footnote to

22   Footnote 56?

23   A.   Yes, I do see that.

24   Q.   Okay. And so I take it the support for that

25   statement is in Footnote 56. So if we can bring that

1   up. All right.

2   So I take it this footnote then lays out the

3   documents on which you rely for that statement, which

4   were from Cumulus and iHeart and other broadcasters?

5   A.   That is correct.

6   Q.   Okay. So I just want to bring up on the

7   screen three of the documents that you cite in that

8   footnote. The first is Exhibit 5204.

9   CHIEF JUDGE FEDER: Is it supposed to be a

10   blank page or are we waiting for it to load?

11   MR. HANDZO: No, I definitely am not trying

12   to admit a blank page.

13   THE WITNESS: When I -- when I went -- I'm

14   on the exhibit share thingamajiggy, and it says to me

15   I can only download it. Is it acceptable if I

16   download it? I assume so, since I have this document

17   I cited elsewhere.

18   CHIEF JUDGE FEDER: It's a native file, an

19   Excel file.

20   BY MR. HANDZO:

21   Q.   Well, let me see if I can do it this way.

22   The documents that you rely on in this footnote,

23   which were produced by the NAB, are those the kind of

24   documents that you are familiar in working with in

25   your -- in the work that you've done with

1   broadcasters that you've talked about?

2   A.   Radio broadcasters, yes. I mean, the key

3   input often into an economic analysis with regard to

4   competition issues among stations can be the margins

5   that stations earn.

6   And so I would have received as part of that

7   financial numbers, forecast and actuals, that would

8   be similar to, or in some cases I cite to documents

9   that I have actually seen previously, I think, in

10   related -- in merger matters.

11   So this is exactly the type of information

12   that I would look at to analyze issues related to the

13   radio market.

14   Q.   Okay. So is it your understanding -- we

15   have now got this first document, 5204, up on the

16   screen -- is it your understanding that this was

17   produced by the NAB in discovery?

18   A.   That's my understanding, yes, sir.

19   Q.   And I think you indicated before, but let me

20   just make sure, that you have familiarity with record

21   company -- I'm sorry, record company -- broadcaster

22   financials generally?

23   A.   Generally, yes. Obviously each one will

24   maintain their data differently. And so it depends

25   on which broadcaster we're talking about, whether I

1   have seen their data before or not.

2   Q.   But is this consistent with the kind of data

3   that gets reviewed by you in the course of your work?

4   A.   I would say analyzed but, yes, that is, it's

5   entirely consistent. This type of information would

6   be the type of analysis that I would conduct as part

7   of an analysis of competition involving radio

8   broadcasters.

9   Q.   And is this consistent with what you have

10   seen in terms of what broadcasters keep in the

11   ordinary course of business as their business

12   records?

13   A.   Again, with the caveat that each broadcaster

14   will maintain their information differently, but,

15   look, this spreadsheet is entirely consistent with

16   the types of information that I have seen previously

17   from radio stations or from broad -- the parent

18   companies, depending upon the entities that I have

19   worked for.

20   Q.   Okay. Can we bring up 5257? Hopefully that

21   will come up a little quicker.

22   CHIEF JUDGE FEDER: Mr. Handzo, are these

23   restricted documents?

24   MR. HANDZO: No, actually -- I'm sorry, yes.

25   CHIEF JUDGE FEDER: And is there anybody who

1   can view these who is not entitled to see them?

2   MR. HANDZO: Actually the only person who

3   was going to be on was an NAB witness, so that person

4   would be able to see them.

5   CHIEF JUDGE FEDER: Okay. So you may

6   continue.

7   MR. HANDZO: Thank you. But my apologies.

8   I should have thought of that. It turns out no harm,

9   no foul. All right.

10   BY MR. HANDZO:

11   Q.   This is, I believe, 5257. Is that right?

12   Yes. Thank you. So the same set of questions.

13   A.   Yes. I mean, sometimes you see information

14   that's more aggregated. This is obviously taken from

15   more detailed information of the spreadsheets like we

16   saw just a second ago, but this is more aggregated

17   information about revenues and costs for a broadcast

18   station group.

19   Q.   Okay. But, again, is this consistent with

20   the kinds of information and the kinds of

21   presentation that you get from broadcasters in your

22   work in this business?

23   A.   Again, sometimes you ask for information and

24   you get more detail like the previous one, and

25   sometimes you get less. So the answer to that would

1   be yes. Obviously it depends on the particular

2   broadcaster.

3   Q.   Okay. And is this the kind of information

4   that when you receive it from broadcasters in the

5   course of your work, you -- you analyze?

6   A.   It would be an input into an analysis in

7   looking at, say, for example, the impact of a merger,

8   this could be -- this could be an input that would be

9   necessary.

10   Q.   And last, let's bring up 5260. All right.

11 Same set of questions.

12   Is this consistent with the kind of

13 information that you have received from broadcasters

14 in your work in the past?

15   A.   That is correct, yes, sir.

16   Q.   And consistent with the kind of information

17 that you have used from broadcasters in your analysis

18 for them?

19   A.   That is correct.

20   Q.   Thank you. Let's -- let's go back to Mr.

21 Orszag's written rebuttal testimony at paragraph 31.

22   CHIEF JUDGE FEDER: Mr. Huseny, are you

23 trying to interpose an objection, because I cannot

24 hear you?

25   MR. HUSENY: My apologies, Your Honor. I

1   think I was muted.

2   I was just saying we renew and press the

3   objection. We're happy addressing Mr. Handzo's

4   attempt to lay the foundation that he did now or in

5   the course of the next few questions.

6   But since he went over a few documents, I

7   think it's important to address the issues now before

8   he moves on and shows additional documents on the

9   screen.

10   CHIEF JUDGE FEDER: Mr. Handzo, have you

11   finished laying your foundation?

12   MR. HANDZO: For those documents, yes, I

13   have.

14   CHIEF JUDGE FEDER: Okay. I will -- I will

15   confer with my colleagues.

16   MR. HUSENY: Your Honor, may I address

17   briefly why we think it's a problem and why Mr.

18   Handzo's foundation --

19   CHIEF JUDGE FEDER: Is this -- this is new

20   argument in addition to what's in your written

21   motion?

22   MR. HUSENY: It is, but it's also just

23   putting in context, Your Honor, what Mr. Handzo just

24   showed and the foundation he tried to lay. So the

25   issue is that these are by and large non-participant

1   documents.

2   These are companies that are not showing up

3   at trial. And the foundation that Mr. Handzo tried

4   to lay is with respect to what an expert can rely on.

5   We're not arguing that Mr. Orszag can look at these

6   documents and say what he wants to say about them.

7   The issue is an expert cannot admit into

8   evidence documents from non-participants through the

9   idea that these are the sorts of documents that they

10   look at in the ordinary course of expert work. No

11   expert is ever allowed to do that. And that's what

12   Mr. Handzo is trying to do.

13   So our issue is both the foundational no

14   sponsoring witness issue, but also that there is a

15   hearsay problem for these non-participant documents

16   that Mr. Handzo hasn't addressed at all.

17   So we would urge Your Honors to not allow

18   these documents to come in separately as testimony or

19   as evidence in this proceeding through an expert who

20   really can't lay the foundation to get them in.

21   CHIEF JUDGE FEDER: All right. Mr. Handzo,

22   would you respond briefly to that?

23   MR. HANDZO: Sure. You know, truth of the

24   matter is the reason I'm doing this is because I

25   don't want anyone to say that Mr. Orszag's written

1   testimony on this point could be stricken because the

2   documents on which he relied were never admitted or

3   explained. Other documents we can get in through

4   other sources.

5   So, look, I think the reality is if, if it

6   is the position of the NAB that Mr. Orszag was

7   entitled to rely on these documents, notwithstanding

8   that they are not in evidence, and if they are not

9   challenging his written testimony on the grounds that

10   these documents are not in evidence, that may solve

11   the problem.

12   I don't intend to use these documents once

13   they are in evidence for any other purpose than what

14   is stated in Mr. Orszag's written testimony.

15   CHIEF JUDGE FEDER: Mr. Huseny?

16   MR. HUSENY: We will challenge the

17   testimony, Your Honor, if we think that the weight

18   that Mr. Orszag is provided, providing these

19   documents is not, not appropriate, which we do.

20   Our issue is that they cannot enter into

21   evidence, separate evidence, documents that the

22   witness cannot be a sponsoring witness for. No

23   expert can bring in documents as a foundational

24   sponsoring witness that your --

25   CHIEF JUDGE FEDER: You're starting to

1 repeat yourself, Mr. Huseny. You have already stated

2 that objection.

3   We will take a five-minute recess.

4   MR. HUSENY: Thank you, Your Honor.

5   (Discussion off the record for the Judges to

6 confer, 5:50 p.m.-5:55 p.m.)

7   CHIEF JUDGE FEDER: Okay. We are ready to

8 continue and we are still in open session.

9   The objection as to hearsay is obviated by

10 Mr. Handzo's statement that it is not being offered,

11 the documents are not being offered for the truth of

12 the matter asserted, but as something that was relied

13 on or upon by the witness. So the hearsay objection

14 is overruled.

15   As for the sponsoring witness objection, or

16 lack of sponsoring witness, these are documents that

17 were produced by NAB. They bear an NAB Bates stamp.

18 They were produced by NAB in discovery.

19   We find that under Klayman vs. Judicial

20 Watch, 297 F.3d 80, that these documents are

21 essentially self-authenticating because they come

22 from the files of an NAB member.

23   We will accept them without a sponsoring

24 witness from the particular radio station. So that

25 objection is overruled.

1   MR. HANDZO: Thank you, Your Honor.

2   BY MR. HANDZO:

3   Q.   Can we go back to the --

4   CHIEF JUDGE FEDER: So do you want to

5   actually move to admit these documents subject to

6   that caveat, that they are not being admitted for the

7   truth of the matter asserted?

8   MR. HANDZO: I do, Your Honor, and there are

9   a few. I showed Mr. Orszag two or three. There are

10   some beyond that. I will just represent to you, and

11   I can tell you where in the written testimony it is,

12   they are all the same thing. They are all financials

13   or rate cards produced by NAB stations.

14   So they are -- I would rather not take the

15   time to show him each one of those. I can just

16   represent to you that they are all of the same

17   character, all produced by the NAB.

18   CHIEF JUDGE FEDER: All right. Why don't

19   you overnight collect those, the list of those

20   documents, share that with opposing counsel, and then

21   move them into evidence tomorrow morning.

22   MR. HANDZO: That's fine. Thank you very

23   much.

24   BY MR. HANDZO:

25   Q.   So, Mr. Orszag, let's go back to the slide

1   we were last on of the deck. There we go.

2   At the bottom you talk about the

3   broadcaster's ability to monetize not affecting, in

4   your opinion, the webcasting rates. So just explain

5   that, if you would.

6   A.   I think it's a basic truism here, that the

7   goal, not the Judges' responsibility to ensure that

8   different businesses succeed in different -- that's

9   not their role.

10   The role is to set a rate based on a willing

11   buyer/willing seller framework in workably

12   competitive markets and using appropriate benchmarks

13   to estimate those rates for the target market.

14   So if those rates for whatever reason are

15   not profitable for a particular player in the market,

16   that's just the nature of competition. And the goal

17   should be to, in terms of setting appropriate rates,

18   not to tilt the playing field to one player or the

19   other.

20   Q.   Okay. On the next slide, I should just say,

21   there is some restricted information. I don't think

22   there is a problem showing the slide, since we don't

23   have anybody on who can't see it.

24   But, Mr. Orszag, to the extent -- well, I

25   would ask you not to sort of read or quote from the

1   quotations here, since some of that is restricted.

2   A.   Sure. I think one of the ways to think

3   about one of the arguments that Dr. Leonard either

4   explicitly or implicitly makes, I forget, from his

5   written testimony is that simulcasters merit a lower

6   rate because they're, in essence, their own little

7   market, and don't compete with other webcasters to

8   any significant degree.

9   And so, as a result, it's okay to set --

10   this is his argument -- to set a lower rate because

11   one would not be tilting the playing field, the words

12   that I just used.

13   And so those are -- that's the essence of

14   the argument. But that is directly contradictory to

15   the evidence from both radio broadcasters that they

16   feel incursions from streaming services and the

17   streaming services that they compete with the

18   broadcasters.

19   Again, I have talked about it a few times

20   today, a number of times. I have worked on mergers

21   in the radio space. And in the context of that work,

22   it's obvious and clear about how radio broadcasters

23   compete with the streaming services and how they fear

24   the incursions from those streaming services and how

25   the air simulcasts are part of their responses to

1   those streaming services. And so there's that

2   direction.

3   And you see this in the documents that are

4   cited here. But then there's the other direction

5   that part of what the streaming services are trying

6   to do is to take down the radio broadcasters and

7   their simulcasters. That is, by the way, healthy

8   competition. That is good. That is, that benefits

9   consumers.

10   And you see that, in essence, in the last

11   quote, which perhaps is a -- is overstated in some

12   ways, but it's really going at the question of how a

13   streaming service can take on a terrestrial radio

14   service. And that's what they are trying to do.

15   And so that nature of competition has been

16   front and center in work I have now done for years

17   involving radio and work that shows that competition

18   between the different sides of this market.

19   MR. HUSENY: Objection, Your Honor. It's

20   Sadik Huseny for NAB. I'm not sure that what Mr.

21   Orszag just testified to, the nature of competition

22   front and center and work he has done for years, is

23   laid out in any detail in his written rebuttal

24   testimony.

25   He certainly cites to the documents in the

1   10-Ks that are on the screen. But if he's using

2   background work as specific evidence for a

3   competition analysis here, we would object because

4   that's not in his written rebuttal testimony.

5   CHIEF JUDGE FEDER: Mr. Handzo?

6   MR. HANDZO: Yes. I think, as Mr. Huseny

7   acknowledges, Mr. Orszag did in his written testimony

8   address the specific subject. So this subject is

9   absolutely covered in his written testimony,

10   including a discussion of these documents.

11   His reference to his experience, I'm not

12   sure that is, but that's not -- that's simply an

13   explanation of, you know, further support and further

14   foundation for why he is able to express the opinions

15   that indisputably appear in his written testimony.

16   And it seems like the sort of elaboration

17   that we permit and, indeed, is the reason why we have

18   direct testimony. No one has ever suggested that

19   oral testimony has to be limited to word-for-word

20   what's in the written testimony.

21   So -- and he doesn't, obviously, present any

22   sort of, you know, data analysis here. He is just

23   relating his experience, which informs his opinion.

24   CHIEF JUDGE FEDER: The objection is

25   overruled.

1   BY MR. HANDZO:

2   Q.   All right. Mr. Orszag, do you recall that

3   in Professor or Dr. Leonard's testimony one of the

4   bases for his arguing that simulcasters do get or

5   should get different rates from webcasting is that he

6   relies to some degree on agreements with the

7   Performing Rights Organizations, PROs?

8   A.   That is correct. That's one of his

9   arguments that he puts forward.

10   Q.   Okay. Could you respond to that, please?

11   A.   Sure. My view is the PRO's treatment of

12   simulcast is really not relevant for purposes of our

13   analysis here. It is not relevant along a number of

14   metrics.

15   First, those agreements are set on a

16   percentage-of-revenue basis, not a per-play basis.

17   And so it would make sense that the

18   percentage-of-revenue rate is lower for the radio

19   broadcasters because they are not just offering music

20   content, as we've just discussed and discussed

21   multiple times, they are offering music and non-music

22   content.

23   And so when one is thinking about a

24   percentage-of-revenue basis, one would need to adjust

25   for that fact. And so to the extent that they are

1   offering less music than a non-simulcast webcaster,

2   the percentage-of-revenue would necessarily need to

3   be lower for that radio broadcaster, radio

4   simulcaster, than for a non-simulcast webcaster.

5   It is one of the reasons why I -- we talked

6   about earlier using per-play rates here in this

7   proceeding avoids the issues of trying to sort out

8   what is the right percentage-of-revenue to use for

9   different players that may have different usages of

10   musical content.

11   JUDGE STRICKLER: Mr. Orszag? Mr. Orszag,

12   isn't your per-play rate based upon, as to an

13   agreement, if you will, a percentage-of-revenue?

14   THE WITNESS: It starts there, yes. But I

15   convert it to a per-play rate so that in

16   implementation, those that want to use the music that

17   take a statutory license don't need to sort out the

18   percentage-of-revenue issue.

19   My benchmark, Spotify, is a pure play music

20   entity. It's making -- it's providing music to

21   listeners. And so one does not need to sort out the

22   differential contributions to the creation of that

23   product from music and non-music content.

24   So it makes complete sense to look at

25   percentage-of-revenue for something like Spotify, but

1   when you have a radio broadcaster that, say, has part

2   music and part non-music, it becomes much more

3   challenging to do that.

4   JUDGE STRICKLER: Well, that's the challenge

5   that we had, for example, in SDARS III, correct?

6   THE WITNESS: Of course. And in SDARS, as

7   you know, there is often a debate about the relative

8   contributions of music versus non-music content, but

9   that's for one service.

10   Now imagine if you had to do it for all of

11   the different types of radio stations and

12   simulcasters that are out there.

13   So if a simulcaster, if one of them has

14   1 percent music and one has 50 percent music and one

15   oscillates between music at different times of the

16   year, you are introducing a lot more significant

17   challenges because one would have to assign revenue

18   on a very granular basis.

19   This would be -- the other way to say this

20   is this issue may be more relevant if all of the

21   simulcasters were only pure play music entities

22   because then the, in that circumstance, you would not

23   have to adjust for the degree to which one uses music

24   or not, the intensity of music.

25   JUDGE STRICKLER: But because your per-play

1   rate is based on a percentage of Spotify revenue,

2   doesn't your per-play rate as applied to simulcasters

3   simply, implicitly, not explicitly, but implicitly

4   attribute all the revenue of the -- of Spotify to the

5   -- to each simulcaster?

6   THE WITNESS: No, I would not say that at

7   all. So what I would say is the revenue of Spotify

8   is generated by music. People are attracted to

9   Spotify when they pay because they want to have

10 access to that music.

11   And to the extent that advertisers are

12 attracted to Spotify, they are paying for the

13 listeners of that music that Spotify is putting up on

14 its service.

15   So the -- what I am measuring is the price

16 for music, what should be the royalty rate per-play

17 for music, based on the percentage-of-revenue, which

18 is the governing and the operative rate in the

19 Spotify agreements.

20   And so that then per-play rate would be

21 assigned to simulcasters. But simulcasters, if they

22 play one song, and say they would pay, in my

23 proposal, is they would pay .0025. That's it.

24 That's the value that they get from playing one song.

25   Whereas, if somebody were a pure play, so

1   all they do is play music, they're going to play --

2   they're going to pay .0025 times the number of songs

3   that they play.

4   And if they play the same number of songs as

5   are streamed on Spotify, they are going to pay, in

6   essence, the same percentage-of-revenue. It will be

7   identical in that circumstance.

8   JUDGE STRICKLER: Thank you, Mr. Orszag.

9   BY MR. HANDZO:

10   Q.   Mr. Orszag, in the bottom bullet point you

11 talk about Dr. Leonard's speculation about the PRO,

12 Pandora's PRO rate.

13   What are you talking about there?

14   A.   Yeah, he does an analysis where he takes

15 some publicly-available data from Pandora to try to

16 estimate what their rate is. And he assumes that,

17 based on that public information, that the range of

18 that rate is 3.6 to 4 -- 3.6 to 4 point, I think it

19 was 5 percent.

20   Again, this is in my written testimony, or

21 it would actually be in his written testimony.

22   And he uses that to argue that that's

23 evidence that the PRO rate for musical content is

24 lower than the rate for basically non-simulcast

25 webcasters. The problem is that his information that

1   he gleans from these third -- public sources appears

2   to be off. That is the rate that he -- that instead

3   of 3.4 to 4.5 percent, 3.6 to 4.5 percent, which I

4   believe is the number he uses, the rate that was set

5   in 2014 is 1.85 percent.

6   And if one were to plug that into his

7   analysis, that would suggest that there's no -- that

8   the differences aren't very significant. And, again,

9   this rate may not be in place today, but it's the

10   rate that was in place in 2014, and it calls into

11   question his suggestion, based on very aggregated

12   information from their financial information, that

13   they are paying a rate of 3.6 to, I think it was

14   4.5 percent.

15   Q.   So I think this is probably implicit and

16   obvious from your answer, but does Dr. Leonard

17   actually have the Pandora agreement with -- with

18   ASCAP?

19   A.   My understanding is, no, he does not. He

20   was making an assumption based on financial

21   information that was publicly available.

22   Q.   All right. So now we're back to effective

23   competition, and the competition adjustments proposed

24   by the services' economists. Dr. Peterson first.

25   I think we have talked about this already.

1 He bases it on the Web IV adjustment. But can you

2 just kind of wrap this up for us?

3   A.   Yeah. I mean, I feel like we've covered

4 this off. But he uses a 12 percent competition

5 adjustment based on the Web IV decision. That

6 agreement is no longer in effect.

7   And I think, as I've explained multiple

8 times today, rates and the relevant rates that I use

9 here have come down. The Spotify rate is

10 significantly below the rate for all other services.

11 And remember in Web IV all services were used for the

12 estimate, and the Spotify rates come down, as has the

13 Apple rate.

14   Q.   Okay. I do have a couple of slides where I

15 am actually going to need to go into restricted

16 session. I don't think it is going to be more than

17 about five or six minutes -- might be ten minutes.

18   CHIEF JUDGE FEDER: Okay. We only have

19 about 15 minutes left today. So shall we say we will

20 be in restricted session until the end of the day?

21   MR. HANDZO: Yes, that's fine.

22   CHIEF JUDGE FEDER: Okay. So we will go

23 into restricted session, and we will remain in

24 restricted session for the remainder of today. Will

25 the host please clear the virtual courtroom.

1   MR. SACK: Thank you, Your Honor. We are

2   beginning to clear the room now. If you are an

3   attendee in the Zoom meeting who is not allowed to

4   attend restricted session, please leave the session

5   by clicking the red leave button on the bottom

6   right-hand of your screen or click the X on top

7   right-hand side. Your counsel will inform you when

8   you are allowed to return to the proceeding.

9   Please stand by, Your Honors, and counsel,

10   while we work to clear the room.

11   (Whereupon, the trial proceeded in

12   confidential session.)

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 1   C O N T E N T S

 2   EXAMINATION   DIRECT   CROSS

 3   JONATHAN ORSZAG

 4   By Mr. Handzo   1183

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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.

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9 8/11/20

10 Date   Signature of the Court Reporter

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