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Docket: 2012-1 CRB Business Establishments II
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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of Determination of Rates and Terms for Business Establishment Services	Docket No. 2007-1 CRB DTRA-BE (2009-2013)
In the Matter of Determination of Rates and Terms for Business Establishment Services	Docket No. 2012-1 CRB Business Establishments II (2014-2018)

DECLARATION OF PAUL FAKLER

I, Paul Fakler, declare pursuant to 28 U.S.C. §1746 as follows:

1. I am a partner at Mayer Brown LLP, counsel of record for Music Choice in the above-captioned proceeding. I submit this declaration in support of Music Choice's Reply Brief re: Gross Proceeds Referral.

2. Attached hereto as **Exhibit 1** is a true and correct copy of a transcript of the hearing testimony given by Barry Knittel on September 5, 2001 in *In the matter of: Digital Performance Rights in Sound Recording and Ephemeral Recording*, Docket No. 200-9 CARP DTRA 1 & 2.

3. Attached hereto as **Exhibit 2** is a true and correct copy of a transcript of the hearing testimony given by Douglas G. Talley on September 6, 2001 in *In the matter of: Digital Performance Rights in Sound Recording and Ephemeral Recording*, Docket No. 200-9 CARP DTRA 1 & 2.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed on June 6, 2022 at New York, New York.

By: */s/ Paul M. Fakler*

Paul Fakler (NY Bar No. 2940435)
pfakler@mayerbrown.com
MAYER BROWN LLP
1221 Avenue of the Americas
New York, New York 10020-1001
Tel.: (212) 506-2441
Fax: (212) 849-5549

Counsel for Music Choice

Exhibit 1

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COPYRIGHT ARBITRATION ROYALTY PANEL

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In the matter of:	Docket No. 2000-9
Digital Performance Right in Sound Recording and Ephemeral Recording	CARP DTRA 1 & 2

CARP Hearing Room
LM-414
Library of Congress
Madison Building
101 Independence Ave, SE
Washington, D.C.

Wednesday
September 5, 2001

The above-entitled matter came on for hearing, pursuant to notice, at 9:00 a.m.

BEFORE

THE HONORABLE ERIC E. VAN LOON Chairman
THE HONORABLE JEFFREY S. GULIN Arbitrator
THE HONORABLE CURTIS E. von KANN Arbitrator

ORIGINAL

1 did previously informally. And ask you to raise your
2 right hand, please, to be sworn in.
3 WHEREUPON,
4 BARRY KNITTEL
5 WAS CALLED FOR EXAMINATION BY COUNSEL FOR AEI MUSIC
6 NETWORK; DMX MUSIC, INC., AND, HAVING FIRST BEEN DULY
7 SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:
8 DIRECT EXAMINATION
9 BY MR. BERZ:
10 Q Good afternoon, Mr. Knittel. Would you
11 please formally identify yourself for the Panel and
12 spell your last name?
13 A Barry Knittel, K-N-I-T-T-E-L.
14 Q And Mr. Knittel, who is your current
15 employer?
16 A AEI/DMX Music.
17 Q And can you explain to the Panel what
18 AEI/DMX Music does?
19 A AEI/DMX Music is the leading original
20 artist programmer of music for business to business in
21 the world.
22 Q And by way of background, have AEI and DMX

1 Music, Inc. always been referred to together?

2 A No, they have not.

3 Q Will you explain your answer to that

4 question, please?

5 A On May 18th of this year, AEI Music

6 Network, Inc. merged with DMX Music, Inc. to become

7 one company.

8 Q What was your position before the merger?

9 A Before the merger I was President of AEI

10 Music Markets Worldwide.

11 Q What was your responsibility with respect

12 to that presidency?

13 A To oversee all of the global licensing

14 issues of AEI Music.

15 Q And how long did you hold that position?

16 A Since 1998.

17 Q Was that your first position with AEI?

18 A No, it was not.

19 Q Can you explain to the Panel any position

20 or positions that you held prior to the presidency?

21 A When I joined AEI in 1995, I was Corporate

22 Director of Business Affairs. In 1996, I became

1 President of AEI Music for North America and then in
2 1998, Music Markets.
3 Q And prior to your positions at AEI, did
4 you have any other experience in the music industry?
5 A Yes, I did.
6 Q Can you explain that to us, please?
7 A I was a Vice President of Licensing for
8 ASCAP which is the American Society of Composers,
9 Authors and Publishers. And I was there for nearly 23
10 years.
11 Q Can you describe to us briefly your higher
12 education background?
13 A I have a Business degree from Kent State
14 University.
15 Q And what, if any, music associations or
16 entertainment organizations do you belong to?
17 A I belong to NARAS which is National
18 Academy of Recording Arts and Science; Country Music
19 Association; Academy of Country Music. I belong to
20 the Confederation of Societies for Authors and
21 Composers which is a world-wide organization, as well
22 as the cable association.

1 Q Now in your own words, Mr. Knittel, what
2 do you view the purpose of your testimony as submitted
3 and here today before this Panel?
4 A I'm before this Panel to outline the
5 business of background music and to give a better
6 understanding of how we interact with our customers
7 and how we support the record labels and their
8 initiatives of sales of CDs.
9 Q In your submitted testimony, you provide
10 an overview of the services that AEI provides to its
11 customers. Can you explain in your own words, in
12 general terms, what the background music service does?
13 A A background music service does a number
14 of things. It acts as a marketing person for the --
15 what I'll refer to as brands. By brands I'll mean the
16 Gap or Old Navy, Victoria's Secret. They're really
17 referred to as brands and each of them have their own
18 identities. AEI works closely with their marketing
19 people to develop and create musical soundscapes that
20 support that brand and that identity in the
21 marketplace and distribute our music to them
22 accordingly.

1 Q And would you describe from your testimony
2 the methods by which AEI delivers its products or
3 sound recordings to business establishments?
4 A yes. There's three generations of on-
5 premise equipment and one generation of what we refer
6 to as DBS or broadcast. The three generations of on-
7 premise, the first is what we refer to as Pro Pac
8 which is a tape or a cassette player. It's programmed
9 with four hours of continuous music and also is a
10 secured system because it's a proprietary piece of
11 equipment.
12 The second generation is CD. It too is
13 programmed with four hours of encrypted, encoded
14 music. Again, a proprietary piece of equipment which
15 only has the ability to play our CDs.
16 The third generation is called Pro Fusion
17 which is a digital distribution system, driven by a
18 hard disk and encryption and encoding which protects
19 the songs within those.
20 And as I said, what we refer to as the
21 other is broadcast or DBS satellite system.
22 Q We'll come back to the various methods by

1 which you communicate your product, but let me ask you
2 preliminarily, can you describe with respect to the on
3 premise methods how AEI goes about developing the
4 programs?
5 A AEI, as I said before, works very closely
6 with the marketing people for the various brands.
7 Internally, we create the programs by using a central
8 data base of music that has been categorized in that
9 data base by energy, texture, mood and there's a
10 number of other variables, how it starts, what we
11 refer to as hot, it comes on with guitars, how it
12 ends, what certain instruments are within that. And
13 our programmers again working with the marketing
14 people select the songs that best suit that brand that
15 work within that retail establishment. They program
16 them from the central data base on to a CD that's then
17 burned on to -- depending upon what the format will
18 be, tape or CD, and distribute it out to the customer.
19 Q Just to clarify, you mentioned a central
20 digital database, has AEI always maintained a central
21 digital database?
22 A No. We started the central database in

1999 in support of Pro Fusion which was a digital distribution system. Prior to that we used what I'll refer to as physical goods, the actual CDs themselves, in some cases, records, that we would move into a DAT system or a minidisk system that before it was taken out to be reproduced for the stores.

Q Thank you. Now just turning briefly to these categories of on premise products that AEI has, could you describe how the programs are delivered to your clients in the, I believe you referred to it as a the tape file.

Q Pro Pac is a four hour, custom programmed cassette that plays on proprietary equipment and it's sent out, depending on the model, most of the licenses that we have with our subscribers are 2 to 5 years in duration and they usually have a sequence of time in which they receive music which could be 30, 45 or 60 days.

Q Now you mentioned earlier that each of the models has a certain amount of security built into it. Can you explain the security measures that are employed in connection with the tape model?

1 A The tape model is programmed at a slower
2 tape than standard cassette players and therefore
3 those tapes won't play on any machines, but our
4 machines.
5 Q And with respect to that music that's
6 played on your machines, can you explain to the Panel
7 what the format is for that playback?
8 A All of our format is in monaural and the
9 reason that we don't use stereo is because most of
10 the, all of the locations that we program music for if
11 you use stereo would give you a convoluted sound
12 within the size of the stores. So everything is
13 programmed in analog and monaural.
14 Q Could you briefly describe now how
15 programs are delivered to clients in connection with
16 the CD model that you mentioned?
17 A CD model, again, as with tape, it's a 4-
18 hour program. Through out technology and compression
19 and also security, we're able to 4 hours of music on
20 to a single CD that is played within our Pro Disk
21 which is our custom proprietary player. It, too, is
22 programmed as I outlined before. The key encryption

1 technology with regards to Pro Disk is that we have a
2 time out phase, so that we can program the CD that it
3 won't play within the machine at certain intervals.
4 An example would be some of the higher end younger
5 retail stores don't want music that is 60 days old, so
6 they want it to time out at 30 or 45 days, while if
7 you have something like Victoria's Secret, where they
8 use classical music and the music can run longer, we
9 may time that out at 14 months.
10 Also, besides the time out feature,
11 there's a remix feature within it, that's the software
12 within our equipment that the songs can't change
13 within the CD, but the laser can read different songs
14 within that CD, so that no two songs play following
15 each other. The odds would be in most 4-hour
16 programs, 60 to 65 songs per 4-hour program that we
17 multiplied to basically to the 60th or 65th power of
18 what the chances of it to play one after another
19 again.
20 Q Are there any other security measures
21 related to the CD itself that the Panel should be
22 aware of?

1 A Besides it cannot play on any consumer
2 product. It's only on our machine.
3 Q So if I were to come into possession of
4 one of AEI's CDs and put it in my CD player, would I
5 be able to hear the music?
6 A You would not.
7 Q All right, let's now turn to the third on-
8 premise model --
9 CHAIRMAN VAN LOON: Excuse me, could I
10 just ask with regard to that, is the actual size and
11 shape of the CD the same?
12 THE WITNESS: Identical. It's identical.
13 CHAIRMAN VAN LOON: I see. Okay.
14 THE WITNESS: It just does not play in any
15 equipment but ours.
16 CHAIRMAN VAN LOON: Thank you.
17 BY MR. BERZ:
18 Q Let's turn to the third on-premise model
19 which I believe is referred to as a hard disk model,
20 can you explain what that model is?
21 A It's what we refer to as our third or next
22 generation of on-premise equipment. Pro Fusion is a

1 hard disk digital model, one of the first to be
2 licensed in the United States, if not the world for
3 distribution of music to business to business. It's
4 built around our own encryption and software to make
5 sure that the music played within the Pro Fusion
6 cannot be used anywhere else.
7 Q How do you go about updating the content
8 or music on this hard disk model?
9 A As with tapes and CDs where we mail out
10 the tapes and CDs and as they get a new product they
11 send the old one back to us. With Pro Fusion, we can
12 update it through the internet, through a secured
13 system, through satellite and through telephone lines,
14 again through a secured set of encryptions as well as
15 software that tells the songs how to play within that
16 location.
17 Q And again, as we have with the other two
18 models turning to security measures, what, if any,
19 security measures are provided with respect to Pro
20 Fusion and to avoid copying?
21 A Besides our own proprietary encryption
22 system, if the machine is disconnected at the location

1 and not connected to what we refer to as the mother
2 ship or AEI, it just stops playing.
3 Q I believe that covers the on-premise
4 models that you described. You also said that the
5 second category of technology or delivery systems was
6 broadcast or DBS. Can you explain generally what your
7 DBS system is?
8 A DBS system is a broadcast system by which
9 we program music, slight difference between on-premise
10 and DBS is that on-premise is really built around a
11 custom brand image likeness. It's specific music for
12 specific brands, as I mentioned before.
13 Satellite business is built around
14 specific industries and we refer to them as fast
15 feeders or the fast food industry, grocery stores or
16 big box retailers such as KMart, WalMart, etcetera.,
17 where you have a number of purposes for that music in
18 which it's being programmed within one to move people
19 through the restaurant quickly, the supermarket, to
20 slow people down as they shop and the same thing to
21 hold true with a number of different areas of big box
22 retailers.

1 MR. GARRETT: What would you use for this
2 proceeding?
3 (Laughter.)
4 THE WITNESS: I think some nice classical
5 music would be perfect here.
6 MR. BERZ: I was going to ask about the
7 fast food.
8 MR. GARRETT: Sorcerer's Apprentice.
9 (Laughter.)
10 THE WITNESS: Again, here, while the
11 satellite dish is really commonly purchased anywhere,
12 it's the decoder within the establishment that grabs
13 the signal and transfers it to the music within the
14 establishment.
15 BY MR. BERZ:
16 Q How do you go about delivering the
17 programming to the businesses?
18 A Our programmers work in a very similar
19 fashion. They use the same digital repository, data
20 based as our on-premise program is used. We block
21 program in 4-hour block programs there also. It's
22 sent from that digital repository to a piece of

1 equipment that holds it and then transfers it up by a
2 satellite and then back down from Seattle to the
3 customers at the various locations throughout the
4 United States.
5 Q Just to round out sort of this DBS system,
6 do you know how many channels of DBS AEI is delivering
7 at this point in time?
8 A AEI has 8 channels of satellite.
9 Q Let's move on to another part of your
10 submitted testimony that deals with the relationship
11 between AEI and the RIAA and its members and labels.
12 Can you briefly describe your own
13 perception of the relationship between AEI and the
14 various labels?
15 A Oh, it's very good, it's excellent.
16 Q And on what basis do you make that
17 statement, reach that conclusion?
18 A I reach that conclusion because as I said
19 early on, AEI is a music marketing company and we act
20 on behalf of the brands, but also we realize how
21 important the record labels are to our product for
22 selling music. And so it's important for us to work

1 very closely with the labels. We are what's referred
2 to as serviced, which means that we get music sent to
3 us every day, bundles of it, by the various labels,
4 wanting us to program the music in the right
5 atmosphere for the right clientele which would be the
6 people who would buy the music at the very end of the
7 day.
8 Q What, if any, benefits do you think the
9 labels receive from your service?
10 A Well, the record labels get a great deal
11 of benefits because depending upon their marketing
12 people and their A & R people, they have a great deal
13 of contact with our people in programming. In many
14 cases, we work with them in promotions, as far as
15 recently someone had asked that we put 3LW into a Wet
16 Seal program, that they were working with Wet Seal
17 which is a teenage fashion store and were able to
18 position those songs accordingly.
19 Q Have there been other examples of joint or
20 promotional activities between AEI and the labels?
21 A As outlined in my testimony, we worked
22 certainly with labels; Lenny Kravitz for "Fly Away";

1 the Cardigans for "Erase and Rewind." But it is very
2 much on-going. The minute that testimony was put
3 together, the next day someone calls and says we're
4 breaking this CD and we'd like your help. We worked
5 very closely with Macey Gray last year and became
6 Grammy winner as well as Santana and a number of
7 artists every day we get calls of new artists as well
8 as artists -- just had a call last Friday of an
9 artist, Dean Martin, they're putting out Italian songs
10 and would like us to be able to program it in some of
11 our Italian restaurants.
12 CHAIRMAN VAN LOON: For some of us and
13 perhaps some of the Panel that resonates as opposed to
14 some of the other groups we've heard about in the
15 course of these proceedings.
16 BY MR. BERZ:
17 Q You mentioned earlier, I believe, that the
18 programmers at AEI explore, among other things, the
19 demographics of the hearers of this music in these
20 various business establishments.
21 What, if any, benefit or impact do you
22 think that activity has on the labels?

1 A Each CD, when each group of music when it
2 comes into AEI is reviewed first of all for content.
3 If there's any kind of lyrical content that we don't
4 find acceptable to the listening audience, those CDs
5 are then necessarily put aside, or in most cases, we
6 may be serviced with radio copies that are a cleaner
7 version of the song that maybe also sold. The
8 programmers then go through the music that comes in to
9 see what's going to work best for their brand. So
10 when a new CD comes in, whether it's a new artist or
11 what was sometimes referred to, I just mentioned Dean
12 Martin as a catalog, someone that's been a hit before
13 and continues to have the labels churn their
14 repertoire of music, they'll listen to those to see
15 how that music fits in with that brand in which we're
16 programming it for. Because it's that demographic
17 that is also, especially when you talk about
18 Abercrombie & Fitch, American Eagle Outfitter, those
19 people are buying music for the college market and to
20 program the new acts into those markets is greatly
21 beneficial to the record labels and they know and ask
22 for them.

1 Q With respect to that, you mentioned
2 earlier that sometimes you receive CD in advance of
3 release. What's your view on why occasionally AEI
4 will receive a CD before it's been generally released
5 to the public?
6 A We receive a great many CD before they're
7 released to the public because the record labels want
8 them to be programmed in store. They realize in the
9 first two generations of distribution that we had the
10 tape and CD that there was a lead time. With Pro
11 Fusion, we could put a song that's given to me today,
12 could be on the system tomorrow. But with tape and
13 CD, the manufacturing and the distribution takes
14 longer and they want those songs out being heard
15 because the more they're being heard, the more apt
16 they're to sell CDs.
17 Q We heard earlier in this proceeding a
18 concern about certain cuts being played regularly on
19 air and deeper cuts not being played. Is there any
20 opportunity with respect to AEI's product to move from
21 the most popular to perhaps what we would call deeper
22 cuts on CDs?

1 A I think that's what the labels see and
2 when I talk about labels, it's majors and
3 independents, see with regards to the benefits of AEI.
4 AEI is not anti-radio, but AEI is not in the business
5 of programming the same 40 selections. We work with
6 a great deal of different demographics in all of the
7 stores that we program for and therefore we're looking
8 for second or third cut. Many times, the
9 conversations with the labels may be what is going to
10 be a second or third cut from this album and we'll
11 start programming that instead of the song that's
12 playing on the local radio station.
13 Also, in many cases, we'll go and choose
14 what we think is better actually for the client and
15 that will be a second or a third cut that's coming off
16 of the album.
17 Q Is there anything in the current iteration
18 of the newest technology profusion that also has the
19 potential to promote record sales?
20 A Well, we do. We have a screen that
21 someone could read off of the machine. In some cases,
22 the machine is right under the cash wrap. That could

1 say what song is playing exactly at this time.

2 With Pro Disk, we had the same pieces of

3 information there and with Pro Pac, we'd always send

4 out tapes so that they could look at the number and

5 then correspond it if it came to that, but we've

6 always been very forthright about getting information

7 out to the buying public about the music that's being

8 played within store.

9 Q Let's move from what I'll call the general

10 relationship between AEI and the record industry and

11 let's talk a little bit about the contractual

12 relationships between the two entities or between AEI

13 and the labels.

14 Does AEI pay royalties to RIAA members

15 today?

16 A Yes, we do.

17 Q And can you give us some sense of how much

18 in royalties or fees AEI pays?

19 A AEI pays over $4 million in license fees

20 annually.

21 Q And in your position as President of AEI

22 Music, in your current position, have you had occasion

1 to negotiate licenses with majors and independents?

2 A Yes, I have.

3 Q Approximately how many agreements does AEI

4 have with the majors and the independents?

5 A AEI has about 1500 license agreements for

6 North America.

7 Q And --

8 A For the United States.

9 Q Now my assumption is you didn't

10 individually negotiate all of those, but did you

11 oversee all of those negotiations?

12 A When I first joined AEI after leaving

13 ASCAP I put together various models of agreement to be

14 used so that we could standardize those relationships

15 as much as possible.

16 Q And just to give us some sense of those

17 agreements, is there any way to categorize or break

18 down how those agreements could be described, these

19 licensing agreements?

20 A Yes.

21 Q Would you go ahead and explain those?

22 A Sure. We have license agreements that are

1 strictly promotional by which the labels don't expect
2 a royalty and for instance, with their CDs just for
3 the promotional value that we give. A second form of
4 agreement is an agreement by which we pay a royalty of
5 $6 for every time the music is used within one of our
6 programs and again, being serviced by those labels.
7 And then there's a license agreement which is referred
8 to as the marketing fund license agreement which is
9 with most of the major labels and that's where they
10 share in our profits from music programming and
11 receive certain distributions of royalties from that
12 and other promotional benefits.
13 Q Now in connection with these various
14 categories of agreements, do they render to AEI
15 similar or the same or different kinds of rights with
16 respect to the use of the music?
17 A The same.
18 Q In your own words, what are the rights or
19 what right is provided to you in these agreements,
20 notwithstanding a differentiation among them?
21 A All the rights we need to create and
22 distribute programs to our clients.

1 Q And with respect to these agreements based
2 on your own experience, do any of the agreements break
3 down into subparts of value in relationship to a
4 particular kind of right that you may have under them?
5 A No, they do not. It's a blanket license
6 agreement.
7 Q Just to clarify a little bit, you
8 mentioned when you were talking about the various
9 agreements, I think one of them you referred to as a
10 marketing fund agreement.
11 MR. GARRETT: I'm sorry, I don't want to
12 interrupt. I would just ask where all this is in the
13 written testimony?
14 MR. BERZ: Paragraph 47.
15 (Pause.)
16 MR. GARRETT: This describes all the
17 different types of agreements that they have, rights
18 that are licensed?
19 MR. BERZ: No, this describes the
20 marketing fund agreement.
21 CHAIRMAN VAN LOON: I don't see the words
22 "marketing fund". You're saying that paragraph 47 --

1 MR. GARRETT: There is a reference in
2 paragraph 46 of marketing fund agreements.
3 MR. BERZ: Right, 46 and 47.
4 MR. GARRETT: That's what you're talking
5 about?
6 MR. BERZ: Yes. I'm asking him to explain
7 that part of his testimony.
8 MR. GARRETT: Okay.
9 MR. BERZ: Is that okay?
10 MR. GARRETT: Yeah, I just thought you
11 were asking about something different.
12 MR. BERZ: No, no, no. I apologize. If
13 you look at -- 46 introduces the topic and uses the
14 term marketing fund agreements and then there's a
15 discussion of how the funds are used in 47.
16 And I just felt that it might be useful to
17 have an understanding of this.
18 BY MR. BERZ:
19 Q Mr. Knittel, do you want to briefly
20 explain these marketing fund agreements and how they
21 work?
22 A The marketing fund agreement, as I stated,

1 has the labels sharing in a percentage of AEI's music
2 revenue. That revenue is when divided according to
3 the number of songs that we use from that various
4 label and payments are made back to them by the number
5 of tracks that we use in specific programs and the
6 balances held in an account to be used with that
7 label, that's their money, in conjunction to other
8 promotional activities that they see, they deem to be
9 fit in conjunction with us or our customers.
10 Q Okay, we've talked about the relationship
11 with the RIAA and AEI in terms of the contractual
12 relationship and what you've described as the
13 royalties or the license fees. Are there any other
14 major cost centers that come out of the relationship
15 between RIAA and AEI?
16 A Technology.
17 Q Could you explain?
18 CHAIRMAN VAN LOON: Before we go to that,
19 could I just ask a clarifying question. The bottom of
20 page 14, top of 15, you say the agreements establish
21 promotional funds and it's a percentage of gross music
22 service fees received by AEI. So when you're serviced

1 by the labels, it's not just the provision of music
2 CDs, things of that nature, am I understanding that to
3 say that you receive funds from them?
4 THE WITNESS: No. Those funds are that
5 amount of money that we take as a percentage from our
6 revenue, our gross revenue of music sales. That money
7 is held in -- it's a little complicated, but I'll go
8 through it if I could slowly. You take all the
9 billings that we have from music to our accounts, a
10 certain percentage of that revenue is taken and held
11 as a royalty payment to the marketing fund labels, the
12 promotion labels. Part of that fund is then reduced
13 by certain -- that amount is reduced by other
14 royalties, ASCAP, BMI, SESAC, Harry Fox, etcetera.
15 Then that sum is divided by the number of tracks,
16 music songs that you use and that breaks out to what
17 the pro rata share would be for that record label.
18 Part of that pro rata share is paid to them in a check
19 at $6 for each song that we use within our programs.
20 The balance is held for them to use as they see fit in
21 a promotional fund. We sometimes take ideas to them,
22 hey, there's this opportunity with regards to American

1 Airlines, if you want to put this video on, we can
2 service that for you. They say yes or no. It's their
3 funds to choose how they want to use it as a part of
4 a promotional fund. In some cases we've supported a
5 tour, part of a tour, put out $100,000 as advance to
6 put an act out on the road that actually in that case
7 turned out to be very successful for the act, but it's
8 their money to be used in promotional aspects in
9 conjunction with us.
10 CHAIRMAN VAN LOON: And this fund is
11 created then essentially as a percentage of your gross
12 revenues, if you will?
13 THE WITNESS: From music, that's
14 absolutely right.
15 CHAIRMAN VAN LOON: From serving 120,000
16 business establishments?
17 THE WITNESS: That's correct, that's
18 right.
19 ARBITRATOR GULIN: Mr. Knittel, let me ask
20 you a couple follow-up questions. Now as to the other
21 90 percent, those are -- those fees you keep? I'm
22 sorry, I didn't mean to use the term -- the amount

1 above the percentage that goes to the labels, that's
2 money that you keep? I got a little confused before
3 when you said the balance goes to this promotional
4 fund.
5 THE WITNESS: You take the revenues. Now
6 when you say, those other costs that we have besides
7 the 90 percent you keep, that royalty rate that was
8 negotiated is what is pulled out, less certain
9 deductions and that becomes what is known as the
10 royalty for the marketing fund and the promotions.
11 ARBITRATOR GULIN: Okay.
12 THE WITNESS: Part paid to them in check
13 and part to be used as they see fit in other
14 promotions.
15 ARBITRATOR GULIN: Okay. Now here's where
16 I'm not clear. How is this marketing fund agreement
17 which I think you just referred to as a royalty
18 payment, how is that different from the other types of
19 agreements you were just talking about with the
20 labels, other than the fact that a small portion goes
21 into this marketing?
22 THE WITNESS: Okay, if I can sort of go

1 back and take you through that. We have very few
2 licenses, but some licenses which are strictly
3 promotion, very small independent, sometimes
4 individuals that just say I don't want a royalty, if
5 my music works within your stores, and you can program
6 it, that would be great.
7 We have a second tier which is mostly
8 independents who say I'd like to get my music
9 programmed there and every time it's used within a
10 program, I'll take a royalty of $6 and so every time
11 we use it, every six months, we send out a royalty
12 check to them that outlines how many times their song
13 has been used and pays them a royalty.
14 For the larger label --
15 CHAIRMAN VAN LOON: Can I --
16 THE WITNESS: Sure.
17 CHAIRMAN VAN LOON: On that one you say
18 "every time it's been used."
19 THE WITNESS: Within a program. I'm sorry
20 to interrupt you, but within a program. So it's not
21 every time it's been played. It's every time we used
22 it within a program.

1 CHAIRMAN VAN LOON: But if you sent it to
2 10,000 of your 120,000 business clients, then they
3 would get a check each month for $6 times 10,000?
4 THE WITNESS: No, just for $6 because it's
5 used within that one program.
6 ARBITRATOR VON KANN: That same program
7 goes to 10,000 customers?
8 THE WITNESS: No, let's not get ourselves
9 confused by that, if I may.
10 CHAIRMAN VAN LOON: Okay.
11 THE WITNESS: We don't have any one
12 program that goes to 10,000 customers. I'd say
13 probably the largest account level that we have may be
14 1600 or 2000 locations. So every time --
15 CHAIRMAN VAN LOON: So each time it's used
16 in a program rather than to an individual business?
17 THE WITNESS: That's right, that's right.
18 ARBITRATOR GULIN: And that program may go
19 for a period of 60 days or may go for a period of 14
20 months, depending --
21 THE WITNESS: Could go for 30 days, could
22 go for 45, could go for 60, could go for 14 months.

1 You have to, again, if I could, and I'm sorry I said
2 "you have to" because you don't. But the fact is that
3 most cases when we start a new subscriber, they get 24
4 to 32 hours of music so that would be 6 to 8 CDs.
5 Every time we send one out, they return it back to us.
6 That's the security level that we have, so that they
7 constantly would have some out there. These CDs have
8 the ability to scratch, God forbid, or the tapes could
9 stretch, so they would never be without music, that's
10 the rotation that we use.
11 ARBITRATOR GULIN: And those are the
12 agreements you have primarily with the independents?
13 You say with respect to the majors, most of your
14 agreements are --
15 THE WITNESS: Marketing fund.
16 ARBITRATOR GULIN: Okay, then there was a
17 third category where you said there was no royalty
18 paid, but --
19 THE WITNESS: Promotion, just promotion.
20 ARBITRATOR GULIN: Just promotions.
21 THE WITNESS: Right.
22 ARBITRATOR GULIN: And those are primarily

1 with whom?

2 THE WITNESS: Usually with individuals.

3 We have very few of those agreements, but usually it's

4 with an individual that's trying to get a song that

5 they've recorded played.

6 And some of those agreements, I probably

7 should say this, since I've been there, we've taken

8 the position that for all of the music we use that

9 they fall either into the marketing fund or the $6.

10 Some of the promotionals were there before.

11 ARBITRATOR GULIN: Now these agreements

12 that you have, how old are they? Are these recent

13 agreements?

14 THE WITNESS: Some agreements can date

15 back to the late 1980s, because they automatically

16 renew themselves. They can be terminated by either

17 side every year. And some of them are relatively as

18 current as last week.

19 ARBITRATOR GULIN: I'm trying to get a

20 feel for how this fits into what your position is in

21 this proceeding. Is this something you're going to

22 get into?

1 BY MR. BERZ:

2 Q Let's talk a little bit about, you had
3 said that a major cost center was technology. Do you
4 want to explain in connection with the relationship
5 between AEI and the industry, can you explain how
6 technology plays in as a cost center for you?

7 A A major part of our cost is developing
8 software and hardware to support our distribution
9 system, but also a very important and major cost is
10 supporting the technology that secures that
11 distribution on behalf of the record labels.

12 Q And I think you mentioned that Pro Fusion
13 is your most recent technological advance.

14 A Yes.

15 Q Do you have a sense of what the investment
16 was with respect to developing the Pro Fusion
17 technology?

18 A Developing Pro Fusion cost us about $2.25
19 million.

20 Q And what was or were the major components
21 of the $2.25 million?

22 A The major components of promoting that

1 were security features, encryption and marketing.

2 Q Now let me ask you if based on your

3 experience in the past if you've been involved in any

4 legislative efforts in connection with the music

5 licensing business?

6 A I have been.

7 Q And are you generally familiar with the

8 DMCA?

9 A I am.

10 Q And what, if any, provisions of the DMCA

11 in your judgment come into play in connection with

12 this proceeding?

13 A The only piece that comes in is what is

14 referred to as an ephemeral copy.

15 Q And under the DMCA, what, if any, other

16 provisions impact your ability to do business as a

17 provider of music to business establishments?

18 A We're exempt from performances.

19 ARBITRATOR VON KANN: Why are paying $4

20 million in licenses? That keeps them from having to

21 disconnect -- a lot of this is analog music anyway and

22 I thought there was a business establishment

1 exception. So I'm really confused.

2 You're getting there. Okay.

3 BY MR. BERZ:

4 Q Mr. Knittel, let me ask you with respect

5 to the license fees that you are paying, what are the

6 benefits or what are the rights that you obtain as a

7 result of paying for those -- paying those royalties?

8 A Well, there are a number of rights. We

9 get a right to duplicate, to distribute likeness of

10 the artist to use as far as ad clips, promotional

11 pieces, etcetera.

12 Q Now you mentioned you got this -- you

13 mentioned earlier there's really no breakdown in these

14 agreements about the various rights. I believe that's

15 correct. But given your experience, both at ASCAP and

16 more recently with AEI, what if any suggestions would

17 you have for this Panel in connection with its

18 consideration of what, if any, licensing fee or

19 royalty should be paid in this proceeding by the

20 background music services?

21 A As my testimony outlines, AEI through

22 developed technology has been able to distribute a

1 better product to its customer, and added a number of
2 extra security factors for the record labels.
3 It is this technology that has caused AEI
4 to be -- caused AEI to come to this tribunal because
5 of its ephemeral copy, because of the technology and
6 the 112(e) paragraph of that agreement. I think that
7 the royalty rate should be zero as we should not be --
8 have to be paid a royalty for the advancement of our
9 technology in this marketplace. And there's no
10 different use in that file than it would be in a
11 physical good that was used before.
12 Q I believe it's also correct, however, that
13 in your testimony you also and it's been the position
14 of AEI that in the alternative zero rate is not
15 adopted by the Panel, that you have proposed a flat
16 fee?
17 A That's correct.
18 Q Do you agree that fee is $25,000 and can
19 you just provide us a rationale for that?
20 A The rationale would be that there is
21 probably certain information that we would furnish the
22 RIAA that would be, this would cover some of the cost

1 for that information being furnished to them.

2 Q And generally, could you just then give us

3 again the reasons why you believe the rate ought to be

4 zero or an amount not to exceed $25,000?

5 A The copyright law is clear that businesses

6 such as AEI and other background operators do not have

7 to pay a performance right fee. It seems odd that

8 Congress would expect us to have an exemption in one

9 case and turn around and have to pay a royalty on

10 something that we use as simply an efficiency in part

11 of our programming and also that through our

12 technology there's probably greater protections given

13 to the record industry than they have with their own

14 sale of CDs. So there's no copying or bootlegging of

15 our programs and there is no leakage as has been

16 referred in other documents that have been part of

17 this tribunal.

18 Q I think that concludes my questioning. I

19 want to make sure after cross that we're clear on some

20 of the Panel questions that the Panel is not clear,

21 but I think at this point I'll stop and make the

22 witness available for cross examination by the Panel.

1 CHAIRMAN VAN LOON: Mr. Garrett?

2 MR. GARRETT: One moment, please.

3 (Pause.)

4 CROSS EXAMINATION

5 BY MR. GARRETT:

6 Q Mr. Knittel, I'm Bob Garrett. I represent

7 the Recording Industry Association. Good afternoon.

8 A Good afternoon.

9 Q Let me first ask some preliminary

10 questions. Now you mentioned that AEI and DMX merged

11 in May of this year, correct?

12 A That's correct.

13 Q And I take it you hold a position in the

14 merged entity?

15 A I do.

16 Q And what is that position?

17 A I am Senior Vice President of Business

18 Affairs Worldwide.

19 Q And does that encompass responsibilities

20 for both what used to be the AEI unit and the DMX

21 unit?

22 A Absolutely correct.

1 Q And so you have familiarity with the
2 operations of both the former AEI and DMX, correct?
3 A I have familiarities with the AEI. I am
4 still learning the DMX.
5 Q Okay. Now AEI/DMX is owned by who?
6 A It is owned by a holding company called
7 Maxside which AEI and DMX's initials turned into a
8 word.
9 Q Who owns that holding company?
10 A There's a number of various individuals
11 and companies that hold it.
12 Q Are you familiar with a company called
13 Liberty Digital?
14 A I am.
15 Q And I have a quarterly report here for
16 Liberty Digital which says that it owns 56 percent of
17 the merged entity DMX-AEI, is that right?
18 A That sounds right.
19 Q And do you know who Liberty Digital is?
20 A I do.
21 Q Would you explain who it is?
22 A I'm not that familiar with it to give you

1 any kind of in-depth explanation. I just know through
2 the merger who they are.
3 Q Tell us what you know.
4 A It's a holding company for a number of
5 content providers.
6 Q Such as?
7 A Such as BET, which they just recently sold
8 and I don't go much further down than that.
9 Q Okay, and this quarterly report also
10 suggests that 44 percent of the merged entity DMX/AEI
11 is owned by the former owners of AEI. Does that sound
12 about right?
13 A That sounds about right.
14 Q And the quarterly report indicates that
15 the combined DMX/AEI music revenues for the month of
16 June 2001 was about $15.4 million. Does that sound
17 about right?
18 A I've got to trust the report. It does
19 sound right.
20 Q So your sense is that the company, merged
21 DMX/AEI Company has revenues in excess of about $100
22 million a year. Does that sound about right?

1 A That sounds about right.

2 Q Incidentally, this $25,000 figure that you

3 advanced here, how did you come up with that number?

4 A We just used that as -- first of all, we

5 really do believe the fee should be zero. We thought

6 there may be a way of saving as a business person a

7 lot of attorney's fees by offering something that

8 would take into consideration, as I stated before, the

9 information that would be needed by RIAA and whatever

10 we would service them. It was just an offering to

11 resolve this matter.

12 Q So it really has no factual basis, just

13 something you consider to be fair?

14 A What we consider to be fair is zero.

15 Q I see. But you would throw out an offer

16 of $25,000?

17 A Are we negotiating?

18 Q I'll negotiate and I'll start at about $1

19 million.

20 MR. BERZ: I object.

21 CHAIRMAN VAN LOON: I think he's answered

22 the question.

1 MR. GARRETT: That's fine. He has.

2 BY MR. GARRETT:

3 Q You mentioned that you have three types of

4 on premises services and then you also have a

5 broadcaster DBS service, correct?

6 A That's correct.

7 Q Of those four different types of services,

8 which of those four do you make ephemeral copies

9 subject to the statutory license?

10 A I'm not sure that I know.

11 Q Is it the position of the company that you

12 make ephemeral copies subject to the statutory license

13 in all four of those different services?

14 A No.

15 Q Which ones do they not make ephemeral

16 copies?

17 A We have license agreements with the labels

18 that we believe cover all of our -- all the rights

19 needed to produce and distribute our programs.

20 Q Let's put aside for one moment all of your

21 license agreements and let me just ask, of the four

22 different types of services that you described earlier

1 today, which of those four are you making ephemeral
2 copies that are subject to the Section 112 statutory
3 license?
4 A I'm not sure. I'm not a lawyer and I'm
5 just not sure that we are.
6 Q Don't you think you need to know the
7 answer to that question in order to determine whether
8 or not a fee of zero or $25,000 is fair?
9 A I think that because of the change in the
10 copyright law and the ephemeral demands of the RIAA is
11 what brings us here today in the position that we are
12 covered under our license agreement for all that we do
13 within our business and that we shouldn't have to pay
14 a royalty for the ephemerals.
15 MR. GARRETT: Mr. Chairman, could I use
16 the white board up there for the purposes of my next
17 series of questions?
18 CHAIRMAN VAN LOON: Yes, please.
19 BY MR. GARRETT:
20 Q I thought I was going to be starting this
21 at about 6 o'clock tonight. This is better than I
22 hoped.

1 A Should I move?

2 Q Now I don't want to hover over you, you

3 can move a little bit off to the side or you are

4 welcome to stand.

5 A Am I going to be looking at this?

6 Q Yeah, you're going to have to as I go

7 along.

8 A Okay.

9 CHAIRMAN VAN LOON: Let's move your chair

10 around so that you can be comfortable, perhaps, just

11 roll that, if you're able to dodge all of these

12 different microphone cords.

13 (Pause.)

14 BY MR. GARRETT:

15 Q Now I believe in your testimony you talk

16 about your first generation of on premises services,

17 one that is called Pro Pac, correct?

18 A Yes.

19 Q That was the first generation service?

20 A Yes.

21 Q And that was something that was started

22 many years ago, correct?

1 A About 30 years ago.

2 Q And you still provide that Pro Pac service

3 today?

4 A We do have some accounts with that, yes.

5 Q And approximately what portion of your

6 business would be Pro Pac?

7 A Today, probably about 47 percent.

8 Q So it's still a pretty good chunk of the

9 business?

10 A It's coming down quickly in time.

11 Q And that's 47 percent in terms of revenue,

12 is that right?

13 A I don't know if that's true. You just

14 asked the number of accounts and I said about 47

15 percent. It doesn't necessarily mean it's revenue.

16 Q All right, so 47 percent of the 1200

17 accounts would be Pro Pac, correct?

18 A That's correct.

19 CHAIRMAN VAN LOON: Forty-seven percent of

20 1200 accounts or 120,000?

21 THE WITNESS: 120,000.

22 MR. GARRETT: I'm sorry, 120,000.

1 CHAIRMAN VAN LOON: I thought I might have
2 missed something here.
3 BY MR. GARRETT:
4 Q Tell me if this generally describes the --
5 accurately describes Pro Pac. I take it you get a
6 number of CDs from record labels or you may purchase
7 some CDs, correct?
8 A Most are serviced, correct.
9 Q And you take those CDs and you'll copy
10 them on to a master digital audio tape or mini disk,
11 correct? Tracks from each of those CDs will be copied
12 on to a master tape or disk?
13 A You lost me.
14 Q That's not good.
15 A No, that's not good.
16 Q We're not very far into this.
17 A Are we talking about today? Or are we
18 talking about when? When in time are you talking
19 about the way we program Pro Pac?
20 Q It's changed over time?
21 A I said that in my testimony and just here
22 today, yes.

1 Q Let's talk first about pre-November of
2 1999.
3 A Fine.
4 Q Okay?
5 A Yes.
6 Q It sort of changed over in November of
7 1999?
8 A You're absolutely right.
9 Q Right. So we're talking in that earlier
10 period. You would take tracks off of CDs and you
11 would reproduce them on to a master digital audio tape
12 or mini disk, correct?
13 A That's correct.
14 Q So we'll call that master tape. And then
15 am I correct that you would make -- put copies of this
16 master tape on to different CDs, correct?
17 A Into different proprietary CDs, that's
18 correct.
19 Q And then those different CDs, you would
20 deliver to different customers, correct?
21 A Correct.
22 Q And those customers would all be different

1 business establishments that would perform these CDs,
2 correct?
3 A They would be to different customers and
4 they'd be played within their locations.
5 Q And when a performance was made within
6 those business establishments, no royalty would be
7 owed to the copyright owners of the sound recordings,
8 correct?
9 A That's correct.
10 Q And that's because those performances
11 would all be exempt under the copyright law, at least
12 for purposes of sound recording copyright owners,
13 correct?
14 A That's correct.
15 Q But performance royalties would be due to
16 the copyright owners of the musical works underlying
17 those CDs, correct?
18 A Such as ASCAP, BMI and SESAC?
19 Q Right.
20 A That's correct.
21 Q In addition, you would be making copies of
22 these original CDs at different points, correct?

1 A We would be making copies of songs from
2 those different CDs, not copies of those CDs.
3 Q Exactly. You make copies of actually the
4 sound recording, right?
5 A Right.
6 Q And in order to make the copy of the sound
7 recording, you would need the authorization from the
8 copyright owner of the sound recording, correct?
9 A That's correct.
10 Q And you would also need permission for the
11 copyright owner of the musical work, correct?
12 A That's correct.
13 Q And you would get that latter permission
14 through the Harry Fox Agency, correct?
15 A That's correct.
16 Q But for purposes of the copyright owners
17 of sound recordings, you would have to go to them
18 individually and get their consent, correct?
19 A We would go to the record labels and get
20 a blanket license agreement from them, if that's the
21 consent you're suggesting, that's correct.
22 Q And in order to get that consent you

1 would, as you described earlier, in some cases
2 compensate the copyright owners of the sound
3 recordings in some fashion, correct?
4 A That's correct.
5 Q And you would provide that compensation
6 either through making contributions to this marketing
7 fund or this $6 payment, correct?
8 A That's right.
9 CHAIRMAN VAN LOON: Mr. Knittel, can I ask
10 you to just please keep your voice up some both so the
11 Court Reporter can get it in and so we behind you can
12 hear. Thank you.
13 THE WITNESS: Sure.
14 BY MR. GARRETT:
15 Q I actually labeled this second page here
16 as CDs, but they're actually tapes under Pro Pac?
17 A That's right.
18 Q So I should take out CD?
19 A Right.
20 Q And we'll just put tape. But tell me if
21 I'm correct, in this model we just discussed here, the
22 Pro Pac model, all of the copies that you made of the

1 sound recordings were ultimately used to support the
2 performance of those sound recordings, correct?
3 A I think they're used to support the
4 performance of those sound recordings and also used as
5 promotional facilities for the record labels to
6 generate more sales of their CDs.
7 Q But even though the performance of the
8 sound recording was exempt from a public performance
9 royalty, you still compensated the copyright owner of
10 the sound recording for the copies that you make,
11 correct?
12 A We compensated the record label for all
13 rights that we needed to duplicate and distribute to
14 our customers.
15 Q Okay. All right now, after November of
16 1999 you said that this process has changed, correct?
17 A That's right.
18 Q And was the change that you now have the
19 Pro Disk system or was there some other kind of change
20 to Pro Pac?
21 A No, Pro Disk worked off the same system
22 that you have there for Pro Pac until November of 1999

1 and Pro Fusion, Pro Pac and Pro Disk worked off of a
2 digital repository as of November of 1999.
3 Q I see. Let me go back a second on this
4 Pro Pac model here. Where in this process, if
5 anywhere, is an ephemeral copy being made, one that
6 would be subject to the Section 112 statutory license?
7 A I'm sorry, I'm not a lawyer, and I've read
8 the copyright law a number of times and I must tell
9 you it's not as clear as I'd like it to be and I'm not
10 just not sure.
11 ARBITRATOR VON KANN: I am shocked and
12 appalled.
13 (Laughter.)
14 BY MR. GARRETT:
15 Q But your view would be you got all the
16 authorizations that you need from record companies for
17 that process though, correct?
18 A I've got all the rights I need from the
19 record companies, the publishers and the performance
20 rights people for all I need through that full chain.
21 Q So you don't really even need the --
22 regardless of whether the statutory license is

1 applicable, you really don't need that statutory
2 license for this Pro Pac process, correct?
3 A I don't need it for the way it's produced
4 as you've outlined it there.
5 Q Okay. And that's for everything you would
6 have done at least prior to November 1999?
7 A That's right.
8 Q All right, let's just talk about the Pro
9 Disk. Now with the Pro Disk again, you get some CDs
10 either from the labels or you go out and purchase
11 them, correct?
12 A Right.
13 Q And then what do you do with those CDs?
14 We're going to talk Pro Disk prior to 1999.
15 A Exactly as you've laid out for Pro Pac.
16 Q And the only difference is that they would
17 be disks instead of tapes?
18 A That's right.
19 Q Okay. And again, just as with Pro Pac,
20 you would go out and get authority from the copyright
21 owners of the sound recordings in order to make copies
22 on the master, correct?

1 A Correct.

2 Q And also to make copies from the master,

3 correct?

4 A Right. Correct.

5 Q And again, with Pro Disk, once the

6 customers actually played the particular disks on

7 their devices within their business establishment,

8 those performances would be exempt from any kind of

9 royalty to copyright owners of sound recordings,

10 correct?

11 A That's correct.

12 Q But you would owe a royalty to the

13 copyright owners of the underlying musical works,

14 correct?

15 A Again, for duplication, distribution, yes.

16 Q So let's make this -- and again, I take it

17 that you're not certain where, if at all, ephemeral

18 copy subject to the 112 statutory license would be

19 made in this pre-1999 Pro Disk process?

20 A Correct.

21 Q But wherever it is made, it's not really

22 going to affect you because you have all the licenses

1 that you need to cover the entire Pro Disk process,
2 pre-1999, correct?
3 A Correct.
4 Q Let's try Pro Pac post-1999, actually
5 post-November 1999, okay? That's when the change was
6 made, November of 1999?
7 A Late November, yes.
8 Q Right.
9 ARBITRATOR VON KANN: 1999 or 1998?
10 THE WITNESS: We changed our system.
11 ARBITRATOR VON KANN: I'm sorry, I was
12 thinking of the Act.
13 BY MR. GARRETT:
14 Q So here you took these CDs and we'll just
15 stick with Pro Pac, you took the CDs and you copied
16 them into a digital repository, right? Is that
17 correct?
18 A That is correct.
19 Q And then from that digital repository, you
20 would make a master tape, right?
21 A We could make a master tape or a master
22 CD.

1 Q But the Pro Pac would be a tape and the
2 Pro Disk would be a CD?
3 A That's correct.
4 Q But the essence of this is that you had a
5 bunch of different tracks, a number of different sound
6 recordings, all in this digital repository and
7 depending upon the mood or whatever else you looked at
8 you would create a tape simply by taking copies of
9 those tracks out of a digital repository, right?
10 A Well, the difference, if I may say, is
11 that in post-1999 through technology, we gained
12 efficiency. Instead of going back to that physical
13 good and making a copy each time you wanted to use
14 that track, of just making it once and pulling it from
15 the digital repository.
16 Q Okay. What you would do is once that
17 track was there in the digital repository, if you
18 wanted to use it on the master tape that you were
19 creating you would pull it off the repository, make a
20 copy of it on to the master tape, correct?
21 A That's right.
22 (Microphone adjustment.)

1 Q So we've got this master tape that has
2 copies of different songs from digital repository and
3 again you make copies of that tape, right?
4 A Correct.
5 Q And you'll make maybe several copies which
6 are then delivered to your different customers,
7 correct?
8 A That's correct.
9 Q And by delivering you just simply take
10 them and stick them in the mail or Federal Express or
11 UPS and mail them out to them, correct?
12 A They are mailed out, that's right.
13 Q And also that was true with the pre-1999
14 system too. You would simply take those physical
15 tapes or CDs and mail them out to your customers,
16 correct?
17 A Mail them out and then they'd mail them
18 back.
19 Q Now once the customers got them, they
20 would again make performances within their business
21 establishments, correct?
22 A They would play the CDs or tapes within

1 their establishments, that's correct.

2 Q And again with the post-November 1999 Pro

3 Pac system as with the pre-1999 Pro Pac system, all of

4 the performances of the sound recordings themselves

5 were exempt from a performance royalty, correct?

6 A That's correct.

7 Q But you did have to pay or you at least to

8 get the authority of the copyright owners of the sound

9 recordings in order to make these different copies,

10 correct?

11 A Same license agreements as Pro Pac, post

12 and pre by the labels, that's correct.

13 Q So really the only change that has

14 occurred between November of 1999 and after November

15 of 1999 is you've added this digital repository into

16 the mix, correct?

17 A We added the digital repository thanks to

18 technology and our ability to be more efficient to the

19 customer.

20 Q Are the tracks that are in that digital

21 repository purged after a particular period of time.

22 MR. BERZ: If you know.

1 THE WITNESS: They are not.

2 BY MR. GARRETT:

3 Q They are not. Okay. Now just to be

4 complete --

5 A I should, if I may, there are certain

6 tracks that are purged, if they're no longer used

7 within our programs.

8 Q You don't have a routine policy of purging

9 them after every six months, do you?

10 A No, we do not.

11 Q So I take it that you do not know for this

12 post-1999 system what, if any, ephemeral copies

13 subject to the Section 112 statutory license are being

14 made here, correct?

15 A That's right.

16 Q But again, you would think that all of the

17 licenses that you have with the different copyright

18 owners of sound recordings and the copyright owners of

19 musical works would give you all the licenses that you

20 need, correct?

21 A That's correct.

22 Q All right. I think what I'd like to do,

1 Mr. Chairman, is make a copy of this and erase it and
2 then continue. Could I could that?
3 CHAIRMAN VAN LOON: That would be fine.
4 And this is also the time when we usually take our
5 break, so perhaps we should take another 15 minutes
6 and come back at a quarter of.
7 And our rule is, Mr. Knittel, that since
8 you are now in the process of being cross examined,
9 you cannot consult with your counsel about the answers
10 that you're giving. You can talk about other great
11 things --
12 THE WITNESS: Thank you, that's fine.
13 CHAIRMAN VAN LOON: Thank you.
14 (Off the record.)
15 CHAIRMAN VAN LOON: We are continuing and
16 we're still in open session.
17 MR. GARRETT: Did you want this numbered,
18 Your Honor? This is a demonstrative.
19 CHAIRMAN VAN LOON: No thank you.
20 MR. GARRETT: This is not my best work.
21 CHAIRMAN VAN LOON: There are those who
22 say it is.

1 MR. BERZ: Are you putting together a
2 portfolio?
3 (Laughter.)
4 MR. GARRETT: This would be my best work
5 for that portfolio.
6 BY MR. GARRETT:
7 Q Before I erase this masterpiece, let me
8 just ask you, in order to qualify for the Section
9 112(e) statutory license, there needs to be a
10 transmission of the sound recording at some point.
11 Just accept that for the moment here. Can you tell me
12 where, looking at the pre-1999 process here, the Pro
13 Pac and Pro Disk, where you believe the transmission
14 would occur?
15 MR. BERZ: Could I ask that maybe you
16 could explain what you mean by transmission?
17 BY MR. GARRETT:
18 Q Well, you used the term "transmission" in
19 your written testimony, do you not, Mr. Knittel?
20 A Would you tell me where I used it?
21 Q I think in paragraph 16.
22 A I don't have it memorized.

1 Q And again paragraph 17. See that there?
2 A I do on 16.
3 Q You say AEI transmissions to business
4 establishments strictly comply with all of the
5 requirements of Section 114(d)(1)(C)(iv) and then you
6 go on and list what those requirements are. And then
7 in the next paragraph you list what the requirements
8 of Section 112(e) are, correct?
9 (Pause.)
10 A That's correct.
11 Q So I will define transmission, I will
12 accept your understanding of transmission as you wrote
13 it there in paragraphs 16 and 17 and I will ask you
14 where, looking at this pre-1999 process, where did the
15 transmission of the sound recording occur?
16 A It would occur from the copying to the
17 digital repository master tapes.
18 Q I'm sorry, I'm asking just for pre-1999
19 first.
20 A Okay.
21 Q Where in that pre-1999 Pro Pac or Pro
22 Disk process did the transmission occur?

1 ARBITRATOR VON KANN: Or as they say,
2 "where's the beef"?
3 THE WITNESS: The transmission, as I would
4 see it, follows throughout that entire chain. The
5 copies are being made to the master tape.
6 BY MR. GARRETT:
7 Q So you would consider the process of
8 copying the CD on the master tape to be a
9 transmission?
10 A Yes.
11 Q And you would consider the copying of the
12 master tape on to another tape to be a transmission?
13 A I'm taking the transmission from the time
14 we produce to the program to it's played within the
15 establishment.
16 Q And you consider when you mailed out the
17 tapes and CDs to your customers, you consider that to
18 be a part of a transmission as well?
19 A Again, the licenses cover the full gamut
20 of what we do and I consider the transmission to be
21 each part of that.
22 Q I'll ask you the same questions here with

1 respect to Pro Pac and Pro Disk post-1999. The
2 transmissions you believe would be occurring
3 throughout this entire process, correct?
4 A I believe so, yes.
5 Q I will -- oh, let me also ask you. You
6 talked a bit in your testimony this morning and also
7 in your written testimony about the elaborate security
8 precautions of what you tape. Do you recall that?
9 A Yes sir.
10 Q And again, if I look at the pre-1999 Pro
11 Pac and Pro Disk process here, I take it that in your
12 opinion this would be a very secure process, that
13 there would be very little, if any, chance of
14 unauthorized reproductions in any of this process?
15 A Absolutely not.
16 Q And likewise in the post-1999 process,
17 there would be very little, if any, chance of
18 unauthorized reproductions being made as part of that
19 process, correct?
20 A That's correct.
21 Q So both of these Pro Pac and Pro Disk
22 processes both before and after 1999 were very secure

1 systems in your judgment, correct?

2 A That's correct.

3 Q And I also take it that the end result of

4 both of these processes, both pre- and post-1999 was

5 to provide a great deal of promotional value to the

6 sound recording copyright owners, correct?

7 A Could you repeat that, please?

8 Q Yes, I think the end result of both of

9 these processes, the Pro Pac and Pro Disk processes

10 both pre- and post-1999 was to result in a great deal

11 of promotional benefit to sound recording copyright

12 owners, correct?

13 A It was first and foremost to deliver the

14 right music to our customers and at the same time give

15 promotional benefits to the record companies.

16 Q Right, and at the end when all of these

17 performances are made of sound recordings that, in

18 your judgment helps promote the sale of sound

19 recordings, correct?

20 A I think the more people hear music, the

21 more people like music, the more apt they are to buy

22 music, yes.

1 Q And you feel that this whole process is
2 very beneficial to the sound recording copyright
3 owners, your performance -- performances that result
4 from the Pro Pac and Pro Disk systems here, those
5 performances are very promotional to sound recording
6 copyright owners, correct?
7 A I believe that the music played within the
8 stores is beneficial to the record companies but our
9 first and foremost is to program for those stores.
10 Q I understand, but it is true though that
11 notwithstanding whatever promotional values that you
12 have here, that you do still compensate the sound
13 recording copyright owners?
14 A They are compensated in royalties, that's
15 correct.
16 Q You may erase this. I'd like to go
17 through the process now of the Pro Fusion. That was
18 the third generation, correct?
19 A Yes.
20 Q I gather that the Pro Fusion process
21 starts like the Pro Pac and Pro Disk process with your
22 obtaining CDs either directly from the labels or

1 purchase them, correct?

2 A That's correct.

3 Q And am I correct that what you do with

4 those CDs is that you copy them into digital

5 repository, right?

6 A The same digital repository that we use

7 for Pro Pac and Pro Disk.

8 Q Right. Let me make that clear that when

9 you copy the different CDs into the digital

10 repository, you're using those copies to support Pro

11 Fusion, Pro Disk and Pro Pac, correct?

12 A That's correct.

13 Q Once it's in that digital repository, this

14 time instead of copying them on to a tape or a CD, you

15 would copy them on to some kind of a hard drive,

16 right? Is that correct?

17 A It could be correct.

18 Q It could be? It could also be incorrect?

19 A It's not all hard drives are loaded that

20 way.

21 Q All right, what other manner would hard

22 drives be loaded?

1 A As I outlined in my testimony, it could be
2 through satellite. It could be through the internet.
3 It could be through phone lines.
4 Q Let's put that off to the side for the
5 moment. In certain cases, what you do is you take
6 copies of the different tracks that are on the digital
7 repository and you put them on to a hard drive,
8 correct?
9 A That's correct.
10 Q And when I say "put them on" I mean you
11 copy them on -- you burn them on to the hard drive,
12 correct?
13 A They are on the hard drive for playback,
14 that's correct.
15 Q And so what you have there on the hard
16 drive is a compilation of different CDs that have been
17 selected from your digital repository, correct?
18 A We have a 4-hour music program that has
19 been created for that customer.
20 Q You then take that hard drive and you ship
21 it off to a customer, correct?
22 A Well, the hard drive is just one part of

1 the Pro Fusion machine, so we ship the Pro Fusion
2 machine, just as we do the Pro Pac and the Pro Disk to
3 the customer.
4 Q Okay, but ultimately the hard drive that
5 contains the different CDs, the different tracks
6 rather, is going to be shipped off to one of your
7 business establish customers, correct?
8 A The Pro Fusion machine, just like the Pro
9 Pac and just like the Pro Disk is an on-premise
10 machine that is supplied with taped CD or in this case
11 songs that are part of a hard drive on that piece of
12 equipment.
13 Q But it's then shipped to the business
14 establishment customer, correct?
15 A The hard drive -- I'm not trying to be
16 hard here, I'm just saying the hard drive is not
17 removable and sent back and then sent back out again.
18 Pro Fusion is a piece of equipment, very much along
19 the line of Pro Pac and Pro Disk. That piece of
20 equipment resides at the location, like Pro Pac and
21 Pro Disk, when it goes out, 8 tapes go out or 6 tapes
22 go out. Pro Disk, 8 CDs or 6 CDS go out. In the hard

1 drive in Pro Fusion, the hard drive is sent out with
2 23 hours or excuse me, 24 or 32 hours of music on it.
3 Q All right, the only thing I'm trying to
4 establish, Mr. Knittel, is that that hard drive is
5 ultimately -- you put it in Federal Express or UPS or
6 whatever and it is shipped out to your customer who's
7 a business establishment?
8 A The hard drive is part of the Pro Fusion
9 unit. The Pro Fusion unit is shipped to the customer
10 for their use within the store.
11 CHAIRMAN VAN LOON: Can I ask, just to
12 clarify in a simplistic kind of way, are you saying
13 that sending them the profusion unit with the music in
14 it is sort of akin to mailing a boom box with the CD
15 or the cassette in it, in the sense that it's both a
16 mechanism and the music, and you physically send the
17 whole thing and get those back?
18 THE WITNESS: What I'm saying is that
19 profusion unit is really just a higher technology, no
20 different than the Pro Pac and Pro Disk in which you
21 have tapes and CDs that are sent out to the store.
22 This goes out with the music in the equipment that is

1 then used at the store.

2 BY MR. GARRETT:

3 Q Now, when it gets to the store, again, the

4 other business establishment, your customer makes

5 performances of what's on that -- public performances

6 of what's on that hard drive, correct?

7 A The customer plays the music from the

8 piece of equipment, Pro Fusion, exactly as they would

9 the Pro Pac and Pro Disk.

10 Q And, again, the performance that are made

11 of the sound recordings are exempt from any kind of

12 copyright liability to copyright -- to sound recording

13 copyright owners, correct? But they're not exempt,

14 copyright liability, to musical work owners, correct?

15 A I'm sorry. I didn't understand the

16 question.

17 Q The performances that are made in your

18 customers' business establishment, performances of the

19 musical works are not exempt from copyright liability,

20 correct?

21 A Could you explain a little more what your

22 question is?

1 Q Yes. When they perform the musical works
2 contained in the sound recordings, you need to have
3 the consensus of the copyright owners of those musical
4 works, correct?
5 A Are you talking about performance fee from
6 ASCAP, BMI, and SESAC again?
7 Q Yes.
8 A Yes.
9 Q Okay. You need to get a license from
10 ASCAP, BMI or SESAC, correct?
11 A That's correct.
12 Q All right. But you don't need any kind of
13 license from record companies for those performances,
14 correct?
15 A No. It's exempt, that's correct.
16 Q But, again, in order to make copies on
17 throughout this process, you need a license from
18 copyright owners of sound recordings, correct?
19 A Exactly as we had for Pro Fusion and Pro
20 Disk, that's correct.
21 Q There's no difference here between Pro
22 Disk, Pro Pac, and Pro Fusion. In all cases, you're

1 going to need to get the consent of the copyright
2 owners of the sound recordings, correct?
3 A That's correct.
4 Q And for that consent, you will provide
5 them with some compensation, correct?
6 A Pay royalties, that's correct>
7 Q And by them I -- you understood it to mean
8 the copyright owners of the sound recordings, correct?
9 A Yes.
10 COURT REPORTER: I didn't hear that
11 answer.
12 THE WITNESS: Yes, I did.
13 COURT REPORTER: Thank you.
14 BY MR. GARRETT:
15 Q And you pay them those royalties for the
16 right to make copies even though the ultimate
17 performances here are exempt from liability, correct?
18 A Again, I pay them royalties for all we
19 need to facilitate the distribution of music through
20 our equipment.
21 Q Okay.
22 ARBITRATOR GULIN: Could I just ask a

1 clarifying question real quick. And that is on the
2 far right there, the performances which you were just
3 discussing with Mr. Garrett, the two of you seem to be
4 agreeing that there's an exemption for paying a
5 royalty for a performance right in sound recordings.
6 THE WITNESS: That's correct.
7 ARBITRATOR GULIN: Okay. Now, my question
8 is, is it your understanding that that exemption is --
9 there's an exemption because you're exempted under
10 Section 114 or is it some exemption you're referring
11 to? In other words, is it that there's an exemption
12 from 114 or is it that you feel there is no
13 performance right --
14 THE WITNESS: There is an exemption in the
15 copyright law having to do with the performance of
16 sound recordings that background and foreground music
17 companies are exempt from.
18 ARBITRATOR GULIN: From Section 114.
19 THE WITNESS: Yes.
20 ARBITRATOR GULIN: Okay.
21 BY MR. GARRETT:
22 Q Just so we're clear, are these, by the

1 way, digital performances or analog performances
2 within the scope?
3 [No Response.]
4 Q Do you know?
5 A No, I don't know.
6 Q Okay. And there are actually two
7 exemptions in Section 114 that might bear here.
8 There's an exemption, correct, that your service would
9 get for making transmissions to business
10 establishments, correct?
11 A Correct.
12 Q And there's a separate exemption for
13 transmissions that are made within a business
14 establishment, correct?
15 A Correct.
16 Q Okay. So in any event, these performances
17 of sound recordings are exempt from any kind of
18 liability of copyright owners of sound recordings,
19 correct?
20 A That's correct.
21 ARBITRATOR VON KANN: Can I follow up with
22 -- I think both of us are trying to make sure we

1 understand the groundwork. With respect to this
2 system, there is a digital piece of it at the
3 repository stage, although you said you weren't sure
4 whether the performances were digital or analog.
5 THE WITNESS: That's correct.
6 ARBITRATOR VON KANN: At least in the Pro
7 -- which was the first one, Pro Pac, I didn't see
8 anything digital at all.
9 THE WITNESS: No.
10 ARBITRATOR VON KANN: The entire thing
11 looked to be analog.
12 THE WITNESS: Right.
13 ARBITRATOR VON KANN: Now, this is
14 probably going to display my real ignorance, but isn't
15 the reason that there's no performance royalty
16 involved there is it's all analog; there's nothing
17 digital going on, right?
18 THE WITNESS: That's correct.
19 ARBITRATOR VON KANN: And, historically,
20 there has never been a copyright with respect to the
21 sound performance of analog music, as I understood it.
22 So unless I'm missing something at the Pro Pac stage,

1 it's pretty simple why you don't know anything. Once
2 we begin to get down into the use of a digital
3 repository things might get a little more complicated
4 perhaps, because that's involved, to some extent, in
5 this transmission process. Is that your
6 understanding?
7 THE WITNESS: It is.
8 ARBITRATOR VON KANN: Okay.
9 BY MR. GARRETT:
10 Q All right. Mr. Knittel, let's go back to
11 Pro Pac and Pro Disk for a minute. When you take the
12 original CD and copy it onto a master tape, a digital
13 copy is being made, correct?
14 A Are we talking about pre-1999 or post?
15 Q Well, let's start out with pre-1999. If
16 the CD is copied under a master tape a digital copy is
17 being made onto that master tape, correct?
18 A I don't know.
19 Q You take the master tape and make a copy
20 of it, isn't that a digital copy?
21 A I don't know.
22 Q Do you know if there's a difference

1 between digital copies and digital performances and
2 how the law treats digital copies versus digital
3 performances?
4 A In what respect?
5 Q Let's go back a second. Is your
6 understanding that analog performances of sound
7 recordings -- analog performances of sound recordings
8 are exempt from copyright liability to the copyright
9 owners of sound recordings?
10 A That's correct.
11 Q But digital performances of sound
12 recordings may or may not be exempt from copyright
13 liability to the copyright owners of sound recordings,
14 correct?
15 A I'm not sure.
16 MR. BERZ: I just want to make a point to
17 the Panel that -- and I recognize the search for where
18 the beef is, but I want to make the point that the
19 Copyright Office originally, in dealing with this
20 issue, I think articulated the view that this was a
21 complicated sort of legal analysis, and I've let the
22 questioning go.

1 I'd also like to make the point that
2 there's a recent report, which I assume will come to
3 the attention of the Panel, about this that further
4 talks about the aberrational nature of Section 112(e).
5 And on the one hand, I'm not inclined to cutoff the
6 questioning, but I want to make it clear that when we
7 start talking about transmissions and what's digital
8 and how that's classified under this law, we're
9 talking about a lot of legal briefing, which has been
10 the dilemma for this particular industry in this
11 proceeding. And I want to make that clear. We can
12 proceed with this.
13 I think there is some clarification I need
14 to go into, because I can see that we're confused on
15 the technology, but I just -- I want to get that out
16 on the record right now that we're really talking
17 about legal conclusions, and the intent, quite
18 frankly, of Mr. Knittel's testimony was really to
19 simply lay out the basic technologies and explain what
20 the licensing agreements are to date so that the Panel
21 would have context for all of this. And tomorrow we
22 have a witness who's going to come on and talk about

1 the technology itself. Now, it won't answer the legal
2 questions, but it will get into more detail on these
3 issues.
4 CHAIRMAN VAN LOON: That was something I
5 wanted to clarify is the case that Mr. Talley is
6 essentially the Chief Technical Officer --
7 MR. BERZ: Yes.
8 CHAIRMAN VAN LOON: -- and the guy who's
9 an electronics engineer and has years of experience --
10 MR. BERZ: Correct.
11 CHAIRMAN VAN LOON: -- on that side of
12 things.
13 MR. BERZ: That's correct.
14 CHAIRMAN VAN LOON: And would perhaps be
15 more knowledgeable than a lawyer or possibly business-
16 types on some aspects of this.
17 MR. BERZ: That's correct. And the lead
18 engineer to develop technology related or similar to
19 Pro Fusion, also called Axis. And now that the two
20 companies have come together the technologies will
21 merge as well. But I really do want to make it clear
22 that we've got a number of legal issues here, and

1 we're just trying to lay the factual predicate so that
2 we can make those legal arguments.
3 ARBITRATOR VON KANN: Could we pause just
4 a moment to talk about that, because I think that's a
5 significant issue in terms of what's the best way to
6 proceed. I recall the Copyright Office dodging the
7 bullet, as it were, and saying, "Oh, the Panel will
8 figure that out," and so at some point we will have to
9 grapple with it. What is your view? It would seem to
10 me that the most useful thing would be to suck all the
11 facts out of these witnesses that we possibly can and
12 then send them off into the night and let you lawyers
13 argue about what it all means. I would have thought
14 that that's what --
15 MR. BERZ: That's what the Copyright
16 Office had said, basically.
17 ARBITRATOR VON KANN: And I guess it may
18 be that part of that is perhaps there's some
19 significance in why a particular business person
20 thinks he does or doesn't have a liability. That may
21 have some value. But at the end of the day, that's
22 probably not controlling. It's probably the -- you

1 know, it's a legal -- so what is your feeling about
2 how is the best way to sort of grapple with this area?
3 MR. GARRETT: Well, my principal objective
4 was to make certain that we had a record on exactly
5 what his four types of services are and to show what
6 differences there were among those services, both
7 timeline as well as within the services themselves.
8 We need to get out exactly what each of these services
9 is, where the copies are being made in these services,
10 and just put that out on the record.
11 I certainly agree that it's sort of
12 difficult. I mean I hear a number of the questions
13 you're asking, and they really are things that as a
14 lawyer you want to argue. It would be a lot easier
15 for me to argue that to you than to try to go through
16 Mr. Knittel here. And it's very awkward but on the
17 other hand you don't want to see opinions formed here
18 that ultimately become controlling.
19 All I want to do is go through the four
20 different types of services that he has described this
21 morning and in his testimony and get out the facts
22 about those services. I also wanted to know where he

1 thinks there are ephemeral copies being made. If he
2 doesn't know, he can say that.
3 MR. BERZ: And he has said that.
4 MR. GARRETT: Well, that's what I need to
5 establish.
6 MR. BERZ: He has said that.
7 MR. GARRETT: But, again, to me it makes
8 a big difference whether they're trying to bring this
9 entire service that has historically always been one
10 subject to negotiations back and forth between record
11 labels and whether they think that that whole new
12 service now is a result of an amendment to 112 is
13 encompassed within the 112 statute license. That's
14 obviously not our view of it. And if that's the
15 position of the Company, then I'd like to know that
16 now upfront.
17 The other thing, too, is while I agree Mr.
18 Talley is coming and he's the engineer and maybe he
19 understands this process in some respects better than
20 Mr. Knittel, Mr. Knittel is there talking about the
21 AEIs and the history of AEI. I assume Mr. Talley will
22 say, "Well, I'm most familiar with what DMX has done

1 here." And I don't want to be all of a sudden --

2 MR. BERZ: I think that that's fair, Mr.

3 Garrett. I agree with that, but I think that there

4 are, and we would admit, there are limitations on the

5 degree of technological knowledge that Mr. Knittel has

6 with respect to these systems. And we're willing to

7 go out there as far as we can and lay out what those

8 technologies are, but there's only so far that he can

9 go as a businessman, quite frankly, and an executive

10 officer of the Company as opposed to a technician.

11 That's all.

12 ARBITRATOR VON KANN: I think it's when

13 you ask questions like "And you're exempt for these

14 reasons" that the Panel -- you get our juices going

15 and when we start to try to figure it out -- and maybe

16 we need to sort of put that on hold for a while as

17 best we can and just understand what they're doing,

18 factually understand what the heck is going on, and

19 then I guess later we'll all have to argue about what

20 does it mean.

21 MR. GARRETT: I think that that's fair

22 enough. The only other reason I asked some of the

1 questions I did, Your Honor, is because he does state
2 in his testimony that he qualifies for the exemption.
3 I felt that I was entitled to explore in what respects
4 he thinks he's qualified for this exemption. If he
5 says he doesn't know that, then that's fine; I don't
6 need to pursue that anymore.
7 ARBITRATOR VON KANN: In some of these
8 testimony, the lawyer's hand may be more evident than
9 in other parts perhaps. That might be one.
10 BY MR. GARRETT:
11 Q The only other questions I want to ask
12 about the Pro Fusion process are, one, Mr. Knittel,
13 you would agree that this process also is a very
14 secure process that minimizes any possibility of
15 unauthorized reproductions, correct?
16 A Yes, I do.
17 Q And, again, the ultimate performance of
18 the sound recordings here, as done through the Pro
19 Fusion process, would also provide, in your view,
20 great promotional benefit to sound recording copyright
21 owners, correct?
22 A Enormous.

1 Q And you also do compensate copyright
2 owners of sound recordings that are used as part of
3 the Pro Fusion process, correct?
4 A Yes, we do.
5 Q And I take it also that it is your view
6 that the agreements that you currently have in place
7 with the different record labels give you all the
8 rights that you need to make copies of sound
9 recordings for the Pro Fusion process.
10 A Yes, I do.
11 Q Okay. Well, with that, I will move off of
12 Pro Fusion, if I could just make a copy of this. Do
13 you want to draw the next one, Mr. Knittel?
14 A I'm not a good drawer, but I'll take to
15 the board if you'd like.
16 Q Yes, why don't you do this one? This is
17 the DBS process. Tell us what you know about it.
18 A I'm going to actually, if I can -- if you
19 haven't copyrighted this, I'll just follow your
20 drawing.
21 MR. BERZ: I think that --
22 MR. GARRETT: You object? I'll be happy

1 to do it.

2 MR. BERZ: I think you should draw it, do

3 your own drawing.

4 MR. GARRETT: Okay.

5 MR. BERZ: We want the full Monty.

6 BY MR. GARRETT:

7 Q All right. The fourth model that you have

8 is the DBS, or broadcast model, correct, Mr. Knittel?

9 A Correct.

10 Q And, again, with this model, I take it we

11 start with CDs that you receive from the labels or

12 that you go out and purchase, correct?

13 A That's correct.

14 Q And, once again, what you do with those

15 CDs is you enter them all into that same digital

16 repository, correct?

17 A That's correct. You realize those are the

18 same CDs. It's not four different CDs of the same

19 artist. It's the same CD and the same digital

20 repository used for all the services.

21 Q Right. The digital repository serves Pro

22 Pac, Pro Fusion and the Pro CD and the DBS model,

1 correct?

2 A That's correct.

3 Q And that's been the case at least since

4 November of 1999.

5 A Correct.

6 Q All right. So once you have it in this

7 digital repository and you're going to use it for your

8 broadcast service, what's the next step?

9 A The songs are programmed through our

10 software to go to a playing device.

11 Q Okay.

12 MR. BERZ: Is the question what happens

13 next?

14 THE WITNESS: It's outlined in my

15 testimony in number 31.

16 BY MR. GARRETT:

17 Q All right. Just tell me how we can

18 visually represent there.

19 A The tracks are identified and moved to the

20 player, as I said. They're cached there and then from

21 there are sent out in real time to the customers by

22 going up to the satellite.

1 Q Goes up to the satellite.

2 A Right.

3 Q All right. Satellite. And then you've

4 got your customer here has got a little Earth station,

5 right?

6 A A little dish, that's right.

7 Q Dish. And it pulls it down from the dish,

8 and, again, that is then -- with a dish, you can play

9 it either on like a TV or a public address system or

10 a stereo, something else, right?

11 A No. It's pulled down from the dish to our

12 proprietary player, and the player then sends it out

13 through the speakers, much along the line as the other

14 players. It's put through speakers not through TVs.

15 Q I'm sorry?

16 A It's put through a speaker system not

17 through TVs.

18 Q Okay. All right. So it goes from the

19 digital repository, a copy is made onto the player,

20 correct?

21 A That's correct. It's cached.

22 ARBITRATOR VON KANN: Does that mean

1 essentially stored?

2 THE WITNESS: It's cached there until it's

3 played. It's usually played within the next few

4 minutes, so it's stored for a very short period of

5 time.

6 BY MR. GARRETT:

7 Q Okay. And then it is erased immediately

8 after being played?

9 A Within 24 hours. At the end of the day,

10 every day it's erased.

11 Q Okay. And then it goes up to the

12 satellite and comes back down on the real time,

13 correct?

14 A That's correct.

15 Q Okay. And, again, I take it with this

16 system you feel that it's a very secure system that

17 minimizes any risk of unauthorized copy, correct?

18 A That's correct.

19 Q And, again, with this particular system,

20 that the performances to be made of the sound

21 recordings are highly beneficially promotional to

22 sound recording copyright owners, correct?

1 A Yes, they are.

2 Q And, again, you are required to get

3 consent from the copyright owners of the sound

4 recording in order to make copies of the CDs, correct?

5 A That's not correct.

6 Q Okay. Why not?

7 A Because for broadcast, we are only storing

8 them in the cache for a very short period of time in

9 accordance with the copyright laws, so there's an

10 exemption.

11 Q Would you think that's where the ephemeral

12 copy is being made?

13 A For this service, yes.

14 Q And you think that's what might actually

15 be subject to the 112 statutory license?

16 A I'm not sure.

17 MR. BERZ: I think we're sort of back into

18 this legal conclusion issue.

19 MR. GARRETT: Okay. I won't ask any more

20 on that.

21 BY MR. GARRETT:

22 Q I meant to ask you a question about the

1 Pro Fusion then before we left it. We talked about
2 taking the disk and sending it to a customer. You
3 will update that hard drive -- strike that. We talked
4 about taking the hard drive, the whole Pro Fusion
5 unit, and shipping it off to the customer; do you
6 recall that?
7 A I recall the conversation in which we ship
8 the Pro Fusion machine to the location, much along the
9 line as we send Pro Pac and Pro Disk.
10 Q Right. Okay. But you will on occasion
11 update the songs that -- the tracks that are on that
12 disk via either the Internet or telephone lines,
13 correct?
14 A You said on that disk, so I'm --
15 Q The Pro Fusion unit.
16 A Yes, we will.
17 Q Okay. I don't think I have any further
18 questions on this. Can I just make a copy of this?
19 MR. BERZ: Before -- I have -- maybe the
20 Panel could give me some guidance. I have some
21 concern about the drawing in terms of its accuracy and
22 quite frankly the use of the word "copy" as between

1 the digital repository and the player, because I don't
2 necessarily think that that's a copy. The music is
3 digitally, if you will, communicated or transmitted.
4 And I'm prepared to go back on redirect and clarify
5 that, but I just want to make that point with the
6 Panel before we reduce the --
7 CHAIRMAN VAN LOON: I think that would be
8 the appropriate time to --
9 MR. BERZ: Thank you.
10 MR. GARRETT: Well, I'll just ask him the
11 question. Tell me exactly what happens between the
12 digital repository, from the time that a track goes
13 from the digital repository to the time it goes to the
14 cache there. What exactly is going on?
15 THE WITNESS: It just goes up to -- the
16 song goes up to the player. It's put in a queue,
17 plays within a few minutes, and then is purged at the
18 end of the night.
19 MR. GARRETT: Okay. Does that clarify it?
20 MR. BERZ: It does. Just my objection is
21 to the use of the word "copy" on the diagram.
22 MR. GARRETT: All right. I'll -- on the

1 record, we'll reflect what the Witness said, okay?

2 CHAIRMAN VAN LOON: So Mr. Garrett has

3 erased the word "copy." So now the copies that we

4 have, what's on the board, will not have the word

5 "copy" in it.

6 MR. GARRETT: But I will reserve the right

7 to put "copy" back up there for the closing arguments.

8 (Laughter.)

9 But we don't need it at this point. Okay.

10 May I erase this? I'll leave it up. It's probably

11 the best of the three.

12 CHAIRMAN VAN LOON: I think that there's

13 an audience out there demanding a copy.

14 Could we get a little bit of guidance, Mr.

15 Garrett, of how much longer you would project your

16 cross to run?

17 MR. GARRETT: Sure. I think within 15

18 minutes. Is that okay?

19 CHAIRMAN VAN LOON: Certainly.

20 ARBITRATOR VON KANN: Good ring to it.

21 MR. GARRETT: I don't function well after

22 this hour.

1 BY MR. GARRETT:

2 Q Let me ask you this -- you're welcome to

3 sit back there if you'd like or wherever you feel

4 comfortable.

5 CHAIRMAN VAN LOON: It only seems fair

6 that you should get a chair there also, although you

7 have to watch this mike as you go by.

8 BY MR. GARRETT:

9 Q Mr. Knittel, we've heard both the terms

10 "foreground" and "background music services" used in

11 this proceeding. Is there a difference between the

12 two?

13 A Not really.

14 ARBITRATOR VON KANN: You're not a

15 sufficient -- you don't have a market or height which

16 some witnesses would really rise to that, I suspect.

17 But I think you're right.

18 BY MR. GARRETT:

19 Q I'm handing out a document that I've

20 marked as 203 DPX.

21 (Whereupon, the above-referred

22 to document was marked as RIAA

1 Exhibit No. 203 DPX for
2 identification.)
3 Q Mr. Knittel, can you identify the document
4 that's marked as 203 DPX?
5 A It looks like a copy of our web page.
6 Q From the AEI web site?
7 A That's what it looks like.
8 Q This talks about -- it says about AEI
9 there; do you see that?
10 A Yes, I do.
11 Q And it refers to AEI was started back in
12 1971; is that correct?
13 A That's correct.
14 Q It says, "Back then consumers were hungry
15 for real music, not the bland orchestra renditions of
16 songs being played in business settings. So AEI Music
17 pioneered using the original songs by recording
18 artists thereby creating the foreground music
19 industry." Do you see that?
20 A Yes, I do.
21 Q What is that in reference to?
22 A AEI, when it was founded in 1971 by a very

1 creative and marketeer, Michael Malone, was the first
2 company in the United States to go out to the labels
3 directly and to secure rights to produce original
4 artists' music very different from then what was
5 referred to as Muzak or elevator music, which had no
6 original artist playing or performing as a part of
7 that music.
8 Q Is there any significant difference
9 between those two types of music?
10 A One, at AEI, certainly it is something
11 that the customers' used to hearing if it's the same
12 artist. I mean if it's Frank Sinatra or the Beatles
13 or Macey Gray, they would be used to hearing that.
14 It's very big promotional aspect for the record labels
15 versus a song by Macey Gray being played by an
16 orchestra in Germany in reverse which doesn't have
17 much attraction.
18 (Laughter.)
19 Q Is it fair to say that the elevator music
20 doesn't have as much attraction as the songs being
21 played by the actual artist?
22 A I think short of helping the

1 claustrophobic it doesn't do much at all.

2 Q Okay. I'd move the admission of 203 DPX.

3 MR. BERZ: No objection.

4 CHAIRMAN VAN LOON: Admitted.

5 (Whereupon, the above-referred

6 to document, previously marked

7 as RIAA Exhibit No. 203 DPX for

8 identification, was admitted

9 into evidence.)

10 (Whereupon, at 5:31 p.m., the proceedings

11 went into Closed Session.)

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Exhibit 2

LIBRARY OF CONGRESS

+ + + + +

COPYRIGHT OFFICE

+ + + + +

COPYRIGHT ARBITRATION ROYALTY PANEL

+ + + + +

In the matter of:	Docket No. 2000-9
Digital Performance Right in Sound Recording and Ephemeral Recording	CARP DTRA 1 & 2

ORIGINAL

CARP Hearing Room
LM-414
Library of Congress
Madison Building
101 Independence Ave, SE
Washington, D.C.

Thursday
September 6, 2001

The above-entitled matter came on for hearing, pursuant to notice, at 9:00 a.m.

BEFORE

THE HONORABLE ERIC E. VAN LOON Chairman
THE HONORABLE JEFFREY S. GULIN Arbitrator
THE HONORABLE CURTIS E. von KANN Arbitrator

1 the record at 11:08 a.m.)

2 CHAIRMAN VAN LOON: Ms. Aistars, will be

3 you be proceeding with this witness?

4 MS. AISTARS: I will.

5 CHAIRMAN VAN LOON: Great. Let us welcome

6 you to the proceeding. We appreciate your coming.

7 Whereupon,

8 DOUGLAS G. TALLEY

9 Was recalled as a witness by Counsel for the

10 broadcasters, and having been first duly sworn,

11 assumed the witness stand, was examined and testified

12 as follows:

13 DIRECT EXAMINATION

14 BY MS. AISTARS:

15 Q Good morning, Mr. Talley. Could you

16 please identify yourself and spell your name for the

17 record?

18 A My name is Douglas G. Talley, last name is

19 spelled T-A-L-L-E-Y.

20 Q And who is your current employer, Mr.

21 Talley?

22 A I'm employed by a company AEI/DMX Music.

1 Q And what is AEI/DMX Music?

2 A It's a company that distributes music to

3 businesses and residential subscribers worldwide. We

4 have over 120,000 businesses worldwide that receive

5 our music.

6 Q And has the company always been known as

7 AEI/DMX Music?

8 A No. Prior to May of this year, DMX was a

9 separate company in competition with another company

10 called AEI Music. And we merged with AEI Music in

11 May.

12 Q And what is your current position at the

13 company?

14 A I'm the chief technical officer.

15 Q And how long have you held that position?

16 A I've had that position since 1992.

17 Q Could you please explain for the panel

18 what responsibilities you have in this role?

19 A I'm in charge of research and development

20 and all of the technical operations worldwide.

21 Q Before you joined DMX did you have any

22 other experience related to background music services?

1 A Prior to joining DMX I was the founder and
2 chairman of a company called Digital Radio Labs which
3 had one of the first cable TV delivered digital music
4 services called Digital Plan. And for a time that
5 company was a competitor of a DMX's.
6 Q Could you describe your educational
7 background for the panel?
8 A I have a degree in electrical engineer. A
9 bachelor's degree from Penn State and a master's
10 degree from UCLA.
11 Q And, Mr. Talley, could you tell the panel
12 what the purpose of your testimony here today is?
13 A The purpose of my testimony here today is
14 to provide the panel with an overview of how DMX
15 programs and transmits its content to businesses. And
16 I also will focus on how DMX uses technology to
17 protect copyrighted content and how our technology
18 helps copyright owners promote the sales of their
19 sound recordings.
20 Q Now, Mr. Talley, today we'll be focusing
21 on your delivery of music to business establishments.
22 So to start off, could you please identify for the

1 panel the methods by which DMX distributes music to
2 business establishments?
3 A We have several delivery techniques that
4 we use. One method is by direct satellite broadcast,
5 transmissions from satellite to small satellite on
6 businesses.
7 We also distribute our content via cable
8 TV network.
9 We also have a product that plays CDs that
10 are physically mailed to the business on a monthly
11 basis. These are special encoded and formatted CDs.
12 And we also have a product that has a hard
13 drive in it that's resident at the business that has
14 music on it that plays back music from this hard
15 drive.
16 Q Now, I'd like to go through each of these
17 delivery models in turn, but just to start things out
18 for the panel, could you please explain to us how
19 music is programmed for delivery to business
20 establishments?
21 A Well, first of all, CDs are obtained by
22 our music programming specialists that are principally

1 located in Los Angeles. These CDs are previewed by
2 each one of the music programmers and each track is
3 categorized as to what style it belongs in, energy,
4 tempo, the mood it sets.
5 Q And what is the purpose of these
6 programming perimeters that you've identified for us?
7 A They're used to determine how often the
8 particular tracks should play, what style it should
9 play and what order it should come in the play list;
10 things like that.
11 Q Now, during the programming phase, are
12 there any copies made of the CDs?
13 A No.
14 Q Now, what happens after the programming
15 phase with the music that's been listened to by the
16 programmers?
17 A It's -- the CDs are physically sent to our
18 worldwide origination center in Denver, Colorado where
19 the first thing that happens is the content on the CD
20 that's been selected by the programmer is QCed. And
21 by that I mean we look for any pops or clicks, or
22 errors in the digital stream. If there are any, we

1 fix them.

2 We might also adjust the volume level that

3 the recording is made at so that every song we play

4 back in our programming plays back at the same volume

5 level.

6 We also might look at the ending of the

7 song. If it has a long, long fadeout, we might trim

8 that fadeout so that it butts up seamlessly next to

9 the next song that would be played.

10 Then we -- we take that QCed content and

11 compress it into several different compression formats

12 that we use, and store it on a master file server

13 that's the main depository for all the music that we

14 program.

15 Q Now, does the programming phase that

16 you've described for us vary from distribution model

17 to distribution model?

18 A No, it's essentially the same for each

19 model.

20 Q Okay. Now you mentioned the file server

21 that's at the worldwide operations center. Could you

22 describe for us the operation of that file server?

1 And perhaps lets start with the DBS cable model of
2 distribution.
3 A Okay. Can I have the first slide, please?
4 MS. AISTARS: For the panel's reference,
5 we'll be using the exhibit that are attached to Mr.
6 Talley's testimony as Exhibits A, B and C, and we've
7 made copies for your convenience.
8 CHAIRMAN VAN LOON: Thank you.
9 And I want to compliment both you and Ms.
10 Aistars. You've done a excellent job so far of
11 keeping your voice up, unlike some other witnesses.
12 We need for the recording purposes and to make sure
13 everybody in the room hears. Appreciate it very much.
14 THE WITNESS: Okay.
15 BY MS. AISTARS:
16 Q Okay. This is a little hard to read. But
17 before I get into the minutia of this chart, just let
18 me describe some more about the way the file server
19 operates, which is housed at the Denver origination
20 center and where all of our content originates from.
21 Basically there's a large depository of
22 songs in the compressed and encrypted format in this

1 file server. Right now we have over a million songs
2 in that file server.
3 Each music format that we program, whether
4 it be jazz, rock, classical has a separate computer
5 that draws content from this file server. Every day
6 we load up the client computers that have the jazz or
7 the rock format designations with new play lists. And
8 the play lists, as they proceed from song-to-song, the
9 client computers draw content from the main file
10 server and play out those songs on an individual
11 basis.
12 At anyone time the client computers might
13 hold up to 8 hours of music, and that music's placed
14 on a first in/first out basis.
15 Q And how frequently is it replaced?
16 A Approximately 8 hours.
17 And then in our broadcast model, which
18 this slide illustrates, the signal is transmitted, the
19 multiplex music which in this case is the feed to our
20 main satellite, Telstar 4, consists of 120 channels of
21 music. The encrypted content is transmitted to that
22 satellite and then it comes down to various places all

1 over the U.S.

2 The primary distribution path of this

3 encrypted music is to businesses with small one meter

4 satellite dishes and a satellite receiver. And they

5 can receive this stream music in their stores or

6 restaurant.

7 We also distribute it to cable TV

8 operators who re-inturn transmit it over their cable

9 TV networks to their subscribers. And it's received

10 on digital set top boxes where it's decrypted and

11 decompressed and turned back into analog music that

12 they can play through their speakers.

13 We also have a subcontractor called

14 Microspace located in Raleigh, North Carolina that

15 retransmits this music. Receives it from Telstar 4

16 and then retransmits it to another satellite, and it

17 in turn goes to other subscribers that have satellite

18 dishes pointed at a satellite called Galaxy 3R.

19 We are in Denver co-resident with the AT&T

20 technical operations that serves their cable networks.

21 And we give this same music to AT&T, and they in turn

22 redistribute to their cable TV subscribers throughout

1 the U.S.

2 Q Mr. Talley, are you familiar with the

3 terms "caching" and "buffering?"

4 A Yes.

5 Q And could you tell us how you understand

6 these terms?

7 A Well, neither of these terms have precise

8 engineering definitions. It's not like if you asked

9 me to define what a watt is or a volt, I could give

10 you precise scientific definition that every engineer

11 would understand and agree with. But I think for the

12 purposes of illustration, I could give you some

13 examples of what these two terms are.

14 For example, if I had a hose in my garden

15 with water coming out of it, and I had a bucket. And

16 I would fill that bucket up with water from that hose

17 then I'd instantly empty it, fill it up, fill it up

18 again; keep doing that repetitively. That's what's

19 commonly known as buffering.

20 If I filled that bucket up once, put it

21 down over here, came back to it in an hour, maybe

22 emptied it, fill it up again I could call that

1 caching.

2 To give you another example, which is more

3 relevant to these proceedings, every CD player has a

4 circuit in it called a DDA converter. And part of

5 that circuit is a thing called a buffer. And 44,000

6 times a second when that CD is playing, 32 bits of

7 data from the CD are taken off the CD and put into

8 that buffer, and then it's converted to analog left

9 and right signals.

10 So, for a typical CD for a 4 minute song,

11 you would make over 10 million buffer copies in the

12 process of playing that CD.

13 Q Your explanation --

14 CHAIRMAN VAN LOON: I'm sorry. Could you

15 just say that again? 10 million buffer copies?

16 THE WITNESS: For a 4 minute song --

17 CHAIRMAN VAN LOON: Yes.

18 THE WITNESS: 10 million buffer copies are

19 made.

20 CHAIRMAN VAN LOON: That's what I thought

21 you said.

22 BY MS. AISTARS:

1 Q Now, when we were discussing h ow the
2 music is transmitted from the Denver facility to the
3 ultimate end user, I believe you made reference to a
4 client server in the Denver facility that stored the
5 content for a period of 8 hours, I believe you said.
6 A Yes.
7 Q With respect to this DBS model
8 transmission and the cable model of transmission,
9 could you tell us whether there are any other cache
10 copies of the content made to facilitate the
11 transmission?
12 A In this process there's no caching that
13 goes on. There's many buffer copies made.
14 Q And could you explain where the buffer
15 copies might be made?
16 A Well, in the process of encrypting the
17 content, compressing it, transmitting it, receiving
18 it, decompressing it, decrypting it there's several
19 buffer copies made. Playing it back, converting it
20 into analog there's several stages of this process
21 where buffer copies are made.
22 Q Now, Mr. Talley, if we could move on to

1 some of the other models of transmission that you
2 mentioned for us. I believe you said that DMX also
3 delivers content to business establishments using a
4 hard disk based device called Axis. Could you
5 describe that device for the panel?
6 A Yes. On the next slide we show the
7 transmission path for the Axis product. What Axis is
8 is essentially a small unit the size of a set top box
9 with a large hard drive in it. When a customer orders
10 our music from us, if they want classical or jazz, we
11 send them a unit that has a hard drive preprogrammed
12 with a large amount of content that's consistent with
13 the style they ordered. A typical unit can hold up to
14 700 hours of music.
15 And then through a private network that's
16 connected between the Axis unit in the business and
17 our origination center in Denver, on a daily basis we
18 send that unit new music and new play lists for it to
19 play.
20 The unit, for all intents and purposes,
21 from the customer's standpoint works exactly like the
22 satellite receiver. They select a channel and the

1 music streams out. And it only plays music that we
2 tell it to play on command from the play list we send
3 it.
4 Q And is it possible for the customer in the
5 business establishment to get access to the content
6 stored in the Axis device?
7 A The customer has no control over the
8 individual songs. There's no user interface that
9 allows the user to identify a song and dig into the
10 directory that has those songs on there. It only play
11 back what we command it to play. And the user
12 experience, as I mentioned, is exactly the same as if
13 they had the satellite receiver.
14 Q Could you describe for the panel what, if
15 any, security measures are employed in the Axis device
16 to protect the content that's stored there or to
17 protect that content that's been transmitted to the
18 device?
19 A Well, first of all, everything that's sent
20 to it is sent in an encrypted format, proprietary
21 encryption format that we license from IBM. It's sent
22 in this encrypted format from our origination center

1 in Denver. It's stored on the hard drive in an
2 encrypted format. And that only when that song is
3 played back is it decrypted and turned back into an
4 analog song that would play out through the PA system
5 in the store.
6 We also maintain ownership, DMX maintains
7 ownership of all the equipment. So the store or
8 business never has title to the product or the content
9 on it.
10 There's also a timeout device built into
11 the player so that if -- if it's disconnected from our
12 network or it's removed from the store, or somebody
13 steals the unit, after a specified period of time the
14 unit deactivates and it won't play music.
15 The content is encoded at a lower data
16 rate than normally would be attractive to consumers.
17 Typically for people with MP3 players and things like
18 that, they record their music at 128 kilobits and it's
19 recorded in stero, and it's a popular consumer format.
20 All this music is recorded at half the data rate and
21 it's a slightly lower quality than would be attractive
22 to consumers. And it's also recorded in mono.

1 Q Now, Mr. Talley, the final model of
2 distribution that I believe you mentioned was the CD
3 based model. Could you describe that model for the
4 panel, please?
5 A Yes. This slide shows that model where
6 the content is encoded onto specially coded CDs at our
7 on premise operations in Seattle.
8 From Denver where we have our master file
9 server over a private network, the content is
10 distributed to Seattle and then specially coded CDs
11 are produced and sent to each customer on a monthly
12 basis.
13 Q And you mentioned these are specially
14 encoded CDs. Could you describe if there are any
15 other security measures that are taken with this CD
16 model of distribution?
17 A Again, the playback device and the CDs are
18 retained in ownership by DMX. There's also a built in
19 timer that won't played CDs after a certain specified
20 period of time.
21 The format used to compress an encrypt the
22 CDs is incompatible with consumer CD players. So if

1 anybody steals the CD and tries to play it on their
2 own player, it wouldn't play.
3 CHAIRMAN VAN LOON: Are those, the
4 transmissions going from Seattle out to the individual
5 businesses, is that again like in the mail?
6 THE WITNESS: Yes, that's mail.
7 CHAIRMAN VAN LOON: Yes.
8 BY MS. AISTARS:
9 Q Now, you've described for us the security
10 measures that are incorporated in each of the various
11 distribution models. Are there any measures that you
12 take at your own facilities to protect the content?
13 A Well, everything in our operations that is
14 used to store or distribute the music is on its own
15 private network, which is independent of the other
16 networks we use for email and connections to the
17 Internet and other business purposes.
18 It's also -- everything's also encrypted
19 using a triple DES algorithm, which is a standard high
20 security algorithm that's used by many financial
21 institutions for the transmission of secure data. And
22 it's not at present exportable to other countries.

1 Q Has your network ever been hacked?

2 A Since I've been at DMX, there's never been

3 a known instance of hacking of the music network.

4 Q And, Mr. Talley, what if any programming

5 measures are taken to prevent the copying of sound

6 recordings used in DMX's services to business

7 establishments?

8 A Well, first of all, all the programming

9 software that puts together the play list has checks

10 and balances in it that complies with the sound

11 recording performance compliment.

12 Second, a very high percentage of the

13 music is programmed so that it is cross-faded from

14 song-to-song. So there's not distinct beginnings or

15 endings of each song, and this also discourages people

16 from trying to tape or hack the music.

17 Q Now, I believe that you said that another

18 purpose of your testimony here today was to talk about

19 how your technology promotes CD sales. What does DMX

20 do, if anything, on a technology front to promote the

21 sales of CDs?

22 A Several things. First of all, the

1 equipment, the satellite receiver and the Axis unit
2 itself have readouts on them, liquid crystal displays
3 that every time a song plays it displays the artist,
4 the album and the title of the song.
5 Also through our cable TV distribution
6 whenever a song plays on screen on TV is that same
7 information; the artist, album and the title.
8 In our next generation systems that we're
9 developing now for interactive cable set tops, the
10 album art will also be on screen, and also ways for
11 the subscriber to point and click and order the album
12 on line via the cable return path.
13 We also have a website that shows for any
14 channel music that we broadcast the last 15 songs that
15 are played and the time that they're played. And so
16 a subscriber could go to our website and get
17 information on that song.
18 And we also have a large number of
19 customer service people located in Los Angeles and
20 Seattle that routinely take calls from subscribers,
21 and they're trained to answer questions about the
22 music and help people get information on how to buy

1 it.

2 Q And why do you employ all of these

3 technologies to provide this information?

4 A Well, it's part of the appeal of the

5 service. It's a benefit that we sell. And it's

6 valued highly by our subscribers.

7 Q Now, the next area that I'd like to turn

8 to is the reasons for the use of cache and buffering

9 copies in your processes. Could you tell us what, if

10 any, effect it would have on your business if you were

11 required to account for the number of buffer and cache

12 copies that you make in any given transmission?

13 A Well, in my opinion, it's really not

14 practical. There are so many events that effect the

15 number of copies that get made. It wold be extremely

16 difficult or impossible to keep track of all these

17 things. Every time a CD is played buffer copies are

18 produced. Equipment fails, a new piece of equipment

19 has to go on line. We may have to take backup copies

20 and replicate them. It's just not practical in the

21 process of producing the music and transmitting it to

22 keep track of all these ephemeral copies.

1 Q And would it be practical to count the
2 buffer or cache copies made in any one particular
3 transaction?
4 A No, because there are so many steps that
5 we go through. There's encryption, decryption,
6 encoding, decoding, decompressing, conversion of the
7 signal from analog -- from digital to analog. There's
8 just too many processes to keep track of.
9 There's also quite a bit of hardware and
10 software that we use that we don't control, we don't
11 design it. We buy it off the shelf. And there's
12 ephemeral copies being made in this software and
13 hardware. And we would have no way to determine how
14 many of these copies are made in this hardware and
15 software.
16 Q And when you were providing some examples
17 of what you mean by cache and buffer copies for the
18 panel, you were fairly specific in identifying, for
19 instance, in the CD playback an example of how many
20 ephemeral copies might be made. Is this something
21 that's standard or is this something that might vary
22 from device-to-device or technology-to-technology?

1 A It can vary from device-to-device. It can
2 vary from how the equipment is used by the operators.
3 We may have an editor that may have to
4 edit a song several times before it's right for air
5 play.
6 I couldn't tell you how many times a
7 particular song would be played back on a CD player or
8 not played back.
9 Q And why does DMX employ technologies that
10 require the making of buffer and cache copies?
11 A We really have no option. We're dealing
12 with digital media today. This is incidental to the
13 process of producing quality content and delivering it
14 to our customers.
15 Q And what if any benefits does the use of
16 this technology which results in the making of buffer
17 or cache copies afford DMX?
18 A Well, there's some value to us in terms of
19 efficiency. But there's also value to the copyright
20 owner from the standpoint that we can encrypt the
21 content to a much higher degree and protect it to a
22 much higher degree than we could if it was in an

1 analog form. And also, we can guarantee that the
2 quality of the content that we deliver is much higher
3 than we normally would.
4 Q Thank you, Mr. Talley.
5 MS. AISTARS: That's all I have.
6 CHAIRMAN VAN LOON: Mr. Garrett?
7 CROSS EXAMINATION
8 BY MR. GARRETT:
9 Q Mr. Talley, I'm Bob Garrett. I represent
10 the Recording Industry Association of America.
11 Good morning.
12 A Good morning.
13 Q In the last series of questions you talked
14 about value of the -- of buffer and cache copies in
15 terms of the efficiencies that it offers you. What
16 did you mean by that?
17 A Well, in terms of being able to process
18 the content and edit it, and QC it, the digital
19 technologies that we have today versus what we had
20 several years ago with analog allows us to get higher
21 throughput, get the work done faster.
22 Q Okay. Any other kinds of efficiencies?

1 A In terms of distribution we can distribute
2 the content without using as much band width as we
3 used to use for analog.
4 Q And that brings down your band width cost?
5 A There's some improvement there.
6 Q You mentioned at the outset of your
7 testimony the merger of AEI and DMX. Do you recall
8 that?
9 A Yes.
10 Q I take it you're the chief technical
11 officer of the merged company, is that correct?
12 A Yes.
13 Q Are the two companies that were merged,
14 AEI and DMX, run separately or are their operations
15 consolidated?
16 A Well, we're starting to consolidate the
17 efforts. The merger was just completed in May, so
18 we're still going through a process of integration.
19 Q Yes, but you do have responsibility for
20 both sets of operations, correct?
21 A Today I do.
22 Q Okay. You referred earlier to the fact

1 that you had 120,000 business customers, correct?
2 A Yes.
3 Q Is that 120,000 business customers for the
4 merged operation?
5 A Yes.
6 Q Okay. Now, could you tell me of those
7 120,000 customers how many operate under your
8 broadcast model?
9 A I couldn't be specific. I would say the
10 majority of them do.
11 Q And how about the Axis technology?
12 A It's new technology, a very small number.
13 Q Something around 5 percent?
14 A Even less than that.
15 Q Under one percent?
16 A Today there's probably a couple of
17 thousand users.
18 Q And on the on premises model would be the
19 remainder, so something less than a majority?
20 A Yes.
21 Q And your on premises model, yesterday Mr.
22 Knittel testified and talked about certain on premises

1 models that AEI had with Pro Pac and Pro CD. Are you
2 familiar with those?
3 A Uh-huh.
4 Q Say yes.
5 A Yes.
6 Q And the Pro Pac and Pro CD is what you're
7 describing here in your on premises model? Let me
8 rephrase that.
9 When you described the on premises model
10 were you including within that what has been referred
11 to as Pro Pac and Pro CD?
12 A What I was describing in this diagram was
13 what DMX has been doing. This doesn't cover what AEI
14 has been doing.
15 Q All right. Let's focus then for a moment
16 on the on premises model. Is there any difference in
17 the model that you described on the one hand and the
18 Pro Pac and the Pro CD models on the other hand?
19 A No, they're technically -- they're
20 similar.
21 Q Okay. And are you familiar with the Pro
22 Fusion method of providing -- of servicing your

1 customers, correct?

2 A Yes.

3 Q And when you described the Axis technology

4 here, is there any difference between the Axis

5 technology on the one hand and the Pro Fusion

6 technology on the other hand?

7 A The only difference is that the Pro Fusion

8 technology presently uses CD ROMs to update it on a

9 monthly basis. The Axis equipment connects

10 electronically to the server in Denver and is updated

11 by this electronic path.

12 Q I see. And when Pro Fusion uses CD ROMs,

13 I take it that CD ROMs are mailed?

14 A Yes.

15 Q All right. And lastly, on the broadcast

16 model, is there any difference between the DMX

17 broadcast on the one hand and the AEI broadcast model

18 on the other hand?

19 A The only difference is the number of

20 channels that are transmitted. Also the DMX broadcast

21 model has a lot more music transmitted than the AEI

22 model. And the AEI equipment also broadcasts what we

1 call in store messaging; announcements that the store
2 may want to insert between the music. The DMX
3 equipment doesn't do that.
4 Q I take it for all of the models that
5 you've described here, that initially the CDs are
6 placed into a digital depository that is located in
7 Denver, is that right?
8 A Yes.
9 Q Let me go back to your broadcast model
10 again. And if I could just ask you to look at the
11 chart that you prepared for that broadcast model. Do
12 you have that before you?
13 A Yes.
14 Q Just incidentally, whose chart do you
15 think is better, yours or mine?
16 A I haven't seen yours.
17 Q That's okay. They put this in just to
18 embarrass me, you know that.
19 All right. Well, just focusing on the
20 broadcast -- oh, one other thing, too. You talked in
21 terms of buffer copies and cache copies, do you recall
22 that?

1 A Yes.

2 Q At one point in your oral testimony you

3 also referred to ephemeral copies, do you recall that?

4 A Yes.

5 Q Is your reference to ephemeral copies

6 meant to meant to include buffer and cache copies?

7 A Yes.

8 Q Does it include anything other than buffer

9 and cache copies?

10 A No.

11 Q Okay. So if I use the term ephemeral

12 copies, we could use that as a term synonymous with

13 both buffer and cache copies, correct?

14 A Yes.

15 Q Okay. All right. Turning to your U.S.

16 broadcast model here, can you tell me at what stages

17 in the process here ephemeral copies are made?

18 A Every stage from the transmission to the

19 reception. There are many, many, many places where

20 this happens, where ephemeral copies are made.

21 Q Okay. Well, let's just if we could go

22 through the whole process.

1 A Okay.

2 Q And identify each of the stages here. I

3 gather in the first step is that the physical CDs are

4 copied into the digital repository, correct?

5 A Yes.

6 Q Okay. Do you consider those copies to be

7 ephemeral copies?

8 A Yes.

9 Q And those copies are periodically purged

10 from the digital repository, is that right?

11 A Yes.

12 Q Are any copies maintained there on a

13 permanent basis?

14 A They could be. The purge -- how often we

15 purge it is a variable.

16 Q What does it vary at?

17 A How often we play the music, whether it's

18 needed on a regular basis or it's not needed.

19 Q There is no set policy that everything

20 within the digital repository must be purged within a

21 specified period of time?

22 A No.

1 Q Okay. Now, when copies are placed in the
2 digital repository, is there more than one copy made
3 of each CD?
4 A No.
5 Q And you would consider the copying of a
6 single CD into that digital repository to be either a
7 buffered copy or a cache copy?
8 A Well, yes. Just let me clarify my last
9 answer.
10 In the process of storing a copy, an
11 ephemeral copy into the master server, there's several
12 processes that we go through first to get it there.
13 There's QCing, there's a slight amount of editing that
14 might be done, there's volume leveling, there's
15 encryption, compression. Throughout all these
16 processes before it even gets on the server, there's
17 ephemeral copies made.
18 Q And those copies are made at your
19 operation center there in Denver?
20 A Yes.
21 Q Once all of that process is gone through
22 and you're actually putting the copy into the digital

1 repository, is the copy that goes into the digital
2 repository considered to be either a cache copy or a
3 buffer copy?
4 A Yes.
5 Q Which one is it or is it both?
6 A I would call it a cached copy.
7 Q And why would you call it a cached copy?
8 A Because it's retained for unspecified
9 period of time.
10 Q All right. Sticking with your broadcast
11 model, we've got the CD in the digital repository.
12 Where does it go next?
13 A Well, we have what we call client playback
14 computers that on command from the individual play
15 lists that are loaded into these client computers,
16 they draw music from the master depository and decode
17 it and play it out of those client computers.
18 Q Physically where are these client playback
19 computers located?
20 A They're in the same room as the master
21 file server in Denver.
22 Q And how many -- in Denver, right?

1 A Yes.

2 Q And how many such computers are there?

3 A Approximately 120.

4 Q Is it like one computer for each channel

5 of programming that goes up to the satellite, is that

6 right?

7 A Yes.

8 Q And so you'd have one computer that might

9 be devoted to a jazz channel and another one that

10 might be devoted to a classical channel, is that

11 right?

12 A Yes.

13 Q Now do you consider the copies that reside

14 in that playback computer to be either cache or buffer

15 copies?

16 A Well, in normal operation everything in

17 that computer is replaced on a first in/first out

18 basis on a regular time interval. So under normal

19 circumstances I would call that caching.

20 If there's a failure of the main server or

21 if the main server goes down, what we do is we start

22 to loop the music from the client computer. And in

1 that mode then it operates like a cache. It keeps
2 playing back the last 8 hours of music until we fix
3 the problem with the main server.
4 Q Okay. What's the next step then after the
5 -- you've got the different tracks in the client
6 playback computer. Are they then transmitted from
7 that computer up to satellite?
8 A Right, but before that happens those
9 tracks are encrypted, they're compressed again into
10 the compression format used on the satellite system,
11 which may be different than the -- and in many cases
12 is different than the compression format we use to
13 store it on the server.
14 They're also multiplexed together so that
15 all 120 channels is transmitted in a blanket format.
16 And in all those processes there are ephemeral copies
17 made.
18 Q Okay. After ephemeral copies are made,
19 then they are actually transmitted up to the
20 satellite, correct?
21 A Yes.
22 Q And that's the Telstar 4 satellite that

1 you described?

2 A Yes.

3 Q And then your customers -- one way your

4 customers can receive the programming is that they

5 take their earth station or their dish and simply take

6 it down from the Telstar 4 satellite, correct?

7 A Yes.

8 Q Okay. Now, between the time that it's up

9 there on satellite and it goes down to that receiving

10 dish are any ephemeral copies made?

11 A No.

12 Q Okay. All right. I gather another way

13 your customers can receive it, is rather than directly

14 from the Telstar 4 satellite, they would get it from

15 Microspace, is that right?

16 A Yes.

17 Q And Microspace would take it down from the

18 Telstar 4 satellite and put it back up on the Galaxy

19 3R satellite, correct?

20 A Yes.

21 Q And in the process of taking it down from

22 the -- strike that.

1 In the process of Microspace taking the
2 programming down from the Telstar 4 satellite, are any
3 copies, ephemeral copies made?
4 A When Microspace receives the signal, they
5 receive it demultiplexed, decrypted, turn it back into
6 an analog signal and then retransmit it. So that
7 whole process of receiving it creates ephemeral
8 copies?
9 Q Okay. And then once they create those
10 ephemeral copies, they retransmit them back up to the
11 Galaxy 3R satellite, correct?
12 A Yes.
13 Q Are there any ephemeral copies created in
14 the course of that transmission?
15 A Not to my knowledge.
16 Q All right. And then again your customers
17 could take it down from the Galaxy 3R satellite,
18 correct?
19 A Yes.
20 Q And in the process of taking it down from
21 that Galaxy 3R satellite are any copies, ephemeral
22 copies made?

1 A The same thing would happen again. In the
2 reception of the signal and decoding of the signal
3 there would be ephemeral copies made.
4 Q Okay. And they take the -- regardless of
5 whether your customer got it from the Telstar 4
6 satellite or the Galaxy 3R satellite, after those
7 ephemeral copies were made, what would happen to the
8 programming next?
9 A It would be played back through the
10 speakers in the store or business.
11 Q Okay. Any ephemeral copies that would be
12 created in that process?
13 A No.
14 Q Now, one other method of distribution you
15 discussed earlier involves cable. Do you recall that?
16 A Yes.
17 Q And as I look on your chart here, it
18 appears that you transmit your programming to the HITS
19 affiliate, correct?
20 A Yes.
21 Q Exactly what is the HITS affiliate?
22 A Well, HITS is an acronym that stands for

1 Head In the Sky, and it's a technical broadcast
2 facility that AT&T has located at the same facility
3 that our studios are at in Denver. And what they do is
4 receive content from many different sources; video and
5 audio providers. And then they reencrypt it, they
6 remultiplex it, they recompress it into the format
7 that's compatible with all the AT&T cable system and
8 set top boxes. And then they retransmit it to their
9 subscribers in that format.
10 Q All right. This is the digital service
11 that the cable operators offer, correct?
12 A If you have AT&T digital cable, you have
13 this HITS service.
14 Q Okay. Now your transmission from Denver
15 to HITS is done via microwave?
16 A No. Actually, it's done by a wire.
17 Q Fiber optics or cable?
18 A It's coax cable.
19 Q Coax cable. Okay.
20 In the process of taking the programming
21 there from your operations in Denver and getting it
22 over to HITS, are any ephemeral copies made?

1 A No.

2 Q Okay. When HITS receives that programming

3 and transmits it off to various cable operators, are

4 any ephemeral copies made there?

5 A Yes.

6 Q And are these cache copies or buffer

7 copies, or both?

8 A I would call them buffer copies.

9 Q Okay. Once the cable operators receive

10 them, they will then further transmit them to your

11 business customers, correct?

12 A Yes.

13 Q Are there any ephemeral copies made in

14 that process there?

15 A Yes.

16 Q And, again, are these cache or buffer

17 copies?

18 A I would call them buffer copies.

19 Q Okay. Why would you call them buffer

20 copies?

21 A Because there are several steps where the

22 signal is received, decoded, decrypted, converted from

1 digital to analog.

2 Q Okay. I guess as you said in your

3 broadcast model there are a lot of different ephemeral

4 copies that are made, correct?

5 A Yes.

6 Q And if you can't make those ephemeral

7 copies, you can't use this broadcast model, can you?

8 A That's correct.

9 Q Okay. Just turn for a second to the on

10 premises model. Are there ephemeral copies that are

11 created in the course of providing your services via

12 the on premises model?

13 A Yes.

14 Q All right. Can you tell us again where

15 would the first set of ephemeral copies be made?

16 A Are you referring to the Axis slide or --

17 Q No, I'm referring to the on premise model.

18 A On premises. Okay.

19 Q Which would also be like Pro Pac or Pro

20 CD. The third slide.

21 MS. AISTARS: Actually, I think he

22 testified that this represents DMX's activities and

1 not Pro Pac and Pro CD.

2 MR. GARRETT: Right. That reminds me.

3 BY MR. GARRETT:

4 Q Let's go back to the broadcast model that

5 we just discussed here. You talked about the

6 different steps or the different stages at which

7 ephemeral copies would be made. Would there be any

8 difference if we focused not just on the DMX broadcast

9 model, but on the AEI broadcast model?

10 A There are some AEI broadcast operations

11 that are done with analog technology. DMX uses all

12 digital.

13 Q Where does AEI use analog?

14 MS. AISTARS: If you know.

15 THE WITNESS: There are some analog

16 satellite transmissions made through the specific AEI

17 satellite that are used. And there's some reception

18 with analog equipment.

19 BY MR. GARRETT:

20 Q Which satellite does AEI use. It's not

21 Telstar 4, I take it?

22 A AEI uses several satellites, but the main

1 one is Galaxy 3R.

2 Q I take it for the AEI broadcast model to

3 operate, it's necessary to make ephemeral copies at

4 various stages, correct?

5 A Yes.

6 Q And without making those ephemeral copies

7 they would not be able to operate using their

8 broadcast model, correct?

9 A Correct.

10 Q Now, does AEI in its broadcast model ever

11 make digital transmissions?

12 A Yes.

13 Q And now let's go over to the on premises

14 model, which was your third chart.

15 And just focusing on the DMX on premises

16 model described in your chart here, can you tell me at

17 what stages the ephemeral copies are made?

18 A Well, starting with the origination

19 operations in Denver where the file server has the

20 music stored, and I've previously described how that

21 music gets on that file server and the ephemeral

22 copies that are made in the process of doing that.

1 Then the output of that server delivers
2 music to Seattle. There are ephemeral copies made in
3 that process. And in Seattle that music is burned
4 onto CD ROMS. And there ephemeral copies made in that
5 process.
6 And when it's transmitted or actually via
7 the mail to the subscriber and they play the music
8 back, there are several ephemeral copies made in the
9 process of playing it back.
10 CHAIRMAN VAN LOON: Can I just clarify on
11 that. You just said and then are several made in the
12 subscriber's playback.
13 THE WITNESS: Yes.
14 CHAIRMAN VAN LOON: A little earlier you
15 talked about, I forget it was 10 million in a form in
16 a song.
17 THE WITNESS: Right.
18 CHAIRMAN VAN LOON: When you said several
19 now, do you really mean a lot like millions or are
20 there significantly fewer of ephemeral copies in the
21 subscriber playback?
22 THE WITNESS: I mean millions.

1 CHAIRMAN VAN LOON: I see.

2 BY MR. GARRETT:

3 Q I just want to make sure I understand.

4 When I put a CD in my computer to play, am I making

5 ephemeral copies?

6 A Yes.

7 Q Okay.

8 CHAIRMAN VAN LOON: Not if you don't play

9 it.

10 MR. GARRETT: If you don't play it, right.

11 Turn it on.

12 THE WITNESS: If you put a CD into a

13 normal CD player, you're making ephemeral copies every

14 time it takes 32 bits of data from that CD and

15 converts it from an digital signal to an analog signal

16 and it's buffered for a short period of time -- it's

17 a short period of time. It's maybe 23 microseconds.

18 But during that time you've created a buffer copy of

19 a portion of the content.

20 CHAIRMAN VAN LOON: And each time -- and

21 every 4 minute song --

22 THE WITNESS: Every 4 minute song --

1 CHAIRMAN VAN LOON: -- whether it's on
2 your CD player or --
3 THE WITNESS: -- represents about 10
4 million ephemerals.
5 ARBITRATOR VON KANN: Is this true, by the
6 way, ephemerals or ephemeral copies, is this a
7 lawyer's term or an engineer's term?
8 THE WITNESS: It's not my term. It's not
9 an engineering term.
10 ARBITRATOR VON KANN: Okay. So you're
11 familiar with it in the context of the copyright law
12 and the lawyers. If we had an engineer convention,
13 they wouldn't find the need to use the word ephemeral
14 in talking about how their services work? They'd talk
15 about buffer copies and cache copies, but they
16 probably wouldn't talk about ephemerals?
17 THE WITNESS: It's not a highly used term
18 in engineering parlors.
19 ARBITRATOR VON KANN: Okay.
20 BY MR. GARRETT:
21 Q Let's go back to your on premises model
22 here. We've got the CDs in the file server there in

1 Denver. And I gather from Denver they end up in
2 Seattle, right?
3 A Yes.
4 Q Okay. Tell me exactly what happens
5 between Denver and Seattle with all those different
6 tracks that are in the file server?
7 A They're transmitted on a private network
8 to Denver -- or to Seattle.
9 Q Transmitted digitally?
10 A Yes.
11 Q And you say in the course of that
12 transmission there are buffered or cache copies that
13 are made?
14 A Yes.
15 Q Is it buffered copies, cache copies or
16 both?
17 A Buffer copies.
18 Q Okay. And why do you consider them to be
19 buffer copies?
20 A Because they replenished on a regular
21 basis. And usually it's only part of the content
22 that's copied.

1 Q Why is that?

2 A Just the way it works. The data is

3 packetized and sent in packets, and it's decoded and

4 replicated.

5 Now, when it gets to Seattle, the entire

6 song is reassembled and put back together. So at that

7 point I guess you could call that a cache copy.

8 CHAIRMAN VAN LOON: The private network

9 that goes between Denver and Seattle --

10 THE WITNESS: Yes.

11 CHAIRMAN VAN LOON: That's a hard wire as

12 opposed to being beamed, or how does that --

13 THE WITNESS: It's a virtual private

14 network that uses the Internet to transmit part of the

15 content on.

16 CHAIRMAN VAN LOON: I see.

17 BY MR. GARRETT:

18 Q And in Seattle the different tracks that

19 you received here from Denver are copied onto a CD ROM

20 you said?

21 A Yes, individual CD ROMs that are produced

22 for each business subscribing to the service.

1 Q And those CD ROMs are then mailed to the
2 different subscribers, correct?
3 A Yes.
4 Q All right. Now, on your chart here you
5 have different arrows from Seattle to the business
6 establishments that are identified both as encrypted
7 compressed physical disk and transmitted. Do you see
8 that?
9 A Yes.
10 Q What does that refer to?
11 A The disks are sent via the U.S. Mail to
12 the customer. And the disks are encrypted and
13 compressed. The format of the content on the disk is
14 encrypted and compressed.
15 Q Where is it encrypted or compressed?
16 A That happens in Seattle prior to the
17 distribution and the production of the CD ROM.
18 Q All right. But all the distribution
19 between Seattle and the business establishment is done
20 really through the mail, correct?
21 A Yes.
22 Q Okay. Can you tell me -- let's just focus

1 for a moment on the AEI on premises model, the Pro Pac
2 or Pro CD. All right. Is there any difference
3 between that model and the model you've described here
4 in terms of where the ephemeral copies or the buffer
5 or cache copies are made?
6 A It's essentially the same.
7 Q Okay. And let me ask you next about your
8 Axis technology, the second chart that you have here.
9 Again, we start with the file server,
10 correct?
11 A Yes.
12 Q And then from the file server there in
13 Denver, what happens to the different tracks next?
14 A Well, there's a separate file server that
15 we use to just house the music that needs to be
16 transmitted or sent to the individual Axis users. And
17 from the play lists for each customer we know what
18 music is already resident on the hard drive and what's
19 not on the hard drive. And everyday there's a
20 schedule of songs and new play lists that need to be
21 sent to various customers. Those songs and those play
22 lists are loaded into this independent file server.

1 And when the Axis unit at the business calls up for
2 its daily download, it gets those particular songs and
3 those particular play lists.
4 Q All right. So in the Axis technology
5 we're dealing with two independent file servers, is
6 that right?
7 A At our broadcast study, that's correct.
8 Q So the different tracks will start out in
9 your main file server and then be transferred to this
10 independent file server, correct?
11 A Yes.
12 Q All right. And in that process of
13 transferring from the main file server to the
14 independent file server are buffer or cache copies
15 made?
16 A Yes.
17 Q Are they buffer copies or are they cache
18 copies?
19 A They're cache copies and buffer copies.
20 Q They're both?
21 A Yes.
22 Q Okay. And then from the independent file

1 server you will send different tracks to the -- is it
2 the hard drives located at the different business
3 establishments, customers, correct?
4 A Yes.
5 Q And you'll do that via the Internet or via
6 telephone lines, correct?
7 A Yes.
8 Q Okay. And are there buffer or cache
9 copies that are made in that process?
10 A Yes.
11 Q Are they buffer or are they cache?
12 A They're both.
13 Q Okay. Now, let me make certain I
14 understand. In the process we were just describing
15 here, you are updating the play list that reside on
16 the hard drives at your business establishment
17 customers, correct?
18 A Yes.
19 Q Am I correct that initially you take that
20 hard drive unit is physically mailed or sent to the
21 business establishment customer?
22 A We have installers that install it in the

1 store.

2 Q Okay. But that hard drive that is

3 ultimately installed in the store is originally loaded

4 in Denver, correct?

5 A That's correct. Denver or Seattle.

6 Q Okay. And then what you do is you will

7 update that on a periodic basis?

8 A Yes.

9 Q Okay. Are the different tracks that are

10 loaded onto the Axis player there in Denver or

11 Seattle, are those -- are ephemeral copies made in

12 that process?

13 A Yes.

14 Q And, again, are they buffer or are they

15 cache copies?

16 A They're cache copies.

17 Q Okay. Is there a policy, at least for the

18 DMX operations, as to when the different cache or

19 buffered copies must actually be purged from the

20 system?

21 A It's variable. It depends on how often we

22 play certain song. If it's a song that's been encoded

1 and we don't use it any longer, it doesn't show up in
2 any play lists, then it's purged.
3 Q Okay.
4 MR. GARRETT: I have no further questions.
5 Thank you, Mr. Talley.
6 MS. AISTARS: We have a few on redirect,
7 but if I could take a minute.
8 CHAIRMAN VAN LOON: Please.
9 (Whereupon, at 12:16 p.m. off the record
10 until 12:27 p.m.)
11 CHAIRMAN VAN LOON: Ms. Aistars?
12 MS. AISTARS: I just have one or two
13 questions.
14 REDIRECT EXAMINATION
15 BY MS. AISTARS
16 Q Mr. Talley, do you recall that you used
17 the term ephemeral per Mr. Garrett's suggestion
18 earlier in your testimony?
19 A Yes.
20 Q And when you used that term as meaning
21 buffer or cache copies, you didn't use it in the legal
22 sense that's ascribed to that term under the Digital

1 Millennium Copyright Act, did you?

2 A No. I'm not a lawyer and I've never read

3 the Digital Millennium Copyright Act.

4 ARBITRATOR VON KANN: It's great stuff.

5 THE WITNESS: I was not using that in any

6 legal context at all.

7 BY MS. AISTARS

8 Q Thank you.

9 MS. AISTARS: That's all.

10 CHAIRMAN VAN LOON: Either of you have any

11 questions?

12 ARBITRATOR GULIN: Well, I guess I would

13 ask, for example, on page 12 when you speak of number

14 of ephemeral copies made in aid of licensed or exempt

15 transmissions, when you were speaking of number of

16 ephemeral copies made regarding exempt transmissions,

17 there also you were not using it in a legal sense?

18 The term ephemeral?

19 THE WITNESS: No.

20 ARBITRATOR GULIN: Okay. Thank you.

21 CHAIRMAN VAN LOON: I wanted to ask you,

22 we had your colleague Barry Knittel here yesterday

1 from the AEI side and more business person and not a
2 technical person. And we asked him some of the same
3 questions that you were asked today, and he gave good
4 answers to the best of his ability, but he's not the
5 chief technical officer and didn't know what you knew.
6 THE WITNESS: Yes.
7 CHAIRMAN VAN LOON: In a somewhat parallel
8 vein, I know you're not as familiar with the business
9 side as he is. I did want to inquire whether you are
10 aware of part of his testimony was that the AEI/DMX
11 proposal for this proceeding is that there be a
12 minimum fee set and a suggested dollar amount for
13 that. Are you aware of that aspect?
14 THE WITNESS: Not at all. I haven't had
15 any discussions with Mr. Knittel about that.
16 CHAIRMAN VAN LOON: I see. Okay. Well
17 then, my other question would be a waste of time.
18 Thank you very much for coming for these
19 great diagrams. And you made it understandable to
20 nonengineers. So thank you very much.
21 THE WITNESS: Thank you.
22 MR. STEINTHAL: I hope that wasn't

Proof of Delivery

I hereby certify that on Monday, June 06, 2022, I provided a true and correct copy of the Declaration of Paul Fakler to the following:

Music Reports, Inc., represented by William Colitre, served via US Mail

DMX, Inc., represented by Gary R Greenstein, served via E-Service at ggreenstein@wsgr.com

Clear Channel Communications, Inc., represented by Bruce Joseph, served via US Mail

Muzak LLC, represented by Gary R Greenstein, served via E-Service at ggreenstein@wsgr.com

SoundExchange, Inc., represented by Steven R. Englund, served via E-Service at senglund@jenner.com

Pandora Media, Inc., represented by Milton E. Olin, Jr., served via US Mail

Sirius XM Radio, Inc., represented by Todd Larson, served via US Mail

Signed: /s/ Paul Fakler