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IN THE MATTER OF:

DETERMINATION OF RATES

Docket No.

AND TERMS FOR MAKING AND

21-CRB-0001-PR

DISTRIBUTING PHONORECORDS

(PHONORECORDS IV)

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10 REMOTE HEARING

11

12 BEFORE : THE HONORABLE DAVID P. SHAW

13 THE HONORABLE STEVE RUWE

14 THE HONORABLE DAVID R. STRICKLER

15 Copyright Royalty Judges

16

17 Library of Congress

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19 101 Independence Avenue, S.E.

20 Washington, D.C.

21

22 Thursday, August 4, 2022

23 3:30 p.m. Eastern Time

24 Reported by:

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P R O C E E D I N G S

(3:30 p.m.)

CHIEF JUDGE SHAW: Good afternoon.

This is a conference in the matter of determination of rates and terms for making and distributing phonorecords, Phonorecords IV, Docket No. 21-CRB-0001-PR.

We have here Judge Strickler and Judge Ruwe and I am Judge Shaw. We're on the public record. I do not plan to raise restricted information. And if you must do so, we will need a warning so we can go in confidential session.

Also, this conference is being reported so there should be no recordings of this conference and the reporter's transcript is the official record.

As you know, before my arrival here at the CRB last month, a decision was already made not to hold our evidentiary hearing in July, and at least some of the participants have proposed that we hold the hearing in September and end before mid-October.

The Judges have determined that the hearing should, in fact, begin in September,

1 specifically right after the September 5th
2 federal holiday.

3 The services and copyright owners have
4 also indicated that they would prepare a
5 proposed order that would include a hearing
6 schedule and other proposals relating to
7 hearing procedures that the parties could agree
8 to. And I think that they should prepare such
9 an order and should file it no later than
10 August the 15th.

11 While preparing that proposal the
12 parties should note that we will not sit for
13 five days in a row each week. And it appears
14 that Fridays would, in fact, be a good day for
15 the Judges to attend to other matters.

16 Some parties would like the Judges to
17 sit in hearing every day each week, but I don't
18 think that's practicable given the fact that
19 the hearing will go on at least a month and
20 maybe longer.

21 On a related note, a question has been
22 raised as to whether 100 or 130 hours should be
23 allocated in total for the hearing, including
24 opening statements.

25 While 130 hours may be excessive, I

1 think that 100 hours, while attractive, may be
2 a bit ambitious but nearer the mark.

3 I will share with you that having read
4 the regulations and the regulatory history
5 pertaining to the regulations and pertaining to
6 direct testimony, I find that direct testimony
7 should consist of the written direct statements
8 and an oral summary of the written statements,
9 not running through most or all of the
10 testimony live.

11 I note, for example, that your expert
12 witness statements have summaries, and asking a
13 limited number of questions, for example, along
14 those lines might be appropriate as well as
15 introducing the witness and qualifying the
16 experts.

17 I have also been told that you
18 prepared demonstrative exhibits for the case
19 and it might be appropriate to use some of
20 those in preparing and presenting the oral
21 summary of the direct testimony.

22 I think that one of the benefits of
23 having the written direct is that, especially
24 in complex cases such as these, is it does
25 allow the other side to prepare effective

1 cross-examination, rather than hearing things
2 for the first time at the hearing, or even just
3 having the ability to go through a written
4 statement is very helpful in complex hearings
5 such as these.

6 I should note, however, that the
7 Judges may choose to ask questions of your
8 witnesses during direct, during cross or at any
9 time during the hearing.

10 Another issue that I hear the parties
11 would like some clarity on is a proposal that
12 pertains to supplementation of Phonorecords IV
13 materials in view of the recent ruling on
14 remand that was issued in Phonorecords III.

15 I noted that parties have already been
16 thinking about this. And so if you have a
17 proposal you should file it concerning both
18 initial and reply submissions, which I'm
19 assuming the parties would want, and I think
20 that filing that by Tuesday the 9th would be
21 good because we really want to get a jump on
22 hearing what supplementation that you have.

23 It would be great if your proposals
24 reflected a stipulation and agreement among the
25 parties but, even if you can't reach that, it

1 would be helpful to have your proposals in one
2 document with any slight differences among the
3 parties noted therein. It would be helpful to
4 refer to one document.

5 As far as the content of your
6 submissions are concerned, I think that it
7 would probably be beneficial for the parties to
8 receive guidance from the other Judges as well
9 on the panel. And so I would like to turn to
10 them.

11 Judge Strickler, any guidance for the
12 parties?

13 JUDGE STRICKLER: Thank you, Judge
14 Shaw. Good afternoon, counsel. It's nice to
15 see you again.

16 Certainly anything that is in the
17 Phonorecords III initial remand ruling and
18 order that has not been addressed by the
19 parties already in Phonorecords IV is something
20 we would want to have you brief and propose
21 providing any evidence or testimony that would
22 be necessary to address those factors.

23 I want to mention one issue in
24 particular, which is mentioned, among other
25 issues, of course, in the Phonorecords III

1 initial remand ruling, and order, and that
2 pertains to something that was touched upon in
3 Footnote 72, I believe, of that Phonorecords
4 III remand ruling and it deals with the Nash
5 bargaining model.

6 So in particular, again, not
7 exclusive, but in particular what I would like,
8 the other Judges would like you to provide in
9 your supplemental filings, is for you and your
10 experts to address the use of "outside options"
11 and "inside options" in connection with the
12 issue of how a Nash bargaining model can be
13 appropriately used to inform the Judges'
14 analysis.

15 As I say, it's clear from review of
16 that Phonorecords III order and ruling what the
17 Judges have considered and what they decided.
18 And the issue as I have just framed it is
19 something that will be important as we go
20 forward in our analysis in Phonorecords IV.

21 So, Judge Shaw, that's what I had with
22 regard to particulars of the supplementation.

23 CHIEF JUDGE SHAW: Thank you, Judge
24 Strickler. Judge Ruwe, is there anything you
25 would like to add to this guidance?

1 JUDGE RUWE: I don't have any
2 particulars that I would like to be addressed
3 in the supplemental briefing, but I would note
4 that the initial ruling and order is the
5 subject that we would like briefing on.

6 Obviously there is a potential for
7 some changes, it's possible, in initial
8 determination or final determination and we
9 would provide for additional supplementary
10 briefing as appropriate.

11 But as it stands now, it is the
12 initial ruling and order that we are seeking
13 the briefing upon.

14 CHIEF JUDGE SHAW: Well, that's right.
15 Thank you.

16 I would like to get, eventually turn
17 the floor over to the parties and we may get
18 into some of the details about the hearing
19 itself. But what I would like to do is have
20 appearances of everyone here today.

21 Now, all I have in that regard is a
22 list of participants that we generated in
23 alphabetical order. And it may be that you
24 have already formed groups and spokespeople and
25 so forth, but at least for our purposes now I'm

1 just going to run through this alphabetically
2 and then you can tell me as we proceed now and
3 especially during the hearing if there is a
4 different order or other groupings to make.

5 But I just want to make sure that I
6 have people here from everybody on this list.
7 It begins with Amazon Services LLC.

8 MR. BRANSON: Good afternoon, Judge
9 Shaw. This is Josh Branson from Kellogg,
10 Hansen on behalf of Amazon.

11 And with me on the line are my
12 colleagues, Scott Angstreich, Andy Goldsmith,
13 Leslie Pope and Lilly Smith.

14 CHIEF JUDGE SHAW: Thank you. And
15 next I have Apple Incorporated.

16 MS. CENDALI: Good afternoon, Your
17 Honors. It's Dale Cendali of Kirkland & Ellis.

18 With me is my partner, Mary Mazzello.
19 And we're happy to be here.

20 CHIEF JUDGE SHAW: Thank you. And now
21 I have a group called Copyright Owners,
22 specifically Nashville Songwriters Association
23 International and National Music Publishers
24 Association.

25 MR. SEMEL: Good afternoon, Your

1 Honor. Ben Semel from Pryor Cashman for the
2 Copyright Owners.

3 In my office with me is Frank
4 Scibilia. And dialing in separately you have
5 Kaveri Arora and Joanne Liu.

6 CHIEF JUDGE SHAW: Thank you. And I
7 have Google LLC.

8 MR. JIH: Good afternoon, Your Honor.
9 This is Victor Jih with Wilson Sonsini on
10 behalf of Google.

11 And with me in the virtual room is
12 Gary Greenstein, Maura Rees and Ryan Benyamin.

13 CHIEF JUDGE SHAW: Thank you. And
14 Mr. George Johnson.

15 MR. JOHNSON: Good afternoon, Your
16 Honors. George Johnson. I'm happy to be here.

17 CHIEF JUDGE SHAW: Thank you very
18 much. And I have Joint Record Company
19 Participants, specifically Sony Music
20 Entertainment, UMG Recordings, Incorporated,
21 and Warner Music Group Corporation.

22 MR. ENGLUND: Good afternoon, Your
23 Honor. This is Steve Englund from Jenner &
24 Block for the Record Company Participants.

25 CHIEF JUDGE SHAW: And I have Pandora

1 Media, LLC.

2 MR. MARKS: Good afternoon, Your
3 Honor. It's Benjamin Marks from Weil, Gotshal
4 & Manges.

5 With me in the room here but not
6 visible on the screen are my colleagues, Todd
7 Larson, David Bier and Rachel Kaplowitz.

8 CHIEF JUDGE SHAW: Thank you.
9 Mr. David Powell?

10 (No response.)

11 CHIEF JUDGE SHAW: All right.

12 Next on my list I have Spotify USA
13 Incorporated.

14 MR. GASS: Good afternoon, Your Honor.
15 Andy Gass from Latham & Watkins on behalf of
16 Spotify.

17 Here on the Zoom with me are Joe
18 Wetzel and Ivana Dukanovic, also from Latham.

19 CHIEF JUDGE SHAW: Thank you. And
20 finally on my list I have Mr. Brian Zisk.

21 MR. ZISK: Good afternoon, Your Honor.
22 Brian Zisk. Happy to be here.

23 CHIEF JUDGE SHAW: Thank you. Is
24 there anyone participating who has not been
25 called? Well, good. I'm glad the list worked

1 out.

2 Now, there are a number of things that
3 we can get into today and I really didn't know
4 how far into the trial procedures you wanted to
5 get because I think I did read in some of your
6 previous filings that you were preparing or
7 some of you were preparing a proposed order
8 that would cover a lot of hearing procedures.

9 I also see that, if you haven't
10 already, very shortly you will be exchanging
11 witness statements, is that correct, getting a
12 sense of the room?

13 One thing I would like you to do when
14 you do that, aside from -- excuse me, not
15 witness statements, witness lists. I may have
16 said statements, but witness lists.

17 But one thing that in this virtual
18 environment I found out over the last two and a
19 half plus years is that occasionally people are
20 not in the United States when they testify.

21 And if that's the case you should let
22 us know. It may not be an issue but, depending
23 on where they may live or where they may be
24 working at the time, it could be.

25 So if someone is outside of the United

1 States and its territories, let us know. And
2 then, you know, we just want to make sure that
3 when I administer the oath and they participate
4 in the hearing that there aren't any issues
5 with that. In some jurisdictions there may be.

6 So what I would also like to do is let
7 you know that I have some ideas about
8 post-hearing matters. I don't know that we
9 necessarily need to get into that today. We
10 may have another conference before the hearing
11 or right at the beginning of the hearing.

12 But you are certainly welcome to make
13 proposals as well as far as your proposed
14 conclusions of law, findings of fact.

15 I might tell you right now that
16 something I'm considering, and many of you may
17 know me from previous hearings in other
18 agencies and so forth, is some sort of
19 collective procedure after the hearing by which
20 the participants can outline the issues that
21 they want the Judges to address, and the Judges
22 would have an opportunity to make sure that all
23 the issues in the case, after we've had the
24 hearing, we found out what, you know, has
25 really transpired, we need to address, you need

1 to address, no surprises anywhere around, and a
2 nice guide for the Judges to find all of these
3 issues in your findings of fact and conclusions
4 of law.

5 I may not necessarily require you to
6 do everything in the same order. Different
7 people have different things they want to
8 address and different things they want to
9 highlight.

10 If they're all in the same order or
11 that's already required, that's great, but
12 certainly a guide to where, for example, I
13 could find the proposed -- the evidence, the
14 proposed findings on issues that are important
15 to you and that you want the Judges to discuss.

16 Another thing that you can consider,
17 I'm not making any decision today, but it's
18 something you can consider and I can hear about
19 is whether you want to have briefing per se,
20 not just numbered findings and conclusions of
21 law, although those can be done practically in
22 a prose fashion, but whether you would like to
23 have briefing and would find that useful or
24 overly burdensome, that I would be interested
25 in hearing about that, or whether it's

1 something you're used to doing or not used to
2 doing, but I've been reading the regs.

3 So I will see how deeply we want to
4 get into trial procedures and post-trial
5 procedures today, but we could put just about
6 anything on the table.

7 What I would like to do is to turn the
8 floor over to the parties. And, again, I don't
9 know if the parties have already decided how to
10 address the Board in groups, so I will just use
11 the same list and start with Amazon and find
12 out what happens.

13 MR. BRANSON: Thank you, Judge Shaw.
14 And I appreciate the guidance from Your Honors.

15 I would say the parties have been
16 meeting and conferring but I would say our
17 progress on pretrial matters has been a little
18 bit limited while waiting for some input from
19 Your Honors since we were unclear on the
20 schedule. So I think we have some work to do
21 to be able to present a full pretrial proposal
22 to you.

23 I will say listening to your very
24 helpful thoughts and rulings at the outset of
25 this call, several questions came to mind.

1 The first was on the supplemental
2 Phonorecords III submission that Your Honors
3 would find helpful. Did you have in mind a
4 ballpark length that you were looking for? Did
5 you want a legal brief in addition to expert
6 evidence, or did you have in mind something, a
7 short expert submission?

8 I'm just looking to get any more
9 feedback that you might have.

10 CHIEF JUDGE SHAW: Personally I
11 thought we might see both. But let me defer to
12 the other Judges and see where their thinking
13 is on this.

14 JUDGE STRICKLER: If I may respond,
15 first before turning the floor over to Judge
16 Ruwe, I was of the mind that it would be more
17 in the nature on what we typically see in these
18 proceedings, so it would be a supplementary
19 introductory statement or introductory
20 memorandum like you would see in a written
21 direct statement or in a written rebuttal
22 statement laying out in summary form the
23 position of the party or the parties who are
24 filing the document, and identifying what
25 evidence, what testimony might be proffered

1 going forward to respond to or to address
2 what's in the Phonorecords III materials.

3 So, that is to say, the remand ruling,
4 Phonorecords III remand ruling. So it seemed
5 to me perhaps more helpful to not try to
6 reinvent the wheel in the context of what we do
7 in these proceedings.

8 So it wouldn't be -- so to get more
9 particular, Mr. Branson, in response to your
10 question, I'm not looking at briefing per se,
11 but my thought is, and, again, this is
12 something that is still germinating, that the
13 idea would be to utilize the same procedure
14 that we utilize for direct statements or
15 rebuttal statements.

16 So it would be a written supplemental
17 statement and the second filing would be a
18 written rebuttal or reply statement in
19 connection with your adversary's prior filings.
20 So that's what I had in mind.

21 CHIEF JUDGE SHAW: Well, and I --

22 JUDGE STRICKLER: I'm sorry, Judge
23 Shaw. And just, again, to be clear, to the
24 extent you're going to be introducing new
25 testimony or new evidence, that would be part

1 and parcel of those submissions. I'm sorry,
2 Judge Shaw.

3 CHIEF JUDGE SHAW: No, not at all.
4 That was extremely helpful. And I didn't mean
5 to cause any confusion.

6 I agree that we're talking about
7 supplementation here, not new procedures, but
8 maybe I misunderstood your question but, you
9 know, as Judge Strickler was pointing out, I
10 mean, you have a summary, you have an
11 explanation of what you are doing, and I think
12 we would obviously want that as well. That's
13 what I meant by both.

14 Judge Ruwe, any comments to add?

15 JUDGE RUWE: Just that like the
16 proposal for the scheduling of Phono IV, it
17 would be ideal if there was agreement across
18 the parties as much as possible -- realizing
19 that might not be possible -- but in the
20 proposed briefing.

21 And I would be interested to hear what
22 the parties themselves envision as far as
23 length and format and content of those
24 supplementary submissions.

25 CHIEF JUDGE SHAW: Mr. Branson, I

1 could move on if you're --

2 MR. BRANSON: I have a few more
3 things, if you could indulge me, Your Honor.

4 One was on the length of what we're
5 calling the chess clock, the 130 versus 100
6 hours. I understood Your Honor to say you
7 thought something closer to 100 might be more
8 in line with what you had in mind.

9 I just wanted to -- I don't think we
10 really got into any detail around the reason
11 for our position in our previous submission.

12 So I wanted to just say that my
13 understanding is that Web V, which was, of
14 course, the most recent trial, was 116 hours.
15 And by my count we have significantly more
16 witnesses this time than we did in Web V. My
17 understanding is Web V was 41 witnesses and
18 here we have 47.

19 And many of those on this call can
20 speak to this better than I, but my
21 understanding was things were a little rushed
22 towards the end of Web V. And so that was the
23 thinking behind the somewhat larger number from
24 our perspective.

25 And, you know, we also think that, you

1 know, witness credibility is going to be an
2 important feature of this trial and, you know,
3 just making sure we have time to explore those
4 issues is something that at least my client
5 feels pretty important.

6 So of course we will defer to whatever
7 Your Honors rule, but I did just want to lay
8 out the reason for our position because I don't
9 think we did that in our previous bare bones
10 submission on this.

11 CHIEF JUDGE SHAW: Of course, there is
12 also the request that we not go past
13 mid-October. And I think, you know, I think
14 part of it, it's not so much a matter of days,
15 but how many -- something the parties should
16 consider and something that I always take into
17 consideration is how many hours you really get
18 in during a day, you know.

19 And another thing that I think the
20 parties need to think about, you know, there
21 are a lot of variables in the formula here,
22 but, you know, when do we begin. I understand
23 it has been suggested that we might commence at
24 10:00 or 10:30 Eastern Time. That's acceptable
25 to me.

1 I understand that people from all over
2 the country will be testifying or
3 participating. And, frankly, it has also been
4 my experience over the years that giving people
5 a little time in the morning to prepare
6 actually speeds things up during the day
7 instead of having disruptions when witnesses
8 aren't ready or audio links haven't been
9 prepared and so on and so forth.

10 So I don't mind starting at 10:00 or
11 10:30 Eastern. I will leave it up to the
12 parties exactly what they want to do. That
13 does mean that we have to be in session at
14 least until 6 o'clock Eastern at night.

15 I think it is also important to point
16 out that we burden the court reporters a lot
17 with these large cases. So when we end at 6:00
18 or 6:30 at night, it sometimes may mean that
19 the transcript will be prepared, but if we are
20 admitting a lot of evidence at the last minute
21 or something, we actually might need to do that
22 on the record the next day because it's more
23 important that you get your transcripts quickly
24 rather than, you know, spending a lot of time
25 at 7:00 or 8:00 at night working on exhibits

1 that I've admitted and that sort of thing.

2 So like I say, there are a lot of
3 variables here. It did seem to me that to
4 begin a hearing when we are and to end it when
5 we want to end, and I don't really think it's a
6 good idea to go up to the last minute because,
7 again, you know, you don't know what will
8 happen, so I thought something closer to 100
9 rather than 130 would be a safer route to go
10 because I'm talking about actual time that
11 would be charged to the parties.

12 But at any rate, maybe those remarks
13 will help with putting a proposal together.
14 But thank you for providing more information
15 for, as you said, beyond the bare bones that
16 was in the submissions that I already saw.

17 MR. BRANSON: I just had, yeah, sorry,
18 Judge Shaw, I had two other items, and I don't
19 want to, you know, occupy the rest of our time.

20 One was you mentioned with direct
21 testimony the thought, that certainly seemed
22 sensible to me, that direct testimony be quite
23 streamlined and be largely just a succinct
24 summary of the written direct testimony.

25 One issue that the parties have been

1 discussing earlier is that traditionally in
2 these cases I believe another role of live
3 direct is to give some of the witnesses a
4 chance to respond to, you know, new criticisms
5 or new arguments that were levied at them in
6 rebuttal by the other side.

7 And from our perspective that's an
8 important feature of the live directs. You
9 know, candidly thinking through it, from my
10 perspective, almost more important than just
11 the summary of the written directs.

12 And so I wanted to just raise that as
13 an issue. We're happy to address it in our
14 written proposal, but it's something that we
15 are planning to pursue with Your Honors'
16 permission.

17 CHIEF JUDGE SHAW: Well, is that
18 permitted under the regulation?

19 MR. BRANSON: My understanding is
20 traditionally it has been. There is usually
21 some debate about where the line is drawn,
22 about exactly what is permitted in responding
23 to the other side's rebuttal criticism but,
24 yes, it has been.

25 CHIEF JUDGE SHAW: Well, it has been

1 done. I want to make sure that it's proper.

2 Also, as I said, one of the benefits
3 of having written direct is it gives the other
4 side an opportunity to prepare an effective
5 cross-examination and not to be hit with things
6 they haven't heard before.

7 But I understand, you know, this
8 happens in all cases. So, well, as you are
9 preparing your proposal, let me see what you
10 say. But what I want to avoid is lengthy
11 written direct, which turns out to be oral
12 direct which takes up most of our time, or a
13 big part of it, and pushes this out well into
14 October or over 130 hours, as I can see that
15 happening.

16 And I also want to make sure I'm
17 following the regulations, and I also want to
18 make sure people have the opportunity for
19 effective cross-examination, and not use the
20 opportunity for an oral summary as to present
21 brand new testimony at length. That just goes
22 against all the purposes of having written
23 direct.

24 But, you know, I hear what you're
25 saying and what has traditionally been done,

1 and so we will look at the proposal, but you
2 should include that then and so that we can
3 rule on that, and that all the parties -- I
4 want to make sure that when we go into this
5 hearing, as I said, even in the post-hearing, I
6 don't want people to be caught by surprise.
7 These are complex cases and I want them to know
8 what the rules are ahead of time and not to,
9 frankly, waste time during the hearing debating
10 these things for the first time as to whether
11 we allow this or we allow that or this is an
12 issue that hasn't been raised before, that sort
13 of thing.

14 And that's the beauty of having the
15 conference, and so I'm glad you're raising that
16 now. And we will get it out on the table and
17 see where we stand.

18 JUDGE STRICKLER: Judge Shaw, if I may
19 respond. Also on the point -- I thought it was
20 actually a point that Mr. Branson was going to
21 make just related to his comment about
22 witnesses responding to rebuttal testimony --
23 most of the expert witnesses, if not all of
24 them, have submitted not only direct testimony
25 but written rebuttal testimony.

1 So typically, and it was very helpful
2 for scheduling purposes, to move the proceeding
3 along if we had a witness available on a given
4 day, the witness might be able to testify with
5 regard to his or her rebuttal testimony as well
6 as the direct testimony at that time, and we
7 could perhaps discuss whether or not the
8 rebuttal testimony, so if you had Jane Doe as a
9 witness both with direct testimony and rebuttal
10 testimony, would Ms. -- Professor Doe's
11 testimony be summary in nature for her direct
12 testimony, on her direct case and summary for
13 her rebuttal testimony on the rebuttal case.

14 So I suppose that's something that the
15 parties should consider when they are making
16 their proposals.

17 CHIEF JUDGE SHAW: That's an excellent
18 observation. And, you know, typically
19 sometimes to accommodate witnesses we will do
20 direct and rebuttal at the same time. In cases
21 -- I don't know what has traditionally been
22 done here, but that's frequently done at
23 agencies.

24 So, yes, that may be helpful on the
25 point that you have raised, Mr. Branson, and

1 certainly in general if one were to ask can we
2 do rebuttal and direct at the same time, there
3 may very well be circumstances where that would
4 be appropriate.

5 MR. BRANSON: Well, thank you, Your
6 Honor. I only had one other thing on my list,
7 which I think will affect how we get from here
8 to the trial.

9 And that was, you know, Your Honors
10 have obviously been working hard on the sadly
11 long list of motions to compel and discovery
12 motions. And one of the things that we just
13 wanted to seek some clarity about was Your
14 Honors seem to be adhering to the usual
15 practice when you grant a motion of ordering a
16 10 business day compliance schedule.

17 But we noticed there were a few
18 requests or even one of the motions where there
19 wasn't a deadline included in the motion
20 itself. And we just wanted to clarify our
21 understanding that Your Honors intended the 10
22 business day deadline to apply, you know,
23 unless otherwise specified, to help us kind of
24 get from here to the beginning of trial.

25 CHIEF JUDGE SHAW: Well, first of all,

1 I might say no one has to take 10 days. It's a
2 deadline. And we are very near. And you have
3 probably noticed a few orders coming out in the
4 last week or so that have been pending a while.

5 So those days, the 10 days may become
6 less traditional as we get closer now that you
7 know September is the hearing date.

8 And I also noticed, thankfully, the
9 Judges already issued an order dealing with
10 rebuttal discovery coming in and, you know, I
11 see it in one of these later scheduling orders
12 and when certain things are due and so forth,
13 in response to the discovery you are getting
14 now at this point.

15 The 10 day, yeah, I saw that, too, and
16 I assume the parties would do 10 days or less
17 given the fact that especially a lot of this
18 has been pending a while, which means there has
19 been time to gather information and it should
20 be at the ready, frankly.

21 So I would say 10 days is the maximum
22 if we don't specify other. And when you look
23 at the schedule we're now on, I mean, I will
24 probably be shortening those times anyway, but
25 I certainly wouldn't take any more.

1 MR. BRANSON: I appreciate that, Your
2 Honor, and just to, not to overly complicate
3 things, but I did want Your Honors to have a
4 forewarning that we have also been working hard
5 on our third-party discovery that you ordered
6 with respect to the audiovisual companies.

7 And it's unfortunately possible that
8 you are going to see a motion from us to compel
9 compliance with one of those subpoenas. We're
10 doing everything we can to avoid it, but that
11 might become necessary for us to meet the trial
12 date as we're negotiating with the
13 third-parties.

14 So I just wanted to let Your Honors
15 know that you might see one or two of those
16 from us. And we're doing everything we can to
17 wrap that up in a timely fashion.

18 CHIEF JUDGE SHAW: I appreciate that.
19 Thank you.

20 JUDGE STRICKLER: In addition, and,
21 again, related to what Mr. Branson said, there
22 is obviously more discovery that will be coming
23 out and, to the extent that your supplemental
24 filing may need to embrace new facts, new
25 issues that are raised by that discovery, you

1 should make mention of that in your proposals
2 or your joint proposal as well so that we have
3 the sense of what you are anticipating to
4 include in your supplemental filing.

5 Obviously if the discovery is not
6 complete yet you can't be specific as to what
7 that is. But your anticipation of the need to
8 file a supplemental submission based on what
9 you -- on the subject matter of what you are
10 seeking, is something that you should make
11 known to us in your upcoming proposal for
12 schedule.

13 CHIEF JUDGE SHAW: Right. I mentioned
14 earlier this was dealt with in a previous
15 scheduling order. But, of course, that
16 scheduling order has been out for a few months.
17 And now you know when the hearing is coming.

18 And so if you want to modify that, of
19 course, you can -- you may need to do that and
20 you may do that. But until I hear otherwise
21 I'm going by the previous scheduling order.

22 MR. BRANSON: Well, Judge Strickler,
23 that actually raises I think an interesting
24 point. My understanding of the previous order
25 on the supplemental filing was that it was

1 actually limited to direct phase discovery, not
2 rebuttal discovery. You know, Mr. Semel can
3 correct me if I'm wrong about that. So we
4 hadn't been anticipating that the rebuttal
5 discovery would be part of the supplement.
6 That said, now that it's obviously we are where
7 we are, we might be open, obviously, if Your
8 Honors would find it helpful, to make it
9 broader in scope. But I did just want to raise
10 that as my understanding.

11 CHIEF JUDGE SHAW: Well, I was just
12 reading. It says "participants file
13 supplemental written rebuttal statements," but
14 that's not what you are talking about then, or
15 I'm reading it wrong?

16 MR. BRANSON: No, I think that's
17 right, Judge Shaw, but my memory is that the
18 scope then that follows that when Your Honors
19 described what we could address, it was
20 anything that was obtained as a result of
21 direct phase motion to compel practice rather
22 than rebuttal phase.

23 So that had been what the Copyright
24 Owners I think and we had been operating under
25 the assumption for.

1 CHIEF JUDGE SHAW: Then please make
2 another proposal and we can move this all along
3 before the hearing. Anything else,
4 Mr. Branson?

5 MR. BRANSON: Thank you for indulging
6 me, Judge Shaw. That's all I have.

7 CHIEF JUDGE SHAW: No, this has been
8 very helpful. That's why we're having the
9 conference. Thank you.

10 Moving on to -- again, I'm going
11 alphabetically down this list which kind of
12 worked before, but as we get into the hearing
13 maybe this isn't, you know, the most efficient
14 way to go. But for now, unless I hear
15 otherwise, brings us to Apple.

16 MS. CENDALI: Thank you, Your Honors.
17 Dale Cendali speaking again on behalf of Apple.

18 You will be happy to know that all
19 parties have been working together already,
20 including earlier today, to try to talk about
21 some sort of order, some sort of procedure so
22 that we would all know what we are supposed to
23 do, ideally have it be simple, and the idea is
24 if we all know what we're supposed to do, then
25 we're more likely to do it. So that's what

1 we're aiming towards.

2 I just have on top of that a few
3 questions and a point of clarification. The
4 first threshold point is with regard to the
5 length of trial discussion.

6 I just wanted to make sure that the
7 Tribunal was aware, to the extent it didn't
8 come out in some of the submissions, is that,
9 as you can imagine, with so many attorneys and
10 so many witnesses there was a lot of back and
11 forth when the July trial date didn't happen as
12 to when the trial could be done.

13 And from Apple's perspective it's
14 important when we say start in September and go
15 through mid-October is that the trial actually
16 is able to do that, for two reasons: One,
17 witness availability on behalf of certain Apple
18 witnesses, in-house counsel availability, and
19 also, oddly enough, we're juggling two trials
20 at the same time.

21 Our intent is to start this trial,
22 have some of the team mid to late September go
23 do another trial and then come back for this
24 trial.

25 So my point is we wouldn't want the

1 case -- the whole reason at least from our
2 perspective that we were able to agree to the
3 September date is the thought it would be going
4 to mid-October to make that possible. And I
5 just wanted to make sure that the Tribunal was
6 aware of that nuance.

7 I think it should work out all fine
8 but I just wanted people to understand that
9 that was what we had baked into it and that
10 we've already talked about this at length with
11 all of the other participants. Other people
12 have other issues later in time, but it's not
13 for me to talk about those schedules. But
14 that's where we are.

15 The second, the other points I had are
16 just questions. And you said that we would be
17 starting right after Labor Day, and that's
18 great, so do we -- do I interpret that
19 correctly as meaning that we will start with
20 opening statements on Tuesday, September 6th,
21 or did you have something else in mind, or are
22 you waiting for a proposal from us?

23 CHIEF JUDGE SHAW: That's what I think
24 we anticipated, to start with opening
25 statements. I don't know if the parties, you

1 know, I don't want to stir the pot especially
2 if everyone has been reaching agreements, but
3 if they wanted to start before that, but I got
4 the feeling that they didn't want to have --
5 that no one wanted to have a disruption of
6 starting things and then having the Labor Day
7 holiday.

8 And I don't know how lengthy people
9 plan on making their opening statements, but it
10 all counts towards the total number of hours
11 anyway. So it really doesn't matter whether
12 you have a lengthy opening statement or a short
13 one, you get charged anyway. So I hope that
14 answers your question.

15 MS. CENDALI: It does. Sometimes
16 people envision the first day lots of
17 administrative things, but I take from Your
18 Honor's remarks that we're going to jump in and
19 start for real on the 6th, and that's fine.

20 JUDGE STRICKLER: If I may, Judge
21 Shaw, when you are counting the days and trying
22 to gain out the number of hours that are
23 available across those days, you should keep in
24 mind that apparently we have three holidays in
25 the period that we're contemplating after Labor

1 Day: There's the Rosh HaShanah holiday,
2 there's the Yom Kippur holiday, and there's the
3 Columbus Day holiday that the government is
4 closed.

5 So you should keep that in mind as you
6 work together to figure out what your schedules
7 accommodate.

8 CHIEF JUDGE SHAW: Well, and that's
9 one of the reasons I said, you know, we can say
10 130, but when we look realistically at how many
11 days you are actually in session and how many
12 hours of time you get in a day, I don't want to
13 over-promise and then find out that we can't
14 end in mid-October.

15 So that's why I was saying being
16 realistic I think that 100 is closer to the
17 mark when we look at the number of actual hours
18 that are chargeable to the parties that will be
19 counted during the days that we have, the
20 available days that we have for trial.

21 And so I think we're all really saying
22 the same thing. And I appreciate, you know,
23 Apple's remarks. And so we're trying to make
24 it fit.

25 And if we need to have another

1 conference before we begin the hearing to make
2 sure that we can start, I mean, there might be
3 a little administrative on the first day, of
4 course, but I'm not anticipating -- anyone who
5 has been through a trial with me knows that my
6 pretrial conference on the first day usually
7 lasts about 40 minutes tops, and that's what I
8 would want to do here. And if we can't do
9 that, then we will just have another one of
10 these.

11 MS. CENDALI: Fair enough, Your Honor.
12 Just two more questions and I will cede my
13 time.

14 CHIEF JUDGE SHAW: Sure. This is why
15 we're here. I keep saying it, but all this is
16 important.

17 MS. CENDALI: So having asked about
18 the openings, my next question is closings in
19 the sense of whether your preference is to have
20 at the close of evidence immediate closings or
21 whether you would like us to do findings of
22 fact and conclusions of law and then come in to
23 do openings then, or, I don't know what, maybe
24 you don't even like closings, I really don't
25 know, but any guidance will be helpful.

1 JUDGE STRICKLER: Judge Shaw, if I
2 may, counsel makes a good point. At previous
3 practice, none of this carve in the regulations
4 has been to get proposed findings and
5 conclusions of law and then have the closing
6 arguments because we had a better sense -- and
7 any briefing that we might decide we wanted, so
8 we have a better sense of what the arguments
9 are relying upon, rather than just listening to
10 the arguments and then having to see the facts
11 of law presented.

12 CHIEF JUDGE SHAW: Right. We had a
13 brief discussion, and that's what I was
14 anticipating. And, as I said, I'm going to
15 have some post-hearing activities for you
16 anyway.

17 So I think it's even more important to
18 hear the arguments, to the extent that we hear
19 them, you know, after we have had some ideas to
20 ruminate on and some questions, as Judge
21 Strickler said, you know, I think it would be
22 more valuable later.

23 Judge Ruwe, I don't know if you had
24 anything you wanted to add?

25 JUDGE RUWE: I was envisioning the

1 proceeding that we've had before for closings.
2 I understand that we may have more -- there may
3 be other requests as you just alluded to. But
4 overall that's what I envisioned.

5 MS. CENDALI: That's great. That's
6 what we thought, but this was our chance to --

7 CHIEF JUDGE SHAW: Sure.

8 MS. CENDALI: -- see if people -- we
9 didn't want to argue about something that it
10 turns out we were all on the same page in any
11 case.

12 And then my last question is motions
13 in limine. I don't know whether this Tribunal
14 wishes to give us any directional support. We
15 have all been collectively talking a little bit
16 about that.

17 You know, from a resources point of
18 view, people don't want to necessarily spend --
19 kill a million trees and hours and associates
20 drafting them if, depending on how the Tribunal
21 might view them, there's lots of ways to skin
22 the cat with regards to motions in limine.

23 People certainly don't want to give up
24 their chance to raise certain motions either.
25 At least that's my impression, speaking, or

1 summarizing. I'm sure my colleagues will tell
2 me if I'm wrong.

3 So we're just trying to get any kind
4 of directional guidance that you folks may have
5 on that subject.

6 CHIEF JUDGE SHAW: Well, I can just
7 tell you, you know, I've done motions in limine
8 for a lot of years, many, many, many dozens of
9 them.

10 And let me just tell you something up
11 front, as far as I'm concerned, and if someone
12 says I'm not doing what you're used to doing or
13 this is against the regs, you know, let me
14 know.

15 But my view has always been that just
16 because you don't object to something in the
17 beginning doesn't mean you've waived it and if
18 I don't, you know, I've been in trials where
19 people file 2,000 objections to every exhibit
20 because they think if they don't do that I
21 won't hear their objection at the hearing.

22 That's not the case. To me a motion
23 in limine is something you're doing to make
24 things clearer at the trial and to save time at
25 the trial. And it also needs to be something

1 that you have a reasonable chance of having
2 granted before the trial. We're very close to
3 the trial.

4 So to be honest, like you said, you
5 don't want to waste resources. If you give me
6 50 motions in limine that aren't ripe until
7 five days before the trial, guess what is going
8 to happen? You're not going to get them ruled
9 on before the trial. So that defeats the whole
10 purpose of having it.

11 I used to be a Latin tutor so I can
12 tell you what limine means, I won't do that,
13 but it defeats the whole purpose. So I would
14 say, you know, rather than just trying to
15 preserve objections you are afraid I won't hear
16 because you didn't present them to me before
17 the trial, I think it's more important to
18 present something that is not only, of course,
19 meritorious but, more important, something that
20 realistically can be addressed in time to save
21 time and effort or confusion at the trial.

22 So I have seen some great motions in
23 limine. I've seen motions for summary judgment
24 posing as motions in limine. I've seen motions
25 to strike and exclude that really aren't proper

1 and I've seen motions that come in such, you
2 know, large number or in such complexity that
3 they might not be ruled on until after the ID
4 comes out, you know.

5 So I think that it's good the parties
6 are talking and they are trying to be judicious
7 in this. There are proper motions in limine
8 that can be brought.

9 But I agree, I thing I agree, where
10 we're very close to the trial, there are a lot
11 of other things going on, I'm expecting to see
12 some, but I think that it's important that they
13 serve a purpose and that they are valuable to
14 you as well as to me. And you don't need to
15 file them just because if you don't file them I
16 won't hear an objection later.

17 MS. CENDALI: Thank you, Your Honors.
18 I will end my questions to give time for my
19 colleagues.

20 CHIEF JUDGE SHAW: Well. Thank you.
21 It has been very helpful.

22 Next on my list is Nashville and
23 Nashville Music.

24 MR. SEMEL: Thank you, Your Honor.
25 Ben Semel on behalf of the Copyright Owners.

1 I will follow the trend of having a
2 few questions, and I will start with some of
3 the more specific ones. You had mentioned
4 doing openings on the day after Labor Day on
5 the 6th. I will say that the parties have been
6 talking, including earlier today, it had been
7 discussed doing it later in that week.

8 And I guess one question I had, which
9 is something we would, only for family reasons,
10 would prefer.

11 But I guess the question was if the
12 parties felt that that was workable with the
13 time frame, is that something that the Judges
14 are amenable to or, I mean, are the Judges
15 doing that in order to accommodate the parties'
16 views or is that something that the Judges want
17 to hold regardless of the parties?

18 CHIEF JUDGE SHAW: Well, I mean, I
19 just want to get the clock rolling as quickly
20 in September as possible. And personally I
21 just have never seen opening statements that
22 aren't opening statements. I mean, I am up for
23 innovation if opening statements come after a
24 few witnesses.

25 Maybe I don't understand what you are

1 asking.

2 MR. SEMEL: Yeah, sorry, I don't think
3 I was clear. I mean doing -- starting the
4 hearing a couple days after. Rather than
5 starting the hearing on the 6th, starting the
6 hearing on, you know, the 8th. If the parties
7 felt that worked, is that something Your Honors
8 are open to?

9 CHIEF JUDGE SHAW: Well, again, it all
10 has to do with fitting this into the right --
11 I'm thinking of all these metaphors and
12 allegories and so forth, but making sure it all
13 gets done and it gets done as quickly as
14 possible.

15 So, I mean, does that come with
16 cutting down the total number of hours, you
17 know, I mean, I don't think there is anything
18 magical about the 6th of September. It's just
19 that it seemed that we really couldn't put the
20 hearing off any further.

21 But, you know, I'm certainly open to a
22 proposal that the other parties agree to or
23 that's workable, but we just wanted to get the
24 hearing going, I think.

25 MR. SEMEL: Got it. That is very

1 helpful. Thank you. And all of this guidance
2 is very helpful.

3 I guess my question is really whether
4 it was a judicial constraint or whether you are
5 accommodating the parties' statement that they
6 needed to have it done by mid-October. But I
7 understand it's more just getting it started as
8 soon as possible.

9 CHIEF JUDGE SHAW: I think if I had to
10 choose between the two, it was because the
11 parties need it done.

12 MR. SEMEL: Understood.

13 CHIEF JUDGE SHAW: I know of no reason
14 to delay, but maybe there is. I'm not aware of
15 one.

16 MR. SEMEL: Understood. Thank you. I
17 will note just in response to Mr. Branson's
18 comments on sort of the chess clock and the 100
19 versus 130, we, you know, you obviously know we
20 have been advocating for a shorter amount of
21 time.

22 I certainly think that fits with Your
23 Honor's thoughts, which we also agree with, on
24 tightening directs. And I will note, just as
25 far as we're making comparisons to prior

1 proceedings, in Phonorecords III the parties
2 each got 55 hours, so 110 total.

3 But of the 55 hours that the services
4 had, only 20 were used on cross. So there is,
5 in fact, only 20 hours of cross on the
6 services' side. The vast majority of the time
7 was spent doing direct.

8 CHIEF JUDGE SHAW: Well, I don't
9 understand how that could happen, frankly.

10 MR. SEMEL: My point just being that I
11 do think we won't -- the precedent doesn't
12 speak to a number close to 100 being a problem
13 if we are, in fact, tightening direct, which
14 really were the source I think of the time
15 constraints, if you will.

16 CHIEF JUDGE SHAW: Thank you. I
17 wasn't here in Phono III so I appreciate the
18 perspective you have.

19 MR. SEMEL: Understood, yes. And with
20 regard to -- I guess there was some discussion
21 of the supplemental submissions. I guess I
22 will just say that the big interest and the big
23 concern that we've had is -- we will make
24 ourselves available for trial whenever.

25 Our concern has always been ensuring

1 that we have a phase done before we do another
2 phase so that we're not running discovery over
3 the trial or we're not running written
4 submissions into the trial.

5 And so I guess what I wanted to speak
6 to is the time frame we're at right now, four
7 weeks from trial, it does raise some
8 difficulties with getting submissions done that
9 are going to come after discovery that is not
10 done yet.

11 And I guess I wanted to, just wanted
12 to get Your Honors' views on sort of when push
13 comes to shove what happens here. You know,
14 our feeling has always been that for an orderly
15 hearing you need to have a cutoff on discovery
16 before the hearing so that you're not doing
17 witnesses and then later doing more discovery
18 or having more written submissions.

19 That's our preferred approach, finish
20 discovery and written submissions, then do
21 prehearing, then do hearing. We are going to
22 have a little bit of a hang-up there.

23 And I guess the sense is, is it Your
24 Honors' feeling that we can continue to do --
25 that they would want the parties to continue to

1 do submissions, written submissions during the
2 hearing, or that that needs to be completed
3 before the hearing starts?

4 CHIEF JUDGE SHAW: Well, those are two
5 questions. I mean, do I want to see that? No.
6 Will it need to happen? I just, you know, most
7 of your law firms have been in front of me for
8 over a decade. So you already know I have
9 discovery cutoffs which are very strictly
10 enforced.

11 That didn't happen here and it's too
12 late to go back and do that. So now we have to
13 give people a fair hearing and we have to have
14 a complete record. And we can do that. You
15 know, not everyone does things the way we did
16 them in other agencies, you know. So that's
17 really immaterial what I would have done or did
18 do.

19 Here is what we have, and I think we
20 can still give a fair hearing and I still think
21 we can still have a complete record. Do I want
22 to litigate that way? Well, I don't think
23 anybody does.

24 But, on the other hand, this is a
25 lengthy hearing so there's a little more

1 leniency here or, I mean, when you have a
2 hearing that's only a week long, obviously you
3 can't have anything coming in after the first
4 day. You have a hearing that's going on, you
5 know, first week is opening statements and so
6 forth, I don't know. The answer is I don't
7 personally know how this will work out.

8 But I, you know, do you have a
9 proposal about what you would like to do if
10 discovery comes so close to the hearing that
11 something like that may happen?

12 MR. SEMEL: Yeah, I think we are
13 definitely in sort of having to make lesser of
14 evils sort of choices now with regard to some
15 of the decisions.

16 You know, if we imagine that we have a
17 supplemental written rebuttal submission that
18 will happen after direct discovery completes,
19 and we currently have one motion, and three, at
20 least three depositions that haven't been
21 scheduled yet that would have to complete
22 before that submission will be done.

23 And then we would also have a
24 Phonorecords III supplemental submission
25 addressing that remand. And then on top of

1 that we have the remaining discovery. There
2 are several depositions. Then we would have
3 the prehearing phase.

4 Our feeling is that doing all of those
5 things in the same two-week period is not
6 really sustainable, particularly for us. I
7 mean, we're only one law firm on the side. At
8 a certain point we're going to get overloaded.
9 Despite our best efforts, we're not going to be
10 able to handle that in an orderly fashion.

11 And it does lead to a sort of, well,
12 what has to give in that situation? And I
13 don't know that I have an answer right here on
14 the spot. I'm processing it all right now.

15 But I do think there is a little bit
16 of, you know, a little bit of a jam we're going
17 to have in which, even though we might not like
18 it, I guess if our choice is either do all of
19 these things in the same week to two-week
20 period while you're also preparing for the
21 first week of trial, or do some of them during
22 trial, I think that would -- I guess that's
23 what we're looking at is some form of
24 compromise on that.

25 CHIEF JUDGE SHAW: Well, let's just

1 see what kind of compromise really has to be
2 done during the first week of trial. Again,
3 fortunately, you know, we're giving -- I don't
4 know how long the parties want for opening
5 statements, but I'm getting the feeling this
6 could go on many hours.

7 MR. SEMEL: Yeah, I think our belief
8 is that the length and the complexity of these
9 proceedings that we think that Your Honors
10 benefit from, you know, say, some substantial
11 opening statements, is just to allow it to lay
12 out, I mean, there can be upward of 50
13 witnesses in the case.

14 And, you know, our feeling is that
15 that lengthy, you know, almost a day sort of
16 thing devoted to opening statements actually
17 helps things and speeds things, even though it
18 comes out of the time, the chess clock anyway.
19 That's our general feeling.

20 But I don't know that it -- I don't
21 know that that affects really the issue I was
22 talking about.

23 CHIEF JUDGE SHAW: Well, it does in
24 the sense that we're now putting a witness on
25 the stand the first day of the hearing.

1 MR. SEMEL: Right.

2 CHIEF JUDGE SHAW: So you're not under
3 as much burden as if that were the case.

4 MR. SEMEL: Right. Fair enough, yeah.
5 I appreciate that, yeah.

6 CHIEF JUDGE SHAW: Anything else?

7 MR. SEMEL: No, I don't think so. I
8 really appreciate your guidance. And I think
9 we will talk with the services to come up with
10 a proposal for Your Honors.

11 CHIEF JUDGE SHAW: Good. Thank you.
12 I appreciate it. Google?

13 MR. JIH: Thank you, Your Honor. We
14 actually have no issues. The parties have been
15 focused on trying to streamline the pretrial
16 procedures, and we appreciate your comments on
17 that, but we're prepared to proceed as you
18 indicated today and as you ordered.

19 CHIEF JUDGE SHAW: Very good. I
20 appreciate it. Thank you. Mr. Johnson?

21 MR. JOHNSON: Thank you, Your Honors.
22 I don't really have any issues either. I would
23 say that before Judge Barnett talked about
24 maybe unbifurcating -- bifurcating the subpart
25 B, so if I do have one issue I'm just curious

1 how subpart B might be handled, separately or,
2 you know, during the hearings. That's it.

3 CHIEF JUDGE SHAW: Well, thank you. I
4 don't have anything on bifurcation, to be
5 honest with you, but I appreciate your
6 comments.

7 This is a -- yes, I will, if you have
8 a proposal or something you would like me to
9 consider along those lines, please don't
10 hesitate.

11 MR. JOHNSON: Okay. I'm not an
12 attorney, so I'm, you know, trying my best.

13 CHIEF JUDGE SHAW: I know. I know,
14 but you still play a valuable role in your
15 participation. So if you have something you
16 want me to think about, you know, I will.

17 MR. JOHNSON: Okay. I just didn't
18 know if it was still bifurcated or it was going
19 to be or not. But I can write something up.
20 But I'm not sure what to do. I guess it will
21 depend on what the Record Labels would like to
22 do as well, I guess, on subpart B.

23 CHIEF JUDGE SHAW: Personally I was
24 not under the impression that these kind of
25 proceedings are bifurcated.

1 MR. JOHNSON: Okay.

2 CHIEF JUDGE SHAW: But --

3 MR. ENGLUND: Your Honor, Steve
4 Englund for the Record Companies. May I
5 address this point?

6 CHIEF JUDGE SHAW: Well, you're next
7 on the list anyway.

8 MR. ENGLUND: Perfect.

9 CHIEF JUDGE SHAW: Let me just make
10 sure. Mr. Johnson, I don't want to cut you
11 off. Anything else?

12 MR. JOHNSON: No, Your Honor, that's
13 great. Whatever you guys want to do.

14 CHIEF JUDGE SHAW: Perfect. Well, Mr.
15 Englund, you're up next.

16 MR. ENGLUND: Thank you, Your Honor.
17 As Mr. Johnson pointed out, there is a proposed
18 settlement between the Record Companies and the
19 Copyright Owners that's on file that has been
20 published for public comment, and comments were
21 received, deadline a month ago.

22 And we hope you will adopt that
23 settlement, although Mr. Johnson probably
24 disagrees. But I think in the last status
25 conference a couple months ago, Chief Judge

1 Barnett recognized that if the Judges were to
2 reject that settlement, there's some more
3 process that would need to happen because, you
4 know, we're a couple of years into this case.
5 There has been no discovery. There has been no
6 exchange of written testimony with respect to
7 the subpart B configurations, the physical
8 products and downloads.

9 And so I don't see a path to go to
10 trial on the assumption of Chief Judge Barnett,
11 and I think the assumption of all of the
12 participants has been that this is not a trial
13 about physical products and downloads. This is
14 a product about streaming. And if it is
15 necessary to have more process around subpart
16 B, that would be separate.

17 CHIEF JUDGE SHAW: Mr. Johnson, I
18 don't know whether you agree with Mr. Englund
19 or not on the substance, but I do understand
20 now what you meant by bifurcation.

21 And so that almost seems like, the way
22 you phrased it, Mr. Englund, that would be a
23 necessity if we were to proceed in that way, if
24 we needed.

25 MR. ENGLUND: I think it is a

1 necessity. Several months of process that need
2 to occur to make a decision to reject the
3 settlement, although, of course, we hope you
4 will adopt it.

5 CHIEF JUDGE SHAW: Well, we will see,
6 I guess. Okay. I get it. Well, if we reject
7 the settlement, then we're in a new reality. I
8 guess what you're saying, ipso facto, that is a
9 sort of bifurcation.

10 MR. ENGLUND: Yeah, I believe there
11 actually is an order to bifurcate.

12 CHIEF JUDGE SHAW: Oh, well, then
13 please do continue.

14 MR. JOHNSON: I was going to say, May
15 24th, I believe, is when the bifurcation order
16 was given. And so, you know, of course I
17 object and am opposed to the second proposed
18 settlement for several reasons that are in my
19 motions.

20 So I just didn't know if we were going
21 to have to argue it. Of course I would like
22 more than 12 cents. There are some adjustments
23 for actual inflation by the end of this year.

24 But, you know, I would still like the
25 58 cents or whatever close to that, at least a

1 break-even inflation adjustment.

2 An argue towards that, I have a value
3 adjustment, and then -- on the subpart B. And
4 then I have a subpart C case that includes the
5 streaming rate and, you know, the limited
6 downloads I think should be abolished and paid
7 for.

8 So those are -- I just don't know if
9 we're supposed to argue those or it's going to
10 be separate. And that was my basic question.
11 But I do object to the settlement and hope Your
12 Honors do not, you know, agree to it. Thank
13 you.

14 CHIEF JUDGE SHAW: Thank you. Thank
15 you. That has clarified things a lot for me.
16 I appreciate it.

17 MR. JOHNSON: Sure.

18 CHIEF JUDGE SHAW: Mr. Englund, you
19 had, you said, more you wanted to say about
20 this issue.

21 MR. ENGLUND: No, I was going to raise
22 the issue if Mr. Johnson had not, but that is
23 my only point this afternoon because our
24 assumption is that the Record Companies will
25 not be appearing at this trial.

1 CHIEF JUDGE SHAW: Specifically who
2 will not be appearing, which company?

3 MR. ENGLUND: Sony, Universal and
4 Warner, the three record companies.

5 CHIEF JUDGE SHAW: That would be you.

6 MR. ENGLUND: That would be me, yes.

7 CHIEF JUDGE SHAW: You're speaking in
8 the third person.

9 MR. ENGLUND: We are participating in
10 this case only with respect to the subpart B
11 issues. And so, as regards the trial, I think
12 I'm not going to be there.

13 CHIEF JUDGE SHAW: All right. Fine.
14 Depending on how we come out on the settlement
15 issue.

16 JUDGE RUWE: As was mentioned, the May
17 24th order already bifurcated.

18 CHIEF JUDGE SHAW: Yeah, but I was
19 confused when Mr. Johnson was talking about a
20 bifurcated hearing. A bifurcated hearing
21 proceeding, I didn't know in the context of
22 what he was speaking, but now I understand.

23 I mean, I have run bifurcated
24 hearings, but at a little bit of a different
25 scenario, but now I understand.

1 MR. JOHNSON: I'm not an attorney.

2 CHIEF JUDGE SHAW: Yes, no, I
3 understand that, yes.

4 JUDGE RUWE: But it also clarified
5 that the proceeding schedule would be
6 established as necessary.

7 CHIEF JUDGE SHAW: As necessary.

8 JUDGE RUWE: So everything that we
9 have discussed thus far is proceeding from
10 that, although the proposals that we have
11 sought are all about the proceeding except for
12 the bifurcated subpart B aspects.

13 CHIEF JUDGE SHAW: Right, right,
14 right, yes.

15 MR. JOHNSON: I may have misspoke,
16 Your Honors, on the --

17 CHIEF JUDGE SHAW: No, no, I don't
18 think so. We just needed clarification. But
19 I'm not running a bifurcated hearing itself.
20 The hearing itself has already been bifurcated
21 with these things in mind. And if it comes out
22 the way Mr. Englund wants, he won't be at the
23 hearing.

24 MR. JOHNSON: I just remember Judge
25 Barnett saying that, we have discussed this

1 before during the last phone hearing, and she
2 said maybe it will be or maybe it won't be.
3 And that's why I was asking, to clarify. Thank
4 you.

5 CHIEF JUDGE SHAW: I appreciate it.
6 Thank you. Thank you.

7 Mr. Englund, anything else?

8 MR. ENGLUND: No, Your Honor.

9 CHIEF JUDGE SHAW: All right. So that
10 brings us up to -- maybe this alphabetical
11 thing isn't working out so badly anyway. That
12 brings us up to Pandora.

13 MR. MARKS: Thank you, Your Honor.
14 Just two quick questions to follow up on the
15 questions that have been asked by counsel for
16 other participants.

17 Number 1, I just want to confirm my
18 understanding is that while openings and
19 directs and cross-examinations count against
20 the chess clock, that closings would not count
21 against the chess clock.

22 In other words, certainly the past
23 practice has been when we do the closings after
24 the submission of post-trial briefing, there
25 has been an order with time allotments for the

1 closing arguments that has been separate from
2 the chess clock that applied to trial. And I
3 just wanted to confirm that that's what we're
4 talking about doing here.

5 CHIEF JUDGE SHAW: That's how I've
6 always run hearings, but let me just check with
7 the other Judges because they've been here for
8 all these hearings.

9 Is that what you do here?

10 JUDGE STRICKLER: That is my
11 recollection, yes.

12 CHIEF JUDGE SHAW: That's what I was
13 expecting.

14 MR. MARKS: I just wanted to make sure
15 as we finalize proposals on the chess clock.

16 CHIEF JUDGE SHAW: I didn't even know
17 how I would do that except just to reserve
18 time, you know, thinking what I thought you
19 want to say in the closing arguments.

20 MR. MARKS: Right. The other question
21 on scheduling as the parties go back and
22 sharpen pencils on a joint proposal, one
23 concept that was discussed among the -- among a
24 number of the participants, although with no
25 decisions or agreements on the proposal yet to

1 be made, was in weeks in which there is a
2 holiday, then it might make sense to have a
3 trial day on the Friday of those weeks so that
4 we're still getting four days each week.

5 And I just wanted to see if Your
6 Honors had any guidance as to whether or not
7 you would prefer to see proposals that reserve
8 all Fridays to keep them open for other matters
9 as Your Honor had suggested, or whether or not
10 you are amenable to suggestions that, in weeks
11 in which we're taking a day off for a holiday,
12 the Judges would be willing to consider
13 proposals that would have a trial day on Friday
14 in those weeks, or maybe one or two of those
15 weeks.

16 CHIEF JUDGE SHAW: Well, to be
17 completely candid with you, we didn't discuss
18 that. There are all these scenarios. So I
19 will just ask, if that's something we want to
20 comment on now or discuss later, if the other
21 Judges have a view on that.

22 That's something we could get back to
23 you on. I personally don't have a strong view
24 about that. But I think, you know, I mean, I
25 haven't thought it through. I just heard this

1 for the first time. So I think we will have to
2 get back to you on that.

3 MR. MARKS: That's fine. Those were
4 my only questions, Your Honor. Thank you.

5 CHIEF JUDGE SHAW: Thank you.
6 Mr. Powell is next alphabetically. He wasn't
7 here earlier when we did appearances, but is
8 Mr. Powell here now?

9 (No response.)

10 CHIEF JUDGE SHAW: All right.
11 And then that takes us up to Spotify.

12 MR. GASS: Thank you, Your Honor.
13 Andy Gass from Latham & Watkins for Spotify.

14 One of the benefits of representing a
15 company whose name starts with the letter S is
16 that, using this approach, many or all of the
17 issues that we would have been interested in
18 have been amply aired and comprehensively
19 debated.

20 Though the one point that I will raise
21 is an embarrassingly mundane and logistical
22 one, which is that over the course of the
23 pandemic, as we have all perhaps inadvertently
24 become experts in remote proceedings, like the
25 one that we will be conducting here, we have

1 found that it is useful to schedule several
2 days before the hearing is to begin what we
3 colloquially term a tech rehearsal day, to just
4 bring the participants together and make sure
5 that everything is more or less working as
6 intended. And you would be surprised the
7 consistency with which those exercises reveal
8 flaws to be corrected.

9 So would you all be amenable to that?

10 CHIEF JUDGE SHAW: I would not be. I
11 require those, so yes.

12 MR. GASS: So perhaps we could build
13 in one of those into the calendar, either
14 before the Labor Day weekend or perhaps along
15 with Mr. Semel's concern on the Tuesday and
16 then begin the proceeding a day or two later
17 with Your Honors' indulgence.

18 CHIEF JUDGE SHAW: Oh, I think doing
19 it on Tuesday is way too late because I've seen
20 a lot of things happen. And that's important.
21 You know, a lot of times I do a prehearing
22 order and, you know, I think it's great you are
23 writing it for me, but one thing that I
24 frequently put in there, though, is a required
25 practice session.

1 And when I say that, and I might as
2 well say it now because I don't really want to
3 put it in an order, it is very important that
4 you recreate the exact situation you will be in
5 during the hearing, because I appreciate that
6 for this conference we're all doing what we can
7 to make this work smoothly, but when we have an
8 expert who is at home or at a different branch
9 of the law firm, that's when these things
10 usually happen.

11 And, by the way, just to be fair, you
12 know, even in the courtroom there are people
13 who don't know the red light from the green
14 light on the mic, so on and so forth. So
15 really these things always happen when you are
16 working with people and different technologies.

17 So, yeah, I think we should have a
18 practice session and we will get in contact
19 with you and try to set something up. Again,
20 not so we can recreate what we're doing here,
21 this has been great, but so if you have an
22 expert who is going to be off-site or
23 something, you can test things out.

24 MR. GASS: Perfect. That's all, Your
25 Honor. Thank you.

1 CHIEF JUDGE SHAW: Very well. And I'm
2 saying if that expert is not in the United
3 States, I will want to know because I have to
4 administer an oath.

5 And, finally, there is someone who
6 trumps you in this regard at Spotify. It's Mr.
7 Zisk, with a Z.

8 Anything that you would like to add or
9 ask at this proceeding, Mr. Zisk?

10 MR. ZISK: Thank you, Your Honor. I'm
11 good with everything.

12 CHIEF JUDGE SHAW: Okay. Great. So
13 one last chance, Judges, court reporter,
14 parties, anything anybody thinks we really need
15 to talk about before I close this record? Very
16 well.

17 MR. SEMEL: If I might, Your Honor.

18 CHIEF JUDGE SHAW: Yes, Mr. Semel.

19 MR. SEMEL: A quick one. There was a
20 note that was passed to me that I think I had
21 not asked.

22 As we do this planning -- I will throw
23 it out there -- do Your Honors have any
24 guidance on when you might have rulings on the
25 outstanding -- there is one discovery motion

1 that deals with redactions and is an in camera
2 review. I'm in a couple rebuttal discovery
3 motions.

4 Do you have any guidance on that,
5 because some of the things that we would be
6 planning come after -- key after those orders.

7 CHIEF JUDGE SHAW: I thought I have
8 been putting those out fairly regularly in the
9 last few days.

10 MR. SEMEL: Understood. We just
11 wanted to -- I was just curious if that's
12 continuing, if you have any guidance.

13 CHIEF JUDGE SHAW: I'm going to try to
14 keep that pace, and I think the other Judges
15 are, too.

16 MR. SEMEL: Much appreciated. Thank
17 you, Your Honor.

18 CHIEF JUDGE SHAW: Yeah, I could go on
19 about certain motions, but we don't want to
20 open that here. Okay, yes, thank you.
21 Important I agree. We're doing what we can.

22 MR. BRANSON: Judge Shaw, this is Josh
23 Branson from Kellogg on behalf of Amazon.

24 Just to make sure my notes are
25 correct, my understanding is you all want the

1 Phono III remand supplemental proposal by
2 Monday, August 9th, and then you want the
3 pretrial order by August 15th. Did I get that
4 down correctly.

5 CHIEF JUDGE SHAW: That's what I said.
6 And if that's not workable, fine. And as I've
7 always said, early is also acceptable.

8 So, you know, because I'm assuming the
9 quicker you get it to me and the other Judges,
10 the quicker you get your response, the quicker
11 you can get the work done, you know, but those
12 would be the outside limits.

13 I mean, I'm looking at the calendar.
14 We've all said again and again, we have a lot
15 to do this month. But you wrote that down
16 right. Those dates you got right.

17 JUDGE STRICKLER: I just want to
18 clarify. Mr. Branson, did you say Monday,
19 August 8th?

20 CHIEF JUDGE SHAW: 9th.

21 MR. BRANSON: No, I think I said
22 Monday, August -- no, Tuesday the 9th. Is that
23 correct?

24 CHIEF JUDGE SHAW: Tuesday the 9th.

25 JUDGE STRICKLER: It doesn't matter

1 what you said as long as we've got it right
2 now.

3 MR. BRANSON: Tuesday, August 9th.

4 Okay.

5 CHIEF JUDGE SHAW: I hope I said it,
6 this is the great thing about having this
7 reported. I said something in the beginning
8 and I meant to say the 9th, whatever day of the
9 week we think that is, the 9th, yes.

10 MR. BRANSON: I think you said it
11 correctly and I just mangled reading it back to
12 you.

13 CHIEF JUDGE SHAW: It's better to
14 check it out. I appreciate it.

15 MR. BRANSON: The only other question
16 I had, Your Honors, is do Your Honors have any
17 back end constraint on when the trial needs to
18 end in October or is the mid-October time frame
19 being driven by your understanding of counsel's
20 schedules, just as we start to hash this out?

21 CHIEF JUDGE SHAW: Speaking for
22 myself, I won't volunteer the other Judges,
23 but, I mean, I would like to get it over with
24 by then. We have a lot of other things on our
25 plate, of course.

1 But also, like I said, I don't want to
2 oversell our ability to move this along. When
3 you really look at how many hours, like I hear
4 that, well, I don't want to go over this ground
5 again, but, you know, if I said 130, oh, that's
6 great, but then you really play that out as to
7 what really happens during the day and you
8 might find that mid-October date hard to get
9 to, you know.

10 And so I just want to be realistic
11 about, you know, about the number of hours and
12 making sure we do end before mid-October, and
13 even earlier in October would be better I think
14 for everyone concerned, if possible.

15 But it's not like, I mean, I don't
16 have something scheduled on October 16th, if
17 that's what you mean, but I think we do need to
18 make sure this is over with by mid-October.

19 All right. Anything else from anyone?
20 All right. Thank you all very much. I think
21 this has been very productive. We may have to
22 have another one of these but, you know, I wait
23 to see your proposals and what we're going to
24 do with them and it may take care of everything
25 before the hearing, except for, Mr. Gass, the

1 practice session with the tech. Absolutely
2 crucial.

3 Thank you all very much. I believe we
4 stayed on the public record as I wanted to do
5 the whole time. So this conference is closed.
6 Thank you.

7 (Whereupon, at 4:45 p.m., the
8 conference was concluded.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a true and accurate transcript, to the best of my skill and ability, from my stenographic notes of this proceeding.

8/8/22

Raymond G. Brynteson

Date

Signature of the Court Reporter

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