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COPYRIGHT ARBITRATION ROYALTY PANEL

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In the matter of:

Digital Performance Right in
Sound Recording and Ephemeral
Recording

Docket No.
2000-9

CARP DTRA
1 & 2

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

Tuesday
August 7, 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

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C-O-N-T-E-N-T-S

WITNESS DIRECT CROSS REDIRECT RECROSS**Ron Wilcox**

By Mr. Garrett	1653	1986	
By Mr. Steinthal		1754	1923 2001
By Mr. Kirby		1906	
By Ms. Aistars		1969	

Paul Vidich

By Ms. Woods	2008	2081	
By Mr. Steinthal		2043	

EXHIBIT NO. DESCRIPTION MARK RECD

SX-15	Los Angeles Times MusicBank Article	1931	
SX-20	Akoo Agreement	2046	2047
SX-21	Loudeye Clip Agreement	2020	
SX-22	MTV and Warner Music Group Agreement	2054	2058
RIAA-114DR	Webcasting Transmission License Agreement Between Warner Music Group and Echo Networks		2094

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

2 (9:17 a.m.)

3 CHAIRMAN VAN LOON: Good morning,
4 everyone.

5 We have been meeting with the senior
6 counsel for the Copyright General Counsel's Office.
7 And partly to get an update on the status of some
8 pending discovery matters. And he has indicated that
9 he would like to meet with the parties face-to-face
10 tomorrow at the conclusion of our session to get
11 resolution on the final matters that are pending.

12 So, I think we need to plan our schedule.
13 I'm not sure exactly when we'll end tomorrow,
14 obviously. But whenever we end with the witnesses,
15 there'll be some additional time with Bill Roberts.

16 Are there any other administrative or
17 procedural matters to come before the panel?

18 Ms. Woods?

19 MS. WOODS: Yes. Just wanted to let the
20 panel know that Mr. Dorsey on the schedule has been
21 able to move forward so that he actually will be
22 available tomorrow to testify as well. At this point--

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1 CHAIRMAN VAN LOON: So that's for
2 Wednesday the 8th? Dorsey is now confirmed.

3 MS. WOODS: He is confirmed.

4 CHAIRMAN VAN LOON: Excellent.

5 MS. WOODS: Obviously, he will stay over
6 if necessary if we don't get through everyone. But,
7 he is here in town.

8 Mr. Hessinger is staying on the schedule
9 for the 8th.

10 CHAIRMAN VAN LOON: Okay.

11 MR. STEINTHAL: And Mr. Kenswil is after
12 Dorsey but before -- I'm just trying to figure out.

13 MS. WOODS: Sure. Mr. Wilcox, Mr. Vidich,
14 Ms. Evans, Mr. Pipitone, Mr. Hessinger, Mr. Dorsey,
15 Mr. kenswil, Mr. Nagel.

16 CHAIRMAN VAN LOON: Okay.

17 MR. NEWBERG: We have a time update for
18 you if you'd like it.

19 CHAIRMAN VAN LOON: Yes, please.

20 MR. NEWBERG: We're going to type
21 something for you, but just so you know what it is
22 now.

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1 Do you want the running totals or what
2 occurred yesterday?

3 CHAIRMAN VAN LOON: Oh, please.

4 MR. NEWBERG: Okay. Yesterday, as far as
5 the copyright owners and performers direct, it was 2
6 hours and 9 minutes. And the cross from the services
7 was 3 hours and 15 minutes. And so the running totals
8 now are for the copyright owners and performers five
9 hours and 26 minutes and for the services ten hours
10 and 39 minutes.

11 CHAIRMAN VAN LOON: So in our nearly ten
12 hours from morning to evening, although there was
13 lunch and breaks, you have calculated as five hours
14 and 20 minutes?

15 MR. NEWBERG: About five and a half hours,
16 a couple of hours of lunch and breaks and about 2½
17 hours of your panel's questions and objection.

18 CHAIRMAN VAN LOON: Okay. Perhaps we're
19 going to need to count objection time into people's --
20 I think as a practical manner, just sort of looking
21 ahead, 90 is looking illusory if the more than a week
22 we've had to date comes out to about 15 hours. But

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1 we'll continue to adjust and keep an eye on this as we
2 go along.

3 ARBITRATOR VON KANN: I think the panel
4 needs to know whether if it would appear that you do
5 not get 90 hours in because of the way this is
6 evolving, but nevertheless you feel that you're going
7 to be able to finish all of your direct and all of
8 your cross within the schedule that's we've got, you
9 know, then our concern is less.

10 On the other hand, if you're feeling that
11 the way it's evolving you're not getting in the 90
12 hours and we're not going to make it by, whatever it
13 is, September 13, then that's a different equation.

14 At this point just on a preliminary basis,
15 do you, Mr. Garrett, feel like you're doing all right
16 even though it may not net out to exactly 90 hours in
17 your column or are you concerned?

18 MR. GARRETT: Well, whenever I see I have
19 a lower number than my opponent, I get nervous.

20 ARBITRATOR VON KANN: Well, it'll reverse
21 in the next phase, I presume?

22 MR. GARRETT: No, I don't perceive a

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1 problem at this time, Your Honor. I think we're all
2 operating on the premise that we will be done on
3 September 13th, and that this is not going to go past
4 September 13th, and that we will have adequate time to
5 conduct what we consider to be both thorough direct
6 and cross examinations.

7 If yesterday came out to about 5½ hours,
8 that tells me that we're getting a little closer to
9 what we originally had projected. We were projecting
10 6 hour days, recognizing that there would be
11 additional time for the breaks and for objections and
12 for the panel's questioning.

13 And the other thing that we certainly
14 don't want to do from our standpoint is deter the
15 panel from questioning. Even if it means we stay here
16 later in the evening to finish in but you get in your
17 questions answered, I mean that I think is something
18 we would rather encourage than discourage.

19 ARBITRATOR VON KANN: It is clear,
20 certainly to me, two things. One is whether our
21 questions necessarily lengthen the time or it may be
22 we covered some things you were thinking of asking on

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1 cross anyway. So the net effect is that the amount of
2 time for the witness overall doesn't change much.

3 CHAIRMAN VAN LOON: Well, if that's the
4 case, we should keep our mouths shut so we use their
5 time for --

6 ARBITRATOR VON KANN: I think we have
7 discussed among ourselves, we are concerned about
8 intruding on your time and we're going to try to be as
9 restrained as we can, particularly for example in the
10 technical areas like we had yesterday. Some of us, me
11 certainly, do not understand nearly as much of the
12 technical material as I think you all kind of do. And
13 we were just trying to get our bearings in this very
14 interesting and fascinating technical world. And I
15 regret that we -- me particularly, but others I think
16 had felt the need that if we didn't ask a few
17 questions, we'd just be lost.

18 MR. GARRETT: Well, as I said, Your Honor,
19 I don't think any of us in this room wants to
20 discourage questioning from the panel. And I don't
21 think any of us minds sticking around an extra hour if
22 that's what it takes to get all the questions out.

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1 ARBITRATOR VON KANN: As long as you
2 aren't getting concerned that we are derailing your
3 overall schedule, that gives us a little comfort
4 level. But if you begin at any point, I think, to
5 think this is not going to make the deadline, we
6 probably need to know about it and discuss it.

7 MR. STEINTHAL: Speaking for our side, we
8 invite the panel to have the dialogue. I think it
9 basically does often cover areas that would be covered
10 either in direct or cross, and we'd rather scratch
11 itches you have as you have them than, you know, wait
12 until everything's done.

13 So, I think we're on a track from looking
14 at it from a daily schedule as opposed to an hourly
15 schedule. I mean, if we finish the direct part of
16 their case by the day that we expected to do it, then
17 we fully expect that we'll get our case on and off in
18 the days that were allocated to us, whether we use 90
19 hours or not.

20 So, if we need because of witness
21 availability issues to do a Saturday here and there,
22 which is entirely possible, that's a different issue.

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1 But I think on an overall basis we're going down a
2 road where we're pretty comfortable we're going to get
3 done by the allotted time.

4 CHAIRMAN VAN LOON: Excellent. But
5 related to that, I noticed in the schedule that we
6 received yesterday the RIAA witness schedule ends
7 really a day earlier than the previous one. And I
8 hope and presume you all are ready with your first
9 witness, including if it's a day earlier?

10 MR. STEINTHAL: We certainly don't want to
11 give up that day, so we'll do everything we can to get
12 people schedule that day.

13 We have a couple of baby problems. We've
14 got a couple of holiday problems. We've got an NAB
15 convention problem that we're all working around to
16 get our witnesses in.

17 And when I say "baby problems," we have
18 two witnesses who are scheduled to have babies between
19 now and Labor Day right in the zone of when they're
20 supposed to testify, and they're both from California.
21 So, we've got ticklish problems in getting them here
22 and getting commitments from them, because it's

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1 basically that's more important, and we all understand
2 that, we just don't know the day it's going to happen.

3 So literally two of our witnesses; one
4 from MTVI, one from Spinner, which is the AOL company,
5 are fathers having their first child right in that
6 zone. So we're trying to balance that and get it
7 done. And we'll do what we can do to get them in a
8 sequence that makes sense.

9 But we're not worried about the schedule
10 as the way it's gone so far, and we invite the panel,
11 as Bob said, to ask questions as they'd like to.

12 CHAIRMAN VAN LOON: You did say "fathers,"
13 right?

14 MR. STEINTHAL: Yes, they're fathers. Not
15 like Ms. Evans whose either having or just had a baby
16 here today.

17 CHAIRMAN VAN LOON: Yes, we are definitely
18 understanding and are accommodating with Ms. Evans.

19 I know this is a case of impression. I'm
20 sure it's unprecedented to have anyone go into labor
21 during a CARP hearing, at least I hope so.

22 MR. STEINTHAL: I told Mr. Garrett we'd

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1 get her on and off very quickly today.

2 MR. GARRETT: We've had people pass out,
3 but this is a different one.

4 One question.

5 CHAIRMAN VAN LOON: Yes.

6 MR. GARRETT: Can I ask who the witness is
7 for the services will be next week, Thursday and
8 Friday? The original schedule was Professor Jaffe
9 followed by the MTV witnesses. Is that still the
10 schedule.

11 MR. STEINTHAL: I need to get back to on
12 that. I'll get back to you at the end of the day. I'm
13 just not the right person to answer that. I haven't
14 been the one on the phones figuring that out. It's
15 not a secret. We'll get it to you.

16 MR. GARRETT: Yes. We just need to begin
17 our preparation. And since they've got 30 odd
18 witnesses, it's important to know whose coming up
19 first.

20 CHAIRMAN VAN LOON: Well, let's commence
21 then with our first one this morning, and get rolling,
22 please. Mr. Garrett?

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1 MR. GARRETT: At this time we call Mr.
2 Wilcox.

3 CHAIRMAN VAN LOON: Welcome.
4 Whereupon,

5 RON WILCOX
6 was called as a witness by Counsel for the Recording
7 Industry Association of America, Inc. and having been
8 first duly sworn, assumed the witness stand and was
9 examined and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. GARRETT:

12 Q Would you state and spell your name for
13 the record, please?

14 A Ron Wilcox. R-O-N, W-I-L-C-O-X

15 Q And by whom are you currently employed,
16 Mr. Wilcox?

17 A Sony Music Entertainment, Inc.

18 Q What is your title?

19 A Executive Vice President Business Affairs
20 and New Technology and Senior Vice President Business
21 Affairs Administration for the U.S. Government.

22 Q How long have you been employed by Sony?

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1 A Twenty years.

2 Q Can you briefly describe your current
3 responsibilities?

4 A I'm responsible, my area's responsible for
5 essentially the business relationship with our
6 artists, producers, licensors, licensees, associated
7 labels, in the negotiation of contract relating to
8 those parties and particularly we've been focused on
9 new technology concerns, and that's an expertise that
10 our staff is responsible for also.

11 Q Do you have any responsibility for
12 supervising negotiations in these areas?

13 A Yes. We supervise the negotiation for all
14 of those sorts of deals.

15 Q Responsibility for approving agreements
16 related to new media licenses?

17 A We negotiate and supervise the -- and
18 approve and negotiate the terms of those licenses,
19 yes.

20 Q Do you have any role in formulating your
21 company's policies concerning new media?

22 A Yes, I do. I've done so for -- since CDs

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1 were a new technology.

2 Q Would it be fair to say that you're the
3 person at Sony who is most directly responsible for
4 licensing new media?

5 A I am.

6 Q Okay. Please describe briefly your
7 background prior to joining Sony?

8 A Simply law school and two years of private
9 practice, followed by joining the CBS law department
10 back in 1981.

11 Q Now, Sony is one of the record companies
12 known as a major, is that correct?

13 A Yes, it is. Sony's one of currently five
14 major record distributors worldwide. We have several
15 major label groups; Columbia, Epic, Loud, Semi-
16 Classical. We have Nashville Country Labels, Epic,
17 Columbia and Monument.

18 We have a special products area, so those
19 are all areas of our -- of our brands, if you will.

20 Q Okay. Can you identify some of the
21 artists who record on some of the labels?

22 A Bruce Springsteen, Celne Diane, Destiny's

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1 Child, Travis, Train, Barbar Strisand, Billy Joel,
2 Getaway People. A good mix. Ricky Martin.

3 Q Okay. Are you familiar with the RIAA
4 Negotiating Committee?

5 A Yes, I am.

6 Q And what is your relationship to the RIAA
7 Negotiating Committee?

8 A Since passage of the DMCA and the move to
9 negotiate licenses in this area, this committee was
10 formed and I have been Sony's senior representative on
11 the committee. I've participated in many, if not all,
12 of the weekly conference calls. And there are calls
13 in addition to that sometimes about particular deals.
14 And sometimes if a conference call is not available,
15 there are individual calls to companies to solicit
16 input. If I'm not on every call, members of my staff
17 are on the call.

18 And we've stayed very closely in touch
19 with the industry negotiations by, first, exchanging
20 ideas about what our goals are, what the -- what might
21 be appropriate negotiating strategies to implement and
22 to move toward acceptable voluntary agreements.

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1 And as part of that process, we at Sony
2 spent a great deal of time internally analyzing the
3 different issues that we're going to have to face
4 coming up with our own philosophies and hoped for
5 terms and conditions.

6 Q Okay. Now, I learned recently that among
7 your other qualifications you're also a good close
8 personal friend of Mr. Steinthal, is that correct?

9 A Yes.

10 Q And so I was given that information then
11 when I was told that Mr. Steinthal has no friends.

12 A He has a great many friends.

13 Q All right.

14 MR. GARRETT: At this time I would make
15 Mr. Steinthal -- I'm sorry. Wishful thanking. Mr.
16 Wilcox available for his good friend.

17 MR. STEINTHAL: We have no voir dire.

18 MR. GARRETT: All right.

19 BY MR. GARRETT:

20 Q Mr. Wilcox, could you just briefly
21 describe the purpose of your testimony here?

22 A Well, I'm attempting to convey to the

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1 panel the standards of willing buyer/willing seller as
2 we perceive them at Sony and has been discussed in the
3 Negotiating Committee. The factors that take that
4 into account and show in that sense, we hope, that
5 what would an appropriate market rate be.

6 Q All right. Could you briefly describe
7 some of the general considerations that have guided
8 the Negotiating Committee's actions in dealing with
9 the webcasters statutory licensing issues?

10 A Well, when we went into this analysis, we
11 looked at several factors and discussed the pluses and
12 minuses of them. But certainly the key ones have been
13 we believe that we're bringing great value to the
14 webcasters. We have, essentially our music, our
15 content is their programming.

16 We as a record industry have significant
17 challenges, costs, risks associated with producing and
18 marketing and promoting our sound recordings, which we
19 had to take that on board.

20 As an industry at this time, I think we
21 feel that licensing revenue is crucial to our
22 business. In some ways I think the perspective is

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1 that U.S. sale of physical product is essentially can
2 be seen as R&D, research and development, and that
3 it's the ancillaries, if you will, which are becoming
4 more and more the bulk of the business or -- and we
5 anticipate to be so -- will be the -- will be the
6 profit opportunity, if you will.

7 Likewise --

8 Q And by profit opportunity, you're
9 referring to licensing revenues?

10 A Yes. That that licensing revenue will be
11 crucial for profitability. The costs and risks
12 associated with the sale of physical goods in the U.S.
13 and making them successful are such, and are
14 continuing to be such that we need to look to that as
15 a source of profit.

16 The related concern is we have seen how
17 people are experiencing music change. It's changed
18 over the decades. I mean, we had a singles driven
19 market 50 years ago, and then we had an album driven
20 market. Times are changing. We have more and more
21 singles driven market, a hit driven market, if you
22 will. Compilation albums are incredibly popular and

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1 the idea of waiting for an artist's full album to
2 satisfy your musical desires is less than it used to
3 be.

4 We see college and adults, my
5 contemporaries, are experiencing their music much more
6 by listening to the computer at work as opposed to
7 putting a CD in the stereo behind them, perhaps.
8 Children, and my children are doing similar things.

9 So we're concerned about how we are going
10 to be satisfying the musical experience in the future.
11 What will satisfy consumers in the future for their
12 musical desires.

13 Another thing we looked at is does the
14 webcasting compulsory area, does it help promote our
15 sound recordings. We weighed that, a lot of issues
16 there. But I think certainly we believe that it is,
17 I guess, de minimis. It's not -- we would say it's not
18 at all significant.

19 We find that promotion is important and is
20 helpful when you have significant repetition in a
21 focused geographic area of the same song over and
22 over. And you're approaching a mass audience and

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1 you're playing the same song, and we have the consumer
2 hearing that talking among themselves, perhaps school
3 groups, office groups, carpools where it incites a
4 desire to own that song. And traditionally that has
5 been satisfied by the purchase of a CD.

6 We're not in the same boat when you're
7 speaking about webcasters who have many genres of
8 music and the repetition is not there, the mass
9 audience is not there, the geographic proximity is not
10 that.

11 We also are concerned, I think as was
12 touched on from yesterday, about security risks;
13 making our music available in digitized form is a
14 great concern. Making it available on the Internet in
15 the same way, is a great concern. We're faced with a
16 compulsory law which requires it to be so, allows
17 people to make it so available, but we have to weigh
18 that in terms of what we feel is an appropriate
19 license fee.

20 We have the face of reality in these
21 negotiations, and it was brought home in any number of
22 these conference calls. The reality that the -- as

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1 we're going out there trying to make voluntary
2 licenses, what was the incentive for the webcasters
3 who are speaking to us, negotiating with us to
4 complete a license? They theoretically were
5 disincentivized from making such a deal when they knew
6 they could rely on the compulsory license. If, you
7 know, we took that into account in trying to make the
8 market, if you will, and we had to move our standards
9 to accommodate that reality.

10 ARBITRATOR GULIN: Mr. Wilcox, this has
11 been mentioned by a few witnesses now, this idea of a
12 disincentive by the webcasters to enter into
13 negotiations because they can rely upon the CARP. But
14 it's unclear to me why the webcasters have more of a
15 disincentive than do the record companies. Either way
16 both parties are taking a risk. This comes before a
17 CARP, and the CARP has to set a rate that's hopefully
18 a market rate. If we error in that endeavor, don't
19 both parties take the same risk? Why is it more of a
20 disincentive for the webcasters?

21 THE WITNESS: Right. I think the way we
22 viewed it was that the market opportunity that we

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1 didn't have by virtue of the compulsory was different
2 in that they were trying to -- the webcasters were
3 trying to determine a cost. And the cost to them if
4 it's the same for all their competitors, will be at
5 least equal footing and they will know that they're
6 not at a competitive advantage or disadvantage.

7 If they were to move ahead, ahead of the
8 time that we had a compulsory rate, I think our
9 analysis was that they would be at risk of overpaying.
10 And I think for a cost item to them, which I believe
11 should be not an insignificant one on their P&L, I
12 think that would be an incentive to -- or disincentive
13 to voluntary license, an incentive to wait and just
14 end up making sure they pay what their competitors are
15 paying.

16 ARBITRATOR GULIN: Wouldn't the
17 possibility of underpaying, with their paying less
18 than what their competitors might ultimate pay, be an
19 incentive to be one of the first one board to get a--

20 THE WITNESS: I think to a certain extent
21 that motivated some of the webcasters to sit with us.
22 But, you know, in weighing those factors I think the

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1 analysis of our committee was at the end of the day it
2 was in that negative. But I understand your point.

3 ARBITRATOR GULIN: Okay. Thank you.

4 THE WITNESS: And going to the same token,
5 from our end we had to be realistic to know that at
6 the end of the day we have to sell; or we've already
7 sold, we just don't know the price. So we took that
8 on board, too, in terms of figuring what appropriate
9 rates and terms might be.

10 BY MR. GARRETT:

11 Q Now you've been describing some of the
12 considerations that guided the RIAA Negotiating
13 Committee, correct?

14 A Yes.

15 Q Are any of those considerations applicable
16 in your negotiations for new media licenses outside
17 the statutory license?

18 A Yes. Many of the same ones. We have --
19 I mean, in fact, the analysis was done, as I said,
20 first in our camp so to speak before we came to the
21 general committee. And we've done that analysis as a
22 company in terms of any number of other sorts of new

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1 media deals that we've had to negotiated, or that we
2 have negotiated over the past few years. The same
3 process is part of it.

4 Q Just focus for a moment on your licensing
5 deals outside the statutory license. What are the
6 principle negotiating objectives of the seller and the
7 buyer in those deals?

8 A Well, we're attempting -- you know, we
9 have essentially a list of terms and conditions which
10 we feel are important. We understand and look for a
11 good balance among them so that if we get less here,
12 we think perhaps we'll be compensated by more there in
13 another one of these issues. And that's kind of the
14 given and take that we go through in our analysis.

15 Usually on the other side, you know, I get
16 the sense that they're trying to make just a low as
17 cost as possible. I mean, that's the essence of it.

18 Q All right. And what arguments do you
19 typically hear on the other side in these
20 negotiations. Or within the other side?

21 A Okay. Well, we get the sense that they're
22 -- they're startups. They -- they have a lot of

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1 serious significant costs associated with starting up.
2 I get the sense that they want us to give them a break
3 in that -- because of that.

4 They encourage or promote the idea that
5 they are helping to sell our records by making music
6 available in a new way and, you know, spreading --
7 spreading music more throughout the Internet.

8 Those are, you know, I guess the key
9 couple of concerns.

10 ARBITRATOR VON KANN: Did you say a moment
11 ago that in these negotiations that the webcasters are
12 trying to pay as little as possible for the royalty
13 rights?

14 THE WITNESS: That's been my impression,
15 yes.

16 ARBITRATOR VON KANN: Is that in your view
17 unusual for a buyer?

18 THE WITNESS: No.

19 ARBITRATOR VON KANN: No?

20 THE WITNESS: No.

21 ARBITRATOR VON KANN: All right. Are you
22 trying to get the highest rate you can?

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1 THE WITNESS: We are, but we also see --
2 I mean, you know, subjectively speaking we also see
3 that there are a lot of pluses and minuses that can go
4 into these deals. And we've weighed those, you know,
5 not insignificantly.

6 ARBITRATOR VON KANN: Okay.

7 BY MR. GARRETT:

8 Q You focused a moment ago on balancing the
9 rate with other kinds of considerations. What are
10 these other kinds of considerations? Just on a very
11 broad way.

12 A Well, we have -- I thought what I'd do --

13 Q Well, just generally what are the other
14 issues that are important to you besides just the
15 rate?

16 A Well, the -- since usually on the other
17 side of the table in this area, one of the things that
18 they talk about is the promotional benefit it would
19 bring for us. One of the things we attempt to do is
20 set promotional value, promotional obligations as part
21 of the deal.

22 We look for some level of data, obtaining

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1 data is important. Good security's important.
2 Appropriate advance or a guarantee is important. We
3 look for what I call sign-on payment of some sort or
4 equity participation.

5 The term, which is one of the big
6 differences from what we deal with in our compulsory
7 situation, term is very important. In compulsory we
8 have a perpetual term; rate to be determined, but the
9 term is perpetual. We have the opportunity in our
10 voluntary marketplace licenses to set a term that has,
11 you know, the deal's over at that point and they have
12 to reup with us on a voluntary basis.

13 The scope can be different. Again, in our
14 compulsory discussions the scope is essentially all
15 their sound recording copyrights. In voluntary
16 discussions -- we have noncompulsory discussions in
17 new media, we have the opportunity to limit the scope
18 based on active catalogue, based on genre, based on
19 new releases versus catalogue, and a lot of different
20 ways.

21 Q Let's get into some of those little detail
22 a little later here, but it's fair to say that there

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1 are many factors that you have to take into account in
2 negotiating a deal other than simply the rate,
3 correct?

4 A Yes.

5 MR. GARRETT: At this time, Your Honor, I
6 want to have the witness discuss material that is
7 restricted. It's on pages 5 to 12 of his testimony.
8 So I would ask that we move into a closed session,
9 please:

10 CHAIRMAN VAN LOON: Okay.

11 ARBITRATOR VON KANN: While they're
12 existing, can I ask a question about that last answer
13 when you spoke about term. It wasn't clear to me when
14 you mentioned term whether you felt that it was
15 advantageous to get a long term or a short term. Is
16 it better to have these deals come up frequently for
17 renewal or is it better to lock in for ten years?

18 THE WITNESS: Sorry. Sometimes I'm into
19 it so much that I presume too much.

20 ARBITRATOR VON KANN: Okay.

21 THE WITNESS: Certainly from our
22 perspective we've had faith in shorter terms. We're

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1 concerned about how things are developing in this area
2 and we want the opportunity to revisit, you know,
3 terms and conditions on a more frequent basis.

4 ARBITRATOR VON KANN: Okay. So I guess
5 what that means is somebody who insists on having a
6 ten year deal, you would probably look for higher
7 royalty rates than if you're just locking in for a
8 couple of years?

9 THE WITNESS: That would definitely be a
10 trade-off we'd consider, yes.

11 ARBITRATOR VON KANN: Okay.

12 CHAIRMAN VAN LOON: We are about to go
13 into closed sessions. I wanted to raise with counsel
14 an issue. There's a young woman, a legal intern
15 that's been working with the Copyright Office during
16 the summer. And a request that she be allowed to
17 remain in the closed sessions with an agreement of
18 confidentiality.

19 Obviously, this is not a burning issue,
20 but I wanted to raise with the parties.

21 Ms. Woods?

22 MS. WOODS: Your Honor, I think that would

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1 be fine with us. And, at least my interpretation, not
2 reading the protective order again, but would be that
3 she would probably be encompassed the provisions that
4 applied to the Copyright Office staff who had to have
5 access to the materials. And perhaps she doesn't
6 absolutely have to have access, but we would see her
7 within the same area.

8 MR. STEINTHAL: We have no objection at
9 all.

10 CHAIRMAN VAN LOON: So we'll now go then
11 into closed session, please.

12 (Whereupon, at 9:50 a.m. the Copyright
13 Arbitration Royalty Panel went into Closed Session.)
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1 ARBITRATOR VON KANN: While Mr. Steinthal
2 is sorting papers, let me ask you one question that
3 you'll have to answer.

4 In a number of these agreements, part of
5 the compensation comes through these pro rata shares
6 of receipts in various ways. It strikes me that
7 getting into that probably opens up a Pandora's box of
8 accounting issues, and do you count this and do you
9 count that, and is he keeping accurate records; as
10 opposed to a fairly clean, mechanical deal -- I don't
11 know -- per song, per performance or something. But
12 apparently, you, and I guess others, do use this
13 notion of a portion of receipts or revenue.

14 Why is it that you all are willing to sort
15 of undertake probably lots of accounting arguments and
16 debates about whether to count this one or not? Is it
17 your conclusion that the upside potential is worth the
18 added costs of administering that kind of scheme?

19 THE WITNESS: There are a couple different
20 answers that have depend upon these different
21 services.

22 For example, in the compilation area I

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1 just spoke about, that, generally speaking, is record
2 company and record company. Generally, we're
3 comfortable with our practices and our procedures to
4 feel that we're going to be properly accounted to.
5 And if not, we also know the kind of standard audit
6 procedures where we can find out if maybe there was a
7 misunderstanding in the interpretation of the
8 agreement. So generally we're going to feel
9 comfortable there.

10 ARBITRATOR VON KANN: Why wouldn't you
11 just say so much per record sold, per compilation
12 sold?

13 THE WITNESS: Right. A lot of it is
14 history, as the business has grown up. We don't mind
15 that as a licensor, if I felt I was able to obtain
16 that each time, particularly in the area of records,
17 where I have a general sense of the pricing, so you
18 know what the public is going to allow to be charged
19 them for a given record. So I might prefer that. But
20 I'm also going against 50 to 100 years of practice
21 that's different than that. So it's rare. If you
22 have the right leverage in those situations, you might

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1 be able to obtain just a straight aggressive penny
2 rate, if you're comfortable about how the pricing will
3 go.

4 In some of the other areas, obviously,
5 when we look at rates, our number one priority,
6 generally, is to get a percentage against a minimum.
7 The minimum, generally, is a penny-driven rate; the
8 basic rate, though, is a percentage. So that protects
9 us we believe in both situations. It means we get a
10 certain amount no matter what their revenue
11 opportunities are or not. But if the revenue
12 opportunities are great and significant, and the
13 profit potential -- the revenue potential -- for this
14 particular new media enterprise is good, we'll
15 participate in that also. So that's ideal. And
16 again, it's a negotiation thing.

17 ARBITRATOR VON KANN: You've taken this
18 concept that you're comfortable with, with your fellow
19 record companies, and you've now imported it into this
20 very uncertain world of Click Radio and several of
21 these other services, where computing their receipts,
22 and are they going to make any money or lose any

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1 money.

2 Is it just that this is kind of a
3 historical way of doing it, and so that's what
4 happened?

5 THE WITNESS: I'm not -- I would
6 probably -- I would say no. I would say there's some
7 of that, but these are new opportunities and new
8 business models that are evolving, and we're cognizant
9 of that. And as I say, the starting point for us in
10 these negotiations is to look for percentage of
11 receipts, because notwithstanding the potential
12 difficulties with it in audit and so on, we feel that
13 the participation in that upside of a certain
14 reasonable amount of their revenue being allocated to
15 their content that they're using -- to our content
16 that they're using is a fair premise to begin the
17 discussion.

18 On the other hand, we don't want to get
19 trapped into situations where the real motive of this
20 particular licensee is to sell something else in which
21 somehow we don't benefit or is part of an overall
22 company or venture situation that we don't participate

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1 in, so that we could be hurt if they don't price it
2 what we would call properly, or don't price it well,
3 or they price it based on other concerns, so that we'd
4 then try and get that minimum. And we aren't always
5 successful in those, but that's always the margin
6 orders. And then it's just a matter what you're able
7 to negotiate to complete a deal.

8 ARBITRATOR VON KANN: So you've sort of in
9 a sense hedged a little, hedged your bets a bit.

10 THE WITNESS: We try, yes. We really do
11 try, yes.

12 ARBITRATOR VON KANN: Whereas in the
13 proposed agreements that RIAA Negotiating Committee,
14 of which you're a part, the terms that have been
15 suggested to us, as I recall it, involve giving the
16 webcasters a choice-- do you want it on a flat, so
17 much per performance basis or do you want a percentage
18 of your revenues. They could make the choice.

19 THE WITNESS: Right. On the Negotiating
20 Committee level when we sat down and started our
21 discussion about what terms we might seek, clearly
22 what I just said was from our point of view what we

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1 wanted, from Sony's point of view. And I believe it
2 was a viable proposition for the whole industry
3 committee.

4 As we got into the day-to-day negotiations
5 of different contracts with different webcasters, we
6 compromised. We were trying to make deals. We wanted
7 to minimize the risk associated with a CARP of this
8 nature. So we were hoping to get deals. We were
9 hoping to have people either avoid the CARP or have
10 people out of the CARP so that we could --

11 ARBITRATOR VON KANN: Everybody works for
12 avoidance.

13 THE WITNESS: Well -- gee, I feel bad
14 about saying that. I tried to say this diplomatically
15 as I could.

16 ARBITRATOR VON KANN: We understand. We
17 understand.

18 THE WITNESS: But -- so we made great
19 effort to try and do that, but we had to adjust our
20 top-line desires with the realities of that
21 marketplace. And there were plenty of times
22 when -- and Steve Marks with RIAA came back to the

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1 Negotiating Committee and said, hey, guys, you may
2 want that, but I'm in there. It's not going to
3 happen, and you're going to have to adjust this. So
4 then we try and come up with alternatives.

5 And I think if you look at the
6 submissions, you'll see that there's a fairly wide
7 variance in terms of exactly how each of these deals
8 were structured. And some of that represents
9 the -- there came a point where -- there came a point
10 where I think some of the webcasters kind of drew a
11 line and said they're not going to participate; they
12 don't want to participate, give us a participation on
13 their net receipts. And so, all of sudden that kind
14 of -- was much more difficult to obtain, period. And
15 you'll probably see that if you look at the
16 chronological order there.

17 ARBITRATOR VON KANN: Okay. Thank you.

18 CROSS-EXAMINATION

19 BY MR. STEINTHAL:

20 Q Good morning, Mr. Wilcox.

21 A Hello, sir.

22 Q Can you tell us a little bit about Sony as

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1 a corporation and where Sony Music fits in within that
2 overall corporation?

3 A Sony Corporation is based in Tokyo.
4 There's a Sony Corporation of America, which is
5 their -- a U.S. company wholly owned by Sony Corp.
6 Under Sony Corporation of America there is Sony
7 Electronics of America, there is Sony Pictures, and
8 there's Sony Music -- Sony Music Entertainment, Inc.
9 I mean, that's the simplest way I can put it across.

10 Q So there are three fundamental business
11 units within Sony Corporation, right?

12 A Well, you also have --

13 Q In America.

14 A Yes, correct, in Sony Corporation of
15 America. We also have a significant -- the Play
16 Station, if you will, the computer division is a
17 separate division, which is also significant. So I
18 would say electronics, the computer games area,
19 pictures and movies.

20 Q And has the music company over the course
21 of the last decade been operationally a part of the
22 company that has done well?

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1 A Has it been -- has it been -- I'm sorry?

2 Q Has it been a part of the company that has
3 reported annual profits on a general basis?

4 A We're actually in a tax-loss,
5 carry-forward basis, but we've contributed profits,
6 yes.

7 Q Now, just to get a sense of the breadth of
8 the Sony Music catalog, is it fair to say that the
9 music in the Sony catalog, or catalogs to be more
10 accurate, covers all sorts of genres of music?

11 A Yes.

12 Q Could you give the panel an idea? That
13 they've seen a demonstration of some of the many genre
14 offerings of Internet radio, but could you give us an
15 idea of the different kinds of genres of music
16 reflected by the Sony catalogs?

17 A Classical, jazz, traditional rock and
18 roll, R&B, hip-hop, adult contemporary, heavy metal,
19 punk --

20 Q Pretty much want to be in as many genres
21 as you can be, right?

22 A Well, not necessarily. There are genres

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1 which are more profitable than others. There are
2 genres which are not necessarily your highest
3 priority. So, not necessarily.

4 Q And would it be fair to say that you have
5 a list of artists that record for Sony Music that you
6 and the other Sony executives are quite proud of?

7 A Yes.

8 Q And just looking at some of the statistics
9 for this year, some of the top-selling albums within
10 your catalogs would include bands and titles as varied
11 as Destiny's Child; is that right?

12 A Yes.

13 Q And Jennifer Lopez and Sade?

14 A Yes.

15 Q Did I pronounce that right? Train, as you
16 mentioned; L'il Bow-Wow; Aerosmith; Dixie Chicks;
17 Incubus; Ricky Martin, and I could go down a list.
18 There are many dozens, I would say, of Sony artists
19 that are currently selling albums bearing their works
20 within the top 100 Sony albums, right?

21 A In terms of unit sales, those are probably
22 representative of that, yes.

1 Q And in terms of all-time history, artists
2 like Billy Joel and Pink Floyd and Barbara Streisand
3 and Michael Jackson are all in the top 20, are they
4 not, of units sold?

5 A For a fact, I don't know, but quite
6 possible.

7 Q But they're all Sony artists, are they
8 not?

9 A Yes.

10 Q Now, you mentioned in response to one of
11 the questions on direct that the brand to use your
12 work that you're selling is either the artist or the
13 album; is it not?

14 A Yes.

15 Q People don't buy Sony albums, they don't
16 buy Epic albums; they buy Billy Joel albums, and they
17 buy Pink Floyd albums, right?

18 A Generally, that's true given the examples
19 you just used, but you also have the ability to -- I
20 mean, for example, Ministry of Sound is a label that's
21 particularly -- not our label. But it's particularly
22 associated with dance music. And there are a lot of

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1 people who will buy dance music based on a brand name
2 of the record company.

3 And we have within our family, for
4 example -- the Columbia Records label has a
5 relationship with someone called -- a label called So
6 So Def, D-e-f. And there are hip-hop fans who knowing
7 So So Def and knowing people that are behind So So Def
8 will say, hey, So So Def. Germaine Dupree, who's the
9 owner of it, great producer, I'm going to buy his
10 records. So we wish it were more oriented towards
11 buying Columbia, Epic or So So Def. It's not there as
12 much as we would like.

13 Q You would agree with me that most of the
14 unit sales are based on people buying albums because
15 they like a given artist or because of the name of the
16 album that they've learned about, right?

17 A Correct.

18 Q Now, if you are an independent webcaster,
19 and you want to have a broad-based radio type product
20 to offer consumers, and for some reason you don't fit
21 within the statutory license over here because either
22 you're too interactive or you don't follow all the

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1 detailed rules, you'd have to go get a license from,
2 among other companies, yours, would you not, in order
3 to really offer a broad-based musical service?

4 A Certainly, that would be your goal.

5 Q As a practical matter, you'd agree you're
6 proud of your catalog. If I wanted to put out a music
7 service to the public and say, hey, I've got a really
8 broad-based music service, come listen to it, I'd
9 better have some Sony music, or I'm not really
10 offering a broad-based catalog, right?

11 A We're struggling with this a bit. As I
12 was talking about how we are enjoying our musical
13 experience and how that's changing, we're not so sure
14 that that is the future. Let me explain.

15 You have, for example -- and this is the
16 example we use a lot in our company -- HBO and
17 Showtime, and other -- Movie Channel -- cable. They
18 have exclusive deals with certain studios, and you're
19 not going to see -- and I don't know the relationships
20 that well. But you may not see a Paramount movie on
21 an HBO broadcast. So we may be going in a different
22 direction, okay?

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1 So, yes, it's desirable to have all of
2 certainly the majors on board. Is it necessary to
3 have -- to present a musical experience that will
4 satisfy the consumer? I'm not sure it's as necessary
5 now as it used to be, and I'm very doubtful how it
6 will it be in the future.

7 Q Do you know of any major market broadcast
8 radio station that is anywhere near the top in
9 audience and ratings in their market, that could do
10 that without relying on a broad-based catalog?

11 A A broad-based broadcaster -- a top-rating
12 song -- I think would be -- have difficulty not having
13 all the major music. Their ratings might be affected;
14 that might be true. But I mean, I distinguish that
15 from this. It's a broad -- there's a limited spectrum
16 on the dial. There can only be so number of radio
17 stations that go for the mass audience. They're not
18 targeted in the same way that the genre-given
19 webcasting, for example, can be.

20 Q But if you are targeting a mass
21 audience -- if you are a webcaster that wanted to have
22 a mass audience -- you'd agree with me, wouldn't you,

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1 that you'd want to get songs from your catalog because
2 it's so much of a great catalog?

3 A All of the things being equal, yes.

4 Q Now, I take it that by now, Sony
5 Music -- or various of the Sony Corporation of America
6 companies, because I don't know them so
7 intimately -- has invested in some companies that are
8 in the digital music business other than Sony Music in
9 terms of a licensor product, right?

10 A Yes.

11 Q Can you tell us a little bit about what
12 those companies are?

13 A Keenly, I am not as familiar with those as
14 I am with some of these licenses, but we've had some
15 organizational structuring issues where I've been more
16 or less involved over the course of the last
17 few -- number of years. But generally speaking, it
18 was a priority of Sony Corporation of America to make
19 some investments in new technology companies.

20 We were looking to be a bit of an
21 incubator, if you will, or serve that function, as
22 many people have, in some of the new technology areas.

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1 I know we've invested in some companies that were
2 providing music information. They were aggregating
3 information about all artists and records and so and
4 so forth, news updates, and making that available to
5 other services that want to take advantage of it, kind
6 of like a wire service for music. That's just one
7 example of an investment.

8 (Whereupon, the open session was
9 discontinued, and the closed session
10 commenced at 11:49 a.m.)

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1 BY MR. STEINTHAL:

2 Q One of the things that you testified about
3 in responding to Mr. Garrett's questions and the
4 panel's questions, in relation to the deals that
5 you're doing in new media, is the desire to have a
6 short term. Do you remember testifying to that
7 effect?

8 A Yes. Again, it's one of the
9 considerations against other considerations. So as
10 we've pointed out here, it can be compensated for in
11 other ways.

12 Q But I believe you told the panel that the
13 reason you like a short term rather than a long term
14 in this space is in order to take changes in the
15 marketplace into consideration and have the ability to
16 adjust, correct?

17 A We prefer not to undersell, and that's a
18 concern in these new areas for us.

19 Q Would it be a fair statement then, that
20 the reason you want a short term is so that if things
21 change in the marketplace -- in a rapidly changing
22 marketplace -- you will have the ability to reset your

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1 price based on those changes after that short term
2 expires?

3 A Yeah. Again, it's one of the factors in
4 weighing what sort of deal you're going to do. If the
5 other pieces of it are just a little bit above our
6 scale, perhaps what we're willing to agree to, might
7 we accept a longer term as part of that? Yes, perhaps
8 so. If we feel very confident that we've negotiated
9 a very good deal, in general, we might be very open to
10 a longer term. So I never look at any one deal term
11 in isolation; that's all.

12 Q But viewing this deal term in isolation,
13 just for a moment --

14 A I just said I never do. What do you want
15 from me?

16 Q Is it true that having a short term
17 protects you and gives you the ability to go with the
18 flow on prices?

19 A As easy to see, I mean, it goes both ways.
20 So to the extent that the licensee in that situation
21 has an opportunity to revisit, we could be harmed. So
22 you've got to weigh that.

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1 Q It avoids locking into a rate for a long
2 period of time if there are things that might change
3 within a short period of time, right?

4 A It does avoid that, but it can go either
5 way.

6 Q At the very beginning of your written
7 testimony, and I think orally this morning as well,
8 you said that you were involved in the formulation of
9 Sony Music's policies concerning new technologies in
10 the use of sound recordings on the Internet, correct?

11 A Yes.

12 Q Are there any particular policies that
13 Sony Music has adopted concerning the licensing of its
14 sound recordings for Internet use?

15 A This is an area where policy is probably,
16 maybe, too strong a term or something. It's influxed
17 sufficiently. And there is discussion about it so
18 frequently I would say it's a bit of a moving target.
19 So we have our -- we have our desires in terms of what
20 we'd like to see, for example, when it comes to what
21 rates we think are appropriate. We have our concerns
22 about security, so probably a policy about making sure

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1 that we're not going to facilitate free -- what we're
2 not going to do -- we're going to do whatever we can
3 to avoid the free file sharing that we were hurt by so
4 much with Napster. We're not going to put out all of
5 our music available on the Internet in MP3 format
6 unprotected for people to grab in a willy-nilly
7 fashion. So those are some, I guess, policies that we
8 feel pretty strongly about, but they're evaluated all
9 the time.

10 Q There are, are there not, thousands of
11 potential Internet licensees out there that Sony Music
12 has found are using sound recordings on the Internet,
13 right?

14 A I'm not -- you mean that are entitled to
15 compulsory licenses?

16 Q Not necessarily. Would you agree with the
17 proposition that there are literally thousands of
18 companies using Sony sound recordings on the Internet?

19 A I honestly don't know if there are
20 thousands?

21 Q Hundreds?

22 A Probably.

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1 Q And would it be a fair statement that
2 there have been dozens, if not hundreds, of companies
3 that have come to Sony in the course of the last three
4 years seeking to obtain some sort of voluntary license
5 from Sony Music?

6 A I would imagine there are certainly a
7 couple dozen.

8 Q And Sony hasn't licensed them all,
9 obviously, correct?

10 A Correct.

11 Q Has Sony adopted any policies about what
12 companies or types of companies it will license as
13 oppose to companies it won't license in the digital
14 music space?

15 A Not really. I think, for example, the
16 breadth of new deals we've presented today covers a
17 lot of different types of companies. So there's
18 no -- nothing comes to mind in that regard, I guess.

19 Q Have you heard the word "servicing" in the
20 context of broadcast radio and major record labels
21 from time to time?

22 A Yes.

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1 Q Just explain to the panel what that means
2 in your jargon.

3 A This is where we make available to certain
4 radio stations our new compact disk -- well, our new
5 record releases. And -- I mean, generally -- and it
6 will vary. There are those stations that will get
7 those on a free basis, and we also have a system where
8 if other people want them, there's a way to pay a fee
9 and obtain them also.

10 Q Which ones get them for free?

11 A Well, it's the immediate area being record
12 promotion, but as I understand, certainly the
13 big -- the biggest, highest rated major radio
14 broadcast stations will be serviced for free.

15 Q And why is that?

16 A Well, it's, I think, a long story. But we
17 want to make available our music to them for play on
18 those big stations. I think there's a bigger issue
19 here in that. This has come about because through the
20 history of the copyright law, we had not had a sound
21 recording performance right, unlike most other
22 countries, and certainly many other major countries.

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1 So that we try to make use of them as best we could.
2 And the best use we could find for them would be to
3 play our records many times over and over to induce
4 consumers to purchase it.

5 Q And as you said, there are some users that
6 you actually charge for servicing, correct?

7 A Yes.

8 Q What kind of users are those?

9 A Probably, frankly, those that are not
10 as -- don't deliver the size of audience that we're
11 seeking in this area. And again, I don't have the
12 breakdown of percentages or who does what or so on.
13 But there is a service that we have at the company
14 where people can sign up -- companies can sign up to
15 be serviced for this at a fee.

16 Q At a fee?

17 A At a fee.

18 Q Has Sony in the digital music space
19 adopted any policies with respect to the servicing of
20 webcasters?

21 A We have felt up to this point that they
22 don't delivery sufficient audience or repetition to

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1 broad demographics that we're looking for in any one
2 instance to call for what I would say free servicing,
3 but we're open to making it available in a non-free
4 basis.

5 Q Was this a policy issue that was actually
6 discussed, whether or not to provide free servicing to
7 webcasters or not?

8 A It's something that I think my area in
9 particular -- I looked at. And I looked at it in
10 seeing the amount of money we spend every year on this
11 sort of thing, and realizing that if we perpetuated it
12 in this space, it would -- because, as we all know,
13 it's a -- there's no limit on the number of compulsory
14 webcasters. There is a limit on the number of radio
15 broadcasters. We could have an infinite number of
16 free CDs going out if we didn't say, gee, we have to
17 stop it somewhere.

18 Q And you were referring on the other hand
19 to the fact that there is an awful lot of money that's
20 going out in the form of free CDs to broadcast radio
21 stations.

22 A It's expensive. And we've also had

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1 situations where music publishers are concerned about
2 it just as we are, and they've insisted more
3 aggressively lately in payment for these free CDs for
4 which we receive no money. And that's kind of a new
5 development, where we'll let you put out this many
6 without payment because we understand it could be
7 promotional; but at a certain point, a certain number
8 of units, we're going to start charging you the
9 mechanical royalty for these copies you're making.
10 And it was kind of those things coming together at the
11 same time that we saw webcasters looking for free
12 servicing, so we had to take another look at that.

13 Q Let's focus on that point, where the
14 webcasters were seeking free servicing.

15 How did that come to your attention? Did
16 it work its way up the ranks from the guys who were
17 doing record promotion at Sony saying, Webcaster X or
18 Webcaster Y wants free servicing like the same radio
19 station gets?

20 A It came to our attention in discussion of
21 licensing negotiations with webcasting services.

22 Q Would it be a fair statement, then, in

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1 licensing negotiations with certain services, some of
2 those services said that they wanted to be serviced
3 for free just like the radio stations are serviced?

4 A I believe that's what happened, yes.

5 Q Did Sony at any point adopt a policy which
6 was essentially that, if a webcaster wanted free
7 servicing, they essentially had to go and get an RIAA
8 license in the first place?

9 A Not to my recollection.

10 Q Do you recall that ever being discussed;
11 that a given webcaster was being told that in order to
12 get free servicing, it was going to be necessary for
13 that webcaster to secure an RIAA license first?

14 A Again, not to my recollection.

15 Q Now, looking at your written testimony, on
16 pages 3 to 4, you list eight factors, I think, that
17 the Negotiating Committee was considering. Do you see
18 that?

19 A Yes.

20 Q Is it a correct statement, Mr. Wilcox,
21 that the first six factors apply to Sony's
22 considerations in voluntary licensing situations as

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1 well as in the considerations of the RIAA Negotiating
2 Committee with respect to compulsory licensing?

3 A Yeah, they're relevant to those
4 discussions, yes.

5 Q Thank you.

6 Now take a look at the last two items, if
7 you would, on page 4, where you say, and you refer as
8 considerations to number 7, "The disincentives to
9 webcasters' willingness to negotiate, given the
10 availability of the statutory license and the CARP
11 process," and 8, "the fact that the law compels us to
12 license our sound recordings to webcasters."

13 Now these two factors are factors that
14 don't apply to your licensing considerations in
15 voluntary license situations, correct?

16 A Yes.

17 Q Is it a correct statement, then, that the
18 availability of a compulsory license, to users who
19 qualify for it, takes away some of the leverage you
20 have in a purely voluntary license situation?

21 A Well, I think it's -- we stated. I mean,
22 these are -- there are a lot of considerations or

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1 there are several considerations, and these
2 are -- then include these. So these aren't all
3 encompassing necessarily. And I guess with that in
4 mind, I'm not sure I get your question.

5 Q Well, let me put it this way. In the
6 context of a voluntary license, where you don't have
7 the dynamics of numbers 7 and 8 on page 4, if you
8 don't say yes to the potential licensee, that licensee
9 just can't use your sound recordings without risking
10 being sued for infringement, right?

11 A Well, yes, I -- right. I would presume
12 they wouldn't use them.

13 Q And so that's a fundamentally different
14 dynamic that exists in the context of a voluntary
15 negotiation that doesn't exist in the context of a
16 negotiation over a compulsory license.

17 A Well, you have to take it in the context
18 of the other factors, meaning as we say -- for
19 example, we evaluate promotional benefit, we evaluate
20 the data we can get, we evaluate advanced guarantee
21 issues. So that one -- it's a whole mix of factors.
22 So I don't -- again, I don't know if I agree with what

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1 I think is to be your premise here.

2 Q There may be a mix of factors on your end,
3 but now let's focus on the buyer's end for a minute.

4 You agreed with me, did you not, that if
5 I'm seeking to get a voluntary license from you, Sony
6 Music, to use your sound recordings, and I'm not
7 eligible for a compulsory license, if I don't agree to
8 terms with you, I simply can't use your sound
9 recordings without being at risk of infringement,
10 correct?

11 A Right.

12 Q On the other hand, a compulsory license
13 provides less leverage to you as a sound recording
14 licensor because you know that the person across the
15 table can say, no, I'll resort to the compulsory
16 license.

17 A That's one of the factors that we've taken
18 on board in trying to negotiate our compulsory
19 licenses. That's true.

20 Q Now, let's take a look, if you would, at
21 factor number 3 on page 4 for a moment. I'm sorry,
22 factor number 4. It says that, "one of the

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1 considerations was the extent to which webcasting
2 services provide an alternative means of satisfying a
3 consumer's interest in a music, and thereby displace
4 sales of sound recordings."

5 Is it your view, Mr. Wilcox, that the
6 greater the risk of displacement of record sales,
7 meaning physical sound recording sales, the higher the
8 price should be for a license that you would
9 authorize?

10 A Yeah. Well, it's not limited necessarily
11 to physical, but -- certainly, the greater the risk,
12 the more we're going to look to other factors and try
13 and compensate. It could -- it could be the
14 promotional obligations, it could be the data, it
15 could be the advance, it could be the rate, it could
16 be any one of the others.

17 Q But generally speaking, the greater the
18 risk of displacement, the more compensation of one
19 form or another you're going to want to get, right?

20 A Yes.

21 Q Would it be fair to say that on-demand,
22 physical, electronic downloads that come to your

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1 computer that you own and that you control would be
2 the greatest form of displacement risk?

3 A No. This goes back to the musical
4 experience. I mean, I'm not convinced of that, and
5 I'm not sure how it's going to evolve. I believe that
6 we're finding consumers having their musical desires
7 satisfied in different ways than we're used to. I
8 think that's going to be accelerating. And I think
9 one of the ways that they're going to find great
10 satisfaction, if you will, is from these wonderful
11 webcasting services that are programmed, targeted to
12 very specific genres of music, and they will have
13 their, if you will, music jones -- their music
14 desires -- satisfied by it.

15 So, and in fact, it may be more convenient
16 to them in some ways than going through the process
17 you just described. We don't yet know exactly how the
18 ease and other issues related to some of these
19 potential on-demand services are going to be. We
20 haven't found a lot of demand for on-demand downloads,
21 which are available now. So I'm not so sure.

22 Q Well, let me ask you a few questions about

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1 what you just said.

2 First of all, you do draw a distinction,
3 do you not, between a service that provides you with
4 the ability to get what you want and when you want to
5 get it, compared to a service that programs in strict
6 compliance with the performance complement under the
7 DCMA, do you not?

8 A Yeah, all the things being equal, I think
9 that would be more desirable. If I may, assuming
10 you're going through -- I mean, to have someone
11 provide the service of programming for you; that has
12 a value. To program yourself, that may be cumbersome.
13 You may forget some things that you didn't include in
14 your desires that a programmer -- an astute
15 programmer -- in a given genre may include.

16 Yeah. But I hear what you're saying, but
17 it's not as cut and dry as that.

18 ARBITRATOR VON KANN: Did you answer a
19 moment ago that on-demand download services are now
20 available. And you're not seeing that they're getting
21 used as much as you thought they would?

22 THE WITNESS: Yes, as I believe the other

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1 majors -- but certainly Sony has a number of
2 individual sound recordings available for purchase, if
3 you will, and then download on your hard drive for you
4 to play back whenever you want for the purchase price.
5 And sales have been disappointing.

6 ARBITRATOR VON KANN: So ones that go
7 direct to Sony and, in effect, download onto your
8 computer some of Sony's music; is that right?

9 THE WITNESS: Correct.

10 ARBITRATOR VON KANN: And true of the
11 other majors as well you think?

12 THE WITNESS: Yes.

13 ARBITRATOR VON KANN: All of them offer
14 that now?

15 THE WITNESS: I believe. They're not all
16 of our sound recordings, but there are some.

17 ARBITRATOR VON KANN: And they haven't
18 been beating down your door to get that stuff.

19 THE WITNESS: Correct. And it's not just
20 available on our site. We have agreements with other
21 Web sites where it's available, so that they could
22 obtain it by going through them also. It's not just

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1 our site. If the other affiliates that we're -- you
2 could go to Tower Records, and they have our buy
3 button on it, if you will, for a download. And if
4 they buy ours, it comes to us to fulfill that purchase
5 order from the consumer.

6 ARBITRATOR VON KANN: Does that mean that
7 what some consumers were previously doing with
8 Napster, for example, they can still do with other
9 entities. But those other entities now have licensing
10 agreements of some sort with you, so that it's lawful
11 to do it, whereas, with Napster it wasn't.

12 THE WITNESS: Yes, to some extent. The
13 experiences aren't necessarily exactly comparable.
14 Napster had everything up there for free. We have a
15 limited number of sound recordings available for a
16 price. But other than that, we're attempting to meet
17 that desire, if you will.

18 ARBITRATOR VON KANN: Well, that's,
19 obviously, a significant difference. Okay.

20 BY MR. STEINTHAL:

21 Q And just to be clear, the download service
22 that you were talking about only provides a very

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1 limited number of Sony sound recordings for a full
2 download to a consumer, correct?

3 A Yes. And it tends to be some of our more
4 recent releases, some of our key catalog sellers. We
5 haven't yet made the whole catalog available. But I
6 believe it's in the thousands and less.

7 Q The --

8 A In the thousands, I believe, and less.

9 Q And where are these downloads available?

10 A A number of affiliate Web sites, such as
11 Tower Records, our Web site. We're working on an
12 arrangement with several companies to make it
13 available at another place, where -- I mean, the
14 people try to aggregate this experience. And one of
15 the cumbersome aspects we face is that there's no one
16 place you can go and put it all in the same shopping
17 basket, if you will, and take Universal Music and Sony
18 Music and EMI Music. So we're working to figure out
19 if there's a way to have a service where you get all
20 for one. I mean, it's in discussion. But there are
21 a number of what we call affiliate agreements in place
22 where you can get it.

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1 Q And are those largely promotional-purpose
2 downloads?

3 A No, I'm sorry, these are the charged.

4 Q The downloads that you're talking about.

5 A No, these are for payment.

6 Q It's for payment for a whole song or a
7 whole sound recording, an album as opposed to just a
8 30-second download that's done for promotional
9 purposes.

10 A Right. It's one of our sound recordings,
11 one song, one master recording. They can pay an
12 amount of money, and it's varied how much we're
13 charging, and get it downloaded to their hard drive.

14 Q Okay. I just wanted to clarify what that
15 was because I wasn't sure what you were talking about.

16 Now going back to the on-demand streaming
17 kind of service that has been talked about, where the
18 consumer would have the ability to get whatever song
19 they want, whenever they want it. You'd agree, of
20 course, that's a service that needs to get a voluntary
21 license from you, and you can say yea or nay. They
22 just can't do it under the compulsory license, right?

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1 A Yes.

2 Q Would you agree that there is a spectrum
3 ranging from a broadcast radio station on one side to
4 an on-demand service where somebody can get what they
5 want whenever they want it, in terms of how much the
6 displacement factor that you refer to on number 4 on
7 page 3 is implicated?

8 A I believe we talked about this a bit
9 already. Certainly if you're preparing a on-demand
10 service versus broadcast radio as we know it now,
11 there's a great difference in their potential
12 displacement value. I believe if you have your
13 compulsory webcasting in there somewhere, it's going
14 to fall in the middle as another example, somewhere,
15 not to be determined, I guess, where.

16 Q You would agree, would you not, with the
17 proposition that the more you get to what you want and
18 when you want it, the more the displacement factor?

19 A I'm not convinced. There's a value to
20 having a finally-tuned genre done by a professional
21 programmer, or done, in the case of voluntary
22 licenses, based on personal preference -- if that's a

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1 negotiation that takes place and there's a voluntary
2 license -- that can be very satisfying, where you
3 don't have to sit there and say, okay, this is what I
4 want to hear.

5 That being said, if you just want to hear
6 one song -- right? -- I mean if you start at the
7 simplest place. If you want to hear one song rather
8 than tune into a genre that even though may be very,
9 very tuned to a given taste, you may not hear that
10 song for quite a while, but you can just click and get
11 on demand. So in that case, on demand, as opposed to
12 going out and buying it, would be more satisfying than
13 sitting there waiting for the genre to happen to play
14 that song.

15 Q And putting aside the voluntary licenses
16 that were part of your last answer, and focusing on
17 just DMCA-compliant webcasting, that people who are
18 applying for a license -- a compulsory license -- are
19 you aware of any evidence, any data, any study, that
20 reflects that the kinds of webcasting that they are
21 doing and have done have caused any displacement of
22 record sales?

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1 A Well, I know that last quarter the
2 industry sales were down 3 percent. Napster's not up.
3 It's not back. I don't know. So that's an empirical
4 point. Whether it's directly causal related, I don't
5 know. So I don't believe -- I'm not familiar with a
6 particular study that has been done where I've
7 reviewed it and seen that conclusion.

8 I have -- being in the business as I have
9 and having a good deal of my life spent focusing on
10 these issues, as we have done in the last 5 or
11 10 years, it is something that I conclude as a very
12 good possibility that it will be displacing.

13 Q But you don't have any studies or evidence
14 that support that, right?

15 A I don't personally.

16 CHAIRMAN VAN LOON: Are we at a good point
17 for a break? Or do you have no further questions?

18 MR. STEINTHAL: We're not at no further
19 questions.

20 CHAIRMAN VAN LOON: I suspected that.

21 MR. STEINTHAL: But I can go for another
22 10 or 15 minutes; I can take a break now. It's fine,

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1 whichever you'd like me to do.

2 CHAIRMAN VAN LOON: Why don't we take the
3 lunch break now. Come back at 1:30.

4 Under the rules under which we're
5 operating, because you're in the midst of
6 cross-examination, you're not permitted to meet or
7 consult with your counsel during this break.

8 MS. WOODS: To get some sense, we've got
9 four witnesses lined up to be heard today. We're,
10 obviously, still on the first and have the potential
11 of up to four crosses of this witness. I'm wondering
12 if we can get some sense from the other side, for
13 instance, if they think it's realistic for us to tell
14 the fourth witness that he's not going to be over here
15 today, or even the third at this point.

16 MR. STEINTHAL: I don't know how long
17 you're directs are going to be. I can tell you that
18 the remaining cross of Mr. Wilcox is probably an hour
19 or so from my end. I think the crosses of the other
20 witnesses, that of Ms. Evans and Mr. Vidich, that are
21 scheduled for today will be extremely short relative
22 to the duration of Mr. Wilcox. I assume the direct

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1 will bear the same relationship as well. Maybe I'm
2 wrong.

3 MR. BERZ: We will also have a certain
4 amount of cross-examination with Mr. Wilcox. I don't
5 expect it to go more than 10 to 20 minutes at the
6 most.

7 MR. GARRETT: Is there anyone else?

8 MR. KIRBY: Yes. About 15 to 20 minutes.

9 CHAIRMAN VAN LOON: So it sounds like we
10 have perhaps an hour-and-a-half of additional cross
11 among the three.

12 MR. STEINTHAL: We're probably an
13 hour-and-a-half to two hours when you put it all
14 together I would think. But I would think, subject to
15 my colleagues on this side -- and I don't want to
16 mislead about people not being here -- I don't see
17 cross as more than 15 minutes to a half an hour of
18 either Ms. Evans or Mr. Vidich.

19 So I think if it's a certain
20 cumulativeness in the presentations, and therefore in
21 the crosses, that we don't need to --

22 MS. WOODS: Well, I guess that sounds like

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1 there's an outside chance that, perhaps, the direct of
2 the fourth witness might get on today, so we'll keep
3 him lined up.

4 ARBITRATOR VON KANN: If you run those
5 numbers, he's not going to get on until 3:30 at the
6 earliest.

7 MS. WOODS: Actually, I wasn't counting
8 all the breaks. Sorry.

9 MR. STEINTHAL: I think the fourth witness
10 is a long shot. Let's try to get through the three.

11 MR. GARRETT: Well, we'll have Vidich and
12 Evans on tap to go today. And if we finish today,
13 we'll start tomorrow with Pipitone.

14 CHAIRMAN VAN LOON: If you would like to
15 in a different order, given her circumstances,
16 obviously, that's your choice.

17 MS. WOODS: Mr. Vidich is going to be very
18 upset about that.

19 CHAIRMAN VAN LOON: Okay. We'll adjourn
20 until 1:30 then.

21 (Whereupon, the foregoing matter recessed
22 at 12:34 p.m.)

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1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 (1:34 p.m.)

3 CHAIRMAN VAN LOON: We are on the record.
4 We are in public session. I'm sorry, let us
5 recontinue the discussion recap, please, on the
6 record.

7 ARBITRATOR GULIN: I just wonder, is this
8 something that maybe you two could talk about rather
9 than deal with it now?

10 CHAIRMAN VAN LOON: I think that that is
11 a better idea. In part we have the witness here. We
12 have other witnesses that have been waiting, some for
13 long periods of time. So why don't we resume with
14 that.

15 CROSS EXAMINATION (continued)

16 BY MR. STEINTHAL:

17 Q Good afternoon, Mr. Wilcox. Are you aware
18 that there are certain provisions of the DMCA in
19 section 114 relating to the compulsory license that
20 are designed to minimize the risk of displacement to
21 the record companies?

22 A Yes.

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1 Q That would include the performance
2 complement requirement?

3 A Yes.

4 Q Include as well the requirement that
5 webcasters not provide advance notice of what they are
6 going to play?

7 A Yes.

8 Q Have you at Sony or anyone with you at the
9 RIAA Negotiating Committee, developed any kind of
10 calibration or formula that relates license fees to
11 the degree of displacement that is caused by the
12 activity of the licensee?

13 A I don't believe there's any set formula.
14 I think we go by the best analysis we can give to any
15 situation based on our experience. We reach our
16 conclusions based on that. Certainly at the Sony
17 level.

18 Displacement, I mean to a certain extent
19 displacement is a moving target too. So as we were
20 saying earlier, things you are concerned about and
21 protecting against that you think maybe displacement
22 factors, if you will, can change. Maybe they are not

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1 as important as they were, maybe they are more
2 important, again, as we find the consumers' desires
3 changing.

4 Q So it is a factor that can vary from year
5 to year?

6 A I think as we see, as we monitor the
7 marketplace, if you will, I think that would be true.

8 Q I want to ask you to as I probe this area
9 of the displacement issue relative to fee, to compare
10 a couple of different webcasting services. First of
11 all, are you familiar with Spinner.com?

12 A Roughly.

13 Q You know that Spinner is one of the
14 companies that is seeking a license on this side of
15 the table?

16 A Yes.

17 Q You know that they offer multiple
18 channels, genre-based programming without any consumer
19 influence features?

20 A I actually don't know that for a fact, but
21 if --

22 Q Well you are aware, are you not, that

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1 Spinner has been the subject, without getting into the
2 specifics of it, that the potential licensing of
3 Spinner is something that the Negotiating Committee
4 has actually talked about. Right?

5 A Yes.

6 Q So you are aware that Spinner's service
7 has been the subject of discussion at the Negotiating
8 Committee as being an eligible service for an NRAA
9 license. Right?

10 A Certainly if you are licensee, one of the
11 requirements would be that they comply with the
12 requirements of the statute.

13 Q As you sit here today, you don't have any
14 reason to believe that what Spinner offers does not
15 qualify for the compulsory license. Correct?

16 A I honestly don't recall their service to
17 be able to comment.

18 Q Let me ask you this then. You are
19 familiar with Radio SonicNet, which is owned by MTVi.
20 Correct?

21 A Yes.

22 Q Are you familiar with the fact that Radio

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1 SonicNet on the one hand offers a series of genre-
2 based channels that have no consumer influence
3 features, whereas they also offer a series of channels
4 that can be created with consumer input. Correct?

5 A Yes.

6 Q Does the RIAA have any problem with the
7 Radio SonicNet channels that are not created by virtue
8 of consumer influence?

9 A (No response.)

10 MR. GARRETT: I'm sorry. Is he asking the
11 witness to answer on behalf of RIAA or on behalf of
12 Sony?

13 BY MR. STEINTHAL:

14
15 Q On behalf of the RIAA and the RIAA
16 Negotiating Committee.

17 A Well that's not how the committee works,
18 but I mean I have input into the committee. But I do
19 not speak for the committee.

20 Q Speaking for yourself and Sony.

21 A So on the presumption that this portion is
22 in compliance. Right? I mean there is no persuasion,

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1 interactivity, et cetera. Correct?

2 Q Let me ask you this, because I don't want
3 to get into differences between your definition of
4 interactive and my definition of interactive.

5 A That can be a problem.

6 Q Are you familiar with the service?

7 A Not -- I haven't been on it in a while.

8 Q But you have been on it, right?

9 A A while ago, yes.

10 Q And you have actually been part of an RIAA
11 Negotiating Committee discussion with MTV about
12 whether the features of its service as a whole would
13 qualify in the RIAA's view for a compulsory license.
14 Right?

15 A Yes.

16 Q In connection with preparing for those
17 meetings, did you not familiarize yourself with the
18 nature of the Radio SonicNet service?

19 A I had rough familiarity with it, yes. But
20 obviously the focus was on the more -- what we would
21 call more clearly or obviously the interactive
22 service.

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1 Q Your focus, to use my language, would be
2 on the stations created with consumer influence as
3 opposed to those that are not created with consumer
4 influence. Right?

5 A Yes. I just would have to say I don't
6 know that those other channels don't have consumer
7 influence. I don't know or recall how they are
8 selected.

9 Q Well let me put it this way then. You are
10 familiar with the fact that there is Federal Court
11 litigation going on in which one issue is whether or
12 not the consumer influence stations offered by Radio
13 SonicNet qualify for this compulsory license or don't
14 qualify for it. Right?

15 A Right. Yes.

16 Q Let's assume for the sake of argument that
17 the Federal Court says you qualify. Okay? My
18 question is do you believe that the greater degree of
19 consumer influence offered by that Radio SonicNet part
20 of the service warrants a higher fee than the fee that
21 this panel should set for non-consumer influenced
22 webcasting?

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1 A All other factors being absolutely equal,
2 I would say that the fee -- the only place we can have
3 additional consideration that may be due for that
4 interactive service or excuse me, the different
5 service, would be if it was only in the rate, then
6 yes, that would be -- we would expect a higher rate.

7 Q Would you expect a higher rate in
8 multiples? Let me do this differently. That is not
9 a fair question.

10 Have you given any consideration to how
11 much higher a rate a service that offers the consumer
12 influence features of a Radio SonicNet as to the
13 consumer influence stations warrant relative to a
14 pure, non-consumer influenced webcaster?

15 A I have given thought to it. Again, there
16 are a lot of variables to come up with a set, you
17 know, one rate against another rate. I don't know
18 that I have a factor in mind. I mean part of it comes
19 down to what I want -- say it is a normal free,
20 willing buyer, willing seller situation. What I want,
21 what I may think is appropriate, is not necessarily
22 what is going to come in that negotiation. So you

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1 have be flexible and try to reach an accord.

2 Q I can only ask you now what you want.
3 Wearing your hat, sitting on the RIAA Negotiating
4 Committee, have you given thought to how much more in
5 terms of a factor? Twice as much? Three times as
6 much? Half again as much? Any thought to how much
7 more you think it would be appropriate to charge for
8 the consumer influence aspects of the Radio SonicNet
9 service relative to a plain vanilla no consumer
10 influence webcasting?

11 A I have given thought to it personally. I
12 don't -- again, I think the problem is going to be in
13 that the services are going to be very different. In
14 other words, it is all premised on your assumption of
15 exactly what the service is. We would have to have --
16 notwithstanding that for example if you say that it
17 has been approved as subject to compulsory licensing,
18 we would still have to analyze exactly what that
19 service is providing, exactly what degree of consumer
20 influence on the one hand, interactivity on the other,
21 personalization, call it what you will, exactly what
22 degree is permitted and come to some conclusion on it.

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1 Q Would it be fair to say that at this point
2 you don't have a view as to how much more, but you
3 believe there should be more charged for a service
4 like Radio SonicNet in so far as we are talking about
5 their consumer influence channels relative to a
6 channel that offers no consumer influence?

7 A That's true.

8 Q Now have you ever seen any evidence as to
9 whether the results of webcasting on a consumer
10 influence channel results in more or less displacement
11 compared to webcasting that has no consumer influence?

12 A I have not seen a study. I am not sure
13 one is needed.

14 Q Have you seen any evidence at all, one way
15 or the other, on that issue?

16 A The evidence I would take in place is how
17 I would feel about it, and if I were a consumer. I
18 take that on board.

19 Q Apart from your own personal feelings and
20 talking to yourself, have you seen any evidence in the
21 marketplace?

22 A I haven't.

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1 Q Now has the RIAA Negotiating Committee
2 discussed how to quantify at all greater values that
3 should be sought by the RIAA in license fees in
4 connection with certain kinds of features that one
5 webcaster may offer compared to another?

6 A It would be again, it's a continuum, so I
7 don't know. I don't believe it's been said that if
8 they do X, speaking of a very specific feature, then
9 the rate should be Y as opposed to Z. I don't think
10 it has been quantified to that exactitude. I mean
11 there's discussion of generalities but it is not like
12 a formula.

13 Q Let's take a specific feature.

14 A (No response.)

15 MR. GARRETT: I'm sorry. Do you have more
16 to say?

17 THE WITNESS: It is not like a formula.
18 I'm sorry. That's all I was saying.

19 MR. STEINTHAL: I thought he was done.

20 BY MR. STEINTHAL:

21 Q Let's take a specific feature that some
22 services have offered. Are you familiar with a skip

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1 feature that some webcasting services offer?

2 A Yes.

3 Q That is a feature whereby as you are
4 listening to a song, if the service offers it, you can
5 skip forward to the next song and not have to listen
6 to the rest of the song that already began. Right?

7 A It allows the consumer to interact with
8 the service and have the channel skip that song, yes.

9 Q Is it your view that the mere presence of
10 a skip feature would render a service interactive
11 under the DMCA?

12 A Personally I would be very concerned about
13 a skip feature and to whether that is compliant DMCA.

14 Q But in fact, the RIAA has licensed
15 pursuant to a section 114 license at least one service
16 that offers the ability to skip forward. Correct?

17 A What we have, as we discussed, a
18 continuum. You know what we've dealt with has been a
19 disagreement as to where the line is to be drawn. We
20 attempted, as you also know, to negotiate industry-to-
21 industry to see if we could agree as to where that
22 line might be drawn. We didn't do so successfully,

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1 but we have acknowledged that we don't want to be
2 unilateral about it. We want to sit down and try to
3 reach accommodation reasonably if we can as to where
4 that line should be drawn.

5 So in light of that, we have not -- the
6 RIAA Negotiating Committee has not drawn a hard and
7 fast line.

8 Q You say you didn't want to be unilateral
9 about it, but it is correct, is it not, that in the
10 middle of those discussions that you just referenced
11 in your last answer, between the webcasting industry
12 and the RIAA Negotiating Committee, while a certain
13 offer was pending the RIAA made a motion to dismiss
14 the applications in this proceeding of seven different
15 webcasters simultaneously with your company and others
16 bringing an infringement litigation against Launch.
17 Correct?

18 A Yes. We were concerned on the timing in
19 terms of proceeding with this proceeding that if we
20 didn't act at that time we would be disadvantaged
21 significantly.

22 ARBITRATOR VON KANN: You just referred to

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1 discussions with the webcaster industry. I had been
2 under the impression that DiMA told you they could not
3 speak for the webcasting industry and therefore you
4 would have to go around and knock on individual doors.
5 So it had been my impression there was not any
6 industry-to-industry negotiation or discussion. So
7 can you help me understand what you just said?

8 THE WITNESS: I think probably it would be
9 more accurate to say the industry as represented by
10 RIAA, the webcasters represented by DiMA had these
11 discussions.

12 BY MR. STEINTHAL:

13 Q The webcasters represented by my law firm
14 as opposed to webcasters represented by DiMA.
15 Correct?

16 A Okay.

17 ARBITRATOR VON KANN: You were talking to
18 some of the players in the industry, perhaps in
19 sizeable number, I don't know, but not a trade
20 association or somebody purporting to speak for the
21 entire industry?

22 THE WITNESS: That is correct.

1 BY MR. STEINTHAL:

2 Q Just to be clear, that discussion was
3 between representatives of the RIAA Negotiating
4 Committee and representatives of certain companies
5 only that had consumer influence features represented
6 by my law firm for purposes of trying to reach an
7 accord among the two groups. Correct?

8 A The two groups being?

9 Q The RIAA Negotiating Committee and the
10 companies represented by my law firm, as opposed to
11 DiMA as a representative entity.

12 A Honestly, I didn't focus on which it
13 was.

14 Q Now we were talking about the skip feature
15 for a moment. You talked about a continuum of
16 factors. Let me ask you this. Did the RIAA
17 Negotiating Committee determine that a service
18 offering a feature like a skip feature, which you
19 believe personally apparently is interactive, should
20 warrant a higher fee than a service that offers no
21 consumer influence features at all?

22 A Again, it was a matter of weighing the

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1 different factors. The different factors, the
2 different functionalities, the different services
3 against what was on the table in terms of license
4 arrangements, license considerations flowing to us.
5 There's nothing that absolute.

6 Q But you personally believe that having
7 that feature would suggest a higher fee ordinarily,
8 putting everything else aside?

9 A Well, for example, you could have a
10 service which has a skip feature but has limited
11 number of genres offered. You could have another
12 service which does not have a skip feature, but has
13 100,000 genres, to divide it up every way you could
14 possibly imagine. So it would be perhaps more
15 displacement value on the 100,000 genre channel and
16 therefore call for additional consideration compared
17 to the 100 genres or 10 genres and a skip function.

18 Q Do you know of any service that offers
19 100,000 genres?

20 A No. But I don't know of any companies --
21 well, no. Well actually that's probably not true, but
22 in other words I think some of the services that are

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1 in dispute here, because of the way they have allowed
2 people to rate their -- you know, rate artists, rate
3 other factors, could conceivably have any number of
4 pre-programmed, have any number of essentially
5 stations developed for that individual.

6 Q What I am really trying to focus on is the
7 deliberations at the RIAA Negotiating Committee on
8 whether or not certain kinds of features that certain
9 services, like MusicMatch, for example, which is a
10 licensee of the RIAA has, whether there was any
11 discussion about whether certain kinds of features,
12 including specifically a skip feature, warrants a
13 differential rate compared to the generally offered
14 rate that is being sought by the RIAA in this
15 proceeding.

16 A There was not, I don't believe, specific
17 discussion relating to the skip feature specifically
18 tied into what therefore would be the appropriate
19 rate. It was tradeoffs on a number of different
20 issues to come up with what we felt was a satisfactory
21 resolution, a satisfactory way to draw that line
22 between interactive and non-interactive.

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1 Q That suggests that the RIAA Negotiating
2 Committee did have discussions about where that line
3 should be drawn. Correct?

4 A (No response.)

5 ARBITRATOR VON KANN: You have to say yes
6 or no.

7 THE WITNESS: Yes. I'm sorry. Yes.

8 BY MR. STEINTHAL:

9 Q Now in your written testimony and this
10 morning, you talked about conference calls that
11 occurred between the Negotiating Committee and
12 representatives of the RIAA. Is that right?

13 A Yes.

14 Q I would like to get a better sense of what
15 actually happens in these meetings between the
16 Negotiating Committee and the RIAA or I guess it's
17 just plain a negotiating committee meeting which
18 includes representatives of the RIAA. That would be
19 more accurate, wouldn't it?

20 A Correct.

21 Q What are the respective roles between Mr.
22 Marks, who has been identified quite a bit on the

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1 record, and the record company representatives on the
2 Negotiating Committee?

3 A I guess I see us as the clients, if you
4 will. We are essentially speaking to our lead
5 negotiator, front-line person, if you will, in those
6 negotiations. He is reporting back. Well, in a
7 specific situation he suggests here is someone who is
8 seeking a license. Tell us a little bit about the
9 service. Maybe they have made a proposal. Maybe he
10 wants to hear what our thoughts are as to what a
11 proposal might look like if we were to make a
12 proposal. It would just flow from there.

13 Q You say you are the clients. In this
14 particular endeavor, Mr. Marks is acting as a
15 negotiator, a business person in the marketplace
16 trying to secure business terms that you approve.
17 Correct?

18 A Yes.

19 Q Now when the Negotiating Committee gets
20 together, either by telephone or in person. Maybe I
21 should ask that. Did it ever meet in person or was it
22 typically by telephone?

1 A Typically by telephone. I can't say that
2 -- I don't think there were in-person meetings, but
3 sometimes after another meeting if we had a legal
4 committee meeting or something like that, there might
5 have been a session. I don't recall exactly.

6 Q Did anyone particular person generally
7 speaking run those meetings?

8 A The agenda would be put forward, if you
9 will, by our representatives. It wasn't always Steve.
10 There could have been other people involved. But they
11 would have the agenda, I guess if you will, things
12 that we needed to discuss and cover.

13 Q So the RIAA generated the agenda and
14 administratively ran the meeting. Is that a fair
15 statement?

16 A Yes. I would say that there could be
17 situations where if any of the companies had been
18 approached by someone, they might use that as an
19 opportunity to raise -- it's not like we were
20 precluded of course from raising agenda items or
21 suggesting that there were people who were looking for
22 voluntary licenses that we knew about that hadn't come

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1 to the RIAA's attention, so we certainly considered
2 that function. But yes, someone needed to be the
3 moderator, if you will.

4 Q As much as I hate to use this word I can't
5 resist it. How much interactivity was there between
6 Mr. Marks or whoever else on the RIAA and the
7 representatives of your committee? Meetings can have
8 very different kinds of qualities in terms of
9 participation of the representatives.

10 A There was a lot of client influence on
11 this.

12 Q Well in the course of the negotiations or
13 discussions that led to the 26 license agreements that
14 Mr. Garrett put up on the board, on a board during
15 opening, was there a fair amount of give and take
16 between the RIAA representatives on the one side and
17 the Negotiating Committee on the other?

18 A Oh yes.

19 Q Did that give and take include just oral
20 give and take, or were there reports generated back
21 and forth between Mr. Marks and your committee?

22 A There certainly were emails from time to

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1 time. I don't recall formal reports. But there was
2 some emails back and forth, particularly as the
3 timeliness of the situation called for it. There were
4 times that you know, we're going to be talking about
5 this particularly at this conference call, if you have
6 a chance, please review this email to familiarize
7 yourself with the issues in this particular deal.

8 Q And would there be occasionally back and
9 forth about term sheets that were being developed in
10 connection with the 26 licensees?

11 A In terms of term sheet meaning something
12 we send them, they send us? That sort of back and
13 forth?

14 Q Yes. In other words, I am asking whether
15 between the Negotiating Committee on the one hand and
16 Mr. Marks on the other, whether it was common for
17 there to be a back and forth about the pendency of
18 certain term sheets and developments that were
19 occurring in relation to those term sheets.

20 A Yes, I believe there was that sort of
21 discussion.

22 Q Did the amount of interaction between Mr.

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1 Marks and his staff and the Negotiating Committee
2 label representatives like you vary depending on who
3 the potential licensee was?

4 A I'm sorry? I lost that. Would you
5 repeat?

6 Q What I'm asking is whether there was a
7 consistent amount of interaction between the label
8 representatives on the Negotiating Committee and the
9 potential licensee or whether the amount of
10 interaction varied depending on who the potential
11 licensee might be?

12 A Well there are probably a lot of factors
13 that call on how much time we spent on it. If it
14 varied from something, you know, we had done before,
15 but if it was different from some parameters perhaps
16 that we suggested or seemed to agree as a committee,
17 there would be more discussion than less. There was -
18 - I mean -- and generally speaking, I think you'd find
19 that the pressure to -- you know, some of the pressure
20 to move from our positions sometimes was tied into
21 bigger deals, if you will. But again, it wasn't the
22 only factor.

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1 Q Would it be fair to say that there was
2 more back and forth with a licensee like Yahoo than
3 there was with a licensee like She Sings Media?

4 A If the presumption on She Sings is that it
5 was within some established parameters, I think that's
6 true.

7 Q Is it fair to say that there was a
8 significant amount of back and forth on the Yahoo
9 deal?

10 A Yes. I think there was significant back
11 and forth in this whole area fairly consistently.
12 Sometimes deal specific, sometimes term specific.

13 Q Are you aware that the RIAA has refused to
14 provide the webcasters' counsel with any single
15 document reflecting communications between your
16 committee and Mr. Marks?

17 A No. I don't recall that, but it may have
18 been provided to me. I just don't recall.

19 Q Is there anything in the documents
20 reflecting the back and forth between your committee
21 and Mr. Marks that you don't want this panel or us to
22 know about?

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1 A I don't recall if there would be such a
2 thing.

3 ARBITRATOR VON KANN: You indicate that
4 Mr. Marks served as chief negotiator. Did you also
5 say that he chaired and presided at the meetings of
6 the Negotiating Committee?

7 THE WITNESS: He moderated, in the sense
8 that someone -- you are not in the same room. You are
9 on a conference call and you need to have somebody
10 bring order to it.

11 ARBITRATOR VON KANN: Okay. Was anybody
12 formally designated as the chair? Most committees, I
13 guess, have the chair. It used to be called chairman.

14 THE WITNESS: It may have been, I don't
15 recall. We don't honestly in our groups, we don't
16 often have any -- we are all kind of equal in that
17 regard.

18 ARBITRATOR VON KANN: There was no formal
19 chair, vice chair, recording secretary,
20 parliamentarian? Foreman?

21 THE WITNESS: I don't believe we adhered
22 to those formalities.

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1 ARBITRATOR GULIN: Mr. Wilcox, let me just
2 ask you going back a second to the Radio SonicNet
3 service that you were questioned about and you
4 expressed some familiarity with it, though not recent.

5 Mr. Steinthal asked you about the consumer
6 influence feature. I want to make sure I understand
7 what that is, that consumer influence feature. Is
8 that a situation where there are surveys taken and
9 then a channel is tailored?

10 THE WITNESS: As I understand it, and
11 please offer your input. I know you love these
12 services. He's on these all the time. He doesn't buy
13 CDs. He doesn't buy CDs.

14 MR. STEINTHAL: You give them to me for
15 free.

16 THE WITNESS: So we were looking at the
17 SonicNet. As I understand it, they have a function
18 where you can as a consumer, as a customer, rate the
19 certainly by artist. You can rate artists and those
20 preferences are taken into account in tailoring a
21 channel especially customized for your preferences
22 that you have expressed. There may be more to it,

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1 greater degrees of rating that I'm not recalling off
2 the top of my head, but that is the gist of it. Just
3 as opposed to picking a genre and then just sitting
4 back within the genre.

5 ARBITRATOR GULIN: I understand. In a
6 sense, you are creating your own channel in a sense.

7 THE WITNESS: Yes.

8 ARBITRATOR GULIN: Are there any other
9 features that you understand that Mr. Steinthal was
10 referring to when he talked about consumer influence
11 features, either with respect to SonicNet or anyone
12 else?

13 THE WITNESS: Well, another one we have
14 talked about has been whether you can skip or not,
15 whether that's, you know, where that falls into it.
16 Some services have even attempted to offer replays, if
17 you will.

18 ARBITRATOR GULIN: So you are categorizing
19 that next song feature as a consumer influence
20 feature? I guess maybe I am trying to understand in
21 my own mind, what is the difference between a consumer
22 influence feature and an interactive feature, if there

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1 is any distinction in your mind?

2 THE WITNESS: I believe there is very
3 little, although again, I think that -- let me if I
4 may step back. When we were essentially negotiating
5 between industries, and I believe there was -- well
6 between DiMA and the RIAA and the industry in terms of
7 working out this legislation, certainly the goal that
8 the record industry has is okay, if we're with the
9 opportunity to have this performance right, wonderful,
10 but there has to be a compulsory part to it.

11 One of the arguments put forward from the
12 other side as to why there needed to be a compulsory
13 element is that while radio is out there, and in the
14 analog broadcast world, they don't compete in this.
15 They don't pay at this point.

16 So to compete with that broadcast analog
17 industry, we were willing to agree in this negotiation
18 over this legislation that if it was essentially, and
19 these are my words, but essentially radio-like, then
20 we would be subject to compulsory licensing.

21 By radio-like, there are a limited number
22 of genres that are available on radio just by

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1 definition. But actually we lost that part of the
2 negotiation because it's not a specific limit on
3 genres. But radio-like means that you can't say,
4 other than perhaps calling up and saying would you
5 play this for me, in which case they play it at the
6 same time for everybody, you can't say I like these
7 five artists and these 10 songs, and this is my
8 favorite album. Would you all take that into account
9 and create this channel for me.

10 So that is where we attempted to, and I
11 believe we did, by legislation draw the line. That
12 was kind of how we saw it.

13 BY MR. STEINTHAL:

14 Q And that is your personal view and your
15 take on the legislative process. Right?

16 A Yes.

17 ARBITRATOR VON KANN: Can I just ask a
18 follow-up with this because I think it may be
19 significant?

20 I realize this is dicey and tricky to
21 figure out where to draw the line, but for better or
22 worse, Congress put a definition in the statute of

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1 interactive service. One sentence at least of which
2 says, "The ability of individuals to request that
3 particular sound recordings be performed for reception
4 for the public at large or in the case of a
5 subscription service, by all subscribers of the
6 service does not make a service interactive." With the
7 proviso that if the programming on each channel of the
8 service does not substantially consist of sound
9 recordings that are performed within one hour of the
10 request or at a time designated by the transmitting
11 entity or the individual.

12 Why wouldn't these consumer influence
13 stuff -- say, I really like Madonna. I think there
14 should be lots of Madonna on this urban rock channel
15 or whatever, genre channel, or I really would like
16 this artist or that artist. That may influence the
17 way that genre is put together, but it is being
18 offered to the public at large, as I understand it.

19 THE WITNESS: Yes.

20 ARBITRATOR VON KANN: Have I made a
21 serious screw-up in this legislative analysis, Mr.
22 Garrett?

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1 MR. GARRETT: Your Honor, I don't want to
2 intrude on your questioning. Feel free to give an
3 answer. But this is exactly the issue that is pending
4 in the litigation that Mr. Steinthal has referenced
5 here. There is a legitimate dispute between the
6 record companies on the one hand and several of Mr.
7 Steinthal's clients on the other hand, as to where the
8 line is drawn between what is and what is not
9 interactive, where these consumer-influenced channels
10 fall, whether on the right side or the wrong side of
11 the line. That is the issue that is being litigated
12 before those Federal courts and presumably will be
13 decided, actually before two courts at the present
14 time.

15 We had filed a motion. When we learned
16 that they wanted to get a rate for those services, we
17 filed a motion to say that no, they are outside the
18 statute here. A rate should not be set for them in
19 this proceeding.

20 The Copyright Office disagreed with us on
21 that and said that no, the legal issue of whether they
22 are inside or outside will be decided in Federal

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1 Court. It won't be decided by the Copyright Office.
2 It won't be decided by the CARP. But that your
3 responsibility would be to set a royalty rate for
4 those that are in this proceeding here.

5 Maybe they will end up paying that rate if
6 they are ultimately found to be inside the statutory
7 license. Or if they are not inside the statutory
8 license, they will have to negotiate with the
9 individual companies.

10 But the point simply was is that the
11 precise question that you asked is one that the
12 parties are litigating over right now in another
13 forum, and that's where it should be.

14 ARBITRATOR VON KANN: I read that order.
15 I have to go back and look. It seems to me it doesn't
16 say just shut up and set a rate for these guys and
17 don't think about these things. It says set a rate
18 for non-interactive services, and someone later will
19 determine whether each of these guys in this line-up
20 does or doesn't qualify.

21 The only problem with that is in setting
22 a rate we have to figure out what the people do that

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1 the rate is going to cover. So with all due respect
2 to the Copyright Office, it is not quite as easy for
3 us to ignore all that.

4 I think I am still trying to struggle to
5 understand as we think about rates, what kinds of
6 activities we need to be trying to account for, and
7 what are clearly other stuff that we shouldn't be
8 focusing on.

9 MR. STEINTHAL: If I can react to that on
10 behalf of the webcasters, I think that Mr. Garrett and
11 I actually agree on this issue in terms of what is
12 before you and not before you.

13 I think that the issue of eligibility ye
14 or nay, someone else is going to decide, and that we,
15 the webcasters that have filed their notices of intent
16 to participate in this proceeding, some of whom are
17 hybrids that offer certain kinds of channels that have
18 no consumer influence defined by whether it be a skip
19 feature or ratings or any other thing that we might
20 have quarrels about where it takes you in that
21 spectrum. They may have other channels that have no
22 consumer influence features. There are other

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1 companies that are here that have entirely their whole
2 offering is based on some degree of consumer
3 influence, and they believe they are within the
4 statute.

5 We will come before you with evidence of
6 how we use sound recordings and why we believe that
7 the fee structure that we have proposed is applicable
8 to those services as well as the other services. If
9 it is ultimately determined that the nuances of one
10 service versus another warrant your determining that
11 certain fees are appropriate for some services and not
12 for other services or broadcasters as the case may be,
13 these are all issues that are before you and will
14 ultimately be decided. But certainly we view you to
15 have the authority and in fact obligation to set the
16 fees that, assuming we are determined to be eligible,
17 we will be able to access under the compulsory
18 license.

19 ARBITRATOR VON KANN: Of course the
20 problem is we are not just dealing with you. We are
21 dealing with whatever it is, 757 other applicants, who
22 have all kinds of gradations, I guess, of services.

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1 For example, if it should turn out that the evidence
2 would suggest that the presence of let's say a skip
3 feature would likely cause the rate for a service that
4 has it to be different than the service that doesn't,
5 we may have to think about whether a feature, whether
6 that feature puts you across the interactive line or
7 not. Because if it is a major component of the
8 pricing, the question is, is it a pricing for anything
9 that we are going to determine or not.

10 If it turns out anything with a skip
11 feature is not in this room and therefore we don't
12 need to take it into account, that's great if somebody
13 would come in and tell us that in advance. But I
14 don't think that is going to happen between now and
15 the time this report gets written.

16 So the question is in our thinking, while
17 they are sitting down to negotiate this deal, what is
18 the willing buyer and willing seller going to pay if
19 it has a skip feature? Are they going to pay more or
20 less? So I think it is not quite as easy for us to
21 deal with. So I am trying to get a little bit of a
22 sense of at least how this particular witness, who is

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1 after all part of the RIAA Negotiating Committee, who
2 may be influencing some of the 26 agreements that we
3 are going to be looking at as benchmarks, how he views
4 some of these different features. I think then we
5 have to try and figure out where that fits into our
6 mandate.

7 Certainly we are not determining
8 eligibility of you, you are and you aren't, and so
9 forth. But we are setting a rate for a certain group
10 of services, which unfortunately have kind of a broad
11 generic term.

12 MR. STEINTHAL: I would like to follow
13 that up with a few questions of the witness right on
14 that point.

15 ARBITRATOR VON KANN: I didn't get an
16 answer from him. So let me press a little bit more
17 for the answer. Do you remember the question?

18 THE WITNESS: I believe I recall. The
19 gist of which is that there is -- if there was say a
20 top 40 genre, and you go onto the site and you sign up
21 for it, and you're on it, and it's pre-programmed.
22 These are the selections that are ahead of you. They

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1 know that. It's all set. You as well as the hundreds
2 of thousands, or whatever it is of other people on
3 there, have an opportunity to click and express like
4 what your likes and dislikes are, like in the top 40
5 genre I don't like this, but I like this. You have
6 those preferences expressed. Those are funneled back
7 to the programmer, if you will.

8 As they program future program segments or
9 whatever, future days or weeks or whatever they are
10 doing, they look at the aggregate input from the
11 consumers that are listening to that genre and say
12 gee, they don't like this that much. They like this
13 a bit. Maybe I am going to alter the programming. I
14 am going to play a little bit less of this artist and
15 a little bit more of that artist.

16 We distinguish that from having the
17 facility to immediately alter one person's request,
18 and say I don't like that artist that much, and
19 altering it for that person based on that preference.
20 So that's I guess the simplest answer.

21 ARBITRATOR VON KANN: One more than I
22 promised.

1 somehow excludes them from the restrictions of
2 interactivity. Okay? We would not agree with that.

3 We would suggest that if you have a pre,
4 already existing pre-programmed channel and the way
5 that that programmer wanted to do it for the service,
6 and they can take aggregate information from all the
7 listeners to that service and modify it, but they
8 can't create a channel for me and just I guess get
9 around the statute, if you will, making it available
10 technically if you wanted to go on, you could find Ron
11 Wilcox channel and click on it. We do not believe
12 that is a worthy distinction.

13 BY MR. STEINTHAL:

14 Q Addressing a couple of Judge Von Kann's
15 inquiries, in particular about a skip feature, the
16 fact is that the RIAA has issued a license under the
17 statute to a service that employs a skip feature. Has
18 it not?

19 A Yes, as well as a number -- I mean in
20 other words, yes. But they have a number of other
21 pieces to that service that were required of them to
22 satisfy that it was not interactive outside of the

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1 Yesterday we learned, I learned that Live
2 365 has about 30,000 channels because Mr. Griffin's
3 brother and a bunch of other people seem to have time
4 to sit around and create channels. I guess they are
5 offered to the public. It's on 365, anybody who wants
6 to listen can listen. It is a service offered to the
7 public. But it has been sort of tailor made for a
8 particular listener.

9 I think what I hear you saying is that
10 although this definition would arguably say that's not
11 interactive, because after all it is offered to the
12 public. Yes, but not really. It is really a very
13 specialized individual's preferences.

14 THE WITNESS: The offering to the public
15 is not a basis to exclude it from potential
16 interactivity, if you will. Okay? That is not at
17 all. I think what in fact -- I think it's a -- one of
18 the arguments we have heard is that okay, if I go on
19 and I put in my preferences, and they create the Ron
20 Wilcox channel, but they make it available to anyone
21 else who comes on and they can go and find the Ron
22 Wilcox channel and pick it and listen to it, that that

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1 statute.

2 Q And it also offers the ability of a
3 listener to indicate preferred artists, up to 25
4 specified preferred artists in getting into --

5 A (No response.)

6 MR. GARRETT: Excuse me. We are moving
7 into restricted material here.

8 First of all, the reference here is to the
9 MusicMatch agreement, which technically is not even in
10 evidence yet. That was the 26th agreement. When and
11 if it does become evidence, we would certainly ask for
12 it to be accorded the same status as all of our other
13 agreements.

14 Now notwithstanding that it's not in
15 evidence, if Mr. Steinthal wants to question about it,
16 that's fine. But I do think we ought to move into
17 restricted session.

18 CHAIRMAN VAN LOON: Do you agree that this
19 is about restricted --

20 MR. STEINTHAL: There has been a press
21 release announcing the deal. There has been -- I mean
22 anybody that goes on the service can see what you can

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1 do and what you can't do. I am not going to get into
2 the financial terms of the agreement at this juncture.
3 I am just responding to Judge Von Kann's inquiry about
4 like what do we have before us. Well one of the 26
5 clearly includes some of the very features you are
6 wondering are they before us. Well, yes. I just
7 wanted to elicit that from somebody on the Negotiating
8 Committee that is familiar generally with those terms.

9 I am not going to go any further along
10 this line with this witness at this point in terms of
11 the way that Music Match works or what the specific
12 terms of the agreement are.

13 CHAIRMAN VAN LOON: I don't know whether
14 you heard, Mr. Garrett, he said that there is a press
15 release that has announced this and that anybody in
16 the public can go onto the service and see what it
17 offers. That was the beginning of the explanation.

18 MR. GARRETT: I don't have the press
19 release, Your Honor. I am not sure what's in the press
20 release. My antenna go up when I start hearing him
21 talk about a deal that again, I mean it's not part of
22 the record. It has never even been produced in

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1 discovery. I think Mr. Steinthal has access to it
2 because it was a former client.

3 ARBITRATOR VON KANN: You are seeing to
4 get it in the record.

5 MR. GARRETT: We haven't moved yet.

6 ARBITRATOR VON KANN: I thought you had,
7 the 26th.

8 MR. GARRETT: That is not one of the 26
9 that we have.

10 ARBITRATOR VON KANN: That's not one of
11 the 26? I'm sorry. I thought it was.

12 MR. GARRETT: The 26, Your Honor, related
13 all to the individual deals that companies had. This
14 was separate.

15 I think that agreement was actually
16 executed after we had filed our original motion. I am
17 not sure what the timing was, but we treated it
18 separately.

19 Again, I am not trying to cut him off, but
20 I am concerned if we are going to start talking about
21 the agreement or about the service or what it is that
22 we considered to be okay, I don't know whether he

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1 wants this as just sort of a free deposition for the
2 pending litigation here or whether he is really trying
3 to answer Your Honor's questions about all of this
4 here. I don't know. But at the very least, if we are
5 going to get into this area, then I would like it to
6 be restricted.

7 CHAIRMAN VAN LOON: Did you have a
8 question, Judge Gulin?

9 ARBITRATOR GULIN: There was a motion to
10 remove Music Match from the proceeding?

11 MR. GARRETT: Yes.

12 ARBITRATOR GULIN: Has that been granted?

13 MR. GARRETT: Yes. That was granted.
14 After they executed a deal with us, I believe it was
15 Mr. Steinthal's firm that moved to withdraw their
16 testimony and have them out.

17 ARBITRATOR GULIN: And the basis for the
18 motion was that there was an agreement?

19 MR. GARRETT: They now have an agreement.

20 ARBITRATOR GULIN: And that is public
21 record?

22 MR. GARRETT: The fact that they have an

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1 agreement is indeed a matter of public record. I
2 don't object to that fact. Indeed, I believe I said
3 that during my opening statement.

4 ARBITRATOR GULIN: The question that is
5 pending right now is whether there is an agreement
6 with MusicMatch. As a matter of fact, he didn't' even
7 mention MusicMatch, but whether there is an agreement
8 with a service that has a skip feature and a survey
9 feature. So is there anything confidential about --

10 MR. GARRETT: I think your response is
11 correct, that the simple answer to that question would
12 probably not be something that requires us to go into
13 restricted session. If that is the end of the line of
14 inquiry, then maybe my concerns have been satiated
15 here. But if there is more about what that agreement
16 entails here or what it is that we considered to be
17 interactive or not interactive and what is
18 incorporated in that agreement, then I have a concern
19 about this being public session.

20 MR. STEINTHAL: I am happy to not stray
21 further at this point if I can get an answer to the
22 pending question, which was I believe whether the

1 witness is aware that one of the things you can do in
2 the MusicMatch service, I didn't state the name of the
3 service at that point, but the licensee, is you can
4 plug in up to 25 different artists that you preferred
5 in getting into a channel offering that that service
6 offered you.

7 CHAIRMAN VAN LOON: The Panel agrees that
8 this is an appropriate question.

9 (Whereupon, the proceedings went into
10 closed session.)

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1 CHAIRMAN VAN LOON: So keeping in mind the
2 limits, let's please proceed.

3 MR. STEINTHAL: We are back on the public
4 record.

5 CHAIRMAN VAN LOON: Yes.

6 MR. STEINTHAL: Not that we have ever left
7 it, other than for that purpose.

8 BY MR. STEINTHAL:

9 Q Just on this subject, one more thing, Mr.
10 Wilcox. You testified about your view of the statute
11 and the legislative history, and then Judge Von Kann
12 asked some questions. Is it a fair statement that
13 there is a lot of different views that have been
14 articulated about where along the line one goes from
15 being non-interactive to interactive?

16 A I haven't heard a lot of different ones.
17 I think the industry has a certain belief which
18 doesn't vary a great deal. I mean there are some
19 modicums. We are willing, as a practical matter, as
20 we did when we sat down, to try and negotiate that
21 line.

22 But I don't know if a lot of people are

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1 saying it could be anywhere along this continuum. I
2 think there are certain key principles that may be of
3 paramount importance.

4 Q But you would agree with me that that
5 statute doesn't really delineate exactly where in the
6 line one goes from non-interactive to interactive?

7 A I admit it's subjective. I find it fairly
8 clear.

9 Q Where is your line?

10 A I think we have discussed that a bit. I
11 believe that the personalized station just for an
12 individual would not qualify.

13 Q Let's talk about pricing strategy for a
14 minute on the RIAA Negotiating Committee. The first
15 licensee, the history books will reflect under the
16 section 114 webcasting license, was a Canadian-based
17 company, was it not, Music Music Music, also known as
18 RadioMoi?

19 A Seems right.

20 Q Had you heard of RadioMoi before the
21 license was done?

22 A I believe so, yes.

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1 Q How did you know about them?

2 A You know various meetings at our company.
3 We discuss. A lot of people who are approaching us
4 for different possible activities, interactions. I
5 believe that may have been one of them.

6 Q Had RadioMoi come to you about the
7 possibility of a voluntary license with Sony?

8 A I don't recall specifically.

9 Q You don't recall one way or the other
10 whether the reason you had heard of them is because
11 they came to you about a voluntary license that they
12 thought they might need?

13 A I don't recall if they specifically did
14 that. Correct.

15 Q In order to keep this on the public
16 record, what I want to do is let me ask you this
17 question. Do you remember what the financial terms of
18 the license are with RadioMoi and the RIAA?

19 A I apologize. I would say that off the top
20 of my head --

21 ARBITRATOR VON KANN: Don't tell him what
22 they are.

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1 THE WITNESS: No, no, no. That's what I
2 mean. I meant to say off the top of my head I
3 probably don't recall. It was a couple years back.

4 MR. STEINTHAL: Let me then just hand out
5 to the Panel and you what that number is. I don't
6 think we need to reveal it on the public record, but
7 I want to ask you some questions about what the
8 numbers are, and how they got to be what they got to
9 be.

10 BY MR. STEINTHAL:

11 Q Does it refresh your recollection that the
12 sheet that I gave you reflects what the fee payment
13 provision of the RadioMoi agreement was?

14 A It seems accurate. I am not sure if there
15 were other parts to it or not or other terms,
16 provisions that are relevant. But on its face, it
17 seems accurate.

18 Q Now we didn't see any documents produced
19 from the RIAA --

20 A (No response.)

21 ARBITRATOR GULIN: Mr. Steinthal, I'm
22 sorry. Are you offering this into evidence?

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1 MR. STEINTHAL: No. It's already in
2 evidence. It is a device for us to have a
3 conversation while keeping the record open. That's
4 all. The license itself is in evidence.

5 ARBITRATOR GULIN: Okay.

6 MR. GARRETT: I also -- I don't think this
7 is accurate. I think it's misleading the way it is.
8 I would say that we need to look at the actual
9 agreement.

10 ARBITRATOR GULIN: The license speaks for
11 itself.

12 MR. GARRETT: Exactly.

13 MR. STEINTHAL: I am surprised to hear
14 that it's misleading in some fashion, but as you say,
15 the document speaks for itself.

16 ARBITRATOR VON KANN: These are obviously
17 only part of the terms, if that's what you are
18 referring to. But I guess if these are -- I guess the
19 question is are these --

20 CHAIRMAN VAN LOON: These are the salient
21 economic features, along with a number of other.

22 MR. GARRETT: Other terms. There's also

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1 a greater of the two, is the correct way.

2 BY MR. STEINTHAL:

3 Q Well, Mr. Wilcox, let me ask you this.
4 There are no documents that we were provided with that
5 talk about where the numbers preceding the percentage
6 mark on the piece of paper and in the license come
7 from. I am wondering, did the Committee do any
8 economic analysis underlying this percentage of
9 revenue or percentage of cost formula?

10 A We had screens first from our company. We
11 had a great deal of discussion in our company all
12 along about the different sorts of services that are
13 being offered, what might be appropriate rates. We
14 began to develop what we feel were appropriate
15 guidelines. Of course it had to vary from service to
16 service, which one of the things is their services
17 vary a great deal.

18 We offered that input in these negotiating
19 team discussions, which to the extent that if we had
20 questions or wanted further review or analysis or
21 input from different sources we would have asked that
22 to be obtained. I don't recall in this instance

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1 whether that was done. But certainly we could have
2 availed ourselves of that option.

3 Q But to your knowledge there were no
4 documents generated by the RIAA or its Negotiating
5 Committee that looked at the economics of the
6 marketplace and said this percentage that's on that
7 piece of paper is the right percentage to get as a
8 percentage of revenue or as a percentage of cost?

9 A Not that I recall by the RIAA Negotiating
10 Committee. Correct.

11 We are all -- everyone on that committee
12 has spent a good portion of their lives, certainly I
13 have and a lot of others were, in negotiating
14 licenses. Although this is a new area, not dissimilar
15 in the essence to these sorts of licenses. So we have
16 I think a pretty good feel for, at least from our
17 perspective, what we feel is right for our companies
18 to be obtaining. We brought that experience to bear
19 in all of these discussions and all of these
20 negotiations.

21 Q Is it fair to say that the percentage of
22 revenue, for example, that was achieved by the RIAA in

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1 this RadioMoi negotiation was one that the RIAA,
2 taking into consideration the various eight factors
3 that you identified in your written testimony, felt
4 was a percentage that the market would bear for this
5 license?

6 A Well I know that there were numbers higher
7 than this discussed, desired. Obviously we came to
8 you know, willing buyer, willing seller in this
9 particular circumstance with this number. But it was
10 never the only number suggested. Generally as
11 negotiations go, we sit around in committee and
12 suggest what we think might be appropriate, but the
13 realities of the marketplace could dictate compromise.
14 I believe you would have to say this is a result of
15 the compromise.

16 Q Do you know whether anybody ever asked
17 RadioMoi, whether Mr. Marks or anybody from the RIAA
18 ever asked RadioMoi for a higher percentage than the
19 percentage on that sheet?

20 A For a fact I don't recall.

21 ARBITRATOR GULIN: Sorry?

22 THE WITNESS: For a fact I do not recall.

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1 I would point out that if it wasn't specifically
2 discussed, I think in essence it may have well been
3 addressed, because if you note there are two factors
4 there, greater of as you pointed out. To me, just
5 based on my experience, that would indicate that there
6 was give and take to arrive at this particular number.

7 BY MR. STEINTHAL:

8 Q But you don't have a recollection that in
9 fact RadioMoi was asked to pay greater than the
10 percentages on that piece of paper. Right?

11 A Not to my recollection.

12 Q Now is it a true statement that in
13 licensing webcasters after the RadioMoi deal, that
14 when the RIAA licensed on a percentage of revenue
15 basis, the RIAA sought to get as close to that same
16 percentage of revenue as possible?

17 A (No response.)

18 ARBITRATOR VON KANN: This same
19 percentage?

20 MR. STEINTHAL: Yes.

21 THE WITNESS: I think it's safe to say
22 that we continued to try to get the highest rate that

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1 we could, taking into account other factors that were
2 being offered to us in a given negotiation. So yes.
3 I guess all other things being equal, do we want to
4 get less or do we want to get that number, we would
5 have taken that number. But it didn't mean we were
6 given up on getting a higher number in order to mean
7 that someone might not offer us other consideration
8 that would have brought to bear sufficient influence
9 to have a lower number.

10 BY MR. STEINTHAL:

11 Q Putting aside situations of syndication
12 for a moment, are you familiar with the term
13 syndication in the webcasting business?

14 A Yes.

15 Q That is where someone actually provides
16 its service to a third party and sells the service
17 like Mr. Griffin demonstrated with Websound yesterday
18 on that Eddie Bauer presentation? I don't' know if
19 you were here for that.

20 A No, I don't think I was, but I know the
21 term.

22 Q Okay. Is it not the case that the RIAA

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1 whenever it sought a percentage of revenue deal after
2 the RadioMoi deal, sought to get the same percentage
3 often in increments, giving somebody a start-up rate
4 that would step up to the same percentage?

5 A I think I addressed it. We would not want
6 to go lower unless there were other considerations to
7 make us go lower. If we could have gone higher or
8 felt we could have gone higher, we would have gone
9 higher. You go out and you try to make the best deal
10 you can. There is no magic to it.

11 Q Now at some point the RIAA offered
12 licenses on a per performance rate basis. Correct?

13 A Yes.

14 Q If my sequencing is right, it looks like
15 the first licensee in that area was a company called
16 Radio Free World. Do you know who they are?

17 A I don't recall them well now at all, no.

18 Q Do you recall that there's this
19 essentially solo guy doing Radio Free World out in the
20 L.A. area that took a per performance license?

21 A I don't recall that.

22 Q Well let me ask you to look at another

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1 visual aid so that we can keep this on the public
2 record.

3 A Just to be clear, I mean if --

4 MR. GARRETT: Hold on. I'm sorry.
5 Whether a licensee took a per performance basis or
6 they took a percentage of revenue basis, those are
7 part of the terms of those agreements that were all
8 marked confidential and restricted. The mere fact
9 that he is now elicited that here's a particular
10 licensee who went on a particular pricing metric.

11 I don't want to get to the position here
12 where we have to go down this sliding slope here of
13 which provision is going to be kept confidential and
14 which one isn't. We have marked all of these
15 agreements as confidential, just as they have marked
16 any agreements that they turned over to us as
17 confidential.

18 Again, I don't understand the insistence
19 on doing all of this in public session. Now these are
20 things that we consider, and our clients consider to
21 be proprietary confidential information, the terms,
22 the rates, the other provisions of these individual

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1 agreements.

2 THE WITNESS: I would also say to sit here
3 and try to answer a question and make sure mostly you
4 are thinking not to talk about a number that's in
5 front of you is fairly difficult, and I don't think
6 fair.

7 MR. STEINTHAL: My desire here, frankly,
8 is to keep the record as open as possible. I think
9 both the Copyright Office and the Panel have indicated
10 that we should do that to the extent that we can. I
11 can't see how the existence of whether a licensee that
12 the RIAA has publicly claimed to be a licensee of its,
13 that it is relying on for purposes of its result in
14 this proceeding, to just indicate that it took a fee
15 on a per performance basis, without saying what the
16 number is, I don't see how that piece of information
17 could properly be considered to be of such
18 confidential and business secrecy that it would
19 justify being restricted.

20 MR. GARRETT: I'm sorry, Mr. Chairman.
21 But there is a procedure under our protective order
22 here for precisely these kinds of situations. If Mr.

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1 Steinthal disagrees with our having marked any
2 provisions in these agreements or any of the
3 agreements themselves as restricted or confidential,
4 there is a procedure to follow to get that
5 declassified. Now these agreements have been here in
6 the record now for several months, and they have not
7 availed themselves of that particular procedure here.
8 I think if he really has a serious disagreement, if he
9 does not think that what we are marking as
10 confidential is confidential, he should avail himself
11 of that procedure and not be doing it in the context
12 of examining this witness here.

13 MR. STEINTHAL: Perhaps we can take our
14 afternoon break and resolve this at the same time. I
15 just see that it's a quarter of 3:00. Instead of
16 wasting everyone else's time, maybe a couple of us can
17 try to deal with this.

18 CHAIRMAN VAN LOON: Let's do that. We'll
19 be back in our chairs ready to go at 3:00.

20 (Whereupon, at 2:41 p.m., the proceedings
21 went off the record, to resume at 3:00 p.m.)

1 CHAIRMAN VAN LOON: Going back on the

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1 record. Have counsel been able to reach an agreement
2 on how to proceed?

3 MR. STEINTHAL: Not really, because while
4 expedience would encourage me to just say let's put it
5 on restricted, I think that if this is the only depth
6 I'm going to go into, it is worthwhile, I think, to
7 keep the record as open as possible.

8 CHAIRMAN VAN LOON: Well, the Panel
9 certainly agrees that we want to keep the proceedings
10 open as much as possible. And at the same time, it's
11 absolutely clear that these agreements are all under
12 seal, they're part of a restricted part of the record,
13 and our feeling is that -- our ruling is that
14 questions along these lines will need to be done in
15 closed session.

16 MR. STEINTHAL: Okay.

17 MR. GARRETT: Your Honor, just to follow-
18 up, I understand your concern with keeping it open.
19 And what I have offered here is that we're prepared to
20 review the transcripts expeditiously. I don't know if
21 we can do them the very next day but as expeditiously
22 as possible and to declassify anything that the client

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1 feels comfortable in releasing.

2 We're not trying to keep things a secret.
3 I mean our biggest concern is that you have all of the
4 information, and only secondarily of what actually
5 goes out here. But, you know, we are certainly
6 prepared to go back and look at these transcripts and
7 put as much back into the record as possible.

8 MR. STEINTHAL: All right. So we're on
9 restricted record then.

10 CHAIRMAN VAN LOON: Yes, we are on the
11 restricted record.

12 (Whereupon, the proceedings went into
13 Closed Session.)

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1 CHAIRMAN VAN LOON: We are pleased to
2 welcome Mr. Vidich to the witness stand, and thank you
3 for your great patience.

4 MR. VIDICH: My pleasure.

5 CHAIRMAN VAN LOON: May I ask the Court
6 Reporter to swear the witness, please.

7 WHEREUPON,

8 PAUL J. VIDICH
9 was called as a witness and, having been first duly
10 sworn, assumed the witness stand, was examined and
11 testified as follows:

12 DIRECT EXAMINATION

13 BY MS. WOODS:

14 Q Good afternoon, or good evening, Mr.
15 Vidich. Could you please state your name for the
16 record and spell your last name.

17 A My name is Paul J. Vidich. The last name
18 is spelled V as in Victor, I, D as in David, I-C-H.

19 Q Mr. Vidich, as you know, we are going to
20 try to go through your testimony rather quickly today,
21 so I will ask you to hit some of the high points of
22 your written direct testimony. We will not discuss

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1 everything that is written there, but will to some
2 extent rely on the written record.

3 Could you start out by telling us what
4 your current employment is?

5 A I'm the Executive Vice President of Warner
6 Music Group in charge of strategy and business
7 development, which involves, among other things, the
8 strategy with regard to the internet, our investments
9 in internet companies, licensing of our assets to
10 internet companies, and acquisitions of a more
11 conventional nature.

12 Q Okay. And how long have you been in that
13 position?

14 A I've been in the position of Executive
15 Vice President since 1999. Prior to that, I was
16 Senior Vice President in a similar capacity from '94
17 until '99. And before that, I was a Vice President at
18 the same company.

19 Q And, Mr. Vidich -- well, I'll skip the
20 rest of this, but are you a lawyer?

21 A I'm not a lawyer.

22 Q Okay. And could you describe for us, with

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1 regard to Warner Music Group, what is the relationship
2 of Warner Music Group to AOL-Time Warner?

3 A Warner Music Group is one of the six
4 divisions, operating divisions of AOL-Time Warner, the
5 other divisions being HBO; Turner; the cable company,
6 Time Inc.; Warner Brothers, the studio; and AOL, the
7 ISP service.

8 Q Mr. Vidich, turning to the topic of the
9 RIAA negotiating committee, did you -- do you serve on
10 the RIAA negotiating committee?

11 A I do.

12 Q And could you describe briefly for the
13 Panel what has been your role on the negotiating
14 committee?

15 A I'm one of I think five representatives
16 from Warner Music that sit on the committee. The role
17 we've played has been to participate in the conference
18 calls to evaluate the licenses that have been
19 negotiated on our behalf and to advise the committee
20 and the RIAA on our views of those licenses.

21 Q Okay. And what is the purpose of your
22 testimony here today, Mr. Wilcox? I'm sorry. Excuse

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1 me. Mr. Vidich.

2 A I'll speak on behalf --

3 Q I apologize.

4 A -- of myself and not Ron, who I'm sure
5 you've heard enough of today. My purpose here today
6 is really to speak to some of the deals we've done
7 that are non-statutory in nature which might inform
8 the hearing and the rates that you have to set here.
9 We think some of the deals that we've done, while
10 being non-statutory, are nevertheless relevant because
11 they deal with similar assets and we think would be of
12 interest to you.

13 Q And, Mr. Vidich, are you familiar with the
14 list of factors in the public testimony of Ron Wilcox
15 on -- starting on page 3 of -- that I believe has now
16 come to be termed perhaps the "Wilcox factors"?

17 A Yes.

18 MR. STEINTHAL: I'm sure he'll be glad to
19 hear that.

20 (Laughter.)

21 THE WITNESS: I'm familiar with them.

22 BY MS. WOODS:

1 Q And in your view generally, do you agree
2 with Mr. Wilcox that this is a list of some of the
3 considerations that the negotiating committee takes
4 into account when negotiating rates and terms with
5 webcasters?

6 A Yes. It's -- since -- in terms of our
7 participation in the committee, the things that were
8 most important to us I think are laid out here, but
9 let me just express them again. Certainly, the value
10 that's being created by the webcaster is something
11 that we take in mind, because that's the value that
12 then generates income that allows them to, in effect,
13 undertake to buy goods and/or to license our music.

14 Licensing income is very important to us.
15 We're increasingly finding ourselves in a world in
16 which we've got to find revenue to offset the costs of
17 our business. And it's my job to find as many
18 different sources of revenue for the assets that we've
19 created.

20 It's important to us also to take into
21 account the promotional benefits of the services.
22 There are promotional benefits, and I think we

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1 evaluated those, and certainly we did in our own
2 licensing.

3 We have also taken into account whether or
4 not there are displacement issues, and we carefully
5 considered each of the licensees with regard to the
6 way that they conducted business and how the consumer
7 interacted with the service.

8 And then, finally, there were the unique
9 circumstances of this licensing arrangement in which
10 there was a compulsory license, and so people had
11 access to that music whether or not they wanted to
12 have a negotiation with the RIAA, which simply made it
13 sort of unique in that regard. And I think that there
14 were certain companies that chose to enter into a
15 negotiation, notwithstanding the fact that they had
16 access to the music because there were certain unique
17 circumstances that they thought were relevant to them.

18 Q Okay. And do you describe certain types
19 of Warner Music Group licenses that are negotiated
20 outside the statutory license environment in your
21 testimony?

22 A I do. Principally, four categories that

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1 are similar but sufficiently distinct, that they can
2 fall into four different descriptions. One is audio
3 clip licenses. Another would be music video licenses.
4 Third is webcasting licenses. And then a fourth would
5 be subscription licenses.

6 Q Okay. And could you explain for the Panel
7 -- the headings that you have in your testimony
8 include internet radio and music locker services.
9 When you said webcasting services, which of the
10 categories in your testimony were you considering in
11 that category?

12 A The webcasting would be an internet radio
13 service. And I guess the locker would be a fifth
14 category.

15 Q Okay.

16 MS. WOODS: May I inquire, are we in open
17 or closed session?

18 CHAIRMAN VAN LOON: We're in open at the
19 current time.

20 MS. WOODS: Very well. At this time, I
21 would then ask that we enter into closed session as
22 we're going to start discussing a number of the

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1 agreements that have been put into the record as
2 restricted.

3 CHAIRMAN VAN LOON: Then we would ask
4 everyone who is not appropriately here in public
5 session, please leave, and please change the sign on
6 the door. Thank you. Done.

7 (Whereupon, the proceedings went into
8 Closed Session.)

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CERTIFICATE

This is to certify that the foregoing transcript in
the matter of: Hearing: Digital Performance Right
 in Sound Recording and Ephemeral
 Recording,
 Docket No. 2000-9 CARP DTRA 1 & 2

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: August 7, 2001

Place: Washington, DC

represents the full and complete proceedings of the
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