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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.

Monday
August 6, 2001

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

BEFORE

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

ORIGINAL

APPEARANCES:

On Behalf of Clear Channel Communications, Inc., National Religious Broadcasters Music License Committee, and Salem Communications Corporation

BRUCE G. JOSEPH, ESQ.
THOMAS W. KIRBY, ESQ.
of: Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-4913
(202) 719-7000

On Behalf of American Federation of Television and Radio Artists

ARTHUR J. LEVINE, ESQ.
of: Finnegan, Henderson, Farabow,
Garrett & Dunner, LLP
1300 I Street, N.W.
Washington, D.C. 20005-3315
(202) 408-4032

On Behalf of the Association for Independent Music

JACQUES M. RIMOKH, ESQ.
BARRY I. SLOTNIK, ESQ.
of: Bingham Dana, L.L.P.
885 Third Avenue
New York, New York 10022-4689
(212) 207-1770

APPEARANCES: (Cont'd)

On Behalf of BET.com; CBS Broadcasting, Inc.; Comedy Central; Coollink Broadcast Network; Echo Networks, Inc.; Everstream, Inc.; Incanta, Inc.; Launch Media, Inc.; Listen.com; Live365.com; MTVi Group, LLC; MusicMatch, Inc.; MyPlay, Inc.; NetRadio Corporation; Radioactive Media Partners, Inc.; RadioWave.com, Inc.; Entercom Communications Corporation; Spinner Networks, Inc.; Susquehanna Radio Corp.; Univision Online; Westwind Media.com, Inc.; and Xact Radio Network, LLC

ADAM I. COHEN, ESQ.
MARK A. JACOBY, ESQ.
R. BRUCE RICH, ESQ.
KENNETH L. STEINTHAL, ESQ.
of: Weil, Gotshal & Manges, LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8622

On Behalf of AEI Music Network; DMX Music, Inc.

SANDRA M. AISTARS, ESQ.
DAVID R. BERZ, ESQ.
of: Weil, Gotshal & Manges, LLP
1615 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 682-7272

On Behalf of the Recording Industry Association of America, Inc.

JOHN A. FREEDMAN, ESQ.
ROBERT ALAN GARRETT, ESQ.
BRAD R. NEWBERG, ESQ.
RONALD A. SCHECHTER, ESQ.
JULE L. SIGALL, ESQ.
CHRISTOPHER WINTERS, ESQ.
MICHELE J. WOODS, ESQ.
of: Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5719

APPEARANCES: (Cont'd)

On Behalf of Public Radio:

DENISE LEARY, ESQ.
of: Public Radio, Inc.
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 513-2049

On Behalf of American Federation of Musicians of the United States and Canada:

PATRICIA POLACH, ESQ.
of: Bredhoff & Kaiser, P.L.L.C.
805 15th Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

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

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
James H. Griffin				
By Mr. Sigall	1180		1607	
By Mr. Cohen		1377		
By Mr. Steinthal				1623

EXHIBIT NO.	DESCRIPTION	MARK	RECD
SX-11	Griffin Testimony to Senate Judiciary Committee July 11, 2000	1481	1482
SX-12	White Paper - "At Impasse: Technology, Popular Demand and Today's Copyright Regime"	1537	1538
SX-13	Transcript of Griffin Interview with Inside Digital Media, August 1, 2000	1517	1521

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

2 9:02 a.m.

3 CHAIRMAN VAN LOON: Good morning, all. We
4 hope very much that you enjoyed the leisure of the
5 three days off and we're back ready to work this
6 morning.

7 We want to thank you for this updated
8 schedule that helps us along, and for this very fine
9 running total document that will keep us all apprised
10 of where we stand.

11 Before we begin with our first witness,
12 are there any administrative or procedural things to
13 come before the panel?

14 We have one. Nature sometimes takes us in
15 unexpected ways. Over the weekend, Judge Von Kann's
16 son had an encounter with a diving board and has 26
17 stitches, I understand, in his forehead. And there is
18 a need for a medical meeting with a specialist late on
19 Thursday afternoon. Judge Von Kann's wife is in
20 important national meeting where she's responsible for
21 thousands of people out of state on that day.

22 And so our plan on Thursday afternoon is

1 to see where we stand. Under the rules, 251.6E two
2 arbitrators can continue and constitute a quorum. If
3 we're at a place where that's appropriate with the
4 witness, we'll do that. And Judge Von Kann has
5 promised. He swears he'll read the transcript
6 carefully six times before the following morning, or
7 Monday, so we'd be able to accommodate things that
8 way. Of if late in the day on Thursday we had wrapped
9 things up, perhaps we'll take a break.
10 This is just sort of an early warning that
11 we will have some sort of an adjustment late on
12 Thursday afternoon.
13 ARBITRATOR VON KANN: There does not
14 appear to be any medical crises, but he had a rather
15 nasty gash and the plastic surgeon wants to meet with
16 one of the parents on Thursday afternoon, and I'm the
17 only one in town.
18 I think I can probably -- I'm going to
19 call today and get the latest appointment I can, but
20 unfortunately he's located in Rockville, which is
21 quite a ways from here. So I will probably have to
22 slip out at about 2:30 to 2:45. I don't know where

1 we'll be with Nagle at that point. We may be close to
2 done, we may not. But I think certainly if he is not
3 completed, the hearing should continue and I will
4 certify that I will get the transcript Friday and read
5 it over the weekend, so as of Friday I will try to be
6 up with you.
7 We need to get my volume that has this
8 witness' testimony.
9 CHAIRMAN VAN LOON: Okay. Yes, Ms. Woods?
10 MS. WOODS: Yes. Just wanted to mention
11 one point about the schedule for August 7th and 8th.
12 Mr. Hessinger, who is listed on the 8th, we are still
13 trying to contact him. There is a possibility that he
14 will testify on the 7th. I just wanted to make sure
15 everybody had notice. Particularly if Mr. Pipitone
16 turns out not to be available, we will try to switch
17 the two of them and put Mr. Hessinger first tomorrow
18 afternoon.
19 CHAIRMAN VAN LOON: So that's tomorrow.
20 And you'll let us all know at the earliest possible
21 time that you have information, I'm sure.
22 MS. WOODS: That's correct.

1 CHAIRMAN VAN LOON: Excellent. Okay.

2 Then, it appears we're ready to proceed

3 with our first witness.

4 Good morning. May I ask the court

5 reporter to swear you in, please.

6 Whereupon,

7 JAMES H. GRIFFIN

8 was called as a witness by Counsel for Recording

9 Industry Association of America, Inc., and having been

10 first duly sworn, assumed the witness stand and was

11 examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. SIGALL:

14 Q Mr. Griffin, for the record can you state

15 your full name?

16 A Sure. James Hazen Griffin. That middle

17 name is spelled H-A-Z-E-N.

18 Q And what is your current position?

19 A I'm the chief executive officer of Cherry

20 Lane Digital.

21 Q And what does Cherry Lane Digital do?

22 A We do a number of things. We're a part of

1 the Cherry Lane Music Group. We consult clients, we
2 think about the future for our company. And we prepare
3 media services for the future.
4 Q Are there other companies that you're
5 associated with related to Cherry Lane Digital.
6 A Indeed. We make investments, and so we've
7 invested into the Digital Brand Casting Corporation,
8 into Ebolab, that sort of thing?
9 Q What does Ebolab do?
10 A It's a wireless media services company.
11 Q Okay. What sort of clients do you advise
12 for in your work for Cherry Lane Digital and Ebolab?
13 A Well, a number of record companies. For
14 example, Dreamworks, Universal, Priority Records we've
15 worked for, Giant Records. We've worked for Roadrunner
16 records, Gieffen Records.
17 We've worked for artists like the Rolling
18 Stones, their managers, their attorneys. We've worked
19 for Nokia, American Management Association, the RIAA,
20 Entertainer, Indamall, Microsoft, Real -- I mean Real
21 Audio, which used to be Progressive Networks. That
22 would be some of the clients.

1 Q What position did you hold before your
2 time at Cherry Lane Digital?
3 A I worked -- actually, it was called One
4 House before Cherry Lane Music Group acquired it. And
5 before that I was at Gieffen Records where I was the
6 chief technology officer for roughly 6 or 7 years, as
7 I recall. Before that, I was at the Newspaper Guild,
8 was an international representative.
9 Q What sorts of things did you do as the
10 head of technology for Gieffen Records?
11 A I was responsible for -- our department
12 was for both moving information inside the company and
13 taking information out into the marketplace to
14 consumers and to our affiliates and vendors, and so
15 forth. So, it was really a dual mission; move
16 information inside the company and then share
17 information with partners and consumers. And that was
18 the approach.
19 Q Did you do anything there related to the
20 digital transmission of music?
21 A Indeed. In that role of bringing things
22 into the marketplace, in June of 1994 we were the

1 first to take a full length commercial entertainment
2 product and release it onto the Net. And, in fact,
3 that was an Aerosmith, a full single by Aerosmith
4 called "Head First." And that was in June of '94. And
5 we were nominated by the Smithsonian for an award for
6 being the first to take a full length commercial
7 entertainment product and put it out.
8 Q What other work have you done related to
9 digital music?
10 A Well, let's see. I write a fair amount
11 for Business 2.0 magazine. I've written for National
12 Academy of Recording Arts and Sciences Journal. I've
13 written for a publication called Divex.
14 My company is primarily responsible for
15 what's called the ThePha list, which The Wall Street
16 Journal has called the number one source of
17 information in this area. And by that I mean we
18 operate a list serve that allows people to send
19 information and it's reflected back out to about a
20 1,000 people. It also sponsors brunches around the
21 world in different cities, so that people who are
22 involved with entertainment and technology can get

1 together and talk about these things.

2 So, that's some of what we've done.

3 Q Do you speak publicly about these issues?

4 A Oh, indeed. I've been a lecturer. Most

5 of my work has been at the Harvard Business School.

6 Since 1996 I've been involved with them. For a while

7 I was the technologist in residence for the e-commerce

8 project that Jeff Rayport and Len Schlessing ran. And

9 now I'm doing work with the marketing department at

10 HBS.

11 I've also lectured at Berkeley or UCLA,

12 USC, Texas, Northwestern. Those are places I do

13 multiple times, in other words, year after year. And

14 then I've gone other places, you know, once or twice

15 there.

16 I'm on the board of the Annenberg School

17 at USC for communications. And I've spoken at a

18 number of conferences. Everyone of the MP3.com

19 conferences, every digital distribution of the music

20 industry. Comdex, the Consumer Electronics Show, the

21 Vanguard Association. I've spoken to the European

22 Union and I was one of the first lecturer at the Nokia

1 Research Center in Helsinki, Finland. And I was
2 recently appointed the Chairman of Web Noise, which is
3 a conference that's conducted about digital music.
4 And I'll be the Chairman at the next conference.
5 And I've been an expert witness for Real
6 Audio in a case. And I've testified before the Senate
7 Judiciary Committee last July, and written a white
8 paper for them as well.
9 Q What is the purpose of your testimony here
10 today?
11 A Well, really, my goal is four things. To
12 explain basically the difference between analog and
13 digital and streams and downloads; that's one.
14 To describe the process of what we'll just
15 loosely call webcasting.
16 To give a demonstration for the Judges of
17 precisely what happens, or at least so that they can
18 see what happened in a surfing session that I did.
19 And also to review the financials of
20 webcasters, the notion that they have expenses and
21 revenues and to discuss some of the different
22 opportunities they have as regards each.

1 Q So when you say the difference between
2 analog and digital, what do you mean exactly?
3 A Oh, I mean that an analog reproduction of
4 sounds, for example --
5 CHAIRMAN VAN LOON: Excuse me. If I could
6 just interrupt for a second before we get into the
7 substance of your testimony.
8 Do you have anything on voir dire?
9 MR. COHEN: No, Your Honor.
10 CHAIRMAN VAN LOON: No. Okay. Then
11 please proceed. I'm sorry.
12 THE WITNESS: No problem.
13 In an analog sound recording, we create an
14 analog of the sound through mechanical means. And an
15 example I would give would be a phono record groove
16 has a varying width, and I'll just use my fingers to
17 demonstrate this. That, say, a base signal will have
18 a very wide groove and a high signal, like a treble,
19 will have a very narrow groove. And that effects the
20 relationship of the needle that's inside the groove.
21 Attached to the other end of that needle
22 is a magnet or a coil and it is inside another magnet

1 or a coil, and that creates alternating current, which
2 is sound. It produces alternating current which
3 represents the sound, an analog of what's riding in
4 the grooves.
5 A cassette deck works on a similar
6 principle.
7 BY MR. SIGALL:
8 Q Would you like to explain it with the
9 board, if you need it?
10 A Sure. If that's okay with Your Honorers.
11 CHAIRMAN VAN LOON: Sure.
12 THE WITNESS: I'm really just speaking
13 here to the notion that if we have a groove and we
14 have a needle that sits in this groove, it is attached
15 to a magnet that is inside of a coil. And, by the
16 way, sometimes it's attached to a coil that's attached
17 to a magnet, but really both systems are substantially
18 the same because they communicate the relative
19 position of the groove to the magnets and coils, and
20 then produce alternating current that comes out. And
21 that is common.
22 Now, if we were dealing with, say, a

1 cassette deck, we are not dealing with the physical
2 relationship of a magnet to a coil, but instead to
3 chromium oxide particles or metallic particles that
4 are on plastic and that ride past a magnetic head.
5 But, again, it is an analog in that particular case of
6 the sound.
7 And then in the case of digital -- I'm
8 going to return to the board for a second. In the
9 case of digital sound is a wave of alternating
10 current, as I've pointed out. And so if we have a mid
11 point of a plus and minus, we have a wave like this
12 that represents the sound. And I simply use this to
13 point out that sometimes it's positive and sometimes
14 it's negative. And that corresponds, by the way, to
15 the speaker going in and out with its magnet and coil.
16 And in digital, essentially, a picture or
17 a snapshot is taken. I'm drawing this just very to
18 crudely represent that we divide the wave up and take
19 a snapshot of it and then communicate with some
20 specificity. And, in fact, the frequency with which
21 we sample can be communicated in terms of bit rate.
22 And that is essentially what we have when we work with

1 digital music.

2 BY MR. SIGALL:

3 Q So when each one of those snapshots is

4 taken, what is done by the computer or other process

5 that's doing it?

6 A It's reporting digitally the position of

7 the wave or the sound that it measures as it's coming

8 across. And then it's reproduced, it can reproduce

9 that wave according to the granularity with which

10 we've recorded.

11 And so if we recorded a very high bit

12 rate, we get more information and the sound has what

13 we would call a greater fidelity to the original. And

14 when we take less information, we are more granular

15 and so we have less fidelity to the original sound.

16 Or you might say that we've taken less of the original

17 sounds.

18 Q So you would say that in each snapshot a

19 digit or some numerical representation of that sound,

20 that part of the sound is assigned to the various part

21 of the sound?

22 A Yes. And, in fact, the only thing I would

1 add to that is that instead of just numerical, it is
2 either a zero or a one. And zeros and ones can, of
3 course, communicate a large number of numbers. But
4 it's digital, and so we refer to it as digital because
5 it is zeros and ones.
6 CHAIRMAN VAN LOON: Mr. Griffin, is there
7 a typical rate at which for the average CD that you
8 buy in a store that there's a number associated with
9 that?
10 THE WITNESS: It would be fair to say that
11 that is subjective to the individual as to what they
12 would think was CD quality or was extremely good. And
13 the different musicians will record things at
14 different sampling rates. But I would say that the
15 end result we could agree that about 128 kilobits a
16 second is roughly where my ears say that we're close
17 to CD sound. Above 130 kilobits a second, I
18 personally find it more difficult to assess the
19 difference between something; a sound and the actual
20 physical disk itself.
21 And, in fact, I will agree that perhaps at
22 128 some trained ears could hear the difference, but

1 it would be very difficult. And as we increase the
2 bit rate, it becomes much more difficult. But as the
3 bit rate goes down, it becomes much easier to discern
4 the difference.
5 CHAIRMAN VAN LOON: But you're saying if
6 I were to go the record store and buy a dozen CDs --
7 THE WITNESS: Yes.
8 CHAIRMAN VAN LOON: -- they wouldn't all
9 be at 120? They'd be -- because of the artist's
10 choice the quality would be different from CD to CD?
11 THE WITNESS: Yes. And, in fact, there
12 could be many components of that sound that were
13 originally recorded at many different bit rates and
14 then mixed back together to create a final product.
15 But, again, that would be subjective for you as the
16 musician as to the bit rate that you choose to record
17 at and what you sent to the record company
18 CHAIRMAN VAN LOON: Not me as the
19 musician, me as the --
20 THE WITNESS: Whoever would be the
21 musician, yes, would assemble this together and it
22 would represent the quality level that was acceptable

1 to their ears.

2 CHAIRMAN VAN LOON: Yes. Okay. Thank

3 you.

4 THE WITNESS: And so I would say that that

5 is the primary difference.

6 Now, I will also add that in an analog

7 circumstance, because we're dealing with a mechanical

8 object and, for example, here a groove. As the needle

9 rides through the groove, the groove changes. And

10 with digital, presumably not, although again the

11 medium upon which the digits are stored could fail,

12 but given that it has not failed, it should be

13 faithful to the original. And with error correction,

14 we can ensure that that's true.

15 Whereas, with analog, chromium oxide can

16 come off the tape and we do not have an error

17 correcting solution. And, of course, with a vinyl, I

18 think most people are familiar with what used to

19 happened with vinyl when we owned it, although

20 probably ten years from now it'll be harder to find

21 people who have used vinyl. But, yes, over time the

22 vinyl clearly degrades, whereas with digital hopefully

1 not, and much less likely so.

2 ARBITRATOR VON KANN: Does quality of

3 sound in CDs degrade over time through constant

4 playing? Not as much as vinyl records, but my

5 daughter's played her 'NSync record a 100 times, her

6 CD, will it not sound as good on the 101st time as it

7 did on the first?

8 THE WITNESS: Well, there's an error

9 correcting mechanism in CDs that pick up physical

10 degradations. And because they can use a mathematical

11 formula to ensure that it's faithful to the original,

12 there's enough time it can go back and try again.

13 And, in fact, it can take the average of

14 those and substitute it such that even if there is

15 physical degradation of the object, it should survive

16 that process and nonetheless be faithful. But it is

17 possible and it does happen that compact disks can

18 degrade beyond the ability of the player to play them.

19 But generally, failure occurs

20 catastrophically; meaning we can't listen to it

21 anymore or it can't proceed past that point. In other

22 words, the sound doesn't degrade nicely, it all of a

1 sudden disappears for the most part.

2 ARBITRATOR VON KANN: Those smudges or

3 fingerprints, or bits of Oreo cookies, or other things

4 that get on it are not going to effect the quality of

5 the sound I hear?

6 THE WITNESS: Minor bits should not. But

7 it can reach a point where pops and clicks occur, but

8 those are quite obvious in the sense that you know

9 that something bad has happened as opposed to

10 deceiving you. In other words, you think it's

11 faithful to the original, but in fact it's not. That

12 doesn't ordinarily happen. You should hear a real

13 catastrophic failure that evidences itself to you with

14 a pop or a click or refusal to go forward at all.

15 So those are the differences that I see

16 between analog and digital.

17 BY MR. SIGALL:

18 Q Can you describe how digital music, how it

19 relates to the transmission of that information over

20 something like the Internet or some other

21 communication network?

22 A Sure. I think here I can break it down

1 into two categories. When we transmit sound,
2 sometimes we call one a stream and we call another a
3 download. And in both cases we are taking the digits
4 that constitute the sound and we are sending them
5 across a line.
6 Now, in a digital circumstance we can
7 maintain digitally this connection, the same thing
8 that we have, say, with a CD player with another
9 object at the other end of the chain and engage in the
10 same kind of error correcting that causes the object
11 at the other end to be very faithful to the original.
12 And, of course, when we transmit sound in an analog
13 way, we transmit analog of the sound, not the sound
14 itself. And we can't be sure that what's playing at
15 the other end in the same. And, in fact, generally
16 it's not. Whereas, with digital it can be quite
17 faithful to the original.
18 That having been said, I think it's fair
19 to say that in my opinion there are a few differences
20 between steams and downloads, but that for the most
21 part it is very difficult to discern, say, for a
22 public policy purpose the difference between one and

1 the other.

2 And I say that because the differences,
3 say, between a stream and a download that I can
4 represent are the intention of the sender. In other
5 words, the sender of a stream intends, most likely,
6 that it be used at the time and at the place that it's
7 being sent to. In other words, in a temporary
8 fashion. I want you to use it now as opposed to
9 holding it.

10 And the intention of someone who wants to
11 send music to be downloaded is that the end user will
12 keep it.

13 And so the intentions are different of the
14 sender.

15 The actual behavior of the recipient can
16 also be different. In other words, if I capture a
17 stream, for some purposes we could call it a download.
18 And if I let a download go after I listen to it, in
19 some ways we could say that the public policy purpose
20 was like a stream.

21 And the only other difference I would
22 discern is that sometimes, but not always, there's a

1 difference in the methods that are used. And here
2 it's a very complex thing, I just don't want to miss
3 it in my testimony, that sometimes streamers use what
4 is called UDP packets and downloaders often use what
5 are called TCP packets. But that's not a necessary
6 difference and it's merely what I would call a
7 correlation.
8 Q Can you explain what UDP and TCP are?
9 A Sure. They are immediately different
10 Internet protocols for sending information. And they
11 are processed by the network in roughly the same way.
12 But a TCP protocol has a bit more attached to it in
13 terms of return information and ensuring that digits
14 are received. And UDP has less so. But by no means
15 is it necessary that this be the truth, it is merely
16 a correlation that in general I have noticed that
17 streamers use UDP packets more often and downloaders
18 use TCP more often. But it's not necessary that they
19 do.
20 Q For the panel's benefit can you describe
21 generally how information is transmitted over the
22 Internet, whether it be music or data or any other

1 type of information?

2 A Sure. There is generally a request made

3 from a receiver for information from a sender. And

4 when that request is received, the sender responds to

5 the address by returning the information that the

6 sender requested. And that comes through any a number

7 of way points.

8 And, in fact, the information may even

9 dissipate like a flock of birds through different

10 routes and then reassemble at the destination in one

11 piece.

12 But it travels over transmission lines in

13 a way that represents the zeros and ones. And

14 mathematical formulas can be used by the receiving

15 computer to ensure that what was received was the same

16 as what was sent. That phrase would be called a check

17 sum. A check sum operation would be performed on the

18 zeros and ones received to ensure that what the check

19 sum of the received digits matched the check sum of

20 the sent digits. And that would ensure that there was

21 fidelity.

22 Q The next part of your testimony you said

1 was going to be the process of webcasting. What do
2 you mean by that?
3 A What I mean by that, and I'll say now that
4 in sometimes I'm uncomfortable with the term, but it's
5 a common term, webcasting. I'm uncomfortable with the
6 term because it some ways it doesn't describe what's
7 happening.
8 I say that because web implies the
9 hypertext transfer protocol of the worldwide web.
10 Q Can you explain what that means?
11 A Sure. The hypertext transfer protocol is
12 a protocol for transmitting all manner of information
13 from one computer to another from a standard web
14 browser interface. And, in fact, that may be how
15 someone finds a stream that they want to listen to or
16 any content, but it doesn't refer to how that content
17 is communicated to the computer.
18 It generally does not come over a web
19 interface, but instead it comes over a digital
20 interface of other kinds. And, in fact, streaming,
21 especially for some of my clients, can involve a
22 cellphone.

1 And so the notion that it must require the
2 web is really antithetical to my understanding of what
3 streaming is about. It could involve the web, but it
4 might not. It's definitely digital, but it may not
5 involve the computer with a browser at all. It could
6 involve digital device that has no capability of
7 interfacing with the web, but is nonetheless able to
8 listen sound.
9 So, I have some trouble with the word
10 "web."
11 Now, the word "cast" I have less trouble
12 with, but again it implies this notion that one is
13 just throwing things out there to anyone, casting
14 things upon the water, for example, or broadcasting.
15 And, in fact, in this case that's less likely to be
16 true. And, in fact, there's an address, a specific
17 numerical address. So specific that, in fact, the
18 number would look something like this 208.37.62.226.
19 That would be how very specific, for example, the
20 address would be.
21 And so I'm just saying it doesn't seem
22 much like casting to me. It seems more like a laser

1 beam that hits you right on the forehead. But I will
2 refer to webcasting, because it is the generic term
3 that's being used in these proceedings and so forth.
4 Q So to be clear, what you're saying is that
5 even though the same content and same music might be
6 available to everyone who visits a particular
7 webcasting site, the actual transmission of the music
8 to them occurs according to very specific addresses
9 and points for them to receive it?
10 A Yes, and I will even add that while the
11 music that's received by each person may be the same,
12 they could receive different advertisements, for
13 example, based specifically on their numerical
14 address.
15 So, I want to distinguish it from the
16 notion that when I webcast -- if I have a radio
17 transmitter, everybody hears the very same signal.
18 Whereas, if I'm webcasting, so to speak, each person
19 could hear a different sound if I choose to have them
20 to do so. And the technology does support that
21 capability.
22 Q Is there a figure in your testimony that

1 helps illustrate the process of webcasting?

2 A I drew a chart for my testimony. And if

3 we could put it on the screen, and I think we can, I

4 could explain that chart and that may be useful.

5 ARBITRATOR VON KANN: While that's coming

6 up, could I ask you something went by quickly and I

7 wasn't sure I understood. You indicated that with

8 respect to some of your clients they may be capable of

9 receiving this on a cellphone. Are you indicating

10 that there is now the capability of people to receive

11 what we're calling, I guess, streaming --

12 THE WITNESS: Yes.

13 ARBITRATOR VON KANN: -- on cellphones at

14 this point?

15 THE WITNESS: Yes, that is possible and is

16 being done now.

17 ARBITRATOR VON KANN: So somebody as

18 opposed to having sit at a computer in their home or

19 office could be walking down the street with a

20 cellphone in their hand and manage to tune in to

21 listen.com or, I don't know, MTV.com or one of these

22 services?

1 THE WITNESS: Yes. This is increasingly
2 true, but it is nascent in its capabilities. I don't
3 mean to misrepresent that anybody would go out and do
4 this today. But there are those who are capable of
5 doing so.
6 For example, these rates through cellular
7 phone systems have reached the 40K level, 40 kilobits
8 per seconds and are increasing beyond this to what we
9 would say 384 kilobits per second.
10 In other words, today my cellphone could
11 probably receive data, the one that I carry, at about
12 9,600 kilobits per second. But the new generation of
13 cellular telephones is capable doing so in
14 increasingly faster speeds. And it is common, for
15 example, in Europe and some new devices in the United
16 States, to operate at 40,000 kilobits per second. And
17 New York is now operating its network, Verizon is, to
18 384 kilobits per second. And there are other networks
19 that are wireless where if you do not have a phone,
20 you can carry a wireless device that can receive
21 digits at that rate.
22 And so increasingly it is true that one

1 could receive music with a device that they walk
2 around with and hear relatively faithful music
3 reproduced.
4 CHAIRMAN VAN LOON: Can I just on that
5 one? Did I understand correctly you're saying some
6 specialized ones in Europe are 40,000 --
7 THE WITNESS: Kilobits per second.
8 CHAIRMAN VAN LOON: -- kilobits a second.
9 THE WITNESS: Yes, sir.
10 CHAIRMAN VAN LOON: And in New York
11 Verizon is upgrading to 384?
12 THE WITNESS: Yes, as is the rest of
13 Europe. But I'm meaning to point out that the United
14 States is now equalizing itself with Europe as a
15 development of advanced wireless networks. And that
16 while Europe may generally be ahead, there are some
17 spots in the United States, major metropolitan areas,
18 that are in fact ahead of Europe in some ways. And we
19 are seeing the world coalesce on a standard.
20 CHAIRMAN VAN LOON: But my confusion is
21 are you saying there's some place in the U.S. that's
22 close to 40,000?

1 THE WITNESS: Actually higher. And this
2 is not something that end user consumers are doing in
3 large numbers yet, but it is something that is about
4 to be rolled out over the next 12 months.
5 MR. RICH: Well, the record might be
6 clarified if the witness -- I think there may be some
7 confusion of saying 40,000 Kbps or 40,000 bits.
8 THE WITNESS: Yes, it is a difficult thing
9 to communicate. But I will say that when I say Kbps,
10 I'm referring to thousands of bits per second.
11 MR. RICH: In response to the Chairman
12 when you're saying 40,000 Kb or 40,000 bits?
13 THE WITNESS: 40,000 Kbps, 40,000 bits.
14 40 Kbps.
15 MR. RICH: 40 Kpbs?
16 BY MR. SIGALL:
17 Q To use the same nomenclature, 40 Kbps is
18 what you were talking about?
19 A Yes, that's right.
20 MR. RICH: Sorry to interrupt. Thank you.
21 ARBITRATOR VON KANN: So wait a minute.
22 So 40 K versus 380 K?

1 THE WITNESS: 384. And, in fact, just to
2 be really clear on that point --
3 ARBITRATOR VON KANN: We're getting ahead
4 of the Europeans if we get to the 380, is that it?
5 THE WITNESS: We're getting there.
6 CHAIRMAN VAN LOON: I thought we were
7 hopelessly behind and here we are.
8 THE WITNESS: I'll just do a little bit of
9 math, a little demonstration.
10 But we would say that the early modems
11 that we used were, say, 9.6 and 14.4. And then we saw
12 a progression to 28.8, then to 56K, and then higher
13 to, say, 128K. And then to 384K.
14 And for comparison purposes, many
15 businesses have what is called a T1 line. And that
16 would be an order higher of 1.54Mbps.
17 And this is a progression that has
18 occurred in communication speeds.
19 ARBITRATOR VON KANN: Are these as the
20 number of bits increase, are we talking -- let me see
21 how I can put this.
22 Does this only effect the quality of the

1 sound or does it effect the -- what is actually heard?
2 In other words, if I'm walking down the street with a
3 cellphone at its current level, whatever it is, 9,000,
4 and I really -- I'm not yet up to the same number of
5 bits that I have on my home PC, so I gather the sound
6 won't be as good, the fidelity won't be as good. But
7 am I basically hearing everything that I would hear at
8 home on the PC, just not hearing it as clearly and
9 beautifully or is there some stuff that's not even
10 coming to my cellphone because I have less bits?
11 THE WITNESS: For the purpose of clarity,
12 it would be fair for me to say that I'm referring here
13 to the potential for quality sound and the width of
14 the data path. And so, for example, I might draw an
15 analogy to a highway.
16 A four lane highway would have the
17 potential for you to move along quicker than, say, a
18 one lane highway. But you might not necessarily use
19 it at its full capacity. And so an automobile may
20 travel the same speed down both roads. That may be
21 the intention.
22 And so the sender may not use the full

1 capability of the circuit and so you may, in fact,
2 receive the very same quality of sound on two lines
3 that have different speeds. But the line that had the
4 wider data path would have a potential to send you
5 more information at once. And that potential could be
6 exploited by the sender to deliver higher fidelity
7 sound and/or sound that was more reliably going to
8 reach its destination on time.
9 ARBITRATOR VON KANN: But apart from the
10 quality of the sound, the reliability, the -- if I'm
11 getting you, the person who sits at his computer and
12 clicks on to a particular webcaster site and the
13 person whose walking down the street with a cellphone,
14 basically going to be getting the same information,
15 albeit the person on the cellphone probably won't hear
16 it quite as clearly or faithfully, perhaps, as the one
17 at home. But it's not that the guy in the home is
18 getting a lot more sound or a lot more information
19 than the one with the cellphone?
20 THE WITNESS: You're right. It's not
21 necessarily true that one is getting more information
22 than the other. And we are merely referring here to

1 their potential for getting that information.

2 And, in fact, in some cases the wireless

3 user would get access to more information than the

4 wired user would if they had a slower connection. For

5 example, a modem user would be pretty much restricted

6 to around 40K, near the max. They call them 56K

7 modems, but they rarely reach that full potential due

8 to the limitations of telephone lines and their

9 circuits.

10 ARBITRATOR VON KANN: Now, there's a lot

11 of this case that requires people to pull out crystal

12 balls. And while we're on this subject, what does

13 your crystal ball tell you about how soon this kind of

14 cellphone access to webcasting is likely to be widely

15 available? You said at this point it's really not

16 very widely available?

17 THE WITNESS: That's right.

18 ARBITRATOR VON KANN: I don't know whether

19 you really have enough information to say anything

20 about that, but you seem to know a little bit about

21 what Verizon is doing and some of the others are

22 doing. Do you have any -- and I think I heard you say

1 12 months a little while ago. Is it your expectation
2 that within 12 months it should be fairly easy for
3 people to get access to webcasting via a cellphone?
4 THE WITNESS: I think it will be possible
5 for them within 12 months, but I do not think it will
6 be common.
7 ARBITRATOR VON KANN: Okay.
8 THE WITNESS: I believe that 24 to 36
9 months offers more opportunity. And I say that
10 because it is not just the speed of the network or the
11 network's capability, but it is also the market for
12 the devices and the degree to which they have rolled
13 out in the community. And I think that that requires
14 more time.
15 ARBITRATOR VON KANN: The devices being
16 the cellphone itself?
17 THE WITNESS: The end user's device and
18 the infrastructure of the network are both important.
19 And the degree to which these end users purchase these
20 devices and employ them is a market question that is
21 very different from the capability of the technology
22 to deliver the result.

1 And I would say that from my own
2 standpoint and experience, the driving force here is
3 the need for the wireless carrier to recover the money
4 that they have spent to build the network. And so
5 their goal is to offer services that will encourage
6 people to buy these handsets and use the new
7 capabilities of the network.
8 ARBITRATOR VON KANN: Is the handset
9 significantly different than the common cellphone
10 that's available now, because it must have --
11 THE WITNESS: Yes. It must have some
12 differences. For example, the advanced handsets have
13 location capabilities that know where they are when
14 they are operating. And they can operate at higher
15 band width and in different frequency ranges.
16 ARBITRATOR VON KANN: I don't want to
17 delay you. That's helpful. Thank you.
18 ARBITRATOR GULIN: I just have a couple of
19 quick questions. I think you understood you to say
20 that the capability exists now for webcasters to
21 target advisements by geographic area?
22 THE WITNESS: Not just geographic area,

1 but by the specific user. In other words --

2 ARBITRATOR GULIN: You mean based upon

3 specific demographic information that the user

4 providers?

5 THE WITNESS: Yes, or perhaps has

6 registered -- yes, in their registration, or for

7 example we can observe the behavior of a user at a

8 numerical address.

9 For example, if the user at this numerical

10 address has been shopping at my website, but left

11 without purchasing something, I can then put a bounty

12 on that particular address if that person shows up on

13 another site and ask them to send them back to me.

14 That would be an example of my saying I assumed that

15 the person at this address is the same person, and now

16 I would like to hit them with an advertisement. That

17 capability exists and is employed.

18 ARBITRATOR GULIN: Are you aware of any

19 webcasters that are doing that now?

20 THE WITNESS: I'm not aware that they are

21 specifically following through on this yet, but there

22 are some that claim to have that capability, but I

1 have not personally witnessed it in action.

2 ARBITRATOR GULIN: How about with respect

3 to retransmissions of broadcast signals, are

4 webcasters now inserting ads in substitute for the ads

5 that were the original ads on the original signal?

6 THE WITNESS: Yes, exactly.

7 ARBITRATOR GULIN: They're working that

8 now?

9 THE WITNESS: In fact, they have begun to

10 do so and the impetus that I understand was that AFTRA

11 was concerned that advertisements that they created

12 for use in traditional media were now also being used

13 on the Internet, and that this under contract required

14 the payment of an additional fee, or at least raised

15 the possibility that that was true. And the

16 webcasters in response looked for means to take some

17 of the advertisements that were on regular radio and

18 not run them on the Internet in order not to incur the

19 additional fee for talent.

20 There's a company called High Wire that

21 specializes in this, and there are some others. But

22 High Wire is the largest player in the field and they

1 specifically insert ads and target to specific users.
2 And so the capability is not only there,
3 it has been demonstrated by High Wire. And they
4 specifically do this work for large broadcasters and,
5 in fact, have made a deal with Clear Channel, I know.
6 Because I am on the board of High Wire.
7 CHAIRMAN VAN LOON: Can I just clarify on
8 that. So if the panel had each registered musical
9 preferences with a profile or it's been observed, High
10 Wire -- and we were all tuned into rebroadcast, by
11 chance. High Wire might insert advertisements to
12 Judge Von Kann about Reggae music, since we know of
13 his great interest in that? And then they might stick
14 in Bob Dillon for me?
15 Q Yes, they have this capability and they
16 can do that. And, in fact, they have inserted
17 specific ads for specific reasons, depending upon the
18 circumstance.
19 CHAIRMAN VAN LOON: And this is
20 simultaneous. The rest of the content of the program
21 is the same, but to his address its Reggae and to me
22 it's somebody else?

1 THE WITNESS: Yes, it is very possible to
2 do this.
3 CHAIRMAN VAN LOON: Yes.
4 ARBITRATOR VON KANN: I really wish I'd
5 used a different example. Gregorian chants or Andres
6 Segovia is much closer, but anyway, go ahead.
7 BY MR. SIGALL:
8 Q Mr. Griffin, just so we're clear, there's
9 another component to the equation about with the width
10 of the path for the data being transmitted. Is there
11 a method through which the information can be
12 compressed or encoded in a certain way to take
13 advantage of the particular path that it's being sent
14 down?
15 A Well, to be sure, that is the point of
16 what is called a codec. A codec basically is
17 compression/decompression. And compression and
18 decompression occurs in order to maximize the use of
19 the circuit.
20 And, by the way, there's an analogy
21 between compression and decompression in even the old
22 analog. Because if the full width of the groove had

1 been used to communicate the bass and the narrowness
2 to communicate the treble, the needle would fly out of
3 the groove and perhaps hit the ceiling due to the
4 physics. And the result was that there was a
5 principle called RIAA equalization that was applied to
6 phonographs such that the width of the groove would
7 not have to be that wide or that narrow. And so it
8 essentially compressed the dynamics and then
9 decompressed them back coming out the other end in
10 order to produce faithfully analog sound.
11 Likewise, in the digital world the same
12 thing is happening mathematically. The goal is to use
13 as few as digits as possible to communicate as much
14 information as possible. And these codex improve over
15 time.
16 Q So does the codex effect the quality of
17 the music that might be received by the user?
18 A Yes, without question that is its goal is
19 to maximize the quality and minimize the transmission
20 resources.
21 Q And do you anticipate that codex will
22 improve in the future so that more information can be

1 sent over a smaller data path?

2 A In fact, my experience is that that's

3 happened in history and the research continues, and

4 there's no reason not to think that codex will

5 continue to improve. Because they always have.

6 Q So when you said earlier that 128K you

7 felt that that was a near CD quality to your mind,

8 quality of sound, that in the future 128K might

9 actually be a much better quality due to an improved

10 codex?

11 A Oh, indeed. Indeed. I think -- and, in

12 fact, it would be fair to say that the average stream

13 that I listen to is at roughly 32 kilobits per second.

14 That is the average stream that I hear today. And it

15 communicates to me sound -- well, we will hear it in

16 the demonstration, but that is roughly FM quality or

17 better to me. And, in fact, sometimes subject to some

18 less degradation because the physics of the

19 circumstance, such as the air quality and so forth,

20 doesn't effect it; Although transmission does.

21 Q What does Attachment P describe?

22 A Oh, this is the process of what we call

1 webcasting, and that's what we have in front of us on
2 the board here. I used this to explain, I think, the
3 process. I'm going to use a pointer, if that helps.
4 And I will start here with the sound
5 recording. Now, in this case this is a disk, and so
6 it could be a vital record by appearances, or a
7 compact disk. And I'm going to assume for the
8 purposes of this process that it's a compact disk or
9 a digital disk of some kind, because most sound
10 carriers that are sold today are in fact digital and
11 not analog. There are still vinyl records sold and
12 cassettes sold, but they are in the minority of sales.
13 And so I'm going to assume we are starting with a
14 digital sound source.
15 And this digital sound source then goes
16 into the computer through a process that we'll call
17 encoding. We take the digits from the original and
18 move them to the server in a process of encoding.
19 And that encoding can say that I can store
20 the same copy at many different bit rates. I might
21 have one at a low bit rate for those users who have a
22 slower connection. And I would likely have another

1 higher bit rate copy for those who have a faster
2 connection.
3 And, in fact, as this process shows, I
4 would also create copies that could be listened to by
5 those with Real Players, that would be the dominant
6 server that's out there today would be a Real Player
7 from --
8 Q Can you explain what a Real Player is?
9 A Sure. There was a company that was
10 originally called Progressive Networks in 1995 that
11 created the real audio player, and then followed it up
12 with the real video player. And now they have
13 integrated that name. They just call it Real Player
14 now. And there are quite a few people that -- this
15 was Rob Blazer who started this company and he left
16 Microsoft to do that.
17 About three years after he left and
18 started this company, Microsoft became very, very
19 serious about Windows Media, and so I show a Windows
20 Media server here as well, because these are the two
21 dominant processes by which what we call webcasters
22 deliver their information.

1 And so now only would I likely encode a
2 copy at different bit rates, I would encode a copy in
3 different formats. And I would encode them for the
4 dominant players, Real Player and Windows Media
5 server.
6 Q And just to be clear, each version that
7 you encode on your server in a different bit rate
8 would be a separate copy of the sound recording that
9 you intended to transmit?
10 A Yes, but I do want to fair and point out
11 that that is not inherently true. In other words,
12 there are new technologies being developed that can
13 permit one copy, a very highly encoded copy, to be
14 then on the fly changed into, say, a Real version or
15 a Windows Media version, or a low bit rate or a high
16 bit rate. Working from one high quality original
17 things could be done on the fly as opposed to staging
18 individual copies.
19 But, yes, today dominantly I will save
20 individual copies and probably even on different
21 servers, depending upon the capacity that was
22 required. And most major webcasters have quite a few

1 different machines with different bit rates and
2 different codex on them.
3 And so this is represented here by the
4 multiple servers after the database.
5 I'm going to jump over the Internet now
6 and go over to the listener's computer. Because from
7 the listener's computer they are wanting to listen to
8 music through speakers or to move that information to
9 their hard drive to save. And they will make a
10 request from this computer that will go to their
11 Internet service provider, use the Internet and
12 request a file from this source that will then
13 allocate one of these servers to send it to this
14 computer. After which, it could be listened to
15 through these speakers or captured to a hard drive or
16 other data storage source, and then in fact
17 transferred to other data storage sources, such as
18 other hard drives or other CD burners or mini disks or
19 whatever media one might want to put it in.
20 And the alternate path that I have on this
21 process is it could be that I am an AM/FM radio
22 station and that I am typically taking sound

1 recordings for my regular transmission purposes. And
2 that I take that signal that I ordinarily transmit and
3 I simply encode that and send it to users who request
4 it.
5 But otherwise, the process can be very
6 much the same.
7 ARBITRATOR VON KANN: Can I ask a question
8 here about the speakers.
9 THE WITNESS: Yes.
10 ARBITRATOR VON KANN: It seems to me that
11 in the law of unintended consequences, one of the
12 things that's happening here is you are -- not you,
13 but the advent of webcasting, I would think, is
14 putting the speaker companies out of business.
15 Because everybody has for years been saying "Oh, my
16 God, we need this great elaborate speakers and look at
17 the Bose something or other that I've got." Now we're
18 being told that with little tiny boxes next to my
19 computer, I can hear it just about as well as I can on
20 my fancy in-home stereo system with my -- is it in
21 fact the case that these little tiny computer speakers
22 generate as good a quality as the person might have on

his home entertainment system with his great big elaborate smassy, expensive, Harman, or whatever they are, speakers?

THE WITNESS: No, Your Honor.

ARBITRATOR VON KANN: Okay.

THE WITNESS: These speakers, they have the same effect regardless. In other words, there's nothing about this medium that makes your speakers better.

ARBITRATOR VON KANN: All right.

THE WITNESS: Your speakers are a limitation.

ARBITRATOR VON KANN: Okay.

THE WITNESS: And, in fact, I would say that what is happening is that the computer is getting to know the hi-fi pretty well, and they are dating and they are learning that their plugs fit into each other. And now the computer is sending the sound to a regular stereo.

And, in fact, in my case I have a pair of speakers that cost $2,500 connected to my computer because it doesn't help to have any that are less

1 expensive.

2 And, in fact, Bose, is now selling stereo
3 units that attach to one's computer because for
4 precisely the reason that you're citing; these
5 speakers are no better or worse, and they are
6 limitation. And there's nothing about digital that
7 overcomes that.

8 ARBITRATOR VON KANN: So the person whose
9 really concerned about fidelity of sound might go out
10 and get, as you indicate, some very fine speakers
11 which can interconnect to their computer so they'll
12 hear it as well then as they would if they were
13 slapping the CD in their CD player?

14 THE WITNESS: Yes, or in the alternative,
15 they would make a copy and take it to a place where
16 they had that. In other words, to their car or to a
17 Walkman where they would ordinarily listen.

18 But I think to the point of your question,
19 there is nothing about this process that overcomes a
20 bad speaker. A bad speaker is a bad speaker
21 regardless. And a good speaker is a good speaker. And
22 they a limitation in communicating the source

1 material.

2 And I will say for your edification in
3 audio we primarily believe that the source of the
4 music and the final reproduction of it are the keys in
5 that chain. But you cannot overcome their
6 limitations.

7 ARBITRATOR VON KANN: Okay.

8 BY MR. SIGALL:

9 Q Following up, Mr. Griffin, how difficult
10 is it for you to connect your computer that might be
11 receiving a webcast to your hi-fi stereo that you
12 might play CDs on?

13 A It's increasingly common. It would be
14 like connecting any other device to one's stereo. It
15 requires a simple cable, not unlike connecting a
16 Walkman to a stereo. And, in fact, in some ways
17 easier. It's just one simple little jack like a pair
18 of headphones might have on the back of a computer
19 that then leads to the stereo.

20 And some units might do this wirelessly,
21 some of the more advanced units. But it is common,
22 too, that the computer and the stereo are in the same

1 area, for example, in the dorm room and can in fact
2 perform both functions. For some people, their stereo
3 is their computer.
4 And the only other thing I would add to
5 this process is that it is very possible to outsource
6 many links in this chain. And so it might happen that
7 someone who was webcasting might say, "Well, I would
8 like Real to do all of this work for me, or I would
9 like Microsoft to do all this work for me, or I would
10 like another company to do this work for me." And to
11 outsource any link in this chain to someone. And so
12 that is also a variant that sometimes happens.
13 But the basics of the process are that a
14 listener sits at their computer and requests that
15 something start from another computer, and it comes
16 through a process that matches the listener's needs.
17 He has a Real Player, a Windows Media player, he has
18 the following transmission capability to receive the
19 digits. And so I will allocate him this stream or
20 that stream for that individual user. And that is what
21 happens in this process. And it may or may not be
22 outsourced, but that is how it occurs.

1 Q How would you compare this process to the
2 traditional over-the-air broadcast?
3 A Well, I think the statement I just made is
4 critical. There the content is traveling regardless.
5 In other words, there is no request from the end user
6 that the content begin. They merely come in and start
7 listening to something that is already in the air.
8 And, in fact, that content is traveling past them
9 regardless of whether they choose to receive it or
10 not.
11 If they have a receiver and they want to
12 listen, of course they can tune to that frequency.
13 Whereas, in the process of webcasting, there is not
14 content coming to your computer whether you want it or
15 not.
16 And the process is also different in the
17 sense that, of course, it doesn't travel over the
18 Internet. I mean, if you're transmitting through the
19 air waves, it's very different than transmitting over
20 a wire.
21 Q How does it compare on the user's end to
22 a traditional over-the-air broadcast?

1 A Well, from the standpoint of listening,
2 you have so many more choices. I mean, the radio has
3 an inherent limitation due to physics, both to the
4 quality of the sound and the number of frequencies
5 that one can receive. And, of course, in this case if
6 it's available on the Internet, you should have access
7 to it anywhere in the world. It's quite a difference.
8 ARBITRATOR VON KANN: I didn't understand
9 the first part of your answer; the difference between
10 the person who goes to his radio and turns it on to
11 listen to his favorite station, you know, stuff is
12 coming by but he hasn't turned on his radio until 2:00
13 when he does. How is that different than the
14 webcaster who is putting out, I guess, a stream of
15 stuff to various other people who are listening and I
16 decide to sit down at my computer at 2:00 and turn it
17 on and click in? I didn't get the difference between
18 those.
19 THE WITNESS: Well, for example, he may or
20 may not already be sending that stream. For example,
21 when Your Honor requests a Reggae stream, there may in
22 fact not be someone else listening to a Reggae stream

1 or an Andres Segovia stream. They may start one anew
2 for you.
3 In other words, in this case it can be
4 upon request, whereas radio is broadcasting
5 regardless.
6 ARBITRATOR GULIN: From the standpoint of
7 the user is there any difference? Does the user
8 perceive any difference between a broadcast and a
9 webcast?
10 THE WITNESS: Well, of course, this is
11 subjective. They are hearing sound. There can be
12 many similarities, but -- and they can be hearing
13 something that is prepared for me as opposed to for
14 the entire world, or for anyone else.
15 But do they perceive a difference at that
16 point other than that it is customized or coming in on
17 their computer? I think generally not. The effect is
18 pretty much the same.
19 Of course, there are many different things
20 going on because that's coming just for you. But you
21 may not know that. You may not perceive that it's
22 coming directly to you.

1 ARBITRATOR VON KANN: And on the earlier
2 part, we've heard there's lots of different channels,
3 lots of sub-specialties and so on. Are you saying
4 that at some point in time nobody is listening to a
5 particular channel, and therefore the webcaster's not
6 putting anything out. But then all of a sudden
7 somebody clicks in, and a few more, and so I guess
8 only one has to click in before -- so there may be
9 periods of time when nothing is coming on a particular
10 webcaster's channel so nobody is interested?
11 THE WITNESS: That's right. And, in fact,
12 a radio station is always radiating its effective
13 power at a consistent level. That may vary according
14 to their Federal Communications Commission license.
15 They may be required at sundown to reduce the power or
16 switch the directionality, but in general it is a
17 blanket they are sending. Whereas, the webcaster is
18 responding to specific requests from users.
19 Of course there are -- if we try to look
20 at of the that occur, we could make a long list of
21 things. We could say, for example, that a radio
22 listener is probably listening on a device, for

1 example, that isn't capable of pirating the material.
2 Whereas, all computer users are listening with a
3 device that is capable of recording digits, for the
4 most part.
5 ARBITRATOR VON KANN: And this may be
6 linking up with some of your later testimony about
7 cost, I guess. But I gather that a difference here is
8 that for the radio station, if it's broadcasting, it's
9 broadcasting and how ever many -- whether 10 people
10 are listening or 10,000 the cost of an hour of
11 operating the radio station is about the same.
12 Whereas, for the webcaster as more and more people
13 listen, we get into issues of band width and
14 presumably added cost and so forth. So that there are
15 differences from that point of view.
16 THE WITNESS: Yes, that's correct. The
17 only thing I would add is that in order for a radio
18 broadcaster to reach a larger geographic area, they
19 would need, of course, more effective radiated power.
20 But within that area, it would be consistent
21 regardless of how many people were listening.
22 So to increase their audience, they might

1 in fact need to send more out. But it would be
2 consistent for that geographic area. Whereas, within
3 that same geographic area, a webcaster may have no
4 requests and use no band width at a particular time
5 when there are no requests coming in.
6 BY MR. SIGALL:
7 Q Now, Mr. Griffin, you have created two
8 videos for the panel, isn't that correct?
9 A Yes, that's right.
10 Q Can you describe a little bit about what
11 they are and how you created them?
12 A Well, sure. And the second video, I just
13 want to dispense that one.
14 Q The first video is, for the record RIAA
15 Exhibit 208DP. And the second is 209DP.
16 A The second is 30 minutes of one webcaster
17 concentrated. In other words, depth not breadth. And
18 I think that's pretty self-explanatory. Tuned into a
19 webcaster, left the videocassette recorder running, a
20 half hour worth of recording. Relatively straight
21 forward. It was produced under the same
22 circumstances, by the way, which I'll get to in a

1 minute.

2 The first video that I'm going to refer to
3 and explain is a video where I took a number of
4 webcasters that represented a variety of different
5 webcasters, and I recorded a session where I sat down
6 and surfed on the web and listened to those and tried
7 to go through them and produce a video that Your
8 Honors would be able to look at and see what I saw
9 when I was sitting at my computer doing this.

10 Now, I would like to be clear about the
11 circumstances under which I did this and the equipment
12 that I used.

13 ARBITRATOR VON KANN: Can you pause for a
14 second. On 209, which is the just listening to, was
15 that -- I listened to this and then watched the video.
16 That appeared to be a radio station or maybe it's a
17 webcaster disc jockey. But there was a disc jockey on
18 there, I guess that's -- and was this a radio
19 broadcaster whose stream -- whose broadcast was simply
20 coming over the Internet? Or was this a broadcaster
21 or a pure webcaster?

22 THE WITNESS: It want not a

1 retransmission. That was a webcaster. And, in fact,
2 I am familiar with that particular webcaster, so I can
3 say that with assurance that I have actually visited
4 their facilities and I'm certain that that was coming
5 off of the server as opposed to off the air. That was
6 the World Class Rock, as I recall.
7 ARBITRATOR VON KANN: So that is actually
8 a sort of disc jockey-like host or whatever on that
9 whose operating much as a disc jockey on a radio
10 station, but it is not a radio broadcast. It is
11 exclusively for people who are tuning in on their
12 computer?
13 THE WITNESS: That's correct. You could
14 not hear what you heard on the radio on that day. You
15 could have only heard it with your computer.
16 ARBITRATOR VON KANN: Okay. Thank you.
17 THE WITNESS: And I recorded that.
18 The circumstances under which I made these
19 videotapes, I did them in my home as opposed to in my
20 office. Because in my home I have a somewhat slower
21 connection. I have a home connection. And my home
22 connection is 384 kilobits per second in both

1 directions. The office is very, very fast, like a
2 dormitory or something. So I did not use the office.
3 And I used a standard video cassette
4 recorder that I owned. And I ran cables between the
5 video cassette recorder and my computer. And I did
6 not use my advanced audio equipment, like I have in my
7 office. I used my home computer.
8 And made the video -- it was somewhat
9 grainy because it was not done under professional
10 circumstances. And so about 10 days later we took the
11 Exhibit 120DP and we made screen shots of a number of
12 the screens that we saw.
13 Now, I want to emphasize that these screen
14 shots were done about 10 days later. They could not
15 have been done simultaneous with what I was doing,
16 because you would have seen print dialogues that would
17 have come up and effected what was happening.
18 And furthermore, we needed to go out and
19 get some software so that we could get this right for
20 you. And so it happens 10 days later. And that
21 accounts for a difference that occurs. Sometimes when
22 you look at these, they are different than what you

1 look at on the screen. Not in a material way, but in
2 the manner of what you might see. And I will explain
3 those differences where I'm cognizant of them.
4 ARBITRATOR VON KANN: Is this what you
5 described at 208 that we're talking about?
6 THE WITNESS: This is the first video. Is
7 that 208?
8 MR. SIGALL: Yes, although there are
9 screen shots at the end that are of the video that you
10 watched this weekend of worldclassrock.com. There are
11 a few for that.
12 ARBITRATOR VON KANN: Can I ask you one
13 more thing on 209 while we're on it? You just
14 explained that this was, in effect, I don't know what.
15 A webcast disc jockey, not a radio disc jockey.
16 THE WITNESS: Yes.
17 ARBITRATOR VON KANN: On the 209 broadcast
18 the screen showed, I guess what you'd see on your
19 computer, at up at the top flashing annoyingly
20 constantly were the words "Listen live, listen live,
21 listen live, listen live." I was about to shot the
22 television after a little while.

1 Was that, in fact, live in the sense that
2 somebody was sitting somewhere right at that moment
3 that you recorded it on a microphone talking to those
4 who were tuned in, or was this in some way
5 prerecorded? I mean, but was this happening real time
6 at the very instant that you recorded it?
7 THE WITNESS: That would be speculation on
8 my part, because I wasn't at the other end of the
9 circuit. And that would be unfair for me to say. But
10 I would say that based on my experience with that
11 particular company, which I have done some work for,
12 that it was prerecorded and that this was, in fact, a
13 script that was running at the time. And that what was
14 flashing at you live was probably a slick little piece
15 of programming that caused the browser to constantly
16 flash "live, live, live" to attract one's attention.
17 MR. SIGALL: Just to be clear, there is
18 one minor difference between the exhibit we've handed
19 out and the exhibit we submitted with our case. We've
20 added page numbers as the Chairman requested, the page
21 numbers for reference purposes down on the lower right
22 corner.

1 CHAIRMAN VAN LOON: And worldclassrock.com
2 begins at 45, is that right? You mentioned that
3 there's a --
4 MR. SIGALL: That's correct. I believe
5 that's right. There are three, I think, shots from.
6 CHAIRMAN VAN LOON: Thank you.
7 THE WITNESS: It's 45, 46 and 47
8 represented.
9 And also Tom Harding is our volume
10 control, so if at any point the volume is too high or
11 too low, you can request of him and he will take care
12 of it.
13 ARBITRATOR GULIN: Mr. Griffin, are you
14 going to be narrating in any sense? Be stopping at
15 any point --
16 THE WITNESS: I will stop as I go along.
17 ARBITRATOR GULIN: All right. Well, if
18 you do that, you're going to have to be very clear
19 where you are in the video for purposes of the
20 transcript. Do you understand that. Because the video
21 is not being transcribed. It's not being recorded.
22 So someone reviewing the transcript later on is going

1 to have to know where you are and what you're
2 referring to, so you have to be very careful about
3 that, okay?
4 THE WITNESS: Your Honor, might a time
5 reference be a good reference? For example, I am now
6 at the 5 minute 10 second point of the video. What
7 that be sufficient for your --
8 ARBITRATOR GULIN: That'll work, yes.
9 CHAIRMAN VAN LOON: It sounds like it
10 would.
11 And I would imagine, actually, will your
12 mikes be picking up the audio presumably?
13 THE WITNESS: Presumably I have no
14 confidence in what the quality will be.
15 CHAIRMAN VAN LOON: Right. Okay.y
16 THE WITNESS: I would not plan normally --
17 normal conditions I wouldn't transcribe what's coming
18 out of the speakers.
19 CHAIRMAN VAN LOON: Okay. Fasten your
20 seat belts.
21 THE WITNESS: It appears that it has
22 begun.

1 Now, let's see here. Yes, we're just
2 about to begin. The video starts at this 18 second
3 point, and that is where we are at right now.
4 And the first thing that we will see, and
5 I will direct attention to the Exhibit 120DP, pages 2,
6 3 and 4 will relate to the first segment that we're
7 going to see in this video of the first site. They
8 refer to netradio.com.
9 ARBITRATOR VON KANN: What we're seeing is
10 on the screen here, it's not on these TVs?
11 MR. SIGALL: That's right.
12 ARBITRATOR VON KANN: Should it be?
13 MR. SIGALL: It shouldn't be, no.
14 ARBITRATOR VON KANN: It shouldn't be.
15 Okay. All right.
16 CHAIRMAN VAN LOON: It might be helpful to
17 turn the lights off also. Or at least turn some of
18 them down.
19 That's going to be hard for note taking.
20 THE WITNESS: It will be hard to see the
21 exhibits, as well.
22 MR. SIGALL: The black screen is the

1 reason it's dark here. Once we get on to the
2 webcasters, you should be able to read it.
3 CHAIRMAN VAN LOON: Okay. Very good.
4 You want the lights back on then, please.
5 Thank you.
6 THE WITNESS: Yes. And so the point is is
7 that we are reviewing netradio.com. First will come
8 up and those will relate to pages 2, 3 and 4 that are
9 in front of you.
10 I have turned this back on.
11 When my computer comes on, it goes to my
12 main home page, which in this case is Microsoft
13 Network, but yours could be any various portal or
14 homepage. And I type in netradio.com, and we come to
15 netradio.
16 And here at netradio I am already a
17 member, so I am entering my email address and my
18 password to tell it who I am, having previously
19 registered. I will have other examples of
20 registering.
21 What is happening here is that I am
22 looking through the various things that are provided

1 by netradio.com.

2 MR. SIGALL: Which page is this, Jim.

3 THE WITNESS: This you will see on page 3.

4 On page 3 you will see a dialogue box that

5 is over the top that has the As and the beginning of

6 the Bs of the chondrus of netradio. And that

7 corresponds to the box that we are scrolling through

8 right here on the video. And this is a still shot of

9 what was scrolling up here.

10 ARBITRATOR VON KANN: Is registration a

11 pre-requisite for all of these services? You have to

12 have some previously, you know, given them your name

13 and your email address, and I don't know what else,

14 your Social Security number, your mother's maiden

15 name? I mean, there is no anonymous listening, as it

16 were?

17 THE WITNESS: Your Honor, I can say that

18 the large sites, the webcasters require registration

19 in the main. I have not seen one that does not, but

20 there are many hobbyist sites that are involved. In

21 other words, we will come to some sites that aggregate

22 others. And those they aggregate may not themselves

1 require registration, but the overall aggregator may.
2 So it is not fair to say that every
3 webcaster knows every listener, but it is fair to say
4 that the large webcasters, those who aggregate
5 syndicated, etcetera, do know who is coming where.
6 ARBITRATOR VON KANN: And what -- I mean,
7 if you're going to get this later, fine. But what
8 does a typical registration involve? What info do you
9 give in registering?
10 THE WITNESS: In difference to the demo,
11 I will have a demonstration of registering --
12 ARBITRATOR VON KANN: Okay. Fine.
13 THE WITNESS: -- that we will walk
14 through. And this is merely to get to the heart
15 quick.
16 ARBITRATOR VON KANN: That's fine.
17 THE WITNESS: And in the very next
18 demonstration you will watch me register for a site.
19 ARBITRATOR VON KANN: Okay.
20 MR. SIGALL: Can you tell us for the
21 record at what time this was stopped?
22 THE WITNESS: Yes, I have stopped at the

1 59 second point of the tape. And the tape began at
2 the 18 second point. And we have stopped at this 59
3 second point to look at a dialogue box of netradio.com
4 that has chondrus listed in a dropdown box. And I
5 will now proceed.
6 I have signed in and I am looking for a
7 chondrus, and I have chosen country in this particular
8 case. And what is happening now is that having made
9 a request of Netradio's computers, Netradio's
10 computers are matching transmission speed and format
11 to my computer. And in a moment, the sound will
12 begin.
13 We are now at the 1 minute 23 second
14 point.
15 So on the screen you can see there is an
16 advertisement here on the Player and an underlying
17 advertisement on the main page. And the ability to
18 purchase the CD is prominent in the middle. And I
19 will explore this as the tape goes on.
20 I am thinking now perhaps we will listen
21 to something different, so we are looking at --
22 ARBITRATOR VON KANN: Can I just ask you,

1 what I am seeing on the screen is not matching up with
2 the slides in my lap.
3 THE WITNESS: That's accurate.
4 ARBITRATOR VON KANN: Okay.
5 THE WITNESS: And to review in my preface-
6 -
7 ARBITRATOR VON KANN: Because this was
8 done later?
9 THE WITNESS: Yes. The ten days after we
10 shot this video, we went back and we made these
11 slides. Because originally we could not shot them
12 because if we printed in the middle, then we would see
13 a big print dialogue and we would not be able to be
14 showing you the demonstration on my computer. So we
15 went back and we got software 10 days later, and we
16 went back to these sites and we shot them.
17 And I can tell you that having reviewed
18 this slides, that while they may differ in some ways,
19 they do not differ in substance from my overall
20 experience. That they matched this. And I will point
21 out where there are slight differences, that I have
22 noticed as we go through the tape.

1 ARBITRATOR VON KANN: For example, here,
2 this prominent -- I can't quite see that -- it's women
3 in music, women and music, women whatever it is there.
4 THE WITNESS: Yes.
5 CHAIRMAN VAN LOON: But it's Louisiana
6 Travel in the slides.
7 THE WITNESS: Yes. Yes.
8 ARBITRATOR VON KANN: I see. And you can
9 see a different advertiser at that point.
10 THE WITNESS: This is commonly what is
11 referred to as a banner advertisement, and this is a
12 different banner in that place. But there's,
13 nonetheless, a banner advertisement in each case.
14 But you are correct that they do differ,
15 but they differed because I could not simultaneously
16 print and create a demonstration at the same time.
17 BY MR. SIGALL:
18 Q Mr. Griffin, your first choice was for --
19 you said it was for country, but it was in fact for
20 '80s country, I think was the choice.
21 A Yes, specifically it was '80s country
22 music. I could have chosen other chondrus. For

1 example, if you look at page 3 you will see that I
2 could have -- I chose '80s country. I could have
3 chosen alternative country, and there were many other
4 country choices in this dialogue box that I could have
5 chosen. But, in fact, I chose '80s country in this
6 particular case.
7 And, by the way, that wasn't for much
8 other reason than it was near the top of the box and
9 I wanted a variety of music for us to listen to. But
10 there was no particular reason that I chose '80s
11 country.
12 And I am now starting again at the 208
13 point and picking up in a rap -- I have chosen rap
14 now. And we have a different song that will come up
15 because I have chosen a different chondrus.
16 Now, I'm stopping the tape at the 238
17 point to point out to you one of the variances.
18 Within the 10 days between the time that we shot these
19 screens and that we made the tape, Netradio when I
20 shot this video, when you said I want to buy this,
21 would take you and sell you the CD themselves from
22 their own place. But if you look on page 4 you will

1 see that here within those 10 days Netradio had
2 switched to referring you to amazon.com. And I am
3 simply observing that this is a difference.
4 That during that 10 day time period that
5 radio.com switched from selling them themselves out of
6 their own warehouse to referring to another retailer,
7 which in this case was amazon.com. That may or may
8 not be a substitute difference, but I note it to you.
9 To me it did not have much effect, but I note it for
10 your purposes that it was different during that 10 day
11 time period.
12 ARBITRATOR VON KANN: Are you going to
13 talk at some point about what happens when you click
14 on the "buy now" button?
15 THE WITNESS: Oh, in fact, I have.
16 ARBITRATOR VON KANN: You have?
17 THE WITNESS: And I am showing you now.
18 ARBITRATOR VON KANN: That's when -- okay.
19 THE WITNESS: Yes. I'm actually going to
20 rewind from the 238 point, and now I am stopping at
21 the 211 point. And I'm going to go back through to
22 the 238 point.

1 So I'm not at 215 and you are seeing the
2 rap dialogue come up. And the music is now playing at
3 the 228 point. And I am about to click, there I am
4 clicking, to buy this now. And what has happened is
5 that it is sending me now to another part of the
6 Netradio site which handles this e-commerce. And now
7 you see that the product that we are listening to has
8 come up on the screen. The very same album that we
9 are hearing is now in front of us. And what we are
10 seeing on the screen here is a track listing of the
11 songs that are on the album.
12 I'm going to go back just for a moment so
13 that you can see that -- this dialogue. There is the
14 product information. And at 242,and you will notice
15 that there are also audio samples here. Static audio
16 samples that we can listen to in addition to having
17 heard the song.
18 And so we have track listening, audio
19 samples. There we have release notes about the
20 particular CD in question.
21 And now I have come back to that dialogue
22 box at the 254 point, and I have gone not to the

1 Player, but to the main scream for Netradio and we are
2 seeing that they tell us general music news and
3 general information as well.
4 ARBITRATOR VON KANN: Can we stop here a
5 second?
6 THE WITNESS: Yes.
7 ARBITRATOR VON KANN: When you are in the-
8 -
9 THE WITNESS: I am stopped at the 3 minute
10 and 8 second point.
11 ARBITRATOR VON KANN: It looked like you
12 didn't actually consummate a purchase.
13 THE WITNESS: I did not.
14 ARBITRATOR VON KANN: Okay. Are you going
15 to talk at some point about how one does that? And if
16 not, let me ask you a couple of questions about it.
17 THE WITNESS: That's not a part of my
18 tape. I did not purchase a CD during this session, so
19 I think this would be the right time to address that.
20 ARBITRATOR VON KANN: If you had gone
21 there and you just couldn't live without getting this
22 CD, you could, as I think I'm getting it, continue to

1 listen while you're, I guess, typing in whatever info
2 you need to effect a purchase, is that right?
3 THE WITNESS: Yes, Your Honor. And, in
4 fact, I will have a demonstration of listening to
5 music and doing other things at the same time later in
6 this tape, but not specifically for the purchases --
7 for the purposes of purchase.
8 ARBITRATOR VON KANN: What I'm trying to
9 get a handle on is how easy it is to make a purchase
10 on the Internet. And if you have already registered
11 at this site, so I guess they have some info on you,
12 and I don't know how much it is; whether they have
13 your mailing address and your Visa card number, or
14 whatever --
15 THE WITNESS: They would -- they commonly
16 would not have that information, Your Honor. My
17 credit card number they commonly would not have. And
18 they commonly would not have my home mailing address.
19 But they might commonly know my email address.
20 ARBITRATOR VON KANN: So you've decided to
21 purchase and you've clicked on "buy now."
22 THE WITNESS: I've decided to investigate

1 a purchase on this video.

2 ARBITRATOR VON KANN: Okay. But let's

3 take it the next step. Let's suppose you decided you

4 wanted to purchase it.

5 THE WITNESS: Yes.

6 ARBITRATOR VON KANN: What would you do?

7 How would you effect that purchase?

8 THE WITNESS: Well,that would be

9 speculative on my part, but I could base it on

10 experience of having done this on other sites in the

11 past.

12 ARBITRATOR VON KANN: Generally. I don't

13 particularly care what specific site. But how does

14 one generally effect a purchase?

15 THE WITNESS: Well, with the click, in

16 other words indicating that I would like to purchase

17 this particular item --

18 ARBITRATOR VON KANN: Right.

19 THE WITNESS: -- it would generally be

20 followed by a dialogue box that would ask me for my

21 shipping and my financial information and ensure that

22 they match. In other words, to say I want to know

1 where your credit card is billed and I would like to
2 know where you would like me to send this CD. And I
3 would like to know who you are. And having been
4 satisfied with this information, it should then pass
5 me along to a dialogue box that completes the
6 transaction and returns me to my session.
7 ARBITRATOR VON KANN: So it's going to
8 probably involve typing in your name and address and
9 a credit card number?
10 THE WITNESS: Yes. And here is -- it is
11 important for me to point out that this is where there
12 is a material difference between what you see of the
13 video and what is on this page. Because in the
14 example of amazon.com I am then leaving this site and
15 I am going to amazon.com. And so webcasting, to use
16 this phrase, can deliver me to the arms of an
17 advertising or a sponsor completely. In other words,
18 now you are at amazon. com as opposed to doing it from
19 this place.
20 ARBITRATOR VON KANN: But if you go to
21 amazon.com will the music stop?
22 THE WITNESS: They could continue the

1 music from that radio.com if they chose to. I can't
2 speak to that, because that would be speculation. I
3 didn't do it this particular example, but it is
4 possible that they could that. That Netradio could
5 continue to play you Netradio music while you are
6 amazon.com. And I will show examples on this videotape
7 of doing something different or going someplace
8 different at the same time as listening to a primary
9 source.
10 ARBITRATOR VON KANN: Whether you do it
11 through amazon.com or its own in-house purchasing, I
12 take it it's a relatively simple and quick process?
13 THE WITNESS: I have found it to be that.
14 ARBITRATOR VON KANN: And something that
15 you could consummate in, I don't know, a minute or two
16 or something like that, I guess?
17 THE WITNESS: Yes, because I have a number
18 of credit cards and a place to be shipped and so
19 forth. I might feel differently if I was 14, but
20 being 43 I found it very easy and so forth. And that
21 I had all the information.
22 ARBITRATOR VON KANN: Are some of the

1 services set up so that you can pre-register your
2 purchase info so that as you go along, you know,
3 you're sort of already on their files and all you have
4 too --
5 THE WITNESS: Yes, Your Honor. Amazon.com
6 specifically claims a patent over what it calls one
7 click shopping and offers you a button that says one
8 click.
9 ARBITRATOR VON KANN: Okay.
10 THE WITNESS: And I have used that in the
11 past and I have found it to be faithful and easier
12 than others.
13 ARBITRATOR VON KANN: Okay.
14 BY MR. SIGALL:
15 Q Mr. Griffin, following up on that, if
16 Netradio sends a user to amazon. com, is there any
17 financial relationship between Netradio and amazon.
18 com?
19 A I could not speculate about that.
20 Q In your experience, generally?
21 A In my experience I would anticipate that
22 one would only make that choice for financial reasons

1 or fulfillment reasons with one's audience. But I was
2 not involved with that particular decision.
3 Q Can you describe generally from the
4 industry what happens when a user is sent to another
5 site where they might purchase CDs?
6 CHAIRMAN VAN LOON: Before we move on to
7 that, maybe on this point it's worth looking that on
8 page 4 it says "Netradio is now an amazon.com
9 affiliate. Every purchase benefits Netradio.com and
10 helps us keep the music free." So that would appear
11 to be a specific answer with regard to this
12 connection.
13 THE WITNESS: Yes, they would be making a
14 claim here on page 4 that that was in fact truthful,
15 that that would be true.
16 BY MR. SIGALL:
17 Q In your experience what does it mean that
18 it benefits netradio.com? What are they referring to
19 generally?
20 A Well, Netradio would be like many media
21 outlets in the business of selling its audience to
22 others. And so that would be their goal, would be then

1 to sell them to others, and in this amazon. com
2 hopefully is going to provide them some revenue, and
3 in fact that's their claim here on page 4 that it
4 does, in fact, benefit them.
5 And so in my experience that does -- that
6 is what happens. The goal is to sell one's audience.
7 ARBITRATOR VON KANN: Does that mean in
8 laymen's terms that in a typical scenario the
9 webcaster gets a commission for each record sold
10 through their webcasting:
11 THE WITNESS: I would be speculating as
12 the specific financial arrangement, and that wouldn't
13 be fair. But I guess it could be described as a
14 commission.
15 ARBITRATOR VON KANN: Okay.
16 THE WITNESS: I think here the words
17 specifically are that it benefits Netradio. And so I
18 don't know if it's in a commission type arrangement.
19 ARBITRATOR VON KANN: Okay.
20 THE WITNESS: Okay. I'm going to restart
21 the tape now at the 3 minute and 8 second point. And
22 we are on the rap dialogue box and it is playing

1 music. And --

2 ARBITRATOR VON KANN: Arguably.

3 THE WITNESS: I am going to pause now at

4 the 3 minute and 24 second point and indicate that I

5 am now going to another site, it is the Spinner site.

6 And you will see Spinner on pages 5, 6, 7 and 8 of our

7 evidence.

8 ARBITRATOR VON KANN: Keep that free so we

9 can record you.

10 THE WITNESS: And so I will direct your

11 attention there. And also this example of Spinner will

12 be somewhat unique because this, Your Honor, is where

13 I will have the registration. And also after I have--

14 and you will see that dialogue box on page 5. And

15 also after I register, Spinner is going to introduce

16 itself to you and I am not going to say anything, and

17 it will explain it's own service in its own words to

18 someone who has just registered for the service.

19 And so now you will see me going to the

20 registration box. And I will choose a user name. And

21 I am now typing that in. And I am choosing a

22 password. I am reentering the password for

1 verification. And I am now giving it my primary email
2 address.
3 Here it is asking what name it would like
4 me to use when it refers to me, and is asking my
5 favorite kind of music that I listen to. It wants to
6 know if I would like to receive their newsletter and
7 if I would like special offers from their partners,
8 and I have now submitted this to them.
9 And having done so, now I'm going to be
10 quiet for a moment.
11 (Whereupon, video plays)
12 THE WITNESS: Yes, we have paused at the
13 6 minute and 48 second point having finished Spinner's
14 introduction of itself.
15 ARBITRATOR VON KANN: What are skins that
16 we just heard about?
17 THE WITNESS: This is a common term, Your
18 Honor.
19 ARBITRATOR VON KANN: Okay.
20 THE WITNESS: That describes to alternate
21 views of software. And it is particularly present in
22 multimedia players such that the functionality of the

1 software is the same, but the appearance changes and
2 is customized to what you want, or rather there will
3 be different interfaces that you can choose that's
4 more like the one you want. Although it's also true
5 that some people make their own, because there are
6 tool kits that allow them to make them and then they
7 share them with others. But the functionality of the
8 software stays the same while the appearance and that
9 which is in front of you is different.
10 BY MR. SIGALL:
11 Q Is there an example of that?
12 A Yes, and in fact --
13 Q It's in the slides?
14 A Oh, sure. If you look at page 7 you will
15 see that the skin on page 7 has the same functionality
16 or roughly the same functionality as that which is on
17 pages 5 and 6. It merely appears different, but it
18 has roughly the same functionality associated with it.
19 A particular ski, might include different
20 things in different places or next them inside of
21 different menus, but it is after all only a way of
22 interfacing with the software and doesn't address the

1 functionality of the software itself.

2 Q Would you say it's similar to getting a
3 television with a black case versus getting a
4 television with a silver case or a white case around
5 it, is that right?

6 A Probably not an entirely fair analogy, and
7 I say that because the color of the case would not
8 influence where the buttons were, whereas in this
9 particular case I could move the buttons without
10 changing their functionality at all.

11 And, in fact, a particular skin might be
12 more convenient for one person to use than another,
13 whereas the color of the box would probably not change
14 the convenience of the functionality of a hardware
15 interface. But I think the idea is the same, is that
16 it is more aesthetically pleasing and convenient for
17 one to use with their environment as opposed to any
18 different functionality.

19 Okay. We'll now resume the tape at the 6
20 minute and 48 second point, and I have now done so.
21 And in this case I am going to choose some music. And
22 I believe I have chosen some rock music.

1 In some places I will let the music play
2 without comment. There will be a wide variance of
3 music in this demonstration, Your Honor.
4 The record will reflect that at the seven
5 minute and 35 second point I switched to Latin music.
6 Now I am switching to rock at seven minutes and 56
7 seconds.
8 Now, I'm going to pause at this point, and
9 I have paused at eight minutes and six seconds or
10 eight minutes and eight seconds, to point out that
11 with Spinner there is the capability to examine other
12 channels and to know what is playing on those channels
13 before I choose the channel.
14 And if we -- if I direct your attention to
15 page 8 of 120DP you will see a representation on
16 page 8 of roughly what is on the screen now at this
17 eight minute and eight second point. And it shows
18 that the now playing indicates the song and the artist
19 and the album name before I choose my next channel, so
20 that I can go to a channel that has the artist that I
21 want or I like or the song that I want, that that is
22 a possibility under these systems that is not possible

1 under a traditional radio dial.

2 ARBITRATOR VON KANN: So if you're

3 listening to your Latin music and you're sort of

4 curious to see what is going on on some of the other

5 channels, you can flip through this and say, "Oooh,

6 gee, I really want to switch over and hear that"?

7 THE WITNESS: That would be possible.

8 And, in fact, the example on page 8 and what is on the

9 screen right now shows you precisely what you would

10 see if you chose to look at what was on the other

11 channels.

12 On Spinner, it comes up with a now playing

13 box that then shows the information that you will see

14 here now for these first three channels on the page,

15 and that includes the name of the channel with a one-

16 line description of the channel, and then the song,

17 the artist name, the album name, and then it asks you,

18 would you like to listen to it? Would you like more

19 information about this artist? Or would you like to

20 buy this CD?

21 CHAIRMAN VAN LOON: So right now you're

22 listening to The Offspring doing Want You Bad.

1 THE WITNESS: Yes, I believe that's
2 correct. And I have the alternative to switch to the
3 other channels. I am top modern rock.
4 CHAIRMAN VAN LOON: Llama Farmers doing
5 the song Snow White.
6 THE WITNESS: Yes. Well, I will point out
7 that that is not specifically the song that I am
8 listening to, but it is meant to represent that
9 because we shot this 10 days later.
10 CHAIRMAN VAN LOON: Understood.
11 THE WITNESS: So that's not the specific
12 song that's on this video, but it would be if I had
13 shot this directly at that time, which I could not
14 because of the printer dialogue, and so forth.
15 CHAIRMAN VAN LOON: Okay.
16 THE WITNESS: Okay. I will resume the
17 tape now at the eight minute and eight second point.
18 I have now clicked for more information on the artist
19 that's playing. Let me go back to that for a moment
20 to highlight it.
21 I've asked for more information about
22 Chris Isaak, whose song is playing. And you will see

1 that the mouse -- I have moved it there -- and now on
2 the screen comes information about Chris Isaak and his
3 history as an artist. And that was at the eight
4 minute and 50-second point.
5 CHAIRMAN VAN LOON: Does something here
6 indicate now who we're listening to this second?
7 THE WITNESS: Yes. This would be in the
8 middle of this screen here. This tells us information
9 about what is on at the moment.
10 In the example that you see on page 7,
11 there is a skin. And if you see that artist, album,
12 song, and channel are the primary information that's
13 contained on those four lines on this skin, and that
14 would be true pretty much regardless of the skin that
15 you were looking at.
16 I will now resume the tape.
17 CHAIRMAN VAN LOON: Before you resume,
18 this -- we're at the zone where we usually take our
19 morning break. Is this a good place to break, or is
20 there something two minutes from now that --
21 THE WITNESS: It's acceptable. I think
22 this is an okay time to break. It's a delineation

1 point, because I'm about to go on to another station.
2 CHAIRMAN VAN LOON: Good. Good. Okay.
3 Why don't we break, then? We'll be back at five 'til.
4 (Whereupon, the proceedings in the
5 foregoing matter went off the record at
6 10:37 a.m. and went back on the record at
7 10:55 a.m.)
8 CHAIRMAN VAN LOON: We would like to
9 please go back on the record and resume with the
10 presentation.
11 BY MR. SIGALL:
12 Q Mr. Griffin, you were showing the
13 videotape.
14 A Yes. I'm going to resume at the nine
15 minute and 43 second point of the videotape, which
16 prefaces RadioMoi. And the particular pages that are
17 in 120DP that refer to RadioMoi are on pages 9, 10,
18 and 11. And now I am starting the videotape. It has
19 to warm up just a little.
20 ARBITRATOR VON KANN: Is this a French
21 broadcasting?
22 THE WITNESS: Not in French --

1 (Laughter.)

2 Okay. Now we are at RadioMoi, which

3 begins at the nine minute and 50 second point on the

4 tape. And I am reviewing the main page of RadioMoi,

5 down to the advertisement at the bottom for ddmi and

6 these others here.

7 And I am starting the Easy Rock Show

8 station. There is a genre review going on up here.

9 This is the breadth of their offerings. Just as an

10 example, because it's probably worth noting a precise

11 example here, I'm going to find a spot here where we

12 can try to isolate a similarity of some of the

13 channels.

14 MR. SIGALL: There's a reference there in

15 the slides if you'd like to use it.

16 THE WITNESS: Yes, I believe that there

17 is. Let me find that. Here is an example, on page 11

18 of jazz. I think on the screen I noticed -- well,

19 let's see, here it is. Here is another example. That

20 one was jazz. And now I'm going to choose Latin pop.

21 You will notice on page 11 that there is

22 the choice here of high fidelity or low fidelity

1 streams. This is in the lower right corner just above
2 the licensed by RIEE logo. You'll see high and low,
3 and that would mean the low bit rate streaming and the
4 high bit rate streaming, one being higher quality, the
5 other being somewhat lower but easier to transmit.
6 CHAIRMAN VAN LOON: Up above in the
7 choices where it says Jungle 6:00 a.m. Sunrise --
8 THE WITNESS: Yes.
9 CHAIRMAN VAN LOON: -- is that actually
10 music, or is that a --
11 THE WITNESS: No, that --
12 CHAIRMAN VAN LOON: -- contracted --
13 THE WITNESS: That is a particular genre
14 of music, of audio to listen to. The question of
15 whether it is music or not would be left to your own
16 ears, of course, as to whether you thought it were
17 musical.
18 CHAIRMAN VAN LOON: I mean, that's a
19 group's recording as opposed to --
20 THE WITNESS: It's an audio choice that
21 they have offered.
22 CHAIRMAN VAN LOON: -- out in the Amazon.

1 THE WITNESS: I confess I have not
2 personally clicked on Jungle 6:00 a.m. Sunrise and
3 listened to the music that issued forth. Yet I feel
4 convinced that it is music of one stripe or another.
5 (Laughter.)
6 ARBITRATOR VON KANN: Can we pause on this
7 genre point just a second?
8 THE WITNESS: Yes.
9 ARBITRATOR VON KANN: In the Spinner.com
10 we saw that they had a lot of genre, RadioMoi has a
11 lot of genre. I assume that while there may be some
12 occasional peculiarities like maybe 6:00 a.m. Sunrise,
13 that all of them have a Latin station probably, all of
14 them have a reggae station, all of them have, you
15 know, urban rock. I would assume there's a lot of
16 similarity in the genre.
17 THE WITNESS: In those that offer genres.
18 But, Your Honor, I will also have demonstrations of
19 those that have no other genres and that, for example,
20 offer one signal --
21 ARBITRATOR VON KANN: Okay.
22 THE WITNESS: -- and then there will be

1 other examples of those that aggregate other signals
2 and those that syndicate signals. So in providing a
3 breadth of demonstration for you, Net Radio and
4 Spinner and RadioMoi offer many genres. My next
5 station that I will offer will be KNAC.com, but it
6 does not offer many genres.
7 ARBITRATOR VON KANN: Well, pausing for a
8 second on those that offer lots of genre --
9 THE WITNESS: Yes.
10 ARBITRATOR VON KANN: -- I'm trying to --
11 I'm thinking to myself, why do we need 30 webcasters
12 all offering 200 genre which are mostly the same. And
13 what's going to determine which of those survives in
14 the competition? Why am I, as a listener, likely to
15 go to the Spinner.com Latin channel as opposed to the
16 RadioMoi Latin channel?
17 Is it because of the bells and whistles
18 and the appeal of the visual? I don't know. Or that
19 it's easier to deal with it, or that they've done a
20 better job of picking out Latin hits? What is it
21 that's going to -- why am I going to -- who's going to
22 win in the competition with all of these genre, and

1 why?

2 THE WITNESS: Well, Your Honor, those are
3 possible reasons, and then some others I might
4 suggest. If you look at page 10, you will notice that
5 RadioMoi, which is the example that we have on the
6 screen -- and it is also on the screen here if you
7 look at where this red arrow is -- points out that it
8 is in streaming MP3. And so this is a different form
9 than, say, the Real format or the Windows Media
10 format.

11 And so one might also choose their
12 webcaster based on the format and the transmission
13 quality that is offered. And so if someone says,
14 "Well, I like to listen to the MP3 format," or, heaven
15 forbid, "I like to record the MP3 format," then I
16 would choose one that offered the MP3 format because
17 I -- let's say my intention was to capture that
18 stream.

19 What I captured if I wanted it in the MP3
20 format, I would go to RadioMoi. And if I was
21 interested in listening in the Windows Media format or
22 the Real format, I might choose another webcaster that

1 offered those formats. And then there are still
2 others, such as Quick Time, and some companies that
3 have their own proprietary player.
4 And so the medium itself, as Marshall
5 McLewin said, might be your message -- that you would
6 like to choose MP3 or Windows Media, in addition to
7 the selection of the particular music.
8 CHAIRMAN VAN LOON: Well, or
9 alternatively, Ford, General Motors, and Chrysler have
10 all survived forever, although each has a convertible
11 and a minivan and an expensive sedan, and then a cheap
12 one, and all the rest.
13 THE WITNESS: And variations come along.
14 CHAIRMAN VAN LOON: Sure. That's true.
15 Okay.
16 THE WITNESS: I will resume the tape at
17 the 11 minute and 53 second point. And I am now
18 switching -- I am going to pause just for a moment to
19 point out that I am now going to KNAC.com, and this is
20 an example not of one with multiple genres but with a
21 single genre.
22 And you will find in the exhibit on

1 pages 12 and 13 and 14 example pages that relate to
2 this next webcaster that I am going to play. And I am
3 now resuming at the 12:09 point, and KNAC should come
4 up within six seconds. There it is.
5 ARBITRATOR VON KANN: Do you think we
6 should brace ourselves for the loudest dot com on the
7 planet?
8 THE WITNESS: You should indeed, Your
9 Honor. In the case of KNAC.com, that is their
10 intention. And, in fact, it is worth noting for your
11 purposes that KNAC was a Southern California FM radio
12 station that had its format changed and reappeared as
13 a webcaster.
14 And at that time, when it reappeared, it
15 was a part of Enigma Broadcasting, which was acquired
16 by Clear Channel. And so it is now a Clear Channel
17 owned station, and it is the resurrection of an FM
18 broadcaster. And so it has a very clear identity to
19 those who are looking for KNAC from what they had
20 heard before on the radio.
21 By the way, the sound you are hearing does
22 not reflect the webcasting sound.

1 I'm going to stop just for a moment at
2 13:10 to point out that on page 13 you have a choice
3 at KNAC of listening to the Real player or to Windows
4 Media or in a format that is compatible with the
5 Microsoft WebTV interface.
6 ARBITRATOR VON KANN: Where does that
7 appear in the slide?
8 THE WITNESS: This appears on 13 to the
9 left. If you see the pop-up box that has a
10 headline --
11 ARBITRATOR VON KANN: Oh, okay.
12 THE WITNESS: -- "Pick Your Poison."
13 ARBITRATOR VON KANN: Thank you.
14 THE WITNESS: Then, you choose the format
15 that you would like to listen to. KNAC definitely
16 exemplifies the attitude of its station when it was on
17 the air. I have now dropped down the player, and what
18 I am now demonstrating on the screen -- and I'm just
19 going to reverse for a moment -- is that while I am
20 playing KNAC I'm going to adjust the volume here, and
21 then I'm going to leave it playing, and I'm going to
22 go do other things.

1 So now I am going to surf the internet to
2 other sites to show that you can listen to a
3 webcasting signal while you use the computer for other
4 purposes. And so I am now going to the Microsoft
5 network Powerpoint site. I will do that for a moment.
6 I will also now show examples that I can
7 bring up a word processor and write a letter while I
8 am listening to the music. I will not write an entire
9 letter, of course, but just a sentence.
10 And I will now exit, and I will
11 demonstrate the cursory use of a spreadsheet.
12 ARBITRATOR VON KANN: But you could only
13 get one webcaster at a time. You could only get one
14 internet streamer at a time, I assume.
15 THE WITNESS: Well, technically, Your
16 Honor, that's not correct. I could receive two, and,
17 in fact, I will have a demonstration later in this
18 tape of a piece of software that is listening to
19 multiple streams at one time, and, in fact, aggregates
20 them into a jukebox. While you are listening to one,
21 it is monitoring many others and offering you choice.
22 So your computer, in this instance, will

1 be listening to many things, where you may only be
2 listening to one. But, in fact, if you chose to do
3 so, it would be possible to blend two signals at the
4 same time. There is not a prohibition against doing
5 this in the hardware.
6 You can see an advertisement for a record
7 album down here, some events to the left,
8 advertisements on the page.
9 Okay. I'm now going to pause at the 14
10 minute and 39 second point to point out that in the
11 next 10 seconds Yahoo Radio will come up. And this is
12 an example of a -- in some ways a slightly different
13 model. Yahoo aggregates radio stations and other
14 providers, other webcasters.
15 And we could refer to this as a B2B model,
16 in the sense that they do business with others who
17 have signals to provide, and they take those and in
18 some cases they retransmit them and in other cases
19 they are the primary provider.
20 Yahoo Radio's history is that it arises
21 out of Audio Net, which was started by Mark Cubin in
22 1995, which then became Broadcast.com. And at that

1 time -- I know Mark -- he started out by taking police
2 scanners and putting them on the internet because he
3 wanted to listen to police scanners.
4 And then he realized he wanted to listen
5 to radio stations wherever he was, and he began making
6 deals with many radio stations to take their signal
7 and retransmit it over what he first called Audio Net,
8 and then he called Broadcast.com. And then he took
9 Broadcast.com and eventually sold that to Yahoo. Now
10 he owns the Dallas Mavericks, as an aside, but -- so
11 it did produce some value for him.
12 MR. STEINTHAL: Can I interpose a modest
13 objection on two fronts? One is clearly a lot of what
14 we're hearing today is beyond the specific scope of
15 the direct. I think, frankly, it's within the scope
16 of what the Panel ought to hear. And rather than
17 insisting that they bring back Mr. Griffin at some
18 later time, I'm not going to object, but I hope that
19 that's not lost on the Panel -- number one.
20 And number two, I see that Mr. Griffin is
21 reading from note cards that apparently are different
22 than his testimony. And, again, I'm not sure whether

1 it's a micro thing of -- of his testimony or not, but
2 I just wanted everyone to see what I saw there, that
3 there is some sort of additional presentation
4 mechanism that he's using. That's all.
5 THE WITNESS: It's just one card.
6 MR. STEINTHAL: Okay.
7 THE WITNESS: And it primarily has the
8 timing of when each thing starts and the --
9 MR. STEINTHAL: Okay.
10 THE WITNESS: -- page number, so that I
11 could relate them well for Your Honors.
12 MR. SIGALL: For the record, I'd like to
13 say that on page 10 of Mr. Griffin's testimony he
14 describes the history of streaming, including the
15 development of Audio Net and Broadcast.com and its
16 purchase by Yahoo. So we feel it's perfectly
17 consistent with his testimony.
18 CHAIRMAN VAN LOON: Please proceed.
19 THE WITNESS: Thank you. We are at the 14
20 minute and 39 second point, and I will now proceed
21 with Yahoo Radio. That is what I am typing in -- what
22 is going on up here in the URL. You can see I went to

1 the main Yahoo site and chose radio. It then took me
2 to the Yahoo Radio part of the site, and now I will
3 review some stations.
4 And the top one is Billboard Radio, which
5 is not, in fact, a regular radio station, but the
6 others on this list that you see on this page are
7 regular radio stations. And I will give an example of
8 that retransmission after this one.
9 BY MR. SIGALL:
10 Q Can you explain the slides and what we're
11 seeing, relate them to the slides?
12 A Certainly. I am looking at slides 15
13 through 21, and they relate to Yahoo Radio. And if
14 you take 15 and 16 and 17, they relate to the overall
15 interface for Yahoo, and then the choice of the radio
16 stations. Again, some are actual radio stations, and
17 some are simply webcasting stations.
18 And, first, I chose Billboard Radio,
19 which, if you look on page 17, is the first choice
20 that's on page 17. When I clicked on it, we listened
21 to it. And now I have switched to station Q100, which
22 if you look on page 19 is the interface that pops up

1 on 19. And I believe this is an Atlanta-based radio
2 station.
3 And now at the 15 minute and 54 second
4 point I'm going to hit play again. And slides 19, 20
5 -- well, 20 and 21 relate to additional choices.
6 While the music is playing on the screen, I am looking
7 at other choices of stations to listen to. But that
8 is identical to what you see on 20 and 21.
9 ARBITRATOR VON KANN: When you say
10 "stations" --
11 THE WITNESS: I'm stopping at 16:31.
12 ARBITRATOR VON KANN: When you say
13 "stations," that means these are true radio stations?
14 THE WITNESS: In many cases. The first
15 choice I made, which was Billboard Radio, is not, in
16 fact, an over-the-air radio station. But
17 predominantly Yahoo Radio has radio stations because
18 of its origin from Broadcast.com.
19 And if you look on pages 20 and 21, for
20 example, the only examples that are on 20 and 21 are
21 regular radio stations that are then retransmitted
22 over the web. But Yahoo Radio is not limited to

1 those. It also includes some specific stations that
2 are not transmitted over the air but only happen on
3 the net.
4 ARBITRATOR GULIN: What is Yahoo
5 Broadcast? What is that different from Yahoo Radio?
6 THE WITNESS: I can't determine a
7 difference in the question from Yahoo Broadcast to
8 Yahoo Radio. I believe that that is an identical
9 term.
10 ARBITRATOR GULIN: They're used the same?
11 THE WITNESS: They're referring to the
12 same thing.
13 ARBITRATOR GULIN: Okay.
14 THE WITNESS: Although Billboard Radio,
15 for example, is different than Yahoo Radio. Billboard
16 Radio would supply a signal to Yahoo, or Yahoo would
17 put it together for them and transmit it under the
18 name Billboard Radio. But it's not the retransmission
19 of a radio station. It's already on the air. It's a
20 specific music service that's created for Billboard.
21 ARBITRATOR GULIN: Okay. So Yahoo Radio
22 is an aggregator. It retransmits radio signals, but

1 it also can direct you to, as you were saying, other
2 webcasters.
3 THE WITNESS: Yes. To specific things
4 that are not on the radio.
5 ARBITRATOR GULIN: All right. So when you
6 use the term "aggregator," are you referring to that,
7 someone who -- an entity that does both of those? Or
8 is the term "aggregator" generally used only for
9 services that retransmit broadcast signals?
10 THE WITNESS: I am not limiting it to
11 those who retransmit broadcast signals. I am using it
12 to refer to those whose model is not assembling those
13 on their own, but instead aggregating them to present
14 to the end user.
15 ARBITRATOR GULIN: And that's how most
16 people use the term "aggregator," as far as you know?
17 THE WITNESS: I think that's accurate,
18 yes.
19 ARBITRATOR GULIN: Okay.
20 THE WITNESS: I would also refer to the
21 term B2B, in the sense that some of their business is
22 done directly with the station itself, and that that

1 would be a part of their financial model as opposed to
2 exclusively with an end user. They would be seen more
3 as a middle man than they would someone who was
4 originating a service.
5 And that's not true in all cases. For
6 example, they could start their own station if they
7 wanted to and mix it in with the others and have
8 genres. But the origins of Broadcast.com were to have
9 aggregated many different radio stations and broad
10 them together, and then they mixed a few things in
11 with that. And I think they still have police
12 scanners as well, so it's a lot of content.
13 ARBITRATOR VON KANN: Now, you said that
14 it is predominantly over-the-air radio stations, but
15 there are things like Billboard Radio which is not.
16 THE WITNESS: That's correct.
17 ARBITRATOR VON KANN: And I'm a little
18 intrigued with the notion of naming something radio
19 which does not, in fact, play on the radio.
20 THE WITNESS: Yes.
21 ARBITRATOR VON KANN: Billboard Radio is
22 not, in fact, an over-the-air radio broadcast. So I'm

1 thinking to myself, why do you name it radio? Because
2 you want it to sound very much like radio, to sort of
3 have the feel and -- I don't know -- immediateness and
4 coolness, or something or other, of sort of listening
5 to live radio even though you're not live radio? Is
6 that what's going on?
7 THE WITNESS: I think they are trying to
8 attract the audience that radio attracts in that
9 particular case.
10 ARBITRATOR VON KANN: Okay.
11 THE WITNESS: Okay. We'll resume the tape
12 at the 16 minute and 31 second point. I've now
13 pointed out that one can clear the screen while these
14 are playing.
15 Now, at this point, the next station that
16 I am going to is Websound. And you will see on
17 pages 22 through 26 Websound. And for this I will say
18 that, like an aggregator, I will refer to Websound as
19 a syndicator. They are -- both have B2B elements to
20 their business. In this case, Websound is creating
21 music for Eddie Bauer and using it to accompany an
22 Eddie Bauer shopping experience.

1 ARBITRATOR VON KANN: Just for -- is that
2 on the last -- just before the tape --
3 THE WITNESS: Yes.
4 ARBITRATOR VON KANN: -- stopped we were
5 listening to a woman who was talking, I guess, on one
6 of these radio stations?
7 THE WITNESS: From an actual radio station
8 that's being retransmitted over the internet.
9 ARBITRATOR VON KANN: Okay. So she --
10 that was live radio.
11 THE WITNESS: That was Q100 in Atlanta.
12 ARBITRATOR VON KANN: Has there -- I think
13 I'm picking up that at least with some of these
14 streamers they also install a disc jockey, if you
15 will, or a person to -- a host. In the radio world,
16 there have emerged sort of personalities.
17 Some disc jockeys become quite famous.
18 They become hot properties. People pay a lot to have
19 them on their radio station. They are popular. They
20 attract listeners. They attract advertisers. They
21 become fairly significant players on the radio seen.
22 Has that phenomena developed on the internet at this

1 point?

2 Do we have, you know, people who, you

3 know, everybody goes to one of the Spinner.com

4 stations because they want to listen to X, who is the

5 disc jockey or host, or whatever you call it, on that

6 channel?

7 THE WITNESS: I haven't personally

8 observed that. However, in the sense of

9 retransmission, of course, one could if there was a

10 disc jockey that one liked on an FM station -- and

11 let's say you worked indoors in a metal structure like

12 this one where you might not be able to get a radio

13 signal, you might use the web to listen to that

14 station that you might have otherwise used a radio

15 for.

16 ARBITRATOR VON KANN: But if I were

17 Billboard Radio -- and I'm not over the air -- might

18 I want to go out and hire a really kind of prominent,

19 hot shot disc jockey? Because I think that's going to

20 attract listeners and --

21 THE WITNESS: You may well want to do so.

22 ARBITRATOR VON KANN: Okay.

1 ARBITRATOR GULIN: When we were listening
2 to Billboard Radio before at the Yahoo site --
3 THE WITNESS: Yes.
4 ARBITRATOR GULIN: -- is that Yahoo's own
5 programming, or is that another site? Billboard -- is
6 that a webcaster?
7 THE WITNESS: I'm not personally familiar
8 with whether Yahoo creates Billboard Radio or not.
9 ARBITRATOR GULIN: Okay.
10 THE WITNESS: But it needn't be from
11 Yahoo.
12 ARBITRATOR GULIN: Yes, I understand that.
13 I was just curious if it was or whether it was someone
14 else's website.
15 THE WITNESS: It could provide as a
16 service, but I do not know the answer in this case.
17 ARBITRATOR GULIN: Okay.
18 ARBITRATOR VON KANN: It said -- I think
19 I heard it mentioned -- the Billboard Magazine -- so
20 I assume that it was -- somebody operated by Billboard
21 Magazine or some division of --
22 THE WITNESS: Yes, or at their behest.

1 ARBITRATOR VON KANN: Okay.

2 THE WITNESS: I'm resuming at 17:02, and
3 now Websound is coming up. And, again, this is on
4 pages 22 through 26 of the evidentiary exhibits. And
5 I am now clicking on play on the websound player.

6 BY MR. SIGALL:

7 Q Mr. Griffin?

8 A Yes.

9 Q Can you pause it for --

10 A I've paused at 18:51. And what we saw was
11 -- I went to the Websound site, and I asked for an
12 example of its Eddie Bauer player. And the Eddie
13 Bauer player came up, explained itself, what its
14 purpose was, that it was for the shopping -- music for
15 your shopping experience while you are shopping at
16 Eddie Bauer. And it was created by Websound.

17 ARBITRATOR GULIN: So if I would
18 ordinarily, just in the regular course, go to the
19 Eddie Bauer site, would I automatically hear the
20 music, or do I have to access it somehow?

21 THE WITNESS: In my example, you need to
22 tell it that you would like to listen to music. And

1 you tell the player to start playing. So it would not
2 automatically happen. That might actually ruin your
3 experience, if your computer were not ready to listen
4 to music or if you were on an extraordinarily slow
5 connection.
6 So making that assumption and starting it
7 would not be smart for Eddie Bauer. But giving you
8 the option of listening to music while you were
9 shopping is what they do.
10 CHAIRMAN VAN LOON: And in this case, if
11 I click that I want to hear music, I'm going to hear
12 that jazz, which is fine for me. But if my son were
13 clicking on Eddie Bauer and he wanted to hear rap,
14 he'd still get the jazz. I mean, there's not a bunch
15 of choices here.
16 THE WITNESS: In the case of Websound,
17 that's correct. It would be possible for them to do
18 otherwise. But, in fact, in this case they provide
19 one consistent music stream. And as the materials
20 explain here, it is -- they sell CDs for Eddie Bauer
21 as well. And they make the CDs and the music comes
22 from those.

1 ARBITRATOR VON KANN: A couple of
2 questions about this. Is this -- I think we've read
3 in the materials somewhere that some of these folks
4 design -- they go in and study the demographics of
5 Eddie Bauer customers and what sort of stuff they like
6 and what ambiance the client wants, and then they
7 specifically tailor and customize a kind of music,
8 which I had sort of understood was while I'm shopping
9 in the Eddie Bauer store. I thought that's if I
10 walked into Eddie Bauer that's what I was going to be
11 hearing. Would this same music be playing in Eddie
12 Bauer stores across the country?
13 THE WITNESS: I do not know the answer to
14 that question. I haven't --
15 ARBITRATOR VON KANN: Okay.
16 THE WITNESS: -- compared this to the
17 music that is in the stores. But the materials that
18 are in evidence, if we look at 22, 23, 24, 25, 26,
19 indicates how they came about this. And they point
20 out that they specifically did this to create a custom
21 audio program for Eddie Bauer and its shopping
22 experience, combined with banner ads, and so forth,

1 that encourage people to shop.

2 ARBITRATOR VON KANN: But at the moment,

3 you're talking about its internet shopping experience.

4 THE WITNESS: That's correct.

5 ARBITRATOR VON KANN: As opposed to its

6 in-the-store shopping experience.

7 THE WITNESS: That's right.

8 ARBITRATOR VON KANN: The other thing I

9 noticed on the slides is that up in the -- I guess

10 it's the address portion, the first several slides the

11 address is www.websound.com. The last slide is

12 www.eddiebauer.com. So I guess you can get -- you can

13 listen to this either by going to the Eddie Bauer

14 website or to the Websound website.

15 THE WITNESS: You start shopping while you

16 listen to the music.

17 ARBITRATOR VON KANN: But I guess if I

18 went to the Websound location there might be many

19 choices. Here's what we're -- that's for Eddie Bauer.

20 Over here is what we've got for Hecht's. Here's what

21 we've got for Needless Markup, and so on.

22 THE WITNESS: Yes. In fact, on 22 and 23,

1 they indicate that Eddie Bauer is a client, but so is
2 the Pottery Barn and Polo Ralph Lauren and Volkswagen,
3 and so forth. And they list Radio VW as something
4 that they created.
5 ARBITRATOR VON KANN: Okay.
6 THE WITNESS: Okay. We are at the 10
7 minute and -- or 18 minute and 51 second point. And
8 we are now about to go to some examples of
9 substitution tools in combination with sites. And so
10 what we are going to see, which will start within the
11 next 10 seconds, will be that I will go to one of the
12 first tools that was created for finding music that is
13 already on the web in stream format or other formats.
14 And this tool is called Friskit.
15 And what you will see, and you can find it
16 on pages 27 and 28 and 29 and 30 of the exhibits, will
17 be the Friskit page. And I will download Friskit and
18 I will launch it.
19 Now, because this was one of the first
20 tools, it is somewhat imperfect, but I'm going to show
21 something of the evolution of these tools, as I show
22 the next one and the next one after that. So Friskit

1 will be the first of them.

2 So I've asked it to launch Friskit, and it

3 says, "Would you like to search for a particular

4 artist or genre?"

5 So now, as you see on the right side, it

6 is bringing up things on the internet that it finds

7 that may or may not correlate to what I asked for.

8 Hopefully, it does. Sometimes it misses.

9 ARBITRATOR VON KANN: What did you ask

10 for?

11 THE WITNESS: In this particular case, I

12 said, "Can you find an artist with the name of Moby?"

13 And in this case it did not find it yet, but it is

14 bringing up examples of things that it is finding.

15 BY MR. SIGALL:

16 Q Can you pause for a second?

17 A Yes.

18 Q Just to be clear, can you tell exactly

19 what Friskit is trying to find on the web and what

20 it's pointing to on the web?

21 A Well, it is looking for the music that I

22 asked it for or things that are related to that music,

1 and bringing it up in the separate browser. It is
2 looking for things for me like a multimedia search
3 engine. It is looking for streams or music that is on
4 the internet, in one fashion or another, that would
5 meet my request either through genre or artist name.
6 Q Do you know if Friskit can find music from
7 webcasters or some of the webcasters in this
8 proceeding or other webcasters?
9 A It is possible for it to find music, yes,
10 that is existent on the internet.
11 Q But as you understand Friskit as it was
12 constituted at this point, was it looking for
13 webcasters?
14 A Oh, no, not looking necessarily for
15 webcasters. Looking for music on the internet, places
16 to find it. And it will bring up other examples of
17 this that you will see in the demonstration.
18 ARBITRATOR VON KANN: I'm sorry. I'm
19 still confused. You're telling this thing -- are you
20 saying, "Is anybody on the internet now playing a Moby
21 Great record?" Is that what you're --
22 THE WITNESS: Can you find me the artist

1 Moby?

2 ARBITRATOR VON KANN: Moby.

3 THE WITNESS: Yes.

4 ARBITRATOR VON KANN: And when you say

5 "finding," meaning somebody right now is playing Moby?

6 THE WITNESS: Yes. I am looking for

7 someone playing Moby or someone who has Moby on their

8 website. I would like it to go out and find instances

9 of this so that I can listen to that music.

10 ARBITRATOR VON KANN: Okay.

11 CHAIRMAN VAN LOON: Now, was that Moby

12 himself?

13 THE WITNESS: No. We have not yet found

14 what we are looking for. And this is the most

15 imperfect of the tools and it was the first. And I am

16 merely trying to provide a review of both its

17 imperfections -- if I were merely to show good ones,

18 that would not be fair.

19 ARBITRATOR GULIN: Let me --

20 THE WITNESS: We'll pause at 20:35.

21 ARBITRATOR GULIN: Okay. So you're

22 searching for Moby.

1 THE WITNESS: Yes.

2 ARBITRATOR GULIN: And how would Moby
3 appear on a website? Assuming it's not playing right
4 now, what is it that I would find and then be able to
5 play subsequently after I find it?

6 THE WITNESS: Perhaps it is a reference to
7 a stream of Moby material or something -- and it could
8 be something that is not involved in this proceeding.
9 It could be a download that it finds. But it is
10 helping me go out and look for things, and it is
11 indiscriminate.

12 ARBITRATOR GULIN: Okay.

13 THE WITNESS: And it is an example of a
14 less perfect search tool.

15 ARBITRATOR GULIN: Okay.

16 THE WITNESS: But I am going to show a
17 gradation as time has gone out.

18 ARBITRATOR GULIN: But as to webcasters --

19 THE WITNESS: Yes.

20 ARBITRATOR GULIN: -- what is it that I
21 could hope to find other than it happened to be
22 playing right now at this moment? Which probably

1 wouldn't do me a lot of good because it might be half
2 over.
3 THE WITNESS: That's right. And you'll
4 see that some of the tools address that question later
5 on. This tool does not. It could, in fact, find
6 something indiscriminate of a page where somebody just
7 says, "I like this," and then there is a media type
8 there. It is rather indiscriminate in its search. It
9 is less than perfect, and it makes it a fair example
10 for a wide array of different services for you to see
11 those that are perfect or more perfect and those that
12 are less perfect.
13 ARBITRATOR VON KANN: But if Spinner.com
14 had decided that one of its genres would be Moby, it's
15 going to actually have a channel of Moby, then this --
16 Friskit would find that for you, I take it.
17 THE WITNESS: It would be possible for it
18 to find it.
19 ARBITRATOR VON KANN: Okay.
20 THE WITNESS: Here we are choosing genres.
21 I have asked it for top country, and on the right side
22 it has found streaming top country, Real Audio. And

1 now it has found a classic rock site.

2 Now I have typed in Ricky Martin. Now I'm

3 asking it for bluegrass, as I recall. I'm now

4 switching out of Tools for a moment, and I am going to

5 a site called Live 365. And Live 365 is an aggregator

6 of many streams, and, in fact, they say that you can

7 find over 30,000 streams at this site. And we are at

8 about the 22 minute and 27 second point.

9 ARBITRATOR VON KANN: What page of the

10 slides is this? 32?

11 THE WITNESS: This is pages 32, 33, 34,

12 35, so 32 through 35.

13 ARBITRATOR VON KANN: So Live 365 is an

14 aggregator that carries 30,000 streams?

15 THE WITNESS: Yes. And it is fair to say

16 that many of those are hobbyist streams. It is easy

17 for almost anyone to start a station on Live 365.

18 Now, at Live 365, we are going to listen

19 to a format that -- it likes the Winamp player, and so

20 I'm going to download a player, and you will watch

21 that happen as well as I install it. And Winamp --

22 the tool that we are going to download is owned by

1 America Online, and this is the player that they
2 built.
3 And so now I am going to download Winamp
4 and show you what it means to install a player and how
5 long that takes on a DSL connection. And now I am
6 telling it that I would like to save this to my hard
7 drive, the file from Winamp, and then I will install
8 it.
9 Now, it found the file. I'm telling it to
10 install it.
11 ARBITRATOR VON KANN: And what are you
12 installing again?
13 THE WITNESS: The Winamp player.
14 ARBITRATOR VON KANN: Okay.
15 THE WITNESS: For the Live 365 service,
16 the Winamp player is very good to use.
17 ARBITRATOR VON KANN: Okay.
18 THE WITNESS: And so I'm going to use it.
19 And I am --
20 CHAIRMAN VAN LOON: The name is?
21 THE WITNESS: Winamp.
22 CHAIRMAN VAN LOON: W-I-N-A-M?

1 THE WITNESS: A-M-P.

2 I'm giving it my e-mail address and my zip

3 code and then answering some dialogues about whether

4 I would like them to communicate with me. And I am

5 now clicking, telling them to stop bugging me.

6 (Laughter.)

7 That is precisely the phrase "stop bugging

8 me" in the box. It now installs itself, and we see

9 the Winamp player on the page.

10 Now I will go back to Live 365 and use the

11 Winamp player to listen to some music.

12 BY MR. SIGALL:

13 Q And where in the slides does this appear,

14 Jim?

15 A This you will see on 32 through 35.

16 CHAIRMAN VAN LOON: And the "stop bugging

17 me" you said is a literal thing?

18 THE WITNESS: It literally says "stop

19 bugging me" with the questions, and if you check that

20 box it won't ask any more questions. It just sends

21 you on.

22 CHAIRMAN VAN LOON: Okay. But it still is

1 collecting data.

2 THE WITNESS: It got the basic information

3 -- my zip code and my e-mail address -- and then said,

4 "If you would like, we won't ask you any more

5 questions." To be conservative I said, "Well, don't

6 ask me any more questions," and so I moved on and

7 installed it.

8 CHAIRMAN VAN LOON: Right. But are they

9 still collecting information about your listener

10 preferences, for example?

11 THE WITNESS: I do not believe that they

12 asked me listener preferences in that case, but they

13 did ask me where I lived and how to get in touch with

14 me, and if I would like information from them on a

15 periodic basis.

16 CHAIRMAN VAN LOON: But that's above the

17 line, so to speak. That's a question in a box where

18 you type in an answer.

19 THE WITNESS: Yes.

20 CHAIRMAN VAN LOON: I'm talking about the

21 more sub rosa, if you will, where they're checking

22 whether you're listening to Sinatra or James Taylor,

1 or whoever.

2 THE WITNESS: They didn't ask me that

3 question as a dialogue box. But, of course, they

4 could collect data as I watch -- or as I listen.

5 CHAIRMAN VAN LOON: Right.

6 THE WITNESS: They could record that and

7 say, "He likes Sinatra," because he gets those

8 stations.

9 CHAIRMAN VAN LOON: Yes. Okay.

10 ARBITRATOR VON KANN: I'm not sure whether

11 this is what Eric was asking, but does the -- if it's

12 not the "stop bugging me" box or button, is there some

13 other button that you would compress which says, in

14 effect, "do not collect information on me"? I value

15 my privacy. I don't want you keeping track of what I

16 listen to.

17 THE WITNESS: They make a predicate of the

18 basic information at the beginning. And so I don't

19 know how I could listen to the site without answering

20 the basic questions.

21 ARBITRATOR VON KANN: I thought I was told

22 by somebody that beyond whatever dialogue you do at

1 the outside, many of these services have the capacity
2 to gather info on your listening preferences, what
3 kinds of things do you listen to and when, so they can
4 target appropriate advertising.
5 If you found that offensive and didn't
6 want to play that game, can you make the website not
7 do that? Can you say, "I want to listen to your
8 music, but do not keep track of my listening habits.
9 Do not spy on me. I do not want to be in your
10 database. I do not want to be the subject of targeted
11 advertisements. Leave me alone."
12 THE WITNESS: The latter part I've seen,
13 "I do not want to be the subject of target
14 advertisements." But in my experience I haven't seen
15 it say, "I don't want you to collect any data on me."
16 ARBITRATOR GULIN: We're just talking
17 about a player right now, right? We're not talking
18 about a webcaster; we're talking about a player.
19 THE WITNESS: In that particular example,
20 it was Winamp, the player, yes.
21 ARBITRATOR GULIN: Right. Okay. So that
22 information is not shared with the webcaster, is that,

1 that Winamp collects?

2 THE WITNESS: I don't know whether it is

3 shared with the webcaster, but the webcaster could

4 collect their own information --

5 ARBITRATOR GULIN: Right.

6 THE WITNESS: -- because they, in fact,

7 are serving up the material.

8 ARBITRATOR VON KANN: And I was not

9 focusing particularly on the Winamp player but just in

10 -- in general on the stream -- on internet streaming,

11 whether there is a capacity for a listener to opt out,

12 if you will, of the gathering of data about their

13 listening behavior. And I guess the answer is you're

14 not quite sure.

15 THE WITNESS: I haven't seen examples of

16 that, but I have seen examples of saying, "Please

17 don't send me anything."

18 ARBITRATOR VON KANN: Okay.

19 THE WITNESS: But I haven't seen examples

20 of, "Don't collect any information about me."

21 I'm going to resume at 24:34, and we are

22 at Live 365. And we are now looking at the country

1 genre area and the number of stations that provide
2 country on Live 365. And examples of this can be seen
3 on page 34, for example, 33, and another example of
4 World on 35.
5 Now I am telling it the player that I
6 would like to use on Live 365, and the settings that
7 I would like to use. And it is verifying that this
8 will be good to connect, and now it says, "Would you
9 like to install the Live 365 plug-in?" And I say yes.
10 And now it is verifying it.
11 BY MR. SIGALL:
12 Q Would you pause for a second?
13 A Yes.
14 Q Can you just recap what you --
15 A I'll pause at 26:05.
16 Q -- recap what you just showed?
17 A Yes. I was selecting a country source of
18 music and going through the list of country channels
19 that are offered on Live 365. And if you look at
20 pages 33 and 34, you will see some of the selections
21 that were available to me.
22 For example, the first seven are listed on

1 page 33, and you will also see this in the background
2 of 34 behind the drop-down dialogue box that indicates
3 some other genres that I can switch to.
4 And so I've made a choice and the music is
5 now playing, and I am resuming at 26:08. And you will
6 see that when -- and I just stopped at 26:26. You
7 will see on 33 that some of the information that I
8 have before I choose a station is is that I see the
9 station's name, and then I am given a suggestion as to
10 the artists that I might find at this station when I
11 click, and the name of the broadcaster.
12 In this case, if you look on page 33 at
13 the top, this one broadcaster calls themselves DJ
14 Country, and in number two they call themselves Alpha
15 Geek. And next to it we see the width of the path of
16 the connection, the bandwidth of their connection.
17 And so the first one we see is at 33K, and
18 that would correspond to previously on the board I
19 drew this K -- thousands of bits per second. And so
20 this is a shorthand reference to 33,000 bits per
21 second is this user's connection to the internet. And
22 that gives us a clue as to the quality and the ability

1 and the reliability of this station to deliver a
2 sound.
3 And then, to the right, we see a rating
4 that has been derived from asking listeners. And the
5 number of listeners at this moment is expressed in a
6 bit of a symbolism here with people to the right.
7 ARBITRATOR VON KANN: And does that
8 mean --
9 THE WITNESS: Just slightly --
10 ARBITRATOR VON KANN: -- there's only
11 three folks listening to this at that --
12 THE WITNESS: No, that does not mean there
13 are only three, but it means that in their relative
14 scale that three is the symbol they are using for
15 showing how many people are listening. And there is
16 a lot more room on the right there to put more of
17 these.
18 BY MR. SIGALL:
19 Q And does this slide reflect where you got
20 the 30,000 figure from?
21 A Well, not this one. Well, yes, because if
22 you look on the upper left it says there are 30,893

1 stations online at this moment. On page 33, if you
2 are looking to the left -- I will point the cursor to
3 it up here. If you look on the page, underneath
4 Browse Country, right underneath it gives an
5 interactive. It tells how many stations there are and
6 how many streams they've served over a period of time.
7 CHAIRMAN VAN LOON: So that would be an
8 example, since there are 30,000 stations listed here,
9 it would be arguably a big difference between standard
10 broadcast. You would certainly anticipate that,
11 particularly if your favorites were obscure ones among
12 the 30,000, that when you logged on it could be very
13 likely that nobody else is listening, so that your
14 click activates that station.
15 THE WITNESS: That's possible. And, in
16 fact, in my experience, my brother created a station
17 that just plays him what he wants. And he's usually
18 the only one listening to it.
19 (Laughter.)
20 But he does promote to try to get me to do
21 some listening and some others.
22 CHAIRMAN VAN LOON: Well, now let me ask

1 you -- you can obviously, if he's asleep, you could
2 log on to his station --
3 THE WITNESS: Or if he's awake. We could
4 both listen.
5 CHAIRMAN VAN LOON: Right. But if he's
6 asleep and he's not listening, there is still a stream
7 sort of in there customized from what he has fed it
8 earlier.
9 THE WITNESS: He has programmed the
10 station to respond to requests and to play the music
11 that he likes it to play.
12 CHAIRMAN VAN LOON: So he can inflict it
13 on you even if he's asleep.
14 THE WITNESS: He can. And there are times
15 when he runs afoul of the programming guidelines at
16 Live 365 and they contact him and say, "Well, you need
17 to do something a little bit different sometimes," and
18 then sometimes they don't notice. But in the main, he
19 does what he wants with the station.
20 CHAIRMAN VAN LOON: What would be an
21 example of a programming guideline that a hobbyist
22 might violate?

1 THE WITNESS: Well, he really likes one
2 rock band a lot. And he would prefer to listen to a
3 lot of music from that rock band, and sometimes he
4 would be a bit too enthusiastic to satisfy his own
5 tastes. You could not listen to enough of the -- in
6 fact, Monster Magnet. You could not listen to enough
7 Monster Magnet if you were talking to my brother.
8 (Witness laughs.)
9 So it's his goal to put a lot of it in
10 there, but, of course, that in some ways reflects his
11 goal of getting option value on Monster Magnet. He
12 wants to listen to a lot of it, and that's his choice,
13 and this helps him get that when he goes to work, or
14 so forth. He doesn't bring his records with him. He
15 turns the station on, and that's how he hears his
16 music.
17 ARBITRATOR VON KANN: Now, when you say
18 sometimes he gets contacted and he's run afoul of the
19 rules, does that mean that Live 365 is enforcing the
20 complement requirements of the statute?
21 THE WITNESS: Well, to be honest,
22 sometimes they do and sometimes they don't. I mean,

1 in my experience looking at his station, they are
2 sometimes very careful at times, and then a long
3 period of time will go without any contact. But it
4 has happened that they have contacted him and said,
5 "You will need to clean this up." And sometimes he
6 has complied, sometimes he has not. He still has his
7 station.
8 ARBITRATOR VON KANN: This may be beyond
9 your capacity. You may not know this. How would
10 they, if there's thousands of hobbyists out there
11 doing this, is this -- is the monitoring of the
12 complement component somehow supposed to be automatic?
13 I mean, you couldn't have people with little green eye
14 shades listening to every one of these stations and
15 counting up how many Monster Magnets we've had.
16 So is it somehow built into the
17 programming that it is supposed to -- a red light is
18 supposed to go off if your brother exceeds the
19 complement?
20 THE WITNESS: If it were built in, he
21 would be contacted much more often. I can say that,
22 because he tells me that he is only occasionally

1 contacted when he violates the rules. So I'm assuming
2 that if it were an automatic filter that were
3 extremely efficient, that he would have been contacted
4 much more often.
5 But I do not know specifically the answer
6 to your question because I have not been to Live 365
7 or examined their mechanisms. But I do have the
8 experience of watching my brother go through this, and
9 I know that there are a few times he's been contacted
10 and then a lot of the times he has not.
11 MR. STEINTHAL: Okay. Judge, we're going
12 to have a Live 365 witness, so we can deal with real
13 testimony instead of hearsay.
14 ARBITRATOR VON KANN: Okay. All right.
15 That's fine.
16 MR. GARRETT: Perhaps he could bring some
17 Monster Magnet CDs, too.
18 (Laughter.)
19 MR. STEINTHAL: I'd like to suggest that
20 Mr. Garrett get in touch with Live 365 and start a
21 station that we can all listen to for a demo when --
22 MR. GARRETT: I don't think you want me to

1 follow through on that.

2 (Laughter.)

3 CHAIRMAN VAN LOON: The CARP channel.

4 (Laughter.)

5 ARBITRATOR VON KANN: Fish.

6 (Laughter.)

7 Large Japanese fish will be going through

8 the --

9 (Laughter.)

10 THE WITNESS: Okay. I will resume at

11 26:26. Actually, if I -- I'll just go back a moment,

12 Your Honor, I think there will be -- the answer to one

13 of your questions is contained on here. I think I saw

14 a legend for how many different people can appear.

15 There we are.

16 If we look down in the right hand of this

17 screen, we can see that five would be the maximum

18 rating for the number of listeners, and one would be

19 the minimum. And so two would be a little below the

20 middle, and three would be a little above.

21 ARBITRATOR VON KANN: I can't see what's

22 to the right of those symbols. Does that say --

1 CHAIRMAN VAN LOON: Can you read what
2 three --
3 ARBITRATOR VON KANN: Yes. How many is --
4 how many listeners is three little bodies?
5 THE WITNESS: It is difficult for me to
6 tell. It is a relative rating that goes from one to
7 five. This I do know --
8 ARBITRATOR VON KANN: Okay.
9 THE WITNESS: -- from here, but I do not
10 see what those words are that are next to it. But I
11 merely wanted to point it out because of your earlier
12 question as to the indication of what the people
13 meant, and now we know that it appears from this that
14 the maximum would be five. And so a station that
15 showed three -- and that would not be the specific
16 number of listeners, but, instead, a rating.
17 We are at 26:32. Now I am reviewing the
18 distinctions, the genres, browsing them. And I will
19 choose World in this case, which you will see on
20 page 35. And I am choosing here one of the Celtic
21 music stations.
22 Now I am going to go to another

1 aggregator, which is similar to Live 365 in some ways,
2 called Shoutcast, which also allows hobbyists to
3 create stations. And, in fact, Shoutcast is owned by
4 American Online.
5 ARBITRATOR GULIN: Before you do that, do
6 the various sites that are listed with the aggregator,
7 is there any kind of a financial relationship between
8 the two?
9 THE WITNESS: I know my brother has paid
10 nothing.
11 ARBITRATOR GULIN: Okay.
12 THE WITNESS: And I don't believe that
13 there is any requirement that one pay to use this.
14 ARBITRATOR GULIN: So when you select one
15 of these channels from an aggregator, you're not
16 actually going to the site and thereby having at your
17 disposal the various features that that site offers.
18 You're just listening to that channel?
19 THE WITNESS: You are listening to the
20 channel as offered by this end user, and they have
21 aggregated a menu of them. And the key to realizing
22 this is if we look at the speed area on page, say, 35,

1 you will notice that there are many different speeds
2 listed, meaning that it is coming from that end user
3 and their connection.
4 If the content were actually at Live 365,
5 they would all be provided at the same speed. And so
6 in this case, it's referring to the person who created
7 the station's connection to the net. And so they are
8 aggregating -- are asking for it and then directing it
9 from them to us.
10 ARBITRATOR GULIN: Okay. So Live 365
11 maintains control, so to speak, over your screen the
12 entire -- throughout the entire experience.
13 THE WITNESS: Over the directory, yes.
14 ARBITRATOR GULIN: Right.
15 THE WITNESS: They provide a directory.
16 ARBITRATOR GULIN: Okay.
17 ARBITRATOR VON KANN: I'm not sure -- I
18 want to make sure that I understood what you -- some
19 of these things are -- you could go to directly I
20 guess, some of these --
21 THE WITNESS: It would be possible if you
22 knew where it was. For example, it would be possible

1 for -- from the office for my brother to contact his
2 home computer. But doing it through Live 365 gives
3 him a very convenient interface for doing so. In
4 fact, he wouldn't know how to do it without that, and
5 so Live 365 makes it possible for him to do that.
6 ARBITRATOR VON KANN: Well, I mean, here's
7 something on page 34 called UScountryradio.com.
8 THE WITNESS: Yes.
9 ARBITRATOR VON KANN: Now, I guess that
10 means I could sit down at my computer and type in --
11 type that in, www.UScountryradio.com, and I'd get that
12 -- that station directly.
13 THE WITNESS: I don't know that that's
14 true in this case.
15 ARBITRATOR VON KANN: Really?
16 THE WITNESS: But it's possible.
17 ARBITRATOR VON KANN: Okay.
18 THE WITNESS: But it's not necessarily
19 true, because that would be a very long URL. It might
20 be -- it might, in fact, exist. It would not have the
21 periods in U dot S dot, because that would screw up
22 the addressing scheme. But it could, in fact, just be

1 UScountryradio.com. But I don't know that that's
2 true.
3 ARBITRATOR VON KANN: So that Live 365 may
4 have some things that are only available through
5 Live 365, and perhaps others that are independently
6 available if you knew where to look?
7 THE WITNESS: Yes. As a directory
8 service, that could be possible, for example, from a
9 technical standpoint. My brother could both have a
10 Live 365 station or contact his home computer
11 directly, but I know that he does not know how to do
12 that directly. So he would use Live 365 to get to it,
13 but if he were --
14 ARBITRATOR VON KANN: I think Judge
15 Gulin's question was: is there a difference? If you
16 access it through Live 365 versus if you could go to
17 it directly, would you have -- if you went through it
18 directly, would you see other things on the screen?
19 Would you have other options? Would you have a buy
20 now click or something that you don't have through
21 Live 365?
22 THE WITNESS: For the purposes of clarity,

1 in both cases we are going directly to the user's
2 computer. But in this case Live 365 is helping us
3 make the connection, which might otherwise be a
4 difficult technical proposition for a novice or even
5 an intermediate technology person.
6 In other words, they are facilitating a
7 direct connection between me and this person's
8 computer. And each of their bandwidths are listed
9 here, because, for example, in the case of U.S.
10 Country Radio, it appears to be operating off a modem,
11 because it is unlikely that a 28K connection would be
12 achieved with anything but a modem.
13 And in the case of Country Music USA,
14 which is just above it, because it lists T1-DSL, this
15 is not a modem. This is a much higher bandwidth. And
16 so in each case we are connecting directly to that
17 computer, but it is Live 365 that is facilitating the
18 direct connection. It is making it easy and one click
19 to do.
20 CHAIRMAN VAN LOON: Up above in the tan
21 area, to the right of the Go button, it says, for
22 example, Love or Beatles. Does that mean you can --

1 there is, in fact, a Beatles channel where you could
2 go and get 90 percent Beatles or --
3 THE WITNESS: In this case, it would look
4 for the word Beatles in these lines of description.
5 CHAIRMAN VAN LOON: Oh, I see.
6 THE WITNESS: And so if, for example, we
7 look at page -- let me find it -- a good example, 33,
8 you will see that the top station has listed
9 parenthetically a list of example artists that they
10 have. And so the search function would assist us in
11 finding someone who suggested that their station had
12 more Beatles or had something to do with love.
13 CHAIRMAN VAN LOON: Thank you.
14 BY MR. SIGALL:
15 Q Now, Mr. Griffin, in your experience, do
16 the kinds of stations available on Live 365 -- are
17 they -- do they have independent websites?
18 A It is possible that some do. In my
19 experience, it is an iffy proposition. It is not
20 likely that they all have websites, although some of
21 them could.
22 ARBITRATOR VON KANN: Are most of these

1 hobbyists that have just put a catchy name on it and
2 are sitting around creating I guess the music?
3 THE WITNESS: Yes, Your Honor. With
4 almost 31,000 of them, I think the vast majority in
5 this case are hobbyists. And, in fact, I think we
6 could pretty much draw the conclusion that any of them
7 that say 33K or 28K, because they come from modem
8 users, are not very serious about serving too many
9 people their music.
10 Because, for example, if there is a 28K
11 connection listed here, and you and I connect, we are
12 not going to get an extremely robust sound. It will
13 be somewhat limited. Whereas, if we connect to this
14 T1-DSL connection, we are going to get quite a bit of
15 content. There is a wide data path for a lot of
16 people.
17 ARBITRATOR VON KANN: And when you say
18 your brother and others are creating a station, what
19 are they doing to create? I mean, does he have a
20 large collection of CDs and he's somehow sitting down
21 at some kind of a machine and playing those CDs? I
22 don't understand what the hobbyist is doing.

1 THE WITNESS: Well, my brother tries to
2 stay away from me when he does these things because I
3 have a different eye towards some of the things that
4 he does. But he finds the music in various places --
5 online, compact discs, etcetera. And he assembles it
6 into a collection that he then makes available online.
7 But he is not limited to a compact disc for his source
8 of material.
9 CHAIRMAN VAN LOON: Once he has put in --
10 let's say from whatever source he has put in four CDs
11 of Monster Magnet in a row, any time you tune in on
12 that particular part of his program, do you always get
13 those same four CDs in that order, or do you --
14 THE WITNESS: In the order that he set it
15 up.
16 CHAIRMAN VAN LOON: So it doesn't bounce
17 around.
18 THE WITNESS: Right. He sets up an order.
19 CHAIRMAN VAN LOON: Like a select later.
20 THE WITNESS: Right. He determines the
21 order of the songs, and so forth.
22 CHAIRMAN VAN LOON: So looking on 35,

1 Radio Rang-A-Rang, Iranian Persian Farcy music, 28K.
2 THE WITNESS: Yes.
3 CHAIRMAN VAN LOON: But there's three
4 people listening.
5 THE WITNESS: Well, there is an indication
6 of three --
7 CHAIRMAN VAN LOON: Three units.
8 THE WITNESS: -- on the level, yes, three
9 units of listeners.
10 CHAIRMAN VAN LOON: If it's only 28K and
11 you've got three out of five, that would suggest, from
12 what you said earlier, that the sound quality would be
13 not so great.
14 THE WITNESS: That's right. It will not
15 be as good. It will be inferior to one that has a
16 wider data path.
17 ARBITRATOR VON KANN: Why is your brother
18 or anybody else interested in doing this?
19 (Laughter.)
20 What is accomplished by his -- he has lots
21 of free time, your brother, is that --
22 (Laughter.)

1 I mean, what -- he has got the music
2 himself, so he's not getting it from some -- this
3 doesn't facilitate his getting music that he wouldn't
4 otherwise get, because you say he -- he pulls it
5 together, and then he makes his -- is this just all
6 about ego? He doesn't get any money out of it, does
7 he? Why is he doing it?
8 THE WITNESS: Oh, no. He likes to listen
9 at work, so then he doesn't bring his music with him.
10 He doesn't get an extra copy. He leaves that at home
11 and sets it up in the order that he likes, and so
12 forth.
13 ARBITRATOR VON KANN: I see.
14 MR. STEINTHAL: If I may, Judge, I'm not
15 objecting to hearsay a lot because of the nature of --
16 of Mr. Griffin's qualifications. But a lot of what
17 you've just heard is clearly, definitively hearsay,
18 and we will have someone from Live 365 answer the
19 Panel's and our questions as to what their business
20 model is, why people do what they do on that site, how
21 they comply with the DMCA performance complement,
22 etcetera. You'll get to hear all of that.

1 ARBITRATOR GULIN: Are you going to have
2 somebody from Yahoo also?
3 MR. STEINTHAL: Judge, I hope so, but I
4 can't --
5 (Laughter.)
6 ARBITRATOR GULIN: Well, let me ask him a
7 question anyway about Yahoo.
8 CHAIRMAN VAN LOON: Before you do, can I
9 just interrupt with sort of one overall -- sort of
10 guidance on time. You're on item three out of four of
11 the main purposes, and I know that the financials are
12 yet to come. We've got a small amount still on the
13 demo.
14 MR. SIGALL: I believe we have seven or
15 eight minutes left on the video, tape time.
16 CHAIRMAN VAN LOON: Okay.
17 MR. SIGALL: And I anticipate the last
18 section would be 10 to 15 minutes of testimony.
19 CHAIRMAN VAN LOON: So if the Panel could
20 control itself, we might get through the direct by
21 lunchtime.
22 MR. SIGALL: That's very possible, yes.

1 CHAIRMAN VAN LOON: Okay.

2 ARBITRATOR GULIN: So Yahoo is an
3 aggregator that primarily retransmits radio station
4 signals.

5 THE WITNESS: That's how they got started,
6 and it's still their primary focus.

7 ARBITRATOR GULIN: It was a primary focus.

8 THE WITNESS: Although they have other
9 things.

10 ARBITRATOR GULIN: Okay. Now, there are
11 some radio stations that retransmit their own signal,
12 correct?

13 THE WITNESS: Yes.

14 ARBITRATOR GULIN: And they have a website
15 that you can go to directly.

16 THE WITNESS: Yes.

17 ARBITRATOR GULIN: Would Yahoo be
18 retransmitting any of them also?

19 THE WITNESS: It is possible, yes. And I
20 believe that is accurate.

21 ARBITRATOR GULIN: Okay. So if that were
22 the case, and I were to click on WABC, or whatever,

1 and go to their -- their internet site, would I then
2 be leaving Yahoo Radio and I'd have all kinds of
3 features and various things that WABC.com, if such a
4 thing exists, offers?
5 THE WITNESS: In fact, it would be
6 possible to do that, but that is not what happens. As
7 you saw in the demonstration, a player comes up from
8 Yahoo and gives a small interface for that station.
9 ARBITRATOR GULIN: Okay. That's --
10 THE WITNESS: Such that we can then look
11 at other stations for Yahoo Radio.
12 ARBITRATOR GULIN: All right. That's what
13 I was trying to get to before. So the aggregator
14 maintains control over your screen essentially.
15 THE WITNESS: Yes.
16 ARBITRATOR GULIN: Okay.
17 THE WITNESS: I will resume at 27 minute
18 and 46 seconds on the tape. And we are now seeing
19 Shoutcast, which is owned by AOL. It is another
20 aggregator. And 36, 37, 38, and 39 are in evidence --
21 are static shocks.
22 Now, one of the things that I'm going to

1 demonstrate in this particular example that is in
2 front of you -- if you look in the upper left-hand
3 corner, or on page 37 or 38, you will see a small box
4 that says Streamripper for Winamp 1.2. And if you
5 look on the screen in front of us this corresponds to
6 where I'm moving the cursor now.
7 And this is a demonstration of a plug-in
8 it is called, meaning a modification for Winamp -- and
9 I will stress that this plug-in was not created by
10 America Online -- that permits someone who uses the
11 Winamp player to record what the Winamp player is
12 hearing in a digital format to one's hard drive for
13 later playback.
14 And now I'm going to resume at the 28
15 minute and seven second point, as this example of a --
16 and this -- what you will see on the right-hand side
17 of the screen is WolfFM.com. This is not actually an
18 FM radio station but a net station, and we see an
19 example of listening to this while it is recording on
20 the streamripper recorder.
21 BY MR. SIGALL:
22 Q Before you do that --

1 A Yes.

2 Q -- can you, for the record, reflect what

3 is in the box you pointed out to on slide 37?

4 A Yes.

5 Q What the text says.

6 A Yes. It says, "Press start to rip HTTP

7 205.188.234.33." And this 205.188.234.33 is in the

8 same format as numbers that I showed you earlier,

9 which is technically the numerical internet address

10 for a site. And it is reporting to us that it knows

11 we are listening to this internet address, and it is

12 saying if you would like to record this, press the

13 start button. That is what is happening.

14 CHAIRMAN VAN LOON: And does this box

15 reflect essentially someone having purchased a

16 separate piece of software?

17 THE WITNESS: They did not purchase it.

18 It is available at no cost. And by downloading this

19 on the net, and also having the Winamp player, the

20 streamripper enables the user of Winamp to record

21 precisely what they heard digitally onto their hard

22 drive, and then to transfer that file where they like.

1 CHAIRMAN VAN LOON: Even though this is
2 essentially a streaming service, not a -- not
3 officially a subscription download service.
4 THE WITNESS: That's precisely right, and
5 that sort of relates back to my earlier testimony that
6 the differences between streams and downloads are
7 primarily the intentions of the sender and the actual
8 results of the receiver, such that even though I have
9 sent a stream it can become a download.
10 I may have intended you to use it now in
11 the place that you're in and in the time that you're
12 in, but the user may choose to record the stream
13 digitally and then have it. And essentially then it
14 will behave like a download for them in a similar
15 fashion, and you will see an example of this on the
16 screen as I go through this.
17 CHAIRMAN VAN LOON: Okay. And I apologize
18 -- I want to get to the example. But you said it's
19 available without charge for downloading.
20 THE WITNESS: Yes. Streamripper is not
21 available. They do not sell Streamripper.
22 Streamripper was written by someone. I do not recall

1 who, and I do not know who. But they wrote it
2 specifically to work with the Winamp player.
3 CHAIRMAN VAN LOON: It's not available
4 from Winamp.
5 THE WITNESS: No, it is not available from
6 Winamp.
7 CHAIRMAN VAN LOON: You have to know where
8 to find Streamripper.
9 THE WITNESS: Sure. You would go to a
10 search engine on the net and you would type in
11 Streamripper, and it would then find a site that had
12 Streamripper on it. And you would then download it,
13 and as long as it existed on your hard drive alongside
14 the Winamp player it would make itself available. And
15 each time Winamp came up, it would be there in front
16 of you and offering you the opportunity to start
17 recording.
18 And then I will proceed with the
19 demonstration of this. We are beginning, again, at
20 the 28 minute and eight second point. And so if you
21 look on the screen now, it corresponds to page 36,
22 because as you will see at the bottom we have a little

1 indication that says "rip it" on page 38.

2 And you see the little three bars on

3 page 38? This corresponds to up here, and above it it

4 tells the bit rate -- in this case, 128 kilobits. And

5 above it it indicates the operating system that it is

6 taking this from. It sees Shoutcast. And it says, "I

7 am taking it from a 96 kilobit stream, from something

8 that calls itself WolfFM."

9 Now I'm going to resume at 28:17.

10 CHAIRMAN VAN LOON: So you're looking at

11 other things because you have a rip --

12 THE WITNESS: Yes.

13 CHAIRMAN VAN LOON: -- is what this boils

14 down to.

15 THE WITNESS: That's right.

16 CHAIRMAN VAN LOON: And now I'm looking at

17 other stations I might like to listen to while it is

18 recording. And I am looking at information on the

19 Shoutcast service telling me that they have new

20 software, there are many streams.

21 CHAIRMAN VAN LOON: Do you happen to know

22 the name of the song that we're ripping?

1 THE WITNESS: Yes, we are listening to
2 Peter Gabriel, Shock the Monkey.
3 (Laughter.)
4 MR. GARRETT: It's a Jungle 6:00
5 Sunrise --
6 (Laughter.)
7 CHAIRMAN VAN LOON: So at the end of this
8 rip, you've got Shock the Monkey on your hard drive.
9 THE WITNESS: I do.
10 CHAIRMAN VAN LOON: And you could -- if
11 you had the equipment, you could subsequently burn it
12 into a CD.
13 THE WITNESS: Yes. I will be more precise
14 to be entirely fair, that what I have is a recording
15 of what I listened to, which may include the disc
16 jockey's talking over a song. But I could also bring
17 up a piece of sound editing software, which I can also
18 download for nothing, and edit that. And, in fact, I
19 have done so.
20 So we are looking at genres here again for
21 overall pages of more stations.
22 Now, I'm about to tell it to stop

1 recording. As you can see, I have the mouse hovering
2 over the Stop button.
3 ARBITRATOR VON KANN: What is the
4 difference between --
5 THE WITNESS: I'm stopping at the 30
6 minute and 10 second point.
7 ARBITRATOR VON KANN: -- this ripping
8 exercise that you've just demonstrated and
9 downloading? Or is there any?
10 THE WITNESS: Well, the differences, as I
11 cited before, are the intention of the sender and the
12 actual result -- behavior of the receiver. If I am
13 downloading a song, there is probably not a disc
14 jockey talking at the beginning or the end, although
15 there may not be in a stream also.
16 But the difference is is that a download,
17 in intention, is a discrete file with nothing but
18 music from beginning to end. And a stream may or may
19 not be that. It could be, and it might not be. And
20 so it may require a little bit of editing, but that's
21 the difference. And also, the bit rate may be
22 different.

1 In other words, the bit rate, to the
2 extent that it is very high -- I have seen 320 kilobit
3 streams on Live 365 and Shoutcast. In those cases,
4 this can be extraordinarily high fidelity. I have
5 also seen them very low fidelity. And so there would
6 be a difference as well.
7 ARBITRATOR VON KANN: Well, you said the
8 Streamripper is really designed to work with Winamp.
9 THE WITNESS: It is.
10 ARBITRATOR VON KANN: Does it work on
11 other things besides Winamp?
12 THE WITNESS: I do not think that it does.
13 I have never used it with anything else, although it
14 would be possible to develop such a ripper for any
15 player, it seems. That could, of course, alter --
16 depending upon -- for example, if you run Microsoft,
17 you might be able to write into the operating system
18 something that prevented this. And it is always
19 possible that those who make players could make it
20 impossible to do this.
21 ARBITRATOR VON KANN: Besides
22 Streamripper, are there other ripping devices that

1 work with other -- on other stations?

2 THE WITNESS: Yes. I will demonstrate

3 another after this.

4 ARBITRATOR VON KANN: Go ahead.

5 ARBITRATOR GULIN: Isn't the big

6 difference, though, between downloading -- the kind of

7 downloading that most kids have been doing from

8 Napster when Napster was up, and I suppose other

9 services, and streamripping, isn't the big difference

10 is you don't know what's playing beforehand?

11 So you'd have to devote a tremendous

12 amount of effort and time to this kind of endeavor to

13 come up with the kind of music that you really want to

14 hear. It may involve having to purge the CDs of the

15 -- the talking over by the disc jockey. But mostly

16 we're talking about we don't know when a particular

17 song is going to be played.

18 So, I mean, I assume you've not done any

19 surveys or anything like that to determine how

20 commonplace that kind of streamripping is.

21 THE WITNESS: Your Honor, this is an

22 excellent introduction to my next demonstration, which

1 does know exactly which song is playing and who the
2 artist is, and allows me to specify this, and then
3 grabs the entire song from beginning to end without a
4 disc jockey.
5 ARBITRATOR GULIN: As part of the
6 Streamripper program or --
7 THE WITNESS: The next demonstration I
8 will give will be of a program called BitBob. It
9 does, in fact, do this because it looks for streams
10 and identifies them first and begins to save them and
11 buffer them and creates a jukebox essentially on your
12 hard drive.
13 ARBITRATOR GULIN: Is it essentially
14 programmed ahead of time to look for a song, so you
15 get it from beginning to end?
16 THE WITNESS: Yes. You can say, "I would
17 like music by Peter Gabriel or Madonna," and it will
18 start recording that music to your hard drive in
19 discrete files. But this demonstration will come in
20 a moment.
21 ARBITRATOR GULIN: Okay.
22 THE WITNESS: I am just now finishing with

1 Shoutcast, and what you will see on the screen now is
2 that I am going to play back the streamripping
3 session. It has saved it to my hard drive as a file.
4 And what I just did was I skipped forward
5 to show that I now have control of the song. I will
6 review just for a moment and go back a second and play
7 again -- as you see the mouse going up, I'm going to
8 grab it and drag it to the middle of the song. There
9 it goes. So I've demonstrated that I have control of
10 this song now. It is on my hard drive.
11 Now we are going to --
12 BY MR. SIGALL:
13 Q Can you pause for a second?
14 A Yes, I have paused it, and I have paused
15 it at the 30 minute and 55 second point.
16 Q And slide 39, what does that reflect?
17 A Slide 39 -- this reflects, if we look at
18 it, you will see the computer screen that I have in
19 the background, and then the next box in the
20 foreground shows the file WolfFM, which it has named.
21 We have the Winamp player in front of us, and then
22 Streamripper at the bottom says that Winamp is not

1 listening to a stream at this time.

2 So if you look at the player, which is at

3 the 22-second point, it is playing music, but it's not

4 listening to a stream, which is another indication

5 that I now have control of the song and that I can

6 play it even though the webcaster is not playing it.

7 Q Mr. Griffin, are you aware of any efforts

8 by either streaming companies or webcasters to stop

9 the proliferation of these pieces of software?

10 A I am aware that there is one instance

11 where Real Audio proceeded in court against Stream

12 Box, which had a product called the Ferret. And they

13 said that -- as I read the papers myself, it said that

14 there was a handshake that occurs with Real Audio when

15 a song occurs. And they said, "You can't take our

16 handshake, so you can't build something that records

17 from the Real recorder." But that's the only instance

18 I know of of where a streaming company has stopped

19 that.

20 I can also say that I believe that

21 Microsoft has built into the next version of the

22 operating system a control restriction on Windows

1 Media player. So that might also be occurring. But
2 those are the only two instances that I'm aware of.
3 Q And in your experience, is there a
4 technological way that a webcaster or streamer could
5 prevent the recording of their streams through these
6 types of software?
7 A There are a number of technological fixes
8 they could adopt. They could, of course, play a game
9 of changing their standards constantly or encrypting
10 standards -- in other words, finding ways that were
11 very, very difficult or obscure for someone to get
12 access to that content. We are at the 30:55 second
13 point, and I am about to start the tape again.
14 Now I am bringing up what is called the
15 BitBop tuner. If you look at page 40, and 41, and 42,
16 and 43, and 44, these reflect BitBop. What you'll
17 notice here is that I have just clicked on the third
18 button, which I am saying show me all tracks which are
19 playing on the net right now that BitBop can see. In
20 other words, I want it to show me all the songs I
21 could have. So it is going to start looking on the
22 Internet for streams that are complete, meaning from

1 beginning to end that it can hold onto and let me take
2 what I want.
3 Q Can you refer to which page you are
4 pointing?
5 A Yes. I am looking at page 40 at the
6 moment.
7 Q Which specifically refers to what you just
8 described?
9 A Yes. That's right. If you'll notice, I
10 programmed in on page 40, Peter Gabriel. I want any
11 song from any album. Ricky Martin, I want any song
12 from any album. Moby, I want any song from any album,
13 and Brian Eno, I want any song from any album.
14 Q Just to be clear, that reflects you have
15 clicked the artists button, isn't that right?
16 A Yes. I previously had done that. What I
17 did here is I am saying also show me all tracks that
18 are related. In other words, things that you might
19 think I might also like.
20 Q Now would that come when you select the
21 all tracks button or when you select --
22 A That's what is happening right now on the

1 screen.

2 Q Or when you select the tuner button?

3 A Oh that happens with tuner as well. That

4 says here's all the things that I can see and tune.

5 So now I will hit the play button. You

6 will see that what happens -- now what we are hearing

7 just now is that I had previously typed in Moby. In

8 fact, one of the songs I like the most from Moby is

9 the song "Porcelain." It is my favorite track on the

10 album. It has found it and begun playing it from the

11 beginning already. It found a Moby track and it has

12 begun playing it from the beginning. We hear it in

13 the background now.

14 I want to be clear, it is not just playing

15 it for me. It is holding onto a copy of it for me,

16 such that if I want to listen to it tomorrow or a week

17 from tomorrow or a year from tomorrow I can.

18 Now if you'll notice, I am going to stop

19 here at the 32 minute and five second point, and then

20 direct your attention to 41 and 42. What you are

21 seeing very grainy on the screen is represented on 41

22 and 42 for you, which is that not only is it finding

1 songs by the artists that I have asked it for, because
2 you can see on 42 it has a red button next to Ricky
3 Martin. But it is finding other music that it has the
4 entire copy of.
5 So if we look at the bottom of page 42 or
6 on 42, you will see that it has a Counting Crows track
7 called Rain King, which again is similar to the music
8 that I like. If you look at the dialogue box at the
9 very bottom of the BitBop tuner, it says, "I have the
10 Counting Crows Rain King. I am giving it from
11 Spinners 90s rock channel," which I did not direct it
12 to or tell it. It simply located it at Spinner on the
13 90s rock channel. It tells me that it is playing it
14 and that it has got it at almost 21 kilobits. It has
15 a time indicator next to it.
16 Q For the record, what is the heading to
17 this list on page 42 that appears on the interface
18 screen here with BitBop?
19 A Stations featuring my artists. Then it
20 has artists and song, and their titles. As you'll see
21 on 41, it also has album, the name of the album where
22 it has that information.

1 Q And on page 41, what is the heading to
2 this listing on page 41?
3 A On 41 we have "You have recorded," meaning
4 that these are the things that are available to me on
5 my jukebox right now. I could go listen to these in
6 their entirety from beginning to end. If you look at
7 41, and if you look at the top, we have BitBop tuner
8 the first line, then tuner. Then it says, "You have
9 recorded," and a colon and then a list of tracks.
10 ARBITRATOR VON KANN: This is going by me
11 pretty quick and I am not sure I am following this.
12 A moment ago with the stream ripper --
13 THE WITNESS: Yes.
14 ARBITRATOR VON KANN: What I think was
15 going on was you had chosen to listen to a certain
16 channel on live 365. Is that right?
17 THE WITNESS: Yes.
18 ARBITRATOR VON KANN: You had I guess
19 previously installed in your computer this stream
20 ripper software?
21 THE WITNESS: Yes.
22 ARBITRATOR VON KANN: And along came

1 something that you liked that you wanted to record.

2 THE WITNESS: Yes.

3 ARBITRATOR VON KANN: So you utilized the

4 stream ripper to record it with or without disc jockey

5 talking over it, whatever was playing was playing.

6 That went into your hard drive?

7 THE WITNESS: Yes.

8 ARBITRATOR VON KANN: Okay. Then so you

9 now had it on your computer.

10 THE WITNESS: Yes.

11 ARBITRATOR VON KANN: Now in this

12 instance, we are doing something a little different,

13 I gather. You are trying to put together I guess your

14 own jukebox of your favorites, and you are going to

15 BitBop and saying what can you find me out there right

16 now from Ricky Martin.

17 THE WITNESS: That's streaming.

18 ARBITRATOR VON KANN: That's streaming.

19 It comes up with some things. If it comes up with

20 four Ricky Martin items, you get to pick which one you

21 want to record?

22 THE WITNESS: It records them for me

1 anyway.

2 ARBITRATOR VON KANN: It records all of

3 them?

4 THE WITNESS: Because I told it. If you

5 look on page 40.

6 ARBITRATOR VON KANN: You said any song

7 from any album.

8 THE WITNESS: And it will put them on my

9 hard drive.

10 ARBITRATOR VON KANN: Okay. Or could you

11 have specified a particular song? Could you have

12 specified Moby Porcelain?

13 THE WITNESS: I do not know if I could do

14 that with BitBop yet, if I can tell it the exact song.

15 ARBITRATOR VON KANN: Okay. But in this

16 case Ricky Martin, any song, it found some out there

17 that were playing at that point. It kept them, but

18 you don't have those on your hard drive now?

19 THE WITNESS: Oh I do.

20 ARBITRATOR VON KANN: Oh you do?

21 THE WITNESS: If I want them on my hard

22 drive, I tell it put it on my hard drive, or it

1 automatically will put it there if it's one of the
2 artists.
3 But there is a difference between those
4 artists it is merely suggesting and those that I asked
5 it to record. I can take those that it is suggesting
6 and move those to my hard drive also, but it will not
7 automatically put everything it finds in my hard
8 drive, only that that I asked it.
9 If I may, I think that the best
10 explanation of the difference between the two is a
11 phrase that I have adopted. I say that stream ripper
12 and others are a dumb buffer. They are a buffer or a
13 storage device that is dumb. It needs someone smart
14 to hit the start and the stop button. But BitBop is
15 an example of what I call an intelligent buffer or a
16 smart buffer because it has logic built into it.
17 For example, BitBop knows when a song
18 begins and when it ends. It knows if it has the whole
19 song or not. It also knows the name of the artist and
20 the name of the song because it has discerned it from
21 the information that is in this stream. Each of the
22 packets, the digital packets of zeros and ones has

1 header information in it from Real that tells it this
2 is the artist inside and this is the song that's
3 inside, and perhaps this is the album. What it does
4 is it says okay, I have got this, I'll set this aside
5 for him. It intelligently buffers what I am looking
6 for. Whereas stream ripper needs me to operate it. It
7 is dumb.
8 ARBITRATOR VON KANN: On the BitBop one,
9 it says you have recorded. That means you have put on
10 your hard drive these items?
11 THE WITNESS: Well technically it has
12 recorded them, but yes, I have recorded on my hard
13 drive these songs.
14 ARBITRATOR VON KANN: Now there is a
15 component of this we're in danger of getting into
16 loaded terms here. But there is a component of this
17 exercise that you are describing which is in a way
18 interactive, interactive in the sense I guess that
19 BitBop comes back and says here's all the Ricky Martin
20 stuff out there, what would you like to record, and
21 you have to give it directions I guess. You have to
22 say record this one and not that one. So you are to

1 some extent having a dialogue with BitBop about
2 searching things for you and then coming back with
3 results, and then record this but don't record that.
4 True?
5 THE WITNESS: Yes.
6 ARBITRATOR VON KANN: Is that kind of
7 exercise in your view or in the way in which the term
8 is used in the industry, an interactive service?
9 THE WITNESS: It has the effect of
10 interactivity without being interactive itself. I
11 will explain that.
12 As I have said before about this, that
13 while no one station can be interactive under the
14 statute, the effect of tens and hundreds of thousands
15 of stations is interactivity in choice itself. That
16 when technology becomes our aid, we have great
17 facility in using that which is non-interactive in an
18 interactive way.
19 In other words, without being interactive,
20 any one of the stations, the effect of 50,000 stations
21 at any given time is roughly one of my definitions of
22 interactivity, because if I have tools that can find

1 and grab, that which is non-interactive becomes
2 interactive. That which is pushed to the end user can
3 then be pulled instead of pushed.
4 To go a step further, I think the reason
5 we buy sound recordings is for option value so that we
6 can use them at our option. Intelligent buffers, even
7 more than dumb buffers, turn push into pull, and give
8 option value to services where they had none.
9 Rendering the effect of so many non-interactive
10 stations, in my opinion, to be one of the very
11 definitions of interactivity itself.
12 ARBITRATOR VON KANN: I don't know if we
13 are going to get to this or this would be beyond the
14 scope of frankly as written, but you have used the
15 phrase definitions of interactivity. What are the
16 definitions of interactivity, in your view?
17 THE WITNESS: In my view, it is about
18 option value. That is my phrase. That if we have
19 music at our option, that is typically associated with
20 purchasing a product. The difference between music
21 that is not at our option, say we hear it at a
22 restaurant or on a radio station, or while we are

1 shopping at Eddie Bauer, is that it was at Eddie
2 Bauer's option or the radio station's option or the
3 restaurateur's option, not mine. So it had no option
4 value to me.
5 But if I can capture that which was pushed
6 from the radio station, now I have option value on it.
7 To me, that is the definition of interactivity, that
8 I can use it where and when I want to.
9 ARBITRATOR VON KANN: If I am following
10 this, there is a difference which maybe is a
11 difference of degree rather than kind. I guess there
12 are interactive services where I can go and if at 4:00
13 in the morning nobody in the world is playing Ricky
14 Martin, this service will find him for me and I can
15 have Ricky Martin on demand? Is that right?
16 THE WITNESS: I believe that there are
17 services that do this. I don't believe that they are
18 in the scope of the proceeding, but I think there are
19 services that do this. For example, Napster would be
20 a good example of a service that we could discern and
21 say it will let us grab the product and have it.
22 ARBITRATOR VON KANN: I am trying in a

1 very rudimentary way to sort of understand the
2 difference between a true interactive service and what
3 you are doing here with BitBop. It sounds to me like
4 a difference, one difference at least, is that with
5 BitBop you are limited to what is playing at that
6 moment. If you decide to sit down at noon and search
7 for Ricky Martin, and unfortunately nobody in the
8 world is playing Ricky Martin at that point, you are
9 out of luck. Whereas, if in an interactive service,
10 and it would probably not be noon but at 4:00 in the
11 morning, you want Ricky Martin, with an interactive
12 service you can get him.
13 THE WITNESS: With a difference, Your
14 Honor, which is that having expressed your preference
15 for Ricky Martin, if you did it say a week ago, it
16 will have recorded a lot of Ricky Martin to your hard
17 drive on songs that you can then grab at 4:00 in the
18 morning. It isn't limited to getting them that are
19 playing now. Its point is to get them that are
20 playing now and record them discretely onto the hard
21 drive as an individual song, as you will see as the
22 demonstration goes on, that I could then play a week

1 later or two weeks later or a month later.

2 CHAIRMAN VAN LOON: Let me ask how much

3 more time is there on the video itself?

4 THE WITNESS: On the video we are at the

5 32 minute and five second point. It should end at

6 about 35 minutes or 36.

7 CHAIRMAN VAN LOON: So a minute-and-a-

8 half. What I am wondering is whether we should do

9 that, break. We are clearly not going to be able to

10 take the full part of your testimony, but that could

11 then provide us an opportunity for some of the more

12 wide ranging questions. Maybe we should ask you to

13 please lead us through the last part of the video.

14 THE WITNESS: Okay. That I'll do.

15 CHAIRMAN VAN LOON: Thank you.

16 THE WITNESS: We are resuming at the 32

17 minute and six second point. We see it filling up

18 with songs that it has the entirety of. You can see

19 them start to appear.

20 BY MR. SIGALL:

21 Q This is Porcelain that we're listening to

22 while we're --

1 A Yes, it is.

2 Q Good choice.

3 A Thank you.

4 Now it has a song from Peter Gabriel

5 because I told it that I would like things from Peter

6 Gabriel. I see that it has one. I have clicked on

7 that. You can hear it starting to come up from the

8 very beginning, very quietly because the beginning is

9 quiet. This is the song "Blood of Eden" by Peter

10 Gabriel. I have told it to stop. Now it has a song

11 by Ricky Martin. I had also asked it, that I would

12 like Ricky Martin, so it has started it from the very

13 beginning because it has buffered it intelligently

14 from the beginning. I have chosen it on the jukebox.

15 Q Can you pause for a second?

16 A Sure, 34:16, yes.

17 Q Do you recall about how long it took for

18 BitBop when you did it, to collect these songs that

19 you asked for?

20 A This is very much a real-time session. I

21 hadn't installed BitBop before the day that I did

22 this. I mean I had installed it on other computers,

1 but on this computer we are watching pretty much a
2 real-time session.
3 Q About how long did it take?
4 A Five, ten minutes for it to start finding
5 many songs, the many songs that we saw.
6 It was grabbing Ricky Martin there. Now
7 what I have done is to go back and play Moby again
8 because I thought I would rather listen to Porcelain.
9 So I have started it again from the beginning.
10 What you see here, I just want to
11 illustrate what is on the screen before you get to
12 your question, is that I have told it to stop, to stop
13 what it is doing. What it says, if you look at page
14 44, is an accurate dialogue box that reflects what is
15 on the screen. It says, "A song is currently being
16 recorded. Are you sure you want to exit?" Because it
17 is saying there is some risk if you stop now. We have
18 songs in their entirety that you will not get in their
19 entirety. I am saying I am not sure I do want to
20 exit. You will see that I tell it no so that it will
21 keep recording.
22 Now what I am doing, if you look, is I

1 have left the player running on the right side of the
2 screen. If you notice here, this and this and this
3 and this and this, these are all songs that it is
4 recording and putting in discrete files onto my hard
5 drive. I am about to click on one of those files so
6 that I can show you that even without this interface
7 on the right, by going to the hard drive there is a
8 file that has this entire song on it.
9 I am just about now to execute this file
10 where my red cursor is right now on the screen. Let's
11 tell it to stop. That's okay. Cancel. Now I can
12 take the volume and so forth and correct it. You will
13 see that that is in fact the end of the demo. The
14 songs are on the desktop up here. They have the Real
15 format on them.
16 In fact if you look on page 44 and 43,
17 let's take 43 as an example. Do you see how on my
18 hard drive there is now a file that has the Real
19 symbol on it? It says Ricky Martin, Shake Your Bon
20 Bon. So if I want to listen to Shake Your Bon Bon, I
21 can go there and listen to it any time.
22 ARBITRATOR VON KANN: No, I don't see

1 that.

2 THE WITNESS: On 43.

3 ARBITRATOR VON KANN: On 43?

4 THE WITNESS: Yes. In the third column or

5 the second column on the left. You will see it also

6 has Everclear, three tracks from Everclear that it has

7 put on the hard drive as well. So it is recording

8 songs to the hard drive.

9 BY MR. SIGALL:

10 Q Mr. Griffin?

11 A Yes.

12 Q Does BitBop place any limitations on the

13 use of these particular files?

14 A Well they are Real Audio files. I believe

15 that ostensibly they say they can not be used on

16 another computer, one that you do not own, that

17 doesn't have your email address on it, I believe is

18 how they do it. But I have found a way to get around

19 that. I just load the songs up and save them in

20 another format. For example, load them with an editor

21 that reads Real and that will save as MP3. Now I have

22 an MP3 file.

1 Q Is the Real format that's indicated in
2 these files, is that the same Real format that you
3 showed webcasters using to stream?
4 A Yes. Precisely so.
5 Q And as I think you testified, it is the
6 same format that is one of the most popular streaming
7 and audio formats on the web?
8 A Sure. I mean we call it a stream because
9 predominantly real streams, but we can save things in
10 Real format too, and it could be a download just the
11 same. It really just depends on what you have chosen
12 to do. If you have chosen to let it go, it's a
13 stream. If you record it, it acts like a download
14 because then I could play it back when I like.
15 This is the end of the demonstration.
16 CHAIRMAN VAN LOON: Thank you. I think
17 you may have heard it said that life is unfair. We
18 would like to take a pause now for the lunch break.
19 You have this morning provided us a great deal of
20 interesting and complex information. Under the rules
21 of our proceeding, this is the life is unfair
22 category, you will not be able to sit with your

1 counsel during --

2 ARBITRATOR VON KANN: They haven't started

3 cross yet.

4 CHAIRMAN VAN LOON: That's true.

5 MR. GARRETT: He may still choose not to

6 sit with us.

7 (Laughter.)

8 CHAIRMAN VAN LOON: That is absolutely

9 right, so I stand corrected. Although life is unfair,

10 this particular unfairness will not apply.

11 MR. SIGALL: For planning purposes, I

12 anticipate only about 15 minutes of further direct.

13 I am in the last section of his testimony when we get

14 back.

15 CHAIRMAN VAN LOON: Excellent. Okay. So

16 at about 12 minutes until 2:00, we will plan to

17 resume. Thank you.

18 (Whereupon, at 12:41 p.m., the proceedings

19 went off the record for lunch, to resume at 1:48 p.m.)

20

21

22

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

2 (1:52 p.m.)

3 CHAIRMAN VAN LOON: I guess we are all

4 ready to resume.

5 MR. SIGALL: Are we back on the record?

6 BY MR. SIGALL:

7 Q Mr. Griffin, just a couple of follow-up

8 questions from your demonstration. Can you just

9 clarify for the Panel exactly how a user would go

10 about attaining the BitBop software and typically use

11 it?

12 A When I heard about it, I went to

13 www.bitbop.com and it was there. I would guess that

14 somebody could go to a search engine or to an online

15 engine that might guide them to it, but in the main,

16 I think they could go to www.bitbop.com, and then of

17 course there would be a piece of software to be

18 downloaded. You would merely click.

19 As happened in the demonstration when I

20 was downloading, I think it was Winamp, it would then

21 come to my hard drive as a file. Then I would double

22 click on it and it would install itself.

1 It runs in the background, as you know.
2 So I could leave it running or turn it off. Once
3 installed and left running, it will continually save
4 files to the drive whether I'm home or not or
5 listening or not, and in fact, could just leave it for
6 weeks and it would continue to save songs to the hard
7 drive. I have left it for days running on a computer
8 before.
9 Q And in one of your answers before the
10 break, you discussed option value. Where in your
11 written testimony does that appear, for the Panel's
12 reference?
13 A I think it's pages 17 and 18 that discuss
14 push and pull, and option value and the concepts that
15 are associated with them in my mind. I have
16 introduced that in lectures and so forth before.
17 ARBITRATOR GULIN: Mr. Griffin, can you
18 explain to me technically how is BitBop able to obtain
19 a song from the very beginning? How is it that it
20 doesn't miss the beginning of a song?
21 THE WITNESS: I was intrigued by that too.
22 So I set up a second computer to monitor my primary

1 computer. I have an array of them. So I put a
2 monitor on my primary computer that reported to my
3 secondary computer every time the first computer
4 looked at its registry or at its files.
5 What I found from looking at the second
6 computer while I was running BitBop was that BitBop
7 was referring to the Real Audio software that was
8 installed on the computer, and using the internals of
9 Real Audio's software component to determine what Real
10 Audio streams were moving on the Internet.
11 What I determined was that the machine
12 that was running BitBop was looking exclusively for
13 Real Audio streams, and that it was identifying them
14 by making reference to Real Audio's intellectual
15 property that had already been installed on the
16 computer. It is a technical term called a software
17 development kit or an application programming
18 interface. But these are technical terms that refer
19 to Real's intellectual property and their body of
20 knowledge. That gives BitBop a way to figure out what
21 Real Audio streams are moving on the Internet and what
22 it can get from the beginning and the end because Real

1 Audio's intellectual property has a way of assembling
2 these packets and knowing what's there.
3 So by observing the second computer, which
4 was watching the first computer, I was able to draw
5 conclusions about how BitBop was doing what it did.
6 BY MR. SIGALL:
7 Q Now the fourth part of your testimony you
8 said you were going to discuss some webcaster
9 financial, the basics of webcaster financial and
10 economics. Can you explain that for the Panel?
11 A Sure in a very cursory way, obviously.
12 There are revenues and there are expenses. The goal
13 in so far as possible is to balance them such that the
14 content feels free without actually being free,
15 because of course they have expenses for acquiring
16 content and staging content. Of course there's also
17 bandwidth that they have to purchase. They have to
18 attract listeners and people to come to the site. So
19 they have advertisements to buy. They have labor to
20 pay. They have overhead and property.
21 On the other side, they have
22 advertisements and sponsorships and they can sell

1 things like music, for example. Many of the examples
2 show them selling music. But as Websound points out,
3 sometimes it's radio VW. Instead of selling music,
4 they are selling a car or an Eddie Bauer parka.
5 So there are e-commerce opportunities that
6 they have. They have business-to-business
7 opportunities in the sense of syndicators or
8 aggregators. They could charge others, for example,
9 Websound makes note that they do it for Eddie Bauer
10 for a fee, so they could charge them money. That is
11 another revenue stream.
12 In my experience, they can also choose a
13 system. In other words, if a webcaster chooses say
14 Windows Media Player exclusively, Microsoft will
15 reward them with things that have financial
16 considerations, such as inexpensive or free bandwidth,
17 things like that, or Real might offer a similar
18 incentive, perhaps free servers or whatever. But
19 choosing a codec, if one chooses to do that, can have
20 a financial reward. But as you know too, others allow
21 you to use any codec and eschew that reward.
22 But that is a rough balance here that on

1 the revenue side you have got ads and sponsorships and
2 ecommerce and the ability to charge syndicators and
3 aggregators and partners whose tools and so forth you
4 might use.
5 On the other side, you are acquiring
6 content, staging content. You have got bandwidth to
7 buy. You have got people to pay. You have got the
8 traditional overhead of a business. By balancing
9 those two, hopefully the revenues out weigh the
10 expenses and you can make the service feel free
11 without actually being free.
12 Q In your testimony, do you summarize this
13 on page 22?
14 A Yes. It's in my direct testimony, each of
15 these things.
16 Q Refer for the record and for the Panel
17 where you describe this.
18 A I'll be happy to. On page 21 it begins,
19 and we will see summaries at 22 and 23 and so forth.
20 I would say that this concludes at around 27, which is
21 the end of the statement.
22 Q Let's describe each one of those items

1 that you alluded to individually. When you say
2 advertising, what exactly do you mean?
3 A That would be self-evident, because my
4 pointer, for example, this morning was pointing at
5 some advertisements and so forth that were on the
6 page. Of course there is the potential to put
7 advertising without any question that you could hear
8 or see or both. Or in fact, you could deliver someone
9 to a sponsor. For example, we saw an example of where
10 it sent you to Amazon. So that would be an example of
11 where you would work with advertising.
12 Q And you described for the Panel the
13 concept of targeted advertising?
14 A Yes. In the direct testimony I get into
15 that. That in my experience, the value of advertising
16 in this area has a large component which is targeting
17 the degree to which I can focus on a particular
18 listener. In my experience, the low end of the range
19 is about a five dollar CPM cost per thousand people.
20 That would just be for indiscriminate, not knowing who
21 was coming, but just for what we call eyeballs, ears,
22 and wallets.

1 ARBITRATOR VON KANN: You call what?

2 THE WITNESS: Eyeballs, ears, and wallets.

3 Attracting eyeballs, ears and wallets has a value to

4 it. If you don't know who they are, it could be at

5 the low end, around five if it were just

6 indiscriminate.

7 So, for example, if I just attract people

8 who like music, I might be able to charge five. But

9 let's say I could attract specifically the Counting

10 Crows fans, that would have a value that would tend

11 towards the upper end of the scale, which would be 50.

12 If I knew for sure that they were Counting Crows fans,

13 because let's say they registered somewhere else and

14 I knew who they were, and I married them to a list of

15 visitors, I could charge more for those people.

16 CHAIRMAN VAN LOON: It's five dollars or

17 50 dollars what?

18 THE WITNESS: That being the high end or

19 the low end. That the least targeted things would

20 tend to attract around five.

21 CHAIRMAN VAN LOON: Five?

22 THE WITNESS: Five dollars per thousand of

1 visitors.

2 CHAIRMAN VAN LOON: Per thousand visitors?

3 THE WITNESS: Yes. In fact, often you

4 send them there or expose them, or they could click on

5 the advertisement and be measured that way.

6 ARBITRATOR GULIN: Where did you get that

7 figure from, Mr. Griffin?

8 THE WITNESS: From experience, that in

9 general these are the figures that have applied say

10 over the past year. They may have tended down due to

11 a somewhat softer market now, but they are nonetheless

12 relatively reliable in my experience for what has been

13 offered and charged and so forth. Because in fact,

14 they are on both sides of this equation, because

15 sometimes they are buying visitors themselves.

16 In other words, I know that the webcaster

17 Launch would buy visitors from say Audio Galaxy. They

18 would pay Audio Galaxy to send them to Launch. In

19 other cases, they will then charge an advertiser

20 themselves for the people that they bought from

21 another place.

22 BY MR. SIGALL:

1 Q In one of the other categories you
2 described revenue sources would be retail and e-
3 commerce?
4 A Yes. As we saw, for example, buying music
5 online, that would be a relatively targeted thing. It
6 would have a high value because if someone was coming
7 to listen to music, it would make sense to offer them
8 music. As a result, that is a little bit more
9 targeted. Of course the notion that someone wants to
10 hear music and they go to the Volkswagen site, that
11 might be less targeted. But yes, selling things, e-
12 commerce is often a way to make money. It is to the
13 benefit of them if they sell a lot of things.
14 Q Finally, just to be clear, you said
15 syndicators and aggregators have another potential
16 source of revenue?
17 A They can charge their clients because they
18 have a B2B possibility of doing this work for others.
19 Q The four categories, of the categories of
20 expenses that you describe, the first one is acquiring
21 and staging content.
22 A Yes.

1 Q What exactly do you mean by that?

2 A Well, acquiring licensing -- I'm guessing
3 this proceeding will set some of the price for
4 acquiring content for a webcaster. Thus far, they
5 have had to make assumptions about what this might
6 cost them down the road. It has been my advice to
7 clients that they should ask for money for the result
8 of this proceeding because there will be expenses
9 associated with it.

10 Staging content, this would go to the
11 diagram that I made that indicated that there is a
12 process of encoding the content and staging it on
13 machines that would respond to the requests of those
14 who ask for music. So that is a cost too.

15 As I mentioned earlier on the revenue side
16 because it applies equal to the expenses side,
17 attracting listeners is an advertising exercise all
18 itself for a webcaster because it too needs people in
19 order to sell to others. It will often pay money in
20 order to attract those people.

21 Q How about delivering content? What are
22 the expenses associated with delivering the content?

1 A Well, bandwidth primarily. You know, the
2 notion that when I need to send a stream I need
3 digital capacity in order to do so.
4 Q Are there any other costs that might be
5 reflected, that a webcaster might incur in order to
6 operate their service?
7 A The traditional, labor, overhead,
8 property, that kind of thing. I mean theoretically
9 because it's a very automated business or it's capable
10 of being very automated, sometimes those are lower.
11 But again, it depends on the stage of the development
12 of the company and where they are at. But perhaps a
13 mature company can stage things in a way that reduces
14 overhead. That is certainly their goal over time. If
15 they aggregate together and so forth or outsource,
16 that can reduce their costs too.
17 Q Following up on that point, based on your
18 experience, is it the case that there are many
19 webcasters who are generating significant profits and
20 revenues at this current time?
21 A (No response.)
22 MR. STEINTHAL: I object to that. What

1 kind of basis would this witness have as to the
2 revenues and profits of webcasters that he is not
3 privy to the finances of? I mean we have tolerated a
4 lot of the general stuff, but that is pretty specific.
5 CHAIRMAN VAN LOON: Is this covered in the
6 written direct testimony?
7 MR. SIGALL: Yes. It is on page 21. It
8 is towards the bottom of the page. The question goes
9 to his view of the state of the industry today and
10 what it might be in the future, which is described on
11 page 21 of his testimony.
12 MR. STEINTHAL: It is a very different
13 question than the one that was just posed to him.
14 BY MR. SIGALL:
15 Q Well, let me rephrase it. What is your
16 view in a general sense of the extent of the revenues
17 that webcasters are obtaining at the current
18 timeframe?
19 A (No response.)
20 MR. STEINTHAL: Same objection.
21 ARBITRATOR VON KANN: Seek to lay some
22 foundation for his ability to speak to that.

1 BY MR. SIGALL:

2 Q Mr. Griffin, have you advised clients who
3 are currently webcasting and operating a webcasting
4 service?

5 A I have advised some clients, although it
6 is fair to say that they have not made me privy to
7 their bottom line in these areas.

8 Q But have you advised them about the types
9 of revenues and expenses that they might obtain?

10 A Oh yes. I think it's fair to say that it
11 is clear that it may not be profitable at this point
12 for them. That in many cases, they have revenues, but
13 that their expenses significantly exceed their
14 revenues in many cases. But that they believe that
15 there will be a future of revenues that would grow
16 dramatically and accrue to some of their other
17 ventures.

18 In other words, for Nokia, it is clear to
19 Nokia that there is not money that comes from this
20 now, and that when they started it will not be large.
21 But that as they build it into the future, it is
22 something they want to invest into, to bring people to

1 their devices and to their software.

2 Q You have talked to these clients about the

3 general types of revenues and amounts of revenues and

4 expenses that they might experience if they enter into

5 this business?

6 A Oh yes, very directly.

7 ARBITRATOR VON KANN: I don't think the

8 question is whether he has talked to people, it's

9 whether he knows what he is talking about. So the

10 question is where does he get the info that he talks

11 to people about. If he dreams it up, I am not much

12 interested. If there is some other basis, I might be.

13 BY MR. SIGALL:

14 Q Do they share with you some of their

15 projections or some of their information they might

16 have about their expenses and their revenues?

17 A Sure. In my case they told me why they

18 wanted to do it.

19 Q And they told you generally about the

20 amounts and the revenues and the expenses and profits

21 that they might anticipate or would like to obtain?

22 A Yes, the need. They outlined the need.

1 That in many cases they had meant 5,000 dollars per
2 potential subscriber to acquire the right to operate
3 in a place, and that this was very, very expensive,
4 and that they hoped to recover these costs through
5 revenues like webcasting.
6 MR. STEINTHAL: Can we find out who the
7 "they" is?
8 THE WITNESS: Wireless operators
9 specifically, and in many cases wireless operators who
10 work with Nokia.
11 BY MR. SIGALL:
12 Q Is it your view that for webcasters to
13 obtain a return on investment that they are seeking,
14 based on your experience in discussing these issues
15 with them, that there might have to be some
16 consolidation in the industry?
17 A I will say yes, I think that is clear that
18 there is going to be a lot of consolidation. My own
19 sense is that it is going to be around people who
20 provide bandwidth because they have much lower
21 marginal costs of transmission. In other words, if
22 you own a pipe, your new incentive is yield management

1 to get the most that you can out of it, like someone
2 who owns an airplane. It may be a very rough analogy,
3 but I am going to use one.
4 I have heard sometimes that they describe
5 the problem as putting rich media over narrow pipes as
6 being this notion of putting a heavy person in a
7 skinny airplane seat, that there is a yield management
8 problem, and that when they have extra capacity there
9 is no problem with doing it. But they are full up,
10 there isn't. So it is a yield management problem for
11 an airplane or a hotel or I'm sure a law firm with a
12 heavy fixed cost. In their particular case, that is
13 much of their incentive.
14 So consolidation I think will be the name
15 of the game. Those who own band width will have a
16 great incentive to use their unused bandwidth on this.
17 Their costs will be much lower.
18 MR. SIGALL: I have nothing further.
19 CHAIRMAN VAN LOON: Thank you.
20 I would like the timekeepers, this is
21 2:10, if after the afternoon break, if we could get
22 just sort of a summary of where we stood from this

1 witness so far this morning that would be helpful.
2 Put your heads together during the break, please.
3 Proceed with cross.
4 CROSS EXAMINATION
5 BY MR. COHEN:
6 Q Good afternoon, Mr. Griffin.
7 Mr. Griffin, you would agree, wouldn't
8 you, that you are not exactly the average webcast
9 listener?
10 A Yes.
11 Q And in fact, you are an expert on digital
12 music matters. Correct?
13 A I think so, yes.
14 Q So you do things with digital music and
15 with webcasting that your average consumer either does
16 not know how to do or certainly doesn't do at this
17 time. Right?
18 A Sometimes, yes.
19 Q And in fact, some of the things that you
20 do with digital music, it might be years before the
21 typical consumer does those things in a common way?
22 A It might be, yes.

1 Q Now I just want to clarify some of your
2 background. Your company, Cherry Lane Digital, you
3 stated in your written statement that that "focuses on
4 developing businesses out of new ideas relating to the
5 digital delivery of music." Could you give us some
6 more specifics, exactly what that means?
7 A Sure. As I mentioned, we are affiliated
8 with the Cherry Lane Music Group and so we think
9 deeply about the future of music and so forth. Cherry
10 Lane, which is primarily a music publisher, has been
11 very involved in the service of music over the years,
12 and less so with the product. So much of our product
13 is on how that service business will continue to
14 evolve.
15 As we work on that with not only our own
16 company but with clients, it behooves us to be ahead
17 of where that's going.
18 Q I am not sure I understand exactly what
19 Cherry Lane Digital does though. I mean are you in
20 the business of consulting with people?
21 A We sometimes consult but that is not
22 primarily what we do. Where it's appropriate, we do,

1 but in fact if we did no consulting in a year, we
2 would still be fine.
3 Q Okay. So is the focus of Cherry Lane
4 Digital the Cherry Lane Music Group?
5 A Not exclusively, but the Cherry Lane Music
6 Group would be my highest priority.
7 Q What is the Cherry Lane Music Group
8 comprised of other than music publishing.
9 A Well, we publish some magazines, Guitar,
10 Guitar I, Home Recording Magazine, Music Express,
11 Music Alive. We publish those out of New York City.
12 We have an office in Beijing, China, one in Los,
13 Angeles, and one in New York City. We have roughly 90
14 people located in New York City. We have about a
15 dozen people located in Los Angeles, and we have six
16 people located in Beijing.
17 Q So you do some magazine publishing, music
18 publishing, some consulting. Anything else?
19 A I have been an expert witness, as I
20 mentioned. I give speeches and lecture. I write
21 columns, as I mentioned, and have worked on that.
22 Q Prior to forming Cherry Lane, you worked

1 for Geffen Records, correct?

2 A That's right. In between. I started my

3 company One House, but then we affiliated with Cherry

4 Lane. But it would be right to say, I think what you

5 are saying now, which is that when I left Geffen, we

6 got involved with Cherry Lane.

7 Q Okay. Geffen is a record label. Is that

8 owned by one of the majors?

9 A It is owned by Universal Studios.

10 Q Okay. I understood that while you were

11 involved with Geffen, you were responsible for a

12 promotion involving Aerosmith. Correct?

13 A Yes. Well we released an online single

14 from Aerosmith. It was a full-length single as

15 opposed to what had been for the most part clipped

16 before that.

17 Q Was this a single that was available for

18 download to consumers?

19 A Yes. In fact it was through the

20 Compuserve Information Service.

21 Q And how much were consumers charged for

22 the download?

1 A They were charged nothing.

2 Q Was the idea there that if you give away

3 the sound recording, that would somehow promote sales

4 of it?

5 A It was partly to promote Compuserve

6 services because those people were online on

7 Compuserve at that time. We were working with

8 Compuserve. So part of it was to get people to go to

9 Compuserve as well. That particular song was not

10 available to purchase by any means.

11 Q So is it your testimony that the making

12 available of this song online did not have any

13 promotional purpose in terms of sales of sound

14 recordings?

15 A No. That is not what I'm saying. I am

16 merely pointing out that we did not sell the song that

17 we made available online. I do suspect it had some

18 promotional value to the band Aerosmith and to the

19 label.

20 Q Well let me understand this. I mean this

21 promotion was carried out by the label in conjunction

22 with Compuserve?

1 A Yes.

2 Q And what was the label's purpose, apart

3 from whatever Compuserve's interests might have been.

4 What was the label's purpose in putting out this sound

5 recording for free to the public?

6 A Education. To be completely honest, we

7 wanted to know what would happen. It hadn't been done

8 before. We were interested in bit rate, what bit rate

9 would be acceptable. We were very curious as to

10 whether people would accept say 22 kilohertz mono in

11 a sample. We were very curious as to what reactions

12 people would have in using it. We had no idea what

13 would happen.

14 We were alternately fearful that some

15 would say this is the worst idea ever. This isn't

16 promotional at all. This is just crap. We were

17 alternately enthusiastic about the notion that some

18 might say, wow, what a great thing. It was a bit of

19 a risk, and so we wanted to learn a lot. That is why

20 we did it.

21 We didn't make that song available for

22 purchase in the store, but I will concede that there

1 was some value to it of course, both for the label and
2 for the artist, and for Compuserve I'm sure. By the
3 way, sound card manufacturers who called on the phone
4 and said that's good, and others who said this is the
5 stamp of legitimacy on a digital delivery. So it was
6 educational and we learned.
7 Q Now you testified that part of your
8 current business is doing work for record labels?
9 A Yes, part of the business is doing work
10 for record labels.
11 Q Can you tell us what kind of work you do
12 for record labels?
13 A It is purely consulting and discussing
14 issues with their executives. The goal is to absorb
15 their uncertainty about the future.
16 Q Tell me specifically, I mean what topics
17 is it that you are giving advice to record labels on?
18 A They ask me where they think that these
19 issues are going and how best they might prepare for
20 the future, and what I think the economics of it will
21 be.
22 Q And do these include any of the big five

1 majors?

2 A Yes. It has included some of the big

3 five.

4 Q Your Cherry Lane Music publishing

5 business, does that own copyrights in musical

6 compositions?

7 A Yes. In some cases, we do. But primarily

8 I would say that we administer them for others. So,

9 for example, some of them are Pokey Man, and the WWF,

10 and Dreamworks, for example. We administer copyrights

11 for them and with them. We may not hold that

12 copyright in that case, but we do hold some copyrights

13 of our own.

14 Q Is there a record label that is part of

15 Cherry Lane Music Group?

16 A We don't have a record label, but we have

17 put records out with some record companies. For

18 example, we hadn't really figured that Pokey Man would

19 be worth a record, but when kids really loved it, we

20 went into the studio and had some artists that we work

21 with record some songs, and it sold a lot of copies.

22 The same thing with the WWF. I don't think initially

1 anybody thought it was going to lead to making
2 records, but it did eventually lead to making records.
3 It sold quite a few.
4 Q Does Cherry Lane hold any copyrights in
5 sound recordings?
6 A I would guess that we do. I can't like
7 specifically put my finger on one for you, but it
8 would really surprise me if we didn't own a copyright
9 on a sound recording because we're talking about a
10 fairly good sized company.
11 Q Now you testified that digital copies of
12 sound recordings are encoded by webcasters. Correct?
13 A Yes. That they choose for want of a
14 better word, a code in which it will be sent and that
15 it for example could be a Windows Media Player or
16 Real. That is what I mean by code.
17 Q If we just take a look at the attachment,
18 that's attachment B of your testimony.
19 A Yes.
20 Q The encoding process is not depicted on
21 attachment B, is that correct?
22 A It is symbolized by an arrow, that as it's

1 taken from the sound carrier that it sources, that as
2 it's moved over to a computer, that there is often a
3 choice made as to what code will be put into it. It
4 may be put on the computer first and then encoded, but
5 that is the process of choosing how one will store it
6 on their computer. In other words, a webcaster makes
7 a choice.
8 I have a sound carrier with a sound
9 recording on it and I am going to transfer it to my
10 computer. What format will I put it on here? That is
11 a choice that I make.
12 Q Can you just tell us where, on attachment
13 B, one would identify the encoding process?
14 A (No response.)
15 MR. SIGALL: Do have that in front of you?
16 THE WITNESS: I don't have it right in
17 front of me here. It doesn't appear to be in this B.
18 MR. SIGALL: Yes. It's at the very back.
19 THE WITNESS: Oh here it is, actually.
20 Yes, it's represented by the arrow of putting the
21 sound recording into the music database. Then the
22 binary choice, in this case it is listed as binary

1 because you can choose Real or Windows, meaning you
2 have two choices. But of course there are more
3 choices. That is intended to symbolize that there is
4 a choice made about the code that one will use in
5 transmitting the content.
6 BY MR. COHEN:
7 Q Okay. Just to be clear, it's that arrow
8 between the CD and the music database that represents
9 the encoding process?
10 A To be totally clear, it's the arrow that
11 leads to the music database, and then the two arrows
12 that lead to Real Play and Windows Media Server,
13 because that indicates the choice issue of choosing a
14 codec.
15 Q So it's this whole section of the
16 depiction before the arrows leading away from the Real
17 Play and Windows Media Servers that represent the
18 encoding process. Is that your testimony?
19 A In the case of an Internet-only webcast.
20 In the case of the AM-FM webcast, that choice is made
21 down here. This is intended to symbolize that in a
22 simplified way.

1 Q Okay. You testified that webcasters often
2 use third parties to handle encoding?
3 A Sometimes they do, yes.
4 Q And that is a service that they pay for,
5 right?
6 A Yes. Sometimes I would guess that they
7 might do it themselves, but in other cases they might
8 employ someone to do it.
9 Q Isn't it true that there are actually
10 businesses that have been built on providing encoding
11 services, for example, Loud I?
12 A Definitely, yes. Loud I and others.
13 Q And you know that Loud I, for example,
14 used to be called Encoding.com.
15 A Yes. In fact, as I pointed out when I did
16 my explanation of this chart, I made it clear that any
17 step of this could well be outsourced and sometimes
18 is. In fact, that is precisely what you are referring
19 to now, was when I went over the chart the first time
20 indicating that many of these areas could be
21 outsourced to someone else.
22 Q Whether it's outsourced or whether the

1 webcaster does it themselves, this is one of the
2 expenses that a webcaster incurs to transmit streamed
3 programming. Right?
4 A Yes. That is right.
5 Q It's not the case that record companies
6 provide encoded digital files with sound recordings to
7 webcasters?
8 A Not encoded in these formats. But I mean
9 when you buy a compact disk, it is digital and it is
10 in a format. But you are absolutely right. That
11 there is another step required.
12 Q It is the encoding that ensures that
13 certain identifying information like the artists, the
14 album, the song name, can be displayed to the listener
15 as the song is playing. Right?
16 A That can be part of the process. It
17 needn't be. In other words, it's not an absolute
18 requirement. For example, in encoding one could
19 ensure that the artist's name and the song title and
20 the album was included in the process, or one could
21 omit that, or one could maybe put it into a format of
22 their own. But yes, in other words, it's not an

1 automatic thing that automatically happens.

2 Q Right. Let me be clear. If you wanted to

3 show that identifying information, artist, album,

4 song, you would have to do some encoding work to make

5 sure that that information was shown while the song is

6 playing. Right?

7 A When you say work, there are some

8 processes that automate that process. But yes,

9 something would have to occur to do it.

10 Q It's not built into the sound recording,

11 right?

12 A It is not built into the sound recording,

13 yes.

14 Q Okay. And in order to get that artist,

15 album, and song information so that it's displayed to

16 the listener, the webcaster would need to either

17 manually type it in or license a database from some

18 third party, right?

19 A They might do that, yes. Those are

20 possible ways to do it.

21 Q Well there's no way to do it without

22 either typing it in or licensing a database, is there?

1 A I think there is a legal question as to
2 whether how they get that information and how it
3 comes. In other words, I know that when I put a CD
4 into the tray of my computer, it can go out and look
5 that information up over the Internet and return it
6 back automatically from a service, and I don't know
7 the legal terms of licensing between that service.
8 Q Okay. Regardless of whether it is licensed
9 or not, you need to use a database or type it in?
10 A Sure. You need to supplement the musical
11 information in order to have that additional
12 information available. That has to come either by
13 your doing it or someone else providing that service.
14 Q Right. There are some businesses that are
15 in the business of providing databases that will match
16 up the sound recording with artist, album, and song
17 information. Right?
18 A Yes. There are some.
19 Q Can you give us a couple of examples?
20 A I believe a company called Grace Note does
21 this. I believe they might have been called CDDB.
22 There are others who look to provide this information.

1 There is some dispute about Grace Note because the
2 public provided that information early on into a
3 database. So there is some dispute about its
4 ownership in the licensing, but yes, you are
5 absolutely correct that they licensed that information
6 and they charge money for it.
7 Q You know, don't you, that providing
8 identifying data like artist, album, song, that
9 providing that in text form to the listener is one of
10 the requirements of eligibility for the statutory
11 license. Right?
12 A Yes. I understand that.
13 Q That was a requirement that the record
14 companies wanted. You understand that?
15 A I don't know that to be true because I
16 wasn't there at the time. It would follow to me that
17 it is, and my experience would tell me that that would
18 be desirable, and that a record company owner would
19 see that as valuable.
20 Q Right. Because it is kind of hard to buy
21 a sound recording if you don't know the name of the
22 artist, the album, or the song. Right?

1 A Yes. I would only point out to your
2 question that it is not uniquely the record company
3 that would want that because if my business model were
4 to sell records, then I would want to do that too if
5 I were the webcaster. I am only pointing out that it
6 is not just one modem, it would be a dual modem.
7 Q Right. But you understand that it is a
8 requirement that is imposed on the webcaster to
9 qualify for the license?
10 A Yes. I understand that.
11 Q To the extent there are expenses of
12 complying with that requirement, those expenses are
13 borne by the webcasters. Right?
14 A I believe they are, yes.
15 Q That is also something that regular
16 broadcast radio, over-the-air broadcast radio, because
17 it doesn't have a visual aspect, can't do. Right?
18 A You mean visually?
19 Q Correct. There is no way for the listener
20 to see the artist, album, and song information when he
21 is listening to over-the-air broadcast radio unless
22 it's being simultaneously transmitted over the

1 Internet. Right?

2 A I would agree with you that in general

3 that has been true, but I will not agree that it is

4 not possible, because there is a system that is widely

5 used in Europe and is now introduced in the United

6 States called the RDBS system, the radio data

7 broadcast system, that causes the alphanumeric

8 characters on my home tuner and my car tuner to

9 display information that the broadcaster wants me to

10 have about the content. So it's not impossible.

11 Q Okay. Leaving aside whether it's

12 impossible.

13 A No. In fact it happens.

14 Q Okay. It happens. You would agree with me

15 that as a general matter, one of the differences

16 between listening to over-the-air broadcast radio and

17 listening to a webcast is that when I am listening to

18 a webcast, if I want to see the artist, album, and

19 song information, it is there for me?

20 A Yes.

21 Q Okay. Now encoding, would you agree that

22 that is an activity that makes intensive use of

1 computer resources?

2 A Yes.

3 Q It is not something you would want to do

4 on your average personal computer. Correct?

5 A I disagree.

6 Q Maybe your average personal computer.

7 A No. I disagree. The average computer in

8 fact is often used to encode material. I mean that

9 was the point of Napster, was that many people encoded

10 their own material from their own CDs and made them

11 available. It really does not take a very

12 sophisticated computer to encode a song.

13 Q Let's be clear about this. Is it your

14 testimony that for a webcasting business such as is

15 participating in this proceeding, that your average

16 personal computer would be an adequate machine to

17 perform the encoding activities that they require?

18 A The average computer for sale in a store,

19 yes. That is right.

20 Q Now in the bottom of the chart where you

21 talk about AM-FM webcasts, this is attachment B to

22 your testimony.

1 A I have it in front of me.

2 Q Is it your understanding that this machine

3 that has the word signal encoder next to it, that is

4 sending out these Real Player and Window Media streams

5 directly to the Internet?

6 A Pardon me? In this particular example,

7 yes, it is.

8 Q Okay.

9 A Because it is sending it directly. These

10 arrows to go the net.

11 Q And your testimony is that there is no

12 required Real Player server or Windows Media server

13 such as you have with Internet-only webcasts that is

14 required to serve those streams to the net?

15 A No. That is not my testimony. I was

16 merely trying to make this diagram as easy to

17 understand as possible. But you could run both of

18 those processes on the machine. You could, if you

19 chose to.

20 Q Is it your testimony that -- well, strike

21 that. In your experience, is that the way webcasters

22 commonly serve streams to the Internet, or

1 simulcasters through one machine that does both signal
2 encoding and serving to the Internet?
3 A No. That is not my testimony. It is
4 possible to do, but in general they would use multiple
5 computers to do that, as in the Internet only example.
6 Q Now on page 4 of your written testimony
7 you stated that by using digits --
8 A Okay, I'm there.
9 Q You say by using digits instead of
10 properties of physical media to represent sounds, it
11 is possible for there to be no loss of quality when
12 the recording is played, copied, or transmitted. But
13 isn't it the case, Mr. Griffin, that the streaming
14 services that are at issue here do involve a loss of
15 sound quality as compared with listening to a CD?
16 A Sometimes, yes.
17 Q Isn't it true, Mr. Griffin, that in fact -
18 - well, can you name any of the webcasters involved in
19 this proceeding that are streaming at CD quality?
20 A No. I don't know of any right now,
21 although on some of them the aggregators, for example,
22 I have seen that there are people on Live 365 or

1 Shoutcast that stream at very high bit rates. They
2 have streamed at bit rates that I consider to be
3 indistinguishable from compact disk.
4 Q Let me ask you this. Your understanding
5 of Live 365, when they show the users' connection
6 speed there, we looked at one of your screen shots,
7 your understanding is that that speed that is shown is
8 the speed at which the user is streaming to the
9 public?
10 A Yes, that that is their capability for
11 delivering a stream.
12 Q Well apart from whether that is their
13 capability for delivering a stream, is it your
14 testimony that let's say I have a high speed
15 connection and I tune into one of those Live 365 users
16 that's also indicated as having a high speed
17 connection, that they may be streaming to me at speeds
18 in fact in excess of 56K?
19 A They may be, but they may also be doing it
20 below that because of the total number of people who
21 are using it at any given time.
22 Q Now have you actually measured the bit

1 rates being streamed by Live 365 users to see whether
2 any of the streams are above 56K?
3 A I did not measure the Live 365 users and
4 their bit rates. No.
5 Q So your basis for saying that there are
6 streams on Live 365 above 56K is what exactly?
7 A That I have sometimes listened to them.
8 I think you are confusing two terms, the speed of the
9 connection and the bit rate of the recording itself.
10 In other words, I have heard very high bit
11 rate recordings on Live 365, and they could have come
12 over lower bandwidth or higher bandwidth connections.
13 Those are two different issues. One goes to the
14 granularity with which the sample was made. The other
15 goes to the capability of the data path. Those are
16 two different questions, although it can be confusing
17 because they are both expressed in terms of say
18 kilohertz or bits per second.
19 Q Just to be clear, your testimony is that
20 you have heard high bit rate, and by high bit rate you
21 mean what exactly?
22 A I have seen high bit rate samples above

1 128. I have seen them above 300.

2 Q I am confused now by your terminology.

3 When you say that you have seen them, what do you mean

4 by that?

5 A In other words, I see them. I listen to

6 them. It is clear to me that it is a high bit rate

7 recording, both to my ears and to my eyes as regards

8 the bit rate of the sample as opposed to this.

9 Q Okay. Now one reason that there is often

10 a loss of sound quality with streaming is that the

11 sound recordings are compressed so that they can be

12 transmitted over the Internet easily. Is that

13 correct?

14 A Sometimes they are, yes.

15 Q Compressing means using fewer digits than

16 would be necessary to fully replicate the CD version

17 of the sound recording?

18 A Yes. In the case of compression, that is

19 right.

20 Q On page 7 of your testimony, you state

21 that fewer digits allows the song to travel over the

22 slower connection without annoying interruption, but

1 it comes at a price. The quality of the recording is
2 not as good.
3 A Yes.
4 Q Now in your testimony when you talk about
5 slower connections, would it be fair to say that a
6 standard 56K dial-up modem is what you refer to as a
7 slower connection?
8 A Yes. That is a slower connection. Slower
9 still would be a 28.8, for example. Yes, modems are
10 slower generally than dedicated lines.
11 Q Isn't it a fact, Mr. Griffin, that what
12 most Internet users have today and have had since
13 certainly October 1998, is a standard 56K dial-up
14 modem?
15 A That is right. My understanding is that
16 most people use modems.
17 Q Okay. So the average Internet user who
18 dials in using their 56K modem and tries to use one of
19 the webcasting services that are at issue here, is
20 going to get a listening experience that is as you put
21 it, "not as good", right?
22 A Yes. Less than optimal and definitely

1 below CD quality.

2 Q Okay. In fact, the sound quality is not

3 any better than an FM broadcast radio quality. Isn't

4 that right?

5 A Sometimes it can be as good or better.

6 Other times it can be worse. But I would say that it

7 is analogous at that point.

8 Q Comparable?

9 A Yes. I think I said earlier in my

10 testimony is that to me a 32K stream was the example

11 I gave, and that most of the streams that I had

12 measured had been about 32K. To me, that quality had

13 been roughly FM quality or above.

14 Q So when you said in your testimony that it

15 is possible for there to be no loss of quality when

16 the recording is played, copied, or transmitted, in

17 the case of most Internet users there is in fact a

18 loss of quality. Correct?

19 A Yes.

20 Q For the users with the higher speed

21 connections, and it would be fair to say that higher

22 speed connections are sometimes referred to as

1 broadband connections?

2 A Yes. That's right.

3 Q For those broadband users, if they are to

4 receive an increased quality of sound, then the

5 webcaster needs to send more digits. Right?

6 A Yes.

7 Q And more digits uses more bandwidth?

8 A Yes.

9 Q And that is more expensive for the

10 webcaster. Right?

11 A Yes. Again, assuming that they have a

12 marginal cost on the digits, but that's right. In

13 other words, if they owned that and they had extra

14 capacity, like the example of the airplane. If you

15 were to lift the armrest between the seats, it would

16 not cost you anything if you had extra seats. But if

17 you in fact had to take someone off the plane to let

18 that person go, there would be a cost. That is often

19 the circumstance, so you are right.

20 ARBITRATOR VON KANN: How do you own

21 bandwidth?

22 THE WITNESS: For example, and I would

1 call it ownership, to my office I have a dedicated
2 pipeline that guarantees me 1.54 mbps at any given
3 time. If I am using 384, I have a great deal left
4 over. It is at zero marginal cost for me to use
5 because it is a dedicated circuit to me.
6 It is as if say I had a four lane driveway
7 and if I generally am only using one, I could use the
8 other three and there would be no inconvenience to me
9 to do so, provided that I didn't have more cars than
10 that.
11 BY MR. COHEN:
12 Q Mr. Griffin, when you testified that most
13 Internet users are accessing the Internet through
14 something that's no faster than a 56K dial-up modem,
15 you're aware, aren't you, that in fact the vast
16 majority of Internet users, close to 90 percent of
17 Internet users, are in fact accessing the Internet
18 through a connection that is no faster than 56K modem?
19 A I can't verify that number, I really
20 can't. I do agree that it's the majority. Ninety
21 percent seems at odds with what I know, but it's a
22 guess.

1 Q Okay. If a GAO study concluded that 88
2 percent of Internet users are accessing through speeds
3 no faster than a 56K dial-up modem, you're not in a
4 position to dispute that, are you?
5 A I would look carefully at the data, the
6 study, and the time during which the study occurred
7 and the methodology that was there.
8 Q Okay. Sitting here today, are you in a
9 position to dispute that number?
10 A No. Just to say that to me it didn't
11 sound right.
12 Q Okay. And what's -- do you have any basis
13 to provide data or numbers to the Panel on what
14 percentage of Internet users are using broadband
15 connections as opposed to 56K?
16 A No.
17 Q Now, turning to your video demonstration
18 --
19 ARBITRATOR VON KANN: What is the
20 difference in cost to the listener between using a 56K
21 dial-up modem as their access to the Internet versus
22 the snazzy pipe that you've got?

1 THE WITNESS: I think there's a
2 significant cost to them.
3 ARBITRATOR VON KANN: Is that bigger than
4 a break basket, smaller than a battleship? I mean
5 what are we talking? How much?
6 (Laughter.)
7 Significant cost is a very -- is a pretty
8 loose term.
9 THE WITNESS: Well, the actual cost is one
10 issue, but the tariffs, which regulatory agencies
11 generally set for communication interconnects. For
12 example, in southern California, the cost for a DSL
13 connection that runs at -- it may average around 512
14 to 768K maybe around here downloading is currently
15 provisioned at $29 a month, with about $150
16 installation fee. And then the user would have to
17 buy, say, a card for $50 that could talk to the box
18 that was provided by the phone company under that
19 circumstance. To a collect student, what we would
20 call broadband is generally provided in a dormitory
21 room.
22 The notion of the user with a modem, the

1 cost is significantly low, because I've seen modems as
2 cheap as $10 to $15. And you need to use your phone
3 line, and perhaps if you want to dedicate it, you
4 would have a second phone line. But you could use
5 your existing phone line and put in a modem for a very
6 low fee.
7 ARBITRATOR VON KANN: And this one that
8 you've got is $100 installation and $29 a month?
9 THE WITNESS: That's not the one that I
10 personally use; that's what PacBell tariffs its
11 current DSL lines at, I believe.
12 ARBITRATOR VON KANN: That doesn't,
13 frankly, sound to me all that significant. And for
14 somebody who's dead set to get all the "Monster Mash"
15 they can, the best quality they can, $29 a month is
16 not prohibitive. We're not talking thousands of
17 dollars a month, obviously.
18 THE WITNESS: Oh, no. Thousands of
19 dollars a month would be this up here. We pay around
20 $2,000 a month for our 1.5 mbps connection. But there
21 is a difference. What we pay is much of this for
22 management fees. And the 700 to 500K connection, the

1 one we get for $29, would not have any network
2 management associated with it, like, for example, mail
3 servers and so forth, for a business.
4 ARBITRATOR VON KANN: What I'm trying to
5 get a sense of are you saying that for $29 a month
6 instead of $10 a month I can get CD quality over the
7 Internet?
8 THE WITNESS: It is possible for you to do
9 so. If someone wants to send you that file at those
10 bit rates, it is possible.
11 BY MR. COHEN:
12 Q Now, the video that you showed, you were
13 using a computer that had a high-speed or broadband
14 connection, right?
15 A Three hundred and eighty-four kilobit --
16 it was a symmetrical connection; meaning it sends and
17 receives at both 384.
18 Q Okay. And what kind of connection was
19 that? Was it a DSL or cable?
20 A Yes, digital -- DSL connection. And I
21 will just point out that cable modems and DSL they're
22 a lot alike in terms of the speed that they deliver,

1 but a DSL is what we call star topology, and a cable
2 modem is a circle, or a ring. And so, for example, we
3 call it a home run. Every DSL connection goes back to
4 the central office of the telephone company, whereas
5 cable modems loop like Christmas tree lights.
6 Q The connection that you use for the video,
7 that's faster than most Internet users have access to,
8 right?
9 A Yes.
10 Q And if you had done your video
11 demonstration over a 56K modem, that would have been
12 a very different user experience that you portrayed,
13 right?
14 A Yes.
15 Q The sound quality might have been lower?
16 A Yes.
17 Q And the pages would have loaded much
18 slower?
19 A Might have been, yes.
20 Q Now, you went on to demonstrate some
21 programs that captured streams; do you remember that?
22 A Yes.

1 Q When did these programs first become
2 available over the Internet, if you know?
3 A Let's see, these programs, in particular,
4 I believe, late 1999, early 2000, roughly in there.
5 Q Leaving aside these particular programs,
6 are you suggesting that -- there are other programs
7 that you know of that perform similar functions,
8 right?
9 A Yes. If you will recall, I drew a
10 difference between what I called intelligent buffers
11 and dumb buffers. And I think dumb buffers have
12 always existed in the sense as long as there's been
13 computers, roughly, they could be used to record
14 audio. And so as long as there have been computers,
15 we've been able to use them to record sound.
16 Q Now, in the video, that was Exhibit 208
17 that you showed us, we saw you download and install a
18 Winamp player, right?
19 A Yes, that's right.
20 Q And you opened up an audio stream from a
21 site called SHOUTcast.com?
22 A Yes.

1 Q And then you went into the Winamp software
2 and you clicked "start" in a window that was called,
3 "Streamripper;" do you remember that?
4 A Yes, I do.
5 Q And you went on to play a Peter Gabriel
6 song and play it back; do you remember that?
7 A Yes.
8 Q Okay. Now, you testified, though, that
9 you didn't actually show all the steps that would be
10 necessary to accomplish what you did with Streamripper
11 in the video, right?
12 A That, I'm not following you exactly.
13 Q Well, you testified that you would have
14 had to separately download and install the
15 streamripping program --
16 A Oh, yes. Streamripper was already there.
17 Q Right. That was not something that you
18 showed in the video.
19 A Right.
20 Q And isn't it true that Streamripper only
21 works on Winamp?
22 A Yes.

1 Q And so in order to have Streamripper
2 working with Winamp, the user would have to take some
3 affirmative action, go outside the confines of the
4 webcasting service, certainly, and as you said,
5 outside of the confines of Winamp, download and
6 install this program, right?
7 A Yes.
8 Q And Streamripper's a program that requires
9 the user to take some steps to configure it too,
10 correct.
11 A Yes, although, just to be really clear, I
12 would refer to it more as a plug-in than a program,
13 but, yes.
14 Q Okay.
15 A Because it works in conjunction with a
16 program.
17 Q Okay.
18 A And adds functionality to the program
19 itself.
20 Q Okay. Now, the plug-in, though, that has
21 to be configured by the user before it will work
22 properly with their computer and their player and the

1 streaming services that they want to capture, correct?
2 A I'll be honest, I don't recall configuring
3 it myself. I believe that I installed and it worked.
4 Q So your testimony is that you download and
5 install it, and that's it, you're good to go?
6 A It started working with Winamp after I did
7 that. I know that there are configuration options,
8 but in the default mode it offered the ability to
9 record when I started up Winamp the next time.
10 Q Okay. And just so that no one is left
11 with the wrong impression from that video, Winamp
12 alone, without the plug-in, is not sufficient to
13 allowing capturing of streams, right?
14 A You're right.
15 Q That's not a feature of the Winamp player?
16 A You're correct.
17 Q Okay. BitBop, again, you didn't actually
18 show that being downloaded and installed on the video,
19 right?
20 A That's right.
21 Q And, again, if a user wants to use BitBop
22 to capture streams, they're going to have to go out

1 and find the BitBop, download it, install it before
2 they can use it, correct?
3 A Yes.
4 Q Did you know that BitBop has a maximum
5 recording rate of 40K?
6 A No, I didn't know that.
7 Q Forty K is a fairly low quality, correct?
8 A No. As I said before, I consider 32K to
9 be roughly FM or above. So I could not agree with you
10 40K is low quality, because I consider FM to be good
11 quality, not low quality.
12 Q Okay. Well, it's significantly lower
13 quality than CD quality, correct?
14 A I think it depends on the speakers you're
15 listening through, but it theoretically has much less
16 potential for quality than a higher bit rate sample.
17 Q And you testified that BitBop only
18 captures Real Audio streams?
19 A Yes.
20 Q Okay. And if we can turn to page 40 of
21 your little booklet of screen shots, each of the
22 entries there under artist says, "Peter Gabriel, any

1 song from any album."

2 A Yes.

3 Q Isn't it the case that this screen of the

4 BitBop tuner always says, "Any song from any album?"

5 A I don't know that to be true.

6 Q Well, you weren't trying to suggest that

7 you can search for a particular song using BitBop,

8 were you?

9 A No, in fact, I did say specifically that

10 you could not, that I did not see an interface that

11 allowed me to enter a specific song that I wanted.

12 Q Okay. And the BitBop program itself

13 doesn't allow files to be transferred off your hard

14 drive unless you take some affirmative steps to make

15 that happen, correct?

16 A I believe that's right, although I did

17 not, for example, test it a lot. So the negative that

18 you're suggesting is hard to prove, but I think you're

19 right. That's what's been represented to me, and I

20 don't have any evidence to contradict it.

21 Q Okay. Even though you figured out some

22 method of transferring those files on your own that

1 you told us about, right?

2 A Yes.

3 Q And you're not suggesting that the average

4 consumer would be capable of or is in fact doing that,

5 are you?

6 A Well, I think they're capable of it. I

7 don't know the incidence of their doing it.

8 Q Okay. You don't believe that this is

9 something that the average consumer would actually do

10 today, do you?

11 A The average consumer, no.

12 Q Okay. Now, when you demonstrated Live

13 365, were you aware that Live 365 has now spent a lot

14 of money developing their own player, which is a

15 downloaded application?

16 A I believe that's true.

17 Q Okay. And you showed on page 34, in the

18 bottom right, there's a reference to Player 365,

19 right?

20 A Yes.

21 Q That would be it?

22 A Yes.

1 Q And it's correct, isn't it, that several
2 webcasters have developed their own player software to
3 be downloaded by the user, right?
4 A That's right.
5 ARBITRATOR VON KANN: Would this one we
6 just looked at replace Winamp?
7 THE WITNESS: It could.
8 ARBITRATOR VON KANN: It could. And so if
9 somebody went to that and didn't have Winamp, then
10 they couldn't use Streamripper.
11 THE WITNESS: Right.
12 BY MR. COHEN:
13 Q By the way, all these players, the skins
14 that you showed, the designs, those are all programmed
15 by the webcaster, right.
16 A Yes. Well, in that case, the skins can be
17 programmed by the end user and contributed to a
18 library that the webcaster provides, because they do
19 encourage the end users to build their own interfaces.
20 Q Certainly, the original tuner interfaces
21 and the designs of the web sites and of the original
22 tuners those are done by the webcasters, correct?

1 A Yes.

2 Q Now, with Friskit, Friskit is not a

3 recording device; is that correct?

4 A That's right.

5 Q Just finds where on the Net recordings are

6 being streamed, correct?

7 A Right.

8 Q And is it your testimony that Friskit can

9 be used to locate a streaming webcast of the type

10 that's involved in this proceeding and qualifies for

11 the statutory license?

12 A It can find pages that reference content,

13 but it may not find those streams. And then again it

14 may, because they may be referenced on the textual

15 page itself.

16 Q I see. So unless the stream is actually

17 -- unless there's a textual reference on the page to

18 the steam, Friskit can't find it.

19 A It doesn't understand media or what's

20 inside of packets.

21 Q Okay. So in other words, unless the

22 webcaster listed the artist that it was streaming on

1 its page, Friskit wouldn't be able to find the stream.
2 A Right. It would not find it under that
3 circumstance; Friskit would not.
4 Q Okay. It wouldn't know that at any
5 particular time a webcaster was streaming a sound
6 recording by a particular artist.
7 A Friskit does not have that level of
8 intelligence built into it.
9 Q Okay. So isn't it the case that none of
10 the ripping programs that you demonstrated allow you
11 to do a search for a particular song, right?
12 A For a particular song, that's right.
13 Q Right. The most that you can search for
14 would be an artist, correct?
15 A Well, no, because if you had -- if it had
16 recorded the song for you, you would simply go to your
17 hard drive and play that song. So once it had done
18 its thing, it would be easy to choose the song.
19 Q Right.
20 A But until it had done that, it would not
21 be possible.
22 Q So what you're talking about is an example

1 of what you call a dumb buffer or, I guess, if it's
2 one of these ones that's selected out by artist, it
3 wouldn't be a dumb buffer. But you're saying that
4 later you could go back and find the song that you had
5 recorded, not that the service would search out a
6 particular song and record it for you.
7 A It can find a particular -- well, to say
8 it can't would be inaccurate, because my own
9 observations say that if they wanted to put that
10 functionality in there, they could investigate the
11 packet and do that. But in fact it does not right
12 now. And so it knows -- it lets you say, "I would
13 like this artist." And once it has recorded those
14 songs to my hard drive, then I could pick the song
15 that I wanted. But you're right, that until that had
16 happened, I would be able to have it take a particular
17 song until it had found it.
18 Q Okay. Let me ask you this: Aren't there
19 certain copy protection mechanisms that are applied to
20 stream programming?
21 A There can be copy protection mechanisms
22 applied.

1 Q Okay. And how do these ripping programs
2 deal with copy protection mechanisms?
3 A How do they deal with them?
4 Q Yes. For example, what does BitBop do if
5 it encounters a copy protection mechanism?
6 A I don't know. Because in the case of what
7 I was watching, it did not encounter any copy
8 protection mechanism, so I don't know what it would
9 do. It was able to find out what was in the Real
10 Streams, and it grabbed them.
11 Q Well, aren't there copy protection
12 mechanisms that can be used with Real Streams?
13 A Not if have access to the Real software
14 kit. In other words, in my example, BitBop uses
15 Real's intellectual property to do what it does. So
16 whatever Real could do it could do, as long as it has
17 access to that software, and it does. It uses it. I
18 mean in that case, I guess if you mean by copy
19 protection that they could go to court and say, "Don't
20 use our software anymore," that would be different.
21 But I think you were referring to a mechanism for copy
22 protection as opposed to something else. And I don't

1 know of a mechanism that is employed there to stop it.
2 And I didn't see any interaction like that, so I don't
3 know how it would deal with it.
4 Q Okay. You mentioned the Streambox case at
5 one point in your testimony. Do you remember that?
6 A Right. That was, as I understand it, a
7 legal issue; it wasn't a technical issue.
8 Q Well, do you remember that one of the
9 issues in that case had to do with the copy protection
10 ability that's built into the Real Stream?
11 A Well, that's your phrase. I mean I use
12 the phrase handshake, because I think they meant it to
13 be the equivalent, but I don't personally call that
14 copy protection. It's merely a gate that someone has
15 set up and they say, "You should not pass this," but
16 I don't think there was anything technical that
17 prevented it, obviously, or the Ferret wouldn't have
18 worked.
19 Q Right. So the issue then with BitBop is
20 that if there's a gate set up, it chooses to ignore
21 the gate, right?
22 A In this case, it acts like it has

1 permission to go through the gate, because it uses the
2 same software kit that the content is created in.
3 Q Okay. And you're familiar from your
4 experience with the Streambox case with provisions of
5 the Digital Millennium Copyright Act that provides for
6 both criminal and civil liability when copy protection
7 mechanisms are circumvented, right?
8 A That's a conclusion really far afield for
9 me. I apologize. I'm not interpreting the law. I
10 turn to guys like you and these guys.
11 Q Yes. I'm not asking for your
12 interpretation. I mean you're familiar with those
13 anti -- the fact that there are anti-circumvention
14 provisions in the DMCA, right?
15 A I've heard this. Again, I'm not
16 intimately familiar with it.
17 Q Okay. You know that those provisions have
18 been invoked in various lawsuits, right? You've heard
19 of those lawsuits?
20 A Not about the specific copy protection.
21 That part I'm not familiar with. It might have
22 happened; I just don't know it.

1 Q Okay. You're not familiar with a recent
2 incident where I think it was a Russian hacker was
3 arrested in the United States --
4 A Oh, you mean over a book, over the
5 electronic book.
6 Q Yes. You're familiar with that, right?
7 A The anti-circumvention provision.
8 Q Correct.
9 A Right.
10 Q You're familiar that those provision
11 exist.
12 A Right, because there was a mechanical way
13 that they were trying to stop someone from using
14 something, and he had created a way to get around the
15 mechanical way, the device.
16 Q Okay. But you don't recall in the
17 Streambox case those anti-circumvention provisions
18 were at issue; is that what you're saying?
19 A It may have come up. I don't recall that.
20 I recall the primary issue being the handshake between
21 the two and whether it was appropriate to use their
22 handshake.

1 Q Okay. You're not suggesting that it's not
2 the case that --
3 A No, and in fact I'm suggesting, clearly,
4 that as far as understanding the law and that which
5 you have to deal with your in average day, I am not
6 your witness.
7 Q Okay. So you're not in a position -- you
8 didn't know that copyright owners are free to use
9 those provisions of the DMCA if a violation's
10 occurring, right?
11 A That sounds like a conclusion that I've
12 heard many views about. People have told me that that
13 was unconstitutional and couldn't be invoked. So I
14 don't really know, to be honest with you, but what I
15 do know is that in that particular case there was not
16 a mechanism that stopped it, and it didn't encounter
17 a mechanism that was a problem.
18 Q Okay.
19 ARBITRATOR VON KANN: When you refer to a
20 handshake, are you talking about what lawyers would
21 call a contract, a legal relationship --
22 THE WITNESS: No.

1 ARBITRATOR VON KANN: -- or are you
2 talking about some kind of a technical handshake?
3 THE WITNESS: What I'm referring to, as I
4 understand it, is a protocol that says, and I'll just
5 do this loosely, "Hi, I'm computer at such-and-such an
6 address, and I've got a connection of roughly this
7 speed, and I'd like this content." And the other
8 computer is saying, "And I'm at this address, and I've
9 got this amount of connection and this," and
10 establishing a protocol to go forward further but not
11 a contract or an agreement, as I know it to be.
12 ARBITRATOR VON KANN: Okay.
13 BY MR. COHEN:
14 Q Now, you've said, basically, that
15 streaming and downloading are really essentially the
16 same thing, right?
17 A Well, I pointed to three differences that
18 I could find that in my mind I could construe.
19 Q Okay. I think you said somewhere in your
20 testimony that something about externally measurable
21 differences, that there really are no externally
22 measurable differences between streaming and

1 downloading, remember that?

2 A Well, yes, but I did refer to one that is
3 correlated to streaming and downloading but not
4 causative. In other words, we could look to see is it
5 a UDP packet or a TCP packet, and we might draw a
6 correlative distinction there, but it wouldn't be
7 causative. In other words, because one was UDP and
8 the other was TCP, it wouldn't establish that one was
9 a stream and the other was a download, but one would
10 be correlated more with the other.

11 Q Right. Okay. But regardless of that,
12 you're aware, aren't you, that copyright law provides
13 for separate rights and performances as opposed to
14 reproductions, right?

15 A Now we're within the scope of what I can
16 tell you about music and the law, working for a music
17 publisher and so forth. Yes, I'll agree with that
18 one.

19 Q Okay. And you would agree, wouldn't you,
20 that the use of these various ripping programs results
21 in reproductions, or copies, of copyrighted works,
22 correct?

1 A Yes.

2 Q And you know, don't you, that copyright

3 owners are free to, and in fact have, pursued remedies

4 against those they believe are making illegitimate,

5 unlicensed copies of copyrighted works, correct?

6 A Sometimes yes, sometimes no.

7 Q But they could, right?

8 A That I'm not sure about, because I mean

9 what you're now asking me to apply it to is a Tivo-

10 like circumstance, and there I'm on much shakier

11 ground, and I can't -- that legal thing I don't know.

12 Q I'm not asking you to apply it. I'm just

13 asking you, you know, don't you, that where there

14 unlicensed, infringing reproductions -- I'm not saying

15 whether these are them or not -- copyright owners are

16 free to pursue remedies.

17 A If something's infringing, you can pursue

18 a remedy.

19 Q Correct.

20 A I believe that to be true.

21 Q And you know that the licenses that we're

22 dealing with in this proceeding deal with performance

1 rights and sound recordings and a limited statutory
2 right to make ephemeral, what are called ephemeral
3 reproductions, correct?
4 A Yes, I understand that.
5 Q Okay. Now, you recall when we were
6 discussing encoding we talked about how webcasters are
7 required to provide identifying information in the
8 form of textual data about the sound recording as a
9 condition to be eligible for the license?
10 A Yes, I understand that.
11 Q Okay. And isn't it true that the presence
12 of this identifying data in the streamed digital files
13 allow programs like BitBop, for example, to search for
14 and identify sound recordings by characteristics like
15 the artist's name?
16 A No, that's a conclusion I don't concur
17 with.
18 Q Okay. Well, how is it that BitBop is able
19 to identify the artist's name?
20 A My only point is that it doesn't have to
21 be identified in an openly discernable way. For
22 example, yes, information does need to appear on the

1 screen at the end result. In other words, my
2 understanding of the statute is that when I'm looking
3 at the player roughly after the song begins -- I think
4 it's 15 seconds or something like that; I'm not sure
5 -- but that these contents should come up in text.
6 But it doesn't necessarily follow that every packet
7 that's delivered has to contain all of that
8 information in an openly discernible way. That could
9 be sent along an allied path or it could be encoded
10 inside of it or it could just be contained in the
11 first packet that came or -- do you see where I'm
12 coming from?
13 Q Well, regardless of how it could be done,
14 isn't it the case that it's data that's encoded in the
15 digital files that are streamed that results in the
16 display of the textual data identifying artist, album,
17 song name?
18 A In the case of Real Audio, you're right,
19 but in some of the others it's done another way.
20 Q Right. And I asked you about BitBop,
21 right?
22 A I don't recall that that was a predicate

1 of this, but if it is, yes.

2 Q Well, I'm presenting to you that I asked

3 you about BitBop, and you've already testified that

4 BitBop records Real Audio streams, correct?

5 A Yes, that's right.

6 Q Okay. Now, you know, don't you, that none

7 of the webcasters who are parties to this case offer

8 Steamripping programs or functionality?

9 A I believe that to be right.

10 Q And, in fact, isn't it true that they're

11 required to accommodate and not interfere with

12 technical measures used by sound recording copyright

13 owners to protect copyrighted works?

14 A I don't know the extent of their legal

15 duties and requirements.

16 Q Do you know what measures sound recording

17 copyright owners have used to protect their

18 copyrighted works in the streaming context?

19 A I just want to hear the question one more

20 time, because I want to make sure I understand who the

21 actors are here and what they were doing.

22 Q Well, what I'm asking you is are you aware

1 of measures that have been used by sound recording
2 copyright owners, record companies --
3 A Right, okay.
4 Q -- to protect copyrighted works that are
5 streamed over the Internet?
6 A That are used to protect copyrighted works
7 that are streamed. I'm not familiar with that,
8 because the webcaster sends the stream, not the record
9 company, so I'm not sure how the record company has
10 the webcaster do it. I believe that there may have --
11 I'm not privy to the discussions that are there, but
12 because the webcaster sends the stream, they're the
13 ones that would have to do that work, not the record
14 company.
15 Q Okay. Well, regardless of who would have
16 to do the work, your answer is you're not aware of any
17 such measures being used by sound recording copyright
18 owners, correct?
19 A The RedBook Audio standard itself, which
20 recording companies have to use, I know it's a very
21 technical term, but for compact discs we have several
22 standards, and typically they are given color names.

1 And in this case it's called the RedBook Audio
2 standard. And so if you want to sell a compact disc
3 that plays in a compact disc player anywhere in the
4 world, it should comport to the RedBook Audio
5 standard. And that, in and of itself, I don't believe
6 has any mechanism that stops someone from taking it,
7 although there have been some attempts to create
8 mechanisms like that.
9 Q Okay. You're not suggesting that
10 webcasters are somehow violating the RedBook Audio
11 standard and streaming copyrighted works, are you?
12 A Oh, no.
13 Q And the RedBook Audio standard is not a
14 measure that would protect copyrighted works in
15 streaming, right?
16 A No, quite the opposite; it opens it up.
17 Q Okay. And are you aware that also in
18 order to qualify for the compulsory license webcasters
19 are required to cooperate to prevent scanning of their
20 transmissions for purposes of selecting particular
21 sound recordings?
22 A I don't know the degree to which they have

1 a legal duty there or what they're required to do.
2 Q Okay. You don't know one way or the
3 other, that's what you're saying.
4 A I can't interpret what they're required to
5 do under that statute.
6 Q Okay. And did you know that they're also
7 not required -- they're required not to take any steps
8 that would cause or induce the making of phono records
9 by recipients of their transmissions?
10 A I believe that to be true, but I didn't
11 personally interpret it to be that, but I've heard it
12 said that way.
13 Q And they're required to use settings on
14 the technology they use that would permit them to
15 limit the making of phono records by transmission
16 recipients, right?
17 A Certainly, I don't have any evidence that
18 confirms that, because when I look at the streams I'm
19 able to get them all. But if that's your conclusion
20 about it --
21 Q Well, I'm asking are you aware that that's
22 a requirement under the law?

1 A I didn't personally see what they are
2 required to do in there, no.
3 Q How many people were using streamripping
4 programs in 1998?
5 A I don't know how many.
6 Q And how about 1999?
7 A I don't know how many.
8 Q Two thousand?
9 A I don't know.
10 Q Today?
11 A I don't know how many are using it.
12 Q And are you aware of any sales of sound
13 recordings that have been displaced by streamripping?
14 A Am I aware of any, yes.
15 Q Okay. Are you talking your brother?
16 A I'm talking about people I know, yes; my
17 brother included but others.
18 Q Are you aware of any studies or analyses
19 indicating displacement of sales of sound recordings
20 by streamripping?
21 A No.
22 Q And are you aware of any studies or

1 analyses on potential promotional benefits and
2 increased sales of sound recordings through the use of
3 streamripping technologies?
4 A I'm not aware of any studies on this.
5 Q Okay.
6 ARBITRATOR VON KANN: Did you say a moment
7 ago -- it went by me quickly, and I wasn't sure --
8 that it would be possible technically for the record
9 companies, in making the CDs, to encode something on
10 the CD that would defeat streamripping?
11 THE WITNESS: They are trying, but there
12 is no proof yet that they can, and the difficulty is
13 the installed base of current compact disc players,
14 which is many tens of hundreds of millions of them, I
15 guess, worldwide respecting RedBook Audio standard
16 that was built awhile back. And so the difficulty is
17 building some anew in the disc that can nonetheless be
18 played in this installed base. And we are pretty much
19 stuck with the RedBook Audio standard.
20 In fact, I can tell you that what work is
21 being done in this area sort of tries to create the
22 generation of errors that a compact disc player could

1 ignore but a computer couldn't. And thus far that has
2 proven so difficult that the few attempts that I have
3 seen that have been made have been withdrawn from the
4 market, because they reduced potential sales, because
5 people were worried that it wouldn't work in their
6 compact disc player and for relatively good reason.
7 Sometimes there would be pops and clicks
8 through the error introduction, as I mentioned. It's
9 forcing errors upon the CD player -- or upon the
10 computer that theoretically it shouldn't be doing to
11 the CD player, but sometimes those come through too.
12 And, in fact, I've seen it happened that it caused a
13 transient spike on my speakers that caused me to have
14 to replace one of the speaker tweeters, the transient
15 spike.
16 BY MR. COHEN:
17 Q I asked you, generally, earlier about the
18 availability of streamripping programs and when that
19 started. Can you tell me with respect to the specific
20 programs or plug-ins that you've demonstrated, when
21 did Streamripper first become available?
22 A I don't know that date. I heard about it

1 anecdotally afterwards, and so I don't know the date
2 that it was first available.
3 Q Okay. When did you first hear about it?
4 A I guessed that it was late '99, early
5 2000, but that's a guess.
6 Q And what about the BitBop application?
7 A I heard about that, I'd say, around
8 Christmastime, maybe a little bit before that.
9 Q Christmastime 2000?
10 A Yes.
11 Q And what about Friskit?
12 A I'd say I heard about that during 2000
13 sometime, but that's just my best recollection.
14 Q Okay. Now, turning to, again, your
15 Attachment B, the process of webcasting.
16 A Yes.
17 ARBITRATOR VON KANN: Are those three that
18 you talked about -- Friskit, Streamripper, BitBop --
19 the only three out there or they're three of 3,000 or
20 I mean are they just illustrative of a vast array of
21 ripping capabilities or is that pretty much what's
22 currently available if one wants to do that?

1 THE WITNESS: I think they're
2 illustrative, but they will probably be some of the
3 more prominent examples from their area. It is fair
4 to say that any audio recorder that works on a
5 computer can perform the function of a down buffer,
6 but these are examples as the intelligence grew over
7 time.
8 ARBITRATOR VON KANN: Okay.
9 ARBITRATOR GULIN: How would you compare
10 the quality of a BitBop-captured stream versus the
11 quality if I simply tape record with a high-quality
12 tape recorder over an FM station?
13 THE WITNESS: I would call them roughly
14 comparable.
15 ARBITRATOR GULIN: About the same?
16 THE WITNESS: In terms of audio quality,
17 but I would call them distinctly different in terms of
18 operation in the sense that starting a tape recorder
19 is really a dumb buffer that requires a mechanical
20 operation in a human being. And BitBop I would
21 distinguish through its intelligence that I don't even
22 have to be there when it's running. That would be the

1 difference to me, but the sound quality, I agree with
2 you, it's similar.
3 ARBITRATOR GULIN: So practically
4 speaking, BitBop -- if I want to make copies for
5 myself, say, two or three tracks from a CD that I
6 like, and I don't want to buy the CD, what I want to
7 do is I want to capture the streams. What I have to
8 do is I download BitBop tuner and I indicate that I
9 want songs from this particular artist, and then I
10 wait to see -- it may take -- how long do you think it
11 would take before I got, on average -- say, talking
12 about a popular CD, say pop music today?
13 THE WITNESS: I wouldn't be surprised if
14 you went to lunch and you did not come back and there
15 were a half dozen songs there or at the minimum three.
16 I've left it running for an hour and never really had
17 less than three or four songs having typed in --
18 ARBITRATOR GULIN: But if I want three
19 specific songs from a particular CD so I don't have to
20 buy that CD, it may take, what, several days?
21 THE WITNESS: In your speculation of a
22 popular artist, I don't --

1 ARBITRATOR GULIN: Say N'Sync.

2 THE WITNESS: I'm thinking that takes

3 maybe three or four hours

4 ARBITRATOR GULIN: Three or four hours to

5 get the three songs I want.

6 THE WITNESS: Yes, that's my guess, and

7 I'm merely guessing. But I do that in the context of

8 tens of thousands of streams at any given time.

9 ARBITRATOR GULIN: Okay. And I assume I

10 would -- to get those three, I would probably have

11 downloaded or whatever the term is, captured to my

12 hard drive many, many tracks, correct, in order to get

13 those three?

14 THE WITNESS: Yes. There would be -- in

15 other words, it would get some that you didn't want in

16 addition to the ones that you did.

17 ARBITRATOR GULIN: Well, not just some, it

18 would be a lot, wouldn't it?

19 THE WITNESS: Depending upon the artist

20 and their collection. So, for example, N'Sync has not

21 had a really long career thus far, and so there would

22 be less to choose from. And so the odds of you

1 getting what you want would be high. But if you chose
2 Van Morrison, let's say, your odds would be lower,
3 because he has such a great body of work that's
4 available, both in terms of quality and quantity.
5 ARBITRATOR GULIN: So the fact that we're
6 dealing with a digital transmission doesn't have a lot
7 of relevance or significance here in terms of the
8 copying. It has relevance and significance only in
9 terms of I can use an intelligent buffer to get the
10 songs that I want.
11 THE WITNESS: The distinction is lost on
12 me, because if I don't have to be there to copy it,
13 and it will get the start to the end of the song
14 without my intervention, I think that's very different
15 personally. But because I would -- I would even find
16 it difficult to hit the start button at the right time
17 and the stop button at the right time, but BitBop
18 takes care of that for me.
19 So I think it's a different process, but
20 I think you're right as regards audio quality at this
21 time. BitBop and the radio would be similar, but I
22 don't draw the conclusion from that that the process

1 is similar, because one is unattended and the other
2 requires a lot of attention.
3 ARBITRATOR GULIN: Okay. Thank you.
4 CHAIRMAN VAN LOON: Mr. Cohen, I'm
5 thinking of taking the break now unless you have just
6 a couple minutes. If you're going to have --
7 MR. COHEN: No, I have quite a bit more.
8 CHAIRMAN VAN LOON: I suspected that. Why
9 don't we come back at 3:30?
10 (Whereupon, the foregoing matter went off
11 the record at 3:13 p.m. and went back on
12 the record at 3:30 p.m.)
13 CHAIRMAN VAN LOON: We'd like to go back
14 on the record then and proceed. Mr. Cohen.
15 BY MR. COHEN:
16 Q Turning to Attachment B in your written
17 testimony, again, that's the process of webcasting.
18 A Be right there. Okay, I have it in front
19 of me.
20 Q In the bottom right, you show an arrow
21 going from the hard drive to the CD burner.
22 A Sure.

1 Q Okay. You're not seriously telling the
2 Panel that burning CDs is part of the process of
3 webcasting, are you?
4 A It's part -- it could be; sure, I've done
5 it. It's part of listening to a webcast.
6 Q Okay. So you didn't see fit to indicate
7 explicitly the encoding process or to even use the
8 word "encoding," but you thought it appropriate to
9 indicate CD burning as part of the webcasting process?
10 A No, in fact, I used the word "encoder."
11 Q Yes, not in connection with Internet-only
12 webcasts, right?
13 A That wasn't there. No, not up there.
14 Q And if you were going to devise a
15 depiction of the process of over-the-air broadcasting,
16 you wouldn't put a little tape recorder at the end,
17 would you?
18 A I might if we were dealing with what
19 happened to music.
20 Q Now, have you -- as a consultant, you've
21 been involved in operation of webcasting businesses?
22 A You mean ongoing operations of a

1 particular webcaster, no.

2 Q No, you haven't, oh.

3 A Not as a part of their ongoing operations.

4 Q Okay.

5 A I've worked with people to decide if they

6 want to be one.

7 Q I see.

8 A If that's an appropriate course of

9 business, what are the things involved with it, if

10 they're running one, how might they maximize their

11 revenues. But it's not the day-to-day operation.

12 Q I see. Well --

13 A That's not my specialty.

14 Q -- you would agree that the webcasting

15 business is in its infancy?

16 A Yes.

17 Q And you would agree, wouldn't you --

18 ARBITRATOR VON KANN: You use that word in

19 your testimony, don't you?

20 THE WITNESS: Yes.

21 BY MR. COHEN:

22 Q You would agree that that makes it hard to

1 run a webcasting business, right?

2 A Yes.

3 Q And it makes things hard to predict?

4 A Yes.

5 Q There are financial, technological, and

6 legal uncertainties, right?

7 A We don't know what the license fee is,

8 yes.

9 Q Correct. So there's a high degree of risk

10 involved?

11 A Yes, there is risk.

12 Q And that can make it hard to get funding

13 and find people who want to invest in your company,

14 right?

15 A That cuts both ways. Some people like

16 high risk, some people don't. With one investor, it

17 might be just the thing; with another, it might be the

18 wrong thing. It depends on the investor and their

19 portfolio.

20 Q Investors who don't want high-risk

21 investments might not want to invest in a webcasting

22 business.

1 A They might not.

2 Q Okay. And you would agree, wouldn't you,

3 that in this kind of environment that webcasters would

4 keenly interested in reducing or eliminating

5 uncertainties or risks to the extent that they could,

6 right?

7 A I think any businessperson would look to

8 reduce their risks.

9 Q Right. And at page 11 of your written

10 testimony --

11 A Let me get there. Hold on just a second.

12 Okay, I'm there.

13 Q You state that, quote, "Since 1998,

14 hundreds of companies have entered the webcasting

15 industry with a variety of services and business

16 models, right?

17 A Yes.

18 Q Now, you would agree, wouldn't you, that

19 if you were trying to determine the hypothetical

20 commercial behavior of a webcaster, it would be wrong

21 to equate webcasters who had different services and

22 business models with each other, right?

1 A I think there are things that could be
2 equated and things that wouldn't. I wouldn't agree
3 with a blanket statement that any equations would be
4 wrong. So I can't agree with you there, but I will
5 agree it's possible that some may or may not work.
6 Q Okay. And in some respects, in terms of
7 their commercial behavior, webcasters with different
8 services, different business models are not
9 comparable, correct?
10 A I think there are things that are
11 comparable about them. You're again asking me a
12 blanket statement, and, again, as a blanket statement,
13 I cannot agree with you.
14 Q There are things that are comparable about
15 them; there are things that are not comparable is what
16 you're saying.
17 A Yes, that's right.
18 Q Correct. And you would agree, wouldn't
19 you, that competition in the webcasting business is
20 stiff?
21 A Yes.
22 Q And along with the many uncertainties in

1 this infant industry, the stiff competition is
2 something that contributes to this risky aspect of the
3 webcasting business, right?
4 A Yes and no; it cuts both ways. It might
5 be more risky not to be in the business if you were,
6 for example, going to compete with someone who was.
7 The risk could cut both ways. The risk of not being
8 in business might be greater than the risk of being in
9 business if you are a media property.
10 Q Okay. To the extent that you're in the
11 business --
12 A Yes.
13 Q -- the fact that you have competitors and
14 that there is stiff competition is something that
15 increases your risks in that business, right?
16 A Not necessarily. The education you get
17 could teach you how to minimize risk in the future or
18 how to take the course of your business. But absent
19 that information, you run a greater risk. It depends
20 on your circumstance.
21 Q So your testimony is that in an
22 environment where there is less competition, that the

1 fact that there is less competition might increase the
2 risk of the business?
3 A No. It's that where you find less
4 competition, like when you go fishing there may be
5 less boats, you may have less fish there. That may be
6 an indication of a bad place to fish. But if you like
7 money, you might want to fish with AOL. So you say to
8 yourself, "They're not going to be far from it," and
9 you go there. So it really depends on how you analyze
10 it.
11 Q Okay. Well, if you go fishing and there
12 are only a few fish, there are more people fishing,
13 it's going to be harder for you to catch fish, right?
14 A In your example, yes, but you'll still
15 want to be where they are.
16 Q Okay. Now, when you say that many
17 webcasting businesses are, quote, "willing to incur
18 large expenses to preserve and prepare for the
19 potential upside of tomorrow," you know, don't you,
20 that many webcasting businesses have already without
21 realizing this, quote, "potential upside?"
22 A Yes.

1 Q And you know, as a general matter, that
2 those who are still in business, as you testified,
3 have lost and at least currently are losing money on
4 their streaming operations, right?
5 A Actually, I think I testified that they
6 tend to own bandwidth. They do lose money, but the
7 question of one that owns bandwidth is looked at
8 differently than one that does not. That was
9 specifically what I recall saying.
10 Q Well, let's be clear about this. You're
11 saying that the webcasters involved in this proceeding
12 own bandwidth and therefore cannot be said to be
13 losing money?
14 A No. I'm saying that they have lower
15 costs, that they have a natural advantage against
16 their competitors.
17 Q You're saying that the webcasters who do
18 own bandwidth --
19 A Yes.
20 Q -- have a natural advantage.
21 A Yes, they do.
22 Q But is it your testimony that webcasters,

1 in general, own bandwidth or are you referring to
2 certain specific webcasters?
3 A I think we know that AOL owns a lot of
4 bandwidth, and I think the suggestion was here today
5 earlier that they own everything. I won't agree they
6 own everything, but I think if you had people raise
7 their hands in this room who weren't -- if you asked
8 people to raise their hands who didn't get a dime from
9 AOL in the past year, we'd have to clear the room
10 probably.
11 (Laughter.)
12 Q Okay. Well, let's talk about those
13 webcasters who don't own bandwidth. I mean you would
14 agree there are many webcasters --
15 A Who have a rough road ahead of them.
16 Q Okay. And you know in fact that those
17 webcasters have lost and are losing money on their
18 streaming operations, right?
19 A Some have, because they have to compete
20 with people who have no marginal costs for their
21 bandwidth.
22 Q And it's your testimony that the reason

1 they've lost money, then, is because they're competing
2 with people who don't have marginal bandwidth costs?
3 A It's one of the reasons is that their
4 bandwidth costs can be quite high if they don't own a
5 pipe. They have to rent someone else's.
6 Q One of many reasons, correct?
7 A Yes, one of many reasons.
8 Q And regardless of the potential upside of
9 tomorrow, at this time webcasters, leaving aside those
10 who own bandwidth, do incur substantial expenses in
11 the form of bandwidth, storage, encoding, all the
12 other costs of running a webcasting operation, right?
13 A Yes.
14 Q And isn't it true that employment costs in
15 terms of the labor costs for highly-skilled technical
16 operating personnel are especially high, right?
17 A I can't agree with that, because a lot of
18 that's been borne through stock options that had no
19 value. I mean, in fact, quite the opposite. I
20 believe that people have taken much lower salaries
21 than they might have taken in the traditional industry
22 during -- going to work for an Internet company.

1 Q Well, let me ask you this: You said on
2 page 27 of your testimony, "Currently, the labor costs
3 for such personnel are high as demand for such
4 employees far outpaces the supply," right?
5 A Yes.
6 Q Okay. Now, with respect to most of the
7 expenses that webcasters are incurring, they can go to
8 more than one seller to get the products or services
9 they need, right?
10 A Yes.
11 Q Okay. For example, there's more than one
12 company that provides storage products and services,
13 right?
14 A Yes.
15 Q And the same would be true about
16 bandwidth?
17 A Yes.
18 Q So it would be fair to say there's a
19 competitive market for those kinds of products and
20 services, right?
21 A Yes.
22 Q And you also know that the primary source

1 of revenue that webcasters have relied on since the
2 industry started is advertising, right?
3 A Yes.
4 Q And at the bottom of page 11 and the top
5 of page 12 of your testimony, you talked about
6 advertising and new avenues for advertising, how
7 advertising can be targeted and how premium rates can
8 be obtained; do you remember that?
9 A Yes.
10 Q Okay. Do you know what recently happened
11 to the Internet advertising market, and you had
12 previously referred to a softening in the market. Can
13 you tell us a little bit more about that?
14 A I can't distinguish the Internet
15 advertising market from other advertising market, in
16 general, has been softer with the economy being
17 softer. I don't know that Internet ads have been hit
18 any differently than, say, other ads.
19 Q Well, when you don't know, are you saying
20 it didn't happen or are you saying you don't know one
21 way or the other?
22 A I'm saying I can't personally

1 differentiate them. They both seem soft to me, but I
2 think your question was specific to the Internet, and
3 --
4 Q It is.
5 A -- relatively, I didn't think it was any
6 different.
7 Q Okay. By the way, have you been involved
8 in actually selling advertising for webcasting?
9 A No, I don't sell ads myself, no.
10 Q Okay.
11 A But I can tell you that I work on
12 technologies that increase the ability for music to
13 sell ads. And we are working deeply on imbedding
14 things inside of audio streams such that it can carry
15 new kinds of advertising that can be summoned on-
16 demand. For example, we know that we can imbed inside
17 of audio into the future clues that tell you things
18 about what's happening inside the song or the band
19 that's there.
20 For example, traditionally, we might talk
21 about an advertisement as being something that you
22 hear in an oral way. In the future, we have now come

1 up with ways to imbed inside of an audio stream that
2 comes up voluntarily. Say, if you right click on your
3 mouse while you're listening to the song, you might be
4 able to find out other bands that that band likes or
5 what kind of car they drive or who their manager was
6 or ancillary information that is a new kind of
7 advertising.
8 So your question of whether I sell ads, of
9 course I have not sold them, but I work heavily on
10 developing new technologies with companies that
11 increase the ability to use audio for the advertising
12 market.
13 Q Okay. This type of technology that you're
14 working on developing is something that you anticipate
15 being used in the future, correct?
16 A It's clear that it will be, yes.
17 Q Okay. And as of from October 1998 through
18 today, that's not a technology that is used in the
19 webcasting market, right?
20 A It is not typically used today, no.
21 Q Okay. It's -- okay, withdrawn. Now, you
22 also talk in your testimony about the data that

1 webcasters collect as a valuable asset?

2 A Yes.

3 Q And isn't it true that the nature of the

4 data collected by webcasters, since they have data on

5 listenership and generally purchasing habits with

6 respect to sound recordings, that that data is

7 especially valuable to record companies, right?

8 A Where music's involved I would guess it

9 might more valuable there, but I think data has value

10 for advertisers in marrying them to buyers. And

11 whether you're dealing with the VW side of music,

12 there is a correlation, yes, to being able to target.

13 Q To the extent that your business is a

14 webcasting business that primarily streams music and

15 you obtain data on listenership as well as normally e-

16 commerce relating to sales of sound recordings, you

17 would agree, wouldn't you, that that data is

18 especially valuable to record companies?

19 A It could be very valuable, yes, if you use

20 it correctly.

21 Q Okay. Now, you talked about how improved

22 codecs can result in better sound quality at lower bit

1 rates?

2 A Yes. Many companies that create media

3 players and that create codecs are improving their

4 work to the point where we are able to do more with

5 less.

6 Q And are you anticipating that at some

7 point in the future that codecs will allow CD-quality

8 music to be accessed through a 56K modem?

9 A Yes. I believe that on the path into the

10 future we will be able to do this.

11 Q And when in the future are you predicting

12 this is going to occur?

13 A If you are asking me, I think the phrase

14 earlier was "crystal ball." I think that over the

15 next decade we will develop that capability. I think

16 we have clearer paths to it that we have found now.

17 Q Sometime within the next ten years?

18 A I believe that that is a good guess on my

19 part.

20 Q Okay.

21 A And, again, I point out it is a guess

22 based on what I know, but there are now methods that

1 we have found that can compress much more than we had
2 previously thought.
3 Q Okay. Certainly, it's not going to occur
4 by 2002, end of 2002, right?
5 A I don't think it will happen by 2002.
6 Q Okay. Now, at the bottom of page 7 of
7 your written testimony --
8 A Yes. I'm there now.
9 Q Okay. You say that, "At some point, as
10 connection speed and compression technology improve,
11 the ability to offer CD-quality performances via
12 webcasting will be ubiquitous."
13 A Yes.
14 Q And when are you saying that this ability
15 to offer CD-quality performance via webcasting is --
16 when is that going to be ubiquitous?
17 A I believe that that will happen over the
18 next decade. I think that when a codec comes out that
19 makes that, it will be widely adopted very quickly.
20 Q Okay. And, again, certainly not by the
21 end of 2002.
22 A I don't think it will happen by the end of

1 2002.

2 Q Okay. And I think we talked about this.

3 Currently and since the advent of webcasting, isn't it

4 true that most people, the vast majority of people,

5 certainly, listen to webcasting at their computers,

6 right?

7 A Yes.

8 Q Okay. And they listen to webcasting

9 through these computer speakers, generally?

10 A Yes.

11 Q And it's only the rare breed like yourself

12 that maybe listen to webcasting over a cell phone or

13 through your home stereo speakers, right?

14 A Yes, although headphones seem to be used

15 a lot by teenagers.

16 Q Okay.

17 A Because they are in environments with a

18 lot of people around, and that is extraordinarily high

19 quality to them.

20 Q Okay. And you're talking about headphones

21 through the computer.

22 A Yes.

1 Q Okay. And when you say it's
2 extraordinarily high quality, that depends on what
3 kind of Internet access they have, right?
4 A Yes, the source and the reproduction, but
5 I think you were referring to the speakers, and I was
6 pointing out that those are very good in that context,
7 but the computer speaker is of lower quality than the
8 average headphone in the way it puts things out.
9 Q Now, you testified that -- oh, and by the
10 way, if you're listening to a 40K stream over your
11 home stereo system, the sound quality is still limited
12 by the bit rate and stream, regardless of how good
13 your speakers are, correct?
14 A Yes, that's right. Source and
15 reproduction are the keys.
16 Q Okay. You stated that listening to stream
17 music on a cell phone is a, quote, "potential way
18 people might receive webcasts in the future," right?
19 A Oh, I'll go further -- they will.
20 Q Okay. Sometime in the future.
21 A Yes, in fact I've heard it recently.
22 Q Okay. And is it your testimony -- you

1 know that none of the webcasters involved in this
2 proceeding are streaming to cell phones, right?
3 A They may -- I can't speak for AOL, because
4 with AOL anywhere in the program they've told me,
5 "It's mobile and wireless, and that's where we are."
6 Vivendi bought Universal Cell Phones.
7 Q Spinner.com, you think that they're
8 streaming to cell phones?
9 A I don't know if they are. I am only
10 saying that AOL, for example, has proclaimed its
11 ability to reach the wireless device with its content.
12 Q Mr. Griffin, who would be more qualified
13 than you, other than the webcasters themselves, to
14 know whether webcasters in this proceeding are
15 streaming to cell phones? I mean aren't you the
16 expert in this field?
17 A There are many experts in this field. I
18 work a lot in wireless, and a lot of my focus has been
19 on wireless.
20 Q Isn't it safe to say that if you don't
21 know that it's going on, then it's probably not going
22 on?

1 A No, I don't think that's accurate. I
2 would say that AOL is something that's difficult to
3 penetrate. A lot of us try to figure out what's going
4 on inside.
5 Q I'm not talking about AOL right now. I'm
6 talking about AOL owns one of the many webcasters who
7 are involved in this proceeding and will be affected
8 by the license fee that this Panel sets. You're not
9 aware of any webcasters, leaving aside AOL --
10 MR. SIGALL: I think this question's been
11 asked and answered.
12 MR. COHEN: I haven't even finished asking
13 the question, and obviously I don't feel that I've
14 received a clear enough response yet. I want to
15 reformulate the question and get a clear answer.
16 BY MR. COHEN:
17 Q Just so we're clear, your testimony is
18 that other than AOL, okay, which may or may not be --
19 none of the other webcasters in this proceeding, as
20 far as you're aware, are streaming their webcasts,
21 their DMCA-complying webcasts, to cell phones, right?
22 A No, I disagree with that. In fact, they

1 are. I mean whether it's something that they are
2 purposely doing, there are data cards that work
3 wirelessly, both on cellular networks and non-cellular
4 networks that end users put in computers and use. And
5 whether they know they are going to a wireless device
6 or not is not the point. AOL doesn't have to say,
7 "This is specifically for a wireless device." The
8 wireless device speaks TCPIP, the language of the net.
9 To AOL, it is the same as sending to any computer. An
10 increasing number of people are using wireless
11 connections. I'm certain that a number of them are
12 using any of a number of these services. Whether they
13 have specifically oriented it towards that, I can't
14 tell you.
15 Q Okay. Is it your testimony that there are
16 consumers in the United States right now who are
17 listening to these webcasts that we're talking about
18 over cell phones.
19 A You mean over wireless devices.
20 Q Yes, other than yourself.
21 A Over wireless devices, yes.
22 Q Yes, they are, okay.

1 A You use the term "cell phone;" I use the
2 term "wireless device."
3 Q And a wireless device, I mean are you
4 including, for example, laptops with wireless modems.
5 A Yes.
6 Q Okay. I'm talking about handheld devices
7 now, for the moment.
8 A Handheld devices, yes.
9 Q Okay. Consumers are listening to these
10 webcasts over handheld devices?
11 A I believe they are, yes. I've seen it.
12 Q And what's your understanding of the
13 market penetration or the number of consumers that are
14 listening to webcasts on these types of devices?
15 A I'm guessing the number who have this
16 capability is roughly 25,000 in the United States
17 right now to 50,000, in that area somewhere.
18 Q And leaving aside whether they have the
19 capability, do you know how many people are actually
20 doing this?
21 A No, I can't tell you how many people
22 listen to those webcasts, who are those people.

1 Q Okay. Because we know there's a big
2 difference between having the capability to do
3 something and actually doing it, right?
4 A Right, but the point that I'm getting at
5 is that you were suggesting that AOL had to
6 specifically format this for a wireless device, and my
7 point is that they don't know how someone is using AOL
8 or their services over the Net, and that if one merely
9 buys a Nokia data card 2.0 for I think it is under
10 $200, it will run at 40K over an existing wireless
11 network. Put into a Compaq iPac, which is a handheld
12 device, or into a small laptop, one would then be on
13 the Net wirelessly, and they could use any of the
14 webcasters who are involved in the proceeding, and the
15 webcaster would not know the difference.
16 Q Okay. Let's just be clear about this.
17 You don't know how many people are actually listening
18 to webcasts over these devices, do you?
19 A No.
20 Q Okay. And there are a lot of things that
21 you could do with digital music that your average
22 consumer simply does not do, right?

1 A Sure.

2 Q And, similarly, listening to webcasts on

3 car stereos, you characterize that as a potential way

4 people might receive webcasts in the future, right?

5 A Yes.

6 Q And is it your testimony that there are

7 consumers listening to webcasts, such as the webcast

8 involved in this proceeding right now, over car

9 stereos?

10 A No. I think there are less people doing

11 it in cars. I think that the speed of the automobile

12 is an additional factor. It can be compensated for,

13 but I think it is more difficult.

14 Q Okay. By the way, if one were to seek out

15 data on streams being sent to these wireless devices,

16 is there a way that one could find out the extent of

17 the use of that type of access?

18 A I suppose you could survey users and try

19 to draw conclusions from it or you might, I don't

20 know, sniff, as we say, a wireless network and look

21 for media. Those are possible ways you could study

22 it. But it would look at what's moving across a

1 wireless connection and see how much of it was music.
2 Those are theoretical ways if I were to do a study,
3 but I've never done one, and I haven't seen one.
4 Q Okay. So just to confirm, as you sit here
5 today, you're not aware of any evidence or data on the
6 use of wireless devices to listen to streaming
7 webcasts, right?
8 A No.
9 Q Okay. And the very capability to do that,
10 when did that come into being?
11 A It came into being with the ability to
12 transmit digits wirelessly.
13 Q Okay. And the actual use of wireless
14 devices to listen to webcasting?
15 A This has occurred as the data rates have
16 risen. In other words, as our ability to form a wider
17 path between the wireless device and the sender has
18 increased, our ability to do this has grown, and the
19 number of potential users grows.
20 Q Okay. Leaving aside potential users, when
21 did users actually start listening to webcasts, such
22 as those involved in this proceeding, over wireless

1 devices?

2 A When did listeners start? I know that I

3 started last year. But others, again, I'm not aware

4 of the surveys. I don't know others' behavior, but I

5 can tell you mine.

6 Q You only started in the year 2000, right?

7 A Right.

8 Q And as we've discussed, you're a little

9 bit ahead of the curve on these kinds of things,

10 right?

11 A I agree with that.

12 Q You've stated in your written testimony

13 that the cost of bandwidth is being cut in half and

14 capacity is doubling every 18 months?

15 A Yes. Now I think there is an informal

16 agreement, although it could be argued, that Moore's

17 Law, which traditionally has applied to

18 microprocessors, can be applied to bandwidth. You

19 will get some arguments from that, but in my own

20 observations that has roughly been true.

21 Q Okay. Well, specifically what data did

22 you rely on to come to this conclusion?

1 A Looking at history and data rates.

2 Q Are these documents that you looked at?

3 A No. It's understanding history, looking

4 at the various points at which things have occurred.

5 And it is a retrospective thing. And I pointed out

6 that it is something I'm sure that reasonable people

7 could disagree on. But I think that the preponderance

8 of opinion has been moving towards the notion that

9 bandwidth has been behaving like Moore's Law has for

10 microprocessors.

11 Q Yes. But what I'm --

12 A Partly for the same reason that

13 microprocessors are a component of bandwidth.

14 Q Okay. Leaving aside preponderance of

15 opinion, what I'm trying to understand is are you

16 relying on some study or analysis of bandwidth costs

17 in making that statement?

18 A No. If I had that, I would have provided

19 it to you, because I would have been relying on some

20 materials that you asked for. But that is not in fact

21 the case. I'm looking at a particular study. I'm, in

22 fact, just thinking to myself how fast has this

1 bandwidth increased, and what are we paying for it?

2 Q That's just -- so this is based on your

3 general knowledge and experience, right?

4 A Yes, that's right.

5 Q And if you were to look at the actual

6 numbers of certain webcasters and they weren't

7 consistent with that, how would that affect your

8 conclusion?

9 A Well, I guess, you know, the statistics --

10 you can always find statistics that challenge things.

11 I'd take them into account, but I think I'm taking

12 statistics into account, those that I come across in

13 my general knowledge and experience in saying this.

14 But I have certainly prefaced this by pointing out

15 that reasonable people could disagree. And if someone

16 said they disagreed and showed me statistics, it's not

17 going to immediately change my mind. It just means

18 that reasonable people disagree, and there are

19 statistics on all sides.

20 Q Okay. Now on page 25 of your testimony,

21 you stated that it should be possible in the future

22 for --

1 A Hold on. Where on the page are you
2 reading?
3 Q Well, it's the last sentence before the
4 last paragraph starts, on the bottom of page 25.
5 A Yes. "The cost" -- is this is the
6 sentence? It starts with "The cost for webcasting?"
7 Q Okay. Now, you said there that "It should
8 be possible for webcasters to avoid them in the
9 future."
10 MR. SIGALL: Could we be clear exactly
11 which one you're referring to? I'm not sure the
12 Witness understands.
13 MR. COHEN: Do you see those words that I
14 just read?
15 CHAIRMAN VAN LOON: I haven't found it
16 yet. Which paragraph is it, please, Mr. Cohen?
17 MR. COHEN: Okay. Page 25, last line,
18 before the last paragraph, just above the last
19 paragraph.
20 THE WITNESS: Yes, I see the remark.
21 BY MR. COHEN:
22 Q Okay. "It should be possible for

1 webcasters to avoid them in the future." You're
2 talking about encoding costs there.
3 A Not all encoding costs but part of them,
4 because they have already staged a copy for their use
5 in the radio station, and they may not need to
6 additionally stage another for use for provision over
7 the Net.
8 Q Okay. So when you said that "These costs,
9 however, are a function of the different standards
10 applicable to today's transmissions and it should be
11 possible for webcasters to avoid them in the future,"
12 you were merely talking about those digital copies
13 that the webcasters have already encoded?
14 A No. I referred to this earlier, that
15 there were new work that said that you could save one
16 copy and then serve up additional copies on the fly,
17 that from high-resolution copy you may be able to
18 serve Windows Media and Real Audio from the same copy.
19 You may be able to serve a low-bit rate and a high-bit
20 rate from the same copy. So these new technologies
21 that allow you to do it on the fly reduce your need to
22 upfront.

1 Q Okay. Just wanted to understand what you
2 were referring to there. And what is the prevalence
3 right now, in your opinion, of the use of these new
4 technologies in the webcasting industry?
5 A I would say that the webcasting industry
6 is trying to adopt them, for example, the one that I
7 just mentioned, because it does lower their costs.
8 Q Okay. Regardless of whether they're
9 trying to adopt them now, can you tell me which of the
10 webcasters involved in this proceeding are using those
11 technologies?
12 A No, I don't know which are using them.
13 MR. COHEN: Okay. I think I'm going to
14 turn things over to my partner now for some additional
15 questions.
16 BY MR. STEINTHAL:
17 Q Good afternoon, Mr. Griffin.
18 MR. SIGALL: Excuse me. I want to make
19 clear exactly, based on the ground rules we set, as to
20 who can cross examine. So it's my understanding that,
21 Mr. Cohen, you cross examined on behalf of
22 broadcasters?

1 MR. STEINTHAL: The ground rules are we
2 can have four, and we can allocate the subject matters
3 of the cross examinations, as we've done, to avoid
4 overlap. And in fact the ground rules are we'd be
5 stupid to do overlap, because we only have 90 hours in
6 which to finish everything. And that's exactly as we
7 have acted in this proceeding.
8 MR. GARRETT: Right. Your Honor, my
9 understanding is they can have their four, but that
10 one of the Weil Gotshal attorneys is representing the
11 broadcasters, and one of the Weil Gotshal attorneys is
12 representing the webcasters, and I think we wanted a
13 clarification, is Mr. Cohen representing the
14 broadcasters in this case or is it the webcasters?
15 ARBITRATOR GULIN: That's not the
16 agreement I remember.
17 CHAIRMAN VAN LOON: We had originally
18 started out, I think, in that vein, and then through
19 discussion ended up with four, no overlap in the
20 round.
21 ARBITRATOR GULIN: That's the direction I
22 think I was trying to push when we first got started

1 in this conversation, but that's not what we ended up
2 with.
3 MR. GARRETT: If everyone has a clear
4 understanding but me, then obviously I'm the one who's
5 off-base here, but I really thought --
6 ARBITRATOR VON KANN: Not necessarily.
7 Galileo was right.
8 (Laughter.)
9 MR. GARRETT: I frequently feel that way.
10 (Laughter.)
11 But the basis of the multi-party tag team
12 rule, as has been developed here, as I understand it,
13 was that each lawyer has a client that has to be
14 represented to their best ability. But I don't think
15 that allows the webcasters, for example, to have two
16 different counsel from the same law firm representing
17 -- cross examining a single witness. I think that was
18 the point that Mr. Sigall was making here. But, you
19 know, if I'm the one who's wrong, then --
20 CHAIRMAN VAN LOON: I think it would be
21 instructive, and we don't plan to take the time to do
22 it right now, but to go back and look at the

1 transcript of our discussion of that. That clearly
2 was in the minds of part of the Panel when that
3 discussion was opened and introduced, and the way that
4 it evolved, at least our memory, is different. And I
5 think, especially given the timing today, we should
6 continue. I gather we'll have Mr. Steinthal. And if
7 our memory is indeed inaccurate, let's go back and
8 we'll review that tomorrow morning.
9 MR. GARRETT: Fair enough.
10 CHAIRMAN VAN LOON: Thank you.
11 BY MR. STEINTHAL:
12 Q Now, we've met before, have we not, Mr.
13 Griffin?
14 A Indeed, we have.
15 Q We've been part of a glasser and music
16 licensing faculty together?
17 A We have, and I think we've shared some
18 soup.
19 Q We have, indeed. And we have a common
20 friend, Ron Gertz, that we had soup with the day the
21 Bitbop tuner was publicly announced in March.
22 A Oh, I don't recall that detail but

1 possible.

2 Q Recall regaling me about how the public

3 announcement of the -- it was called the radioactive

4 tuner first, right, before it was called BitBop?

5 A I don't recall that part. That might be

6 right.

7 Q Okay. Recall discussing with me about how

8 technologies that permit stream capturing or their use

9 to proliferate would increase the option value of

10 streamed webcasts to consumers, right?

11 A Yes, that's right.

12 Q And you talk about option value, as you

13 did this morning, in your direct testimony, correct?

14 A Yes.

15 Q Is it fair to say that you believe that

16 the maximum option value to consumers in the music

17 delivery area is created by the purchase of a CD?

18 Because as you say on page 17 of your written

19 testimony, you can play any song on that CD at any

20 time, right?

21 A It currently exemplifies high-option

22 value. I won't say maximum, because there are other

1 circumstances for some people, but I will agree that
2 it has a lot more option value than you average
3 service does.
4 Q And the concept of option value is
5 something you testified before the Senate Judiciary
6 Committee about last July, correct?
7 A Yes, I did; that's right.
8 Q And you told Congress, essentially, that
9 the ability to decide what I want and get it where and
10 when I want it is what you and the economists call
11 option value, right?
12 A Yes, that's right, yes.
13 Q Indeed, on your direct today, I think you
14 said that control over the song is equivalent to
15 option value. That's another way of looking at it,
16 right?
17 A Yes, it's an element of option value.
18 Q And it's your view, is it not, that the
19 more option value you can deliver to a consumer the
20 higher the price that will be associated with the
21 product or the service that you're delivering?
22 A I think that's clearly the goal of those

1 who have products is to ensure that as option value
2 transfers from product to service that that price
3 reflects the transfer of option value. That's what I
4 --
5 Q Let me ask you to take a look, actually,
6 at -- I know you characterized this to the Senate
7 Judiciary Committee.
8 A Sure.
9 MR. STEINTHAL: I'm going to mark as --
10 what are we up to 11? Did I miss one? Yes. Why
11 don't we have this marked as SX, is it 11?
12 (Whereupon, the above-referred
13 to document was marked as
14 Exhibit No. SX-11 for
15 identification.)
16 THE WITNESS: And you're directing to my
17 attention to what page?
18 BY MR. STEINTHAL:
19 Q First of all, is this a copy of the
20 testimony that you gave to the Senate Judiciary
21 Committee on July 11, 2000?
22 A It appears to be, sure.

1 MR. STEINTHAL: I'm offering it into
2 evidence.
3 MR. SIGALL: No objection.
4 CHAIRMAN VAN LOON: Admitted, please.
5 (Whereupon, the above-referred
6 to document, previously marked
7 as Exhibit No. SX-11 for
8 identification, was admitted
9 into evidence.)
10 BY MR. STEINTHAL:
11 Q Take a look at page 5, if you would.
12 A The page numbers on mine are clipped out,
13 so it's going to take a second here. Hold on.
14 Q I'm sorry.
15 A Okay. I think I'm there.
16 Q The first paragraph on the page says, "The
17 capital markets."
18 A Yes, I see it.
19 Q If you'd skip down, the area I want to ask
20 you about is in the middle of the page. There's a
21 paragraph that starts, "Products."
22 A Yes, I see it.

1 Q And then you say, quote, "Put more simply,
2 the ability to decide what I want and get it where and
3 when I want it."
4 A Yes.
5 Q "Economists call it option value."
6 A Yes.
7 Q "What it means to you is that this content
8 is available at your option."
9 A Yes.
10 Q "Conversely, the song you hear on the
11 radio or video you see on MTV isn't at your option and
12 is priced accordingly."
13 A Yes.
14 Q "We pay a price for the ability to have
15 option value over something."
16 A Yes.
17 Q "A movie or song broadcast ephemerally has
18 low economic cost to the viewer. But on a pre-
19 recorded cassette, it draws a premium for its option
20 value. The entertainment business refers to it as the
21 difference between a performance license, paren,
22 inexpensive, compulsory, generally embodied in a radio

1 or television broadcast, end of paren, and a
2 mechanical license, paren, relatively expensive,
3 discretionary, and generally a box containing a disc
4 or tape."
5 A Sure, yes.
6 Q That testimony is what you believe and
7 what you told the Senate, correct?
8 A Yes.
9 Q Okay. Now, you say in the paragraph that
10 the song you hear on the radio or video you see on MTV
11 isn't at your option and is priced accordingly. It's
12 priced essentially for free of the consumer, correct?
13 A No, it feels free, but it's not free. I
14 mean they pay each time they go to an advertiser more
15 money than they probably would directly, but it feels
16 free to them.
17 Q Feels free to the consumer, and there's no
18 fee paid to receive the product directly, correct?
19 A Not a direct fee, but there is clearly a
20 fee.
21 Q Okay. The fee being that which is paid
22 essentially by advertisers to subsidize MTV or radio

1 going out and doing everything they do, right?
2 A The fee that I pay the advertiser or the
3 company when I buy a good goes to their cost of
4 advertising.
5 Q Assuming the advertising works.
6 A Well, whether it does or not, I pay the
7 restaurateur for a fee that he includes the cost of
8 advertising in, and so that money comes back in -- it
9 comes indirectly, but it's not free; it just feels
10 free at the moment we use it.
11 Q Okay. Now, when you say the song you hear
12 on the radio or the video you see on MTV isn't at your
13 option and is priced accordingly.
14 A Yes.
15 Q What's the "priced accordingly" phrase
16 mean in this sentence?
17 A The fee is indirect and lower.
18 Q And you say at the end of this paragraph,
19 "The entertainment business refers to it as the
20 difference between a performance license, as being
21 inexpensive, compulsory, generally embodied in a radio
22 or television broadcast, and a mechanical license --

1 A Yes. I think it was unartful with the
2 phrase "mechanical license," but I'm referring to a
3 product, yes, the difference between a service and a
4 product.
5 Q Are you suggesting that there's a
6 difference between the option value of a fleeting
7 performance on the one hand and a physical copy that
8 one can discretionarily control?
9 A Sure, unless we've recorded that fleeting
10 one, yes.
11 Q Let's put aside the --
12 A Sure.
13 Q -- recording of a fleeting performance for
14 a moment --
15 A Yes.
16 Q -- and we'll come back to that, I assure
17 you.
18 A Yes.
19 Q But putting aside capturing of streams,
20 you would agree with me, would you not, that streaming
21 constitutes a performance and falls in the category
22 that you would refer to here as being inexpensive,

1 compulsory, and generally embodied in a radio or
2 television broadcast?
3 A Yes, because, as I pointed out, the
4 intention of the streamer is that you use it at the
5 time and the place in which is offered.
6 Q And the reference you made to a mechanical
7 license being relatively expensive and discretionary,
8 again, is because of the physical control associated
9 with the copy that you are purchasing, right?
10 A Yes, that that's one of the thing that's
11 associated with it.
12 Q Now, in your written testimony in this
13 case, you talk about certain other kinds of music
14 delivery.
15 A Can you direct me to where you're going?
16 Q Yes. It's all on pages 19 to 20, I
17 believe.
18 A Okay, I'm there.
19 Q And other CDs, which you've already
20 identified as having high-option value, you testified
21 in your direct testimony that, for example,
22 interactive digital jukeboxes offer high-option value,

1 right.

2 A That would be an example of a high-option

3 value service.

4 Q Because listeners can select a particular

5 song and listen to it on-demand, right?

6 A Yes.

7 Q There's a high-option value because, "In

8 theory, the listener," and I'm quoting you now, "In

9 theory, the listener need not even had a permanent

10 download copy if access to the performances are truly

11 on-demand and ubiquitous, right?

12 A Hold on, I've lost you here. I need to go

13 back to that, and I apologize. I'm just looking for

14 the place that you're reading from. If you could just

15 direct my eye to that part of the page --

16 Q Sure.

17 A -- I'll be good with that. Yes, I think

18 I found it. It's the beginning of the last paragraph,

19 the first two sentences, on page 20.

20 MR. SIGALL: To be clear, where are we?

21 MR. STEINTHAL: We're on page 20.

22 THE WITNESS: Twenty, last paragraph,

1 first two sentences.

2 BY MR. STEINTHAL:

3 Q And it's correct that there's high-option

4 value associated with digital jukeboxes, because as

5 you say, "In theory, the listener need not even had a

6 permanent download if access to the performances are

7 truly on-demand and ubiquitous."

8 A Yes, in the case of an interactive

9 jukebox. I mean we're not necessarily talking about

10 a jukebox in a restaurant, but we're talking about a

11 jukebox that one has available to oneself as they move

12 about.

13 Q And you note that services which permit

14 on-demand downloads also provide high-option value,

15 correct?

16 A Yes.

17 Q And that would include, I believe you used

18 as an example, Napster.

19 A Yes, that's an example.

20 Q And you're familiar with Press Play and

21 Music Net Services that have been announced, and you

22 believe they will provide high-option value as well,

1 do you not?

2 A That's a tough one, because I don't know

3 what they're going to do, but it sounds like their

4 goal. And just merely going by what I've heard is to

5 provide you something of a jukebox experience.

6 Q And you also talked in your written

7 testimony about digital lockers.

8 A Yes.

9 Q And I believe that's on page --

10 A Nineteen.

11 Q -- 19, okay.

12 A At the bottom, beginning of the last

13 paragraph.

14 Q And you believe they offer high-option

15 value as well, right?

16 A They do.

17 Q And they allow users to store the songs

18 from their CD collections in an Internet locker that

19 can be accessed from anywhere, correct?

20 A Yes, essentially.

21 Q And the locker --

22 A I mean, again, wherever you can get

1 digits.

2 Q Right. But the reason you feel that

3 there's high-option value is the user can play from

4 the locker the songs that he or she wants from his

5 collection that's in the Internet locker when and

6 where she wants it or he wants it, right?

7 A Sure. It gives them option value.

8 Q And, again, it's the concept of having

9 what you want, when you want it that creates the high-

10 option value, right?

11 A Yes.

12 Q Now, let's contrasts these download

13 services -- the on-demand streaming services, the

14 celestial jukeboxes, the locker services, the download

15 services -- which give you exactly what you want, when

16 you want it from the other end of the spectrum. On

17 the other end of the spectrum, we have broadcast radio

18 that offers listeners essentially zero option value,

19 right?

20 A Well, you've gone further than what I

21 think I said. You've taken it at an extreme that just

22 says wherever you want it, whenever you do. These are

1 relative things. In other words, with some of them,
2 if you're in a place that you can't get digits, what
3 option value there is limited; with others, it's
4 greater. But, in other words, I don't go to the
5 superlative that you went to. It's not all or
6 nothing. There are gradations in between.
7 Q So you'd agree that there's a spectrum.
8 A Yes.
9 Q On the left side, at zero option value,
10 you have broadcast radio, right?
11 A It's not left/right, but it's spacial,
12 yes; there are different distinctions.
13 Q Okay.
14 A It's not a very linear scale, but it's
15 gradations.
16 Q Okay. But you would agree that broadcast
17 radio is at the bottom on the option value spectrum,
18 right?
19 A No. It depends on the broadcast radio
20 station, but I will say that some -- in other words,
21 the example I will give you of a lot less option value
22 is when you listen to a radio station that you've

1 never heard of before in your life. You don't know
2 what to expect, so you don't know what's coming. And,
3 for example, there's a radio station in Key West, I
4 think it's called Parrot Radio, all Jimmy Buffet all
5 the time. I think it's got a bit of option value
6 associated with it than, say, the average station that
7 you've never heard before doesn't. And, of course,
8 being in Key West and wanting to hear Jimmy Buffet
9 it's got a bit of option value associated with it.
10 Q Could you give Judge von Kann the call
11 letters for that?
12 (Laughter.)
13 ARBITRATOR VON KANN: Very eager to know
14 about it.
15 THE WITNESS: I know they call it Parrot
16 Radio.
17 BY MR. STEINTHAL:
18 Q So even at a service like broadcast radio
19 that offers less option value, generally speaking,
20 than the kinds of on-demand, download, and locker
21 services we identified.
22 A Yes.

1 Q Certain radio stations may provide greater
2 option value than others.
3 A Some might, yes, where you know what to
4 expect.
5 Q But even there when you know generally
6 what to expect, that's must different than getting the
7 song you want, when you want it, right?
8 A Yes.
9 Q Less option value.
10 A But it's a gradation.
11 Q Right. Okay. And in that spectrum that
12 we're talking about, a webcasting service like an
13 individual webcaster that you identified, just one
14 station not giving any choices, has essentially got
15 the same option value as a broadcast radio station,
16 does it not?
17 A Potential's different.
18 Q The potential when you start talking about
19 the Internet generally, right?
20 A No, I mean the context in which it sits
21 too; that can be different. We can't deal with them
22 devoid of the technological context in which they sit.

1 Q But you would agree, generally, that
2 broadcast radio, where songs are selected and played
3 by someone else and the listener chooses only which
4 channel to receive, provides very little option value,
5 right?
6 A In general, it provides a lot less, yes.
7 Q And putting aside stream capture devices
8 for a moment, wouldn't you agree that the same
9 features whereby songs selected and played by someone
10 else, where a listener chooses only what Internet
11 channel to receive at a given moment, would lead you
12 to the same sort of low-option value for a webcast
13 channel as it does a broadcast channel.
14 A Boy, you're going to a place that I don't
15 know exists. I'm just being honest with you. You're
16 asking me to assume something that I just don't think
17 can exist. I mean you're saying just rid the world of
18 digital recorders and now deal with the hypothetical?
19 I mean if we're ridding the world with any ability to
20 record audio, yes, I'll agree with you, but it's not
21 a world that we live in.
22 Q Well, I'm going to come back to that world

1 --

2 A Okay, gotcha.

3 Q -- so just indulge me for a minute. With

4 the assumption, you agree with me, right?

5 A With the assumption that you have no way

6 to capture the digits and no way to find them; meaning

7 we not only don't have the ability to record, but we

8 don't have the ability to find them while they're

9 playing or to buffer them at all. Proceed.

10 Q Okay. Now, and the reason you think

11 there's greater option value is precisely because of

12 these stream capturing devices that allow you to gain

13 some degree of control over that which, as you

14 testified originally, may not have been intended to be

15 captured, right?

16 A The context in which they are offered,

17 yes, deprives them or adds option value to them, the

18 context, the recorders. Yes, that's one of the things

19 in combination with the specificity with which it's

20 offered and the specificity of the content material.

21 In other words, because we may have it less granular,

22 we may have a very high bit rate stream, that also

1 adds. In other words, it more closely replicates the
2 original experience. It's also an element.
3 Q But, again, and I ask you to indulge me
4 just for a moment; I promise we'll come back to stream
5 capturing.
6 A Okay.
7 Q But for the ability to capture those
8 streams, the option value of a single webcaster
9 station is no different than the option value of a
10 broadcast radio station of the same music format,
11 right?
12 A No, not just the storage; the ability to
13 find them is important too. For example, we can't say
14 that it's irrelevant that I know what's playing on a
15 channel before I go there, regardless of whether I'm
16 able to store it. And, critically, we can't say,
17 especially, that in a world of 30,000 streams that
18 even if I couldn't capture them that there isn't a
19 lot more option value to 30,000 choices versus, say,
20 ten. And the option value is entirely different, even
21 absent the storage devices.
22 Q Let me ask you this: I mean normal

1 webcasting you can't -- I mean to be compliant with
2 this license, you know, you can't publish an advanced
3 schedule, can you?
4 A Advanced? I guess not. I mean I've heard
5 that, that's my understanding. Don't ask me to
6 interpret the law, but apparently that's right.
7 Q But broadcast radio, you can look it up in
8 the New York Times or the Washington Post and find out
9 what the broadcast radio channel programming is, can't
10 you?
11 A Well, not in my experience. I mean if you
12 listen to Schostikovitch and so forth, that may be
13 true --
14 Q That's right.
15 A -- but that would be, I think, as I
16 understand it, an extraordinarily limited exception,
17 and I think you're trying to suggest that I could look
18 up in the paper and find out what KROC's playing at
19 4:15 in the afternoon, and I think that's false.
20 Q No, but on certain stations you could find
21 out somebody, for example, is going to have the King
22 Biscuit Flour Hour and do a live concert at a given

1 hour. You could know when that's going to happen,
2 couldn't you?
3 A Yes, but now we've left your predicate
4 that you know what song's playing and who's doing it
5 at what time. All I'm pointing out is that this is a
6 bit more inexact than you're trying to make it sound.
7 Q No, no, no. Stick with certain things.
8 Broadcast radio versus Internet radio.
9 A Right.
10 Q Broadcast radio permits you to have some
11 degree of advanced notice of what you're going to
12 play, and Internet webcasting under the DMCA doesn't,
13 right?
14 A Broadcast radio permits you to know in
15 advance. That hasn't been true in my experience.
16 Q Oh, except for, as you say, Tchaikovsky.
17 A There might be some examples, but that's
18 not where I'm listening.
19 Q Okay.
20 A I'm just saying it's not common that I
21 know when I turn on the radio what's going to be
22 coming.

1 Q So ,at worst, we're even on option value
2 at that point, right?
3 A Not necessarily. I mean, again, we are
4 looking at a limited point in time, but, again, I
5 don't think we can divorce the notion that I have a
6 lot more choices. I think that our experience tells
7 us that that's not true, because, for example, if we
8 look back on the history of the video cassette
9 recorder, our assumption was that it was going to take
10 a lot of content. But what went at that was a 1,000
11 channels of video. And when you have so much video
12 available to you, perhaps you are less likely to grab
13 it, and that is what has happened. Less people use
14 their video cassette recorder to record to get option
15 value on it, because there's so much option value to
16 such a large number of streams and video.
17 Q You know what? I'm going to follow that
18 along and then come back to where I was going. What
19 you're saying now is that the ability to copy is not
20 something that's always used by the American public if
21 there is a plentiful stream of viewing or listening
22 choices made available to them at costs they can

1 afford, right?

2 A Well, regardless of cost. I don't think

3 cost is the issue as regards option value. I don't

4 think it has an impact there. I think -- I can go to

5 what I said earlier, which is that the availability of

6 thousands and in fact the definition being tens of

7 thousands of different streams, I think I read

8 somewhere Live 365 has, at any given time, no less

9 than ten stations that are playing the artist that

10 you're looking for. If I live in a world with 30,000,

11 even absent digital recorders, I have a great deal

12 more choice than I do on the average radio dial.

13 Q But I can only listen effectively -- as an

14 average American, I can only listen to one webcaster

15 and one channel at a time, right, putting aside stream

16 capturing, and I insist that you do that.

17 A Yes, but now you have not asked me to set

18 aside stream searching, and that is --

19 Q We'll come to that in a second.

20 A So can I include that in the example?

21 Q Well, if I'm literally listening to one

22 channel, I can't hear another one at the same time,

1 can I? I've only got two ears.

2 A No, but you could look on a list of what

3 the other stations are playing. For example, Spinner

4 provides that, and you might say, "Oh, I would like to

5 go to that channel and listen to Van Morrison."

6 Q Now, have you done a little search and

7 found out how many other webcasters provide you with

8 the ability to check what's playing on another one of

9 their channels at the same time?

10 A I mean this exemplified it for me.

11 Spinner's one of the major ones.

12 Q Do you know of any other one that permits

13 you to go to a page on their site to find out what's

14 playing on another channel? Name one.

15 A Specifically, I mean Live 365. It gave me

16 lists of the artists that they were playing, not the

17 specific thing, as I told you.

18 Q They gave you representative artists,

19 right. They didn't tell you what was playing when?

20 A Sure. I'd have to go back and look, but

21 I'll accept that. Perhaps to you Spinner is an

22 anomaly.

1 Q Well, let's play this along. Now, how
2 many dozens or hundreds of pages can I access when I'm
3 at Spinner.com?
4 A I don't get where you're coming from.
5 Q Well, I mean if we put it back up, why
6 don't we take a look at your exhibit?
7 A Sure.
8 Q The Spinner page is -- it came relatively
9 early on. Okay. Now, why don't we go to -- go to
10 page 6, okay?
11 A Yes, I'm there.
12 Q Now, I mean just looking at this page, you
13 could click on the Matthew Good Band, you could click
14 on the top of the tuner where it says, "What's new,"
15 you could click on that, right? You could click on
16 any of the things that are under the first bank of
17 genre channels where it says, world and new age,
18 eclectic, Latin. You could click on those and
19 probably get information, could you not, about artists
20 in those categories, right?
21 MR. SIGALL: Which question is the Witness
22 supposed to answer?

1 BY MR. STEINTHAL:

2 Q Aren't there a number of different click

3 opportunities here which will take you to different

4 pages of Spinner. com?

5 A Yes, but I've got to say, Ken, I think you

6 were drawing some conclusions there. What's new may

7 not be what's new music; it might just be what's new

8 for Spinner, I don't recall.

9 Q Right.

10 A But, yes, it could have information about

11 Spinner as opposed to music.

12 Q And the reality is that unless you click

13 on the "My Channels" page, which takes you to the

14 presets that you've established, you're not going to

15 find out what's playing on any other channel, right?

16 A If you go to look for what's -- right here

17 at the top it says, "Playing now." At the very top

18 next to "Music News."

19 Q Right.

20 A I'd click on that; I did. It was natural

21 for me. It wasn't something I scripted. I didn't

22 think to myself ahead of time, "Boy, I would like to

1 show that feature." I assure you, I merely went to
2 the Spinner site, saw it there, and clicked on it.
3 Q Okay.
4 A That was my experience.
5 Q And you also gave a demonstration of
6 people that do a lot of different things while they're
7 listening to music, right?
8 A No, I gave a demonstration that it's
9 possible to do that. I didn't show you other people
10 doing that.
11 Q Well, I mean, for example, there are a lot
12 of people you know that go to work and they put on
13 their Spinner or their Radiosonic or whatever it may
14 be, and then they actually minimize the tuner and
15 spend the day working, and they have music in the
16 background, right?
17 A Yes. I was demonstrating that it is
18 possible to do that.
19 Q Now, of course, anybody that's doing any
20 of that kind of activity would never know what's being
21 played on the other Spinner channels, right?
22 A Not unless they went to Spinner.

1 Q And not unless they specifically clicked
2 on that particular button that would enable them to
3 find out, right?
4 A Right. But I mean if they heard they
5 didn't like, wouldn't they be motivated to say, "I'd
6 like another song"?
7 Q Well
8 A I mean why would you tolerate that?
9 Q The point is, though, that your testimony
10 that people do this and have high-option value because
11 they can know what's playing on the thousands and
12 thousands of other channels on the Internet, the
13 reality is you only know of one service, Spinner, that
14 permits you to find out what's playing on other
15 channels at the same time, right? It's the only one
16 you can specify today.
17 A Right. It's the one in my examples that's
18 here.
19 Q Okay. And Spinner, of course, isn't
20 thousands and thousands of channels; it's whatever
21 number of channels Spinner offers, right?
22 A Right.

1 Q Okay. So other than that, you don't know
2 of any option value created by this particular
3 feature.
4 A Well, sure, it creates option value. Now
5 you are back into your mode of it either has option
6 value or none, and I must insist that there are
7 gradations. And it offers more option value to have
8 so many choices, inherently so.
9 Q Okay.
10 A And it's not either a zero or a one or
11 high or low; it's an additional gradation of option
12 value.
13 Q Now, part of this option value that you're
14 talking about relating to the choices on the Internet
15 is inherently the changing of channels, right?
16 A Yes, putting on different music.
17 Q Right.
18 A Having what you want, where and --
19 Q Right. There's no option value unless you
20 click on and go to a different channel, right?
21 A You offered the definition earlier out of
22 my testimony, which is to get what you want, where and

1 when you want it. It's not about switching channels;
2 it's getting what you want. Just switching channels
3 isn't the point. I mean, yes, you get more choices if
4 you switch channels, but with so many choices, you are
5 more likely to get what you want, where and when you
6 want it, which is what I call option value.
7 Q But when you're talking about a DMCA-
8 compliant service, the option you're getting is
9 extremely limited compared to on-demand streaming, on-
10 demand downloading, and purchasing a CD, for example,
11 right?
12 A Well, now you're new predicate is that
13 there's only one service, Ken, and truthfully there
14 are so many services that there are tens of thousands
15 of channels available on your computer at any given
16 time. Each of your predicates asks me to throw out
17 huge amounts of what exists in the world. We live in
18 a world where one's computer can access tens of
19 thousands of different streams. That is more
20 interactive.
21 Q When you're talking about -- you're not
22 talking about capturing streams now, are you?

1 A No. You said, well, there's just one --
2 if we just take one service in isolation, how much
3 option value does it offer. And I wanted to point out
4 that in your predicate -- previously, you asked me to
5 throw out storage; now you're asking me to say, "Well,
6 let's assume there's only one service. How much
7 option value does that offer?" And I'm saying we
8 don't live in a world where we have access to only one
9 service. We live in a world where we have access to
10 many services, each of which have thousands -- in many
11 cases, thousands of channels; one that says 30,000.
12 And so that's important part of the predicate that you
13 want to throw out in advance and have me isolate on
14 just one service, and I'm not limited to one.
15 Q As a practical matter, Mr. Griffin, if I
16 live in New York or Washington, I can choose over
17 several dozens of radio stations in the marketplace,
18 right?
19 A If you have no preference, you're right.
20 If you have a preference, you're probably limited to
21 two or three.
22 Q Okay. And same is true, to some degree,

1 on the Internet, right? I mean you're not going to
2 listen to every one of the thousands. You have
3 certain preferences, right?
4 A You'll have preferences for kind of music,
5 but there will be far more choices for the preference
6 that you have.
7 Q But the bottom line is while I may have a
8 greater choice to get into a DMCA-compliant station,
9 I'm still not going to know what's going to be played
10 when, right?
11 A I may or may not know. Depending on if
12 I'm using BitBop or if I'm using one of the guides
13 that Spinner has, I may or may not know, but I will
14 have a great deal of choice.
15 Q The likelihood is if you're not stream
16 capturing and you're not on Spinner, certainly you'd
17 agree with me there's no option value beyond --
18 A No, I disagree with you, Ken.
19 Q Okay.
20 A With 30,000 choices on one alone, you
21 can't say that there's not a lot more option value
22 than when you're in New York and you've got three

1 stations that match your preference. I won't agree
2 with you on that.
3 Q Now --
4 ARBITRATOR VON KANN: A lot of those
5 30,000, I gather, are your brother and other people
6 whose choices I could care less about, all right? I
7 mean --
8 THE WITNESS: Yes.
9 ARBITRATOR VON KANN: -- I'm not
10 particularly -- I wouldn't think that the real
11 spectrum of viable choices is anywhere near 30,000.
12 Now, it may be several hundred, maybe even a few
13 thousand, I don't know. But a lot of that 30,000 is
14 ego trips by people that, you know, most folks aren't
15 going to listen to, I would have thought, but that may
16 not be true.
17 THE WITNESS: But the effect of which,
18 Your Honor, is that I have seen it from Live 365, as
19 I recall, that in any given time your favorite artist
20 is on no less than ten of their stations. So I cannot
21 agree that there is less option value.
22 BY MR. STEINTHAL:

1 Q But how do you know when your favorite
2 artist is there, Mr. Griffin?
3 A You don't, but that doesn't mean you have
4 less option value. In other words, your likelihood of
5 finding the artist you want is much greater with more
6 choices.
7 Q Isn't it just random, if I choose one of
8 those 30,000 channels on radio -- on Live 365, whether
9 I'm going to get Tom Petty at that given moment?
10 A If you were blind when you were using the
11 mouse. But here you can choose, as I recall, ten
12 kinds of reggae. I don't think that that's random.
13 Q Okay. So that's the option you're talking
14 about.
15 A No, it's amongst the different options.
16 There's a gradation, Ken, and a lot of things are
17 involved. And throwing out pieces of it and isolating
18 certain parts and then saying, "Well, now there's no
19 option value," I don't think is fair when we're trying
20 to take into account the context in which webcasting
21 sits.
22 Q Now part of the reality of the Internet,

1 of course, is that if you're going to change channels,
2 you've got to click and then get to another channel,
3 right?
4 A You need not, but that would typically be
5 the way you would do it. It would be possible for you
6 to even have two up at once.
7 Q Would the average person have two up at
8 once?
9 A The average person would not, but it is
10 possible for them to do it.
11 Q Let's take the real world of people having
12 one computer listening to music and, as you say,
13 getting tired of what they're listening to and wanting
14 to go to another channel.
15 A It would be done with one computer.
16 Q Right. You'd click on and go to another
17 channel, right?
18 A Yes. Or you could bring up the second
19 channel at the same time. You could do that if you
20 chose to, because the computer multi-tasks. It is
21 capable of running two players and taking things from
22 two sources. You might say, "I will keep the volume

1 down on this one and watch for something to come up."
2 It is less likely for someone to do, but the question
3 of whether it is possible and in fact some people do.
4 And that is what BitBop is based on is being able to
5 listen to many streams at once from one computer, to
6 process them all and know what is happening. If that
7 weren't possible, BitBop couldn't work. It does work,
8 and in fact it can do many channels, more than one or
9 two.
10 Q Let's take the example of the person
11 that's not doing that, that's just doing what you were
12 showing on the computer -- I mean on the screen,
13 clicking from one channel to the next.
14 A Yes.
15 Q Now, the reality is that in pressing the
16 button or clicking and moving to another channel,
17 there's some degree of waiting as you wait for the
18 songs to buffer and get on your computer, right?
19 A Indeed. As we saw in the demonstration,
20 there is a maybe ten- to 15-second time period.
21 Q And the slower the connection, the longer
22 that buffer could be?

1 A Yes, it could be. The speed of the
2 connection could affect that.
3 Q And you've said in a recent interview,
4 have you not, that every time someone has to push a
5 button, the audience is diminished by 25 percent?
6 A Yes, that --
7 MR. SIGALL: Can we see a copy of that?
8 MR. STEINTHAL: Sure. I was just about to
9 do it. Let me just, for the record, ask the Witness
10 to follow. You gave an interview on Inside Digital
11 Media on August the 1st, did you not?
12 THE WITNESS: I think they broadcast it on
13 August the 1st, but I think it happened before that.
14 BY MR. STEINTHAL:
15 Q Okay. And --
16 CHAIRMAN VAN LOON: August 1 of this year?
17 THE WITNESS: Yes.
18 BY MR. STEINTHAL:
19 Q And we've actually got a transcript that
20 our paraprofessionals typed up or our assistants typed
21 up, so there's no -- is there a published version of
22 that interview, do you know?

1 A Not that I know of, but I remember the
2 phrase in question. It referred to copy protections,
3 not to listening to different songs. And in fact, the
4 reference that I made was to Nokia, which had related
5 to me that in their studies they had found that when
6 you have to click on a button to get through
7 something, 25 percent of the people stay behind. But
8 they were not using an example of where somebody
9 wanted to find something else and clicked on a button.
10 This was relating to their examination of copy
11 protection schemes.
12 Q But you would agree with the Nokia
13 statement that, generally speaking, if people have to
14 go to the trouble of moving away from where they are,
15 pushing a button, clicking a button to get to the next
16 level of what they want, you're going to have some
17 degree of audience loss.
18 MR. SIGALL: Can we see a copy of what's
19 being referred to here?
20 MR. STEINTHAL: Sure.
21 CHAIRMAN VAN LOON: Yes. I think that
22 would be the way to proceed -- one for the Witness --

1 MR. STEINTHAL: No problem.

2 CHAIRMAN VAN LOON: -- and for opposing

3 counsel and for the Panel and for the reporter.

4 MR. STEINTHAL: Why don't we mark for

5 identification as Exhibit -- we've already marked

6 something as 12, so we'll mark it as 13, and we'll

7 come back to 12 if that's okay with everybody.

8 (Whereupon, the above-referred

9 to document was marked as

10 Exhibit No. SX-13 for

11 identification.)

12 THE WITNESS: We're on page 14.

13 CHAIRMAN VAN LOON: Do you have a copy

14 yet?

15 MR. SIGALL: Yes, we have a copy, yes.

16 CHAIRMAN VAN LOON: So we're going to page

17 14?

18 BY MR. STEINTHAL:

19 Q Yes, with a question from Phil, I guess.

20 First of all, why don't you tell us the circumstances

21 of the interview, just so it's not in a vacuum.

22 A Sure. The guy called me and said, "Would

1 you like to do an interview?" We scheduled one, it
2 took us a couple of months, and we did one.
3 Q Okay. And the question that led to the
4 answer, with respect to the 25 percent audience issue
5 is at the bottom of page 14. Do you see that?
6 A Yes.
7 Q The question is --
8 A That's right.
9 Q -- what's your opinion on whether or not
10 the labels should attempt to impose copy protections
11 --
12 A Right.
13 Q -- on existing CD releases?
14 A Yes.
15 Q And you say, "Well, I think it's silly; I
16 really do. I say you need to attack the motive and
17 not the mechanism."
18 A Yes.
19 Q "And the problem with the mechanism is
20 this, by the way, is that everything you do basically
21 reduces the size of the audience."
22 A Yes.

1 Q "I mean Nokia, a client of mine, they were
2 telling me recently that they were doing some surveys
3 in the wireless world and they had determined that,
4 basically, as a rule of thumb, every time someone has
5 to push a button the audience is diminished by 25
6 percent."
7 A Right.
8 Q "That's just a button. And you've
9 probably learned that yourself. They're just
10 obstacles, and that every obstacle you put between
11 people and the content they want reduces the size of
12 the crowd, so if the value of the content is the size
13 of the audience, size of its audience squared, which
14 is generally what we argue for network effects and
15 technology work, then what good does even a button do?
16 If it reduces the audiences, it must reduce the value
17 under that equation."
18 A Yes, that's right.
19 Q Now, in a world where you're looking at
20 the difference between music-on-demand, getting what
21 you want, when you want it --
22 A Right.

1 Q -- and on the other hand being on a genre-
2 based channel and deciding you don't like Song X but
3 you have the option to go to Station Y that might have
4 a better song for you, that's pushing a button, isn't
5 it?
6 A It's pushing a button, yes.
7 Q And waiting for the buffer time before you
8 get that next song delivered, right?
9 A Yes, that will reduce the size of the
10 audience. Any impediment will reduce the size of the
11 audience somewhere.
12 CHAIRMAN VAN LOON: Would you like to
13 offer this into evidence?
14 MR. STEINTHAL: Sure. Why don't I offer
15 Exhibit 13?
16 MR. SIGALL: We would like to reserve the
17 right to compare this transcript to the actual
18 interview to make sure that it's correct and accurate
19 before --
20 THE WITNESS: The grammar's atrocious.
21 It's not mine.
22 (Laughter.)

1 But the concepts are right.

2 CHAIRMAN VAN LOON: Would you be willing

3 for us to admit it now, subject to your reviewing it

4 and reopening if there's problems?

5 MR. SIGALL: That's correct.

6 ARBITRATOR GULIN: Mr. Steinthal --

7 MR. STEINTHAL: Oh, absolutely.

8 MR. GARRETT: Just a question about that

9 if this is admitted. Apparently -- I'm sorry, I'll

10 withdraw that.

11 CHAIRMAN VAN LOON: So we will admit it

12 under the understanding that you're going to see the

13 copy.

14 (Whereupon, the above-referred

15 to document, previously marked

16 as Exhibit No. SX-13 for

17 identification, was admitted

18 into evidence.)

19 BY MR. STEINTHAL:

20 Q Now, putting aside, again, screen

21 capturing --

22 A Yes.

1 Q -- is it not true that the combination of
2 fact that none of the non-interactive webcasting
3 stations that you can choose from on the Internet give
4 you any control over what you hear and when you hear
5 it?
6 A Hold on. I got confused by your double
7 negative, "none of the non." I'm stuck here. Can we
8 go back to that?
9 Q Okay. Two factors, okay? Is it correct
10 that your understanding of a non-interactive
11 webcasting station can't tell you what you're going to
12 get, when you're going to get it, right?
13 A That makes it less interactive. It's not
14 non-interactive. In other words, the more choices it
15 offers the more interactive it is, whether you know
16 what's playing or not. But it makes it less
17 interactive not to know what's playing before you go
18 there, but not non-interactive.
19 Q Well, you know the term "non-interactive"
20 under the DMCA? I'm afraid to be technical here, but
21 you're familiar with the fact that in order to qualify
22 for the statutory license, you have to be, quote,

1 "non-interactive?"

2 A Yes, but Your Honor asked me earlier what

3 I thought interactivity was, and because the

4 question's coming to me I think it's about option

5 value, and I think there's more option value the more

6 choices you have. But if your definition is strictly

7 under the statute, that would be a different thing

8 than I was prepared to answer.

9 Q Well, then let's back up a little bit and

10 try to do it so we're speaking the same language.

11 Assuming that you are a service, a webcasting service,

12 that qualifies for this statute, okay, and you're

13 familiar with that definition, generally, are you not?

14 A Yes, that's right.

15 Q So you're not able to tell people in

16 advance what songs you're going to play and when

17 you're going to play it. You with me so far?

18 A I am with you, yes.

19 Q Okay. And given that and the limited

20 options you have in clicking to other stations of the

21 thousands and thousands that are out there --

22 A Pardon, I don't follow.

1 Q Well, you've testified that one of the
2 things that provides some degree of option value for
3 Internet webcasting is the ability to change stations
4 to among the other thousands and thousands of stations
5 that are out there.
6 A Yes, that choice.
7 Q Okay. Now, what I'm asking you to do is
8 look at both of those factors. One is that you're
9 dealing with a service that qualifies for the statute
10 and can't tell you in advance what you're going to get
11 or when you're going to get it. And your option value
12 is, as you define it, in the choices of the thousands
13 and thousands of stations on the Internet -- we're
14 going to put aside stream capturing still -- that
15 offering is a long way on an option value spectrum, is
16 it not, from owning a CD or using an on-demand
17 streaming or download service, is it not?
18 A In and of itself, it's quite different.
19 Q And it provides you quite less in the way
20 of option value, right?
21 A There is less option value. Again, with
22 the predicate that there are no storage devices and

1 that we live in a different world of technology than
2 we do now, I think there is less.
3 Q And isn't the truth of the matter that
4 what you believe Internet webcasting provides in the
5 way of option value is as you testify on page 18.
6 It's the, quote --
7 A Wait, I have to get there. And you are
8 referring to where?
9 Q Where you say, "It's the technology that
10 allows a consumer to catalog and find particular
11 streams," unquote, and then capture them that provides
12 you with genuine option value on the Internet.
13 A That's part of it, but, again, there's no
14 genuine, non-genuine; they are gradations. They do
15 not reach a threshold and become it or go below it and
16 not have it. They merely are gradations.
17 Q Do you remember telling me in our
18 conversation that the potentiality of a BitBop type of
19 technology could create significant option value on
20 the Internet?
21 A Yes; in fact, I believe that what I said
22 is that intelligent buffering adds option value.

1 Q Remember also telling me that until stream
2 capturing becomes prevalent the option value of the
3 kinds of webcasting services that our clients provide
4 is not significant relative to CDs and other kinds of
5 on-demand services?
6 A I didn't say that. That has to be made up
7 and concocted.
8 Q No, it doesn't have to be.
9 A What did I -- I didn't even know what
10 webcasters we were dealing with in this proceeding, so
11 how could I have used it?
12 Q In March, you didn't know what webcasters
13 were involved in this proceeding?
14 A I didn't know who was going to show up
15 here, no. I had not idea which ones had filed and
16 which ones had not and which ones you had. So that
17 sentence is not even in the realm of possibility.
18 CHAIRMAN VAN LOON: Let me ask Mr.
19 Steinthal, we are near the time when we would normally
20 take the second afternoon break. Are you close to a
21 breaking point or have a lot more?
22 MR. STEINTHAL: I have probably about 15,

1 20 minutes more, so I'd like to take a break.

2 CHAIRMAN VAN LOON: Let's take a break now

3 then and return at five.

4 (Whereupon, the foregoing matter went off

5 the record at 4:46 p.m. and went back on

6 the record at 5:00 p.m.)

7 CHAIRMAN VAN LOON:

8 Q I think we're ready to go back on the

9 record. I wanted to ask is that, Mr. Harding, in the

10 -- is that the time consultation going on or did that

11 happen already during the previous break?

12 MR. NEWBERG: We are consulting about time

13 now, but as far as consulting with other side, we did

14 at the previous break. So not counting this past

15 cross and we did come to a time agreement on that up

16 until the, I guess it was the 3:15 break,

17 approximately.

18 CHAIRMAN VAN LOON: How much direct?

19 MR. NEWBERG: That added on 1:54 direct,

20 an hour and 54 of direct, which brought us to five

21 hours and 11 minutes total, and 49 of cross, which

22 brought us to eight hours and 13 minutes total.

1 CHAIRMAN VAN LOON: Okay. So you had,
2 essentially, as much Panel questioning time as direct
3 by Counsel.
4 MR. NEWBERG: Not sure exactly, but there
5 was, certainly -- I'd say there was probably over an
6 hour of Panel questioning time.
7 CHAIRMAN VAN LOON: If you have a way to
8 see that from your records, that would be useful for
9 us. Not at the moment.
10 MR. NEWBERG: Sure.
11 CHAIRMAN VAN LOON: Let's continue.
12 BY MR. STEINTHAL:
13 Q Mr. Griffin, are you generally familiar
14 with the services that background music services
15 provide to their clients?
16 A Yes, generally familiar.
17 Q Do you recall during your testimony this
18 morning Judge von Kann referred to these services, I
19 believe, he described them as something to the effect
20 that they analyzed the businesses and developed music
21 programs that are intended to create an image for the
22 business and evoke a response from a consumer in the

1 store?

2 MR. SIGALL: Can I ask you, are you saying

3 that that's what Judge von Kann said or what the

4 Witness said? I didn't hear you when you first said

5 it.

6 BY MR. STEINTHAL:

7 Q Do you recall the discussion about that

8 subject.

9 A Yes. I think it related to Websound.

10 Q Right. Would you agree that the general

11 business which is served by a background music service

12 is to develop musical programs intended to create an

13 image for the business or evoke a response from a

14 consumer in the store?

15 A Specifically to spend money. That they

16 hoped that they spend money in that store. I believe

17 that is their goal.

18 Q Now, again, on your testimony about option

19 value, do you agree that background music services

20 provide little, if any, option value, because an

21 individual who hears music as part of the background

22 music service while dining or shopping does not

1 control the selection of the channel, much less the
2 music being played on that channel?
3 A Yes. There are reasons why that's true,
4 and those are amongst them.
5 Q And the consumer would have no idea what
6 to expect in terms of the next song or the music
7 they're going to hear when they walk into a store,
8 right?
9 A That lowers its option value, yes.
10 Q And it wouldn't be practical for a
11 consumer to wander from store to store hoping to hear
12 a particular song, I take it.
13 A It would surprise me if that was what
14 someone did.
15 Q And if they happen to come into a store
16 and hear a song they like, it wouldn't be practical to
17 really copy it, as you're browsing around in the
18 store, would it?
19 A Right, that's not practical.
20 Q So there's no really option value to speak
21 of with a shopper in a store from a background music
22 service, right?

1 A Well, now you're asking me to let go of
2 gradations, and I have to insist that there are
3 gradations. There is less. Somebody may go to a
4 skateboard shop to hang out and listen to music of
5 their peers. There are reasons why they would choose
6 to do this, but there is less option value.
7 Q You aware of any studies or reports that
8 show whether there's been any displacement of CD sales
9 as a result of consumers being exposed to music by
10 background music services while they shop?
11 A I'm not aware of any reports, and I
12 haven't seen any myself.
13 Q Now, I believe this morning on your
14 direct, you testified that there are or could be
15 developed what you call, quote, "technological fixes,"
16 unquote, that would limit the ability of most people
17 from doing the kinds of stream capturing that you've
18 described. Remember saying that?
19 A Yes. And my recollection is, is that it
20 was not an absolute. I was pointing out that you can
21 implement effects, and then someone could react to it,
22 much like the wars over instant messenger. You know,

1 one would change, and then the other would change.
2 It's a battle.
3 Q Fair to say it's like a cat and mouse game
4 between the technology buffs, between those on the
5 side of trying to keep content from being copied or
6 pirated as opposed to the steps that hackers will make
7 to try to access that content?
8 A No, I don't think it's the incentive that
9 a cat has when it sees a mouse.
10 (Laughter.)
11 I have a cat, and that is a very different
12 motive, because the motive that one has in providing
13 a music service and the player and so forth is quite
14 different than what a cat has with a mouse. It is not
15 an atavistic reaction; it is in fact a very
16 complicated decision that involves -- you know, I
17 might choose this player and that system, because they
18 give me free bandwidth. Even though that one might be
19 less secure, that might be a choice that I made, and
20 that could sacrifice security. So it's not as simple
21 and single-minded as you have tried to paint it with
22 the cat and mouse.

1 Q But you're familiar with the fact in the
2 area of motion pictures and music. There's been a
3 history in the last few years whereby content owners
4 try to create technological mechanisms to prevent
5 hackers from accessing their content. And then when
6 a hacker develops a solution that enables them to get
7 inside, the content owners sometimes try to create a
8 better -- I hate to use the phrase -- mousetrap so
9 that they can't be hacked, right?
10 A Well, actually not because of the
11 installed base. It's hard to do what you're
12 describing. There is certainly thoughts along those
13 lines, but once you have an installed base of CD
14 players or video cassette recorders, it is difficult
15 then to change. Your greatest interest is, of course,
16 putting product into that installed based. So you
17 want to balance the instinct you just mentioned with
18 the revenue potential of selling into an installed
19 base that you're not playing with. So there is a very
20 -- a balance here. They are not single-minded about
21 this.
22 Q But we shouldn't all leave here today

1 thinking that the stream capturers have won the battle
2 with respect to companies that may wish to create
3 technologies so that streams can't be captured, right?
4 A I will say flat out that that battle will
5 not be won. I will say that as a personal
6 declaration, and I know many other technologists who
7 feel precisely the same way, that no matter how that
8 battle plays out, that music comes out into the air.
9 And it is going to be very difficult battle to win.
10 And my own prediction is, is that that battle is never
11 won. That's my prediction.
12 Q Is your prediction it's not going to be
13 fought?
14 A Oh, no, it will be fought, but my belief
15 is, is that while we fight it, we will find out that
16 the other side always wins. They only have to win
17 once really.
18 Q The other side being who, the stream
19 capturers?
20 A Well, the end users who desire option
21 value on content will work very hard to get it. And
22 I believe that over time they will continue to

1 prevail.

2 Q But as you said this morning or this

3 afternoon, you haven't done any kind of analysis of

4 just how much content's been captured at this point,

5 right?

6 A No, I haven't, but of course it's tied

7 into the desire to make music too. I mean we can't

8 completely eliminate the devices that record music,

9 because then we wouldn't have any music to offer. So

10 these two instincts work in balance and mean that we

11 must always lose.

12 Q Now, you mentioned that the term of the

13 major labels at various points today -- this morning

14 and this afternoon. Do you have concerns that the

15 major labels are seeking to control and limit the

16 types of digital music offerings available to

17 consumers?

18 A I have concerns that that's the effect of

19 what happens. I'm not suggesting that there is a

20 particular animus or motive on their part, but the

21 effect of the industry is such that, yes.

22 Q What do you mean by that?

1 A What I mean is that the effect of having
2 a relatively limited number of licenses in a certain
3 area. It doesn't mean that they are meaning a bad
4 thing, but the effect of the marketplace of that,
5 combined with the breadth of number of, you know,
6 you've got independents out here too, creates a
7 circumstance that certainly feels that way. But I'm
8 not suggesting that they have some kind of illegal
9 motive or that there's something bad about what they
10 do.
11 Q I'm not suggesting illegal motive. I'm
12 just asking whether your view is that the effect of
13 their conduct is that there are fewer digital music
14 offerings available to consumers?
15 A My answer was that the effect is that,
16 yes.
17 Q And you mentioned that you've done a White
18 Paper? I think that was in the early phase of your
19 questioning, that you had done a White Paper?
20 A Indeed I did, yes.
21 Q Is the White Paper entitled, "At Impasse:
22 Technology, Popular Demand and Today's Copyright

1 Regime"?

2 A Yes, it is.

3 MR. STEINTHAL: Can we mark that as

4 Exhibit SX-12 and pass out to the Panel and the

5 Witness?

6 (Whereupon, the above-referred

7 to document was marked as

8 Exhibit No. SX-12 for

9 identification.)

10 BY MR. STEINTHAL:

11 Q Is this the White Paper that you

12 identified in response to the questions at the outset

13 of your testimony?

14 A Yes, I think it is. In fact, I think it

15 comes from my home server.

16 Q And was it written in April 2001?

17 A Yes. Before that too. It was done in

18 April of 2001.

19 Q It's consistent with your views from

20 before but published in April of 2001?

21 A Yes.

22 MR. STEINTHAL: I'd offer it into

1 evidence.

2 MR. SIGALL: No objection.

3 CHAIRMAN VAN LOON: Admitted.

4 (Whereupon, the above-referred

5 to document, previously marked

6 as Exhibit No. SX-12 for

7 identification, was admitted

8 into evidence.)

9 BY MR. STEINTHAL:

10 Q I want to draw your attention, first, on

11 page 1 of this White Paper.

12 A Yes.

13 Q You state in the third paragraph, quote,

14 "In passing the Digital Millennium Copyright Act in

15 1998, Congress recognized the need for legislation to

16 foster the Internet's potential for broad

17 dissemination at the time and place chosen by the user

18 of all forms for original work."

19 A Yes.

20 Q "But the existing scheme for protecting

21 and encouraging the dissemination of copyright

22 material is inadequate for the changed market

1 environment brought by the new online world.
2 Legislation enabling the continued development of
3 online music delivery services, while fully protecting
4 the interests of copyright holders is now needed."
5 A Yes.
6 Q And you believe that, right?
7 A Yes.
8 Q What kind of legislation were you talking
9 about?
10 A There I was specifically speaking to the
11 issue of Napster and downloaded recordings.
12 Q Do you express the view in this White
13 Paper that you think that a broader compulsory license
14 for digital music offerings would be appropriate?
15 A In fact, I think what I say is that it's
16 inevitable, that that is how public policy tends to
17 deal with these matters.
18 Q What do you mean by that?
19 A That because we have such a profusion of
20 different rights holders and different problems. In
21 other words, I go through the history of each of these
22 circumstances. So, for example, we have many rights

1 holders on one side and many people who would like
2 content on the other, and that matching them up proves
3 extraordinarily difficult. The effect of all of this
4 is to suggest that we should have this kind of
5 legislation, yes.
6 Q Take a look at page 2, if you would.
7 A Yes.
8 Q There's a statement just briefly in the
9 second to last paragraph about "Online music listeners
10 report sampling new music using Napster --
11 A Hold on, I can't find you, just a second.
12 Q Okay, I'm sorry.
13 A Where are you suggesting?
14 Q Second to last paragraph.
15 A Second to last. Okay, now I found you.
16 Q Where you said, quote, "The advent of
17 online music delivery services has and will fuel sales
18 of music, both as a new delivery service and in hard
19 copy form. Many Napster users are willing to pay a
20 monthly fee for continued access to the service, and
21 many online music listeners report sampling new music
22 using Napster or another such service --

1 A I've lost you, and I apologize for this,
2 but I really --
3 MR. SIGALL: On our copy, I'm not sure if
4 it's the second to last paragraph.
5 CHAIRMAN VAN LOON: In the version that
6 we've received, it's the--
7 MR. SIGALL: Sort of right in the middle.
8 CHAIRMAN VAN LOON: -- fourth from the
9 top.
10 MR. SIGALL: Fourth from the top.
11 THE WITNESS: Okay. I found where you
12 are.
13 BY MR. STEINTHAL:
14 Q Okay. I'm sorry. See the paragraph
15 starting, "The advent?"
16 A Yes, that's right.
17 Q The last sentence it says --
18 MR. SIGALL: For the record, we're talking
19 about the fourth paragraph from the top?
20 CHAIRMAN VAN LOON: That's correct.
21 BY MR. STEINTHAL:
22 Q "And many online music listeners report

1 sampling new music using Napster or another such
2 service and then purchasing a CD of the music they
3 like." Do you see that?
4 A That's right.
5 Q And you're familiar with the fact that
6 there can be promotional benefits associated with
7 various online music services, including file --
8 A Oh, yes.
9 Q -- sharing services, right?
10 A Yes, yes.
11 Q Now, in the next paragraph, the second
12 sentence, you say, "As with the invention decades ago
13 of radio service for delivering plays and music and
14 then of television service by means of broadcast and
15 later cable and satellite delivery for delivering
16 video performances and events, digital music service
17 has transformed the nature of the market for the
18 underlying copyrighted content."
19 A Yes.
20 Q "This transformation can be suppressed
21 only at enormous cost to consumers and to copyright
22 holders who should benefit from the greatly expanded

1 delivery of their works and the services promised.
2 The American public's demand for music delivery
3 services will continue to grow. It is in the public
4 interest and in the interest of rights holders to
5 satisfy that demand, but the demand cannot effectively
6 be met under the current statutory schemes." Do you
7 see that?
8 A Yes.
9 Q And that accurately reflects your views?
10 A It does.
11 Q Okay. Why doesn't the current statutory
12 scheme work to deliver the services that you think
13 should be delivered?
14 A Well, in the point of this paper is, as it
15 points out at the beginning, that it tends to think of
16 content as product and not as service, and this act,
17 amongst others, moves towards that, but we can go
18 further and in fact will over time.
19 My point is that it's inevitable, because
20 every time we have seen technology come into play with
21 content, we have tended to deal with it just this way.
22 It may be a federal judge who reviews a consent decree

1 somewhere. It may be a CARP hearing like this. But
2 throughout the history of technology coming together
3 with content this is what has happened, and that at
4 least is my view as expressed in this paper. And I
5 review the examples paper, and I review the examples
6 of this.
7 Q Is one reason that you believe that
8 legislation is necessary because of a concentration of
9 the music business in few companies' hands?
10 A It is partly the effect of that, yes.
11 That is partly it, but it is again more the notion
12 that historically we have always done this, and it is
13 a consistent way that we have approached it.
14 Q Let's take a look at the portion of your
15 paper that starts at the bottom of page two, the "for
16 two reasons."
17 A Yes.
18 Q You say, quote, for two reasons the market
19 place cannot and will not provide a solution.
20 A Yes.
21 Q "First, the music industry, long known for
22 close coordination among its major players, has with

1 one notable exception chosen to work to retain control
2 of music distribution, refusing to deal with entities
3 that threaten that control, even if in the process
4 substantial popular demand for music is left
5 unsatisfied."
6 A Yes.
7 Q "Five companies -- AOL-Time Warner, EMI,
8 Sony, BMG, and Universal -- control about 85 percent
9 of the market for pre-recorded music."
10 A Yes.
11 Q "These companies are collectively known as
12 the majors. The remainder of the music industry is
13 made up of much smaller companies, referred to as
14 independents or indies. As reflected by their
15 collective market share, the majors dominate the
16 distribution of prerecorded music, and have done so
17 for decades."
18 "The majors' dominance extends beyond the
19 distribution of pre-recorded music into both music
20 publishing and the signing and promotion of new
21 artists. While music publishing is less concentrated
22 than sales of pre-recorded music, the music publishing

1 businesses owned by the five majors control a high
2 percentage of the most valuable song copyrights."
3 "Indeed, the two largest music publishing
4 companies, those owned by AOL-Time Warner and EMI,
5 alone control the rights to millions of songs.
6 Although literally thousands of musical copyright
7 owners are not affiliated with any of the major music
8 publishing companies, including a number of
9 independent music publishing companies, the catalogues
10 of song copyrights owned by these entities pale in
11 comparison to those of the major music publishing
12 companies."
13 "Similarly, the labels owned by the major
14 music companies are capable of offering the most
15 lucrative recording deals, and therefore typically
16 sign the most promising new artists to recording
17 contracts."
18 "Few artists succeed in a big way without
19 the backing of a major label, since the majors'
20 expansive resources and high market shares given them
21 considerable influence over the primary promotional
22 vehicles in the music industry, including radio and

1 cable television channels like MTV and VH1. For
2 artists, the majors collectively control the gateway
3 to the top."
4 "Where a small number of large firms
5 comprise an" --
6 ARBITRATOR VON KANN: Excuse me, but how
7 much of this article do you propose to read?
8 MR. STEINTHAL: I will finish this
9 paragraph here, which is at the end of this thought.
10 ARBITRATOR VON KANN: Okay.
11 BY MR. STEINTHAL:
12 Q "Where a small number of large firms
13 comprise an industry, their interests will frequently
14 align, and very often, so will their business
15 decisions and strategy. And parallel, and even
16 interdependent, decision making has long been a
17 hallmark of the music industry."
18 "Such behavior can be a natural outgrowth
19 of market concentration, and may occur even without
20 what might be deemed collusive activity in violation
21 of the anti-trust laws."
22 "Even if it is not illegal, however, such

1 non-competitive behavior still harms consumers,
2 because it enables each of the majors to safely ignore
3 consumer demand, confident that its competitors will
4 do the same."
5 Now, you believed and still believe in
6 what I just read from this white paper, correct?
7 A Yes.
8 Q Do you have a concern that because of the
9 concentration in the music business among the major
10 labels, the five major labels, that there will be less
11 licensing of content from those labels on a voluntary
12 basis to independent companies that wish to offer
13 digital music services to the public?
14 A Well, I mean, given the paper, I am not
15 concerned about it, because it goes to a blanket
16 compulsory. But absent that, we don't have a
17 consistent way of communications technologies
18 demanding ubiquity.
19 So we have to know what format it is
20 coming in and so forth. I mean, I would point to the
21 example of the Red Book Audio CD. And absent that, we
22 really don't even have a market.

1 Q Well, we don't have a blanket compulsory
2 for rights beyond that which are covered by this
3 proceeding; is that not right?
4 A Well, in certain cases. Some things are
5 subject to compulsories, and there are other CARP
6 hearings for music. So this isn't the only one.
7 Q For example, the right to perform sound
8 recordings on digital music services that don't
9 qualify for the eligibility requirements under Section
10 114, there is no compulsory license to do it?
11 A I am not going to be able to interpret
12 your law well. I mean, that's where I -- you know.
13 Q Well, you are familiar with the fact are
14 you not that some services qualify for the compulsory
15 license, and some services don't, right?
16 A Well, I would believe, yes, that that
17 would be true.
18 Q And are you not concerned that because of
19 the concentration in the music business that you were
20 referring to that I just read --
21 A Yes.
22 Q -- that services that wish to offer sound

1 recordings to the public will not be able to have the
2 ability to do so without a broader compulsory license?
3 A Amongst other things, yes. That is one of
4 the components.
5 Q I would ask you to take a look at -- on
6 page three, the second to the last paragraph.
7 A Yes. It begins with the words, "The
8 majors."
9 Q Right.
10 A Yes.
11 Q There is a passage here where you say,
12 "The majors know that the public wants the ability to
13 access the full range of music, not just the music of
14 one or two companies, from a single source."
15 "As they are reported to have written in
16 another context, quote, to be compelling to consumers,
17 a service must offer tens or hundreds of thousands of
18 songs.' They cannot themselves offer a single joint
19 site for antitrust reasons."
20 "But as long as most of them remain
21 united, they can prevent the success of any
22 unaffiliated service by refusing to license their

1 songs. They are insulated from market pressures by
2 virtue of their coordinated behavior. Only if several
3 were to defect would the others have to follow in
4 order to remain competitive."
5 "Why would the majors choose to prevent
6 the development of popular digital delivery services,
7 despite the demonstrated ability of such sources to
8 increase public demand for music?"
9 "Napster, as the innovator of peer-to-peer
10 music file sharing technology, has earned a 'first-
11 mover' advantage over other companies in the digital
12 delivery of music."
13 "As a threshold matter, the majors do not
14 want to enable Napster to earn a financial reward for
15 this innovation, but would rather try to recapture the
16 advantage for themselves."
17 What do you mean by "trying to recapture
18 the advantage for themselves."
19 A They want the relationship with the end-
20 user.
21 Q They being the major labels?
22 A Anybody would want the direct relationship

1 with an end-user for the purchaser of ones' products.
2 Q And you say at the end of this paragraph,
3 and do you agree, "that they do not want to lose their
4 historical influence and concomitant ability to direct
5 consumers' attention, and purchases, to their own
6 artists and levels."
7 MR. SIGALL: We are on page four now?
8 MR. STEINTHAL: The same paragraph, but
9 the very last sentence.
10 THE WITNESS: Yes.
11 BY MR. STEINTHAL:
12 Q And you agree with that, right?
13 A I wrote it.
14 CHAIRMAN VAN LOON: While you are
15 searching for the next point, let me ask whether other
16 colleagues are planning cross-examination. Two more.
17 Okay.
18 And have you consulted enough among
19 yourselves to have a projection of how much time that
20 might be
21 MR. JOSEPH: I would expect -- I don't
22 know that we have consulted among ourselves, but I

1 would expect mine to be under a half-an-hour, and
2 possibly considerably and possibly not.
3 CHAIRMAN VAN LOON: Under a half-an-hour?
4 Do you have a sense, Ms. Leary?
5 MS. LEARY: Yes, I would say 10 minutes or
6 less.
7 MR. STEINTHAL: And I have less than 10
8 minutes.
9 CHAIRMAN VAN LOON: All right.
10 BY MR. STEINTHAL:
11 Q And right after that last passage that I
12 read you, you say, "Thus, it is in the majors'
13 collective interest to regain" --
14 A Hold on. I have got to find the other
15 page.
16 Q I'm sorry. It is on page four, the first
17 full paragraph.
18 A Okay. Very good.
19 Q "Thus, it is in the majors' collective
20 interests to regain control of music distribution from
21 upstart entities such as Napster, even after it
22 transitions to a royalty-generating service." Is that

1 correct?

2 A Yes.

3 Q Now, if you look at the discussion -- and

4 I beg your indulgence, as I am looking at something

5 that for some reason has been paginated differently.

6 Where you start the discussion of the AHRA on page

7 five --

8 A Yes.

9 Q That is the American Home Recording Act?

10 A Yes.

11 Q I'm sorry, the Audio Home Recording Act.

12 A Yes.

13 Q And then you talk about various compulsory

14 licenses in the mechanical compulsory license. Do you

15 see that?

16 A Yes.

17 Q And you talk about the juke box compulsory

18 license?

19 A Yes.

20 Q And you talk about the AJRA, and would it

21 be fair to say that you believed that it effectively

22 created a compulsory license?

1 A I don't know what you mean by effective.

2 MR. SIGALL: I am trying to find out where

3 he is.

4 CHAIRMAN VAN LOON: Yes. Could you direct

5 us, please, to where --

6 MR. STEINTHAL: The discussion of the AHRA

7 starts on this copy on page five, and it goes to page

8 six.

9 CHAIRMAN VAN LOON: We saw where it

10 started. Below the large indented quote from the copy

11 of the amicus brief in Napster.

12 MR. STEINTHAL: Yes. It is on the bottom

13 of five, and going over to six, is where I am. And my

14 question was simply whether the witness believes that

15 the AHRA created a statutory license mechanism, or

16 effectively a statutory license mechanism.

17 THE WITNESS: Well, it has a relationship

18 to one, in the sense that it says that you can copy,

19 but creates attacks. It is attempting to deal with

20 what it thinks our damages that may come from what it

21 provides.

22 BY MR. STEINTHAL:

1 Q And you go on to talk in your article
2 about the cable compulsory license do you not?
3 A I do, yes.
4 Q And on page six, at the bottom or at the
5 very end of the third full paragraph, in reference to
6 the cable compulsory license.
7 A Yes.
8 Q You say do you not, "As leading
9 authorities on copyright law explained, one of
10 Congress' initial reasons for implementing the cable
11 compulsory license was to foster the growth of the
12 then nascent cable industry, a purpose that has been
13 very effectively accomplished." And that is something
14 that you believe is correct, right?
15 A Yes.
16 Q Is there any doubt in your mind that there
17 would be more licensing of digital music services,
18 including interactive digital music services, were
19 there to be a compulsory license mechanism available
20 to all digital music services?
21 A Yes.
22 Q And you agree with that statement do you

1 not?

2 A I do.

3 Q And do you agree with the statement that

4 license fees for those services would be more readily

5 available to digital music services for content in the

6 presence of a compulsory license for digital music

7 services beyond the scope of this proceeding?

8 A I think so, yes.

9 Q And do you think that compulsory licensing

10 tends to lower the price at which rights will be

11 available to services that make access to the

12 compulsory license?

13 A That is a tough one. I have speculated

14 about it before. I think there are considerations

15 other than economic that are involved, but I can't say

16 that I think that it necessarily makes them lower.

17 Q But it makes pricing at a level subject to

18 oversight by somebody like this one available to those

19 that wish to use copyrighted works, correct?

20 A Right. There is no doubt that these guys

21 will decide, and then someone will be able to avail

22 themselves of that license.

1 MR. STEINTHAL: Your Honors, as opposed to
2 --
3 ARBITRATOR VON KANN: I have been called
4 worse.
5 BY MR. STEINTHAL:
6 Q Take a look now if you would at the bottom
7 of page eight.
8 A I'm there. Well, I think I am. It has
9 nine of and eight of on this.
10 Q Well, I think it is the 8 of 11, or
11 actually the 9 of 11.
12 A Yes, except the next one is 10. I would
13 appear to be missing a page.
14 MR. SIGALL: It looks like the one we have
15 is missing a page. The reference to 8 and 9 on the
16 same page, and no -- I don't know which one --
17 MR. STEINTHAL: We will make sure that if
18 there is a page missing that we will supplement it and
19 get it in.
20 (Brief Pause.)
21 BY MR. STEINTHAL:
22 Q In the paragraph starting, "Congress," you

1 said, "Congress has also adopted legislation where
2 necessary to ensure that a newly developing industry
3 will have an opportunity to flourish."
4 "Napster and other peer-to-peer
5 technologies are in their infancy, and their full
6 potential for music delivery is not yet known. They
7 certainly hold substantial promise."
8 "Absent Congressional intervention,
9 however, the problems currently plaguing development
10 of online music delivery may never be fully resolved.
11 In that event, the growth of digital music delivery
12 services will be stunted, if not smothered,
13 altogether, and the commentators have recognized,
14 consumers' loss of the traditional rights and
15 privileges of fair use would be significant."
16 MR. SIGALL: I want to make sure that that
17 is what he is saying on page nine. Is this page nine
18 that you were reading from, because that goes over to
19 the next page on ours.
20 CHAIRMAN VAN LOON: I think it is at the
21 bottom of page eight. But could we ask in the future
22 that you all make extra efforts to ensure, first of

1 all, Mr. Steinthal, that the copy that you are using
2 would be the same one that gets handed out for people,
3 so that we wouldn't have this difficulty and delay.
4 MR. STEINTHAL: I am absolutely as
5 embarrassed anybody it his room over it.
6 ARBITRATOR GULIN: It does appear that a
7 page is missing, and that there is simply that the
8 last three pages were mis-paginated, because there is
9 a total of 10 pages.
10 THE WITNESS: I am more embarrassed,
11 because it looks like I wrote something that goes
12 right over a page.
13 MR. STEINTHAL: Well, in fact we may be
14 missing something there.
15 THE WITNESS: That;s what I think, yeah.
16 BY MR. STEINTHAL:
17 Q You make a statement on page 10 of 11, the
18 second to the last page of the document that you are
19 looking at.
20 A Yes.
21 Q And at the very first full paragraph, you
22 say, "The copyright laws, as authorized by the

1 Copyright Clause in the Constitution, are intended to
2 foster the creation and distribution of original
3 works."
4 "Copyright holders are to be compensated
5 for licenses because awarding compensation encourages
6 them to create and disseminate their work. It is this
7 goal of promoting the enjoyment and distribution of
8 original work that has led to the various statutes
9 described above, as well as to exceptions tot he
10 copyright law, such as fair use."
11 "Considered pursuit of a balanced
12 copyright regime has served the nation well, fostering
13 continuing creativity over the centuries. The
14 underlying purpose of the nation's copyright regime
15 should guide analysis of the action needed to adapt
16 the nation's copyright regime to today's technology."
17 And you agree with that do you not?
18 A Yes.
19 CHAIRMAN VAN LOON: Is there anything in
20 this paper that you published about three months ago
21 that you didn't write?
22 THE WITNESS: Well, there is a missing

1 page. Outside of that, Your Honor, I think it is
2 accurate.
3 CHAIRMAN VAN LOON: Okay.
4 BY MR. STEINTHAL:
5 Q Lastly, I would just ask you to take a
6 look at or towards the bottom of page 10, just to make
7 sure that this, too, reflects your view.
8 A I wrote it.
9 Q You said, "Market forces will not resolve
10 the problem, just as they have not resolved problems
11 arising from earlier transformational technological
12 developments in the delivery of copyrighted material."
13 "The large music companies, with one
14 exception, have chosen to stand together against the
15 new music services, knowing that they can thereby
16 maintain, at least for a time, their control over the
17 distribution of music products, and the selection of
18 new talent."
19 "While the new services have to negotiate
20 with each major independently, the majors have worked
21 together against the new services, filing a joint
22 lawsuit thought their trade association, jointly

1 working on new security technology, and jointly
2 presenting their viewpoint to the public."
3 "Through their joint efforts, they have
4 been in a position to observe one another closely, and
5 retain confidence that most of them at least will
6 remain the traditional alliance." You believe that,
7 right?
8 A Yes.
9 Q Now, are you familiar with a phrase that
10 you have used from time to time called "Tarzan
11 economics."
12 A Yes.
13 Q And do you want to describe what that is?
14 A Sure. I have said that I think we are in
15 a time of Tarzan economics. That we have our hand
16 firmly on a vine, and we being -- well, I will say the
17 music industry, and people of all kinds -- publishers,
18 et cetera.
19 That we have a vine that keeps us off the
20 jungle floor today and that is how we do business.
21 And that we are transitioning to the next vine, and it
22 is very difficult for us to let go of the vine that we

1 are on until we get the next vine in our hand, and in
2 fact, not just difficult.
3 It would be hard to imagine that someone
4 would do such a thing, and that your motive for
5 letting go of that which pays the rent, and keeps the
6 company in business before you have the next vine in
7 your hand is clear. That you would not let go of this
8 one until you have that one.
9 Q And so in the interview that we looked at
10 earlier, do you recall discussing that we might deduce
11 that the majors have motive to slow the transition
12 down from the product vine as you called it, and the
13 product world of sound recordings, until the next vine
14 comes along, which they can grab their hand on, which
15 is the service vine of distribution of sound
16 recordings?
17 A Yes. And specifically -- and I am not
18 sure if this is in there, but I do think I recall
19 saying to him that it is because we have to share the
20 next vine, because where our hands and what our
21 various rates and so forth are not yet known.
22 MR. STEINTHAL: I have no further

1 questions.

2 BY MR. JOSEPH:

3 Q Thank you, Mr. Griffin, my name is Bruce

4 Joseph. I would like to ask you to take a look at

5 your Senate testimony again on --

6 A Let me get that.

7 (Brief Pause.)

8 THE WITNESS: Okay. I have it in my hand

9 now.

10 BY MR. JOSEPH:

11 Q Would it be accurate to say that on pages

12 6, carrying over to 7 --

13 A Well, I don't have page numbers. Okay. I

14 am on page six now.

15 Q It is actually the section numbered 4A.

16 A I see it.

17 Q You describe how copyright owners view the

18 radio when it was new as a threat?

19 A Sure.

20 Q In fact, you even refer to radio as the

21 first Napster don't you?

22 A Right, and that wasn't just music. It was

1 sports, and churches, and all manner of people who
2 draw a crowd.
3 Q But a threat?
4 A Yes.
5 Q They viewed it as a threat?
6 A Yes.
7 Q And in fact radio didn't turn out to be a
8 threat to the record industry did it?
9 A No, not over time. Not as they built a
10 relationship.
11 Q And in fact as you testified before the
12 Senate Judiciary Committee, radio now is viewed a
13 necessity to the success of the record business isn't
14 it?
15 A Yes, in the relationship that they have,
16 they now need it, yes.
17 Q And that is because radio air play
18 promotes the sale of sound recordings isn't it?
19 A It is even more fundamental. The odds of
20 someone wanting to have something that they have never
21 heard can be relatively low because they have never
22 heard it.

1 Q And the more they hear it, the more they
2 tend to want to have it; isn't that correct?
3 A Well, this is the dilemma, Bruce, is that
4 in our new world the odds of someone buying something
5 that they haven't heard are close to zero. But the
6 problem is that if they can hear it, they may not need
7 to buy it.
8 And increasingly as digital technology
9 gets better, they don't, and that is the dilemma that
10 I speak to.
11 ARBITRATOR VON KANN: The more I hear it,
12 the less the need I feel to buy it.
13 THE WITNESS: Well, for the macarana,
14 that's true. And maybe Barney and the Dinosaur, and
15 so forth. And yet this becomes a very difficult
16 dilemma with digital recording being as good as it is.
17 I have referred to it as what I call the first use
18 dilemma.
19 BY MR. JOSEPH:
20 Q But you are talking about the digital
21 recording issue again, but putting aside the digital
22 recording issue --

1 A In other words, we should go to fantasy
2 land.
3 Q And with respect to performance, the
4 tendency is that the more you hear, the more you are
5 interested in acquiring the ability to have option
6 value; isn't that correct?
7 A Traditional that was true, but as I point
8 out, this first use dilemma is arising, and that the
9 more that we can hear something now, the less we need
10 to have it, because our opportunity to take it and
11 have option value on it has grown so dramatically, and
12 continues to grow.
13 Q But that is because of the opportunity to
14 take it, correct?
15 A Well, because we live in a world in which
16 that which we hear, we can have.
17 Q Because of recording capabilities that you
18 are speaking of?
19 A Well, yes, indeed. In other words, there
20 would be no music if we lived in a world of no
21 recordings. So if your predicate is right, there is
22 no recording, and then there is no new music.

1 Because you have to be able to record
2 music to make it, and so if you add the predicate that
3 there is no storage technology, then there is no
4 music.
5 So your predicate means that there isn't
6 a music business, but as long as there is the ability
7 to make music, there will be the ability to take music
8 by the same means by which it was made. This is the
9 dilemma, and this is what is difficult for Your
10 Honors.
11 I mean no disrespect to say quite directly
12 to you that this I think is the horns of the dilemma
13 that we have, and what is at the root of pricing.
14 Q Do you have any evidence or any
15 information that would suggest that record companies
16 are promoting less actively to radio stations and to
17 string their signals or their programming on the
18 internet?
19 A Less actively? No.
20 Q Okay. So they are continuing to promote
21 to radio stations?
22 A I mean, selectively. I mean, where the

1 goal is to do so. I mean, the point is to be very,
2 very careful with promotion. The promotion is an
3 enticement, and it is a carrot that hopefully one does
4 not get in ones hands.
5 So the need to be selective about
6 promotion is really the key. I mean, if you are
7 suggesting that one would say, well, just to let other
8 people have such a thing will in fact promote it, I
9 would have to respectfully disagree that this is not
10 my experience.
11 My experience is that the promotional
12 value is very carefully watched, and how many times is
13 it played. I mean, the example being of the Macarana,
14 one would or might object if the song was played too
15 much.
16 And in fact your goal is to carefully
17 craft that it is played in places where there is
18 inventory. If a radio station were to play it in a
19 place where there was no inventory, its promotional
20 value would be relatively low.
21 And so crafting and selecting the
22 promotional availabilities is very, very important in

1 this case.

2 Q So you do agree that nobody calls radio

3 stations pirates when they play sound recordings?

4 A Well, they pay for them, and they pay an

5 appropriate rate that is set and so forth.

6 Q Who pays for what? I'm sorry, what?

7 A Well, the radio station pays a fee for the

8 right to play music, and this it does.

9 Q Does the radio station pay a fee for the

10 right to perform a sound recording?

11 A There is certainly a sound recording that

12 they are using, and they have to pay someone for that

13 right. And in that particular case, it may be

14 assigned not to the owner of the sound recording

15 itself, but if I want to play a song, I will have to

16 compensate someone for the right to do so.

17 If I don't write any checks, I can't run

18 a radio station and use content.

19 Q When a radio station -- well, first of

20 all, it is true is it not that record companies give

21 free Cds to radio stations?

22 A Sometimes they do, but they don't give

1 them a key to the closet.

2 Q Would you say often?

3 A On a selective basis, yes, and they punch

4 a hole in them and so forth. They are very careful

5 about what they do, but yes, they do deliver them.

6 Q Is it your experience that they give tens

7 or hundreds of thousands of free Cds to radio

8 stations?

9 A Oh, boy, now you are into a place where it

10 could happen, but you would be very careful.

11 Q So radio stations don't typically pay for

12 the Cds that they play on the air do they?

13 A I would guess that they probably don't,

14 because I think that somebody goes over to the radio

15 station and plays it for the program director, and

16 probably leaves it there.

17 Q It is called service, and what the record

18 companies do is commonly in the industry called

19 servicing isn't it?

20 A Sure. But I wouldn't ignore the notion

21 that some radio stations make go out and get it.

22 Q And when the radio station has that CD, in

1 order to play that CD on the air, the radio station
2 doesn't have to pay the record company does it?
3 A That is a different thing. I said they
4 have to pay, but not necessarily to the record
5 company. It can go, of course, to the publisher, but
6 they pay for the right to do so.
7 Q A simple question. Do radio stations pay
8 record companies for the right to play the albums that
9 they play?
10 A The answer is no, but I don't think it is
11 a complete answer to the question.
12 Q Well, in fact, in your interview on Inside
13 Digital Media, you gave just that example. You
14 thought that it was a significant enough example to
15 give, just that example, didn't you?
16 A Where are you referring to?
17 Q Well, let me ask you to turn to page 8 of
18 that interview.
19 A Okay. Let me get there.
20 (Brief Pause.)
21 THE WITNESS: I'm there.
22 BY MR. JOSEPH:

1 Q Okay. And at the end of the carryover
2 paragraph, isn't it true that you said, "Do we call
3 radio stations pirates? No. Do they pay record
4 companies for the right to play their albums?
5 Certainly not."
6 And then I would note the last sentence,
7 "And in fact truth be told that the economics run the
8 opposite."
9 A Yes. They have an incentive to use them
10 on a selective basis. But the point being to my
11 previous answer, if you are interested in a complete
12 answer, is that in my opinion -- and you could argue
13 this I am sure, that the money that goes to the
14 composer and the lyricist, might otherwise have to be
15 paid by the record company under a different
16 circumstance.
17 My own belief is that it is very difficult
18 to extricate all of this. The copyright is like a
19 quilt, and that the payment that we assign to the
20 composer and the lyricist helps alleviate the record
21 company of one of their obligations to compensate for
22 what they have.

1 And that absent that payment, they night
2 have to compensate at a higher level for the payments
3 that they do make.
4 Q To compensate the record records?
5 A Pardon me? The record company would have
6 to compensate the publisher at a higher level because
7 they would then get less money.
8 So if radio didn't pay the publisher, the
9 record company would have to pay the publisher more,
10 because otherwise they would get a lot less money, and
11 have a lot less good lyrics and good songs.
12 So it is an assignment of money, but to
13 say what it is for, it is for the right to play the
14 record. If it goes to the publisher who represents
15 the composer or the lyricist, it is nonetheless a cost
16 assigned to creating music. And for the right to play
17 that music, you must pay the fee.
18 Q Now, you testified in your written direct
19 testimony, I believe on page four --
20 A Just a moment. Okay. I'm there.
21 Q That to the listener, screening looks and
22 feels a lot like traditional radio, and you go to a

1 website and click on a button, and music begins to
2 play from the computer.
3 A Sure, look and feel.
4 Q And just as when you tune your radio to
5 your favorite station.
6 A In general, yes.
7 Q And again you continue the analogy on page
8 13 do you not, where you describe what you call the
9 core web casting model, again by reference to radio,
10 correct?
11 A That is one of the references. I am
12 looking specifically to where you are talking about
13 here.
14 Q Well, if you look to the middle paragraph
15 under (a), and at the end of the first paragraph under
16 (a), the user's interaction. It says does it not that
17 the user's interaction is limited to the selection of
18 the genre channel he wishes to hear, much like
19 traditional car radio, where the user punches a preset
20 station to receive the music?
21 A Yes, my analogy is that selecting a genre
22 is like pushing a button. That is correct.

1 Q Now, if you turn to the white paper, you
2 continue the same analogy on page nine, correct?
3 A Well, actually, I have to get there first.
4 I think page nine is missing.
5 Q Well, it is the double-numbered page.
6 A Yes.
7 Q If you go to the --
8 A I'm there.
9 Q It is the page that follows seven, and we
10 will have to refer to it that way. At the start of
11 the fourth full paragraph on the page, the DMCA, and
12 that is a reference to the Digital Millennium
13 Copyright Act is it not?
14 A Yes.
15 Q Okay. It expands the public performance
16 rate and sound recordings to include digital and audio
17 transmissions in webcast services that resemble
18 traditional terrestrial radio broadcasts, correct?
19 A That is its goal, yes.
20 Q And just in keeping with this same analogy
21 that you keep referring to, on page 14 of your written
22 testimony, your direct written testimony --

1 A Okay. Hold on. Okay, I'm there.

2 Q -- you note that there are certain types

3 of webcasters that stream in a format that is

4 particularly -- and I quote -- like traditional radio,

5 where they use live DJs and essentially only one

6 channel of music, correct?

7 A Sure, that's more like radio.

8 Q Now, in the second of the videotapes that

9 you offered -- I know that RIAA asked you to play 208

10 for the panel, and you and they decided not to play

11 209.

12 A Right.

13 Q And 209 was of a -- I believe you

14 testified that it was a website called,

15 "WorldClassRock.com." Is that correct?

16 A That's right.

17 Q And that is a site -- that is one of those

18 channels that is streamed in a format like traditional

19 radio, where they use live Djs and essentially only

20 one channel of music, correct?

21 A Yes. Yes, that's right.

22 Q And in fact it sounds a lot like a radio

1 station doesn't it?

2 A I think it does.

3 Q And in fact it used to be an over-the-air

4 broadcast radio station didn't it?,

5 A Indeed, it did, like KMAC, its owner.

6 Q And by the way, earlier we discussed the

7 concept of live in connection with WorldClassRock, of

8 whether or not a particular program was taped or live,

9 and that a human being was sitting there, and that it

10 was being streamed in real time, correct?

11 A Right. I hit the record button and I went

12 to the station on the computer, and let it run for a

13 half-an-hour.

14 Q And anybody else who had clicked on --

15 when you just said the record button, you hit the

16 record button on your VCR?

17 A Yes, on my VCR, and I went --

18 Q And with all the record buttons flying

19 around, I just wanted to make sure what you were

20 referring to.

21 And if someone else had clicked on

22 WorldClassRock.com at exactly the same time you were

1 making that video tape, they would have heard the same
2 thing, right?
3 A I think so. I mean, I don't think that
4 WorldClassRock was doing custom streaming at that
5 time.
6 Q Just single channel, right?
7 A I believe -- well, single channel is not
8 the same as custom streaming. You can have one signal
9 that sounded the same to everyone that had different
10 ads for some of the people, for example. But that is
11 possible to do, insertions.
12 In other words, someone else could have
13 heard a different advertisement during that than I
14 heard, and that is possible. I don't have any
15 evidence that that is true, because I didn't set up
16 two different computers.
17 But that one broadcast could have had
18 things that say, well, if the listener is from an IP
19 address that we know is in Texas, maybe we would play
20 them something different, or show them an
21 advertisement from a Texas airline.
22 Q So what you are saying is that you believe

1 that is technologically possible, and you are not
2 saying that WorldClassRock used that?
3 A Right. I am saying it is not only
4 possible, but it is increasingly common in the
5 business. So I don't know if it happened at that
6 point, because companies like High Wire specialize in
7 precisely that.
8 And in fact that particular company,
9 WorldClassRock, has a deal with High Wire to do just
10 that, to do customized delivery.
11 Q And to your knowledge have they started
12 doing customized delivery yet?
13 A I don't know the answer to that question.
14 I know that the deal is several months old.
15 Q Did you watch the videotape in 209?
16 A I did not watch it in its entirety. I
17 simply let it run for a half-an-hour.
18 Q And so you can't even say as you sit there
19 whether there were any actual advertisements contained
20 in that stream can you?
21 A I can say no, I cannot say that. My goal
22 was simply to provide a half-an-hour experience for

1 people here to be able to get a sense.

2 Q So if Their Honors have a half-an-hour to

3 spend watching it, they can see whether or not there

4 were?

5 A In fact, it could have ended up as a good

6 example for you or for this side. It was a very

7 neutral preparation.

8 Q By the way, you don't doubt that Webcast

9 can promote the sale of sound recordings do you?

10 A No, I don't doubt that.

11 Q And in fact on pages 23 and 24 of your

12 direct testimony, when you are describing the types of

13 E-Commerce that are available on websites, you

14 describe the sale of sound recordings prompted by the

15 webcast as the most obvious form of E-Commerce revenue

16 don't you?

17 A Yes. Indeed, as I said earlier, the

18 likelihood of someone buying a song that they have not

19 heard is relatively low.

20 Q Now, let's return a minute to the Digital

21 --

22 ARBITRATOR VON KANN: Does that last

1 answer suggest that because we are told that the scope
2 of what one can listen to now through internet
3 screening is much wider than what is generally
4 available on over-the-air radio, because there are so
5 many more channels.
6 And if you don't have a passion for Irish
7 Harp, which I think I saw somewhere here, that
8 internet listeners will hear because of webcasting a
9 lot of music that they probably would not have heard
10 just from radio, and will be prompted to go out and
11 buy some of that.
12 And therefore the sales of at least some
13 music, and perhaps not the big hits, and not the bit
14 ones, but less popular music, will probably at least
15 in the short term be increased as a result of
16 screening on the web?
17 THE WITNESS: Yes. I believe that in
18 hearing music leads us to want to have it, and again
19 as I pointed out before, the dilemma is whether this
20 then substitutes, promotion substitution being the
21 critical balance here.
22 So I think that it is no secret that

1 hearing music increases -- and I think they say in the
2 industry AICP. You get an awareness, and you develop
3 an interest, and you consider it, and you purchase.
4 If you have no awareness of something, it
5 is hard to have an interest in it, and to consider its
6 purchase. So making someone aware of something can
7 lead to its purchase.
8 On the other hand, with digital
9 technology, if you can be aware of it, you may be able
10 to grab it. And then you would have no need to
11 purchase it.
12 So this is increasingly the dilemma, but
13 without question it is hearing the song that makes
14 someone want it.
15 ARBITRATOR VON KANN: Leaving aside for a
16 moment the grabbing issue, which there may be ways of
17 dealing with it in other words. If we were just
18 dealing with it with pure streaming, and no ripping,
19 and no recording, or BitBops searching and so on, is
20 it your impression that the net effect of internet
21 streaming is going to be to increase or decrease the
22 sale of records in the immediate future?

1 Will the sale of the less known, less
2 heard, records which may go up, offset perhaps the
3 people who will feel somewhat less of a need to
4 purchase a CD that they can hear with great frequency
5 on a specialized streaming channel?
6 THE WITNESS: In my opinion, there can be
7 a temporary effect from this, but I do believe that
8 over time the same effect will occur that essentially
9 that credit cards and ATMs have had on travelers
10 checks.
11 And which is to reduce your need for them
12 over time, and that the availability of other means,
13 or the availability of the delivery of food might
14 reduce your need to store it.
15 But as a fundamental issue, it is not
16 deniable that it could be a bump that occurs over a
17 short period of time. But I believe that over a very
18 long period of time that we have seen an inevitable
19 slide from product to service for those things that
20 are capable of it.
21 And the notion that a zero and one will
22 continue to travel into the marketplace on the back of

1 a plastic disk from a truck in a warehouse, I think,
2 that is not as likely.
3 So I can't say that into the distant
4 future that this will mean increasing sales. I
5 believe that inevitably that that service will grow,
6 and that an inappropriate price can cause this to
7 occur in a way that is meaningful for everyone on all
8 sides.
9 Q When you speak of that belief of the
10 surface growing, you are referring primarily are you
11 not to on-demand streaming, and digital downloads,
12 more so than non-subscription or subscription
13 channels?
14 A Well, I am referring to music in general.
15 And in fact I say that the more access that you have
16 to something, the less you need to have and hold it.
17 So as access to things goes up, our need
18 to have and need to hold them goes down. Inevitably so
19 over time, because while there may be temporary
20 fluctuations -- in other words, we can increase
21 interest here, but until wireless and band width goes
22 up, maybe we will have a little thing here.

1 But as this comes up, then that will be
2 problematic. And by all means, I think that critical
3 to this discussion is the bit rate that I added, and
4 that the quality of the thing that is coming. is very
5 important as to whether there is a substitution.
6 And in some ways, our questions here are
7 ignorant in the sense that they assume that 12 carat
8 gold is the same as 18 carat gold, or that a
9 McDonald's burger is the same as someone else's
10 burger.
11 In fact, a high bit rate stream is more
12 capable of reducing one's heed to purchase something.
13 And a lower bit rate stream will have less of that
14 potential, because quite simply we are taking less of
15 the thing, and representing less of it on the other
16 side.
17 And so I think that this is also an
18 element that is critical to your question.
19 ARBITRATOR GULIN: In response to Judge
20 von Kann, and when you talked about a bump up, perhaps
21 in the near term -- I assume what you mean by that is
22 a bump up in CD sales?

1 THE WITNESS: It could occur in a short
2 term because it could happen, and that your awareness
3 went up without everybody -- there is a trailing
4 effect as I think many of the questions have pointed
5 out.
6 That we typically see, even with hacker
7 behavior must the same, that the first time that a 14
8 year old does it, those of us who are over 540 think,
9 well, how in the hell did that happen, and
10 And then no one could do that, and then
11 someone writes a script that does it, and then it gets
12 easier, and as it comes down, finally someone makes a
13 plug or a piece of software, and now it is really easy
14 to do.
15 ARBITRATOR GULIN: So do I understand you
16 to be saying that in the short term that the net
17 effect of web casting may actually be an increased
18 sales in Cds?
19 THE WITNESS: For some artists. For
20 example, Judge Von was for an obscure artist, and I am
21 saying that for that obscure artist, they could in
22 fact benefit before somehow had their ability here.

1 That could happen, and I am not denying
2 that there will be examples of where this occurs.
3 Now, I am speaking more to the general progress of
4 history over a long period of time, and acknowledging
5 that there may be variances in the interim that occur
6 partly because of wireless, and because music does
7 need to be wireless.
8 But over a long period of time, I think
9 that this is inevitable and has been proven out in
10 other similar industries. And in fact software is a
11 good example. That where we once went to the store to
12 buy a shrink red box, every time that we wanted to do
13 something. There are many cases now where we go to
14 use a service instead of buying a disk.
15 THE WITNESS: So if we limit ourselves to
16 a short term, and we are talking about CD sales in
17 January, and not just obscure artists, do you have an
18 opinion as to the effect of webcasters on CD sales in
19 the short term?
20 Yes, I believe that in the short term that
21 it does decrease sales, and I say that based on
22 discussions with teenagers who tell me that they will

1 never buy another CD again.

2 And they relate to me how they do this,

3 and my own belief is that the availability of these

4 services is not lost on this prime demographic.

5 MR. FROEHLICH: And your opinion is again

6 based upon web casters who are part of this

7 proceeding, and not download service, or interactive

8 services. Just the webcaster services that are

9 eligible for the license.

10 The next effect of them being in existence

11 in the short term, your opinion is that it decreases

12 CD sales.

13 It is very difficult for me to isolate the

14 effect out of the environment. So do you have an

15 opinion or not on that?

16 THE WITNESS: Specifically, the webcaster,

17 it is difficult for me to say. I would have to go

18 back and try to find out specifically how people were

19 doing things. But I do believe that any avenue will

20 be used.

21 BY MR. JOSEPH:

22 Q And that opinion with respect to the

1 various digital music services, you just said is based
2 on antidotal discussions with teenagers?.
3 A Well, yes.
4 Q And you have not conducted any kind of
5 statistical survey?
6 A No, I have not.
7 Q Opinion poll?
8 A No, I have not.
9 Q Scientific survey of any kind?
10 A No.
11 Q Now, I guess, I would like to return for
12 a minute to the DMCA, the Digital Millennium Copyright
13 Act. And I believe that you testified earlier that
14 statutory licenses are necessary because matching up
15 the buyer and sellers can be extraordinarily
16 difficult, correct?
17 A That is amongst the reasons, yes.
18 Q If you turn to again that page 8 and 9 of
19 11 of your White Paper.
20 A Okay.
21 Q You note that one of the foremost reasons
22 -- and this is right after the italicized indented

1 paragraph in the middle of the page. Do you have it,
2 starting with, "One of the foremost reasons."
3 A Yes.
4 Q So it is true is it not that one of the
5 foremost reasons that Congress has amended copyright
6 legislation -- and I take it in the ways just
7 described, is to create statutory licenses, has been
8 to eliminate or to at least diminish the transaction
9 costs associated with the introduction of new
10 services?
11 A Yes.
12 Q And you note at the end that individual
13 licensing, each time a song is accessed, would
14 necessitate a preposterous number of individual
15 transactions, correct?
16 A Yes, indeed it could.
17 Q And that is exactly what statutory
18 licensing can help solve, correct?
19 A It can address that, yes.
20 Q I just wanted to clarify a couple of
21 things that I think came through in our -- well, one
22 thing that came through in your video presentation was

1 of Streamripper.

2 I take it that with Streamripper that you

3 need to hit the start button and the end button; is

4 that correct?

5 A Yes, I did.

6 Q And you said that?

7 A Yes, you do.

8 Q And it only records what is in the stream

9 when you actually ask it to record?

10 A Yes. In fact, I think I called it a dumb

11 buffer, and that requires an operator.

12 Q And I noted that you were clicking from

13 channel to channel in your demonstration that most of

14 the time you wound up on the middle of a song, isn't

15 that correct, when you click on to a new channel?

16 A Yes.

17 Q And in fact that would be the common

18 experience when you change channels, that you will

19 wind up in the middle of a song, correct?

20 A That was my experience, yes.

21 Q At one point you testified as to the range

22 of ad rates that are available on the internet, and I

1 think you spoke of between $5 and $50 cost per
2 million, or cost per thousand rather?
3 A Yes. That generally had been my
4 experience, yes.
5 Q Now, it had generally been your experience
6 for what kind of advertising?
7 A Well, in my example here, it was targeted
8 advertising versus non-targeted advertising. And
9 there I am dealing with advertising generally in the
10 entertainment area.
11 Q Okay. But with respect to non-
12 subscription -- well, first of all, advertising
13 generally in the entertainment area. Are you speaking
14 of --
15 A Entertainment on the net.
16 Q Entertainment on the net?
17 A Yes.
18 Q Are you speaking of banner advertising, or
19 are you speaking of --
20 A Not just banners.
21 Q I'm sorry?
22 A Not just banners. In fact --

1 Q What other kind of banners?

2 A -- in those cases where someone clicks on

3 something, and says yes, I want more information about

4 this, whether it is a banner or a link of some kind,

5 that for those that you deliver, you can get paid for

6 that audience.

7 And you can get paid at the rate of five

8 per thousand if it is a general audience; and as you

9 provide a more targeted audience, you can then raise

10 that rate.

11 Q So when you say not just banners, you are

12 speaking of what kind of advertising?

13 A Well, I am point to -- and I think that

14 the example that I gave earlier was that if I know

15 that I have a Counting Crows album, or you have a

16 Counting Crows album to sell, and I have Counting

17 Crows fans that are of interest to you, you will pay

18 more for that than you would for me to send you

19 someone for whom I had no preference indicated, or

20 that I didn't know much about what they wanted.

21 Q That wasn't my question I don't believe.

22 A Okay.

1 Q My question went to what is the
2 advertisement, and in what manner is it being
3 provided? What kind of advertising are you talking
4 about?
5 A In this particular case, it is not the
6 advertisement. It's that you deliver them an
7 impression, you deliver them a person. I think that
8 is true regardless. A banner may be something that
9 people look a little bit less at now. I do not know.
10 But we are speaking just generally about
11 audience, and delivering those who might be interested
12 in ones' service or product.
13 Q So you are actually talking about counting
14 to get your CPM the number of people who click on a
15 link to go to the place where the product or service
16 is being offered?
17 A Yes, when you send them there, and then
18 often do, because that is the point. These
19 advertisements are generally not static, and if you
20 click on that advertisement, it takes you somewhere,
21 and that is a registration of an interest.
22 Q But the CPM that you are counting, the M

1 as it were --

2 A It is not just people who are listening at

3 any given time. It is those who have expressed an

4 interest, because then I have introduced an audience

5 to you.

6 Q And it is not just the people, for

7 example, in a banner ad who see the ad?

8 A No. In fact, my example was quite

9 specific that a site will pay to have people send them

10 to their site, and that they pay for traffic.

11 But if they don't get that traffic, then it is hard

12 for them to say that this has been good.

13 Q And how recently have you seen $50 CPMs

14 for traffic?

15 A Oh, I was very clear. I think that there

16 has been a softening of the market of late, and I

17 would say that I have seen $50 CPMs last year in very

18 targeted circumstances, and I admit that is the very

19 high end of the scale without any question.

20 Q Last year at the beginning of the year, or

21 last year at the end of the year?

22 A I would say the middle of the year, near

1 the summer.

2 Q And since that time the market has

3 softened considerably hasn't it?

4 A I believe that it has, along with the

5 economy in general.

6 Q And would you agree that the internet

7 market, and the market for internet advertising has

8 softened even more considerably than the economy

9 generally?

10 A I think it has been equal in my opinion.

11 Q Have you recently had occasion to look at

12 the CPMs available for traffic to web sites?

13 A In fact, I do talk to clients about this.

14 Q And what is the range that you are seeing

15 today as you sit here?

16 A Well, these particular clients are finding

17 it very difficult to provide targeted CPMs at the

18 moment. They are having difficulty with their

19 database operations, but they are seeing the $5 CPM

20 hold up quite well, and are doing well off of it.

21 Q The $5 CPM being --

22 A Yes, at the bottom of the market, because

1 it is very difficult for them to assemble the database
2 capability to do this.
3 Q So the range that you are seeing now is
4 from $5 to $5?
5 A No, I am seeing it roughly in the $5 to
6 $10 range for bulk CPMs, which is consistent with what
7 I saw last year. The high end of the market has come
8 down, but I haven't seen the low end of the market go
9 down.
10 Q And what have you seen at the high end of
11 the market?
12 A I actually have not been seeing $50 CPMs
13 lately because of the softening of the market.
14 Q And what have you been seeing at the high
15 end of the market?
16 A Actually, I do not have experience lately
17 with targeting, because as I point out, the database
18 capabilities of the clients that I have been working
19 with are lacking in this area. And I think that the
20 standards of those who use them has gone up as well.
21 MR. JOSEPH: May I have a moment?
22 (Brief Pause.)

1 MR. JOSEPH: I have nothing further.

2 CHAIRMAN VAN LOON: Thank you. Ms. Leary.

3 BY MS. LEARY:

4 Q Good evening, Mr. Griffin. I am Denise

5 Leary and I am representing National Public Radio, and

6 public radio stations around the country.

7 A I listen all the time.

8 Q Well, thank you. In your testimony, you

9 make the following statement; that no webcaster would

10 survive if --

11 A Where would this be?

12 Q At about page 21 or 22. Page 21.

13 A Okay. I'm there.

14 Q "No webcaster would survive if it offered

15 music for free." Did you make that statement based on

16 your analysis of public radio stations?

17 A In fact, yes. I am very familiar with my

18 local public radio station, which I spend a lot of

19 time with. They actually would like me to purchase

20 advertising on a regular basis, and sent an

21 advertising salesperson to see me from KCRW in

22 Southern California, and I meet regularly.

1 And they have asked me to sponsor the Joe
2 Frank Show and many other shows, and they regularly
3 call and ask me to give them money to help run the
4 station on an advertising basis.
5 Q And so you have based that conclusion on
6 KCRW?
7 A Yes.
8 Q And how many other public radio stations?
9 A Well, that is my local public radio
10 station.
11 Q So that is based on one public radio
12 station out of the 400-odd public radio stations we
13 are representing in this proceeding?
14 A Yes. I have a limited thing because I
15 work in Southern California. That is where my
16 business is, and I haven't been running a business in
17 any other part of the country, and that is the one
18 that I have been called upon by.
19 So I tell you from my experience, but I do
20 not know about the others.
21 Q All right. So just that the record is
22 clear, your experience is based on one public radio

1 station in Southern California?

2 A That they need money to operate, yes, and

3 they would like me to give some, and I tried to help.

4 And not only voluntarily, but with the -- they say

5 that they will put the audio thing at the beginning of

6 the show and at the end.

7 Q Have you ever been approached by that same

8 public radio station for on-the-air underwriting on

9 the broadcast channel?

10 A Well, I think that is exactly what I am

11 speaking to here.

12 Q You think it is the same?

13 A Yes, and in fact they do have their signal

14 both on the internet and on the radio. Yes, that's

15 what they do.

16 Q And are you aware of any restrictions on

17 the kinds of wording that you can use in public radio

18 for your on-air announcements?

19 A We have not gotten to that point.

20 Q So you don't know or you do?

21 A No, I don't know, because we have not

22 gotten to that point. I have not discussed that with

1 them.

2 Q And at page 22 --

3 (Discussion off the record.)

4 ARBITRATOR VON KANN: Yes, let's go off

5 the record for a minute, please.

6 (Whereupon, at 6:13 p.m., the arbitration

7 was recessed, and resumed at 6:15 p.m.)

8 CHAIRMAN VAN LOON: Let's go back on the

9 record, please.

10 BY MS. LEARY:

11 Q And you state also at page 22 in your

12 testimony that all webcasters try to monetize the

13 listeners they attract through visual and oral

14 advertisements. They sell banner ads and insert audio

15 ads between songs in their streams to get the

16 attention of those listeners who are not watching the

17 web pages. Is that correct?

18 A That is what I wrote.

19 Q And did you base that statement on any

20 public radio station's website?

21 A Well, I know that I was thinking about

22 KCRW in my own particular case.

1 Q Did you write that looking at the KCRW
2 website?
3 A I wasn't looking at it at the time that I
4 was there. They may not have banner advertisements at
5 that particular site, but I consider the oral
6 advertisement to be part of the experience.
7 Q And how would you define an oral
8 advertisement on KCRW?
9 A The promotional announcement that this has
10 been provided by such and such a company, and then it
11 introduces what kind of a company that is, and what
12 they do.
13 And that this would raise the awareness of
14 my own company, and thereby attract the interest of
15 those with whom I could do business, and they would
16 consider purchasing my services.
17 Q So it is a listener identification is it,
18 rather than a description of your products and
19 services?
20 A I am not sure that I follow you.
21 Q Let me rephrase the question. What you
22 are describing is an identification of your business

1 as a supporter of public radio, is what you get from
2 underwriting on public radio?
3 A Well, specifically, the salesperson, or
4 the fellow who came to me from KCRW said that he
5 thought that it would benefit my business, and that I
6 could make more money this way.
7 Q And it would benefit your business because
8 the product is described, or because you are a
9 supporter of public broadcasting?
10 A Well, I think both. I think the awareness
11 of me and my company, and I guess that I would feel
12 that more people would know that I was a good guy if
13 I was sponsoring public radio, because I think that is
14 a good thing.
15 Q Why would you be a good guy if you were
16 sponsoring public radio, as opposed to commercial
17 radio?
18 A I am supporting an endeavor like KCRW, and
19 I would feel very good about it. It is a good
20 station, and I think that others who knew that I was
21 doing so would share my good tastes, and I would think
22 that they would thank me for assisting in financing

1 something that they were listening to.

2 Q Is it your testimony that advertising as

3 you call it on KCRW is the same as advertising on

4 commercial radio stations?

5 A No, I think it is better. I think it is

6 more high-brow. It attracts my targeted demographic

7 better. The average KROC listener in Southern

8 California is unlikely to purchase my services. But

9 the very educated demographic that is attracted to

10 KCRW is in fact my target audience, if I have one, in

11 the media.

12 Q And is that audience targeted because of

13 the quality of the programming?

14 A Partly, yes.

15 Q And what quality programming is it?

16 A I think it is extraordinarily high

17 quality. I think you do an excellent job at National

18 Public Radio. In fact, it attracts my interest on a

19 regular basis.

20 MS. LEARY: I have no further questions.

21 CHAIRMAN VAN LOON: And having used up the

22 allotted four on this side of the room, we turn back

1 to opportunity for redirect.

2 MR. SIGALL: I have just a few questions

3 on redirect.

4 REDIRECT EXAMINATION

5 BY MR. SIGALL:

6 Q Mr. Griffin, you discussed in cross-

7 examination what the average user might have in terms

8 of a connection to the internet. Do you remember

9 that?

10 A Yes, I do.

11 Q Would you agree that that depends on what

12 segment of the population that you are looking at in

13 determining what the average user might have in their

14 connection to the internet?

15 A Well, sure. I think if you were to

16 segment the population, as you got down to smaller

17 segments, you might say this group had a different

18 access means, or that the percentages would be

19 different.

20 I think nonetheless though that in every

21 group that modems would still probably be the highest.

22 For example, if you were taking people who were going

1 to college, I think the modem is a rare thing for
2 them.
3 Well, not rare, but much less common, for
4 a college student, for example. So it does depend
5 very much on who you are asking.
6 Q How would college students connect to the
7 internet? What level of connection would they have?
8 A Well, I can't speak for every college
9 student, but they very much want that high band width
10 network.
11 MR. KIRBY: I am going to object on the
12 grounds of foundation unless he has studied college
13 students, and has information about typical college
14 students.
15 MR. SIGALL: I can rephrase the question
16 if you would like.
17 CHAIRMAN VAN LOON: Please, if you would.
18 BY MR. SIGALL:
19 Q In your experience, based on your
20 understanding of internet access, with the typical
21 college student, what level of access do they have to
22 the internet?

1 MR. KIRBY: I would object on the grounds
2 of lack of foundation. He doesn't know what the
3 people out here from Montgomery Community College
4 have, and I don't think he has shown a basis for his
5 testimony.
6 ARBITRATOR VON KANN: Do you wish to
7 elicit some foundation for his answering the question?
8 BY MR. SIGALL:
9 Q Mr. Griffin, do you have an understanding
10 based on your experience of the types of service that
11 various segments of the population might have with
12 respect to internet connections?
13 A Antidotally as I meet people and as I go
14 out and look for them, yes. I don't know what is
15 going on at Montgomery Community College, but I do
16 make it a special point to meet with those people who
17 are in the prime demographic of my clients.
18 And they ask me to be very familiar with
19 how their prime demographic does, and that, for
20 example, is college students, high school students,
21 people in that range.
22 Q So some people have better internet access

1 than a modem connection?

2 A Yes, some have better.

3 Q And when you described to Judge von Kann

4 the offering that Pacific Bell offers, in terms of

5 their DSL package, how would you compare that offering

6 to the connection you used to make this videotape?

7 A Well, actually I pay a great deal more for

8 my connection, unfortunately, because I have it

9 heavily managed, and those people who pay the $29

10 actually get a faster connection than I do, because I

11 have some security requirements that are much higher,

12 and some management requirements.

13 But for that price, you can get twice the

14 conductivity that I have roughly if all you were

15 interested in is using the net.

16 Q So in terms of the quality of the music

17 and the connection that you had when you recorded the

18 videotape, how would that compare to the quality that

19 someone using the Pacific Bell 2999 DSL, that they

20 would receive doing similar activities that you did?

21 A Well, I have been to a lot of places where

22 I personally went and looked at the system, where it

1 was the Pacific Bell system, and it was faster.

2 Q So it was at least as good on the Pacific

3 Bell system that is offered, and is at least as good

4 as what we saw in the videotape that you prepared?

5 A Yes.

6 Q So would you say that the quality of

7 connection that you use to record the videotape in

8 some cases was better than what many users might have?

9 A I think it was normal for a DSL or a cable

10 modem user. I think that is what it was normal to.

11 I think it would be abnormal to someone who was using

12 a modem. I think they would look and say, wow, I want

13 one of those if they were watching the demonstration.

14 So a modem user would be impressed, but

15 someone who is using a cable modem, or a DSL

16 connection, might say it is so-so, and they might like

17 what they had better than what I have.

18 So I think it was a conservative

19 expression of what a cable modem or a DSL user could

20 have. And in fact it was quite a bit slower than what

21 I get in the office, and what I would get on the

22 university backbone.

1 Q So it was somewhere in the middle of the
2 range of connection offerings that are available to
3 consumers?
4 A It was in the median, I suppose, to the
5 average.
6 Q Now, on cross-examination, we discussed or
7 you discussed some limitations that BitBop, the
8 scanning and recording software that were discussed
9 that were imposed. As you will recall, there was a
10 discussion that it records only in 40K bit rate. Do
11 you remember that?
12 A That's correct, yes.
13 Q And it allowed you to search for artists,
14 but not for particular songs; is that correct?
15 A Yes, that's correct.
16 Q Now, do you know why these limitations
17 exist in the BitBop software that you tested and
18 demonstrated for in this videotape?
19 A I do not know why those limitations exist.
20 They certainly do not appear to my knowledge to be
21 limitations of the technology, because they clearly
22 knew the name of the songs when it got them. So if it

1 wanted to look for that, I think that it could have,
2 and I would be very surprised to hear that it did not.
3 Q So it would not be hard for the company
4 that makes BitBop to change their service that would
5 allow a recording at a higher bit rate?
6 A There are no inherent limitations that
7 would prevent them from recording at any bit rate, and
8 to know all of the information, provided that it is
9 there in the stream.
10 Q And they could also adjust their service
11 to allow you to search for a particular song; is that
12 correct?
13 A They could do this technically, yes,
14 because they know what the song is when they get it,
15 and they also list with the song when they first see
16 it.
17 Q And on cross-examination, you also
18 discussed the Live 365 service and the player that
19 they offer from themselves to receive the streams that
20 they offer to consumers, right?
21 A Yes, I remember that discussion.
22 Q Do you know if Live 365 still allows

1 consumers to use the Winamp player that you
2 demonstrated for this panel?
3 A I can't answer that question. I don't
4 know. I believe that they do, but if something
5 happened yesterday -- the last time I tried it, I used
6 Winamp. I did not use their player.
7 I have tried the service regularly. If
8 something has happened lately to change that, it will
9 surprise me, but it could be true.
10 Q So based on that experience, and based on
11 your experience that you have described, it would
12 still be possible for someone to use the Winamp player
13 to listen to the streams?
14 A Yes.
15 Q And it would still be possible based on
16 the experience that you described that if they used
17 that Winamp player that they could use that streamer
18 for a plug-in if they had it?
19 A Yes. I would just elaborate for a moment
20 that this was made to deal with the MP3 format in
21 general, and was expanded a bit, and it has become a
22 player that is one of the favorites of those who

1 listen to MP3s.

2 And so when they encounter an MP3 stream,

3 they often want to use the Winamp player. It has a

4 history as we say.

5 Q Now, you have an extensive discussion with

6 Mr. Steinthal about the option value, or your concept

7 of option value.

8 A Yes.

9 Q And how that relates to various types of

10 services. Do you remember that?

11 A Yes.

12 Q How would you compare the option value

13 offered by the DMCA-compliant stream that is issued in

14 this proceeding, to the option value that is offered

15 to a listener of traditional, over-the-air, radio

16 broadcasts?

17 A One more time. I just want to make sure

18 that I understand the question.

19 Q Okay. How would you compare the option

20 value that is offered to a listener of DMCA-compliant

21 streaming, which is the subject of this webcaster at

22 issue here, versus the option value offered to a

1 listener of traditional over-the-air radio?

2 A Oh, I believe there is much more option

3 value because there are so many stations, and we also

4 cannot be devoid of the context in which they exist,

5 the recording. So for those reasons and others, I

6 think there is a great deal more option value.

7 Q Much more option value on which?

8 A If I am using webcasting services, in an

9 environment of webcasting, even compliant webcasts, I

10 pointed out that they themselves may not be

11 interactive.

12 The effect of so many different services

13 that are non-interactive is to me interactivity, and

14 combined with my ability to take those streams and

15 hold them, I believe that there is an additional

16 element of interactivity.

17 And then if we add the elements, then

18 sometimes I can know what is playing, and I think

19 there is much more interactivity.

20 Q But just to be clear, you are not saying

21 that that option value is present, or that greater

22 option value in DMCA-compliant streaming is limited to

1 circumstances where the user uses recording tools; is
2 that correct?
3 A Oh, definitely not. Even -- absent the
4 recording tools, and I am not going to say that they
5 don't exist, but even absent the recording tools, they
6 have so many more choices that their likelihood of
7 being satisfied by a service begins to get close to
8 where the product is.
9 Q So how would you compare the offering of
10 what the DMCA-compliant streamer offers to the
11 listener, to the offering that the traditional over-
12 the-air radio offers to that listener?
13 A In and of themselves, they are different,
14 but I will also add that the primary effect here is
15 that there are so many of them, and that there are a
16 virtually unlimited number from what I can tell.
17 Q Now, on cross-examination, you discussed
18 your White Paper, which I think has been marked as
19 SX0012.
20 A Yes, I have it.
21 Q And can you explain for the panel how the
22 statements that you have made in this paper compare to

1 the -- how they are relevant to the statements in this
2 proceeding, or I'm sorry, the services -- I'm sorry,
3 let me start over.
4 Can you explain for the panel how your
5 statements in this paper relate to the services at
6 issue in this proceeding, the DMCA-compliant streaming
7 at issue in this proceeding?
8 A Well, I think they are quite different,
9 and I say that because here we are dealing with
10 products, and in which they are more payment revenue
11 streams that are difficult to reconcile with that new
12 vine.
13 I mean, I used this example of Tarzan
14 economics, and I point out as we have here that if we
15 were dealing with a radio station, there is a simpler
16 revenue stream, and when you deal with a sound
17 recording, it is a more complex revenue stream.
18 And so there are I think a different
19 circumstance here where we are dealing with downloads,
20 than when we are dealing with services. But make no
21 mistake about it, I think the fundamental force here
22 is technology and content in confluence.

1 Q And the concerns that you express in this
2 paper about market concentration, how do they relate
3 to the issues in this proceeding related to the
4 compulsory license at issue in this proceeding?
5 A Well, I don't think you have the same
6 circumstance here now. I mean, as I have told my
7 clients, you can use the music, and you do not have to
8 pay right now.
9 You can escrow the money if you like, and
10 you cannot be stopped as long as you are following
11 some basic rules. And so I believe that as regards
12 this proceeding that that power has now shifted as a
13 result of the Digital Millennium Copyright Act.
14 I mean, since the point that it has passed
15 -- and this is part of the fear that I relate to the
16 recording companies, too, is that, number one, all of
17 the music a webcaster can use there is nobody to say
18 no to them as long as they file a sheet of paper, and
19 I do suggest that they escrow some money, and that
20 they will have to pay.
21 And that, number two, as digital recording
22 capability goes up, all of these things people will be

1 able to get option value on. So I really believe that
2 as regards this proceeding, the power has shifted, in
3 the sense that my clients, that they cannot say no to
4 the record companies.
5 They don't have any power to disagree, and
6 merely by the filing of a paper, you can take the song
7 and use it. I believe that that has given them a
8 great deal of power.
9 And that's why I think it is very
10 different than what is here.
11 Q Just to be clear, who are you referring to
12 when you say them?
13 A Oh, when I talk about my clients, that the
14 ones like Nokia, that they can get content from the
15 record companies, but they do not have to have their
16 permission to do so anymore, and that they can merely
17 file a piece of paper and say now I am going to be a
18 part of this proceeding, and I will pay the rate down
19 the road, and I will follow these rules, and that they
20 can use the first-run content of the record labels, or
21 any content.
22 There might be some limitations, but I

1 don't know, with 72 sound recordings for something, or
2 pre-72. But for the most part, they get today's
3 first-run material, and they can take it and they can
4 use it to attract listeners.
5 Q So the concerns that you expressed here
6 about market concentration and the ability of the
7 record companies in your words to control the
8 distribution, would those concerns be present in the
9 case where the compulsory license exists, and
10 agreements negotiated in the context of that
11 compulsory license?
12 A In my opinion, since the compulsory
13 license, I believe that the power has shifted. I
14 believe that the webcaster has a great deal of power
15 now, and that that was the intent of Congress, was to
16 enable them to take this nascent industry and boost it
17 up.
18 They now have that power. They have a
19 great deal of it, and without the power to say no, you
20 cannot have my content, it is very difficult to have
21 a negotiation of it from that standpoint, because you
22 can simply say no, and that there is no duty to

1 bargain.

2 MR. SIGALL: I have nothing further.

3 CHAIRMAN VAN LOON: Is there anything on

4 recross?

5 MR. STEINTHAL: Yes, there are a couple of

6 things that came up in the context of the panel's

7 questions, and on redirect. I am puzzled --

8 CHAIRMAN VAN LOON: You need to give us a

9 forecast of how long you are --

10 MR. STEINTHAL: Five minutes.

11 CHAIRMAN VAN LOON: Excellent.

12 MR. SIGALL: Five minutes for a total, or

13 five minutes for your recross?

14 MS. LEARY: I will not be asking any more

15 recross.

16 MR. SIGALL: I am trying to figure out

17 about the questions from the panel that you were

18 referring to. I am trying to figure out what was

19 that.

20 MR. STEINTHAL: It was during Mr. Joseph's

21 cross.

22 MR. SIGALL: Is that proper recross?

1 MR. STEINTHAL: Believe me that it is
2 within the scope of your redirect as well. I assure
3 you.
4 CHAIRMAN VAN LOON: Let's hear the
5 question.
6 MR. GARRETT: We trust you, Ken.
7 MR. STEINTHAL: Thank you.
8 RECROSS-EXAMINATION
9 BY MR. STEINTHAL:
10 Q I am puzzled about the following thing,
11 Mr. Griffin. If in fact steam capturing is as easy
12 and prevalent as you make it sound like to this panel,
13 it wouldn't seem to make any economic sense to invest
14 tens or hundreds of millions of dollars in, for
15 example, digital subscription services that will
16 deliver encrypted songs to consumers under a business
17 model where they are going to have to pay monthly to
18 get songs, right?
19 MR. SIGALL: I am going to object. I
20 don't recall on redirect raising the recording of
21 streams and subscription services that Mr. Steinthal
22 is bringing up.

1 MR. STEINTHAL: I am quite sure that you
2 talked about recording of streams.
3 ARBITRATOR VON KANN: We would probably
4 spend more time trying to run down whether this is or
5 isn't within the scope than getting the answer.
6 BY MR. STEINTHAL:
7 Q You are familiar are you not with services
8 that are investing tens or hundreds of millions of
9 dollars in technology to deliver music on demand,
10 right?
11 A Yes.
12 Q And the concept of those businesses is
13 that they are going to charge people monthly, a
14 subscription fee, for the ability to receive music on
15 demand on a monthly basis, right?
16 A Yes.
17 Q Now, here is my problem. If it is so darn
18 easy to capture and copy songs like you make it seem,
19 and it is so prevalent, why in the world would people
20 be investing tens or hundreds of millions of dollars
21 in technology to deliver songs assuming that people
22 are going to pay for it rather than copy it for free?

1 A Because the goal is to attack their motive
2 to do so, and not their mechanism. To give them an
3 attractive economic proposition that obviates their
4 motive.
5 Q You would agree with me --
6 ARBITRATOR VON KANN: Who is they?
7 THE WITNESS: Oh, the providers of the
8 services. Why have they invested all this money into
9 subscription services, and the reason that they would
10 invest this money is to attack the motive for copying,
11 to try to provide a viable service at a reasonable
12 price that would cause someone to say why hold on to
13 it. I can get it when I want.
14 BY MR. STEINTHAL:
15 Q But you would agree with me wouldn't you
16 that the people that you know of that are investing
17 tons or hundreds of millions of dollars in
18 subscription services like this includes some of the
19 major labels, right?
20 A Yes, but I have got to be honest. They
21 are not so much selling music anymore. They sell on-
22 line services, and they sell their audience. It is

1 not just a record company.

2 In other words, Universal Studios, while

3 they have liquor and stuff, records was their biggest

4 thing. That's one of the main reasons they existed

5 and the bottom line was selling records.

6 But now they are owned by a company whose

7 clear interest is building up cell phone services.

8 Q So you don't think there is a concern on

9 the part of the labels about displacement of record

10 sales, because they are interested in new business?

11 A No, I think that they are very interested

12 in attacking people's motive for disintermediating so

13 that they can continue to build a relationship with

14 them that accrues to their benefit, and my point was

15 that it was not just music that they want to sell them

16 anymore.

17 That they have some big ticket items that

18 they also have, and that is part of the motivation.

19 Q But you would agree with me wouldn't you

20 that if it was really prevalent and simple to copy

21 songs for free, that the teenagers you would talk to,

22 for example, they wouldn't pay five or ten dollars a

1 month for the ability to get songs? I mean, they can
2 go and copy them for free.
3 A Actually, the teenagers wouldn't need to,
4 because somebody would offer to pay for them, say,
5 even more money to have access to the teenager.
6 In other words, they could say that 7-11 would let you
7 -- if you buy a slurpy three times a week, have a free
8 subscription to that service.
9 In other words, they sell audience and not
10 music as much anymore. So the profitability isn't
11 limited to what a sound carrier can bring. It is cars
12 and cell phones, and having an audience, and so there
13 is a lot more money involved when ViVendi owns the
14 record company than when the record company is the top
15 line of business, or when America Online owns the
16 record company.
17 Q So you really believe that if people could
18 prevalently and easily make copies for free, that the
19 major labels would be investing hundreds of millions
20 of dollars in services to deliver music on a
21 subscription basis. That is your testimony?
22 A Sure, to obviate their motive, and in fact

1 I would say that historically the video cassette
2 recorder proves it is true; that as they created the
3 availability of services -- for example, Direct T.V.,
4 and cable, and so forth -- that the multiplicity of
5 channels reduced our desire to capture the video that
6 we saw on the screen, because we had so much available
7 to us.
8 Q And I think in your written materials, you
9 have also conceded have you not how vehemently the
10 content owners fought against --
11 A Oh, sure. They were shortsighted at that
12 time, but there are different people in charge now who
13 sell cell phones, and on-line services, and it is not
14 about selling music as much anymore as it is about
15 selling some really big ticket items, too.
16 Q Just one last question. I take it that
17 you are being paid by the RIAA for your testimony?
18 A Yes. Not by the hour, but it is fun, and
19 I am enjoying it.
20 BY MR. JOSEPH:
21 Q Mr. Griffin, I believe that you just were
22 asked by Mr. Sigall to compare the option value of

1 DMCA-compliant streams to webcasting, to over-the-air
2 radio were you not?
3 A I think that's right.
4 Q And you ventured an expert opinion on that
5 question did you not?
6 A Yes.
7 Q Would you please describe for the Judges
8 what conditions are imposed upon webcasters in order
9 for them to be DMCA-compliant streams as Mr. Sigall
10 asked you to compare.
11 A As I said before, I am not an expert in
12 the law, and all of its various provisions that have
13 to be gone through, but I do get the effect of it. I
14 am not going to be able to list for you everything
15 that is there, but I get the facts.
16 Q So you don't know the requirements that
17 the DMCA-compliant imposes upon webcasters?
18 A I don't know all of them. I am familiar
19 with some and not others. I just don't think that I
20 am the right guy to give you a conclusion about what
21 is required from the law.
22 Q Which ones did you take into account in

1 venturing your expert opinion?

2 A Well, I took into account to me the gist

3 of it as it is explained to me by others, and by what

4 I know as the law was being written.

5 Q And what did you understand the conditions

6 to be and that you took into account? What was the

7 gist of what you took into account in venturing your

8 expert opinion?

9 A One of the goals of the conditions was to

10 reduce the option value that was communicated, and the

11 Act did attempt to reduce the substitution in some of

12 its rules that it imposed on webcasters.

13 Q And do you understand how it did that?

14 A That's where I can't get into every one of

15 the provisions, because I asked these guys, too, what

16 about this, and what about that.

17 Q I am not asking you for every one. Can

18 you tell us the ones that you do know about?

19 A Well, for example, you should not know

20 what is going to be played in advance. You should be

21 told at the time that the song is playing what song is

22 playing in order to hopefully build product sales.

1 So we will not tell you in advance, and
2 that this is what I understand to be true, and that
3 the goal is not to make people aware of what content
4 is coming.
5 Q What other requirements are you aware of?
6 A Well, there is some notice requirements
7 that one has to file and so forth. I have not been
8 through the whole list. I know that I have asked
9 those in my company to investigate and make sure that
10 they knew how to do it, but it is not something that
11 I have gone in depth about.
12 Q So you didn't take any others into account
13 in venturing your expert opinion?
14 A Well, I certainly take into account the
15 effect on people and the kinds of -- I mean, I have
16 gone to each of these sites, and I have spent time
17 with them. I think that the effect of the sites is
18 really the point; what content is there, and what does
19 one see.
20 This is represented in the demonstration
21 that is here. Their actual behavior, I think, speaks
22 very much to what they do.

1 MR. JOSEPH: I have nothing further.

2 BY MS. LEARY:

3 Q I have one question. Are you aware that

4 before the Digital Millennium Copyright Act was passed

5 that webcasters were free to include sound recordings

6 in their performances, and did not have to pay any fee

7 to anyone?

8 A Well, I didn't think of it that way. I

9 mean, I have been told differently, and so your

10 mileage may differ, or your interpretation may vary.

11 I have been told that his was not true, and that in

12 fact that this was not the case.

13 Q And who were you told that by?

14 A By those within -- by the lawyers that I

15 talked to, and that they would say that there should

16 be permission under these circumstances, and so that

17 there was some uncertainty, and that was the reason

18 that the Act was passed.

19 Q Are you talking about the lawyers from the

20 recording industry?

21 A No, I am talking about those people in my

22 circle. I mean, I have pointed out earlier on that I

1 four times now.

2 MS. LEARY: My request here is that I

3 think the witness was perhaps confused between the

4 difference between the sound recording, that tangible

5 object that embodies a composition of lyrics, as well

6 as the performance by the artist.

7 ARBITRATOR GULIN: I think in the first

8 answer that he was talking about paying for the song,

9 and I assume you meant paying the publishers. Do you

10 understand that she is asking you about paying the

11 record labels?

12 THE WITNESS: Yes, and my understanding

13 has been that to transmit the digits that constitute

14 a phono-record is a DPD that is compensable, and that

15 that was my interpretation before the Digital

16 Millennium Copyright Act.

17 And that one would need permission to do

18 so, and to have a relationship with those that own the

19 sound recording before they were to transmit the

20 digits to constitute a phono-record.

21 BY MS. LEARY:

22 Q And that is just based on your own

1 understood the question. You may want to go back, but
2 it is up to you.
3 BY MS. LEARY:
4 Q Let me rephrase the question. Prior to
5 the enactment of the Digital Millennium Copyright Act,
6 do you know whether or not the webcasters on this side
7 of the table had to pay record labels, or the RIAA,
8 for the public performance of the sound recordings on
9 their webcasts?
10 And I ask you to distinguish between sound
11 recordings and the underlying composition, musical
12 compositions. I am asking you merely about the sound
13 recordings.
14 A They would negotiate with the sound
15 recording owners for the right to do so.
16 Q Is it your testimony that they had to
17 secure the rights of the record labels prior to the
18 enactment of the DMCA?
19 MR. SIGALL: He has already said that he
20 is not a lawyer, and he has already tried to answer
21 this question several times, and I am just objecting.
22 It seems that we have been down this road three or

1 have regular meetings and so forth with many people.
2 And our belief has been that if you want
3 to run a webcasting station before the MCA, that you
4 would need the permission of those who have the rights
5 for the songs. But that afterwards, you would have a
6 compulsory, a blanket compulsory.
7 Q And that is not based on any legal
8 analysis of the statute as it existed before the DMCA?
9 A Right. I am not a lawyer, and it is not
10 my legal analysis. I am only going antidotally, and
11 my belief is that before the DMCA that you needed
12 permission, and afterwards, you could do so without by
13 filing a paper and following some requirements.
14 Q And that is permission to play a sound
15 recording, as opposed to underlying music; is that
16 correct?
17 A Well, now it is getting -- again, this is
18 where I would look to an expert as best I could, and
19 even those that I know that own publishing companies
20 call a lawyer, and to make sure that they understand
21 these distinctions.
22 ARBITRATOR GULIN: I don't think you

1 understanding?

2 A That was my understanding.

3 MS. LEARY: I have no further questions.

4 CHAIRMAN VAN LOON: Anything further? Any

5 re-redirect or whatever?

6 MR. SIGALL: No, mercifully, we are at an

7 end with that.

8 CHAIRMAN VAN LOON: In that case, we would

9 very much like to thank you for your endurance, and I

10 think as the longest witness on the stand, or at least

11 so far.

12 THE WITNESS: Well, I thank you, but I

13 hope that at the end that your endurance does not give

14 out.

15 CHAIRMAN VAN LOON: Well, thank you very

16 much, and we will stand adjourned then until nine

17 o'clock tomorrow morning.

18 (Whereupon, at 6:47 p.m., the hearing was

19 adjourned, to reconvene at 9:00 a.m., on Tuesday,

20 August 7th, 2001.)

21

22

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 6, 2001
Place:	Washington, DC

represents the full and complete proceedings of the aforementioned matter, as reported and reduced to typewriting.

SX 0011

Jim Griffin
Founder and CEO
Cherry Lane Digital & OneHouse LLC's
Los Angeles, CA

Mr. Chairman and Members of the Committee:

My name is James Hazen Griffin. I am the Chief Executive Officer of Cherry Lane Digital, part of the Cherry Lane Music Group created by world-renowned musicologist Milton Okun. At Cherry Lane Digital we hope to absorb the uncertainty of our clients regarding the change inherent in entertainment technology. I serve as co-chairman along with Jeremiah Chechik of Evolab, the Evolutionary Laboratory, where we are focused on the wireless delivery of media. Before my involvement with these companies, I started in 1993 and ran for five years the technology department at Geffen Records.

I am also a founder and leader of the Pho group, approximately a thousand people connected electronically and through over a dozen meals held weekly around the world. The Pho group takes no position on these issues, but is instead a catalyst for discussion on issues such as those we are addressing here today. In addition, I write a column in every issue of the magazine Business 2.0.

Counsel accompanying me here today is Phil Corwin, a partner at the Washington, D.C., firm of Butera & Andrews. This appearance would be considerably less coherent without Mr. Corwin's guidance and that of the Senate Judiciary Committee's staff, and I thank all these people along with you for the opportunity to appear today and address these issues, which I believe to be of Paramount and Universal importance, to name just two of the studios that will be affected by them.

The Pho group and my advisors and associates have contributed mightily to my comments today, but they are not to blame for its presentation and my nervousness and perhaps resultant failure to fully articulate them.

Your foresight in convening these hearings is to be commended, as there is and always will be enormous change in the delivery of entertainment and all intellectual works, whether music, movies, books or other forms of art.

Essentially, my remarks are a brief presentation centered around a half-dozen fundamental points:

No one is here to defend free music, but music can and should be made to feel free, even when it is not free.

Few will suggest music should be free, as this would be absurd from either a business or emotional point of view. Indeed, if it were truly free, there wouldn't be much more of it, as any economist can tell you, and any artist will readily verify. I am certain there are some here today who will.

However, as certainly as it must not be free, I suggest that it is our obligation and our opportunity to insofar as possible make it feel free, at least at the moment we decide to use it.

The delivery of music is approaching zero marginal cost - the cost of enabling each listen after the first. For some, this is a terrifying prospect, as their income may have depended upon charging a price much higher than marginal cost, say $18 for a disc that costs no more than a dollar to reproduce.

For others, this is not at all terrifying. To Mel Karmizan, who runs CBS radio and its Infinity broadcast stations, it is expected. He makes music played on CBS stations feel free to its listeners, though they pay indirectly each time they patronize an advertiser. Likewise, Jerry Seinfeld feels free to his viewers, none of whom can remember paying, though they all do. If we suggested to either of these gentleman that they encrypt and protect from non-paying eyes and ears their words and images, they would laugh, as this would reduce the income they receive.

Indeed, for those who pay a subscription fee to watch MTV or listen to an audio service, though they pay directly, each decision to listen or watch returns more value for fees already paid, making the use of music or movies a positive economic act/

Today, it can be truly said that music behaves more like Thomas Jefferson's candle - which when lit with another candle diminishes the flame of the first not at all - than it does like an object subject to the laws of supply and demand.

To the music listener who shares music, there is no consumption, as there is no less music after playing it than there was beforehand. The supply of boxes containing music is decremented not at all, and arguably the demand is increased.

These are the new clothes the music industry must wear if it is to grow to the $100 billion business it wishes from the $40 billion business it is.

2. This is because in the music world, like so many others, service is replacing product.

The economy that affects the jobs of steelworkers and artists alike is changing in fundamental ways, and like so many industries, the artist's world is transitioning from product to service.

Essentially, we are learning that the answers lie in new business models, not technology-based solutions. The video industry that once emphasized control now sees greater value in growing the crowd.

The best forms of copy protection are new business models that destroy the motive to copy, not its mechanism. A wireless flat-fee/advertising-supported jukebox of unlimited capacity would strip us of our desire to make MP3 files. We are transitioning, as my friend John Perry Barlow likes to say, from an economy of nouns to one of verbs. An economy that emphasizes the wine, not the bottle.

Digitization and data networks liberate content from control over its quantity and destination, in much the same way that broadcast of radio and television remove control over the number and location of listeners or viewers. Control over quantity and destination are customary requisites for establishing pricing schedules that leverage maximum price over marginal cost.

If control is lost, price falls and hovers at or near marginal cost of delivery. For example, if DeBeers lost control over the distribution of diamonds, their price would drop dramatically. Absent DeBeers' control, the price of diamonds would obey the standard laws of supply and demand and command a lower price in the market.

Digital service relationships, on the other hand, can and do flourish in an environment where there is no control and the audience is left to grow virally. With the service provider serving as a gatekeeper to the growing audience, profit can follow. Service relationships, such as those established by radio or television stations, emphasize repeat visits and informal or formal "data mining" to extract full value from the business affiliation.

The Net of the future will continue to exhibit flat-fee/flat-free pull, where we choose to monetize our presence by tolerating advertisements or by paying a subscription fee to banish the ads and the loss of privacy. We've already seen online services such as America On-line adopt the flat-fee model, as have telephone companies such as Sprint and AT&T. Where these companies once billed us for our activities and their duration, we now enjoy a smorgasbord of communication for one price.

At its most rational, consumer behavior suggests they believe media should be priced at or near marginal cost of delivery, which is closer to zero than 99 cents. This is the price to which they have grown accustomed in radio, television, newspapers, magazines, and so on. Where media can be controlled, such as concert seats or difficult-to-replicate analog items, consumers are more likely to be compelled to accept a wide disparity between price and marginal cost, but uncontrolled media generally move at or near marginal cost.

Even if we can control the destiny of songs, we give up control over quantity and commoditization, creating a singles business where none has ever proved profitable. Even singles at a dollar apiece reduce album-related income

because debundled consumers will skim the cream off a market built on bundled pricing. For years we've promoted singles and sold albums.

At its most irrational, by the way, consumer behavior suggests the obvious: We are often doing business with teenagers! This should be little surprise because it is teenagers we target with the music. It's as if we were complaining that they should like our dinosaur books more than those silly Pokemon cards -- value is in the eye of the beholder, and the beholder is distracted and empowered in ways our experience cannot appreciate.

Regardless, we must realize that our digits will flow like water from their source to their destination. Whether disintermediated from broadcast or networks or disk duplication or kids plugging into listening posts or whatever, our reality is that our inability to control has a dramatic effect on pricing and our business plans.

Great music was made long before music the product was even conceived. Music the product is a relatively modern invention, and has been part of music for only a blip in history.

Promoting ubiquitous music as a service creates the right business model -- with the permission of the appropriate rights holders (which may or may not include the artist, and may or may not include the music listener). When we move away from the package we liberate the content to seek larger audiences, and serving as gatekeeper to that ever-growing crowd is the key to viral success.

Even product-based business will thrive from entertainment the service. By creating a flat-fee buffet instead of the current tax on trying new things ($15 to see if you might like more than one song from that new band), we'll likely see merchandise and concert tickets and all manner of ancillary income increase. At the same time, we can grow the bundled subscription revenues to support the financial licensing needs of the industry.

It's time to set a price for the interactive license and administer it. The consumer wants option value without the disk, and in an increasingly mobile and wireless world this is not an unreasonable request, certainly no more unreasonable than wanting to watch a local network television station via my DirecTV satellite dish (which Congress mercifully recently enabled over the objections of the local network television station, which copyrights the content).

3. Digits will become ubiquitous and will increasingly arrive just-in-time, and in a customized way. They will eventually cease to be distributed digitally through downloads or transferred in analog boxes.

The arrival of wireless digital access will someday permit just-in-time, customized access to music, movies, books and other media content. These digits and the content they carry will be streams, not downloads.

The capital markets enthusiastically support the growth of connectivity by whatever means, including wireless, copper cable, and fiber optic. Connectivity becomes an assumption, not a complicated arrangement. Our American obsession with wires and set-top boxes ignores belies the fact that China and Africa and others are not wiring, they're skipping ahead, leap-frogging to wireless, ubiquitous connectivity.

It's a commonly held assumption that digital distribution will replace the analog distribution system that traditionally delivers services and information-based products. In the music industry, for example, there is much talk about the future of downloading music singles for a dollar apiece - or free - in MP3 or some other digital format.

More likely, however, the notion of offering music or other data, such as Websites or movies or newspapers, to be downloaded and stored will give way to business models that emphasize the widespread availability of content. When we can access all the bits we want, wherever we are, whenever we want them, we won't want to carry them around. Delivery on a disk or fixed storage of any kind will atrophy, as consumers tire of digital-asset management lessons and content providers become annoyed at giving those lessons.

Products we once could only conceive of as tangible are now fully functional services without form, ubiquitously delivered just-in-time at marginal cost and customized for each use and user. Put more simply, the ability to decide what I want and get it where and when I want it.

Economists call it option value. What it means to you is that this content is available at your option. Conversely, the song you hear on the radio or video you see on MTV isn't at your option, and is priced accordingly. We pay a price for the ability to have option value over something. A movie or song broadcast ephemerally has low economic cost to the viewer, but on a prerecorded cassette it draws a premium for its option value. The entertainment business refers to it as the difference between a performance license (inexpensive, compulsory, generally embodied in a radio or television broadcast) and a mechanical license (relatively expensive, discretionary, and generally a box containing a disc or tape).

Today, however, consumers have access to a multiplicity of recording devices, some real products we plug into the wall (such as the Replay or TiVo devices or standard audio or video recorders), others are software services downloaded or accessed over the Web. They are buffers, repositories of digits that hold them for your later use, cached to enable you to summon them at will.

These products and services offer consumers option value over streams, the ability to retain an ephemeral performance and use it when and where they want to do so.

In other words, these buffers transform push into pull. They take content pushed aimlessly by broadcasters and make it content you pull when you want it, and if you don't want the commercials, you click a button and they disappear. They buffer or cache the output of the broadcast and allow consumers the ability to retain the content and use it virtually at will.

Ultimately, the only purpose of the buffers and caches we rely upon today, such as diskettes and compact discs and DVDs, is to overcome real or perceived supply inefficiency.

Buffers and storage are determinative factors of our media interaction today, but long-term they are obsolete, the equivalent of today's floppy disk - or disk of any kind. Disks are like traveler's checks in an era of automatic teller machines. Who amongst us didn't rely upon traveler's checks when we absolutely, positively had to have the money we needed to feed and shelter ourselves in a foreign land? Today, with the just-in-time efficiency of customized cash available with the swipe of a plastic card, I know few who bother.

In the final analysis, products, hard drives, and downloads disconnect, depriving the audience - and the creator - of a relationship bonded with continuous access. Every streamed use, however, is an opportunity to grow a closer, better relationship between artist and fan.

4. History proves this analysis by analogy.

A. 1920's

Radio was the first Napster, just as Gutenberg made simple the task of printing previously difficult papal indulgences. Radio meant that we could no longer control the quantity or destiny of the music, or sporting event, or church service, once broadcast.

The New Economy is anything but new. Like a recently purchased vehicle, it's new to us. But let there be no illusion: This economy has been around the block a few times. Sadly, we put out to pasture decades ago those who could teach us now. There are few old-timers remaining to bear witness to the truth: The Roaring '20s make our 2,000 days in the throes of dot-com fever look tame by comparison.

Acoustic became electric during the '20s with far more savage impact on the economy of art than we see now with electric becoming digital.

Radio was followed almost immediately by television. In 1925 the image of a revolving windmill was broadcast, and by 1928 the first patent was filed for color television.

Music and movies and books not only survived the 1920's, they thrived because of them, not in spite of them. Where radio was once viewed as a

threat to the music business, it is now viewed as a necessity to success, and television and then cable television and the video cassette recorder have proven no different.

We recognized this and acted accordingly: There is a blanket, compulsory license applicable where control is difficult or impossible (i.e., broadcast, performance, satellite, etc.), and for the same reasons I am suggesting here it should be applied to electric becoming digital. These systems produce a known cost and easy licensing. Blanket, compulsory licenses imposed by Congress were the outcome of the recent DirecTV/DBS/DSS debate over rebroadcasting the copyrighted material of network broadcast stations, and in my opinion they will and should be applied to interactive use.

At some point, there will be so many digital licensees and so many digital licenses and so many digital licensors that we will likely agree to lower the overhead of negotiations and establishing a simple rate and an easy way to pay. The Digital Millenium Copyright Act itself offers a similar analogy in our world, because it promises (but has not yet delivered) one simple rate with automatic licensing.

Ironically, today we live in a world of blanket, compulsory enforcement (there is one organization per industry enforcing the laws on behalf of every company in roughly the same way) instead of blanket, compulsory licensing.

B. Video cassette recorder

The entertainment industry must learn from its mistakes. In the 1970's, Universal City Studios fought the introduction of the videocassette recorder. Universal felt that losing control of the quantity and destiny of content would lead to ruinous damages for information purveyors, and took Sony to court as the primary manufacturer. The case went all the way to the United States Supreme Court, but fortunately Sony won. Today, Sony shares with Universal the rich revenue stream provided by videocassette distribution, and most television companies participate in the VCR+ system that makes videotaping easier.

Print purveyors took a similar view in the early days of the Web. Many that previously feared copying today offer a one-click button to "send this story to a friend."

C. Sports

Sports team owners were once certain that televising sporting events would be the death of their sport -- why go to the game if you can watch it on television, our business is selling stadium seats -- who now could not and would not survive without it.

It is legend that Ronald Reagan was one of the very first sports broadcast pirates, recreating games in a booth after reading them over a wire service. Ultimately we've come to realize that not only was there no threat to

Reagan's game broadcasts, but they actually grew the size of the crowd, and served an important purpose that we once confused with theft. Little wonder we now encourage broadcasts from the ballpark.

D. Biology

Whenever I wade deep into law and technology, I find an analogy helps shed light on the otherwise incomprehensible. Biology fuses the wondrous with the incalculable, and it is instructive where methodology fails. Our rising level of digitization is like the Mississippi River during a flood, with whole towns and small cities disintermediated by water seeking the shortest path from source to destination.

Every day I find evidence of this flood, but technological or legal sandbags will not stop the deluge. As they say, the water eventually finds its way to the sewer and floods your home anyway. Technology has no switch, no lever to throw, no way to reverse the course that history and fate have chosen for intellectual property. Napster, Gnutella, and their progeny are the first flood waves to crest the berm. These peer-to-peer file-sharing systems were born to swap music, but are already finding use for movies, photographs, and other rich media content.

Intelligent storage is also part of this flood. The video business has its TiVo, Replay, and other devices that buffer push-based content and make it feel interactive to the viewer, allowing pull at push prices (flat-fee or flat-free), and without the commercials if you prefer. Audio versions of TiVo and Replay will likely arrive soon, permitting users to fill jukeboxes from digital and analog broadcast stations.

Technology does not have a switch, there is not a way to decide to go back. We can pass laws and we can hire lawyers to enforce them and they can employ technologists to enable their legal vision, but ultimately control of art is shifting from push (instigated by the artists and their enabling companies) to pull (at the will and at the instigation of art lovers).

5. There will be a renaissance of creative expression.

Technology's deepest impact will be from enabling the digital delivery of art, such as music, movies, books, and other intellectual property. The effects will go deeper than just changing the way we listen to popular music. Currently, we kill art regularly due to our need to balance the costs of distribution with its rewards. Once delivery is digitized, art need never die, and new art can come to life that might not otherwise find an audience.

The enabling effects of digitization will not be found in today's or yesterday's stars or big names. After all, they achieved worldwide delivery and distribution.

The primary effects of digitization are three:

A. Dead art will come back to life, and in the future art need never die.

Today, it is necessary that we kill most art to ensure that some can live. Like a gardener who prunes a rose bush, we kill some art to enable others.

Entertainment studios routinely discontinue music products. They must determine where the cost of distribution exceeds the rewards, and act to keep the rewards greater than the costs.

Once digitized with the costs of delivery commoditized to a marginal cost near zero, no art will be said to have delivery costs in excess of its rewards, and it is likely we will not only bring dead art out of the vaults and back to life, but we will find that art will never die in a digital future.

B. New art

Likewise, we abort new art even more often than we kill it. Everytime we turn away a new artist, what we mean to say is that we've decided that the costs of distributing their art will exceed the rewards.

We are essentially a college admission committee, denying an opportunity to dozens for the same of the few we admit.

Once commoditized with a minimal delivery cost, digital art can find a life it might never have otherwise found. We can enable new artists to find their audience where once distribution costs prohibited many such bold and noble experiments.

C. Unusual art

The rock band Nirvana, for example, might like to release every concert the band ever performed, but in an analog world of distribution this is impractical.

Now these bands can make available their entire repertoire of music, and so we will likely see in the future that we are able to purchase any Rolling Stones concern every performed, or watch any baseball game played and kept in an archive.

6. In the alternative, this could condemn billions of people to access to knowledge conditioned only on their ability to pay.

Friction was a very useful tool in allocating access to art. Riding my bicycle to the library overcame the friction that others would pay to defeat. If the delivery of intellectual property is to become truly friction-free, new models must evolve to restore and preserve balance in access to art.

Digital "lending institutions" must evolve and flourish, spreading entertainment and information, replacing product with service. We must

promise our children that like us they deserve to hear any song, read any book, watch any movie - regardless of their ability to pay.

The potential of every individual is at stake. Will their parents' wallet determine the music they hear, the books they read, the movies and video they watch?

Ultimately, digital delivery may prove as problematic as it is enabling. Once digitized, art can be liberated, but equally if not more tempting is the idea of making access conditional through encryption. If we choose the course of predicating access to intellectual property on ability to pay, a class-based society of information haves and have-nots will emerge.

Sadly, those with access will find the content pool diminished unless we open access to all, through digital libraries and ad-based services that make a mockery of content as product.

Once replicated, books - and by extension - movies, and music are available to everyone. As a child, I became addicted to books and music that librarians and others were happy to supply, regardless of my ability to pay.

I was encouraged to borrow any book or record in existence with the promise that if it was unavailable locally, other libraries would lend it to my library. I was promised access to any intellectual property I might seek.

Librarians schooled me in what could now be called the instruments of piracy. The library was the first place I saw a photocopy machine and a tape recorder. Use of these copying tools was openly encouraged and taught by those who also made change for the nickels needed to feed the copy machine.

No one called us pirates. None dared - though our actions violated any corporate interpretation of copyright laws, we were considered the opposite of scofflaws. We were scholars.

The fine balance between scholarship and piracy eludes us today in our relentless struggle to monetize the digital delivery of art and other intellectual property. Devoid of contextual motive, we now declare illegal and immoral any use of digits outside their predefined, technically based rule set.

Quite the opposite of the situation in my youth, it can now be said that some digits (and the knowledge they embody) are off-limits, and those limits are based purely on my ability to pay.

The digital delivery of intellectual property is our generation's nuclear power. We can either liberate knowledge through its friction-free delivery, or we can develop these same tools to condition access to art on ability to pay.

AT IMPASSE: TECHNOLOGY, POPULAR DEMAND, and TODAY'S COPYRIGHT REGIME

by

Jim Griffin
Founder and CEO
Cherry Lane Digital & OneHouse LLC
Los Angeles, California

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The Internet has fostered the creation of new music delivery services that provide Americans with unprecedented access to a broad catalogue of music. Consumers have responded enthusiastically. Continuing to meet this popular demand is clearly in the public interest, yet the future availability of these services is now in jeopardy. It would be unfortunate both for the American public as well as for copyright holders if peer-to-peer delivery of music were to be suppressed. If encouraged by appropriate legislation, these services can be configured in a manner that fully protects the interests of rights holders by ensuring them a steady stream of royalties. Moreover, consistent with the goals of the Copyright Act, these popular delivery services offer the potential for unprecedented growth in the creation and enjoyment of music.

In effect, the Internet is shifting the music marketplace from one for *products* to one for *delivery services*. Technological advances have fostered similar transitions in other markets in the past, and each time, the nation has opted to adjust its copyright laws as needed in order to enable competitive delivery services to face off against one another in the marketplace. Each time, consumers and copyright holders alike have benefited from the resulting expansion in the production and enjoyment of original works.

In passing the Digital Millennium Copyright Act in 1998, Congress recognized the need for legislation to foster the Internet's potential for broad dissemination, at the time and place chosen by the user, of all forms of original work. But the existing scheme for protecting and encouraging the dissemination of copyrighted material is inadequate for the changed market environment wrought by the new online world. Legislation enabling the continued development of online music delivery services, while fully protecting the interests of copyholders, is now needed.

The earlier statutes intended to encourage the use of prior generations of new delivery services should guide the way. Some of these statutes were designed to address problems created by high transactions costs when new technology offered the potential to deliver original works to multitudes of users. Some were intended to promote a nascent technology that might not, without statutory encouragement, have taken hold. Some were designed to help identify a reasonable price when the marketplace was inefficient at doing so. All were intended to promote the underlying goals of our copyright regime – to encourage the creation and broad dissemination of original works. These statutes provide a variety of examples of

solutions that serve the interests of both rights holders and the public.

Public demand for digital music delivery services is strong and growing.

"Music has been at the forefront of the Internet explosion, and for good reason: The Internet offers tremendous opportunities for the music business as well as for everyone who loves music." Because music is easily transmitted in digital form, the Internet has promoted the development of new music delivery services, bringing the American public convenient access to much more, and more varied, music than has ever been possible before. The public response has been overwhelming.

Napster has grown with unprecedented speed. First available in 1999, its software has now been downloaded over 71 million times. Its appeal is broad – though designed by a college student and popular with teenagers, half of its users are over 30 years old, and they are evenly divided between men and women. Its peak of 1.8 million simultaneous users is within striking range of AOL's reported peak of 2.2 million simultaneous users. And its more than 10 million hits from unique addresses per day is significantly greater than the fewer than 7 million unique address visits that eBay and the Walt Disney Internet Group attract per week.

Another software program for distribution of music and other digital files was originally posted on a website affiliated with AOL in the spring of 2000. It was removed after a single afternoon, but in just those few hours, 10,000 copies were downloaded, and today the decentralized file-sharing Gnutella software is enjoying ever-widening usage. It is also rapidly becoming more user-friendly. And there are many other means of obtaining access to music through the Internet, including Aimster, Bearshare, iMesh, and Spinfrenzy.

The advent of online music delivery services has and will fuel sales of music both as a new delivery service and in "hard copy" form. Many Napster users are willing to pay a monthly fee for continued access to the service. And many online music listeners report sampling new music using Napster or another such service, and then purchasing a CD of the music they liked.

Napster and similar services are racing to fill an entirely new market for services offering the customized delivery of music, a market just recently enabled by technological innovation. As with the invention decades ago of radio service for delivering plays and music, and then of television service by means of broadcast and later cable and satellite delivery, for delivering video performances and events, digital music service has transformed the nature of the market for the underlying copyrighted content. This transformation can be suppressed only at enormous cost to consumers and to copyright holders, who should benefit from the greatly expanded delivery of their works that the services promise. The American public's demand for music delivery services will continue to grow. It is in the public interest, and in the interests of rights holders, to satisfy that demand. But the demand cannot effectively be met under the current statutory scheme.

Digital music delivery services may be sharply curtailed despite widespread popular demand.

Adverse court decisions now threaten the continued availability of digital music delivery services. Moreover, market forces, which might be expected to engender a new means of meeting the popular demand, are being thwarted by a variety of obstacles. Legislation is needed to resolve the impasse.

For two reasons, the marketplace cannot and will not provide a solution. First, the music industry, long known for close coordination among its major players, has with one notable exception chosen to work to retain control of music distribution, refusing to deal with entities that threaten that control even if in the process substantial popular demand for music is left

unsatisfied. Five companies – AOL-Time Warner, EMI, Sony, BMG, and Universal – control about 85% of the market for pre-recorded music. These companies are collectively known as the "majors." The remainder of the music industry is made up of much smaller companies referred to as "independents" or "indies." As reflected by their collective market share, the majors dominate the distribution of prerecorded music and have done so for decades.

The majors' dominance extends beyond the distribution of pre-recorded music into both music publishing and the signing and promotion of new artists. While music publishing is less concentrated than sales of pre-recorded music, the music publishing businesses owned by the five majors control a high percentage of the most valuable song copyrights. Indeed, the two largest music publishing companies, those owned by AOL-Time Warner and EMI, alone control the rights to millions of songs. Although literally thousands of musical copyright owners are not affiliated with any of the major music publishing companies – including a number of independent music publishing companies – the catalogues of song copyrights owned by these entities pale in comparison to those of the major music publishing companies.

Similarly, the labels owned by the major music companies are capable of offering the most lucrative recording deals and, therefore, typically sign the most promising new artists to recording contracts. Few artists succeed in a big way without the backing of a major label, since the majors' expansive resources and high market shares give them considerable influence over the primary promotional vehicles in the music industry, including radio and cable television channels like MTV and VH1. For artists, the majors collectively control the gateway to the top.

Where a small number of large firms comprise an industry their interests will frequently align and, very often, so will their business decisions and strategy. And parallel, and even interdependent, decision making has long been a hallmark of the music industry. Such behavior can be a natural outgrowth of market concentration and may occur even without what might be deemed collusive activity in violation of the antitrust laws. Even if it is not illegal, however, such "non-competitive" behavior still harms consumers, because it enables each of the majors to safely ignore consumer demand, confident that its competitors will do the same.

The ongoing litigation against Napster allows the music companies to watch one another's business plans even more closely than usual. Their joint participation in the litigation, although likely shielded from antitrust challenge by the *Noerr-Pennington* defense, provides each company with a picture window on the others' strategies for dealing with the online world. Each time they consider and discuss the relief they are seeking in the litigation, and as they evaluate Napster's billion-dollar settlement offer, each firm necessarily reveals its own plans and goals for the digital marketplace.

The majors know that the public wants the ability to access the full range of music, not just the music of one or two companies, from a single source. As they are reported to have written in another context, "[t]o be compelling to consumers . . . a service must offers tens or hundreds of thousands of songs . . ." They cannot themselves offer a single joint site for antitrust reasons. But as long as most of them remain united, they can prevent the success of any unaffiliated service by refusing to license their songs. They are insulated from market pressures by virtue of their coordinated behavior. Only if several were to defect would the others have to follow in order to remain competitive.

Why would the majors choose to prevent the development of popular digital delivery services, despite the demonstrated ability of such sources to increase public demand for music? Napster, as the innovator of peer-to-peer music file sharing technology, has earned a "first-mover" advantage over other companies in the digital delivery of music. As a threshold matter, the majors do not want to enable Napster to earn a financial reward for this innovation, but would rather try to recapture the advantage for themselves. More importantly, they fear increasing competition from independent labels. Napster does not have an interest in what, or whose, music is shared on its service – with Napster's service, independent music is as readily available as the majors' music. And Napster is not only a vehicle for the delivery of music, but

also an open venue for the exchange of opinions and recommendations about music, entirely free of the majors' control. For the major music companies, which dominate older music promotional channels, this would be a dramatic change. They do not want to lose their historical influence and concomitant ability to direct consumers' attention, and purchases, to their own artists and labels.

Thus, it is in the majors' collective interest to regain control of music distribution from upstart entities such as Napster, even after it transitions to a royalty-generating service. The concentrated structure of the music industry and the increased coordination facilitated by their joint participation in litigation enable them to assure themselves that most are pursuing a strategy that protects them all. Absent intervention by Congress, adverse court decisions and the coordinated resistance of four of the leading record companies will deprive consumers of digital distribution technology in the future. A unique opportunity for consumers to enjoy a fantastic range of original work, in a context that ensures full compensation to rights holders, will be lost.

Another reason that the unassisted marketplace will not meet the public demand for digital music delivery services is uncertainty over pricing. Customized music delivery is a wholly new service-based approach to content delivery, and it does not fit neatly into the current copyright regime. If the various legal issues are not soon addressed by legislation, considerable additional litigation is likely to ensue, regarding fair use, first amendment rights, and more; as a result, absent legislation, the pricing picture is not likely be clarified anytime soon. In this environment, it will be difficult if not impossible for new services to succeed, and their failure would leave public demand for these services unmet.

> *When faced with similar problems in the past, Congress has enacted legislation to foster development of new delivery services while ensuring that the interests of copyright holders are protected.*

With some frequency over the past century, new technology has enabled the creation of new delivery services for copyrighted works, while at the same time creating new inconsistencies and inefficiencies in the existing copyright regime. Each time, Congress has responded by enacting legislation that encourages the maximum development of the new delivery services, but also protects the interests of rights holders.

Each of these examples can be best understood as a Congressional response to the transformation, through new technology, of a market for protected works sold in the form of *products* into a market for the sale of *services* delivering those works to consumers. Each time, Congress has acted to protect the rights of copyholders in the works themselves, while ensuring competition among services that deliver those works.

The Supreme Court has written, "[f]rom its beginning, the law of copyright has developed in response to significant changes in technology. . . . Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary." Not every technological change, of course, necessitates a corresponding change in the copyright laws. Indeed, were this the case, Congress would get very little accomplished *other* than amending the copyright laws. When, however, in light of new technology, the boundaries of existing copyright law are inadequate to promote the widespread distribution of works that the copyright regime encourages, Congress fashions an appropriate legislative solution. "Sound policy, as well as history, supports . . . [the courts'] deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology."

One example of an earlier Congressional compromise designed to encourage maximum use of a new technology for delivery of copyrighted work is the Audio Home Recording Act of 1992. Under the AHRA, manufacturers of "digital audio recording devices" are required to

include technology that prevents serial copying. Manufacturers of these devices and of "digital audio recording media" must pay predetermined royalties into a general fund that is, in turn, distributed to holders of certain copyright interests in music. The *quid pro quo* under the AHRA is that manufacturers and consumers are granted statutory immunity from suits for copyright infringement. The AHRA provides for full use of consumer audio tape recording technology, while ensuring a royalty stream for rights holders.

The legislation grew out of litigation filed by music publishers and songwriters in 1990 against Sony Corporation, which had begun marketing DAT recorders. Negotiations aimed at achieving a non-judicial solution soon followed, and ultimately a proposal was presented to Congress as the basis for legislation. The AHRA is the embodiment of the compromise reached among the interested parties.

As explained by the U.S. Copyright Office in its *amicus* brief in the *Napster* case:

> Beginning in the 1980s, consumer electronics firms began to develop tape recorders and other consumer recording devices that employ digital audio recording technology. Unlike traditional analog recording technology, which results in perceptible differences between the source material and the copy, digital recording technology permits consumers to make copies of recorded music that are identical to the original recording. Moreover, a digital copy can itself be copied without any degradation of sound quality, opening the door to so-called 'serial copying' – making multiple generations of copies, each identical to the original source. The capability of digital audio recording technology to produce perfect copies of recorded music made the technology attractive to the consumer electronics industry, which anticipated substantial consumer demand for tape recorders and other recording devices equipped with digital recording technology. However, the same capability was a source of concern to the music industry, which feared that the introduction of digital audio recording technology would lead to a vast expansion of 'home taping' of copyrighted sound recordings and a corresponding loss of sales.

Two main benefits flow to the music industry from the AHRA. First, manufacturers of "digital audio recording devices" are required to incorporate into their products technology that prevents serial copying. Second, manufacturers of "digital audio recording devices" and "digital audio recording media" must pay predetermined royalties into a general fund to be distributed to copyright holders. The *quid pro quo* under the Act is that manufacturers and consumers are granted statutory immunity from suits for copyright infringement, and consumers are granted immunity for the "noncommercial use" of digital audio recording technology.

The AHRA does not create a statutory license, but it achieves a parallel outcome. The interests of copyright holders are served through a system of royalty payments, and the public interest is served by giving consumers the greater access to delivery of protected work that the new technology has enabled. Under the statutory scheme, there is competition in the production of players and tapes by means of which consumers can customize their music listening. Each copyholder is assured of royalties from distribution of the music delivery service – the sales of tape players and blank tapes. Copyholders cannot, however, thwart the delivery process.

In addressing different new delivery services, Congress has adopted varying solutions. In these cases, the marketplace did not provide a complete answer, and Congress acted to establish a government sponsored or facilitated licensing or royalty scheme, or to foster development of the new delivery service in some other way.

In 1909, in recognizing for the first time the right of a copyright owner to authorize mechanical productions of music, such as piano rolls, Congress also acted to prevent creation of a threatened monopoly by a piano roll firm that had entered into exclusive agreements with a number of leading music companies. The 1909 statute provides that if the copyright holder has allowed mechanical reproduction of its copyrighted song by anyone, then others may also make mechanical reproductions. Payment of royalties is required. The statutory procedures required by the license provision are fairly time-consuming and burdensome; so most mechanical licenses are now negotiated privately and directly between the rights holder and the licensees. While these agreements often do not conform exactly to the statutory provisions, the statute generally provides an outline for the negotiated license and the statutory rate imposes an upper limit on fees that copyright holders are able to charge.

There are many other examples of legislation designed to solve licensing issues arising from a new form of delivery. For over a decade, jukebox operators had a statutory license for the songs their machines played. Earlier, jukebox operators had enjoyed immunity from infringement claims, in part as a result of an early court ruling. The 1976 Copyright Act removed this immunity and replaced it with a statutory license and minimum royalty per performance, both of which were administered by the Copyright Office. Congress later amended the statute to replace the statutory license/royalty scheme with a requirement that the copyright holders and jukebox operators negotiate a private license in good faith, under the oversight of the Copyright Office.

Also in 1976, Congress enacted a statutory license for cable services that retransmit broadcast television signals. This legislation was an effort to forge a compromise between copyright owners of television programming and operators of cable companies. Beginning in the 1950s, cable companies picked up transmission signals from broadcasters and retransmitted them, initially to local homes and later, with improved technology, to distant locations. This practice undermined the exclusive agreements between broadcasters and copyright holders, arguably to the detriment of the latter. In two cases, nonetheless, the Supreme Court refused to find that the cable companies were infringing upon the copyright holders' rights. Congress responded with a compromise embodied in the 1976 Copyright Act's cable license provision. Congress acknowledged the copyright owners' interests in their broadcasts and determined that the cable companies should pay royalties for their use. In addition, Congress determined that transactions costs would be onerous if the cable companies were required to negotiate separately with each rights holder. Congress resolved both issues by means of a statutory license, found in section 111 of the 1976 Copyright Act. As leading authorities on copyright law have explained, one of Congress' initial reasons for implementing the cable compulsory license was to foster the growth of the then-nascent cable industry, a purpose that has been very effectively accomplished.

In 1988, Congress enacted the Satellite Home Viewer Act ("SVHA") to enable secondary transmissions by satellite carriers of primary transmissions for private home viewing by owners of satellite dishes. The SVHA created a statutory temporary license for this purpose.

Satellite carriers had began to market dishes to home users as the cost of dish technology came down. Home users were able to receive unauthorized signals directly from satellites, avoiding copyright fees. Although the courts did not find that satellite carriers were infringing copyright owners' rights – they were, instead, "passive carriers" – Congress responded by creating a system of statutory licensing. This legislation follows the same rationale as the cable compulsory license: it allows a new delivery technology to grow and supports a new industry. The statutory license extended only to home users who would not have access to programming if they could not use the satellite dish to pick up a signal; serving the interests of these otherwise unserved consumers was a major purpose of the legislation.

The advent of webcasting services created a series of new copyright issues. Prior to the passage of the Digital Performance Rights in Sounds Recordings Act of 1995 ("DPRSRA") there had been no recognition in the U.S. copyright laws of an exclusive right of public

performance for owners of sound recording copyrights. "While

composers of music are given the right to publicly perform their work, owners of sound recording copyrights generally are not. Therefore, when a song is played by a radio station – and, until now, when it was played on Internet radio or via webcast – the composer of the song receives a royalty payment from the radio station, while the owners of the actual recording receive nothing." The DPRSRA created the first limited public performance right in sound recordings. It also amended the 1976 Copyright Act to provide a statutory right to perform a sound recording publicly by means of a digital audio transmission.

All of these statutory schemes fostered the development of new delivery services, all of which have since proved successful in the marketplace. In the early days of many of them, however, there were sharp disputes about whether the new services should be permitted, and claims were made that copyright holders should be empowered to suppress them. It should be remembered that in *Sony*, *supra* n.14, the Supreme Court came within one vote of effectively outlawing video cassette recorders, which in the end have increased the viewing of movies substantially and have generated billions of dollars for the holders of movie copyrights.

Congress then enacted the Digital Millennium Copyright Act of 1998, which, among other things, protects the American public's ability to customize delivery of original work, while again protecting the interests of rights holders

Three years ago, Congress recognized that the copyright laws needed amendment if the full potential of the Internet was to be realized. Congress enacted the Digital Millenium Copyright Act ("DMCA") of 1998 in part to foster the public's ability to obtain protected content over the Internet, when and wherever it wishes. To achieve this end, Congress granted Internet Service Providers some protection from liability for the unauthorized transmission of protected content by means of their services. A Senate Committee summarized the purpose of these provisions:

> Copyright laws have struggled through the years to keep pace with emerging technology from the struggle over music played on a player piano roll in the 1900's to the introduction of the VCR in the 1980's. With this constant evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials. The legislation implementing the treaties, Title I of this bill, provides this protection and creates the legal platform for launching the global digital online marketplace for copyrighted works. It will also make available via the Internet the movies, music, software, and literary works that are the fruit of American creative genius. Title II clarifies the liability faced by service providers to transmit potentially infringing material over their networks. In short, Title II ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will expand.

In order to protect the ability to customize delivery of content – to maximize its "option value" – the DMCA "provide[d] certainty for copyright owners and Internet service providers with respect to copyright infringement on-line."

The DMCA contains four distinct safe harbors, which under certain conditions protect Internet Service Providers, including services such as Napster, from liability for copyright infringement. The centerpiece of three of the safe harbors is a notice and takedown scheme that provides for the Internet Service Provider to block access to or distribution of infringing content upon receiving notice from a copyright holder that access and distribution are unauthorized. Unless the Internet Service Provider has independent knowledge of infringing content on its system (as defined by the statute), it is entitled to rely upon the notice provisions.

With limited exceptions, the DMCA places the duty to police infringement upon the copyright holder. This policy is essential to prevent imposition of private restraints on content by Internet Service Providers, the entities generally least equipped to decide which content should be permitted to flow through the Internet. Placing the responsibility on the copyright holder is also justified because the copyright holder often may not object to the sharing of its copyrighted content online, and indeed may benefit from the wide and inexpensive dissemination of its content to the public over the Internet.

In the peer-to-peer environment, the Internet Service Provider, such as Napster, does not maintain a copy of any content, but only provides the means for sharing the content directly among its users. Napster itself does not upload or download content, but rather any sharing of files occurs directly, peer-to-peer, at the user level. The peer-to-peer service provider does not even see the content being shared among its users. The technology provides the Internet Service Provider with only a transitory, real-time, catalogue of file names, written by its users, that can be accessed by anyone logged on to the service at that moment. Napster's real-time catalogue is maintained automatically, without human intervention, and changes from minute-to-minute depending on who is logged on and what files these users have labeled for sharing.

The DMCA expands the public performance right in sound recordings to include digital audio transmissions in webcast services that resemble traditional "terrestrial" radio broadcasts. It also grants a statutory license for the use of sound recordings in connection with Internet services under certain circumstances. As with the DPRSRA, one of the criteria for receiving a statutory license under the DMCA is that the webcasting service be "noninteractive."

> *In enacting each of these statutes described, Congress addressed pricing problems unsolved by the marketplace, including among other problems transactions costs issues and the need to encourage nascent technologies, while at the same time furthering the underlying goals of the copyright laws.*

One of the foremost reasons Congress has amended copyright legislation in the ways just described has been to eliminate, or at least diminish, the transactions costs associated with the introduction of new services. Through Napster's technology, for example, millions of consumers now can have access to a service providing a virtually limitless number and variety of songs. But the rights holders number in the thousands, if not the tens of thousands, for they include not only the record companies, which hold the rights to most of the sound recordings, but also the music publishers, which hold the rights to use the underlying words and music. While the majors all have affiliated publishing houses that own substantial catalogues of songs, ownership of publishing rights is substantially less concentrated than ownership of the rights to sound recordings. Individual licensing each time a song is accessed would necessitate a preposterous number of individual transactions. This is exactly the type of problem that statutory licensing can help solve.

Congress has also adopted legislation where necessary to ensure that a newly developing industry will have an opportunity to flourish. Napster and other peer-to-peer technologies are in their infancy, and their full potential for music delivery is not yet known. They certainly hold substantial promise. Absent Congressional intervention, however, the problems currently plaguing development of online music delivery may never be fully resolved. In that event, the growth of digital music delivery services will be stunted if not smothered altogether, and the

commentators have recognized, consumers' loss of the traditional rights and privileges of fair use would be significant. It would constitute a sharp diminution of the benefits consumers receive when they purchase copyrighted work today.

The copyright laws, as authorized by the Copyright Clause in the Constitution, are intended to foster the creation and distribution of original works. Copyright holders are to be compensated for licenses because awarding compensation encourages them to create and disseminate their work. It is this goal of promoting the enjoyment and distribution of original work that has led to the various statutes described above, as well as to exceptions to the copyright law, such as fair use. Considered pursuit of a balanced copyright regime has served the nation well, fostering continuing creativity over the centuries. The underlying purpose of the nation's copyright regime should guide analysis of the action needed to adapt the nation's copyright regime to today's technology.

The current system of copyright protection needs to be adapted to reflect the transformation of the music marketplace, in the same way that Congress has adapted the laws in the past to reflect marketplace changes effected by new technology.

Americans love music. Technology like Napster's offers music in a new form, as a service the consumer can adapt to his needs and tastes. Yet this technology may be suppressed. This is not what the copyright laws were intended to do. Rather, they are designed to accomplish the opposite result – to foster the wider creation and dissemination of original work.

Moreover, technology is rapidly evolving. The music industry's current strategy of trying use the courts to chase down each new service is doomed to failure, although in the process substantial moneys will be spent and the potential for wider delivery of music will be largely unrealized. In the end, a new legal environment will have to be devised. If it is done sooner rather than later, millions of dollars in litigation expenses will be saved, copyright holders will receive more compensation, and the public will benefit from access to new music delivery services.

The issue for Congress is how to ensure that Internet technology is fully harnessed in the public interest, while the interests of copyright holders are protected. Many times in the past Congress has successfully addressed technological change, each time adapting and amending the copyright laws to best achieve their underlying goals in the changed circumstances that the new technology has created. It now faces the challenge again.

Conclusion: statutory licensing is fair and needed to enable new music services to meet public demand.

Public demand for new digital music delivery services is powerful and growing daily. These services will be difficult to suppress entirely, but without Congressional action they will be tightly restricted. Millions, perhaps billions, of dollars will be spent in the struggle over their future. Market forces will not resolve the problem, just as they have not resolved problems arising from earlier transformational technological developments in the delivery of copyrighted material. The large music companies, with one exception, have chosen to stand together against the new music services, knowing that they can thereby maintain, at least for a time, their control over the distribution of music products and the selection of new talent. While the new services have to negotiate with each major independently, the majors have worked together against the new services, filing a joint lawsuit through their trade association, jointly working on new security technology, and jointly presenting their viewpoint to the public. Through their joint efforts, they have been in a position to observe one another closely and retain confidence that most of them, at least, will remain in the traditional alliance.

In addition, market problems obstruct the continued development of the new music services as they transition to a fee-based structure. High transactions costs associated with individual licensing of each service subscriber and each sharing of a song, as well as pricing uncertainties associated with a wholly new technology, will make survival difficult for the new services in the absence of a clear and known legal framework. Congressional assistance, along the lines of prior legislation, is thus essential.

I recommend a licensing regime requiring that songs released for public distribution be licensed to the new digital music services as well. Consumers subscribing to these services would pay fees, from which royalty payments would be remitted to rights holders. Such a compromise mirrors multiple prior compromises, in legislation spanning most of the twentieth century. The interests of copyright holders would be fully protected. The interests of consumers would be protected. And the outcome would be consistent with the primary goal of our copyright regime since its inception – the greater production and wider enjoyment of original works.

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Phil Leigh's Inside Digital Media: Cherry Lane's Jim Grifflin
Wednesday, August 1, 2001

INTERVIEW

Phil
Phil Leigh back again with Inside Digital Media, and our guest today is somebody of great interest, I think, Jim Griffin with Cherry Lane Digital. Or how would you like me to make the introduction Jim?

Jim
That one works for me, I do run Cherry Lane Digital and through Cherry Lane Digital, we do a fair amount of work investing in other companies, running our own company, staying active through the Cherry Lane Music Group, which is a publishing company and magazine company, and we put out records too, so very active, we have offices in Los Angeles, and New York, and Beijing.

Phil
OK, WOW! Jim is quite, quite a visionary as far as the music industry is concerned and he is also a techno**Phil**e. He is the type of man that not only is enamored with technology, but actually likes to get his hands on it and really won't really comment about his opinion of technology until he has had a chance to work with it and give a firm opinion of what his actual experience is. So, Jim, just for the benefit of our audience, could you take a few minutes and describe your background, where you been before, how you got to where you are now, what you see as your mission in life at Cherry Lane Digital.

Jim
Sure, I started out as a journalist myself. I worked at a newspaper in Lexington, Kentucky, than eventually came to represent journalists for over a decade in Washington, DC. I was very young, when I did that, about 22 to, say, 35, then I moved on to Hollywood where I went to work for Geffen and became their Director of Technology, founded the new technology department there and ran it for about six years before I left to start my own company.

Phil
That's Geffen Records, right?

Jim
Geffen, well yeah, Geffen records yeah,
Yes, Geffen Records, yes it was a record company there and a movie studio, an things of that -- movie efforts. There was a lot to be involved in working with Geffen, but yes, our primary focus was Geffen Records.

Phil
Is that an independent company or is that one owned by Warner?

Jim
Well, it's sort of gone by the by now. It was an independent company funded by Warner, then Universal bought it, and now it's totally subsumed within Universal and is not a separate company at all. And none of the people who worked there before work there now. So it is really a part of Interscope Records, at this point, and is really just a brand. But when I was there David Geffen was running it and was transitioning from an independent company to being owned by Universal.

Phil
Who were the artists?

Jim
Oh, boy, they had terrific years when I was there -- Aerosmith, Guns 'n Roses, Edie Birckell, Enya, Tesla, Nirvana -- you know you can go on, there were just so many bands. We used Aerosmith for the first single, we were the first ones to release full length commercial entertainment product online, the full Aerosmith song, called Head First, in June of 94.

Phil
Ok, now, prior of that you were representing journalists.
Jim
Yes, actually right.

Phil
What does the term 'representing journalists' mean?

Jim
Ah, negotiating their contracts, representing them when they had issues at stake around the world. I worked for the newspaper guild as an international representative and they represented both print and electronic journalists in many different locations. So that was my introduction to all of this, was as a journalist myself and representing journalists. And really digital media came first to the journalist business because they have deadlines, well, every hour in many cases, and so they need to move things with facility around the world and so moving 0s and 1s were very much a part of the journalism business long before it became part of the rest of the entertainment business and so my experience there really helped me integrate into Geffen's operation in bringing technology to a company that hadn't previously had any.

Phil
So, when did you join Geffen?

Jim
I joined Geffen in 1992, early 1993 roughly.

Phil
So, you were ahead of technology?

Jim
Yeah, started and ran a technology department for them, say, for the next 6 or 7 years before I left and started my own, which I called One House, which we then merged with the Cherry Lane Music Group and called Cherry Lane Digital and from there, I run Cherry Lane Digital and our efforts with other companies and to help our clients in investments and all the rest of the Cherry Lane Group.

Phil
Is Cherry Lane Digital, is that a label or is that an investment company?

Jim
No, I would say neither of those although we have made investments. It's really a digital media services company that integrates well with the rest of the Cherry Lane Music Group that lets us think about the future. While they focus on the day-to-day operations of publishing and helping artists and musicians and entertainment people of all kinds, make a great deal of money. We managed the rights, for example, of Cherry Lane for WWF, for Pokemon, for DreamWorks, John Denver, Placido Domingo, we have any of the number of people with whom we work and produce value for them. So when I speculate or offer my opinions, they're informed by experience with needing to make money content whether it was at Geffen or whether it was representing writers or whether it was working with Cherry Lane in our broad array of rights that we manage and administer for others.

Phil
Well, I have to confess I sort of come at this whole business from a technology side, and so I don't know the artist and your side of the business so well. Is Cherry Lane Group, is that a publishing house?

Jim
Yes, mostly we are a publisher, but we have put out records before and basically we manage the rights in music for others. And again, such as DreamWorks and WWF and others of that sort.

Phil
Those are certainly high profile clients.

Jim
Well, yeah, I think we help make them that. And Cherry Lane is wonderful to be working with. Our affiliation there has been really working for us. They do good things for their clients; they just acquired the rights to administer much of the Elvis Presley estate. So they are up and coming and it's great to be associated with them and I hope we help them.

Phil

But, uh, Cherry Lane Group, I think of a music publisher as one thing and somebody representing WWF as being something else. Is that kind of unusual?

Jim

Oh no, not at all. There is a great deal of music used every time there is a WWF television show that is produced, or in an arena. And I think that is really the point is that these are many of the new uses for music.

Every time a wrestler comes out, there is a theme song played for that wrestler. That theme song is a piece of feature music and that artist who makes that music, gets paid. The people who own the right to that music -- and so really I like to think the work we do at Cherry Lane is very much the same kind of work that sets the model for the future. And I say that because when you are dealing with the rights of music and a radio broadcast or a television show or public address, or movies or any of the many new uses that have arisen since the electrification of America -- and by the way the rest of the world-- it sets a precedent: radio, televisions, cable, satellite. All of these tell us a lot about what's going to happen in the future as digital music unfolds. I say that because we see the future of digital music not so much as new, but following a path that was set when the world was electrified. I often say that acoustic becoming electric was for more savage of a transition then electric becoming digital. Electric becoming digital was merely a matter of gradation. But imagine what it must have been like – say in 1915-1930. You started that time period with acoustics being entertainment and your voice and your image can travel no further than the room that you are in or the place that your are. And say ten or fifteen years later with public address, radio, and even color television, now your voice and your image can't be controlled in terms of their quantity or destiny. You can no longer count the audience and what they do with your content afterwards. And I think getting over that transition, that was tough, but electric becoming digital? It's just merely a matter of graduation.

Phil.

[Laughter] Another thing that I mentioned up front that I like about talking with Jim is that I don't know who said it, but I did read it somewhere, "The future has already arrived, it's just not evenly distributed."

Jim

[Laughter] Well, I like to say that "technology does not have a switch on it." And that it's really not our choice of whether it arrives or not. It's really more our function to figure out how to live with it. You know we often hear the debate over technology couched in terms of should we, or if, or what if, and it's really not our choice to decide.

Phil

What does the head of technology do at Geffen Records? Can you give us a couple of ideas of what you think your responsibilities are?

Jim

Sure, well your primary responsibility has been to move digits around within company. When I was there, that was our prime **Phil**osophy, was that we earned in our department the right to work in the marketplace by discharging our responsibility for moving 0s and 1s around and inside the company. ultimately the goal was to do so in basically three circles. That your first responsibility was to move digits around within the company, and then the second responsibility was to swap digits with the company's partners and affiliates, like the company over the hill that owned it, and then vendors and others, and thirdly to move those digits into the marketplace and to talk to consumers hopefully and end users in the same language that you talk to your employees and to your business partners and so create a comprehensive approach of moving digits, of enabling the company to do things that it could ever do before. That was really your **Phil**osophy.

Phil

Well, I think it was Andy Wang who set up Wang Labs, oh, 23 years ago, commented some time ago that the greatest development in the 20th century, I guess you would disagree with your electrification aspect, but he said the most important development would be the digitalization of information in all of its forms. It looks like right now the music publishers and record labels are facing this thing and the studios possibly down the road. So what is your analysis of the digitization of music and what it would imply for the labels, how does the Napster phenomena unfolds into this, what do CD burners mean? Can you help us sort all that from your prospective.

Jim

Sure, fundamentally it's a transition from product to service. When I said before that in the 1920s we learned to let go of the quantity of the destiny of content, it's true. That if you lived through the '20s you saw your control diminish and then disappear and the result was that artists created societies like ASCAP and BMI and SESAC, and their goals was really to do two fundamental things: create a pool of money and come up with a fair way of divvying it up. Because in essence, whenever technology has taken content, whenever they have had a confluence between technology and content, the result is that content is harder to control. But it does reach a wider audience and the way we deal with technology and content is we socialize them, we've never not done that. In other words, we create a pool of money and a fair way of dividing it up and Congress basically passes a blanket/compulsory at some point that tells those people with the new technology that they can use the content but they do have to pay into a fund and then that fund is divvied up somehow. And that's what's happened with radio and what's happened with television, it's what happened with public address, it what's happens now with satellite broadcast, and what happened with cable. Essentially we create these pools of money, and create fair ways of dividing them up and ASCAP, BMI, SESAC they have pools of money and they have fair ways of dividing them up. Again, not perfect ways, they don't count each time a song is used, but they count or sample roughly the percentage of time that something is used and so this is a service model surrounding music that has evolved as technology has rolled into this area. And now with the digitization of content and its delivery over networks we're going to see again much of the same approach, a pool of money and a fair way of dividing it up. Musicnet is one way of doing that, certainly Pressplay intends to do that as well. But I think that what we will not see is moving from analog distribution to digital distribution. And I say that

because digital distribution is a digital product nonetheless. It may not be an analog product but it's a digital product and products are dying. Products die because they require control over quantity and destiny. In order to sell a product, you need to match supply and demand in order to get a price that's above marginal cost. But whenever you lose control over a product, either its quantity and/or its destiny, its price falls to its marginal cost of delivery. Meaning whatever it costs to make each copy after the first one. And again, that's not the average cost of making, it's the marginal cost, and that becomes the new price. Now marginal cost 0, price 0? That's very scary in the record industry as I am sure you know and that way you ask the question. But if we go over to a radio station or television, they are not scared at all by marginal cost 0, price 0, because they don't sell products, they are in the service business. Their business model which they have learned since the 1920s is instead of controlling the quantity and destiny of content, use content to profilagate [?] and then become a gatekeeper to an ever growing crowd of people. So if we sent Mel Karmizan at Infinity CBS, whether he owned many broadcast properties, they would say they like marginal cost 0, price 0. And if we offered them the opportunity to employ digital rights management or copy protection in order to sell Howard Stern every morning, you might have go buy a little key or something in order to hear it. They would laugh and say, well, no, we would not want to stop people; we wouldn't want it to be a way that kept them from hearing Howard Stern. We like the fact that the audiences can double overnight. And I think that's the point, that service models accommodate disorder that accommodates price 0, cost 0 in ways that products do not. Service models encourage this, productd die in this kind of environment, and that's what we are watching is a transition from entertainment to product to entertainment to service. And it really can't happen soon enough, because it you had digital products, let's say, let's say you sold singles online people would be able to cherry pick or skim the cream off the top of the business instead of buying a $16 album. They pay $.49 or $1 and while that might sound good, to the end users, we can't sustain the entertainment business on singles or granularity. We've always made our money off bundles. Basically promoting the single, but selling the album, promoting the Edgar Allen Poe poem, "the Raven," but hoping you buy the book. In a bundled price with unbundled choice is where we're headed. And essentially that an AOL all you can eat model or AT&T Digital One Rate. And Bob Pitman and the folks at AOL have driven that business even before when he was at Warner, he was at Six Flags Over Texas and he learned the trick that you don't charge for the roller coaster or the Tilt-a-Whirl, that really isn't the point. It's bundling the price and charging you one fee when you come in the park. And increasing the number of people who comes in the park. And I think that is precisely where we are headed, is where the product of controlling the quantity and destiny of boxes as the 0s and 1s moves on plastic disks to a service model of growing the size of the crowd and then serving as a gate keeper to an every growing crowd of people, a bigger bundles, a monthly or annual bundle instead of buying a particular box, so --

Phil

OK, let's assumed that I am Edgar Broffman. I am a smart guy, I'm a brilliant guy maybe, but I am really a little confused and quite concerned about how to proceed here?

Jim

Sure, you got a problem because you come out of the liquor business. [Laughter]. And the liquor business is a product business and this new world; it's about selling the wine, not the

bottle. And that's part of the problem is that, as the economy moves from one of nouns to one of verbs, if you were selling bottles, you have a problem you have to learn to sell wine and these new services are wine and the old product-based business was bottles.

Phil

OK, will even though I do have this legacy background, I am bright man, OK, I am a bright guy and I am trying to make steps in your direction, so here's what I propose to do --

Jim

Well why would you do that, first of all? Maybe the right point for Edgar Broffman, is, why would he run from the product business? Why wouldn't he try to slow it down, and say you know this is what it may eventually will be, but I would like to slow it down and that is way? I like to say that what we are in is a time of Tarzan economics. Edger Broffman lives in a time of Tarzan economics, he clings to one vine which is the product vine, because that is what keeps his company going; it's what he reports to the share holders quarter after quarter. And he may be swinging for the next vine, but he can't let go of this one until he has that one firmly in hand.

Phil

OK

Jim

And that is my point, is that he is a time of transition, he is moving from product to service, but he cannot let go of product until service is firmly in hand, and so we might deduce that he has a motive to slow the transition down until he does have the next vine in his hand. And by the way, if you knew as I think Edgar does, that he has to share the next vine with far more people then he did the last vine, you might want to slow that process down even more. And in particular, you have to share that next vine with music publishers who are people who has been focused on music the service, not music the product. And who might want more than their product-based share at a service based world.

Phil

Well in truth though, isn't true that the publisher has been compensated for every CD that he sold?

Jim

Yes, but on a far smaller basis, in other words, that they have taken but a fraction of what they could take in the new world. Because remember, in the new world everything is a performance, whereas in the old world less was. Why do I say that? I say that because in a product-based world, what you sell is option value. The reason people by CDs, compact discs, is so that they can play music at their own option, where and when they want to. Now to be sure we can hear music in a restaurant or at a theme park, or over the radio, on the television and pay almost nothing. In fact we pay indirectly, it feels free, without being free, because it is so inexpensive and it is paid indirectly, but the real reason is that it is played at someone else's option. Because the theme park wanted to play it or the restaurant, or the radio station owner. It's at their option, and when we own music or buy it, it's at our option, and so that's why we've

had a product base world. But increasingly we are moving to a world were digits arrives just in time and in a customized way. We new advanced digital networks and many of them increasingly wireless, we will find that we can summon all the digits we want, wherever we are and when ever we want them. And when that happens, services acquire option value. And that is a very important transition. And so if you can summon a performance, whenever you want one, the performance has option value and publishers have traditionally owned the performance, so why should they take the same small share that they have traditionally taken? Now, in a service, perhaps they are entitled to half, instead of a small percentage. And I think that is what many publishers are saying is, you know, this may required a rejiggering of economics. and may be appropriate that we get half of the money, or more. And if you have built your company around the product of music, who's to say that your dominance should continues as music becomes a service. And truthfully even the record companies have acknowledged that, I mean do we call radio station pirates, no, do they pay record companies for the right to play their albums, certainly not. And in fact, truth be told the economic runs the opposite.

Phil
Yeah, yeah.

Jim
You know and so, a in that kind of a world, it certainly turns it on it's head, doesn't it, and it doesn't mean that the publishers should except the same proposition.

Phil
Well, not be cynical, but couldn't this reasoning just be a part of the Tarzan economics just from the point of view of the publisher too?

Jim
Oh sure, I not, by the way, saying that's how it's resolved. I am just pointing out that it's not as neat and clean of an equation into the new world. The next vine will be shared.

Phil
What do you make of the, apparently, it's my understanding that the Soundscan data shows that the CD sells were down on the first half. Would you not conclude?

Jim
No, I think they may well be down, I think there could be a number of factors behind that, I certainly, you know, this is all very subjective. There are many observers that have commented that they have not put out the same kind of music this year that they did last year and it's of a lower quality of less compelling to people. That of course is an extraordinarily subjective notion. I think, but it is one that many hold and cling to. I would point out also, I am sold that many blank CDs are being sold a record stores, and that I am even told that average record stores sell in quantity more blank CDs than they do recorded CDs.

Phil
Yeah, I wouldn't doubt it.

Jim

I think this suggests that we are not only moving from a world of product to a world of service, but that we are moving from a world of push to a world of pull. By that I mean that end users, they are the new media, they are deciding what they want to put on that CD. They want control of that, they want to put the one song they want there, not the thirteen songs they don't.

Phil

Yeah, that makes sense, but you know, what would you do -- If in fact, that decline really signals a long-term secular trend, as oppose to just some fluctuation that would be self-correcting. Then, what would you do it you were in charge of the labels and the publishers and they were combined into one organization, what would be your recommendation with respect to CD burners and to online distribution. Would you continue to sue to slow them down? Would you put copy protection into CDs? What would be your approach?

Jim

While I might take many approaches, I know what my fundamental approach would be.

Phil

OK.

Jim

And my fundamental approach would be stop relying upon lawyers and technologist to solve my problems. To confront them as business problems and to attack the motive for piracy more than I attack the mechanism. In other words, the law and technology are very clumsy and blunt tools for attacking this problem. You can attack the motive, however, very, very successfully. And in fact, I would point out that most effective digital rights management scheme know to man is what we have protecting the video industry right now. And that is we don't attack the mechanism. Anybody can record any video they want, I mean if you can see it on your TV screen, you can transfer it to your videocassette recorder. Meaning we can all download all the video we wish to have. But none of us does. I mean the fear at the time the videocassette recorder was introduced, I think we all know there was five years of litigation and it went all the way to the United States Supreme Court and that essentially the entertainment industry took the position that, well, not just the position -- I mean you have to remember they put there left hand on the bible and there right hand in the air. And they swore that this will kill not only their companies, but the entire entertainment business, and it had precisely the opposite effect.

Phil

Um-hm.

Jim

And I think that's the point, is that we have attacked the motive for people to copy, not the mechanism. To spite the fact that any of use can buy a videocassette recorder for $49 and, you know, get blank tapes for almost nothing, I can't remember the last time I put a blank

videocassette into my videocassette record and hit the record button. For anything other than time shifting. Which by the way is very good for the industry, because if I missed a show, at least I can see it. I think my point is, is that the reason that I don't record anything, and the reason you don't, the reason that the vast majority of people don't is that we made content so available. In other words with a thousand channels of satellite TV and a hundreds channels of cable television, we have very little motive to record. That essentially the just in time arrival of customized video has destroyed our motive to pirates or hold it at all. And that is the point, is that as content becomes more available in a service model, our desire or motive to disintermediate products completely disappears.

Phil

Well except you will presumably have to pay for this service.

Jim

You pay for it, but it certainly feels free. In other words you don't pay by the play, it's not a product model. In other words service models destroy your desire, they obviate your motives to disintermediate the products.

Phil

Well, just thinking out loud here, but wouldn't that only apply if I am comfortable with a service fee?

Jim

Oh yes, to be sure, I mean, it has to be a comfortable fee. But that's my point. My point is that it's getting over products and moving on to services. Because in the final analysis the restaurateur, he pays one fee a year, and we let him use any music he wants, he doesn't even have to ask permission. And the radio station, how do we treat him? He pays one fee a year and he doesn't even have to ask permission before he uses his music. Why do we do that, why do we let a radio station operator or a television station operator, or a restaurateur use all the music they want? And the answer is clear, it's because there are on a service model. They pay one fee into a pool of money and then we divvy it up based on how often each thing is used. We feel comfortable, and we don't call them pirates. Because we have them on a service model.

Phil

Well, it seems to me that PressPlay and MusicNet are moving into that direction, right?

Jim

Yes and No. The reason I say that is ultimately no one ever bought a Geffen record or read a Simon & Schuster book or went to a Paramount movie. And that's important because how would you know whether PressPlay or MusicNet or one of the other services had that Aerosmith tune you were looking for?

Phil

Well I think that's a cogent point, but the people of the publishing and the label business can clearly identify that point and then I would have to infer that there be cross licensing.

Jim

Well, Yeah, you can infer that, but the suggestion thus far has been that if you offer one, you can't offer the other.

Phil

Then so, why would you think they are doing that?

Jim

I think that it is for the legislatures. I think right now, the labels battle is on two fronts: against technology and against the law. And it's ironic because technology and the law are the worst ways to try to stop this problem. [Laughter] But that is precisely the way they try, instead of even a business department reworking pricing and thinking of new deals.

Phil

What if, say, Sony and Universal was to license MusicNet and Warner and EMI and BMG was to license press play then that way the two services could be offer competently but at least they would have access to all the labels?

Jim

Yes, and I suspect that then you would have antitrust charges filed of some kind. I think that ultimately what you're describing is a public policy question of why isn't that administered by the Librarian Congress instead of by two companies. In other words, what are the odds that we treat this differently than any of the other services in history? And I say that for a real point here which is that, can you give me an example to where Congress hasn't passed a blanket compulsory to deal with technology and content? In other words, even the mechanical rate set that record company's pay composers and lyricists is set by the Librarian of Congress in a CARP hearing. You know the radio rate, the television rate, the cable rate the satellite rate -- I mean, what's your argument, or anybody's argument, that this is treated any differently than DirecTV the satellite service when they had trouble with ABC, NBC and CBS. You know, they were charged with copyrights violations because they were putting those signals on the satellite and before the dispute was over with, Congress had passed a blanket compulsory, that said they didn't have to ask for permission any more.

Phil

Oh Yeah, but if -- with a hundred million CD burners in use by the end of Christmas and with online alternatives now popping up for the former Napster users, I would suggest that there's a possibility that we can see CD sales decline rapidly enough that Congress does move quickly.

Jim

Yeah, but you will agree that Congress have already anticipated that and dealt with it, wouldn't you? They passed the home recording act in 1992 and it said: end users and consumers have the right to make copies of any CDs they want. And in fact, that same law set up what's called the "DART tax", the digital audio recording tax. And every time you buy a compact disc

that's blank, or a digital burner, you pay a tax, and that tax goes to the artist. Meaning that there is a pool of money that is created by the DART tax and the Librarian of Congress administers that fund, and sends money to artists based on how often they estimate that their work was redistributed.

Phil
So do they send that money to the publishers, who then send to the artist?

Jim
Yes, there is a way the fund is divvied up the Library of Congress administers. We can disagree whether that is right or whether that is wrong but what is clear, that is precisely how Congress dealt with it.

Phil
Yeah, but does the labels get any of that?

Jim
Oh, yeah.

Phil
So labels, publishers and artist all get.

Jim
Oh yeah, they all have a claim, any copyright holders, any rights holder. The legislation's written in a particular way. Now by the way, I am not saying that right or wrong. I am saying that how we always deal with it.

Phil
I see your point.

Jim
Congress has never not passed a blanket compulsory or enabled one to happen. In other words ASCAP, BMI, SESAC, they license everyone, anyone can have a license. And you don't have to ask for their permission before you use something. And my point is, that's review by federal judge, and so that may not be, A federal judge, they have a consent degree, because it's an antitrust problem. But my point is, that it's always a matter of public policy.

Phil
Ok, how can the labels implement this service would avoiding this antitrust .

Jim
I don't know how you can, I mean, I believe that ultimately it is a public policy question.

Phil
I see what you're saying.

Jim

What I am saying is it's the benefit of the commons issues that becomes enormous and it always happens this way, whether we are dealing with cable or satellite or radio or television or public address. Time immemorial this precisely how we have dealt with it' we've created a pool of money and then we come up with some arguably fair way of divvying up. I mean, let's face the whole notion that we should get paid every time somebody hears something doesn't really work in a service based world the way it does in a product based world and so our company Cherry Lane, although we administer the rights of WWF and let's say that WWF show, that wrestling show -- as odd as wrestling is to some people, to others it has an enormous audience -- and let's say it is on a particular television station, in a particular city on given night and it's not sampled by ASCAP, well then we don't get paid. But let's say that in another night it's sample, and we get over paid. Well the law of large numbers says, that over time it works out and so sampling becomes a fair but not perfect way of dividing the money up, but its acceptable to everyone involved.

Phil

How long would you think it would be before Congress can get motivated to do something?

Jim

Oh, I think they are watching the industry and they are hoping that what they impose is something that is acceptable to most of the industry through arms length of negotiations in the in between. In other words, what they are looking for is for the situation to sort of solve itself and for them to put their imprimatur or their stamp of legitimacy on and eliminate the antitrust issues by making it a public policy issue. That's essentially how it always gets resolved.

Phil

Yeah, well said, but what would that be six months or twelve months?

Jim

Oh, I think that it might be longer, because again, we are in the time of transition of Tarzan economics. The industry doesn't have a good reason to let go of its current vine until that next vine is firmly in its hand.

Phil

What about the declining CD sales, isn't that a reason?

Jim

I think you could look at that and say perhaps that is a reason, but the price has gone up and so I am not sure if the revenues has gone down. In other words if they sell a few less CDs, if the price has gone up and revenue has gone up they may be good for you.

Phil

But what if that down turn in the first half of this year was only the starting point?

Jim

Oh look, I would the first one to say they need to change. I'm not here arguing that they should ....I am just simply pointing out that it is speculative as to how quickly they should let go and how quickly that the reward on the other side becomes greater than the current revenue stream. And I would argue that there is no one who can figure that out better then them.

Phil

Oh, OK.

Jim

No body know better than out of their own self interest, which vine is better for them to hold on to. And I guess their point is if we want that other vine, we can just buy Michael Robertson, which they did, or buy E-Music, which they did.

Phil

Well they got that one cheap.

Jim

Yeah, well what you are saying is that they got a good price of a piece of the next vine. I don't disagree with you although in the case with Michael Robertson company, MP3.com, which is the more to discuss there, because E-Music is much smaller. Whether or not they got a good price, I think ultimately will be determined by Michael Robertson continues to be involved. If they still have MP3.com management team then they got a bargain, but if they lose them then the asset... if it was it was purely an asset buy then, it was over priced. But if they keep that team, because that team has such a reputation for execution, that arguably if they didn't execute as well as they did, they would have saved a lot of money on legal fees. They executed so well that they disintermediated so many copyrights that it was very expensive. But that's just how effect they were.

Phi

What's your opinion on whether or not the labels should attempt to impose copy protection on existing CD releases?

Jim

Well, I think it's silly, I really do, I say you need to attack the motive and not the mechanism. And problem with the mechanism is this by the way. Is that everything you do basically reduces the size of the audience. I mean, Nokia, a client of mine, they was telling me recently that they was doing some surveys in the wireless world and that had determined that basically, as a rule of thumb, every time someone has to push a button, the audience is diminished by 25%. That just a button. And you probably learned that yourself, there just obstacles, and that every obstacles you put between people and the content they want reduces the size of the crowd, so if the value of content is the size of its audience squared, which is generally what we argue for network effects and technology work, then what good does even a button do. If it reduces the audiences, it must reduce the value, under that equation. And to you ask

yourself, I ask myself why wouldn't Mel Karmizan used copy protection on the Howard Stern Show?

Phil
Yeah.

Jim
And you know the answer. If you ask yourself why don't the record companies kill the current CD if they are getting copied and people are making MP3s from them, why don't we kill them? Well the installed base in enormous. They would like us to buy DVD audio, how many people own a DVD audio player? DVD video players, by the way, will not play DVD audios, so you can't assume they're part of your audiences, because they are not. And my point is that there is no installed base. And you really need an installed base for that, so if you want to grow the size of the crowd that's the mean goal here. If the value of content is the size of its audience squared then the right thing is to build that audience dramatically and then serve as a gatekeeper.

Phil
That sounds generally sensible to me, let me just ask you for some opinions, and if you don't want to express them, then that's fine, but if you had to take a guess, would you say this down turn that we say in the first half is the beginning of a trend or not?

Jim
A trend, I think it's a trend in the sense that the pendulum swings back and forth but it doesn't surprise me that was the trend that started long before us. That a trend that's hundred of years old.

Phil
Is it a secular down turn?

Jim
It's cyclical, the questions is how does we come out of the cycle.

Phil
No I mean secular -- consistent?

Jim
Is it consistent? I would say, in general the pendulum has not swung consistently. But we will see change. I mean, the argument goes, this is not a trend away from technology or away from its disintermediation, it's actually quit the opposite. This is an embracing technology, this is the big companies now getting into the game.

Phil
I know but is this a gradual trend away from pre-recorded CDs, in your opinion?

Jim

Away from pre-recored CDs, I don't think you can say that. I mean, I think that it is a trend away from push. In other words, I'm not necessarily going to buy the CD that the other guy made for me, but I like the CD format. We're selling a lot of blank CDs out there.

Phil
That's not pre-recorded?

Jim
Oh, well yes, I got you, I get what you are saying. You are saying that somebody else made for us, yes agree with you, that's on the way down. That's a trend away from that, but we have had a trend away from that for a while. Away from push and towards pull. People generating their own contents and the way it comes together and so.

Phil
What would be your prediction as to what action the RIAA might take against apparent alternatives that has sprung up for the former Napter users?

Jim
Well that whack-a-mole, you know every time the mole stick its head up you got to whack it.

Phil
[Laughter]

Jim
They'll play that game, and you can argue about whether that is smart or not, because the more of the moles you hit the mole they end up popping their heads up and looking like your end users or your audience. You know because as this game goes on they smaller and smaller. So you hit Napster hard and then the ten that replaces it are smaller than Napster. Then you hit them hard and then you find out, well now we are hitting end users on the head.

Phil
What's wrong with hitting end users?

Jim
Well, they certainly drawn a line in the past, they tend not to go after end users, after their own audiences. In other words, in by the way, that's also the argument for the RIAA doing it. I mean you asked me the RIAA, do you really think it's the RIAA? I mean you do know it's the record companies that run the RIAA?

Phil
Now is that right?

Jim
The RIAA is not some independent institution that, you know, has its own fund of money and operates entirely on its own, I mean in fact, quite the opposite. Its client is the record

companies; its primary function is to be a lightening rod or a scapegoat for the what they choose to do, so will the RIAA do it? No, it won't be the RIAA. Will the major records instruct them to do various things? Yes, they will. And they will I sure make those decision out of self interest as almost as every advocacy group does.

Phil

Well if PressPlay and MusicNet are not the right solution, then when do you think we will see the right solution?

Jim

They're the beginning of right solutions, which is that people sit down... I guess what I am saying is that dating in high school or colleges -- maybe it looks like the right solution even if its not going to last, in other words you do have to at some point start and get started with your attempts to learn about each other, and so forth. And Music Net, Press Play these are attempts, these are starts. But what they are most notable for is the beginning of the service model. Meaning that the essential part of Music Net is that the participants agree that they are not getting paid by the number of times that somebody listen or takes a song, they are getting paid as a percentage of a pool.

Phil

OK, let me just ask you, there are a number of topics I would like to go over with, but I just like to get your quick response to them. I've got a number of thoughts here, when I say CD burner, what do you think is the significance of that product?

Jim

To me its bionomic, its like biology and economics fused together, it's like a river. It means that does digits they want to flow from source to destination and that CD burner is just one more way their going to do that. There are going the find every path they can from their source to their destination. That path will become increasingly over time just like a river. And this is just one more way for it to move. You know when I think of the CD burner and I think of Napster and I think of all the disintermediations, I think about his teenage kid at a laundry mat that, my friend, the head of sales at MCA Records tells me about. She says I see the teenage kid in a laundry mat and he has a mini disk player around his neck and she says, you know, at first, I conflicted, because I think about how Sony runs a record company and how Sony sold him the many discs player. And about how one part of the company wishes he wouldn't copy and the other part the companies sold it to him and advertised it to him as a way to copy, but she say so I ask the kid. Where do you get you music for that mini disc player and he says, well I get it... and she say do you take off Napster and he says, well no, my parents won't let me do that. And she says, well how do you get music for it? And she says, he pulls this little cord out of his pocket and he says well I take it down to the Tower Records and I plug into the listening post. And dump songs to it. That what I think about CD burners, I think there like mini disc players. I think they're like anything else, I think there just another way for content to flow from source to destination. Its silly to try to stop, its like putting up sand bags against the raging river, because the water still going to go through the sewer and flood your house through the toilet.

Phil
Well I think that is an excellent point? What does TiVo mean to you?

Jim
TiVo is the ultimate disintermediation, it turns push into pull, it's an intelligent buffer. It know how to grab push and turn in it into pull.

Phil
So it pretty profound?

Jim
What's profound, it's not just TiVo, but imagine an audio TiVo. And to me that bitbop. If you used bib bop by audiomill or any of the 13 or 14 other audio TiVos that are evolving out there.

Phil
BitBop?

Jim
Yes, by audiomill. it's a product that Real Networks has some association with, it certainly uses real audio SDK.

Phil
For the benefit of the audiences bitbop.com ?

Jim
Yes, I think, its bitbop.com. I know it made by a company called audiomill, it might be there, but yeah bitbop.com

Phil
So this is hardware?

Jim
Software.

Phil
Software you load on your PC.

Jim
Download it, put on your PC it will watch for real auto screens and then it will start recording you want automatically for you. In other words you go away for lunch, dinner, leave it for a day. And you will come back and find a lot of songs on your hard drive.

Phil
And then you can delete the ones you don't want?

Jim

Yeah, basically the songs are pushed to you, you have no options value on them, but when it grabs the ones you want and records them, now you have complete option value on them. So it turns a service into a product, it turns push into pull, it gives you option value over that which theoretically had no option value, so the point is that TiVos, audio TiVos and so forth, these are one of the next big disintermediations. Napster looks small by comparison to the TiVo. And, I'll tell you the button line reason why. It's because intelligent buffers which turn push in pull and so forth. They create a first use dilemma that is almost unavoidable. And let me explain by what I mean by first use dilemma. The first use dilemma is this: if you create music it is very unlikely that people would buy it from you unless they have heard it. That's step number one, people have to hear music in order to want to buy it. But number two if they can hear it with intelligent buffers and good digital recording they don't need to buy. Because if they can hear, they can record it. Or it can be recorded for them automatically. And so, you live in the very, very difficult world where if you don't expose people to your products they won't buy them, but if you do expose them to them, increasingly they don't need to buy them. And that becomes what I call the first use dilemma. And it really created by intelligent buffers, intelligent recording, and that's why I say that the trick to this whole business is to destroy people motive to use recording, not their mechanism. To make content so plentiful through the service model that they have to motive to disintermediate the product. I mean, I have very little motive to record anything on television because its all available to me interactively for the most part.

Phil

So then what does TiVo mean to you?

Jim

TiVo is really just an in between disintermediation. Even TiVo disappears because ultimately I'll have no need to hold it on a hard drive at all. It will be available to me interactively from the source. But in the between, its my way of making them do that, its my disintemediation until that do that.

Phil

What does peer-to-peer mean to you, what's the significance?

Jim

Peer-to peer is also very inefficient, its also moving things around, it's like traveler check in a time of ATMs. And that what I mean, I think peer-to-peer is interesting. It begins as a bionomic disintermediation. It as if you cut off the Mississippi River in the middle and the water wouldn't stop flowing, it would just start going around the river in these little capillaries and moving in streams and down streets. And that's what peer-to-peer is like, it routing around damage. You know damage is the lack of content. And peer-to-peer is all these people saying WOW, I wish I can have this song. Not being able to get it from a main vain, so tapping in and informing little rivers between them in order to replace the vain, but when the vain comes, those little capillaries will disappear. When the service comes their desire to deintermediate the product, can disappear.

Phil
So you don't think... you would say that peer-to-peer is really just not important?

Jim
It's not that its not important it's the thing forces them to the right thing. In order words, by routing around the damage, it makes them want to repair the damage very quickly or lose their place in society.

Phil
What are the two, what are the two –

Jim
You see what I mean, in other words, what I saying is that if your TiVo or your Napster gives you access something that they don't want to license, then it make them want to license it all the quicker, and so its important even if it disappears over time.

Phil
What would you say the two most significant gadgets you discovered in the last year or so?

Jim
WOW, I guess, well I do think that TiVo's is on that list. I discovered it more than a year ago, but I think it continues to be the thing on that list. But I would say more than anything probably Ricochet or Metrocom getting a hundred and twenty eight K streaming has opened my eyes?

Phil
Even though the company has filed for bankruptcy?

Jim
Oh, sure, that doesn't strike me at all, I mean, American Airlines, you know filed for bankruptcy, I would think them less relevant. Continental Airlines certainly filed for bankruptcy several times, I think. All the major record retailer have filed bankruptcy, except for Tower and my LA Times two weeks ago said they were about the file for bankruptcy.

Phil
Yeah, that true.

Jim
I think it just bankruptcy as a financing mechanism for just dumping a billion dollars worth of debt for them. But they are not going to go away, and certainly wireless is not going to go away and it's essential for audio because music is to the car, television is to the home and as a forteen year old kid in Finland told me our Amercian view of the future, he would have to be grounded to enjoy. He would have to be stuck at the other end of a copper cable or a fiber optic

cable and he wants to be in a car and there is really no way to hook a car up to a cable without wireless, so.

Phil
So your experience with Ricochet is great, you like it.

Jim
Well it not that its great, it what it teaches me about the future, it's the first robin of spring you know. It may not be what you going to see later, on but it's a sign of something. And it a sign that digits are finding there way to people where ever they are and in dozen major cities like New York and LA I can get 128K when ever I want it. Now the reason that's important is that the tipping point of wireless is roughly 56K, meaning when can I get Windows Media Player or Real Audio or MP3 to scream to my device where ever I am, when ever I want it, including a car. And that has now happen for me, and it really change the way I use media, that's true, but open my eyes to what I see would one of the next big things which is not how streaming wireless would change the way we use media, although it will, but now dramatic the change will be in how we provide media. And I mean that because what does the exclusive right to cover a basketball game mean when a thousand people at the game have digital camera and high speed wireless connections? You know with microphones and cameras. What will it mean when a thousand people at a U2 show, just say one percent of the audience, happens to have a wireless device that can send audio robustly in rich media and video. What would it be when little games have people attending them with camera and microphones and just incidentally they start broadcasting them and stitching those images together. What would it be like to have two thousands microphones at a U2 show that are streaming at 384 K. Over time, that becomes really, really interesting.

Phil
What is your Ricochet cost you?

Jim
$75 bucks a month.

Phil
Any extras?

Jim
No, I don't think there is anything extra on top of that. I use a NIC card, Sierra Air Card 300.

Phil
And what's your device?

Jim
I use a compact iPAC with it, or a Sony picture book. And I am very impressed.

Phil
So you are getting video, you are getting anything.

Jim
Yes, anything, I want. Anything digitally.

Phil
What have you found most impressive in term of the content you have gotten it?

Jim
Oh, that I can get anything I want, where ever I am, when ever I want it. Off my server my home for example, or from work, I mean I can literally just ask for and receive it at the moment I need and not carry it around. But hard drive of the device is irrelevant to me. It completely irrelevant, its storage is unlimited because you can access what ever I need from home for work faster than I can listen to it.

Phil
The network computer?

Jim
Yes, and my point is that yes, the thing that we are discussing right now, the notion that it changed the way I listened to things, yes, you're right, it did. And it changed the way I watch things. But what it made me realize was that what was coming was that armed with these devices we would be able to send rich media as well as take it. And that in that kind of a world, boy, rights really change dramatically. You know, I've seen lawsuits over a movie director who included a statute or something in a movie, that was say, in a public park, and the author says well, you know, I own that statute, I made that statue, and you know, that's my intellectual property you put in that movie. And then they have to reach some settlement. I mean imagine when everyone broadcasting all the time, how many violations of copyrights, privacy law occur. You know, when you're walking down the street with a camera on around your neck and streaming at 384 with your microphone, you're invading all kinds of people's privacy, constantly. And taking all manner of rights away from all kinds of people. An yet, providing content in a way the world hasn't seen before. When your kid's little league game is being broadcast by no less than a dozen of the other parents, you know, you would say my Goodness, what kind of a world have we created? And it will be fascinating. There will be so much content it will be unbelievable. And I guess you could call that like an eBay DJ. You know, the real issue isn't how it changes how we get stuff, it's how we get stuff to you.

Phil
Yeah. Let me just ask you two final questions. You make some profound points. But number one, Napster came out of the blue a couple of years ago and surprised all of us – nearly all of us – what would be your prediction is the next big surprise?

Jim

Well, I think what we can say is that it's all bionomic, so we know the content will keep flowing. I use that phrase "bionomic" again – it's Michael Rothschilds[sp?] who wrote a book called "Bionomics" in which he basically said if you have trouble understanding something like computer networks or media or whatever, picture it like a biological thing like a human body or a river. And Napster is really just evidence of this bionomic approach taking hold, of content flowing from source to destination as if it were a river. And so I would say we will see more of he same. But I would say that we should not be deluded into thinking that because it happened this way in an analog world that it will happen that way in a digital world. The digital world was very, very different in many ways. So we should anticipate that analog distribution, for example, will not become digital distribution, but that it will become digital delivery. The just in time arrival of customized content is where I think that we're headed. I think if anything is a good guide for us, it's the past, not the future. In other words, we shouldn't be thinking that we're part of some special generation that's rewritten all the rules. You know what we're doing is really out of the 1915-1925 time period when acoustic became electric. That is our guideline. And I think that there's nothing that could do you better in understanding this than going back and reading Marshall McLuhan's book from 1964 called Understanding Media, where he took those first fifty years of electronic media and sort of boiled it down and predicted where it was going. And what he said was that the medium is the message. Mot the message itself. And in that kind of world, the people who run networks make more than rock stars. And isn't that where we are? You know, that the medium has become the message? That it's more important to have an MP3 player than it is a particular album from Madonna, because having an MP3 player says you're cool enough. And it says that you can share, that you can trade with other people. And I think that's the point, that the medium is the message, that increasingly how we move things and that we can share them says as much if not more than what kind of stuff we go through.

Phil

Ok. I think this has been an enlightening interview for me. I'd like to just give you a final opportunity to express a whatever points you felt would really be important that I failed to address that might be of interest to the audience.

Jim

Oh, I think we could never regress at all. I hope that we've stimulated people. I guess the one thing I would say is that while I say things boldly and forcefully, I say them to stimulate people to think. As much as it sounds like I know the answer, I know I don't. My goal here is to stimulate people to think about what the answers really are. I certainly don't know what they are. But I hope that some of the things I've said give us different paths for thinking about them. That's my hope. That there's some stimulation here. That we not be deluded into thinking that we're some special generation here that's got a new problem that we will have to think of how to solve, but instead to realize that the answer may be that finding someone who lived through the 1920s, someone 80 or 90 years old, may have the answer for us. And that going back and reading books and looking at things that happened during the 1920s may give you much more if an answer than thinking that we are very special and endowed with some special things for our future, because I don't think that's accurate. I think Fitzgerald was right, so we beat on boats against the current borne back ceaselessly into the past.

Phil
Well, I have to think about that one.

Jim
OK.

Phil
Well that's a good thought.

Jim
It's fitting that we're doing a radio show, because, this could have happened in the 1920s.

Phil
Well now, OK, that is F. Scott Fitzgerald?

Jim
Yeah.

Phil
Well then I'll take a look and see if I can find that and ponder it. And this is Phil Leigh for Inside Digital Media and ..... [end of tape]