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COPYRIGHT ARBITRATION ROYALTY PANEL

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

Conference Room 216
Second Floor
Offices of Arnold & Porter
555 12th Street, N.W.
Washington, D.C.

Friday,
October 19, 2001

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

BEFORE

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

ORIGINAL

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

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
David Fagin				
By Mr. Cohen	12112			
By Mr. Levine		12124		
By Ms. Woods		12133		
Jonathan Zittrain				
By Mr. Cohen	12144		12215	
By Mr. Katz		12157		12216
Richard Seltzer				
By Mr. Jacoby		12221		
Adam Jaffe				
By Mr. Rich	12310			
By Mr. Garrett		12463		

EXHIBIT	DESCRIPTION	MARK	RECD
RIAA			
114 RPX	Press Release Jupiter Media	12182	
115 RPX	BitBop Screen Shot	12203	12205
SERV Rebuttal			
4	Work Paper	12239	12307
5	List of Variables	12240	12307
6	1999 Sales Data	12240	12307
7	RESL 73/74	12240	12307

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

2 (9:02 a.m.)

3 CHAIRMAN VAN LOON: Well, good morning

4 everyone. Do you have any administrative or

5 procedural matters before we get started with our

6 witness testimony?

7 MR. GARRETT: Not from our side, Your

8 Honor.

9 (Laughter.)

10 CHAIRMAN VAN LOON: Well, Ms. Woods had

11 her hand up.

12 (Laughter.)

13 The right hand and the left hand --

14 MR. GARRETT: As I was saying, we have one

15 matter, Your Honor.

16 MS. WOODS: Only a question, actually. I

17 had understood we were getting some new scheduling

18 information last night, and I didn't get it, so --

19 MR. STEINTHAL: Do you mean on the waiver

20 issue?

21 MS. WOODS: Yes.

22 MR. STEINTHAL: I think that the people

1 that are looking into that issue are still looking
2 into the issue, and I think they said they would let
3 you know by today.
4 MS. WOODS: Okay.
5 MR. STEINTHAL: Okay. So we'll make a
6 decision I'm sure by, you know, lunchtime or so as to
7 the waivers.
8 CHAIRMAN VAN LOON: I had one question for
9 you. At the very end of the day yesterday we
10 discussed the Disney filing and the affidavit from Mr.
11 Holtzman, which the majority of the Panel had not read
12 yet. And I -- I know they were not supposed to look
13 at it.
14 The question was: are we to disregard
15 this whole filing or only the affidavit or some parts
16 or --
17 MR. GARRETT: Well, officially, I would
18 move to strike the entire affidavit with the --
19 CHAIRMAN VAN LOON: And it --
20 MR. GARRETT: -- 10 attached exhibits.
21 CHAIRMAN VAN LOON: -- Exhibit A.
22 ARBITRATOR VON KANN: I thought the upshot

1 was it was essentially withdrawn.

2 MR. STEINTHAL: Right.

3 ARBITRATOR VON KANN: So we don't have

4 anything to strike.

5 MR. STEINTHAL: That's correct. It's

6 withdrawn, and the data that's -- you know, to the

7 extent that's already been produced as part of the

8 discovery in the case, it's already been produced and

9 exists in that form. So we've withdrawn the entirety

10 of the document.

11 CHAIRMAN VAN LOON: So it's the thick part

12 as well as the thin.

13 MR. STEINTHAL: Yes.

14 CHAIRMAN VAN LOON: Okay. All right.

15 ARBITRATOR VON KANN: Now, that -- in

16 terms of the three of us, that's I think all that

17 needs to be done. Whether there's something that

18 needs to be done with the Copyright Office, I don't

19 know whether it was officially filed and logged in

20 and --

21 MR. STEINTHAL: It was. We're happy to

22 withdraw it. If the RIAA would like us to do that,

1 we're happy to do the necessary to withdraw it from
2 the file as well. It's not on a public file.
3 MR. GARRETT: Well, I'm not -- it's not
4 the procedure that I'm concerned with. I want to be
5 certain that -- you know, since this is an affidavit
6 of someone who is not coming to be cross examined, and
7 I have no ability to test the assertions that he has
8 made in his affidavit, that it is not part of the
9 record, it is not something that the Panel is or will
10 rely upon. And we'll deal with the -- with the other
11 issues when Dr. Jaffe testifies.
12 ARBITRATOR GULIN: It should be withdrawn,
13 though, from -- the file should be withdrawn, so
14 there's no question that it's part of the dirt case or
15 anything like that; the Library can't make any --
16 won't confuse that issue.
17 MR. STEINTHAL: All right. We'll take
18 care of that.
19 CHAIRMAN VAN LOON: Good morning, Mr.
20 Fagin.
21 MR. FAGIN: Good morning.
22 CHAIRMAN VAN LOON: Welcome to this

1 proceeding. We're especially grateful for you to make
2 this effort to come. I know you were one of only two
3 of our 50 or 60 witnesses from the initial stage that
4 had to be completely rescheduled, and we're very
5 pleased that your schedule worked for you to be able
6 to come and be with us this morning.
7 MR. FAGIN: Thanks for having me.
8 CHAIRMAN VAN LOON: I'd like to ask you,
9 please, to raise your right hand, so you can be sworn
10 in by our Court Reporter.
11 MR. FAGIN: Okay.
12 WHEREUPON,
13 DAVID FAGIN
14 was called as a witness and, having been first duly
15 sworn, assumed the witness stand, was examined and
16 testified as follows:
17 CHAIRMAN VAN LOON: Excellent. Will we be
18 having initial direct?
19 MR. COHEN: Yes, brief.
20 CHAIRMAN VAN LOON: Excellent. Okay. Mr.
21 Cohen?
22 DIRECT EXAMINATION

1 BY MR. COHEN:

2 Q Good morning, Mr. Fagin. Could you just

3 spell your name for the record?

4 A D-A-V-I-D, F-A-G-I-N.

5 Q Okay. Can you tell the Panel a little bit

6 about who you are and what you do?

7 A Sure. Basically, I'm a musician. I guess

8 you'd call it an independent artist, because we signed

9 a record deal that was a little bit different than

10 your normal record deal. We have -- the band, for the

11 last seven years, has been operating as The

12 Rosenbergs. And before that, I was in and out of a

13 few other groups.

14 But for the most part, I've been playing

15 professionally for about 10 years, and in that time

16 held down every single day job you could possibly

17 imagine. And the one thing that I always wanted to do

18 was to be near music in one form or another, so I

19 never -- I never took a job where it was in an office,

20 where I was confined to a cubicle from 9:00 to 5:00 or

21 anything like that. I always wanted to be near the

22 radio and hear music, and so --

1 CHAIRMAN VAN LOON: You stayed away from
2 law firms, then.
3 (Laughter.)
4 THE WITNESS: Exactly. The closest thing
5 I ever did was I came -- I was a personal assistant to
6 an attorney and a stockbroker, and I would drive them
7 around in New York, you know, and do all their chores
8 for them, and basically I was a driver. And I've
9 always been a driver, no matter what, whether it was
10 driving for architect's blueprints, whether it was
11 Domino's pizza, whatever -- the whole gamut.
12 The interesting thing is is that I just
13 found myself, you know, in the car from 9:00 to 5:00,
14 or whatever it was, listening to sports talk. And I
15 wanted to be near music for -- in the worst way. And
16 I don't listen to the radio anymore. I don't listen
17 to music.
18 And, you know, that's just an upsetting
19 and sad thing at this point in time, because it's just
20 bland. It's gone. And, you know, from my point of
21 view, there's just -- there are so many artists that
22 need to be heard and that aren't heard, and so

1 basically there's no point, because the same -- the
2 same songs are going on 10 times a day.
3 And what I've done with Evan Silverman,
4 who is my partner, the bass player in the band, we've
5 gone through, you know, countless musicians and done
6 countless tours on our own, on our own budget,
7 released records ourselves. It's a lot easier now
8 that you have, you know, all the tools at your
9 disposal through pro tools, and all of the other basic
10 equipment, that you can almost make a record in your
11 own home and do it on your own time.
12 We've toured England twice. We're going
13 back over to Japan. And, basically, just really --
14 you know, just really played for the song, and we
15 wanted to believe that we didn't suck, even though we
16 weren't getting the major label attention for so many
17 years.
18 And we did the major label dance for a
19 long time. I mean, we basically would call our
20 attorneys up on a daily basis and say, you know, "Is
21 this guy coming down? Is this guy from Virgin Records
22 going to come down? Is this A&R guy coming down?"

1 And we realized after a while that we were playing to
2 a roomful of suits, and that we were going about it
3 the wrong way.
4 And it turned out to us that record labels
5 are like HMOs, in that when you need them they don't
6 want you. And when you don't want them, they want you
7 really bad. And that's what happened to us. I mean,
8 we basically chased after them for a couple of years.
9 And as we were sitting there trying to
10 figure out, you know, why doesn't anyone like our
11 music, why isn't anyone signing us to a record deal,
12 we saw our friends one by one by one get signed and
13 then subsequently dropped or not dropped, and their
14 music just held on to as an asset for the company to
15 hold. And they each ended up in litigation for years,
16 never having seen the fruits of their labor.
17 And, to us, we didn't want to see that
18 happen to us. We always wanted to know that, you
19 know, regardless of whatever happens, whether we make
20 a million dollars or five dollars, that we were never
21 going to be denied the opportunity to play our own
22 music and to play our songs in front of an audience.

1 BY MR. COHEN:

2 Q Let me ask you, you say in your written

3 testimony that you're a songwriter.

4 A Yes.

5 Q Are you the person that composes the songs

6 for The Rosenbergs?

7 A That would be me.

8 Q And you also are involved in performing

9 the songs as well. What's your role in the band in

10 terms of performances?

11 A I do lead vocals and rhythm guitar.

12 Q Okay. I know it's difficult to do this in

13 words, but could you describe what kind of music do

14 The Rosenbergs play?

15 A We do -- what we like to call it is power

16 pop. It's I guess Beatles for the year 2000. It's

17 basically hard guitars, meaning not -- you know,

18 meaning crunchy, distorted guitars, but melodic

19 vocals. And every single song that we write has a

20 hook. It's all hummable. But there's still some guts

21 there. You know, it's not -- it's not bland, as we

22 like to call it, or -- or, you know, mishmosh or

1 homogenized music. I guess you'd call it power pop
2 for lack of a better word.
3 Q Just as a point of curiosity, you seem to
4 be the leader of the band, but your name is not
5 Rosenberg.
6 (Laughter.)
7 What's the origin of the name of the band?
8 A Well, a lot of people think that the name
9 came from Julius and Ethel. We do play on that a
10 little bit when we have our street team. We have a
11 group of kids that -- around the country that
12 basically help us out and put up flyers when we come
13 to their towns, and making sure our CDs are in the
14 stores and stuff, and we call them the spy society.
15 But, really, the way the name came about
16 was I was at my friend's house one day about six years
17 ago and her grandparents were over. And they're in
18 their eighties and her grandfather was talking about
19 going skiing that weekend and playing racquetball.
20 And I was just completely blown away. I mean, he was
21 like the juicer guy, you know, he was just --
22 (Laughter.)

1 He was just out of his mind with energy,
2 and I was like, wow, you know, this is amazing. If I
3 could be that cool, that full of life when I'm 80
4 years old, you know, that will be really -- that'll be
5 good.
6 And so we took his name, his last name was
7 Rosenberg, and we named it after her grandparents.
8 So --
9 Q It's quite a tribute. So you have
10 released records that are available for sale
11 commercially?
12 A Yes.
13 Q How many have you released?
14 A We've got two that are available
15 commercially. We did a couple of other CDs before
16 that that we sold at shows ourselves, you know, that
17 don't have the actual bar code on them and all that
18 stuff. But basically two records that are available
19 in stores.
20 Q And the band does a lot of live
21 performances?
22 A Oh, yeah. Yeah.

1 Q In fact, you have a gig tonight, I
2 understand?
3 A In Asbury Park, New Jersey, at midnight.
4 Q And you've toured outside the United
5 States as well?
6 A Yes. Canada, parts of the U.K., off to
7 Japan in about two weeks.
8 Q Can you tell us some of the more well-
9 known artists that you've been involved in planning
10 with in terms of your shows?
11 A Sure. We've played with the Black Crows,
12 Bob Dylan, Duran Duran, a band called Supergrass from
13 the U.K. We just toured with a band called Echo & The
14 Bunnymen, Modern English. Were touring next week with
15 a band called Dishwalla. Let's see, who else. We're
16 playing with a band called The Verve Pipe in a couple
17 of weeks.
18 And sometimes it feels that a lot of the
19 shows we get you have to be out of your major label
20 contract for at least five years before they book a
21 show with us. It's like Modern English, they had one
22 hit song. And the interesting thing last year was --

1 when we were touring with them, we were trying to
2 figure out, is it better to have one hit song and make
3 a career of that, or to not, because it's quite a sad
4 thing, you know, in some -- some ways.
5 And Robbie, the lead singer, was -- was
6 basically, you know -- you know, I've lived a good
7 life off of this one particular song, and, you know,
8 it's just -- it's unfortunate that when you go play
9 somewhere and you're a band like Modern English,
10 everybody goes, "Play that song." Nobody else wants
11 to hear anything else that they do, but that one
12 particular song has sustained them over the last 20
13 years.
14 Q And in your opinion -- or do you have an
15 opinion as to whether exposure in terms of air play
16 over the radio is important to a band?
17 A Yeah, just a little.
18 Q Since the transcript might not pick up the
19 sarcasm --
20 A Yes. Yes, yes, yes. It's very important.
21 Very important. It's extremely important. It's
22 almost everything. You know, if you're not on the

1 radio in the United States, good luck and God be with
2 you as far as earning a living as a musician. It's
3 extraordinarily difficult if you're not.
4 Q Okay. And where does air play on less
5 traditional broadcast radio, in terms of air play on
6 webcasting-type outlets, where does that fit in with
7 the importance of this exposure?
8 A I think it's extremely important, because
9 from the way we've seen, I mean, there's basically,
10 give or take, 10 bands that get played on major
11 broadcast radio. And there's a few more than 10
12 artists out there in the country at this point who
13 deserve exposure and who are worthy of that exposure.
14 And so the internet digital medium is a
15 huge way for us to connect with fans who, you know,
16 don't hear us on PLJ or the KROQs and stuff like that.
17 Q Okay. And do you have any opinions as to
18 whether the diminishment of webcasting outlets would
19 have a negative impact on artists such as yourself?
20 A Yes, it would have a huge negative effect
21 on us and lots of other artists. I mean, it is -- it
22 is a hugely, tremendously important tool to get your

1 band name out there, so that kids can search for music
2 that bands who don't have, you know, a zillion dollars
3 behind them and massive amounts of resources, these
4 kids can find bands and, you know, search music that
5 they like, and it's just incredibly important to have
6 that tool.
7 If you're not one of the 10 bands that
8 Clive Davis doesn't push the button behind, you know,
9 you're in a tough place. You know, MTV, massive
10 radio, it pretty much all, you know, coincides
11 together.
12 Q Can you just explain for those of us who
13 aren't quite as in the know what did you mean by
14 "Clive Davis"?
15 A Well, it's just a figure of speech.
16 Basically, you know, when you sign a record deal, you
17 basically automatically become adversaries with your
18 company. You basically become a push-me/pull-you.
19 You want your music to get out there. The label, you
20 know, is not sure a lot of times, and, you know,
21 something like 99 percent of artists sell only about
22 400 records on a major label.

1 And so to us it's basically cut and dry
2 where, you know, you sign a deal, and that doesn't
3 necessarily mean that your music is going to get out
4 there. If you have the president of the label behind
5 you, obviously, then that's a good thing. Nine out of
6 10 times the president loses his job, another A&R guy
7 comes along, something else happens. Lots of politics
8 are involved.
9 And so when I say "Clive Davis," I mean
10 basically, you know, you need the machine behind you
11 to be working in perfect order in order for your band
12 to get heard. And that's basically only one in a
13 million.
14 And so for the -- for the 999,000 other
15 bands who are out there at this point in time, you
16 know, the internet is -- is a massive tool to be able
17 to allow them to operate.
18 Q Okay. So would it be fair to say that for
19 you and for other artists like you it's -- it's
20 important to you that diverse webcasting outlets be
21 permitted to flourish?
22 A Yes.

1 MR. COHEN: Nothing further on direct.

2 CHAIRMAN VAN LOON: Ms. Woods?

3 MS. WOODS: Actually --

4 CHAIRMAN VAN LOON: Oh, okay.

5 CROSS EXAMINATION

6 BY MR. LEVINE:

7 Q Good morning, Mr. Fagin.

8 A Good morning.

9 Q My name is Arthur Levine. I represent

10 AFTRA and the AF of M in these proceedings. I'm just

11 going to ask you a few questions. It's a pleasure

12 meeting you. I wish you great success in your career.

13 It sounds as though --

14 A Thank you.

15 Q -- you're doing very well without my best

16 wishes.

17 A We're doing okay.

18 Q You're not here representing any organized

19 group of musicians, are you, today?

20 ARBITRATOR VON KANN: Other than The

21 Rosenbergs.

22 THE WITNESS: Other than The Rosenbergs,

1 no. But I -- I can speak for a lot of other artists.
2 I think I'm pretty much, you know, not alone on this
3 issue.
4 BY MR. LEVINE:
5 Q Are there any organized groups that you're
6 aware of that support your position?
7 A I don't think so, as far as the Future of
8 Music coalition supports what we say, and they're
9 basically a new entity on Capitol Hill so to speak.
10 Q Any others that you're aware of?
11 A Not that I'm aware of, no.
12 Q You understand that what this Arbitration
13 Panel is determining is the rate that broadcasters and
14 webcasters will pay for streaming --
15 A Yes.
16 Q -- sound recordings, correct?
17 A Yes.
18 Q And you understand that this is the rate
19 that will be paid in those instances where there's
20 been no agreement reached between the record company
21 and the webcasters.
22 A Yes.

1 Q Are you aware that background musicians
2 and vocalists will be paid five percent of the
3 royalties collected from webcasters?
4 A I haven't been informed of the exact
5 numbers of what the rate is. I haven't been informed
6 on that at all.
7 Q Do you use background musicians or
8 background vocalists?
9 A No. Sometimes we have friends of ours
10 come in and play on a record, and they sing, and I
11 guess they'd be called the background. But it's not
12 -- you know, we don't use unionized musicians, if
13 that's what you mean.
14 Q So your testimony wouldn't take into
15 consideration, then, the effect of this rate that the
16 CARP Panel will be determining --
17 A On background musicians?
18 Q -- on background musicians and background
19 vocalists?
20 A I don't think so.
21 Q Is it correct to say that The Rosenbergs
22 have a distribution agreement with Discipline Global

1 Mobile?

2 A Yes. Yes.

3 Q And under that agreement, you retain

4 rights in your master recording, is that correct?

5 A Yes.

6 Q And you license -- you have the right to

7 license and not license.

8 A That's correct.

9 Q In terms of your music, are you aware that

10 The Rosenbergs can enter into a voluntary license

11 agreement that you choose to with any of the

12 webcasters and broadcasters for the streaming of your

13 music?

14 A Yes.

15 Q And you can do it for nothing if you

16 choose to, is that correct?

17 A Yes. Yes, that's correct.

18 Q But that's not the situation that most

19 other recording artists find themselves in, is it?

20 A No, I don't believe it is. Can I -- can

21 I answer that or --

22 CHAIRMAN VAN LOON: Please.

1 THE WITNESS: I mean, basically, the
2 reason that a lot of other artists don't find
3 themselves in that situation is because there is
4 almost only one way to get your music out, and that is
5 to sign an extremely unfair, one-sided record
6 contract. And by doing so, you give away the rights
7 to your music.
8 And the reason we signed with Discipline
9 Global Mobile is because, you know, we saw what was
10 going on, what is the -- the basic, the norm in this
11 business, where if you don't sell 10 million records
12 in a week you're done. End of story. And you're a
13 stock option to these people, and you're not an
14 artist, you're not a group or whatever.
15 And so Robert Fripp, the owner of
16 Discipline Global Mobile, who is a musician who has
17 been in the business for over 30 years, you know, came
18 out on the other side of this and said, "Well, what
19 happens if we do things a little differently?" And so
20 we're just trying to avoid a lot of the potholes that
21 are normally coming along and meeting, you know,
22 everybody else that we know in the business.

1 Whether it's your tour support being
2 pulled, whether it's your record never reaching the
3 stores, whether it's there for a week and doesn't sell
4 a lot of records, you know, do you spend the rest of
5 your years in litigation? They can break up your
6 band. They own your website name after -- even after
7 your contract has expired.
8 So, to us, the reason that they can't have
9 that right and don't have the right to license music
10 on the internet freely is because they don't own their
11 own copyrights. And sure, there's a lot of pitfalls
12 that will hit, too, along the way. I mean, Lord
13 knows, it's extremely difficult when you don't have
14 $500,000, a million dollars behind you in record
15 company backing to get your song played on commercial
16 radio.
17 And so, to us, we really -- we really felt
18 that, you know, although we're not going to sell a
19 million records, we get a much higher royalty rate
20 than your average recording artist. We get about four
21 dollars a record. So if we sell 25 -- 50,000 records,
22 we're in a lot better shape. And the internet is very

1 important in that. A lot of artists don't have that
2 right because they don't own their own record.
3 BY MR. LEVINE:
4 Q So your situation here today is unique in
5 terms of other recording artists.
6 A I would say, yeah, we have a very unique
7 situation. But, you know, at the same time, I would
8 also say that, you know, artists getting paid is not
9 what we're against. We all want to get paid.
10 It's just that what I'm saying is -- and
11 what our position is as a band, and whether we speak
12 for everybody else or not, we don't think that getting
13 paid is worth possibly putting this entire medium out
14 of business or even making it to the point where maybe
15 they don't go out of business. But if the rate is so
16 high, then a lot of these companies are going to
17 refuse to -- they're just going to cut back on their
18 streaming.
19 And if a lot of these companies do go out
20 of business, what we think is going to happen, which
21 is what always happens, the labels come in and then
22 they take over what they've just killed.

1 You know, I mean, especially in other
2 situations where technology pops up, I think the
3 labels are panicking at this point because when they
4 see something like Napster and the kids go crazy for
5 it because there's other music out there that's
6 available, they go, "Well, we don't understand that.
7 We didn't create it. Let's, you know, sue the hell
8 out of it. Let's throw a zillion lawyers at it and
9 put it in litigation for years, charge them a -- you
10 know, cost them a billion dollars in defending it.
11 Once it goes out of business, let's create the exact
12 same service that we can own and we can exploit." And
13 that's been, you know, basically the practice since
14 the beginning of time.
15 Q But you're not suggesting that the rate
16 that this Panel sets be such that either royalty or
17 background artists or background musicians be deprived
18 of a fair income, are you?
19 A Not, not of fair income. Not at all. But
20 we're also saying that we're willing to take less,
21 because as the system grows, as the internet gets
22 larger, the royalties get larger.

1 So what we are willing to do is, first of
2 all, say, you know what? We'll take a lower rate in
3 order to allow the most important thing, which is the
4 medium itself, to operate and continue operating and
5 continue the little guys to be able to run their own
6 businesses and get our music out there, which is the
7 most important thing.
8 In the future, if it grows, if it gets to
9 be a bigger and a much more widely spread listening
10 base, hopefully the royalties will grow as well. We
11 just don't want to come right off the bat and say, you
12 know, "This is how much we get," not to mention the
13 fact that we're concerned the higher profile artists
14 -- your Dave Matthews or your Metallicas, whoever it
15 might be, will see most of the royalties anyway on
16 that situation.
17 And basically, you know, to us, we're not
18 going to see a lot of that money because we're not
19 major stars anyway.
20 Q When you say "we" and "us," you're
21 referring to The Rosenbergs.
22 A I'm referring to my band, yes.

1 Q Right. And --

2 A I'm referring to my band, but --

3 Q And you are in a unique situation because

4 you do own the master recordings, is that correct?

5 A Right.

6 MR. LEVINE: I think that's all I had.

7 CHAIRMAN VAN LOON: No other cross from

8 any other parties?

9 MS. WOODS: Yes. A couple of questions.

10 CHAIRMAN VAN LOON: Ms. Woods does have a

11 couple. Okay.

12 CROSS EXAMINATION

13 BY MS. WOODS:

14 Q Mr. Fagin, I just wanted to ask you, are

15 you in here today to advocate any particular numerical

16 rate that this Panel should set?

17 A No. I'm not here to comment on the rate

18 whatsoever.

19 Q Okay. That saves us from a lot of

20 potential cross.

21 A There you go.

22 (Laughter.)

1 Q Okay. I think you mentioned before that
2 you don't actually listen to radio music anymore?
3 A You know, it's unfortunate, but -- and
4 it's really strange, because when I sit in the car and
5 -- as I was talking to Adam last night, you know, you
6 find yourself spending 10 or 15 minutes in a car, and
7 your hand is on the button changing the station 15
8 minutes --
9 Q Can't find --
10 A Yes, you just can't find anything to
11 listen to.
12 Q -- anything you want to listen to.
13 A And at the same time, you've changed
14 stations so much, and you've heard little bits and
15 pieces of so many songs that you've never listened to,
16 yet you know all the words to all of these songs. And
17 they just seep into your brain at different points,
18 and it's very strange.
19 Q And so you basically said that maybe about
20 10 bands get real play on broadcast radio.
21 A For the most part.
22 Q Okay. And so, basically, if your band

1 doesn't get play on broadcast radio, there's no real
2 promotional benefit to the band that doesn't get the
3 play from promotional -- from broadcast radio.
4 A Yeah. I mean, if you're not on the radio,
5 then there's really no promotional benefit of not
6 being on the radio.
7 Q And I take it that if the exact same radio
8 station were to stream its music over the internet but
9 still play the music of the same 10 bands, it would
10 really still only be promotional for those 10 bands.
11 A For the most part. If that particular
12 radio station is -- is a big radio station, yeah,
13 that's pretty much the case. But there is a zillion
14 other little ones out there that, you know, do afford
15 opportunities for other bands to be heard, different
16 genres you can go and --
17 Q Sorry. I just want to make sure it's
18 clear. That question was addressed just to the
19 commercial -- the broadcast radio stations.
20 A If they're only going to play the same 10
21 bands, yeah, then it would be pretty much pointless.
22 Q Thank you.

1 MS. WOODS: Nothing further.

2 CHAIRMAN VAN LOON: Anything on redirect?

3 MR. COHEN: I don't think so.

4 ARBITRATOR VON KANN: Can you tell me a
5 little bit more about Discipline Global Mobile? What
6 sort of organization is that, and what exactly do they
7 do for you? Do they --

8 THE WITNESS: Well --

9 ARBITRATOR VON KANN: -- produce the
10 records? Is this a record --

11 THE WITNESS: No.

12 ARBITRATOR VON KANN: No. Okay.

13 THE WITNESS: Basically, the way we came
14 into contact with them is through a situation that
15 happened with Universal Music Group. Okay. We were
16 supposed to go on a television show called Farm Club.
17 We were supposed to play on TV with a particular band
18 called The Counting Crows.

19 And we were expecting a two-page rights
20 clearance form to come through on our fax machine, and
21 what we got was a 23-page, six-record deal in exchange
22 for two minutes of television time, which we felt was

1 just, you know, very unfair, and, you know, we were
2 just like, "Exsqueeze me? What is this?"
3 And, basically, we sent out an e-mail to
4 a few of our friends and other bands saying, you know,
5 be careful of this particular company, because there's
6 clauses in here, you know, that a master-slave
7 contract wouldn't have. The 1920s MGM Louis B. Mayer
8 had better clauses for his actors than this contract
9 does for its band.
10 And to make a long story longer, we ended
11 up being the spokespeople for artists rights, because
12 we got calls from Entertainment Weekly, CBNC, The L.A.
13 Times, and nobody could figure out -- they couldn't
14 believe that a band would say no to a record deal.
15 And in our case, you know, what we've seen in our
16 experience is is that a lot of these -- a lot of these
17 bands sign these deals by looking at the brass ring,
18 and they don't look down and see the eternal crevice
19 beneath their feet opening up as they're reaching for
20 this brass ring.
21 Robert Fripp came along and said, "You
22 know what? Your philosophies are pretty much exactly

1 the same as ours in what we want to do. And although
2 you're a pop band and Discipline Mobile Global
3 basically releases King Crimson," you know, a
4 progressive rock band, John Paul Jones' music -- he
5 was the bass player from Led Zeppelin -- so it's not
6 exactly the same and similar thing.
7 And a lot of people can't -- can't believe
8 when they hear our music that we are a radio-friendly
9 band, that we are a pop band and not a politically
10 active, you know, lyrically band. I mean, we write
11 songs about boys getting screwed over by girls, like
12 everybody else does.
13 (Laughter.)
14 ARBITRATOR VON KANN: What does Mr. Fripp
15 and his company do for you? That's my question.
16 THE WITNESS: Discipline Global Mobile is
17 basically our management company.
18 ARBITRATOR VON KANN: Okay.
19 THE WITNESS: And we signed a deal which
20 -- when we signed with them originally, we didn't have
21 a blueprint of an original record deal to follow,
22 because we were trying to figure out, how do we make

1 money and own the rights to our songs, and how does
2 Discipline Global Mobile make money by allowing us
3 that right?
4 And so a record company's perspective is
5 they own the plastic disc. That's their only
6 function. In our situation, we signed with DGM and
7 allowed them 20 percent of everything across the
8 board. They get percentages of T-shirts, ticket
9 sales, publishing, the record itself. So they have an
10 interest in everything that the band does, meaning
11 it's more important for them that the entire unit, you
12 know, as a whole does well.
13 DGM now acts as our management and not our
14 record label, so they basically procure us
15 distribution deals through Rico Disc in the United
16 States, through Avex in Japan, and their other
17 contacts overseas, which we then go and license the
18 record to in separate countries.
19 ARBITRATOR VON KANN: They help, if I
20 understand it, promote the sale of your records.
21 THE WITNESS: Exactly.
22 ARBITRATOR VON KANN: And also book

1 concerts for you or --

2 THE WITNESS: No. We have a booker that

3 does that.

4 ARBITRATOR VON KANN: Okay. So mainly

5 it's a distribution --

6 THE WITNESS: It's a distribution deal

7 with a management -- with a management contract.

8 ARBITRATOR VON KANN: Okay. Other

9 question -- are your -- is your music, to your

10 knowledge, carried at the moment on any internet

11 webstreaming services?

12 THE WITNESS: Yeah, it is. It's a lot,

13 but I don't have the information with me. I can't

14 rattle off the actual --

15 ARBITRATOR VON KANN: Did you know that a

16 number of services are playing the music?

17 THE WITNESS: Yes, I do. And, you know,

18 I know that we're basically focusing on the United

19 States, but where we also had a tremendous benefit

20 using internet radio is overseas. People from the

21 Canary Islands buy our records online.

22 People from Staad and Nigeria, wherever it

1 is -- you know, we get e-mails from Morocco, from
2 people listening to our music over there saying that,
3 "You know what? When you guys come to Germany, when
4 you come to Italy, you know, we're going to come out
5 and see you play." And for us, you know, that's a
6 great benefit overseas as well as in the United
7 States.
8 ARBITRATOR VON KANN: Let me zero you in
9 for a second on the U.S.
10 THE WITNESS: Okay.
11 ARBITRATOR VON KANN: Do you know whether
12 the playing of your music on internet webstreaming
13 services has increased sales of your records?
14 THE WITNESS: Can we say that as a fact it
15 has? I couldn't answer that question definitively yes
16 or definitively no. I know that certain people have
17 downloaded our songs and then sent us e-mails and
18 we've met them at shows and they said, "I downloaded
19 your song off of this particular site, or off of your
20 website," or wherever it was, "and then I went out and
21 bought the record."
22 So in those situations where we've

1 actually had physical confirmation of it, yes. But we
2 can't say whether or not it's from touring or from the
3 internet whether or not people, for the most part,
4 majority have bought the record from the internet.
5 I'm not sure.
6 ARBITRATOR VON KANN: Would there be ways
7 -- for example, are there links between some of these
8 web services and maybe your site where people can come
9 and order the record or something of that --
10 THE WITNESS: Oh, yes. Yes. We've had
11 quite a few orders from the DGM site itself, you know,
12 or from our site.
13 ARBITRATOR VON KANN: Of the DGM --
14 THE WITNESS: Discipline Global Mobile.
15 ARBITRATOR VON KANN: But you're not able
16 to trace whether that is a sale that was generated
17 by --
18 THE WITNESS: Well, in that situation --
19 ARBITRATOR VON KANN: -- play on the
20 internet?
21 THE WITNESS: Right. I mean, in that
22 situation, it could come from an article that they

1 read in the newspaper. It could come from seeing a
2 show when they bought it on the internet. Or it could
3 come from listening to the music over the internet in
4 their bedroom.
5 ARBITRATOR VON KANN: Okay. All right.
6 Thank you.
7 CHAIRMAN VAN LOON: Again, we want to
8 thank you for coming here and for being up early in
9 the morning, being our --
10 THE WITNESS: Yeah.
11 CHAIRMAN VAN LOON: -- our first up.
12 (Laughter.)
13 We'll look forward to hearing more from
14 you.
15 THE WITNESS: Thank you very much.
16 (Whereupon, the witness was excused.)
17 CHAIRMAN VAN LOON: Good morning,
18 Professor Zittrain.
19 MR. ZITTRAIN: Good morning.
20 CHAIRMAN VAN LOON: Welcome back.
21 MR. ZITTRAIN: Thank you.
22 CHAIRMAN VAN LOON: Please make yourself

1 at home there.

2 Mr. Cohen, would you like to proceed,

3 then, please?

4 MR. COHEN: Okay. Do you want him sworn

5 in?

6 CHAIRMAN VAN LOON: Very good point. Not

7 only do we welcome you back, we swear you in again.

8 WHEREUPON,

9 JONATHAN ZITTRAIN

10 was called as a witness and, having been first duly

11 sworn, assumed the witness stand, was examined and

12 testified as follows:

13 DIRECT EXAMINATION

14 BY MR. COHEN:

15 Q Okay. And I'm going to assume that we

16 don't need to spell your name again, since we already

17 have that in the record.

18 Mr. Zittrain, can you tell us, when was

19 the last time you were in this building?

20 (Laughter.)

21 What were the circumstances?

22 A That would have been the summer of 1995 as

1 a summer associate at Arnold & Porter and --

2 ARBITRATOR VON KANN: We only want about

3 10 more minutes on the statue in Katz's office.

4 (Laughter.)

5 We have as much as we can take.

6 THE WITNESS: Darth Vader I've since been

7 told. And I must say the building even smells the

8 same as I remember.

9 (Laughter.)

10 BY MR. COHEN:

11 Q Okay. Well, we're finished with irony for

12 the direct examination.

13 (Laughter.)

14 You state in your written testimony that

15 the purpose is to expand on prior testimony that you

16 gave before the CARP, and your written testimony is

17 fairly comprehensive. So without going through the

18 details of this, I'd just like you to recap for us

19 what your conclusions were on some of the main points

20 that are discussed in your written testimony.

21 And why don't we take them one by one. IN

22 paragraph 2 of your written testimony, you talk about

1 factors affecting future trends of webcast quality.
2 Can you summarize for us your conclusions in that
3 regard?
4 A Yes. The factors that affect trends of
5 webcast quality in large part affect -- are based on
6 the development of internet infrastructure from one
7 doorstep to the other doorstep -- one doorstep being
8 that of the would-be webcaster, the other doorstep
9 being that of the listener.
10 And the internet was built not to stream
11 necessarily. That was not the focus of the people
12 designing the protocols and even the hardware
13 underlying the internet as we know it today. It was
14 built to get data from one point to the other, but to
15 get it there with a particular quality of service was
16 not the emphasis. And streaming, of course, is
17 something that differs from download in a number of
18 respects.
19 One important respect is that for
20 successful streaming there needs to be a consistent
21 rate of transfer from that one doorstep to the other.
22 And to the extent that there isn't, all sorts of

1 kluges and adjustments need to be made such as buffer
2 time, the amount that's actually sent to the computer
3 before the computer will dare to play it, lest the
4 playing of the song as it's being received outstrips
5 the rate at which the song comes in and you end up
6 having to stop in the middle waiting for the rest of
7 the song to arrive.
8 So my conclusions are that over the next
9 couple of years there are a number of wrinkles that
10 are still to be worked out, some very, very difficult
11 problems that may not be insoluble but are going to
12 pose challenges.
13 And they include peering in the middle, to
14 get from that one doorstep to the other, several
15 intermediate places -- quite often, managed by and
16 controlled by intermediaries who may not even have a
17 contractual relationship with either of the two
18 doorsteps. And anywhere along that route, if there's
19 a delay, it delays the ultimate stream. As I said in
20 the rebuttal testimony, the convoy only goes as slow
21 as the slowest ship.
22 ARBITRATOR VON KANN: As fast as the

1 slowest ship.

2 THE WITNESS: Yes. Well, I guess and as

3 slow, but -- and as fast.

4 BY MR. COHEN:

5 Q And with respect to those factors and

6 solving some of the problems that you alluded to, is

7 there any point in the future where you would feel

8 comfortable saying, "At this point in the future,

9 these problems are going to be solved"?

10 A I do not feel comfortable making any kind

11 of prediction like that. That's not to say that it

12 wouldn't, but I am skeptical of anybody who makes that

13 kind of prediction. It seems that there are just a

14 lot of factors at work. Optimists -- and I count

15 myself among them -- hope that the ultimate trendline

16 is upward. But over the next couple of years, I don't

17 think there's any easy way to say.

18 Q Okay. And the next topic that you discuss

19 is --

20 ARBITRATOR VON KANN: Is the gist of that

21 that we are very unlikely to see CD quality streaming

22 prior to December 31, 2002?

1 THE WITNESS: Yes. Understanding that by
2 "CD quality streaming" we mean to say a majority of
3 the American public, that kind of thing. Certainly,
4 there exists people capable of receiving it today. I
5 can receive it in my office. But even there, thanks
6 to the -- some lapses with intermediaries, even though
7 my connection to my internet service provider or to
8 Harvard's is meant to be a solid one, depending on
9 where the webcaster is, it still may be coming in in
10 a manner that doesn't make it CD quality.
11 CHAIRMAN VAN LOON: He said -- if I could
12 -- you said obviously not -- not available to a
13 majority of the --
14 THE WITNESS: Right.
15 CHAIRMAN VAN LOON: -- of the American
16 public.
17 THE WITNESS: Right.
18 CHAIRMAN VAN LOON: I bet you're not
19 saying 49 percent either. I mean --
20 THE WITNESS: Right.
21 CHAIRMAN VAN LOON: -- you said what --
22 could you give any guesstimate at all? Is the order

1 of magnitude one percent, 20 percent?

2 THE WITNESS: Well, from what we know,

3 when speaking of residential locations, right now

4 we're in the very low millions. How's that for a

5 vague estimate? But we're talking generously three

6 million homes that are currently configured to receive

7 even between themselves and their internet service

8 provider high-speed services.

9 And to expect that to grow by leaps and

10 bounds within the next couple of years I think is

11 expecting a whole lot.

12 CHAIRMAN VAN LOON: If I have DSL from

13 Verizon at home, I can at least arguably get CD

14 quality streaming.

15 THE WITNESS: Yes. If you have DSL from

16 Verizon at home, you are among the lucky three million

17 that are being talked about with respect to high-speed

18 access. And then the question is only the

19 intermediate peering issues and the rate at which the

20 doorstep of the webcaster chooses to stream the stuff

21 to you.

22 The most recent trends are that webcasters

1 appear to be cutting down on their higher bandwidth
2 streams -- the, say, 60 kilobit streams -- either for
3 cost reasons on their end or otherwise. So even if
4 you've got that DSL, if the webcaster is only
5 streaming at 16 kilobits per second, that's the
6 maximum you'll get.
7 But it might say that you'll get a pretty
8 reliable 16-kilobit per second stream. It's just
9 that's not CD quality.
10 BY MR. COHEN:
11 Q Professor Zittrain, just to clarify in
12 light of Judge von Kann's question, are you saying
13 that after December 31, 2002, there is some
14 determinant point in the future where you predict that
15 all of these problems are going to be solved?
16 A No, I wish to make no predictions as to
17 the future in that respect.
18 Q The next topic that you discuss in your
19 written testimony is user's options for obtaining
20 permanent digital music files via methods other than
21 ripping of streaming audio. Can you summarize your
22 conclusions in that regard?

1 A Well, there are even at this moment plenty
2 of other options. There exist successors or siblings
3 to Napster, with which many of us are now familiar,
4 that permit users to find a search box, type in the
5 name of a song or an artist they're interested in, see
6 a list pop up of songs by that artist, generally
7 residing on the hard drives of other internet users'
8 computers, and then be able to basically double click
9 on the song and have it delivered at whatever rate.
10 It might take a while, because it's not in
11 a streaming environment where you necessarily need to
12 listen to it immediately, but you can basically double
13 click on the stuff you want and sooner or later it
14 will arrive on your machine. When it does, that's
15 typically, then, an untethered file that you can
16 listen to at your leisure at CD quality, even though
17 you have a low bandwidth connection, so it took a
18 while to get it in the first instance.
19 And then you can put it onto a portable
20 MP3 player and walk around with it. You can attach it
21 to an e-mail and send it to a friend. I mean, it's
22 then, in a custodial sense, your file to do with as

1 you please.

2 Now, my belief is that it's entirely

3 possible over the long term that these services will

4 dwindle. I think the music industry has gone after

5 these and will continue to and may ultimately hold the

6 cards to put them out. But over the next little

7 while, we are still in an environment where you can

8 use these services and find them, depending on your

9 needs, a much better alternative to ripping a stream.

10 The one reason to go to streaming for your

11 music that's paramount is that you can get it now and

12 hear it now. To rip it is to try to convert it into

13 a download. But if a download is what you want,

14 you're going to want to go to the Napsters, the

15 Neutellas, etcetera, to get your high-quality keeper

16 file rather than a sort of half-baked ripped stream

17 with all of the care that's required in order to

18 master the programs that stream rip.

19 Q And as of today, do you have any

20 information as to the extent of use of these so-called

21 Napster siblings?

22 A Well, I have anecdotal data from being in

1 a university environment in which no student that I've
2 talked to has said that he or she uses a stream
3 ripper, and virtually all of them, apparently
4 sometimes during my classes, are using --
5 (Laughter.)
6 -- Napster or one of these. And as a
7 result, it seems to me these are much more popular
8 services. A check of a service like Download.com,
9 which is a clearinghouse for software of various kinds
10 for which the authors or producers of the software
11 want to see it made available -- this is not an
12 illegal site.
13 Download.com keeps a rough count of the
14 number of downloads, and if one looks at the number of
15 downloads of even the Napster client at Download.com,
16 we're talking in the millions. And the number of
17 downloads of a program like Streamripper, which you
18 can get through Download.com, are -- you know, we're
19 talking 3,000 or 3,500.
20 Q Okay. Are you -- on page -- I'm sorry --
21 paragraph number 25 of your written testimony, you
22 report that these Napster alternatives are reporting

1 more users than Napster did at its peak.

2 A Yes.

3 Q Does that indicate to you that file-

4 sharing services are alive and well, at least as of

5 today?

6 A At this instance, they are alive in the

7 sense that with very little effort you can step up to

8 a personal computer hooked up to the internet and

9 start downloading your favorite artists. Now, whether

10 they're alive and kicking in that they make for sound

11 financial propositions, I have no idea if I were

12 offered shares of KaZaA that I would be all excited to

13 accept them.

14 But, again, over the next couple of years,

15 the effort required to produce software like this is

16 low enough that one need not even necessarily have a

17 particular financial model in mind to produce it, get

18 it out onto the internet, and have people using it.

19 Q And, lastly, you discuss what you call the

20 distinct hurdles of providing streaming audio content

21 over a wireless network. Could you summarize your

22 conclusions in that connection?

1 A Yes. The idea that one would be receiving
2 streaming digital music over wireless any time in the
3 near future seems somewhat fanciful to me. I use
4 wireless services personally. I have a cell phone.
5 I have a 2G cell phone, which is second generation.
6 That means it has digital to it.
7 It has a very awkward web browser that one
8 can use that fits onto a screen that's about, I don't
9 know, an inch wide by half an inch tall. And to me,
10 the vision of somebody actually pawing through the
11 keyboard and trying to work the machine to tune into
12 a stream, which then one has to keep the phone
13 oriented, make sure the connection is tight. Again,
14 you've got these buffer issues.
15 Also, that one can stick a small headpiece
16 into it and listen to it on the subway. It's a much
17 better alternative until we really have, in the
18 distant future, some kind of solid digital kind of
19 wireless cloud around all of us, it's a much better
20 alternative to simply get the stuff off Napster or off
21 a CD, or otherwise packaged in a flashcard, and
22 carried around with you in one of these portable MP3

1 devices.

2 Q What did your research indicate as to the

3 development and deployment of the so-called 3G

4 network?

5 A In the United States at least, it's

6 stalled. I mean, it's very difficult. There are no

7 standards agreed upon for this. There's no bandwidth

8 as yet, that I know of, allocated to this. And this

9 is a time in which bandwidth availability is by no

10 means certain for it.

11 Now, again, it's not that it's impossible.

12 It's just that this is not going to be happening in

13 the next couple of years.

14 MR. COHEN: Nothing further on direct.

15 CHAIRMAN VAN LOON: Mr. Katz?

16 CROSS EXAMINATION

17 BY MR. KATZ:

18 Q Professor Zittrain, good morning.

19 A Good morning.

20 Q This is rebuttal testimony, is that

21 correct?

22 A Yes.

1 Q And what testimony is it that you perceive
2 yourself to be rebutting?
3 A Well, I perceive myself, as I say in
4 paragraphs 1 and 2, to be expanding upon certain
5 points. I guess I took it more to be this is the
6 rebuttal phase of the hearings, rather than
7 specifically rebutting.
8 I was here during Jim Griffin's testimony
9 and listened to that. And to the extent that Mr.
10 Griffin reached conclusions about wireless that seem
11 wrong to me, I've tried to gently point that out.
12 Q Anything other than Mr. Griffin's
13 testimony that you felt that you were responding to?
14 A The only thing I have in mind, really, are
15 Griffin's claims about wireless. And what hangs in my
16 mind is the claim that the only difference between a
17 download and a stream is the intent of the sender, but
18 that essentially it's the same thing. That seems to
19 me very wrong.
20 Q Well, Professor, did you ever actually use
21 Napster?
22 A Yes. I spent a long time cogitating about

1 it before using it, and at some point finally sat down
2 and said, "All right. I'm going to see what all of
3 the fuss is about," and then I used Napster.
4 Q And there is a player built into the
5 Napster client that --
6 A Yes.
7 Q -- will play the stream as it's being
8 downloaded, isn't that right?
9 A That's right. I wouldn't call it a
10 stream, though. It will play the file as the file is
11 accumulating on the hard drive as a download, yes.
12 Q To a user, downloading a file in Napster
13 using a player, it acts just like a streaming service,
14 isn't that right? As it's coming to you, it's playing
15 those bits and performing simultaneously, isn't that
16 right?
17 A I think to the inexperienced user, at
18 first blush it may seem that way, which is to say I've
19 asked for this music now, here it is coming in, I can
20 try to listen to it now by pressing play. The
21 difference is that streaming done professionally has
22 all sorts of protocols designed to get around the

1 problem, but it's very difficult to guarantee a
2 particular bandwidth over time between one doorstep
3 and another.
4 So to use the Napster quote/unquote -- I
5 put it advisedly in quotes -- "stream player" as the
6 thing is downloading, the most likely result is that
7 it will play for a little bit, and then the playing of
8 the accumulated file will overtake the rate of
9 download of the file, so that at some point your music
10 will stop, and then you have to wait for more file to
11 come before you hit play again to hear the rest of it.
12 Q There are some technologies that a
13 webcaster could employ for streaming which would have
14 some ability to correct for that, isn't that right?
15 A Oh, yes, that's one of the reasons that
16 somebody pays Real Networks a lot of money for a Real
17 Networks server.
18 Q But there's nothing in the statute that
19 would require a webcaster to get the statutory license
20 to employ those technologies, isn't that right?
21 A If what you mean is that a webcaster could
22 choose to "webcast" by basically making files

1 available through Napster, encouraging users to press
2 play, is that the sort of idea you have in mind?
3 Q A person can do webcasting simply by
4 streaming MP3 files, isn't that right?
5 A Yes.
6 Q And there are, in fact, webcasters in this
7 proceeding who are doing that. They are simply
8 streaming MP3 files.
9 A That's correct.
10 Q Have you used the KaZaA or Morpheus
11 client?
12 A Yes.
13 Q For audio or video or both?
14 A I've used it just for audio.
15 Q And there's a player in there as well,
16 isn't that right?
17 A Yes.
18 Q And, again, you can listen to that
19 information as it's coming through, just as though it
20 were a streaming service, isn't that right?
21 A With all of the caveats that I expressed
22 with using the Napster player, the fact that it

1 doesn't work very well, which is why the whole market
2 in actual streaming servers and players has developed.
3 Q But there's nothing inherent in this
4 proceeding that requires a webcaster to be using one
5 of these specialized streaming technologies as opposed
6 to simply providing the information in an MP3 format,
7 isn't that right?
8 A I certainly know of --
9 MR. COHEN: These questions about what is
10 required or what's inherent in the proceeding -- Mr.
11 Zittrain is not here to give his conclusions on what
12 the DMCA requires or what the proceeding requires.
13 And as a matter of fact, whatever the requirements are
14 is a legal issue that can be argued among the lawyers.
15 And I don't think it's appropriate to be asking Mr.
16 Zittrain these types of questions.
17 ARBITRATOR GULIN: Frankly, Mr. Katz, I
18 don't understand the line of questioning. I don't
19 understand what you're trying to --
20 MR. KATZ: Well, the witness has come
21 forward and suggests that there are intrinsic
22 differences between streaming and other kinds of

1 information provision. And I'm suggesting that they
2 are intrinsic to the difference between streaming and
3 other kinds of systems. It's some kind of streaming
4 versus other kinds of streaming.
5 And some webcasters choose to use Real
6 format and Windows Media format, which are somewhat
7 different. Other webcasters choose to use MP3, which
8 are just like Napster and these other services.
9 So whatever distinction it is the witness
10 is drawing, it's not a distinction between webcasting
11 and other kinds of services. It's a distinction
12 between some kinds of webcasting and other kinds of
13 webcasting. And if that's clear -- and it may be
14 clear at this point -- I'll move on to something else.
15 MR. COHEN: I'd also like to point out
16 that, you know, Mr. Katz is blurring this distinction
17 between what he's calling streaming, which is some
18 kind of on-demand situation, and the kinds of services
19 that we're actually talking about and dealing with in
20 this proceeding, which are DMCA-compliant webcasting
21 services.
22 MR. KATZ: Well, that would suggest, then,

1 that I need to continue this examination, because what
2 the witness is testifying to is that these DMCA-
3 compliant services, like Live365, which stream in MP3,
4 are really no different in technological terms from
5 the services that people use for downloading but could
6 also use for streaming with the integrated player.
7 MR. COHEN: Well, obviously, we disagree
8 with that characterization. I mean, I think the fact
9 that a webcaster is streaming in MP3 has been a part
10 of this record for a very long time, and I don't know
11 why it's necessary to cross examine on it.
12 CHAIRMAN VAN LOON: And is there something
13 specific in his rebuttal testimony that maybe went to
14 that?
15 MR. KATZ: Well, it was that testimony the
16 witness was just giving, how there is this key
17 difference between the Napster client and these other
18 services. And the point having been made, I can move
19 on to something else.
20 BY MR. KATZ:
21 Q Now, Professor Zittrain, let me see if I
22 have a correct understanding of the obstacles

1 confronting a webcaster as you portray them in your
2 rebuttal testimony.
3 First, as you indicate in essentially the
4 first six pages, there is a problem of backbone
5 congestion, isn't that right?
6 A Right.
7 Q And that's an inherent problem of the
8 structure of the internet, isn't that right?
9 A Right.
10 Q And even if webcasters were not
11 constrained by bandwidth costs, it would still be
12 difficult to provide high-quality streaming audio
13 content to most users as a result of the design of the
14 internet infrastructure, isn't that right?
15 A Yes.
16 Q That's what you say at pages 1 and 2,
17 isn't that right?
18 A Yes.
19 Q And there are these peering points on the
20 internet, and they suffer from significant congestion
21 and that condition is likely to persist for the
22 foreseeable future, isn't that right?

1 A Yes.

2 Q And this network congestion presents

3 serious difficulties to webcasters seeking to improve

4 the quality of their audio signal, isn't that right?

5 A Yes.

6 Q And to date, improvements in network

7 peering infrastructure have been slow and notably

8 limited, isn't that right?

9 A Yes.

10 Q That's at page 4. And there are also

11 technical limitations that are hindering progress in

12 improving the speed and reliability of the internet

13 backbone, isn't that right?

14 A Yes.

15 Q And these factors that you identify in

16 pages 1 to 6 of your statement provide significant

17 cause to believe that the network backbone

18 architecture will continue to suffer the congestion

19 evident today, and so it will remain difficult to

20 offer cost-effective, high-quality streaming from most

21 sources to most destinations for some time to come,

22 isn't that right?

1 A Yes.

2 Q And that's all this issue of backbone

3 congestion on the internet.

4 A Yes.

5 Q And then you address this question -- this

6 issue sometimes referred to as the "last mile" of the

7 difficulty in getting the internet information right

8 to the household or the desktop of the user, isn't

9 that right?

10 A Yes.

11 Q And you note that this last mile is an

12 additional bottleneck in the deployment of high-

13 quality streaming audio services, isn't that right?

14 A Yes.

15 Q And to date, the rollout of broad band

16 internet connectivity has been relatively slow, isn't

17 that true?

18 A Yes.

19 Q And incomplete deployment of broad band

20 network hardware, because there has been slowness in

21 building the broad band infrastructure, that, too,

22 limits the availability of broad band internet access

1 to most users, isn't that right?

2 A Yes.

3 Q And then you talk about the structure of

4 the market, the economic situation among the suppliers

5 of high-speed internet access, and you feel that that,

6 too, is going to limit the deployment of broad band

7 service, isn't that right?

8 A Yes.

9 Q And you also point out on page 10 that

10 there are regulatory challenges that further hinder

11 the market for broad band internet access, isn't that

12 right?

13 A Yes.

14 Q And at page 10 you note that even

15 technician availability is going to limit the

16 deployment of broad band access, isn't that right?

17 A Yes.

18 Q And then you talk about economic weakness

19 at page 11, and economic weakness is going to further

20 reduce the speed of deployment of broad band, isn't

21 that right?

22 A Yes.

1 Q And then at page 12, you mention that
2 there are lawsuits from some internet customers
3 claiming that there is poor service, and these
4 lawsuits are going to lead to a perceived divergence
5 between advertising and reality that may reduce
6 consumer demand for broad band, and that, too, will
7 slow deployment of broad band, isn't that right?
8 A Yes.
9 Q And you conclude that your review of the
10 progress to date and analysis of market structure
11 provides significant reason to believe that end users'
12 connections to the internet are not going to increase
13 in speed rapidly the way some people have predicted,
14 isn't that right?
15 A Yes.
16 Q And then you turn to wireless over at the
17 end of your testimony, isn't that right?
18 A Yes.
19 Q And you point out that you can't find a
20 single article documenting any wireless audio
21 streaming service actually in operation anywhere in
22 the United States, isn't that right? Pages 15 to 16.

1 A Which paragraph are you looking at?

2 Q End of page 15. "I could not find a

3 single article documenting any such system actually in

4 operation in the United States at this time."

5 A Yes.

6 Q And you feel that high-speed wireless is

7 going to grow more slowly than previously predicted,

8 isn't that right?

9 A Yes.

10 Q And you feel that significant technical

11 difficulties remain as services attempt to balance

12 competing requirements in developing the handsets

13 necessary for wireless, isn't that right?

14 A Yes.

15 Q And you feel that regulatory uncertainties

16 are going to delay and slow progress, isn't that

17 right?

18 A Yes.

19 Q And you feel there are logistical

20 difficulties that are going to hinder deployment of

21 wireless?

22 A Yes.

1 Q And you feel that economic weakness is
2 going to result in reduced wireless, both because
3 providers will have difficulty obtaining capital and
4 users will have difficulty paying for the service,
5 isn't that right?
6 A Yes.
7 Q And there are even factors like the fact
8 that waning expectations about wireless reducing
9 attendance at conferences, preventing firms from
10 getting together and setting standards, isn't that
11 right?
12 A Yes.
13 Q And then at page 17 you note that recent
14 security concerns mean that the military may be
15 reluctant to release scarce spectrum, and that will
16 further delay high-speed wireless.
17 A Yes, page 17. Yes.
18 Q Page 17. And you also say that there are
19 no well-defined standards for wireless, which
20 increases costs and adds uncertainty and slows
21 deployment, too, isn't that right?
22 A Yes.

1 Q And you say the economic model for
2 streaming media isn't going to work, that it's not
3 suited for the way wireless is priced, over on
4 page 18, isn't that right?
5 A Won't work as well, yes.
6 Q And then, over at pages 18 and 19, you
7 draw some conclusions, and you say that because of all
8 of these problems, problems in the internet backbone,
9 problems in the last mile, problems with the
10 development of wireless, there is reason to expect
11 that users are going to go elsewhere for music
12 content, such as listening to FM radio or -- or
13 loading digital files extracted from compact discs
14 into a variety of portable digital music players,
15 isn't that right?
16 A Yes.
17 Q Now, given all of that, isn't developing
18 a webcasting business for streaming audio
19 fundamentally irrational and a non-economic use of the
20 internet?
21 A I wouldn't be prepared to add that as a
22 paragraph to my testimony.

1 Q Well, Professor Zittrain, why not?

2 A Because there are a number of other

3 factors that if I were asked to assist somebody

4 setting up shop as a webcaster -- I mean, yeah, I

5 might give them a kind of bracing bit of cold water to

6 say, you know, I hope you don't expect this is going

7 to be like a pot of gold just for the picking up.

8 It's not.

9 But there are all sorts of other factors

10 I suppose for which, if you have an entrepreneurial

11 idea, you try to go out there, you try to limit your

12 costs, you try to aggregate eyeballs, and you try to

13 make the best of it. But I agree, these are difficult

14 times to be basically trying to build a business that

15 is as yet unproven. And I think it is fair to say

16 that this is as yet an unproven business.

17 Q Based on all of these problems --

18 A Yes.

19 Q -- and all of these factors that you've

20 considered --

21 A Yes.

22 Q -- wouldn't a reasonable person conclude

1 that the only way a person is going to have a viable
2 webcasting business is if they can leverage that
3 webcasting content as part of a larger operation which
4 is profitable overall?
5 MR. COHEN: I am going to object to that.
6 It's just beyond the scope of his testimony. We took
7 pains not to have Mr. Zittrain testify about the
8 economics of the webcasting business that are outside
9 the scope of the technical issues that he has
10 discussed in here, unlike Mr. Griffin who went and
11 gave testimony about that.
12 And I don't think it's appropriate to
13 treat Mr. Zittrain as some of our webcaster witnesses
14 who could comment on their business model and
15 advertising rates and all sorts of things like that.
16 It's just not appropriate.
17 CHAIRMAN VAN LOON: Mr. Katz?
18 MR. KATZ: Well, the witness has given
19 testimony about his predictions as to what people will
20 do and what people won't do, and this seems to be
21 entirely consistent with that.
22 MR. COHEN: Well, he has testified about

1 the technical issues that might impact on those
2 choices, not on all of the niceties and economics of
3 the business of running a webcasting operation. And
4 that's the critical distinction here.
5 MR. KATZ: A substantial portion of his
6 testimony is economic in character, as I pointed out
7 a few minutes ago.
8 MR. COHEN: Yes. It's economics as
9 relates to the technical issues that he discusses, not
10 as to all sorts of other aspects -- business issues,
11 marketing, advertising, willingness to take risk,
12 etcetera -- that relate to running a webcasting
13 operation.
14 We've had all sorts of business people
15 here testifying about webcasting, and to ask Mr.
16 Zittrain, then, to jump from his technical conclusions
17 to some kind of exegesis about the economics of
18 running a webcasting operation apart from these
19 technical issues -- it's beyond the scope of his
20 testimony, and it's not what he's here to testify as
21 an expert on.
22 MR. KATZ: I suggest it is the logical

1 implication of this witness' testimony, which is
2 largely economic in character and predictive in
3 character.
4 CHAIRMAN VAN LOON: And the specific
5 objection that we have before us is now to this line
6 of questions going forward.
7 MR. COHEN: Yes, it's beyond the scope of
8 his testimony, and it's not what we've put him forward
9 as an expert on. There are all sorts of factors
10 involved in running a webcasting business, apart from
11 these technical issues and problems about which Mr.
12 Zittrain has testified, that are inappropriate for him
13 to give testimony on.
14 (Long pause.)
15 CHAIRMAN VAN LOON: Well, as the length of
16 the Panel consultation might indicate, we think it's
17 a fairly close question. I think there's a lot of
18 argument that it is beyond the scope. On the other
19 hand, there's the reference to economic weakness.
20 Our ruling is that we are going to
21 overrule the objection, in terms of it being beyond
22 the scope, but also remind the witness that, of

1 course, you need to respond to this only to the extent
2 you feel comfortable and appropriate and
3 knowledgeable. And if it's things you didn't analyze
4 or think about for these purposes, we don't -- we
5 don't -- we can go as far as you feel comfortable.
6 THE WITNESS: I'll help as best I can and
7 go no further than I can.
8 CHAIRMAN VAN LOON: Okay. Thank you.
9 BY MR. KATZ:
10 Q Do you remember the pending question
11 sufficiently to answer it, or should I try to
12 reformulate it for you?
13 A I think a reformulation would be helpful.
14 Q If you have a view on the subject,
15 Professor, wouldn't it seem that given all of these
16 numerous difficulties and impediments to webcasting in
17 the current environment that the only sensible
18 economic model likely to be profitable for the
19 foreseeable future is one in which webcasting is part
20 of a larger offering that is profitable overall,
21 rather than simply providing this very difficult, very
22 technically obstructed webcasting service to the

1 public?

2 A Well, taking up the issue of technically

3 obstructed, the obstructions that I've been talking

4 about are principally of two kinds here. One kind is

5 in expanding webcasting beyond the core of taking it

6 over the traditional internet, such as it is, out into

7 the zone of the wireless and saying, "That's not

8 something I would hasten to try to do as a webcaster

9 right now, because there's no infrastructure through

10 which to do it."

11 The second is looking at the quality of

12 these streams. If you can come up with a business for

13 which FM quality is what you're satisfied streaming,

14 and what you hope your customers are satisfied

15 listening to, then that's the base from which to

16 operate. That CD quality streaming is very I think

17 difficult to pull off right now, and for the next year

18 or two, for all of the reasons I've talked about.

19 So if we then put the question as, what

20 are the challenges still attendant upon webcasters who

21 are sticking to the core, are starting just from home

22 plate, which is lower bandwidth, more traditional

1 streaming, then within that there may be a variety of
2 models that could work.
3 And I would say these models are untested,
4 and that's why it takes kind of an entrepreneurial
5 appetite for risk and for kind of boldness, but I
6 wouldn't say it's doomed. Certainly, among those
7 models would be integrating the service with other
8 services, seeking strategic relationships for which
9 there is, you know, various opportunities for
10 marketing and promotion and commerce.
11 I mean, I have a feeling all of these are
12 being explored, but I wouldn't try to handicap which
13 among those, once you're working from the core, is the
14 preferable one.
15 Q So when you refer in your testimony to all
16 of these daunting technological challenges, you don't
17 mean that these would interfere with the ability to
18 provide FM quality webcasting on a regular and
19 consistent basis, do you?
20 A If we're talking about 16-kilobit streams,
21 which is even, at least to my ears, sub-FM quality but
22 you can hear the music, this is where webcasting is at

1 its safest. Will there still be glitches to people
2 listening to it? Possibly, yeah. If you're on a
3 modem connection, as most Americans are, and likely
4 will be, it can still be glitchy.
5 Is it particularly hard to switch from one
6 stream to another? Yes. Actually, orchestrating the
7 new buffering can be annoying to the listener. But as
8 far as tuning in to one stream and hearing it at that
9 rate, that's solid. We are here for that, I think.
10 Q So we have solid sub-FM quality with these
11 annoying buffering delays on occasion.
12 A If -- either within the stream or as one
13 tries to click -- click around, basically do the sort
14 of FM radio -- I want to hear another station, wait,
15 I want to hear another station sort of thing.
16 Q Have you looked at any of the various
17 business plans or forecasts presented by webcasters
18 participating in this proceeding?
19 A Possibly. None jumps to mind immediately,
20 but it's entirely possible that I have.
21 Q Do you know if any of them indicate any of
22 these infrastructure and technological problems

1 outlined in your testimony?

2 A I don't.

3 Q Do you know if any of them refer in rather

4 glowing terms to the expansion of the internet and the

5 rapid rollout of broad band?

6 A I don't.

7 Q Would it surprise you if some of them

8 contained such material?

9 A I would not be surprised to see documents

10 that contained rosy predictions from any source about

11 the future of the internet.

12 Q You cite a number of articles with respect

13 to the rollout of broad band. Have you read anything

14 about the recent Jupiter Media Metrix study on that?

15 A Quite possibly. Is there one in

16 particular you'd like me to refer to?

17 Q Well, let me show you an article that we

18 will mark as --

19 ARBITRATOR VON KANN: Who is Jupiter? I

20 think that was referenced several times in somebody's

21 testimony.

22 MR. KATZ: We will get into --

1 ARBITRATOR VON KANN: Are you going to get
2 into --
3 MR. KATZ: Yes.
4 BY MR. KATZ:
5 Q Let me show you what we'll mark as RIAA
6 Exhibit 114 RPX, a copy of a press release from
7 Jupiter Media Metrix dated October 17, 2001.
8 (Whereupon, the above-referred
9 to document was marked as RIAA
10 Exhibit No. 114 RPX for
11 identification.)
12 CHAIRMAN VAN LOON: You said 10/17?
13 MR. KATZ: Yes.
14 CHAIRMAN VAN LOON: So Wednesday.
15 MR. KATZ: Wednesday. This is a real-time
16 arbitration.
17 (Laughter.)
18 BY MR. KATZ:
19 Q Is this something that you've seen before?
20 A No, I have not seen this before.
21 Q Let me, then, give you a couple of minutes
22 to read through it.

1 (Pause.)

2 A Okay.

3 Q First, are you familiar with Jupiter Media

4 Metrix?

5 A Oh, yeah.

6 Q And what is that?

7 A It's -- well, I can even give it to you

8 right from their press release. The global leader --

9 this is, again, from a press release, so it should be

10 taken with a grain of salt. "Jupiter Media Metrix is

11 the global leader in internet and new technology

12 analysis and measurement. The company delivers

13 innovative and comprehensive internet measurement

14 analysis, intelligence, and events, to provide

15 businesses with unmatched global resources for

16 understanding and profiting from the internet."

17 (Laughter.)

18 Maybe I should be a radio broadcaster.

19 (Laughter.)

20 Q Would you agree with that conservative

21 self-representation by Jupiter Media Metrix?

22 A Adjustment for the usual puffery of the

1 sort that's in press releases, Jupiter is certainly a
2 credible source of information among such companies.
3 Q Have you seen or heard anything about this
4 particular study reported on in this press release?
5 A No, I haven't.
6 Q Are the conclusions reached here
7 consistent with those that you reached in your own
8 investigation of this study?
9 A Well, since I don't have the study in
10 front of me, I just have the press release on the
11 study, the datum that jumps out, which is the one I
12 should make clear that it's the one you're asking
13 about, is the conclusion that the number of households
14 accessing the internet via broad band connectivity
15 will be 35.1 million in 2006.
16 And for that, I would not buy stock whose
17 value was premised on that happening. I would be no
18 more likely to buy it on the basis of this report than
19 I was before the report.
20 Q Although many people were buying such
21 stock last year, weren't they?
22 A Yeah. Well, it's awfully cheap now, so I

1 guess you could --

2 (Laughter.)

3 -- you know, throw $10 that way and see

4 what happens.

5 MR. KATZ: I would move Exhibit 114 RPX.

6 MR. COHEN: I would object. If you look

7 at the last page of this, there's a statement here

8 that this contains statements of a forward-looking

9 nature relating to future events or future financial

10 results. Investors are cautioned that such statements

11 are only predictions and that actual events or results

12 may differ materially.

13 We don't have a copy of the actual study.

14 We know nothing about how the study was conducted. I

15 just don't see how it's appropriate to get this in as

16 a study through this press release. It just doesn't

17 make sense.

18 MR. KATZ: I certainly don't offer it as

19 a study. I offer it as a press release, and I think

20 the witness has sufficiently qualified it, that it

21 should come into the record for what it's worth.

22 MR. COHEN: Well, is it coming in for the

1 fact that it's -- this is an actual press release from
2 Jupiter, or as evidence of some of the contents of the
3 press release? I mean, I'm not sure I understand.
4 Jupiter is not a party here. There's no admission
5 here on the part of Jupiter. I just don't understand,
6 what is the purpose for which this is coming in?
7 MR. KATZ: That's a fair question, and
8 I'll answer it. The witness has identified this as an
9 authoritative source. The authoritative source has
10 made this statement to the world at large. That may
11 have some impact on people's perceptions.
12 MR. COHEN: The witness has also been very
13 clear that he doesn't have the study, he hasn't seen
14 the study. We don't have a witness here to testify
15 about the study. I mean, this is just -- seems like
16 a clear-cut situation to me.
17 MR. KATZ: I also will offer to put in the
18 study as soon as we get hold of it.
19 (Pause.)
20 ARBITRATOR VON KANN: Mr. Katz, what would
21 be the relevance of our receiving info that day before
22 yesterday it was reported that Jupiter had conducted

1 this study and come to this conclusion? We don't have
2 the sponsoring witness for the study. They may have
3 made a fatal mistake in their methodology or
4 something. But what would be the relevance of the
5 fact that there's a public report of this now?
6 MR. KATZ: Well, the Panel needs to
7 consider the perceptions in the marketplace, what
8 willing buyers and willing sellers will be doing over
9 a period which includes the current or includes the
10 future. And there's a mix of information in the
11 marketplace which will be available to buyers and
12 sellers, and within that mix one piece of it, maybe a
13 large piece, maybe a tiny piece, will be the fact that
14 organizations like this make statements like this.
15 For whatever that's worth --
16 ARBITRATOR VON KANN: And this will show
17 that there have been reports that four years after our
18 period ends there will be 40 percent of houses
19 connected through -- with broad band.
20 MR. KATZ: Yes. But people may make
21 investments today and may enter into contracts today
22 based on their perceptions of some pot of gold out

1 years in the future.

2 ARBITRATOR VON KANN: Oh, there's some

3 evidence of that in --

4 CHAIRMAN VAN LOON: Although, Professor

5 Zittrain, won't it be -- it's not going to --

6 (Laughter.)

7 (Pause.)

8 CHAIRMAN VAN LOON: The document will not

9 be admitted. We don't have a sponsoring witness who

10 can be cross examined and talk about it. It's

11 marginal, even if we admitted it for what it was

12 worth.

13 BY MR. KATZ:

14 Q Let me turn briefly to wireless. Now, as

15 you testified, Professor Zittrain, there's no one who

16 is actually doing streaming audio wirelessly today,

17 isn't that right?

18 A Right.

19 CHAIRMAN VAN LOON: Let the record reflect

20 some small handheld device, which is emitting sounds,

21 and which the witness and his cross examiner are

22 playing with --

1 (Laughter.)

2 THE WITNESS: I just need a few minutes

3 with it here. I'm not intending to do anything that

4 will permanently damage it.

5 MR. KATZ: I believe it's a Microsoft

6 product. It would be hard to avoid permanently

7 damaging it.

8 CHAIRMAN VAN LOON: For the record, is

9 this a Palm Pilot or a Blackberry or a --

10 MR. KATZ: This is a -- yes, the witness

11 can answer.

12 THE WITNESS: This is a Compaq iPAC,

13 pocket PC, which has been inserted into an expansion

14 sleeve, as you can see. Into the expansion sleeve has

15 been inserted this, which is a wireless LAN card. And

16 what I was just doing when I asked for the stylus was

17 I went over into the settings to see how it was

18 getting its music.

19 I credited that the music was coming from

20 the air, otherwise if it were just built into this

21 thing -- which, by the way, this thing also does.

22 This can take MP3 files off of Napster or ripped from

1 a CD and retain it inside, and then you can walk
2 around with it without the sleeve and without the card
3 and hear the music you like, I dare say in better
4 quality than we just heard, but it might have been the
5 tinny speaker that was --
6 MR. KATZ: I do have headphones.
7 THE WITNESS: Yes. And I won't speak to
8 the actual quality of the music.
9 (Laughter.)
10 But --
11 ARBITRATOR VON KANN: That's Fagin's
12 department.
13 (Laughter.)
14 THE WITNESS: But what I did was I checked
15 in the settings of network to see, all right, how is
16 this thing getting its network connection, presuming,
17 as I took a brief look, it looked like this was coming
18 from Live365.com. And I don't know if it's fair to
19 ask if I'm right. I don't want to suppose something
20 that isn't true.
21 BY MR. KATZ:
22 Q This is a live streaming audio from

1 Live365.

2 A Okay. And I went into the network

3 settings, and what I see is IEEE 80211 wireless LAN CF

4 card. So this is what's called an 80211B wireless

5 card.

6 Now, this is of just the sort that I have

7 at my office and in my house. I have a base station

8 that I purchased from LinkSys that's an 80211B base

9 station. And once you set that up, it has two little

10 antennas on it that you can adjust, and then as long

11 as you don't stray too far beyond my backyard, with

12 one of these you can be connected to the internet

13 thanks to the brokering that the LinkSys base station

14 does.

15 So my guess is that somewhere in this

16 building or this room -- I actually when just setting

17 over there with my research assistant said, "Do you

18 think they have 80211B? I was about to tune in to the

19 'net." And he said, "Nah, they don't have it."

20 (Laughter.)

21 I did ask if there was DHCP, and he said,

22 "Yes, I presumed it was for the network," which then

1 turned out to be dead. But it's because I guess the
2 wireful network has been turned off in favor, at least
3 in this room, of this kind of wireless network.
4 Okay. So here we have, then, an artifact
5 that is, in fact, streaming music over a wireless
6 network. But let me be clear: this sort of wireless
7 network is not at all the sort of wireless network I
8 was meaning and did talk about in my testimony.
9 This is a network for which the consumer
10 of an internet connection, an actual broad band
11 internet connection coming through a wire, has to then
12 set up this little base station, which then, in a
13 footprint that -- again, my house is not very big. It
14 doesn't -- you don't have to go too far to get beyond
15 my backyard. That's where this would then cease to
16 work.
17 So it is possible to think of an
18 environment in which one can then get wireless
19 streaming music, but this basically thanks to an
20 amplifier placed locally controlled by a consumer, in
21 this case perhaps Arnold & Porter are the building
22 management, rather than the idea. The model I'm

1 talking about here is the sort that Mr. Griffin
2 appeared to be referring to, which is I'm walking
3 around in the middle of the street with my wireless
4 device. If you walk around in the middle of the
5 street with this, you may or may not be starting to
6 pick up wireless space stations that other law firms
7 have placed around. Chances are good that they have
8 configured the networks not to accept wireless
9 attachments from strangers. There's probably, in fact
10 I should look it up in SSID that I can then use if I
11 stay in the room later, to tune into the wireless
12 network here. But absent that SSID, it's not as if
13 somebody passing on the street below with one of Mr.
14 Griffin's nonexistent devices is necessarily going to
15 be able to tune into the wireless net.
16 CHAIRMAN VAN LOON: Could I --
17 THE WITNESS: Yes.
18 CHAIRMAN VAN LOON: -- see if I got that.
19 It sounds to me as if you're saying this is the
20 equivalent of my handheld phone at home.
21 THE WITNESS: Exactly.
22 CHAIRMAN VAN LOON: That I can walk around

1 and use.

2 THE WITNESS: The phone, that's exactly

3 right.

4 CHAIRMAN VAN LOON: But it's not the same

5 as the cell --

6 THE WITNESS: As a cellular phone.

7 CHAIRMAN VAN LOON: -- phone that I could

8 use?

9 THE WITNESS: That's exactly right.

10 CHAIRMAN VAN LOON: Okay.

11 MR. STEINTHAL: Just for the record, this

12 that you both were referring to was the device that

13 Mr. Katz handed you rather than the cellular phone you

14 were referring to from time-to-time?

15 THE WITNESS: Correct. The iPAC device

16 with the 802.11B wireless card.

17 CHAIRMAN VAN LOON: It was playing music

18 when it was handed over.

19 THE WITNESS: It was playing music through

20 a wireless connection the way that a cordless phone

21 with a cordless base station in a house can be said to

22 be -- sure enough, it's cordless, it's not a cellular

1 phone for which one should go beyond your house, it
2 would act like an actual cellular phone.
3 BY MR. KATZ:
4 Q So, in your testimony when you refer to
5 the absence of streaming audio over wireless, you
6 don't mean any wireless?
7 A Correct.
8 Q You mean ad hoc cellular telephone like
9 wireless?
10 A That's exactly right. I mean ad hoc
11 connections as one walks about the world. It's
12 entirely possible that you'd get a campus network or
13 something, indeed, in places even at Harvard Law
14 School there are two places. The floor with my office
15 on it, the dean's office and the Bergman Center floor
16 in which with a properly configured wireless card on
17 some days you can hook into the net this way. But,
18 again, you can't stray much farther beyond those
19 realms.
20 And you're right, definitely true. My
21 testimony was not referring to this sort of structure.
22 Q Only you and I, Professor, will understand

1 the courage entailed in doing a wide demonstration of
2 the sort I just did.
3 A And it did work, I might add.
4 Q It did. Every now and then it does.
5 A Yes.
6 Q 802.11B is a standard, isn't that right?
7 A Yes.
8 Q And one of the markets and environments
9 that has frequently been viewed as friendly to
10 webcasting is the office environment, isn't that
11 right?
12 A It's entirely possible, yes.
13 Q Part of the business model of many
14 webcasters is that they will stream to office workers
15 and they will listen to it through headphones at their
16 computer while they're working on their computer
17 during the day, isn't that right?
18 A That could be, I couldn't say it for sure.
19 Q And there are many modern office complexes
20 that do have 802.11B wireless, isn't that right?
21 A I could not say that. I can't say the
22 extent of the deployment of 801.11B. In my limited

1 experience, it's hard to find.

2 Q But that is at least one existing wireless

3 standard in which, if you are in an environment in

4 which it is supported, that would be a possible use of

5 wireless streaming audio?

6 A That is true, but one should understand

7 what it means to say that's a wireless standard.

8 That's a wireless standard designed for, I put it in

9 my bedroom in the base station and I use it out by the

10 pool. It's not -- just as there's a standard,

11 perhaps, for the communication of a cordless phone

12 between a cordless base station, but that standard

13 bears no relationship to the standard by which a

14 cellular phone would connect with a cellular base

15 station. So it's not as if -- I see no realistic way

16 one could leverage the 802.11B standard that does this

17 into an ad hoc 3G style standard for use around the

18 city generally.

19 Q Well, I also have an Air Card 300 CDPD

20 card for the iPAC. Have you familiar with those?

21 A No, not so much.

22 Q Are you familiar with CDPD as a standard

1 for receiving packet data wirelessly?

2 A Is that radio data? Is that like

3 Ricochet?

4 Q It is somewhat like Ricochet.

5 A Uh-huh.

6 Q Are you familiar with those?

7 A I'm somewhat familiar with Ricochet, yes.

8 Q And would that be a way the wireless could

9 be received over the Internet by people with

10 subscriptions to those services?

11 A It might. To my knowledge, I mean I can't

12 say for sure. To my knowledge Ricochet I think just

13 went out of business.

14 Q Ricochet just went out of business?

15 A Yes. So radio -- I mean, it's also geared

16 to be a low -- a relatively low speed network. So I'm

17 not sure it's a realistic way as currently configured

18 in which to do streaming.

19 Q Ricochet was billing out to 128K, isn't

20 that right?

21 A Yes, they were until they didn't.

22 Q Until somebody buys those assets.

1 A Yes.

2 Q Let me just ask you a couple of questions

3 on stream ripping.

4 ARBITRATOR VON KANN: What is the

5 reference 802.11B, where -- in what framework does

6 that number have significance?

7 THE WITNESS: The various standards

8 organizations, some of which are more formal than

9 others, some of the most important Internet standards

10 organizations are not even incorporated and they have

11 no formal succession of leadership or presidents, or

12 anything like that. But these various organizations

13 will denominate standards by numbers. So IEEE in this

14 case, the International Electric -- it stands for

15 something. Electrical and Electronic Engineers, IEEE

16 has a standard called 802.11B. It's thanks to some

17 numbering scheme they have for which this then fits

18 into the proper folder, by which they can publish a

19 spec and to the extent that a given card, this

20 particular brand -- I can't even tell what brand this

21 is, but whatever brand card this is need not be the

22 same brand as the base station so long as each of them

1 respect 802.11B standard.

2 So it's basically a handle for the

3 suitcase that are the rules by which they would

4 communicate wireless and then any player in the

5 industry can subscribe to that standard and expect

6 interoperatability among the equipment.

7 ARBITRATOR VON KANN: Okay. Thank you.

8 BY MR. KATZ:

9 Q A couple of questions on stream ripping,

10 Professor. Have you actually used BitBop?

11 A Yes.

12 Q And you give some testimony in here --

13 ARBITRATOR VON KANN: Is this the second

14 felony that you've been involved in?

15 THE WITNESS: I didn't say what I used it

16 for.

17 BY MR. KATZ:

18 Q You give some testimony in here about the

19 difficulty of installing and using the stream ripping

20 tools. Would you view BitBop as a program that is

21 difficult to install and use?

22 A It crashed my computer when I tried to run

1 it, and I pride myself on configuring a computer that
2 is not delicately running. I have very few things in
3 my system tray and BitBop still managed to crash it.
4 It's relatively easy to use from a user
5 interface perspective. You know, you click on things.
6 There's some things that were hard for me to
7 understand putting on the user's hat. I wanted to
8 record a particular song that I designated, and it
9 wouldn't apparently because it's just not designed to
10 do that. You instead have to prospectively tell it
11 the sorts of things you like and it approximates, you
12 know, recording some of those things.
13 But it was not the most stable application
14 I've loaded onto my machine, and I wouldn't even say
15 it meets the standards of stability that I would want
16 of software that I keep on my machine.
17 Q Have you used the latest release?
18 A I don't know what their latest release is.
19 Q Have you used BitBop 2 new version beta
20 .80?
21 A I don't know. I haven't used it in
22 several weeks, so if that beta is later than that,

1 then I haven't used it.

2 ARBITRATOR VON KANN: Statute of

3 limitations is running.

4 BY MR. KATZ:

5 Q What operating system did it crash,

6 Professor?

7 A Windows 2000 Professional, at least within

8 the standard of Microsoft more stable than average.

9 Q Stipulated. When you say it crashed, was

10 it actually an internal crash. Did you get a stop

11 screen?

12 A No, I didn't get a whole shutdown. The

13 program simply crashed.

14 Q The program crashed.

15 A Right.

16 Q Okay.

17 A So I had to end the task.

18 Q It didn't take down the whole system?

19 ARBITRATOR VON KANN: I'm sending you guys

20 to the cafeteria soon, so be careful.

21 THE WITNESS: I have no recollection of

22 the cafeteria from my summer associateship, which

1 worries me.

2 CHAIRMAN VAN LOON: With good reason.

3 MR. KATZ: Another place that I'd hang

4 out.

5 Let me mark one more one more exhibit

6 which are some BitBop screen shots, which will be RIAA

7 Exhibit 115 RPX.

8 (Whereupon, the document was

9 marked as RIAA's Exhibit 115

10 RPX for identification.)

11 BY MR. KATZ:

12 Q Do you recognize the first three pages

13 here, Professor, as essentially the user interface for

14 BitBop?

15 A Yes, I do.

16 Q And here on the first page the first panel

17 of the application, they pick out streaming radio

18 stations are currently going forward and give you a

19 chance to listen to one of these stations as it's

20 going forward?

21 A Yes.

22 Q And over on the second page, that's the

1 second panel, artist preferences. And while you can't
2 indicate a specific song, what you can do here is
3 identify a particular artist or group that you're
4 interested in and then record songs for that artist or
5 group?
6 A That's right.
7 Q And over on the third page, which says
8 recorded tracks, after you indicate the artists or
9 groups that you're interested in and those who know me
10 will know whose computer this came from those
11 selected, these are the songs that you find in our
12 computer when next you go back to it after BitBop's
13 been running, is that right?
14 A It looks to be, yes.
15 Q And if you click one of these songs and
16 hit play at the bottom, you can listen to it?
17 A Yes.
18 Q And over on the last page, with respect to
19 the installation of BitBop, you get a screen on the
20 BitBop website and you click on a wink for the tuner
21 and you end up with a file download screen, and you
22 ask it to open and then it runs the setup program for

1 the application?

2 A Correct.

3 Q And that's the way you install it?

4 A Correct.

5 MR. KATZ: I'd move Exhibit 115.

6 CHAIRMAN VAN LOON: Any objection, Mr.

7 Cohen?

8 MR. COHEN: If the purpose is just these

9 are printouts from the BitBop website, I guess I don't

10 have any objection to it.

11 CHAIRMAN VAN LOON: Admitted.

12 (Whereupon, the document marked

13 as RIAA's Exhibit 115 RPX was

14 received in evidence.)

15 BY MR. KATZ:

16 Q Now, as you indicate in your testimony,

17 there are easier ways, perhaps, to get music by

18 stealing it through services such as KaZaA and

19 Morpheus, isn't that right?

20 A Well, I don't know that I'd say stealing.

21 It would depend on the source of the music, the

22 copyright status, but by obtaining it through the

1 service, yes.

2 Q And your feeling is as long as there are

3 ways to get these files that are easier, although they

4 may be illegal, some people will use those services

5 instead of ripping streams, isn't that right?

6 A Well, again, I'd want to be careful with

7 the phrase illegal. Illegal for the user to use may

8 be different than illegal for the service to even

9 exist. And I don't know about the legality of BitBop

10 either. And the question seems to suggest is that

11 BitBop is ipso facto legal and these others aren't. I

12 don't know. I mean, they might -- to the extent that

13 they are similar, they bear the same vulnerabilities.

14 Q I certainly don't mean to imply that.

15 A Yes.

16 Q But I am suggesting here, as you

17 testified, the record companies, the RIAA have been

18 taking action --

19 A Yes.

20 Q -- against some of these services with

21 respect to contributory copyright infringement, isn't

22 that right?

1 A Yes, that's right.

2 Q Most recently a case that we filed a

3 couple of weeks ago against KaZaA and Morpheus and

4 Grokster, isn't that right?

5 A Yes.

6 Q And if we shutdown all of those services

7 and didn't shutdown stream ripping schools then it

8 might be an environment in which these stream ripping

9 schools would be a lot more common, isn't that right?

10 That might be an environment in which the stream

11 ripping would be a lot more common, isn't that right?

12 A Yes, to the extent that one factor

13 effecting a consumer's decision to use a stream ripper

14 is the availability of alternate routes of obtaining

15 permanent copies of music to the extent that those

16 alternate routes were shutdown, there may be more

17 incentive either to give up or to shift over to this.

18 But it's probably helpful to note that it's not as if

19 it's a BitBop apple or an Napster apple. I mean,

20 these are sort of apples and oranges.

21 As you note from the first screen of your

22 exhibit, the reported quality of the streams for which

1 there are reports are all 21 kilobit per second
2 streams. So the resulting file would likely not be
3 anywhere near the quality of the sort of file that you
4 would typically obtain over Napster or KaZaA or
5 something else. So it's not just shifting from one
6 source of your apples to another, it's shifting from
7 one source of tasty apples to a source of sort of
8 moldy ones.
9 Q Nonetheless, if those are the only source
10 available, people may use them.
11 A If you crave apples, you may grin and bear
12 it, yes.
13 Q Yes. That's all I have. Thank you,
14 Professor.
15 A Oh, if I may add one thing. Too, of
16 course, it appears that for reasons that I guess we
17 can only speculate upon and that we discussed a little
18 bit when I was last here, the resulting apples, such
19 as it is, from BitBop are ones that by BitBop's coding
20 are tethered to the computer for which BitBop is
21 running. So if I grab one of these songs that are on
22 the list, I don't know, one of the Jonnie Mitchell

1 songs, "Big Yellow Taxi," there is a file on my hard
2 drive that BitBop placed there from the stream that's
3 meant to represent the recording of that track, but at
4 least as best as I could do, if I try to move that to
5 another machine, if I were to try to put it -- it
6 would be impossible, to my knowledge or without a lot
7 of effort, to put it into a portable MP3 player. I
8 mean this is, again, why it's not comparable to what
9 you would get from Napster if you could still get to
10 Napster or one of the siblings.
11 Q Not to recreate that whole line of
12 examination --
13 A Right.
14 Q -- but there is another product called
15 Total Recorder which could be used to move a BitBop
16 file, isn't that right?
17 A For which then Total Recorder would lose
18 much -- in its current incarnation, loses much of the
19 intuitive friendly interface that we see from BitBop.
20 Basically they're trade offs with each of these things
21 discussed in the testimony.
22 Q Right.

1 MR. KATZ: That's all.

2 MR. COHEN: Well, I'm sorry to disappoint,

3 but I don't have anything on redirect.

4 ARBITRATOR VON KANN: Two questions. Is

5 the reason that you can get -- I think the gist of

6 your testimony is that while you cannot reliably

7 consistently get CD quality music through streaming at

8 the moment, you can get CD quality downloads, is that

9 right?

10 THE WITNESS: Yes, that's right.

11 ARBITRATOR VON KANN: And the reason is

12 because the time factor or you're not in any great

13 rush, it may take quite a while for all that stuff to

14 come through, but eventually you'll have it, is that--

15 THE WITNESS: That's exactly right.

16 ARBITRATOR VON KANN: Okay. You said that

17 there was a service somewhere, download.com, which

18 permits one to determine how many downloads have

19 occurred, how many people have downloaded? Or is it

20 how many download products are out there or how many

21 people have actually downloaded how many songs --

22 THE WITNESS: Right.

1 ARBITRATOR VON KANN: -- last week or last
2 month, or something?
3 THE WITNESS: Download.com is a portal
4 primarily for software, not for music that the
5 software might then enable you to download. And when
6 I was talking about the figures available at
7 download.com, it was simply their own internal reports
8 of how many users had come to download.com to download
9 a given piece of software that they offer.
10 So when I was talking about the number of
11 downloads of Napster, there's a figure that exists
12 that download.com when you look up the Napster client,
13 which is to say the software that is used with
14 Napster, and we can find out how many people
15 download.com claims went to the download.com and
16 grabbed Napster. But it doesn't tell us how many
17 people grabbed Napster elsewhere, perhaps from the
18 Napster website, should it be available there, nor
19 does it tell us how many songs may have been swapped
20 or traded or downloaded using Napster.
21 So, it's a fairly limited thing that you
22 find out from download.com.

1 ARBITRATOR VON KANN: Would that service
2 also give any indication of the extent to which people
3 have taken services like BitBop and other stream
4 ripping services into their homes for the purposes,
5 presumably, of stream ripping? By going to that
6 source would one be able to get any evidence whatever
7 as to the incidents or prevalence or extent of stream
8 ripping that's going on?
9 THE WITNESS: I think it would be more
10 than -- it would be at least probative, but less than
11 scientific given that download.com is but one, still
12 popular, but one site from which one can get downloads
13 of various programs that are circulated freely, again,
14 with the permission or encouragement of the authors.
15 The BitBop client may be such a thing.
16 If one were to go to download.com and see
17 lots and lots and lots of downloads of the client,
18 that would be probative of something. The absence of
19 it is also probative, given that that's a place that
20 many people will go to get software. Again, one could
21 get the Napster client from Napster.com, and yet
22 millions of people chose to get it from download.com.

1 To the extent that virtually none choose to get
2 another particular piece of software, I think it does
3 say -- it sheds some light in the absence of further
4 evidence on the popularity of that software.
5 ARBITRATOR VON KANN: I think you said --
6 maybe I'm misremembering this, but that you visited
7 download.com --
8 THE WITNESS: I did.
9 ARBITRATOR VON KANN: -- to do something,
10 I can't remember what.
11 THE WITNESS: I visited download.com to
12 visit the respective pages from which one would
13 download, say, the BitBop client or the Napster
14 client. And saw download.com's report that the
15 Napster client had been downloaded millions of times.
16 I think it was just under 4 million when I last
17 looked.
18 ARBITRATOR VON KANN: Okay.
19 THE WITNESS: And the BitBop client was --
20 boy, maybe I should surf there right now with -- I
21 guess that's a live demonstration and not allowed.
22 ARBITRATOR VON KANN: You said 3 million,

1 is that what -- 3 thousand --

2 CHAIRMAN VAN LOON: Just under four

3 million you said.

4 THE WITNESS: Yes, for Napster.

5 CHAIRMAN VAN LOON: Right.

6 THE WITNESS: And I think that it was

7 either 3500 or 35000 -- I want to get it -- it was not

8 a lot as the register had hit in my brain rather than

9 the exact number for BitBop.

10 ARBITRATOR VON KANN: Okay. And were

11 there other stream ripping services that you checked?

12 THE WITNESS: Yes. You could look at

13 Streamripper there as well, and I guess I shouldn't

14 hazard a guess as to what counsel is doing, but I

15 suspect he may be -- depending on what he finds, he

16 may be asking me a question. Yes.

17 ARBITRATOR VON KANN: So the gist of that

18 was that there was a relatively small incidence of

19 people downloading stream ripping software?

20 THE WITNESS: That's right. I basically

21 looked to see -- again, anecdotally or maybe put

22 qualitatively there is a tipping point by which a

1 particular piece of software or a service can kind of
2 enter the consciousness of the wired; of the students
3 I'm teaching, of the people that, you know, use iPAC
4 sort of thing. And to my knowledge, especially after
5 having a specific interest in this now for the past
6 several months, neither BitBop nor any of the stream
7 rippers referred to, none of these has entered that
8 kind of public consciousness. It's just not on the
9 radar of people in the way -- certainly in the way
10 that Napster or KaZaA or Morpheus or these other
11 services is.
12 ARBITRATOR VON KANN: Okay. Thank you.
13 MR. COHEN: I just have a couple of very
14 quick follow up questions to that.
15 REDIRECT EXAMINATION
16 BY MR. COHEN:
17 Q You said you searched Napster, how many
18 downloads of Napster there had been on the
19 download.com?
20 A Right.
21 Q Did you search Morpheus, KaZaA, Grokster,
22 all the other pier to pier services that you're aware

1 of?

2 A I may have, I don't recall specifically

3 their level of popularity.

4 Q Okay. And just to be clear, the numbers

5 on download.com don't tell you anything about whether

6 or how much the program that was downloaded was

7 actually used, correct?

8 A Correct. It does not tell you about the

9 usage.

10 Q So it wold be entirely possible that

11 someone might download a program, decide that they

12 hated the way the files played through its sound and

13 never use it again, correct?

14 A Correct.

15 MR. COHEN: Nothing further.

16 CHAIRMAN VAN LOON: Mr. Katz?

17 MR. KATZ: Yes, a couple of follow up if

18 the panel is completed.

19 RECROSS EXAMINATION

20 BY MR. KATZ:

21 Q First, as indicated in the exhibit that we

22 marked, the BitBop client is available also on the

1 BitBop website?

2 A Oh, yes, right.

3 Q And one might suppose that lots of people

4 would be getting it there?

5 A Exactly, that's why it's probative and not

6 scientific, just as Napster is available on the

7 Napster website.

8 Q Now, are you able to answer the panel's

9 questions about BitBop on download.com based on what

10 I've just done with my portable?

11 A Trusting the authenticity of the page I'm

12 looking at, which looks to my eye authentic, it looks

13 like there are 18,000 -- as of today now, these are,

14 you know, kind of like -- it's updated more frequently

15 than the McDonald's marque of billions and billions

16 served. It's 18,910 copies of BitBop tuner have been

17 downloaded.

18 Now, of course, to truly come to an

19 understanding of that, one might want to look at it

20 over time and, you know, how long has it been

21 available. But that's a drop in the bucket. I mean,

22 18,000 sounds like a lot of anything, but that's not--

1 when we think about download.com that not a lot of
2 downloads across the world of a given product, again
3 looking at millions for the other services we're
4 talking about.
5 ARBITRATOR VON KANN: That's 18, almost
6 19,000 downloaded from download.com?
7 THE WITNESS: Correct. Correct.
8 ARBITRATOR VON KANN: Today?
9 THE WITNESS: Correct.
10 CHAIRMAN VAN LOON: Compared to four
11 million?
12 ARBITRATOR VON KANN: Compared to four
13 million?
14 THE WITNESS: Right. And, in fact, the
15 four million figure, by the way, is from when I looked
16 at this several months ago, so perhaps -- I no longer
17 am in possession of the high tech. But one could look
18 at that and see what the most -- I mean, Napster may
19 well have fallen off since the service is basically
20 terminated, but one could be looking to get -- if
21 there was some baseline wanted, comparable figures
22 today for these other services.

1 MR. KATZ: I won't take up the panel's
2 time to do it. There's no question that these
3 services against which we've taken action, and taken
4 action for good reason, are extremely popular,
5 extremely dangerous, extremely evil. And many, myself
6 included, are devoting substantial resources to trying
7 to shut these things down.
8 ARBITRATOR VON KANN: And make Louis Mayer
9 look like a saint.
10 MR. KATZ: Yes, if opposing counsel wants
11 to assist us in this effort or the witness --
12 CHAIRMAN VAN LOON: Anything further, Mr.
13 Cohen?
14 MR. COHEN: No.
15 CHAIRMAN VAN LOON: Anything further from
16 the panel?
17 Then my understanding is that we would
18 have a resumption of Dr. Seltzer at 11:30.
19 ARBITRATOR VON KANN: Unless he comes in
20 early.
21 CHAIRMAN VAN LOON: Unless he comes
22 earlier.

1 So --

2 MR. STEINTHAL: That's the game plan as I

3 understood it.

4 ARBITRATOR VON KANN: Okay. And then Dr.

5 Jaffe -- and what order of magnitude are we guessing

6 right now or estimating for Dr. Seltzer?

7 MR. STEINTHAL: I think Mr. Jacoby's

8 estimate was 45 minutes or so, as I recall.

9 ARBITRATOR VON KANN: So hopefully finish

10 Seltzer by 12:30 and break for lunch.

11 MR. STEINTHAL: Yes, I think sort of the

12 plan is that Seltzer will be done by 12:30, we take

13 our lunch break and Dr. Jaffe right on after lunch.

14 CHAIRMAN VAN LOON: Professor Zittrain,

15 once again, thank you for making the trip down with

16 your research assistant.

17 (Whereupon, the witness was excused.)

18 CHAIRMAN VAN LOON: We'll stand adjourned

19 then until 11:30, although if people are near here and

20 Mr. Seltzer were to arrive ten minutes earlier, we

21 might as well get rolling.

22 (Whereupon, at 10:57 a.m. until 11:26

1 a.m.)

2 Whereupon,

3 RICHARD SELTZER

4 was recalled as a witness by Counsel, and having been

5 previously sworn, resumed the witness stand and was

6 examined and testified as follows:

7 CHAIRMAN VAN LOON: Good morning, Mr.

8 Seltzer. Thank you very much for coming back and

9 cutting somewhat short your time with your students

10 this morning to continue this examination.

11 Mr. Jacoby?

12 CROSS EXAMINATION

13 BY MR. JACOBY:

14 Q And I thank you for coming back as well,

15 and I am Mark Jacoby with the firm of Weil Gotshal &

16 Manges and we represent a number of the broadcasters

17 and webcasters participating in this proceeding.

18 I am going to focus for the most part on

19 your critique of Mr. Fine's analysis.

20 I take it, first of all, from your CV that

21 you consider yourself more of a social scientist than

22 statistician, is that a fair statement?

1 A I teach statistics in the social sciences.
2 Q Pardon me?
3 A I teach statistics in the social sciences.
4 Q I understand that, but you would consider
5 yourself more a social scientists than a statistician?
6 A I'm a -- yes.
7 Q And judging from the focus of your
8 writings they seem to be in rather serious social
9 areas, such as racial profiling, Islamic
10 fundamentalism, death penalties rather than the light
11 hearted fair that we're dealing with here such as what
12 influences people to buy music, is that correct?
13 ARBITRATOR VON KANN: I thought this was
14 a life or death struggle we were in.
15 BY MR. JACOBY:
16 Q But I understand you do have some
17 experience in the music industry in that you have been
18 a consultant to the Alliance for Artists and Recording
19 Companies in connection with the development of a
20 database that they're using for distribution of
21 royalties, is that correct?
22 A That is correct.

1 Q And how long have you been a consultant
2 for the Alliance?
3 A I think approximately four years.
4 Q Okay. And that continues to the present?
5 A It does.
6 Q And I gather that you obtained access to
7 the Soundscan database for some of the studies you
8 presented in your rebuttal testimony here from
9 accessing it through the Alliance?
10 A That is correct.
11 Q And from your work with the Alliance
12 you're familiar with Soundscan data, the Sounddata
13 data and the BDS data that Mr. Fine uses in his
14 analysis?
15 A I am not.
16 Q Okay.
17 A I am not familiar with the Sounddata nor
18 the BDS data from my relationship with AARC.
19 Q Okay. It's only the Soundscan data that
20 you were working with there, is that correct?
21 A That is correct.
22 Q All right. You represented, however, with

1 -- well withdrawn.

2 When were you first consulted about giving

3 -- possibly giving expert testimony in this

4 proceeding?

5 A I don't remember the exact date, but I

6 think it was approximately two months ago.

7 Q Okay. And you were provided with a copy

8 of Mr. Fine's full written testimony on direct

9 examination, on the direct phase of this case?

10 A Yes, I believe I was.

11 Q The April testimony?

12 A His written testimony?

13 Q Yes.

14 A Yes, I was.

15 Q Okay. And you were furnished with the

16 underlying data and work papers as well that

17 accomplished that report or that were produced in this

18 proceeding as underlying data?

19 A Yes, I believe I was.

20 Q Okay. And at the Alliance you had

21 access to a complete Soundscan database?

22 A No, I did not.

1 Q Okay. What was the database that you had
2 access to there?
3 A They send yearly summaries of title sales.
4 So we have data, for example, for 1986 and 1987 and
5 1988. It's the one dataset, you know, for the year.
6 So we have just the totals for the year. So we don't
7 have it by the month or by the day, or whatever. It's
8 simply the totals by title for the year.
9 Q Okay. All right. Let me turn to section
10 B1 of your written testimony, beginning on page 10.
11 And as I understand it in this section of your
12 testimony you raise a question whether Mr. Fine's
13 analysis comparing a ratio of pre-released detects to
14 total year detects with the ratio of first week sales
15 and total sales, whether that was a false or spurious
16 correlation; that's what you're undertaking to look
17 at, is that correct?
18 A I'm tempting to examine whether or not the
19 correlation size that he has, the .70, whether that is
20 significantly or substantially reduced or eliminated
21 once you control for other variables.
22 Q Okay. Well, you discuss this concept of

1 spurious and false correlations and you're questioning
2 whether or not this is a false or spurious
3 correlation, isn't that right?
4 A Yes.
5 Q Okay. And, in fact, after you did your own
6 partial correlation analysis to attempt to account for
7 a control variable that you defined, you found that
8 the correlation between the pre-detect, pre-release
9 detect ratio and the first week sales ratio came out
10 to .46, is that correct?
11 A That is correct.
12 Q And you would agree that .46, though it's
13 lower than the correlation that Mr. Fine found without
14 the control variable that you used, is still a
15 significant correlation?
16 A It was statistically significant or it was
17 -- yes, it was a substantial correlation.
18 Q It's a substantial correlation and a
19 statistical significant correlation, is that what you
20 say?
21 A It was a statistically significant
22 correlation, and I might add by the way that the

1 significance may not -- was not necessarily
2 appropriate in that situation.
3 Q I'm sorry, I didn't hear you.
4 A The test of significance was not
5 necessarily appropriately used in that situation, but
6 it was statistically significant given the formula.
7 It was much smaller than the .70, whether you consider
8 .46 to be substantial is a matter of interpretation.
9 Q Okay. But you would agree as a matter of
10 interpretation that .46 is a significant correlation,
11 wouldn't you?
12 A I would not -- no, a significance is a
13 term of art that we use for whether or not the sample
14 relates to the population.
15 Q Let me ask the question this way then.
16 You would agree, putting aside the statistical
17 significance question, you would agree that that
18 represents what statisticians would call an important
19 correlation, a level .46, correct?
20 A It depends upon the kind of data you're
21 examining, but okay I'll accept that.
22 Q All right.

1 A Sometimes social scientists a .9 could be
2 considered low depending upon what you're examining.
3 So it's not always easy to interpret exactly what that
4 correlation coefficient implies.
5 Q Right. But in this case you wouldn't
6 reach a conclusion that this was not important?
7 A I would not say it's not important, no.
8 Q Okay. And, in fact, you -- in your work
9 papers found on the statistical significance issue
10 that it was statistically significant at a very high
11 level, 99.9 if we convert the P value, isn't that
12 right?
13 A That is correct, although as I stated
14 before, whether it's tested significance is
15 appropriate here, is an issue.
16 Q Okay. But in fact you didn't -- you
17 yourself refer to statistical significance levels in
18 your own analyses, isn't that right, on page 14?
19 There a couple of places in which you make reference
20 to the fact that certain correlations that you ran
21 turned out to be no longer statistically significant.
22 And I note you footnoted that issue of the question

1 you've referred to, the statistical question you've
2 referred to in your testimony is footnoted here in
3 footnote 18, correct?
4 A That is correct.
5 Q Okay.
6 A This controversy here, I'm just trying to
7 be honest.
8 Q Okay.
9 A There's a controversy among statisticians
10 on the concept of whether statistical significance
11 should be used when you already basically have the
12 population.
13 Statistical significance tells you whether
14 -- if you have the sample, how does that sample relate
15 to the population. We don't have a sample here.
16 There's no random sample. You simply have the top 54
17 album sales. And some statisticians say okay, test
18 significance tells us something, others say it's
19 inappropriate here. And it goes back and forth on
20 that -- there's a substantial debate about that issue
21 among statisticians.
22 Q And you, nonetheless, called attention to

1 the statistical significance when you found that it
2 was not statistically significant, but when you found
3 it was statistically significant, you didn't mention
4 it in your written testimony?
5 A Well, I think by having it in footnote 18
6 I'm implying there's simply a debate about this issue
7 and although I report the statistical significance
8 because it's almost expected, I have my own doubts
9 about its validity and reliability.
10 Q I understand there are matters of
11 controversy about this according to your testimony.
12 But the nonetheless, you reported it when it was not
13 statistically significant in your testimony, but you
14 failed to report it in the written testimony when you
15 found it was statistically significant, is that
16 correct?
17 A In my written testimony there are exhibits
18 and there are test significance associated with every
19 correlation that's in there, as I believe.
20 Q No, that's in the -- yes, that's in the
21 work papers that we were provided, but that's not in
22 the -- that's not in your report or any exhibit to

1 your report, isn't that right?

2 A Well, it is provided in the working

3 papers. And given the extent to which there's any

4 validity to the test of significance, I at least

5 mention it to begin with and then point to the

6 controversy.

7 Q Okay.

8 ARBITRATOR VON KANN: Can I ask a question

9 about correlation factor, make sure I understand?

10 MR. JACOBY: Yes.

11 ARBITRATOR VON KANN: Am I right that what

12 you're doing in that exercise is seeing the extent to

13 which two -- I guess maybe you could do it more than

14 two -- but anyway, two different groups of things

15 correlate. And if there's perfect correlation, it's

16 1.0. And I guess if they correlate half the time,

17 it's .5, is that right?

18 THE WITNESS: Can I use the board as an

19 illustration?

20 ARBITRATOR VON KANN: Sure.

21 THE WITNESS: Let's say I'm looking at the

22 relationship between education and income. Most

1 students, hopefully, are going to -- they presume by
2 going to school more often, their income will increase
3 over their lifetime. And let's say I survey 20
4 people. And the 20 people falls in a pattern like
5 this.
6 This is going to be a correlation of about
7 1.0. It's perfect. It falls exactly on a free
8 radical line that I can draw.
9 I'm going to draw several of these.
10 Let's say I have data looking like this.
11 It's random, but close to. This might be 0.0.
12 Let's say I have data looking like this.
13 This is inverse and there's the independent -- let's
14 say you're talking about the number of days you're
15 unemployed and your income. As the number of days
16 unemployed increases, your income should decrease. So
17 this might be -- it's a fairly strong relationship
18 that comes pretty close to theoretical line, this
19 might be negative 0.80.
20 And finally, this is the relationship,
21 this one's inverse. It's strong, weak, it's in there
22 somewhere. This might be negative 0.50

1 So the correlation measured sort of like
2 an index how close your data points cluster around
3 this line. If they fall exactly on the line it's 1.0.
4 It is no relationship to any line, it's close to zero.
5 And you have values in between.
6 Sometimes the values in between are curved
7 because virtue of randomness. I once did a set of
8 random correlations with random numbers to see what
9 happened. When I was first teaching, you may remember
10 the old ideas of funny money where computer time was
11 very, very valuable. And I had to expend the funny
12 money for my class so we'd get more money -- the same
13 amount the next year.
14 So I just started telling the computer
15 random sets of numbers -- with other sets of random
16 numbers. And, in fact, the correlations range up to
17 .40 with random numbers.
18 So, you know, it's unclear always how to
19 interpret the correlation that's sort of in the
20 middle, because they sometimes do occur, you know,
21 with numbers of that magnitude.
22 ARBITRATOR VON KANN: Okay. Thank you.

1 BY MR. JACOBY:

2 Q Let's, if we will, put a depiction on the
3 board of something that looks more like -- well, in
4 fact we find in the case of .46. And that would be
5 fair to say that at least pictorially, forgive me for
6 there's no accuracy to the placement of the dots, but
7 pictorially what we'd see in a correlation of .46 is
8 some array that looks like this between our
9 independent variable and our dependent variable,
10 correct?

11 A The points are probably spread out a bit
12 more than you have, but yes.

13 Q Absolutely. Okay. And just to be clear
14 about it, the question among statisticians as to
15 whether or not it's appropriate to use the statistical
16 significance in this particular case revolves around
17 the fact that this set of observations that are in the
18 data were themselves not selected by random, but in
19 fact were the top 54 albums of the year, correct?

20 A That is correct.

21 Q However, the statistical significance
22 measurement that you mad is a measurement that is an

1 assessment of how likely is it that this array that
2 seems to fall along a particular pattern was the
3 result of chance?
4 A You've done very well in your statistics
5 class.
6 Q Thank you very much.
7 A There in fact is, if I may --
8 Q Yes.
9 A Again, the debate is as follows, and
10 there's not a right or wrong answer to this; if you
11 already have the population, and you don't really have
12 the population. That's another issue which I'm happy
13 to discuss. But you don't have the population. But
14 if you assume you have the population, the top 54,
15 then what you can -- some statisticians will say the
16 test of significance is inappropriate because you're
17 not relating a sample to a population. Others say
18 they will still tell you, well could the results have
19 occurred by chance. And it's a debate we'll probably
20 occur for the lifetime of the industry.
21 Q In any event it is a measure in this case
22 of the extent to which those particular observations

1 that we are working here, those 54 are the result of
2 chance. And in this case the .46 if we have a P of
3 .001, means that as a statistical matter applying the
4 two-tailed significance test, the outcome is 99.9
5 percent certain that it did not occur by chance?
6 A No.
7 Q No?
8 A No. Actually, not quite.
9 Q Please.
10 A What it's telling you, there's a range in
11 which the correlation can occur. And let's say your
12 P value, we call that a P value, and let's say it's
13 .01 as you're saying or something along those lines.
14 What you're saying there's only a one percent of
15 probability that that correlation could be flat or
16 negative. That's what it's theoretically stating.
17 There's a one percent of probability that it could be
18 completely flat or the reserve direction. That's what
19 .01 represents, which means it could in fact be
20 higher, lower, or sort of in the middle. There's a
21 range of the correlation.
22 But, you know, relatively we know that

1 it's not going to be zero, at least we assume it's not
2 going to be zero if it's .01 and unlikely to be
3 negative.
4 Q Do I get an A or an A minus?
5 A You actually have done very well. You
6 could do very well in my multi --
7 ARBITRATOR VON KANN: This would be a good
8 time to quit?
9 MR. JACOBY: And don't think I didn't --
10 didn't occur to me. I have to take the full examine
11 on this. I can't only answer the first section.
12 Okay.
13 BY MR. JACOBY:
14 Q Now, in your partial correlation analysis,
15 you are attempting then to control for a potential,
16 what you call confounding variable which you defined
17 as artist popularity, is that right?
18 A That is correct.
19 Q But in fact what you use for the purpose
20 of this control as your proxy for artist popularity
21 was '99 sales data for the artists within this
22 population of 54 artists, correct?

1 A That is correct.

2 Q And I guess the first question I have

3 would be did you make any studies or analysis to

4 determine whether or not '99 sales data for these

5 artists was a reliable proxy for artist popularity?

6 A Whether or not sales data is -- adequately

7 represents popularity is -- I'm not able to

8 necessarily answer that. In my opinion it was a good

9 value. It was a good way of trying to measure to

10 indicate level of popularity the artist had in the

11 previous years.

12 Q Based on what?

13 A Common sense, if nothing else.

14 Q Okay.

15 A We call that face validity.

16 Q All right. Let's take a look at that.

17 MR. JACOBY: I'd like to have a few

18 documents -- I'd like to provide you with a copy of

19 Services Rebuttal Exhibit 4, which corresponds to RSEL

20 Exhibit 1, and that I believe is -- these are the work

21 papers that were turned over to us representing the

22 correlation coefficient calculations and statistical

1 significance calculations.

2 MR. SCHECHTER: Just to make the record

3 clear, these were produced and they're not an exhibit,

4 they artists -- the Bates number was 0014003.

5 MR. JACOBY: Yes.

6 MR. SCHECHTER: They were produced in

7 discovery.

8 MR. JACOBY: Yes.

9 MR. SCHECHTER: You said they were an

10 exhibit. You said that they are Exhibit 1.

11 MR. JACOBY: No, I'm sorry. I thought I

12 said Service Rebuttal Exhibit --

13 MR. SCHECHTER: And then I believe you

14 said --

15 MR. JACOBY: Okay. I'm sorry. In any

16 event the RSEL number if the production number.

17 MR. SCHECHTER: Bingo.

18 MR. JACOBY: The Exhibit is Service

19 Rebuttal Exhibit 4.

20 (Whereupon, the document was

21 marked as Service Rebuttal

22 Exhibit 4 for identification.)

1 MR. JACOBY: And Service Rebuttal Exhibit
2 5 is a document that corresponds a document that was
3 produced as RSEL 71, I believe. And this is, in
4 effect, a list of variables and computations.
5 (Whereupon, the document was
6 marked as Service Rebuttal
7 Exhibit 5 for identification.)
8 MR. JACOBY: And let's have it all out at
9 one time. Service Rebuttal Exhibit 6 corresponds to
10 documents produced as RSEL 75 through 100, which is a
11 printout of the 1999 sales data to which the witness
12 has referred. I trust we'll find out when we get a
13 chance to ask him.
14 (Whereupon, the document was
15 marked as Service Rebuttal
16 Exhibit 6 for identification.)
17 MR. JACOBY: And lastly, Service Rebuttal
18 Exhibit 7, which corresponds to RSEL 73/74. It does
19 not have the legend on it of the RSEL number because
20 we printed it out from the computer on one page.
21 Verify that.
22 (Whereupon, the document was

1 marked as Service Rebuttal
2 Exhibit 7 for identification.)
3 ARBITRATOR VON KANN: Who was the witness
4 that referred to a font that was so small that I
5 didn't know that you could actually have a font that
6 size? You're approaching that.
7 MR. JACOBY: Well, I have the same problem
8 and I was able to do it.
9 ARBITRATOR VON KANN: Okay.
10 MR. JACOBY: Be grateful for the fact that
11 we are in a better lite room here than at the
12 Copyright Office.
13 BY MR. JACOBY:
14 Q So, first of all, just to identify these
15 documents for the record, Dr. Seltzer, am I correct
16 that Service Exhibit 4 is, if you will, work papers
17 that show the computations or the results of the
18 computations made in the various tabulations and
19 correlations that you ran for purposes of your
20 testimony?
21 A That is correct.
22 Q Okay. And Service Exhibit 5 will give us

1 the list of variables and the in effect defining the
2 terms as well as the computation formulas that appear
3 both on Service Exhibit 4 in your work papers and will
4 also define the variable list on Service Exhibit 7,
5 correct?
6 A That is correct.
7 Q So that, for example, from Exhibit 5 it
8 says variable 3 is sales 2000 Fine -- that's the sales
9 data for the 54 albums that will correspond with the
10 data, the sales data found on Mr. Fine's amended
11 Exhibit 2?
12 A That is correct.
13 Q And variable 6 is the detects pre-release
14 amended, so that would be raw numbers of the six weeks
15 of detects that corresponds with Mr. Fine's exhibit 2?
16 A That is correct.
17 Q Okay. And so on. I think we'll look at
18 some of them when we get to ask some questions, but if
19 one wants to know what the variables are on Exhibit 7,
20 you can get them off Exhibit 5 and for convenience,
21 even write them in above the variables so you don't
22 have to remember it.

1 And let's just look at one right now.
2 This variable 16, if I understand it correctly from
3 the list, is artist sales 1999, correct?
4 A That is correct.
5 Q And if we go across, in fact, you
6 apparently had data variable 17 is '98 sales?
7 Variable 19 -- 18 is '97 sales, 19 is '97 sales and 20
8 is '95 sales, correct?
9 A That is correct.
10 Q So you actually had -- you have five
11 preceding year sales?
12 A That is correct.
13 Q All right. And then if we look at Exhibit
14 75 -- I'm sorry, Service Rebuttal Exhibit 6, which is
15 the 25 page document, this prints out the '99 sales
16 for each of the artists who had '99 sales among the 54
17 and prints them out by album, correct?
18 A That is correct.
19 Q All right. So let's just examine this
20 proxy of '99 sales data. The '99 sales data, again,
21 is variable 16, correct?
22 A That is correct.

1 Q On Rebuttal Exhibit 7?

2 A That is correct.

3 Q And if we go, let's say, four lines down,

4 the fourth entry is the Beatles?

5 A I'm sorry, which --

6 Q I'm on Service Rebuttal Exhibit 7, I'm on

7 your big chart. And I'm looking at -- the panel may

8 wish to make a note as well, but it's variable 16

9 we're focusing on, and that's the 1999 sales. You may

10 want to make a note, as I did. Keep track of it

11 later.

12 CHAIRMAN VAN LOON: 2,547,000?

13 MR. JACOBY: You got it.

14 BY MR. JACOBY:

15 Q So that is the number that you used as the

16 control variable representing the Beatles popularity,

17 is that right?

18 A That is correct.

19 Q And if we go down four lines from that,

20 you've got the Backstreet Boys -- I'm sorry, three

21 lines down from that. Two lines down from that.

22 Right?

1 A Two.

2 Q Two lines down, this is the Backstreet

3 Boys? And so the variable you used in your analysis,

4 the proxy for artist popularity for the Backstreet

5 Boys is 13 million, right?

6 A That is correct.

7 Q Which I suppose would suggest that at

8 least in terms of how your data plays out, the

9 assumption here is that if we're using this data as a

10 proxy for artist popularity, that the Backstreet Boys

11 are, I guess, more than six times as popular as the

12 Beatles, is that right?

13 A In that year they would -- it had been

14 measured as being six times more popular among

15 consumers.

16 Q But as a layperson, as you describe

17 yourself, you wouldn't regard the Backstreet Boys are

18 being six times as popular as the Beatles, would you?

19 A True story. Last year I had my son listen

20 to the Beatles, he never heard them before, didn't

21 know who they were.

22 Q Yes.

1 A Many of the music consumers are simply not
2 listening to Beatles.
3 Q That's not my question.
4 MR. SCHECHTER: Well, I think that's
5 responsive.
6 MR. JACOBY: It's not my question.
7 BY MR. JACOBY:
8 Q I was asking you. I wasn't asking -- your
9 son is not under oath. He's not here to answer
10 questions, you didn't bring him here. RIAA -- we've
11 had a number of -- we've had a number of --
12 MR. SCHECHTER: Excuse me.
13 BY MR. JACOBY:
14 Q I'm just asking, we've had a number of
15 shadow witnesses. I would like to know your opinion.
16 A My opinion of the popularity of the
17 Beatles versus the Backstreet Boys?
18 Q Yes.
19 A I've never seen the Backstreet Boys, so I
20 can't comment. I happen to prefer the Beatles. As
21 far as what everybody else believes, I'd have no way
22 of judging that.

1 Q Okay.

2 A I do not have any poll data on asking
3 people if they'd take the Backstreet Boys versus the
4 Beatles. All I have is the data we have in front of
5 us.

6 Q Right. And in fact, you made no studies,
7 as you testified to, otherwise to access whether this
8 was a reliable proxy for what you described as artist
9 popularity, right?

10 A It's a fairly standard practice to look at
11 the sales of a commodity, in this case I think to
12 determine whether or not that person -- there's people
13 prefer or favor a commodity because they're purchasing
14 it.

15 Q Okay. Well, let me ask you this, if you
16 had used five years worth of data rather than one
17 year, 1999 data, you would have found, and I've done
18 the math in my head but I'm sure you will be able to
19 correct me if I'm wrong, but it would appear that if
20 you had taken five years data for this purpose then
21 both the Backstreet Boys and the Beatles would come
22 out in the range of approximately 20 to 22 million.

1 So the number representing the popularity would have
2 been much more comparable, correct?
3 A If you took a five year average, yes.
4 Q Okay. And --
5 A There, in fact, as you're suggesting many
6 ways of measuring variables. There are probably a
7 dozen we could have come up with this context.
8 Q That's right. And --
9 A And the reason for not going back -- I did
10 go back to previous years, as you do see in the
11 partial correlation here. The results are relative
12 similar to what we see in the first year. And as you
13 go back further and further, you end up having much
14 smaller sample sizes because the groups are not --
15 they were not -- of the 54 there are newer and newer
16 groups. I did go back and the numbers simply didn't
17 make --
18 Q I'm --
19 MR. SCHECHTER: Let him finish. Are you
20 done.
21 BY MR. JACOBY:
22 Q I'm sorry. I didn't understand what you

1 meant by sample size there.

2 A As you go back further and further in

3 years the -- it's unclear necessarily as well as what

4 it's measuring. You doing any analysis, we call

5 triangulate. You do as many different approaches to

6 the topic as you can think of, perhaps. And --

7 ARBITRATOR VON KANN: The more you go over

8 the right, the more --

9 THE WITNESS: Yes. They're not there.

10 ARBITRATOR VON KANN: N'Sync wasn't

11 selling any records in '97, 6 and 5, I guess. Is that

12 the idea?

13 THE WITNESS: Yes. Presumably counsel

14 here is talking about what we would call a latent

15 structural understanding of popularity, you'd have to

16 look at it over 2 years, 4 years or 5 years, or 10

17 years, or whatever it may be. But in using control

18 variable, it doesn't matter if it's one year or five

19 years or ten years if you find that in fact that it's

20 explaining those differences, that's what's important.

21 BY MR. JACOBY:

22 Q Okay. Did Mr. Fine anywhere in his

1 testimony suggest that artist popularity is not a
2 factor in album sales?
3 A He didn't discuss it. He did not. I'm
4 sorry, go ahead.
5 Q He didn't discuss it? Is that your
6 testimony, he didn't discuss that question in his
7 testimony?
8 A In his written testimony I don't remember
9 -- I don't believe he discussed it. I may be wrong
10 about that. Clearly in his rebuttal testimony he did.
11 Q We'll let the totality of the testimony
12 speak for itself.
13 Let me ask you this, in terms of using a
14 control variable isn't there some importance as to the
15 impact the control variable would have if using one
16 set of data you find that you would find that the
17 Backstreet Boys was six times as popular as the
18 Beatles and using another set of data you'd find that
19 they're roughly comparable in popularity?
20 A Then you would perhaps have two different
21 ways of measuring popularity. And I'm sorry, I don't
22 understand your point.

1 Q And if you use the different method of
2 measuring, you'd have widely differing numbers being
3 used as your control variable, correct?
4 A When you do that, and I'd like to draw
5 your attention to it, you gave me this Exhibit 4. We
6 have the partial correlation between variable 4 and 6
7 here. And variable 4 being the sales in the first
8 week and variable 6 being the detect, the pre-release
9 amended, and that correlation is .21. And, by the
10 way, it's not such a significant.
11 If I do the addition of two years
12 together, '99 and '98, in fact the correlation drops
13 to zero. You know, you run it. You see that there's
14 no real differences between the two techniques and
15 you--
16 Q The correlation drops to zero? Where do
17 you find that conclusion in your testimony?
18 A Okay. If you go -- pardon me. I'm
19 looking at the exhibit here
20 Q What exhibit? Which exhibit?
21 A Exhibit 4. At the bottom of the page.
22 Q Why don't you identify the page and what--

1 A Okay. The bottom of the page 1 of Exhibit
2 4 you see VAR4 and VAR6, the correlation. VAR4 being
3 in the sales in the first week, VAR6 is being the
4 detects pre-release amended.
5 Q Well, wait a minute. That's raw data
6 now. That's not the analysis we're talking about at
7 this point.
8 A But I'm partially -- you'll see a
9 controlling 4 previous sales 2 toward the top of that.
10 You'll see where it says controlling 4 --
11 Q Yes --
12 MR. SCHECHTER: Let him answer the
13 question.
14 THE WITNESS: PREVSAL2 is the combination
15 of two years of data, 1999 and 1998.
16 BY MR. JACOBY:
17 Q Yes.
18 A So when you control for the two years of
19 data, in fact, the correlation in fact becomes even
20 smaller.
21 Q Would you draw any conclusion whatsoever
22 as to the change -- as to the change in the

1 correlation between .46 and .448? As a statistician
2 would you say that there's anything that can be -- any
3 conclusion that could be drawn by the difference
4 between those two numbers?
5 MR. SCHECHTER: Objection. Which numbers
6 are you referring to now, please? He was referring to
7 the chart at the bottom of RSEL 001 and Exhibit 4.
8 And I'm not sure which ones you're referring to.
9 MR. JACOBY: Okay. That's a good point.
10 BY MR. JACOBY:
11 Q In fact, let's go to the chart that
12 corresponds to, I think the analysis that you do in .1
13 -- in section 1 of your written report.
14 CHAIRMAN VAN LOON: I am sorry, Mr.
15 Jacoby, I'm confused about what you're referring to.
16 MR. JACOBY: I'm going to make it clear.
17 CHAIRMAN VAN LOON: Thank you.
18 MR. JACOBY: I'm going to make it clear.
19 BY MR. JACOBY:
20 Q The .46, okay, that you discussed here on
21 page 11?
22 A Yes.

1 Q All right?

2 A Yes.

3 Q That would be found on page 2 of Exhibit

4 4, correct, in the first section marked partial

5 correlation coefficients controlling for PREVSAL1.

6 A That is correct.

7 Q In the upper right hand quadrant of that

8 .4621, is that right?

9 A That is correct.

10 Q That is the BDSPERA represents the ratio

11 that Mr. Fine was analyzing on the detect side,

12 correct?

13 A That is correct.

14 Q And SSPER is the first week sales to total

15 sales that was also a part of his analysis?

16 A That is correct.

17 Q Okay. And there it comes up with .4621,

18 correct?

19 A That is correct.

20 Q Now, you did run one other analysis,

21 control analysis using two years of data, right?

22 A That is correct.

1 Q And that's in the next quadrant or the
2 next section just below partial correlation
3 coefficients controlling for PREVSAL2, is that right?
4 A That is correct.
5 Q And there it would be, again, the same,
6 it's either the upper right or the lower left
7 quadrant, and it's only a question of whether you
8 reverse the variables, right? And the number is
9 .4489?
10 A That is correct.
11 Q Okay.
12 A They're essentially the same, depending
13 upon which variable -- which control variable you're
14 using, you get the same result.
15 Q Okay. Did you run it all the way for five
16 years to see --
17 A I did not.
18 Q Okay.
19 A Actually, I did run it for a third year,
20 and it's not here. But I did run it for a third year.
21 The results were the same, at which point I didn't
22 need to go any further.

1 Q So you ran it another way and didn't
2 provide the underlying work papers for it?
3 A There are many, many correlations that
4 were run that I do not provide the work papers for it.
5 If I may continue. There's hundreds -- not hundreds,
6 there are many, many different assumptions you can
7 make about the nature of the data.
8 How you characterize some of these groups,
9 and so forth, and you run them different ways giving
10 the different assumptions. You're trying to be as
11 honest as you can.
12 What happens with, for example, with Mr.--
13 this came up I believe yesterday. Mr. -- it was noted
14 that I did not control for -- well, we had B.b. King
15 and Eric Clapton down in zero sales. And in fact,
16 collectively as a group they had zero sales and I
17 simply used the AARC process of how they define groups
18 to run it through. But I also ran it through another
19 way, which was in fact including them. But that's not
20 included as a work paper. You just run many, many of
21 these and there's just not --
22 Q And you didn't look at that and --

1 A I did.

2 Q -- make a judgment based on that that you

3 could do it without it, is that what you're saying?

4 A I looked at that. I said -- many

5 different ways of examining it and some of them you

6 look at and you say did it substantially change the

7 results? The answer is no.

8 Q But you didn't produce any of those other

9 correlations that you looked at, considered and then

10 decided --

11 A I did not.

12 Q -- that you would use another one?

13 A I used the ones I started with. It seemed

14 to me the most obvious.

15 Q But you considered the other ones in

16 making the decision, is that correct?

17 A You're looking at this and saying could I

18 be making a mistake somewhere? How can I be making a

19 mistake? Let's try different assumptions around the

20 mistake, and you run through sometimes a different

21 scenario.

22 For example, the B.B. King issue and Eric

1 Clapton issue, how do you account for the fact that
2 there are two artists in there when you're trying to
3 even adjust for that assumption? You take the total
4 sales of the two artists and put that in, well that
5 over inflates it. Or how much I put -- so you -- what
6 I also did, I took the -- added the two together and
7 divided by two to come with an average. So there's
8 lots of ways you can try to do some of these
9 assumptions and you try different techniques to try to
10 work around it, given the limited time you have to
11 deal with some of these decisions, by the way, and the
12 availability of data. And the results are relatively
13 the same and comparable. You know, there's no need,
14 at least from my perspective, to bore you -- there's
15 enough footnotes in this report that are statistically
16 jargon already to go through the hundreds of different
17 or the many, many dozens -- the many -- the many
18 different permutations that you could potentially go
19 for, it becomes unworkable.
20 ARBITRATOR VON KANN: When you say you ran
21 some different, does that mean on a computer? You sat
22 at a computer and played with different variables and

1 things appeared on a screen or something?

2 THE WITNESS: Yes. You know, for example,

3 we're looking -- going to Exhibit 7 where we have

4 Clapton and King riding with the King.

5 CHAIRMAN VAN LOON: 1.6 million in sales.

6 THE WITNESS: Okay. And under variable 16

7 you see it says null, which it's zero. Then I go tell

8 the computer well assume it's not zero, assume it's

9 the number of their sales in 1999 for Eric Clapton

10 plus B.B. King, put that number in and then run the

11 analyses again. And then I say, okay, let's also take

12 that sum number but divide it by 2 this time, just to

13 make sure I'm not overinflating because I'm adding two

14 artists together, run the same analyses and see what

15 happens.

16 And, you know, within a point or two

17 they're the same results. You've tested your basic

18 assumption, there's no need to necessarily go further.

19 Or you can go further if it looks like there's an

20 issue, but if there wasn't an issue, you basically

21 stop and move on to your next issue that you can think

22 of.

1 And, again, the way I try to approach
2 analyses, there are many issues that face that
3 statisticians and survey researchers about problems
4 with statistics, about problems with surveys, problems
5 with question phraseology, question order and so on
6 and so forth that are real. These are serious debates
7 that occur. They get completely glossed over when
8 it's presented to laypeople, for the most part.
9 And what I try to do in my own writing and
10 to my students is here's the traditional approach, and
11 then to my students here are the problems. I don't
12 want to present as being the end all and be all. So
13 I'm trying to be, you know, as critical as I can of my
14 own results, perhaps. And you run it in different
15 ways and see if perhaps you made a mistake. And there
16 could be mistakes here, clearly, but you're trying to
17 -- there are many, many ways of trying to analyze the
18 same data, which sometimes do in fact give different
19 results.
20 Counsel talked about one -- he mentioned
21 two-tailed tests. There's a tremendous debate about
22 one-tail versus two-tailed tests, which I will not

1 bore you with in these proceedings. You can say thank
2 you very much. But, you know, I've been in court
3 proceedings where that becomes a major debate and you
4 have two statisticians fighting it out, one-tail
5 versus two tail. There are these debates which do
6 occur which are in fact real. And sometimes the
7 answers are not always apparent what that implies.
8 Here it is, depending on which scenario I
9 use, I came up with the same -- essentially the same
10 results.
11 BY MR. JACOBY
12 Q Let's take a look at Rebuttal Exhibit 6
13 for a moment. Now, and let's just take the first
14 entry which is an artist called 98 Degrees, correct?
15 A That is correct.
16 Q Now, Mr. Fine's data on album sales
17 excluded sound tracks and compilations, isn't that
18 right?
19 A That is correct, but not all the time, by
20 the way.
21 Q In your data you included it, is that
22 right?

1 A Pardon me?

2 Q In your data you included sound tracks?

3 A Well, that came from the Soundscan

4 datasets for 1999. '99 I did in fact include them,

5 yes.

6 Q You included them?

7 A Yes.

8 Q And was there a reason you included them?

9 A That's the way the AARC defines it. I

10 decided just to keep with their methodology.

11 Q You couldn't eliminate that data?

12 A It would have been very difficult to

13 eliminate. It's not apparent in Soundscan data that

14 I get whether or not it's in fact a compilation or

15 best of -- it's not always apparent. You might know

16 to the 54 that Mr. Fine starts with, you know, he

17 supposedly does not include "best of," but then you

18 have the "Best of the Beatles" there. So -- and he

19 has access to that data, and there are four or five,

20 by the way, like the "Best of Tim McGraw" that he

21 excluded but then he includes the Beatles.

22 So there's -- you know, there's issues

1 about how you define what's best of, what's a sound
2 track and so on. I don't have that information. I'm
3 doing the best I can. I'm simply using in the AARC
4 definition since I don't have firsthand knowledge of
5 it.
6 Q Was there a limit on the data you were
7 permitted to look at?
8 A I was given the right to look on line on
9 the Soundscan data. They apparently have an online
10 system which I was able to look at as well.
11 Q Did I RIAA say this is a low budget
12 litigation. If you think there's some data that you
13 need to do a better analysis, we just can't afford to
14 go out and get it for you?
15 A Oh, we were at one point -- not we, but at
16 one point it was -- we were told that we could analyze
17 the entire RIAA -- excuse me. The entire Soundscan
18 database coming across at many, many different data
19 tapes. Or perhaps that was the BDS database. I
20 forget which. It would have taken months of doing
21 nothing but analyze that data to come up with numbers.
22 And there is of course some level which

1 you say you can't do it.

2 Q It would have taken months for you to use-

3 -

4 A The BDS data?

5 Q -- the BDS data?

6 A Yes, absolutely. The way it was described

7 to us is it's on mountains of -- it's on dozens of

8 different data tapes. You want the raw data, it's

9 going to be -- you know, it's going to be extremely

10 difficult to get it to you and it's clear that given--

11 it was something that I did not have the time to

12 analyze, and I don't that RIAA had the budget to pay

13 me to analyze.

14 Q You are aware that you just simply go to

15 BDS and tell them what kind of data set you want, and

16 they'll sell it to you?

17 A I had no familiarity with BDS.

18 Q You don't? So you're familiar with

19 Soundscan?

20 A I'm familiar with Soundscan because --

21 Q They're in business, right, to sell data?

22 A Pardon me?

1 Q They're in business to sell data?

2 A I presume they are.

3 Q And if you wanted a monthly layout of the

4 data, you could have contacted them and gotten it.

5 You might have had to pay for it, but you would have

6 gotten it, right?

7 A I have no -- I presume. I have no

8 knowledge of that.

9 Q Well, you know about Sound --

10 MR. SCHECHTER: I would -- I would note --

11 BY MR. JACOBY:

12 Q You know about Soundscan because you've

13 been working with Soundscan for four years, haven't

14 you?

15 A That's correct.

16 MR. SCHECHTER: I would note for the

17 record that we requested access in discovery to the

18 Soundscan database. The response was we already had

19 access through RIAA, and that's exactly what Professor

20 Seltzer used.

21 MR. JACOBY: Well, you can note for the

22 record that, but you can also note for the record that

1 anybody can go and purchase data from any of these.
2 You were looking for a free ride for your
3 rebuttal witness, that's a different question.
4 MR. SCHECHTER: We were looking for --
5 CHAIRMAN VAN LOON: Mr. Jacoby --
6 MR. JACOBY: Let me proceed.
7 CHAIRMAN VAN LOON: Mr. Jacoby, when you
8 asked you yesterday how long you thought your cross
9 would be, you said about 45 minutes or so, which is
10 sort of where we are. Are you --
11 MR. JACOBY: Well, it's taking a little
12 longer. Let me proceed some more. I have more to do.
13 CHAIRMAN VAN LOON: That's fine, but
14 expeditiously, please.
15 BY MR. JACOBY
16 Q Isn't there in fact another problem? Let
17 me -- I'm sorry, one more question with reference to
18 data Exhibit 6. You see the entry, oh it's about six
19 down, "Volume 2, now that's what I call."
20 A I see it.
21 Q And you could probably fill in the last
22 word there. It's music.

1 Flip over the page and you've got
2 Backstreet Boys, fifth one down, "Volume 2, now that's
3 what I call." Do you know what's happening there, why
4 the data and the number's are identical?
5 A If the Backstreet Boys and 98 Degrees were
6 in the same album, then they would be counting in both
7 places here.
8 Q All right.
9 A Both being the measure of their
10 popularity.
11 Q So in the case of Clapton and King you
12 excluded any data, but in the case of, for example,
13 the album called -- the compilation album called "Now
14 That's What I Call Music," which has 11 or 12 tracks
15 with different artists, well there are 12 different
16 artists, you counted the data every time?
17 A I'm simply rolling up the data that I had
18 from Soundscan and AARC.
19 Q And arbitrary distinction making one zero
20 and one -- putting it in in each place, wouldn't you
21 agree?
22 A No, not arbitrary at all.

1 Q Not arbitrary. Okay. Let's move on.

2 Did you make -- let me ask you another

3 question.

4 Isn't there a fundamental statistical

5 problem in using '99 sales data as a control variable

6 when you're assessing the impact of radio airplay on

7 album sales?

8 A I don't believe so.

9 Q Isn't if you're examining the question, if

10 you're attempting to examine the question of the

11 impact of radio airplay on album sales and you use as

12 a control variable a prior year's album sales, isn't

13 there then a question of the extent to which radio

14 airplay may have influenced the control variable?

15 A The radio airplay influencing the time

16 period before, a year before?

17 Q Yes.

18 A I guess an album is released in early

19 February and you're looking at the six weeks of pre-

20 release time, there could have been some overlap, but

21 I don't see that as a --

22 Q No, I'm talking about radio airplay in

1 1999 effecting album sales in '99. Withdraw.

2 What after all was the purpose of the

3 exercise that Mr. Fine was doing as you understand it?

4 A He was attempting to determine whether or

5 not the six weeks of pre-release air time effected

6 sales in the first week of an album's release.

7 Q So that was a targeted kind of analysis he

8 was doing, right?

9 A Okay.

10 Q But it is a targeted analysis of the

11 effect of radio airplay on album sales, correct?

12 A Okay.

13 Q And if you're going to attempt to use a

14 control variable as a proxy for artist popularity, and

15 you use album sales, there is at least a question

16 whether radio airplay during 1999 effected the '99

17 album sales, correct?

18 A Your clearly -- the radio airplay in 1007

19 effects sales in 1999 and they effect one another.

20 It's, you know, pretty much the definition of the

21 music industry, I presume, in part, being a layperson.

22 Q So doesn't that pose a problem in terms of

1 using the album sales as a control variable and
2 analyzing impact on album sales?
3 A No, it doesn't.
4 Q Did you ever hear of the concept of an
5 interactive equation?
6 A I've heard of it.
7 Q You see no application of that here?
8 A No.
9 Q Wouldn't you want to clean up your control
10 variable so that it wasn't in effect influenced by
11 radio airplay?
12 A It's not influenced by the radio airplay
13 of this independent variable. It's just the preceding
14 six weeks.
15 Q So that's why you view it as unimportant?
16 The radio airplay, the impact of radio airplay in '99
17 it's not important because the variable you're
18 studying is radio airplay in the six week period, is
19 that correct?
20 A It's in the period after 1999.
21 Q Let's go to point 2 of your analysis. And
22 there I find there is two criticisms that you make,

1 the first one being the use of the failure to use
2 rolling data. And your explanation for why that's a
3 problem is that there may be extreme data points in
4 the analysis --
5 MR. SCHECHTER: That's on page 12 of the
6 testimony?
7 MR. JACOBY: Yes.
8 MR. SCHECHTER: 12 and 13, okay. Thank
9 you.
10 MR. JACOBY: It's point two that begins on
11 12.
12 MR. SCHECHTER: Yes.
13 BY MR. JACOBY:
14 Q Correct?
15 A There is inconsistent ways that the data
16 points are measured.
17 Q Inconsistent ways in which the data points
18 are measured, in what respect?
19 A Some have data points of which album
20 points were released in February, which have almost
21 ten and a half months or eleven months of data to add
22 up to the total sales, and others released in November

1 which would have, I think, 5 or so weeks of the total
2 sales.
3 Q But in the analysis that Mr. Fine did
4 because the total numbers were in the denominator on
5 both the independent variable and the dependent
6 variable, that should not be a serious statistical
7 problem, should it?
8 A It makes it much more serious statistical
9 problem.
10 Q Really?
11 A Yes.
12 Q Why is that?
13 A Because data that is released in November,
14 let's say you have 11 months -- it's released in
15 November. It's total sales are for, let's say, six
16 weeks then and beyond that you may have -- it's a very
17 large number because of that. It's most of the sales
18 for the year are occurring in that -- within that same
19 period of time.
20 Q Yes.
21 A So the numbers in November, everything
22 else being equal, are going to be much larger than the

1 numbers for albums released in February.

2 Q That's on the right side of the equation

3 in the denominator, correct? The comparison that Mr.

4 Fine was making was two ratios, right? The total

5 sales figure that you're referring to is if the album

6 was released in -- let's assume, November 1st, would

7 be two month's data, correct?

8 A Okay.

9 Q All right. And the variable, the ratio to

10 which it's being compared is also a ratio of six weeks

11 to the balance of the year, correct?

12 A That's correct.

13 Q So that also represents two months of

14 total detects, correct?

15 A Well, if you turn -- just conceptually,

16 every time, air time -- 6 weeks before divided by a

17 total air time, it's unclear what that necessarily

18 represents. It's so complicated to conceptualize, why

19 not just look at the easy numbers? Why not just have

20 the easy numbers there, which are simply the straight

21 sales? What's the total detects with the total sales?

22 Q You don't see any reason why you would use

1 a ratio rather than --

2 A There are ways I could see the use of

3 ratios, but in here the most clear example is not to

4 do that. It's much more intuitive to simply -- you're

5 trying to avoid, if you can -- you can't always do it,

6 but you're trying to avoid complexity when possible.

7 And --

8 Q Doesn't in fact --

9 MR. SCHECHTER: Let him finish.

10 BY MR. JACOBY:

11 Q I'm sorry. I'm didn't mean to interrupt

12 you. Please complete your answer.

13 A No, but it's overly complex and it's hard

14 to conceptualize and grasp when you go to perhaps a

15 technique that's easier to grasp, which in this case

16 is so much more intuitive to me. At least in my own

17 analyses I try to keep things as sample as you can,

18 make it understandable to me conceptually and to the

19 layperson. It's a very unclear concept, these ratios.

20 Q You have trouble understanding it?

21 A I do.

22 Q Okay. Can you see a reason as a

1 statistician why you would use a ratio in this
2 particular analysis where he was trying to target the
3 six week period before release and the first week
4 sales?
5 A Why not simply look at the six week period
6 before release for the first week's sales?
7 Q I'm saying you if you can see a reason as
8 a statistician why you might want to use a ratio
9 instead, that's my question.
10 A From reading his rebuttal, I'm not sure
11 I'm allowed to talk about that, you know he --
12 Q I'm asking you your reason.
13 MR. SCHECHTER: He asked you, you opened
14 it up.
15 MR. JACOBY: I opened it up? I'm asking
16 him for your reasons. I'm not asking him to comment
17 on Mr. Fine. I'm asking him for his reasons.
18 THE WITNESS: I did not see a reason for
19 doing so.
20 BY MR. JACOBY:
21 Q In the footnote here you said some of the
22 data points are extreme. What are you referring to

1 there when you talk about extreme data points, and it
2 might be unduly influenced.
3 MR. SCHECHTER: Which footnote, please?
4 MR. JACOBY: Footnote 17.
5 MR. SCHECHTER: Thank you.
6 MR. JACOBY: I'm sorry. I should have
7 clarified that.
8 BY MR. JACOBY:
9 Q In which you describe your reason.
10 A Bear with me for a second, please.
11 It's that -- because some of the data or
12 albums are released in November, you're going to
13 potentially have correlation, ratios that are very
14 high, for example, .80 or .85, whatever they may be;
15 whereas, ones that are released in January/February,
16 the likely ratios will be far smaller. It gives you
17 a greater spread of variability.
18 Q You would consider .8 to .85 to be high;
19 is that it?
20 A It depends what you're looking at. You
21 can't look at it in isolation. It has to be compared
22 with the other data. If all your data is .7, 8, 9,

1 then it's not necessarily high. But you need to look
2 at it across a whole range of data. And my belief was
3 that by doing what he did, it increases the
4 likelihood -- the potential likelihood -- that that
5 will occur.
6 Q Are you aware that, in fact, the highest
7 data point was .61 in Mr. Fine's analysis?
8 MR. SCHECHTER: Do you have a reference on
9 the record?
10 MR. JACOBY: Yes, Exhibit 2 to Mr. Fine's
11 testimony, in the last column.
12 MR. SCHECHTER: We don't have that one.
13 MR. JACOBY: I would be happy to give you
14 a copy.
15 MR. SCHECHTER: Thank you.
16 Which column are we referring to now?
17 MR. JACOBY: Which column would the
18 extreme data points be in?
19 THE WITNESS: Well, you just mentioned --
20 MR. SCHECHTER: You asked him about a
21 particular number. I'm asking where on the document
22 that particular -- you said something about --

1 MR. JACOBY: The final column.

2 MR. SCHECHTER: Well, there are two

3 correlations. There are two percentage columns here.

4 THE WITNESS: You have .60 here, or

5 approximately .59, for Backstreet Boys I believe it

6 is.

7 CHAIRMAN VAN LOON: Sorry, Professor. I'm

8 still not with you, what number you're referring to.

9 THE WITNESS: The sixth one down I believe

10 was the Backstreet Boys. And you go all the way to

11 the right.

12 CHAIRMAN VAN LOON: 6.79?

13 THE WITNESS: 6.79. I'm sorry, you

14 have -- I'm sorry, the 59.48.

15 MR. JACOBY: I'll cite you to the 61.43.

16 The .61 I was referring to, which is the highest one

17 in the entire 54 rate. And it's about two-thirds to

18 three-quarters of the way down, and it's Ricky Martin.

19 So in fact here, you only have just two or

20 three observations above .5; is that right?

21 THE WITNESS: That is correct.

22 BY MR. JACOBY:

1 Q Did you make any attempt to analyze
2 whether or not the failure to use rolling data would
3 impact the conclusions reached here?
4 A I did not have access to rolling data.
5 Q Although you criticized Mr. Fine for not
6 having run a 12-month rolling data analysis here; is
7 that correct?
8 A That is correct.
9 Q It would have been very difficult for him
10 to run such an analysis for 2000 year data, wouldn't
11 it?
12 A I have no idea. I presume he has the
13 access to the data; he could have taken it back six
14 months if he had it.
15 Q Well, if something was released in
16 November of 2000, it would be very difficult for
17 either him, you or anybody else to provide 12 months
18 of rolling data, wouldn't it?
19 A There's no need to stay with the 2000 as
20 a starting point. He could have very well started
21 with the middle of 1999.
22 Q And so could you, had you bothered to get

1 the data.

2 A If I had the data.

3 Q Okay.

4 Mr. Fine did not, in fact, make analyses

5 of raw data, correct?

6 A That is correct.

7 Q And he chose to do the ratios. When you

8 ran raw data, at the bottom of page 13, on actual six

9 weeks pre-released detects against actual sales in the

10 first week, you got a correlation of .52; is that

11 correct?

12 A That is correct.

13 Q And again, we can see from your work paper

14 that that is statistically significant for the

15 99.9 plus level; is that correct?

16 A That is correct.

17 Q And then when you attempted to control for

18 it with this variable of 1999 sales that we talked

19 about before, you were then able to drive the

20 correlation coefficient down to .22, right?

21 A That is correct.

22 Q Which you then noted was not statistically

1 significant.

2 A That is correct.

3 Q How many other runs did you have to make

4 to come up with a comparison that was not

5 statistically significant?

6 A Pardon me?

7 Q How many other runs did you make? You

8 said you made numerous runs. How many other runs did

9 you make?

10 A This is the first one I ran. It came out

11 this way; it was the most obvious to me in totally

12 which to do it. Every other one came the same way as

13 well.

14 Q And would you say, as a statistical

15 matter, that given the variability in the '99 sales

16 data that we talked about earlier as a proxy that you

17 would reach any conclusions yourself from running raw

18 data comparisons, such as this, with the control

19 variable of absolute full-year albums sales for 1999?

20 A My conclusion I think is stated there.

21 Thus, "once one conducts a more methodologically sound

22 analysis relationship between pre-released detects and

1 first-week sales" is extremely weak.

2 Q Are there other ways that you might have

3 eliminated potential confounding variable of artist

4 popularity?

5 A I presume if I had -- there are many

6 ways -- other potential control variables you could

7 conceptualize that you'd want to include an analysis

8 like this-- for example, whether or not they had

9 concert tours, whether or not there were posters in

10 the store and so on and so forth. And I didn't have

11 any access to that data. And if you included, almost

12 by statistical definition, conclude us to even a lower

13 correlation coefficient.

14 Q You can make that statement?

15 A I can.

16 Q Based on what?

17 A Based on the knowledge of statistics. As

18 you include more variables, independent variables, as

19 controls, the correlation coefficient will by

20 definition get reduced or stay the same.

21 Q Right. And that's a common criticism

22 regression analysis. You can just run more variables

1 in until the correlation disappears, right?

2 A That's not true.

3 Q Now, let's turn to .3 of your analysis.

4 First of all, did Mr. Fine himself present any

5 analysis correlating pre-release air play to total

6 sales?

7 A He did not.

8 Q Wouldn't it be more appropriate if you

9 wanted to -- which he didn't -- examine impact total

10 sales to look at total air play for the year?

11 A That would have been totally confounding.

12 Presumably, that both those variables go in synch. As

13 the record sales increase so does the air plays; air

14 play increases, so does record. They're totally

15 confounded.

16 Q Isn't there a confounding variable in

17 looking at pre-release air play against total sales?

18 A No. They're occurring at different

19 periods of time. One is occurring before the album is

20 released; the other's occurring afterward.

21 Q And there's no confounding variable you

22 can think of?

1 A Well, except for the ones I've already
2 discussed, which is artist popularity and so forth.
3 Q How about the popularity of the album?
4 How about the popularity of the music, the album that
5 you're measuring? If you're looking at total year
6 sales, whether that turns out to be accepted by the
7 public as a hit, wouldn't that have an impact on total
8 year sales?
9 A That's why you can't use an -- you cannot
10 look at total sales and total detects over the course
11 of the year. They're totally --
12 Q But isn't that, in fact, the confounding
13 variable in looking at a comparison of a six
14 pre-release period and total sales? Wouldn't you have
15 to acknowledge that that's a confounding variable
16 whether or not it's ultimately a hit?
17 A You'd want to -- if you could somehow
18 analyze that, yes.
19 Q But you didn't. Instead you made the
20 analysis between pre-release and total annual sales
21 without accounting for the confounding variable of
22 whether or not the song was a hit.

1 A Well, whether the song was a hit is by
2 definition; I presume by definition whether or not
3 it's selling. So I don't -- I can't define music
4 quality; I don't know how to do that.
5 Q That is a problem.
6 CHAIRMAN VAN LOON: Mr. Jacoby, we've
7 pushed a bit past our lunch. I just wanted to get an
8 indication.
9 MR. JACOBY: I'm going to try to wrap up
10 within 10 or 15 minutes. I'm on the last pages of my
11 outline. And I think it would be preferable if I do,
12 but if you want to break.
13 CHAIRMAN VAN LOON: No, please continue.
14 MR. JACOBY: Okay.
15 Now, on page 14, in the middle paragraph
16 there's a page beginning, "Using Mr. Fine's data" you
17 ran several tests you said to determine whether
18 pre-release air play correlated with total sales,
19 right?
20 THE WITNESS: I did.
21 BY MR. JACOBY:
22 Q And the first thing you did was you

1 compared the pre-release ratio that Mr. Fine had used
2 with total sales; is that correct?
3 A That is correct.
4 Q And you found a correlation that was
5 negative.
6 A Essentially zero.
7 Q Essentially zero. And without ever having
8 pressed the button on the machine, running that
9 analysis of pre-release detect ratio against total
10 sales, wouldn't you expect to find no correlation?
11 A No, I would -- I would have thought that
12 that's the point of having the pre-release time which
13 increase sales.
14 Q Dr. Seltzer, the independent variable is
15 a ratio, is it not? Is it not?
16 A Excuse me. It is a ratio. I -- I would,
17 again, as I discussed before, would not have used a
18 ratio in analysis. I included it here because
19 Mr. Fine used it. I then included what I thought was
20 more proper, which is simply the total.
21 Q Just a moment. Let me just finish,
22 please, okay? And stay with the analysis you ran and

1 you reported here first, and then we'll come to the
2 second one as well, okay?
3 The first one you reported as zero, if
4 you're running an analysis where the left side, if you
5 will, of the equation is with a correlation, there's
6 a ratio between a six-week period and a total year
7 figure, and the right side is a total year figure. So
8 that the two total figures you're working with, one is
9 in the denominator on the left side and one is in the
10 numerator on the other side, you would expect no
11 correlation.
12 A No, there's some situations where you
13 would. But let me, first of all, get to the matter.
14 I essentially agree with you that it was not proper to
15 include that in that analysis. I included it because
16 it seemed that if I did not include it, you'd be
17 asking me about it.
18 Q Well, you're making some very large
19 presumptions there. You did run it, as you said, the
20 other way. Again, this is an absolute number,
21 six weeks pre-release detects against total sales.
22 And, in fact, you find the correlation of .37.

1 A That's correct.

2 Q And that correlation itself is

3 statistically significant to the 99.4 percent level,

4 according to your own work paper; is that correct?

5 A That is correct.

6 Q All right. The last thing you did here

7 was you did your own analysis now of eight CDs that

8 were the subject of a material representation -- bar

9 charts -- in Mr. Fine's report, correct?

10 A That is correct.

11 Q At paragraph 16 of his initial report?

12 MR. SCHECHTER: Would you like a copy?

13 THE WITNESS: Please.

14 MR. JACOBY: Thank you.

15 MR. SCHECHTER: Is it paragraph 16?

16 MR. JACOBY: Yes. It begins on page 9,

17 and the picture is on page 10.

18 MR. SCHECHTER: You want page 10?

19 MR. JACOBY: Well, he should at least have

20 9, 10 and anything else he wants, but that's what I'm

21 focusing on.

22 MR. SCHECHTER: No problem.

1 THE WITNESS: I'm at the wrong page here.

2 MR. SCHECHTER: It's entirely possible.

3 He started talking about the drawing, but he's now

4 back to the chart.

5 THE WITNESS: Pardon me.

6 BY MR. JACOBY:

7 Q Okay. The pictorial that appears on

8 page 10 of his testimony follows the discussion of the

9 analysis that has been the subject of our discussion

10 today and your commentary on his report, in which he

11 did the correlation analysis for all 54 albums using

12 the ratio analysis that we talked about, right?

13 And on page 10 he had a pictorial

14 illustration of four with low pre-release air play and

15 four with higher pre-release air play, correct?

16 A That's correct.

17 Q And to be sure, Mr. Fine made no

18 statistical analysis whatsoever of the examples he put

19 in his pictorial demonstration; is that correct?

20 A That is correct.

21 Q But you in fact did a statistical analysis

22 of those eight CDs; is that right?

1 A That is correct.

2 Q And that appears on the bottom of page 14

3 and over on the top of page 15 of your report; is that

4 correct?

5 A That is correct.

6 Q And what you did was to look at the annual

7 sales for the four that were categorized as low

8 pre-release and the annual sales for the four that

9 were categorized in the pictorial at higher

10 pre-release. And they're not actually categorized

11 that way, but they are the four on the right side of

12 the pictorial, correct?

13 A Yes.

14 Q And then you entered the sales rank for

15 each of those; is that correct?

16 A That is correct.

17 Q And you conclude that the four CDs with

18 low pre-release detects had higher yearly sales than

19 the four CDs with high pre-release detects; is that

20 right?

21 A That's what I say.

22 Q And I take it from that you are suggesting

1 that pre-release radio air play has, in fact, perhaps
2 an inverse impact on annual sales.
3 A No, I'm suggesting that there's -- from
4 the four that he -- he took eight data points
5 virtually by his own process of selection as far as I
6 can determine. I call it analysis by anecdote. You
7 know, he has four that it's unclear how they're drawn,
8 then they're high and low. But he's taken four.
9 I'm looking at this as a lay person the
10 first time I'm reading this through. And I'm
11 saying -- and he's got for examples that he's chosen
12 without any systematic way of necessarily doing so.
13 But from my lay perspective, should this be affected
14 in total sales? He has this indicator of the effect
15 of pre-release air time. And I say just from a lay
16 person perspective let's see how it affects total
17 sales. And it's actually the first analysis I did
18 before -- I didn't have access to his data at that
19 point, really; I didn't have it computerized. I just
20 by hand did what you see here on page 15, which is a
21 spot check to see whether it made sense what was
22 occurring. And that's why you see what you see here

1 displayed on page 15.

2 Q First of all, you characterized what

3 Mr. Fine did as an analysis. Is there any analysis in

4 here relating to that chart by Mr. Fine?

5 A Results -- bear with me for a second,

6 please. Well, he says on I guess the bottom of

7 page 9, "Results of the study are illustrated on the

8 bar chart that follows." So he's using it to

9 illustrate his basic analysis.

10 Q Well, he's using it to illustrate the data

11 that's in this rather dense chart, appended Exhibit 2,

12 correct?

13 A That's correct.

14 Q But he doesn't perform any statistical

15 analysis of those eight CDs, does he? His only

16 analysis is with respect to the 54 as a whole that are

17 on this dense chart, correct?

18 A Well, then why is he displaying them?

19 He's using -- he's trying to illustrate his findings.

20 So I call that an analysis.

21 Q You call that an analysis. Did he make

22 any statistical analysis of the data on those eight

1 CDs?

2 A No, he did not.

3 Q Okay. But you did.

4 A I did.

5 Q And would it be your conclusion after

6 looking at this that pre-release air play does not

7 have a very significant impact on album sales?

8 MR. SCHECHTER: What's the "this" in your

9 question?

10 MR. JACOBY: Looking at the analysis that

11 Dr. Seltzer performed, which is described on the

12 bottom of page 14 and carried over to 15.

13 THE WITNESS: I'm not necessarily

14 disputing there's a relationship between pre-release

15 air time and sales. I'm simply saying that Mr. Fine

16 is not showing that. The data that he put forth does

17 not show that underlying relationship, which may or

18 may not occur. I don't know. But his data certainly

19 doesn't suggest -- does not show that.

20 BY MR. JACOBY:

21 Q Dr. Seltzer, aren't there a number of

22 fundamental flaws in the analysis you performed in

1 this paragraph?

2 A Please elaborate.

3 Q Can you think of any yourself?

4 A I would not have done his analysis to

5 begin with. I would not have chosen basically

6 anecdotal pieces of data to try to illustrate as my

7 examples.

8 Q But you made a statistical analysis of it,

9 didn't you?

10 A Yes, I did. I --

11 MR. SCHECHTER: Let him finish.

12 MR. JACOBY: I'm sorry. And you made

13 a --

14 MR. SCHECHTER: Let him finish.

15 MR. JACOBY: Sorry.

16 CHAIRMAN VAN LOON: Please allow the

17 finish.

18 MR. JACOBY: Forgive me.

19 THE WITNESS: He's making not a

20 statistical argument, but he's using it for purposes

21 of illustration to illustrate his basic statistical

22 argument. And the fact that he has the data here on

1 page 10, it requires some -- it seemed to me it
2 required some sort of analysis. Why are they here?
3 What does it imply? And that's why I did some very
4 simple -- I'm not doing correlational measures; I'm
5 doing a very simple analyses by sales rank. It's not
6 the best. There's other things you perhaps could have
7 done, but it's a very simple statement that if you
8 look at total sales, these eight that he hand chose
9 shows no relationship.
10 BY MR. JACOBY:
11 Q You are making an analysis of a subset of
12 four against a subset of four; is that correct?
13 A He is.
14 Q No, he didn't make an analysis. You made
15 an analysis; you made a finding here. I'm asking
16 about your finding, not about his report.
17 A My analysis --
18 Q His report will speak for itself.
19 MR. SCHECHTER: Let the witness --
20 CHAIRMAN VAN LOON: Mr. Jacoby --
21 MR. SCHECHTER: He's not asking a
22 question.

1 MR. JACOBY: I'm focusing on my question
2 rather than what the witness wants to focus on. I'd
3 like to get an answer to my question.
4 MR. SCHECHTER: What is the question?
5 BY MR. JACOBY:
6 Q Let me rephrase the question. You did an
7 analysis of a subset of four against a subset of four,
8 correct?
9 A I did an analysis of his subset of four
10 against his subset of four.
11 Q And you made a finding about that, didn't
12 you?
13 A I did.
14 Q And you would agree, would you not, that
15 that analysis is inappropriate in the first instance
16 because you've got such a small subset comparing with
17 another small subset, neither of which were selected
18 in any way that you can determine was statistically
19 proper.
20 A Absolutely. We agree statistically.
21 Q We agree, but you made a finding.
22 A I made a finding that his basic

1 analysis -- that he has an analysis here. He's using
2 this to illustrate his basic statistical argument, and
3 he's flawed.
4 Q And isn't this flawed?
5 A It is flawed. I'm responding --
6 Q Your analysis.
7 MR. SCHECHTER: Would you let him answer
8 the question?
9 THE WITNESS: I'm responding to his
10 analysis. It is an analysis that he's making; that he
11 uses it for purposes of illustration. It is flawed.
12 I would never have used this. I would never analyze
13 something like this in my own work. He is.
14 BY MR. JACOBY:
15 Q Dr. Seltzer, did he even in this
16 illustration make a comparison of pre-release detects
17 to annual sales?
18 A Not to annual sales, no.
19 Q No. Okay. You did.
20 A I did.
21 Q And you chose that. You made that
22 decision --

1 A That's correct.

2 Q -- for your analysis.

3 A That is correct.

4 Q Correct?

5 A That is correct. And isn't that analysis,

6 in addition to being subject -- whatever other

7 statistical flaws may exist in it -- subject to the

8 spurious, confounding variable problem that you

9 defined on the first page of your analysis of

10 Mr. Fine's report -- isn't this subject to the floor

11 of the winter coats and the snow shovels?

12 A Oh, I guess I have included a control

13 variable popular to the previous year. I didn't do

14 that. I mean, he is making an analysis here. He's

15 using it for purposes of illustration. I'm simply

16 pointing out that it's nonsensical to do so if you

17 look at it from the perspective of total sales.

18 I didn't create this data. He created

19 this data. He chose those eight points.

20 Q And you chose sales rank, didn't you? You

21 chose to look at annual sales, didn't you?

22 Let's look at annual sales a little bit,

1 rather than argue about it, okay?

2 Would you take a look at amended Exhibit 2

3 for a minute? Mr. Fine's testimony. Do you have that

4 chart?

5 A Okay.

6 Q Okay. And do you also have in front of

7 you your testimony and your chart on page 15? Page 15

8 of your testimony.

9 A I'm sorry. Bear with me. Yes, I do.

10 Q I would ask you to look at the chart from

11 which you made this finding.

12 A Yes.

13 Q And you looked at total sales by using

14 sales rank, right?

15 A I did.

16 Q By the way, was there a reason you used

17 sales rank rather than total sales?

18 A Because it gets around the problems of

19 extreme data points. Often times in analyses with a

20 total number in which there's a real variability, you

21 have extremes. And by just having the rank numbers,

22 it gets around that problem as an issue.

1 Q And then you summed up the rank --

2 MR. SCHECHTER: Let him finish.

3 CHAIRMAN VAN LOON: Mr. Jacoby, could you

4 please allow the witness to continue --

5 MR. JACOBY: I'm sorry.

6 CHAIRMAN VAN LOON: -- until he completes

7 his answer to the question.

8 MR. JACOBY: I apologize. I'm operating

9 under two constraints. One is your desire to get my

10 cross over quickly, and secondly, my desire not to let

11 the witness' answers running on prevent me from

12 meeting that deadline. But I absolutely apologize for

13 interrupting him.

14 CHAIRMAN VAN LOON: All witnesses I hope

15 throughout this proceeding have been allowed to

16 complete their answers regardless of the hour or

17 regardless of how long it's taking. And we'd like to

18 afford that same courtesy to Professor Seltzer.

19 MR. JACOBY: And I apologize once again.

20 CHAIRMAN VAN LOON: Apology accepted.

21 MR. SCHECHTER: There's a question. Were

22 you done with your answer?

1 CHAIRMAN VAN LOON: I think we've lost
2 track of where it was. But why don't you ask another
3 question.
4 MR. JACOBY: Let me ask a few questions.
5 MR. SCHECHTER: Well, the question, I
6 believe, was why did you use ranking rather than total
7 sales; that you completed that answer.
8 BY MR. JACOBY:
9 Q Have you completed that answer?
10 A I believe I completed that answer.
11 Q If my interruption prevented you from
12 doing so and it occurs to you later what you wanted to
13 say, please interrupt me.
14 A Thank you very much.
15 Q You should have in front of you now
16 Exhibit 2 to Mr. Fine's testimony and your own
17 testimony, page 15, the chart that you analyzed. Do
18 you have that?
19 A I do.
20 Q Okay. I'm going to simplify the process
21 for you. You can check that I'm right. What I have
22 on your chart written down are the release dates of

1 each of the albums that are the subject of your
2 analysis here. And according to my review of the
3 release dates coming off of the third column of
4 Mr. Fine's Exhibit 2, I have Papa Roach as released on
5 April 30; Pink on April 9; Nelly on July 2nd; and Baha
6 Man on July 30. And then on the right side, I have
7 from Madonna, September 24th; Kid Rock, June 4;
8 R. Kelly, November 12; Backstreet Boys, November 26.
9 ARBITRATOR VON KANN: And the question is?
10 BY MR. JACOBY:
11 Q And the question is, do you see the
12 relationship with the seasonality of your example and
13 the data that I have just presented to you?
14 A Are you suggesting that Mr. Fine purposely
15 placed data with the release dates on the left side
16 different from release dates on the right side? I'm
17 not sure I understand the question.
18 Q No. I'm suggesting that in your doing
19 your own analysis, different from his analysis, using
20 total year sales or rank of total year sales, your
21 analysis here is fundamentally flawed, is it not,
22 because the sales that you're capturing on the left

1 side represented by my calculation over 26 months of
2 sales in the aggregate; whereas, the sales captured on
3 the right side, based on the later release dates,
4 represents total sales for a period of only 12 months.
5 A Well, there are two points which I may
6 respond, first of which is, a) the reason why you'd be
7 using a rank throughout totals, and b) the fact that
8 he fundamentally -- this is his data. These are his
9 rows of numbers. They're not mine; they're his.
10 Q Dr. Seltzer?
11 A Yes?
12 Q Again, are you saying that the sales rank
13 is his data?
14 A He put -- you have just told me -- and
15 thank you very much for doing that analysis -- that he
16 has data -- two completely different types of data on
17 the left and the right here. I should have thought of
18 that myself. The data are two dissimilar to try to
19 analyze and compare with one another.
20 Q Dr. Seltzer, would you, once again, look
21 at the pictorial illustration on page 10 of Mr. Fine's
22 testimony. Isn't it the case that what he has

1 depicted here, both with respect to pre-release air
2 play and with respect to debut week album sales, is
3 the ratio about which we talk not total annual sales
4 or sales rank?
5 A No, he's not looking at annual sales, no.
6 Q But you did.
7 A I did.
8 Q And your analysis is in fact corrupted by
9 the fact that there is the confounding variable of the
10 release date.
11 A He has different release dates, yes.
12 MR. JACOBY: No further questions.
13 MR. SCHECHTER: I believe I have one
14 question.
15 MR. JOSEPH: In light of my crispness last
16 night, I was going to ask -- there was one issue that
17 had come that seemed to have the panel's interest with
18 respect to Gallup poll response rates, Gallup and
19 Harris.
20 ARBITRATOR VON KANN: The interest has
21 leaned considerably.
22 MR. SCHECHTER: I would object to that.

1 The theory behind allowing multiple cross-examinations
2 was to allow the different interests to be
3 represented, not to allow them to tag team.
4 Mr. Joseph had all the opportunity to cross-examine
5 yesterday. He rested, and I would object to
6 continuing his cross-examination. That has not
7 occurred in this proceeding.
8 CHAIRMAN VAN LOON: Agreed.
9 And you have only --
10 MR. SCHECHTER: One question. Or let me
11 see.
12 REDIRECT EXAMINATION
13 BY MR. SCHECHTER:
14 Q I want to ask a couple of questions about
15 Exhibit 2 that's right in front of you, Fine Exhibit 2
16 amended. And I want you to go back to the right-hand
17 column where you were talking about extreme data
18 points. Do you see that?
19 A I do.
20 Q And you were directed towards a few of
21 them that were in the 40's and 50's. Would you just
22 explain where some of the extreme data points show up

1 in that column?

2 A Well, they're not -- it's fine to have a

3 range of data. And I'm not necessarily saying there

4 are extreme data points in here. I'm simply saying

5 that it's more likely to have extreme data points with

6 the ratios. In order to see there's extreme, you have

7 to look at the entirety of the data to try to make

8 sense of that. And just because there's zeros and

9 60's doesn't make them extreme. It's sort if you had

10 most of them low and one or two that are high; that

11 would be -- we would call it a fairly non-normal

12 distribution, which would be -- which would be

13 suspicious. And I'm not even saying that was

14 necessarily the case here. I'm just simply saying

15 that by use of ratios, that increases that likelihood.

16 MR. SCHECHTER: I have nothing further.

17 CHAIRMAN VAN LOON: Does the panel have

18 some questions?

19 ARBITRATOR VON KANN: I've got 60 or 70

20 questions here. No.

21 CHAIRMAN VAN LOON: Then we want to thank

22 you for coming and extending your morning, and release

1 you to return to your students.

2 We will reconvene at 2:00, at which point

3 we'll be hearing from Dr. Jaffe. And I gather we have

4 an updated schedule here.

5 (Whereupon, the foregoing matter went off

6 the record at 1:01 p.m. and went back on

7 the record at 1:01 p.m.)

8 CHAIRMAN VAN LOON: Mr. Jacoby?

9 MR. JACOBY: Yes. I'd like to offer

10 Service rebuttal Exhibits 4 through 7.

11 MR. SCHECHTER: No objection.

12 CHAIRMAN VAN LOON: No objection?

13 Admitted.

14 [Whereupon, SERV Rebuttal

15 Exhibits 4, 5, 6, 7 were

16 received for evidence]

17 CHAIRMAN VAN LOON: Adjourned until 2.

18 (Whereupon, the proceedings went off the

19 record from 1:02 p.m. until 2:07 p.m.)

20 CHAIRMAN VAN LOON: Good afternoon,

21 everyone.

22 Welcome back, Mr. Rich. Glad to see you.

1 MR. RICH: And likewise.

2 CHAIRMAN VAN LOON: And welcome back,

3 Professor Jaffe.

4 THE WITNESS: Thank you.

5 CHAIRMAN VAN LOON: Glad to see you.

6 Let the record reflect that you have

7 probably the most colorful tie of any witness in the

8 whole proceedings so far.

9 I also note that we appear to have shed I

10 think four witnesses. I propose that we not talk

11 about it right now, but give the panel during the

12 break a chance to sort of look at it and reflect. And

13 then we can discuss it.

14 Ms. Woods?

15 MS. WOODS: I just wondered when. Would

16 it be after the next break you would be discussing it?

17 I'm just not planning to stay for this, but just to

18 come back for the schedule.

19 CHAIRMAN VAN LOON: Oh, well. Let's not

20 inconvenience you.

21 MS. WOODS: No, no. They can just call me

22 to come down.

1 CHAIRMAN VAN LOON: Okay. I think we
2 would like the time at the break to take a look at it.
3 Thank you.
4 Yes?
5 MS. WOODS: I'm sorry. Just one other
6 thing. We have apparently been receiving telephone
7 calls in our practice development department about the
8 dress for the weekend.
9 CHAIRMAN VAN LOON: Something on.
10 MS. WOODS: And there's been some
11 suggestion about business casual. It really doesn't
12 matter to us, but they'd like some instruction on if
13 it's more casual for the weekend.
14 CHAIRMAN VAN LOON: Is this for them or
15 for us?
16 MS. WOODS: For this proceeding. I don't
17 know why they're getting the telephone calls, but
18 apparently they are.
19 CHAIRMAN VAN LOON: Is that my wife
20 calling?
21 Is there a firm policy generally?
22 MS. WOODS: Oh, no one at the firm cares.

1 MR. GARRETT: We're already violating the
2 firm policy. Nobody wears suits.
3 CHAIRMAN VAN LOON: Oh, I see.
4 Why don't we be more casual for Saturday.
5 MR. STEINTHAL: Adam, so you don't have to
6 wear as colorful a tie tomorrow.
7 CHAIRMAN VAN LOON: So that burning
8 issue's been resolved, and you can let the development
9 people know.
10 Mr. Rich, I believe you might have a
11 question or two for the witness.
12 MR. RICH: Several.
13 Whereupon,
14 ADAM JAFFE
15 was called as a witness, and, having first been duly
16 sworn, was examined and testified as follows:
17 DIRECT EXAMINATION
18 BY MR. RICH:
19 Q Welcome back, Professor Jaffe.
20 A Thank you.
21 Q In the interim since you were here, you
22 have submitted a modest additional piece of testimony;

1 is that correct?

2 A Yes, that's maybe correct.

3 ARBITRATOR VON KANN: I thought you were

4 going to say a modest additional bill.

5 MR. RICH: That I won't even deign to

6 comment on.

7 This afternoon we will cover aspects of

8 that testimony. I'm sure the panel will be glad to

9 know not attempt to cover everything that's covered in

10 the written testimony itself.

11 We'll let the introduction and overview

12 Section I, speak for itself. Let's turn to Section 2,

13 please, and start by my asking you to briefly restate

14 how you conceptualize the willing buyer/willing seller

15 test and how that impacts on the determination of the

16 value to be ascribed to the sound recording performing

17 rights involved here.

18 THE WITNESS: Okay. Well, we talked about

19 this quite a bit the first time I was here. I did try

20 in the rebuttal testimony to carefully lay out the

21 whole argument in one place so that it would be there.

22 And because it is there, I'm not going to regurgitate

1 the whole thing now, but just to kind of set up the
2 discussion.
3 As we go, let me just briefly say that my
4 view is that because the sound recording performance
5 right is being sold in a market that is incremental to
6 the market for which the sound recording was
7 originally created, that there is no additional cost
8 associated with providing the sound recording
9 performance right on the part of the parties that own
10 it. And because the value that it creates for the
11 user is completely symmetric and tied up with the
12 value created for the user by the musical works
13 performing right, that what we'd expect is that in a
14 willing buyer/willing seller competitive market kind
15 of situation the price, if you will -- the market
16 price -- for the sound recording performance right
17 would be expected to be -- almost equal -- the same as
18 the price for the musical work before a consideration
19 of issues of promotional value or displacement, which
20 we'll come back to later.
21 BY MR. RICH:
22 Q Now, an aspect of this analysis is that

1 there is a zero incremental cost of the right being
2 transferred; is that correct?
3 A Yes.
4 Q But I believe as you do point out in your
5 written testimony -- and I would ask you to just say
6 a couple more words about it -- that does not
7 translate into the consequence that, therefore, the
8 value should be zero or that there should be a zero
9 dollar royalty resulting from this process; is that
10 correct?
11 A That's correct. All I'm asserting is that
12 in this hypothetical willing buyer/willing seller
13 negotiation we have a valuation at the top on the part
14 of the buyer for both the musical work and the sound
15 recording are the same, and the bottom is the same,
16 namely zero. And so the negotiation is going to
17 arrive in both cases at some point in between, and
18 there's no reason to believe that the point that it
19 arrives at in between would systematically favor one
20 or the other.
21 Q So for this purpose, the purpose of that
22 observation is to bolster the view that the value of

1 the respective rights, namely the sound recording
2 performing right and the musical work right, from the
3 standpoint of the willing buyer/willing seller
4 perspective should be comparable. Is that the essence
5 of it?
6 A That those should be comparable and the
7 related point, which is that the cost and risk of
8 having created the sound recording in the first place
9 would not enter into the competitive market or willing
10 buyer/willing seller determination of the price for
11 the performing right.
12 Q Now elsewhere in your testimony on that
13 last point, you observe that, at least as to that
14 observation, Dr. Nagle appears to agree with you; is
15 that correct?
16 A Yes.
17 Q Now, there has been submitted rebuttal
18 testimony on behalf of the copyright owners by
19 Professor Wildman and Dr. Schink taking issue with
20 this aspect of your analysis. Have you had occasion
21 to review that rebuttal testimony?
22 A Yes.

1 Q And would you provide the panel with your
2 response to their own critique of your approach?
3 ARBITRATOR VON KANN: Sur rebuttal?
4 MR. RICH: Sur rebuttal.
5 THE WITNESS: I think at sort of the
6 highest conceptual level, I suspect it doesn't
7 surprise the panel to learn that different economists
8 can look at a given situation from a theoretical
9 perspective and propose different theories that they
10 think should apply. And that happens.
11 In general when that happens, what we like
12 to do is to resolve that conflict by resort to
13 empirical data to see which theory actually fits the
14 data. And I've done that in my report, and I think it
15 unambiguously and overwhelmingly shows that the theory
16 that I've put forward fits observed data from the
17 world. And the theory that Dr. Schink and Professor
18 Wildman put forward does not. And we'll come back to
19 that in a minute.
20 But even at the theoretical level I do
21 want to correct what I think are either
22 misunderstandings or mischaracterizations of what my

1 theory was, or is, that appear in those testimonies.
2 What both Dr. Schink and Professor
3 Wildman, to some extent, suggests is that my
4 characterization of the performance right for the
5 sound recording as being incremental to the underlying
6 production of the sound recording is an inappropriate
7 characterization of the relationship between those two
8 things; that I don't have any basis, they assert, for
9 saying one of these is the thing that recovers the
10 cost and the other is incremental.
11 And I think that what they would like to
12 have you take away is that somehow the sound recording
13 itself and the right to perform it on the Internet are
14 like sheep -- sorry, are like wool and mutton. There
15 are two things which are inextricably produced at the
16 same time by some production process. In that case it
17 would be growing sheep. And that to say the wool is
18 incremental to the mutton or the mutton is incremental
19 to the wool would be just arbitrary; that you can't
20 make that distinction. But I think that that
21 characterization of the two things as being jointly
22 produced in a sort of symmetric and even way just

1 doesn't fit the situation we happen to be talking
2 about.
3 I think the situation we happen to be
4 talking about is more like if you had a sheep farmer
5 who has been raising sheep and selling both wool and
6 mutton. And he gets the brilliant idea to make a few
7 extra bucks charging tourists to come and let the kids
8 pet the lambs and have a great time walking around the
9 farm. I submit that the way he would think about that
10 would be to say, well, I can make some money doing
11 that. That's completely incremental to the business
12 that I'm really in, which is growing sheep. And when
13 I decide how much should I charge those kids to come
14 and pet the lambs, I'm not going to think about what
15 does it cost me to operate my sheep farm. That's not
16 going to be the way I do that calculation. I'm going
17 to say, what are tourists willing to pay to come pet
18 sheep. And the cost of running the farm is going to
19 be something which I view as being associated with
20 growing sheep, and I have this incremental source of
21 revenue. And if there's no additional cost in earning
22 that revenue, there's no reason why the pricing of it

1 should be in any way connected to the pricing of the
2 underlying primary activity.
3 Now, it's completely possible that at some
4 point in the future the economics of the recording
5 industry are going to change, and people will truly
6 start thinking of making sound recordings, in effect,
7 for the purpose of playing them on the Internet. And
8 when deciding on the margin, am I going to make
9 another sound recording, they're going to be thinking
10 about the revenues that could be generated on the
11 Internet from streaming that. That could happen
12 someday. And if someday that happens, then it would
13 no longer be the case that the market would be as I've
14 characterized, where the selling of the performance
15 right is from an economic perspective incremental to
16 the underlying creation of the right itself. But I
17 think that if you were to ask people who make records,
18 are you on the margin deciding to make another record
19 because of the revenues you might get my streaming it
20 on the Internet in the period through 2002, I
21 certainly have seen no evidence that that would be
22 part of the economic equation.

1 BY MR. RICH:

2 Q Now, another aspect of your analysis in
3 this section of your rebuttal testimony states that in
4 this unusual setting, where we're dealing with two
5 inputs for which there is no incremental costs and
6 which contributes so fundamentally to the same
7 product, that you write at page 9 of your testimony
8 that parties that jointly create value in that
9 situation will split that value equally, yes?

10 A Yes.

11 Q And are you familiar with Professor
12 Wildman's response to that, in which he says, well, in
13 a reductio ad absurdum kind of way, how would you deal
14 with ice cream, where you have cream and sugar? And
15 how would you deal with script writers and actors and
16 producers, all of whom in combination contribute to
17 the product, but who in their right mind would suggest
18 that one value equally those inputs?

19 Have you had occasion to review that
20 testimony?

21 A Yes. I think this is where Professor
22 Wildman may not have understood what I wa saying,

1 because it was essential to my argument that the
2 inputs we're talking about have this property that
3 there's no cost of providing them in this particular
4 context. And that just wouldn't be true of cream and
5 sugar. Both cream and sugar have a cost. And they
6 reason they have a cost is because if you don't put it
7 in the ice cream, you can use it for something else
8 and get a value out of it.
9 And so I was very specific that the
10 circumstance I was talking about was one in which the
11 input is coming to this incremental use in such a way
12 that there's nothing saved by not using it here. And
13 that doesn't apply to cream and sugar, and it doesn't
14 apply to the actor and producer in making a movie. If
15 an actor doesn't make a given movie, he can go make
16 some other movie or she can go make some other movie.
17 So there's a cost associated with the actor's time in
18 making a given movie. And in that case, that cost is
19 going to weigh heavily on the market price for their
20 services in that context. So I don't think his
21 examples fit my conceptual framework.
22 Q Now, you began your initial response to

1 the Wildman and Schink critique of your approach by
2 indicating that there was, in fact, data, which have
3 now been observed, which, in essence, allow one to get
4 past the economic debate, correct?
5 A Correct.
6 Q This is the information I take it which
7 you begin to put forward at page 18 of your rebuttal
8 testimony, in Section III?
9 A Correct.
10 Q Can you set the stage for this discussion,
11 please, by first addressing the copyright rights to
12 which the data which you'll be discussing pertain?
13 A Yes. As I think we discussed a little bit
14 when I was here the first time, it would be wonderful
15 if we could go out and look at some other framework in
16 which there is a competitive market for sound
17 recording performance rights and a competitive market
18 for musical work performance rights, and compare the
19 two. For better or for worse, there are so few
20 contexts in which the sound recording carries a
21 performance right that that's just not practical. We
22 can't observe that. But it does turn out that there

1 is a circumstance in which a copyright associated with
2 the sound recording and a copyright associated with
3 the musical work are both sold or licensed in very
4 parallel circumstances. And that's the basis for the
5 empirical test that I've constructed.
6 So the right that is at issue here is the
7 right -- it's not a performance right; it's really a
8 reproduction right. It's the right, in the case of
9 the sound recording, to reproduce the sound recording
10 in the sound track of a motion picture or television
11 program. In the case of the musical work, it's the
12 right to reproduce the musical work in the sound track
13 of a movie or TV program. And in the jargon or lingo
14 of the industry these have names. The name that is
15 used for the reproduction right for the sound
16 recording is a so-called master-use right, and the
17 name for the use of the musical work is a so-called
18 synchronization or synch right.
19 So what we have here are in both cases,
20 again -- and this is what's crucial -- conceptually
21 the same situation that I've been analyzing. We have
22 an existing sound recording, we have an existing

1 musical work. The costs of creating both are sunk.
2 There's substantial revenues that have typically
3 already been collected toward both. And now we have
4 this incremental use. Someone wants to make a movie;
5 someone wants to make a TV show, and they would like
6 to incorporate this particular performance of this
7 particular song into this movie or into this TV show.
8 Now, that is an incremental use, and it is
9 one for which there is no cost to the owner of the
10 intellectual property. If they say, no, you can't
11 have my song for this movie, it doesn't make that song
12 any more available for other movies or for other uses.
13 They have the same ability to use it in other movies
14 or in other uses whether they say or whether they say
15 no to this particular use.
16 So, once again, even though it's not a
17 performance right, it is a circumstance that
18 conceptually, exactly fits the circumstance that I've
19 been talking about, in which you have these parallel
20 negotiations to acquire a previously created right
21 whose costs are sunk, and where you need both, and you
22 can't put the song sung by that artist into the movie

1 unless you get both. So the circumstance we're
2 talking about from an economic perspective has exactly
3 the same structure as the licensing for performance
4 purposes of the musical work and the sound recording.
5 Now, it turns out that in this case we do
6 observe an active, reasonably competitive market in
7 which these transactions occur. So what happens is,
8 the director or the other creative people who are
9 making a movie will decide that they want to use a
10 particular song performed by a particular artist. And
11 the studios have people whose job it is to go out and
12 acquire the rights that are necessary to do that. And
13 they do that by negotiating with record labels for the
14 master use or sound recording right, and with music
15 publishers for the musical work or synch right. And,
16 typically, on an arms-length basis, they come up with
17 some fees.
18 And I submit that my theory implies that
19 what we ought to observe if we look at such fees is
20 that, on average, they will be about the same.
21 Q Let me interrupt you to ask you, under the
22 Wildman and Schink thesis what would you expect to

1 observe in the data?

2 A Well, there are two ways of seeing what

3 the implication of the Wildman and Schink analysis is.

4 One is that the cost of having made these things to

5 begin with is suppose to be a big factor here. It's

6 suppose to be affecting the competitive market price

7 for each of these rights. And if their analysis of

8 the costs, from which they conclude that the cost of

9 producing the sound recordings is much greater or

10 correct, then the clear implication would be that we

11 ought to observe that this purchase of the right for

12 the sound recording will be, on average, at a higher

13 price than the purchase of the corresponding musical

14 work.

15 Now, as I've said, for any one song there

16 could be reasons why one is worth more than the other.

17 We'll see our data in a minute. There's an occurrence

18 in our data where "Auld Lang Syne" is put into a

19 movie, and the composer gets more than the songwriter.

20 I don't know any of the details of that circumstance,

21 but I suspect it's because if you want to have "Auld

22 Lang Syne" in your movie, there are actually a lot of

1 different recordings of it that you could use. And so
2 in some sense, in that one case, the musical work is
3 worth more than the sound recording.
4 Conversely --
5 CHAIRMAN VAN LOON: You mean to say, I
6 think, that the composer got more than the artist.
7 THE WITNESS: Did I say that wrong? I'm
8 sorry. The composer got more -- the musical work, the
9 publisher, got more than the sound recording.
10 ARBITRATOR VON KANN: Well, the composer
11 was Scottish, so he was a very tough negotiator.
12 THE WITNESS: In other cases, the director
13 is going to want a particular performance by a
14 particular artist and may pay a lot to get that. So
15 any one case it could go one way or the other. But I
16 submit that, on average, my theory predicts they
17 should be about the same; whereas, Professor Wildman
18 and Dr. Schink's theory predicts we should
19 systematically observe a higher price for the sound
20 recording.
21 BY MR. RICH:
22 Q And I take it, despite your conceptual

1 differences, Professor Wildman himself says the proof
2 of the pudding would be in the empirical data, and
3 would agree; is that correct?
4 A I do agree with that, yes.
5 Q Okay. Well, before we get to that
6 empirical data, one more question as to the rights
7 involved.
8 In footnotes 21 and 25 of your written
9 rebuttal testimony you discuss certain aspects of the
10 licensing of synchronization and master-use rights in
11 the motion picture, theater and television settings.
12 And can you elaborate a bit on the purpose of those
13 footnoted comments?
14 A Yes. What I'm trying to do, is I'm trying
15 to look and see, if we put the sound recording on one
16 side of the scale and we put the musical work on the
17 other side of the scale, do we observe that they're
18 about equal.
19 In general, when you do an exercise like
20 that you would worry that if there's some ancillary
21 factor that is not connected to your economic analysis
22 that is distorting one side or the other, you might

1 want to worry about that. So if there's something
2 that causes -- something else that causes the musical
3 work to go at a higher price, you might be worried
4 that what's really going on is the sound recording is
5 worth more, but that's being offset by this other
6 factor that is sort of distorting the comparison of
7 the two.
8 Now, as a threshold matter we're going to
9 see in the data in a minute that for two-thirds of the
10 songs, almost 500 different songs, the price at which
11 the sound recording sells and the price at which the
12 musical work sells are not just similar; they're
13 identical to the penny. So it seems to me that just
14 as an threshold matter, given what the data look like
15 where two-thirds of the cases they're the same to the
16 penny, any kind of argument that says, well, your
17 analysis is biased because Factor X is distorting the
18 musical works side, and that's somehow masking the
19 reality, the supposed reality in which the sound
20 recording is worth more, is just implausible because
21 it requires that these two things offset each other so
22 precisely and so evenly that for almost 500 songs

1 representing two-thirds of the data, they're exactly
2 the same. So, although, at some level you'd always be
3 worried about those kinds of confounding factors, the
4 results are so consistent, I don't think any such
5 argument really can carry much water in this case.
6 Now, let me address specifically, though,
7 the issue that's in those footnotes, which has to do
8 with a legal issue as to how the compositions are
9 licensed for use in movie theaters. And there is
10 arguably a legal difference between the way the right
11 for the sound recordings are conveyed and the way the
12 rights for the musical work is conveyed that arguably,
13 at least as a theoretical matter, would lead to an
14 upward valuation of the musical work in movies.
15 I don't think that argument's right as a
16 matter of concept, and that's explained in that
17 footnote. And further, if it were right, it has the
18 clear implication that you should see a different
19 pattern in movies than in television, because this
20 difference which occurs in movies simply does not
21 exist on the TV side. And what we'll see in a minute
22 when we look at the data is that not only is there

1 this very clear pattern of equality, there's no
2 evidence of any difference between movies and
3 television. So I just think there's no issue there
4 with respect to this complication of how the rights
5 are conveyed.
6 MR. RICH: Mr. Chairman, for this next
7 section, but only for this next section, of my direct
8 examination, we will need on a restricted record.
9 CHAIRMAN VAN LOON: Okay. Let's go on a
10 restricted record then. If I could ask that the sign
11 be put outside to indicate a closed session. And I
12 believe there's no one to ask to leave at the moment.
13 (Whereupon, at 2:33 p.m. the proceedings
14 went into Closed Session.)
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1 Q Now in sum, Professor Jaffe, what do these
2 studio data which you've now reviewed tell you about
3 the validity of your conceptual analysis about the
4 relative value of the sound recording performing right
5 and the musical work performing right?
6 MR. STEINTHAL: Should we go back on the
7 public record at this point?
8 MR. RICH: I think we can, yes.
9 CHAIRMAN VAN LOON: Back to the start of
10 this question.
11 THE WITNESS: Well, as I sort of implied
12 in my written testimony, this is verification of an
13 economic theory of a surprisingly strong form. I
14 mean, I've written a lot of papers where I've tried to
15 test my theories using empirical data, and it's pretty
16 rare that the test is this clean, this unambiguous and
17 this compelling. I think it just rules out any
18 interpretation other than that in this competitive
19 market setting where there is a valuation of, on the
20 one hand, an incremental use of the sound recording,
21 and on the other, an incremental use of the musical
22 work. There is anything other than approximate parity

1 between the two in market value.

2 ARBITRATOR GULIN: Professor, would it be

3 reasonable to assume that when a motion picture or TV

4 program incorporates one of these sound recordings

5 that there's a promotional value to the sound

6 recording, and it's going to promote the sale of CDs?

7 THE WITNESS: There could be, and I think

8 I have --

9 ARBITRATOR GULIN: So it would be?

10 THE WITNESS: Sorry?

11 ARBITRATOR GULIN: Would you guess there

12 would be?

13 THE WITNESS: I would guess there would

14 be. Now, how big it is, I don't know. Most movies

15 flop, so that you're making a movie hoping it's going

16 to be a big success, but most of them aren't.

17 As far as I can tell, I asked the studio

18 people did these other considerations ever come up in

19 these negotiations-- the cost or the promotional

20 value. From the studio people's perspective they kind

21 of complained that these guys demand all this money,

22 and they don't seem to take into account that there

1 are all these other benefits to them of putting it in
2 the movie.
3 The fact of the matter is, whatever are
4 such effects, they either are not big enough or not
5 perceived as big enough or sure enough to actually
6 affect these outcomes, as far as I can tell.
7 ARBITRATOR GULIN: Let me think about that
8 for a moment.
9 If, in fact, they are having an
10 effect -- maybe you're right that they're not, but
11 maybe they are, and we just don't see it. I think in
12 your direct testimony you made clear that when a CD is
13 sold that that benefits the record companies a lot
14 more than the PROs.
15 THE WITNESS: Correct.
16 ARBITRATOR GULIN: Correct? Now if that's
17 the case, and that's happening here, and the absolute
18 values of master-use rights and synch rights were
19 truly equal, would not one expect that the record
20 companies would accept less for the master-use right
21 than the PROs for the synch right? Because they're
22 making it up in promotional value. And that was the

1 same analysis you did with respect -- that's why you
2 had a downward adjustment in your rate.
3 THE WITNESS: I think conceptually you can
4 ask that question. And there's two comments I would
5 make on that. One would be, there's a limit to how
6 big even I would say the promotional value effect
7 would be. So if you carried that out, you might look
8 at these data and say, aha, the true value before
9 promotional value considerations is not equal; it's
10 30 percent higher for sound recordings. That's a lot
11 closer to equal than to the implied rates in the RIAA
12 proposal.
13 But I think more fundamentally, the
14 problem I have with that analysis is the one I
15 mentioned at the beginning, about two-thirds of them
16 being equal to the penny. I mean, somehow it just
17 doesn't seem plausible to me that there's this
18 uncertain promotional value out there which is
19 operating. And the impact that it has is to offset
20 the intrinsically greater value of sound recordings,
21 and to do it coincidentally with such precision that
22 we end up at exactly the same point. I don't find

1 that plausible.

2 ARBITRATOR GULIN: Well, if you're a

3 record company, and you say to yourself, boy, if we

4 can get exactly the same as the synch rights, we've

5 got a built-in premium, so let's just go for getting

6 exactly the same -- if that premium is 30 percent or

7 whatever it happens to be -- we don't know. There's

8 been no surveys done as far as -- certainly not

9 anything presented in this proceeding. But wouldn't

10 that be a reasonable way to proceed if you're a record

11 company? Say, let's just go for parity, and we're

12 making 30 percent, or whatever the figure is.

13 THE WITNESS: I'm not going to try to

14 guess what they might be thinking. When I talked to

15 the studio people and specifically asked them is it

16 their impression that's what's going, I didn't hear

17 that. Now, I don't know what the record label people

18 would say.

19 ARBITRATOR VON KANN: We may have a chance

20 to find out.

21 BY MR. RICH:

22 Q Professor Jaffe, just following on Judge

1 Gulin's questions, looking at the other side of the
2 equation, that is with respect to the musical works
3 and possible other royalty opportunities, any thoughts
4 what a successful exploitation of that product might
5 do with respect to boosting other sources of income to
6 the music publisher?
7 A I hesitated to get into this because it's
8 complicated. This is where the similarity of the
9 results for the movies and TV actually gives me a fair
10 amount of comfort, because one of the things that goes
11 on which is -- so you're saying, which I think may be
12 right, conceptually, "We're thinking about this movie.
13 If we get the song in the movie, it will boost the
14 sale of CDs." That benefits the sound recording more
15 than it benefits the musical work.
16 There's another phenomenon which is also
17 going to go on, which is if that movie is a success,
18 and presumably there's not going to be much
19 promotional value for CDs if it's not a success, it's
20 also going to end up on television later. And when
21 the movie is shown on television, the musical work
22 commands a performance royalty but the sound recording

1 does not. So that there is an offsetting factor with
2 respect to movies, in terms of promotional value,
3 connected to the additional performance royalties that
4 the composer will get when the movie is on TV that the
5 sound recording doesn't get, which would tend to
6 offset -- if they really are thinking this far down
7 the road about these sort of subsequent royalty
8 implications, that would tend to offset the CD sales,
9 and it would imply that we ought to see something
10 different between movies and television because with
11 respect to television we have a different situation
12 with the rights.
13 So, again, I think the fact that we such
14 a consistent pattern across movies and TV, what it
15 suggests to me is that while these subsequent values
16 are there, they're uncertain and they don't seem to be
17 big enough to be affecting the negotiations. I think
18 that's the most plausible interpretation of the
19 numbers.
20 Q Now, if you'd look at the bottom of Page
21 23 of your prepared testimony, you have a summary
22 section dealing with what you term the fundamental

1 symmetry of sound recording and musical work
2 performing right valuations.
3 A Yes.
4 Q I take it that synthesizes in one place
5 the various aspects of this issue, which to you
6 coalesce in the conclusion you've reached?
7 A Yes. I just tried to pull together in one
8 place in my testimony, in fairly condensed form, all
9 of the arguments or the important arguments about the
10 equality of the two works.
11 Q The last bullet of which is the data you
12 just described.
13 A That's correct.
14 Q Let's turn next to the fee model, which
15 you have sponsored here on behalf of the Services.
16 Beginning at Page 25 of your written testimony you
17 discuss that model. Am I correct that you have recast
18 that model in certain respects? And if I am correct,
19 can you tell the Panel why you did so and how
20 conceptually different the recast model is?
21 A Yes. I did, and it's not conceptually
22 different. It's presentationally different.

1 Obviously, at the time I wrote my direct testimony I
2 didn't know what the RIAA was going to propose. So
3 what I did was introduce a model that was
4 fundamentally based on or derived from this concept of
5 a listener hour, and from that I derived what I called
6 a listener song. And both of those, I argued, were
7 alternative ways of looking at the value of the
8 performance itself, which I argued was the appropriate
9 way to structure the model.
10 Then the RIAA, in its proposal, one of its
11 alternatives is something that it called a per
12 performance fee, which was conceptually the same as my
13 listener song fee. So what I realized or what I
14 decided on the second round I believe that it helps
15 the Panel in comparing these two approaches to focus
16 in on where they're the same so that you can then have
17 to worry about the places where they're different.
18 So all I've done here is to sort of
19 redefine the way I talk about my model to show as
20 clearly as possible how to compare it to the RIAA
21 model. So what I did was instead of starting from a
22 listener hour and then deriving from that a listener

1 song, what I have now done is to say, okay, I'll start
2 from a listener song and, you know what, I'll even
3 call it a performance since that's what RIAA calls it
4 so we can just agree on that terminology.
5 So I'll start by constructing a
6 competitive market value for a performance in the same
7 way I did before, so it's the same conceptual
8 approach. And I will derive the listener hour version
9 of the model from that so that it's totally parallel
10 to the RIAA presentation.
11 (Whereupon, at 2:57 p.m., the proceedings
12 went into Closed Session.)
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1 MR. GARRETT: Mr. Chairman, let me have
2 that portion of the transcript --
3 THE WITNESS: Oh, I'm sorry. Yes, I
4 apologize.
5 CHAIRMAN VAN LOON: Yes. We'll need to go
6 back, please, John, and mark it restricted. Thank
7 you.
8 COURT REPORTER: Before Mandelbrot?
9 CHAIRMAN VAN LOON: Yes.
10 THE WITNESS: Should I continue?
11 CHAIRMAN VAN LOON: Yes. I mean it's
12 completely appropriate, we just need to be mindful of
13 what's public information and what's not for the
14 purposes of the public.
15 THE WITNESS: And now that I've been
16 reminded that these agreements are in fact restricted,
17 I'll try to keep that in mind. I'd forgotten about
18 that.
19 CHAIRMAN VAN LOON: If it's necessary or
20 helpful to make the point, it's completely appropriate
21 for us to do it in closed session so that we have a
22 full understanding.

1 THE WITNESS: Yes, and all I meant was
2 I'll try to remember to say I'm about to say something
3 restricted rather than just launching into it. If I
4 can remember, I'll try to do that.
5 MR. GARRETT: Don't worry, I'll remind
6 you.
7 (Laughter.)
8 THE WITNESS: Okay. So the point I was
9 making was that it's the same model. What I've tried
10 to do is to now set it up in a way that makes it very
11 easy to compare to the RIAA's -- what they've called
12 their performance model.
13 BY MR. RICH:
14 Q Now, before we review some of the details
15 of this model in its current form, cutting to the
16 bottom line, what is its net impact on the fees that
17 you propose for the various services?
18 A Well, we may have skipped a step. Let me
19 also just mention, because I didn't in my previous
20 answer, I also recalculated all the numbers with
21 updated data, so that's sort of separate issue from
22 recasting how I've described the model.

1 The combination of those two things,
2 recalculating all the numbers and recasting the model,
3 has no impact on the fees for simulcasting or
4 rebroadcasting of over-the-air signals. It does end
5 up increasing slightly the fee for webcasting because,
6 as we'll explain in a minute when we get to it, when
7 you start with the performance and go from that to the
8 hour model, the fact that there are more songs per
9 hour in webcasting results in a slightly higher per
10 hour fee for webcasting than the way I did it before.
11 Q Why don't we, using Figure 3, walk the
12 Panel through the figures as they now exist,
13 benefitting from both the recasting and the updating
14 of data? So if you could describe what Figure 3
15 depicts, please.
16 A Yes. Figure 3 is analogous to a figure
17 that was in my direct testimony. It was called
18 Exhibit B-2 in my direct testimony. And the numbers
19 that were in Exhibit B-2 are shown in the righthand
20 column of Figure 3. And I won't test your memory, but
21 in B-2 the listener hour model came first, and then
22 the per performance, or listener song, model came

1 second. So I've just reversed the order.

2 And then I've recalculated, as is

3 indicated, in the first column the actual numbers.

4 Now, the first thing to observe in the first two rows

5 is that the numbers are exactly the same of 0.0002

6 dollars or 0.02 cents per performance. This is now in

7 over-the-air radio. We haven't yet brought it over to

8 the Internet context. And 0.22 cents per hour, per

9 listener hour. And that's the same in both cases --

10 to two decimal places those are the same numbers I had

11 before.

12 Now, let me just briefly describe the

13 updated data. When we did this before, which was in

14 the spring of this year, what we had were for the year

15 2000 actual amounts paid by the licensees on an

16 estimated basis to ASCAP, BMI and SESAC for the year

17 2000. They had not yet reconciled and produced final

18 numbers or final reports and final payments to the

19 ASCAP, BMI and SESAC, so I based my calculation on

20 those estimates. I suggested at the time that there

21 was no reason to believe that the final numbers would

22 vary systematically one direction or the other.

1 Those final numbers were produced between
2 the spring and the end of the summer, so I went ahead
3 and recalculated using the final numbers. I also --
4 there were a few stations for which we didn't have
5 complete data the first time around, and with the
6 additional time, we now had complete data, so you'll
7 see there's a few more stations in the recalculated
8 numbers.
9 But, essentially, it's the same
10 calculation I did before. And as I predicted, while
11 for an individual station there is sometimes a
12 variation, either up or down, in the final number as
13 compared to the estimate that I used, on average, to
14 two decimal places it doesn't change the answer. You
15 get exactly the same number I got before.
16 Q So, in essence, Figure 3 tells us that the
17 conversion metric, if you will, using over-the-air
18 broadcast fees has remain unchanged.
19 A Correct.
20 Q Okay. Now, if we could turn next to
21 Figure 4, which is the application of that metric in
22 the context of webcasters and broadcast streamers and

1 rebroadcasters, could you please describe how the
2 proposed fee, as set forth in the first row going
3 across, indicating webcasters fee per performance and
4 fee per tuning hour, were derived?
5 A Yes. The key link between Figure 3 and
6 Figure 4 on Figure 3 the first number in the upper
7 lefthand, the 0.02 cents per performance, or 0.0002
8 dollars per performance, that is my estimate of the
9 value of a performance of a musical work in over-the-
10 air radio. As I explained in my direct testimony, I
11 believe that because of the promotional value
12 difference, the market power of ASCAP and BMI and the
13 statutory factors, it would be appropriate to discount
14 that for Internet streaming, and I applied a discount
15 of 30 percent or equivalently multiplied that 0.02 by
16 0.7 to get what I think is the reasonable webcasting
17 fee per performance, and that's the number that
18 appears in the first box on Figure 4. So if you look
19 at Figure 4 for webcasters for fee per performance,
20 what you see is 0.014 cents per performance, which is
21 just the 0.02 on the previous page times 0.7.
22 Then moving across to the fee per tuning

1 hour, and are we still now on the restricted record?

2 COURT REPORTER: I never left it.

3 THE WITNESS: Good, because I'm about to

4 avert back to the Yahoo again.

5 CHAIRMAN VAN LOON: I believe that

6 everything that was testified after that one or two

7 sentences on Yahoo was appropriate to be back on the

8 public record.

9 MR. RICH: It was indeed appropriate to

10 be. I don't think we signaled it.

11 CHAIRMAN VAN LOON: Yes. I think we

12 didn't, just that one answer. But now this answer

13 should again go to the restricted record.

14 (Whereupon, at 3:05 p.m., the proceedings

15 went into Closed Session.)

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1 THE WITNESS: So I took the 0.014 cents
2 per performance and said my reading of the record in
3 this case, from the testimony of one of the
4 webcasters, was that there were 50 songs per hour in
5 webcasting. So I simply multiplied the 0.014 cents
6 per performance for webcasters times 15 performances
7 per hour to suggest that you could have a fee per
8 tuning hour, which is what the webcasters really can
9 measure, at least easily, of 0.21 cents per tuning
10 hour, so that that number would be an appropriate to
11 use for a webcaster, which is essentially broadcasting
12 or webcasting sound recordings more or less all the
13 time.
14 As I suggested before, if you have a
15 webcaster who has large number of hours in which they
16 don't have sound recordings for which they're paying,
17 they could use an alternative estimate of sound
18 recordings per hour times the 0.014 figure in the
19 upper lefthand corner instead, if that made sense in
20 their context.
21 Q Let me ask you this: Does the recasting
22 to calculate, first, the fee per performance and then

1 to move up, if you will, or multiply up to the fee per
2 tuning hour reflect any changed judgement on your part
3 from the time of your initial testimony, as to
4 desirability of calculating royalties, at the end of
5 the day, on the basis of aggregate tuning hours?
6 A No. I mean as I think I described the
7 first time around, there's a lot of benefit to both
8 sides in structuring these fees so that they're
9 reasonably easy to calculate. And I think the tuning
10 hours concept is very powerful and very helpful,
11 because this is something which is easily measurable
12 on the Internet. So it's beneficial to both sides to
13 have a fee that can be calculated on that basis.
14 My model, fundamentally, is derived from
15 the same performance concept that RIAA has used, but
16 what I'm suggesting is that it's important that there
17 be a per hour implementation of that performance
18 model, because it would be inefficient to require most
19 webcasters to actually go and count the specific songs
20 on an hour-by-hour basis.
21 Q Why don't you next walk the Panel through,
22 in a similar fashion, how you derived the proposed

1 fees for the broadcast streamers? That's the second
2 row on this Figure 4.
3 A Okay. Once again, the starting point is
4 the 0.02 cents per performance over the air that
5 appears on Figure 3. What I've done with respect to
6 the rebroadcasting is to recognize that there's a lot
7 of testimony in the record from Mr. Mandelbrot and
8 others about reasons why the market price for this
9 right, with respect to simulcasting or rebroadcasting,
10 is likely to be lower than the market price for
11 webcasting. The simulcasting or rebroadcasting is
12 inherently, on the user's side, competing with over-
13 the-air radio where this right is free, and that is
14 going to tend to have a downward pole on any market
15 price for the right on the Internet.
16 Many of the issues regarding displacement,
17 which have been raised as least as concerns, seem to
18 be connected to features of the Internet that would
19 not be present with respect to rebroadcasts of the
20 same material as over-the-air. So I think there is a
21 general agreement that a lower rate, in some sense, is
22 appropriate for the rebroadcasting or simulcasting.

1 I don't believe that there's anything in
2 the record that really allows one to precisely
3 quantify what that difference should be. So what I
4 propose is, as I described in my original testimony,
5 I think the evidence on promotional value, on market
6 power of ASCAP and BMI, on the international
7 comparisons of the ratio of sound recordings and
8 musical works, if you take all that together, I judged
9 a range of 40 percent to 70 percent would be --
10 anywhere in that range could be a reasonable fee for
11 the Internet. I had conservatively chosen the upper
12 end, 70 percent, for the webcasters. So what I'm now
13 suggesting is that one could choose the lower end of
14 the range, 40 percent, for the over-the-air
15 rebroadcasting and simulcasting.
16 So what I've done in Figure 4 is to take
17 that same 0.02, which appears in Figure 3, and
18 multiply it by 40 percent. That produces the 0.008
19 cents per performance that's in the lower lefthand
20 corner. Then to get over to the righthand side we
21 need to multiply that by songs per hour. I used 12
22 songs per hour. The average in my data for over-the-

air music stations is 11.5, so I just rounded that up to 12 to keep the numbers relatively simple. And that 0.008 cents per performance times 12 gives you 0.01 cents per hour for the streaming -- the simulcast and rebroadcast streaming.

Q And for what period of time do you propose that the fees set forth in Figure 4 apply?

A As I explained last time, these numbers are calculated on the basis of data for the year 2000. So what I'd like to propose is I think a conservative and straightforward of then applying them for the entire period that is at issue in this proceeding. So I would submit for the year 2000 these are clearly appropriate fees, because they're based on the actual economic experience in the year 2000. With respect to the year 1999, the fundamental basis of this is fees, which are based on revenue, per performance. The data show clearly that revenues relative to audiences in over-the-air radio for 1999 were lower. So if I had done this same calculation based on 1999 data for over-the-air radio, I would have gotten slightly lower numbers.

1 So what I would suggest, just to keep
2 things simple, and because I haven't done the
3 calculations in any precise way, is that these numbers
4 could be applied for the entire first period; that is,
5 from the end of October 1998 up through the end of
6 2000, these fees could be applied. That's actually
7 slightly conservative, because the right numbers for
8 1999 are probably slightly lower.
9 Going forward, with respect to 2001 and
10 2002, we don't have any data yet. We don't know what
11 the fees are going to be in the benchmark for 2001 and
12 2002. Given the way the economy is going, I think
13 there is reason to believe they might actually fall
14 again, but I don't know. So what I propose, just
15 again to keep it simple, is to just increase them for
16 an estimate of inflation. So what I would propose is
17 take the numbers that appear in Figure 4, increase
18 them by three percent for the year 2001, which is
19 basically the current best estimate of the inflation
20 rate, and then to take that level and increase it by
21 another three percent for the year 2002 in order to
22 build in a small increment for inflation.

1 Q I take it that with respect to ephemeral
2 fees, your testimony and your recommendation remains
3 that there be no increment ephemeral fee payable
4 beyond the fees set forth and proposed in your model;
5 is that correct?
6 A That is correct.
7 Q For the reasons that you have earlier
8 testified to.
9 A Yes.
10 Q Now, beginning at Page 40 of your
11 testimony, you address an additional issue which the
12 Panel has expressed interest in, which is whether
13 there are any other categories or subcategories of
14 webcasters for whom different fees should pertain.
15 Could you briefly summarize the gist of that
16 testimony, please?
17 A Yes. I've given this a lot of thought,
18 and I think it's important when you're asking yourself
19 whether some difference in circumstances demands a
20 difference in fees that you focus in on the question
21 of whether the difference in circumstances leads you
22 to believe that the value of a performance in

1 different circumstances is actually different. It's
2 very easy to have circumstances that are quite
3 different in terms of important business aspects
4 without having any reason to believe that the value of
5 the performance itself is any different.
6 And in this respect, I think we see one of
7 the main virtues of the per performance model as
8 distinct from the percent of revenue model, because if
9 you have a percent of revenue model so you observe in
10 a given benchmark that there's a two percent of
11 revenue fee and you believe that's reasonable and now
12 you've got some other circumstance over here and you
13 want to apply it over here, suppose there's all kinds
14 of other things over here that generate revenue that
15 really don't have anything to do with the performance.
16 They're just other things generating revenue in the
17 second context that weren't going on in the first
18 context.
19 If you were doing this on the basis of a
20 percent of revenue, you'd have to try to figure out
21 how to adjust your percentage so that the value you
22 attribute to the performance itself is correctly

1 translated from one context to another. But if you
2 valued the performance itself, the mere fact that over
3 here there's additional things that generate more
4 revenue just doesn't matter. You don't need to worry
5 about it.
6 To change slightly the analogy I used in
7 my written testimony, if you're trying to figure out
8 how much a set of tires is worth and you have a car
9 sitting here and the tires on it you know are worth
10 $200 and that happens to be one percent of the price
11 of the car, and that car is a Toyota, and over here
12 you've got a Mercedes that happens to have the same
13 tires on it, well, presumably, the value of the tires
14 themselves hasn't changed. The percentage that those
15 tires represent of the overall value has definitely
16 changed. So if what you were trying to do was to
17 value the tires on the Mercedes on a percent of value
18 basis, you have to use a different percentage, and the
19 percentage you used or the percentage that obtained on
20 the Toyota. But if you know, looking at that Toyota,
21 that the tires are worth $200 and it's the same tires
22 on the Mercedes, they're still worth $200. It doesn't

1 matter that it's now a Mercedes. The tires are still
2 worth $200.
3 So I think that when trying to answer this
4 question of making distinctions, you have to ask
5 yourself, is there something different about the
6 performances which leads you to believe the
7 performances should have a different value.
8 So the two issues that I looked at, which
9 are issues that have come up in this proceeding, are
10 the issues of consumer influence and the issue of
11 syndicated performances. And I would submit that in
12 both those cases, while the business models are
13 different and the revenue streams may be different and
14 the way the user gets value may be different, the
15 performances themselves are actually the same. And so
16 there is not a need to somehow value the performance
17 itself at a different rate just because it goes
18 through a second party before it gets to the user, in
19 the case of syndication, or because, in the case of
20 consumer influence, the consumer -- there's other
21 things about this service that make it attractive to
22 the consumer. The performances themselves are still

1 the same and I think should have the same value.

2 Q Let's next briefly summarize your

3 testimony beginning on page 31, respecting an

4 appropriate minimum fee. Can you summarize your --

5 CHAIRMAN VAN LOON: Thirty-one.

6 MR. RICH: Thirty-one. We're jumping just

7 a bit out of order.

8 BY MR. RICH:

9 Q Can you summarize your analysis there,

10 please.

11 A Yes. And for the most part, this

12 recapitulates material that we've already talked

13 about. My view of the minimum fee within a per

14 performance model is that since the performance

15 counting itself makes sure that regardless of what

16 happens to revenue or other economic variables, the

17 copyright owners will get appropriate compensation for

18 their performances. The only role for a minimum fee

19 is to protect against a situation in which the

20 performances are so minimal that it costs the license

21 administrator more to license this party than they're

22 going to get in royalties.

1 And so the appropriate calibration for the
2 minimum fee is the incremental cost to the license
3 administrator of adding another licensee to the
4 system. It's not the overall average cost of
5 operating a license system, because that will be
6 recovered out of some deduction from the per
7 performance fees. And ASCAP and BMI, which are my
8 benchmarks, do exactly that, they deduct some amount
9 from the royalties that they collect in order to cover
10 their administrative costs. But they do have minimum
11 fees, and I would suggest that those minimum fees are
12 indicative of what this cost of having a licensee in
13 the system are likely to be. In my report, I tell you
14 what the numbers are for ASCAP, BMI and SESAC. They
15 vary somewhat, but they are all in this range of $250
16 that I had suggested initially.
17 Q For the sake of clarity, you're now
18 referring to the ASCAP, BMI and SESAC internet
19 licenses; is that correct?
20 A That is correct.
21 Q Okay.
22 A And, therefore, I think that the $250

1 figure that I had previously suggested is at least in
2 the right range.
3 CHAIRMAN VAN LOON: Can I ask you on that
4 one, since SESAC is -- I think it's $150, so much
5 lower, why not go with that?
6 THE WITNESS: I think there is no precise
7 answer to this question. I mean $150 --
8 MR. GARRETT: Good.
9 THE WITNESS: -- would be probably okay,
10 and I think one of them is higher than $250, I forget,
11 CHAIRMAN VAN LOON: Two sixty-eight.
12 THE WITNESS: -- like $275, so that maybe
13 that could be okay. I think that nobody knows exactly
14 what is the right number, but I think this indicates
15 a range of a few hundred dollars.
16 ARBITRATOR VON KANN: Or arguably, you
17 should go with the three of them together, because
18 they represent parts of the total sound recording
19 repertoire, don't they?
20 THE WITNESS: But the incremental cost of
21 having somebody in your system is independent of the
22 size of the repertoire. It's really the cost of

1 mailing out an invoice, it's the cost of keeping track
2 of this guy in your computer, it's the cost of the
3 dunning them if they don't pay, and so I don't really
4 see an argument for adding up three different
5 organizations, each of which are incurring the same
6 minimum cost.
7 CHAIRMAN VAN LOON: Is there any actual
8 evidence that says these three figures are
9 representative of the minimal costs for them? I
10 understand you've sort of inferred that, but is there
11 any evidence that indicates that's where they came
12 from?
13 THE WITNESS: Not that I know of.
14 CHAIRMAN VAN LOON: Is it possible that if
15 the margin -- if 90 percent of the people that were
16 paying paid royalties enough to cover the incremental
17 costs, plus a lot more so that they had a good margin,
18 that the minimum fee that's picked is just some
19 convenient one that made it affordable for everybody
20 but doesn't really reflect the actual admin cost.
21 It's just a picked minimum because they've got enough
22 margin with this to cover everybody.

1 THE WITNESS: So what you're saying is
2 that they've made a conscious decision to set a fee
3 knowing that they're going to get some licensee that
4 they're actually losing money on, because this guy
5 really costs $500 to service. I'm going to give him
6 his license for $150 and make that up somewhere else,
7 and they've made a conscious decision to do that in
8 order to license as broadly as possible.
9 CHAIRMAN VAN LOON: I guess the first half
10 of the question is whether there's actually any
11 evidence that you know for sure that says they're not.
12 THE WITNESS: My understanding is that
13 these fees have not been tested as being derived from
14 cost data. I don't think -- I mean I think they are
15 set by these -- they're proposed by these
16 organizations. These licenses haven't actually been
17 accepted by very many people. They've been proposed
18 by these organizations, they have not been, for
19 example, tested in a rate court, and so,
20 unfortunately, I can't -- I'd like to tell you that
21 there is evidence that they represent the costs, but
22 I don't think that's true. It's just what is out

1 there in the marketplace.

2 ARBITRATOR VON KANN: Probably not going

3 to have a ten-year litigation over whether the company

4 should pay $150 or not, although one can never tell,

5 I guess.

6 MR. RICH: I can ask the Panel's pleasure

7 about a break time, a mid-afternoon break time?

8 CHAIRMAN VAN LOON: Well, we were

9 wondering about your best estimate of -- do you have

10 another hour to go or just ten more minutes?

11 MR. RICH: An hour plus.

12 CHAIRMAN VAN LOON: An hour plus. Why

13 don't we take a break then right now, it's about an

14 hour and half, and plan to come back at quarter till.

15 And the Panel, during this break, will look at the new

16 lineup, and so you might alert Ms. Woods that at

17 quarter of that's when you all can come into to look

18 at that.

19 (Whereupon, the foregoing matter went off

20 the record at 3:26 p.m. and went back on

21 the record at 3:51 p.m.)

22 CHAIRMAN VAN LOON: -- discuss the

1 possibility of moving the final arguments to Tuesday,
2 December 11, giving the parties an additional weekend
3 to prepare, and in lieu of the historical significance
4 of that date. And now we're discussing a revised
5 schedule for next week that would waive personal
6 appearances by Coppola, Marcus, Hessinger and Price.
7 Mr. Garrett?
8 MR. GARRETT: I just wanted to put on the
9 record the fact that Ms. Leary and I had agreed the
10 other day to waive the direct and the cross
11 examination of Dr. Murdoch.
12 CHAIRMAN VAN LOON: Yes, that's an
13 important addition. I know that was done at the at
14 the very end while we were arranging boxes to leave
15 the Library building to be evacuated. Okay. Another
16 item?
17 MR. GARRETT: And further matter. The
18 Panel, as you know, had asked that we provide you with
19 certain information concerning various agreements,
20 such as the Artists Direct agreement, the radio
21 agreement. We did put together a response to the
22 Panel. We have shared it the other side a couple of

1 days ago. We have not gotten a response back. I
2 think I did at one time promise to have it filed with
3 the Panel by the end of the day today, but we're still
4 awaiting comment from the other side.
5 CHAIRMAN VAN LOON: Given the fact that
6 we've had to move and a few other disruptions, I'm
7 sure the Panel would be happy to wait until Monday to
8 receive it.
9 MR. GARRETT: That's fine with me.
10 CHAIRMAN VAN LOON: Any other --
11 MR. GARRETT: Yes, one other thing too.
12 CHAIRMAN VAN LOON: Another housekeeping
13 --
14 MR. GARRETT: We also have provided to
15 Yahoo's counsel, Mr. Greenstein, a sanitized version
16 or a resanitized version of the transcript of Mr.
17 Mandelbrot and have asked that he get back to us and
18 let us know whether or not it's okay with him and his
19 client. I gather he's forwarded it on to his client.
20 We obviously have not gotten a response back. I went
21 over it, I believe, yesterday. And so we have not
22 been able to provide a copy of it to RIAA yet, and

1 also we don't have a summary of what it is that Mr.
2 Marks would be testifying to. But as soon as we get
3 this resolved with Mr. Greenstein, we'll provide that
4 summary as well.
5 CHAIRMAN VAN LOON: You have a few more
6 hours, if they're on the west coast, to try to reach
7 him by the end of the day.
8 ARBITRATOR VON KANN: Marks is now next
9 Wednesday.
10 MR. RICH: Can we also have a sense of
11 location at this point? Is it logical at this point
12 to assume we would stay here for the duration? Do you
13 have any more information on Library of Congress
14 closure?
15 CHAIRMAN VAN LOON: The latest -- we get
16 what are called broadcast alerts, or something like
17 that, on voice mail, which we've been checking. The
18 latest that we had heard from them was that they were
19 closed till further notice. They thought that they
20 would reopen Tuesday, but that has not been confirmed,
21 and I guess part of the Library was used, the clinic,
22 for testing, anthrax testing of people which concluded

1 around eight o'clock last night.

2 ARBITRATOR VON KANN: Mostly over where

3 you guys were sitting, I think.

4 (Laughter.)

5 ARBITRATOR VON KANN: So if you're eager

6 to rush back there at this point --

7 CHAIRMAN VAN LOON: I suppose -- one thing

8 is we could look for the earliest possible opportunity

9 to return to our hallowed venue or we could simply say

10 for a last day or two why not stay here if Mr.

11 Garrett's willing to allow us to impose on his

12 hospitality still further. I don't know whether the

13 parties have a preference whether --

14 ARBITRATOR VON KANN: I guess you enjoyed

15 that move so much that you'd like to now do it again.

16 CHAIRMAN VAN LOON: Do you all have a

17 preference?

18 MR. JOSEPH: I would say that this side

19 has a preference, probably, but we --

20 CHAIRMAN VAN LOON: Could you reveal it?

21 MR. JOSEPH: We wouldn't want to impose on

22 Mr. Garrett's hospitality unless he's interested in

1 inviting us to do so.

2 MR. GARRETT: Your bill's going to be the

3 same regardless.

4 MR. RICH: Regardless.

5 (Laughter.)

6 CHAIRMAN VAN LOON: So you all would

7 prefer just to stay here and not go through that

8 hassle. This may be a case of no good deed goes

9 unpunished. We're so happily ensconced and you made

10 a big mistake by having the brownies brought in.

11 MR. GARRETT: We're happy to have you all.

12 CHAIRMAN VAN LOON: Perhaps we should just

13 say then that we'll plan to stay here unless something

14 comes up. I suppose if the General Counsel's Office

15 at the Library said -- were to say to us, no, it's

16 very important that for public policy reasons or

17 something they wanted us back, we could reopen this.

18 MR. JACOBY: Well, we'll get an injunction

19 against them.

20 (Laughter.)

21 CHAIRMAN VAN LOON: The heart of the

22 litigator.

1 (Laughter.)

2 MR. JOSEPH: That may at least keep it up

3 in the air until Thursday.

4 CHAIRMAN VAN LOON: All right. Are there

5 any other housekeeping matters? Dr. Jaffe, you've

6 been treated here to a rare insider's look at the high

7 level business of the arbitration. Let's continue

8 then, Mr. Rich.

9 BY MR. RICH:

10 Q Dr. Jaffe, now that we have taken the

11 Panel through the fee model, as it presently stands,

12 I want you to speak a bit to the three principle

13 criticisms of your fee model, which have been leveled

14 by Dr. Shink in his own testimony submitted on the

15 rebuttal case. Have you had a chance to review that

16 portion of Dr. Shink's testimony?

17 A Yes.

18 Q First, let me ask you to respond to what

19 Dr. Shink describes as his important criticism, namely

20 that you have, as he would view it, improperly sought

21 to convert a percentage of revenue fee experience in

22 the ASCAP, BMI, SESAC radio world into the metric

1 which you have presented to the Panel. Do you have
2 a reaction to that criticism?
3 A Yes. I think --
4 ARBITRATOR VON KANN: Can you remind me
5 sort of what page we're on?
6 MR. RICH: This is now surrebuttal.
7 THE WITNESS: This is more surrebuttal, so
8 we're not in my report.
9 ARBITRATOR VON KANN: Okay. I'm sorry.
10 This was on the notes.
11 THE WITNESS: Well, I suppose it won't
12 surprise the Panel that I think Dr. Shink's criticisms
13 of my model are wrong.
14 CHAIRMAN VAN LOON: Shocked, shocked.
15 THE WITNESS: And the fundamental issue --
16 the first issue then is this question of the percent
17 of revenue model. I think there's actually a quote
18 which is in my testimony here somewhere from
19 negotiations for these rights where Mr. Marks says,
20 "We both know that it's not revenue that determines
21 the value of performances." And I think that that's
22 true in over-the-air radio. I view a percentage of

1 revenue as a convenient proxy for the value of the
2 performances. There is nothing intrinsic that
3 determines that it's right to value performances as a
4 percentage of revenue.
5 And I think that point carries particular
6 force when you're going to, in effect, use a benchmark
7 and move from one context to another. It's one thing,
8 for example, over time to say, "Let's agree today on
9 a certain royalty and rather than having to
10 renegotiate tomorrow and the next day between the same
11 parties, we know my business may grow and therefore
12 you'd be entitled, in some sense, to more revenue,
13 let's just make it two percent of revenue, and that
14 way it will naturally increase as my business grows."
15 And that's a convenient way of avoiding having to
16 continue to revisit what's it really worth. That
17 makes a certain amount of sense.
18 But when you're going to use it as a
19 benchmark to determine a fee in a slightly different
20 context, I just think it's extremely problematic to
21 take a percentage of revenue in one context and
22 presume that the value of the performances is the same

1 percentage of revenue in another context. There is no
2 economic reason why that should be true. It goes back
3 to my tires on the Toyota versus tires on the Mercedes
4 example. The revenue is determined by many, many
5 different things. And if those things that determine
6 revenue are different in the two contexts, then the
7 percentage of revenue that is reasonable and a market
8 value in one context is not going to be the
9 appropriate percentage in another context.
10 But I think you can say, well these
11 parties -- the radios and ASCAP and BMI -- over many
12 years have developed a model for valuing performances.
13 They do it on a percentage of revenue basis, but
14 presumably that reflects their valuations of what the
15 performances are worth, and so we can figure out on a
16 per performance basis what their percent of revenue
17 model tells us the performances are actually worth.
18 And then that, because it's valuing the performances
19 themselves, can be moved from context to another,
20 because it's not tied to the particular business model
21 that drives revenue in either context.
22 BY MR. RICH:

1 Q Now, Dr. Shink also criticizes your
2 methodology, because he claims, and I'll quote this
3 portion of his testimony from Page 7 of his own
4 testimony, quote, "It is not possible to define a
5 single per listener hour fee that is comparable to the
6 percentage of net advertising revenue fee in the radio
7 broadcasting arena," unquote. And then he has some
8 appendix material where he purports to demonstrate the
9 disparity on an entity-by-entity basis. Have you had
10 a chance to consider that criticism?
11 A Yes.
12 Q And do you have a response?
13 A Actually, I have two responses. First of
14 all, what he does is he looks at, for example,
15 different formats of radio stations or different
16 markets, and he shows that if you calculate the per
17 performance fee that's paid in these different formats
18 or different markets, they vary somewhat. In fact, I
19 found his appendix quite comforting, because what it
20 showed to me is they really don't vary very much at
21 all. I calculated the number as being about 0.2, and
22 what he shows is, well, in some cases it's as low as

1 0.15, and in some cases I think it was as high as
2 about 0.3 or so. But in fact it really doesn't vary
3 all that much.
4 Now, fundamentally, the license we're
5 talking about, the radio license -- or the licenses,
6 BMI, ASCAP in particular, are negotiated on an
7 industrywide basis. It's not that KFOG goes to ASCAP
8 and negotiates a license and maybe they have a
9 different fee or fee structure from some other station
10 that goes to ASCAP and negotiates a license. They are
11 negotiated on behalf of the entire industry.
12 So, presumably, when that negotiation
13 occurs what people are thinking about is, in some
14 sense, the average value of a performance. And it's
15 the very nature of an industrywide negotiation that
16 the formula they agree upon may fit some stations
17 slightly better than others, and the result is going
18 to be that some stations might pay a little more
19 relative to their performances, and some may pay a
20 little less. That's going to be an inevitable outcome
21 of an industrywide negotiation. But what they're
22 negotiating over is the overall average, which is what

1 I used.

2 And if KFOG believes that they're paying
3 too much because the revenue formula really hurts
4 them, there's really not much they can do about it.
5 They really, as a practical matter, can't go on their
6 own to ASCAP and say, you know, "I don't like this
7 industrywide formula, I want my own formula," because
8 then they confront the market power of ASCAP. They
9 could take ASCAP to rate court, but for one licensee
10 to do that is an expensive proposition.

11 So I think, conceptually, if you accept at
12 all the notion that the ASCAP and BMI licenses are a
13 benchmark, they are a benchmark at the overall
14 industry average level, and the fact that the numbers
15 vary somewhat station to station is really neither
16 here nor there.

17 Q Now, third, and lastly, as to Dr. Shink's
18 critique, he obliquely criticizes your reliance solely
19 on the blanket license fee experience of radio
20 broadcasters while not extrapolating from the per
21 program fee rates for the radio industry. Do you have
22 a comment as to that criticism?

1 A Yes. I don't really understand it. The
2 blanket license model is the model which applies to
3 music formats, which is primarily what I'm talking
4 about -- webcasting and rebroadcasting of music
5 formats. So the notion that somehow it ought to be
6 the per program model that would be used as the
7 benchmark just doesn't make any sense to me. The
8 analogous users on the radio side are not using the
9 per program model; they're using the blanket model,
10 and it is a blanket license, in effect, that is being
11 priced here.
12 Q Let's turn to the discussion appearing at
13 Page 35 of your written testimony. For the reasons,
14 Professor Jaffe, you've already testified to, you use
15 the over-the-air radio ASCAP/BMI experience as the
16 basis for converting to appropriate fees here as
17 opposed to Internet experience of those entities. At
18 Page 35 of your testimony, though, you report that you
19 performed a check on that analysis by in fact
20 examining the ASCAP and BMI Internet licenses; is that
21 correct?
22 A Yes.

1 Q Could you describe what you did?

2 A Yes. As I explained the first time, I
3 don't think the economic experience with the Internet
4 licenses is really sufficient to draw a benchmark
5 inference from them, but it's still, I think -- the
6 Panel raised some questions, and it makes sense, to
7 ask can we -- do we see any evidence there that the
8 treatment of musical works on the Internet and, by
9 inference, the treatment of performances generally on
10 the Internet is different than in over-the-air?

11 So I looked at this two ways. The first
12 way I looked at it was just at the level of the
13 percent of revenue formula that is used by ASCAP and
14 BMI in both cases, are the formulas and the
15 percentages any higher on the Internet than they are
16 in over-the-air radio? And this is a slightly
17 difficult comparison to make, because the percentage
18 that's used in over-the-air radio is a percentage that
19 is applied to a concept that they developed of new
20 revenue, which really is calculated for their
21 purposes, and it's not clear how you would calculate
22 that for an Internet streamer. So there's a little

1 bit of ambiguity, but as I explained in the report,
2 even given that ambiguity, what the situation is is
3 that the percentage of revenue that ASCAP and BMI have
4 proposed -- now most licensees have not accepted this
5 and no rate court has approved this -- but BMI and
6 ASCAP have proposed that they collect about three and
7 a half percent of the Internet streamers revenue for
8 their licenses.
9 Q Combined.
10 A Combined. The total of BMI and ASCAP
11 would be three and a half percent. The over-the-air
12 rate on a comparable basis is somewhere in the range
13 of three to three and a half percent. It might be a
14 little lower or it might be about three and a half
15 percent. So on a percent of revenue basis, the ASCAP
16 and BMI Internet proposed models are not substantially
17 higher than the over-the-air basis. So that gives me
18 some comfort that in moving to the Internet there's no
19 evidence that an upward adjustment in the musical
20 works fee would be appropriate.
21 The other check I did requires restricted
22 information.

1 Q Let's go on a restricted record, please.

2 (Whereupon, at 4:09 p.m., the proceedings

3 went into Closed Session.)

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1 THE WITNESS: What I attempted to do in
2 this section was to try, as I saw it, to pull together
3 a summary of the overall evidence on promotion and
4 displacement, as it appeared in the record before I
5 wrote this. And that begins on Page 51 of the
6 testimony. I think for today the only thing I would
7 emphasize is there is a flavor in some of the
8 discussion in the direct case of is it promotion or is
9 it displacement, which is it? And I just wanted to
10 emphasize that it's really not an either/or kind of
11 thing. What's probably going to happen is that to
12 some extent both will occur, and the issue is really
13 net promotion.
14 And I think, as I summarize here, that the
15 evidence is very clear that there is promotional value
16 over the air. The evidence that we do have on the
17 Internet in terms of quantitative data shows that
18 there is also net promotional value on the Internet.
19 And the evidence regarding displacement is essentially
20 anecdotal and fears about the future, but there is no
21 quantitative evidence in the record that I could find
22 of the amount -- the extent to which displacement is

1 diminishing the net promotional value now or by the
2 end of 2002. And that was true when I wrote this
3 written report, and I don't believe that anything in
4 the RIAA's rebuttal filing changes that. They did not
5 put in any quantitative data to demonstrate the
6 magnitude of displacement relative to promotion in the
7 relevant time period.
8 BY MR. RICH:
9 Q Let's turn to the last major section that
10 I want to review with you, which is Part 6, which is
11 your review of and analysis of the RIAA fee
12 benchmarks. You indicate at Page 54 of your rebuttal
13 testimony that -- or you recommend, certainly, for the
14 Panel's consideration that there are three categories
15 of issues to consider in evaluating how much reliance
16 should be placed on the various agreements into which
17 the RIAA has entered. Can you address each of these
18 three bulleted categories at a conceptual level?
19 A Yes. I think, conceptually, in order to
20 analyze whether we have benchmarks there that we can
21 use, there are three steps. The first step is, is the
22 agreement, in its own context, on its own terms,

1 likely to be evidence of a willing buyer/willing
2 seller competitive market situation that was not
3 distorted by the presence of the RIAA market power?
4 And I discussed briefly in my direct testimony, what
5 that really comes down to is did the buyer have good
6 information and access as a realistic matter to the
7 statutory license as a substitute for what RIAA was
8 offering so that that substitute -- the availability
9 of that substitute could discipline the market power
10 of the RIAA? That's the first step, and I refer to
11 that as the is it willing buyer/willing seller in its
12 own context.
13 A second issue is does it really give us
14 significant evidence of market conditions? Is it
15 economically significant? Did they actually pay real
16 money under this agreement? Is there evidence that
17 this was a viable business transaction? Because
18 otherwise it's not telling us about the market price.
19 And then, finally, there's the question of
20 even if it is economically significant and reasonable
21 on its own terms, is it comparable to what we're
22 trying to license here? Is it -- does it represent an

1 economic situation that can be appropriately
2 extrapolated to the current licensees? Because
3 otherwise it's not an appropriate benchmark.
4 Q Mr. Jaffe, have you occasion now to review
5 the record evidence with respect to the 26 licenses
6 and licensees put forward by the RIAA?
7 A Yes.
8 Q And have you had a chance to apply your
9 thinking, with respect to these three categories of
10 issues, against that record evidence?
11 A Yes, I have.
12 Q And I'm going to now hand out a
13 demonstrative exhibit, which I'm going to ask you to
14 describe, which I believe reflects your work product
15 of respecting that analysis.
16 A Now, this exhibit is certainly
17 restrictive.
18 Q Yes, and I think for a considerable
19 portion of --
20 A I was just going to say I can complete my
21 overall description of what it is without getting into
22 any information, and then we could go on the

1 restricted record. Is that the best way to proceed?
2 Q That would make sense. That would make
3 sense. Can you broadly describe what --
4 A Yes.
5 Q -- this document is?
6 A This document is just an attempt on my
7 part to organize and summarize the information that
8 I've reviewed regarding these issues of the
9 applicability of the 26 agreements. And, essentially,
10 the first four columns, which are labeled,
11 "Information Concerns," "Concerns About Timing and
12 Uncertainty," "Other Consideration Bundled with the
13 Statutory Right," and "Concerns About Cost of
14 Litigation," all go to the first of my three major
15 issues: Was the license a willing buyer/willing
16 seller agreement in its own context?
17 And the second page of the exhibit just
18 summarizes, conceptually, what's in my written
19 testimony in terms of the kinds of things that I
20 believe one looks at in those categories. The fifth
21 column addresses the comparability issue, and then the
22 final column addresses this question of, even putting

1 aside whether it was willing buyer/willing seller and
2 comparable, is there really any economically
3 significant evidence contained in that agreement?
4 MR. RICH: Perhaps now we should move to
5 a restricted record.
6 CHAIRMAN VAN LOON: Yes, let's go to the
7 restricted record.
8 MR. RICH: Thank you.
9 (Whereupon, at 4:23 p.m., the proceedings
10 went into Closed Session.)
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1 BY MR. RICH:

2 Q Following generally, on Judge Von Kann's
3 questioning and coming back for a moment to the rate
4 which you do propose, Professor Jaffe, what degree
5 does that rate -- has that rate been shaped by
6 concerns over webcaster viability or the suggestion
7 that has floated through the record occasionally here
8 that there is some interest on the part of the
9 services to subsidize, to be subsidized or not to pay
10 fair market value? What degree does your own proposed
11 fee structure attempt to be sensitive or to deal with
12 that issue?

13 A It does not. And as I said a second ago,
14 it doesn't bother me at all if people go bankrupt
15 paying the rate I propose. The rate I propose has
16 been derived from a viable, healthy, reasonably
17 profitable, over the air radio business. And all I'm
18 saying is that these webcasters ought to pay an
19 appropriately comparable rate and if they can make
20 money doing that more power to them, and if they can't
21 make money doing it, then that's the way it goes.

22 MR. RICH: Mr. Chairman, we have about 15

1 more minutes, just to advise you and we'll be done
2 with direct and we're prepared to proceed on that
3 basis.
4 CHAIRMAN VAN LOON: Excellent, let's
5 continue.
6 BY MR. RICH:
7 Q Professor Jaffe, at 74 of your -- page 74
8 of your testimony, you address an aspect of Dr.
9 Nagle's initial direct testimony in which he addresses
10 or in which he performs an estimation of buyer's
11 maximal willingness to pay and in which he also relies
12 on estimates of future positions of viability and
13 extrapolations of data.
14 Could you synopsize your analysis of that
15 approach of Dr. Nagle?
16 A Yes, very briefly, I don't understand what
17 the future has to do with these for the period through
18 2002. There will be some other CARP maybe or
19 negotiations that can set those fees. And if the
20 world looks different in 2005 than it does today, they
21 can set different fees. So it would seem to me that
22 the task for this CARP, whatever its model, whatever

1 its fee approach is to base it on economic conditions
2 today.
3 On the other point, I think conceptually
4 what Dr. Nagle has done and I don't think he really
5 disagrees with this is that he has calculated the
6 maximum amount you could extract from a hypothetical
7 streamer for this right which is by definition the
8 monopoly price. And for the reasons that are
9 articulated in my direct testimony, I don't think that
10 Congress intended to have all these people sit in this
11 room and consume tremendous amounts of time and money
12 in order to produce the rate which RIAA would have
13 gotten on its own if there had never been a statutory
14 license which is in effect the monopoly rate.
15 And so I think for that reason, this
16 analysis is not relevant to the willing buyer/willing
17 seller analysis.
18 Q And in the succeeding section of your
19 testimony, Section 8, where you talk about the
20 significance of broadcaster/webcaster projections, I
21 think you've just touched on your view of that. Is
22 there anything further you want to add respecting your

1 written testimony there?

2 A I don't think so. I think there are some

3 more minor points that are made here about what we see

4 in those projections, but the main point is that I

5 don't think they tell us about the market value today

6 of this right.

7 Q Now two moments ago Judge Von Kann made a

8 reference to other inputs, bandwidth and the like and

9 in your testimony, particularly 83, you talk about a

10 red herring that has been raised by RIAA, namely the

11 magnitude of some of these other payments. Can you

12 describe a little bit what you mean by that?

13 A Yeah, I mean what I'm talking about is the

14 notion that say my fee or other fees that the

15 streamers or webcasters have proposed can't be right

16 because the result would be that the streamer is

17 paying less for the performance than they're paying

18 for something else, for bandwidth, or it can't be

19 right because they're paying such a small percentage

20 of their overall costs.

21 And I must say I just find this argument -

22 - I just don't understand where this argument comes

1 from. It seems to be based on a presumption, almost
2 a religious presumption that it's got to be true, that
3 the performance is the thing that is really valuable
4 in terms of what streaming is about. And therefore
5 that thing has to be getting a significant fraction of
6 the total.
7 Well, it seems to me if it was
8 performances that are really valuable, we would
9 observe somebody making money with them because they
10 are easy to get. You or I can get performances, the
11 right to make performances. All we have to do is file
12 with the Copyright Office in terms of the sound
13 recording and write a letter to ASCAP and BMI and
14 indicate your willingness to be bound by their license
15 and lo and behold you've got that. You've got the
16 right to make performances. If that was the key to
17 Eldorado on the internet, then we would have seen
18 people making money on the internet and we haven't
19 really seen that. What that says to me is that if and
20 when anybody ever goes figure out how to make money on
21 the internet, it's going to be somehow bringing to
22 bear to that business something or some things that

1 are very important and significant other than the
2 performances themselves, because the performances are
3 available today to anyone who wants them. And if that
4 was the thing that creates value on the internet, then
5 value would have been created on the internet. So I
6 just think it's irrelevant to observe that if we apply
7 a market price-derived model, the result is going to
8 be a relatively small percentage of the costs or
9 revenues of these streamers are actually going for the
10 performances. Because my response to that is yeah,
11 and that makes a whole lot of sense. It should be a
12 small percentage because it's pretty darn clear that
13 the right to make performances is far from what you
14 need to make money on the internet. You must need a
15 whole bunch of other stuff.
16 Q As a final minor, Professor, I think there
17 is one correction you want to make to your rebuttal
18 testimony and I refer the Panel to page 4. It should
19 be page 4 on every version. And the second bullet.
20 Can you identify what the mistake is?
21 A Yes. This refers to a point that's in my
22 testimony that I actually haven't highlighted today in

1 the spirit of brevity about the relationship between
2 RIAA's own revenue model and it's own per performance
3 model. I say that their per performance model is 20
4 to 100 times as expensive as their percent of revenue
5 model and that's just wrong. My only excuse is that
6 it was written at an a.m. hour that is only a single
7 digit. The correct range is 4 to 25, not 20 to 100.
8 And the part of the testimony -- I mean this is the
9 summary. The substantive part of the testimony where
10 that is derived and explained is in Section roman
11 numeral 9, in particular, in connection with footnote
12 109.
13 Q The footnote is correct as stated?
14 A The footnote is correct. It's only the
15 summary that got off the reservation.
16 Q Okay. And with that, we conclude our
17 direct examination.
18 CHAIRMAN VAN LOON: Thank you very much,
19 and that was significantly under the 15 minutes you
20 projected, so that's great.
21 Why don't we take our break at this point
22 and come back at quarter past to begin the cross

1 examination.

2 (Off the record.)

3 CHAIRMAN VAN LOON: Is it true, Mr.

4 Garrett, you'd like to go to 9 tonight so that we

5 don't have to have a long day tomorrow?

6 MR. GARRETT: 9.

7 CHAIRMAN VAN LOON: Please proceed.

8 MR. GARRETT: Thank you.

9 CROSS EXAMINATION

10 BY MR. GARRETT:

11 Q Good afternoon, Dr. Jaffe. I'm Bob

12 Garrett and I represent the Recording Industry

13 Association in this proceeding.

14 A Good afternoon.

15 Q Dr. Jaffe, we've been at this now for

16 about two months and I know time flies, but there have

17 been a number of different benchmarks that have been

18 either directly or indirectly proposed in this

19 proceeding. What I'd kind of like to do at this point

20 is get certain that we're all clear on where you stand

21 on the different benchmarks, both on an absolute level

22 and a relative level.

1 And to do that, Mr. Chairman, I'd like to
2 be able to use the board if that's all right?
3 CHAIRMAN VAN LOON: Absolutely, please.
4 We'll need to call on your erasure skills first.
5 MR. GARRETT: I think I can handle that.
6 BY MR. GARRETT:
7 Q Dr. Jaffe, I'd like you to imagine for a
8 moment a continuum, two poles, sort of the extent of
9 my talent. And on the one hand we have a benchmark
10 that if it were proposed in this proceeding and there
11 were record evidence supporting it would be in your
12 view outcome determinative. It is so close to what
13 the real rate ought to be here that you would say go
14 for it. Okay? That's on one end of the extreme.
15 We'll call this the outcome determinative benchmark.
16 The other end of the continuum here, I'd
17 like you to think of a benchmark that if it were
18 proposed by any party, it would be totally
19 unreasonable. No reasonable person would rely on that
20 benchmark, okay? We'll just call it unreasonable. If
21 the Panel adopted it, they would certainly be acting
22 arbitrarily, okay?

1 Do you understand what I've done so far?
2 A I suppose, yes.
3 Q I'd like to get a sense of where on this
4 continuum you would put your benchmark, the over the
5 air radio payments to ASCAP and BMI? Now how close
6 does it come to be outcome determinative, in your
7 mind?
8 A I have great difficulty thinking about
9 that as a one dimensional question and let me explain
10 why. I think there's sort of two issues. One is how
11 good a benchmark is it and there's a separate issue
12 which is how precisely does it pin down exactly what
13 the number is and those are two different issues.
14 I think in terms of a good benchmark that
15 can be relied on, my model is outcome determinative.
16 I would be the first to admit though that it doesn't
17 give you an extremely precise number. There is some
18 estimation that is involved in it, so that it's
19 outcome determinative with a range.
20 Now I don't know how to represent that on
21 your one dimension.
22 Q Let's make it -- let's just take the top

1 continuum as being the concept, okay?

2 A Okay.

3 Q So in concept you believe what you've got

4 is at this end here, the end that would be outcome

5 determinative, right?

6 A Correct.

7 Q Why don't we just stick with the concept

8 for a moment then?

9 A Okay, fine.

10 Q And I guess I'll put it right here, this

11 would be as close as I could get it to outcome

12 determinative, is that okay to you?

13 A Fair, yes.

14 Q We'll just label the radio PRO payments,

15 okay?

16 A Okay.

17 Q Just thinking conceptually, the RIAA 26

18 agreements, where would you put those on this concept

19 continuum?

20 A I think they're unreasonable. They don't

21 tell me anything about the willing buyer/willing

22 seller rate.

1 Q Okay. So we've got a little space to make
2 up between the two of us, I guess.
3 ARBITRATOR VON KANN: We noticed that too.
4 BY MR. GARRETT:
5 Q Okay, now let me ask you this, what if we
6 had had agreements with the 12 webcasters who are
7 parties to this proceeding. Where would you put that
8 on this continuum here?
9 A I don't know.
10 Q Why not?
11 A Because it would depend on the
12 circumstances under which those agreements were
13 arrived at.
14 Q So for the 12 webcasters, you're not
15 certain. Let me ask kind of a related question. What
16 if we had an agreement with DiMA in this proceeding
17 which represents a number of webcasters. Where would
18 you put it on the continuum here, or concept?
19 A I guess again I'd have to say I don't
20 know.
21 Q Okay. You would need to know the
22 circumstances surrounding that agreement too,

1 correct?

2 A That and I also personally don't know very

3 much about how DiMA really works and to what extent it

4 represents particular different groups and how it

5 makes decisions. I'm just not that familiar with the

6 organization.

7 Q So the bottom line though is even if we

8 had agreements here with the 12 webcasters and with

9 DiMA, we'd still have to pass the test that you have

10 constructed for determining whether or not the

11 agreement is, in fact, a reasonable reflection of the

12 royalty rate, right?

13 A Yes, but to be clear I wouldn't rule out

14 the fact that it was with DiMA might in and of itself

15 be an important factor that would get you over a lot

16 of those barriers. I just don't know as I sit here

17 enough to know that.

18 Q That's fine. Now what about -- you've

19 talked today a little bit about the webcasting

20 agreements, I shouldn't say agreements. The

21 webcasting licenses that ASCAP and BMI and SESAC have,

22 correct?

1 A Have put forward, yes.

2 Q On this concept or continuum here, where

3 would you put those webcasting agreements? Should

4 they be closer to the outcome determinative side of

5 the continuum or would it be totally unreasonable to

6 rely upon them as a benchmark for setting a royalty

7 rate --

8 MR. RICH: May I object or at least ask

9 for a clarification. There's a reference to

10 agreements and the witness said forms offered. I

11 don't know which it is that Mr. Garrett is asking

12 about?

13 MR. GARRETT: You are right, that's right.

14 I'm talking about what he was talking about which are

15 the license, if you want to call it forms.

16 BY MR. GARRETT:

17 Q Is that a better way to describe it for

18 you?

19 A That's fine. Well, again, I have another

20 issue that I have difficulty fitting in one dimension

21 which is to me there's a difference between how I

22 would think about a benchmark if that was all I had

1 and I were viewing it in isolation and how I might
2 think about that same benchmark and is it useful to me
3 when used in conjunction with other benchmarks in
4 terms of reinforcing or confirming what is shown by
5 other benchmarks.
6 If you ask me -- so suppose we didn't have
7 the RIAA 26 agreements and we didn't have an over the
8 air benchmark, so the only thing we had to look at
9 were the webcaster agreements, no, now I'm falling
10 into the trap you want us to fall into, the webcaster
11 forms, I would say they would be somewhere on sort of
12 the lefthand side here because there's very little
13 experience under them. At the same time I think that
14 when looked at in conjunction with the over the air
15 model that we have available, they are more useful in
16 terms of giving more confidence to the numbers
17 produced by that model.
18 Q Well, but you have looked at, you've done
19 the analysis for commercial radio, correct?
20 A Yes.
21 Q And you know what the ASCAP forms and BMI
22 forms -- they're actually form agreements provide,

1 correct?

2 A I know what they provide in terms of a

3 percent of revenue, that's correct.

4 Q And do you feel comfortable having done

5 that analysis to say that it ought to be closer to the

6 outcome determinate side or closer to the unreasonable

7 side?

8 A If the question you're asking and this is

9 where I have difficulty interpreting your continuum is

10 for example, does the existence of those form

11 agreements provide good support for a 3.5 percent of

12 revenue, sound recording performance license, I would

13 say it's on the left hand side.

14 Q What I want to be clear about is you are

15 not here advocating that this Panel adopt the rates or

16 the terms that are set forth in the ASCAP and BMI form

17 agreements as a benchmark for setting the royalty rate

18 in this proceeding, are you?

19 A No, I'm not.

20 Q Is your view that those rates and terms

21 that is those in the ASCAP and BMI form internet

22 agreements would not be a good benchmark to set the

1 royalty in this proceeding, correct?

2 A I would not think they would be a good

3 benchmark used in isolation, that's correct.

4 Q You think they might be a good benchmark

5 used in conjunction with the analysis that you've

6 done?

7 A Yes.

8 Q So in that sense because you've done that

9 analysis, correct? You've done the commercial radio

10 analysis, correct?

11 A That is correct.

12 Q So are you advocating then that the Panel

13 use the benchmark, use as a benchmark the rates and

14 terms set forth in the ASCAP and BMI internet form

15 agreements?

16 A Not per se, no.

17 Q When you say that, sort of hesitatingly,

18 not per se, I'm reminded a little bit of the Brer

19 Rabbit fable, don't throw me in the briar patch. I'm

20 not really suggesting here in any way -- if you had

21 your druthers and you got the Panel to adopt -- strike

22 that.

1 If the Panel adopted the rates and the
2 terms that are set forth in the internet agreements
3 offered by ASCAP and BMI, that would not be terribly
4 disappointing to you?
5 MR. RICH: I want to lodge an objection to
6 the preamble to Mr. Garrett's question in which he is
7 characterizing the witness's reflection as hesitancy
8 or the like. I don't think it's appropriate for
9 counsel to characterize the demeanor or the nature of
10 a witness's response as part of a question.
11 MR. GARRETT: Okay, I'll strike the
12 hesitate.
13 THE WITNESS: I think it would be a
14 mistake for this Panel to choose as its result a 3.5
15 percent of royalty formula. I do think that. I think
16 your question was wouldn't I think that was a good
17 outcome and I'm saying no, I don't think that was a
18 good outcome.
19 At the same time I do think that it would
20 be perfectly reasonable for this Panel in weighing all
21 of the different evidence before it and I have no
22 particular illusion that they're going to adopt hook,

1 line and sinker every number and every plus sign and
2 minus sign and multiplication sign in my model.
3 They're going to look at all of the evidence and
4 decide, on balance, what to do and I do think that it
5 would be appropriate for them in the context of doing
6 that to think about what the over the air -- sorry,
7 what the internet offered license forms tell us, so in
8 that sense, I do think it's part of the evidence. I
9 don't think and that's why I carefully chose the words
10 "per se." I don't think that that license form per se
11 ought to be taken and just adopted as benchmark.
12 Q Now also just to make clear the rates that
13 are in the ASCAP and BMI agreements are not purely a
14 set of revenue rates, are they?
15 MR. RICH: Which agreements are you
16 referring to, Mr. Garrett?
17 MR. GARRETT: Form agreements.
18 MR. RICH: Internet license --
19 MR. GARRETT: Yes. Internet form
20 agreements.
21 MR. RICH: Thank you.
22 THE WITNESS: Yes, that is correct. We've

1 glossed over that. The form agreements that are
2 offered by ASCAP and BMI have a number of different
3 options, including options that are not based on a
4 straight percent of revenue.
5 It is my understanding from the way those
6 terms work that it is the percent of revenue version
7 of the ASCAP and BMI models which is, in fact, what a
8 streamer like the licensees who are in this proceeding
9 would use if they were using the ASCAP/BMI model. The
10 other alternatives are really designed for websites
11 that are not primarily related to music, but have only
12 an occasional use of music perhaps for example, on one
13 page that you might get to sometimes and so I think
14 that to the extent that there's anything there in
15 terms of probative information for this proceeding, it
16 probably is, in fact, the percent of revenue version,
17 but you're right, there are other alternatives that
18 are being offered in those form licenses.
19 Q And the other alternatives generally
20 consist of higher percent of revenues applied to a
21 smaller base of revenue and it's either the higher of
22 that percent of revenues or something that is based

1 upon the number of page impressions, correct?

2 A I know that there are some higher

3 percentage of revenues and I know that there are some

4 age impression calculations. I don't actually

5 remember as I sit here, exactly how that formula or

6 those alternative formulas work.

7 Q Let me ask you about one other thing.

8 There's a number of agreements in this record here

9 dealing between record labels and various internet

10 companies concerning audio clips and music videos,

11 concert streaming, locker services, those kinds of

12 things. You're familiar with that, are you not?

13 A Yes, I'm familiar with those.

14 Q Where would you put those on this

15 conceptual continuum here?

16 A Unreasonable, because they're not for the

17 statutory license right.

18 Q Now go back to your point that there's

19 this second continuum here.

20 ARBITRATOR GULIN: Can I just interrupt?

21 How about agreements between record labels and

22 services that are DMCA compliant?

1 (Pause.)

2 THE WITNESS: I don't know. I haven't

3 focused on those. I think it would depend on again

4 the circumstances under which that agreement came

5 about.

6 BY MR. GARRETT:

7 Q Describe for me the second continuum, the

8 second dimension of this continuum I'm trying to

9 construct.

10 A I'm not sure it's a second continuum. I

11 was just trying to articulate a difficulty I was

12 having with characterizing how good a benchmark is

13 along a single dimension. And I pointed out that

14 there is an issue with how precisely does a given

15 benchmark actually pin down what the right number is.

16 Q Well, I would guess that when we're

17 talking about the RIAA agreements or the record label

18 internet agreements, you would still put those down on

19 the unreasonable side, right, on this second

20 dimension?

21 A No, they're very -- well, actually, let me

22 think about that.

1 That's complicated. They're pretty
2 precise in terms of identifying a percentage of
3 revenue and a percent of expenses. They're much less
4 precise in identifying a per performance number.
5 Q Okay. So maybe I can get it to move a
6 little further away?
7 A No, no, well -- I guess I would break it
8 down. I would say with respect to revenue and
9 expenses, they're all the way on the right. They're
10 quite precise. They're just wrong, but they're very
11 precise.
12 (Laughter.)
13 They give us a --
14 Q I'll take what I can get.
15 A This is quite serious and this is an
16 important principle that you learn in chemistry majors
17 and undergraduates, they teach you this in science
18 classes. There's a difference between accuracy and
19 precision. Accuracy is the matter of are you right or
20 not? Precision is how precisely have you measured,
21 how narrowly have you measured whatever you've
22 measured. And you can be very precise and be wrong.

1 And you can be pretty accurate and be imprecise. And
2 so what I would say is with respect to revenue and
3 expenses, the RIAA agreements are quite precise. They
4 tell us the number is 15 percent because virtually all
5 of the percent of revenue agreements are 15 percent,
6 percent of expenses is a little less so, some of them
7 are higher, but certainly in terms of -- there are
8 none lower than 5 percent. So they're precise, even
9 if they're wrong.
10 With respect to performance they're not so
11 precise because some of them are at .4. Some are at
12 .35 and the Yahoo agreement is at .065. So it's much
13 less precise with respect to pinning down a per
14 performance number.
15 MR. STEINTHAL: In the public service, I
16 would like to point out that should probably be
17 restricted.
18 BY MR. GARRETT:
19 Q And for your proposal, the precision is a
20 little bit further to the left here, of outcome
21 determinant, is that what you said?
22 A Yes.

1 Q So if I put it right about here, would
2 that be all right?
3 A Yes.
4 MR. RICH: Could we ask Mr. Garrett to
5 label either end of the spectrum on the second
6 continuum because I don't know that outcome
7 determinative fits precision, if I understood the
8 witness's answer.
9 THE WITNESS: No, I can't -- it's not
10 outcome determinative. It's just precise and
11 imprecise.
12 ARBITRATOR VON KANN: Are you talking
13 about the extent to which a proposed benchmark tells
14 the parties with laser-like precision exactly how much
15 to write on the check?
16 THE WITNESS: No, that's not what I'm
17 talking about. I'm talking about is how precise is
18 the judgment I've given you. So I think the over the
19 air model, based on musical works with the
20 confirmation that we have on equality and with the
21 other things that we've talked about is air tight as
22 an argument as to how to approach this, but I've been

1 pretty up front of saying, for example, when I look at
2 the appropriate discount, it's somewhere between 40
3 and 70 percent, so I really haven't given you an exact
4 number. I've told you a range that I think would be
5 reasonable and then I've picked a number within that
6 range, but I think I've been pretty up front about
7 saying that that involves some judgment.
8 So the advice that I'm giving you, I think
9 is based on a very strong conceptual approach. There
10 is some play in that approach as to what number it
11 tells you you should choose. I think once you choose
12 a number, the model can work quite well in the sense
13 that you raised, Judge Von Kann in terms of reliably
14 telling the parties how it's going to work and what
15 size checks they need to write. That's really a
16 separate issue.
17 By MR. GARRETT:
18 Q So I can complete the chart here on the
19 precision continuum here, the RIAA agreements are a
20 little bit to the right or a little bit to the left of
21 the benchmark you have? Or about the same place?
22 A Well, as I said, with respect to an

1 expense or revenue benchmark, I would say they're all
2 the way to the right. With respect to a per
3 performance number, they're a fair ways to the left
4 because the range is from .05 to .4. That's a factor
5 of -- I can't do it any more after 5:30.
6 CHAIRMAN VAN LOON: 8.
7 THE WITNESS: A factor of 8. That's a
8 pretty wide range.
9 BY MR. GARRETT:
10 Q All right, so that would be somewhere down
11 here?
12 A Yes.
13 Q All right, any other potential benchmarks
14 you think we ought to put up on any of these
15 continuums here?
16 A I don't know what point you're trying to
17 make so I don't know how to answer the question.
18 Q That's the idea.
19 (Laughter.)
20 I was just going to give you an
21 opportunity if you thought I'd not fully covered all
22 the potential benchmarks that you think the Panel

1 ought to be considering here. This is your chance to
2 speak up.
3 A I have not proposed any other benchmarks.
4 Q Okay. Now when you were here the last
5 time, I believe you had said something to the effect
6 that you thought there might be some issues with the
7 26 RIAA agreements, but that you were still in the
8 process of looking at the facts surrounding those
9 agreements more closely, correct?
10 A I think that's correct, yes.
11 Q And you said you thought there were some
12 problems, but you really weren't sure?
13 A Yes.
14 Q Because you hadn't done the requisite
15 analysis yet, correct?
16 A I think what I said is I had identified
17 categories of problems, but I hadn't yet figured out
18 to what extent they applied to each of the 26
19 different agreements.
20 Q And you have now made that determination
21 as to what the problems are with respect to each of
22 those 26 agreements, correct?

1 A I certainly enumerated some of the
2 problems I found in the record with respect to the 26
3 agreements, yes.
4 Q You think there might be more?
5 A Yes.
6 Q I guess I shouldn't have asked that
7 question, huh?
8 (Laughter.)
9 ARBITRATOR VON KANN: Didn't they teach
10 you anything in law school?
11 MR. GARRETT: Yeah, they told me not to be
12 in this position at 6 o'clock on Friday night.
13 (Laughter.)
14 BY MR. GARRETT:
15 Q You, in your written testimony, have
16 focused your discussion of these agreements and the
17 problems with these agreements by looking at just the
18 record of this case here, correct?
19 A Certainly that's the vast majority of the
20 evidence, yes.
21 Q Well, that was not a good question. The
22 question really is exactly what is it that you have

1 looked at here to determine the specific problems with
2 respect to the RIAA agreements?
3 A I've looked at the documents that were
4 produced primarily these negotiating documents, e-
5 mails and so forth and the testimony of the various
6 witnesses in the proceeding.
7 Q Have you spoken with any of the 26 RIAA
8 licensees?
9 A Yes, I have.
10 Q And who have you spoken with?
11 A I knew that was going to be the next
12 question.
13 Q I'm pretty predictable.
14 (Pause.)
15 A I'm afraid as I sit here, I can't remember
16 these names, all sort of sound the same to me and I
17 get confused as to which is which. There were two, I
18 believe, individuals that I spoke with from two
19 different licensees, but as I sit here, I can't tell
20 you which ones they were.
21 Q Do you recall the names of the
22 individuals?

1 A No.

2 Q You don't recall the specific licensee

3 either, do you?

4 A Correct.

5 Q When did you have those conversations?

6 A Those conversations were back in the time

7 frame actually before -- between the written direct

8 and my oral direct testimony when I was starting to

9 think conceptually about what are the issues that

10 might have arisen and I was trying to formulate my

11 thinking about that.

12 Q Did you make any notes of those

13 conversations?

14 A Not that I still have, no.

15 Q Do you remember what issues you discussed

16 with them?

17 A Some of them, yes.

18 Q Would you tell us?

19 A One of them dealt with sort of this

20 information issue and the question of whether the

21 individual at the time that he was dealing with the

22 RIAA, understood what the statutory license could do

1 for him and whether he made the decision knowing that
2 the presence of the statutory license meant that he
3 could stream without signing with the RIAA. And that
4 helped me to think about things. I'm not relying on
5 that representation. I mean there's not an X in my
6 chart that is supported by that particular
7 conversation.
8 The other one had to do with or focused to
9 a significant extent on the interplay, really, between
10 the bundling issue and the uncertainty issue. There's
11 a licensee that was involved in some activities which
12 it was at least, as I understand it, alleged by record
13 labels, were interactive, and therefore were not
14 subject to the statutory license and they were trying
15 to figure out how they could resolve those issues.
16 And again there's no X on this agreement that I'm
17 relying on that conversation for. It was just
18 something that I used in order to help me to start
19 thinking about these things.
20 Q Okay. Now among the different issues that
21 you've identified here, one is the litigation cost.
22 You discussed that pages 64 to 65 in your testimony,

1 correct?

2 ARBITRATOR VON KANN: Which version do you

3 have?

4 MR. GARRETT: The later version.

5 THE WITNESS: It is on page 64 on the

6 version I have in front of me. That's all I can say.

7 ARBITRATOR VON KANN: Incidentally, when

8 you refer to these Xs you said that that phone call is

9 not the support for some particular action. Is there

10 a document somewhere that explains why, for example,

11 in relation to Cablemusic there's a check about

12 concerns about timing and uncertainty, what the

13 concern on timing and uncertainty was for each one of

14 these, what the bundling issue was? Is there, in

15 effect, a work paper or a backup that supports these

16 Xs?

17 THE WITNESS: Yes. Well, back up the work

18 paper. I don't think there is a work paper that is in

19 the record because this is just a demonstrative that

20 we worked up for today's presentation.

21 I have a list of citations either to

22 specific documents or transcript references which is

1 the basis for every X on that chart..

2 ARBITRATOR VON KANN: Okay.

3 MR. RICH: If the Panel would desire, we'd

4 be happy to provide it.

5 ARBITRATOR VON KANN: Let Mr Garrett, if

6 he wants to pursue that for the moment.

7 MR. STEINTHAL: On the subject of

8 providing the Panel, we've had another copy made of

9 apparently the document with the correct pagination,

10 Judge Von Kann, so if you'd like everybody is working

11 off the same page.

12 THE WITNESS: As it were.

13 BY MR. GARRETT:

14 Q Now if I go to your chart as well, Dr.

15 Jaffe, the demonstrative, I see that you've got checks

16 for concerns about cost of litigation with three

17 different licensees, correct?

18 A Yes.

19 Q It's Soundbreak and Yahoo! and MusicMatch,

20 correct?

21 A Yes.

22 Q Now potentially all webcasters could

1 participate in CARP proceedings and therefore incur
2 the cost of litigation, correct?
3 A They could, yes.
4 Q But you don't have checks next to any of
5 the other RIAA licensees other than the three that we
6 just mentioned, correct?
7 A That's correct. I didn't -- it's my view
8 that the conceptual possibility that litigation costs
9 may have been an important factor for any licensee, I
10 don't think that in and of itself would be sufficient
11 grounds to say that that's a concern about the
12 validity of that benchmark. What I looked for was
13 some evidence that the particular licensee felt that
14 the cost of litigation or in their particular case
15 would be sufficiently great, that that was an
16 important motivating factor in signing the voluntary
17 license.
18 Some of these licensees, I think a
19 reasonable presumption is that if they had not signed
20 a voluntary license and had relied on the statutory,
21 they would not necessarily have participated in this
22 proceeding and incurred significant litigation costs.

1 Q And in the case of Soundbreak, for
2 example, you reached the conclusion that you did based
3 upon a newspaper article that was put in the record
4 here, correct?
5 A Yes, I think that is correct.
6 Q And with respect to Yahoo!, since you
7 didn't have the benefit of Mr. Mandelbrot's testimony,
8 you relied upon a statement by Mr. Marks, correct?
9 Page 65 of your written testimony?
10 (Pause.)
11 A Yes, I don't recall, as I sit here,
12 whether there were Yahoo! documents that also conveyed
13 that or not. I just don't remember.
14 Q I've only got what you've cited here and
15 what you've cited here was a statement made by Mr.
16 Marks during the course of negotiations that it would
17 be a good idea to settle because it would avoid
18 litigation costs, correct?
19 A That's what's quoted in the written
20 testimony, that's correct.
21 Q So would it be your view that whenever you
22 had an agreement where one of the negotiators said to

1 the other negotiators, hey, you ought to settle this
2 and avoid some litigation costs, that in and of itself
3 would be enough to warrant a little checkmark here on
4 your chart?
5 A I don't know.
6 Q Well, I mean here you seem to have drawn
7 that conclusion solely from Mr. Marks' statement.
8 There is no other reference supporting it here in your
9 written testimony.
10 MR. JACOBY: Can I ask for a clarification
11 of the pending question, whether Mr. Garrett is
12 exploring the basis for the presence of the X of this
13 document as to Yahoo!, this document having been
14 prepared after this written testimony was prepared or
15 independently of it, whether it warrants an X based
16 solely, whether it would have warranted an X based
17 solely on the material quoted in the written testimony
18 at page 65?
19 BY MR. GARRETT:
20 Q Let me make it easier. We'll just move
21 off the demonstrative and just focus on your testimony
22 here, pages 64 and 65.

1 Do you have that before you?

2 A Yes.

3 Q And you talk there about cost of

4 litigation s being a factor that might make an

5 agreement not a reliable benchmark, correct?

6 A Yes.

7 Q And incidentally, if you find that one of

8 the parties or both of the parties had concerns about

9 litigation, would that in and of itself make the

10 agreement an inappropriate benchmark?

11 A It would raise concerns and with respect

12 to Yahoo!, I think we had more than just the fact that

13 Mr. Marks raised this as a negotiating technique.

14 What we had was and specifically saying we'll pay more

15 in attorney's fees than the numbers we proposed, which

16 is not -- which is somewhat more than saying avoid

17 litigation costs. And in addition, I have the

18 knowledge that I have regarding Yahoo!'s place in this

19 industry and the fact that Yahoo! is really not

20 comparable to these other parties, so that it's

21 unlikely even before I heard Mr. Mandelbrot say it, it

22 was clear to me just as a matter of logic that it

1 would be unlikely to think that Yahoo! would have been
2 able to free ride, or would have been inclined to free
3 ride and not participate actively in this proceeding
4 when -- if it had not signed a voluntary license. So
5 I'm really reading the Marks e-mail in conjunction
6 with that other information and it clearly was
7 confirmed by Mr. Mandelbrot's testimony.
8 Q Incidentally, I guess to be clear of the
9 chart, the demonstrative that you prepared, I thought
10 you said that you had prepared this before Mr.
11 Mandelbrot testified. Am I wrong?
12 A What I said was I prepared that before I
13 had completed my reading of Mr. Mandelbrot's
14 transcript. Just to be very specific. It was
15 prepared on Wednesday and Wednesday night, so Mr.
16 Mandelbrot had testified. I had heard some stuff
17 indirectly about what he said. I had not yet read the
18 transcript.
19 Q And that's why you changed the number
20 here, right?
21 A Correct.
22 Q I want to go back again though, so we're

1 clear here. Is it your statement by one of the
2 negotiators that you ought to settle because you're
3 going to avoid a lot of litigation cost. Is that in
4 and of itself enough to render a particular agreement
5 an inappropriate benchmark?
6 A Not necessarily, no.
7 Q What more do you need to know?
8 A Well, again, it's not a 0-1 thing of
9 appropriate or inappropriate. I think it's a
10 cumulative effect of evidence. I think the threshold
11 question is what evidence do you need to think that
12 this particular issue in this case, litigation costs
13 is a concern and we talked about that. I think
14 whether or not litigation costs being a concern would
15 lead you to really not rely on the agreement at all or
16 to perhaps just give it less weight, would depend on
17 the facts. And in the case of Yahoo! we have some
18 pretty specific facts. In the case of these others
19 there are other factors besides the litigation costs
20 which are also contributing to the conclusion that we
21 can't learn much from these agreements about a
22 reasonable fee. So it's not a matter of you know,

1 it's not like pregnancy, you're either pregnant or
2 you're not. It's a matter or cumulative evidence
3 regarding the concerns about this proposed benchmark.
4 Q Now the benchmark that you used based upon
5 license fees paid by radio stations to ASCAP and BMI,
6 correct?
7 A And SESAC, yes.
8 Q I'm sorry, and SESAC. At least in the
9 case of ASCAP those particular license fees, the year
10 2000 fees were paid pursuant to an agreement that was
11 negotiated back in the early 1990s, is that correct?
12 A I don't know exactly when it was
13 negotiated. The previous point has been in force for
14 the period of time the parties expected it to and I
15 used the fees produced in the Year 2000.
16 Q Did you make any determination as to
17 whether ASCAP, for example, entered into that
18 agreement, in part, in order to avoid the costs of
19 going to rate court?
20 A I think actually I did discuss in my
21 direct testimony the effect that the rate court has on
22 the interpretation that is appropriately given to

1 license fees for the PROs.

2 It operates on both symmetrically on both
3 sides in a way that is not applicable to the RIAA
4 agreements and in addition that agreement is itself,
5 comes out of a long history of agreements and is of a
6 piece with a history of agreements, some of which were
7 voluntarily negotiated, some of which were I guess all
8 of them, a history of agreements that were negotiated
9 over a period of time, subject to the oversight of the
10 rate court.

11 Q Did you make any determination as to
12 whether ASCAP entered into the agreement that it did,
13 resulted in the license fees using your benchmark,
14 whether ASCAP entered into that agreement, in part,
15 because they wanted to avoid cost of litigating before
16 the rate court?

17 A Yes, I think I did. That was discussed in
18 my direct testimony as to what was the effect on that
19 agreement of the fact that both ASCAP and the Radio
20 Music Licensing Committee were doing that knowing that
21 if they didn't reach that agreement, there would be
22 litigation in rate court. So yes, I did consider that

1 and made a determination that on balance, the effect
2 of that determination is that the rate is probably
3 high, if anything, but that it's the best indication
4 we have of a competitive market rate.
5 Q What about with respect to BMI? The
6 particular Year 2000 payments that are reflected in
7 your study were made pursuant to an interim agreement,
8 correct?
9 A That's correct, and that issue is
10 discussed in here and I talk about what BMI is
11 requesting as a final fee which is presumably greater
12 than anybody thinks they're actually going to get out
13 of the rate court determination and if you substitute
14 their ask for the actual BMI fees, it has a trivial
15 effect on the numbers that I've produced. It
16 increases it as much as a few percent. So I don't
17 think -- again, I've analyzed the effect that
18 potential litigation has on that and I've concluded
19 that it can be shown to be very minor.
20 Q And this is a piece of litigation that
21 you're involved in as well?
22 A That's not correct. I'm not involved in

1 that litigation.

2 Q You have a personal knowledge of -- strike

3 that.

4 Let me ask you about the information

5 concerns that you've identified in another category

6 here.

7 (Pause.)

8 Exactly what information must the licensee

9 have in order to pass the test that you've set up

10 here?

11 A Well, to be clear, I didn't impose a test

12 that said they have to have the information. For most

13 of these licenses, I don't know one way or the other

14 what they knew. They may well have had bad

15 information. But I haven't put an X just because I

16 don't know that they had good information. That's not

17 how I went about it.

18 What I've done is I have said if I see

19 evidence that they did not understand that the

20 statutory license was available to them, that the

21 existence of the statutory license meant that they

22 could begin streaming from the day they filed the

1 appropriate papers whether the RIAA wanted them to or
2 not, or that they didn't know whether or not what they
3 were doing was compliant with the statutory license
4 and if I see that affirmative evidence of that lack of
5 information, then I would have put an X here.
6 Q Is there anything else that would have
7 caused you to put an X there?
8 A I don't think so.
9 Q Basically, they needed to know that a
10 statutory license was an option, correct?
11 A Yes.
12 Q And what else did they need to know?
13 A Well, that it was an option. That what it
14 meant as an option was that there was no need for them
15 to deal with the RIAA in order to begin their
16 streaming activities and that the specific activities
17 that they wished to engage in were, in fact, covered
18 by the statutory right so that that option was a
19 meaningful and appropriate one for them. And if I saw
20 evidence that that was not the case, I'd put an X.
21 There really are only a handful of information Xs, all
22 of which are licensees that had other problems as

1 well. So I haven't made a huge deal out of this
2 information issue, but there is some evidence.
3 Q You're not suggesting that they needed to
4 be conversant with all of the provisions of the DMCA
5 here, were you?
6 A Certainly not.
7 Q Incidentally, you're aware, are you not,
8 that the recording industry is in litigation with a
9 couple of the webcasters who are on the other side of
10 the room here, correct?
11 A I am aware of that in fairly general
12 terms, yes.
13 Q There are disputes with some of the other
14 webcasters over whether or not they're operating
15 interactive services, correct?
16 A I mean I don't know -- I guess what I'm
17 hesitating over is I think there was a plural in your
18 question I'm not actually sure that it's plural. I
19 certainly know that there is some litigation. I don't
20 know how many webcasters it involves.
21 Q If we, the RIAA, were to enter into
22 agreements with any of the parties that they're

1 litigating with on these personalized services, would
2 that fact by itself mean that there are agreements on
3 statutory licensing rates, would be -- would not
4 provide a good benchmark for setting a royalty rate in
5 this proceeding?
6 A That would certainly be a significant
7 concern, yes.
8 Q Well, my question though is whether just
9 that fact alone.
10 A That fact alone would be a source of
11 significant concern, yes, because the most likely
12 assumption is that if I enter into a statutory
13 agreement with you in conjunction with settling
14 litigation over other issues, that there's no way to
15 know whether what I've paid for the statutory license
16 really corresponds to what the statutory license is
17 worth as distinct for corresponding to what it was
18 worth to me to settle that litigation.
19 Q So for example, if you were to enter into
20 a settlement with a webcaster such as MTV who we are
21 litigating against, that agreement would not be a good
22 benchmark for setting a royalty rate in this

1 proceeding?

2 A I would certainly have significant

3 concerns about using that agreement as a benchmark,

4 yes.

5 Q And when you say significant concerns,

6 does that mean that you're holding out the possibility

7 that it still might be a valid benchmark?

8 A Well, what I've said is you know, I don't

9 think validity of a benchmark is a yes/no thing. It's

10 a matter of degree and cumulative evidence. I would

11 -- and you're giving me a hypothetical where I sort of

12 don't know any of the other aspects and I guess what

13 I'm saying is I'm not going to sit here and say that

14 based only on what you've told me I would throw it out

15 the window and pay no attention to it. Based on what

16 you've told me I would have significant concerns and

17 I'd be inclined not to give it a lot of weight and if

18 there were other reasons to be concerned, I might well

19 give it no weight, but I don't know.

20 (Pause.)

21 Q Let me ask you about the column that

22 you've marked bundling with statutory right. You've

1 reviewed the 26 agreements themselves?

2 A You mean the actual license documents?

3 Q That's correct.

4 A I have not reviewed all 26 of the actual

5 license documents, no.

6 Q In this section you're not suggesting that

7 there's anything in those agreements that gives the

8 licensee something beyond the statutory license rights

9 here, are you?

10 A Not in general, no.

11 Q When you say not in general?

12 A There may be one or two cases where

13 there's actually something in the agreement. I don't

14 remember.

15 Q All right, so what you're referring to in

16 your testimony here is something beyond those written

17 agreements, correct?

18 A Generally, that's true, yes.

19 Q Now for example, you say here on your

20 demonstrative that one of the things that some of the

21 licensees were getting was received enhancement

22 relationships with label community to improve ability

1 to secure non-statutory licenses, correct?

2 A Yes.

3 Q Is it again your view that the mere fact

4 that some company, some webcaster wanted to obtain an

5 interactive license or have a certain kind of

6 relationship with other record labels, that mere fact

7 alone mean that you could not look at any agreement

8 that RIAA entered into with them?

9 A No, that is not my position.

10 Q So for example, there are a number of

11 these webcasters here in this proceeding who have

12 indicated that they would like or they have other

13 relationships with record labels. Are you aware of

14 that?

15 A Yes.

16 Q And the fact that they have those

17 relationships or want those relationships is not per

18 se disqualifying their agreements with RIAA or any

19 agreement with RIAA as a benchmark in this proceeding?

20 A No, I don't think the test is that the

21 licensee wanted something more. The test is did the

22 licensee perceive, is there evidence that the licensee

1 perceived that they were, in fact, getting something
2 more and that's what I've looked for and as we've
3 seen, although I agree with you, it's not part of the
4 agreement. Mr. Marks' own behavior suggests that it
5 was not unreasonable for these licensees to perceive
6 that they were getting something more.
7 Q So if Mr. Marks sends out an e-mail to all
8 of the labels and said this is a good guy, you ought
9 to help him out with what they're looking for, that
10 fact --
11 A He did more than that. He said --
12 Q I'm not asking it. I was asking you if
13 that's all, all right. If he simply sends out --
14 A I'm sorry, I interrupted you. I
15 apologize.
16 Q It's all right. If all he does is sends
17 out an e-mail saying that this is a good guy. He's
18 one of our licensees. He's looking for some -- the
19 ability to deal with the rest of you, would that fact
20 in itself mean that you can't look at the license
21 agreement any more?
22 A First of all, I never said that any one of

1 these says you can't look at the license agreement.
2 I said that these things are sources of concern. I
3 think if I had an e-mail from the licensee saying I'm
4 doing this because I really want to be on good terms
5 with the record industry and then they sign the
6 license and I saw an e-mail from Marks saying this guy
7 has just signed a license, I think we should be nice
8 to him. I think yes, that would be a source of
9 concern, that that's what the parties perceived was
10 going on. I never said it in and of itself
11 disqualifies the thing, but I think it would be a
12 source of concern.
13 Q Do you think that in your competitive
14 market that there would be a number of webcasters, who
15 would believe that if they entered into some sort of
16 statutory or entered into some sort of licensing
17 arrangement with RIAA, that that would help them in
18 the relationships with the individual record labels?
19 A Perhaps.
20 Q And the notion that if you're a webcaster
21 entering into a deal with RIAA would help you with the
22 individual labels, would you consider that to be

1 something that is uncommon in the industry itself?
2 A No.
3 Q But in your view it would raise concerns
4 as to whether any agreement they entered into could be
5 used as a benchmark for purposes of this proceeding?
6 A Yes, and to be clear I'm not saying
7 there's anything nefarious or anything inherently
8 nonbusiness-like of their being these other
9 considerations. The question I'm putting to myself is
10 we have the RIAA who is a monopolist who is putting
11 out a price and hoping people will take it and the
12 question I'm asking myself is can we draw an
13 inference, an affirmative inference from the fact that
14 certain people have chosen to take it, that that is,
15 in fact, the competitive price. You're asking us to
16 draw an affirmative inference from their acceptance of
17 that price, that it is not a monopoly price, it's a
18 competitive price. What I'm saying is some of these
19 other considerations as common as they may be, as
20 human nature as they may be, as natural as they may
21 be, nonetheless, when you think them through
22 analytically, leads you to the conclusion that you

1 can't necessarily conclude that what you're seeing
2 here is a competitive market transaction that tells us
3 the competitive market price for the statutory right.
4 Q Would you agree, would you not, though
5 that there would be probably a lot of webcasters out
6 there who would like to maintain good relationships
7 with the individual record labels?
8 A Sure, although many of them decided that
9 however much they might like to have that, they
10 weren't going to sign with the RIAA. I don't take
11 that as evidence that it was unreasonable any more
12 than I take it in and of itself as somehow
13 unreasonable that people wanted to do that. I think
14 you have to analyze what does it tell you about the
15 market prices.
16 Q I guess my only question here is whether
17 you thought that by having -- the webcaster who had
18 that view and wanted to maintain good relationships
19 with individual record labels was somehow atypical of
20 the rest of the webcasters?
21 A Well, we already said that wanting to
22 maintain good relationships is not what caused concern

1 for me.

2 Q You talk about another concern here that

3 there are certain licensees who thought that by

4 entering into a license would enhance their ability to

5 be serviced, correct?

6 A Yes.

7 Q And the notion of wanting to be serviced

8 again is probably not atypical of the marketplace

9 either, right?

10 A No, it's not.

11 Q And your concern is that they thought that

12 by entering into an agreement with RIAA that would

13 help them be serviced?

14 A It wasn't just that they thought it, it's

15 that it appears to be have been true.

16 Q There's evidence that you've seen here

17 that once they enter into those agreements, they then

18 begin to get serviced?

19 A I should say that differently. There is

20 evidence that they seem to have tried to get serviced

21 and were told if you want to get serviced, go get a

22 license and then we'll talk about being serviced. I

1 don't actually know what then -- I'm not sure I know
2 what then happened.
3 Q But wanting to be serviced in and of
4 itself is not something that was uncommon in the
5 industry here?
6 A No, but it's still true that if there's
7 something that everybody wants, but the only people
8 who get it are the ones who sign the voluntary
9 agreement and what is being conveyed in the voluntary
10 agreement is not just the statutory agreement, but is
11 something else and maybe it is, in fact, something
12 else that everybody wants, but the other people aren't
13 getting.
14 Q Is there any evidence that RIAA promised
15 any of the licensees that if you entered into an
16 agreement with us you would then get serviced?
17 A Not that I recall.
18 Q You also talk about ability to authorize
19 performances by third parties including
20 nonentertainment websites and radio broadcasters, do
21 you see that?
22 A Yes.

1 Q Again, that -- there are probably a number
2 of webcasters out there who wanted to have that same
3 ability, correct?
4 A Yes.
5 Q So this is not something that was uncommon
6 in the industry?
7 A The desire to have it was not uncommon as
8 far as I know.
9 Q But your concern was is that the -- would
10 it be uncommon to think that by getting a license with
11 RIAA that might help their ability to authorize
12 performances by third parties, including
13 nonentertainment websites and radio broadcasters?
14 MR. JACOBY: Mr. Garrett, could we ask you
15 to keep your voice up?
16 MR. GARRETT: I thought I did.
17 THE WITNESS: I'm sorry, I've lost track
18 of what the question was. Could you either restate it
19 or have him read it back. I'm losing my focus here.
20 (Pause.)
21 CHAIRMAN VAN LOON: Could I ask, related
22 to that, Mr. Garrett, I know we made a pledge that our

1 normal time would be to go through ballpark 6:30 which
2 is what is fast approaching.
3 Was it your -- do you have a stopping
4 point in mind that's close or are you thinking of
5 going longer?
6 MR. GARRETT: I think to do what I want to
7 do would take us well beyond the 6:30 time and so I'm
8 prepared to stop at this point and pick up again in
9 the morning.
10 CHAIRMAN VAN LOON: Okay, I'm not
11 suggesting you stop right at this instant.
12 MR. GARRETT: No, if Dr. Jaffe would be
13 fresher in the morning, too, that's fine.
14 ARBITRATOR VON KANN: All of us will be.
15 (Laughter.)
16 MR. GARRETT: I don't relish the thought
17 of doing this at 6:30 on a Friday evening, nor do I
18 relish doing it at 9:00 on Saturday.
19 (Laughter.)
20 CHAIRMAN VAN LOON: It does raise a
21 question about whether anyone thinks it would be wise
22 at all to start a little earlier tomorrow morning,

1 8:30 or whether that's a fate worse than death.

2 MR. GARRETT: Not a groundswell there.

3 CHAIRMAN VAN LOON: If we're at a place

4 where you feel comfortable pausing for the evening, I

5 think that could be wise for all of us and we'll plan

6 to reconvene in the morning with business casual dress

7 or whatever.

8 ARBITRATOR VON KANN: Mr. Garrett, can I

9 just ask this, without kind of forcing you to be

10 definitive, but some folks might like to know, do you

11 still think if we resume at 9 o'clock we probably can

12 complete Dr. Jaffe tomorrow and therefore everybody

13 can assume they'll have Sunday off?

14 MR. GARRETT: I am hopeful of that. I

15 frankly thought I'd be much further along at this

16 stage too, but certainly my goal is not to bring

17 anybody back here on Sunday.

18 ARBITRATOR VON KANN: Okay.

19 MR. GARRETT: Including myself.

20 CHAIRMAN VAN LOON: Okay, let's all try to

21 get a good night's rest and be back at 9.

22 (Whereupon, at 6:25 p.m., the hearing

1 recessed, to reconvene tomorrow, Saturday, October 20,
2 2001 at 9:00 a.m.)
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CERTIFICATE

This is to certify that the foregoing transcript in

the matter of:	Hearing: Digital Performance Right in Sound Recording and Ephemeral Recording, Docket No. 2000-9 CARP DTRA 1 & 2
Before:	Library of Congress Copyright Arbitration Royalty Panel
Date:	October 19, 2001
Place:	Washington, DC

represents the full and complete proceedings of the aforementioned matter, as reported and reduced to typewriting.