Before the
COPYRIGHT ROYALTY BOARD
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Washington, D.C.

In the Matter of: The Digital Performance Right in Sound Recordings and Ephemeral Recordings (Webcasting Rate Adjustment Proceeding)	Docket No. 2005-1 CRB DTRA

Volume 38

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Library of Congress
First & Independence Avenue, S.E.
Washington, D.C. 20540

Thursday,
November 9, 2006
The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:
THE HONORABLE JAMES SLEDGE, Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge

THE HONORABLE STAN WISNIEWSKI, Judge

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1 PROCEEDINGS
2 9:33 A.M.
3 MR. STEINTHAL: Your Honor, DiMA
4 calls Bob Roback from Yahoo Music.
5 WHEREUPON,
6 ROBERT ROBACK
7 WAS CALLED FOR EXAMINATION BY COUNSEL FOR DiMA
8 AND, HAVING FIRST BEEN DULY SWORN, WAS
9 EXAMINED AND TESTIFIED AS FOLLOWS:
10 MR. STEINTHAL: Just as a point of
11 housekeeping, Your Honor, we had made a motion
12 earlier this week for the introduction of the
13 amendment of the last paragraph of Mr.
14 Roback's statement to make a correction in one
15 of the exhibits.
16 CHIEF JUDGE SLEDGE: That's what
17 we got yesterday afternoon, you say earlier
18 this week?
19 MR. STEINTHAL: Two days ago, I
20 think, but yes.
21 JUDGE ROBERTS: You passed it out.
22 MR. STEINTHAL: Yes.

1 JUDGE ROBERTS: I have that.
2 MR. STEINTHAL: It solely relates
3 to the correction of some figures on Exhibit
4 8 and I'm not going to spend much time, if
5 any, examining Mr. Roback orally on it, other
6 than to verify the accuracy of the new
7 exhibit.
8 CHIEF JUDGE SLEDGE: Is there any
9 objection to this motion?
10 MR. PERRELLI: No objection.
11 CHIEF JUDGE SLEDGE: Without
12 objection, the motion is granted.
13 MR. STEINTHAL: Thank you. And I
14 think the binders that have been passed out
15 include the corrected -- okay, good.
16 DIRECT EXAMINATION
17 BY MR. STEINTHAL:
18 Q Mr. Roback, good morning.
19 **A Good morning.**
20 Q Can you remind the Board as to
21 what your current position and
22 responsibilities are?

1 **A I am the Vice President and**
2 **General Manager of Music for Yahoo. I'm**
3 **responsible for managing the Yahoo Music**
4 **Business Unit, globally.**
5 Q Again, just to give some context.
6 Can you summarize for the Board again what are
7 the music products that Yahoo operates that
8 are subject to the statutory license?
9 **A Sure. We offer an Internet radio**
10 **service called Launchcast and that is offered**
11 **in effectively three ways: one, on an ad-**
12 **supported basis, which are nonsubscription**
13 **services, free to the consumer. We also offer**
14 **a subscription version that is commercial free**
15 **called Launchcast Plus that is offered either**
16 **on a la carte basis for a stand-alone fee to**
17 **the consumer or that is bundled with a package**
18 **of other Yahoo services or connectivity from**
19 **a third party. That is one package price for**
20 **everything that includes access to Launchcast**
21 **Plus.**
22 Q And has there been one particular

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1 distribution vehicle with respect to that
2 bundled service over the last few years?
3 **A It's principally been through**
4 **Yahoo's partnership with SBC, now AT&T, but**
5 **there are others, other access providers that**
6 **provide a similar bundle.**
7 Q And the SBC, AT&T bundle that you
8 talk about, those include broadband access to
9 consumers?
10 **A Correct, DSL access.**
11 Q Now there's also testimony, I just
12 want to get certain things back for context as
13 we talk today, about the programmed channels
14 and the customized channels, I think you've
15 used the word before. Can you just remind the
16 Board as to what the difference between those
17 channels are and what Yahoo's view is as to
18 their -- whether they are subject to the
19 statutory license?
20 **A Sure. The Launchcast service**
21 **offers a variety of stations, if you will, for**
22 **the listener. Most of them are preprogrammed**

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1 **stations where our professional staff of**
2 **programmers looks at research and their**
3 **understanding of the music business and new**
4 **releases to actually program those individual**
5 **stations.**
6 **Separately, we have a station**
7 **called My Station where a user can start with**
8 **certain inputs and then through rating music**
9 **over time, get better recommendations of new**
10 **music fed back to them in that station.**
11 Q On the customized stations, does
12 the consumer control sound recording by sound
13 recording in any respect what music they
14 receive?
15 **A No.**
16 Q And again, just for context, what
17 is Yahoo's view as to whether those customized
18 stations fall within the statutory license?
19 **A It's our view that all of the**
20 **stations fall within the statutory license and**
21 **as I've said before that view is not**
22 **necessarily shared by certain record**

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1 **companies.**
2 Q And is there still on-going
3 litigation between the recording industry and
4 Yahoo over whether those customized stations
5 comply with or qualify for the compulsory
6 license?
7 **A There is with respect to one**
8 **record company, BMG.**
9 Q Now putting aside the products
10 that you just mentioned, the music products
11 that you mentioned that are subject to the
12 compulsory license, what other services, music
13 services, if any, does Yahoo distribute?
14 **A Well, we distribute a variety of**
15 **music services, depending on how you find**
16 **music services, but we offer a music video**
17 **service where users can view music videos on**
18 **demand or in programmed recommended channels.**
19 **We offer live interviews with**
20 **artists, exclusive live performances, a range**
21 **of text space content and photographs, all**
22 **free to the user.**

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1 **We also have a premium music**
2 **service which is for music on demand that we**
3 **call Yahoo Music Unlimited, where you pay a**
4 **monthly or annual subscription fee to get**
5 **unlimited access to audio streams on demand,**
6 **which depending on which tier you choose to**
7 **sign up for, you may or may not be able to**
8 **move to a portable music device.**
9 Q Currently, is that on demand
10 subscription service that you've described a
11 service that is provided to you by MusicNet?
12 **A The back end of the service,**
13 **meaning the music files and the licenses are**
14 **provided by MusicNet.**
15 Q Now there's been testimony from
16 time to time about a company called Musicmatch
17 which the record reflects was acquired in
18 October of 2004 by Yahoo?
19 **A Correct.**
20 Q Again, for context, what is the
21 status of the Musicmatch music offerings
22 within the Yahoo music offering umbrella?

1 **A Well, Musicmatch effectively**
2 **consisted of really three things. It was a**
3 **desktop music application called the**
4 **Musicmatch Jukebox, and a premium version of**
5 **that called Jukebox Plus. It was also an on-**
6 **demand streaming audio service and then a**
7 **radio service similar to Launchcast.**
8 **We've been in the process over the**
9 **last two years of integrating all of those**
10 **products into existing Yahoo products, so that**
11 **there's only one offering from Yahoo in each**
12 **of those categories as opposed to two.**
13 Q Now I've been asking questions
14 about the music products within Yahoo. Can
15 you remind the Panel more generally what Yahoo
16 Inc., the overall Yahoo offers consumers as a
17 business proposition?
18 **A Well, Yahoo Inc. offers a**
19 **multitude of services to users. Most of them**
20 **are free, ranging from Internet search to**
21 **finance, news, personals, health, games, TV,**
22 **movies, mail, the largest mail Internet email**

1 **application. I could go on and on, if you**
2 **want me to, but there are many.**
3 Q Where does music fit in within the
4 overall -- in terms of the size of the music
5 business, relative to the size of the overall
6 Yahoo portal business?
7 **A Well, I'd say it's a small part.**
8 **It's one business unit inside of the Yahoo**
9 **Media Group which is one group inside of all**
10 **of Yahoo Inc.**
11 Q Let's turn specifically to the
12 matters that you addressed in your written
13 rebuttal testimony. And I think you have that
14 in front of you and the Board has it as well.
15 The first matter that you address
16 is your relationship with Universal Music
17 Group and the terms and conditions of that
18 agreement. And just for the sake of keeping
19 as much on the public record as possible, if
20 you're able to answer questions by speaking of
21 the subject matter of a term without the
22 specific numeric or other term that you might

1 deem to be confidential, that would save us a
2 lot of problem and address the Board's
3 concerns that we have as much on the public
4 record as possible.
5 If we come to a point where there
6 are figures or information that you believe to
7 be confidential and restricted, we may have to
8 make an application to the Board to treat that
9 as under the protective order. But the more
10 we can keep it on the public record, the more
11 I think everybody will be pleased.
12 You discuss in your written
13 rebuttal testimony the contract between
14 Universal and Yahoo Music of November 2004.
15 Can you first put that agreement in context in
16 terms of where you were in your relationship
17 with Universal at the point in time when that
18 agreement was entered into?
19 **A Sure. We had entered into a**
20 **voluntary webcasting license with Universal**
21 **Music in approximately June of 2001 as part of**
22 **the settlement of litigation around whether or**

1 **not the customized stations that I spoke of**
2 **were or were not eligible for the statutory**
3 **license.**
4 **And so at that time we entered**
5 **into a voluntary license at an extremely high**
6 **rate on a per stream basis that we were in for**
7 **about a year. It covered only the customized**
8 **stations, after which we tried to**
9 **renegotiation the license for an extension at**
10 **lower rates than had previously existed and**
11 **Universal declined to enter into that**
12 **agreement.**
13 **So there was a period of about two**
14 **years where we were required to keep Universal**
15 **users' repertoire out of the customized**
16 **stations only. They remained in the**
17 **preprogrammed stations. And it was in**
18 **November of 2004 when we were finally able to**
19 **reach the new agreement in respect of the**
20 **customized stations which the original**
21 **agreement, by the way, had required us to do.**
22 **We were not allowed under the original**

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1 **agreement to take the position with respect to**
2 **Universal that the customized stations would**
3 **ever be eligible for the statutory license**
4 **unless a Court or Congress had determined that**
5 **they were, in fact.**
6 Q And that was a written, that was
7 clause within the original agreement?
8 **A A clause in the June 2001**
9 **Universal agreement.**
10 Q And at some point -- how long was
11 it that you operated without a license from
12 Universal Music Group?
13 **A Approximately two years.**
14 Q And was that as to all of the
15 stations that you viewed as DMCA compliant or
16 just some portion of them?
17 **A It was solely in respect of the**
18 **customized My Station.**
19 Q With respect to the other, the
20 other preprogrammed stations, you continued to
21 use Music under the statutory license?
22 **A Correct.**

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1 Q Now can you tell us what the
2 structure, without getting into the exact
3 figures, of the Universal Music Group-Yahoo
4 deal was that was finally done in November of
5 2004?
6 **A Yes. The new agreement in**
7 **November of 2004 addressed both our**
8 **nonsubscription service, as well as our**
9 **subscription service which hadn't existed at**
10 **the time of the original agreement**
11 **So with respect to the**
12 **nonsubscription service --**
13 Q Were going to just do framework
14 here. We're not going to do numbers. Okay?
15 And then if you want to point to the numbers,
16 what I would suggest we do is you point to the
17 paragraph number in your witness statement
18 which is you discuss this agreement in
19 paragraphs 3 through 5 of your witness
20 statement. It might be easiest for you to
21 describe the structure and then as to the
22 amount just make reference to the amount as

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1 set forth in the witness statements so that we
2 don't have to go into restricted session.
3 Q Sure. As I mentioned at the
4 beginning of my testimony, there are
5 effectively three versions of Launchcast.
6 There's the nonsubscription version. There's
7 the subscription a la carte, and there's the
8 subscription bundled.
9 With respect to the first,
10 nonsubscription, and the last, the bundled
11 subscription, we paid a monthly flat fee.
12 That is set out in paragraph 3A of my written
13 testimony.
14 Q And that flat fee covers all the
15 uses on both those aspects of your Launchcast
16 service?
17 **A That's correct. And in respect of**
18 **the second category which is the a la carte**
19 **subscription, we paid the greater of a**
20 **percentage of that a la carte subscription**
21 **price or a fixed fee per subscriber minimum to**
22 **Universal, both of which are set out in**

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1 **paragraph 3B of the written testimony.**
2 Q And in paragraph 3C, you refer to
3 the fact that an advance was paid. Can you
4 tell the Panel, I'm sorry, the Board, as to
5 whether the advance was deemed significant by
6 Yahoo?
7 **A So we paid the advance, correct.**
8 **That was set out in C. And no, we did not**
9 **consider that to be a significant advance.**
10 Q Why not?
11 **A Just because it was a relatively**
12 **low number in terms of what we believe we**
13 **would be able to recoup under the terms of the**
14 **license.**
15 Q And was it recouped?
16 **A Yes.**
17 Q Now you've been talking about two
18 different mechanisms under the agreement for
19 paying Universal. As between the
20 nonsubscription offerings that you've
21 identified and the subscription offering that
22 you've identified, what is the relative amount

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1 of performances or stream hours as between the
2 nonsubscription offering and the subscription
3 offering?
4 **A There are far more users of the**
5 **nonsubscription offering, so the volume of**
6 **performances is also significantly greater**
7 **with respect to that service.**
8 Q And what is your view? I think
9 you testified about this before as to where
10 the business opportunity lies for Yahoo in the
11 radio business on the web as between
12 subscription and nonsubscription?
13 **A We believe it's principally in**
14 **nonsubscription because there's such a large**
15 **market for terrestrial radio advertising over**
16 **magnitude of about $20 billion and so that is**
17 **the opportunity we believe we can pursue with**
18 **respect to nonsubscription radio.**
19 Q Now are you familiar, as you set
20 forth in paragraph 2 of your written statement
21 with the assertions from some of the
22 SoundExchange witnesses with respect to the

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1 typical three-part rate structure or voluntary
2 agreements that the label say they've entered
3 into?
4 **A I'm sorry?**
5 Q Are you familiar with the alleged
6 typical three-part rate agreements that the
7 labels say they've entered into in the
8 licensing of music?
9 **A Yes, I'm familiar with that.**
10 Q How does your arrangement with
11 Universal compare against that three-part
12 greater of the framework that the labels have
13 testified about?
14 **A It does not compare. It's**
15 **entirely different.**
16 Q Now, there is a -- in footnote
17 three of your testimony, you refer to what the
18 per performance fee under the Universal deal
19 has worked out to be, which I gather is simply
20 looking at the total number of performances
21 and dividing by the amount of money that's
22 been paid?

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1 **A Right.**
2 Q Now that number is higher than the
3 pre-existing CARP rate, is it not?
4 **A Yes, it is.**
5 Q What is your view as to why you
6 voluntarily entered into an agreement with
7 Universal that has ended up with a rate that
8 translates into something that is somewhat
9 higher than the pre-existing CARP rate?
10 **A Well, effectively Universal as the**
11 **largest record company, has such a significant**
12 **portion of the critical repertoire that we**
13 **believe that we needed to get them back into**
14 **the service and that paying on a flat fee and**
15 **being able to drive the effective rate down**
16 **below where it had been with Universal, but**
17 **even if it were still above the CARP rate, is**
18 **something that we needed to do in order to be**
19 **able to have a competitive offer.**
20 Q And what is the rationale for your
21 advocating the position that you should pay at
22 a rate --

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1 JUDGE WISNIEWSKI: Just a second,
2 I don't mean to interrupt, but competitive
3 with respect to whom?
4 THE WITNESS: Other radio services
5 including terrestrial radio which has access
6 to all repertoire.
7 JUDGE WISNIEWSKI: Thank you.
8 BY MR. STEINTHAL:
9 Q The position that you and other
10 DiMA companies are advocating is obviously
11 lower than what you've effectively agreed in
12 the Universal deal.
13 Can you tell the Board why it is
14 you believe that it is justified that you
15 should not be looking at the Universal, the
16 amount you're paying Universal as a benchmark,
17 as distinguished from the lower rates that
18 you're advocating?
19 **A Well, the history with Universal,**
20 **as I mentioned before, was such that we were**
21 **required, in effect, to pay this extremely**
22 **high rate as a result of settling the**

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1 **litigation. And that has always been the**
2 **case vis-a-vis our position with Universal is**
3 **that they require us to take this voluntary**
4 **agreement. We need their repertoire. So we**
5 **were able to come up with a construct that was**
6 **more favorable than it had been, but at rates**
7 **that we still considered to be too high in**
8 **order to competitively run the business.**
9 Q Same question with respect to the
10 subscription rate which is somewhat higher
11 than the pre-existing statutory percentage
12 rate for subscription services.
13 Is your answer any different as to
14 why you believe that the percentage rate
15 should be lower than the Universal deal?
16 **A No, it's the same, same answer.**
17 Q Now just some specific things
18 about terms that have been stated to be
19 typical of label deals and voluntary license
20 arrangements by label witnesses that you
21 referred to in your testimony, one about
22 holdbacks. First of all, can you remind the

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1 Panel what holdbacks are?
2 **A Holdbacks are effectively the**
3 **label's right to keep certain repertoire out**
4 **of the licensed bucket of what they offer to**
5 **us.**
6 Q Are there any holdbacks in the
7 Universal voluntary agreement with Yahoo?
8 MR. PERRELLI: Move to put this
9 question and answer under the protective order
10 which it goes to a specific term in the
11 agreement, the actual content of a specific
12 term as opposed to general discussion of the
13 terms.
14 CHIEF JUDGE SLEDGE: SoundExchange
15 is moving to apply the protective order to a
16 term of agreement between Yahoo and Universal?
17 MR. PERRELLI: That is correct,
18 Your Honor. There's information that's
19 maintained as part of our confidential
20 agreement. I think Universal Music Group
21 maintains it is confidential. The documents
22 were obviously produced in discovery in this

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1 case because a Universal witness appeared on
2 behalf of SoundExchange and with respect to
3 that witness's testimony, the same kind of
4 term was also treated as specific terms in the
5 agreements themselves were treated as
6 restricted.
7 JUDGE ROBERTS: What is the
8 confidentiality here, Mr. Perrelli, that the
9 term exists?
10 MR. PERRELLI: Not that the term
11 exists, but that what actually the term is.
12 That's how I distinguish this question from
13 prior questions.
14 CHIEF JUDGE SLEDGE: That is a
15 distinction without a difference, not that the
16 term exists, but what the term is.
17 MR. PERRELLI: I think there is a
18 difference between does the contract address
19 holdbacks versus how does the contract address
20 holdbacks. One is, I think, would no be
21 confidential information, but specifically how
22 it does address holdbacks. That would be

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1 confidential information.
2 CHIEF JUDGE SLEDGE: This is the
3 information in paragraph four that's in
4 brackets?
5 MR. PERRELLI: Correct, yes, Your
6 Honor.
7 MR. STEINTHAL: Yes.
8 MR. PERRELLI: And it was
9 obviously identified by Yahoo who was also a
10 party in the agreement and there's restricted
11 information in the statement.
12 MR. STEINTHAL: Your Honor, I
13 don't object to the motion, although if
14 something doesn't exist in an agreement, I
15 have less of a concern, so if the testimony is
16 going to be that no such term exists, I'm not
17 sure that the lack of the existence of that
18 clause in and of itself is a confidential
19 matter.
20 CHIEF JUDGE SLEDGE: The motion to
21 apply the protective order is denied.
22 BY MR. STEINTHAL:

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1 Q I think my question, Mr. Roback,
2 was whether the Yahoo-Universal deal that
3 we've been talking about has any limitation of
4 the nature of a holdback clause that we've
5 been talking about?
6 **A No, it does not.**
7 Q And you testified about the
8 structure of the fees, both for the
9 nonsubscription service and the subscription
10 offering. Are there any per play minimums in
11 the Universal deal?
12 **A Well, no. In the subscription a**
13 **la carte, no. The other two are based on flat**
14 **fees, so no, there's no per play.**
15 Q There is a minimum fee on a per
16 subscriber basis and the subscription
17 offering, correct?
18 **A Correct.**
19 Q What about promotional
20 consideration? Were there any promotional
21 considerations in the Universal deal?
22 **A No.**

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1 Q What do you understand the term
2 promotional considerations to be, generally
3 speaking, in the world of music rights
4 licensing between labels and users like Yahoo?
5 **A Well, if we were to agree to, for**
6 **example, give banner or other advertising**
7 **inventory to the label in addition to the**
8 **actual monetary consideration we provide, or**
9 **if we were to give them the right to require**
10 **us to promote certain artists, those would be**
11 **of the nature of promotional considerations.**
12 Q And last question about the
13 Universal deal terms, did they limit
14 portability insofar as the ability of
15 consumers to access the web and Launchcast
16 stations on the web from mobile phones or
17 computers or other wireless-connected devices?
18 **A No. Launchcast is an Internet**
19 **radio application to the extent you can access**
20 **the Internet from anywhere, you would have**
21 **unlimited access to it and there's no**
22 **prohibition in the contract with Universal or**

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1 **premium paid to be able to do that.**
2 Q And do you have an understanding
3 as to the difference between the term
4 portability in the context of accessing the
5 Internet in the manner that you've just talked
6 about and the ability to literally transport
7 a music file from one device to another device
8 where it can be played back on a portable
9 basis?
10 **A Well, portability limitations**
11 **typically in the context of label licenses are**
12 **creatures of on-demand audio licenses, where**
13 **you may have restrictions as to the ability to**
14 **move a file from your PC to a portable music**
15 **device like an iPod or something else, and any**
16 **premium that you may pay, either as a consumer**
17 **or as the licensee for the ability to do that.**
18 Q Does that apply to Internet radio
19 as supplied by Launchcast?
20 **A No, that's not relevant in this**
21 **context.**
22 Q You address in paragraph five of

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1 your testimony certain testimony given by Mr.
2 Kenswil to the effect that the existence of
3 a statutory license somehow constrains what
4 the label is able to secure in voluntary
5 licenses when negotiating with operators of
6 customized radio services.
7 What is your view of that
8 testimony?
9 **A Well, to the extent I understand**
10 **that point, I would say that the existence of**
11 **the statutory license does not constrain their**
12 **ability in any way to charge.**
13 Q Why do you say that?
14 **A Well, today, they are charging us**
15 **excessively high rates in respect of the**
16 **customized stations that they have**
17 **unilaterally asserted are not eligible for the**
18 **license and unfortunately, the current**
19 **environment puts us either at risk of**
20 **infringement or in need of taking the license**
21 **that they'll offer us.**
22 Q What is your option if Universal

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1 is not willing to license you at a rate that
2 you believe is acceptable under all of the
3 circumstances?
4 **A With respect to the customized**
5 **stations?**
6 Q Yes.
7 **A Our only alternative is to leave**
8 **their repertoire out of those stations.**
9 Q And as to the suggestion that all
10 you would have to do is essentially flip a
11 switch and operate your service entirely on a
12 preprogrammed basis, how do you react to that?
13 **A Well, I mean technically speaking,**
14 **we could probably turn off our customized**
15 **stations, but from a business perspective**
16 **there's been enormous investment in the**
17 **infrastructure and in the algorithms that**
18 **deliver the customized experience because we**
19 **believe that those are what are necessary to**
20 **effectively compete with terrestrial radio to**
21 **get listeners to switch their listening**
22 **habits.**

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1 **So it would be a significant**
2 **detriment to us if we were to have to not**
3 **participate in that space.**
4 Q And as to the suggestion made by
5 Mr. Kenswil that the existence of the
6 statutory license gives you leverage in the
7 negotiations with Universal over customized
8 radio service licenses, how do you react to
9 that?
10 **A I would say I disagree. It gives**
11 **us no leverage.**
12 Q For the reasons you just
13 testified?
14 **A Correct.**
15 **CHIEF JUDGE SLEDGE: Mr.**
16 **Steinthal, you just made a jump, a connection**
17 **that is not clear to me. You went from**
18 **decided to operate without the repertoire of**
19 **a single label to the analysis of deciding to**
20 **give us customized services. And you made no**
21 **connection between those two thoughts.**
22 MR. STEINTHAL: I thought it was

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1 connected. I'll let the witness address that.
2 BY MR. STEINTHAL:
3 Q Is there a connection between the
4 two?
5 **A Well, I think the connection is**
6 **that in offering the customized stations, we**
7 **believe it's necessary to have access to all**
8 **the repertoire and while we had gone through**
9 **a period in the past without Universal's**
10 **music, it certainly wasn't helpful in our**
11 **growth or in our competitiveness.**
12 **So as a general rule, if we're not**
13 **able to secure a sufficient amount of**
14 **repertoire for the customized service, we**
15 **could shut down the customized service, but**
16 **that would be at a significant detriment to**
17 **our overall business and competitiveness in**
18 **the marketplace, if all we were offering were**
19 **our preprogrammed stations.**
20 CHIEF JUDGE SLEDGE: Or you could
21 operate the customized service without the
22 repertoire?

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1 THE WITNESS: Without the
2 repertoire, but yes, at a significant
3 disadvantage as well, because we would be
4 missing, in Universal's specific case, almost
5 30 percent of the market in terms of
6 repertoire.
7 CHIEF JUDGE SLEDGE: And not
8 paying the rate that you say is unfair, that
9 you're unwilling to pay?
10 THE WITNESS: Right, and we had
11 done that. We had, in the past, we had left
12 their repertoire out, not paid their
13 exceedingly high rates, but we suffered for
14 it.
15 CHIEF JUDGE SLEDGE: How is that
16 established?
17 THE WITNESS: Well, we were not
18 able to grow our service as quickly as we
19 would have liked because we were missing such
20 an important amount of the critical
21 repertoire.
22 JUDGE WISNIEWSKI: Are you saying

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1 it was worth your while to get access to this
2 repertoire, right?
3 THE WITNESS: Well, eventually we
4 were able to reach a better deal with them,
5 all the while continuing to prosecute the
6 litigation in hopes of having a result that
7 made it clear that those stations were not
8 outside the scope of the license.
9 BY MR. STEINTHAL:
10 Q Do you have a view as to whether,
11 were you not initially sued by Universal and
12 threatened with further suits by Universal
13 absent agreeing to the rates that you agreed,
14 whether the resulting license fees that you're
15 paying Universal would be as high as they are?
16 MR. PERRELLI: I'm going to
17 object, Your Honor. It's hypothetical for a
18 fact witness.
19 CHIEF JUDGE SLEDGE: Mr.
20 Steinthal?
21 MR. STEINTHAL: Well, I think he
22 participated in the negotiations and is in a

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1 position to have a view as to whether the
2 outcome of those negotiations would have been
3 different had there not been copyright
4 infringement litigation threatened and
5 brought.
6 CHIEF JUDGE SLEDGE: Mr.
7 Perrelli's right. That's asking for an
8 opinion, not a fact. Sustained.
9 BY MR. STEINTHAL:
10 Q Let's switch to the subject of
11 Yahoo's voluntary license arrangement with
12 independent record labels that you start
13 addressing in paragraph eight of your written
14 testimony, Mr. Roback.
15 First of all, what, when we're
16 talking about independent labels, what do you
17 mean by that?
18 **A By independent labels, we mean**
19 **labels that are not part of the four majors,**
20 **BMI, Warner, Sony and Universal.**
21 Q And has Yahoo entered into
22 agreements for any or all of its music

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1 products that you testified about earlier with
2 independent labels?
3 **A Yes. We have entered into**
4 **voluntary licenses with the indies.**
5 Q Could you describe for the Board
6 what kind of arrangements you've entered into
7 with independent labels?
8 **A Sure. In general, when we enter**
9 **into a voluntary license with the**
10 **independents, we are trying to cover four of**
11 **our overall music service offerings. Our**
12 **first would be our on-demand subscription**
13 **service that I described earlier. The second**
14 **would be the a la carte downloads. Third**
15 **would be music videos and the fourth would be**
16 **webcasting.**
17 **And the first three components**
18 **clearly require a voluntary license and so we**
19 **try to address all four in one overall license**
20 **with the indie.**
21 Q Is that sometimes called the four
22 services deal?

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1 **A Yes. We refer to it as the four**
2 **services deal. Correct.**
3 Q And, has Yahoo established --
4 CHIEF JUDGE SLEDGE: List those
5 again, please.
6 MR. STEINTHAL: I'm sorry?
7 CHIEF JUDGE SLEDGE: List those
8 again please.
9 THE WITNESS: That would be the
10 on-demand subscription service, the a la carte
11 download sales, video and the webcasting.
12 BY MR. STEINTHAL:
13 Q And did Yahoo develop a form or
14 series of forms of licenses that it tries to
15 use with independent labels?
16 **A Yes. We have a form that's**
17 **evolved over the years.**
18 **A Now, what is the rate structure**
19 **for the webcasting part of those independent**
20 **label deals?**
21 **A Well, in general they're either**
22 **just a statement of paying at the statutory**

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1 **rate, or it's payment on a per unique listener**
2 **basis. The label's pro-rata share of a fee**
3 **indicated in Paragraph 8A, per unique listener**
4 **per month.**
5 Q And how does that work? In other
6 words, how would one calculate the fee due
7 under a per unique listener basis?
8 **A Well, we would look at the total**
9 **number of unique listeners to the Launchcast**
10 **nonsubscription service in a month, multiply**
11 **that times the fee, and then times that for**
12 **any particular label's pro-rata share of the**
13 **total**
14 **number of songs played out of the overall**
15 **total.**
16 Q And as between the two structures
17 for rates applicable to independent labels
18 that you've mentioned, the statutory rate or
19 this per unique, could you explain to the
20 Board whether there's been an evolution from
21 one to the other over time and what the
22 current situation is with respect to how many

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1 or what proportion of the total or one
2 mechanism versus the other?
3 **A Well, historically, we've always**
4 **just addressed webcasting at the statutory**
5 **rate and it was only in the last year or so**
6 **that we started to negotiate with the indies**
7 **and encouraged the indies to move to the per**
8 **unique listener model, so I'd have to say that**
9 **the majority is still at the statutory rate,**
10 **but more of the newer ones are at the per**
11 **unique listener rate.**
12 Q And on the subscription webcasting
13 side, how are the fees structured with the
14 independent labels with respect to the
15 subscription a la carte Launchcast service?
16 **A Just at the statutory rate for a**
17 **la carte subscriptions.**
18 Q Is there any limitation in your
19 independent label deals on the ability to
20 transmit through portable or mobile devices?
21 **A No.**
22 Q Is there any limitation on catalog

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1 in terms of holdback rights?
2 **A I don't believe so.**
3 Q Now you state in paragraph nine of
4 your testimony that the effective per
5 performance rate under these per unique
6 listener arrangements would be significantly
7 less than the prior statutory CARP rate.
8 Can you explain to the Board how
9 you arrived at that conclusion?
10 **A Well, we arrived at that**
11 **conclusion just by looking at the total number**
12 **of unique listeners on a monthly basis and the**
13 **corresponding number of performances and then**
14 **calculating the overall royalty payment at the**
15 **existing per stream CARP rate, on the one**
16 **hand; or, on the per unique listener basis, on**
17 **the other and then comparing the two. You can**
18 **look at the overall royalty obligation for the**
19 **per unique listener basis on an effective per**
20 **stream basis.**
21 Q In terms of talking about the
22 actual estimated number of unique listeners

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1 and the number of streams from which could
2 derive a per stream fee?
3 **A Sure. We have approximately five**
4 **million unique listeners to Launchcast**
5 **nonsubscription on a monthly basis in the**
6 **neighborhood of 350 to 380 million streams per**
7 **month. So if you take the total number of**
8 **streams times the statutory rate per stream,**
9 **you get one royalty obligation. If you take**
10 **the five million unique listeners times our**
11 **per unique listener rate indicated in my**
12 **written testimony, you get another absolute**
13 **obligation which is lower and then if you look**
14 **at that absolute obligation on an effective**
15 **per stream basis. It comes out to be lower**
16 **than existing statutory.**
17 Q So hypothetically, if you were
18 charging a penny per unique, under these deals
19 you would multiply that five million by a
20 penny and then divide by the number of
21 performances that you just mentioned and come
22 out with a per stream fee?

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1 **A With an effective per stream fee,**
2 **correct.**
3 JUDGE ROBERTS: Mr. Roback, these
4 independent record labels, they're listed in
5 Exhibit 1 of your testimony. What percentage
6 of Yahoo's overall music offerings to these
7 independent record labels represent?
8 THE WITNESS: Of each of the
9 different including specifically webcasting?
10 JUDGE ROBERTS: Yes, looking
11 overall at your music operation, I presume
12 that these licenses that you have for these
13 independent labels are not just for
14 webcasting, correct?
15 THE WITNESS: Right, they're for
16 the four services that I mentioned, right.
17 JUDGE ROBERTS: Looking at it
18 overall, what percentage of the total music
19 offered is represented here by --
20 THE WITNESS: I can't give you an
21 exact number, but I can tell you it's very
22 small.

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1 JUDGE ROBERTS: Very small.
2 THE WITNESS: Very small.
3 JUDGE ROBERTS: Thank you.
4 BY MR. STEINTHAL:
5 Q Let's turn now to your comments in
6 your rebuttal statement about Professor
7 Brynjolfsson's amended direct testimony, Mr.
8 Roback. That starts at paragraph ten on page
9 nine of your written rebuttal.
10 In paragraph 11, you quote
11 Professor Brynjolfsson's testimony where he
12 says "market participants who willingly stayed
13 in the market after the first proceeding were
14 clearly willing buyers at the rates set by the
15 last CARP." And then paraphrasing those
16 webcasters could have exited the market if
17 they were not willing to pay the stated rate.
18 How to you react as it applies to
19 Yahoo Music in terms of Yahoo staying in the
20 market?
21 **A I would disagree at that time that**
22 **that was a fair characterization of where we**

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1 **were insofar as we were along with other**
2 **members of the industry actively working to**
3 **reform the process at which the statutory rate**
4 **had been arrived at, so that we could avail**
5 **ourselves of the new process in the hopes of**
6 **having a lower rate and one that would enable**
7 **us to stay in the market.**
8 Q Dr. Brynjolfsson focuses on the
9 fact that you had made a lot of investments
10 beforehand, but that decisions about whether
11 to continue in business should be made not
12 based on sunk costs, but based on whether or
13 not the existing rate factored into the
14 business is one that is appropriate or one
15 that you're prepared to live with.
16 How do you react to that in terms
17 of your willingness to continue in operation?
18 **A Well, in general, our evaluation**
19 **of the rate on a prospective basis is about**
20 **our ability to reach and sustain**
21 **profitability. On an operating basis, it's**
22 **not about sunk costs.**

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1 Q And do you have a view as to
2 whether sunk costs or not Yahoo would continue
3 operating its radio business, irrespective of
4 what royalty rate is set by this Board?
5 **A Well, we wouldn't -- if I'm**
6 **understanding your question correctly, we**
7 **would not make a decision about remaining in**
8 **this business without thinking about what the**
9 **prospective royalty rate is going to be.**
10 Q And is that a decision that will
11 be made again once the rate is set in this
12 case?
13 **A Absolutely.**
14 Q Now in paragraph 12 you refer to
15 Professor Brynjolfsson's testimony about
16 additional investments in webcasting after
17 2002, including specifically the acquisition
18 of Musicmatch in late 2004.
19 How do you react to the suggestion
20 that the acquisition of Musicmatch by Yahoo
21 was a substantial additional investment in
22 webcasting according to Professor

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1 Brynjolfsson?
2 A **Well, I don't think it's a fair**
3 **characterization. Our primary reason for**
4 **buying Musicmatch was all about the scale and**
5 **infrastructure that existed with respect to**
6 **the on demand side of the business and their**
7 **distribution that existed for their desk top**
8 **application to Musicmatch Jukebox and some of**
9 **the infrastructure they had built around on-**
10 **demand audio. They did, in fact, have a radio**
11 **service. It was nice for us to have that, but**
12 **it was not the reason for doing the**
13 **acquisition.**
14 Q I think you testified earlier that
15 that webcasting business has essentially been
16 integrated on a gradual basis into Yahoo?
17 A **That's right.**
18 Q Now in paragraph 13, you address
19 Professor Brynjolfsson's claims in his amended
20 testimony that Yahoo does not attribute banner
21 advertising revenue from all of its music
22 pages to its radio product when it has done

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1 whatever calculations it has done about what
2 is radio revenue.
3 How do you react to Professor
4 Brynjolfsson's criticism about that?
5 A **Well, I guess I just disagree with**
6 **Professor Brynjolfsson that revenue from those**
7 **general music pages that are really about**
8 **marketing the diverse array of music that we**
9 **have and types of content that we have, that**
10 **that revenue should be allocated to the radio**
11 **service.**
12 Q Let's try to elaborate upon that
13 in more detail and be careful, if you could,
14 about explaining the difference between Yahoo
15 Music and Yahoo Radio as you explain to the
16 Board where the revenues are being driven and
17 why you don't believe that revenue at the
18 Yahoo Music level should be attributed to
19 Yahoo Radio?
20 A **So Launchcast Radio, that product,**
21 **we evaluate in our business context in terms**
22 **of the opportunities to generate revenue that**

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1 **come from somebody actually listening to that**
2 **service and so clearly when somebody initiates**
3 **the radio service and is listening, we have**
4 **the opportunity to sell advertisements in**
5 **between the songs, to sell advertisements on**
6 **the player through which we distribute and to**
7 **the extent that we can generate revenue, and**
8 **do generate revenue, that is attributable**
9 **clearly to the radio service and to how we**
10 **evaluate its contribution to our business**
11 **overall.**
12 **There are also certain web pages**
13 **that are part of Yahoo Music that would**
14 **effectively not exist but for the existence of**
15 **Launchcast, so they are pages that are a**
16 **station guide, for example, that would show**
17 **all the stations that you could listen to,**
18 **that you could adjust your profile or**
19 **different types of things with respect to the**
20 **radio service.**
21 **Clearly, to the extent that we can**
22 **generate revenue from those pages and do**

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1 **generate revenue from those pages, we believe**
2 **that's attributable to the radio service and**
3 **we look at again the radio service's**
4 **contribution to our overall business.**
5 Q Let me ask you to pause right
6 there. Just to be clear, those pages that you
7 talked about, for example, pages that are the
8 radio guide would be pages where advertising
9 can be generated even when somebody is not
10 streaming music, correct?
11 A **That's correct, but those pages**
12 **would not exist but for the existence of the**
13 **radio service. So it would only be fair to**
14 **characterize that as being attached to the**
15 **radio service as distinguished from the home**
16 **page of Yahoo Music that merchandises the**
17 **array of content that we have in respect to**
18 **music. So it has advertising, but it points**
19 **you to music videos, to our interviews that we**
20 **do, to concert information, news articles,**
21 **radio, photographs, merchandises the on demand**
22 **service that we try to get people to sign up**

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1 **for and then share that revenue with the**
2 **record companies.**
3 Q Now you've explained why you don't
4 believe that the Yahoo Music home page, the
5 broader Yahoo Music home page that you just
6 talked about revenues should come into an
7 analysis of attributable revenue to radio.
8 Assuming, however, that one were
9 to look at the Yahoo Music home page revenue,
10 are you familiar, are you not, with Professor
11 Brynjolfsson's methodology where he suggests
12 that (a) that should come in, and (b) one
13 should allocate that Yahoo Music broader home
14 page revenue, based on the number of hours of
15 radio streaming versus the number of hours of
16 all other music activity?
17 **A I'm familiar with that, yes.**
18 Q And what is your view,
19 understanding that you don't believe any of it
20 should come in, to an attributable revenue
21 base for radio, what is your view as to even
22 if you were going to make such an allocation,

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1 whether it would be reasonable or appropriate
2 to do it based on that hourly allocation basis
3 that Professor Brynjolfsson did?
4 **A Well, I think that I would**
5 **disagree with that methodology. I think it**
6 **would overstate the importance of radio**
7 **insofar as the radio product is the type of**
8 **thing that someone can turn on and minimize**
9 **and go do a whole bunch of other things and**
10 **it's more of a passive engagement with radio**
11 **as opposed to other areas of our service like**
12 **music video, for example, where we're even**
13 **able to sell advertising at higher rates**
14 **because the type of ad delivered, a video ad,**
15 **has more engagement with the viewer, it's**
16 **visual and audio and it's able to command a**
17 **higher price.**
18 **So to just attribute based on the**
19 **volume of streaming hours and radio, my view**
20 **would overstate its value.**
21 **CHIEF JUDGE SLEDGE: Mr.**
22 **Steinthal, may I follow up on that for just a**

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1 **moment?**
2 MR. STEINTHAL: Sure.
3 CHIEF JUDGE SLEDGE: If the result
4 of listening to radio in the context of
5 minimizing the screen was an undesirable
6 result for the webcasters, they could change
7 that, couldn't they?
8 Couldn't they keep you from
9 listening to the sound and minimize the
10 visual?
11 THE WITNESS: I am not saying that
12 it's undesirable that somebody would start
13 their radio player and minimize it. In fact,
14 that's just a behavior that is typical with
15 respect to radio. You turn it on and it's on
16 and you may do other things.
17 CHIEF JUDGE SLEDGE: So it's
18 something you want people to do?
19 THE WITNESS: We're not saying
20 we're discouraging people. What I'm saying is
21 that if you then try to allocate revenue from
22 other pages based on the fact that they have

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1 this on in the background, you would end up
2 attributing too much of that revenue to the
3 radio service just because it's something
4 that's on in the background.
5 CHIEF JUDGE SLEDGE: Thank you.
6 BY MR. STEINTHAL:
7 Q And you mentioned as well that the
8 advertisers' value, the uses of radio versus
9 video, for example, differently as well,
10 correct?
11 **A The prices for video advertising**
12 **are higher than they are for radio**
13 **advertising.**
14 Q And what do you attribute that to?
15 **A Largely the type of advertisement**
16 **and the degree of engagement that the user has**
17 **with what they're seeing. A television**
18 **commercial is more expensive than a radio ad.**
19 Q Now Professor Brynjolfsson has
20 also talked about the -- what I think he uses
21 is the words "spill over benefits" associated
22 with a portal, that there's some revenue

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1 outside of radio or even outside of music that
2 is derived by a portal like Yahoo that should
3 somehow be captured in a revenue base for
4 which a statutory license should be
5 structured. What is your view about that?
6 MR. PERRELLI: Your Honor, I am
7 going to object. I think this actually goes
8 beyond written rebuttal testimony. He talked
9 about the allocation aspects, but in the
10 written rebuttal testimony he doesn't talk
11 about spillovers outside of the music areas.
12 CHIEF JUDGE SLEDGE: Mr.
13 Steinthal?
14 MR. STEINTHAL: Let me rephrase
15 the question to try to avoid an objection.
16 CHIEF JUDGE SLEDGE: All right.
17 BY MR. STEINTHAL:
18 Q You testified about the Yahoo
19 Music home page situation and why you don't
20 believe that the Yahoo Music home page revenue
21 should come into a revenue base upon which
22 statutory license should be structured.

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1 Is your view any different with
2 respect to other aspects of the Yahoo website,
3 even outside of Yahoo Music?
4 CHIEF JUDGE SLEDGE: Mr.
5 Steinthal, let me interrupt you to question a
6 part of that question.
7 It struck me a moment ago as in
8 error when you summarized his testimony that
9 he did not feel the revenue from the music
10 pages should be attributed to the radio pages
11 and you just said it again.
12 I understood Mr. Roback to say
13 that there are parts of the music page that
14 are -- that support the radio and are
15 benefitted from the radio and he said that
16 those parts of the music page should be
17 attributable to radio. So I hear an
18 inconsistency between your summary and his
19 testimony.
20 MR. STEINTHAL: I'm happy to have
21 him address it. I don't think there is an
22 inconsistency. It may be the difference

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1 between looking at the radio pages that don't
2 actually stream music which he testified he
3 believes to be attributable to radio and
4 should properly come and then shifting over to
5 the broader home page of Yahoo Music where I
6 believe his testimony was as I summarized it.
7 But I'm happy to have him address that, Your
8 Honor.
9 CHIEF JUDGE SLEDGE: Perhaps I was
10 confusing those pages. I thought they were on
11 the music side and not the radio side.
12 MR. STEINTHAL: Let's have the
13 witness try to address it and clarify it.
14 THE WITNESS: Maybe it would be
15 helpful to describe it this way. You have the
16 Yahoo Music site overall. A subset of the
17 webpages in the Yahoo Music site are
18 effectively dedicated to the radio service, to
19 the Launchcast service. In my parlance, they
20 would not exist but for the existence of the
21 radio service.
22 It's my view that were we paying

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1 on a percentage of revenue that revenue
2 generated from those pages should be included
3 in the base on which we pay.
4 Outside of that subset, there are
5 other pages that comprise the music site, one
6 of which happens to be the home page of Yahoo
7 Music. And in my view, revenue from those
8 pages should not be at all attributed to the
9 base on which we pay, but if they were, then
10 I would disagree with the Professor's
11 methodology for making that allocation which
12 would be based on time spent streaming radio.
13 That was what I was --
14 CHIEF JUDGE SLEDGE: And I guess
15 to take that to the question I raised, is that
16 subset that you just identified, limited to
17 screens that are available only after you go
18 to the radio?
19 THE WITNESS: Those pages are --
20 the content of those pages is only about or
21 predominantly about radio, but you do not
22 necessarily need to be listening to the radio

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1 to be using those pages, nor does listening to
2 the radio qualify whether or not the revenue
3 on those pages should be paid as part of the
4 bucket. I believe they should always be paid,
5 whether the radio has been on or not.
6 CHIEF JUDGE SLEDGE: And that
7 sounds like that's inconsistent with your
8 summary.
9 MR. STEINTHAL: Your Honor, what I
10 was summarizing was Yahoo Music's home page
11 versus the terrain of Yahoo Radio.
12 CHIEF JUDGE SLEDGE: The terrain
13 of Yahoo Radio is not limited only to the
14 Yahoo Radio page and where you get to from
15 that page.
16 MR. STEINTHAL: I think that's
17 where we're perhaps -- this is where we're at
18 a disadvantage not having the ability to
19 demonstrate it. But let me try to address
20 Your Honor's question and have the witness
21 agree or disagree. I'm not trying to lead.
22 I'm trying to resolve some confusion.

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1 CHIEF JUDGE SLEDGE: All right.
2 MR. STEINTHAL: If we have -- if
3 you go to Yahoo and you press Yahoo Music, you
4 end up as the witness testified to, and a
5 place within the Yahoo portal that offers you
6 the ability to get on demand, to get videos,
7 to get interviews, to get all sorts of things
8 of which radio is one.
9 If you click on the radio button,
10 you then go to the Yahoo Radio home page which
11 I would call a subset of Yahoo Music. Now
12 that Yahoo Radio space includes not just the
13 player and the ability to click and listen and
14 generate revenues through the sale of in-
15 stream ads or banner ads or ads within the
16 player itself, but you might say you know, I
17 don't really want to listen right now, but I
18 want to go check out what stations are
19 available and of course, Yahoo has customized
20 radio, so you can manage, you can edit the
21 things you like and you don't like that might
22 affect your ability to have -- your limited

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1 ability to have some effect on the play list.
2 And all of that Mr. Roback
3 testified, should come into the revenue base.
4 Even if you're not listening to music and all
5 that terrain is within the terrain of Yahoo
6 Radio. The distinction, Your Honor, between
7 what Professor Brynjolfsson said and what the
8 witness said is that if you go outside of
9 radio and you're now back at that general home
10 page for music, what do you do with that
11 revenue?
12 Professor Brynjolfsson has said
13 some of it should come in, if you're looking
14 at a revenue base for radio. The witness has
15 said he doesn't believe any of that revenue
16 from the home page of music should come in
17 because it's not sufficiently attributable to
18 the radio product.
19 CHIEF JUDGE SLEDGE: Mr. Roback,
20 let me ask you -- I have not heard you say
21 something that Mr. Steinthal just said and I
22 think this will clarify the question.

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1 I've not heard you say that this
2 subset is only reached after you click on the
3 radio button from the Yahoo Music page. I
4 heard you say that that subset included parts
5 that are driven by the radio, supported by the
6 radio, but are not only available after you
7 click on the radio button on the Yahoo site.
8 THE WITNESS: Right, so the
9 navigation that Mr. Steinthal described would
10 be from the music home page, clicking on radio
11 to get to that subset.
12 CHIEF JUDGE SLEDGE: Right.
13 THE WITNESS: Is only one way to
14 arrive at the subset. You could arrive at
15 that subset by being on another company's
16 search engine like Google and searching for
17 Launchcast radio, clicking on a search result
18 and it would take you directly into the
19 subset.
20 But however you arrive at that
21 subset, in my view, the entire subset should
22 always be included.

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1 CHIEF JUDGE SLEDGE: Well, thank
2 you. I think that clarifies the two different
3 observations.
4 MR. STEINTHAL: It's very hard,
5 Your Honor, without the ability to look at it
6 the same time and deal with these issues, but
7 we're doing the best we can to try to in vocal
8 ways, try to articulate the different terrains
9 within a portal and have the witness address
10 his views and Professor Brynjolfsson's views
11 about where the revenue is being derived and
12 whether it should come in to an appropriate
13 revenue base.
14 BY MR. STEINTHAL:
15 Q Now let me to back to the question
16 I was going to ask you before. You've now
17 clarified the issue about your views about the
18 Yahoo Music home page revenue. What is your
19 view about whether banner ads or other ads
20 running on other pages of Yahoo, whether it be
21 the overall Yahoo Inc. home page or any other
22 pages of Yahoo should come into an appropriate

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1 revenue base for the statutory license?
2 **A It's my view that they should not.**
3 Q Why not?
4 **A For a similar reason that I**
5 **described with respect to the music pages that**
6 **are not radio pages. The rest of the Yahoo**
7 **service is effectively a marketing device to**
8 **get people into radio and if they are in radio**
9 **we then have an opportunity to generate**
10 **revenue from their activity.**
11 **And the activity on the rest of**
12 **Yahoo would still exist even if you weren't**
13 **marketing the radio service there. So it's**
14 **our view that it should not be part of the**
15 **revenue bucket.**
16 Q I think in that sentence, that
17 answer, you said the rest of the Yahoo service
18 is a marketing activity to drive people to
19 radio. Putting aside how radio views the rest
20 of Yahoo, what does the rest of Yahoo do?
21 **A I'm not sure I understand what you**
22 **mean by what does the rest of Yahoo do.**

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1 Q You said that the rest of Yahoo,
2 the rest of the Yahoo service and I don't have
3 it literally, is a marketing activity for
4 radio. Does the rest of Yahoo exist for the
5 benefit of radio?
6 **A No, the rest of Yahoo doesn't**
7 **exist for the benefit of radio. What I'm**
8 **saying is that there are several hundred**
9 **million people a month that come to the**
10 **yahoo.com home page. If you have the ability**
11 **to directly access radio from that page, that**
12 **is clearly a huge benefit to the radio service**
13 **because it drives traffic in. I do not**
14 **believe the traffic on yahoo.com would change**
15 **based on the presence or absence of access to**
16 **radio.**
17 Q Is there any evidence you're aware
18 of that the traffic to the Yahoo portal would
19 change whether or not you had the ability to
20 access Yahoo Music from, for example, the
21 Yahoo home page?
22 **A I'm not aware of any evidence that**

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1 **it would change, no.**
2 Q And in terms of the revenue that
3 Yahoo derives outside of Yahoo Radio, I'm
4 going to try to speak louder, Your Honor, in
5 light of the competition -- does any of the
6 revenue that Yahoo is able to derive outside
7 of the context of Yahoo Radio enter into Yahoo
8 Music's -- or I should say Yahoo Radio's
9 willingness to pay for webcasting royalties?
10 Let me rephrase that. I don't
11 like the way I said it.
12 Does any of the revenues that you
13 can derive outside of Yahoo Radio enter into
14 the equation when Yahoo Radio makes a
15 determination as to what it is willing to pay
16 for music royalties?
17 **A Well, let me try to answer your**
18 **question. Yahoo Radio is not a separate**
19 **person from the rest of Yahoo Music, so we**
20 **evaluate our business based on those product**
21 **lines, in effect. And so when we determine**
22 **whether or not to continue to invest in having**

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1 **radio, we look at the revenue that I just**
2 **defined in respect to radio to determine**
3 **whether it can and will be a profitable**
4 **business.**
5 **So we look specifically at the**
6 **revenue opportunities created by the fact that**
7 **people are listening to radio and that's what**
8 **we effectively project the business against.**
9 Q Just one more thing on the revenue
10 attribution, when Yahoo Inc. sells a run of
11 sight ad, meaning -- first of all, are you
12 familiar with the phrase run of sight?
13 **A Yes.**
14 Q Can you remind the Board what a
15 run of sight ad is?
16 **A Well, at Yahoo we refer to it as**
17 **run of network and it's basically an**
18 **advertiser that would come in and if you**
19 **purchased, for example, 10 million impressions**
20 **run of network, you as the advertiser do not**
21 **get to determine where and when across all of**
22 **Yahoo's properties that ad will run. It just**

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1 **runs somewhere across the network. But**
2 **wherever it does run the revenue is attributed**
3 **to that specific place in which the ad ran.**
4 Q And that's what I wanted to get
5 to. So that if I'm Pepsi and I'm making a run
6 of network ad buy on Yahoo for $1 million,
7 how, if at all, does any of that $1 million
8 get attributed to Yahoo Radio?
9 **A It's gets allocated to Yahoo Radio**
10 **based on the number of actual impressions**
11 **delivered in Yahoo Radio.**
12 Q So that when you talked previously
13 about within the terrain of radio, whatever
14 banner ads might be sold within that, to the
15 extent that banners were the result of the run
16 of network sale, it would come into the
17 bucket?
18 **A Any advertising that runs on those**
19 **pages whether it was sold directly to be there**
20 **or part of run of network would be included.**
21 Q Let me ask you a question about
22 the AT&T SBC bundled service. I think you

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1 addressed this in paragraph 14 of your written
2 rebuttal testimony on page 15?
3 **A Yes.**
4 Q Professor Brynjolfsson has made
5 various comments about the failure of Yahoo in
6 looking at its radio revenues to attribute
7 revenues associated with the SBC Yahoo
8 distribution vehicle. Why is it that Yahoo
9 Radio does not have any revenues directly
10 attributable to that?
11 **A Well, SBC, AT&T pages Yahoo on a**
12 **monthly basis for every subscriber to the**
13 **overall package of broadband connectivity and**
14 **the various premium services from Yahoo that**
15 **are packaged in. And so that single fee is**
16 **not allocated out in any way to the various**
17 **components because there's no methodology that**
18 **worked for doing so.**
19 Q And does Yahoo Radio actually get
20 paid any money within the Yahoo organization
21 for the distribution through the SBC, Yahoo,
22 AT&T arrangement?

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1 **A No, that's all dealt with in a**
2 **separate business unit outside of music.**
3 Q Now --
4 CHIEF JUDGE SLEDGE: That is an
5 exception to everything you were saying
6 earlier about no matter where it's sold, if
7 it's run over the radio pages, it's allocated
8 to radio?
9 THE WITNESS: Well, this is not --
10 in that case I was talking about advertising.
11 So in the SBC, AT&T service, we bundle our
12 subscription product that's commercial-free.
13 So this is just about whether any of SBC's
14 payment to Yahoo is then broken up, based on
15 the various components that Yahoo offers and
16 it's not, in fact, done that way.
17 MR. STEINTHAL: I should have been
18 more clear that I was transitioning to a
19 subscription offering, Your Honor, compared to
20 the testimony before about the
21 nonsubscription.
22 BY MR. STEINTHAL:

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1 Q Now even though your testimony is
2 that there's no way of looking at how much
3 revenue can be derived out of that bundle
4 associated with the Launchcast service that's
5 bundled within that offering, is it your view
6 that Yahoo shouldn't pay for the streams in
7 that offering?
8 **A No, we should and we do pay for**
9 **the streams in that offering.**
10 Q And what's your position as to how
11 you should pay for the performances within
12 that kind of bundled service offering that you
13 just described?
14 **A We should pay based on the usage**
15 **that actually takes place and that's the**
16 **methodology that we're paying on today.**
17 Q Now the Launchcast service that is
18 bundled within the AT&T bundle that's sold,
19 the broadband access bundle, is it true that
20 essentially the same service is sold on an a
21 la carte basis by Yahoo?
22 **A Yes.**

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1 Q And again, just to make sure we
2 get the terms right, by a la carte, what do
3 you understand that to me?
4 **A Well, the product itself is called**
5 **Launchcast Plus. It's the commercial-free**
6 **product. And you can come to our website and**
7 **pay approximately $3 per month to access**
8 **Launchcast Plus. That's a la carte. Or if**
9 **you happen to have signed up for the SBC Yahoo**
10 **connectivity bundle, you would have access to**
11 **that commercial-free product without having to**
12 **pay a separate discrete price.**
13 Q What is your view as to whether it
14 would be appropriate in evaluating the value
15 of the Launchcast Plus product within the AT&T
16 broadband bundle by looking at what the a la
17 carte subscription price to those people that
18 buy it individually?
19 **A I would think that that would be**
20 **an incorrect methodology.**
21 Q Why is that?
22 **A Well, for a couple of reasons. I**

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1 **guess the -- start with the fact that based on**
2 **my understanding of the SBC AT&T agreement**
3 **with Yahoo, the consideration paid by SBC to**
4 **Yahoo for the entire package of services**
5 **delivered is well below the a la carte**
6 **subscription price for Launchcast Plus.**
7 **And secondly, in the case of**
8 **Launchcast Plus a la carte, a user is choosing**
9 **to pay us for that product and then can make**
10 **the determination whether they use it or not**
11 **as part of this bundle. Where they're**
12 **primarily paying for connectivity to the**
13 **Internet, they may choose to use it, they may**
14 **not. They may not even know they have it.**
15 Q And in paragraph 14, do you
16 identify approximately what percent of Yahoo
17 SBC -- just to be clear, I've used the phrase
18 Yahoo SBC and Yahoo AT&T. Are those
19 interchangeable?
20 **A Yes, SBC -- formerly SBC is now**
21 **AT&T. They're the same.**
22 Q Okay. There's a statistic in

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1 paragraph 14. Does that reflect roughly what
2 percentage of the total SBC subscriber base
3 actually accesses in a given month, the
4 Launchcast Plus part of the bundle?
5 **A Yes, paragraph 14 in my written**
6 **testimony accurately reflects that.**
7 Q Let's turn to paragraph 15 of your
8 written rebuttal statement.
9 CHIEF JUDGE SLEDGE: Mr.
10 Steinthal, before you leave that, am I correct
11 in hearing that last testimony about paragraph
12 14 that Mr. Roback rejects the testimony of
13 Professor Jaffe where he specifically included
14 a separation of bundled revenue when you could
15 have a la carte pricing of the parts of the
16 bundle and determine the amount of setting up
17 a pro-rata part of the bundled price then?
18 MR. STEINTHAL: Are you referring
19 to Mr. Fancher earlier in the week, rather
20 than Dr. Jaffe?
21 CHIEF JUDGE SLEDGE: Maybe I am.
22 I was thinking it was Dr. Jaffe yesterday that

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1 covered that.
2 MR. STEINTHAL: I think Mr.
3 Fancher addressed the whole issue of how you
4 deal with bundled services from a revenue
5 perspective.
6 CHIEF JUDGE SLEDGE: Okay.
7 MR. STEINTHAL: And I think what
8 Mr. Fancher said and I'm happy to have you ask
9 the witness this question, but I believe that
10 the fair characterization of what he said was
11 if you can identify legitimate stand-alone
12 prices for each element of the bundle so that
13 if you had a bundle of two things and I think
14 that was the hypothetical, he had two things
15 in the bundle and one had a stand-alone price
16 of $8 and one had a stand-alone price of $4
17 and that's all the bundle consisted of, and
18 there was a regular market price for each of
19 those aspects and then the bundle was sold for
20 $10, then you could unbundle based on looking
21 at the relationship between the two, so that
22 you could take the $10 and allocate it one to

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1 two, as a way to deal with that kind of
2 bundle.
3 He also testified that when you
4 had a situation where there is not a stand-
5 alone price for each element of the bundle,
6 then there would be an inability to unbundle
7 that way and he specifically addressed the
8 circumstance of where you have an a la carte
9 situation as it would be inappropriate to look
10 at the a la carte price that someone pays for
11 a music service when it is bundled as part of
12 a broader package, including connectivity,
13 especially under circumstances where only 10
14 percent of the universe of subscribers is
15 actually using the service. So he addressed
16 that hypothetical quite squarely and I don't
17 believe and I think the record will reflect
18 it, that there's any inconsistency whatsoever
19 between Mr. Fancher's testimony on the
20 allocation issue and what Mr. Roback said
21 because he's addressing only one aspect of the
22 various hypotheticals that were presented

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1 which is the music as part of a very broad
2 bundle where there's not a stand-alone price
3 for each aspect within the bundle.
4 CHIEF JUDGE SLEDGE: Thank you.
5 MR. STEINTHAL: I look forward to
6 wrapping this all into the post-trial
7 findings, Your Honor, to try to weave the
8 testimony that comes in over many weeks or
9 months and I think that's our responsibility
10 to the Board, really is, in part, to do that
11 and we look forward to doing that.
12 JUDGE ROBERTS: It certainly is
13 your responsibility.
14 (Laughter.)
15 MR. STEINTHAL: So I hope we'll
16 have at least enough time to do that.
17 (Laughter.)
18 CHIEF JUDGE SLEDGE: It's already
19 being done now as previously represented to
20 us.
21 MR. STEINTHAL: You know, I had a
22 conversation with my team about that last

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1 night, Your Honor.
2 CHIEF JUDGE SLEDGE: So it can be
3 ready at any time.
4 (Laughter.)
5 MR. STEINTHAL: Any time is a
6 little --
7 BY MR. STEINTHAL:
8 Q Mr. Roback, if you would look at
9 paragraph 15?
10 **A Yes.**
11 Q As you state here, Professor
12 Brynjolfsson has testified that services like
13 Launchcast are being used as a lost leader by
14 companies like Yahoo. What is your reaction
15 to that?
16 **A Well, I think in our case it's**
17 **absolutely wrong.**
18 Q Why do you say that?
19 **A Because we're not using it as a**
20 **lost leader. We're trying as best we can to**
21 **generate as much revenue as we possibly can**
22 **from the activity, so that we can earn a**

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1 **profit which is the reason that we exist.**
2 Q He comments on the stickwall issue
3 and your use of the stickwall as a mechanism
4 by which you limit revenue. What is your
5 reaction to his comments about the use of a
6 stickwall as a mechanism that limits revenue?
7 **A A stickwall is not a mechanism to**
8 **limit revenue. It's a mechanism to limit**
9 **cost. In the nonsubscription service, we have**
10 **a situation where we have users that listen a**
11 **lot and consume a lot and create a lot of**
12 **advertising inventory that we're not able to**
13 **sell and because it's so expensive for us to**
14 **stream that additional music above the demand**
15 **for advertising, we've created what we call**
16 **the stickwall which is largely an incentive to**
17 **get our heavy listeners to switch from**
18 **listening to the free service to actually**
19 **paying us for the a la carte subscription**
20 **service, so it's definitely not a way to limit**
21 **revenue, but it is certainly a way to mitigate**
22 **the excessive cost.**

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1 Q And insofar as you're successful
2 in incentivizing certain users to move from
3 the nonsubscription to the subscription
4 offering, what effect is there, if any, with
5 respect to the payment of royalties to Sound
6 Exchange?
7 **A We continue to pay them royalties,**
8 **but just on a different structure.**
9 Q Turn, if you would, to paragraph
10 16. First of all, Professor Brynjolfsson, as
11 you note, posits that advertising revenues are
12 rising for webcasters. Do you agree with
13 that?
14 **A That are specifically or for**
15 **webcasters?**
16 Q That the advertising market for
17 Launchcast, for your radio product is growing?
18 **A Yes, it's growing.**
19 Q Now he refers in paragraph 4.2.1
20 of his testimony and you refer to this in
21 paragraph 16B of your written rebuttal
22 testimony, he makes reference to certain

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1 projections.
2 Do you believe it is appropriate
3 to rely on these particular projections in any
4 model making for webcasting royalties?
5 **A No, I do not.**
6 Q Why not?
7 **A Well, these projections were done**
8 **a while ago. They were directional and they**
9 **include a broad base of revenues,**
10 **significantly greater than just revenues**
11 **associated with the radio service.**
12 Q So when you say a broad base
13 revenue associated with radio service, will
14 you elaborate upon that a little bit more?
15 **A Well, we sell in-stream audio**
16 **advertising, but we also sell advertising**
17 **across the entire music service. We sell**
18 **video advertisements, banners and without**
19 **having the projection in front of me, this --**
20 **our revenue overall as a music business unit**
21 **also consists of our subscription a la carte**
22 **revenue and basically any revenue that we**

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1 **generate inside of the music business.**
2 Q And in terms of the revenue
3 opportunity, as you project forward for the
4 radio product operating under the statutory
5 license, is there any relationship between
6 what those revenues are likely to be as
7 against what the royalty rate will be as
8 established by this Board?
9 **A Well, as forecast our revenue out**
10 **in time, we do have to make some assumptions**
11 **about the royalty rate declining and if they**
12 **are to stay at the same rates, then our growth**
13 **would likely to be slower, would be hitting**
14 **anywhere near those kinds of revenue numbers,**
15 **if we were in the business at all.**
16 Q And if the royalty rates were
17 raised, especially to the three times level
18 that Professor Brynjolfsson's model yielded,
19 would that have an effect on the revenues that
20 you would likely yield over the course of this
21 time period?
22 **A Well, I'm pretty confident saying**

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1 **if those were the rates, we would not be in**
2 **the business, so there would not be that**
3 **revenue.**
4 Q Take a look at subparagraph C, if
5 you will, of paragraph 16. You address here
6 the calculation that Professor Brynjolfsson
7 made in reference to a revenue per hour for
8 Yahoo. What is your reaction to the analysis
9 and calculation that Professor Brynjolfsson
10 made there?
11 **A Give me a moment to remind myself**
12 **what it is.**
13 **(Pause.)**
14 **So I mean I have issues with his**
15 **calculations.**
16 Q Can you elaborate a little bit
17 more as to what those issues are?
18 **A Well, I think he's just doing some**
19 **magical math. We're not averaging 12 ad**
20 **impressions per hour. There's some figures in**
21 **here, 26 percent of the banner revenue**
22 **estimated for the year. I'm not sure where**

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1 **these numbers are coming from.**
2 MR. STEINTHAL: Your Honor, I have
3 no further questions.
4 CHIEF JUDGE SLEDGE: We will
5 recess 10 minutes.
6 (Off the record.)
7 CHIEF JUDGE SLEDGE: Thank you,
8 we'll come to order.
9 Any questions by Radio
10 Broadcasters?
11 CROSS EXAMINATION
12 BY MS. RYAN:
13 Q Good morning, Mr. Roback. My name
14 is Meg Ryan. I represent the Radio
15 Broadcasters. I have just a few questions to
16 ask you to clarify some points of your
17 testimony that I wasn't exactly clear on.
18 **A Okay.**
19 Q When you were talking about an
20 effective per performance rate that was above
21 the statutory rate, were -- pursuant to an
22 agreement that you had with Universal Music

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1 Group, does that rate apply to your customized
2 stations only?
3 **A Yes.**
4 Q And if you would look at Exhibit 2
5 to your direct testimony, go to page 10,
6 paragraph B. Paragraph B describes your
7 Launchcast Radio, do you see that?
8 **A Yes.**
9 Q And it describes it as a streaming
10 Internet radio service that includes
11 preprogrammed editorial stations, fan stations
12 and customized stations?
13 **A Yes.**
14 Q Is that the type of stations that
15 you have on Launchcast?
16 **A Yes.**
17 Q And when it describes the ability,
18 the customized stations as allowing listeners
19 to influence music on their stations, based
20 upon their ratings of artists, albums and
21 songs, do you see that?
22 **A Yes.**

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1 Q Are those features available on
2 your preprogrammed editorial stations?
3 **A On the preprogrammed editorial**
4 **stations you have the ability to rate the**
5 **songs that you're hearing, but it doesn't**
6 **influence the station that you're listening**
7 **to.**
8 Q On the preprogrammed editorial
9 stations, are you able to pause, resume play
10 or skip to the next song?
11 **A Yes.**
12 Q So you're able to do that on the
13 preprogrammed editorial stations also?
14 **A Yes. There's a limitation on the**
15 **skips, but yes. You can skip to the next**
16 **song.**
17 Q Are you able to create moods or
18 different profiles under the same user name
19 reflecting the current personality or mood of
20 the user for the preprogrammed editorial
21 stations?
22 **A No.**

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1 Q In terms of songs per hour, is
2 there any difference between the programming
3 composition for preprogrammed editorial
4 stations, fan stations and customized
5 stations?
6 **A There could be.**
7 Q What do you mean by that?
8 **A Well, it depends upon what a user**
9 **does in a particular session. So if somebody**
10 **chooses to listen all the way through all of**
11 **the songs in a particular hour on the**
12 **nonsubscription service, that may be different**
13 **than if somebody chooses to skip and were**
14 **counting the songs that are skipped, you're**
15 **going to have more songs per hour. So it just**
16 **depends on a user by user basis.**
17 Q Okay, well, if a user didn't skip
18 any songs, can you tell me how many songs per
19 hour there would be in a preprogrammed
20 editorial station on average?
21 **A Well, we sell -- probably songs**
22 **per hour, let me do some rough math here.**

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1 **Twelve maybe, 12 songs.**
2 Q What about on a fan station?
3 **A They'd all probably be about the**
4 **same, subject to what the user does.**
5 Q You said that there was
6 approximately five million unique listeners a
7 month on Launchcast?
8 **A Launchcast nonsubscription.**
9 Q Launchcast nonsubscription. Have
10 you broken those unique listeners down between
11 the three different types of Launchcast
12 services that you have?
13 **A When you say Launchcast services,**
14 **do you mean the nonsubscription and the**
15 **subscription a la carte and the bundled?**
16 Q No, I'm talking about the
17 preprogrammed editorial stations, the fan
18 stations and the customized stations. Do you
19 know how many of the unique listeners are
20 attributable to each of those different types
21 of stations?
22 **A No, that's five million unique**

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1 **listeners to the service, but I don't know who**
2 **is listening to which or both.**
3 Q On page six of your testimony, the
4 second to last sentence in paragraph six, I'm
5 sorry, in paragraph five, you talk about
6 garden variety preprogrammed webcasting.
7 **A Garden variety preprogrammed**
8 **webcasting, yes, I see that.**
9 Q What is garden variety
10 preprogrammed webcasting?
11 **A Garden variety preprogrammed**
12 **webcasting would be similar to a terrestrial**
13 **radio experience, so just a straight**
14 **programmed stream.**
15 Q Without the ability to pause the
16 music?
17 **A Well, certainly without the**
18 **ability to influence along the lines of**
19 **MyStation.**
20 Q Just one second, sir.
21 (Pause.)
22 MS. RYAN: I have no further

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1 questions, thank you.
2 CHIEF JUDGE SLEDGE: Mr. Roback,
3 just so I'm not confusing any terms, is there
4 any distinction between preprogrammed stations
5 and preprogrammed editorial stations?
6 THE WITNESS: No, there's no
7 distinction.
8 CHIEF JUDGE SLEDGE: Who is NPR
9 today, Mr. Taylor?
10 MR. TAYLOR: No questions at this
11 time, Your Honor.
12 CHIEF JUDGE SLEDGE: Thank you,
13 sir.
14 Mr. Perrelli?
15 MR. PERRELLI: Thank you, Your
16 Honor.
17 MR. STEINTHAL: I was thinking we
18 would pass out hats so we could -- you know,
19 put an NPR hat on --
20 CHIEF JUDGE SLEDGE: You'd have to
21 pay the membership fee to get a hat.
22 (Laughter.)

1 CROSS EXAMINATION
2 BY MR. PERRELLI:
3 Q Good morning, Mr. Roback. My name
4 is Tom Perrelli representing Sound Exchange.
5 **A Good morning.**
6 Q I want to start back on page four
7 where you talk about the UMB agreement and
8 start with subscription which I think is
9 paragraph 3D and that's a service where a
10 consumer pays $3 a month or slightly more and
11 it includes both preprogrammed stations and
12 the ability to customize on MyStation,
13 correct?
14 **A Correct.**
15 Q For that service, the rates are
16 reflected in paragraph 3B, correct?
17 **A With respect to the customized**
18 **stations, yes.**
19 Q With respect to the customized
20 stations only?
21 **A Correct.**
22 Q And the preprogrammed stations,

1 you pay to Sound Exchange separate and apart
2 from this?
3 **A That's correct.**
4 Q With respect to the per subscriber
5 minimum here, that is not a pro-rata
6 subscriber minimum, correct?
7 **A I'm sorry, right. Universal gets**
8 **the first subscriber minimum, not pro rated,**
9 **based on their number of plays.**
10 Q So no matter how much you play
11 Universal music's sound recordings on the
12 customized stations and the subscription
13 service, they get that amount of money?
14 **A Correct.**
15 Q And can you tell me how much you
16 play Universal's sound recordings in your
17 customized stations as a percentage of all
18 plays?
19 **A I don't know the specific number.**
20 Q Let me hand out what we've marked
21 as Sound Exchange Trial Exhibit 151.
22 (Whereupon, the above-

1 referred to document was
2 marked as Sound Exhibit
3 Trial Exhibit 151 for
4 identification.)
5 For the record, this is a
6 document, CRB-R-YAH-HC0024, marked as Sound
7 Exchange Trial Exhibit 151.
8 Can you tell me what this document
9 is, Mr. Roback?
10 **A This appears to be our royalty**
11 **statement to Universal Music Group for the**
12 **webcasting.**
13 Q I am going to ask a set of
14 questions about particular information,
15 numerical information in this document which
16 I believe would be viewed as restrictive both
17 by Universal Music Group as well as Yahoo and
18 would move to under the protective order for
19 those questions and answers.
20 CHIEF JUDGE SLEDGE: Any objection
21 to applying the protective order to the
22 questions related to Exhibit 151?

1 MR. STEINTHAL: No, Your Honor.
2 CHIEF JUDGE SLEDGE: Without
3 objection, the motion is granted.
4 (Whereupon, at 11:23 a.m. the
5 hearing went into closed session.)
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1 CHIEF JUDGE SLEDGE: Any objection
2 to Exhibit 151?
3 MR. STEINTHAL: No, Your Honor.
4 CHIEF JUDGE SLEDGE: Exhibit 151
5 is admitted and the offer was that it was
6 subject to the protective order and it is
7 admitted subject to the protective order.
8 (The document, having
9 been marked previously
10 for identification as
11 Sound Exchange Exhibit
12 151, was received in
13 evidence.)
14 BY MR. PERRELLI:
15 Q I want to turn now to the
16 discussion of bundled services, the bundled
17 service in the Universal Music Group
18 agreement.
19 First of all, it's correct, is it
20 not, that the flat-fee agreement that you have
21 with the Universal Music Group is not the same
22 the kind of agreement you had for bundled

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1 services with Sony-BMG or Sony?
2 A **That's correct.**
3 Q And without going into specific
4 numbers, can you describe the structure of how
5 bundled services are dealt with in the Sony
6 agreement?
7 A **In the Sony agreement, bundled**
8 **services are paid on a usage basis, meaning we**
9 **pay for every actual stream delivered in the**
10 **bundled service we pay a per stream fee.**
11 Q And for preprogrammed channels
12 under the Sony agreement, do you pay at the
13 statutory rate or at higher rates?
14 A **The preprogrammed stations, under**
15 **the Sony deal, we pay at the statutory rate,**
16 **we pay directly to Sony rather than to Sound**
17 **Exchange.**
18 Q And for customized stations, do
19 you pay at the same rate as you pay for
20 customized stations in nonsubscription or do
21 you pay a different rate for bundled services?
22 A **I don't actually remember.**

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1 Q I'll swing back to that in a
2 little while when it makes more sense.
3 Coming back to the Universal
4 agreement, you calculate in footnote 3 an
5 effective performance rate, correct?
6 JUDGE ROBERTS: What page?
7 MR. PERRELLI: Footnote 3 on page
8 4.
9 JUDGE ROBERTS: Thank you.
10 THE WITNESS: Yes, I see that.
11 BY MR. PERRELLI:
12 Q Have you estimated what the
13 percentage of revenue is for the payments that
14 you make to Universal, the flat fee payments
15 that you make for Universal with respect to
16 the bundled amounts?
17 A **I want to make sure I understand**
18 **your question. In any particular month, are**
19 **we calculating the percentage of revenue that**
20 **Universal alone is as a percentage of revenue?**
21 **Is that the question?**
22 Q Or Universal with respect to a

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1 pro-rata share of plays?
2 A **No, I don't believe we're doing**
3 **that calculation.**
4 Q So you don't know what it is?
5 A **I don't know if Universal is on a**
6 **stand-alone basis.**
7 Q But it's correct, is it not, that
8 in paragraph 3A, if you took that amount and
9 multiplied it by 12, you would get what
10 Universal receives on an annual basis for
11 customized stations in the preprogrammed and
12 bundled offering, correct?
13 A **In the nonsubscription bundled**
14 **offering.**
15 Q Nonsubscription, correct?
16 A **Yes.**
17 JUDGE ROBERTS: I'm sorry, in the
18 nonsubscription bundle --
19 Q And bundled offering. Can you us
20 as a percentage of your overall sound
21 recording royalties, what the amount you paid
22 Universal for this slice of bundled and

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1 nonsubscription stations is versus your total
2 sound recording royalty payments for the year?
3 A **The total sound recording payments**
4 **for webcasting or in total?**
5 Q Correct.
6 A **No, I couldn't tell you what that**
7 **is. I just don't know.**
8 Q So you don't know what your total
9 sound recording royalties for 2005 were?
10 A **Not off the top of my head, no.**
11 Q And I take it it's correct that
12 the amount that you paid to Universal for the
13 right to sound recordings for your customized
14 stations is significantly more than the amount
15 you pay the music publishers for the right to
16 use music for your customized stations?
17 A **Yes.**
18 Q And do you have a sense of the
19 order of magnitude of the difference?
20 A **Well, it's hard for me to isolate**
21 **just universal. I mean I spoke later in my**
22 **statement about in the aggregate, the order of**

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1 **magnitude, but I'm not sure with respect to**
2 **just Universal.**
3 Q And is it with respect to all of
4 Yahoo Music's offerings so the preprogrammed
5 radio, custom radio, music video, downloads
6 and on demand services, Yahoo pays
7 significantly more to sound recording
8 companies than it does to music publishers?
9 A **In general, yes.**
10 Q Are there any exceptions that you
11 can think of?
12 A **Not off the top of my head, no.**
13 Q On page five, paragraph 3C, sorry,
14 paragraph 4, I apologize, you talk about that
15 the Universal agreement doesn't have a
16 portability limitation, paragraph 4 on page 5?
17 A **Yes.**
18 Q It's correct, is it not, that
19 under that agreement you would not be
20 permitted to sell the Launchcast service over
21 a proprietary wireless network like Verizon or
22 Cingular, correct?

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1 A **Over a proprietary -- correct.**
2 Q You would have to go back to
3 Universal and enter into another negotiation,
4 is that right?
5 A **Yes.**
6 Q And is it also correct, I believe
7 you testified before that there were no
8 promotional aspects of the agreement with
9 Universal, is that right?
10 A **Right.**
11 Q Is it correct, is it not, that
12 under the Universal agreement you have to
13 provide Universal with a buy button for their
14 sound recordings when they're paid, isn't that
15 right?
16 A **Yes, I believe so.**
17 Q It's also true that you also link
18 to artists' websites when they permit you to?
19 A **We do have links in Launchcast to**
20 **artists' websites.**
21 Q And that's under the agreement,
22 you have to do that under the agreement,

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1 correct?
2 A **I don't know, specifically.**
3 Q Now you talk on pages -- paragraph
4 five about and paragraph six about the period
5 when you did not offer Universal music on your
6 customized stations. It's correct, is it not,
7 that you still offer Universal music on all of
8 your hundreds of preprogrammed stations?
9 A **On all of our preprogrammed**
10 **stations, I don't know that they number in the**
11 **hundreds, but on our preprogrammed stations,**
12 **Universal remained.**
13 Q So that music -- if a user wanted
14 to listen to the most popular recent song by
15 a Universal artist, they would be able to hear
16 it on your Top 40 station when it played?
17 A **If it was in the Top 40, they**
18 **would be able to hear it.**
19 Q And during that entire period, you
20 were paying a statutory rate to Sound
21 Exchange?
22 A **That's right.**

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1 Q Now in paragraph five, you talk
2 about Launch building a business and investing
3 millions on a customized product. I take it
4 you believe that the customized product is an
5 important competitive advantage for Yahoo?
6 **A Yes.**
7 Q And you are competing, I think you
8 said, with terrestrial radio, among other
9 things?
10 **A Absolutely.**
11 Q You're also competing with AOL?
12 **A AOL Radio, yes.**
13 Q And also competing with Live365?
14 **A All Internet radio providers.**
15 Q And competing with Clear Channel
16 when they're simulcasting as well as when
17 they're terrestrial radio stations?
18 **A Yes.**
19 Q None of those other companies have
20 custom radio, correct?
21 **A The ones that you've named I don't**
22 **believe have custom radio.**

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1 Q Can you tell me what other
2 companies do have custom radio?
3 **A Well, there are a number that have**
4 **gone out of business as a result of the**
5 **litigation and the infringement threats from**
6 **the labels. But companies like Pandora today**
7 **offer customized radio. There's a company**
8 **called Mercora that does a degree of**
9 **customized radio.**
10 **Those are a couple of examples.**
11 Q And you're competing with them and
12 you're also competing with AOL Radio and
13 Live365 and the rest?
14 **A Right. I mean within, I guess**
15 **it's important to say, our nonsubscription**
16 **products compete with the free versions of**
17 **other people's services and then subscription,**
18 **a la carte would compete in its own arena.**
19 Q Again, turning back to paragraph
20 five you talk about Launch building a business
21 and investing in this business. I take it
22 that the cost that you have expended in the

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1 past influence your evaluation of what rates
2 you should pay under the licenses that you
3 negotiate outside the context of the
4 compulsory license?
5 **A I'm not sure I understand your**
6 **question.**
7 Q Well, you talk here about the
8 amount of money that Launch has invested over
9 time and to the extent you say -- let me start
10 over again.
11 You talk about the amount that
12 Launch has invested over time. Is that a
13 relevant consideration in deciding how much
14 you should pay for royalty for sound
15 recordings?
16 **A Well, it's relevant insofar as**
17 **we're investing in building a business that we**
18 **believe is pursuing a large market**
19 **opportunity, but has to have the appropriate**
20 **operating model going forward, meaning the**
21 **cost of goods has to be one that provides us**
22 **the kind of margins that we need. So we are**

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1 **then evaluating our -- the financial picture**
2 **of our business on a going-forward basis to**
3 **see if we can reach those targets, so we have**
4 **to hope or assume that we can reach those**
5 **levels which is why we're in this proceeding**
6 **to be able to continue forward.**
7 Q And is that evaluation based on
8 your past cost or your projected future costs?
9 **A Largely based on future**
10 **projections.**
11 Q Turning to paragraph eight where
12 you talk about -- this is page seven where you
13 talk about agreements with independent labels.
14 It's correct that all the agreements that you
15 provided are agreements for multiple types of
16 services, not just webcasts?
17 **A That's right.**
18 Q And I think you also testified
19 that the majority of your agreements with
20 independent labels are not on a pre-unique
21 user basis?
22 **A Yes.**

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1 Q And at some point in the past,
2 Yahoo made a shift from offering licenses to
3 independent labels on a statutory rate and
4 then offering them on a pre-unique user basis.
5 Isn't that right?
6 **A Yes.**
7 Q And that was a conscious decision
8 on Yahoo's part?
9 **A Yes.**
10 Q Can you explain that decision?
11 **A The decision was that we've always**
12 **believed that paying royalties for webcasting**
13 **on a per stream basis was not the best**
14 **structural model. We wanted to create a**
15 **system that aligned the incentives of the**
16 **parties, namely ourselves and of the sound**
17 **recording owner, that would encourage us to**
18 **grow our audience and to perform more of the**
19 **music and promote more of the music. So we**
20 **came up with this per-unique listener**
21 **structure that would provide a growing royalty**
22 **stream to the sound recording owners as our**

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1 **audience grew, but would not be punitive as**
2 **people listen more as we promoted more.**
3 **So we have been advocating that**
4 **model in the marketplace. The independent**
5 **labels who are always interested in more**
6 **promotion and gaining an advantage over the**
7 **four companies in particular that really**
8 **control most of the market were particularly**
9 **interested in considering that as an option**
10 **for how they were compensated for webcasts.**
11 Q I'm going to hand out what we'll
12 mark as Sound Exchange Trial Exhibit 152.
13 (Whereupon, the above-
14 referred to document was
15 marked as Sound Exchange
16 Trial Exhibit 152 for
17 identification.)
18 (Pause.)
19 Q Mr. Roback, can you identify what
20 this document is?
21 **A This looks like our form of indie**
22 **license for services license as we call it,**

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1 **with a particular label called Greentrax**
2 **Recordings.**
3 Q And this is an agreement actually
4 that you signed, isn't that right?
5 **A Yes.**
6 Q And do you sign all of these
7 licenses?
8 **A For the most part, yes.**
9 Q And I take it this is the form of
10 the agreement that Yahoo was offering to
11 independent labels in 2005, is that right?
12 **A Well, this license was executed in**
13 **October of 2005, so this particular agreement,**
14 **yes --**
15 Q And this -- I apologize for
16 interrupting you.
17 **A No, I was saying, yes, this**
18 **agreement was done in 2005.**
19 Q And under this agreement, it's
20 correct, is it not that you pay essentially
21 the statutory rate for webcasting? I believe
22 it's on page four, if that would assist you.

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1 **A Yes, that's what this agreement**
2 **says.**
3 Q Now under this agreement you also
4 -- this agreement also covers digital
5 downloads, isn't that right?
6 **A That's right.**
7 Q And the place that you offer to
8 independent labels for digital downloads is on
9 page 11, is that correct?
10 **A Yes, that's correct.**
11 Q And I think I will need to get
12 this number in the record.
13 MR. STEINTHAL: Did we ever go off
14 restricted?
15 CHIEF JUDGE SLEDGE: The motion
16 was only to apply to the testimony relating to
17 Exhibit 151.
18 BY MR. PERRELLI:
19 Q Can you tell the Board the rate
20 for digital downloads related to independent
21 labels under this form?
22 MR. STEINTHAL: I think the

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1 question is do you view that as being
2 confidential?
3 MR. PERRELLI: I am asking what
4 the number is.
5 MR. STEINTHAL: Your Honor, the
6 document was produced on a restricted basis.
7 It contains pricing provisions between this
8 particular independent label, Greentrax
9 Recording, Limited and Yahoo. That is deemed
10 by the parties apparently to be confidential
11 and not public, so I would just move that
12 insofar as the request is to have the answer
13 as to what the download rate is in this
14 agreement on the record that that answer be
15 taken on a restrictive basis, unless counsel
16 will agree yes, it is what it is in the
17 document.
18 MR. PERRELLI: I mean if you want
19 me to move it into evidence and then you'll
20 move to put it under protective order?
21 MR. STEINTHAL: Right.
22 CHIEF JUDGE SLEDGE: I still

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1 haven't found page 11.
2 MR. PERRELLI: I apologize, Your
3 Honor.
4 Your Honor, if it would circumvent
5 any concerns here, I'm happy to move this into
6 evidence which will trigger a motion to put it
7 under the protective order.
8 MR. STEINTHAL: I am happy to not
9 object to the document coming into evidence,
10 as long as it comes in as a restricted
11 document as it was produced.
12 CHIEF JUDGE SLEDGE: Is this
13 agreement still in effect?
14 MR. PERRELLI: To the best of my
15 knowledge, Your Honor.
16 THE WITNESS: Is it a three-year
17 term from October 2005.
18 CHIEF JUDGE SLEDGE: That would be
19 one factor of whether it's still in effect.
20 THE WITNESS: Fair enough. I
21 believe that it's still in effect.
22 CHIEF JUDGE SLEDGE: Without

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1 objection, the exhibit is admitted. The
2 motion to apply the protective order is
3 granted.
4 (The document, having
5 been marked previously
6 for identification as
7 Sound Exchange Exhibit
8 152, was received in
9 evidence.)
10 BY MR. PERRELLI:
11 Q Now Mr. Roback, the agreements
12 that you provided to the Board, Exhibits 225
13 of your testimony, are a newer form of Yahoo's
14 music license to independent labels, correct?
15 A **That's correct.**
16 Q And in discussing this new version
17 of your license agreement with independent
18 labels, you told them that under it, Yahoo
19 would be incentivized to play their music for
20 them?
21 A **Told who?**
22 Q Independent labels.

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1 A **Yes.**
2 Q Now is it also correct that Yahoo
3 told independent labels that if they didn't
4 sign the agreement, their music might actually
5 be taken down from Yahoo's music services?
6 A **I don't know that we said that,**
7 **no.**
8 Q That one we'll mark as Sound
9 Exchange Trial Exhibit 153.
10 (Whereupon, the above-
11 referred to document was
12 marked as Sound Exchange
13 Trial Exhibit 153 for
14 identification.)
15 CHIEF JUDGE SLEDGE: Mr. Perrelli,
16 I hear your question being the same thing as
17 saying we're offering a voluntary agreement
18 and if we don't reach a voluntary agreement,
19 we're not going to play your music. Isn't
20 that what naturally follows if you don't enter
21 into a voluntary agreement?
22 MR. PERRELLI: Well, if the label

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1 already has a voluntary agreement in place, in
2 that circumstance, there would be an agreement
3 to play the music already in place. Yahoo
4 would already have the right to play the
5 music. It would just be a question of
6 changing the terms.
7 CHIEF JUDGE SLEDGE: If you change
8 the terms, you're violating the agreement,
9 unless the other side agrees to it, don't you?
10 MR. PERRELLI: That's what I'm
11 about to hand out, Your Honor. This is Sound
12 Exchange 153.
13 CHIEF JUDGE SLEDGE: That's not
14 the impression I'm getting from your question.
15 MR. PERRELLI: If you'd like me to
16 clarify --
17 BY MR. PERRELLI:
18 Q So Mr. Roback, this is Sound
19 Exchange Trial Exhibit 153. Before we get to
20 the document, with respect to this new form of
21 license agreement that Yahoo is offering to
22 independent labels. You offered that license

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1 agreement not just to new independent labels
2 that you never worked with before, but also
3 independent labels with whom you had an
4 existing agreement in place. Is that correct?
5 **A I don't know, unless -- if you**
6 **mean when existing agreements expired and came**
7 **up for renewal, I'm sure that we did. I'm not**
8 **aware whether or not we went to people with**
9 **whom we had a -- already had a binding**
10 **contract and asked them to change it. We may**
11 **have. I just don't know.**
12 Q I'd like you to take a look at
13 Sound Exchange Trial Exhibit 153 which is a
14 document produced by Yahoo. It appears as an
15 email from Diane Hunter with attachments
16 included.
17 Who is Diane Hunter?
18 **A Diane Hunter is a contract**
19 **attorney who works with the Yahoo Music Team**
20 **doing licensing.**
21 Q And she negotiates agreement, I
22 take it that you eventually sign?

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1 **A Yes.**
2 Q And I take it she was charged with
3 negotiating independent label agreements?
4 **A She spends a significant portion**
5 **of her time on independent agreements, yes.**
6 Q If you'll turn to CRB-R-Yahoo6599,
7 which is about four pages from the back of
8 this email. It's a list of Frequently Asked
9 Questions.
10 **A Yes.**
11 Q And answers. Have you seen this
12 document before?
13 **A I saw it in my deposition for the**
14 **first time last week.**
15 Q Are you aware that Yahoo sent out
16 a document like this to independent labels?
17 **A I am now.**
18 Q And if you'll turn to what is
19 Bates labeled 6601, there is a question midway
20 down the page which says "what will happen if
21 I don't sign the agreement? Can we continue
22 to operate under the terms of our previous

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1 license agreement with Yahoo?"
2 And there's an answer: "Yahoo
3 expects to keep your content posted on our
4 music services through August 15, 2006, date
5 mentioned above. After that, as we roll out
6 new user functionality and/or based on our
7 business requirements, we reserve the right to
8 remove your content from any or all of our
9 music services."
10 Are you aware of whether that was
11 communicated to independent labels in the
12 context of this new form of license you're
13 offering?
14 **A Well, I'm aware of what it says**
15 **here. I'm also aware of the fact that we**
16 **always have the right to keep the music in or**
17 **to not have it up and promote it. So there's**
18 **nothing that requires us to play anybody's**
19 **music.**
20 Q And in the context of trying to
21 get independent labels to enter into this new
22 agreement, are you aware that Yahoo indicated

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1 to them their content might come down from all
2 of Yahoo's music services?
3 A **Like I said, I see what it says**
4 **here. I don't know what, which of the four**
5 **services under the license this refers to or**
6 **what, even what the new functionality is**
7 **that's being described here.**
8 Q Let me say it again, are you aware
9 that this idea was communicated to independent
10 labels when you offered them the license?
11 A **I'm aware that this Frequently**
12 **Asked Questions document was distributed with**
13 **what it says here.**
14 Q So you're aware that this document
15 went to independent labels?
16 A **Yes, at least to one.**
17 MR. PERRELLI: Your Honor, I'd
18 move the admission of Sound Exchange Trial
19 Exhibit 153.
20 CHIEF JUDGE SLEDGE: Perhaps I'll
21 see some connection at some point.
22 Any objection to Exhibit 153?

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1 MR. STEINTHAL: No, Your Honor.
2 CHIEF JUDGE SLEDGE: It's
3 admitted.
4 (The document, having
5 been marked previously
6 for identification as
7 Sound Exchange 153, was
8 received in evidence.)
9 BY MR. PERRELLI:
10 Q Now in seeking to get independent
11 labels to sign up for this new agreement, it's
12 correct that Yahoo offered independent labels
13 an additional five cents per download in order
14 to enter into that agreement?
15 A **In some cases, yes.**
16 Q And are you familiar that that was
17 actually explicit that Yahoo said we will give
18 you an additional five cents if you will agree
19 to our new radio royalty?
20 A **Yes, I'm aware of a few examples**
21 **where that happened.**
22 Q And it's correct that that

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1 happened with IODA, for example, which is
2 Exhibit 2 of this testimony, is that correct?
3 A **Yes, that was probably the case**
4 **with IODA.**
5 Q We'll mark what is Sound Exchange
6 Trial Exhibit 154.
7 (Whereupon, the above-
8 referred to document was
9 marked as Sound Exchange
10 Trial Exhibit 154 for
11 identification.)
12 Mr. Roback, Sound Exchange Trial
13 Exhibit 154 is an email from Diane Hunter and
14 to what appears to be Tim Mitchell. Do you
15 know who Mr. Mitchell is?
16 A **No.**
17 Q If you'll look down at paragraph
18 three of this email, there is a sentence that
19 begins "for subscription radio we are
20 continuing to pay then current CARP rates as
21 before, but for free and bundled radio we are
22 now paying labels their proportionate share of

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1 one penny per user per month. In exchange for
2 accepting the new structure, we have agreed to
3 bump up the permanent download wholesale price
4 by five cents to 70 cents."
5 Is that consistent with your
6 understanding of the negotiations between IODA
7 and Yahoo?
8 A **Yes.**
9 Q And have you seen this document
10 before?
11 A **I don't recall whether I was shown**
12 **this last week in my deposition or not. I was**
13 **shown a few emails. I just don't remember**
14 **which ones.**
15 Q Now am I correct that today the
16 market for digital downloads is much larger
17 than the market for webcasting?
18 A **Well, I'm not sure how you'd**
19 **define the market.**
20 Q In terms of revenues, the amount
21 of money spent?
22 A **In terms of revenues, yes, that's**

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1 **probably true.**
2 Q Now it's correct that Yahoo was
3 willing to trade additional money on downloads
4 for a lower rate on webcasting because it
5 believes webcasting is a big market
6 opportunity?
7 A **Webcasting is a more important**
8 **part of our business.**
9 Q And you believe that webcasting is
10 a bigger marketing opportunity for Yahoo as
11 well as for content providers than digital
12 downloading?
13 A **Well, certainly for Yahoo.**
14 Q But you also believe that's the
15 case for content providers?
16 A **That webcasting is a bigger market**
17 **opportunity, is that the question**
18 Q Yes.
19 A **I'm not sure I would entirely**
20 **agree with that. It's an apples and oranges**
21 **comparison.**
22 Q I want to mark which is a

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1 transcript of your deposition as Sound
2 Exchange Trial Exhibit 155.
3 (Whereupon, the above-
4 referred to document was
5 marked as Sound Exchange
6 Trial Exhibit 155 for
7 identification.)
8 Now Mr. Roback, you remember being
9 deposed last week by Mr. Smith, representing
10 Sound Exchange, is that right?
11 A **Yes.**
12 Q If you could turn to page 71 and
13 72 which -- sorry, pages 71 and 72 of the
14 transcript which is page 19 in this format.
15 It spills over on to page 73. But Mr. Smith
16 asked you the following question: "Can you
17 tell me why, I don't want to mischaracterize
18 you, but first of all, it sounds like what
19 you're saying is the penny per unique user was
20 more important to you at Yahoo than the
21 difference between 65 cents and 70 cents for
22 a download. Is that a fair summary of what

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1 you said?" "Yes."
2 Do you remember that question and
3 that answer?
4 A **Yes.**
5 Q And the next question, "Can you
6 tell me why that was the case?'
7 Answer: "Because we don't believe
8 that the download and sale business is a
9 particularly big and lucrative business to be
10 in. We believe there's much bigger
11 opportunity for the benefit of ourselves and
12 the content providers in the radio business,
13 a bigger market opportunity."
14 A **Yes.**
15 Q Those are the questions and
16 answers you gave?
17 A **I did say that.**
18 Q Now at the end of -- excuse me,
19 with respect to these agreements with
20 independent labels, most of them, is it
21 correct, are worldwide in scope?
22 A **Yes, I believe so.**

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1 Q So with respect to those
2 agreements where you agreed to pay the
3 statutory rate, which I believe you testified
4 was the majority of your agreements with
5 independent labels, you agreed to pay the U.S.
6 statutory rate worldwide?
7 A **Yes, I believe so.**
8 Q So no matter what the rates might
9 be set in any other country, you agreed to pay
10 that rate worldwide to the independent labels?
11 A **That's right.**
12 Q Now in paragraph 9 you talk about
13 -- this is the bottom of page 8, your early
14 experience suggests -- is it your written
15 rebuttal testimony, paragraph 9, bottom of
16 page 8.
17 There's a sentence that says,
18 "moreover, our early experience suggests that
19 the effective per performance rate under these
20 agreements, i.e., our monthly payments, our
21 monthly payment under the per unique
22 measurement averaged across the number of

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1 performances during the month will be
2 significantly less than the prior statutory
3 CARP rate of .000762 per performance." Do you
4 see that?
5 Q Yes. By "earlier experience" you
6 are not talking about any experience paying
7 under these licenses, correct?
8 **A Right.**
9 Q This is a calculation you made,
10 correct?
11 **A Correct.**
12 Q But Yahoo has never actually paid
13 any independent label under a per unique
14 basis, has it?
15 **A I don't know the status of any of**
16 **the royalty statements.**
17 Q So with respect to Exhibit 1, I
18 take it you don't know whether or not Yahoo
19 has ever paid any of these independent labels?
20 **A Like I said, I don't know what the**
21 **current status of the report of these.**
22 Q I'll mark something which I'll

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1 mark Sound Exchange Trial Exhibit 156.
2 (Whereupon, the above-
3 referred to document was
4 marked as Sound Exchange
5 Trial Exhibit 156 for
6 identification.)
7 Mr. Roback, this is a letter from
8 your counsel attaching a document which was
9 provided to Sound Exchange in this proceeding?
10 The first line of the second paragraph of the
11 letter says "as we explained in our opposition
12 to Sound Exchange's motion, Yahoo has not yet
13 reported performance data or made any payments
14 under the independent record company
15 agreements referenced in Mr. Roback's
16 testimony."
17 Now were you consulted before this
18 letter was written?
19 **A I'm not the person responsible for**
20 **doing the report and making the payments. So**
21 **no, I would not have been the person that they**
22 **spoke to.**

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1 Q And you don't know sitting here
2 whether or not that statement is true from
3 your counsel?
4 **A Well, I believe it to be true now**
5 **that I'm reading it here.**
6 Q I think that Mr. Larson is a
7 pretty honest guy.
8 MR. STEINTHAL: We would so
9 stipulate, Your Honor.
10 CHIEF JUDGE SLEDGE: Remember
11 that.
12 (Laughter.)
13 MR. PERRELLI: Maybe not when he
14 writes findings of fact.
15 BY MR. PERRELLI:
16 Q Let's move to your critiques of
17 Dr. Brynjolfsson.
18 Paragraph ten, you discuss Dr.
19 Brynjolfsson's statement that it is clear from
20 their financial documents that large
21 webcasters such as AOL and Yahoo do not
22 include in their webcasting income statements,

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1 large amounts of revenue that are derived from
2 their webcasting services, thereby making it
3 appear as if they are earning less than they
4 actually are.
5 It's correct that Yahoo doesn't
6 include in its Yahoo Music revenues, any
7 revenues that Yahoo receives from its bundled
8 service offerings, correct?
9 **A Correct.**
10 Q Is it also true that Yahoo doesn't
11 have a webcasting profit and loss statement of
12 any kind?
13 **A No, not on a stand-alone regular**
14 **reporting basis.**
15 Q So if you were to talk about Yahoo
16 having a loss on its webcasting business, that
17 wouldn't be based on any documents created in
18 the ordinary course of business?
19 **A No.**
20 Q Now, although you don't count the
21 revenues, I take it in paragraph 18, page 20
22 of your testimony you are including the costs

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1 when testifying before the Board about the
2 cost of webcasting, correct?
3 A **Where are you pointing me to?**
4 Q This is the royalty costs on page
5 20, paragraph 18 which is six lines down.
6 MR. STEINTHAL: Can I hear the
7 question back?
8 BY MR. PERRELLI:
9 Q My question was although Yahoo
10 doesn't attribute any revenue to its bundled
11 service offering to the Yahoo Music Group in
12 providing testimony about the costs of
13 webcasting, you do include the costs of
14 providing the bundled service?
15 A **Here, where we're comparing**
16 **publishing costs to sound recording costs,**
17 **yes, we do include those.**
18 Q Now you talk about in paragraph
19 11, top of page 10, about Yahoo's capital
20 investment in webcasting. And you refer to
21 your designated testimony from the 2001 CARP
22 proceeding. Do you see that?

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1 A **Yes.**
2 Q Is it correct that your testimony
3 in 2001 was about the company Launchmedia,
4 correct?
5 A **Yes.**
6 Q Yahoo didn't invest in Launchmedia
7 before it purchased it, did it?
8 A **No.**
9 Q So Yahoo's investment in Launch
10 was what it purchased Launch for, correct?
11 A **Correct.**
12 Q And what is that amount?
13 MR. STEINTHAL: Your Honor, I
14 would move to apply the protective order to
15 the answer to that question. I assume it's
16 not a public number.
17 CHIEF JUDGE SLEDGE: What the loss
18 amounts to?
19 MR. STEINTHAL: No, I think what
20 the question was what the amount was that
21 Launch was sold for to Yahoo. Is that the
22 question?

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1 MR. PERRELLI: I did get it from a
2 press release.
3 THE WITNESS: We are a public
4 company.
5 BY MR. PERRELLI:
6 Q My question is how much did Yahoo
7 pay and invest in Launch?
8 A **Approximately $12 million, I**
9 **believe, somewhere in that range? Too little.**
10 Q That was cash in stock or all
11 cash?
12 A **That was cash.**
13 Q Now at the bottom of page 11, you
14 talk about the -- the bottom paragraph 11, I
15 apologize. About the promise of this
16 proceeding, lowering the rate. It's correct,
17 is it not that prior to this proceeding, Yahoo
18 was willing to lock in the prior statutory
19 rate at least in one agreement of the major
20 labels?
21 A **Prior to this -- say it again?**
22 Q Prior to this proceeding

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1 commencing, Yahoo was willing to lock in the
2 old statutory rate in an agreement with a
3 major label, is that right?
4 A **We actually agreed to pay the**
5 **statutory rate, whatever the statutory rate**
6 **was.**
7 Q Let me mark this as Sound Exchange
8 Trial Exhibit 157.
9 (Whereupon, the above-
10 referred to document was
11 marked as Sound Exchange
12 Exhibit 157 for
13 identification.)
14 Let me hand out what we marked as
15 Sound Exchange Trial Exhibit 157.
16 (Pause.)
17 Mr. Roback, this is a document
18 produced by Yahoo, Bates label 27184 to 185.
19 It appears to be an email from Mr. James
20 Pitaro.
21 Can you tell me who James Pitaro
22 is?

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1 **A He's the head of business affairs**
2 **for Yahoo Music.**
3 Q I take it he negotiates license
4 agreements with major labels?
5 **A Yes.**
6 Q I take it in 2005 you were
7 negotiating an agreement with Warner Music
8 Group?
9 **A Yes.**
10 Q And that agreement ultimately did
11 not address statutory webcasting in its terms?
12 **A This says international radio**
13 **deal, so maybe you could repeat your question,**
14 **I'm not sure --**
15 Q I'm asking whether your agreement
16 with Warner Music Group addresses statutory
17 radio -- excuse me, preprogrammed radio under
18 the statutory license in the United States?
19 MR. STEINTHAL: I'm a little
20 confused, Your Honor. Is the question about
21 this document, about the agreement that was
22 ultimately done?

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1 MR. PERRELLI: Yes.
2 MR. STEINTHAL: Okay.
3 THE WITNESS: We have a webcasting
4 license with Warner for the U.S. that is for
5 customized only.
6 BY MR. PERRELLI:
7 Q It does not address preprogrammed
8 stations?
9 **A It does not address preprogrammed**
10 **stations.**
11 Q That's all I was trying to
12 establish. If you look at this email down at
13 the second -- it says "thanks for your time
14 today, we discussed" --
15 MR. STEINTHAL: Your Honor, if I
16 may, to read from the document, the document
17 is marked restricted. It's an internal
18 document within Yahoo about apparent back and
19 forth negotiations with Warner and I would ask
20 that if he's going to read from the document
21 that that part of the transcript be designated
22 as restricted.

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1 JUDGE ROBERTS: Mr. Perrelli, why
2 don't you just go to the line of the document
3 that you're interested in?
4 MR. PERRELLI: I am happy to.
5 That will get into numbers which I think will
6 erase Mr. Steinthal's concern.
7 JUDGE ROBERTS: It will certainly
8 avoid you from reading from the document.
9 CHIEF JUDGE SLEDGE: At this point
10 we have got to determine whether a message
11 back and forth prior to an agreement is even
12 relevant. Why would discussions prior to
13 entering an agreement have anything to do with
14 evidence as -- since there was a subsequent
15 agreement?
16 MR. PERRELLI: I want to discuss
17 with him the offer that Yahoo made. And with
18 respect to something for which the parties did
19 not reach an agreement.
20 CHIEF JUDGE SLEDGE: Did not reach
21 an agreement?
22 MR. PERRELLI: Correct, Your

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1 Honor.
2 MR. STEINTHAL: And Your Honor, I
3 would move to strike any testimony about that
4 subject precisely on the grounds that it would
5 be covered any settlement negotiation
6 privileges as well as it's not relevant to the
7 proceeding.
8 CHIEF JUDGE SLEDGE: The
9 settlement negotiation wouldn't have anything
10 to do with it.
11 MR. STEINTHAL: As between Warner
12 and Yahoo it would, not in reference to this
13 proceeding, but in reference to claims Warner
14 had in relation to Yahoo insofar as it used
15 its music on customized radio.
16 CHIEF JUDGE SLEDGE: Addressing a
17 much more basic question, why are negotiations
18 leading up to an agreement relevant after the
19 agreement is reached?
20 MR. PERRELLI: And Your Honor, the
21 focus on my questions is going to be something
22 that was not -- that they did not agree on.

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1 CHIEF JUDGE SLEDGE: If it's not
2 agreed on, it's still a negotiation that led
3 up to an agreement and therefore the
4 negotiations have no relevance after the
5 agreement is reached.
6 MR. PERRELLI: Well, I'm trying to
7 show the offer that Yahoo made for statutory
8 webcasting services. They ultimately agreed
9 on customized services, but not preprogrammed
10 services and I'm trying to show the offer --
11 CHIEF JUDGE SLEDGE: I'll sustain
12 that objection. That would not be admissible
13 after the agreement is entered.
14 MR. PERRELLI: Thank you, Your
15 Honor. Your Honor, what I'm going to hand out
16 is marked Sound Exchange Exhibit 158.
17 (Whereupon, the above-
18 referred to document was
19 marked as Sound Exchange
20 Trial Exhibit 158 for
21 identification.)
22 BY MR. PERRELLI:

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1 Q Mr. Roback, here's a document
2 marked Sound Exchange Trial Exhibit 158 which
3 was produced in discovery as CRB-R-Yahoo00030.
4 Can you take a look at this document and tell
5 me what it is?
6 **A It appears to be some presentation**
7 **advocating the acquisition of Musicmatch by**
8 **Yahoo.**
9 Q And when you say advocating the
10 acquisition -- is this a document that would
11 have been prepared in Yahoo Music?
12 **A Yes, it's a Yahoo document. It's**
13 **an internal Yahoo document regarding the**
14 **proposed acquisition of Musicmatch.**
15 Q And if you'll look at the first
16 page which lists a series of bullet points
17 about the strategic rationale, I take it you
18 would agree that these are part of the
19 strategic rationale for acquiring Musicmatch?
20 **A Well, the key rationale is bullet**
21 **four, Maestro is the code name for Musicmatch,**
22 **so it allows us to accelerate this transition**

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1 **and have an option to play music subscription.**
2 **So this actually supports the point I made**
3 **earlier about the fact that radio was not the**
4 **reason that we purchased Musicmatch.**
5 Q If you'll look at page --
6 **A With a project code name for**
7 **Musicmatch internally, all potential**
8 **acquisitions are assigned to a code name.**
9 JUDGE ROBERTS: How James Bond.
10 MR. STEINTHAL: In one case I have
11 the project case was Thunderball. So there
12 you go.
13 BY MR. PERRELLI:
14 Q Mr. Roback, if you turn to page 7
15 of this presentation, it's Bates labeled 36.
16 It's titled "Music related advertising and
17 will convert online."
18 It talks about the total media ad
19 market size for radio, $21 billion. This page
20 and its description is consistent with the
21 testimony you gave before about the size of
22 the business opportunity in the radio market

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1 for webcasters, is that right?
2 **A Yes.**
3 Q I'd also like you to turn to page
4 15 of the document which is, I believe Bates
5 labeled page 44.
6 This talks about the economics of
7 online digital music vary across tiers is the
8 title.
9 Now this document, this reflects
10 the relative share that Yahoo pays sound
11 recording copyright owners and music
12 publishers for downloads and radio and
13 subscription services?
14 **A Yes, roughly speaking, yes.**
15 Q And those numbers are roughly
16 correct, is that right?
17 **A Yes, they're pretty close.**
18 MR. PERRELLI: Your Honor, I move
19 the admission of Sound Exchange 158.
20 MR. STEINTHAL: No objection, Your
21 Honor, as a restricted document, Your Honor,
22 as it was produced, internal strategy document

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1 of the audit.
2 CHIEF JUDGE SLEDGE: The document
3 is admitted. Mr. Steinthal, your statement is
4 inconsistent with the testimony. It's not - -
5 the testimony does not show that it's a
6 strategic rationale of Yahoo. The testimony
7 is that this was a presentation advocating a
8 position. It never shows that this was ever
9 adopted by Yahoo or is anything other than a
10 presentation that was made.
11 MR. STEINTHAL: With Yahoo,
12 though, Your Honor. I think his testimony was
13 it was an internal document within Yahoo
14 advocating a certain position. So I don't
15 think it was meant for public dissemination.
16 I believe it includes strategic confidential
17 information of the company.
18 I'd be happy to have a witness
19 answer any questions that the Board may have
20 about confidentiality of it, but it was on
21 that basis that we produced it as a restricted
22 document.t

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1 CHIEF JUDGE SLEDGE: Again, your
2 characterization of it is different than the
3 testimony. And based on the testimony there's
4 no support for confidentiality.
5 MR. STEINTHAL: Your Honor, there
6 are numerous --
7 MR. PERRELLI: I might be able to
8 ask a question that may partially address the
9 Board's concern.
10 CHIEF JUDGE SLEDGE: All right.
11 BY MR. PERRELLI:
12 Q Mr. Roback, with respect to the
13 strategic rationale on the first page, Yahoo
14 eventually acquired Musicmatch, correct?
15 **A Correct.**
16 Q Does the strategic rationale on
17 the first page and the discussion subsequent
18 in this document reflect Yahoo's evaluation of
19 the reasons to purchase Musicmatch?
20 **A This was part of the process of**
21 **evaluating the purchase and both on a**
22 **qualitative and quantitative basis, the**

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1 **information in the document.**
2 Q Does it reflect not just someone's
3 advocacy of this, but actually Yahoo's
4 thinking about the acquisition?
5 **A Well, that's a difficult question**
6 **to answer. It reflects those people working**
7 **at Yahoo, the position put forward. I'm sure**
8 **discussion ensued and there may not have been**
9 **absolute agreement around every point. So**
10 **it's hard to say that this presentation was**
11 **given and wholesale, just somehow adopted.**
12 **I'm not sure if I'm answering your**
13 **question, but I'm trying to.**
14 MR. PERRELLI: Mr. Steinthal, I
15 will leave this back to you.
16 MR. STEINTHAL: Your Honor, there
17 are pages of this document that have explicit
18 internal financial information of Yahoo as
19 well. So for example, page 8 and page 9 are
20 pro forma operating metrics of Yahoo, pro
21 forma operating plan. Again, I would submit
22 that the document as a whole is a strategy

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1 document for internal discussion and not meant
2 for public dissemination. That's what the
3 testimony is. And it certainly contains
4 individual pages that have financial
5 information that have been of the nature that
6 has been designated and treated as restricted
7 throughout this proceeding.
8 So I would ask that the document
9 which I don't object to coming into evidence
10 as a document simply come in as covered by the
11 protective order.
12 CHIEF JUDGE SLEDGE: Let's be
13 clear, Mr. Steinthal, that the decision by the
14 parties on how they treat a document is very
15 different than the decision by the Board as to
16 whether a document can be restricted --
17 MR. STEINTHAL: Absolutely, that's
18 why I'm asking that it be treated as such.
19 It's a request by us to you to treat this
20 document as confidential for the reasons I've
21 articulated and at a minimum to treat those
22 pages that contain financial information, as

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1 restricted.
2 (Pause.)
3 JUDGE ROBERTS: What's the
4 financial information here, Mr. Steinthal?
5 MR. STEINTHAL: Page 8, 9, 12 and
6 13 from what I'm looking at. One of them is
7 more --
8 JUDGE ROBERTS: This is a document
9 from what year, Mr. Roback?
10 THE WITNESS: We did the
11 acquisition in late 2004, so 2004.
12 JUDGE ROBERTS: So page 8 is
13 projections.
14 MR. STEINTHAL: And projections
15 have been treated as when they're generated
16 internally, not for public dissemination.
17 There have been countless documents that have
18 been put into the record here under the
19 protective order.
20 JUDGE ROBERTS: I just want to
21 clarify that they're projections.
22 MR. STEINTHAL: Okay.

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1 JUDGE ROBERTS: What about page --
2 since you're saying that they're financial,
3 what about page nine? Is that actual
4 expenses?
5 MR. STEINTHAL: Again, it goes
6 into 2005-2006, so it has to be projections.
7 JUDGE ROBERTS: But there is 2004.
8 MR. STEINTHAL: 2004 presumably,
9 actual.
10 JUDGE ROBERTS: What other pages
11 did you say have financials?
12 MR. STEINTHAL: Twelve and 13.
13 Twelve is more of a head count and sort of
14 personnel analysis associated with the matter
15 that was being analyzed. And 13 is an
16 analysis that has various estimates
17 internally, including margins and the like.
18 It may be that page 13 is based on
19 public information and therefore my position
20 wouldn't be urged as to -- if we're going to
21 take this document and parcel it out as to
22 what should be restricted and what shouldn't

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1 be.
2 It looks to me like page 13 is
3 based on public sources, so I wouldn't press
4 on page 13.
5 (Pause.)
6 JUDGE ROBERTS: What is page 12?
7 MR. STEINTHAL: It looks like an
8 analysis of what might happen if the
9 acquisition went forward in terms of
10 integration of the companies.
11 JUDGE ROBERTS: What might happen
12 in what way? By head count, are we talking
13 about people here?
14 THE WITNESS: Launch was the
15 existing music business at Yahoo and how the
16 head count broke out at the time. Maestro is
17 the Musicmatch head count and then the change
18 to get to the total would be what the
19 operating plan a few pages earlier financially
20 assumes are the heads that are continuing to
21 work as part of the business.
22 MR. STEINTHAL: I am sensitive to

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1 the Board's desire to keep as much on the
2 public record as possible. At the same time
3 there have been a variety of documents taken
4 in that are internal strategy documents and
5 studies. And this is about an acquisition
6 that occurred two years ago, so it's fairly
7 fresh in the scheme of things and certainly
8 the projections themselves throughout this
9 case, when a company is undergoing any kind of
10 financial projection process and generating
11 documents, those documents have been urged as
12 being restricted and the Board has generally
13 accepted that those kinds of documents will be
14 restricted.
15 So at a minimum, the financial
16 documents, I would submit, would have to be
17 and the rest of the document, I would submit,
18 part of an internal analysis of whether to go
19 forward with a particular transaction or not.
20 I have no problem with questions being asked
21 about the document on the public record
22 insofar as they don't reveal the substance of

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1 the economic information that is restricted as
2 well.
3 I would simply urge that the
4 Board, at least as to the financial
5 information, and as well as the document as a
6 whole, simply to take it in as a restricted
7 document without having the need to go and
8 change anything on the public record
9 transcript.
10 (Pause.)
11 CHIEF JUDGE SLEDGE: This appears
12 to be another good example of a pressing need
13 for careful review of any protective orders.
14 Without objection, the motion is granted.
15 MR. PERRELLI: Your Honor, I am at
16 a natural breaking point, if it's appropriate
17 to take a lunch break.
18 MR. STEINTHAL: Your Honor, I
19 don't know how long Mr. Perrelli has.
20 MR. PERRELLI: I will not finish
21 up in five or ten minutes.
22 MR. STEINTHAL: I was just going

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1 to inquire since Mr. Roback is going back to
2 California, whether there was an opportunity
3 to finish before lunch, but if not, so be it.
4 CHIEF JUDGE SLEDGE: We will
5 recess until 2 o'clock.
6 (Whereupon, at 12:38 p.m., the
7 hearing was recessed, to reconvene at 2:00
8 p.m.)
9 CHIEF JUDGE SLEDGE: Thank you.
10 We'll come to order.
11 Mr. Perrelli?
12 MR. PERRELLI: Thank you, Your
13 Honor.
14 CROSS EXAMINATION (CONTINUED)
15 BY MR. PERRELLI:
16 Q Mr. Roback, I want to turn to
17 paragraph 13 of your statement, page 11. And
18 let's just see if we can crystallize the
19 disagreement between you and Dr. Brynjolfsson,
20 an allocation of banner ad revenues.
21 It's correct, is it not, that you
22 would agree that a page that has the radio

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1 guide, a list of radio stations that a person
2 can click on and listen and nothing else,
3 should be attributed as revenue for purposes
4 of the webcasting service, correct?
5 **A Correct.**
6 Q Now if you have the same list of
7 radio stations that you can click on on a page
8 and a list of music videos that you can click
9 on on a page, your view is none of that should
10 be attributed to the webcasting service
11 definition of revenue?
12 **A Correct. It would depend on how**
13 **much, what the relative weighting was of the**
14 **content, but if it was predominantly about**
15 **radio and there were a couple of things about**
16 **video, then I'd be inclined to think it were**
17 **included. But if it's the other way around,**
18 **then no.**
19 Q And if it's 50-50, the weighting
20 if 50 percent radio and 50 percent video?
21 **A Probably not.**
22 Q And you wouldn't attribute that

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1 banner revenue on that page to either video or
2 webcasting, is that right?
3 **A If it was just a guide for video?**
4 Q Yes.
5 **A Well, it depends on what our**
6 **license agreements require us to do for music**
7 **video. So there's not a standard. But no, I**
8 **would not attribute it to video unless the**
9 **contract specifically required us to.**
10 CHIEF JUDGE SLEDGE: Mr. Perrelli,
11 can you clarify, when you say "weighting" as
12 I recall from earlier testimony, you're
13 talking about per line on the page or per
14 square inch or some measure of the actual
15 space on the page that it covers?
16 THE WITNESS: Some measure of --
17 yes, of the relative prominence of the types
18 of content that are there.
19 CHIEF JUDGE SLEDGE: Prominence is
20 different than space.
21 THE WITNESS: Well, I mean I guess
22 to answer the question, we don't -- I don't

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1 really measure it either way because we either
2 have pages that are predominantly or
3 exclusively about radio or we have pages that
4 are just a mixture of things. And so we don't
5 have any gradation in between that we're
6 trying to fine tune and we don't have any
7 reason to.
8 CHIEF JUDGE SLEDGE: So these
9 questions do not relate to something that
10 actually exists?
11 THE WITNESS: Correct, it's
12 hypothetical.
13 CHIEF JUDGE SLEDGE: I see.
14 BY MR. PERRELLI:
15 Q With respect to -- you indicated
16 you have two kinds of pages, one which was
17 predominantly dedicated to a particular
18 service and one which is a mixture of
19 services, correct?
20 **A Yes.**
21 Q And with respect to those that are
22 predominantly dedicated to a service, it's

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1 your view that that should be within the
2 definition of revenue for purposes of
3 webcasting, if it's predominantly devoted to
4 webcasting?
5 **A Yes.**
6 Q And any time you have a mixture of
7 services, whatever the relative weighting of
8 the mixture, so long as no particular service
9 is predominant, your view is it shouldn't be
10 in the revenue bucket for webcasting?
11 **A Correct.**
12 Q And it wouldn't be in the revenue
13 bucket for any other service if that service
14 didn't predominate?
15 MR. STEINTHAL: Your Honor, I'm
16 going to object. It's a hypothetical question
17 the way it's been posed.
18 CHIEF JUDGE SLEDGE: Mr. Perrelli?
19 MR. PERRELLI: He has testified
20 about what should and shouldn't be within the
21 definition of revenue and I'm trying to
22 understand with respect to specific kinds of

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1 pages he talked about, his mixed pages,
2 whether they're in or out.
3 CHIEF JUDGE SLEDGE: He didn't
4 talk about mixed pages. You asked him
5 questions about mixed pages and I understand
6 him to say that there are no such things as
7 mixed pages.
8 MR. PERRELLI: Let me take a step
9 back.
10 BY MR. PERRELLI:
11 Q Mr. Roback, are there pages in the
12 Yahoo music service where you offer users the
13 opportunity to go to radio or to go to music
14 video or to another Yahoo service?
15 **A Yes.**
16 Q And that, for example, is the
17 Yahoo Music home page, correct?
18 **A Correct.**
19 Q So in the Yahoo Music home page,
20 you've got some radio content, some video
21 content and other content as well?
22 **A Yes.**

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1 Q And in that context, your view is
2 that none of the banner advertising revenue
3 from such a page should be attributed to
4 webcasting?
5 **A Correct.**
6 Q I take it it's also your view that
7 none of the banner advertising revenue from
8 that page should be attributed to music
9 videos?
10 MR. STEINTHAL: There is where I
11 stand because I think it's a hypothetical
12 question as to whether or not there's anything
13 that relates to a percentage of revenue other
14 than an existing contract and without
15 reference to a contract, I don't know how he
16 can answer that question, on the video side,
17 Your Honor.
18 CHIEF JUDGE SLEDGE: Overruled.
19 THE WITNESS: So my view, in
20 general, would be that it should not be
21 included with respect to music video, but we
22 pay for music video under voluntary licenses

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1 and we pay based on whatever that license
2 actually says.
3 BY MR. PERRELLI:
4 Q And just so we're clear, in the
5 definition of revenue that you've attached to
6 your statement, if that definition were
7 applied to music videos as opposed to
8 webcasting, the same definition that applied
9 to music videos, it would not capture revenue
10 from the Yahoo Music home page?
11 A **Correct.**
12 Q I want to move to paragraph 14 of
13 your statement that talks about bundled
14 services.
15 With respect to the money that
16 Yahoo gets from SBC or AT&T now, pursuant to
17 its bundled services, it's true, is it not,
18 that whether or not an AT&T subscriber to the
19 bundled service uses webcasting, Yahoo gets
20 paid, correct?
21 A **Correct.**
22 Q And that's true whether -- does

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1 Yahoo also get paid whether or not an
2 individual subscriber uses any Yahoo service?
3 A **I believe so.**
4 Q So the user is paying for access
5 to those services, whether or not they use
6 them?
7 A **The user is paying for**
8 **connectivity and they're getting access to**
9 **those things.**
10 Q And AT&T pays Yahoo for making
11 those services available whether or not
12 they're ever used?
13 A **Well, I don't have a detailed**
14 **understanding of the agreement, but Yahoo does**
15 **do custom work that is not necessarily the**
16 **equivalent to a Yahoo premium service. So**
17 **there are elements of value that Yahoo**
18 **provides beyond just packaging premium**
19 **services. So it's not --**
20 Q I guess my question is Yahoo gets
21 paid for every single subscriber who purchases
22 the bundle, whether or not that subscriber

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1 ever uses one of the Yahoo services they are
2 offered?
3 A **Yes.**
4 Q In your testimony and I will try
5 to do this to stay off the -- going into
6 restricted record, you provide a percentage of
7 the number of SBC Yahoo subscribers that
8 actually use Launchcast, is that correct?
9 A **Yes.**
10 Q Do you know the percentage of SBC
11 Yahoo subscribers who use any of the other
12 services that Yahoo offers to SBC?
13 A **No.**
14 Q So it could be 50 percent or 1
15 percent, but you just don't know?
16 A **I don't know.**
17 Q We'll mark this as Sound Exchange
18 Trial Exhibit 159.
19 (Whereupon, the above-
20 referred to document was
21 marked as Sound Exchange
22 Trial Exhibit 159 for

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1 identification.)
2 (Pause.)
3 Mr. Roback, I'm giving you a
4 document, Sound Exchange Trial Exhibit 159,
5 which has a Bates label CRB-Yahoo-46460. I'd
6 ask if you could take a look at this document
7 and tell me if you understand it to be an
8 amendment to Yahoo's webcasting agreement with
9 Sony BMG?
10 A **Yes, it appears to be that.**
11 Q If you could turn to page 8 of
12 this agreement, at the bottom and I again will
13 try to do this without getting into restricted
14 information.
15 If you'll look at 4B2 which is at
16 the bottom of the page, towards the bottom of
17 the page.
18 Am I correct that under this
19 agreement for customized nonsubscription
20 offering, customized nonsubscription radio
21 that Sony -- Yahoo pays to Sony the greater of
22 the percentage of revenue in a per performance

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1 rate?
2 A **That's correct.**
3 Q Now if you'll turn to page 9 --
4 well, let me go back to that, back on page 8.
5 And without going on to the restricted record,
6 the percentages that are reflected in this
7 paragraph in 4A2A and 4A2B, are those the
8 rates that Yahoo is currently operating under
9 with Sony?
10 MR. STEINTHAL: For the customized
11 station?
12 MR. PERRELLI: Yes, for the
13 customized station?
14 THE WITNESS: Yes.
15 BY MR. PERRELLI:
16 Q If you'll turn to page nine and
17 this is 4C2, there's a provision that explains
18 how Yahoo pays for its bundled services,
19 correct?
20 A **Correct.**
21 Q And it's correct in that context
22 that there is no revenue share for the bundled

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1 service in this agreement, is that right?
2 A **Correct.**
3 Q Rather than revenue share, it's
4 correct that Yahoo pays at a higher per
5 performance rate than it does for a
6 nonsubscription offering?
7 A **Correct.**
8 Q And is the percentage uplift which
9 is reflected in that 4C2 what Yahoo was
10 operating under for customized stations and
11 their bundled service?
12 A **Yes.**
13 Q And this is an agreement that you
14 yourself signed, is that's correct?
15 A **Yes.**
16 MR. PERRELLI: Your Honor, I'd
17 move the admission of Sound Exchange 159.
18 CHIEF JUDGE SLEDGE: Any
19 objection?
20 MR. STEINTHAL: No objection
21 provided it is taken in under the protective
22 order, Your Honor. It's labeled as a

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1 restricted document and I would make a motion
2 to the Board to treat it as restricted, given
3 that it is an existing license agreement
4 between Sony and Yahoo, that both parties have
5 urged the Board to treat as under the
6 protective order.
7 CHIEF JUDGE SLEDGE: Without
8 objection, the exhibit is admitted.
9 (The document, having
10 been marked previously
11 for identification as
12 Sound Exchange Trial
13 Exhibit 159, was
14 received in evidence.)
15 Any objection to applying the
16 protective order?
17 MR. PERRELLI: No, Your Honor.
18 CHIEF JUDGE SLEDGE: Without
19 objection, the protective order is applied.
20 BY MR. PERRELLI:
21 Q Mr. Roback, turning to page 18 of
22 your testimony, this is paragraph 16A, you

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1 talk about the amount of instream advertising
2 that Yahoo has booked for 2006, is that
3 correct?
4 A **Yes.**
5 Q And this is a significant increase
6 over the amount that Yahoo booked in 2005, is
7 that right?
8 A **The amount listed here?**
9 Q Yes.
10 A **Is an increase over 2005.**
11 Q Well, you characterize as an
12 impressive gain, correct?
13 A **Yes.**
14 Q Can you -- again, I'm going to try
15 to do this while avoiding being on the
16 restricted record, but can you identify at
17 what percentage increase it is over the 2005
18 amount?
19 A **I don't know the exact percentage.**
20 Q Do you know how much Yahoo earned
21 in instream advertising in 2005?
22 A **I don't remember.**

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1 Q Moving to paragraph 16B, your
2 criticism of Dr. Brynjolfsson there is looking
3 at a document that was created by Yahoo, is
4 that right?
5 **A My criticism is that he's looking**
6 **at a document by Yahoo?**
7 Q Yes.
8 **A I'm not criticizing the fact that**
9 **he's looking at a document by Yahoo.**
10 Q The document that's referenced
11 there, there are Yahoo projections, that's the
12 one that was created by Yahoo for its business
13 purposes, correct?
14 **A Yes.**
15 Q It wasn't created for litigation
16 or any other purpose?
17 **A No.**
18 Q And I take it the same is true
19 with the projections that he used that you
20 referred to in paragraph 16C. That too is a
21 document created internally by Yahoo for its
22 own business purposes?

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1 **A Yes.**
2 Q And it's the kind of thing that
3 you use in your daily work, isn't that right?
4 **A Yes.**
5 Q I'm going to hand out what had
6 been previously admitted as Sound Exchange
7 Exhibit 42, which is the document referred to
8 in 16C.
9 Now in paragraph 16C, I think you
10 indicate that the documents on which you rely,
11 Dr. Brynjolfsson relies and this is middle of
12 page 19, and you say apart from the question
13 of where the 26 percent figure comes from, he
14 does not explain. The same documents on which
15 he relies reveal that the average number of
16 impressions per hour has averaged from 6 to 9,
17 not 12.
18 And I want to understand how you
19 came up with the figure six to nine as the
20 average number of impressions per hour in
21 these projections.
22 (Pause.)

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1 **A Well, I'm not sure where it comes**
2 **from, from these pages.**
3 Q Just so we're clear, with respect
4 to projections, future projections in this
5 document for inventory, I take it you don't
6 know what assumptions were used by the person
7 who created this document?
8 **A There are some places where you**
9 **can see what the assumptions are, but not the**
10 **assumptions in total. But we're looking at**
11 **what the average number of impressions per**
12 **hour had been. What's missing from here is**
13 **the number of hours.**
14 Q And I guess what I'm asking is do
15 you have any basis from this document of
16 saying what the number of impressions, what
17 number of impressions per hour, the future
18 projections are based on?
19 (Pause.)
20 **A No.**
21 Q Let's turn to Exhibit 8 to your
22 testimony which is -- as amended, which is the

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1 2003 to 2005 revenue cash flow document.
2 I just want to get some basic
3 information to explain this document. This is
4 for the overall music business unit, correct?
5 **A Correct.**
6 Q And it breaks down at least with
7 respect to revenue into a Launch sub-business
8 unit and a Musicmatch sub-business unit, is
9 that correct?
10 **A Correct.**
11 Q And the Launch sub-business unit
12 includes webcasting of customized
13 preprogrammed and music videos, is that
14 correct?
15 **A Correct.**
16 Q And the MusicMatch sub-business
17 unit includes MusicMatch's webcasting
18 operations and your on-demand service?
19 **A It includes MusicMatch's, well,**
20 **back up for a second. Are you talking about**
21 **Launch sub-BU versus MusicMatch sub-BU, in**
22 **general or specifically within each marketing**

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1 **services line and fees line?**
2 Q I meant in general.
3 **A Launch sub-BU includes all**
4 **businesses that were Yahoo Music prior to the**
5 **acquisition of MusicMatch.**
6 Q What are those businesses?
7 **A Well, going back as far as 2003,**
8 **that could have been everything from**
9 **webcasting to music videos to artists premium**
10 **clubs that we used to have, our a la carte**
11 **sales of Launchcast Plus, so all elements of**
12 **the revenue we've talked about.**
13 Q And in 2005, what were the
14 elements of the business unit?
15 **A In 2005, there were no longer**
16 **artists premium clubs. It was basically all**
17 **of our advertising revenue around anything**
18 **that we did, be it webcasting, music videos,**
19 **original content, text content, photos, all**
20 **those things. It would also be Launchcast a**
21 **la carte, subscription fees. It would also be**
22 **the introduction of our on demand service**

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1 **which was in the second half of 2005. This is**
2 **for Launch.**
3 Q Again, we'll focus on 2005.
4 What's in the MusicMatch sub-business unit?
5 **A The MusicMatch sub-business unit**
6 **would be anything from their sales of premium**
7 **software, from their on demand service, from**
8 **their a la carte download sales and from their**
9 **radio product.**
10 Q And so virtually all of your
11 advertising revenue is attributed to the
12 Launch sub-business unit, is that right?
13 **A That's correct.**
14 Q And if we're looking at the last
15 line for FY -- last column for FY 2005, where
16 it says marketing services and then you go all
17 the way across, that's advertising services,
18 correct?
19 **A Correct.**
20 Q And the vast majority in almost
21 all of the advertising services fall into the
22 Launch sub-business unit?

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1 **A That's right.**
2 Q Which is where you have music
3 videos and webcasting and some of the other
4 things you identified, correct?
5 **A Correct.**
6 Q With respect to license sub-
7 business unit and the MusicMatch sub-business
8 unit, are there separate profit and loss
9 statements for those two different businesses,
10 sub-business units?
11 **A There have been, but I don't**
12 **believe that they're done any more. For**
13 **purposes of tracking the acquisition, the**
14 **results of the acquisition. It's not how we**
15 **view the business on a day-to-day, month-by-**
16 **month basis.**
17 Q So you don't break the cost down
18 between business units, sub-business units?
19 **A Not between Launch and MusicMatch**
20 **any more, as far as I know.**
21 Q Just to look down at a couple of
22 expense categories, you've got head calculated

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1 expenses and if you look at the Fiscal Year
2 2004 to Fiscal Year 2005 total head count
3 expenses, there's a significant increase?
4 **A Correct.**
5 Q That increase is because of the
6 acquisition of MusicMatch, correct?
7 **A That's right.**
8 Q That's not due to an increase in
9 Launch's staff, for example?
10 **A There may have been some increase**
11 **in Launch staff, but largely attributable to**
12 **the acquisition.**
13 Q And that's because there aren't
14 very many people dedicated to Launch, isn't
15 that correct?
16 **A Dedicated to Launch? I'm not sure**
17 **what you mean.**
18 Q To Launchcast.
19 **A Well, this is all head count**
20 **supporting everything.**
21 Q I understand that, but there
22 aren't very many people dedicated to

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1 Launchcast, is that right?
2 A **There aren't many people who work**
3 **exclusively on Launchcast.**
4 Q If you also look at content costs
5 which is about the fifth category of cost and
6 look across, there's a significant increase
7 from FY 2004 to FY 2005?
8 A **Yes.**
9 Q I take it that significant
10 increase in cost is principally because of
11 offering an on demand service, is that
12 correct?
13 A **That's correct.**
14 Q Not because of increases in cost
15 in webcasting?
16 A **Well, costs in webcasting video**
17 **some had gone up, but the primary result of**
18 **the huge increase is related to on demand.**
19 Q And just so it's clear, down here
20 there's level one and level two costs
21 identified. Can you explain what those are?
22 A **Those are corporate costs that are**

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1 **allocated back to the business unit. Level**
2 **one costs in general tend to be things that**
3 **can be more directly associated with the**
4 **business unit; for example, sales commissions,**
5 **the Yahoo sales force is a central sales**
6 **force. It's not part of our business unit, so**
7 **commissions paid against our revenue would**
8 **show up in level one. Customer care**
9 **associated with the premium products can be**
10 **tracked specifically by our products in the**
11 **central organization. So they would come**
12 **through as level one, whereas level two would**
13 **be just an allocation for things like human**
14 **resources and corporate development and**
15 **general corporate functions that are just**
16 **based on some formula for allocation.**
17 Q I take it you and Yahoo Music
18 don't have much control over how those costs
19 are allocated to you?
20 A **No, no control over it.**
21 Q One last question going back to
22 MusicMatch. Is it correct that Yahoo is still

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1 offering MusicMatch's radio product today?
2 A **I believe we're still offering**
3 **MusicMatch radio. The operation is not**
4 **complete.**
5 Q And with respect to that offering,
6 the non-subscription version of MusicMatch, is
7 it correct you're not advertising MusicMatch
8 today?.
9 A **No, I don't believe there's**
10 **advertising in stream.**
11 Q So this -- let's just be clear.
12 This is a non-subscription version of
13 MusicMatch, but doesn't have an in stream ads?
14 A **Correct.**
15 Q All right, I think I have nothing
16 further.
17 CHIEF JUDGE SLEDGE: Mr.
18 Steinthal?
19 REDIRECT EXAMINATION
20 BY MR. STEINTHAL:
21 Q A few things, Mr. Roback. First
22 of all, you were shown the Universal deal with

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1 Yahoo and the Sony deal with Yahoo.
2 Do you have different deals at
3 different rates for customized music with each
4 of the four majors? Or only three of the four
5 majors?
6 A **I believe they're all slightly**
7 **different.**
8 Q But the all being -- you don't
9 have a deal with BMG, but you do with respect
10 to the other majors?
11 A **Right. Well, yes. Well, no, we**
12 **do have a deal with BMG prospectively. So,**
13 **Sony BMG, which is now one company, we are**
14 **still in litigation with BMG, based on the**
15 **historical infringement litigation, but we do**
16 **have a prospective license for use of all Sony**
17 **and BMG repertoire in the customized service,**
18 **as well the free program service.**
19 Q Now, you were shown a document,
20 which is Exhibit 151, which related to a
21 report under your Universal agreement. And,
22 Mr. Perrelli asked you some questions about

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1 the penalty for not having -- it had to do
2 with implementing a certain security feature,
3 do you recall giving that testimony?
4 A **Yes.**
5 Q Has Yahoo in 2006 come into
6 compliance with the security features so that
7 it not longer pays that penalty?
8 A **I believe we recently came into**
9 **compliance with that. Yes. And actually it's**
10 **reflected on the statement as of July 2006.**
11 Q And you're looking at the last
12 page of that document, which is Bates stamp
13 number 0026, in the bottom right-hand corner?
14 A **Right.**
15 Q Mr. Perrelli asked you about buy
16 buttons that you have on the Launchcast site
17 and links to artists' websites that you have
18 on the Launchcast site.
19 Are those features that are only
20 given to the benefit of UMG or are they
21 generally available on the website?
22 A **Generally available on the**

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1 **website.**
2 Q So, do you view the fact that
3 there are buy buttons on Launchcast or links
4 to artists' websites as providing Universal
5 any promotional benefits under that agreement?
6 A **No.**
7 Q You were asked a number of
8 questions about the indie label deals, and in
9 particular whether Yahoo has told independent
10 labels that if they don't accept a penny per
11 unique, that you won't use their content.
12 Let me ask you this question. Is
13 it correct or not that Yahoo has engaged in
14 licenses with independent labels if they
15 choose not do to a penny per unique rate at
16 the statutory rate?
17 A **Yes.**
18 Q And you were asked to look at your
19 deposition in reference to your description of
20 the radio business market.
21 I'm going to ask you to go back
22 and look page 19, actually, page 72 to 73 of

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1 your deposition. I can just read you what you
2 said, because I'm going to ask you to
3 elaborate upon it so you don't have to find
4 it.
5 The quote that you are asked to
6 look at was -- the question was initially,
7 "can you tell me why that's the case?"
8 Answer, "because we don't believe that the
9 download and sale business is particularly big
10 and a lucrative business to be in. We believe
11 there's a much bigger opportunity for the
12 benefit of ourselves and the content providers
13 in the radio business, a bigger market
14 opportunity."
15 Can you elaborate a little bit
16 more on what you meant by a bigger market
17 opportunity in relation to the download
18 business?
19 A **Well, I talked about it earlier**
20 **that there's about a $20 billion market for**
21 **radio advertising, most of which is spent on**
22 **terrestrial radio, which doesn't pay royalties**

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1 **to sound recording owners.**
2 **So, to the extent that we can**
3 **capture that revenue on Internet radio,**
4 **obviously, that would benefit us. And it**
5 **would clearly benefit the content owners, who**
6 **would then be getting paid off of that base.**
7 **Further, you have the value of the**
8 **promotion from the airplay on Internet radio**
9 **that drives the underlying sale of the music.**
10 **So that's why I believe it's a big**
11 **opportunity, a need in the digital download**
12 **market, you have a situation where the content**
13 **owners selling their content, clearly a higher**
14 **margin business for them but we just do not**
15 **believe that the a la carte sale of downloads**
16 **marketplace will ever be significant or**
17 **significantly replace the decline in physical**
18 **CD sales.**
19 Q Now, Mr. Perrelli asked you a
20 number of questions about your Sony deal and
21 your Universal deal, where you testified that
22 in those agreements you've agreed to pay the

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1 statutory rate or a higher statutory rate for
2 the Launchcast Plus service, including the
3 customized radio features of that service.
4 Do you view the higher than
5 statutory rates that you pay under those deals
6 to be reasonable rates?
7 **A Well, I would --**
8 MR. PERRELLI: Your Honor, I would
9 object to the extent he's asking him to draw
10 some kind of legal conclusion.
11 CHIEF JUDGE SLEDGE: Mr.
12 Steinthal?
13 MR. STEINTHAL: I can rephrase the
14 question.
15 CHIEF JUDGE SLEDGE: All right.
16 BY MR. STEINTHAL:
17 Q Why is it that you agreed to rates
18 at levels above the statutory rate level in
19 those license agreements?
20 **A Well, because we knew that if we**
21 **offered that repertoire in the customized**
22 **stations that we without a voluntary license**

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1 **we would be subject to infringement and the**
2 **only way that we could get a voluntary license**
3 **was to agree to pay a premium and not risk the**
4 **infringement litigation which we had already**
5 **settled.**
6 Q Is it your view that absent the
7 risk of copyright infringement and the claims
8 pending associated, what is or isn't
9 interactive, you would pay the same or less
10 for those uses?
11 MR. PERRELLI: I'm going to
12 object, hypothetical, Your Honor.
13 CHIEF JUDGE SLEDGE: Mr.
14 Steinthal, is that the same thing as saying if
15 I could get something for free why would I pay
16 for it?
17 MR. STEINTHAL: No, it's not for
18 free, Your Honor. I'm asking him whether
19 having been involved in those negotiations he
20 has a basis to say whether but for the claims
21 associated with that interactivity claim in
22 litigation, the resulting fees would be the

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1 same.
2 CHIEF JUDGE SLEDGE: Would the
3 fees be the same if you didn't have to pay for
4 income tax?
5 MR. STEINTHAL: Your Honor, it's
6 not hypothetical. He's been sitting in on
7 those negotiations and participating in those
8 negotiations and I think he has a basis to
9 testify about how significant the -- I'll
10 rephrase it this way.
11 BY MR. STEINTHAL:
12 Q Mr. Roback, do you view the
13 presence of the claims being made by Universal
14 or Sony or other labels about the customized
15 radio service being interactive rather than
16 within the statutory license is something that
17 has affected what you've had to pay for the
18 voluntary licenses?
19 **A Yes.**
20 Q And how has it affected it?
21 **A We pay a premium because of it.**
22 Q I just want to clarify something.

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1 I had asked you about the buy buttons and the
2 links to artists and I may have been inartful
3 in the question I asked. Do you view those
4 features as promotional features that only
5 Universal gets?
6 **A Well, as I said earlier, they are**
7 **features that are applied to everyone. You**
8 **can buy any song that you're listening to in**
9 **Launchcast, so it's not uniquely available to**
10 **Universal.**
11 Q Do those features have some
12 promotional value to the labels and to other
13 copyright owners?
14 **A Well, I guess it depends on how**
15 **you define promotional value. A value is the**
16 **user is hearing the song. If they don't like**
17 **it, there's no value in the buy button being**
18 **there. But if they do like it, there's a lot**
19 **of value in the buy button being there.**
20 Q And links to the artists' pages as
21 well?
22 **A Yes.**

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1 Q I want to ask you some questions
2 about the mixed pages questions that were
3 asked of you by Mr. Perrelli.
4 You referred to the Yahoo Music
5 home page as distinguished from the radio home
6 page as having a number of different offerings
7 on those pages, correct?
8 **A Correct.**
9 Q Are there some pages within Yahoo
10 Radio that include text and information and a
11 mixture of things other than actually
12 streaming of music?
13 **A There are pages in the radio**
14 **section that feature content about the radio**
15 **service. You have the ability to get to other**
16 **places, but the content is primarily about the**
17 **radio service, either the types of stations**
18 **that are available or the content of each**
19 **station or what have you?**
20 Q And on pages within the radio area
21 of the website that are both text-based and
22 offer the ability to listen to music, do you

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1 view that as coming into the revenue base?
2 **A Yes.**
3 Q Mr. Perrelli asked you some
4 questions about the music video licenses you
5 have. Let me ask you, there is a reference,
6 I believe, to the Universal music video
7 license which has previously been marked and
8 reflects that there's a payment structure and
9 that is a percentage of revenue as against a
10 per play minimum fee. Are you familiar with
11 that?
12 MR. PERRELLI: Your Honor, I
13 object. I didn't inquire about Universal
14 music video licenses with this witness at all.
15 MR. STEINTHAL: Your Honor, there
16 were several questions about the video
17 licenses and the definitions of revenue
18 associated with it and I'm asking him a
19 specific question about the percentages of
20 revenue feature of that license.
21 CHIEF JUDGE SLEDGE: Overruled.
22 BY MR. STEINTHAL:

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1 Q First of all, is it correct that
2 the Universal license has a greater of fee
3 structure between a percentage and a per play?
4 **A It's greater of a percentage of**
5 **revenue or a fee per video stream, correct.**
6 Q And on what basis has Yahoo been
7 paying under that agreement?
8 MR. PERRELLI: Your Honor, I
9 object. Now we're far off whatever questions
10 may have been asked about a definition of
11 revenue.
12 MR. STEINTHAL: Your Honor, I
13 think it goes to the questions about the
14 percentage and the definition of the
15 percentage if, in fact, what's not being
16 operational under that agreement is the
17 percentage and that, in fact, what's really
18 being paid is the per play, then to some
19 degree affects the significance of the
20 testimony that Mr. Perrelli was trying to
21 elicit.
22 I'm not going to go very far with

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1 this. I just want to find out which one of
2 those features is operational in that
3 agreement?
4 CHIEF JUDGE SLEDGE: I'll
5 overrule.
6 THE WITNESS: To date, we have not
7 paid on the basis of percentage of revenue.
8 We've been paying on the basis of the per
9 stream minimums.
10 BY MR. STEINTHAL:
11 Q You were asked some questions
12 about the SBC-AT&T bundle, broadband access
13 and the various features provided by Yahoo.
14 Do you have an understanding of
15 what the primary product is that's being sold
16 to the consumer in those bundles?
17 **A Connectivity to the Internet.**
18 Q Now I'm going to surely step into
19 some things that I'm not as qualified to talk
20 about as Mr. Larson, but I need to try to help
21 everyone get to the bottom of this impressions
22 per hour issue that you were asked about by

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1 Mr. Perrelli.
2 I'm going to show you some
3 documents produced in discovery by Yahoo.
4 MR. STEINTHAL: And Your Honors,
5 we produced these documents in native form.
6 As you may remember, there was a motion
7 earlier on and the printouts made from things
8 in native form don't always match up and so
9 there are extracts, as I understand, from
10 what's in native form. And what I need to do
11 is show the witness what has been previously
12 marked as Sound Exchange Exhibit 42DR.
13 (Whereupon, the above-
14 referred to document was
15 marked as Services Trial
16 Exhibit R-2 for
17 identification.)
18 (Pause.)
19 MR. PERRELLI: Your Honor, I'm
20 going to object to the extent that it's an
21 attempt to introduce a document that obviously
22 wasn't provided to us yesterday via Mr.

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1 Roback's testimony. I understood the exhibits
2 that were to be used with a witness would be
3 disclosed the day before testimony.
4 CHIEF JUDGE SLEDGE: Let me ask a
5 further question before I address that.
6 Mr. Steinthal, the questions as
7 presented by Mr. Perrelli were that the
8 reference in the statement about the
9 impressions per hour was to the document in
10 which Mr. Perrelli was presenting to them.
11 Are you proposing that these other
12 documents are instead the documents that were
13 referenced in that citation?
14 MR. STEINTHAL: I don't think so.
15 (Pause.)
16 MR. STEINTHAL: Your Honor, there
17 were a number of materials produced in native
18 form. Dr. Jaffe made reference to those
19 materials in his testimony.
20 The witness, and I guess the
21 reference is on page -- frankly, I'm just
22 trying to help everybody understand where

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1 these figures came from. And the difficulty
2 is they came from native format and they're an
3 extract from it. So I'm surprised Mr.
4 Perrelli is objecting. We wouldn't have gone
5 here and used these documents if he hadn't
6 raised it on his examination and they're not
7 having -- and not having shown the witness a
8 document he could identify on his cross
9 examination in relation to this, I'm simply
10 trying to provide the information that sort of
11 connects the dots here.
12 CHIEF JUDGE SLEDGE: I haven't
13 heard you answer my question.
14 MR. STEINTHAL: Let me get you the
15 reference, Your Honor.
16 The reference is to what Professor
17 Brynjolfsson does. And then --
18 JUDGE ROBERTS: Is this page 19?
19 MR. STEINTHAL: Yes, page 19. The
20 witness is referring to what Professor
21 Brynjolfsson has done and the calculations
22 he's made and the witness in his witness

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1 statement then says "apart from the question
2 of where the 26 percent figure comes from, he
3 does not explain, the same documents on which
4 he relies reveal that the average number of
5 impressions per hour has averaged from 6 to 9,
6 not 12."
7 So there's no specific reference
8 here to one document or another document. The
9 documents upon which Brynjolfsson relies are
10 the massive materials produced by Yahoo.
11 What I'm trying to do is enable
12 the witness to look at one of the materials
13 that was in the native files that was made
14 available to Professor Brynjolfsson that
15 explicitly relates to this statement.
16 CHIEF JUDGE SLEDGE: I am still
17 awaiting an answer to my question.
18 MR. STEINTHAL: Then I must have
19 misunderstood or not remembered your question.
20 CHIEF JUDGE SLEDGE: In asking
21 those questions, Mr. Perrelli presented the
22 document to the witness which was Sound

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1 Exchange Exhibit 42 and said this is the
2 document referenced in this paragraph, where
3 do you find in this document the 6 to 9
4 impressions?
5 And are you presenting now that
6 rather than that foundation by Mr. Perrelli,
7 that the Service Exhibit R-2 is the document
8 referenced?
9 MR. STEINTHAL: What I'm
10 suggesting, Your Honor, is that the Service
11 Exhibit R-2 is an extract from the native
12 files that were produced to Professor
13 Brynjolfsson which is, in fact, the materials
14 generally that are referred to in this
15 paragraph.
16 The question is what did
17 Brynjolfsson rely on, whether he did the right
18 thing? The witness is saying Brynjolfsson had
19 available, he relied on various documents
20 produced by Yahoo and he used a 12 impression
21 per hour number when, in fact, the materials
22 we produced reflect that our impressions per

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1 hour were between 6 and 9.
2 So there's no specific statement
3 in this paragraph that says it's this
4 document or that document. And in addition,
5 as I understand it, Service's Exhibit R-2 is
6 an extract from the very same native files as
7 were produced to Sound Exchange and were used
8 to develop Sound Exchange Exhibit 42DR.
9 JUDGE ROBERTS: Is this an extract
10 from native form as well?
11 MR. STEINTHAL: Yes, it is.
12 JUDGE ROBERTS: It is. So all
13 you're saying then is that Mr. Perrelli drew
14 out the wrong portion of this particular
15 document?
16 MR. STEINTHAL: Without any --
17 JUDGE ROBERTS: And you have the
18 right one here?
19 MR. STEINTHAL: Yes, that's what
20 I'm suggesting. I wanted to show the witness
21 another extract from the native files on the
22 same subject to see whether that is what

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1 formed the basis of the statement, rather than
2 what he could not find within the Sound
3 Exchange Exhibit that he was shown by Mr.
4 Perrelli.
5 CHIEF JUDGE SLEDGE: Mr. Perrelli?
6 MR. PERRELLI: Your Honor, a
7 couple of things. Dr. Brynjolfsson did not
8 look at native file format documents in
9 preparing his testimony because they hadn't
10 been produced to us at the time he wrote his
11 testimony. He was looking at paper documents
12 that were produced by Yahoo and he
13 specifically referenced the documents he was
14 looking at.
15 I don't believe that this document
16 was one of the documents on which -- that he
17 reviewed and relied for purposes of his
18 testimony. So I don't think Mr. Steinthal's
19 arguments are correct, at least in terms of
20 the sequence of the way the documents were
21 produced in this case.
22 CHIEF JUDGE SLEDGE: Mr.

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1 Steinthal?
2 MR. STEINTHAL: Your Honor, I
3 can't testify or even represent what Professor
4 Brynjolfsson, in fact, relied upon. We know
5 what we produced.
6 CHIEF JUDGE SLEDGE: Were they
7 produced after he did his statement?
8 MR. STEINTHAL: I don't believe
9 they were produced after he did his amended
10 statement, but I can't swear to it.
11 Your Honor, we're simply --
12 CHIEF JUDGE SLEDGE: That's what
13 you just told Judge Roberts.
14 MR. STEINTHAL: That they were
15 produced. I don't know -- and they were
16 produced before he put in his rebuttal
17 statement. The question is where they
18 produced -- I know the native format issue
19 came up not in the rebuttal phase, Your Honor.
20 It came up in the original discovery phase of
21 the case in the direct phase. So I'm doing
22 this from memory, but that motion was decided

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1 and we were ordered to provide native format
2 materials before we started the trial on the
3 direct phase. No question about that.
4 CHIEF JUDGE SLEDGE: That included
5 the information from which Service Exhibit R2
6 is extracted?
7 MR. STEINTHAL: Yes.
8 CHIEF JUDGE SLEDGE: Mr. Perrelli?
9 MR. PERRELLI: Your Honor, I think
10 Mr. Steinthal is correct that those documents
11 were produced prior to trial, but they weren't
12 produced prior to the time that Dr.
13 Brynjolfsson wrote his statement. In other
14 words, the Board's order on this issue --
15 CHIEF JUDGE SLEDGE: Are you
16 referring to his direct statement or his
17 rebuttal statement?
18 MR. PERRELLI: The direct
19 statement. The testimony at issue is Dr.
20 Brynjolfsson's amended written direct
21 testimony which was filed the third week of
22 March of this year.

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1 The order on disclosing native
2 files was produced at or around that time or
3 thereafter and the native files from which
4 this appears that Mr. Steinthal says is an
5 extract weren't provided to us until after
6 that. And so Dr. Brynjolfsson had paper
7 documents that he reviewed, but he did not
8 review or have in his possession any native
9 files.
10 MR. STEINTHAL: Your Honor, I'm
11 not even sure the issue is whether or not
12 Professor Brynjolfsson specifically looked at
13 this as opposed to what the basis for the
14 statement that, in fact, the reality is six to
15 nine impressions were run per hour.
16 CHIEF JUDGE SLEDGE: No, that's
17 not the issue at all. The issue is what he
18 used in making this testimony --
19 MR. STEINTHAL: What he used --
20 the witness?
21 CHIEF JUDGE SLEDGE: And the
22 statement says that he said that he did it

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1 wrong and that he didn't even have the
2 information, then he couldn't support an
3 argument that he did it wrong.
4 MR. STEINTHAL: Your Honor --
5 CHIEF JUDGE SLEDGE: Let's recess
6 and confer about this a moment. I've got too
7 many different --
8 JUDGE WISNIEWSKI: May I ask you
9 one question before --
10 CHIEF JUDGE SLEDGE: Sure. I've
11 gotten too many different statements of what
12 the facts are here and that distresses me.
13 CHIEF JUDGE SLEDGE: Mr. Perrelli,
14 this document, your exhibit 42DR, is this a
15 document that you prepared?
16 MR. PERRELLI: Exhibit 42DR is a
17 document that Services provided to Dr. Jaffe,
18 their witness, and was then produced to us in
19 discovery. So it's a Yahoo document that I
20 believe given the Bates label that refers to
21 Dr. Jaffe, was given to Dr. Jaffe and was
22 provided to us in discovery.

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1 JUDGE WISNIEWSKI: Thank you.
2 (Off the record.)
3 CHIEF JUDGE SLEDGE: We will come
4 back to order. I'm going to recount to you
5 the best that we have been able to put
6 together the presentations by counsel and then
7 give you a chance to respond to that.
8 It appears that neither Mr.
9 Perrelli nor Mr. Steinthal have correctly
10 represented the situation to us. At the time
11 Mr. -- at the time Professor Brynjolfsson
12 prepared his written statement, he wouldn't
13 have discovery documents from DiMA and
14 therefore Sound Exchange Exhibit 42 being a
15 related document to Professor Jaffe would not
16 have been something that Professor
17 Brynjolfsson would have had and relied upon in
18 the line in the middle of page 19 which is the
19 point in issue.
20 Neither would the Service's
21 Exhibit R2 be an extract of the native form
22 that Professor Brynjolfsson was relying upon

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1 in preparing his direct statement.
2 In order to proceed with the
3 question for which the objection remains, the
4 foundation would have to be laid that
5 Service's Exhibit R2 is the -- is an exhibit
6 on which Professor Brynjolfsson was relying at
7 the time he prepared his direct written
8 statement as stated in the question lines on
9 page 19, that foundation has not been laid and
10 therefore the objection is sustained.
11 Now Mr. Perrelli, any response to
12 this?
13 MR. PERRELLI: Your Honor, just to
14 clarify the record, I may have misspoken. The
15 testimony of Mr. Roback's criticism relates to
16 Dr. Brynjolfsson's amended written direct
17 testimony which was filed in March, March 27
18 of 2006 which was after discovery had been
19 conducted, but before the Court had ruled on
20 the motion to compel native filed documents.
21 That ruling occurred on April 6th of 2006.
22 All of the documents on which Dr.

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1 Brynjolfsson relied were attached to his
2 amended direct statement. He did not have an
3 extract from -- it would have been in a native
4 file produced subsequent to that April 6th
5 order and that's what I believe is the
6 sequence and events. I can hand up the April
7 6th order as well as --
8 JUDGE WISNIEWSKI: Maybe you are
9 missing the point here, Mr. Perrelli. 42DR,
10 was that a document that was attached to his
11 amended statement?
12 MR. PERRELLI: It was that -- that
13 document was produced to us in paper form
14 because it was a document that had been
15 provided by the Services to Dr. Jaffe and
16 produced to us in the ordinary course of
17 discovery during February and March.
18 The issue of native files which
19 was the subject of the motion to compel was
20 only resolved by the April 6th order. So that
21 paper document, DR42, was both provided in
22 discovery and Dr. Brynjolfsson identified it

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1 as a document he relied on in his amended
2 written direct testimony and attached as an
3 exhibit to that testimony.
4 CHIEF JUDGE SLEDGE: Mr.
5 Steinthal?
6 MR. STEINTHAL: Your Honor, there
7 is no dispute that Exhibit R2 comes from the
8 same native files that Sound Exchange Exhibit
9 42DR comes from. What happened was after you
10 ordered, as you did, with respect to the
11 native files, which were requested by Sound
12 Exchange because of the difficulty of reading
13 some of these files or some of the
14 spreadsheets, it was produced.
15 My whole point here, Mr. Perrelli
16 asked questions about Exhibit 42 and whether
17 the witness could find anything in Exhibit 42
18 that related to impressions per hour and he
19 couldn't because there's nothing in there
20 specifically on that. But within the same
21 category of documents comes Exhibit R2. I was
22 simply going to ask the witness whether R2 was

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1 the basis upon which he made his statement
2 that the average was 6 to 9 instead of 12.
3 So I'm only --
4 CHIEF JUDGE SLEDGE: That's not
5 the statement he made. The statement he made
6 is that the same documents on which he relies
7 reveals that the average number of impressions
8 per hour has averaged six to nine.
9 MR. STEINTHAL: And Your Honor, if
10 there is a problem, if there is a mistake in
11 the sense that when somebody refers to the
12 same documents and they're referring to the
13 entire file, not knowing explicitly whether
14 Professor Brynjolfsson relied on this part of
15 the native file or this part, if there's some
16 miscommunication here, that's fine, but I'm
17 simply trying to establish what the witness
18 was relying on for the six to nine number.
19 CHIEF JUDGE SLEDGE: Well, you can
20 see the inability to establish the required
21 foundation. Please move on.
22 MR. STEINTHAL: Can I ask the

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1 witness whether he can identify R2?
2 CHIEF JUDGE SLEDGE: No, sir. You
3 can make a proffer.
4 MR. STEINTHAL: Okay.
5 BY MR. STEINTHAL:
6 Q Do you have R2 in front of you,
7 Mr. Roback?
8 **A Yes.**
9 Q Can you identify what R2 is?
10 **A It's an internal financial**
11 **schedule.**
12 Q Is it your understanding that
13 these materials were provided along with the
14 materials comprising Exhibit 42 to Sound
15 Exchange during the course of the case?
16 MR. PERRELLI: I'm going to
17 object, Your Honor. I don't see how he can
18 answer that, as to when it was provided, and
19 what was provided.
20 CHIEF JUDGE SLEDGE: He didn't ask
21 him that. What he said was is it your
22 understanding it was provided at some point

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1 during the case. Overruled.
2 THE WITNESS: Yes, it is my
3 understanding it was provided.
4 BY MR. STEINTHAL:
5 Q And when you were referring to
6 documents that reflected an average number of
7 impressions of 6 to 9 and not 12 per hour,
8 were you referring to the date as set forth in
9 Exhibit R2?
10 **A Yes, the line labeled impressions**
11 **per hour.**
12 Q Do you personally know, in fact,
13 what part of the native file Professor
14 Brynjolfsson looked at or didn't look at?
15 **A No.**
16 MR. STEINTHAL: Your Honor, I
17 would submit that the sole purpose of putting
18 in this exhibit and this testimony is to
19 satisfy the Board and counsel as to what the
20 basis for the statement is in this paragraph.
21 CHIEF JUDGE SLEDGE: I take it
22 you've finished your proffer?

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1 MR. STEINTHAL: Yes.
2 CHIEF JUDGE SLEDGE: Please move
3 on.
4 MR. STEINTHAL: I have no further
5 questions, Your Honor.
6 CHIEF JUDGE SLEDGE: Ms. Ryan, any
7 other questions?
8 MS. RYAN: No, sir.
9 CHIEF JUDGE SLEDGE: Mr. Perrelli?
10 MR. PERRELLI: One brief one, Your
11 Honor.
12 RECROSS EXAMINATION
13 BY MR. PERRELLI:
14 Q Mr. Roback, you testified in
15 response to a question from Mr. Steinthal that
16 Yahoo was continuing to enter into agreements
17 at the statutory rate with independent labels,
18 is that correct?
19 **A Yes.**
20 Q And with respect to those
21 independent labels who insist on getting the
22 statutory rate, it's correct, is it not that

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1 they do not get an additional 5 cent payment
2 for downloads, isn't that right?
3 **A I believe that to be the case.**
4 MR. PERRELLI: Thank you, Your
5 Honor.
6 CHIEF JUDGE SLEDGE: Thank you,
7 sir.
8 (The witness was excused.)
9 CHIEF JUDGE SLEDGE: We'll take a
10 -- given the time, we'll try to abbreviate.
11 Let's take a six minute recess and begin at
12 3:20 by that clock.
13 (Off the record.)
14 MR. LARSON: Your Honor, DiMA
15 calls Jay Frank.
16 WHEREUPON,
17 JAY FRANK
18 WAS CALLED FOR EXAMINATION BY COUNSEL FOR DiMA
19 AND, HAVING FIRST BEEN DULY SWORN, WAS
20 EXAMINED AND TESTIFIED AS FOLLOWS:
21 DIRECT EXAMINATION
22 BY MR. LARSON:

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1 Q Hello, Mr. Frank.
2 A **Hello.**
3 Q Thank you for waiting patiently
4 for the last few hours.
5 Can you remind us before we get
6 started what your title is at Yahoo Music?
7 A **My title is Head of Programming**
8 **and Label Relations.**
9 Q And also if you could remind us of
10 your job responsibilities in that position?
11 A **Sure. My job responsibilities are**
12 **to oversee daily music programming, what music**
13 **we select to play on Yahoo Music and also**
14 **responsible for all communications with record**
15 **labels, artists, management and make sure that**
16 **they are kept abreast of what we're doing and**
17 **we're aware of their priorities and business**
18 **needs.**
19 Q And tell me, what is the nature of
20 the communications that you have with the
21 record labels that you just mentioned?
22 A **We discuss individual acts and**

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1 **which acts perform well on Yahoo Music, which**
2 **ones don't, which ones are priorities, which**
3 **ones they're putting a lot of marketing effort**
4 **behind.**
5 Q And what type of people do you
6 work with at the record labels?
7 A **We work with all different levels**
8 **of individual record label personnel, mostly**
9 **the new media departments, but we also work**
10 **with label presidents, marketing, radio**
11 **promotions.**
12 Q And just generally, how frequently
13 are these communications?
14 A **Daily.**
15 Q So in your -- based upon your
16 experience interacting with the record labels
17 in your position, have you had the opportunity
18 to observe the promotional activities of
19 record companies?
20 A **Yes, I have.**
21 Q Now just a couple of background
22 questions before we move into some details.

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1 In your direct testimony you indicated that
2 before Yahoo you worked as a label manager for
3 Ignition Records?
4 A **That's correct.**
5 Q And in that position did you
6 participate in promotional activities with
7 respect to artists assigned to your --
8 A **Yes, I did. One of my job**
9 **responsibilities was in charge of radio**
10 **promotions and so I worked with independent**
11 **radio companies and radio stations attempting**
12 **to get our records played.**
13 Q Can you tell us why you submitted
14 rebuttal testimony in this proceeding?
15 A **Yes. I submitted rebuttal**
16 **testimony basically because through some**
17 **conversations, it was my understanding that**
18 **the Sound Exchange was offering viewpoints**
19 **that we had offered no promotional value to**
20 **record labels and in my daily communications**
21 **I have many communications where they find**
22 **promotional value that we provide to them on**

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1 **both our radio service and our video service.**
2 Q Now you quote Mr. Kushner here
3 right in paragraph one to the effect that
4 their promotional personnel do not spend any
5 time trying to promote to webcasters. Do you
6 agree with that statement?
7 A **No. I think that record labels**
8 **actually spend a fair amount of time promoting**
9 **to us specifically for radio airplay and that**
10 **over time that that frequency is actually**
11 **increasing, not decreasing.**
12 Q And are you in contact with
13 promotions personnel from Mr. Kushner's
14 Atlantic record label?
15 A **I'm in contact with a variety of**
16 **different people at various levels from the**
17 **president on down at Atlantic Records.**
18 Q And you also, I think quote Mr.
19 Eisenberg in here in paragraph 3. Are you in
20 contact with promotions personnel from Mr.
21 Eisenberg's Sony BMG Company?
22 A **Yes.**

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1 Q Now let's move to the first
2 section of your statement at page 3 where you
3 -- it's entitled "The Labels Promote Newly
4 Released Singles by Providing Yahoo Music With
5 Copies to Play on our Webcasting Stations."
6 In the first paragraph there, you
7 talk about the idea of servicing, companies
8 servicing services like Yahoo with product.
9 Can you explain what servicing is?
10 **A Certainly. When a radio station**
11 **plays a record, they don't actually purchase**
12 **the record. The record company actually sends**
13 **them a copy of the record, which is**
14 **traditionally called servicing. Usually, they**
15 **send it on what's called the CD Pro, and that**
16 **is when the song that they wish to promote is**
17 **actually put in such a way that it's formatted**
18 **for radio station, for example, edited for**
19 **profanity, edited for length or perhaps**
20 **remixed so that it sounds better on the radio**
21 **than it would on the actual record.**
22 **So, we receive that same servicing**

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1 **that they deliver to radio stations, so we**
2 **receive the same, same edits of the songs that**
3 **radio stations do.**
4 Q And do you have an understanding
5 of why this music is provided to you?
6 **A This music is provided to us so**
7 **that they can be able to increase the airplay**
8 **and get more promotional value out of their**
9 **artists.**
10 Q Now, you've provided some examples
11 of this type of activity or communication, I
12 think, in Exhibit 3 of 5, is that correct?
13 **A That's correct.**
14 Q Let's take a look at those. I'm
15 hoping that with some of these attachments you
16 can walk us through them and --
17 **A Sure.**
18 Q -- and just make sure we
19 understand what you've attached. Let's start
20 with Exhibit 3.
21 **A Sure.**
22 Q So, just before I have you tell us

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1 about it, I wanted to note a couple things.
2 First of all, from what looks like a John
3 Salter at, from the RCA Music Group?
4 **A Yes.**
5 Q Who's Mr. Salter?
6 **A Mr. Salter is the Director of New**
7 **Media for RCA. He actually formerly was.**
8 **He's no longer in that position.**
9 Q Okay. And I note above in the
10 original message, it says John Salter from RCA
11 Music Group, and then up above it says John
12 Salter of BMG.com.
13 **A Yes.**
14 Q Do you have any sense of what the
15 difference is there?
16 **A All, all BMG labels, whether it's**
17 **RCA, Arista or J Records, all have at the time**
18 **BMG.com email address is now their Sony-**
19 **BMG.com.**
20 Q And again, that's Mr. Eisenberg's
21 label?
22 **A That's correct.**

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1 Q So, can you just tell us what this
2 exhibit this, what this email is?
3 **A Certainly. This is -- a few years**
4 **ago, the record companies moved from**
5 **physically servicing compact discs of the CD**
6 **Pros of the radio singles into digital**
7 **servicing. So this is an example of a digital**
8 **servicing where John Salter actually sent us**
9 **a digital file, an MP3 file of the songs**
10 **specifically for promotional air play. And as**
11 **it states in the email, he said that it's**
12 **confidential, meaning that it's not intended**
13 **for any other use other than the airplay and**
14 **then as he says in the second paragraph, it's**
15 **for a post-for secured promotional audio steam**
16 **ASAP which the only use that we have for that**
17 **would be through our radio service.**
18 Q Now I note that this -- it says
19 here that -- are the Strokes a band?
20 **A That's the name of the band,**
21 **correct.**
22 Q And --

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1 A **The song is called 1251.**
2 Q I see. And it says that the album
3 is coming October 21st, but the date of the
4 email is September 2nd?
5 A **That's correct. It is traditional**
6 **for record companies and radio servicing to**
7 **solicit the song well in advance of the actual**
8 **album release date. So the only way that we**
9 **can legally be able to play the song is if the**
10 **record company actually services us the**
11 **single.**
12 Q And it says "please let me know
13 what promotion it receives and when you will
14 run it."
15 Did you do so?
16 A **Yes.**
17 Q Now let's look at Exhibit 4. Can
18 you tell me what Exhibit 4 is?
19 A **Certainly. Exhibit 4 is another**
20 **example of digital delivery. Unlike the**
21 **previous example, instead of sending the**
22 **actual digital file, they send us a secure**

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1 **link to a file that we can then download from**
2 **the record label's website to be able to**
3 **obtain the song for radio airplay. In this**
4 **particular instance, Epic Records, who is**
5 **delivering the song delivers us also some**
6 **information on how they feel the song is**
7 **potentially going to do in the marketplace to**
8 **encourage our additional promotion of the song**
9 **through our radio service.**
10 Q And so is this a type of
11 communication that you received on a regular
12 basis?
13 A **Yes, we received this for almost**
14 **every song that they release.**
15 Q And Exhibit 5, looking at that, is
16 another example of that?
17 A **That's correct.**
18 Q And is it the case that there are
19 examples of this apart from what you've chosen
20 to include in your statement as examples?
21 A **Yes. There's numerous examples of**
22 **this. In this particular instance, both Epic**

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1 **and Columbia, both Sony labels, deliver**
2 **singles to us in this fashion.**
3 Q The next section in your testimony
4 is headlined "the labels seek to have songs
5 market tested on Launchcast" on page 4.
6 Before we look at some of the
7 examples that you've provided there, can you
8 give us a general sense of what market testing
9 on Launchcast involves?
10 A **Certainly. Well, in some**
11 **instances, record labels want to actually test**
12 **the validity of a particular song in the**
13 **marketplace before they actually release the**
14 **song to know that their investment is actually**
15 **going to be successful.**
16 **In the past, they had done so**
17 **through what is known as call out research**
18 **where they submit it to somebody who plays 20**
19 **to 30 seconds of the song, asks a group of**
20 **several hundred people what they think of the**
21 **song and then utilize that information to make**
22 **commercial judgments.**

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1 Q I'm going to jump in there. Are
2 you talking about in the terrestrial radio
3 sense?
4 A **I'm talking about in the**
5 **terrestrial radio sense. Actually, this is**
6 **not offered by terrestrial radio. It's**
7 **companies that work with terrestrial radio**
8 **stations.**
9 **We began, since we saw that our**
10 **user feedback in our customized radio stations**
11 **allowed us deeper penetration with our users,**
12 **that we were getting that feedback a lot**
13 **faster than these traditional outlets of**
14 **research. And so we began in our partnerships**
15 **with record labels to examine actually**
16 **delivering the same research for them.**
17 **And so we began offering testing**
18 **to various record labels to allow them the**
19 **opportunity to try out new songs in front of**
20 **a mass audience, using our customized radio**
21 **service to test out the validity of those**
22 **songs in the marketplace.**

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1 Q Now what sort of information do
2 you provide to the labels?
3 **A We provide just general**
4 **information on how well either the song has a**
5 **potential to succeed or how poorly the song**
6 **might have been received by the public.**
7 **Occasionally, if we get enough**
8 **information, we might provide additional**
9 **information on age groups that seem to like**
10 **the song.**
11 Q And just how is that, that
12 feedback measured when you say whether it will
13 succeed or whether it won't. How --
14 **A We measure the feedback through**
15 **the customized radio stations. People have an**
16 **opportunity to rate the song on a scale of**
17 **zero to four stars. So the more people that**
18 **rate it four stars, the more that we find it**
19 **has potential success in the marketplace.**
20 **People also have the opportunity**
21 **to skip the song so that they can actually**
22 **move on to the next song. This allows us to**

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1 **measure some negative impact. The more people**
2 **that skip the song, the more likely the song**
3 **is not going to have success in the**
4 **marketplace.**
5 Q Now do you use that information to
6 inform your own decisions about --
7 **A That's correct. That's how we**
8 **determine our regular daily radio programming.**
9 Q And does it inform other aspects
10 of your programming, video or --
11 **A Video programming operates in the**
12 **same way, but video ratings are in their own**
13 **silo. Radio ratings are in a separate**
14 **category.**
15 Q So again, I understand from your
16 testimony that you've provided us with some
17 examples of this testing phenomenon.
18 Can you turn to Exhibit 6, please?
19 Now just generally, before we get
20 into details, can you just identify what this
21 chain of emails is?
22 **A Certainly. This is a**

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1 **communication that I had after a presentation**
2 **with Warner Brothers Records where in the**
3 **presentation we began to discuss the idea of**
4 **potentially doing music testing and they came**
5 **to us for one of their artists, asking us if**
6 **we would participate with that artist on**
7 **testing that artist's music.**
8 Q So is it correct, looking at this,
9 that it's in reverse order, essentially the
10 first email in the conversation is at the
11 bottom of page 2?
12 **A That's correct.**
13 Q So let's look at that. And this
14 is a message, just correct me if I'm wrong,
15 from Jennifer Bird?
16 **A Yes.**
17 Q And who is Jennifer Bird?
18 **A Jennifer Bird is a new media**
19 **director at Warner Brothers Records.**
20 Q And it's to Jennifer Smith or
21 Smythe?
22 **A Jennifer Smythe. Yes, she's a**

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1 **radio programmer on my staff. At the time,**
2 **she was the head of radio programming.**
3 Q So what do we see here in this
4 bottom email?
5 **A The bottom email shows Jennifer**
6 **communicating to us after our presentation**
7 **that she wished to actually test as soon as**
8 **possible the validity of two different songs**
9 **by an artist by the name of ZWAN. She copied**
10 **on that email both Phil Costello, who is the**
11 **head of radio promotions for the record label**
12 **at the time and Eric Fritschi who was the**
13 **marketing manager for that particular act at**
14 **the time.**
15 **And so the communication basically**
16 **follows through on the steps that we took to**
17 **put the songs into our radio service and that**
18 **since at the time this was a new offering for**
19 **us, took a little bit longer and as you can**
20 **kind of see by the end, they're requesting the**
21 **information the sooner the better because they**
22 **really felt that this information would have**

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1 **a significant impact for their marketing**
2 **efforts.**
3 Q Well, tell me about that. There's
4 communication back and forth about the testing
5 data and then it says the sooner the better on
6 ZWAN, as we are working on picking the next
7 single ASAP?
8 **A That's correct.**
9 Q Do you have an understanding of
10 the connection between the testing data and
11 picking the single?
12 **A Well, they were hoping that our**
13 **information would actually give them valid**
14 **information to make a more educated, better**
15 **choice into which direction their marketing**
16 **efforts should go in.**
17 Q And maybe to step back one second,
18 what does it mean to pick the next single?
19 **A Well, the record companies focus**
20 **on one particular song, basically making sure**
21 **that that song then has mass exposure so then**
22 **that would hopefully sell as many records as**

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1 **possible. If different radio stations and**
2 **different online outlets play too many**
3 **different songs, there's not enough consensus**
4 **and it's very difficult for the artist to**
5 **achieve familiarity and therefore sales. So**
6 **they concentrate on one song and have**
7 **everybody focus their energies on playing one**
8 **song in order to be able to maximize record**
9 **sales.**
10 Q Let's take a look at Exhibit 7.
11 Again, this is one that sort of works its way
12 up from the bottom of page 3 up to the
13 beginning in reverse chronological order.
14 So the first message, correct me
15 if I'm wrong here is down at the bottom of
16 page 2 from Doug Barasch, is that right? From
17 March 21st?
18 **A Yes.**
19 Q Who is Mr. Barasch?
20 **A Doug Barasch is a manager of New**
21 **Media at Epic Records.**
22 Q And is he someone that you deal

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1 with on a regular basis?
2 **A Yes, I deal with both him and Cory**
3 **Llewellyn who is the VP of New Media who is**
4 **also on this communication.**
5 Q Okay. She's cc'd there?
6 **A That's correct.**
7 Q And the subject line of this email
8 is Natasha Assets. Who is Natasha?
9 **A Natasha is an artist named Natasha**
10 **Benningfield who is a British artist that Epic**
11 **Records released least year.**
12 Q And just tell me, the first line
13 of this email says "I sent you another press
14 packet that includes Natasha's CD, the U.S.
15 single remix and a compilation tape."
16 **A Yes.**
17 Q Do you have an understanding of
18 what the U.S. single remix was?
19 **A Yes. What happens is that this**
20 **was the version of the song that they plan to**
21 **release to radio and so a remix is a term that**
22 **they basically said that they went and changed**

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1 **certain aspects of the song in order to make**
2 **it more palatable for U.S. radio, since it was**
3 **a British artist, they wanted to make it more**
4 **U.S. sounding.**
5 Q Okay. Now up in the -- at the top
6 of this page, top of page 2, there's an email,
7 actually carries over from the bottom of page
8 one.
9 **A Yes.**
10 Q Mr. Barasch says "can you let us
11 know when you will be able to plug the U.S.
12 remix into Launchcast." Do you know whether
13 that's a reference to Launchcast radio
14 products?
15 **A Yes. The intention of this email**
16 **at the start was they solicited the artist**
17 **through a promotional package that a lot of**
18 **information on the artist, both the music, the**
19 **image and at the time there was no music video**
20 **ready, so in order to be able to start**
21 **awareness and start promotion for the artist,**
22 **they were looking for airplay on a radio**

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1 **service and this had just begun to go to U.S.**
2 **radio, so it had not had significant traction.**
3 **So they were looking for us to be able to**
4 **start the story through our radio service.**
5 Q I just want to ask, if we go back
6 to the first page of Exhibit 7, there's an
7 email that's a little later in the chain where
8 it appears that Cory Llewellyn jumps in. She
9 says "we really need you guys on this. Once
10 it tests well, I would really like to talk
11 about how to partner together on making this
12 as big as we did Franz."
13 Do you know who Franz is?
14 **A Franz is the act Franz Ferdinand**
15 **which was an act that we had done -- a new act**
16 **that we done very successful with two years**
17 **prior with the same record label.**
18 Q And she says "I spoke to Donnie in
19 the label meeting today to let them know you
20 were going to be playing it before a radio."
21 Who is Donnie?
22 **A Donnie is Donnie Einer who is the**

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1 **former chairman of Sony Music and was chairman**
2 **at the time.**
3 Q So do you know whether people at
4 that level in the record labels are generally
5 provided knowledge of your activities?
6 **A Yes. The chairman and the**
7 **presidents of the record labels are very**
8 **abreast in what we're doing on the radio**
9 **service, especially with new artists that they**
10 **have a keen interest in. They really are**
11 **wanting to make sure that the story develops**
12 **and in many cases they look to -- they look to**
13 **on-line outlets like us to make sure that we**
14 **are playing the record first because they know**
15 **that they are going to have a difficult time**
16 **getting the record played on terrestrial**
17 **radio.**
18 Q And is that when you call out in
19 your testimony this phrase that -- where it
20 says "to let him know you were going to be
21 playing it before radio" -- is that what
22 you're talking about?

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1 **A Yes, that's correct.**
2 Q Now we'll try to move quickly here
3 without going through everyone in detail, but
4 let's look at Exhibit 8.
5 **A Yes.**
6 Q Let's look down again to the
7 bottom which I assume is the first email
8 exchange.
9 **A Yes.**
10 Q This is from a Peter Gray.
11 **A Yes.**
12 Q At Sony BMG?
13 **A Yes.**
14 Q Who is Mr. Gray?
15 **A Peter Gray is the vice president**
16 **of Pop Promotion for the RCA Records Group.**
17 Q And the subject line is Paula
18 Deanda testing. Paula Deanda is a recording
19 artist?
20 **A That's correct.**
21 Q And just tell us what, in this
22 bottom email, what happened there?

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1 **A We had had success with the first**
2 **song from Paula Deanda and it helped her sell**
3 **her first 100,000 records through a variety of**
4 **promotions and they were looking, since our**
5 **audience had already expressed an affinity to**
6 **her, they were looking to utilize the**
7 **information from our audience to be able to**
8 **find and determine the second single that they**
9 **could then be able to promote to radio**
10 **stations. And so they gave us a list of a**
11 **variety of songs from her album and asked us**
12 **which songs might actually be the ones that**
13 **would achieve better success through her**
14 **audience and her fans.**
15 Q And so am I correct, there's a
16 list of five songs here on the next page?
17 **A That's correct.**
18 Q That you were given?
19 **A Yes.**
20 Q And there's a question after that
21 where it says is it possible to see results
22 prior to a world-wide label presentation on

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1 Friday, 9/15? Do you recall whether you were
2 able to give them those results?
3 A **In this particular instance, we**
4 **were unable to give them the results in time,**
5 **but yes, the phone conversations that I had in**
6 **relation to this email definitely suggested**
7 **that they wanted us to get the information as**
8 **quickly as possible so that we could -- they**
9 **could be able to trumpet the success in their**
10 **worldwide meetings.**
11 Q Now just a couple of quick
12 questions on Exhibit 9. Again, this is from
13 a Richard Palmese at Sony BMG to you?
14 A **Yes.**
15 Q Someone named Clive Davis is cc'd
16 on the email. Could you tell us who Clive
17 Davis is?
18 A **Clive Davis is the chairman of the**
19 **RCA Music Group.**
20 Q And the subject of this is Mario
21 Vasquez. Who is Mario Vasquez?
22 A **Mario Vasquez is an artist on a**

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1 **record label who is a former American Idol**
2 **contestant.**
3 Q Now in the third line of this
4 email, it says "Yahoo was an early supporter
5 and now five months in our campaign, the
6 single is breaking in a big way as we get
7 ready to release the album."
8 Can you just tell us what Yahoo
9 did with Mr. Vasquez' record?
10 A **Sure. We did testing of Mario's**
11 **record prior to it being released at Radio.**
12 **And we also worked with him at various stages**
13 **of the campaign, knowing that this was a major**
14 **prior from Clive Davis on the entire company**
15 **that we made sure that the artist continued to**
16 **have visibility, both within the first, within**
17 **the radio player and then eventually on the**
18 **video, to make sure that the artist had as**
19 **fair a chance of being promoted well due to**
20 **the priority from the top.**
21 Q Let's look at a couple more here.
22 Let's skip ahead to Exhibit 10, if we could.

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1 Now this is -- again go to the bottom. This
2 is an email from someone named Lynnete
3 Garbonola.
4 A **Yes.**
5 Q Who is Ms. Garbonola?
6 A **She's a director of New Media for**
7 **Warner Brothers Nashville.**
8 Q And is Ms. Garbonola someone that
9 you correspond with regularly?
10 A **Yes.**
11 Q And who is Ray Scott?
12 A **Ray Scott is a new country artist**
13 **that they released last year.**
14 Q Okay. Now just tell us what the
15 bottom email is, if you could?
16 A **The bottom email again she's**
17 **communicating through the president of the**
18 **record label who is the bill that's referenced**
19 **in the first paragraph that her and the**
20 **president wanted us to test out the new artist**
21 **again. They were having difficulty in**
22 **convincing radio programmers that this artist**

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1 **was viable and so they were looking for us to**
2 **create some positive information so that they**
3 **could be able to generate some success and**
4 **promotional awareness for this artist.**
5 Q And it appears in the second
6 paragraph that you were sent some tracks that
7 they -- it says here, they considered
8 potential single contenders on the album?
9 A **That's correct.**
10 Q And so what was it that you did
11 with those tracks?
12 A **We took the tracks and we placed**
13 **them in our radio service and began playing**
14 **them and soliciting research information to**
15 **gauge the success of the artist.**
16 Q Let's take a look at the top
17 email. This is another email from Ms.
18 Garbonola a little later in the chain.
19 In the second paragraph, she says
20 "hey, what if we sell the digital single
21 exclusively on your new store when it
22 launches?"

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1 Do you know what that means?
2 A **Yes. This testing happened right**
3 **around the time that we actually launched our**
4 **digital music store and she was looking for**
5 **additional ways to be able to also promote the**
6 **artists and so she was thinking that**
7 **potentially offering an exclusive download**
8 **might help increase awareness and help out on**
9 **the radio promotions front.**
10 Q And did you have to provide them
11 with anything in return for having that offer
12 of an exclusive single?
13 A **No.**
14 Q Let's take a look at Exhibit 11.
15 And once again, look at the bottom email. I
16 think this is just one page here. It was an
17 email from Robin Bechtel.
18 Who is Robin Bechtel?
19 A **She's the head of New Media at**
20 **Warner Brothers Records.**
21 Q And this email is one you
22 received, I gather?

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1 A **Yes.**
2 Q Who is Bonnie McGee?
3 A **Bonnie McGee was a new artist that**
4 **we had done testing with that had a phenomenal**
5 **response rate on our radio service and had**
6 **done extremely well in generating a lot of**
7 **interest in our audience.**
8 Q And when it says "Bonnie is number
9 two on Launchcast" is that a radio ranking?
10 A **That's specifically referring to**
11 **the radio service.**
12 Q And then it says "Jay, can you get
13 us any detailed research on this?"
14 Did you, in fact, provide some
15 research to them?
16 A **Yes, we actually put together some**
17 **extensive research since it was a new artist**
18 **that was a top priority for them. Radio was**
19 **unwilling to play the record, yet it was a**
20 **very big success for us. So they were looking**
21 **to -- for us to gather research that they**
22 **could use then on radio stations and help them**

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1 **convince them that they should be playing the**
2 **record as well.**
3 Q I notice at the top it says --
4 again, this is from Ms. Bechtel to David
5 Goldberg. David Goldberg is a Yahoo
6 executive?
7 A **Yes.**
8 Q It says "she's artist of the month
9 in November"?
10 A **Yes.**
11 Q What does that mean?
12 A **Because we had had about four to**
13 **five months seeing her have success in the**
14 **radio player and then after the radio player**
15 **it went to success in the video player as**
16 **well. We decided to actually place her in a**
17 **top new artist program that we had to make**
18 **sure that we could achieve maximum visibility**
19 **in our efforts to be able to try to make her**
20 **a success.**
21 Q Was the decision to make artist of
22 the month informed by the feedback you got

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1 from the radio player?
2 A **That's correct.**
3 Q Now while we're on the subject of
4 Ms. McGee, I think you have provided us with
5 some other examples later in your testimony.
6 A **Yes.**
7 Q That deal with Ms. McGee. Let's
8 jump ahead to Exhibit 17. I need to find it.
9 Now can you just tell us what
10 Exhibit 17 is?
11 A **Exhibit 17 was the record label**
12 **actually providing us information from the**
13 **artist's website where people were informing**
14 **them that they were becoming fans of Bonnie**
15 **McGee through the airplay that they were**
16 **receiving on Yahoo Music.**
17 Q So in the bottom here, just so
18 we're clear what this is, where it says "from
19 the site of Bonnie McGee", the subject is an
20 email from Bonnie McGee and then below it
21 looks like there's an email embedded in that
22 with someone saying I'm getting your CD

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1 today."
2 A **Yes.**
3 Q Can you just again explain what
4 that is?
5 A **This is a fan who's posting a**
6 **message on the artist's website and then the**
7 **person who was at the website in turn**
8 **forwarded it to the New Media executive and**
9 **this fan is basically talking about that**
10 **they're purchasing the CD because of the**
11 **airplay they received on Launch which is the**
12 **former name of Yahoo Music.**
13 Q All right. And Exhibit --
14 JUDGE ROBERTS: Was this email in
15 your original testimony?
16 THE WITNESS: I don't recall if it
17 was or not. I'm not sure.
18 This particular artist is actually
19 a pretty strong example that we've used. As
20 a matter of fact the research that we
21 mentioned is actually has since been published
22 in the book The Long Tail which has now become

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1 a very industry standard book on how to market
2 entertainment in the new digital age.
3 BY MR. LARSON:
4 Q Exhibit 18 is another example of a
5 user or a visitor to Ms. McGee's website?
6 A **That's correct.**
7 Q And just tell us -- it says "where
8 did you discover Bonnie? Launchcast Radio on
9 Yahoo.com?"
10 A **Yes.**
11 Q So that's a comment that would
12 have come from a user?
13 A **That's correct.**
14 Q Forwarded on to you from Mr.
15 Watson at Warner Reprise?
16 A **That's correct.**
17 Q Now you have another section in
18 your testimony. Let me go back to that. It's
19 on page 7. It says the labels send Yahoo
20 Music information about their artists in an
21 effort to increase the play of their songs and
22 our webcasting play rotations.

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1 What sort of information are you
2 talking about here that they send you?
3 A **They let us know information on**
4 **whether the press is giving the record**
5 **favorable reviews, are other radio stations**
6 **playing it or other video stations playing it?**
7 **Are they receiving a lot of statistics,**
8 **positive statistics on other websites,**
9 **basically just information that will encourage**
10 **us to potentially increase the amount of**
11 **airplay we might give it on our radio**
12 **services.**
13 Q And why is it important to know
14 whether other outlets are playing it or not,
15 radio stations or video outlets?
16 A **This is more of a traditional form**
17 **of marketing that they've done in years past**
18 **of radio, it's of less value to us because the**
19 **user reactions and the customized stations**
20 **influence us far greater than the external**
21 **airplay, but it is still important to know**
22 **what else is happening with the record just in**

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1 **case we miss something because there is a lot**
2 **of records that we have to deal with on a**
3 **regular basis.**
4 Q Let's look at Exhibit 12 that you
5 reference in this section. This is an email
6 from someone named Janet Stampler to you, is
7 that correct?
8 A **Yes.**
9 Q Who is Ms. Stampler?
10 A **Ms. Stampler was a vice president**
11 **of New Media at the time.**
12 Q And that's at Atlantic?
13 A **Yes.**
14 Q That's Mr. Kushner's --
15 A **That's correct.**
16 Q Company. Cam you just tell us
17 what's happening here in this email. Who is
18 Shine Down?
19 A **Shine Down is a rock band that**
20 **they had signed to the record label.**
21 Q I see in the second paragraph it
22 says what can we do together to make this

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1 bigger and better on the greatlaunch.com?
2 What did you do?
3 A **We had started to see that it was**
4 **generating some interest and generating some**
5 **sales from our radio airplay, so they were**
6 **encouraging us to actually increase the radio**
7 **and video airplay to make sure that the artist**
8 **was a lot more visible to our users.**
9 Q And you did so?
10 A **Yes, we did.**
11 Q Let's look at Exhibit 13. Now
12 again, this is from Ms. Stampler?
13 A **Yes.**
14 Q And this was sent to you among
15 other people?
16 A **Yes.**
17 Q Who is Sean Paul?
18 A **Sean Paul is a pop reggae artist**
19 **on Atlantic Records.**
20 Q And it says here, "please let my
21 enthusiasm" -- I'm looking at the third line
22 down -- "Please let my enthusiasm inspire you

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1 to step out even further in support of this
2 single, Get Busy, and the video for the same?
3 A **Yes.**
4 Q What do you understand the request
5 with respect to the single to be?
6 A **She was basically making sure that**
7 **we were paying equal attention to increasing**
8 **the promotions of both the music video as well**
9 **as the song in our radio service so in that**
10 **particular instance, the single is referring**
11 **to the push of the song on the radio service.**
12 Q Now the final section of your
13 testimony, it's headlined "the labels credit
14 Yahoo's webcasting service with a number of
15 promotional successes"?
16 A **Yes.**
17 Q And you say in paragraph 18 that
18 you've received a number of communications
19 from promotional personnel, explicitly stating
20 how much they appreciate the positive
21 promotional impact that exposure on our
22 webcasting service has for their artists.

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1 Did you provide some examples of
2 this?
3 A **Yes.**
4 Q Let's take a look, Exhibit 19, I
5 believe? Can you just tell us what we see in
6 Exhibit 19?
7 A **This email came from Warner**
8 **Brothers Nashville, the afternoon after the**
9 **first week's sales numbers came in for an**
10 **artist that we had had tremendous success with**
11 **by the name of Cowboy Troy and this artist had**
12 **very minimal radio airplay and was highly**
13 **successful for us on both radio and video and**
14 **so the record label was saying thank you**
15 **because they were crediting us and our airplay**
16 **for a lot of the artist's success in sales.**
17 Q This one here, I see this email is
18 actually from Jenny Smythe. Did she move from
19 Yahoo to Warner Brothers?
20 A **She left my staff to go become the**
21 **director of New Media for Warner Brothers**
22 **Nashville.**

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1 Q And I think this will be the last
2 one we'll take a look at, but let's look at
3 Exhibit 20.
4 A **Yes.**
5 Q This is from a Nikke Slight?
6 A **Yes.**
7 Q And she's from Atlantic?
8 A **That's correct.**
9 Q This was sent to you?
10 A **Yes.**
11 Q And just give us a sense of what
12 this email chain involves?
13 A **This was done shortly after we had**
14 **started doing a lot of work with the band**
15 **Shine Down which we had referenced previously.**
16 **We had started to see increases in the**
17 **audience success and increases in our airplay**
18 **and they coincided with some sales success**
19 **that the record was having and so we were**
20 **starting a dialogue with them to ascertain to**
21 **what degree our airplay was actually**
22 **contributing to the sales success and they**

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1 **felt that it definitely contributed to a**
2 **significant degree of success for that**
3 **particular record.**
4 Q Mr. Frank, let me just ask you,
5 what's your takeaway from these examples that
6 you've provided here in terms of the value of
7 webcasting airplay?
8 **A Well, through these examples, as**
9 **well as my regular contacts, the record labels**
10 **continually look to us to provide value with**
11 **our radio airplay. They are constantly**
12 **looking for us in terms of guidance as to the**
13 **decisions that they should make, as well as**
14 **the value that our promotional aspects have in**
15 **order to be able to generate sales from the**
16 **radio airplay and specifically, the**
17 **information and the customization that they**
18 **can get from our customized radio stations.**
19 Q Let me ask you, do you ever do
20 promotions that actually exclude the song from
21 webcasting stations?
22 **A We do not do promotions that**

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1 **exclude the song although the user has the**
2 **opportunity to exclude the song that they're**
3 **choosing.**
4 Q But generally, when you choose to
5 promote a song by running the video or
6 featuring them as artist of the month, does
7 that include play for the artist on the radio
8 stations as well?
9 **A That would be correct. If we do a**
10 **large scale promotion, radio airplay is an**
11 **absolute must as part of that promotion.**
12 Q Has anyone from the record labels
13 ever suggested to you that they don't want you
14 to play songs in Launchcast because they fear
15 that that airplay would jeopardize record
16 sales?
17 **A I've never had that said to me.**
18 MR. LARSON: I have no more
19 questions.
20 JUDGE ROBERTS: Mr. Frank, maybe
21 you can help me understand this promotion
22 business. I think I've heard your testimony

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1 and please correct me if I'm incorrect that
2 the record companies by virtue of giving Yahoo
3 free CDs, by virtue of getting in contact with
4 Yahoo to run these different programs to
5 promote different artists, ultimately that's
6 probably going to result in the record
7 companies being able to sell more records,
8 correct?
9 THE WITNESS: That's correct.
10 JUDGE ROBERTS: Okay, by the same
11 token, Yahoo is getting a benefit from this as
12 well, are they not? First off, you're getting
13 a free CD?
14 THE WITNESS: Yes.
15 JUDGE ROBERTS: You're also
16 presumably by running these different
17 promotional programs, hoping, I guess, to
18 encourage either more subscribers or more
19 listeners being attracted to the music so that
20 they come to your site and they see the
21 advertising that you have up there. And
22 perhaps they buy some things while they're on

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1 the Yahoo site. Is that correct?
2 THE WITNESS: Well, actually, can
3 you rephrase that again? Can you restate that
4 again?
5 JUDGE ROBERTS: Sure.
6 THE WITNESS: I just want to make
7 sure I get it right.
8 JUDGE ROBERTS: I was focusing on
9 the Yahoo side of the equation now that there
10 are certain things from these different sound
11 recordings being performed on Yahoo that Yahoo
12 benefits from.
13 THE WITNESS: Yes.
14 JUDGE ROBERTS: One being free
15 CDs?
16 THE WITNESS: Yes.
17 JUDGE ROBERTS: Another being that
18 you're attracting listeners to the Yahoo site
19 to hear these artists that are being played.
20 THE WITNESS: Yes.
21 JUDGE ROBERTS: And to listen to
22 the music. So there are certainly benefits to

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1 Yahoo by playing this music.
2 THE WITNESS: And most of the
3 instances that we are talking about, we are
4 talking about new artists which in nearly
5 every case, our audience does not have an
6 immediate desire to consume. They mostly want
7 to be consuming music that they are familiar
8 with.
9 There's a small subset of new
10 artists that the record labels produce that do
11 provide us a tremendous amount of benefit as
12 you discussed. The majority of new artists
13 though are not necessarily so successful that
14 they are an automatic benefit to our audience.
15 There has to be a lot of convincing. And the
16 record companies place the bulk of their
17 promotional priorities on these new artists
18 and they also want to make sure because there
19 are hundreds of artists that we receive every
20 single week. They want to make sure that
21 their artists get promoted over another record
22 label's artists. What makes their record

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1 better than somebody else's record. So they
2 hope that they get better research from us, so
3 in that way it plays more on our radio service
4 so that they can be able to receive the
5 benefits versus their competition.
6 And for us, it doesn't really
7 matter. If we wanted to move forward on the
8 best business possible, we'd probably play
9 only the top 5 to 10 percent that are
10 automatics of the new artists. We probably
11 wouldn't play the other 90 percent because the
12 audience doesn't really have to have that
13 music. But we feel that in the spirit of our
14 partnership and in the spirit of actually
15 being able to work together and collaborate as
16 both an industry as well as music fans that we
17 want to do the best that we can for those new
18 artists and hence, this is where this dialogue
19 comes from.
20 JUDGE ROBERTS: It seems to me
21 that for promotional value to outweigh the
22 value to Yahoo,

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1 There has to be some way to
2 quantify it. You have to be able to say okay,
3 the record companies are getting a lot more in
4 value than we get and you have to quantify
5 that. Is there any way that you can quantify
6 how much more they are getting than how much
7 more you're getting from playing those --
8 THE WITNESS: There's -- there are
9 ways to quantify. We can look at potentially
10 isolated cases where we are absolutely the
11 only outlet on a record and then look to see
12 how much it sells in a particular week, based
13 on the amount of promotion that we give.
14 But what we found is is that the
15 tastes for music vary widely. There are some
16 artists that we promote that the record
17 company asks us to promote that generate no
18 sales because the audience doesn't like it.
19 Then there are other artists that
20 generate so much that not only does it
21 generate a lot of sales of physical CDs,
22 digital downloads, ring tones, master tones,

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1 ring backs, that they then are able to take
2 that information and knowing now that we've
3 built a reputation within the industry as
4 being a bell weather for new music because of
5 this strength of our audience and
6 relationship, they can then take that
7 information sell it to a radio station to
8 convince them to play a record more. And then
9 they go and play the record more and then the
10 record sales continue to increase.
11 And had we not actually started
12 that chain, then the record very well may die
13 flat on the vine and never actually receive
14 anything. So it can run the gamut. It
15 depends on the actual quality of the music and
16 the potential audience that it can reach.
17 JUDGE ROBERTS: I hear your
18 testimony to be focused on what the record
19 companies can sell and I'm wondering how you
20 factor in what the benefit is to you and if
21 you can subtract that, then you have an
22 absolutely value that yes, one side is clearly

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1 getting more than the other and here is the
2 value and then that's something to work with.
3 Can you offer anything that would
4 define that value and quantify it?
5 THE WITNESS: In an actual dollar
6 amount? I don't think that I could offer a
7 specific dollar amount to that.
8 JUDGE ROBERTS: What then could
9 you offer in terms of defining or quantifying
10 that value?
11 THE WITNESS: Well, I think it has
12 always been our intention that the work that
13 we've done, I've been within Yahoo for six
14 years and the work that we've done at Yahoo,
15 the intention has always been that this value
16 that we are providing for their new artists,
17 which are their top priority, which are the
18 drivers for their future growth of their
19 business, was going to be so successful that
20 we would be able to receive consideration in
21 kind.
22 And I think one of the reasons why

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1 we're here today is because we are certainly
2 feeling that while we have received some
3 considerations, for example, they do provide
4 us access to some of their artists to perform
5 on some of our programming, that we still have
6 not actually received adequate enough
7 consideration although I can't specifically
8 put a dollar amount or an exact figure on what
9 that is because it can be variable and in some
10 cases it's variable in the record labels.
11 JUDGE ROBERTS: So you really
12 can't put a number on it?
13 THE WITNESS: I can't. I haven't
14 studied it to put an exact dollar figure on
15 it. I could make guesses to say that we have
16 provided the labels millions of dollars in
17 value that we have not necessarily received
18 all of it in return, but that would be just
19 speculative and would not be an exact number
20 that I could give you.
21 JUDGE ROBERTS: thank you.
22 CHIEF JUDGE SLEDGE: Ms. Ryan, any

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1 questions?
2 MS. RYAN: No questions.
3 CHIEF JUDGE SLEDGE: Mr. Taylor?
4 MR. TAYLOR: No questions, Your
5 Honor.
6 CHIEF JUDGE SLEDGE: Mr. Freedman?
7 MR. FREEDMAN: Yes, Your Honor.
8 CROSS EXAMINATION
9 BY MR. FREEDMAN:
10 Q Good afternoon, Mr. Frank. I'm
11 Jared Freedman and I'll be asking you some
12 questions on behalf of Sound Exchange today.
13 I think I'll be pretty brief.
14 **A Okay.**
15 Q Now you've testified that Yahoo
16 Music offers record companies several ways to
17 publicize or promote artists or songs, right?
18 **A That's correct.**
19 Q For example, Yahoo Music plays
20 music videos?
21 **A That's correct.**
22 Q And it has features on the Yahoo

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1 Music home page like Who's Next?
2 **A That's correct.**
3 Q And that was, I think, in one of
4 the emails that we saw earlier today from you,
5 is that correct?
6 **A I believe so, it's very likely.**
7 Q And there are other features such
8 as Live at Yahoo Music, isn't that right?
9 **A Yes.**
10 Q And several other features that
11 you offer?
12 **A That's correct.**
13 Q And those help promote artists and
14 songs, is that your testimony?
15 **A Yes, they also help as well.**
16 Q And Yahoo Music also offers things
17 like live performances and interviews with
18 artists, isn't that correct?
19 **A Yes, those live performances are**
20 **within the scope of the programs you just**
21 **mentioned.**
22 Q And it's your testimony that the

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1 record companies are interested in all of
2 these opportunities, right?
3 A **That's correct.**
4 Q And it's fair to say that the
5 interest in several of those kinds of
6 opportunities is reflected in some of the
7 emails you looked at on your direct exam,
8 isn't that correct?
9 A **Yes, some of the emails that are**
10 **here in addition to the radio airplay**
11 **promotional value, they do reflect the**
12 **promotional value of some of our other**
13 **programs as well.**
14 Q You testified that the record
15 companies send audio tracks to Yahoo Music,
16 isn't that right?
17 A **That's correct.**
18 Q And you'd agree when a record
19 company sends Yahoo an audio track and when
20 Yahoo then plays that track, the record
21 companies are paid a royalty, isn't that
22 right?

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1 A **That's correct.**
2 Q So that's one incentive for the
3 record companies to send you those tracks,
4 isn't it?
5 A **That would be an incentive,**
6 **certainly where they would receive no money if**
7 **we did not have the music to play.**
8 Q And you would agree that one of
9 the reasons the record companies encourage you
10 and others at Yahoo Music to listen to the
11 music they send you is that they may want to
12 pique your interest in a particular song or a
13 particular band?
14 A **Yes.**
15 Q And one reason they want to pique
16 your interest is that Yahoo Music might select
17 that artist or that song for inclusion in one
18 of the special features we talked about?
19 A **Their hope is that potentially you**
20 **could get into a special feature, but at the**
21 **same time they know the value of our regular**
22 **radio and video airplay as well.**

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1 Q And another reason that the record
2 companies might -- excuse me. Another reason
3 that the record companies send you these audio
4 tracks is that they want Yahoo to test them.
5 Isn't that your testimony?
6 A **Yes, that's correct.**
7 Q Now there's no statute that
8 requires Yahoo to provide that testing
9 information to record companies is there?
10 A **No, there's not.**
11 Q So the testing that you discussed
12 in your written rebuttal statement isn't
13 covered by the compulsory license that is at
14 issue in this case, right?
15 A **It's not required by the**
16 **compulsory license, but the airplay that is**
17 **involved within the testing is covered by the**
18 **compulsory license.**
19 Q The testing itself, you're not
20 required to test?
21 A **No, we are not required to test**
22 **music.**

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1 Q And it's fair to say, in fact,
2 Yahoo Music provides the testing information
3 to the record companies on a voluntary basis,
4 right?
5 A **Yes.**
6 Q And it's your testimony that
7 testing information is valuable to the record
8 companies, right?
9 A **That is correct.**
10 Q And do you have written agreements
11 with them for the testing?
12 A **No, we do not.**
13 Q How is it done?
14 A **It's done through email and phone**
15 **communications. And it's done on a per case**
16 **basis. Right now, we don't have the resources**
17 **to roll it out on an automatic basis, so we**
18 **provide testing as our time allows us to.**
19 Q And in exchange for providing
20 copies of their recordings to Yahoo, the
21 record companies in those instances get the
22 testing information back from you, right?

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1 A **That is correct.**
2 Q Does money change hands ever in
3 these testing arrangements?
4 A **My understanding is that the**
5 **record company would receive royalties from**
6 **songs played within the testing program.**
7 Q I actually meant something else
8 which is do you charge the record companies
9 for the test information provided to them?
10 A **No, we don't.**
11 Q It's also your testimony, isn't it
12 that the testing information is valuable to
13 Yahoo, right?
14 A **The testing information --**
15 **research information is valuable to us for**
16 **regular radio airplay. Testing and**
17 **determining what songs are better than others**
18 **can have some value to us, but has more value**
19 **to the record labels because that aids in**
20 **their marketing efforts whereas for us, in**
21 **general, the focus and the best response**
22 **always occurs with the song that is going to**

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1 **be mass marketed by the record label.**
2 Q And my question isn't so much one
3 of comparison, it's whether there's value to
4 Yahoo received from this testing?
5 A **There is some value, yes.**
6 Q And isn't it true that through the
7 testing, Yahoo Music can identify artists,
8 their songs that it might want to feature on
9 its home page or on one of its featured
10 programs?
11 A **Through the testing, we can**
12 **certainly be able to identify other artists**
13 **that we might be able to feature, as well as**
14 **be able to help record companies make better**
15 **and more informed decisions on which artists**
16 **they should be focusing their efforts on.**
17 Q I'm not sure I understood your
18 answer. What I'm wondering is isn't it true
19 that Yahoo Music can use the testing
20 information for itself to figure out what
21 artists it might want to use in an advertising
22 or what artist it might want to use in a

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1 feature on its website. Isn't that true?
2 A **That research can come into play**
3 **for those instances, yes.**
4 Q And you, when you put up those
5 features on your website, you're trying to
6 feature artists that you think will draw
7 people to your website, right?
8 A **As well as emphasizing diversity**
9 **at the same time, yes.**
10 Q Well, ultimately, isn't it your
11 goal to get people to come to your site and
12 stay there?
13 A **Yes, the goal is to get people to**
14 **come to our site and stay there.**
15 Q And in fact, Yahoo will feature ad
16 campaigns for Yahoo Music in which they
17 feature various artists, right?
18 A **That is correct.**
19 Q And that's because the artists,
20 you believe, are going to draw people and keep
21 people on your site, right?
22 A **In some instances. We also are**

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1 **working with record labels to feature some**
2 **artists that they feel are going to have**
3 **promotional value that we feel might have a**
4 **chance of success, but within those marketing**
5 **efforts, but in some cases we're not certain,**
6 **prior to publicizing those marketing efforts**
7 **that they will actually succeed in drawing an**
8 **audience.**
9 Q And in fact, sometimes Yahoo will
10 approach a record label and offer them the
11 opportunity to appear in ads, Yahoo ads, Yahoo
12 will seek out artists to feature in various
13 advertisements. Isn't that right?
14 A **We have done that on some**
15 **occasions.**
16 Q And in that instance, you're using
17 those artists to help promote your services,
18 right?
19 A **In those instances, yes, but we**
20 **are also in those instances paying the artists**
21 **a fee for the use of their likeness.**
22 Q Is that always the case, you're

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1 always paying them a fee?
2 A **When we were doing extensive**
3 **promotions that involve promotions outside of**
4 **the Yahoo network, I think in most cases we**
5 **have paid the artists a fee.**
6 Q Aren't there instances in which
7 you seek out artists to put in your
8 advertisements for Yahoo where the artist is
9 not paid?
10 A **Yes, but there are also instances**
11 **where the record labels seek us out to place**
12 **those artists in the very same promotional**
13 **announcements.**
14 Q The answer to my question is yes?
15 A **The answer to your question is**
16 **yes.**
17 MR. FREEDMAN: One moment.
18 (Pause.)
19 MR. FREEDMAN: I have no further
20 questions, Your Honor.
21 CHIEF JUDGE SLEDGE: Mr. Larson,
22 anything further?

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1 MR. LARSON: Just a couple of
2 questions.
3 REDIRECT EXAMINATION
4 BY MR. LARSON:
5 Q Mr. Frank, just a couple of
6 questions for you.
7 It's true, is it not, that for the
8 songs that you play on Launchcast, on your
9 radio product, you're paying a royalty for all
10 that play, right?
11 A **That's correct.**
12 Q So in addition to the promotional
13 value that you discussed, for playing those
14 songs, the record companies are receiving that
15 royalty payment from each of the --
16 A **That is my understanding, yes.**
17 Q Let me ask you this, is it your
18 belief that the personnel from the record
19 labels that you deal with would continue to
20 solicit airplay from you or promotions from
21 you if they didn't feel it was valuable?
22 A **Repeat the question.**

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1 Q I said do you believe that the
2 personnel from the record labels that you deal
3 with would continue to contact you and
4 communicate with you if they didn't see the
5 value in webcasting?
6 MR. FREEDMAN: Your Honor, I'm
7 going to object. It's both asking essentially
8 a hypothetical question, asking the witness to
9 speculate. I'm also think it's beyond the
10 scope of my cross.
11 MR. LARSON: It was actually more
12 in response to Judge Roberts' question than
13 cross.
14 CHIEF JUDGE SLEDGE: It's an
15 argument rather than a question, but I'll
16 overrule the objection.
17 THE WITNESS: It is my
18 understanding because of the audience reach
19 and the promotional value that we provided
20 record labels in the past that they would
21 continue to be looking for us for promotional
22 support.

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1 MR. LARSON: I have no further
2 questions.
3 CHIEF JUDGE SLEDGE: Any questions
4 from the Board?
5 Thank you, Mr. Frank.
6 (The witness was excused.)
7 CHIEF JUDGE SLEDGE: That
8 completes the testimony for today. Is there
9 anything else that needs to be taken up before
10 we recess?
11 MR. LARSON: Just one more
12 housekeeping matter. It looks like we're
13 going to be able to get Mr. Isquith from AOL
14 who was bumped yesterday in next Tuesday
15 afternoon and we'll file a letter on it, but
16 I just wanted to let you know we're going to
17 be able to squeeze him in.
18 JUDGE ROBERTS: Is that going to
19 be a problem for Mr. Malone? I believe he was
20 --
21 MR. LARSON: We have talked to Mr.
22 Malone and we believe we might be able to get

1 all four in on Tuesday, but if not, his
2 Tuesday afternoon witness will start, is
3 willing to start Wednesday morning.
4 CHIEF JUDGE SLEDGE: Okay, we will
5 recess until Monday at 9:30.
6 (Whereupon, at 4:18 p.m., the
7 hearing was adjourned, to reconvene Monday,
8 November 13, 2006 at 9:30 a.m.)
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