UNITED STATES OF AMERICA

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U.S.COPYRIGHT OFFICE
MUSIC LICENSING PUBLIC ROUNDTABLE

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MONDAY, JUNE 23, 2014

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The U.S. Copyright Office Roundtable on Music Licensing met at 9:00 a.m., at the New York University School of Law, Lipton Hall, 108 W. 3rd Street, New York, New York, when were present:

PRESENT

JACQUELINE CHARLESWORTH, General Counsel and Associate Register of Copyrights, U.S. Copyright Office
KARYN TEMPLE CLAGGETT, Associate Register of Copyrights and Director of Policy & International Affairs, U.S. Copyright Office
SY DAMLE, Special Advisor to the General Counsel, U.S. Copyright Office
JOHN R. RILEY, Attorney-Advisor, U.S. Copyright Office
CHRISTOS P. BADAVAS, The Harry Fox Agency, Inc.
GREGG BARRON, BMG Rights Management
RICHARD BENGLOFF, American Association of Independent Music (A2IM)
JEFFREY BENNETT, SAG-AFTRA
MATT DEFILIPPIS, ASCAP
WALEED DIAB, Google/YouTube
JAMES DUFFETT-SMITH, Spotify USA, Inc.
WILLARD HOYT, Television Music License Committee, LLC
COLIN RAFFEL, Prometheus Radio Project
LEE KNIFE, Digital Media Association (DiMA)

BILL LEE, SESAC, Inc.
STEVEN MARKS, Recording Industry Association of America (RIAA)
CASEY RAE, Future of Music Coalition
GARY RINKERMAN, Drinker, Biddle & Reath LLP
JAY ROSENTHAL, National Music Publishers Association
MICHAEL G. STEINBERG, Broadcast Music, Inc. (BMI)
DOUG WOOD, National Council of Music Creator Organizations
ERIC ALBERT, Stingray Digital Group
PAUL FAKLER, National Association of Broadcasters/Music Choice
ANDREA FINKELSTEIN, Sony Music Entertainment, Inc.
CYNTHIA GREER, Sirius XM Radio Inc.
BOB KOHN, Kohn On Music Licensing
WILLIAM MALONE, Intercollegiate Broadcasting System, Inc.
ALDO MARIN, Cutting Records, Inc.
PERRY RESNICK, RZO
COLIN RUSHING, SoundExchange, Inc.
JOHN BARKER, Interested Parties Advancing Copyright (IPAC)
CATHY CARAPELLA, Global ImageWorks
ALISA COLEMAN, ABKCO Music & Records, Inc.
JOE CONYERS III, Downtown Music Publishing
CHERYL POTTS, Crystal Clear Music & CleerKut
RICK CARNES, Songwriters Guild of America
JODIE GRIFFIN, Public Knowledge
FRITZ KASS, Intercollegiate Broadcasting System, Inc.
BLAKE MORGAN, #IRespectMusic/ECR Music Group
COLIN RAFFEL
TODD DUPLER, The Recording Academy
DICK HUEY, Toolshed Inc.
LYNN LUMMEL, ASCAP
JIM MAHONEY, American Association of Independent Music (A2IM)
ANDREW RAFF, Shutterstock

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9:03 a.m.

MS. CHARLESWORTH: Good morning, every one. My name is Jacqueline Charlesworth, I'm the General Counsel of the U.S. Copyright Office. Welcome to the third, in our series of roundtables on music licensing. It is good to see so many of you, here today. I was telling one of our repeat attendee, that we feel very special that some of you are following us around the country. It makes us feel a little like, you know, rock stars, but in a copyright sense of the word.

I have several people here, with me, today from the Copyright Office. Maybe you can stand, so that you will see them clearly. Karyn Temple Claggett, who is, head of our policy and international affairs unit in the Copyright Office. Sy Damle, Special Advisor to the General Counsel. John Riley, Attorney Advisor. And we have -- where is Andrew? Back there, Andrew Moore, who is an intern with us,

this summer, and he is actually a student, here, at NYU Law. So we will all be listening, very closely, to everything you have to say. I want to give a special thank you to NYU Law School, and Professor Beebe in particular, for making this room available.

I think we can all agree it is a lovely setting. And, hopefully, we will get a lot of good work accomplished here. For those of you who are interested, just -- before I forget, we have -- there is wifi in this room, and we have little paper slips that John has if you need one. As many of you are aware our system of music licensing, including the government's role in that system, is an area that has been specifically called out by Register Maria Pallante as ripe for review, as Congress continues to review our copyright law.

We, obviously, put out a notice of inquiry, and are hosting this roundtable to help develop a record, and a better

1 understanding, of issues in the music
2 licensing marketplace. And we have received
3 many thoughtful, sometimes even passionate,
4 written comments. And I want to thank you for
5 those. I sense a lot of effort went into them,
6 and we really appreciate them. And I can tell
7 you that we read every single one.
8 We have had two previous round
9 tables in Nashville and Los Angeles. And I
10 think the people who were there agreed with me
11 that they were very productive. We had
12 excellent conversation. I think that people
13 felt that we were able to hear the issues. And
14 I also think that, perhaps, we saw some areas
15 of consensus, at least high level of
16 consensus, from those two experiences. I would
17 say that there is, certainly agreement that
18 this is a system that could be working better.
19 Some of it is over a century old,
20 as you know, and I think that a lot of people
21 there, at Los Angeles and in Nashville,
22 believe that it is out of step with the

1 realities of the modern marketplace. So that
2 is why we are here today. The point of these
3 roundtables is to allow for constructive
4 dialogue on how we might improve the system,
5 so we can better serve the interest of music
6 owners, music users, music lovers, and music
7 creators. We hope you will take advantage, of
8 this opportunity, to speak to us at the
9 Copyright Office, and probably more
10 importantly, to speak to each other, and try
11 to move the discussion forward. I'm going to
12 indulge in a little muse here, by referencing
13 one of my favorite Doctor Seuss stories, the
14 Zax. For those of you who may not be familiar
15 with this tale it is about a north wing Zax
16 and the south wing Zax come face to face one
17 day, when they are making their tracks, and
18 that is in the walking sense, not the music
19 sense, but I think it is interesting, I think
20 of it in terms of music. And there the two zax
21 stood, face to face, each taking the position
22 that the other was in his way. Each refused to

move one inch out of his path.

Said the one to the other, I will stay here not budging. I can and I will, if it makes you and me, and the whole world stand still.

But as Dr. Seuss explains, well, of course the world didn't stand still, a highway came through, and they built it right over those two stubborn Zax, and left them there, standing, unbudged in their tracks. So I say let us learn a little something from Dr. Seuss. The highway has come through, and rather than standing under it, let's see if there is a way to get on it.

Thank you all again for coming. We look forward to a lot of good discussion. And before we begin, I mentioned the wifi. But a few housekeeping matters. You each have a table tent. When you wish to speak just turn it sideways, and we will call on you. We will try to keep track of the order, but sometimes we lose track. We do try to get to everyone,

in each conversation. The roundtable is being transcribed. And it is very important that you make sure that your mic is on when you are speaking, so that the recording is properly made, and the reporter can hear you.

Please try to speak one at a time. And, as I said, make sure that your mic is on, and we share mics here, so just feel free to slide them across the table if you need to. At the end of the day, tomorrow, we will have an opportunity for members of the public, or the audience, to step up and add to the public record, if they so choose. And John Riley is keeping a list of anyone who would like to do that. That is the very last session tomorrow. And speaking of tomorrow, due to the availability of the rooms, we are starting a little earlier, we will be starting at 8:30.

For those of you who are coming back for tomorrow. And we may be in the Greenberg lounge, is that right, John?

MR. RILEY: That is correct.

MS. CHARLESWORTH: Yes, the Greenberg lounge which is in the older, the main law school building. It is in a different building, it is across the way, roughly, right? Okay. And for those of you who believe they may wish to supplement the record, written record, at some point we will be announcing a reply comment period. We haven't quite figured out the time of that but, please, keep your eye out and we will be allowing the submission of reply comments. Probably the deadline will be somewhere in mid-August, after -- I think the USPTO deadline is what, August 6th? I don't know -- well, we will probably try to schedule it after that.

And last, but not least, I'm pleased to announce that Representative Jerrold Nadler will be joining us a little later on this morning. He is going to be making some remarks. As many of you are, probably, aware he is involved in these

issues, as the ranking member of the House Judiciary Subcommittee on Intellectual Property.

So we are going to try to stay on track. I'm advised that this morning he is expected at 11:45, which is right when our second panel ends. So we look forward to that. And I urge you all to stay and hear what he has to say. And now I will return to my seat and we will get the discussion going.

MS. CHARLESWORTH: The first panel is to discuss the current music licensing landscape. And we are looking for people to tell us what is working, and what is not. And just to sort of point out the biggest issues that they see and, perhaps, the areas that we should focus on the most, as we consider these issues moving forward. So I'm going to ask for someone -- ask for volunteers, on the panel. Anyone who wants to speak just tilt up your table tent, don't be shy. I know there is a lot to say. Richard Bengloff is not shy. So,

Mr. Bengloff, do you want to make some remarks?

MR. BENGLOFF: I hope you mean that as a good thing, that I'm not shy, Jacqueline.

MS. CHARLESWORTH: Of course.

MR. BENGLOFF: Thank you. We just, you know, we represent A2IM, I think, as most people are aware, the small and medium sized creators in the industry which per Billboard Magazine represents about 34.6 percent of the industry in 2013.

We applaud the Copyright Office on the fact that you are looking to make revisions to the existing laws, to reflect what is going on, today, in the world. We have the impression that the DPRA and the DMCA were created, in the 1990s, to support as you said, creators, services that use music, as well as consumers of music, obviously, the most important party of all. And then treating everyone, within that pipeline, would be on a fair and equitable basis. That process, we

1 believe, and the CRB process, that was created
2 to set the rates, after those legislations
3 were passed in the '90s, supports A2IM's
4 belief that each song is created equally.
5 And that each copyright owner
6 should be compensated equally for each song.
7 That is the essence of the compulsory
8 statutory rates. The size of the creators, and
9 the song performance and the economic power of
10 the investor in the sound recording should be
11 irrelevant.
12 The only differentiation in pay
13 should be based on consumer demand for the
14 music. The number of streams received. So
15 whether you have a blues song, a jazz song, a
16 classical song, or whatever the song may be,
17 all of them should have the same basic, single
18 usage value, if one happens to get more plays
19 than others, that should be the adjustment.
20 What we are looking for, in the
21 revisions going forward, is an adjustment to
22 the way the marketplace has changed. Consumers

are now consuming music in a totally different way than they did back in 1995, and 1998, when those laws were passed. Consumers want more functionality, although not necessarily total interactivity. Copyright ownership should be the way people should be compensated for the uses of that music. And that is what we are looking for, a re-definition of the compulsory statutory license, and how people are compensated for it.

MS. CHARLESWORTH: Thank you, Mr. Bengloff. And I, I apologize, I neglected, usually we go around the table and have people introduce themselves, and tell us who you are representing. 1 So, Mr. Bengloff, you are here with 2 --

MR. BENGLOFF: I'm with the American Association of Independent Music, we are a not-for profit trade organization that represents 338 small and medium sized creator music labels around the country.

MS. CHARLESWORTH: Thank you. And

just quickly, before we take other comments let's just go quickly around the room, and tell us who you are, and what your affiliation is?

MR. RAE: I knew I would be first, or second. Casey Rae, from Future of Music Coalition based in Washington, D.C. We are a national non-profit organization for musicians and composers, working on research, education and advocacy. Copyright pragmatists, we are here as sort of in a semi-observer status and I'm happy to be involved in the conversation.

MS. CHARLESWORTH: Mr. Lee?

MR. LEE: Good morning, my name is Bill Lee, I'm the senior vice president of licensing operations for SESAC. SESAC based out of Nashville, is one of the three United States performance rights organizations. Our primary goal is to ensure that songwriters, and music publishers, and creators of music, are properly and fairly compensated for the use of their intellectual property.

MS. CHARLESWORTH: Mr. Barron?

MR. BARRON: I'm Greg Barron, senior director of licensing for BMG Rights Management. Our company is involved in, primarily, music publishing. But also recorded music as well.

MS. CHARLESWORTH: Mr. Badavas?

MR. BADAVAS: Christos Badavas, I'm Deputy General Counsel for Legal and Regulatory Affairs at the Harry Fox Agency, and we are a mechanical rights organization, as well as an administrative service provider for licensees.

MR. WOOD: I'm Doug Wood, a composer, and I'm here representing the National Council of Music Creators Organization, which is such a new organization that we don't even have business cards. We filed for our 501-C3. We represent songwriters, we started in New York with songwriters. We represent songwriters, film and TV writers who are caught in a,

1 particularly, difficult predicament with the
2 copyright law, Broadway composers, and all
3 other music creators for whom the copyright
4 law was written.
5 MR. DIAB: Waleed Diab, I'm Senior
6 Counsel for Music at Google. So I support
7 various music offerings, including Youtube and
8 Google Play. I am here, mostly in an observer
9 perspective but, also, representing the
10 prospective licensees.
11 MS. CHARLESWORTH: Okay, thank you.
12 Mr. Knife?
13 MR. KNIFE: Lee Knife, from the
14 Digital Media Association, a non-profit trade
15 organization, in Washington, that represents
16 consumer facing digital media companies, such
17 as Mr. Diab's company, Google, Apple Itunes,
18 those types of companies. Again, representing
19 music licensors and their consumers.
20 MS. CHARLESWORTH: Mr. Marks?
21 MR. MARKS: Steven Marks, tap me
22 right off as a groupie, I guess, since this is

my third of three.

MS. CHARLESWORTH: We are happy to have you, I think.

MR. MARKS: Yes, it is very early.

MS. CHARLESWORTH: The day is young.

MR. MARKS: Recording Industry Association of America, representing the major record labels.

MS. CHARLESWORTH: Mr. Rosenthal?

MR. ROSENTHAL: My name is Jay Rosenthal, I'm the senior vice president, and general counsel for the National Music Publishers Association, and we represent publishers, songwriters, and all the aspects of music publishing industry. And thank you for allowing us to be part of this.

MS. CHARLESWORTH: Mr. Duffett-Smith?

MR. DUFFETT-SMITH: Yes, I'm James Duffett-Smith, I'm here representing Spotify USA, Inc. Spotify is the largest interactive

subscription business in the United States.

MS. CHARLESWORTH: Mr. Bennett?

MR. BENNETT: I'm Jeffrey Bennett, I'm chief deputy general counsel of SAG-AFTRA. SAG-AFTRA is a national labor union representing over 165,000 actors, broadcasters, and recording artists. And it is the recording artists part why I'm here today.

MR. RINKERMAN: I'm Gary Rinkerman, I'm with Drinker, Biddle & Reath, LLP, I have produced records. I have made a living as a musician. I work with a lot of record companies, such as Hard Rock Records, with client -- what is called the anti-360, an agreement where the artists gets back their master rights, after 18 months, so that they can exploit them independently. I also work pro bono with a lot of musicians. And I have worked, also, for example with Wal-Mart, setting up a legal exclusive distribution, of the Eagles CD for Wal-Mart. So I'm here, today, in part to talk about these alternative

1 types of licensing elements.
2 MR. DEFILIPPIS: Good morning, I'm
3 Matt DeFilippis, vice president of New Media
4 Licensing at ASCAP, one of the world's oldest
5 and foremost performing rights organization.
6 This year is going to be known -- we are
7 celebrating both our 100th year in existence
8 and also, we hope, the first of another 100
9 years. And I'm here to give a perspective from
10 the front lines of licensing for ASCAP.
11 MR. HOYT: I'm Will Hoyt, with the
12 Television Media License Committee, Executive
13 Director. We represent about 1,200 local
14 television stations, as users, probably I've
15 had as much experience as anybody with the
16 PROs over the years.
17 MR. STEINBERG: I'm Mike Steinberg,
18 from BMI, I'm the senior vice president in
19 charge of licensing, and the -- as you know,
20 BMI is a performing rights organization,
21 representing the rights of songwriters,
22 composers, and music publishers. We monetize

on the value of those rights across hundreds or thousands of businesses across the country, including on the radio, television, bars and restaurants, new media, websites, subscription music services, all of the above.

MR. RAFFEL: Hi, I'm Colin Raffel, I'm the outreach coordinator for the Prometheus project. We are the main representative of low power FM community radio stations throughout the U.S.

MS. CHARLESWORTH: Thank you very much. And, Mr. Bengloff, I apologize to you, since I had forgotten to do the introduction But your point was, as I understand it, that you want to see the compulsory license re-imagined, re-written?

If you want to just summarize the --

MR. BENGLOFF: I would say expand it. Just because there is a tweaking of some functionality in response to changing consumer demands, that have happened over the last 20

years. Shouldn't throw it out of the compulsory license. So that certain entities would be able to control the marketplace in terms of licensing compensation, and what consumers are able to receive.

MS. CHARLESWORTH: And which license, or licenses are you speaking of specifically?

MR. BENGLOFF: Well, there are people, in our community, the independent music label community, and actually others, at least one in the so-called major label community, that feel the Itunes, the new Itunes service that is streaming music, possibly, should belong under the compulsory statutory license.

MS. CHARLESWORTH: So you are talking about 114, or --

MR. BENGLOFF: Yes, 114.

MS. CHARLESWORTH: Okay.

MR. BENGLOFF: I'm very much in favor of willing buyer, willing seller. And

the 114 license, yes.

MS. CHARLESWORTH: And what about 5 115?

MR. BENGLOFF: We are users of the 115 license. We respect our colleagues in the creative community, the songwriters and the publishers in that community. As users we found that the compulsory statutory license works for us. We understand that they may be looking for certain changes to those licenses. We think it is worthwhile to have that discussion, as well. But at this point I have no firm address.

I'm here more, today, to talk about the 114 license, and the 112 license, than the 115 license. We feel that, overall, to be able to serve consumers, the amount of compensation should be shared fairly, across all different platforms, not cherry picking individual platforms, as to how the compensation should be divided. And that is one of the great things about the dialogue

that the Copyright Office is engaging us in, to talk as an overall landscape, as opposed to picking individual units.

MS. CHARLESWORTH: Thank you, Mr. Bengloff. Mr. Wood?

MR. WOOD: Thank you. I thought it was interesting, the first people you sought to protect, when you started talking this morning, were the copyright owners. And I just, you know, I would just like to point out, as we think about our discussion, here today, that the Constitution talks about authors. And the purpose of the copyright was, I understand it, is to protect authors. And I think some times we lose sight of that. Copyright begins to be about property rights, and not about protecting authors. So I urge you to keep that in mind as you, as you think about this. I mean, it is the music creator that is the center of everything that we are here for today.

If the music creator doesn't put

that word with that note, and that chord, then everybody else, on these next two days can go home, because there is no music business without that. So that is where we start. And we start with the music creator, kind of, at the top of the -- the pyramid. We say, okay, how do we make sure that authors are protected? Essentially the copyright law being, you know, the purpose of the copyright was to provide an economic incentive, for people who have creative talent, to exploit that talent. And on the theory that the society benefits when creative people use their talent to create things.

So that is just an overall statement. I did want to say, and we may get into this on other panels. But I have no idea of how these work, so I'm going to take advantage, while I have the microphone.

And say that, from the creators' perspective, the PRO model is really, has been working great for 75 years. That the whole

1 idea of collective licensing is something
2 that, I think, most creators, despite their
3 harping and griping about how they don't get
4 paid for this, or that performance, generally
5 find that ASCAP and BMI provide, not just an
6 economically reasonable way to license music.
7 But, also, they provide safe
8 harbor for composers, and songwriters who,
9 otherwise, live in a fairly difficult,
10 turbulent world, where they don't necessarily
11 have the protection that the PROs offer. And
12 I just, I will just jump in here, one more
13 thing, and talk about the threat of direct
14 licensing, or the possibility of direct
15 licensing.
16 Music creators, I think, have a
17 real concern about what will happen in the
18 event of widespread direct licensing of
19 performance rights. And that is mostly because
20 music creators, over the past 50 years, have
21 grown up in a milieu which includes the
22 performing rights organizations, and nobody

has ever thought that they wouldn't be there.

And as a result of that almost all the legal structure around how music composers and songwriters are paid, assumes that there is a performing rights organization. And in the event of direct licensing it puts most of those writers into limbo. And nobody really knows who has the rights to license performing rights because most contracts are silent on that issue.

But this is particularly important for composers who write music for film and television, where it has been done under a work-for-hire contract. And the work-for-hire contract, basically says you are entitled to receive a performing rights, the writer's share of performing rights distributed by the performing rights organizations.

And it is, absolutely, silent on what would happen in the event of a direct licensing. Of course those composers have no way to, to go and get them on it. So I will

leave it at that. I really appreciate the opportunity to be here today, and thank you for inviting me.

MS. CHARLESWORTH: Very glad you are here, thank you. Mr. Marks?

MR. MARKS: Thanks very much. I will comment on a couple of things, since we seem to be talking about compulsory licenses, just to give our view on the section 114 license. And then, also, just for the record, state in brief what we think should be done on the music side.

On the 114 license we think the existing license has worked very well in many respects, in terms of reducing transaction cost, and allowing a number of radio companies, as contemplated back in '95 and '98, to get into business.

On the other hand the license has, unfortunately, been expanded by what we believe to be a poor judicial decision, in the LAUNCHCast case, well beyond the scope of what

1 was intended back in '95 and '98. And we don't
2 think it should be extended any further beyond
3 that. In addition the compulsory license in
4 114, especially, has become very politicized.
5 In that even for those services that are
6 paying under willing buyer, willing seller
7 rate standard, which should be the standard
8 that governs everybody under 114. The
9 decisions that have been reached have then
10 been challenged so that licensees have taken,
11 what we view as, kind of a second bite at the
12 apple, to try and get the rates reduced, by
13 putting political pressure on the parties.
14 Or, in the first instance, the
15 Copyright Office, and other decisionmakers, in
16 order to reduce the rates. And that has,
17 unfortunately, has been successful in many
18 regards. So for those two reasons we would not
19 support expanding the section 114 license
20 beyond the scope it has today. And I think to
21 the extent that, you know, there are other
22 services that want to offer additional

functionality, those services, there are many of them, Spotify is one of them, and there are others, that have other kinds of features, that have been able to get the licenses necessary to get those rights.

On the section 115 front, as we have stated at the other roundtables, and in our comments, we would radically rewrite that. Even get rid of, you know, 115 as it exists today, and replace it with a system that, one, ensures fair market value for the songwriters and the publishers, by getting rid of the CRB and the Rate Court. And having a marketplace discussion about what those rates should be instead. But, at the same time, to Mr. Wood's comment, simplify the licensing in a blanket license approach. So that it is easier to get licenses for everybody. We are not losing money out of the system, seeping through the cracks, naming third parties to administer what is a very difficult license to obtain and then administer afterward.

And, third, ensure that all, what we call moderate music releases, taking into account the fact, today, that most consumers are looking at a screen, and not just listening to speakers, when they are consuming music.

That may include everything that comes out with the kinds of projects that major and independent record labels work so very hard in releasing to the public.

MS. CHARLESWORTH: Mr. Marks, just a quick point of -- a follow-up question. On the 114 license you mentioned the LAUNCHCast decision, and you don't want to expand 114. So is your assumption, though, that the personalized streaming, as was determined under LAUNCH has to be within the 114 license, would remain there, and you just don't want to see 114 expanded further, is that --

MR. MARKS: Well, I don't -- it would remain there, I guess, by virtue of --

MS. CHARLESWORTH: Judicial

decision?

MR. MARKS: -- the fact that the judicial decision is there. I don't think we would want to codify that.

But, you know, as a practical matter, Pandora is operating under that license, and paying under it right now, and has been for, since its inception. So, you know, we -- I could talk longer about the LAUNCHCast decision, but don't want to take up too much time.

MS. CHARLESWORTH: Okay, thank you. Mr. Bengloff, did you have a quick response?

MR. BENGLOFF: I will be brief. I rarely agree with Steve. But the 114 working very well, and reducing transaction costs, I feel, he hit the nail on the head. Perry Resnick, and he will be on a panel later, with Bob Kohn's testimony, in terms of reducing those costs. And I have seen him in the house, and he will be speaking later. I guess what we feel is, since it is working so efficiently,

to expand that license would bring more services into the marketplace, would make more music available to consumers, because we don't want to decide who should be in the business, and who shouldn't be in the business, consumers should make that decision.

MS. CHARLESWORTH: Okay, thank you. Mr. Rosenthal?

MR. ROSENTHAL: Thank you. As you could tell, from our submission, we intended to start a new conversation. And that new conversation is about doing away with Section 115, as a compulsory license. Perhaps there is some aspects of it that might be held off, because of all sorts of good reasons, that everybody can agree upon.

But I think that after 105 years we recognize that while transaction costs are an important issue, the more important issue is the value. And that under a compulsory license music publishers, and songwriters, are not being paid the free market value that they

1 should. We are under restrictions that others
2 are not. And we have to stop treating
3 songwriters, and music publishers, as second
4 class citizens. Marybeth Peters agrees with
5 us, totally. I'm going to paraphrase her, Let
6 my People Go.
7 MS. CHARLESWORTH: Would she agree
8 with that paraphrase?
9 MR. ROSENTHAL: Yes, I think she
10 would. That is, I think she would like
11 authorship of that little phrase right there.
12 And to build on your little story, putting
13 aside whether the Dr. Seuss estate gave you
14 the rights to do that, let's call it --
15 MS. CHARLESWORTH: I'm sure that
16 comes under --
17 MR. ROSENTHAL: Yes, that is fair
18 use, okay. I'll even fight with you on that,
19 that it is very -- you know, the creatures,
20 what were they called?
21 MS. CHARLESWORTH: The Zax.
22 MR. ROSENTHAL: The Zax, the Zax,

that is 115. They are sitting there, under the bridge. The bridge is the free market.

MS. CHARLESWORTH: You got the metaphor?

MR. ROSENTHAL: Oh, yes, I got it, I got it.

MS. CHARLESWORTH: Good.

MR. ROSENTHAL: And we should be talking about all the great things that we are doing, in the free market, right now. All the best licensing is going on there. We don't need section 115 any more. And the idea that songwriters, and music publishers labor under this process where, in fact, there is a question. And you know, as well as I, because we have worked so closely on these matters, there is a question of, can the government even get it right, and understand what is going on in this business?

We need to let the parties move out and to do what they need to do.

Now, with that said, and we want

that conversation to start, we also believe that there are certain aspects of 115 that can be improved. In particular songwriters and music publishers desperately need an audit right. It is ridiculous, to say the least, that under the compulsory licenses that we have, the only one that doesn't provide an audit right, of some kind, is section 115.

We also are very, very strongly motivated to pass the Songwriters Equity Act, which equalizes the standard rates across the board. And we can also talk, later on, about maybe the pass through license and possibly, you know, having a right to opt out on all of this. As a final point, two weeks ago there were hearings on Capitol Hill. And I think that one of the most compelling testimony, that we heard, was from Lee Miller of the National Songwriters Association. He spoke about what is going on with the stand-alone songwriter community in Nashville, where 10 or 15 years ago you had thousands of writers

1 engaged in the business of creating songs.
2 Today you possibly have a couple
3 of hundred. That is a tragedy. And that is
4 something that we have to recognize, and focus
5 on, value. Not just economics, not just the
6 idea of transparency, efficiency, we are not
7 paying songwriters and music publishers what
8 they should be paid.
9 That is the conversation we should
10 be having.
11 MS. CHARLESWORTH: Thank you, Mr.
12 Rosenthal. Mr. Rinkerman?
13 MR. RINKERMAN: Yes. It is awe
14 inspiring to be here among the classroom and
15 talking about Section 115. But I have
16 something else that I would love to inject
17 into the conversation. Let's talk about Joe
18 Bryant and the great Jimmy Carroll and these
19 are artists whose work --
20 MS. CHARLESWORTH: Can you -- I'm
21 sorry, just speak into the microphone?
22 MR. RINKERMAN: I'd like to talk

about Bogie Great, Jim Carroll, Joe Byrant, the artists who actually make the music, and record it. And one of the licensing issues that takes place in the shadow of all this 115 and 114 controversy, is that many of these artists are, effectively, out of print, even though you can get them on Youtube occasionally, or stream them, because the record companies have simply banned these masters, or are splitting these masters.

I think we need to seriously consider a masters right, of performing artists, after a certain period of time, when they can get their master rights back, and exploit them through their websites, and make money that way.

I'm sad to say my good friend Jim Carroll, who lived not very far from here was actually poverty stricken, while many of his records just sat in vaults of the record companies. So we do have a termination right, and that is a great step, it is a great moral

right. But I think we need to start considering these artists and saying, maybe after a certain amount of time, that the record company is not exploiting the recordings properly, the masters revert to the artists.

Perhaps with a residual license for the record company. But that, to me, is on a par equal to 114 and 115 considerations. And if we really want to respect our legacy artists, we will give them this type of right, this marching right, to recover back their livelihoods.

MS. CHARLESWORTH: Thank you.

MR. RINKERMAN: That is my soap box for the moment.

MS. CHARLESWORTH: Okay. Well, this is a good place to be on a soap box, so thank you. Mr. Hoyt?

MR. HOYT: First of all, Mr. Wood said that he felt the current system was working relatively well. I would guess that we

1 would say that it is working reasonably well,
2 in terms of television.
3 There are a couple of things,
4 though, that concern us. One is the definition
5 of free market. And we get very concerned
6 about a free market, willing buyer, willing
7 seller, worrying there, if you have a
8 monopolist, who is a willing seller, and you
9 have no other recourse but to go with that
10 monopolistic price, that is not a willing
11 buyer, willing seller relationship. So I get
12 concerned about how you define willing buyer,
13 willing seller, and how you define free
14 market. I know that question was the last
15 question asked at the hearing in front of
16 Congress.
17 And we hope to, at least, try to
18 expand on the definition of what we consider
19 free market, and fair market, and competitive
20 market. Secondly, we believe that direct
21 licensing is the way to go. And we would
22 prefer to direct license everything. The

problem, right now, is given the historic methodology of getting rights for television, there are third party producers, who force us to imbed the music in the program. And we are, then, forced to license those performance rights, even though we don't control them.

MS. CHARLESWORTH: Can I just -- because I have heard this a few times. I mean, hasn't that been true for a very long time?

MR. HOYT: Yes, it has.

MS. CHARLESWORTH: Okay. It has been the system for a long time.

MR. HOYT: -- the system is working reasonably well with the rate court in place. And that is why we would say, the problem we have is there is an anti-trust issue, as well as a copyright issue. So you have those two competing things going on. And so what you have to do is have something that says to a monopolist, like a PRO, you have to abide by certain regulations. And that is why we consider the current rate court system working

reasonably well from our standpoint. And we would continue that rate court type situation because we think it is working. It is not working perfectly but we don't see a better way of doing it. The other thing I might mention is that, currently, we are not in the center of this controversy as much as the digital people are. I mean, if you note, most of the discussion, discussions surrounding the whole area don't involve television. So I guess from our standpoint we are more worried about collateral damage than we are anything else.

MS. CHARLESWORTH: Okay, thank you Mr. Hoyt. Mr. Steinberg?

MR. STEINBERG: Well, I don't think it is a surprise, to anyone, that we do not think the rate court is working well. It certainly has worked well for businesses that are interested in lowering the compensation to composers of music. I will say that, in response to what Will said about some of the

1 music that is imbedded in programming, and you
2 kind of followed up on this, Jacqueline. It
3 has always been the case, and it has always
4 been the case that, I think, television
5 stations contract with users of television
6 programming and enter into contracts, whereby,
7 if they wanted to, they can include some sort
8 of provision to deal with that fact.
9 And BMI, we aren't entering into
10 contracts with the users. So Mr. Hoyt mentions
11 in his testimony that the PROs are holding the
12 television stations hostage. I don't think
13 that is the case. We understand that music is
14 imbedded in the programming but it doesn't
15 mean that they don't have the ability to,
16 somehow, control the set of circumstances
17 going forward.
18 On, just to shift gears for a
19 little bit. We operate under a consent decree,
20 that dates back to the year of the theatrical
21 release of Citizen Kane. About five years
22 before the first television network ever

1 existed. So I don't -- it is no surprise, to
2 anyone, because it has been said a lot over
3 the last few months, that BMI is interested in
4 amending its Consent Decree, and getting some
5 relief there, for a few things that need to be
6 changed. And we are very pleased that the
7 Department of Justice is entertaining that.
8 And, you know, I think it is, I think it has
9 been made clear, Mike O'Neill testified to
10 Congress, the four ways in which we want to
11 amend the Consent Decree. We don't want the
12 publishers to have to make a choice between
13 whether they are all in, or all out of the
14 PRO. We think that it benefits everyone if
15 they have the option to decide what rights
16 they want to leave inside a PRO, and which
17 they want to directly license themselves. Mr.
18 Hoyt talked, as well, about direct licensing.
19 I think it is a two way street. It is not just
20 up to a licensee, who is in a position to set
21 the price and call the shots, when a direct
22 license should happen.

1 That is the case in the local
2 television industry. It effective becomes,
3 direct license effectively becomes a ceiling,
4 and they always have the underlying license to
5 fall back on, if they don't get the price that
6 they want. So we think that is a two way
7 street. The other ways in which we would like
8 to see the Consent Decree amended is we have
9 licensees, like Google, coming to us, asking
10 us for multiple rights, not just the
11 performing rights.
12 So we want that reflected. We, as
13 I said, don't think the Rate Court works well,
14 and it is expensive, it is time consuming. And
15 we think that, obviously, there are systems in
16 place that are going to creators. And we have
17 also made clear that at some point, to the
18 extent that publishers do withdraw, and the
19 competitive playing field has changed
20 significantly, that the Consent Decree should
21 sunset in totality, and make the publishers,
22 and creators, who remain with the PROs, left

on a level playing field, in terms of if they are able to negotiate in the free market.

MS. CHARLESWORTH: Thank you, Mr. Steinberg. Mr. DeFilippis?

MR. DEFILIPPIS: That was well said, Michael. And I just want to pick up on a sentiment that is expressed by Doug Wood. And that is the critical role of collective licensing, in the broader ecosystem. I mean, everyone knows that ASCAP is a membership organization whose primary mission is to ensure fair and proper compensation to songwriters, composers and publishers. And while the organizational structure, it may be slightly different than BMI and SESAC, they are essentially aiming to achieve similar aims. However, collective licensing plays a very critical role in the broader ecosystem.

And that is serving the music users and, therefore, and ultimately consumers. And speaking from the front lines of licensing, in the digital space, I can

attest to the real challenges that we are facing in fulfilling our critical role. We've got some creative people in our licensing group now, and I would say across the PROs, generally. And anyone who has dealt with us, recently, I hope will attest to the hard work we have put in to try to come up with new, innovative, ways to work with their very innovative services within the very restrictive regulatory environment that the PROs are operating. And to come up with win-win solutions.

But I think they will also attest that we are frequently stunted, even shackled, by the Consent Decree prohibitions. And, potentially, negative implications of our well intended efforts. And even though those limitations may, at times, be convenient even beneficial to them, I think we have reached a point where an honest and genuine examination, of our ability to perform our role, or even exist, as Doug alluded to, will lead them to

conclude that the changes we are proposing, and Michael spoke to some of them, a similar set of Consent Decree proposals.

That we make those proposals in the same innovative win-win solution. And that is to fulfill our critical role in a manner that allow us to both serve in our mission, for our songwriters, composer, publisher members.

But, at the same time, to better serve the licensees and, therefore, the end users. And so all of these things are reflected in our, in our comments. We could talk about a lot of different cases, perhaps we will get into some.

But it is critical that either change happen in the form of Consent Decree reform, legislation is pending, and ultimately copyright perform, in order to preserve a very valuable, critical element of the ecosystem that is collective licensing.

MS. CHARLESWORTH: Thank you. Mr.

Rae, you have been very patient.

MR. RAE: I'm going to jump back to 114 because I'm sure we will have plenty of time to argue about 115 in later panels. I just wanted to give a shout-out to Gary. I hope we can talk about this exploit or die concept, later, because it sounds very intriguing to me. My organization works a lot with independent recording artists. And a lot of those folks may be signed to labels that Rich is representing. When we talk about the concept of expanding a statutory, I think that is supportable in a lot of ways, primarily because of the market share issues that Rich alluded to.

But what I would be concerned about is what the supports would look like. And also, secondarily, how the rates are determined. For us, looking at it from the recording artist, and performing artist perspective, it is about transparency, it is about leverage, or proxy leverage through PRO,

1 SoundExchange in the case of 114.
2 And it is, also, about the ability
3 to bring a catalog of music to legal license
4 services. Because I think that that is where
5 we are at, in this new market place. And I
6 think that is what we want to continue to keep
7 in mind and encourage. Another thing that I
8 would like to, just quickly flag, because this
9 is coming up in a lot of different context,
10 particularly in the House Subcommittee
11 hearings. There is a -- Steve alluded to the
12 politicization of rate setting. And I think
13 that that happens, or can happen, on both
14 sides of the equation, so to speak. I would
15 like to remind folks of the distinction
16 between the standards by which rates are
17 determined, and the compensation structure
18 within the collection and distribution of
19 royalties. So right now we are in a
20 marketplace where we feel like we are shifting
21 to streaming. We may be entering a new era of
22 substitution for physical and file-based

1 media. So, to me, it makes the distinction
2 between interactivity, and non-interactivity
3 even more important to figure out.
4 Because right now interactivity
5 seems to rest on volition. And what does
6 volition really mean when you are in an
7 environment where similarly situated services
8 are performing, and delivering music,
9 oftentimes, the same kind of consumer focus
10 components. It is an increasingly arbitrary
11 technological distinction but it is,
12 extremely, important when we talk about how
13 rates are structured and how artists are
14 compensated. And so for us I would underscore
15 that the fairest splits, the transparency and
16 understanding how those rates are determined,
17 and the mechanisms of payment, are -- for
18 creators, are equally important to other very,
19 very, very important parts of the
20 conversation, including direct licenses versus
21 expanding compulsories.
22 MS. CHARLESWORTH: Thank you, Mr.

Rae. I think I will go to Mr. Diab, and then Mr. Knife, and then we will come back around here and go around.

MR. DIAB: So I actually just wanted to talk, generally, about two principles that I think are going to be really important as we consider reform. The first is transparency. And I'm happy to hear Mr. Rae raise that point. I was surprised that nobody raised it earlier, because you have heard a lot about protecting authors and creators. And I think, historically, what we have seen in these industries, certainly on the PRO side, is sort of black box licensing.

Where there is no clear transparency for authors in terms of how their content is used, a sort of insight into the real valuation of, of those uses. And so I think any reform that we consider should try and improve that sort of transparency.

One way that we can do that is Through some sort of more formalized data

standards, and providing some incentives for PROs and other licensors, to comply with those data standards. The issue that we have, as licensees, is we oftentimes don't know what it is that we are licensing. Google, in particular, has begun to enter into licenses on a global basis, where data is a requirement, at the outside.

So what we do is we require our licensors to identify exactly what it is they are licensing, to us. And that helps, both from a deal implementation standpoint, as well as a deal valuation standpoint. And what I would like to see is reform that allows that sort of transparency, and those sort of data requirements, to work their way back up the chain, to the creators. So we are real interested in reform that is going to allow services to operate under that basis.

MS. CHARLESWORTH: Thank you very much. Mr. Rae?

MR. RAE: So Mr. Diab just actually

took a little bit of the wind out of my sails. I was going to talk a little bit about transparency, as well. You had given an invitation, earlier, for people to use this forum to get on their soap boxes. And we have certainly heard a lot of people get on their soapboxes. And I'm going to try not to do that now. I assume you are going to have an ample opportunity, over the next couple of days, to state a particular case. I wanted to make two general comments that are much more, I hope, objective. The first one is picking up on what Waleed was saying, about transparency. And I think transparency is super important, going in both directions. And when I say both directions, what I mean is, transparency to potential licensors is incredibly important.

Licensors, as everybody has been talking about, we are moving into a new digital age. We are in, we are not moving. And we are already in a digital environment where massive licensing is really the coin of the

1 realm. And so transparency as to what works
2 are available, what rights appended to those
3 works are available, who owns those rights,
4 who can grant those rights, on what basis they
5 are grantable, et cetera, is extremely
6 important. So let's call that going forward.
7 But, also, transparency going
8 backwards to the creators is, also, incredibly
9 important. It is something that Mr. Diab was
10 talking about as well. So I think transparency
11 going, again, in kind of both those
12 directions, making sure that, that the number
13 of works that are out there, are easily
14 catalogued, that all the rights appended to
15 them are easily addressable, and identifiable
16 is extremely important.
17 Both for licensors and then going
18 all the way back the chain to the creators.
19 And we have heard a lot of people, you know,
20 not surprisingly, people who are under
21 compulsory licenses, or collectives that have
22 consent decrees, applicable to them, they have

1 problems with those licensing frameworks.
2 But one of the things that those
3 licensing frameworks can, at least, provide
4 whether or not we are going to tweak them
5 around the edges, is they provide at least
6 some level of that transparency, because they
7 are collectivized.
8 And so there you go, right, that
9 is the crux. The collectivization of rights
10 can assist in transparency in the marketplace
11 in mass licensing but it also creates
12 monopolies. And so there is a difficulty there
13 that we should just pay attention to. And that
14 gets me to just the second, kind of objective,
15 point that I wanted to make. Is, and it picks
16 up on something that Mr. Bengloff said, and I
17 think Mr. Wood also talked about, and a couple
18 of other people. As the Copyright Office
19 considers modifying the existing regime that
20 we have, I think it is important to pay
21 attention to the fact that the business that
22 we have, right now, has grown up underneath

these various compulsory collectives, et cetera. And if we were to simply do something, like do away with Section 115 next week, or absolutely you know, just get rid of the consent decrees, I think we would be left in a world that, had those things not existed, that world also wouldn't exist. The contours of the business, that we have right now, and Mr. Wood talked about it in terms of the individual creators. The contours of the world that we have, right now, are dictated by all of these assumptions of all of these, you know, collectives and these rights management scenarios.

So as we go forward, and we talk about whether or not we should, consent decrees, or get Section 115, or heavily modify it.

I think we would all do well to just keep an eye on the fact that the world, that we live in today, wouldn't exist unless those things existed. So if we are going to

talk about moving away from them, we have to, we have to talk about all the ramifications of doing that as well.

MS. CHARLESWORTH: Thank you, Mr. Rae. Mr. Lee?

MR. LEE: Thank you, Jacqueline. Actually I had just had a very brief comment. And it is a follow-up regarding the rate courts. And I think Jay had mentioned Lee Miller, and Lee Miller is very prone to say that it all begins with a song.

And I think that is a very apropos statement. It all begins with a song, and it is extremely important that the songwriters are compensated for their creativity. We believe, at SESAC, that the rate courts may not always have that end result in mind, based upon the activities that take place within the rate courts.

Although SESAC is not under a rate court, many rate court decisions do have a negative impact on SESAC's ability to modify

license agreements. And ultimately it is the creator, the songwriter, who suffers because of that lack of modernization.

So the rate courts are not a true market environment, and it tends to depress royalties for songwriters.

MS. CHARLESWORTH: Thank you, Mr. Lee. I'm just going to go in order, because I'm not sure -- Mr. Badavas?

MR. BADAVAS: I think I would like to address the transparency and the massive licensing issues, in the context of 115, on a general basis. I understand that we are going to have another panel in more detail.

But the first thing is, transparency is the one place where Section 115 actually works, because it requires some about song-by-song licensing. So it is one of these things where you really start one product, and you figure out what parts go into the product, and you pass it through, and you pay the specific publishers, ultimately pay

the songwriters. I use parts on purpose because, what we are talking about here, is actually is, actually, supply chain management. I have a music degree, I never thought those words would come out of my mouth.

But every other industry in the world, that has to sell a product, has to figure out how to get the raw materials and parts into that product.

So when you are thinking about this problem, that way, the question isn't, is this easy, is this hard? The question is, are you expending an unreasonable amount of money doing it?

Most other industries, the automobile industry for example, have trading partner platforms, where they figure out how to deliver parts and raw materials, from around the world, through complex terrorist era importation rules, and get the parts here, and assemble them into a car that has 17,000

1 parts, or something like that. And the reason
2 they spend that amount of money, on supply
3 chain management, is that they are looking to
4 reduce the costs of those parts, they don't
5 want to make them here. So they are actually
6 going to spend a lot of money managing their
7 supply chain, in order to reduce the cost of
8 raw materials. Here, under the compulsory
9 license, and under the consent decrees, you've
10 already got low cost of parts, low cost of
11 supplies. So the availability of those
12 structures, the history of those structures,
13 to be fair, as they point it out, means that
14 you can come in and talk about blanket
15 licensing, and legal claims, and all of that,
16 rather than actually dealing with the
17 functional resolution of the problem. We have
18 to deal with that every day. I understand
19 completely. I think the licensees do, I'm not
20 saying it is easy, it isn't. It takes work.
21 The question is, is it an unreasonable amount
22 of work? And no one, really, has provided

1 audited financial information about the cost
2 of their supply chain management, related to
3 compositions. So we will find out, eventually,
4 and probably some people start talking about
5 it. The second piece is the massive licensing
6 issue. I'm not quite sure what that means, in
7 the context of whether licensing works.
8 Because what we see, in reports
9 that get to us -- and, by the way, we don't
10 license everyone, so we don't see, so I
11 understand that this would be different across
12 licensees.
13 But we see it in some one to two
14 million tracks account for the vast majority
15 of users for the new service, maybe up to 95
16 percent. So, all right, there is a licensing
17 problem. Is that just that one or two million
18 we talking about, where we can, we can figure
19 out who is associated with the sound
20 recording, or the other 30 million tracks
21 offered by the service. It is just unclear to
22 me. And I don't know which of those things

matters, and which of those is incorporated in a compulsory license, and whether the fix that applies to the 1 to 2 million tracks, that are commercially used, versus the 30 million other tracks, which may be artistically valid, but aren't listened to very much, are different. And maybe the rules of law, and the licensing structures, and things like that, should be different. So I just raise those issues to start out with, for you to think about, in the context of the next panel.

MS. CHARLESWORTH: Thank you. Mr. Wood?

MR. WOOD: Thank you, just a quick thing on transparency. I agree one hundred percent. I think, you know, one of the reasons why transparency is so difficult is because, in the case of performing rights nobody really knows who has the rights to license. So, as I said before, so that is something to keep in mind, if you are going to require direct licensing.

MS. CHARLESWORTH: Can you explain what you mean by that, a little bit?

MR. WOOD: Yes, sure. So a typical songwriter agreement would say, for instance, the songwriter shall be entitled to collect the writer's share of performing rights, distributed by a performing rights organization, period.

What happens to the performing rights money that is not distributed by a performing rights organization? That might go to, that would fall now under the contract between the songwriter and the publisher, which might have some sort of split. It might allow a publisher, for instance, to get an advance that the writer wouldn't be sharing in, or to add administrative fees to his deal, and go to the DMX deal, as a good example.

Where DMX and MRI basically convinced one of the major music publishers to give them a license. And, as an incentive, they gave them a signing advance of 2.7

1 million dollars, as a kind of advance on the
2 money that they were going to get. And then
3 they went around to all the other publishers
4 and said, we will give you the same deal as we
5 gave this big publisher, and all small
6 publishers thought, well, you know, this is
7 one of the smarterst guys in the music
8 business and so this must be a good deal. And
9 so they convinced, you know, a lot of small
10 publishers to sign an agreement, sorry, I'm
11 skipping over a lot of facts here.
12 But what happened in the end was
13 that songwriters and composers ended up losing
14 a lot of money because of direct licensing by,
15 in this case, a large publisher, I think, who
16 wasn't quite aware of what was going on.
17 MS. CHARLESWORTH: Were the
18 advances distributed by the publishers to the
19 songwriters?
20 MR. WOOD: That is a really, that
21 is a really good question, Ms. Charlesworth.
22 I don't know, and nobody does, except the

publisher.

But, you know, when a PRO gets a dollar, you know, they take out their expenses, and then they cut the dollar in half, and half goes to the writer, and half goes to the publisher. When a publisher gets a dollar, for performing rights, we have no idea what happens to that dollar. That dollar might be subject to an administrative fee, a technology fee, it might be subject to, you know, we signed the agreement on Monday, so we take another ten percent off. We don't know, and there is no transparency, there is no requirement for a publisher to be transparent, to a writer, about what happened to that money.

MS. CHARLESWORTH: I'm sorry, but doesn't the -- usually, the traditional songwriter contract talk about that, talk about the split between the publisher and the songwriter?

MR. WOOD: It does, but it

determines -- the question is, what is the actual performance fee. So if you get 100 dollars from somebody, how much of that fee is the administrative fee, and how much is the performance rights fee?

It could be a 50 dollar administrative fee, and 50 dollar performance fee. So you split that with the writer, the writer got 25 dollars.

MS. CHARLESWORTH: Okay, so --

MR. WOOD: In other words, the publisher has his hand down the lever, he can move it wherever he wants, because there is no real transparency. Does the writer have the ability to audit? Yes, sure. So are you expecting the songwriter, in Des Moines, Iowa, who has a day job selling real estate, because he only makes 30,000 dollars in royalties from his song, back in 1982, is he supposed to come to New York and hire a 5,000 dollar retainer, to an entertainment attorney, to go audit the record company, and the publisher, to find out

about his money?

It is impractical. So you had asked for comments about, you know, the small market people. I'm here to represent the small market people, and to tell you about what their predicament is. And I'm happy to answer more questions. But, really, what I wanted to get to, and it is kind of tangential to this point, Mr. Hoyt brought up the question of direct licensing for television. In many cases we are talking about negotiations directly between television stations and program producers, and composers. Composers who are spending their day composing, not understanding, you know, the economics of television licensing. And so instead of a willing buyer, willing seller, you have a willing buyer, uninformed seller. You have informational asymmetry between these two parties, that is drastic and plays out every day.

Where composers, who just want

that new piece of equipment, or the new piece of hardware, or software, or to take their wife out to dinner, are happy to get that 100 dollar extra fee, for the performance rights, because they have no idea what those performance rights are really worth, and no way of knowing. We don't have an open market for performance rights in this country. So there is no way for a seller, a composer, seller of performance rights, to have any idea what his performance rights are worth. So I just, you know, I bring that up because, again, I think it is important, as you consider, you know, these changes, think about what the implications might be for, you know, for those of our creative community, who spend their time doing what we want them to do, which is to create. And recognize the role that in this case, ASCAP, BMI, and SESAC play in letting creative people create, while these organizations take care of the performance rights. And I can give you a much better

explanation of DMX.

MS. CHARLESWORTH: I have read the case, thank you very much. Mr. Bengloff?

MR. BENGLOFF: Thank you.

MS. CHARLESWORTH: And we have a lot of signs up so it is -- we are at the point, you know, I want to get everyone in, so if we can keep it to two or three minutes or so, as we go around, especially if you have spoken before.

MR. BENGLOFF: Sound bites are fine. Talking about transparency, I'm going to talk, obviously, more in terms of Section 114. We need a data base controlled by an impartial third party, with representation by third parties, such as SoundExchange, that could watch out for everybody's interest in the 114 area. It could make sure the correct creators are getting paid for the works that are being delivered to people in a fair and equitable basis. We represent creators who have a half percent market share, three quarters of a

1 percent market share, or a point market share.
2 But most of our members have
3 significantly smaller market shares, and we
4 have to make sure they get paid.
5 Unfortunately, if that is not the case, but
6 rather the money gets swept into what is
7 called the black box, and it is allocated
8 based on going to the largest creators, which
9 isn't fair for anyone in any community. So we
10 are very much against that. In terms of
11 transparency we embrace everything that is
12 going on, the discussions that we just had. As
13 Mr. Diab is familiar with, last week the
14 world-wide independent music label community
15 met here in New York, and tackled a number of
16 issues.
17 But one of them was fairness. In
18 his testimony, this week, at the House our
19 representative Darius VanArman will announce
20 the Fair Deal Declaration. It was passed by
21 the World Independent Network, last year, when
22 my colleagues from around the world, with his

permission, we are using Tom Waits' line, "What the big print giveth, the small print taketh away". We don't feel that, that is a fair system for our artists. We plan to disclose, to all our artists, to make sure that they are paid properly. Thank you.

MS. CHARLESWORTH: Thank you. Mr. Marks?

MR. MARKS: Thank you. A couple of words on both 114 and 115. On 114, due to the current rate standard, and the politicization of the process, I think it is fair to say that we have lost billions of dollars to our industry. And, therefore, expanding 114 beyond what it covers today is something that we would not want to do, for fear of losing even more. And while, you know, the intent of the original 114 was to enable radio-like services to get into business, it has served that purpose well, given that there are 2,000 plus of those kinds of services.

But for other kinds of services

you don't have that kind of volume, and losing that kind of money, given the challenges facing our industry today, are not something that we want to risk. And I, I agree that, you know, data bases are important, data is important, avoiding black box is important, and a direct license would enable an independent, or a major label, to be able to do that.

On the 115 front, just an observation. I think both in the first two round tables and here, I have heard a couple of things that I would say are fairly common themes. Not themes that every person at the table represents but most people seem to like.

One is ensuring fair market value for songwriters and publishers. And the other is some form of collective licensing. You know, whether it is a PRO blanket license, whether it is, as Jay's colleagues have talked about, in terms of Youtube, and other examples, collective licensing is important in

order to simplify the process. I, you know, with all due respect to Mr. Badavas, you know, the song by song licensing that is today, you know, we had one example where it took 1,500 licenses to get one project out the door.

That is something that is not good for anybody. We can talk more, in the next panel, a little bit about how much money is being lost, for all of us, as a result of that kind of licensing procedure.

But if you take those two, those two themes, and you add to it a lot of the things that Jay, and others around the table, have talked about, an audit right, no pass-through.

Where you have, you know, a direct relationship between the service and the publisher, and the songwriter, representative. Giving consumers, you know, what they want, you know, by having this kind of blanket system, like Lee and others have said. Retaining first use rights, so that you are

1 not, you know, folding into something, you
2 know, taking away rights, but doing away with
3 the rate court, and the CRB. Those are all
4 things, all elements of the idea that we
5 presented, which we can talk in more detail
6 about later, if folks would like. Again, it is
7 just an idea, but -- and there may be better
8 ones. But trying to thread this needle of
9 achieving fair market value, yet simplifying
10 licensing through some kind of collective
11 licensing, I think is a difficult thing to do.
12 But it is something, hopefully, we
13 can build upon either through discussion of
14 our proposal or our other proposals.
15 MS. CHARLESWORTH: Thank you, Mr.
16 Marks. Mr. Rosenthal?
17 MR. ROSENTHAL: Okay, a couple of
18 quick points. First of all, by proposing that
19 we get rid of Section 115 we are not, in any
20 way, proposing that we walk away from
21 collective licensing. As Marybeth Peters will
22 be quoting a lot. As stated, that two

1 countries have Section 115-like apparatus,
2 Australia and the United States, the rest of
3 the world has kind of worked out its own
4 collective licensing approach. And we think
5 that, that is where we need to go, we need a
6 harmonization. The labels always talked about
7 the rescue of radio, we need harmonization of
8 what they are doing in Europe. Well, we
9 believe the same thing. And we think that it
10 can work out better, in the free market, than
11 if it is somehow regulated. Number two, the
12 issue of song by song, versus blanket
13 licensing. I don't understand how, at a time
14 when technologically we could handle song by
15 song licensing, that the primary goal should
16 be anything but paying the copyright owner,
17 author, music publisher, for the usage that is
18 being used by the services, or whomever. And
19 to pay them with transparency, and to get to
20 the ultimate right point, which is paying the
21 right folks, the right amount of money. I know
22 that over the years, with collective

licensing, especially an approach that is more like a blanket, that while it has worked, to a certain extent, in performance rights, there are still issues. And that is the history of the performance rights world, of are the right people actually getting paid, what they should be getting paid?

This is where we want to get to, by song by song. And as a last point. I cannot tell you how much I disagree with this idea that, if we do not have Section 115, there would be no digital rights ecosystem out there. The idea that publishers are so irrational that they would not have, in a free market, worked out deals with the digital services, is just simply ridiculous.

They would have, and to a large extent, what has been granted to the labels, the right to go out and not just work out deals, but to actually gain equity interest in some of these services, is a right that is not granted to the music publishers. This is why

we need to move towards a system of free market, to allow the music publishers and the songwriters, to get everything that the labels had under their systems.

MS. CHARLESWORTH: We are going to have several more panels, and we will have more opportunity to discuss some of these issues.

I think on a song by song, and licensing structure, I think the question to keep in mind is the major publishers clearly are able to, and have done, direct deals with many digital services. So the question, I think, that has come out of many of these conversations is, how do you deal with the people who don't have that kind of leverage, smaller players in the marketplace. How do you ensure that they are part of this marketplace?

MR. ROSENTHAL: To a large extent they have in the songwriter side, I mean, the sound recording side. The idea that for the smaller players there are companies out there,

that offer services. You can join certain types of collectives. Might we deal with an antitrust issue? Maybe, and we have to kind of, you know, weave that into this whole conversation we are having.

But I don't see any reason why the smaller players could not effectively deal in a much more of a collective licensing mode. The Youtube deal, that we have entered into, is a perfect example of that. Major publishers, entering into deals with Youtube directly. Because of a lawsuit that we settled we entered into a longer term, not longer term, a licensing arrangement with Youtube.

Now over 3,000 publishers have opted into that particular deal. The free market allows for the smaller publishers, as well as the smaller sound recording owners, to engage in this kind of licensing apparatus.

MS. CHARLESWORTH: Thank you, Mr. Rosenthal. Mr. Duffett-Smith?

MR. DUFFETT-SMITH: Thanks very

1 much. And I just want to address that, at a
2 high level, that we have heard a lot about
3 free market value of licensing rate setting
4 proceedings. We agree in principle that
5 songwriters, and music publishers should be
6 compensated. There is, however, a practical
7 issue here, which is this. The services like
8 Spotify are in danger of being caught in the
9 cross fire, between the labels and publishers.
10 Under the current systems, of all the money
11 that comes in through the door at Spotify 70
12 Per cent goes out in royalties straight away.
13 Before other costs are accounted for. I think
14 it is just very important that we recognize
15 that any changes to the system, as it
16 currently is, recognize the fact that there is
17 only so much money to go around. So you pay
18 more to one person, then that must result in
19 somebody else getting paid less.
20 MS. CHARLESWORTH: Thank you. Mr.
21 Bennett?
22 MR. BENNETT: Thank you. I want to

1 talk about, very briefly, one of the positive
2 aspects of Section 114 for, probably, the
3 smallest market participant at the table. We
4 have all talked about music consumers, talked
5 about the music services, talked about the
6 rights organizations, copyright owners,
7 copyright authors. I'm talking about the
8 recording artists, who sometimes are copyright
9 owners, many times are not copyright owners.
10 They benefit, dramatically, because of Section
11 114's direct payment to them. The importance
12 of the recording artist is in the sounds that
13 you are hearing. I can tell you, having grown
14 up in a house with an older brother and
15 friends who played music in the basement, you
16 can take a really great song, and it can sound
17 terrible, terrible, without good recording
18 artists that know what they are doing, and
19 know how to create the sounds. And so, to that
20 extent, I would agree with Rich that the more
21 services that are covered under 114, that
22 provide direct payment to the artists, the

better. Better for the music community, for the quality of music, and given the number of services out there, and the ways we can consume it, you are going to need a lot of quality music, to make it all work. Thanks.

MS. CHARLESWORTH: Thank you. Mr. DeFilippis?

MR. DEFILIPPIS: Thank you. Two quick comments. First is blanket licensing is not the opposite of song by song licensing. It is certainly not, it is certainly not song by song licensing on the front end. And I would say that is more a function of efficiency and pricing than it is being wedded to any particular license structure or scheme. And the evidence of that is, that on the back end, every day we are closer, and closer, to a census that is song by song survey opinion. And so the two are not mutually exclusive. With regard to transparency, ASCAP recognizes the importance of transparency. And the evidence of that is alongside of our proposed

consent decree changes, we can express the voluntary expansion of visibility into our own, the details of our members proprietary data.

But there must be a balance. And here is where I'm glad that this issue was raised by my friend Waleed, of Youtube, given its stellar record of leadership in the halls of transparency.

But I, by no means, single out Youtube. The current consent decree, the process that has evolved from it, it truly has us pleading for the information we need in order to quote a license, we are waiting for it for many months, even years. And so when it does arrive, or when it does not arrive, the current system provides our only remedy, a very incredibly expensive and risky rate court. And so I just wanted to make a point about transparency, where there has to be a balance between the licensor and licensee.

MS. CHARLESWORTH: Just to follow-

1 up with that. When you say pleading for
2 information, can you elaborate on that, for
3 the record?
4 MR. DEFILIPPIS: Sure. I mean, the
5 consent decree says that when ASCAP receives
6 a request for a license, it is entitled to
7 request the information it needs in order to
8 quote the fee. We are very good at making
9 those requests. But the response is not always
10 timely, it is not always thorough. And so what
11 we have is a very attenuated process. And
12 there are, there may be good reasons why the
13 licensee does not want to be forthcoming
14 immediately, or comprehensively, with the
15 information. And, again, our only remedy is to
16 march into a rate court, that costs us
17 millions of dollars, and has very inconsistent
18 outcomes.
19 MS. CHARLESWORTH: Okay. And what
20 kind of information would you routinely
21 request from a licensee?
22 MR. DEFILIPPIS: Revenue usage,

subscriber information, music intensity information, all of the things that we consider when formulating a fee proposal.

MS. CHARLESWORTH: Thank you. Mr. Hoyt?

MR. HOYT: Let me make, hopefully, three quick comments. Number one, Mr. Woods example of the direct licensing where the composer is uninformed of what the value is. The value to that individual is what he gets in return in a competitive environment. So if he wants a new guitar and he says, I'm willing to give you this copyright for a new guitar, that is the competitive market at work. Secondly, I think we, there are a number of different things where we all agree. We want a competitive rate. We want, I think, we all want transparency. And I would agree with Mr. DeFilippis, that that would entail more information from the user, as well as from the provider. So you have that whole thing. I think the transparency issue is fairly clear

1 from all aspects of things. And that is what,
2 I think, both sides of the table want. I think
3 we also want a competitive rate. But the
4 problem is how do you get to those things?
5 Not what the ultimate goals are,
6 but how do you get there? And I'm disagreeing
7 mildly, I think, at times on how you get
8 there. The third thing I want to say is the
9 reason that the rate court exists is because
10 the PROs are monopolists. And that is the --
11 and so you have to balance that monopolistic
12 power against the efficiency of aggregating
13 copyrights. And the aggregations, the
14 aggregation of individual copyrights, that
15 leads to the monopolistic practices of all
16 three PROs, at this time. And I think, in the
17 future, there may be more PROs that exist that
18 use the same type of, I would say, model. And
19 we consider the model that SESAC has put
20 forth, as the monopolistic model that we would
21 face, as users, if we don't have the rate
22 courts in place, and continuously have those

rate courts in place.

MS. CHARLESWORTH: Thank you, Mr. Hoyt. Mr. Raffel.

MR. RAFFEL: Thank you. Yes, as we discussed, a new licensing policy, I just want to make a quick point that low power FM stations are critically important for community organization. And, but they are, in many ways, affected by policy that affects much more, much larger groups. You know, the royalty revenues from low power FM are a relatively tiny drop in the bucket. But about -- recently, at the survey, about half of the stations surveyed, were broadcasting on the web. And about half of those cited, web licensing fees as the reason. And it is, as you can imagine, being on the web is becoming more and more important for a station. So I just want to make a quick -- yes, just a quick point, to remember the small guys.

MS. CHARLESWORTH: Okay. Mr. Rae?

MR. RAE: Transparency is really

interesting. But it is, kind of, like transparency for whom? You know, when you talk to a songwriter there is, sometimes, consternation about how those deals were arrived at, and what the terms are. So, you know, in some instances we can point to new and exciting novel deals that, kind of, can come out of direct market negotiations between those in the music environment.

But they still do not, you know, meet the criteria that I would apply for the writers to understand how compensation is arrived at, and distributed. Along those lines there is a lot to like, you know, I read the BMI filing, and the ASCAP filing. There is a lot to like there.

I think that, you know, solving the interim rate issue would be tremendous. I think that that would relieve a lot of tension even within the current rate court structure.

What makes me nervous is, if we are talking so much about transparency, moving

to arbitration seems like a backwards step from transparency.

Because, as I understand, those proceedings are sealed, unless there is a directive for them not to be. So that is kind of concerning to me. I'm really glad that Doug is here, because Doug just keeps hitting on all the things that I think are, really, really, important from the creative side. Over the years on the master use, we have had tons of unattributable income. And we had a lot, a lot of deals that were struck that did not benefit the sound recording artist on any fundamental level, outside of what was stipulated in their contracts. There is, also, file sharing lawsuits, where that money did not make it to the people who were getting ripped off. So I think that this is an opportunity for us, as we figure out how we want to redraw the lines, and some designations, interactivity, non-interactivity, figuring out what process, for

rate standards is most efficient, and allows the music to get to the marketplace more quickly, and also compensate composers, and performing artists fairly.

That is the riddle. The path to get there is interesting. Bundling rights, on the PRO side is interesting. I can completely understand how difficult it must be when you look at your international peers, to see the environment for licensing look, you know, completely different than it is here. Of course then you run into the problem of HFA, song by song, and so on, and so forth. Meanwhile, you know, folks want to get new products to marketplace, and people want to hear music. So somewhere in between solving all of these little tiny problems, and ending up with, you know, potentially passable piece of legislation that would address them all, seems like a tall order, even within our industries.

MS. CHARLESWORTH: Thank you. We

are going to try to remain optimistic. But I think there are quite a few issues that need to be solved, as we listen to the roundtables. How to reconcile collective licensing with, perhaps, some direct licensing. How to achieve fair rates, how to achieve transparency, all very important issues. Mr. Diab?

MR. DIAB: I will just be really quick because I know everybody is sort of tired. So I just wanted to respond to one point about the transparency. I think, you know, what we are really talking about is aligning incentives with those of the creators, in terms of identifying the repertoire they are licensing. And I think that is an issue that we run into, on the licensee side, where you know, whereas we are asked information about how to value a license, it is sort of, like, a chicken and egg situation.

Because, you know, obviously part of the value of the license is knowing exactly

what is being licensed to you. And that is where you sort of run into a lot of problems. So I think if you can look at, you know, trying to create incentives to, maybe, enable that information to be readily available to licensees, I think that would be a vast improvement.

MS. CHARLESWORTH: Okay. Yes, our time is up. We are actually running right on schedule, which is great. We are going to take a break for 15 minutes, until a quarter of, and go on to the next panel, and we will be re-arranging the placards.

(Whereupon, the above-entitled matter went off the record at 10:32 a.m. and went back on the record at 10:47 a.m.)

MR. DAMLE: I think we have everyone. Thank you very much. This next panel is a panel on sound recordings and, specifically, about the statutory licenses in Sections 112 and 114. Before we get started I wanted to offer, the new people on the panel,

an opportunity to introduce themselves, and explain what perspective they are bringing to the panel. So we will start over here with Mr. Marin?

MR. MARIN: Hi. My name is Aldo Marin, I represent Cutting Records, Inc. We have been an independent label since 1983, mostly in the dance and latin market.

MR. DAMLE: Okay, thank you. Ms. Greer?

MS. GREER: Hi, Cynthia Greer, Sirius XM Radio. We are a licensee of four statutory licenses.

MR. DAMLE: Thank you. Ms. Finkelstein?

MS. FINKELSTEIN: Hi. I am Andrea Finkelstein from Sony Music. I'm in the business affairs area and I've been with Sony Music since it was CBS records. So quite a long time. I oversee the mechanical licensing area, as well as a lot of other business, centralized business affairs functions. And I

1 represent Sony Music on the SoundExchange
2 Board.
3 MR. DAMLE: Mr. Albert?
4 MR. ALBERT: Good morning, I'm Eric
5 Albert, I'm with a company called Stingray
6 Digital. Stingray is, actually, based in
7 Montreal, Canada. We operate in just over 120
8 countries now. So I think I will be able to
9 bring somewhat of an international
10 perspective, if you will, to this debate. And
11 our services leverage both the collective
12 licensings, and also direct licensing with
13 publishers and record labels.
14 MR. DAMLE: Thank you. Mr. Resnick,
15 I think you are next.
16 MR. RESNICK: Yes, I am. My name is
17 Perry Resnick, I'm an artist representative on
18 the SoundExchange Board, but I'm not here
19 representing SoundExchange, Colin is doing
20 that. I'm here representing featured recording
21 artists. I'm a principal at RZO which is a
22 business management firm for featured

recording artists.

MR. DAMLE: Thank you. Mr. Kohn?

MR. KOHN: Hi, I'm Bob Kohn. I'm author of Kohn on Music Licensing. I founded a company called Emusic, which is selling downloads, MP3 files, in '97, '98. And I founded a company called Royalty Share that provides digital revenue, and royalty processing services for record labels, music publishing companies, and music distributors. No longer associated with any of those organizations, other than as a shareholder. Thank you.

MR. DAMLE: Thanks. Mr. Fakler?

MR. FAKLER: Yes, hi. My name is Paul Fakler, I'm with the firm of Arent Fox. I'm here, today, representing both the National Association of Broadcasters, as well as Music Choice, which is the world's first and oldest digital music service.

MR. DAMLE: Thank you. And, Mr. Rushing?

MR. RUSHING: Hi, I'm Colin Rushing, I'm the General Counsel of SoundExchange. SoundExchange is the organization that collects and distributes the royalties that Digital Radio Services pay under the Statutory Licenses in Sections 112 and 114.

MR. DAMLE: And, Mr. Malone?

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MR. MALONE: I'm Bill Malone. I'm a lawyer, for the Intercollegiate Broadcasting Company, which is the trade association, if you will, which represents a large proportion of the college broadcasters, both those on closed circuit AM companies and then educational FM licensees. And there are a few who are also commercial FM licensees. And I've -- IBS has no employees, so I'm an outside lawyer, essentially, representing them.

MR. DAMLE: Okay, thank you. So we have heard, in the written comments, and at other roundtables, and today, that the

statutory licenses in sections 112 and 114, are generally effective, but that improvements could be made around the edges. And there, obviously, was a debate in the earlier panel, about some of those improvements. So we would be interested in hearing, obviously, more about your views about those improvements. Including, for instance, the line between interactive and non-interactive. And whether there should be, perhaps, even a tier in between. There are a couple of specific things that we would be interested in hearing views about, in particular, that we haven't had a chance to explore in earlier roundtables.

One is we have heard a lot of criticism, in the written comments, from the digital service providers about the limitations in Section 112. Including, for instance, the fact that it is limited to one phono record. And the requirement to destroy that phonorecord, within six months. And so to the extent that people have views about that

critique, and whether that is a fair critique, we would be interested in hearing that.

Now, the other thing we have heard, and we'd like to delve into a little bit more, is the difficulty of settlement before the Copyright Royalty Board. And to explore, a little bit, about why that is difficult, and things that might be improved to make settlement easier before the Copyright Royalty Board. So, again, without limiting the topics that are open for discussion, I just wanted to put those two, specific, issues out there. So Mr. Resnick, I guess we will start with you.

MR. RESNICK: Okay, thank you. First I would like to say what I do is on behalf of artists. I do audits of record companies, I do audits of music publishers, and with my clients, which include U2, Rolling Stones, David Bowie, Sting, and people like that, we have recovered over 50 million dollars in royalties, for our clients. And we

are a very, very small piece of the industry, we are way under one percent, our clients. So extrapolate that to the rest of the industry, and we are talking big money, and 80 percent of that is attributable to sound recordings, and 20 percent of that is attributable to copyrights, music publishing, you know, songs. The 114 license, the best thing that you can do for artists is to eliminate this interactive, non-interactive artificial dichotomy. There is a whole, it is a spectrum, really. It is not really black and white. And the non-interactive, which is administered by SoundExchange, is working great. Artists get paid 50% percent, it is transparent. And there is hundreds of millions, billions of dollars that is going to labels that is not being shared with artists. And there are many ways that this happens. This happens by guaranteed payments, non-recoupable payments, by pieces of -- by insisting on equity in the licensees. And the labels have become experts at

extracting value from the digital service providers that is not related to the actual royalty stream itself. So there may be five aspects to a deal. There could be a non-recoupable payment, there could be technical setup fees, there could be a royalty rate, there could be minimum payments, there could be minimum annual guarantees. And the artist only gets paid on that one royalty rate stream, which is a fraction of the value of what is being licensed. So that is how I would like to start.

MR. DAMLE: Okay, thank you, Mr. Resnick. Mr. Kohn, I think you are next.

MR. KOHN: Thank you. I would like to make a few general comments, because I wasn't on the first panel.

MR. DAMLE: Sure.

MR. KOHN: And then we could talk on some of the details on 114. I've heard, earlier, someone saying and maybe a few people said that the purpose of the copyright law is

1 to compensate recording artists and
2 songwriters. And I think it is helpful to put
3 this in higher structure, in this enquiry, in
4 perspective. In that, that is not the case.
5 The purpose of the copyright law, and the
6 Supreme Court has said this over, and over
7 again, is for the public interest, it is to
8 promote the creation availability of writings,
9 of works of authorship. And we take that
10 perspective, you would have to understand that
11 compensating recording artists, and
12 songwriters, is a means by which you
13 accomplish that goal. So without the
14 compensation to the recording artist, and the
15 songwriter, you wouldn't have the incentive to
16 create these works, and to make them available
17 to the public. There would be underproduction
18 of copyrighted works. So you have the
19 compensation, so there is an efficient amount
20 of copyrightable works are created. And that
21 is where the role of transaction costs come in
22 to this question.

Now, nearly everyone here, I can't say everyone, but nearly everyone here, is a transaction cost. It seems to me that people who -- people don't like anybody, they don't like transaction costs unless they are the transaction cost that is going away. And that is pretty much what we have seen, this morning, what people have said. If transaction costs are money that don't go to authors, and to songwriters, and to recording artists, they go to other people. So, therefore, if the main purpose of copyright law is to create and get works available, and they are not -- the compensation is not going to the people who are actually creating the works, and they are going to somebody else, then the purpose of the copyright law is not being served. So, really, transaction costs, here, are the real problem. Now, we saw this morning, with the RIAA, they don't have a problem with 115. They like 115.

But they don't like 114, and they

1 don't want to see 114 expanded. Now, all of
2 these compulsory licenses are there,
3 essentially, the only way you can justify them
4 is to reduce transaction costs. You see the
5 NMPA, they like to get rid of 115, okay, that
6 is -- they want to, that would increase
7 transaction costs of licensing the underlying
8 songs. And, of course, their agencies, and
9 their reason for existence, and the
10 transaction costs would increase, to those
11 entities, due to licensing of songs. Other
12 organizations, MRI came out against collective
13 licensing. Well, they don't want collective
14 licensing because they are making a lot of
15 money from all the complications. Certainly I
16 have made a little money selling a book, an
17 1,800 page book on music licensing. I'm part
18 of the transaction costs. Certainly that book
19 is, because people seem to want to buy it, to
20 solve some of these problems. I guess my goal
21 is to stop updating the book, because I want
22 to do something else, give it to somebody

else. So I really don't care if my transaction costs are reduced. So I think that is the theme that you have to think of that, why we have copyright to begin with? It is to make works available. And if you take a look at what is going on, on the video side, the audio visual work side, you have all of these movies that are not available on Netflix, and Amazon, Prime, and whatever.

Because everyone in the movie industry says, we can't clear the music rights, it is just simply not worth the time to go back to a 1936 movie, or whatever, to go find the que sheets, or create them, and find out who we have to license.

Because those synchronization licenses, back in those days, simply wouldn't apply to anything other than exhibition in theaters or, perhaps, television if they would arise later on. So you have the public, and the purpose of the copyright law is to make these works available. And because of the

transaction costs of licensing the songs, and the recordings, or whatever that are in these motion pictures, they are not available. So the public isn't being served. So if you are going to take away 115, and take away 114, you are going to end up even in a worse position than we are today.

Because you are going to have what you have on the motion picture side. So I will leave it there. I have some specific comments on 114, but I don't want to, you know, dominate -- you know, talk more than I should, so --

MR. DAMLE: You can feel free to offer your thoughts on specific topics. 19

MR. KOHN: Okay, I thought I would be polite. On one -- certainly on the sound recording side I think, clearly, 106.6 has to be expanded to include all the performances, all public performances.

I think, generally, even the NMPA has come out in favor of that. There have been

all of these practical issues, and problems of ASCAP, and BMI, and SESAC, perhaps being concerned that they are going to get a smaller cut, from terrestrial, radio, because some money is going to the sound recording side. And everyone is going to be watching out for their share of the pie. But, at the end of the day, you clearly have to increase -- you have to expand the right under 106.6 to include movies, not just by digital audio transmission, but by any means of public performance. It is only fair, and that should be done. But when you do that, the question is, okay. How does 114 apply to those new performance rights? And I think because it has been established, through history, that these webcasting kinds of compulsory license, under 114, that apply to digital audio transmission, should probably apply.

Because it is a new right that, a new right of public performance with terrestrial radio, that it would flow through

1 SoundExchange through webcasting under, under
2 114. Half to the artist directly and half to
3 the record companies. But I'm also suggesting
4 that in 114, that should be expanded to, not
5 only, include whatever it includes today, the
6 compulsory license should include interactive
7 streaming. And it should include permanent
8 downloads. I can tell you, as emusic, trying
9 to get -- I never did get any licenses from
10 the major record labels, because they wouldn't
11 license to MP3. I can talk about the history
12 as to why, you know, one of the mistakes that
13 they made over time. But, at the end of the
14 day, the major record companies, through their
15 ability to get massive advances, which DCs
16 would pay money over to the small companies.
17 None of which, like even Spotify, can find, or
18 Pandora, can find a business model, because of
19 what they have to deal with, in the sound
20 recording side. It is not making these works
21 available, and it is not helping the growth of
22 the business. It is just, simply, going to the

transaction costs, and the bonuses of executives, of the major record labels.

That is simply, you know, not allowing the business to grow. And I think that has got to stop. So I think that 114 should be fully expanded to include all of these different digital kinds of rights. And, of course, it should cover reproductions and performances, you know, however you want to do that.

On the other side, I would expand Section 115, number one, it should be a blanket license. Someone should just be able to send a letter to registry and boom, you know, you get across the board. It was discussed, in SIRA several years ago. I was at a roundtable that was conducted seven years ago, whenever it was, and that would have been, you know, the way that could have gone. It should include 115, all forms of downloads, of course, not just permanent downloads, but streams, and public performance right should

be folded in. And I know this is a 114 panel, we can get into that later. But I want to show that there is some fairness, here, that these publishers are correct in terms that they need to have a direct relationship with those who they are licensing for. And there should be that kind of relationship.

MR. DAMLE: Thank you, Mr. Kohn. Mr. Fakler?

MR. FAKLER: Sure. Well, first of all, on behalf of the National Association of Broadcasters, I would just say, in response to that, and it probably won't come as much of a surprise to you.

That, you know, there has been almost 100 years of this mutually beneficial relationship between broadcasters, record companies, and artists, and the public, that has been categorized, legally, by free air play, for free promotion, free to the public. Congress has revisited this, has been asked to revisit this issue many times and has,

consistently, and correctly, determined that it would not be wise to the ecosystem, to upend this long-standing relationship.

But, moving to the questions that you asked, about sections 112 and, particularly, settlements before the Copyright Royalty Board. With respect to your ephemeral licensing problem, what we are really talking about, here, are ancillary copies, right?

Okay, we are talking about copies that are made, or at least what I'm talking about, are copies that are made solely to facilitate an otherwise lawful performance of the sound recording. Whether it is a server copy, or multiple server copies for different bit rates, buffer copies, cache copies, all of those sorts of copies have no independent economic value, other than to facilitate that performance. And as the Copyright Office, itself, has acknowledged in the past, the value comes from the performance, that is where the value should be determined, in rate

1 setting, and in the statutory licenses. Both
2 NAB, and Music Choice, would support, as has
3 been previously recommended by the Copyright
4 Office, getting rid of the 112(e) license, and
5 just expanding the 12(a) exemption, to cover
6 these sorts of ancillary copies. To the extent
7 that these copies cannot be accessible, on
8 demand, to the user, to the extent that their
9 sole purpose is to facilitate these non-
10 interactive program performances, they
11 shouldn't be separately valued. And, frankly,
12 they never have. Either in the settlements, in
13 front of the Copyright Royalty Board, the
14 decisions in front of the Copyright Royalty
15 Board, or even in direct licenses, in
16 unregulated sectors, where the record
17 companies have tremendous market power, and
18 have been able to extract any sorts of terms
19 that they desire. Including equity and rates
20 that have deprived those services from ever
21 turning a profit, any one of them. Even there,
22 there is no separate fee for these ancillary

copies.

MS. CHARLESWORTH: So just a quick follow-up on that. I mean, from a practical standpoint, when you go through the 114 and 112 proceeding and, you know, they set the rate at the end, I think, for the 112. I mean, is this a real problem?

Hasn't, at least in the 114 context, isn't the ephemeral copy problem fairly well solved through that CRB proceeding?

Or --

MR. FAKLER: Well, it is not -- not if you look at it from the perspective of you waste all this time and energy, separately trying to come to a negotiation. Sometimes it is solved at the end, sometimes it is solved at the beginning. In the last satellite and PES proceeding, at the outset, everybody agreed, well, we are just going to have it be attributed to be whatever the percentage is, of the 114.

But just because there is this kludgey work-around, that does consume a certain amount of time and energy, and it gives one side the ability to, you know, it is one other point you have to negotiate out for, really, no reason. We think there is really no point in maintaining this fiction. If we are talking about tweaking these licenses, to conform to technological business and market realities, this is low hanging fruit. And it ought to be done.

MS. CHARLESWORTH: So rather than amending, well, could you imagine a scenario where the 114 license would just, simply, include all the necessary copies?

And not so much -- maybe just get rid of the 112 exemption, altogether? Is that a -- maybe even a better solution?

So that when you set the rate under 114, just that license would be expanded to include the necessary ephemeral copies? I see some nodding down the table. I mean, that

is -- there is a provision in the 115 streaming regs, I think, that does that. And, I don't know, maybe you could both comment on that?

But I was just wondering why you need a specific exemption in 112, why can't you just roll it all up into 114?

MR. FAKLER: Well, I think part of it is because the 112 is already there, and it will have to still be there, because there are licensees, you know, business that use the 112(a) exemption, that do not use the 114. So -- and it applies to musical compositions, as well as sound recordings, 112. So it seems like the most logical place to do it.

If you can include all of those rights within 114, it seems like a much simpler thing, to take 112, which already exists, and has a broader scope than 114, and just fix it. So it covers everything that is actually being done, than to try to recreate one --

MS. CHARLESWORTH: Well, you could just -- we could just write it and just say, you know, when you get your 114 license it includes all these rights, and get, just -- you know, amend 112 so it is consistent with that. In other words, why should you -- your question why you have two different licenses, and two different proceedings. And I'm sort of suggesting maybe there is another course. I mean, we could --

MR. FAKLER: Yes.

MS. CHARLESWORTH: The rest of 112 may need to remain in some form. But --

MR. FAKLER: And, of course, it would all depend on how it was done, in the details.

But it certainly is, is a possibility, that should be considered.

MR. DAMLE: Thank you, Mr. Fakler. 10

MR. RESNICK: On Section 112 I just do not get paid on that, directly. That only

goes to some copyright owners, the record labels. So if it was 114 artists would get 50 percent directly, which is the fair way to do it.

MR. DAMLE: Okay. Thank you, Mr. Resnick. Mr. Rushing?

MR. FAKLER: Could I just address the issue of --

MR. DAMLE: Sure, Mr. Fakler.

MR. FAKLER: -- settlements before the Copyright Royalty Board, just --

MR. DAMLE: Yes, please.

MR. FAKLER: -- quickly. Here I can speak from Music Choice's perspective, because I represented Music Choice in two proceedings, in front of the Copyright Royalty Board. Certainly, from that perspective, the biggest impediment to settlement, is the positions that have been taken. And, frankly, in both proceedings SoundExchange's refusal to even discuss settlement with us, substantively, until the proceedings began. Literally we

could not even get a substantive response. And when we did it was, we think your rates should go up 400 percent. And then we were already in the proceeding, we were already in the process of we had filed our written direct statements. So, in fact, the first pre-existing service proceeding, in front of the Copyright Royalty Board, didn't settle until the first day of trial, when Chief Judge Sledge admonished counsel for SoundExchange to go settle. Suddenly settlement discussions were possible, at that point. But, frankly, there has been an intransigence. Maybe part of it is because Music Choice is perceived as a small player. Although, you know, as I mentioned, you know, before when I introduced myself, as the first and oldest digital music service, with over 50 million monthly listeners.

But it is not because of -- that, I can't -- there are a lot of things wrong with Copyright Royalty Board procedure, in my view, as somebody who is a litigator,

1 primarily, in my legal practice. There is
2 plenty wrong with it. I don't think you can
3 blame the lack of settlements on Copyright
4 Royalty Board procedure.
5 I think there is so much,
6 typically, at stake, in these rate cases. And,
7 and I think that, you know, there is a
8 tendency towards hyper litigation in that
9 context.
10 I think that was true under the
11 CARP system. So, you know, you hear some
12 recommendations, like we are going to solve
13 all these problems by going to private
14 arbitration. Does anybody remember the CARP
15 system? I mean, everybody ran back to Congress
16 begging them to undo that. That is how
17 arbitration is going to work. The problem
18 isn't -- less due process is not the answer,
19 certainly, to keep getting these things more
20 efficient, getting things settled. But that is
21 --
22 MR. DAMLE: Okay, thank you, Mr.

Fakler. Mr. Rushing?

MR. RUSHING: Sure. I wrote some things down, but I will address some things that Mr. Fakler said. Starting with the settlement point.

I have a different recollection of the last proceeding we were in, together, in terms of settlement talks, but I won't go into details because my memory of that is a little fuzzy.

But it is not the case that we refused to engage in settlement, or that we were only willing to talk on certain terms. And I will just leave it at that, because I don't want to bring confidential settlement discussions into this sort of public forum. I will make some observations about settlement, though, which is we had an experience, years ago, where we demonstrated that settlement with large swaths of the industry was possible. It was in connection with the Webcasters Settlement Act of 2008 and 2009.

Sometimes people think about that as purely about the past, because it came up in connection with the discussions around the webcasting two rates that were then being appealed.

But the -- what happened, at that time, was a settlement that actually covered, or settlements, a series of settlements that covered the Web 3 term, as well. It went all the way, you know, so we did these agreements in 2009, covered the term from 2011 through 2015. And there were some features of that process which, I think, are worth keeping in mind. Because I think they were very effective.

One was that they had deadlines, which are very good at getting people to concentrate their attention. Two, and I think this was the most critical part of what those Acts provided. It allowed the parties to make agreements non-precedential.

One of the biggest problems, that

1 our industry faces when we are up against a
2 Copyright Royalty Board process, or any sort
3 of rate court proceeding, any time there is a
4 set of judges who can take evidence into
5 account, and then set a rate accordingly, at
6 the end of the day you don't have control over
7 what they do with the information that comes
8 before them. And you always have to worry
9 about, all right, I'm willing to do such and
10 such with this particular type of service, it
11 makes sense for that particular type of
12 service.
13 What is going to be the impact on
14 the broader case? That animates everything we
15 do in connection with settlement. It is an
16 unfortunate byproduct of any sort of rate
17 court back stop, is you have to worry about
18 the broader litigation context. The Webcaster
19 Settlement Act removed that as a problem. The
20 other thing that the Webcaster Settlement Act
21 had was a feature that, frankly, allowed to us
22 have certainty as to the settlements. We did

1 the agreements the way the Act, that
2 particular Act operated. They just became
3 binding on copyright owners, and then services
4 could elect into them or not. I'm not
5 necessarily advocating the sort of default
6 standing WSA structural, along those lines.
7 But one of the things that I think would help
8 the settlement process is if there are, in the
9 statute, specific deadlines when settlements
10 must be adopted. So, for example, one of the
11 things that happened to us, in Webcasting 3,
12 was we reached agreement with a group of
13 college webcasters, represented by someone
14 other than my friend, Mr. Malone.
15 But it was this group, College
16 Webcasters, Inc. We entered into a settlement
17 with them. We also did a settlement with NAB.
18 Neither of these settlements were actually
19 adopted by the CRB until the very end of the
20 proceeding. And so we found ourselves unsure
21 of what, you know, whether the settlements
22 were, actually, going to be adopted. And the

current panel has, actually, in their scheduling order laid out, you know, a schedule according to which they would publish any settlements that had been entered into during the negotiation period.

That was promising, I thought that -- there was an indication, to me, that they were focused on the need to promptly publish settlements, when they are reached. Nonetheless I think a little, you know, more structure around that would help, just to give the parties certainty as to, as to whether settlement would be adopted. And so I would think those two, those three things, a deadline, deadlines always help. They can also be problems, obviously.

Allowing settlements to be non-precedential, and something to allow more certainty would be useful in terms of facilitating settlement. With respect to 112 I think the rate settings have become very simple, as far as setting the actual rate.

I think the last three times this has been an issue, it has been resolved by stipulation. And then, essentially, in practice the ephemeral rate is just folded into the overall 114 rate. From the licensee's perspective it has an impact on distribution, and so we need a certain rate. I do think it is important that we not diminish the value of particular rights.

But, as a practical matter, I do think that the setting of the 112 license seems to be, basically, working. Which is a segue to the general point I was, otherwise, going to start with, which is -- and Sy, you alluded to it, at the beginning. So the Section 114 license does, in general, seem to be working. Stakeholder seem generally satisfied with the process. I was struck by the comments that were filed, in that you have both creators and licensors, and licensees, all sort of in general agreement that the overall system, really, basically works and

maybe needs some tweaks.

And the main tweaks that I would focus on, I think that we are going to talk about on later panels, but I will go ahead and allude to them now. First, the statutory license for sound recordings works because it is a true statutory license that covers everything. Well, as we know, there is an important gap which is how do you deal with sound recordings protected only by state law?

The fact that there is that open question makes the statutory license more complicated than it was ever intended to be. So that is a problem that needs to be addressed.

Second, you know, it is -- we will talk about this on the next panel. I agree that definitely needs to cover all radio broadcasting, the lack of a terrestrial performance right is an ongoing problem. I won't spend a lot of time talking about that now because that is what the next panel is

about.

And then, likewise, the next panel is going to get into rate standards. That is a problem, the fact that different radio services have different rate standards. We think all of these rates should be set under a willing buyer, willing seller standard. It is only fair. In terms of the system, and this is what I will spend a couple of minutes on this, and then I will go, not leave, but I will yield the -- So I think if you are going to have a statutory license, that is obviously a policy question. And, and a lot of thought has to go into that.

And the scope of the statutory license is, also, a policy question. But once you make the decision to have a statutory license, I think you have to have several important principles in mind. First, whoever administers that has got to be guided by principles of transparency, efficiency, and accuracy.

I think everyone probably, basically, agrees with that, and people talked about on the first panel.

But it is important for rights owner to know that their money is being well handled. And that the rights are being administered fairly. Related to that I think it is critical that, whoever is administering the statutory license, actually, be controlled by the people whose interests are at stake.

That, those are the people who have a direct stake in those three principles. Also, those are the -- if, if, and if it is non-profit, and if it is organized, around this basic idea, that is also going to be the group that will be focused on the biggest problem with the statutory license. And, especially, a statutory license like we administer, which is it covers all sound recordings and it applies to all artists. It is whether or not these folks have ever signed up with those. When you are facing that it is

very tempting, for an administrator, to say that that stuff is too hard to deal with, you know, let's get as much money out as we can, and not worry about this stuff that is really challenging to do.

And it is critical that that organization have industry pressure to do what it needs to do in order to get -- to strike the right balance but erring on the side of total accuracy, total transparency. And ultimately the organization, and I think this is what has guided SoundExchange, is we see ourselves as working to act in service of the overall industry. And our goal, as an organization, is to get to a point where we can, sort of, fade away into the background. So the money, and the data, and all of that just sort of flows.

I think that is the way that this system works best. And, you know, and I think those would be good principles for any intermediary.

MR. DAMLE: Thank you, Mr. Rushing. Let's see, I think I have Mr. Marks next, and then Mr. Rae.

MR. MARKS: Thank you. I have several comments. I just -- let me start with the last conversation about the limitations on 112, and the settlements. I agree, largely, with what Colin said. The biggest impediment we have had, in reaching settlements, has been the fact that you don't want to do a deal that is going to prejudice the rest of your case.

And so if there is a way to address that, especially when you are coming up upon a new proceeding, or in the middle of a new proceeding, that would be the best way to facilitate some settlements that, otherwise, would happen. I also think that the CRB, it would be nice to have, maybe, some set times for the CRB to rule on settlements that are proposed. We had, our last mechanical settlement, that was offered, a delay of almost a year. This is not good for anybody

because it just creates uncertainty about whether the terms of the settlement are going to be ratified, or not.

There didn't appear to be anything objectionable, it turned out not to be objectionable.

But, you know, you have delays that are built into the process, it is not good for any of the parties.

MS. CHARLESWORTH: I just want to say, for the record, there was constitutional litigation going on. I think that contributed to that, in terms of the status of the Copyright Royalty Board. I'm just --

MR. MARKS: Yes, I'm trying to remember where the timing --

MS. CHARLESWORTH: In other words I think that may have impacted the timing of the adoption of the settlement, it is the IBS case.

MR. MARKS: Well hopefully, then, that won't be an issue going forward. To the

extent it is maybe that is something that, you know, could be addressed. You know, with regard to the idea of, you know, folding in 112 to 114 or not, you know Mr. Fakler stated that the technical business and market reality is that there is no extra value to this.

I think it is precisely the opposite with regard to all those three. The mere fact that in a direct license somebody bundles all the rights necessary so that it is easy to do the license, and doesn't demand a separate payment for, you know, a server, or other kind of copy that is necessary to make. It doesn't mean that there is a recognition that there is no value to those. So -- and I think, as we discussed in the previous panel, there are technologies, and technological services that are available, that are designed to make more copies closer to consumers.

And, therefore, provide an advantage to those services. That is just the market at work. But those copies, which are

covered by 112, have value for somebody who wants to pay to be able to deliver their content more quickly, or in a more stable or robust way, to their consumers.

Whether it is folded in or not, to 114, I don't think is the issue so much as ensuring that, you know, if it were folded in, given that there has been kind of a de facto folding in, in a lot of the proceedings, that there still is required to, that the value for those copies doesn't go by the wayside, and there is still a requirement to address those, address that value and figure out what it is. With regard to terrestrial, I agree with Bob that, we need to expand 106.6 to cover that right. And, also, that it should be brought within 114.

And the notion that this is Congress that has been saying, it has been wise not to expand it, I don't believe that to be the case. I believe it to be politics. I certainly hope it is not the case, because

that would put our policies in line with North Korea, Iran and, you know, other countries of the sort. So I just, I guess that is all I will say on terrestrial.

In terms of this idea of expanding, and the 50/50, I just want to take a step back for a second. When the compulsory license for 114 was created, it was created for radio-like services, where there had been no revenue and which were, at the time, thought to be akin to some of the ancillary revenue that you would find in a 50/50 split, maybe, in an artist's contract.

We all know, today, that some of the services operating within 114 but, certainly, those outside of 114, are not ancillary revenue, by any means. Streaming is a very large part of the revenues, and growing. We know that downloads have, in the last year have been declining. Digital revenues, generally, are two thirds of the revenues to the industry. So these revenues,

especially on the interactive side, and since that is the suggestion here, to bring those within Section 114, are critical to driving the investment of all record labels, to create recordings.

And, you know, we -- and I think it was Martin Mills who recently recognized that a 50/50 split, in a world where streaming is the principal revenue, as opposed to downloads, is not appropriate. You can't operate a record label like that because the investments that have been made, and last decade, close to 23 billion dollars, just in talent, an additional several billion in marketing.

These are the kinds of investments that need to be made in order to create market, help artists reach their potential, and everything else that goes into that process. And if you just siphon off 50 percent, by statute, and, further, subject things that are in the market now to what is,

otherwise, in the marketplace -- or into a statutory license that, as we discussed in the last panel, has a lot of problems when it comes to rate setting, in terms of leading to below-market rates.

We just would not see that as a viable way to move forward for this industry. And sweeping statements about how advances, and equity, are treated, I have heard them twice today. You know, settlements -- they are just flat wrong, okay? I'm not going to go into how any one particular company does it. But saying that advances are never shared, or equity is never shared, or settlements are never shared is just plain false.

And we should stop throwing around sweeping statements like that when it comes to those kinds of things. And all you have to do is look around. There are 500, more than 500 services that have been licensed outside the statutory license.

They are all available up on the

Why Music Matters site. There is a thriving marketplace for whatever consumers are demanding, whether it is statutory plus downloads, cloud services, on demand streaming services, you know, advertising based streaming services, whatever it is, the marketplace, on the sound recording side is addressing those.

MR. DAMLE: Yes. So we just want to make sure we don't -- we leave enough time for everyone to speak, and before Representative Nadler comes.

So if I could ask people to limit their comments to just a couple of minutes, going forward, that would be very helpful to us. So I think, Mr. Rae, you were next. And then Ms. Finkelstein. And then Mr. Bengloff after that.

MR. RAE: Of course, you said that right before I speak.

MR. DAMLE: I apologize.

MR. RAE: I know that was a

tactical move on your part. You know, I think we have a lot of bright people in the room. And one thing that we haven't actually figured out, together, is establishing a protocol of whether we call people by their first name, or say mister. I'm inclined to do the mister because the New York times does it. So I think Mr. Marks raises an interesting point about return on investment, in this new marketplace. However, one of the things that we really appreciate, on the creator's side, the performer's side, is direct payment and 50/50 splits.

This is something that has been brought up several times. I raised it, I think, in my opening remarks on the last panel. I definitely do not think that anyone is complaining about the tremendous growth that we have seen at SoundExchange, under the current 50/50 split arrangement. Moving on I can't really resist an opportunity to philosophize about the constitutional compact.

I think that securing for limited times is an incentive to the author to create, for sure. I think that Mr. Kohn and, probably, everybody in this room should agree that the clause is silent with regard to intermediaries. Intermediaries bring a lot of value to the process. But, you know, we have to look at what that value is when we are trying to figure out how compensation and value accords to creators.

Mr. Fakler brought up low hanging fruit in 112. I think there is another low hanging fruit, that is frustrating hard to reach.

And that, of course, is the public performance right on terrestrial radio. I see that we have Mark and Melvin from Content Creators Coalition, really excited about the work that they are doing.

I think for the first time, ever, as we are looking at international music licensing, domestic music licensing, and what

artists bring to the table, in terms of their performances, we can solve this. And I think that it is very, very interesting that as the United States Congress considers issues of parity, across platforms, that the terrestrial radio exemption remains frustratingly out of reach, before now. Three basic value propositions.

Direct payment, where possible. Very, very important for creators, particularly in this new environment. Representation in rate setting processes, even through a proxy. And, right now, in 114 and the public performance right for digital, SoundExchange does provide that proxy representation and rate negotiation. I would prefer, strongly, and I know that a lot of the folks that we work with don't, necessarily, feel comfortable with having their representation in negotiations only being the folks who hold the artist under contract.

One last remark, because I think

1 you guys are going to cut me off any second.
2 I can't stand the word disruption, I think it
3 is a stupid buzz word, and I want it retired.
4 But I do think that there are all
5 kinds of new ways that we have yet to see, to
6 bring music product to new services, to
7 consumers that don't need to require 18 months
8 of negotiation with three major rights holder,
9 with tremendous upfront expense, and only
10 within the permitted contours of innovation.
11 I think that, that limits our
12 opportunity to create new products that will
13 really drive fans to legal and licensed
14 services. And it may end up frustrating how
15 creators are paid at the end of the line.
16 MR. DAMLE: Okay. We are going to
17 move, quickly, through the last people that
18 have their placards up. So Ms. Finkelstein, I
19 think you are next.
20 MS. FINKELSTEIN: Well, my remarks
21 will be brief because I think my friend, Mr.
22 Marks, covered most of the points I was going

to make.

But just to show that I'm a brave woman, I'm going to just restate some of the record company apology because I think it is important for people to understand just how much record companies put into investing.

And growing artists and songwriters by supporting every aspect of their career, through billions of dollars of investment, through many hours of commitments to making sure that artists get the tours they need, the publicity that they need, the promotion to making health and retirement contributions through the Union pension plan, to support them. And the idea of moving all of -- or significant chunks of our business, into a statutory license is, obviously, highly problematic.

That doesn't seem like a business proposition that could be retrofitted onto the business that we have today, where we have undertaken those commitments, and we have

1 invested billions of dollars. I also just
2 wanted to respond to my friend Perry's
3 comments about the record companies not
4 sharing in the advances and guarantees. And I
5 think that is a misconception which,
6 hopefully, will be corrected in future audit
7 work that he does.
8 MR. DAMLE: Okay, thank you. Mr.
9 Bengloff?
10 MR. BENGLOFF: I am going to agree
11 with Andrea and the fact that A2IM
12 constituents are the primary financial
13 investors in the creation process.
14 A lot of our members, also, invest
15 in the creation process in terms of their
16 sweat equity, and labor. And they earn low
17 profits, and they are really struggling in
18 terms of the bottom line, how much everybody
19 is making. I'm not really focused, too much,
20 on the top line, so we agree there. We need to
21 define what is true interactivity, as was said
22 by the Chair.

Everything, once we decide what is truly interactive everything else will be non-interactive. We should define what functionality is, not have any more of this functionality tweaking to create that direct licenses and get excessive income. We are for closed surface market entry.

Equity is shared, in fact, with a number of our members, but not all of our members, and that is the issue. It has to be in someone's contract. I'm not disputing the equity, and advances and things, are charged with some. But it is not charged with enough. Fifteen plus years since the DMCA, the line is blurred, as was noted earlier by the Chair. Let's reflect current consumer demands.

Bottom line is that under Section 114 each song is created and paid equally. The overall level of creator compensation receipt is correct, and needs to be maintained.

But that creator pay needs to be allocated based on actual music usage, to the

correct owners of those copyrights. The only criteria that matters on a fair and equitable basis.

MR. DAMLE: Thank you. Mr. Resnick?

MR. RESNICK: Okay, thank you. The interactive license, part of the problem is transparency.

This came up a lot in the last panel, it has barely come up on this panel. And the -- yes, we use words like always, or never, because we have no information. I do audits of record companies, and I can't get near any of this information. And I can't get -- I say, can I go look at the Spotify deal? No, you can't look at the Spotify deal. Can I look at this? No, you can't look at that. I mean, all these direct licenses that they are doing, I have never seen one of them, I have never been able to see one of them, because everything is under confidentiality agreements. When we do an audit it is a confidentiality agreement. But if I learned

1 something on one artist, I can't use it for
2 another artist?
3 It is just -- everything is, the
4 only way to get transparency is to bring the
5 interactive onto the 114. There is no other
6 way to get transparency because major labels
7 just don't do transparency. That is basically
8 it.
9 MR. DAMLE: Thank you. Mr. Kohn? If
10 you could just speak into the microphone?
11 MR. KOHN: Just to clarify one
12 point. And that is when we expand, if we
13 expand 106 to include the public performance,
14 I said that that should go through 114
15 collective license, and to be split, as it is
16 split today, as digital audio transmissions.
17 When you expand 114, as I
18 recommend, on permanent downloads as well as
19 interactive streams, that should go directly
20 to the record companies because it is not a
21 new right, it is just a reproduction right
22 that has been there. Record companies have to

be reminded they are also part of the transaction cost. When they talk about this 50/50 I think they have to realize that the problem is, it is because the music publishers are operating under certain constraints that they are not operating under.

And nobody is at the -- all the parties aren't at the table at the same time. So parity has to be looked in the overall context of both 114 and 115.

On 112 I was, I don't know, I don't remember, did record companies, and maybe someone can answer this, ever collect from radio stations from making ephemeral recordings, for the purposes of facilitating their broadcast?

Because I was surprised that, over a period of time, as 112 is expanded to include the digital audio transmission, that there was any payment for it at all. It doesn't make sense to me, and it is just there to facilitate what was, the licensed

1 transmission.
2 And, finally, with respect to the
3 CRB, if you just take a look at what has gone
4 on here, I have spent an enormous amount of
5 time trying to figure out the 13 or 14
6 different licensing regimes for all of these
7 114 things. Mainly because whatever was
8 decided, by the CRB, wasn't acceptable to all
9 these various organizations and, therefore,
10 you had these settlements. I don't know what
11 the cause of that is. I did meet one of the
12 CRB members, I won't say -- this was a long
13 time ago. But he had no music industry
14 background at all. So one of the things I
15 recommended, in my paper, that I submitted in
16 the comments, is that if there is going to be
17 a CRB, or some kind of a rate board to deal
18 with all these allocations that, at least, the
19 board members be nominated from people in the
20 industry. Both the service providers, the
21 music publishers the PROs, and everybody in
22 the industry. So at least when someone is

selected, by the Copyright Office, whoever, it is someone who knows the business, rather than someone coming in just fresh.

Because I think that might have been symptomatic of what has happened with all of these different complicated regimes under 114.

MR. DAMLE: Okay. And thank you. Mr. Malone you are last. And if you could just be as brief as possible?

MR. MALONE: I think that my message, here today, is that the college radio stations really don't belong here. You've got volunteer staff, sometimes for academic credit, mostly for not. You've got average number of listeners per, you know, three. And they are not in the business to make money off of the record companies. They are in the business to teach students how to run a business, how to program, how to write. It is, basically, an educational establishment. And these groups exist in high schools, in

colleges of course, the military academies, and other strange configurations. And I -- the statute just doesn't really take that into account. And the first and practical problem we encounter is the fees that are being charged under Board orders are totally disproportionate to the usage being made of them. You know, SoundExchange came in and insisted on a 500 dollar minimum fee for a group that is, maybe, three hours a night during term times, to audiences of three or four listeners. And 500 dollars is just total disproportionate to what is at stake here. And the Board seemed very reluctant to accept the concept of submarkets.

But, you know, you don't sell on a permanent basis, or any other way, the same price in every submarket. And yet your Board seemed to feel that we belonged with the commercial broadcaster that use the Top 40 format. It just makes no sense. That is the heading.

MR. DAMLE: Thank you very much. And thank you, all of you, for your participation in this panel, it was very helpful to us, as all the panels have been. And I think I will turn it over to 3 --

MS. CHARLESWORTH: I'm going to step up to the podium. Well, as you saw, we have Representative Nadler has come in and I'm so very pleased to have him here with us today. As the New Yorkers know he represents the 10th Congressional District of New York, which happens to include a lot of artsy territory, I think it is fair to say. And he is now ranking member of the House Judiciary Subcommittee on the Courts, Intellectual Property, and the Internet. Many of you, especially New Yorkers, will know Representative Nadler is a strong supporter of civil rights, civil liberties, and freedom of expression. And we are fortunate, now, to have him advocating for the very important values of our copyright system in Congress as well.

Thank you for coming here today, to offer some words of wisdom, and encouragement, as to how we might go about fixing this. This is the music licensing chart.

I think that Representative -- or Mr. Issa held up at a recent hearing. As you can see it is rather complicated, and we need your help, Congressman. I also want to acknowledge your incredible staff, especially Heather Sawyer, Chief Counsel for the subcommittee, and Lisette Morton, Legislative Director.

They have not hesitated to dive right into these issues. And they, apparently, are very fearless. So we at the Copyright Office are very grateful to be able to be working with them, and other members of your staff, Representative Nadler. And now, without further ado, I give you the Congressman.

CONGRESSMAN NADLER: Thank you. First let me apologize, I was supposed to speak here, this morning, at 9 or 9:30, but I

had a funeral that I had to speak at. So thank you for rescheduling. Thank you, Jacqueline, for the kindly, warm, introduction and for inviting me to participate in today's roundtable. As a longstanding member of the Judiciary Committee Intellectual Property Subcommittee, I applaud your leadership, and the truly outstanding work of your staff.

It is my pleasure to welcome everybody to the great city of New York. It is wonderful that the Copyright Office is holding these roundtables in different areas of the country. And engaging in a critical dialogue with people working in all aspects of the music industry. We are directly affected by the laws governing music licensing.

The Subcommittee on Courts, Intellectual Property, and the Internet, in which I currently serve as a ranking member is, as you probably know, conducting a comprehensive copyright review. In one of our very first hearings the U.S. Register of

1 Copyrights, Maria Pallante, called on Congress
2 to update copyright law, and specifically
3 mentioned music as an area in need of reform.
4 I wholeheartedly agree. It is
5 often said that if we started from scratch,
6 nobody would write the law the way it stands
7 today. Music copyright and licensing is a
8 pantry of reactions, at different times, to
9 changing technologies. From the development of
10 player pianos, and phonograph records, to the
11 advent of radio, and the internet, the law has
12 constantly been playing catchup and, quite
13 often, failing. To date terrestrial,
14 satellite, and internet based radio stations
15 deliver music to listeners in their cars,
16 homes, and at work.
17 Each of these uses of music
18 requires licenses from copyright owners, for
19 both the underlying musical work, and the
20 sound recording. With the rights of each often
21 owned and managed by different individuals, or
22 entities. Over time, and in an effort to help

1 ensure equity and access to this complicated
2 universe, Congress has created the Statutory
3 Licensing Scheme.
4 Unfortunately the existing
5 landscape is marred by inconsistent rules that
6 place new technologies at a disadvantage,
7 against their competitors, and inequities that
8 deny fair compensation to music creators.
9 Under current law, for example, the rules vary
10 for payment of royalties by internet
11 broadcasters, cable, radio, and satellite
12 radio providers.
13 Internet broadcasters, like
14 Pandora, pay royalty rates set to reflect a
15 so-called willing buyer and willing seller
16 model. By contrast the rate for cable, and
17 satellite providers, is established through
18 factors set in 1998, that pre-dated
19 development of internet radio. And that many
20 believe result in a below market royalty rate.
21 As a result Pandora has, fairly,
22 complained that it is at a competitive

disadvantage, and creators receive less when their works are accessed through cable or satellite, than when a consumer streams that same work over the internet.

During the last Congress I circulated draft legislation, the Interim FIRST Act, to establish parity among all digital radio services. The Songwriters Equity Act, recently introduced by Representatives Collins, and Jeffries, would similarly modernize the law to ensure that the same willing buyer, willing seller standard, governs songwriters and music publishers mechanical reproduction royalties.

Other provisions of the Copyright Act prevents songwriters and publishers from providing evidence, in Federal Rate Court, under a 1941 Consent Decree governing licensing of their works. The Songwriters Equity Act has removed that evidentiary ban, thus helping songwriters obtain a fair market value for their work.

In the meantime the Department of Justice recently announced the much-needed review of the Consent Decrees that govern ASCAP and BMI, two of the performance rights organizations responsible for collecting and distributing royalties. Meanwhile digital providers are paying nothing, at all, to artists who recorded many of our culture's greatest musical classics, before 1972, like Aretha Franklin, the Birds, and the Temptations.

The RESPECT Act, recently introduced by my colleagues, Representatives Holding and Conyers, would close a loophole in the law that has allowed digital providers to argue against paying any royalties for these great legacy artists.

Of course one of the most glaring inconsistencies, and injustices, is that our performance artists, background musicians, and other rights holders of sound recordings, receive absolutely no compensation, when their

music is played over the air on terrestrial, meaning AM or FM radio.

In 1995 Congress required payment when sound recordings are transmitted digitally. But we have yet to extend this basic protection to artists when their songs are played on AM, FM radio. This is incredibly unjust. The bottom line is that terrestrial radio profits, from the intellectual property of recording artists for free.

I'm aware of no other instance, in the United States, where this is allowed, and it needs to be remedied. We are in a short list of countries, we are joined by such other countries as Iran, North Korea, and China, that do not pay performing artists when their songs are played on the radio.

Great company. And when American artists' songs are played in Europe, or any other place that provides a sound recording right, these countries withhold performance royalties from American artists, since we

refuse to pay their artists, we don't have reciprocity. Although the existing music licensing, and copyright scheme can be difficult to understand, the solution is simple.

If Congress is going to maintain compulsory licensing then any statutory rate standard should attempt to replicate the free market to the greatest extent practicable. And the same rules should apply to everyone. The law should be platform neutral, and all music creators should be fairly compensated.

It is well past time to harmonize the rules, and put an end to Congress creating arbitrary winners and losers. There have been several proposals to address individual and equities in the music landscape. Some of which I have just mentioned, and that I support.

But if we had to rationalize the law, and level the playing field, we should take a comprehensive approach. At this year's Grammy on the Hill event, Recording Academy

President, and CEO, Neil Portnow called for the industry to coalesce behind a music omnibus, or music bus.

His call for unity was later echoed by Republican Whip Kevin McCarthy -- I should say now Republican Majority Leader, soon to be Kevin McCarthy, and Democratic Leader Nancy Pelosi, who agreed that the time has come for Congress to address these issues in one package.

Last week in the Judiciary Committee's first music licensing hearing, I made a public commitment to take up their charge. With colleagues from both sides of the aisle, I'm developing legislation to address the various problems in existing law, in one unified bill, bring fairness and efficiency to a music licensing system and ensuring that no particular business enjoys a special advantage against new and innovative technologies.

It is my hope that, through the Judiciary Committee hearings, the second of

which will be this Wednesday, June 25th, the Copyright Office study, the Department of Justice review of ASCAP and BMI's consent decrees, and other reform efforts, we can come together to create a better system for radio competitors, for music creators, and for fans, all of whom depend on a healthy music ecosystem.

This new system should be platform neutral, across the board. It shouldn't matter which button you push in your car, as to the rate that the creators of the music get for that performance. And it should be based on the willing seller, willing buyer. Thank you. And I hope to work with all of you to develop and pass meaningful, comprehensive review. Again, I thank the Copyright Office for these series of events.

MS. CHARLESWORTH: Thank you very, very much, Representative Nadler. We really appreciate your joining us here today.

I think we will take a 5 minute

break, and then we will carry on with the next panel.

(Whereupon, the above-entitled matter went off the record at 11:53 a.m. and went back on the record at 13 12:08 p.m.)

MS. CHARLESWORTH: So this panel, some of these issues have been raised, the 115 license is, really, what is on the table here, in terms of whether it should continue, whether it should be revised, whether it should be done away with.

I think there is a range of opinions on that. And before we get into those opinions I would like for the new panel members to introduce themselves, and explain why they are here.

MS. CARAPELLA: Hello, my name is Cathy Carapella, and I'm the Managing Director of Global Image Works. And I am a transactional cost. I have spent the better part of the last 30 years clearing music, and licensing, for film and television, and new

technology. My first new technology was home video on VHS and Beta. And I spent the better half of the '90s steeped in sampling clearances. And I, sort of, have pitched my tent at the crossroad of willing buyer, wiling seller. My clients are creative individuals, making new works that contain music. And I have also ran two music clearance companies for 25 years, and myself and my contemporaries are the ones that are tasked with finding out what is fair on a per use, per license, per copyright, per percentage thereof basis.

MS. CHARLESWORTH: Thank you very much. Let's see, who else? Mr. Barron, are you -- Mr. Barron, I think you are next, as a newbie.

MR. BARRON: Yes, I'm Greg Barron, I'm director of Licensing at BMG Rights Management.

MS. CHARLESWORTH: No, you were here earlier. I'm sorry, forgive me, he mislead me, it is his fault. You did look very

familiar. Okay, yes, thank you Ms. Coleman. I'm sorry, Mr. Barron.

MS. COLEMAN: Hi, I'm Alisa Coleman, I'm the Senior Executive Vice President of ABKCO Music & Records, Inc. We are an independent music publishing and record label, that has the music publishing rights, and the sound recordings for the Rolling Stones, the Kinks, Eric Burdon, Sam Cooke, and I'm involved on a day to day basis in all of the licensing objectives and global business development of our company.

MS. CHARLESWORTH: Thank you very much. Okay, moving around, Mr. Barker.

MR. BARKER: Thank you. I'm John Barker. My day job is Clear Box Rights Administration, which is an independent Copyright Administration firm. I'm here, really, representing a new organization called IPAC, which is Individual Independent Music Publishers, and Interested Parties, that started in Nashville, and is spreading

outside.

MS. CHARLESWORTH: Mr. Conyers?

MR. CONYERS: My name is Joe Conyers, I'm the vice president of technology for Downtown Music Publishing, representing copyrights from John Lennon's, Mike 6, and other fantastic writers. I oversee digital and other data standard issues that we deal with.

MS. CHARLESWORTH: Okay. And Ms. Potts?

MS. POTTS: Good morning, my name is Cheryl Potts, I'm the founder of Crystal Clear Music, we are a copyright and royalty administrator for sound recording owners, authors, and music publishers. In addition I'm a software engineer, currently producing a product for our company CleerKut. We are producing a rights management system for independent and dependent music owners, to be able to license, account, and manage the music they create.

MS. CHARLESWORTH: Okay. So, thank

you. And I think, as I said, there is a -- there seems to be a range of opinion on whether to continue to work with 115, perhaps modify it. Or whether to do away with it. So -- and if we do away with it, or if we were to get rid of it, what would replace it? It is a very big question. I think everyone recognizes that the industry, and we heard this earlier, has been shaped in its contractual practices, and just the assumptions and expectations, by the 115 license. In fact, in '76 the Copyright Office said, let's get rid of this, and too bad you weren't around then, Jay, maybe we wouldn't be having this conversation.

But the publishers, although there was some resistance to maintaining the compulsory licensing, ultimately decided that if they could, achieve a better rate, they could go with it for another, what has it been, 50 years or so?

So, anyway, I want to -- I do want to see if we can figure out, or at least

1 explore some ways where we might be able to
2 try and meet some of the objectives of, as I
3 understand it, the publishers and songwriters,
4 which is to achieve better rates, to have more
5 control over those rates, but to maintain
6 another important piece of our system, which
7 is collective licensing, which many also feel
8 is a necessary ingredient in the successful
9 licensing system. So who wants to take up the
10 -- Mr. Barker, there you go, let's hear from
11 you.
12 MR. BARKER: How about that? Well,
13 first of all, I guess I am one of those that
14 has followed, I'm a fan of the Copyright
15 Office, since I'm following around the
16 roundtables. And I have realized, you need to
17 kind of say it early, if you want to get it
18 out there. So here goes. And I will say I
19 agree with almost everything Mr. Rosenthal
20 said. And, Jay, I will say everything, other
21 than -- our position -- he said we need to get
22 rid of 115. And then, however, if not then

here is how we need to fix it. I think our position is, no, we just need to stop here and get rid of it. Because 115 is not working. Just to make sure, and as an independent administrator, I deal with 115 licenses, and things like that, on a daily basis. There are a lot of things wrong with 115. There are no audit rights, some of these things have been mentioned.

One thing that a lot of people don't realize is that the co-publisher, in a 115 license, the NOI, the Notice of Intent, can be sent to only one of the many co-publishers. And one hundred percent of the payment paid to that one publisher. So when we are talking about transparency, there is none in the 115, because as a co-owner of a song, I don't know if my song is under compulsory license or not, because I have not received a notice, nor a payment. Or I may receive a payment, and really, it is not necessarily clear that it is one hundred percent or just

1 my share of that. So it is not transparent.
2 Basically the 115 has effectively defined a
3 rate, and it has turned out to be a max rate,
4 by the way the industry is operating. There is
5 no control, meaning after the first use the
6 publishers do not have the ability to say I
7 choose to not have my song used that way. And
8 the other thing, just to close that off, is
9 the NOIs, I have drawers full of NOIs. And I'm
10 a small administration company, so I have a
11 very small percentage of songs compared to
12 many players in this industry. And yet I have
13 file cabinet drawers filled with NOIs many of
14 which, I would argue, are probably not
15 correct. And the Copyright Office is very
16 clear to say, if certain hoops are not jumped
17 through, meaning within 30 days of
18 manufacture, the notices go out, or prior to
19 release, monthly payments, audited annual
20 statement. I would venture to say a high
21 percentage of the NOIs, that I have in my
22 office, are ineffective. And the law is clear

to say if they don't jump through the hoops, it forecloses their ability to ever get that license. So the licenses are not valid licenses. I would say a high percentage of what the industry is now seeing. So, to me, 115 does two things today. It defines a rate, and it is a process that we have begun.

Now, Jacqueline, as you said, Marybeth Peters, I think, had even made a comment that in 1961, or as we were leading up to the '76 Act, the Register of copyrights was then trying to get rid of that. And Marybeth Peters had mentioned that. And, basically, said the publishers got used to it, and thought it might cause problems in the industry, therefore they just started looking at the rates. To me we, as publishers, even though I was not around at the table at that time, we missed an opportunity to do something better. And I'm here to say, let's not make that same mistake, let's do it better. So, in closing, and I will try to make this very

1 quick, having participated in some of these
2 roundtables before, I talked to Lee, I have
3 seen DIMA's comments, the six pillars that
4 have not been mentioned, necessarily, here.
5 But Six Pillars for Modernization
6 of Copyright Laws, we agree with five and a
7 half of those. And Lee and I have talked about
8 this. Continued government oversight and
9 regulations, we agree halfway with that,
10 because we agree there may be some need for
11 that, but not everything. Transparency and a
12 centralized data base, yes. License
13 efficiency, and reduced transaction costs,
14 yes. Clarification of rights, yes. Reduction
15 of legal risks around licensing activities,
16 absolutely. Level playing field, yes. And I
17 won't take the thunder away from Steve, in
18 RIAA's position, but we agree with most
19 everything that they have thrown out, with the
20 exception of tethering the publisher right as
21 a percentage to the recording right.
22 That is one thing that we would

prefer to have, actually, a free market deal with. And then, as Steve and I have talked about, first use control of the ability to say yes or no. We agree that a record company, when we say yes to a recording artist, there may need to be the ability to continue to distribute that in certain ways.

But we should have a right to say no to a new recording So what our position is, again in closing, is we would like to see, as the Copyright Register in 1961 had suggested, sunset 115.

If we can come up with a term and say, let's sunset it clearly within a, I will throw out, a two year period. Let us, then, take these points that we all agree with, and understand the ones we don't, and come up with a centralized solution that can better serve us.

Because, clearly, 115 is a rate, we need free market value, willing seller, willing buyer. We have talked about that. It

is hard, for people around the table, to come up with an argument to say we should not have that, because so many around the table do.

But as far as the process, and Jacqueline, as you said and, actually, as Congressman Nadler said, if we started out with this now, if we came up with the solution today, for this, we would not come up with anything that looked like what we have in 115. So I think it is time for us to start with a blank piece of paper. We can come together, take steps toward each other, and come up with a solution that works, and a process that will allow for fair rates. The quote is: "the enemy of best is good." What we have is good. Let's don't miss the best. I think we can do better.

MS. CHARLESWORTH: Thank you, Mr. Barker. Mr. Kohn?

MR. KOHN: Again, as I -- comments I had earlier was that a lot of the problems, that have arisen with the various constituencies have with the compulsory

license has to do, or is symptomatic of the parity problem. Which is going to be discussed, I think, later today or tomorrow. So they are not getting their fair share. So, therefore, we either get rid of it, or something. And I don't think getting rid of it is the answer, because I do believe the compulsory license is useful for reducing these transaction costs. And I don't have any particular point of view as to whether Section 114, on sound recordings and Section 115, compulsory license for the musical works, maybe they should be combined.

I think Bennett Linkoff had something in his comments regarding that. And maybe some others have it as well. I don't know whether -- what the practical problems are of doing that. It could be combined. But the rates have to be separate, in the sense that there might be a song, in the public domain, but the recording is not on the public domain. So maybe one side should get paid, and

the other side shouldn't. So it could be combined. I don't have any particular viewpoint on that. It seems like the easiest thing is simply to amend 114 to include what I thought it should include, and amend 115 to include the things I mentioned, started to mention before. It should be, I think, as the RIAA is suggesting, in a blanket form. Someone should just send a notice, they get everything they need.

I think it should include all forms of downloading, streaming, interactive, or at least make it clear that it does include all the forms that could be on any of these platforms. It should include the public performance right. It doesn't make any sense, for the public performance entities, to go seeking their own rates, at a different table, from the allocation that is being made between the sound recording, and the musical work.

That has to be done sort of at the same time. There is no reason why it can't.

1 The organization or the rate board that would
2 do the allocation, as to how much the sound
3 recording gets, and how much the music
4 publishing gets, and of the music publishing
5 how much goes to the performance, and how much
6 goes to the reproduction side.
7 That can be determined by some --
8 that rate board, and the revenue can be
9 allocated accordingly. I do think, and agree
10 with the comments, on the elimination of the
11 pass-through license. It doesn't make any
12 sense whatsoever. When I started emusic, and
13 we talked to the Harry Fox Agency, we were
14 doing, in 1998, MP3 clouds. No one knew what
15 it was. And I went to Harry Fox and said, you
16 know, it looks like I'm getting all these
17 mechanical licenses from independent record
18 labels. I'm the company making the
19 reproductions. If they don't pay the music
20 publishers, I get sued by the Harry Fox
21 Agency. So I didn't trust the indies to
22 actually do the accounting correctly, because

it was a whole new thing. So we agreed, with the Harry Fox Agency, to pay directly to them. So we paid full statutory right directly to Harry Fox. We got all the indies to agree to that. And Harry Fox had full ordered rights, vis a vis emusic. And I think that is the only way that, that could really go.

Now, in terms of transparency, there is -- it is important that the music service provider, who would be getting all of these benefits from a blanket license, from a single place to go for all of these things, perhaps. Both on the sound -- let's say on the music publishing side they would get both the reproduction, and the performance right from the same entity.

I think they have to be willing to be very transparent as well. And what I suggested, in my paper, is that the music publishers, who give the licenses, and of course the sound recording side that does, should have access to the systems of these

1 companies, Spotify, and the rest. Put some
2 software on the systems, whatever it is, to
3 get real time transaction data, sort of a desk
4 audit. So that they know when those
5 transactions are taking place, and they
6 actually, perhaps, even to whom they are going
7 to. By total transparency of the copyright
8 owners side, in exchange for having all of
9 this ease of licensing, and the audit costs
10 would go down because, essentially, when the
11 royalties are paid, you just simply match it
12 against the transaction data that you have
13 access to.
14 I think that is an important point
15 here. So, again, I think a lot of the
16 individual comments on we have to get rid of
17 115, and we have to not expand 114, it all has
18 to do with, you know, each party trying to get
19 their fair share. I'm very sympathetic with
20 the music publishers because maybe they aren't
21 getting their fair share. I have no opinion on
22 -- we will talk about parity later. I don't

have an opinion, specifically, as to how the allocation should be done. But don't let that issue blind the process from seeing the benefits of the compulsory licenses being applied across the board, to reduce transaction costs, and get those works out there.

MS. CHARLESWORTH: I just heard a spirited defense of the compulsory license system. Let's see what Ms. Coleman has to say.

MS. COLEMAN: Thank you, Jacqueline. I'm sure you are not surprised that I disagree. We feel very strongly about a willing buyer, willing seller marketplace, in the mechanical licensing world. Especially since, you know, there are so many other areas that we are constantly working and developing that marketplace, like Sync and you know, digital exploitation. I'm here to tell you that that willing buyer, willing seller marketplace works. Harry Fox can come to us with an opt-in on a Youtube deal, and we can

make a decision on whether or not we want to be a part of that opt-in system, or do a direct deal. In certain cases we choose to make direct deals. We would like to see a designated agent set up so that smaller publishers, or medium sized publishers, can group together, and deal with some of the antitrust issues. And set up guidelines so that we all have a fair voice at the table. That is really it, thank you.

MS. CHARLESWORTH: Okay, I just -- well, and maybe -- I don't mean to pick on you, and you may not have an opinion on this.

But you represent some incredible catalogues. I think a question is, if you are looking at a voluntary system, where it is an opt-in system, and I think we have seen some news reports, and I have seen some comments, you know. The big guys and significant catalogues can actually negotiate with a large service, a Youtube or whoever. Do you think that is -- what about the people who don't

1 have that kind of leverage?
2 I mean, how do you address that?
3 Because I think we have seen some
4 reports, and I'm not -- I just wanted to, you
5 know, for people who haven't seen them, where
6 it is sort of a take it or leave it type
7 offer. 4 And there has been some concern that
8 the smaller marketplace participants are just,
9 literally, in that position, take it or leave
10 it. So I'm just wondering if you have any
11 thoughts on that, and --
12 MS. COLEMAN: Absolutely.
13 MS. CHARLESWORTH: -- how that
14 would, maybe, ways that might be ameliorated,
15 addressed?
16 MS. COLEMAN: No, that is fine. I
17 actually do. I mean, we chose not to opt-in to
18 the Harry Fox offer and the NMPA agreement
19 with Youtube because of our business
20 decisions. And we were able to, obviously,
21 leverage some of the great artists and songs
22 that we have in our catalog, into making a

very suitable deal.

What we need to give is the power back to the music publishing community, so that they can join together to make these decisions. Individually we don't have that ability. But if we are able to create a designated agent, again, that has some guidelines dealing with some of the antitrust issues, we then will have that. The reports that you are talking about I'm going to make a leap, here, that you are talking about what is going on in the record industry. Part of the challenge is that they can't all come together and make a joint deal with this, you know, with this huge conglomerate, because of our antitrust issues. We have to figure out ways around that, and we have to figure out ways to give power back to these companies, so that they can maximize their investments in these works.

MS. CHARLESWORTH: Okay. Mr. Duffett-Smith?

MR. DUFFETT-SMITH: Thanks very much. So, first of all, just on the 115. The compulsory license is very, very helpful for a service like Spotify. Our transaction costs are very, very high. Licensing takes a lot of time, it takes a lot of energy, it takes a lot of effort. It is very technical, it is very complex. It varies from territory to territory. So anything that helps us easily license works is something that we welcome. Outside of the U.S. there are lots of blanket licenses that we take advantage of, from collecting societies around the world. And, in principle, these things, these are good. The big problem that we have with Section 115 is that it is very difficult to administer. There isn't a comprehensive works data base. It is extremely difficult, and the NOI process, as you rightly point out, is very cumbersome, it doesn't really work very well. To your point about real time data, that is something that Spotify is investing, very heavily, in. And,

you know, we are working very hard to try and help, make our services more transparent, our data more transparent.

Because we recognize that it is incredibly important to make sure that everybody is being paid properly and on time. So 115 for us isn't something that is perfect, by any means. But it is a start, it is a good start for us. It does help us. It does mean that we have the comfort, you know, of at least knowing that if we follow the process then we are actually licensed. The other point that I want to make is on rates. I made this point earlier, in passing. But it is really important that rate setting does not happen in a vacuum. There is only a certain amount of money to go around. We only bring a certain amount of money in through the door. We can only pay a certain amount of money out. And if -- the danger is, if rate setting standards are applied, without taking into account the other set of rates. So if sound recording

rates are applied, without taking into account publishing rates, and vice versa, you could get into a situation where service has to come from over one hundred percent of its revenue. I know that sounds like it may be farfetched. But, you know, it is a real possibility. Licensing is incredibly difficult, as I say. And it is very expensive. And it is tough to make it as a digital music service, in the market, at the moment. Anything that increase the overall burden, the royalty burden, or the administrative burden, I think is something that we would oppose.

Now, that said, we recognize that the current system probably isn't perfect. It is arrived at through a historical process, lots of compromises, lots of political deals, over a long period of time. And, you know, I'm sure that we could echo the statement that if we were to sit down and try to design it today, we probably wouldn't design it like it is, either.

But in trying to fix things, I just want to make sure that we look at everything holistically.

Because the danger is that if we don't do that, then we will kill off the music services that are actually providing, you know, some kind of future to the music industry. And I don't think anybody wants that to happen.

MS. CHARLESWORTH: Thank you. Mr. Rosenthal? Actually before -- my colleague, she warned me in the nick of time.

MS. TEMPLE CLAGGETT: Yes, it is a good question, because it follows up on something that Jay had said earlier, as well as something that you said, just focusing on the international angle a little bit. I know that Jay alluded to the fact that, internationally, Section 115 doesn't exist, obviously, in most markets. So in terms of the experience internationally, you mentioned blanket licensing. How has that actually

1 worked? Is that something the United States
2 would be able to follow?
3 Or are there efficiencies that are
4 lost, that you have seen internationally, when
5 you don't have the compulsory license? And
6 maybe both Jay and Mr. Duffett-Smith could
7 answer that.
8 MR. DUFFETT-SMITH: Yes,
9 absolutely. I mean, the beauty of a blanket,
10 from a licensee's point of view, is that there
11 is a party that is guaranteeing that if you
12 pay it, in accordance with the rate, that you
13 agree that you are licensees. And they are
14 guaranteeing that the repertoire will be
15 cleared. Organizations like PRS, or GEMA or
16 SACEM in Europe, it is their jobs to make sure
17 that their members are being properly
18 compensated.
19 They have the data base, they have
20 the rights, you know, they have the
21 information about what, who owns which works.
22 And they are in a fantastic position, much

better position than a service, to actually figure out who owns which works. Administering the rights data base for us would be, you know, a part of our business that would be ancillary whereas, actually for those organizations it is key, it is everything that they do. So they are the professionals, they are the people that are best able to deal with it, in our view. So certainly blanket licensing, collective licensing, in that respect, is very helpful for a licensee, you know, who is trying to do the right thing. We are trying to make sure that everybody is paid properly. The problem with 115 is the requirement to identify every single composer, and publisher, is extremely difficult, when you don't know who they are. And I think everybody around this table would agree to that comment.

MR. ROSENTHAL: First of all we have to distinguish two problems over there. One which is, I think, solved in terms of the

structure, in Europe.

I think it would be a much more preferential system than we have here, because it puts into play free market principles that will solve many of the problems that the compulsory has.

But let's not confuse that with the problem that Europe has had with, with cross-border licensing. That is a totally different issue. And I think they are working it out in a way, talk about tough, you know, problems. Think if we had every state that had their own little collective, I know that makes people go crazy thinking about state collective licensing agencies.

But I think that there is no comparison. I think that the idea that in a free market we would be much better off, in dealing and creating these collective licensing systems. Certainly by song, by song, but in times if blanket is the way you approach it, or there is some kind of a

hybrid, depending upon the service, depending upon this, we certainly want it song by song.

Because we feel like that is who gets paid directly. But I think that the free market will play all of that out.

MS. CHARLESWORTH: Mr. Duffett-Smith, just -- I'm sorry, now, to follow-up. So how, take an example of MCPS-PRS, how are rates set as between you and that organization?

MR. DUFFETT-SMITH: Well, I --

MS. CHARLESWORTH: Or any of the ones you mentioned.

MR. DUFFETT-SMITH: So the idea of a free market is, perhaps, slightly a misnomer when dealing with PRS because they are a monopoly. They are regulated. You know, there is an equivalent organization, the Copyright Royalty Board, that has jurisdiction to set rates. PRS publish tariffs. So, you know, it is not really a true free market in that sense. Certainly, as a licensee, you are

1 dealing with somebody on the licensor side
2 that has monopolistic power. And the law
3 recognizes that, yes.
4 MS. CHARLESWORTH: Is there, is
5 there intervention along the lines, similar to
6 a rate court here, or is that a rare
7 occurrence?
8 MR. DUFFETT-SMITH: We have not
9 resorted to rate court, no.
10 MS. CHARLESWORTH: So it sounds
11 like more -- and I'm not trying to put words
12 in your mouth. But is it more typical than to
13 agree to a license rate, in that situation,
14 than it may be here, or --
15 MR. DUFFETT-SMITH: Yes, I think in
16 Europe everybody knows what the rates are now.
17 But, you know, that is done
18 against the backdrop of the Copyright Tribunal
19 litigation the Joel litigation, the JOL
20 litigation, for example, went on for some
21 time. Which then help to set the standards.
22 Yes, I can't really go into any details of

confidential deals, of course.

MS. CHARLESWORTH: Thank you. Mr. Rosenthal did you have anything else you wanted to say, or --

MR. ROSENTHAL: Yes. In addition to answering the question, sure. Just to respond to a couple of things. First of all, you know, obviously you know what our position is on gradually, you know, in a manner that is informed, to get out of Section 115.

But there might be some spots where we might want to still hold on to. For instance, we have heard that the idea that the notification of the Copyright Office, in the context of you can't find a certain owner. You know, you can send it in, to the Copyright Office, they register it in one way or another. It might be even expanded to include payments of royalties.

That if you can't find an owner you pay somebody. And we feel like that, really, satisfies what is a constitutional

1 requirement which really is to satisfy the
2 property interest of the songwriter.
3 That might not be a bad thing to
4 keep, or to think about keeping, at the end of
5 the day. But I also just want to talk a little
6 bit about the constitution. I know it is a
7 weird thing to kind of dwell on here, but it
8 was raised by Bob in the last panel. And I
9 think that one of the reasons that we are
10 taking the position that we are, and a
11 position that many authors take, and authors'
12 groups, that the copyright clause does not
13 result in an economic theory of copyright.
14 That is agreed upon by all
15 parties, and that the courts are set on, and
16 that it can never change. We believe, I
17 personally believe, that it is not an economic
18 theory. I believe it is a human right. And I
19 believe it is manifested in the property
20 interest that is conveyed upon the author.
21 That is where we should be
22 starting from. So it is not just a matter of

1 economics. It is not just a matter of
2 transaction costs. It is more than that.
3 I think, you know, when you say
4 that the Supreme Court ruled that it is an
5 economic theory, a few years later the same
6 Supreme Court ruled in the Dred-Scott case.
7 Things change, and view points change. And in
8 the modern day we have an internationally
9 human rights theory that has, we have just not
10 even really scratched upon, to figure out what
11 kind of obligation do we have, under these
12 international human rights treaties, to convey
13 upon an author a property interest that is
14 meaningful. So a lot of where we are coming
15 from and, I think, that a lot of where the
16 artists are coming from, starts from there.
17 That one must recognize a stronger
18 property interest than it is recognized now.
19 Thus the idea of taking away the right to
20 negotiate in the free market is not just,
21 let's say, supported by constitutional
22 economic theory. It is the wrong economic

1 theory to apply. It is the wrong
2 constitutional theory to apply. And I have to
3 say this, and I think that we have discussed
4 this internally, and I don't think there is
5 anything wrong with stating it.
6 I think that if the compulsory
7 license is expanded, in any way, under 115 we
8 would seriously consider a constitutional
9 challenge. And we would think that is a
10 regulatory taking, without just compensation.
11 And it might even be a constitutional
12 challenge under the Copyright Clause itself,
13 because there must be a meaning to the word
14 exclusive.
15 One cannot just take these rights,
16 turn them all non-exclusive, and think that
17 somehow we are not violating what the founding
18 fathers believed should be part of the
19 copyright law. So enough of that theory, kind
20 of off in the clouds, to a certain extent. But
21 I wanted to kind of lay out, that we do have
22 a fundamental difference in constitutional

1 theory, as it relates to these rights.
2 MS. TEMPLE CLAGGETT: I just have a
3 quick follow-up question. You mentioned
4 constitutional concerns with expansion of 115.
5 Would you have any concerns in terms of our
6 international obligations, under treaties, or
7 agreements, in terms of expansion in that --
8 MR. ROSENTHAL: Well, I would
9 always have concerns about our treaty
10 obligations. You know, there are folks in
11 Congress who feel like that is an important
12 issue, and others who don't. And we dealt with
13 this on the panel with the making available
14 right, which was an issue of are we violating
15 the Constitution by not recognizing a certain
16 international legal norm, and that has been
17 agreed to, through treaty. So, yes, I think
18 that there has to be uniformity of thinking.
19 And I certainly think, in this context, we are
20 off in the 19th century, in terms of how we
21 view copyright law when, in fact, in most of
22 the world they have a 21st century view of it,

1 and we would like to catch up, and convey that
2 upon the authors.
3 MS. CHARLESWORTH: Okay. Mr. Kohn,
4 and then I have a follow-up for Mr. Rosenthal.
5 1
6 MR. KOHN: Sure. We could give him
7 what he wants, and then do what the founders
8 did, and have copyright last for only 14
9 years.
10 Because the Constitution does say
11 for limited times.
12 MR. ROSENTHAL: Yes, it does say
13 for limited times. And, you know, as we have
14 gone forward with the meanings of the
15 different words, under copyright law, some of
16 the other words that is a little bit unclear
17 are progress. I don't think progress, any
18 more, is 14 years. I think that the Congress,
19 which has the power to pass copyright laws,
20 believes differently as well. And so long as
21 we have a copyright law, with some kind of
22 defined term, I think that constitutional

issue, of limited times, is satisfied.

MS. CHARLESWORTH: Mr. Rosenthal, I'm going to ask --

MR. ROSENTHAL: Yes, go ahead.

MS. CHARLESWORTH: -- coming down a little bit from the clouds.

MR. ROSENTHAL: Yes. Let's come down from the clouds.

MS. CHARLESWORTH: And, hopefully, you won't be suing the Copyright Office.

MR. ROSENTHAL: Yes, sorry about that.

MS. CHARLESWORTH: Or Congress, or someone.

MR. ROSENTHAL: It was the School of Law thing, in the back, that just made me do that. I'm sorry.

MS. CHARLESWORTH: You should read, you know, you should read Professor June Besek, just actually published a very informative article on takings and copyright, which I commend to you.

MR. ROSENTHAL: We are collecting them all, believe me.

MS. CHARLESWORTH: Yes, that one I can recommend.

MR. ROSENTHAL: I will read hers, yes. I have great respect for her.

MS. CHARLESWORTH: So here is the question. You are very interested, obviously, in allowing publishers and songwriters to negotiate for the value of their rights.

But in a situation where, you know, the transaction costs are very high, and you have some majors, as I mentioned earlier, you have some very prominent catalogues, that would be probably perceived as necessary to many services. How do you deal with the smaller guys who aren't going to have any leverage in the system, who may not be able to get the attention of a large digital service?

And I think that is a reality that has already come to pass. As I mentioned, earlier, we have seen that. So how do you

protect them under your proposal?

MR. ROSENTHAL: You protect them by allowing for some form of collective rights in the marketplace.

MS. CHARLESWORTH: Okay.

MR. ROSENTHAL: We can't equalize the rights between small and big, just like for years I was trying to do that with recording artists and labels. No, you can't. You have some recording artists who get better deals than others, that is the free market. And the same thing happens in the songwriting market as well. It is just reality.

But to allow a form of collective licensing system to be adopted, without government restrictions. And by doing this is the best answer to your question. And that is how do you get the small guys in? When we have done this in the free market, we have succeeded in getting the small guys involved. Do they get the same value that the majors do? No, they probably don't. Do they get close to

it? Yes, they probably do.

MS. CHARLESWORTH: Well, but there is two different -- you are -- are you referring, when you say when we have done this, what are you referring to?

MR. ROSENTHAL: Well, I'm referring to, for instance, our Youtube deal.

MS. CHARLESWORTH: Okay.

MR. ROSENTHAL: And other deals, along those lines, that we have even with the major labels.

MS. CHARLESWORTH: Okay, and I don't -- the Youtube deal was sort of, you know, there were direct licenses, and there was an offer, a licensing offer made by Youtube to other people.

MR. ROSENTHAL: Right.

MS. CHARLESWORTH: Correct me if I'm wrong, essentially take it or leave it terms, right? Is that correct?

MR. ROSENTHAL: Well, I think that 5 --

MS. CHARLESWORTH: I mean, I don't mean that in a negative way.

MR. ROSENTHAL: No, no, no.

MS. CHARLESWORTH: I'm just saying, they offered the deal and the publisher could choose to --

MR. ROSENTHAL: I think you referenced the contracts of adhesion, which is the take --

MS. CHARLESWORTH: No, it is not. I'm not trying --

MR. ROSENTHAL: -- it or leave it --

MS. CHARLESWORTH: -- to cast any aspersions on the deal. I'm just saying, it was an offer, and the publisher could choose to take it or not take it.

MR. ROSENTHAL: Yes, smaller publishers probably have a harder problem than major publishers.

MS. CHARLESWORTH: But the question is that --

MR. ROSENTHAL: That is across the board, though.

MS. CHARLESWORTH: -- if that, and this isn't about Youtube, but hypothetical service says, well we are going to do our deals with the big guys, we are going to pay them nicely.

MR. ROSENTHAL: Correct.

MS. CHARLESWORTH: And we are going to do, we are going to make an offer that is not as valuable to the smaller guys. I mean, how do the smaller participants, how are they able to achieve parity in that system?

MR. ROSENTHAL: Well, parity, I'm not sure you are ever going to achieve parity. But I think, as a practical matter, whatever the smaller guys get, through a collective licensing system, without the compulsory license is going to be valued more than what they get under the compulsory license.

That is what we believe, and that is why we are fighting for it.

MS. CHARLESWORTH: Thank you, Mr. Rosenthal. Mr. Marks?

MR. MARKS: Thank you. So I want to get back to something I said, on the first panel, which is the difference between getting fair market rate, or how the rates are set. And the obtaining of and administration of the licenses. Because I think those two are getting conflated in kind of an all or nothing way, in some of the proposals that are being made. So I have heard one proposal that, you know, we have to keep, we have to so hold onto the collective, or blanket license, or move to a blanket license, or that we have to hold on to the compulsory license as it regards rates. And then I have heard, on the other hand, let's throw out 115 completely, because we need to get better rates. But with it you are throwing out all the benefits of the collective licensing, or the ability to improve upon that. And I will let Ms. Finkelstein say, more eloquently than I could,

how difficult it is to obtain license on a song by song, right by right, work by work, format by format basis, for every song that has multiple songwriters, and publishers, et cetera. So I'm hoping we can -- I can get a little feedback. Because our proposal, which again was by no means a take it or leave it offer, or anything like it, it was just an idea.

But the essence of it was for publishers and labels to come together, at the outset, and figure out what the appropriate rates should be. As they have done historically, in the past. And it doesn't necessarily need to be a ratio, or tethered. I mean, that was just an idea we had based on what songwriters and publishers were pushing for in the Songwriters Equity Act.

If they don't want that, that is fine, we can talk about something else. But, you know, our proposal included first use being retained, which let's face it, exists

today and is the ability to negotiate freely in the market. And so that would exist. Bundling of rights, audits, transparency, direct pay, direct relationship with, you know, no pass-through. All of those things I hear, both on the publisher and songwriter side, as well as for many of the services, being good things. And so, and let's face it, the way 115 works today, in terms of setting rates, there is a first use right. That first use right, you know, is there to be exercised. When people say that the rates are set by 115, that is basically a collective negotiation, you know, that publishers and songwriters come together, collectively, every five years, to sit down and try and figure out what rates should be for particular categories. So I think everybody is understanding the benefit, here, of the collective nature. I guess what I'm saying is, and what we are saying is, have that discussion upfront, between the labels and their partners, the songwriters and the

publishers. So that -- and then, separately, after that rate has been set, through agreement, not through any rate court, not through any CRB, get rid of those completely, get rid of all of the government regulation.

That solves your other half of the five and a half of the six. We are with you on that. Get rid of all the regulation there. Have that be a free market negotiation, and have that established as the rates that exist for some period of time. That is something that we can discuss. And then, separately, set up a mechanism where we can have a blanket license. And a blanket license doesn't mean individual songs don't get remunerated in an accurate way. Let's create an authoritative data base. I have heard DIMA, you know, say this in the past. We have said it in the past, publishers have said it in the past. Let's come together and figure out how to do that. And have the blanket license rely on that, so that there is accuracy. Let the publishers and

1 songwriters figure out who they want to, you
2 know, administer. It could be ASCAP, it could
3 be BMI, it could be a new organization. The
4 governance could be established, you know,
5 however they deem appropriate. Labels and
6 services would be kept completely outside of
7 that. So I'm, I'm -- I would like, I guess, to
8 hear from Mr. Rosenthal, Mr, Barker, and
9 others about what about that is problematic?
10 8 9 And I would just say one thing
11 in addition. I think we have to recognize,
12 here, that when a label invests a lot of
13 money, in the creation of a recording, they do
14 so with the expectation they are going to be
15 able to exploit that recording, and have a
16 return on that investment, across a certain
17 number of uses that exist in the marketplace
18 at that time, or in the future. Having a
19 separate negotiation, after those investments
20 have been made, by publishers or songwriters,
21 is not the way a normal market would work.
22 That negotiation should happen upfront, at the

time of creation, so that the investments, you know, whatever investments can be made. You may have a songwriter who says, you know what? I only want this use to be done for downloads and CDs. At that point the label, and the artist, to the extent that the artist is different, could say I'm fine, we will invest so much in the investment, in the creation of this recording.

Because they know that those are the exploitations they are going to be able to get back on it. Or they might say, sorry, we are going to use somebody else's song, because we can exploit that across the full range of services that exist today, or in the future.

That is the time for that discussion to happen, not later on, after investments have already been made. And I say, let's come together, let's make that happen, and let's include all of those other things that publishers and songwriters want and need, in terms of getting rid of the regulation, and

having the audit right, and the direct pay, and no pass-through the labels and everything else. And, again, it doesn't need to be a ratio. We can figure out what that rate structure is.

MS. CHARLESWORTH: Well, okay. Before I turn to Mr. Rosenthal, Mr. Barker, I really want to -- I don't want to shortchange this side of the room. And, you know, some of these issues, by the way, we have a panel, I don't know are you guys on the last panel? There is a panel about the future. And so we will have other opportunities to explore them. But we will try and get to everyone. We are going to have, since we ran over, we started a little bit late, and we will probably go until about 1:15, which still give people plenty of time for lunch.

But I want to go to Mr. Badavas, Ms. Finkelstein, Mr. Barron, and then around. And then, hopefully, we will get back to you guys to respond to Steve's question.

1 MR. BADAVAS: So I guess to pick up
2 where Steve, I think, was going and left off.
3 When one talks about song by song licensing,
4 one isn't necessarily talking about song by
5 song, right by right, format by format. And
6 one could test exactly what you are suggesting
7 right now, by picking up a phone and getting
8 an all format, all right license from a
9 publisher, with a market rate negotiation. You
10 could pick an album to try it. Just a
11 suggestion. It could be done. And instead of
12 the 1,100 licenses, lets make it a really,
13 really complicated hip hop album. It would
14 have 20 songwriters and producers on it. 3 It
15 is still only 20 calls, it is not 1,100. That
16 is, I presume, actually something like what
17 you are suggesting, at the end of the day,
18 except under a govermentally imposed
19 structure. You have the ability to get an all
20 rights license for each song that gets
21 recorded correctly. Because, at the end of the
22 day, a license serves two purposes. It

1 provides liability protection for the
2 licensee, and it links a use to a composition,
3 which ultimately means royalties get paid to
4 both the publisher and the songwriter, on the
5 publishing side of the table. I understand,
6 actually, the record labels are very good
7 faith players in that. Spotify is, many of the
8 people at this table are.
9 I think we are still not quite
10 scoping this issue properly because that is
11 still -- those are still very commercially
12 viable entities, it includes independent
13 record labels, people who are really
14 participating in the market.
15 That isn't the 30 million tracks
16 that are being presented out there, by large
17 digital music services. So I'm not sure what
18 to do about the other 28 million tracks. Let's
19 assume it is 2 million. Those aren't going to
20 get matched by figuring out a way to license
21 as a percentage of a record label, a well
22 functioning record label's business, or some

other structure, where that is the case. And those are two different matching issues. I'm not sure how to deal with that. And that is, kind of, lost in this discussion.

MS. CHARLESWORTH: Although I think, Mr. Badavas, I mean, it may not be part of Steve's presentation. But people have been speaking about blanket licensing.

MR. BADAVAS: Yes, but the blanket license for that 30 million tracks, the idea that you can actually figure out what is being uploaded, by the garage band next door, into the system. And then place the responsibility on publishers, or centralized organization, to figure out what the link is, is way more challenging than dealing with what commercial music providers are talking about, in terms of the labels.

MR. MARKS: It is the same as what SoundExchange does. I mean, you get a report, and I'm certainly not saying that the reports, even for SoundExchange couldn't be improved.

1 But if you had the service
2 reporting, you know, what their use is, and
3 you had accurate information, as rights owners
4 on your end, why wouldn't that work for the
5 other 28 million?
6 MR. BADAVAS: My point is that
7 those, the sound recording file, that is
8 uploaded to the service, isn't coming from
9 someone like you, where the meta data, in the
10 first instance, is properly right. Right? It
11 is coming from a kid who made the recording in
12 the garage next door. And when they upload it
13 to an aggregator, what is typed in is
14 inaccurate. And it is extremely difficult to
15 deal with. Now, I hope that as technology gets
16 better, the matching will be better, but that
17 is a big problem. The second thing is, we are
18 concerned, or publishers are concerned, with
19 what you are concerned about. Which is, under
20 blanket licensing, at SoundExchange, 31
21 percent of the licensees don't even send in
22 reports. So what we are concerned about is the

1 incentive to make sure that the reporting
2 comes in, and is accurate. And that is a big
3 deal. And we have seen, because we actually
4 have a termination right, which is suggested
5 by the RIAA, that that isn't really valuable
6 in the new media world.
7 Because the companies don't have
8 any assets. So they come in and out of
9 business, frequently. Some survive, that is
10 great. When they do they are usually good
11 actors.
12 But the threat of a termination of
13 the license, for someone who doesn't have any
14 fixed assets to glom onto, isn't very real. So
15 it is very, very hard, to get someone to
16 comply who, at a certain stage, particularly
17 early on in the life cycle of that launch,
18 doesn't see a lot of risk. And that is kind of
19 a big deal. So when coming up with a
20 structure, to provide liability protection,
21 the balance is, what is going to be the
22 incentive, to make sure that people are

actually recording, and paying properly.

Now, some people just do it. Some licensees do it, and they do it right most of the time. And many of them are at this table.

But that is the issue being addressed by song by song. I do think, in a free market, you actually might see something like you were talking about. And I guess I will leave it there.

MS. CHARLESWORTH: Okay. I just have a question, though. If someone could wave a magic wand and, say, create a centralized data base, or agency, to manage this stuff. I mean, is it -- I hear what you are saying about the link between the musical work, or the sound recording, and the musical work, and the ownership. I mean, can that happen at a different point in the chain? In other words, because having it at the outset, what I hear from digital media companies, I think Mr. Duffett-Smith is saying that is a huge burden. And so I'm wondering if it is, the suggestion

is to drag on the system, it keeps people from, it is inhibiting innovation, it is inhibiting the launch of services. And so I guess the question is, we understand the importance of that link. Can the link occur at a different point? And, if so, what point would that be?

MR. BADAVAS: Can it occur? Yes, of course. But how effective will it be is a different issue. When you have the biggest example, in the United States, and 31 percent don't report, you have a real problem. The matching, after the fact, is -- it can be done, it is imperfect, that is okay.

But it could be done. The question is, what type of incentive would actually work to make sure that someone did it, after they already had free protection from liability, right?

If you already have liability protection what is going to force you to actually invest in the systems necessary to

1 make the matches right, or obtain the data
2 that is right. So the record labels put the
3 right data in their sound recordings, that
4 will, eventually, get matched. And if you are
5 talking about the first two million
6 recordings, you know, we have a bunch of
7 humans that sit there and do the links. And if
8 we spend more money on doing the work, we
9 would probably get there quicker. Resource
10 constraints are resource constraints.
11 But those, eventually, get worked
12 out, they eventually get found. It is not as
13 quick as we would like. For the other 28
14 million, and I'm making up the number of 30
15 million, that is a different story. Those,
16 those compositions that are imbedded, in those
17 sound recordings, aren't necessarily written,
18 for example, by our writers. We don't have a
19 relationship with those people, they don't
20 come in through us.
21 They come in through a large group
22 of aggregators that charge for the service of,

1 essentially, selling a dream of getting your
2 recording put on Itunes. Which is a fine thing
3 for them to sell, and it is a great dream.
4 And, every once in a while, those folks get
5 discovered. But that is really different from
6 what we are talking about in the commercial
7 music industry. And so, yes, it could -- the
8 matching could happen later. But I don't know
9 if you are ever going to get to a point where
10 the amateur recording, that is uploaded
11 through an aggregator, and placed on Itunes,
12 and placed on a streaming service, is actually
13 going to match. Until computer software is so
14 good at identifying songs that from a bad
15 cover recording, you can figure out what
16 composition is imbedded in the recording.
17 MS. CHARLESWORTH: Thank you.
18 MR. MARKS: Can I just -- one quick
19 comment?
20 MS. CHARLESWORTH: Very quick
21 because I really do want to get to the -- yes.
22 MR. MARKS: Yes, I would just say

we understand that issue. We would just say let's figure out how to create those incentives together, rather than just, you know, throwing out the complete idea, given all the other benefits that I listed earlier, and that others seemed to agree with.

MS. CHARLESWORTH: Okay. Ms. Finkelstein?

MS. FINKELSTEIN: Well, as I said earlier, I oversee mechanic licensing at Sony, and I have for a couple of decades. So usually I like to start with my theme music of Nobody Knows the Troubles I Have Seen.

MS. CHARLESWORTH: We do know now.

MS. FINKELSTEIN: So, you know, I would like to echo the point Steve made about the need to negotiate all rights upfront. Obviously when a record company invests in a sound recording, and undertakes to hire a producer, and the studio, and create that recording, we would require, we would expect, that we would have the right to exploit that

in any means known, or becoming known. And Christos alluded, earlier, to the supply chain management. I think one of the things that would be an anathema, to any business, is to say that you are going to leave yourself exposed by not having the ability to exploit the thing that you are creating, in all ways you need to, in order to run your business.

I think artists are hurt if they can't put their music out in Spotify, because the publisher holds back those rights. And I think it is odd, to us, that there is a lot of discussion about how do you facilitate the licensing between the services and the publishers, when we would, you know, think that of course there has to be a fair compensation to the publisher.

But the ability to, you know, throw up a roadblock and say, well even though Beyonce recorded that song, and it has been out on her albums, wow, we never meant for it to be on this kind of service. For the

publisher to have that control is, you know, unsettling, shall we say?

We are trying to be as flexible and responsive to a rapidly changing marketplace as we possibly can be. We have licensed, you know, hundreds of music services across the industry. And we see, now, we are constantly kind of caught in the middle between the fact that there is the parsing of rights and say, kching, another right, kching another right. And that we are, you know, licensing for interactive streaming, there is a performance right, there is a reproduction right.

That mechanism for the payment of those became so complicated that, basically, most of the record labels, I think, didn't want to take on that complicated payment. And so the direct licensing from the services came about. I mean, for us, we have probably the most sophisticated system in the business. We would have been okay during the pass-through.

But it obviously doesn't make sense for a service to say, this set of masters has a pass-through, and this one has a direct license. There is already so much fragmentation that it kind of has to go all one way or another way. But I think, you know, one of our main issues is, of course, getting all the rights. Audio visual has become a huge issue for us. Because, as I think we said earlier, everything has a screen. People like to see something on their device. And so, suddenly those are all now, as if they came from Mars, completely different from every other exploitation of the recording that we are, otherwise, making. Which, you know, again just seems very odd. Why does that take it out of your standard licensing realm? Because you add a picture of the artist, that the consumer can see, when they are looking at their phone?

The 115 license obviously is, you know, it has been the backbone of the industry for forever. And the industry has grown up

1 with reliance on that. Christos' suggestion
2 that we go under, negotiate direct licenses
3 for those 14 tracks is quite interesting.
4 Because just to negotiate a couple of sample
5 licenses, for one album, can take somebody two
6 or three weeks of calling, and begging, and
7 leaving messages, and finding A&R people who
8 used to work at that publishing company, who
9 knows somebody else, who could call somebody
10 to try to get this cleared. It is a huge
11 undertaking. And, you know, there is just no
12 mechanism to say we want to negotiate a direct
13 license, here are the terms, call us back in
14 an hour. And, you know, that is usually the
15 time of time pressure we are under to try to
16 get products out. And we have artists who want
17 to deliver a record today, and have it on a
18 service tomorrow. So we are trying to be
19 responsive to those artists' demands, and we
20 are doing the best we can. But that involves
21 a lot of begging, and pleading, and faxing,
22 and mailing requests.

MS. CHARLESWORTH: But just to follow-up. You are -- a lot of the uses do have to be negotiated directly, right? Because --

MS. FINKELSTEIN: Yes.

MS. CHARLESWORTH: -- the 115 licenses, audio only, it is limited.

MS. FINKELSTEIN: Right.

MS. CHARLESWORTH: So when you are negotiating the -- I think maybe the question was, you know, -- well maybe my question is.

If you are negotiating direct licenses for other exploitations, like an audio visual, or whatever, could you throw the mechanicals in there?

Or, I mean, is that -- why is that, since you are doing it already, why is that -- I mean, I'm not saying it is a small problem.

But could that be rolled into the negotiations over the non-compulsory uses?

MS. FINKELSTEIN: I would say that

1 would be extremely difficult because people
2 don't want to step out and say, well, we will
3 negotiate these rates in this way. There is a
4 lot of, you know, wait and see what Martin
5 Bandier is doing, wait and see -- let's wait
6 and see how this market evolves. 6 It is very
7 difficult to just do a one off negotiation and
8 get all the rights that you need, you know, in
9 perpetuity. Which, of course, the mechanical
10 has always been in perpetuity. Now we have,
11 you know, people want to limit terms of
12 licenses. There is a lot more complexity built
13 in. But mostly there just isn't this mechanism
14 of saying, we need a license, get back to us
15 right away. I mean, it is very much like there
16 is standard mechanical licensing for
17 downloads, and for physical that works very
18 well.
19 But for newer types of
20 exploitations you don't even know what kind of
21 license you need. Is it a purchase content
22 locker, does the sale within an app means that

it can be an interactive stream, or is that a different kind of a license that you need?

So there are a lot of creating analogies, and study that goes into even trying to figure out what some of these things are.

I think, also, we have conflated the data base, data issues, with the licensing in ways that, perhaps, have gotten to be less helpful.

I think we supported the pass-through licensing concept on the one hand because, obviously, it would give us a certain ability to have certainty. And I think it is an element towards market stability. But it also seems sort of like a way to avoid the kind of redundancy that has happened. I mean, when we distribute Beyonce we have to know, in order to pay the mechanicals, and physical, and downloads, we have to know what all the shares are, all the splits are, for the 18 songs.

If somebody wanted to use that knowledge, that we have, to just do pass-through licensing, it seems to make more sense than suddenly having every service tracking every share of those 18 songs for Beyonce. And as our friend from Spotify pointed out they don't want to track that. So they end up going to a third party service. So, you know, there is just -- but I think that we are pretty open to the ideas of data sharing.

I think, you know, we are an active participant in DDEX. There is a lot of discussion about how to do more to share data. You know, one could imagine that, maybe, Spotify reports to us and they send a mirror copy to the, you know, with the publishing, I mean, with the same sales transaction records, to the central publishing entity. There are a lot of things that could be done to give the publishers more visibility into how their works are being used. I had suggested, at a DDEX meeting, that we start imbedding ISWC

codes, that we assign them, when we know that there is a brand new work.

Because we know the work has never been registered before. We could assign a dumb number so that, as things are sent out into cyberspace, they have both an ISCC, and an IWC, and then the information could be filled in by the publishers when they, you know, establish what the relative shares are, and that data base could be populated.

But there are a lot of things, I think, we could do if we work together. And I think that some of the politics around licensing are making some of the data, and the mechanicals, the mechanical aspects of reporting, and paying, we are not taking advantage of all that we could be doing.

MS. CHARLESWORTH: Okay. Yes, we are -- I'm sorry to report, this is a bad moderator. We are running over, again.

But did you have something, very quick, to respond to Ms. Finkelstein? And then

I do want to get to Mr. Barron. And then who else hasn't yet spoken on this panel? Okay, we are going to do a speed round with the people who haven't spoken. And it is not because we are not interested in hearing from everyone. It is just that people do need to get to lunch. So Mr. Kohn?

MR. KOHN: Just real quick. On the data issue I think it is important to separate out the reporting data that comes from the organizations, like Spotify, to the copyright owners, from the repertoire meta data of who owns what, and what is linked to what. The ISRC linking to the songs, for example. And what I have seen, and I have been in some of these meetings with the organizations. There seems to be an understanding that there is a need for a centralized data base for this. But nobody is willing to give up the data. To some of the collection organizations the data helps them maintain their existence. They will never give up the data. The, even the IPI numbers,

which are basically a list of who is who, by the collection societies, that is managed in Europe, nobody has the access, only the collection societies do. Andrea mentioned that she does have data bases of songs linked to sound recordings. And a lot of that, and so do the other record companies. But try to get that out of there into a separate data base, along with the Harry Fox data, and the ASCAP data, and the BMI and SESAC data. Having that, that is going to require, I think, some legislation because there has to be transparency. If you don't have transparency on who owns what, complete transparency, you are never going to have the artist and the songwriter get paid properly.

MS. CHARLESWORTH: Okay. And we do have a separate panel devoted to meta data. So I hope -- I don't know if you guys will be on it. But we can explore some of these issues in more depth. Ms. Potts?

MS. POTTS: Hi. I would like to

voice, on behalf of a non-commercial performers (performers distributing their own music) that would be affected by some of the changes being discussed in the statute of 115 of the Compulsory License. With technology today it is very easy to be able to create a sound recording and upload your sound recording to retail digital stores. However, if they want to use the compulsory license to record a cover song is not working as easily as it could today. But I believe with some changes it could work on behalf of these performers who are putting out their own music. A lot of performers, are also doing their own music administration. They don't have anyone doing the administration for them. And while it is very easy for a lot of us in this room to make suggestions for publishers or record labels, since we already have our systems in place to administrate for us. But for them it is difficult doing their own administration. So there are a couple of

1 things that I think that changes in the
2 compulsory license, I would like to suggest
3 that would be beneficial for those who are
4 putting out their own music and doing
5 administration for themselves. We talked about
6 a national registry, or possibly having a
7 central location for trying to locate
8 copyright owners so they can obtain a
9 compulsory license. There has been times
10 people complained about the difficult trying
11 to locate copyright owners to try and obtain
12 a compulsory license. We tell them to go to
13 ASCAP, BMI, SESAC websites to look up who the
14 rightful owners are.
15 But sometimes they because music
16 catalogues have changed, the sites are not
17 always up to date. I hear from some
18 independents who talked about the monthly
19 accounting and the difficult in preparing the
20 statements to the publishers with the
21 compulsory license. With the publisher
22 mechanical licenses, the accounting is done on

a quarterly basis. But with the compulsory license the accounting is done on a monthly basis. And if you are, if you are a -- following the statutory accounting rules and regulations on how to account to the publishers, most would have to hire an accountant to be able to produce the monthly statements. I would recommend that if Congress keeps the compulsory license, that they go to the same quarterly reporting as the publisher mechanical licenses are today. I would also like to recommend that for Performers releasing their own music who want to obtain a compulsory license to allow for payment to be made for an estimate number of units up front like publishers for mechanical licenses does today for non-commercial users. Users are able to get a license for let's say a1,000 units, or 2,000 units, but they have to pay the royalty upfront.

If Congress decides to keep the 115 compulsory license, and not do away with

1 it, I would recommend to possibly move to
2 something along those lines for the self-
3 releasing artists that are sound recording
4 owners, but they are not -- they do not know
5 what the compulsory license law states for
6 most of us, around this table. They do know
7 however that they have to obtain a
8 (compulsory) license and to pay the royalties
9 for what they distribute. On several occasions
10 today I have heard the suggestion to do away
11 with the compulsory licenses all together and
12 move to "negotiated licenses" with many using
13 the term "Willing buyer, willing seller." For
14 many performers distributing their own music
15 who want to record a cover song, I do not see
16 a lot of them going directly to publishers to
17 negotiate the use of a cover song because most
18 do not know copyright law and I believe they
19 would be fearful because as one other
20 gentleman mentioned, here at the table today
21 it is a very complicated, technical, and
22 expensive to be able to understand what the

(mechanical) licenses are saying. I believe most feel the same way. So for those artist in the garage making music (as someone mentioned earlier) I believe should have some kind of mechanism for those Who want to record a cover song and to be able to account for the number of units distributed without having to have to go to negotiate.

Because a lot of times they could just file a notice for permission and pay the appropriate royalties and so they can be able to continue to use published the music.

MS. CHARLESWORTH: Thank you, Ms. Potts. Okay, Mr. Barron, Mr. Knife, and Mr. Bengloff. And then -- yes. I mean, we are happy to stay here longer. I mean, I don't know how hungry are the panelists. I want to make sure that you guys get lunch. So why don't we wrap it up after these guys? Are you on a subsequent panel?

Okay, so perhaps we could --

MR. ROSENTHAL: Jacqueline, one

point. Will you at least later on, if we don't do it on this panel, give us the opportunity to respond to Steve's request for feedback to his proposal?

MS. CHARLESWORTH: I will. I think both of you guys -- yes, I mean, as I said, we are willing --

MR. ROSENTHAL: That could be later. I just wanted to make sure that we have involvement.

MR. MARKS: That will give him time to think of something.

MS. CHARLESWORTH: Yes, I mean -- why don't -- we are going to reserve a little time, I think, on a future panel for you two to answer -- yes.

Because people are hungry. Barron, Knife, Bengloff. And then if you have two seconds, yes. Then we are going to break for lunch, and we will adjust the lunch a little bit so people have enough time to eat.

MR. BARRON: Thank you. I think

1 going this late in the session, I think a lot
2 of my points have already been addressed.
3 But I'm glad that DDEX was brought
4 up. Most recently, and I think we can address
5 this in the later session, but this has proved
6 critical to the way that publishers, and
7 labels, are now working with these services.
8 It is such a conglomeration of massive sets of
9 data. And I think we learned a lot from
10 Youtube. With the transparency that we have
11 with them, that we don't see with the other
12 services. Youtube has actually been very vocal
13 about the need for ISWC, to match up with
14 ISRC.
15 They have worked very hard to take
16 data from multiple, multiple, organizations,
17 and 20 publishers of one song, ten recordings,
18 of course, belong to that song. It is rife for
19 complications, and there does need to be a
20 centralized service that can tie all that
21 information together, and that could be
22 available to the smaller users, who are

uneducated on who to approach, and the need to obtain 1,480 licenses to license one album.

I think it was suggested that, perhaps, it worked well with the Harry Fox opt-in for the smallers, and free market negotiations between publishers and Youtube, for those direct licenses.

I think we have seen, and DiMA agreements signed between labels and publishers that have proved to be very effective. Youtube, again, has proven very effective. And it has been our first foray into the transparency that we can have with these services, that we just don't enjoy from the other services, who are simply sending NOIs. There is absolutely no way to be transparent under the current system of sending boxes, and boxes, and boxes of NOIs. And, perhaps, not to every publisher of a song, perhaps just to the majority shareholder. That is the most difficult question that I can answer for my clients,

when I have writers calling and saying I saw this on Youtube, what does it mean?

I have pretty good insight into, going to the CMS, I can see the activity, I can compare it to the royalty statements. That just doesn't exist with any of the other services. There is absolutely no way to see if we received an NOI, if the royalties are corresponding to those NOIs. There needs to be more transparency and a centralized service, I think, would go a long way towards that.

MS. CHARLESWORTH: Thank you very much, Mr. Barron. Mr. Knife?

MR. KNIFE: Really quickly. Just getting back to the original point, which was responding to the RIAA proposal there.

I think it is interesting, I don't want to get into, you know, Steve said that there is some flexibility, there, with regard to exactly how a percentage would be set, or how that relationship between music publishers, the songwriters, and the record

1 labels would go.
2 But I think it is interesting
3 because it touches on a little bit of what Bob
4 Kohn was talking about, in that it kind of
5 gets us a little bit closer to a unitized, or
6 a single, you know, kind of a one stop shop.
7 Which is just inherently attractive. I just
8 wanted to, you know, observe that that is a
9 very attractive idea. And then that goes off
10 of something that Mr. Duffett-Smith was
11 talking about, which is ideally it would kind
12 of contain your overall costs, right?
13 And I know we have a panel, later
14 on about investment, and the ramifications of
15 all of this.
16 But I think it is very important
17 to remember that any type of bundling, or
18 collectivization of those rights, also has
19 that -- it has that ancillary benefit of
20 transparency with regard to a service, or
21 their investors looking at total costs. And
22 making sure that your total costs, occurring

in separate negotiations, don't actually kind of ultimately eat up the total revenue that you might have.

MS. CHARLESWORTH: Thank you, Mr. Knife. Mr. Bengloff?

MR. BENGLOFF: About a third of our members are also publishers, and this consent decree, the way judges coat and stamp their work, we feel for our creator colleagues, who are the songwriters and the publishers.

That all said, typically, when everyone is looking at total content costs, as I have described in other situations earlier today, the people that I represent tend to end up with less. We like the compulsory statutory licenses under 115. We feel that some sort of CRB type, tribunal type process could look at -- set rates as well in willing buyer, willing seller, and take care of that. When the judges are instructed, they should be looking at the total business. I keep hearing about ratios of Pandora money, over and over again, and how we

are getting too much.

But, as Andrea has already said, we are the investors. Whether it be in terms of signings, marketing, big staffs, the judges should be looking, in their economic analysis, at the net bottom line.

Because our net bottom lines are very small profits, or unfortunately a lot of times publicly the PROs report over two billion, and distributing over 86 percent of that money.

That is what we need to do it. To the comment that Jay said earlier, and other people said the right people should get paid. We should invest to get the right people paid, otherwise it ends up in the black box. Thank you.

MS. CHARLESWORTH: Thank you, Mr. Bengloff. And last, but not least, Ms. Carapella.

MS. CARAPELLA: This is a very, very important conversation, two days, three

cities. I just want to mention that while all this theory is being discussed, let's not lose sight, at the end of the day, this all has to be put into practice. So when you are talking about the higher theories, and the concepts being discussed, here, just also take into consideration the efficiency of implementing these in the actual practice of putting these changes into effect.

MS. CHARLESWORTH: Thank you. So you are probably hungry. Do you want to start -- we can start the next panel a little late, maybe 2:40, ten minutes, it gives you an extra ten minutes, because I think you all have to go out and find lunch, in the wilds of New York which can, sometimes, be time consuming. So we will see you back at 2:40.

(Whereupon, at 1:27 p.m. the above-entitled matter was recessed for lunch.)

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

2:40 p.m.

MS. CHARLESWORTH: Welcome back, everyone. I hope you enjoyed your lunch. And we are now up to session 4 which, I think, may end up being somewhat of a continuation of some of the earlier discussions we were having. In this session, what we are trying to focus on, Fair Royalty Rates and Platform Parity, and to try and articulate some principles, if we can, about what we feel, or what you feel, potentially Congress should be thinking about, in reviewing our music licensing system.

Some of you have mentioned issues before, but I want to explore them. I mean, obviously the rate setting standards, the Board in which rates are set, and the difference in rights, all play into this. And what we are trying to evaluate is both, how do those impact the equities of the marketplace, and also what might be done to cure any

perceived inequities. So those are big questions. I think we have a couple of new victims, here. No, I think we want to start with Ms. Griffin, and Mr. Morgan, and anyone who is new to the discussion, if you could introduce yourself, and explain your interest in music licensing that would be great.

MS. GRIFFIN: Well, I'm Jodie Griffin, from Public Knowledge. We are a consumer advocacy group based in D.C. And we work on issues, really, to open communications platforms which use copyright, telecommunications, and things like that. And in terms of my interest, personally I used music licensing in a past life.

I earned my living playing cello, and working on concert productions, and helped launch, and work for, a small record label. Which, I have to say, is still doing great work without me.

But they were really successful and it really brought -- it needs to use the

1 perspective of the independent musician.
2 MS. CHARLESWORTH: Okay, thank you
3 Ms. Griffin. Mr. Morgan?
4 MR. MORGAN: My name is Blake
5 Morgan, I'm a recording artist, and a
6 songwriter. And a label owner here in New York
7 City, in fact, right up the block. And in
8 January I started something called I Respect
9 Music, which began as a Petition to Congress,
10 urging Congress to support artists pay for
11 radio play.
12 And many, many thousands of
13 signatures later, it has grown into a grass
14 roots movement, with people holding up signs,
15 on Twitter and Facebook, and Instagram, and
16 covered by major national press, and all sorts
17 of terrific things. So it is a simple idea
18 that artists should be paid for their work,
19 when it comes to radio air play, we are the
20 only democratic country, in the world, that
21 does not pay artists for radio play. And this
22 is something that fundamentally affects.

MS. CHARLESWORTH: Okay, thank you. Mr. Carnes?

MR. CARNES: Yes, my name is Rick Carnes, I'm President of the Songwriters Guild of America, and I'm co-chair of Music Creators of North America. I'm a professional songwriter, myself, for 35 years.

MS. CHARLESWORTH: Mr. Dupler?

MR. DUPLER: Hi. I'm the Director of Government Relations for the Recording Academy. The Academy is best known for the Grammy Awards, but we are a membership organization with 20,000 members, representing songwriters, recording artists, studio professionals in the music industry.

MS. CHARLESWORTH: Well, so who wants to speak first on the issue of platform parity? Mr. Carnes, you are the loser?

MR. CARNES: That is so typical for me. Let's see, okay. I'm just going to pick it up when we talk about fair value for music in general. The Music Creators of North America

just conducted a study for a thing we are about to roll out, called Fair Trade Music. And basically what we are talking about is how do you value music?

You know, what is analogous to a music farm, you know? What workers and other professions make, you know, in the chain when they create the basic good that everyone else sells. And I'd like to be able to submit that to the Copyright Office, at some point, I will get that done. It is done, but we are still editing it.

MS. CHARLESWORTH: Well, we will have an opportunity for reply comments, probably some time in August we will be announcing that. So you will have an opportunity to submit further written comments, including that data.

MR. CARNES: Thank you very much.

One of the things that I would like to discuss, real quickly and briefly, is the fact that the digital music file, as

opposed to a 45, CD, that no one remembers, a vinyl album or a CD. The digital music file is, actually, more valuable, I think because it is portable. It doesn't degrade, you can make copies of it.

But it has never had, as opposed to those other formats, it has never had its price discovery moment. It has never been sold at a free market price.

Where it got to be valued for what it was. It was always sold, in the marketplace, competing against the very same file for free.

So we start off with that basis, when we start talking about value in music. And as long as we are doing that, we are always going to be in a situation where songwriters, and artists, can't make a living. You can't compete against your own risk, okay?

So we first have to have a fair market price. And then we will have a price discovery moment. And at that point you can

1 start setting rates that actually work.
2 Because, right now, you are seeing a complete
3 obliteration, destruction of the songwriter
4 community. As Lee Miller described, at the
5 last copyright meeting, we really are down to
6 about ten percent of what we were 15 years
7 ago, okay?
8 So the current system is broken.
9 When we talk about the 115 rate setting, by
10 the way, I have a modest proposal. If my
11 earnings are going to be capped at 9.1, I
12 think that my income should be taxed at 9.1.
13 Is that asking too much?
14 But, basically, we have been in
15 situations where everyone in the music
16 business bleeds a little money. We are getting
17 killed by parasites. And no one said that word
18 all day long. And so it is very hard to
19 establish a fair value of music. And we have
20 proposed, and thank God the Copyright Office
21 has taken it seriously, and has done a notice
22 of enquiry about small claims court.

Where I can actually have a chance, as a person who owns intellectual property, to go defend that property, in a place where I can actually afford to do it, you know?

Instead of taking one person to court for 250,000 to a million dollars, and then find out it is a 12 year old girl who has 89 cents in a piggy bank somewhere. I can, hopefully at some point, take 100 people to court for stealing my songs, for 1,000 dollars a piece. And that would actually be a deterrent. And then you can start talking about, okay, eventually people are going to look at that and go, you know, 99 cents, whatever it is, it is better than getting dragged into small claims court for stealing something.

And I think that is a basic point of value. We need to have that price discovery moment, where a music file actually competes, you know, for what people are willing to pay

for it. Not against a free copy of it.

MS. CHARLESWORTH: Thank you, Mr. Carnes. Mr. Bengloff?

MR. BENGLOFF: Thank you. I have already spoken, today, about the fact that the compulsory license, as far as we concerned, creates equity. So I won't go over that again. But I will discuss the fact that there has to be fair rates.

The compulsory license also helps give fair rates to services, so that they are not held up for exorbitant amounts of money, which gives consumers a lot of choice, and also gives independent music labels access. There has been a lot of services that have closed, over the years, because they are unable, the economics weren't able to work for them.

And some of those services that closed, quite frankly, were very favorable to playing independent music. So we miss them very much. I really want to focus, mostly,

today on having a performance right, broadcast radio, I'm a founding member of the Music First Coalition Steering Committee. And I have been doing it now for seven and a half years. It is very important to us that we get a performance right.

Seven and a half years ago, over the air radio wasn't even playing that much independent music. We have made a lot of inroads in those past seven and a half years, so I thank your constituents for that, sir. And, but still, while we are undeserved there, the real issue is, is a lot of our music, and a lot of our members are not, necessarily pop music.

I mean, we do have Mumford and Son, is one of our members, and Howard Swift is on one of our members, and Vampire Weekend, and I can keep going on, the Lumineers, and they certainly get a lot of radio play. Of course, radio didn't embrace them until they already broke, because they seemed to be late

to the party on independent music. So I'm really not going to be amenable to hearing anything about the promotional value, right now, because it had already happened prior to breaking the artists, prior to it getting on the radio.

But what we need it for, also, is we have a lot of genre-specific members, members who do jazz, members who do the blues, members who do classical. Those are the members that need our help the most, as I discussed this morning. Most of our members, while we have members that are a half of a percent, or three quarters of a percent, or one percent of the industry, a lot of them are working specific genres. We honored, last week at our Indie Week Awards, Bruce Iglauer, of Alligator Records, which is the brand in the blues out of Chicago.

They do get played overseas. A lot of those genres of music are much bigger overseas than they are here, in the United

States, in terms of broadcast radio. Unlike the major labels, we don't have domiciles in most of the countries overseas. Most of our people may have an office in the UK, but they don't have offices around the world, like Steve's constituents might. So as a result we have to have a performance right to be able to bring our money home, and get paid for the air play that we get overseas.

This is an essential thing that we need. I have been fighting the fight for seven and a half years now, as I said I'm a founding member of the Steering Committee of Music First. And, I think, as the register has said publicly, now is the time. Thank you.

MS. CHARLESWORTH: Mr. Marks?

MR. MARKS: Thank you. I will start by echoing Richard's sentiments about the need for terrestrial right, and thank Mr. Morgan for his campaign and efforts on that front. It is, obviously, been a long continuing battle that will, hopefully, end in fairness of

terrestrial radio paying its fair share for the recordings that it uses. When we think of platform parity I think we also, one of the first things that also comes to mind is ensuring that the rate standards that are paid, that are used for the compulsory licenses are the same.

It doesn't mean the rates will always be the same. But, at least, the standard by which they are, any particular service is paying, and the rates are being measured, should be the same.

And we think that should be something that reflects fair market value, such as willing buyer, willing seller standard. So in 114 we think that should be changed for the three services, not platforms. It is often said that cable and satellite radio have this 801(b)(1) exemptions. It is, actually, three companies that happen to be in those spaces. That it is time for those three companies to no longer enjoy their special

status, that was given more than 15 years ago, when they were young companies.

So that on the pretext that they should continue to enjoy a standard that they had started their business under. The other thing I would add is, on the pre-'72 front, as Colin said earlier, rather than having a patchwork of state laws that govern this area, it would be nice, in terms of paying rates, to have that brought into the compulsory license, so that all of those services are paying, just like other services that aren't operating under a compulsory license.

MS. CHARLESWORTH: Thank you. Mr. Duffett-Smith?

MR. DUFFETT-SMITH: Thanks. And at the risk of repeating myself, and something that I said before lunch, we, at Spotify, are all about making sure that everybody gets paid properly, identifying the authors, being able to make sure that the money is paid to the rightful owners.

One thing that is absolutely essential, though, is that any rate setting standard is not looked at in a vacuum. And the impact of any increase, in the rates, on the sound recording side, or decrease of rates on the sound recording side, is matched by corresponding increase and decrease on the other side.

If we have an increase in publishing rates, for example, that go up beyond, much higher than they are at the moment, then we could be in a situation where we pay out more than one hundred percent of our revenue, which is unsustainable. And to your point, earlier, about piracy, one of the ways in which people will stop pirating music is if there is, you know, good legal alternatives out there. Making sure there are good legal alternatives out there also means not stifling them by charging rates that are too high, or are uneconomical for them to be able to pay. So that was all.

MS. CHARLESWORTH: Thank you very much. Mr. Rushing?

MR. RUSHING: At the risk of piling on, but I will keep my comments short. So I just want to echo what Steve said about parity and the rate standard. It is only fair, if you are going to have a government license that says that people can use copyrighted works, and recordings.

That, at a minimum, the law ensures that there is a fair market price for whatever those works are. Still, the government doing it, it is always going to be imperfect. But at least the guidance should be a fair market touchstone. In terms of radio we, obviously, agree with what Rich and Steve, and others have said, about a need for a terrestrial performance right.

And the only detail I will add to that is the way that, you know, I think it is the way we should think about radio, terrestrial radio is just another way that

1 people consume music. And I sort of hate using
2 the word consume and music in the same
3 sentence. But it is an economic term, and I
4 think it is important, you know, the thing
5 that we know, from surveys, is a massive
6 amount of listening to music, is still done in
7 the car, over FM radio.
8 And it is not just sort of
9 happenstance, this is an economically,
10 incredibly important opportunity that radio
11 broadcasters have, and exploit. And they make,
12 you know, the whole radio industry we think
13 is, what, 17 billion dollars a year. Most of
14 that is selling ads, that they are able to
15 sell, because they have the attention of
16 people that are listening to music. And radio
17 broadcasters are very good at finely tuning
18 their programming schedule, so that the exact
19 right song is playing, at the exact right part
20 of the hour, so they can keep those people
21 through the bank of ads. And so that if you
22 happen to have a meter, you can count it, and

that helps their ratings, and on, and on, and on. And it is incredibly lucrative, and there is nothing wrong with that. But what that means is that we have a 17 billion dollar business of distributing music, of distributing recordings, and yet the people who created those recordings, play no direct role, at all, in the revenue that it generates.

And to put that in context, the recorded music industry revenues, that the RIAA put out, I think for 2013, were around seven billion dollars. So radio makes double what the whole record business makes, distributing music. And, you know, and it is a fundamental problem that must be addressed.

MS. CHARLESWORTH: Thank you. Mr. Kohn?

MR. KOHN: Okay, on platform parity, I have been struggling with a way to -- I think you have to deal on a conceptual level first, before you dig into the weeds of

the problem, and how to fix the problem. And I was trying to come up, from the bottom up, or from the top down. And I chose the top down. I'm not sure it is the best way.

But you look at the book publishing industry, which sells ebooks to Amazon and the Ibook store, and Nook, and everything, under what is called the agency model.

They get 70 percent of the income. The copyright owners get to set the price, whatever that price is, and they get 70 percent.

If you have a developer of software, of an app, on the app store, Apple pays you. You set the price and Apple pays you 70 percent. So you look at it, no matter what is going up, piece of content, what is coming back, let's say, is 70 percent of the revenues.

Now you have to divide it up. It is sort of, like, what is in there, you know,

where is the value being provided and why, and how do you separate that out. So there is one way to break this up, is to say, you have these webcasts that are very radio-like. You have these interactive streams, and you have these permanent downloads. And you have things in the middle, like tethered downloads, and all kinds of things. And you could say, well permanent downloads are, perhaps, the most valuable, I don't know.

So maybe it should be more than 70 percent of the revenue coming back for that. Or if a webcast is less valuable, because you have less interactivity, you have less than 70 percent. So you could change that rate based upon the level of interactivity, or permanence, in what you are getting. You might say, in today's environment, what the hell is the difference between streaming and downloading?

The technology is all the same, buffering is occurring, copies are always

1 happening, what is the difference? Let's just
2 make it 70 percent. So you could eliminate
3 that platform difference in terms of
4 interactivity or not and say, look, we are
5 going to treat it all the same, let the
6 consumer decide.
7 I think that is what, maybe,
8 Nadler was saying. You know, let the consumer
9 decide how they want it, when they want it,
10 whether it is on a streaming basis, or a
11 permanent download, who cares. The other thing
12 you have to look at, is on the audio visual
13 work side, music licensing is really highly
14 variable.
15 If a producer wants to use one of
16 my recordings and/or songs, it really depends
17 upon the value of the recording. Is it Lady
18 Gaga's recording, or is it Bob Kohn singing in
19 the shower's recording?
20 And, certainly, the importance of
21 the recording, and the importance of the song,
22 ought to affect the value that is licensed in

1 the audio visual work. Also the intended use
2 of the song.
3 If it is over the title, or used
4 throughout the entire program, or the movie,
5 or used the source music as background, is
6 going to have an affect upon the value. Highly
7 variable licensing when you are dealing with
8 individual works of music in a larger piece,
9 like a movie.
10 But, at the sound recording versus
11 music level, you know, sound recording with a
12 little bit of work, of a musical work
13 together, in this ball of wax, there is a lot
14 less variability. Yes, there is Bob Kohn
15 singing Lady Gaga's song, that she wrote. And
16 there is Lady Gaga singing a recording of my
17 song. And there is some variability there.
18 But it isn't as great as the music
19 licensing on the audio visual work. So what
20 I'm suggesting is, I think you have to have a
21 rule of thumb. The transaction costs of making
22 the distinctions between my written song, and

Lady Gaga singing it in the reverse, of her singing one of my songs, it is not worth doing it all. So we ought to come up with a rule of thumb saying it is 9.1 cents, no matter what song you use, no matter how important that song is, and it doesn't matter who you are. It could be Frank Sinatra paying 9.1 cents, or Bob Kohn paying 9.1 cent. So you have this rule of thumb.

So then you have the 70 percent coming down. It doesn't matter how it is being played, streaming, downloading, you get 70 percent of the revenues. And now you have to divide it up. A piece goes to the sound recording, a piece goes to the music publishing. On the music publishing side you have the foreman's interest, and you have a reproduction interest.

Well, it depends upon the use, but you can get transaction data from Spotify, as to what the use is, to make that proper allocation. And then you have to decide, well

how much does the sound recording get, versus the whole music publishing side? And then you get into this debate, between the music publishers and the recording industry association, as to the recording industry, we have records of -- we are doing all the work, we are making all the investment, and you wrote the song 40 years ago, while we are taking all the risk. Well, maybe they should get a higher percentage. But maybe it is not as high as it is today. And I don't know where that is.

But let a rate board, or someone, make these allocations based upon those kinds of, you know, issues as to -- maybe the first five years the sound recording side gets 75 percent. But, thereafter, they only get 25, who knows. Or maybe it is 50/50 after a certain point in time.

But you have to look at this, I think, conceptually first. Say, I'm sure Spotify is happy to pay 70 percent of their

1 revenues, if the service is, primarily, just
2 using music, right?
3 If it is just music, right? That
4 is what they do anyway, and that is what Apple
5 does, and that is what Amazon MP3 does, that
6 is what all the books -- ebooks work that way.
7 All the app developers work that way.
8 Pay 70 percent, and then worry
9 about the allocation. But this business about
10 ASCAP has to go to a rate court, and they get
11 a percentage, and they are upset that they are
12 not getting enough, and the music publishers
13 want to pull out of ASCAP so they can get a
14 bit more money.
15 They are going to become just like
16 the record companies have been, over the past
17 several years, where the record companies had
18 a voluntary license, and not let companies
19 like Spotify, or Emusic, or other companies,
20 that have been going out of business and
21 dropping like flies. And that is why you don't
22 have a healthy business. Rhapsody, which

1 started 14 years ago, probably would have had
2 50 million subscribers, had there been more,
3 less transaction costs, and getting the
4 license they needed to get their businesses
5 going. So I think start conceptually, and then
6 do the allocation.
7 Fight over the allocation, you
8 know, whether the recording gets 75 percent,
9 or 25 percent, or 50 percent, is a big issue.
10 And there ought to be some fights about that.
11 And I don't know where you come out on that,
12 between the songwriters and the recording
13 artists.
14 But have your fights over that, in
15 the same form, in a proper forum. And maybe
16 that is what you were suggesting earlier,
17 Steve. Well, you know, there is nothing wrong
18 with having a standard form contract to reduce
19 transaction costs. All marriages are standard
20 form contracts that the states have. Or every
21 corporation has a standard form contract,
22 let's say, in Delaware, or in New York. So

having a standard form contract, that the little guy like ABKCO Music, or the big publisher like Martin Bandier are in a level playing field, is not a bad way of solving that problem.

MS. CHARLESWORTH: Thank you, Mr. Kohn. Mr. Fakler?

MR. FAKLER: -- between the pre-existing service issue, and the radio issue, since I'm the one at the table with everybody's arrows in my back, it may take me a little bit longer to respond to all of the various things. Let me start out with some general points, here, because this has been a problem endemic to this discussion. And it has only gotten worse in the course of this discussion, already.

Where different types of digital music services are all lumped together, and when we are talking about rate standards, we are usually talking about 114 non-interactive programmed music services. This discussion has

all been about on demand interactive services, and all of this discussion about distribution platforms, consuming music, radio listeners consuming music, distribution platforms, it is really disingenuous, and it doesn't help.

Because programmed music services, like radio, like Music Choice, are not distributors of music. They don't sell music, the listeners don't get to keep the music. It is a programmed performance based service. And by starting out the discussion, referring to these services as mere distribution platforms, for music, you know it really devalues what these services bring to the table, which is significant.

MR. MORGAN: I didn't do that. I just said we are the only democratic country that doesn't pay artists for their work --

MR. FAKLER: I will get to that point later. But the point is, the discussion about distribution platforms, and everything else, is a red herring.

1 Because what makes a programmed
2 music service valuable to consumers is,
3 obviously the music is a part of it. The music
4 services never tried to claim that music isn't
5 a part of it.
6 But the quality of the programming
7 is what differentiates, is what causes a
8 consumer to listen to one provider, or
9 another. And there is an awful lot of effort,
10 and creativity, that goes into programming
11 compelling music channels. So it really is
12 less than helpful to just refer to, all of
13 these services, as mere distribution
14 platforms.
15 And I think that there is an
16 interdependence, obviously, if you just for a
17 moment look at it from that perspective, of
18 the programmed music service, and the
19 consumer, the listeners to the programmed
20 music service. There is an interdependence,
21 obviously, between copyright owners, the
22 authors from whom the copyright owners get the

1 copyrights, the music services, and these
2 programmed music services, particularly the
3 digital music services, that have had to pay
4 a performance royalty for the sound
5 recordings.
6 This provided, in 1995, a whole
7 new revenue stream to the record companies and
8 artists, that didn't exist before. And
9 importantly, as compared to interactive
10 services, it did not do this at the expense of
11 other revenue streams. No doubt revenues, in
12 the record industry, have gone down, and
13 shipments have gone down, sales have gone
14 down, depending on what point in time you do
15 the analysis from.
16 But these programmed music
17 services have not caused these declines. There
18 are a lot of reasons for these declines, and
19 we could spend a whole day talking about the
20 various businesses. Somebody mentioned piracy.
21 You know, there is also an extended economic
22 recession that has affected all business

sectors. There is the fact that digital technology has allowed consumers, or it has prevented the record companies from continuing to force consumers to repurchase the same recordings, over and over again, when new formats came out. Also known as the product replacement cycle.

Consumers no longer are forced to buy a bundled album containing recordings that they don't want to buy. So there are a lot of factors that have gone into declines of record sales. Programmed music services have not been one of those factors. And, yet, in the policy debates about what is a fair rate, and where the rates should be, these digital music services have been asked to subsidize the record companies for those unrelated losses. So, you know, there are multiple sides to this. And you can't just look at it from the idea that it is only the music that adds the value.

Now, turning to the more

substantive specific arguments that have been going around. You know, with respect to radio, and the promotional value of terrestrial radio, all I can say is that all of the studies still always showed radio as the number one discovery vehicle for sound recordings, and driver of purchases.

That hasn't changed. The record companies still spend millions of dollars, every year, lobbying radio stations to play their music. They wouldn't be doing that if they didn't think that there was a promotional impact from that.

That would be wasted money. That behavior, really, has not changed. And, certainly, radio stations are prevented, legally, from asking for payment for that promotional value.

If the record companies were suddenly allowed to demand a royalty, and yet the radio stations, say Payola laws were all repealed at the same time, I can tell you,

everybody who is, actually, in the business of promoting records, knows where the net flow of cash would go. It would be going to the radio stations.

Now, with respect to standards in connection with the 114 license, and the pre-existing services. I represent Music Choice which is, really, the only surviving pre-existing subscription service. There used to be two others. One was DMX, it went bankrupt. The other was Muzak. Muzak, long ago, abandoned trying to operate in this field, because the financials of it were impossible. They only have one affiliate, and they only service that affiliate, because they get various other business benefits that relate to their more profitable commercial background service. So for all intents and purposes, Music Choice is, really, the only pre-existing service left. And Music Choice was the first digital music service, as I said before.

They launched their service in the

1 late 1980s, when there were no digital music
2 services. They had to create the technology to
3 make digital performances happen, they had to
4 create a market for digital music services.
5 They invested millions, and
6 millions of dollars, establishing their
7 service at a time where the was no performance
8 right, for sound recording.
9 MS. CHARLESWORTH: Mr. Fakler, I'm
10 sorry, I am going to try to be more assertive,
11 as a moderator, and keep us a little bit on
12 track. There are a lot of other people who
13 need to speak. So if you could wrap it up in
14 the next minute.
15 MR. FAKLER: Okay.
16 MS. CHARLESWORTH: I really want
17 everyone to be able to contribute to the
18 conversation, thanks.
19 MR. FAKLER: So the point is that
20 Music Choice started an investment in service
21 at a time where there was no expectation to
22 have to pay a performance royalty for

1 songwriters and players.
2 That is the reason that when
3 Congress changed the legal landscape, in 1995,
4 they created the 114 license, and the 801(b)
5 policy standard.
6 That is the reason why, without
7 Music Choice's involvement, DiMA cut a very
8 bad deal, in 1998, for this willing buyer,
9 willing seller standard, that has proved to be
10 unworkable. Congress, nonetheless,
11 grandfathered the pre-existing services under
12 the old standard.
13 Now, Music Choice, nonetheless, so
14 there is an -- and in our written testimony we
15 go through the whole history of why there is
16 this difference. And nothing has changed with
17 respect to that. Having said that, Music
18 Choice understands that willing buyer, willing
19 seller has been unworkable, because there is
20 no competition in that market. There is no
21 true willing buyer, willing seller. The 801(b)
22 standard is more flexible, and it includes

fairness issues, including a fair return to the copyright owners. So Music Choice would, certainly, support extending that standard to all digital music services, subject to the royalty.

MS. CHARLESWORTH: Here is the question. I mean, if 801(b) is, many perceive it to be a below market standard. And do you agree with that?

MR. FAKLER: Not necessarily. It is a standard that can -- it can allow for below market rates, it does not require below market rates. And part of the problem is, even establishing a market rate, is such a mythical beast, you know, the willing buyer, willing seller rates, that have come out of the Copyright Royalty Board, have resulted in a digital music system, where no company has ever turned a cumulative profit.

None, not one. So to say that, that could even be a fair market rate, it is not. But no doubt there is a lot more that

1 goes into 801(b). There are, definitely,
2 policy issues involved. But when you look at
3 it as providing, these are services that are
4 not substitutional, for other revenues of the
5 record companies. And when you look at it, in
6 that context, we think 801(b), which is used
7 for all sorts of other licenses, as well, it
8 strikes an appropriate balance, and gives the
9 judges more flexibility in a world where true
10 competitive benchmarks don't even exist.
11 MS. CHARLESWORTH: Thank you, Mr.
12 Fakler. Mr. Dupler?
13 MR. DUPLER: I'm glad I'm after
14 this. Unlike Colin I'm happy to pile on and,
15 hopefully, throw a few more arrows. First of
16 all, we are appreciative of the Copyright
17 Office having a consistent stand on
18 terrestrial performance rights. While with all
19 these other issues, we talk about what is the
20 appropriate rate structure, what is the
21 appropriate licensing mechanism, none of those
22 questions apply to terrestrial radio, because

there is no performance right to begin with.

That has to be fixed. Right now we are waiting on the Supreme Court to issue a ruling on Aereo, and the principle there is that Aereo is using the video content of the broadcasters, without their permission, and without compensation. To which we would say, yes, that is completely wrong.

And what is correct, and applicable to the video content of the broadcasters is also applicable to music creators, as well, who also deserve to be compensated when their work is used. Quickly, on some of the promotion arguments that have been raised, first of all, the clear channel CEO, who is a the largest member of NAB has already stated, publicly, that promotion is not enough in terms of compensation and value to the artists, and copyright owners.

A GAO study has already shown that there is an inconclusive relationship with promotion. And even if promotion is everything

that the broadcasters say that it is, give us a performance right and let's find out what the value of the promotion is, if we had an actual rate, to the public performance of that music.

If promotion really was as, as they say it is, then that would be factored into the rate setting, and they may not have to pay anything to use music if the promotional value was so great.

If they had enough faith in what they say is promotional value, we would be able to test that. I would also say, in terms of all these services being lumped together, Pandora has used this example before, that if you sit in your car, and you fiddle with your dashboard, switching from FM radio, to Pandora, to Sirius XM, you are still listening to the same music through the speakers in your car. And the consumer experience is not that different from one service to the next, yet they are all treated completely different.

In terms of the common rate standard, we do believe that there should be one common rate standard that applies no mater where you are in the music creation chain. Whether you are the songwriter, or the recording artist, or the studio professional, everyone deserves to be paid a fair market value. And the fact that we have different rate standards being used in different contexts, automatically means that not everyone is paid a fair market value consistently.

A common rate standard would provide some measure of predictability, and reliability, both for the services, and for the creators, both. I'm glad to hear NAB concede that the 801(b) standard can produce below market standards. It is interesting since disruptive innovation was brought up, earlier today, that 801(b) specifically is designed to minimize any disruptive impact. And so unless you have these tech services,

1 wanting to protect themselves from disruption.
2 Lastly I will just say -- last comment, on
3 this issue of linking songs and sound
4 recordings that one necessarily has an impact
5 on the value of the other, I would strongly
6 reject that notion.
7 I think the musical work is worth
8 what the musical work is worth, and the sound
9 recording is worth what the sound recording is
10 worth, and they should be paid accordingly.
11 That there is not this inverse
12 relationship that one necessarily takes away
13 from the other. I think that is a false
14 premise.
15 MS. CHARLESWORTH: Thank you, Mr.
16 Dupler. Ms. Griffin? And two to three minutes,
17 if you can, so we can get everyone in.
18 MS. GRIFFIN: Thank you for the two
19 to three minutes. And I think, from Public
20 Knowledge's standpoint, maybe it is worth kind
21 of going back to what we think the goals
22 should be. We think that the music licensing

structures we have should be designed to create a competitive market, with lots of entrance on the distributor side, and the rates holder side, that results in services that are accountable to fans, on one end, and musicians on the other.

I think that Mr. Kohn alluded to this, in an earlier panel. But, you know, it is important to remember that, at the end of the day, we are concerned about the public, and that includes people who listen to music, and people who create music.

And I think in most cases people who do both, in some way. So I think for us one big principle that gets us towards that goal is technological neutrality.

We do think that, kind of -- Todd was saying that as you look at it, from the consumer perspective, when you are listening to a radio service, it is a radio service. I know the interactive, non-interactive distinction can be really tricky. But if we

are talking about, kind of, the Pandora or AM/FM type of services, they look very similar, from the consumer's perspective. And we think, therefore, they should be treated under the same standard.

The rates may not end up being exactly the same, but we do think that on-line radio, cable, satellite, and AM/FM should all be paying, and they should all be paying rates that are set under the same standard.

I think, and I will add one more thing about the rates. We do support the 801(b) standard. If I was to make a change to it, I would list artists, explicitly, among the factors of people who should be considered.

I think right now it lists the licensee, and the copyright owner. But I think that, particularly on the recording side, for a lot of cases, that means that it doesn't include the artist, who has sold their copyrights. And I think they should be

1 considered as well. And I think that it is a
2 market-based solution. Because we have seen,
3 in previous rate settings, where the CRB will
4 look at private deals, and then adjust based
5 on the factors.
6 MS. CHARLESWORTH: Thank you very
7 much. Mr. Morgan?
8 MR. MORGAN: I'm sorry you didn't
9 get to the other issue. With all due respect,
10 and I can imagine how you feel here.
11 But these aren't arrows in your
12 back, they are questions to your face. And the
13 question is, to artists and musicians, how is
14 it possible that anyone can agree, with a
15 group of countries, that don't pay artists for
16 radio play, the small group of countries that
17 include North Korea, Iran, and Rwanda.
18 And to hear, you are actually the
19 first person I have ever met, face to face,
20 who I presume believes that we should not have
21 this performance right in this country. And
22 Kim Jong Un agrees with you. And it is hard to

1 believe. This --

2 MR. FAKLER: Really?

3 MR. MORGAN: Really, sir. And there

4 are many, many complicated issues here, but

5 this part of it isn't. This country is an

6 idea, it is one that has lit the world for two

7 centuries. And the idea is we can do better.

8 We are here to form a more perfect union. We

9 fix injustices, large and small. Sometimes it

10 takes us a lot longer than it should.

11 But we do it. And in the last

12 century, alone, we have been able to split the

13 atom, and put a man on the moon, and splice

14 the gene. And I think artists and musicians

15 are saying, can we please, can we pay Aretha

16 Franklin, when Respect is on the radio? That

17 is the question.

18 MS. CHARLESWORTH: You have 30

19 seconds to respond and then we will continue,

20 since there is a direct question.

21 MR. FAKLER: Well, I mean, I don't

22 know how one responds to these ad hominem. You

1 know, the Kim Jong Un thing, it is -- that is
2 not, you know, an ad hominem is a great
3 substitute for a policy argument. It is, sort
4 of like the MPAA with the VCR and the Boston
5 Strangler, and all of that. It makes for a
6 good sound bite.
7 But the point is, the promotional
8 value is received. It is something that has
9 been a mutually beneficial arrangement, for
10 many years. It has been recognized by
11 Congress. And to ignore that promotional
12 value, and to minimize it, we just have a
13 disagreement. But I don't have to call you,
14 you know, a name, or 8 -- 9
15 MR. MORGAN: I'm not calling you a
16 name, sir. I'm simply reminding you that the
17 rest of the democratic world sees value, and
18 awareness, and promotion on the radio. And
19 also says our work should be paid for. The
20 only group of countries, that does not agree
21 with that, is a bad group of countries. And it
22 is embarrassing, I think, as the United States

1 of America, when blues, and rock-n-roll, and
2 hip hop, and Jazz, et cetera, are American
3 innovations, and American birthrights.
4 And we don't show the same amount
5 of respect, pardon the overuse of the word, to
6 those artists. So I'm not attacking you,
7 personally, or in any way. I'm really asking
8 what is a very reasonable question, to the
9 music maker, and music lover public. Which is
10 it is incomprehensible that we don't have this
11 right, in this country, when we are the ones,
12 together, who came up with these art forms,
13 and Belgium is able to do this, but we are
14 not.
15 MR. FAKLER: And yet the American
16 recorded music industry is the biggest, best,
17 and envied throughout the world. And it has
18 lived with this system for close to 100 years.
19 MR. MORGAN: We live with a lot of
20 things for a long time --
21 MR. FAKLER: Not to mention the
22 fact --

MR. MORGAN: -- until we fix them.

MR. FAKLER: -- that all of these other countries, that you are discussing, have very different legal regimes, as relating to sound recordings in particular.

MS. CHARLESWORTH: Okay. I think both sides have made their points, and we are going to move on to Mr. Wood.

MR. WOOD: Thank you. You know, I'm here representing music creators of all sorts, as I said earlier this morning.

One of the things that is clear to us is that the digital music services are, really, the future for music creators.

And that we've got to find a way, and we look forward to working with you, to try to find a way to make this all work.

I think Mr. Duffett-Smith has spent some time trying to convince everybody, and he has made a good point, you can't, we can't have royalty rates that exceed one hundred percent.

So no matter how we look at this, we are going to have to come face to face with the elephant in the room, here. Which is that the rates that are currently being paid, to artists and record companies, on one side, and to songwriters and publishers on the other, are just -- are way out of whack. And it is that, it is that imbalance that is driving this whole stampede -- well, I won't use the word stampede.

This whole tendency, on the part of major publishers, to pull out of the performance rights organizations, so that they can license directly. And I'm not going to go through, again, the litany of problems that fall from that. But suffice it to say that, for music creators, the idea that a disparity in rates is going to end, you know, 75 years of collective licensing for music creators, and jeopardize the, you know, the safety and the security that PROs bring to music creators is a very, very frightening prospect. Yes, and

I really like Mr. Kohn, you know, he has some really straight on ideas. I just want to say thank you for bringing them here.

MS. CHARLESWORTH: Thank you. Ms. Greer?

MS. GREER: Thanks. While I can't agree with Paul's position on broadcast royalties, I can agree with his position on 11 801(b). And we think that all of the services can come together, under 801(b). And I won't repeat all of what Paul said, in the interest of time.

But I do want to point out that under willing buyer, willing seller, and 801(b) the analysis is very much the same at the beginning. In the past two CRB proceedings we have spent the majority of our time arguing over, analyzing, and then adjusting marketplace agreements, and I will use marketplace agreements that may be relevant for the judges to consider, in our 801(b) proceeding. And that is the majority of time

spent. So you get the marketplace analysis, under both standards. But under 801(b) the judges get the ability, to take into consideration fair income, fair return, the relative contributions of the parties. And all those things, I think, we want from policy consideration, to be considered, especially when we are talking about new companies coming into the market, and encouraging that innovation as well.

MS. CHARLESWORTH: I have a question. I mean, is there -- some of the comments have suggested that maybe at the time 801(b) was adopted for some of the services, I think, including yours, it made more sense, perhaps.

Because you were a newer company, and I guess the question is, is there a point at which someone, a company maybe, ages out of that?

MS. GREER: So I think, and Mike I'm sure can correct me if I'm wrong, the

801(b) has been around since the '76 Act.

MS. CHARLESWORTH: Well, I meant, I'm sorry. When 114 was adopted, the question of what standard to apply, and so forth. The reason that -- the justification that you suggested was that you want to allow new companies, or innovative companies to develop --

MS. GREER: Well, no, that is --

MS. CHARLESWORTH: -- under the 801(b) standard, and the judges are able to accommodate that start-up issue better, perhaps.

But the question is, at what point is a company considered mature, I guess, or is it -- because some of the comments suggested that, at a certain point, maybe, a company should be considered mature, and should age out of the, what some perceive is a below market standard.

MS. GREER: So I don't think it is a below market standard. But I think that the

1 factors, as the judges go through them, you
2 know, they establish a zone of reasonableness,
3 using the marketplace benchmarks. And then
4 they look at each one of the factors and
5 figure out whether it applies, how much weight
6 to be given. And that may change, over time,
7 with the company. As the company matures, a
8 factor that might have been significant in
9 its, you know, first CRB proceeding, may not
10 be a factor, or has as much significance in
11 its next proceeding.
12 But I think it allows the judges
13 to take those policy considerations and use
14 them, no matter what stage a company might be
15 in, but without that, the judges are just left
16 with marketplace agreements. Which I think are
17 not real marketplace agreements. And so they
18 have no latitude. And I think 801(b) can be
19 used for all companies, regardless of where
20 they are, in their life process.
21 MS. CHARLESWORTH: Thank you, Ms.
22 Greer. Mr. Carnes?

MR. CARNES: I have a question I would like to address to Steve Marks, real quickly, since we are going his direction. Representative Nadler was talking about the fact that when the royalties for the performance right, when those are collected, or for American artists, in other countries, we don't have reciprocity with those countries.

But my question is, if say Sony Records France, is sitting there, and they get to collect their share of the black box, do they go collect those royalties? And if they do, do they then give them to the artists? And that is my question.

MR. MARKS: I know the answer to the first part of the question, which is that they are entitled to collect them there.

But, oftentimes, what they are collecting is only the producer's part. The producers and the artists' portion are separated. And so most of the time it is just

the producers' part.

MS. CHARLESWORTH: Is that -- are you finished? Okay. Mr. Knife?

MR. KNIFE: I was just going to ask, it sounds to me like I'm hearing a pretty definitive, whatever you want to call it, a predisposition against 801(b) as that it, that it must lead to, or that it often leads to below market rates. And you had asked the question, a moment ago, --

MS. CHARLESWORTH: Well, I'm sorry, just to clarify. I mean, there has been a lot of commentary to that effect. So I'm trying to flesh this out in terms of how people think about it, on both sides of the table.

MR. KNIFE: Okay, I understand.

But, again, it is still -- you know I have heard the question asked a couple of times that, you know, it leads to below market rates. And I think Ms. Greer, you know, tried to, you know, press back on that a little bit. And I was just wondering, I mean,

you had -- even the way you had asked the question, was kind of, like, couldn't companies age out of 16 801(b)?

And I thought, her answer kind of went to something that we kind of shot right over. Which is that the 801(b) standard has been around for a really long time. And the willing buyer, willing seller standard has been around for a relatively short period of time. And I'm wondering, you know, could you flip that question and ask, is there a time that the willing buyer, willing seller standard ages out, and is no longer applicable?

MS. CHARLESWORTH: So that is your question you are putting out there?

MR. MARKS: Yes, kind of. I mean, it just seemed to me like the whole enquiry is going in one direction, only. Which is that there is this 801(b) standard and it shouldn't be applicable. And we should be moving towards a willing buyer, willing seller. And I'm just

asking, is that -- I mean, is the premise, here, that that is the only direction that we could move?

MS. CHARLESWORTH: Well, I think, you know having read through all the comments, and I'm not saying everyone sees it this way, which is why we are exploring these issues, there is a perception that 801(b) is a below, quote, below market standard. Which I think, in itself, is a somewhat complex issue, when you are dealing with the statutory license regime. And that willing buyer, willing seller results in rates that are closer to what would be, would come about in the so-called free market, or through free negotiations.

That is, at least, the theme of a lot of the comments. And, of course, we have legislation. And so I guess, underneath that, there is a question about, if that is true, if there is -- if you accept that. And I'm not saying we all must accept it or even that I, necessarily, or we necessarily accept it.

But that 801(b) is sort of a subsidy, a little bit, and willing buyer, willing seller comes closer to what people would agree to in the free marketplace. There is a significant policy question, baked in there, as to why music owners, and music creators would -- why is the government doing that? Why are we asking them to subsidize services?

And I think that is the question that a lot of people put out there. And so you may have an answer for that. So you can feel free to comment on it.

MR. KNIFE: Well, I don't necessarily have an answer for it. But, again, I think what I heard was, essentially, you saying since the preponderance of the comments seem to side with the idea, with the presumption that 801(b) is, can lead to below market rates. And that it is, somehow, an artist subsidy of the services that enjoy the 801(b) rate setting standard, that we are

1 starting from that premise. And that was,
2 really, that was really my question. Is I was
3 asking, why are we starting from that premise?
4 And I think you kind of answered it. It is
5 just that the preponderance of -
6 MS. CHARLESWORTH: Well, I think
7 there is a lot of -- a lot of the comments
8 suggested that. And I think even the people
9 who support 801(b) sort of tend to frame it in
10 terms of we need the CRB to be able to adjust
11 rates, to help grow new services.
12 MR. KNIFE: Right.
13 MS. CHARLESWORTH: And allow them
14 to develop in an atmosphere where the
15 government is paying attention to the fact
16 that they have start-up costs.
17 MR. KNIFE: Yes, so -- and I just
18 thought, as I was listening to you talk that,
19 again, I don't have the answer, you know,
20 obviously that is why we are all here, because
21 I don't think any of us does have the answer,
22 and we are trying to work it out.

1 But, again, I would, just me
2 personally I would weigh against, you know,
3 whatever, the majority of comments kind of
4 coming up with this presupposition, that
5 801(b) leads to a below market value, against
6 the history of the application of 801(b), how
7 many objections we have had to either the
8 standard itself, as it has existed for,
9 whatever it is, 25 or 35, 40 years, or
10 whatever. And, you know, whatever legislative
11 tampering with it versus willing buyer,
12 willing seller. Again, you know, whatever. It
13 is what it is. I was just a little bit
14 concerned because it felt, to me, like the
15 tone of the conversation was kind of like,
16 well, we all kind of agree that 801(b) is this
17 standard that leads to below market rate. And
18 I just didn't know where that comes from. And,
19 again, I look at the history of 801(b) as
20 applied, and I kind of think to myself, that
21 is a relatively new complaint, certainly,
22 historically. And so I'm not sure that we

1 should completely embrace that right now.
2 Because it is, you know, it is this new
3 outcrop.
4 MS. CHARLESWORTH: Mr. Marks?
5 MR. MARKS: I think what is one
6 direction, about this conversation on
7 801(b)(1), is the one direction is that the
8 rate never results in something above market
9 value. It only results in things that are
10 either market value, or below. It is a heads
11 I win, tails you lose kind of proposition.
12 There is --
13 MS. CHARLESWORTH: That was a very
14 definitive --
15 MR. MARKS: -- you have -- right.
16 You have, as has been described, an evaluation
17 of the marketplace rates. But then you have a
18 separate evaluation about whether the rates
19 should be reduced.
20 That is the only direction it ever
21 goes. And it doesn't go there all the time.
22 But it has gone there, enough, to where there

has been, essentially, a wealth transfer of billions of dollars, from certain services, or from record companies and artists, to certain services, when those adjustments have been made. We can look at, you know, specific decisions where you have the marketplace rate identified, and then the rate actually cut in half. And so that is the problem with the standard. It is not as though you look at a marketplace rate and then say, well, should it be a little bit higher, or a little bit lower?

It is always a matter, should it be lower, or should it not? And that is an unfair thing.

One more comment, I had, just to Mr. Fakler. You are representing Music Choice and AM/FM radio, and talked about them both as kind of program services, or pre-programmed services. And I was wondering whether your position is that neither should be paying, or both should be paying?

Because if the services are alike

I assume that either, you know, both should be paying something, or neither should be paying anything.

MR. FAKLER: Well, obviously, the ship has sailed on Music Choice paying. You know, back when Music Choice was persuaded, by the record companies that invested in it, during a particular precarious time in its history, to agree to pay a 2 percent, by the way, royalty rate asked for by the record companies. In order to help back the notion that it would, that there should be this payment for digital services. I can assure you that if Music Choice had any idea what would happen to those rates, in the intervening years, and to the system, where no digital music service has ever been cumulatively profitable, they probably would have thought twice about that.

But that ship has sailed, so there is no question of Music Choice not --

MR. MARKS: So Amazon shouldn't pay

1 market rates, either, since they haven't been
2 cumulatively profitable for anything?
3 MR. FAKLER: Now you are talking
4 about market rates. And this is -- you know,
5 Mr. Dupler characterized the --
6 MR. MARKS: No, you have raised the
7 concept of cumulatively profitability which
8 in, and --
9 MR. FAKLER: Yes.
10 MR. MARKS: -- of itself is a very
11 odd measure to use.
12 MR. FAKLER: Not to somebody who
13 owns a business. It means whether you have
14 made money or lost money.
15 MR. MARKS: Yes, but while you are
16 paying for market rates, for everything else.
17 MR. FAKLER: You, again --
18 MR. MARKS: The rents, everything
19 else.
20 MR. FAKLER: Let's be clear. The
21 801(b) standard does not result in -- when you
22 say a market rate, there is no market rate,

first of all. The question is whether it is a fair -- first of all, the difference between fair market, and free market, that is another group of terms that keeps getting thrown around interchangeably, okay?

801(b) seeks to find a fair market rate. And it does not typically find a single market rate. This is all --

MR. MARKS: That is not true. That is simply not true.

MR. FAKLER: Usually there is a range of fair, reasonable market based rates. And the 801(b) factors are used to set a rate in that range of rates.

MR. MARKS: The CRB is directed to achieve the objectives that are set forth there, not to find a market rate.

MR. FAKLER: But they --

MR. MARKS: That is not what it is.

MR. FAKLER: But they use marketplace benchmarks, quote, unquote, in order to set that range of reasonable rates.

MR. MARKS: Right, and then figure out whether to adjust it down.

MR. FAKLER: No, in between.

MR. MARKS: Has it ever been adjusted up?

MR. FAKLER: Sure, from the bottom of the range, it has never been set at the bottom of the range, it never once --

MS. CHARLESWORTH: Okay, all right. As usual we are running out of time. I think we have explored that issue. Mr. Knife.

MR. KNIFE: Yes, really, really quickly, because Steve did me a service and gave me another one of the --

MS. CHARLESWORTH: Really quick.

MR. KNIFE: -- arguments.

One of the arguments, about 801(b), he said, before, that 801(b) always results in either market rates or below. And I don't really think that is the case. It has been applied to the mechanical royalty rate for, again, since whatever, 1976, when it was

introduced, or whatever. And I think the preponderance of recording agreements actually have mechanical rates at 75 percent of what is the statutory rate, which is set under 801(b). So we have a market rate that is set. And then we have tons, and tons, of commerce underneath that rate that goes below it.

That shows that the market is lower than the rate that was set.

MS. CHARLESWORTH: Okay. Mr. Rosenthal?

MR. ROSENTHAL: Thank you. After listening to this conversation I don't know of any cumulative evidence that could be brought forward, whereby all of us shouldn't be running to the free market as quickly as we possibly can.

Because here we are expecting judges to understand these distinctions, if we can't even agree on these distinctions. I can tell you, in terms of free market versus 801(b), even the CRB has stated that when they

1 apply, and this was in SDARS, even when they
2 apply the rates, if it is an 801(b) it is
3 going to be lower than the free market rate.
4 And I think that we have to just accept that.
5 So I'm going to get back to actually focusing
6 on some legislation. We have the Songwriters
7 Equity Act, which we are trying to bring
8 forward which just doesn't help these guys.
9 You know, I mean, it certainly helps 114, it
10 helps 115, too, and it helps the PROs in a lot
11 of different ways.
12 What I would like to, at least,
13 for the Copyright Office to think about is,
14 that while everybody is talking about an
15 omnibus bill to solve all of these problems,
16 we think that there is going to be such
17 unanimity on support for this kind of a
18 change, that this be dealt with as a separate
19 issue from other issues. And let's, at least,
20 get this passed. So that in the rate courts
21 that we have to labor under we will, at least,
22 have a better shot at getting fair, or free,

or a rate higher than we had before. And it brings back what I think all the content owners, including the artists, including the songwriters, have been yelling about for the past couple of years. And that is we are so undervalued that something drastic has to happen. And I think it should happen quicker than otherwise some people would like it to happen. So I would propose that we get this Songwriter Equity Act passed, and that the Copyright Office support us in that.

MS. CHARLESWORTH: Okay. Mr. Bennett?

MR. BENNETT: I have got two pages of notes that I have whittled down to three sentences and a postscript.

MS. CHARLESWORTH: We love that.

MR. BENNETT: Yes.

MS. CHARLESWORTH: Thank you.

MR. BENNETT: Very general, also. First sentence, creativity, I believe, creativity is one of this country's greatest

assets. And ingenuity. That includes the ingenuity of some of the for-profit companies at this table. I believe we want music licensing laws that reflect a culture that truly values creativity, and for this particular forum, I'm talking about songwriting process, and the work of the artists who record those songs. In order for the laws to value artists' creativity we must ensure that the artists get paid, and, ideally, they would be paid directly, and across all platforms. That was sentence three. The Postscript: Having sat next to him most of the day, I believe that James will figure this out.

(Laughter.)

MS. CHARLESWORTH: Wow, that is very good. Well, let's see, we are over time. I can take -- why don't we just, if anyone wants to, literally, say one or two sentences more, and I mean that, then -- Mr. Malone?

MR. MALONE: I can be brief. It

1 seems to me that there is a theoretical defect
2 in the fair market value standard as it has
3 been applied by the board. In other words,
4 when a marketplace transaction takes place,
5 there is both money changing hands, and there
6 may be something else changing hands, tangible
7 or intangible. And it seems to me that for the
8 Artists -- particularly the new artists that
9 the college radio stations deal with -- the
10 exposure is far more important to them, than
11 any reasonable expectation as to monetary
12 response. And I think that if you are going to
13 put down a fair market value standard, you
14 have to realize that that comes with it.
15 MS. CHARLESWORTH: Thank you. Mr.
16 Dupler, one to two sentences, then Mr. Kohn,
17 we will just go around and then we will close
18 this out.
19 MR. DUPLER: One sentence. As we
20 are dealing between 801(b) or willing buyer,
21 willing seller, there is a third option, which
22 would be to come up with a new standard.

MS. CHARLESWORTH: That is a creative thought. Mr. Kohn?

MR. KOHN: I thought it would be fun to come to the defense of the NAB.

MS. CHARLESWORTH: Well, I think --

MR. KOHN: -- so let me just --

MS. CHARLESWORTH: -- Mr. Fakler would appreciate that, take a few arrows for him.

MR. KOHN: If the NAB were reasonable, I would think that they would come up with an argument, like, well we have had it good for the past 95 years, not having to pay these performance fees.

But they do have a legitimate fear of getting screwed. Because look at the meat grinder that all these digital services have gone through over the past ten years. And, still, haven't been able to find a business model. The other thing, terrestrial radio is a bit different than Spotify or Pandora. I would argue that the costs are, certainly,

higher. Terrestrial radio stations, with the towers, and the regulations they have to go through, and what they have to provide to the public, just to continue to be on the air should be taken into consideration on that 70/30 split. Maybe it should be far less than that because of the costs that they have involved. Assuming you want them to stay in business, because you can get rid of them by simply charging them the same fee as you would charge Spotify, 70 percent. Then they certainly would go out of business. They couldn't afford the DJs, and the costs, and everything else, and the licensing.

Now, obviously some radio stations provide, like Spotify, I don't think have DJs, you know, introducing things. They don't have news, weather and sports. They don't provide these added value services which, I think, should be taken into consideration on the allocation of that 70/30. And then, finally, there is WOR, which is all talk radio, that

uses a little bit of music during the commercial, should be paying far less than WCBS which is, you know, shooting it out at HD and high quality. It is competing, to some degree, with Pandora, on an advertising basis. So it is the same conceptual problem, 70/30 or whatever, adjusted based upon the value that they are providing. And I could -- I'm sympathetic with someone who is concerned about getting thrown into the meat grinder without somebody taking into consideration their costs. And I don't think that the CRB has really done that very well. They have just simply put them off to the meat grinder, without thinking about all these other negotiations being taking place between the rate court hearings, and the PROs, and the mechanical license, and what the record companies have been doing. It has to be thought through, in one place, by people who have an understanding of what these allocations should be.

MS. CHARLESWORTH: Thank you.

MR. MARKS: But they should pay, right?

MR. KOHN: Absolutely.

MS. CHARLESWORTH: That was a couple more than two sentences, but we are going to keep trying. Mr. Rosenthal, Mr. Marks, then Mr. Carnes. Mr. Rosenthal, you are done? Are you done? I scared you off? No, you are talking, okay, good. Mr. Carnes?

MR. CARNES: I'm not intimidated.

MS. CHARLESWORTH: Good.

MR. CARNES: Let me simply say, in closing, about fair rates, and the market value, et cetera, et cetera. As a songwriter I think it needs to be clarified, and it needs to be on the record, that there is such a difference between what the rate is, and what I actually get paid, okay?

Because the rate for mechanicals, say, is 9.1 okay? That is publishing, and so on. But after everyone gets through slicing

and dicing it, and after my contract, and the record label to ask for 3/4 rate. And after they get through basically pillaging and plumbing every penny that I could possibly get taken from me, I make 17,000 dollars per million sales. Let me repeat this for everybody. I am making 17 grand per million sales. That, for a family of four, is going to put me on food stamps, okay?

So that is the rate that we are getting right now. And, by the way, that is if anybody pays for the music. That is best case scenario, okay?

MS. CHARLESWORTH: Thank you, Mr. Carnes. I think Mr. Morgan is going to bring us home.

MR. MORGAN: Just very quickly. So this is -- you are conducting a music licensing study about these issues. And some of this stuff we do get lost in the tall weeds, because it is complicated. And, Mr. Fakler, you do have a tough gig, here today.

And I appreciate you coming here and being the standard bearer for that particular position. I guess, as part of the study, what did seem very simple to me, I didn't hear anybody else, and I'm just curious, is there anyone else, at this roundtable, that is against a performance royalty at terrestrial radio?

So everyone here, at this table, except Mr. Fakler, believes that there should be a performance royalty at terrestrial radio?

Okay, thanks.

MR. FAKLER: Would anybody else's clients actually have to pay the royalty?

(Laughter.)

MR. MORGAN: And, actually, with a little comedy, we can end with a little comedy. I appreciate that. And wherever I go, when I travel and I talk about this issue, I say that. I say I understand the NAB's position, it is legitimate, and it is one that we should pay attention to, because it is serious, and it is valid. And the valid

position is we don't want it. We don't want to pay for it. And I get it. But other than we don't want to pay for it, I have yet to hear an argument that is solid.

MS. CHARLESWORTH: Okay. Well, thank you, I'm glad we had a little bit of humor at the end.

If you can get back at 4, we are still running behind, we would be grateful. Thank you.

(Whereupon, the above-entitled matter went off the record at 3:52 p.m. and went back on the record at 6 4:08 p.m.)

MR. DAMLE: Okay, thank you. Our next panel is on data standards. And before I -- I have a few questions to kick things off.

But I will let the new people introduce themselves. Starting with you, Mr. Raff.

MR. RAFF: Hi, there. I'm Andrew Raff, I'm with Shutterstock. We are a New York licensing company. We started out in images,

we represent about 55,000 different creators of visual content, license about 35 million of their assets. And we, as about a month ago, now also license music for sync rights.

MR. DAMLE: Okay, thank you. Mr. Huey?

MR. HUEY: Nice to meet you. I'm Dick Huey, I'm a digital consultant to Merge Records, a small independent record label, home of many well known independent acts. I handle their digital music service licensing in an outsource capacity. And I have a group called Toolshed that has been around for about 14 years. My history is with Beggars Group, I started their new media department in 1997. And since then have worked with scores of independent record labels, more or less, in the music service licensing space. Thanks.

MR. DAMLE: Thank you. Ms. Lummel, am I pronouncing that correctly?

MS. LUMMEL: Lummel.

MR. DAMLE: Lummel, got you.

1 MS. LUMMEL: Close enough. I'm Lynn
2 Lummel, I'm senior vice president for
3 distribution and repertory at ASCAP. I'm
4 responsible for each quarter taking in
5 hundreds of billions of musical performances,
6 and matching them to our members work
7 registrations. The bulk of our manual effort
8 is matching the performance data at title and
9 artists, to our title and artists on our work
10 registrations, and cleaning up our members'
11 work registrations, where we do not have a
12 complete copyright picture.
13 MR. DAMLE: Okay, thank you. Mr.
14 Mahoney?
15 MR. MAHONEY: I'm Jim Mahoney, vice
16 president of A2IM, the American Association of
17 Independent Music. We are a not-for profit
18 trade organization representing the rights and
19 interests of American independent music
20 labels. A segment that industry trade magazine
21 Billboard, reports accounts for 34.6 of the
22 industry's recorded music partnership. We are

1 comprised of over 335 label members, small and
2 medium sized businesses, independently owned,
3 who are located in nearly every state of the
4 union, and who invest in artists and music
5 genres that enrich our musical experience and
6 culture.
7 MR. DAMLE: Thank you. Let's see,
8 who -- anyone else? No, I think that is it.
9 Okay, so to kick things off. I think it is
10 clear, from some of our discussions we have
11 had here, and in earlier roundtable comments,
12 that one of the most critical issues facing
13 the music licensing system is a lack of
14 adequate flow of data. First to identify what
15 music is being used. And, second, to identify
16 the owner, or owners, of that music. And so
17 there are two questions. One, it seems that
18 publishers and record labels should be able to
19 assign unique identifiers to sound recording
20 and musical works, that are imbedded in a
21 digital music file, and send that information
22 to music services. And then, on the other end,

it seems that music services should be able to feed that data back to the copyright owners on their reports of music use. So the first question is, to what extent is that not happening? And if it is not happening, why is it not happening? And is there anything government can do to remove any impediments?

And the second question, I think we have heard today that many services see value in having greater transparency of ownership data. Particularly with respect to musical works, you know, not song by song searches by website, but bulk access to ownership data. So, again, why is there not, to what extent is that true, why is there no greater transparency of this ownership data, and is such transparency important to the functioning of the market?

So with those questions about data, Mr. Barron, do you want to start? Sorry, if you could speak into the microphone?

MR. BARRON: To answer one of the

1 specific questions you asked, as to is all of
2 that data being delivered?
3 I think that is part of the
4 problem, it is that data is being delivered by
5 so many different sources. One single
6 recording, attached to one composition, could
7 have seven different unique codes. ASCAP is
8 sending their codes, a publisher is sending
9 their codes, a label is sending an ISRC code,
10 we may be sending an ISWC code if, in fact, we
11 have already received that from the PROs. In
12 many cases it takes a while before we have
13 that ISWC code. So when a song is at its most
14 popular, and getting the most use, in digital
15 services, that code doesn't exist. You throw
16 in Harry Fox, who has a unique publisher code.
17 But only the publisher code when the song was
18 first created. So as catalogs exchange hands
19 your code for the publisher remains with the
20 acquired company, and that could be 2, 3, 4
21 acquisitions ago. You can see where a company
22 like a Youtube, where they have 20, many 25

different records, being submitted by 25 different parties, all with these unique codes, how it can get a little bit jumbled.

But why DID is such a good solution is that they are operating, and they are talking to all of us as to what is the best way for us to ingest all of the different data sets that you have, and being able to spit them all back.

If publisher A can fill rows 1 through 3 and publisher B can fill rows 4, 5 and 8, and someone else can do 6 and 7, can someone gather all those together, spit them back out to the entire community, so that we can all have identifiable works attached to digital recordings.

MS. CHARLESWORTH: I have a follow-up. DDEX I know, obviously, has a messaging protocol.

But you are talking about within that protocol having a lot of, say, open fields where everyone could put their

1 proprietary identifier in there?
2 MR. BARRON: Right.
3 MS. CHARLESWORTH: And then they
4 would accumulate. And so those identifiers
5 would then be associated with each other?
6 In other words, it is sort of an
7 open ID? Instead of making everyone adhere to
8 one single identifier, it is allowing people
9 to populate their particular codes?
10 Or am I oversimplifying that?
11 MR. BARRON: No, no. I think that
12 is my understanding, and I'm only just
13 learning about DDEX. But in speaking with
14 them, what they are suggesting, what they are
15 working towards, is being able to accommodate
16 the individual needs of different sized
17 companies, and different companies with
18 different technologies.
19 If I can only provide a set of
20 data I have, another company can provide a
21 slightly different set of data, that they
22 would build the infrastructure that can take

in everybody's details, tie them in and then spit them back with the most comprehensive information collected from every source

MS. CHARLESWORTH: And I know that you are not DDEX. But can I ask, how are they going to tie them in together? That is -- in other words, how are they going to match all these records together?

What is it --

MR. BARRON: And, again, thank you I'm not DDEX. But I think what is being proposed, at the simplest level, is they can say if A equals B, and B equals C, then A equals C. There have to be enough common threads.

MS. CHARLESWORTH: Okay.

MR. DAMLE: Okay. Ms. Lummel, I think you were next.

MS. LUMMEL: So I definitely get the challenge, because we spend all of our time trying to get identifiers into meta data, and use detection data.

1 One of the things that we, at
2 ASCAP, did was we actually started with a
3 small test, with a technology company out of
4 the UK, and with production music libraries.
5 And we basically said, to the production music
6 libraries, you need to source your music, and
7 your meta data with this technology company.
8 In the meta data you must imbed, in this case
9 it is the ASCAP work ID, or the ISWC. We then
10 give audio files, to this technology company,
11 they run it against their data base of
12 fingerprints, they report back to us the data
13 with the work identifier in there. No manual
14 work involved. We know it can work. Is it
15 easy?
16 No. What we have found is that,
17 let's take the production music library world.
18 They have their creative piece
19 that is basically in charge of the assets. And
20 then they have the publishers, who are in
21 charge of registering a copyright. Those data
22 bases don't talk to each other. And so the

assets have to go out, because they want to exploit them. In the meantime the works need to be registered. So we had to have them talking to each other. So there is that internal kind of communication between the data bases. And I would say it is the same thing for labels, right? So you've got a sound recording going out, you've got your label and your performance artist, and now you have work registrations that need to come in. So, again, not only are the identifiers the IRSC and the work ID let's say the international standard work code marries that data.

But what we are also finding, with getting the identifiers being the utopian world, just like you discussed, in the meantime just get the title and artist straight. So when the usage meta data come in, with title and artist, what is in the labels -- title and artist -- is the same thing in the publisher work registration. So that we can match, automatically, rather than having

to do manual matches. So, in the meantime, while we are working on these identifiers, let's get the meta data for title and artist correct. So we find that these are the things that we would hope help to improve the matching of the data.

Now, let's talk about the work registrations, from the publishers. We have IPI numbers, which are interested party identifiers that should be on work registration, so we know who the music creators, and the publishers are. Very rarely, especially when you have a popular song, do you have complete data on all of your copyright, music creators, and your publishers. Or you may get 7 different work registrations, with 7 different revisions. And so what we have to spend our time on is marrying all those work registrations to have one complete copyright picture. So, you know, if all the publishers would give us, at least complete information for, certainly, the

1 composers and publishers that they represent,
2 as well as if they know the other composers
3 and publishers, we could have a more efficient
4 process in terms of identifying who the
5 copyright owners and songwriters are. It is,
6 definitely, a challenge for PROs, I can tell
7 you that. And we are constantly talking to
8 music users, we are constantly talking to the
9 publishers. We are working with the
10 international community to get these
11 international standards quicker. But it is,
12 certainly, something that we endorse, and we
13 try to actually come up with ways to
14 implement.
15 MS. CHARLESWORTH: And just, do you
16 assign the ISWC numbers through ASCAP?
17 MS. LUMMEL: Actually we have taken
18 the work registrations and we send them out to
19 the ISWC Agency, which is CISAC which assigns
20 the ISWCs.
21 They come back in and we notify
22 the publishers once we have an ISWC.

MR. DAMLE: And just to -- sorry to get into the technical details. So when, exactly, in the process is the ISWC assigned? Do you have to figure out all the splits before you can assign an ISWC?

MS. LUMMEL: No, you don't.

MR. DAMLE: So that can happen at the beginning, before you figure out --

MS. LUMMEL: When the work registration comes in, exactly.

MR. DAMLE: Okay, okay, thank you. Ms. Finkelstein, I think you were next.

MS. FINKELSTEIN: So where to begin? I guess to begin, on the label side we have been working with ISRC for about 20 years, and I think we are pretty good about ISRCs assigned to all the products. I wouldn't say we are totally clean in terms of not having the same sound recording, having multiple ISRCs associated with it.

But you could probably create a table of all the different ISRCs associated

with the same sound recording. So they are tagged and I think that when we do an integration, with a digital service provider, we provide all that meta data, and it has the ISRCs. So I think that is in reasonably good shape.

MS. CHARLESWORTH: Is that when you send the sound recording files to the provider?

MS. FINKELSTEIN: Yes.

MS. CHARLESWORTH: Are they imbedded in the file, or are they just associated meta data, what is the format?

MS. FINKELSTEIN: In the associated meta data.

MS. CHARLESWORTH: So if you could just be specific about what the file format is, when you are sending a sound recording file, maybe different versions of it, right?

MS. FINKELSTEIN: Right.

MS. CHARLESWORTH: Different bit rates, and how is the meta data attached to

that?

MS. FINKELSTEIN: I mean, there is a meta data attached to each sound file that gives all the label, artist, song title, ISRC, all the standard information.

MR. DAMLE: It is attached to the digital file itself?

MS. FINKELSTEIN: Yes.

MR. DAMLE: It is not in some separate table that then they have to match?

MS. FINKELSTEIN: No, it is attached to the digital file.

MR. DAMLE: Okay.

MS. CHARLESWORTH: And do you, but obviously you are not providing ISWC, correct?

Or are you?

MS. FINKELSTEIN: No, we don't have ISWCs, and we certainly don't have them at that point.

I think I mentioned, earlier, that it seems to me that it would make sense for the label to assign a, you know, a dumb ISWC,

1 from day one, if we know it is a new musical
2 work. So that then, when the process fills
3 out, when people claim their shares, that it
4 would already, that tag would already be
5 there. I mean, as I think Greg pointed out,
6 you are talking about a very dynamic
7 situation, you are trying to create a data
8 base where many of the fields are subject to
9 changing values. So you have temporal
10 limitations. We may control a catalog of
11 masters for a certain period of time,
12 certainly publishing catalogs very frequently
13 change hands. And we have territorial
14 limitations when you get beyond China or the
15 United States.
16 But it is very common, in the
17 publishing world, for the splits to change
18 after they are, initially, determined. There
19 are, you know, so many instances of publishing
20 rights being clarified after six months --
21 MR. DAMLE: So, sorry, this goes
22 back to my earlier question to Ms. Lummel,

which is if you can assign an ISWC, before you figure out, sort out what all the splits might be, the ownership splits might be. Just in terms of being able to identify what is the underlying musical work?

And, as I said, they are sort of two separate issues.

One is just not knowing what the underlying composition is. You know, at the time that a label sends a -- yes, sends a sound recording out, is there some way of sort of coordinating, so that there can be an -- at least before you figure out what the splits are, that there is, at least, an ISWC assigned to that?

Again, this goes into, I don't know exactly what the process is, and the timing of when --

MS. FINKELSTEIN: I don't know what the process is. But I assume there is a possibility of just being given blocks of numbers. So that if it is a new work --

MR. DAMLE: Right.

MS. FINKELSTEIN: -- and it has never been assigned an ISWC, if you assign it, 5, 6, 7 and a year later, or a month later somebody decides that is 50/50, EMI Warner Chappell, that is kept in a registry some place, the same way it is now.

But at least, then, you have already sent the work out into the world, with a tag on it.

MR. DAMLE: Right. I mean, that is sort of the idea.

MS. FINKELSTEIN: Right.

MS. CHARLESWORTH: And how would ASCAP be able to match, how would you know that, Ms. Lummel? In other words, if the label did that, how would that information get to you in terms of the ISWC, and how would you use that?

MS. LUMMEL: What would the label do?

MS. FINKELSTEIN: This is not a

fully fleshed out --

MS. CHARLESWORTH: No, we are thinking blue sky, we are not going to hold you to this.

MS. FINKELSTEIN: So you know the basics of mechanical licensing are that the record company gets, usually, from the manager, the artist.

They will say, this is the song, these are the writers, and these might be the publishers. And then there is an extensive process that the label goes through to call each one of those possible publishers, to confirm that they are, in fact, the publisher of the song, and to get their split.

That process goes on for months, sometimes years. We are probably still trying to finish licensing Fuji's album. So, you know, it makes it impossible for us to provide that information to a digital service provider, in the initial load of the files, because that information is not known at that

time. I mean, in some cases we provide preliminary information. But so, I guess, the concept would be that because we know we have a number assigned now, in this case, ISRC 678 to this musical work, we know the name, we know the songwriters, we know the presumed publishers, that somehow we would notify those two or three publishers, as part of the split gathering process. And we would say, hey, here is this new work, we need you to give us our splits and, by the way, we have given it this dummy ISWC number, that you guys should take over from here. We don't have any interest in administering that.

MS. LUMMEL: But in the ISRC is at the sound recording level, and the ISWC is for the musical composition. So it could be the musical composition is already out there, and now you have a new recording of it.

MS. FINKELSTEIN: It could be.

MS. LUMMEL: Right.

MS. FINKELSTEIN: I was just

talking about new works. Most of our front line albums embody new works.

MS. FINKELSTEIN: Yes. And then once you've done that, you -- I mean, so if it is a new work, all of those publishers are expected to register the work with the PROs, correct?

MS. FINKELSTEIN: I don't know whether -- how you work --

MS. LUMMEL: Yes.

MS. FINKELSTEIN: -- if the publisher takes the lead, or -- but we are already in contact with all those publishers, to either confirm their splits, or ask them for their splits.

MS. LUMMEL: Right.

MS. FINKELSTEIN: We could provide that number to them, at that point, as part of that enquiry.

MS. CHARLESWORTH: So under this construct, presumably, the publishers would then be, in theory, may be providing it to

ASCAP?

MR. DAMLE: The PROs, right.

MS. LUMMEL: Let me think About it.

MS. FINKELSTEIN: Or we could provide it to whoever your central registry is. I mean, we are not trying to hide the ball.

MS. LUMMEL: But that works for sound recordings, right?

MR. DAMLE: The idea would be that, at the time, the goal would be that at the time the sound recording is being sent out the door, to the digital services, or whoever, that it has both an ISRC and ISWC, so that it flows back through the system. So that when you are receiving it, that has the -- I mean, ideally that would make your job easier, if you have that same ISWC associated with the composition.

MS. LUMMEL: And an ISWC is, usually, assigned when, again, you know your writer and publisher splits. So will you --

you may know your writer and publisher splits, but you may not.

MR. DAMLE: Sorry. So that went back to my earlier question, whether you needed to know --

MS. LUMMEL: Not all of them.

MR. DAMLE: -- the writer and publisher splits before you assign that ISWC?

MS. LUMMEL: Not all of them. But you need, at least, some authoritative shares, in order to get that ISWC. So somebody has to register the work to say, I control these splits.

MR. DAMLE: I see.

MS. LUMMEL: Even though you may not have all of your splits in.

MS. CHARLESWORTH: And that is a CISAC rule?

MS. LUMMEL: You know, I have my little ISWC cheat sheet with me, I will pull it out. And while you guys are talking I will see if I can find that.

MS. CHARLESWORTH: And I just had one follow-up. On the ISRC, does anyone maintain a central registry? I have heard that there is one being built?

MS. FINKELSTEIN: There is one cooking at SoundExchange.

MS. CHARLESWORTH: It is on your hard drive, right, Andrea?

MS. FINKELSTEIN: No, I think SoundExchange is undertaking, because they have a massive data base of performances, they are undertaking to sort through the ISRC issue. I know we have done a data exchange with them, to give them all of our ISRCs. And I think the other majors have, as well. I assume a lot of the indies are doing that as well. So their goal is to create a definitive look-up for ISRCs that would then be made available to others.

MS. CHARLESWORTH: And that would be tied to artists and title, is that --

MS. FINKELSTEIN: Yes.

MS. CHARLESWORTH: So, in other words, you would look it up by one of those two and then you could, in theory, determine the ISRC?

MS. FINKELSTEIN: Right. And then, of course, we would love it if the digital services, that are operating the statutory license could avail themselves of that data. So that when they report to SoundExchange they would have the ISRCs prebaked in their reporting, which would really help the value chain.

MS. CHARLESWORTH: Thanks.

MS. LUMMEL: I have an answer for you.

MR. DAMLE: Okay, Ms. Lummel.

MS. LUMMEL: Okay, so an ISWC is only Allocated a qualified number when all the Creators are identified, it doesn't have to have all the publishers, but all the creators have been uniquely identified.

MR. DAMLE: What is the qualified

agency?

MS. LUMMEL: It is the ISWC Agency -- part of the CIS plan, common information system, which CISAC, the Confederation of Societies of Authors, has developed, in order to respond to the needs of information to the digital age. It has been approved by the ISO, the International Organization for Standardization.

MR. DAMLE: So it sounds like you have to identify all --

MS. LUMMEL: Creators, the creators.

MR. DAMLE: The creators?

MS. LUMMEL: Yes.

MR. DAMLE: i.e. the songwriters?

MS. LUMMEL: The songwriters.

MR. DAMLE: Identify all the songwriters?

MS. LUMMEL: That is right.

MR. DAMLE: Yes.

MS. CHARLESWORTH: Do you need the

splits, or just the identities?

MS. LUMMEL: It looks like creators identified by their IPI numbers, and roll codes.

MR. DAMLE: Okay, interesting.

MS. LUMMEL: Without this minimum information ISWC cannot be allocated. So it is the creators who have to be there, but not the publishers.

MR. DAMLE: Not the publishers. And then not necessarily the splits?

MS. LUMMEL: It doesn't say the splits.

MS. FINKELSTEIN: But, in theory, that could be the ISWC confirmation requirement, or something? Because whatever 8 --

MR. DAMLE: Right.

MS. FINKELSTEIN: -- you do with those ISWCs, from that point forward, you could still have a gate, there, for whatever you want to have required.

But at least you already have a tag in the files.

MR. DAMLE: Yes.

MS. FINKELSTEIN: That had already --

MR. DAMLE: Yes, I don't know that necessarily those two requirements need to be attached or not, need to be linked in anything that way. You should be able to modify the songwriters, if you can, after the fact. And just get the identification of the song, perhaps. Maybe that is the idea. Anyway, sorry, thinking out loud.

I think Mr. Kohn was next, and then we will come back around this way.

MR. KOHN: So, again, conceptually there are two things, right? There is the repertoire meta data, which is what you have been spending most of the time on, here. There is also the reporting aspect of it. And DDEX does both. There is a standard that they are trying to put together for this. There is,

also, reporting standards, et cetera.

Now, it underlying a lot of what the problem is, I mean, we know the goal is to compensate the artists and the songwriters, eventually. And I'm firmly of the belief that to make that happen you have to have transparency, particularly in the repertoire meta data. There is a lot of confidentiality on the revenue flow, of course, on the reporting, so leave that aside.

But on the repertoire meta data, there ought to be a lot of transparency. And what is the repertoire meta data?

Well, it starts out with the names of the people who are possible creators. These could be either composers, or lyricists, or arrangers, or recording artists, or publishing companies, or administrators, or agents, or PROs. And it is, basically, a name, a birth date I would think, to make it more unique, and a unique identifier, a number.

What has been used, in the music

industry, is what has been mentioned by Lynn, is the IPI. And what I think they are moving to, and I'm not sure what the cooperation and the status of it is now, is the ISNI standard. Which is the International Standard for Name Identifiers, which is going to bring in authors from the book publishing industry, as well, as the recording side, to have this one data base, and a registry for it.

But let's just take the IPI right now. If I wanted a copy of the IPI, and remember there is no revenue here, there is no song names, there is nothing except Elton John. And maybe his birth date. But, you know, he is a lyricist, or he is a composer. I just want a list of names. How would I get a copy of the IPI data base? Me, right here, sitting today. Or just access to it on the web? I want to do a look-up, can I do that?

MS. LUMMEL: I can only speak for ASCAP. And I guess the short answer is no, you can't. It is accessible, certainly, to

societies who use it. Publishers can get access through their society websites. For all of ASCAP members, who are on our public data base, you can look up their name, you can even look it up by performers. So you can find Elton John, even though he is with our competitor. But we do list their IPI name numbers.

MR. KOHN: So if I were a songwriter, or an heir of a songwriter, I would have to go through a publisher, or someone who has access to this data base, to do a look up on that.

MS. CHARLESWORTH: Can I ask, who owns the IPI data base?

MS. LUMMEL: I brought that with me, too. Let me look that up.

MR. KOHN: That is the Swiss. I think it is the Swiss organization.

MS. LUMMEL: It is SUISA who assigns it. SUISA assigns it. So the societies, when you have members, or

1 affiliates of the societies, they will provide
2 SUISA with the information, and SUISA will
3 assign it. There is a base number, which is
4 like an umbrella number. And then IPI name
5 numbers for each pseudonym. So each pseudonym
6 would have a name number. Elton John is his
7 performing artist name. So he has a different
8 legal name.
9 MR. DAMLE: Samuel Clemens would
10 have a name, and so would Mark Twain?
11 MS. LUMMEL: Exactly. But you can
12 find, the public can find that on ASCAP's
13 public data base as well. So you could look up
14 the name on ASCAP's public data base.
15 MR. KOHN: Okay. So there is the
16 name identifier, then there is the ISWC, which
17 is the song identifier, and then there is the
18 ISRC, we have been talking about, identifier.
19 And then a separate issue, really, is quite
20 separate, is the links between those. The link
21 between the ISNI, for example, and an ISWC. Or
22 a link between -- or I should say IPI. Let's

say ISNI, and the ISRC, and then of course, the ISWC and the ISRC. So you have to separate all these things out, and parse out who has what data, and there was a good discussion here, in terms of where should something be generated for practical purposes.

But I'm not sure whether the record companies even have the IPI access. They are not publishers, they don't have the IPI. So they can't even get the identifier without going through a music publisher, to get the IPI. And I don't think there are a lot of people, in the publishing business, or in the record side, are even familiar with any of these standards, at all. Usually it is in the back office somewhere. So there is one big problem, here, with repertoire meta data, that these data base don't exist. And I have tried, the RIAA, there were meetings between the RIAA and the music publishers, tried to put together a licensing system for, what was it? Micro licensing.

If you were a DJ somewhere, and you needed to get a license, and you only wanted a few hundred copies, or whatever, to do something. Where could you go?

Well, if the whole thing is useless, unless you can get both the sound recording and the song, which means there has to be a data base with a list. And I have been in meetings, five years ago I was in a meeting, and eight years ago there was a meeting, and it has just been going on for, you know, a decade. And they can't get it. So why can't they get it? I think it is a matter of control. So it may very well be that there are certain things that you can parse out legislatively and basically say, look, ISNI, everyone should have access to that. And they should, you know, whether part of it is going to be in Harry Fox, part of it is going to be at a PRO, part of it is going to be in a record company, none of them are going to want to give up their lists. All we are talking

about is a list of names, right? Same thing with the ISWC, that is a list of songs, right? And the ISRC, which is a list of recordings. So you have to decide, most of this stuff I don't know is, terribly, proprietary. It has to be transparent to get people to get paid properly.

Because if the number is not there, someone is not going to get paid. And the purpose of the copyright law is to get someone to be paid.

Now, on the reporting data, I'm not suggesting reporting data should be made public, or whatever, it is totally different. So don't confuse reporting of revenue data with simple repertoire meta data. So that is my soap box on data, you know?

And I have been part of efforts, there have been all kinds of -- we pitched royalty share, when I was there, we pitched in the European Union for a global repertoire data base. Somebody is now managing it.

Somebody is trying to put something together.

But, again, it is proprietary. You are not going to give up control of this. And without giving up the control, and making it more transparent, you are not going to have accurate reporting. And I don't think it is, necessarily, in your interest to -- black box money is there because of opacity.

Because it is money that they can't match to anything. So where does that go? It doesn't go to the songwriter or the recording artist. And that doesn't serve, really, anybody. Except for the people who manage to get their hands on the money.

MS. CHARLESWORTH: So I think one of the questions, if you accept that, that there should be a publicly accessible data base, let's say I guess the three -- well, we have heard four IPI, ISNI, are they essentially competing data standards?

MR. KOHN: No.

MS. CHARLESWORTH: No?

MR. KOHN: No, ISNI is a name standard, Mark Twain means Samuel Clemens.

MS. CHARLESWORTH: Right, the name.

MR. KOHN: ISWC is for the name of the song itself.

MS. CHARLESWORTH: I know that. I'm talking about ISNI and IPI.

MR. KOHN: IPI is the old thing that was on index cards all over Europe. No?

MS. LUMMEL: The CAE is the old -- ISNI is kind of wanting to replace the IPI. But to broaden it beyond, you know, your creators and publishers, music creators and publishers.

MS. CHARLESWORTH: So it would be, in theory, one might choose one or the other?

It sounds like maybe --

MR. KOHN: Well, IPI is old. And it is not complete. I don't think it has the birth dates.

MS. LUMMEL: Absolutely it has birthdays.

MR. KOHN: It does?

MS. LUMMEL: And, again, the IPI information is on -- it certainly is on ASCAP's public data base. You can look up a name. So where we have the ASCAP work identifier, if you have an ISWC you can look up a work by ISWC, if you have that number. So we actually try to put as much data, onto our public data base, as possible, for any music user, or licensee.

MS. CHARLESWORTH: So, I guess, getting to the heart of my question. Assuming, let's assume hypothetically we pick three data points, ISRC, ISWC, ISNI, because that is the newer one. And we, the government, we wanted to incentivize people to contribute them to a public data base that would need more than manual look up, where you could actually download the data, and run it through matching processes and so forth.

What incentives could there be to, for people to do this? Because I think that

1 this is a situation where everyone thinks that
2 we need it but, as people point out, we
3 haven't been able to get there. And the
4 question is, is there anything we can do to
5 encourage that? Because it is -- I mean, this
6 is the third roundtable. This is a huge,
7 apparently, I mean this is -- I believe it is
8 a huge issue for the music industry. It
9 creates huge transactional costs. It slows
10 down launches. And I, absolutely, can
11 understand why people want to hold on to their
12 proprietary data. So it is not, I mean, it is
13 a lot of money, time, and manual work went
14 into those data bases.
15 But if we, if there is a general
16 consensus that we need a public data base that
17 is, really, very usable. And, again, where
18 people can take it, and refresh their data,
19 and match data, what are the incentives to get
20 people to contribute to that?
21 MR. DAMLE: So, Casey, I'm sorry
22 when I called on Bob I missed that you had

your placard up, apparently. So I will let you go first and then I will come back around.

MR. RAE: So, you know, there is a colleague that many of you know, named Jim Griffin, who has been banging on this drum for a long time. And I sort of woke up to the idea, personally, of informational data bases, because he was talking about it an awful lot, to anyone who would listen. He was talking about it an awful lot to Congress who, hopefully, listened a little bit, a week or so ago. When I started doing the work at FMC I was kind of looking at everything, obviously, through more of a policy lens than a marketplace lens. I am learning that so many individual and highly idiosyncratic solutions already exist in the marketplace.

What everyone seems to be having a difficulty with is, you know, which string do you pull first, and how do you tie this together?

From our perspective, one of the

things that would be the most important, about establishing meta data standards to get to, or you need identifiers to get to interoperable registries, would be how open and accessible are they. Who bears the cost for these things and, you know, who has say over their governance. Because any workable system would have to include a great number of copyrights that are being generated daily, that may not be, that may not have the same phalanx of professional affiliations as rights that were generated in the past. Okay, that is just a given. So what do you do with all of that information, and who manages it?

You mentioned incentives. And I think that is, really, really important. What can you do to get people to feel like this would be a good outcome, to be a little less proprietary, and a little bit more open in sharing information. Well, you know, there has been a lot of talk about, for example, remix culture, and some folks are adamantly against

compulsory licenses, and some people support them. I actually, frankly, believe you don't need to have compulsory licenses to get smaller operators to come to terms if you have efficient informational systems. So that is an incentive right there. It is a ton of money that is left on the table. Rights holders aren't getting paid, and the artists aren't getting paid.

I think it is really an issue, the fact that we don't have complete information about all of the potential uses that somebody would want to acquire information about. Another thing that is funny, to me, as a sort of neophyte in this conversation, is eight years ago everyone was saying, in three to five years we will have global interoperable registries, that talk to each other. And it is still not here. So somebody is not telling the complete truth about why that hasn't happened. It is above my pay grade to know who it is.

But I do believe that part of the

incentive, for making this happen, is that you could actually get some of what we were arguing about before, with less of a public policy burden. For example, if you wanted to publicly perform music and have an opt-out protocol, you have to know what rights you are prohibited from performing publicly. I am really encouraged that Lynn mentioned that ASCAP does all of this public, you know, presentation of your information sets.

But I still encounter folks who are worried about liability issues when we are talking about rate court disputes, and so on and so forth. So I think that the incentive is more, like, how can we get more people to be able to do business functionally, and more seamlessly?

And what is it going to take to get everybody to go all in?

One last thing, and I will stop. You know, you have the unique identifiers, you have the internal meta data issues, for the

1 purposes of identification of ownership and
2 payment.
3 But you also have, to some extent,
4 a failed promise of providing interesting and
5 useful information, to the general public,
6 about the people who are behind the creative
7 work. You know, I know that the Grammys have
8 to give the fans the credit campaign around
9 outward facing, or consumer facing meta data.
10 Well, you know, that actually has a revenue
11 generation component to it, because a lot of
12 folks are in the back line, who aren't
13 currently captured in consumer facing meta
14 data, get jobs because people see that they
15 worked on a record, or so on and so forth. Not
16 to mention geeks, like me, who grew up kind of
17 looking at the end of the lines of a record,
18 and buying everything by a producer, just
19 because I like that producer, or whatever. We
20 have more opportunities, because of
21 technology, to bring real positive information
22 stats for both the business management side,

and the consumer facing side. And I don't see any reason why we shouldn't work together to do that. The excuse that it just works this way, isn't good enough, you know?

Where there is entire aspects of the marketplace that aren't properly captured, right now, in classical and jazz meta data, on the consumer facing side, that frustrate fans, and also frustrate payment. And then there are entire systems, that are inefficient, because the data bases don't generally talk to each other, you know, as comprehensively as they should. And that is all I have to say about that.

MR. DAMLE: I have frequently looked for the liner notes on my Iphone, and they are not there. Mr. Rushing? And then, Ms. Potts, you had yours up earlier, I don't know if you want to say anything, I will go to you next.

MR. RUSHING: I will keep my comments brief, because I don't know anywhere

1 near the level of detail about ISNI and ICNIs,
2 to be able to contribute, meaningfully, to
3 that part of the conversation.
4 On the question of what the
5 government can do to help incentivize the
6 adoption of these, and other standards, and
7 other unique identifiers, I think there are
8 two areas, obviously more, but I think there
9 are two to focus on.
10 One is just always focusing on
11 interoperability between, in particular
12 Copyright Office systems, and third party
13 systems, whether it is through an API or
14 something else, taking steps to make sure that
15 Copyright Office infrastructure can always
16 talk to and easily interact in an automated
17 way. Some sort of systematic way with third
18 party and private data bases is a way to
19 facilitate just the flow of this data. The
20 other is, you know, when it comes to sound
21 recordings there is, actually, a set of
22 contractual practices, around meta data, that

in my impression has worked pretty well. So that when digital services are served by record labels, it includes the meta data, that meta data is reported back to them. It is, obviously, imperfect but it is, more or less functioning. When you talk about statutory services, it is a completely different story. And the regulations governing what statutory services are supposed to provide, to a SoundExchange, are pretty limited in terms of what sort of data is required. And, in particular, ISRC is not required. It is an option. Even if it is readily available, even if it is possible for a service to get access to an ISRC, they don't have to provide it. As long as they can provide album title, album and label, and track, and artist.

MS. CHARLESWORTH: In your experience do services that do have access to that because, perhaps, Ms. Finkelstein has sent it to them, are they -- do they choose to report that voluntarily, or even when they

have it they exclude it?

MR. RUSHING: We have, there are a couple that provide it voluntarily. But the huge majority don't. And I can't remember what the percentage is now.

But, I mean, I think it is something around 90 percent of the recordings that come to us lack ISRC. We have made do without it, and have built our systems to accommodate this.

I think a few years ago, when the regulations were first set, that was maybe a more defensible place for the regulations to be.

I think the world has changed. That is something that the government can do right away that would, certainly, encourage the adoption of ISRC as the standard, and it is a standard, again, that is working in the private context. And I think there are, likely, other examples of standards that have been adopted, that the government can, you

1 know, also adopt and implement in the
2 circumstances in which it finds itself playing
3 a role in the marketplace.
4 MR. DAMLE: Thank you. Ms. Potts?
5 MS. POTTS: Just to piggy back on
6 what Colin had also mentioned about standards
7 and that the government has come up with a
8 certain amount of standards. I want to speak
9 in terms of a software development aspect.
10 Having worked in another industry that also
11 needed to set up standards, so I'm thinking
12 right off my head, is the HR industry.
13 Where they came up with an HR XML
14 Consortium. Where all the HR companies have
15 sat down and came up with a set of standards.
16 I can see it working for the music industry,
17 where the recording companies can come up with
18 certain standards, and the tags that are
19 applicable, and what data is going to be held
20 in those tags. Music publishers can also sit
21 down. All the stakeholders involved can sit
22 down and come up with the standards that they

need for reporting. And what the HR XML Consortium, they published that information. Then you have other companies, such as background check vendors, or other vendors that use HR data information, they have also come up and used the data structure, and came up with their own sets of data. So I don't -- I know we mentioned messaging is possibly what they are using at DDEX. I would like to get more information on it.

But I believe that if there is, all the stakeholders can sit down and decide on what is very important that they need, and to be able to come up with those standards, even down to the level of tag names and the data that is also for those tag names. And all the stakeholders to sit down and to be able to use that. I would also recommend that even for music publers, record labels have to come to music publishers to get their licensing. If the music publishers would already have a catalog, many of them have catalog song

numbers that they use on their licensing.

If we came up with a standard, possibly they could have their ISWC also submitted to a record label. And when the record labels are doing their distribution, whatever the tag, that the industry has came up with, that information can be already imbedded during the distribution. So those are just some of the suggestions that I come up with.

MR. DAMLE: Thank you. I'd like to go to Mr. Hoyt, because I see him over here, and then I will come back around, if that is all right.

MR. HOYT: I guess I have a very simplistic view of all of this. Number 1, it seems to me the incentive for cataloguing, or assigning ID number should be you get paid a royalty if you sign up. Or if there is a unique identifier.

If you don't have that unique identifier as a composer, you don't get paid.

1 I mean, that is a very simplistic view of the
2 world. In addition the reason -- one of the
3 problems that we have had, in the television
4 industry, is even getting the information for
5 que sheets, which is a level, a different
6 level of that.
7 But I think the proprietary view,
8 of the PROs, at least in television, is that
9 they don't want to give that information out.
10 But it seems to me, if you have a
11 public responsibility, if what you are trying
12 to do is something for the public, then the
13 public should be aware of that information.
14 And it seems to me if you have a public file,
15 with a unique ID number, and I don't care
16 where you get the unique ID number, but if you
17 have a public file, with a unique identifier,
18 for every musical work, and it has a tag on it
19 that shows the recording, another unique ID
20 for each recording. And then you have the
21 publisher information, and maybe the record
22 label information in there, too. Then the

1 composer can then follow that information, so
2 that he knows whether or not he is being paid
3 fairly. And I think that is one of the things
4 that we hear, constantly, from the composers.
5 I'm not getting paid fairly. Well he may not
6 be. But it may not be because the users are
7 not paying a lot of money into the
8 collectives, it is that money gets lost in
9 that black box somewhere. So if you had the
10 responsibility of the composer to get a unique
11 ID number, and then I think there has to be
12 some responsibility, on the part of the user,
13 to give information back into that public
14 file, somehow. So that, that composer can also
15 follow that information, from the user
16 standpoint. Right now I don't think users feel
17 obligated to put, give any of that information
18 back. And that is, probably, not fair.
19 MR. DAMLE: Thank you, Mr. Hoyt.
20 Mr. Knife? Mr. Mahoney, you had your placard
21 up earlier, so I can --
22 MR. MAHONEY: Colin Rushing beat me

1 to the point, but I guess I can put more
2 directly, I believe SoundExchange has gone in
3 front of the Copyright Royalty Board several
4 times, with a petition asking the CRB to
5 compel users of the statutory license to
6 provide ISRCs. And each time it has been shot
7 down. I don't know what the explanation for
8 that would be. But I could ask more directly,
9 if you could speak to your friends at the CRB.
10 MS. CHARLESWORTH: Yes, it is a
11 part of a rulemaking process and I'm sure they
12 weigh the record before them.
13 I think we are thinking a little
14 bigger picture here, which is good. Although
15 their role is important and it is an important
16 point, that they have some ability, under the
17 statute, to regulate the stuff.
18 MR. MAHONEY: Well, if I may, then
19 I will say yes, it is important. SoundExchange
20 is distributing over 700 million this year,
21 700 million dollars this year, perhaps. And
22 they are going on artist, and title, and

sometimes album name is supplied, and we can all get into what happens when the artists' name has an N sign, instead of -- all those things we can go over. Without an ISRC it is almost laughable.

MR. DAMLE: Okay, thank you. Mr. Knife?

MR. KNIFE: Not that I wanted to answer, but I say that I have very little insight into that process.

But just what little I do understand, is one of the reasons that the ISRC hasn't been being adopted, is because it is relatively incomplete. And at least I understand that part of the enquiry keeps resulting in a finding that wouldn't be as helpful as it might otherwise be, if we all assume that ISRCs are perfect, and they exist for each work, and they are applicable, and uniform.

But I wanted to make two comments.

One kind of a little bit higher

level, and philosophical, and the other answering directly the question about what could government do, what could the Copyright Office do to incentivize the adoption of these particular data standards. And putting aside, for a moment, what the particular data standard is, I think, obviously picking up on something that Mr. Rushing said. The Copyright Office and other governmental entities can certainly incentivize people by making the use of whatever particular data standard, you know, we decide to use, as a fundamental requirement of, say, registration, and protection, or whatever.

I could certainly even see like a quid pro quo, that if you don't adhere to the recommended data standard that has been identified then, say, you don't get statutory damages, because now you are in a position where you are kind of playing, you know, cat and mouse, and you seem to be intentionally hiding. And so you shouldn't be able to avail

1 yourself of those types of remedies. So now
2 the second point that I was going to make,
3 which is a little bit higher. I think what we
4 are seeing here, with all the different data
5 standards and everybody's attitudes here. It
6 is kind of emblematic of the same issues that
7 we have been talking about all day, and at all
8 of these roundtables about, you know, have
9 very, very -- you have fiefdoms, you have very
10 siloed interests. You know, the PROs are very,
11 very concerned with performance royalties, and
12 the data that is associated with those. Record
13 labels are concerned with sound recordings,
14 and the data that is specifically associated
15 with them. And I had heard the phrase, a
16 couple of people kicked it around, something
17 like we understand the proprietary nature of
18 the data, and we understand people's desire to
19 protect the data. And I just would like to
20 say, I think that the data standard is kind of
21 like a lot of the other issues that we have
22 been talking about, you know, statutory

royalty rates, and how you set them, et cetera. In that they are also going through a violent change. The perspective of what is the value of the data that any, you know, single entity has?

Whether it be a PRO, or a record company, or music publishing, I really think we are passing into an area where the ownership of the data, and hiding the data, and the secrecy of the data, is not really the value any more. Indeed, and I don't know how we are going to get there, but I think the mentality has to shift over to that the value is, actually, in completely publicizing the data, and making sure that you, you know, generate as much revenue generating opportunities as possible.

That you, you know, that you avail yourself of them. And, obviously, it is the creator's choice, or the rights owner's choice, to decide which they do or which they don't do, subject to statutory licensing.

But the point is, I think, one of the things that we are facing here is kind of, like, a paradigm issue about the idea that, you know, we come from an old world, where the proprietary data, there was a value in having proprietary data.

And knowing the rights that you had, knowing the works that you had, knowing the artists that you had a relationship with, the works that you controlled. There was a value in that, separate and apart and above, indeed, additional to the value of what you could license those works for, and everything. And I think it would do everybody well to kind of, you know, whatever, readjust and reset that perspective and kind of think, the value might actually be in making sure that that data is completely public.

And that you, again, are availing yourself of as many rights, usage, and revenue generating opportunities as possible.

MR. DAMLE: Mr. Diab?

MR. DIAB: I'd like to just say everything that he just said. But I will just add a finer point on one of the themes. Which is the ability to match the information on the sound recording side and the composition side is absolutely necessary. And it is, probably, the part that is the most challenging. And I think what you are hearing is, there is absolutely a need for a centralized, standardized, data base, somewhere that services can go and pull that information.

And maybe it is not ISRCs, because I agree with one of the points that he made is, you know, anybody can, I mean, you can file a registration to start issuing ISRCs, and you don't have to report that, anyway.

I think that it is great that SoundExchange is going to start putting together a data base. But there needs to be some standardized way to identify sound recordings. Just so you know, on the ISCR side you can have multiple ISRCs for the same sound

recording, if they are re-issued on compilations, if they are issued in other albums. And, before you know it, you have this huge swath of identifiers, and it is not really that useful.

MR. DAMLE: So there are two separate, one is having a sound recording in different albums, with different ISRCs. Is the opposite problem, are there multiple ISRCs for -- I mean are there multiple tracks for one ISRC? Is that a problem as well?

MR. DIAB: That is a much less frequent problem.

MR. DAMLE: Okay.

MR. DIAB: But I'm sure it exists.

MS. CHARLESWORTH: So how, what is the penetration by -- I mean, do most sound recordings, or virtually all of them have an ISRC associated with them?

MS. FINKELSTEIN: I would say for the majors, everything that is in digital release has an ISRC associated.

1 But it certainly is an issue as
2 far as there are, you know, the same sound
3 recording can have multiple ISRCs. I mean,
4 part of that is from the ISRC standard.
5 Because when you released a Billie Holliday
6 record on vinyl, it might have cut off at
7 three minutes, and then there is the ten
8 second tolerance rule. Part of it is,
9 unfortunately, just humans trying to get their
10 products out the door, and not putting a
11 comprehensive search to see if there is an
12 existing ISRC.
13 So that is not perfect. But to
14 follow-up on what Mr. Knife was saying. I
15 mean, I think that the record companies, and
16 the participants in DDEX, overall, have really
17 turned the corner of, psychologically any way,
18 trying to foster a world in which the data can
19 be shared and exchanged. There are numerous
20 issues with every single field, and every
21 single data base. There is a ton of work that
22 goes on trying to say, should we have this

standard for this, do we need to have tolerance, do we need to have variations?

The idea of the umbrella name is very interesting. I have sort of been arguing for an umbrella ISRC because maybe we need to bring ISRC up a level, so that we can consolidate all of those, sometimes erroneous, sometimes required extra ISRCs.

But, you know, we have a lot of artist creativity behind all of this. And so we have artists who even though their name is John Smith, they want their second album to come out with the name John J. Smith. And then they want this track title to have a variation, within the name of the song, so that it will display on Apple in a certain way. Even though we would prefer to have that in the variation field. And so there are all of these different competing requirements. And some of it is, you know, the bigger digital services have said, this is the way, this is all we can deal with, these are the fields you

have, deal with it.

And so things get concatenated, when they wouldn't have otherwise been, and people make adjustments. It is a very, very, big messy issue. And you kind of have to break it into groups and say, you guys deal with your issues and then --

MS. CHARLESWORTH: Yes. We are going to let Mr. Diab finish. I just want to -- on the ISRC, Mr. Rushing, what is the status of the effort to create an index, by ISRCs, at SoundExchange?

MR. RUSHING: It is in process. I mean, I think that it is something that we are hoping to have available in some form, soon. I don't know exactly what the time frame is. We have a data base internally that exists. And I think the main operational question is figuring out how to, you know, make it usable outside of the company.

MS. CHARLESWORTH: And would that be publicly available?

MR. RUSHING: I think that is the idea. And the question is how best to do it. We are sort of thinking through it. For example, one of the things that we just rolled out was an artist facing portal. The next phase of our portal work would be a licensee facing portal. And whether this is part of that is still to be determined.

MS. CHARLESWORTH: Thank you.

MR. DIAB: I will just finish up with two quick points. So the, to take a point that Lee made, one step further, I think what you have seen, historically, in the music industry is, and we have been referring to it as proprietary information.

But holding on to the information also allows license owners to create the perception of value. Because licensees don't necessarily know what it is that they are or are not getting. And I'm sure that this is something you guys have probably heard in other music licensing studies, in other

1 cities.
2 But I think we are moving into an
3 age where that information does need to be
4 produced. It needs to be available, it needs
5 to be available for smaller companies, as well
6 as larger companies like ourselves. I mean,
7 Google and other technology companies have
8 spent millions of dollars trying to work with
9 the existing data issues. And that is just not
10 scalable. And if you have new entrants coming
11 into the market, they are going to be
12 prohibited from launching services, from
13 innovating, because of that barrier. So -- and
14 I think this is an area where the Copyright
15 Office can make a huge difference. And that
16 sort of leads me to the last point I was going
17 to make. Which is, I think Ms. Potts made the
18 point about potentially having, you know, a
19 consortium of companies, of interested parties
20 getting together and trying to solve these
21 problems. And I think that we have seen is
22 that, that doesn't necessarily always work,

1 particularly in this space. Most recently with
2 the GRD efforts. And it is really, really
3 hard. And the point that Ms. Finkelstein was
4 making, I mean, it is complicated stuff.
5 But I do think, at the same time,
6 with the right standards and the right
7 oversight from the Copyright Office, can make
8 some difference here.
9 MS. CHARLESWORTH: Thank you.
10 MR. DAMLE: Mr. Kohn?
11 MR. KOHN: It is a very frustrating
12 thing to watch something that could have
13 happened, and it hasn't happened. And there
14 are, I mean, everyone is guilty a little bit
15 of something here. Because really, first of
16 all you can't conflate, let's say, having a
17 proper ISRC standard, with the DDEX repertoire
18 meta data going up. I mean, I have been to the
19 DDEX meeting, and they have loaded up this
20 repertoire data to deal with all the problems
21 that Andrea was just saying, about we want
22 these bundles to work this way. And all the

business rules that go into telling a service, you know, how these sound recordings should appear. That is one thing.

But ISRC 2 was an effort that some were trying to get along. It was actually within the RIAA. But no leadership, it just simply dropped. ISRC 2 would have solved the problems just the way ISBN 10 solved the problems of ISBN. It was too short, it needed to bring up the standard, the BISG book industry, a study group on the book publishing business, they got together and they actually put through a new standard. So there was no effort, or no leadership, to make something simple, like that, happen. Because of all this other stuff, like DDEX.

Now, the other problem is, on the Demandable side, there was an effort, five or six years ago, to try to have this global repertoire data.

But it is not just the data base of ISRCs. It is the links between the ISRCs

and the ISWCs. That is what -- not only the ASCAP website, you have your ISRCs, but you don't have the ISWCs, but you don't have the IRS series, you don't show that to the public. So the problem, here, is DIMA, one of -- John Potter, your predecessor wanted to get this done. But companies like Google, and Apple, and huge companies wouldn't want to put a dime into it. GR Global Repertoire Data Base, Apple was sitting at the table, they didn't want to put a penny into this thing. And it costs money to run a registry, a public registry, outside of the societies, costs money. How do you charge to create the ISBN like they do in the book industry? Do you charge for access, do you charge for use? It is a very big problem.

What is the business model of a registry, of simply of a data base? But companies, how much are they spending on you to be here, you know? And you wouldn't spend that money to create the data base. So it is

ridiculous.

MR. DIAB: I don't think that the GRD and other efforts have failed solely from lack of funding.

MR. DAMLE: Okay. I'm going to go to a couple of people that haven't had a chance to speak yet. Mr. Badavas, and then Mr. Raff, and then we can end with Ms. Lummel. We are a little over time. I hope it is okay if we stay another five or so minutes, if that is okay? Okay.

MR. BADAVAS: I think both Lee and Bob are right. Data bases will become more public as having the information out there is more valuable to the people who want to make it public, or can make it public. The PROs, HFA, others, the record labels spend a lot of money on this, too. They spend a lot of time, and have spent decades collecting the information, and building the links. We have humans who, literally, sit there looking up songs, and creating a link between an ISRC and

1 a composition. We have additional people who
2 talk to publishers, they talk to heirs, they
3 talk to people who claim termination rights,
4 to get their information, and get the facts
5 that still comes in from some of these people
6 to put into our data base.
7 That is real work. And that costs
8 money. Our publisher owners are paying for
9 that. In the case of the PROs, I believe, that
10 would be the publisher owners, and the
11 songwriter owners. And the labels are paying
12 for that, to maintain their own data bases.
13 That is expensive. I think more and more
14 people are seeing that putting this
15 information, out there, to be used in ways,
16 sort of publicly, or in some other fashion, by
17 other businesses, is becoming valuable. We
18 actually, recently, turned over our entire
19 ISRC linked data base to Youtube in connection
20 with a licensing deal. I don't think it has
21 been implemented yet, but it is there. And
22 what Bob is talking about is, yes, it costs

money to do that.

Right now publishers have invested in that, songwriters have invested in that, record labels have invested in that, because there is money to be made. And I will point out, these are the commercial licensors and licensees, of this music. We still haven't talked about whether or not it is viable to do that for all of the music that comes through aggregators for amateur product. And that is a really, it is a big problem. And what you are talking about is, okay, have someone like HFA or ASCAP give it up. Publishers might find that to be valuable if they thought they were receiving the appropriate compensation.

Maybe not for the data but, maybe, for the ultimate royalty. Maybe the very fact that Jay has been so vociferously arguing for a fair market rate, here, is actually tied to the fact that this information is not there. Supply chain networks that exist in every other unregulated industry in this country, do

this already. They track 17,000 different part numbers. I think Bob mentioned seven. This isn't that big a deal. It sounds awful here, but we are in a heavily regulated industry, and the other industries aren't. And, therefore, you are able to point to legislative fixes, where these people just had to fix it. And that is all I have to say.

MR. DAMLE: Thank you. Mr. Raff?

MR. RAFF: And to pick up on that thread. The interest of macro creators is something that does need to be considered. We, in the image space, it is very easy for one person to create content that can be commercially licensed. We are starting to see that in music, where there are creators, now, who aren't working with publishers, who aren't working with labels, who are going to be incredibly confused when, in order to be able to make money, license their music, have to go register an ISRC, ISWC, all these different pieces of data, where they have to go through

and do the work, if they want to make money. So the more that we can do to encourage original creators, to make it easier for them to register their works, the better off they will be, and be able to actually make some amount of money from that.

MR. DAMLE: Okay, Ms. Lummel, some final thoughts?

MS. LUMMEL: So I have been listening to all of this. And in terms of timing, ASCAP generally processes its performance data six to nine months after the actual performance. During that time the publishers are busy trying to get the splits all correct, and they register their works. We talked about the ISWC being in with the ISRC.

The ISCR should be with the work registration, right? So when the publishers register their work, with the PROs, if they give us the ISRC when we get that music use information, from a music user, if it has the ISRC we can map it to our work registration.

1 So that would work. There is a field in the
2 common works registration format that is out
3 there now for ISRCs. We have an on-line portal
4 that our members register their work. We are
5 actually working with BMI on a North American
6 repertoire data. We've talked about
7 normalizing our data and making sure that we
8 have complete and common work registration
9 picture.
10 But I think that would help,
11 getting the ISRCs in with the work
12 registration, from the publishers. And,
13 lastly, I beg the publishers that when they
14 register their works, with the PROs, that they
15 have as complete a picture as possible.
16 Because a lot of our manual effort is spent on
17 merging those works and getting out that
18 common view, into the public. And, by the way,
19 if we had ISRCs, we will put them on our
20 public data base.
21 MS. CHARLESWORTH: Well, I was
22 going to ask one question, I want to jump from

that. Would you be willing to send your file back to, you know, Ms. Finkelstein?

MS. LUMMEL: Our file of?

MS. CHARLESWORTH: The ISWC --

MS. LUMMEL: The mapping.

MS. CHARLESWORTH: -- with the ISRC. Because that is the data that needs to be in circulation.

MS. LUMMEL: Absolutely.

MS. CHARLESWORTH: So if they were willing to send it to you, would you be willing to send it back, in a way that, you know, interoperational with other business?

MS. LUMMEL: Yes. So we are really talking about mapping ISRCs to ISWC.

MS. CHARLESWORTH: At the moment.

MS. LUMMEL: And having a data base that maps that.

MR. DAMLE: At the moment.

MS. LUMMEL: Exactly. Why not? I mean, this is to benefit all of us, right? But, remember, we have to be careful because

1 that ISWC is, you want it to be one common
2 work picture.
3 And right now, just because of all
4 of our resource limitations, we get in over a
5 million work registrations a year and fifteen
6 percent of those work registrations are
7 possible matches, or duplicates to existing
8 works. We merge works when there is activity.
9 We can't merge every single
10 duplicate work that comes in. So you are going
11 to find that there are a lot of duplicates
12 that are just going to be sitting out there.
13 So there are challenges in managing all of the
14 duplicate data, and creating that common work
15 picture with one ISWC, and maybe multiple
16 ISRCs, because you have multiple recordings.
17 That is fine, it is getting that one single
18 musical composition, with your writers and
19 publishers on it, that is the challenge.
20 MR. MAHONEY: So that would work
21 really work for Sony and for ASCAP. My
22 question, maybe go larger, would you and

SoundExchange do a matching?

MS. LUMMEL: Tomorrow.

MR. RUSHING: I'm the wrong guy to ask, I have to talk to my COO.

MS. CHARLESWORTH: Well, yes. I was using, I was picking on -- I'm not picking on, but I was using Ms. Finkelstein as an example.

But the point is, if we could figure out a mechanism to get the ISRCs to you, as you are suggesting, could that then be disseminated to anyone, really, who could use those data files, you know, so that there is a two way flow?

MS. LUMMEL: Yes, I mean, I think somebody said, earlier, the ASCAP work IDs are out there, with the ISWCs, on our public data base.

But they are one by one. What we are talking about is some type of a data base, a mapping data base. And I absolutely see benefit in that. We have been trying to figure out how to get ISRCs into our data base.

Because we do get IRCs in on music use reports. But because they are not in the work registration it is hard for us to do that mapping.

MS. CHARLESWORTH: Thank you.

MS. FINKELSTEIN: Can I just say, we do give ISRCs. Like when we request a license, from Harry Fox, the ISRC is part of the record. So they, theoretically, give the ISRC as part of the ISWC registration. If ASCAP is feeding them to us, that is kind of after the barn door is closed.

Because we have already sent those files out into the world. And we would like is for existing works, if we could look them up on the data base, and then we could incorporate it into our record, from day one.

MS. CHARLESWORTH: Yes, because the key is, and I mean, not that -- this is a very hard issue.

But it seems to me that when your companies send the files to the services, if

they have both pieces, or whatever data, ISRC, ISWC, then they can take that and report it back.

But the point, the most logical point would seem to be when you initially send the file to them, so it is in their data bases from the get-go, and then it circulates around.

MS. FINKELSTEIN: But such a high proportion of the very valuable exploitations, in the short term, are going to be from new works, and those will not have ISWC, that is where there is a big gap.

I mean, we could take the ISWCs from the publishers that would fill in the lot, and put it in. But those are the works, when you are doing covers, those are probably well known, already, to ASCAP.

MS. CHARLESWORTH: So it is a timing issue, as usual. Sounds familiar.

MR. DAMLE: Although if ASCAP has that data base, with the links, and you are

1 willing to make it publicly available to
2 anyone -- well, if they would make it
3 available to the services, the services would
4 do a look-up as they are reporting that.
5 MS. LUMMEL: Or the services, if
6 they have the ISRCs, and give us the ISRCs,
7 and the publishers have given us the ISRCs in
8 their work registration, we have a match. An
9 automatic match.
10 MR. DAMLE: Well, this was a very
11 productive conversation, I think. I thank you
12 all very much for your help, and for putting
13 up with our somewhat technical questions. Yes,
14 just as a reminder, tomorrow we are starting
15 at 8:30 a.m., in the Greenberg Lounge, which
16 is, I gather, is in the main NYU law building.
17 It is 40 Washington Square South. It is right
18 next door, around the corner, main law school
19 building at the NYU Law.
20 MS. CHARLESWORTH: Thank you all.
21 MR. DAMLE: Thank you very much.
22 (Whereupon, at 5:21 p.m., the

1 meeting was recessed, to be continued on June
2 24th, at 8:30 a.m.)
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Neal R Gross

Court Reporter