UNITED STATES OF AMERICA

U.S. COPYRIGHT OFFICE

MUSIC LICENSING PUBLIC ROUNDTABLE

TUESDAY, JUNE 24, 2014

The U.S. Copyright Office Roundtable on Music Licensing met at 8:30 a.m., at the New York University School of Law, Greenberg Lounge, 40 Washington Square South, New York, New York, when the following were present:

PRESENT

JACQUELINE CHARLESWORTH, General Counsel, U.S. Copyright Office
KARYN TEMPLE CLAGGETT, Director of Policy and 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
ERIC ALBERT, Stingray Digital Group
CHRISTOS P. BADAVERAS, The Harry Fox Agency, Inc.
JOHN BARKER, Interested Parties Advancing Copyright (IPAC)
GREGG BARRON, BMG Rights Management
RICHARD BENGLOFF, American Association of Independent Music (A2IM)
JEFFREY BENNETT, SAG-AFTRA
JUNE BESEK, Columbia Law School
CATHY CARAPELLA, Global ImageWorks
RICK CARNES, Songwriters Guild of America
ALISA COLEMAN, ABKCO Music & Records, Inc.
JOE CONYERS III, Downtown Music Publishing
MATT DEFilippis, ASCAP
WALED DIAB, Google/YouTube
JAMES DUFFETT-SMITH, Spotify USA, Inc.
TODD DUPER, The Recording Academy
PAUL FAKLER, National Association of Broadcasters/Music Choice
ANDREA FINKELSTEIN, Sony Music Entertainment, Inc.
CYNTHIA GREER, SiriusXM Radio Inc.
JODIE GRIFFIN, Public Knowledge
WILLARD HOYT, Television Music License Committee, LLC DICK HUEY, Toolshed Inc.
FRITZ KASS, Intercollegiate Broadcasting System, Inc.
BOB KOHN, Kohn On Music Licensing
LEE KNIFE, Digital Media Association (DiMA)
BILL LEE, SESAC
LYNN LUMMEL, ASCAP
JIM MAHONEY, American Association of Independent Music (A2IM)
WILLIAM MALONE, Intercollegiate Broadcasting System, Inc.
ALDO MARIN, Cutting Records, Inc.
STEVEN MARKS, Recording Industry Association of America (RIAA)
TOMMY MERRILL, The Press House/#IREspectMusic
CHERYL POTTS, Crystal Clear Music & CleerKut
CASEY RAE, Future of Music Coalition
ANDREW RAFF, Shutterstock
COLIN RAFFEL, Prometheus Radio Project
PERRY RESNICK, RZO
GARY RINKERMAN, Drinker, Biddle & Reath LLP
JAY ROSENTHAL, National Music Publishers Association
COLIN RUSHING, SoundExchange, Inc.
MICHAEL G. STEINBERG, Broadcast Music, Inc. (BMI)
DOUG WOOD, National Council of Music Creator Organizations
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8:30 a.m.

MS. CHARLESWORTH: Good morning, everyone. And thank you for coming so early today. We appreciate it and, once again, this is on the record. Our remarks here, today, will be transcribed. We ask that you speak into the microphone, one at a time, and of course civilly, to one another. Today is the sixth day of Music licensing Roundtables. And I keep thinking, the sixth day, and on the seventh day they rested. I think those of us, who have attended, have been very well educated. I can speak for myself and my staff, on this point.

That we have found these discussions to be very productive, very illuminating, and helpful to our thinking about these issues. And we look forward to another such discussion today. A few housekeeping matters, apart from the fact that we are off the record here. If you could limit
your remarks to two to three minutes? We were running a little long yesterday, and I know it is a long day. And so we want to try to stay as close to the schedule as we can. For those of you who are observing, and who may wish to make comments for the record, we will have a period, at the very end of the day, to do that. There is a sign-up sheet.

John, where is that? Yes, we just ask that you write your name down, and you will be called up to make some comments. Let me just make sure -- I think there is wifi. Is it the same password as yesterday, John?

MR. RILEY: It is the same password as yesterday. If you need a password, come to me, or there are some out on the table out front.

MS. CHARLESWORTH: Okay. And for those of you who may be interested, in supplementing the record with either additional written comments, or written comments if you haven't previously submitted
them, we will be having a reply comment period. It hasn't been announced, yet, in terms of the dates. But we are looking at mid-August as a due date, for those of you who may want to, as I said, submit additional comments. And, finally, I just want to thank NYU Law School and Professor Barton Beebe. We have another beautiful room today. Hopefully we will be able to take advantage of this to move our conversation forward, and in a positive direction.

Because I think that there is one thing that people seem to agree on, here, is that we probably need some change in our music licensing structure. So without further ado I'm going to begin the first panel, which is on the PRO licensing system and the consent decrees. Many of you are aware that there have been some significant developments in that area, growing out of a couple of Federal Court decisions here in New York.

One of the key concerns is that
the courts ruled that music publishers could not partially withdraw their rights. They sought to withdraw their digital rights from the PROs and license those uses directly. The courts both held, in slightly different opinions, or different opinions, but from a practical standpoint essentially the same thing. Which was that, that was not permissible, under the consent decree system. And those rulings, and the decision that came out of the Pandora litigation have, I think, it is fair to say caused some serious thinking, in the music community, on all sides. And what I would like to do is open the floor to those of you who may wish to comment on that. We are particularly interested in hearing about what people see is the potential impact of those rulings, and the possibility that we are aware of -- which is that major publishers, and perhaps others, might choose to withdraw their catalogues, entirely, from the PROs. And how that would affect our
licensing system, and the people who are currently relying on the PROs. So with that very broad question I will open up the discussion. And before we do that, thank you for reminding me, can we go around the room and introduce ourselves? And please explain your interest in this proceeding, and affiliation. I will start with you, Mr. Hoyt.

MR. HOYT: I'm with the Television Music Licensing Committee. Our interest in this is that we have been participating in rate courts for decades. And have had a great deal of experience there.

MS. CHARLESWORTH: Thank you. Ms. Griffin?

MS. GRIFFIN: I'm Jodie Griffin, I work for Public Knowledge, we are a consumer advocacy group that works on issues related to the public's access to knowledge, and open communications platforms. And before this I worked in the music business as a cellist, and concert production, and for an independent
label.

MS. CHARLESWORTH: Mr. Lee?

MR. LEE: Good morning. My name is Bill Lee, I'm with SESAC.

SESAC is one of the three PROs in the United States. And we are here because of the potential changes in the law, and we want to ensure that the rights of songwriters, and publishers, are properly represented.

MS. CHARLESWORTH: Mr. Donnelly?

MR. DONNELLY: Good morning. I'm Patrick Donnelly, I'm the General Counsel at SiriusXM. We think we are uniquely positioned to participate in these discussions. We have litigated two CRB proceedings. We have licensed music from all the PROs, and have a broad based business that consumes many copyrights.

MS. CHARLESWORTH: Okay, Mr. Diab?

MR. DIAB: Waleed Diab, Senior Counsel for Music at Google/Youtube. And our interest is we, obviously, take many licenses
from the PROs, for our various products and services, and given the changes in the landscape, we are interested in seeing where this develops.

MS. CHARLESWORTH: Mr. Reimer?

MR. REIMER: Richard Reimer, in-house Counsel for ASCAP, for almost as many years as we have had consent decrees. I think my interest in these proceedings, the Pandora Decision, is pretty well known to everybody here.

MS. CHARLESWORTH: Mr. Gibbs?

MR. GIBBS: I'm Melvin Gibbs, I'm a songwriter, musician, composer, and I'm here today representing C3, the Content Creators Coalition. I just want to say that using the word content, in the name, is not a statement of what we believe ourselves to be, or a statement of policy. It is a statement about the temporary historical position we find ourselves in, as creators. We represent musicians, photographers, anyone whose finding
themselves dealing with the issues we are
dealing with today.

MS. CHARLESWORTH: Thank you, Mr. Gibbs. Mr. Fakler, you are back.

MR. FAKLER: Yes, I am. Paul Fakler, I'm a lawyer with Arent Fox for the
purposes of this panel I'm representing Music Choice, the world's first and oldest digital
music service. Later in the day I will also be representing the National Association of
Broadcasters. But on this panel both the television and the radio negotiating
committees are here, and representing the interests of broadcasters for this panel.

MS. CHARLESWORTH: Okay. Mr. Carnes?

MR. CARNES: Yes, my name is Rick Carnes, I'm President of the Songwriters Guild
of America, and co-chair of Music Creators North America, and being a professional
songwriter, I won't have any trouble limiting my remarks to between 2 minutes and 45
seconds, and 3:15.

MS. CHARLESWORTH: Well, there is
the overtime rate, so --

MR. CARNES: Exactly right. Our
interest is, basically, we want to see the
collective licensing regime, for collection of
money, maintained as much as possible, because
it has worked for songwriters, for 100 years.
And I think it should for the next hundred.

MS. CHARLESWORTH: Okay, Mr.
Rosenthal?

MR. ROSENTHAL: My name is Jay
Rosenthal, I'm the Senior Vice President, and
General Counsel for the National Music
Publishers Association.

MS. CHARLESWORTH: Okay. Mr. Rosen?

MR. ROSEN: Good morning, I'm
Stuart Rosen, Senior Vice President, General
Counsel, of Broadcast Music, Inc. So we have
a passing interest in today's discussion.

MS. CHARLESWORTH: Just a small
interest, then. Mr. Duffett-Smith?
MR. DUFFETT-SMITH: Hi, I'm James Duffett-Smith, I'm here representing Spotify. We are a big music user, and I also have a great interest in today's discussions.

MS. CHARLESWORTH: Mr. Rich?

MR. RICH: Good morning, I'm Bruce Rich, I'm a partner at Weil, Gotshal, & Manges and I have the, perhaps, dubious distinction of probably having tried more ASCAP and BMI rate cases than anybody, probably in the country but, certainly, in this room. And so we have a number of perspectives on behalf of significant users.

MS. CHARLESWORTH: Thank you, Mr. Barron?

MR. BARRON: Thank you. I'm Gregg Barron, head of licensing for BMG Rights Management, fourth largest music publisher, and we a significant interest in today's topic.

MS. CHARLESWORTH: Mr. Rinkerman?

MR. RINKERMAN: Yes, I'm Gary
Rinkerman. In addition to being an attorney I'm a musician. I produce albums. I probably am the only person who produced an old country album and didn't lose money. I have been practicing copyright for a long time. In fact, in 1983 I was the first government attorney to successfully argue that software should be covered by copyright.

Most recently I helped Hard Rock records set up their record shop. And we pioneered it, with the agreement I wrote, the anti-360 deal where the master rights revert to the artist after a reasonable time, or after certain benchmarks are met. So I think my interest, here, is to help represent the musicians, and artists, that are the engines of our industry and to, perhaps, add some new ideas to the mix.

MS. CHARLESWORTH: Well, thank you. It sounds like everyone here is a significant interest in, I think, what is a very significant topic. And we, as I mentioned, at
the Copyright Office are really interested in learning what people think, or what people foresee as happening in the event, particularly in the event that music publishers choose to withdraw from the PROs. What does the future look like for the people who are dependent on the PROs today, how that might affect them. We are interested in a sort of broad discussion of ultimately the impact of the consent decrees on the PROs, and in turn, the PROs role in our music licensing system. So does anyone want to speak up? Mr. Reimer and then Mr. Rinkerman.

MR. REIMER: I think we, as you've said Ms. Charlesworth, we are at a key point here, in where we are in licensing, these areas. The Pandora decision, I think, as everyone knows is on appeal. There has been much discussion as to what our major publisher members intend to do, depending on where the appeal comes out. We are at a point, now, where major publishers are telling us they are
going to withdraw their rights, whether they
will give us back some rights, if they can,
 isn't clear.

These are all issues that are at
the surface right now. I think everyone
probably knows that we have asked the
Department of Justice to review our consent
decree. The Department has agreed to do so. We
are, right now, in the public comment period.
It is a truncated public discussion period, if
you will. So we expect that, by the end of the
year, we will have word from the Department of
Justice and, obviously, from Judge Cote as
well, who administers the ASCAP consent
decree. Perhaps from Judge Stanton who
administers the BMI decree. And, you know,
this will play out, I think, over the short
term, rather than the long term.

A major concern, of our members,
both the large publishers, small publishers
and, particularly, the songwriter members, is
that they be able to get fair value for their
copyrights. And we have seen, in the Pandora Decision, and in the earlier decisions, that the rate court is really hamstrung by the language of the consent decree. Certainly Judge Stanton's approach vis a vis Judge Cote's approach on the withdrawal issue, tells everybody that the decrees have to be modified. And two different judges can't come to completely different results, at least reach those results differently, by reading the same language as the consent decrees. That just doesn't make any sense. So we think, given the context in which we are asking for the review by the Department of Justice, it is imperative that we have the kinds of changes that we've asked for, and we are happy to discuss those this morning.

MS. CHARLESWORTH: Yes. Well, as long as you bring that up, do you want to tell us what changes you are seeking, or ASCAP is seeking on behalf of its members?

MR. REIMER: Yes. Basically we have
three asks of the Department. We would like to
have modifications to the Decree, to make it
a much more efficient, cost-effective,
process. Right now we find ourselves involved
in very costly rate court litigation. Even
though the ASCAP decree, unlike the BMI
decree, and Mr. Rosen can speak to that, of
course, has a two year limitation -- one year
and then an extension of the year for good
cause shown. Given the entire process,
including appeals, it is two to three years,
and perhaps even longer before we can get a
decision. And, of course, during that period
of time both ASCAP and the particular user are
involved in these lengthy and costly
proceedings.

So that is one ask, the
modification of the consent decree in respect
to the process. And, also, a substantive
change, as well. And the substantive change is
to give the Court the ability to consider all
licenses, all agreements negotiated in the
free market. Right now, and as we have seen
again, from the Pandora decision, Judge Cote
couldn't consider some of the existing
licenses out there. We would like that
changed. We would also like the right to be
able to license what we call multiple rights.
Right now the ASCAP consent decree precludes
ASCAP from licensing anyone, or from obtaining
from its members, any rights, other than the
rights of public performance. And, of course,
as everybody knows there are many rights
involved in licensing music.

Our third ask is, let me come back
to that in a minute. That members be able to
withdraw or limit their rights. We have seen,
from the effort before Judge Cote, and the
Pandora Decision, that the existing decree
does not provide, at least in her judgment,
for that right. We think it is essential that
members be able to grant us limited rights.
The alternative is as you have expressed, Ms.
Charlesworth, complete withdrawal and,
perhaps, an implosion of the entire collective licensing system for performing rights. So those are our three principal asks.

MS. CHARLESWORTH: Okay, thank you very much, Mr. Reimer. I think Mr. Rinkerman?

MR. RINKERMAN: Yes. In the interest of full disclosure I should mention that I have had some tangles with SESAC recently, and I have a partner who works with BMI on occasion. But I did want to say, based on what we heard yesterday, and today, we can all acknowledge that the content creators are the engine of our industry. But an engine won't get very far without wheels. And the PROs, in my view, are the wheels that help distribute the assets among us, both upstream to the creators, and downstream to the distributors in some sense. Now, as a participant in the music businesses I like to have a lot of choices of services that are offered to me, because I believe that creates a competitive market, and I get the benefit of
that. When I look at these consent decrees, and how they have been applied, recently, it puzzles me, in that we have entities that can't offer multiple services, multiple rights, or you can't withdraw a limited amount of my rights from them. That doesn't seem, to me, to emulate the free market that we all aspire to.

As a side note, in terms of regulation of these entities, we do have antitrust laws that can remedy future or current violations. And as our experience in the patent anti-troll controversy shows that the courts are very, very sensitive when we have abuses in the intellectual property arena. As I mentioned to a few friends, yesterday, we have seen those laws, the anti-troll laws, even bleed over into copyright. Illinois now has a proposed anti-copyright troll law, which will make it a deceptive, or unfair business practice, to send out an infringement letter without a reasonable
basis. So we do have plenty of regulation. And I don't think having a series of regimens, that deprives me of my choice of services, and service providers, is very healthy for the market. Now, I did want to say one thing about the PROs, from yesterday's data comment. I think, as we saw yesterday, I refer to these entities as wheels. But sometimes they go slow, and get stuck in the mud. And it looks, to me, like in order to make sure that the artists are paid promptly, and fairly, we need a better system of calculating when the money is due, when it comes in, and who it goes to. And I think the Copyright Office should be commended in taking the leadership role in spotting that issue, and trying to help us get this all organized, to some degree.

I would suggest we look to other industries, and look at their models. I work with the world's largest retailer, Wal-Mart, and we have a computer system that tracks millions of sales a day. And our vendors can
open up a portal and see, in almost real time, whether their product has been sold in Iowa, or New Jersey, or other parts. And I don't see why those types of systems can't be adapted to our world of entertainment. I'm not denigrating the problem, I realize there are millions of records, and old records, and they are improperly coded. But I think that rather than looking at that system, and figuring out how to patch it, perhaps we should look to other industries. And I think the Copyright Office can play a great role in helping with those studies, and pointing out examples for us to look at and consider. And, again, I'm not suggesting that the Copyright Office needs to propound legislation or regulation. I think that they can help us study the problem and come together. In closing I will say a few years ago I was sitting next to the fellow from Time-Warner, who does all those great collections of soul music from the '70s, and stuff like that.
Stuff I love, and stuff that annoy my wife. But I said to him, why don't the record companies get together and do this themselves? Why do they need you? And he said, well, this is in their interest, but they are competitors, and they don't like to talk to each other very much. So what we need is an honest broker like them. So I think the Copyright Office can serve a great role in facilitating our dialogue and showing us alternative models to look at. That is it.

MS. CHARLESWORTH: Thank you. Mr. Rich, were you responding directly to that, or can I call on Mr. Carnes? I forgot to mention, you are new to the party. When you want to speak you can turn your table tent up. So Mr. Carnes can go first? That is good. You want to yield? Okay, Mr. Rich.

MR. RICH: Thank you. I think in trying to sort out the panoply of issues, that you have teed up, relating to the most immediate rulings on publisher withdrawals, I
think it is important to separate out several
distinct concepts. Mr. Reimer suggested that
one offshoot of the Pandora case rulings was
the inability of Judge Cote, as the ASCAP rate
d judge, to arrive at what he termed fair value
for ASCAP's members performance rights.

Certainly in our experience, and we have
tilted with Paul Weiss, and Hughes, Hubbard,
and Reed, and other leading law firms in this
arena, it seems to me that while it is a
terribly imperfect process by nature, which is
to figure out the value of something as
ethereal as a music performing right,
nonetheless the current structure,
particularly I would say, as supervised by a
judge as diligent and intelligent as Denise
Cote, has worked quite well. She keeps the
trains running on time.

She rarely will afford extensions,
even when mutually sought by the parties, when
she feels adequate time for preparation has
run. More importantly, these have been very
sophisticated proceedings. So the world's leading forensic economists, some reasonably good lawyers, some competent witnesses for all sides, issue joinder has been at a very high level. And I think whether one agrees or disagrees with the substantive outcomes, one need only read the jurisprudence, at the level of comprehensiveness of someone like Judge Cote, to appreciate that far from being broken, I think the process of adjudicating rates is working quite well. So I think we risk confusing unhappiness with results, with branding that as inherently unfair, or below market value, or other sort of labels that I think can mask something quite different. That is a separate issue, in my estimation, from the publisher withdrawal issue. And I find that and the clients we've discussed it with, find it an extremely complicated issue, how to think about it. In principle, certainly, everyone would support the idea that direct licensing opportunities should be fostered and
encouraged. And, indeed, part of the
rationales of the ASCAP and BMI consent
decrees is to accomplish exactly that.

At the same time, again, adverting
back to Judge Cote, if you read the record of
the Pandora proceeding, one of the
complexities is that the music performing
rights system has become so inbred, as it
were, with major music publishers dominating
the board of ASCAP, for instance, regular
communications between ASCAP senior executives
and the CEOs of the music publishers, clearly
what Judge Cote found to be a preconcerted set
of activities. Which led to the withdrawals,
designed for the express purpose of causing
one or more majors in a position of extreme
leverage, to secure from Pandora much higher
rates, for the express purpose of then
introducing that as evidence in the
proceeding. I will only say that, that reality
makes unscrambling the egg very complicated.

Because we have to deal with the
world we know, with the history that we live with. And simply to say, let's let a group of very large music publishers who dominate the industry, free float as it were, outside of ASCAP in a selective fashion, I think we have to approach that issue with caution. Not as a matter of economic principle, but as a matter of historic reality. And I think sorting that out, while still preserving the role that ASCAP and BMI play in the market, is an exceedingly complicated issue.

MS. CHARLESWORTH: Mr. Rich, I was just going to ask. I mean, if the publishers, the major publishers were to withdraw entirely, I assume you agree we would, some of the issues that you identified would still be highly relevant?

MR. RICH: There is no doubt about it. And that is why I find it very complicated. Wearing my radio music license committee hat, there is no doubt that the committee benefits from having one stop
shopping or, really, two stop or three stop
shopping, when you add SESAC into the mix.
There is no doubt about it, it has enormously
positive benefits, even though those come with
a price, which is why the rate court
supervision is so important and, really,
integral to the process. There is no doubt
that the prospect of dealing, in addition to
that, with a diminished scale of performance
rights organization, and then a series of very
powerful music publishers.

In the real world market, if you
are a top-40 radio station you are not going
to get by without Universal, let's be honest.
The leverage that presents is very
complicated. And so I don't think there is an
easy solution to the issue. I think it takes
some very thoughtful, real world analysis,
economic analysis, antitrust analysis, to
figure out what, if any balance, makes sense
here. I don't think it is an easy answer.

MS. CHARLESWORTH: Okay. Mr. Carnes
and then Mr. Rosen.

MR. CARNES: Yes. First of all I would like to thank the Copyright Office for having two songwriters on this panel. This is the first time I have had a radio guy boxed in, instead of the other way around. I would like to start off by saying, for those of you who have never earned a living with, you know, a blank piece of paper in front of you, at 8 o'clock in the morning, it is not easy. And my first music publisher told me something about what the goal was as a songwriter. It is, like, trying to get to number one. Being number one in the world, that is like 6, 7 billion people you are competing against to get to number one, to get the number one position on the charts, with a song. That should mean something when you get there. I mean, if you get to number one in any other profession, you should be close to retiring. Do you know what I mean? It is like if you are a Michael Jordan, you are going to get some
serious money, right?

Well, if you are a songwriter, you get to number one, you may be able to work for another couple of years as a songwriter. But you are not going to be able to retire on that money. And I think that the first problem that we have is the rates are too low. Now, Judge Cote may be a -- you know, the jurisprudence, the process, it may be absolutely perfect. But the result has been disastrous for songwriters. We have lost the mechanical, essentially, 115, the copyright -- it is a voluntary agreement. You volunteer to pay for music now, because you can get it for free all day long. So we are living, and dying, on that performance dying.

And, right now, we are more or less dying, okay? And so when the major publishers decide, well we have to do something to get a higher rate, and they decide to direct license, I understand that completely. They need some leverage, okay? And
the consent decree, being 70 or whatever years
old, it is just horse and buggy ruling, and we
are in a high tech internet age. Digital music
has changed a lot of things. And one of the
situations we are dealing with is the rates
are too low, for where we are trying to make
a living at. So when you talk about the
leverage of a major publisher, let's talk
about the leverage of a Pandora, you know?

How much of the market are they? I
mean, when they didn't like the rates that
they got, you know, that the artists got, they
threatened to go to Congress and, you know,
try to get the legislation to change it. Hey,
I don't see any publishers being able to do
that. I mean, that is a lot of leverage, okay?
So let's talk about everybody's market share,
and everybody's leverage. But my caveat about
direct licensing, I have many problems with
it. And first, and foremost, no partial
withdrawal. If you start cherry picking, from
the PROs, just the good stuff, just the stuff
that you can make money on, and then you leave
the stuff that is too expensive to collect, to
the PROs, you are going to put the PROs out of
business. And that is going to be a disaster
for songwriters.

Because the PROs give us a lot of
things that we really need. First of all, they
give us direct payments, okay? If you look at
the DMX case, you look at some of the
situations where people, you know, publishers
have done direct licensing, taken advances,
the money goes into the publisher, we don't
know where the money is assigned, okay? We
don't have the transparency, at all, then. And
most songwriting contracts we have, you know,
a situation where we are supposed to be able
to have our performance monies collected by a
performance rights organization, and what
happens when a publisher just circumvents that
process and takes the money, you know? And so
we have a problem there.

One of the things that we like is
having songwriters representation in the organizations that collect our money. Well, we at least get that from ASCAP, okay? So that is kind of where I stand. We really need some sort of situation where we have representation in the process, some transparency. And, at the end of the day, we need a rate we can live with, okay? And we are not getting that right now. So either we need to get rid of the consent decree, or we need to base it on some other, you know, fair market value, okay?

Thank you.

MS. CHARLESWORTH: I think Mr. Rosen was next, and then Mr. Fakler, and then Mr. Hoyt.

MR. ROSEN: Well, good morning and thanks for having the opportunity to speak today. I will start with what you asked, at the beginning, which is what was the effect of last year's decisions by Judge Cote and by Judge Stanton. And I think what it did, ultimately, was just turbo charge a process
that was happening, already. The notion of a partial withdrawal obviously was in place before either of the Judges had to deal with it. And I think it reflects that, in a larger sense, our world is absolutely changing, and it is not our choice whether it is going to change or not. Publishers are insistent that they want to make, do their own deals.

And I think that publisher withdrawal is an absolute inevitability, in the sense that it is either going to happen because the Decree will be modified to allow it or I think publishers are going to seriously think about walking away from the PROs model, in order to take advantage of direct deals that they would like to make. At the same time, publishers are poising themselves to be another player, out there, making deals you are going to see new entrants into the market. And we have heard some talk, in previous panels, about that. So I think, you know, the landscape I think has changed
inexorably. And in that new landscape, I'm
sort of surprised to have read the comments
that I read from most of the major user
groups. Not only what was there, but what
wasn't there. Let's just assume, for the
purposes of this discussion, that BMI is a
monopoly, and we extract supra-competitive
pricing. I don't think that is the case, but
certainly the major user groups do. You would
think with the possibility of going out there,
and being able to make deals with BMG, or
other music publishers, that the line would
form to the left.

And we found that that is not the
case. We found, in fact, that Pandora fought
tooth and nail, I mean, really willing to
bring us to the brink that we are at today,
rather than simply having to make the deal
with Universal or Sony. And I think that is
telling. We have heard, for decades, that they
want direct deals, as a competitive check on
supposedly monopoly power of the PROs. We have
heard, in these filings, about the burdens of making a bunch of individual deals when, after all, that is really what the major users have been looking to do for decades. So I think there is a gap between what the PROs are perceived to be, or characterized to be, and the insistence of the user groups, on maintaining the status quo.

So I think that is notable. But let -- just to answer, or to attempt to answer the implicit question of where does BMI stand on decree reform. We are very similar to where ASCAP is. But let's be clear, we are not looking to eradicate a rate setting mechanism. We are not looking to eradicate mandatory licensing. Here is what we are asking, let's have the flexibility so that publishers who want to use the PROs for what they want to, and don't for what they don't want to, that they have that freedom. Let's not force publishers to have to choose between walking away from all the advantages that a PRO
offers, in order to pursue direct deals, which
you would think that it is something that they
are entitled to do. Let's have the flexibility
to bundle rights. And it is important to
stress, here, we are not requiring publishers
to give us multiple rights, we are not
requiring users to take multiple rights.

So this will work, or it won't
work. Let's see how it plays in the
marketplace. But I think the way we are
structuring it, it does not raise antitrust
concerns. And, finally, let's keep the rate
setting mechanism, but move it to something
like an arbitration, which will be quicker,
and which will be cheaper. These are
incredibly expensive proceedings for all
parties, not just the PROs. And even from the
-- and to go to the point of direct deals and
whether they ought to be benchmarks in a
proceeding. I can't speak for Judge Cote, but
I can say that I have heard Judge Stanton
voice his frustration that, really, the only
benchmarks he gets to look at are his own. So there is an echo chamber quality that, I think, partial withdrawal will help remedy. So as to whether the decrees have to exist or not, or ought to exist, I mean I think let's see how this plays out. If the marketplace goes the way I suspect it might, and you have many additional players, and you have publishers out there making significant deals, and significant markets, then you have to just ask yourself whether the whole predicate for the decree, the notion that BMI or ASCAP have purported market power, what happens when that market power goes away?

Doesn't the predicate for the decree go away? I think it is certainly worth considering. So with that, I mean, I have other things to talking about the Songwriter Equity Act, but I have taken enough time today.

MS. CHARLESWORTH: Well, now I'm going to take up some of your time. A couple
of things. When you say both you and ASCAP mentioned, you know, the ability to license additional rights, can you be a little more specific about which rights you are talking about, in addition to performance?

MR. ROSEN: I mean, it depends, again, it depends on what the publishers want, but it could be the sync, it could be the mechanical, it could be a lyric display right. If we are going to a customer, they are going to need whatever rights they are going to need, particularly on-line, there is a need for multiple rights. We want to be in a position to provide the efficiencies of providing any rights that are needed for that transaction.

MS. CHARLESWORTH: And I guess the other -- do you want to comment on that, Mr. Reimer?

MR. REIMER: I just wanted to add that as recently as a week, or so, ago we got a phone call, or an email from someone who
raised the issue of, in addition to the performing right can I get, from you, the rights I need to record the performance? And we would like to be able to do that. And we are not, necessarily, talking about the major music users out there, we are talking about even the smallest users, somebody who is running a nightclub, or a concert venue, and would like to have all of these rights, and not have to contact everybody and his uncle to get seven or eight different rights.

MS. CHARLESWORTH: And your position would be that wouldn't be required to be a member, it would be optional to --

MR. REIMER: Absolutely, absolutely. It would be the member's call in the first instance.

MS. CHARLESWORTH: Okay. And then the other question, I think, for both of you is, if the majors were to withdraw entirely, or a significant piece of their rights, that would impact your collections, how would that
impact your cost of providing services to the people who remained in the organization? I mean, what is your thought on that?

MR. REIMER: I think the question implies that it would be to the detriment of those who remain, to have to share a bigger burden of the cost of administration. So I don't think there is any doubt that, to the extent that major publishers withdraw entirely, that has to affect the bottom line.

MS. CHARLESWORTH: Is that --

MR. ROSEN: I mean, obviously, that is the same for BMI. But I guess where I land on this is, at the end of the day, we find ourselves, then, in the same position as, I don't know, every company in America, every company in the world. We have to continue to provide good service, innovate. You have to provide things at a good price. I mean, I'm betting on BMI's ability to retain a lot of its business. So the notion that someone is free to walk away, well at BMI they are free
to walk away every three years. I think one year at ASCAP. It is a pressure we are under. We want to make our customers happy the same as any other business.

MS. CHARLESWORTH: And we did hear, in Los Angeles, some discussion, and I'm just sort of laying all this out, for the benefit of the other people who are going to comment. That, perhaps, some of the larger publishers would contract with you to just serve as an administrator. Would that be at a lower rate than your current commission rate, or how would that work, in your view?

MR. ROSEN: First lets be clear. BMI has not stated any interest, right now, in being an administrator for anybody who withdraws entirely from the PROs. But let's say we have a customer who is in for a lot of purposes, and out for others.

Sure, I think providing administrative services is a part of what we ought to offer. As to what the cost is, I can
tell you that we make every effort that the
folks who stay with BMI don't pay the penalty
for people who are leaving BMI. That the rate
would be the same, and we would endeavor to
make it as low as we can. And if I can just
speak a little bit more about administration?
I have heard in previous panels, I was at LA,
I was in Nashville as well. This suggestion
that there is something either sinister, or
conspiratorial with the notion that publishers
may go out and set their rates, and yet look
to BMI to do administration, first of all, if
there is any sin, of the PROs, and I'm not
saying there is, but if there is, it is the
concern about collective licensing. So when a
publisher goes off and makes its own deal, it
is not doing an end run around the decree, it
is really eliminating the need for the decree
in that transaction. And when they come back
to me, to BMI, and want to do administrative
work, what we are doing is no different than
a payroll company that process the payroll for
any number of businesses. It doesn't have a
say in that business, it is the pipes.

And for these purposes BMI would
be the pipes. Granted, we are trusted pipes
because we have a relationship with
songwriters. And I think that is valuable to
the publishers. But I have no doubt that, over
time, administrative services are the ultimate
of commodities, and we are going to be
competing with any number of services. I see
some folks, in the room, with whom we are
probably going to compete for administrative
services. So I think, inevitably, the cost on
these will go down, to come around to answer
your question.

MS. CHARLESWORTH: And did you have
anything to add to that, Mr. Reimer? And then
we will get to you, Mr. Fakler and Mr. Hoyt,
and then we will go around the room.

MR. REIMER: No, I think Mr. Rosen
has said it very well. And it is a competitive
world. And in a competitive world you do your
best to get the best price for your members
and, at the same time, provide the best
service to those who have asked you to do the
administrative work.

MS. CHARLESWORTH: Okay.

MR. REIMER: Although, let me just
add this one thing. I think that we have seen,
with the Pandora experience, one thing we have
seen, is that the major publishers who did
withdraw and then, obviously, found out that
they couldn't do it, based on the decision of
the two judges, have had a great deal of
difficulty just in terms of getting the data
that we need, both from the publishers and
from Pandora to make the distribution on the
administrative side. It just isn't as easy as
the traditional blanket license arrangement.

MS. CHARLESWORTH: Okay, thank you.

Mr. Fakler?

MR. FAKLER: Thank you. The problem
is that blanket licenses of music performance
rights are inherently anti-competitive. There
is no fair market for these blanket licenses
because there is no competition. There may be
competition between the PROs for attracting
members. But from a licensee's perspective, an
ASCAP license is not a substitute for a BMI
license. Music Choice cannot negotiate with
ASCAP and BMI, on the grounds of saying, well,
if you don't give us a fair rate, we are just
going to go with your competitor BMI.

Everybody knows it doesn't work
that way. And that inherent anti-competitive
problem with the blanket licenses has been
recognized for a long time. The Copyright
Office has recognized it in the past. And it
is the reason, one of the reasons for the
consent decrees. Nothing about, we hear a lot
of talk about new technology, old consent
decrees. Nobody said what new technology has
changed that part of the problem. Nothing
about any new technology has changed the fact
that the PRO licenses are not in competition
with each other, they don't substitute for one
another. So when you talk about a sunset, there is no need for that, you know, these antitrust concerns don't stop, they don't have a shelf life, unless somehow competition comes into the market.

But that can't happen in the context of blanket licenses. Of course there are tremendous benefits from the blanket licenses. Those benefits don't flow only to the licensees, okay? They flow, also, to the copyright owners. That is part of the reason that the DOJ, back in the day, said you know what? Even though they are anti-competitive, we are going to find a way to make them work, because there are all of these positives, along with the negatives. As far as the age of the consent decrees, they have been amended dozens of times. There are ways to adjust them, if there is a good cause to adjust them. But throwing them out, and trying to paint them as just anachronistic, and no longer applying, I just don't think is particularly
accurate. Music Choice would also disagree
with the premise that the rates that have been
set in rate court are not fair market value.
The legal standard, in both of the rate
courts, is fair market value. That is the
legal standard. And it is a willing
buyer/willing seller, in a competitive market,
a hypothetical competitive market. And that is
the part of the standard that is essential to
deal with the inherent antitrust and anti-
competitive problems created by allowing these
blanket licenses. Now, the fact of the matter
is you have two separate, sophisticated,
nearl federal judges who are experienced
both in copyright law, and antitrust law. Who
are experienced with very complex commercial
cases. Both sides have been represented by
excellent counsel, I will go a little further
than Mr. Rich, perhaps in his modesty. But on
both sides, certainly, by excellent counsel.
You have had two District Court judges, you
have had multiple panels of the Second Court
of Appeals, due process and federal litigation.

Each side has had ample opportunity to introduce any evidence they have to support the rates that each side was suggesting. And the judges have, routinely, in a string of cases, over the past several years, every single case found that both ASCAP and BMI were seeking rates higher than fair market value. Now, again, they may not like the result of that, but that doesn't mean that they weren't fair market value. The fact is, performance rights rates, going back for as long as they have been in place have, typically, been in the low single digits for each PRO, when they are expressed as a percentage of revenue. None of this has been overly, causing much consternation, until nowadays, when you see what is happening on the sound recording side. And it is a matter of sort of, comparative envy. But when we talk about those issues, later, maybe I will return
to that. I don't want to take up too much
time, right now.

But the question of what happens

if the major publishers are allowed to
withdraw is a very important question, okay?

Now, naturally Music Choice doesn't think,
thinks both courts got it right. They
certainly shouldn't be allowed to partially
withdraw, to cherry pick and discriminate
against certain types of services. It is not
like there are different rights that they are
pulling out. It is all the public performance
right, it is just they want to be able to keep
their benefits of collective licensing when,
in their view, the pros outweigh the cons.
For example, bars and restaurants, they could
never withdraw their rights and go around and
license every bar and restaurant. But if they
did withdraw their rights, whether it was
partially, if somehow they were allowed, if
the law changed, or if they withdrew entirely.

If you want to know what would happen all you
have to do is read the Pandora decision. Because within moments of getting
-- before the ink was even dry, on the changes
to the ASCAP and BMI rules, that allowed,
purported to allow the partial withdrawals,
all you have to do is read the Pandora
decision. They went out, there was evidence
from the record, of collusion, strong arm
tactics to inflate the rates, sharing
confidential information about negotiations.
And, afterwards, bragging about, and including
to the trade press, about how the major
publishers used their size, as leverage, to
raise the rates substantially. So the point
is, major publishers when they are issuing
blanket licenses, are really the same as PROs.
They are no different. And they would
ultimately have to be subject to some sort of
consent decree, or some sort of rate court
supervision.

Because if they are completely
unregulated we already have seen, exactly,
what will happen. They have absolute market
power. It is the same. And, in fact, some of
the majors, you look at Kobalt, it doesn't
even own its own copyrights. So they are still
aggregating large numbers of copyrights to the
degree where a licensee really has no ability
to forego the license. There is still no
competition. UMG's blanket license for its
songs is not a substitute for Warner
Chappell's license of its songs. So we are
really all back in the same problems. And
there is going to have to be, the answer can't
be that they are just allowed to exercise that
market power.

MS. CHARLESWORTH: You know, I
think that is an interesting, that raises a
very interesting question which, you know, as
we go around the room I'd like to hear
comments on. It is whether sort of implicit in
what you are saying, is that there seems to be
some right to, to have a license for,
basically, all music. I think it is the
premise that you -- or that it is a necessity
in operating a service. And I think that, that
is an interesting question, it is sort of a
philosophical question. So I would encourage
people to share their thoughts on that. I hear
your thoughts on it, Mr. Fakler. So if you
have something further to say?

MR. FAKLER: I promise very
briefly.

MS. CHARLESWORTH: No, that is
okay.

MR. FAKLER: I would not couch it
as the services, the licensees claiming they
have a right to a license, okay? But what I'm
saying is that everybody wants these licenses
to happen. There have to be these licenses if
the copyright owners are going to make money
in this field, right? Otherwise we would go
back to the pre-PRO days, when everybody was
-- you talk about stealing music, every bar
and restaurant in the country was playing
music, and nobody was getting paid, right?
That is a good reason why the PROs came into existence, and they serve a great purpose. All I'm saying is that when you do allow that sort of blanket license, which is in everybody's interest, there are antitrust laws, there has to be -- you know, there has to be a protection. So that licensees get a fair market value in the sense of what would take place in a competitive marketplace.

MS. CHARLESWORTH: Thank you. I think Mr. Hoyt was next.

MR. HOYT: Just a couple of comments about arbitration, and the speed of the courts. It has been our experience that arbitration is not, necessarily, less expensive than the rate court. And so I'm not certain I might buy the argument. And in addition I think the speed with which the rate court process happens, depends on the attorneys on each side, and the clients on each side, on how much they want to push the evidence. And one of the concerns, I think we
would have about an arbitration, versus a rate
court would be the discovery rules, and what
is allowed, and what is not. So it would
depend a great deal on what those rules were,
from our perspective. Getting into what I
consider the major issue, you asked what would
happen if the publishers were allowed to
withdraw their rights.

We would have a great deal of
concern about the fact that these publishers,
given the third party content, the third party
producers, who have had the music, we would
have a concern that we would be in the same
position as we are with SESAC, with BMI, and
with ASCAP today. So they would, as Mr. Fakler
points out, become a PRO. And I think what you
will end up with is, if they start down that
road, we will end up with more antitrust
action than we have today. Which is
unfortunate. So one of the reasons that we
think the rate court works the way it does
today is because it does allow a, if you will,
a third party to kind of oversee what is happening. And I would also say that it is the aggregation of the copyrights that cause us problems. If you couldn't aggregate those copyrights, and each one of the PROs today aggregates those copyrights separately. So they don't sell them individually. There is no way that you can buy, you can't, you have to buy the blanket license, the traditional blanket license from ASCAP.

You have to buy it from BMI, and you have to buy it from SESAC. We have seen that in the SESAC rate court proceedings that we have going on, I mean, the antitrust action that we have going on right now, with SESAC. So it would seem to me that one of the things that you might look at is, is making certain that individual creators have the power to competitively sell their compositions. And we have tried to get that with the programming, with the AFBL licenses. It is limited in what it does for us, but at least it is a start
down the direct licensing path.

One of the thoughts that I have had is why not let composers join all three organizations? Or all five organizations? Why can't you go to different grocery stores to buy the same product, and see what those are priced at? I mean, I don't know what the answer is. But I don't think that you -- I think in balancing the antitrust, versus the collective licensing, you have to have some kind of oversight on that. And I don't know how you get there. But right now the system seems to be working reasonably well. As I said, just reasonably well, not necessarily getting to a competitive market rate.

One of the things that I did notice in, I think, it was ASCAP's filing, they suggested that the evidence from the publishers, who withdraw their rights, should become part of the market rate. But if that market rate, that they establish, is a monopolistic price, then it doesn't do us any
good. And I know ASCAP, BMI especially, and
SESAC for that matter, have fought using the
competitive direct licensing that we do at the
local program level, have fought that as not
being meaningful in terms of establishing a
fair market value price. We would disagree
with that. So what they want to do is bring
the publishers price in, this potentially
large publishers price in. But they don't want
the local program direct licenses to be
included in the competitive pricing
evaluation. So I have a problem with that.

MS. CHARLESWORTH: Just a quick
follow-up. I mean, if you could consider both
would that be fair?

MR. HOYT: Well, I think what you
should have to do, is figure out how you get
to a competitive price. So in answer to your
question, maybe. If that publisher's price is
not based on a power, a power that they have,
I won't say monopolistic, but a huge leverage
they have. Let's get back to one of the
problems we have, is this third party producer
decides what music goes into the program. If
we said that the program producer is the one
responsible for clearing the performance
right, and perhaps clearing, since he already
clears the synchronization right, then you get
into a more competitive world. When I have
talked with composers, or people who represent
composers, they say we don't want to do that
because, gee, those composers will just sell
themselves out. Well, that is the competitive
world. But, right now, we have to take the
program with the music imbedded in it. We
can't change it. And so that gives, that is,
in our view, that is a non-competitive world,
if you will. So if you can show that those
publisher's prices are competitive, then yes,
then yes I would say that is correct. I don't
think those publishers prices will be
competitive, truly competitive.

MS. CHARLESWORTH: Okay, thank you

Mr. Hoyt. Ms. Griffin?
MS. GRIFFIN: Thank you. I think, from our perspective, the consent decrees are still useful, and still necessary. And I'm not -- by that I don't mean that we support the current rates, or any particular rate, as being inherently correct. But rather the principles of non-discrimination, making your entire catalog available, and providing reasonable rates. I think are principles that we need to make sure that are actually happening, given the consolidation in the market. And I will echo what I think a couple of other people have already mentioned. Where I'm really concerned by some things we saw in the Pandora/ASCAP decision, particularly when Judge Cote noted that when Sony and UMG were negotiating, they had considerable market power. And that when they coordinated that power was magnified.

And also, I think Judge Cote mentioned that the songwriters, and at least some of the independent publishers voiced
concerns about partial withdrawal of rights. That they were concerned that, that would lead to less transparency, potential payment dispute with publishers, and it would contribute to problems of overall consolidation in the industry. So, from my perspective, I feel like these issues of market power hurt both the musicians and the consumers that are, ultimately, using the services. And kind of on that note, it brings me back to when BMI was being sold, and the FTC ultimately decided not to try to block the acquisitions, either on the sound recording, or the publishing side. And one argument we saw there, a lot, on the publishing side was, well, this is entirely different because we have this PRO licensing structure. And when we see that argument, perhaps, go -- when we see that argument, perhaps, support the decision to let the acquisition go through, and then later we see efforts to take those licensing structures away, it feels a lot like a shell
game. In that the individuals, on either side of the licensing market, are going to get left out. In terms of the specific modifications, that ASCAP and BMI are asking for, we are still researching a lot of them. But I do have some concerns, like, if we go to arbitration what does that mean for transparency, what does that mean for, again, either the consumers, or the songwriters, or both, and their ability to understand what is going on, and where their interest lie in the proceedings.

MS. CHARLESWORTH: Thank you, Ms. Griffin. Mr. Gibbs?

MR. GIBBS: First I want to thank the Copyright Office and you, Ms. Charlesworth, for the opportunity to speak. I think there has been a lot of talk about process, about how the actual consent decree process has been set up and how it is working. On that side, from my side as an individual creator, it is really very basic.
The rates are too low, they are artificially too low. It is making it impossible for us to get a reasonable return, especially in this electronic transmission environment. Assuming the consent decree is not rescinded, then we should go to a willing buyer/willing seller standard. The C3 supports the rate setting approach taken in the Songwriter Equity Act, which requires the copyright royalty judges to use a willing buyer/willing seller standard. We also support a limited rights grant for a PRO member that would authorize publishing companies to withdraw their digital rights, allow for negotiating of licensing fees for streaming services, and replace the federal rate court with binding arbitration. That expressly influence fair market valuation for rate setting. Also, as far as new entrance, the members of C3 have been impressed by the model adopted by SoundExchange. We believe that it can profitably be replicated in other areas,
as digitalization spreads. And beyond that
just, really, basically I think we have to --
I'm hearing a lot about competition, about
these very large organizations. I think we
have to remember that the songs have to be
created for any of this other stuff to happen.
And if the songwriters cannot get a return
that allows them to create, the rest of this
process is just going to fall apart.

MS. CHARLESWORTH: Thank you, Mr.
Gibbs. I'm not sure who was next. Mr. Duffett-
Smith, maybe?

MR. DUFFETT-SMITH: Okay, thanks.
So Spotify opposes partial withdrawal and
thinks the consent decrees are generally
working. Licensing a digital music service is
a very tricky business. And I think everybody
here would agree that successfully legal
digital music services are a good thing.
Digital music services are the future of our
industry. And anything that makes it more
difficult for music services to be licensed
should be resisted. As I said, digital music licensing is already a very complex process, and partial withdrawal, as Mr. Rich said, raises extremely complex issues. And that is something that we think should be resisted. Mr. Rosen talked about major users wanting direct licenses, and we are becoming a major user, and I don't think we want that, at the moment.

Mr. Reimer talked about multiple rights licensing. And I think he said that it would be great if people could come to ASCAP and get mechanical and performing rights, because that reduces the complexity. Well, of course, if you have partial withdrawals then that increases the complexity. So it seems a little inconsistent. Just as a general perception, as well, the idea that the rates are too low, as I said yesterday, for a service like Spotify, which is a pure music service, we don't have any other services that we can cross-subsidize against. We pay out 70
percent of what comes in through the door, in royalties. And so if we are looking at raising any of the rates, that needs to be seen in the context of overall what rates we are paying, on both sound recording and on the publishing side, and can't be seen in isolation.

MS. CHARLESWORTH: Just a follow-up for you. I mean, I think what we are hearing is that what could happen, is that if the partial withdrawal is not permitted, in other words, if the consent decrees aren't modified, you may see a full withdrawal. Which, from your perspective, I mean, I'm interested in your thoughts on that. In other words, if the options are partial withdrawal versus a complete withdrawal, do you have a point of view of which would be, I guess, in your view worse?

MR. DUFFETT-SMITH: I mean, they are both -- we wouldn't like either of those scenarios, really. I mean, collective licensing as I say, reduces complexity for
licensees, identification of works is a very,
very difficult business. And the PROs, and
societies overseas, are best placed in order
to be able to do that. And that is their
business, and they are good at it. Partial
withdrawal, full withdrawal, I think they are
both bad results for music users.

MS. CHARLESWORTH: Okay. Mr.
Rosenthal?

MR. ROSENTHAL: A couple of quick
points. First of all, it has been talked about
a little bit, and that is Songwriter Equity
Act. There is a portion of that Act that deals
directly with the issue of evidence being
presented to the Court. To me that is the
least controversial issue out there. And I
think that, you know, Congress should be
dealing with this, and passing it, and I hope
that the Office supports that. The idea that,
you know, one would allow for a court not to
hear certain evidence is, just, everyone's
sense of what justice is all about. In
particular in dealing with trying to create fair market rates. So I think that, you know, we should keep in mind that, that already is in front of Congress.

And that we should, at least, get behind that. The second issue is, and this kind of follows on Stewart's question and Richard's points about what is going to happen with the business. What, you know, if some publishers withdraw rights, what about the cost to everybody? Well, we are going to have to innovate, and promote innovation. And there are examples, out there, in the marketplace for example, what the Harry Fox Agency does with their slingshot business. This is a situation where, in pretty rough times, they have decided, we can offer more administrative services, and they have, and they have done very well at it. And I don't think there is anything stopping, or should stop HFA from actually dealing with public performance as well. We should be dealing with the free
market, as much as possible, right across the
board. You asked the question about music and,
you know, should everyone have a right to it?

   And I think, as a practical
matter, the idea of looking at music as if it
was like gas and electricity, is pretty
ridiculous. You know, if we don't have gas and
electricity this city comes to an end. If
Music Choice, just as an example, is a
business model that doesn't work, because it
cannot afford, or cannot deal with paying fair
market rates, and they cease operations, the
world will continue to spin. I don't think
there is any detriment. Businesses, all over
the place, start and fail. The idea of
treating music, as an essential, for every
business, and that is why we have to have this
antiquated system, I think, is pretty
ridiculous. So that is all I have to say on
that.

MS. CHARLESWORTH: I think Mr.
Carnes, Mr. Rosen, and then Mr. Rich, and then
Mr. Fakler.

MR. CARNES: I want to start by agreeing with my colleague, Mr. Gibbs, here about the end of the day the rate is about survival for songwriters. And when we are looking at a situation where I'm, you know, producing one hundred percent of the product, and making 1.8 percent of revenues, in return for one hundred percent, I think instead of doing a skilled job, like being a songwriter that takes years to learn how to do, and the competition is brutal. That 1.8 percent rate, that is more for like gluing together shoes in a sweatshop, you know, somewhere. It is an unbelievably unfair rate. And if the Songwriters Equity Act, you know, using a willing buyer/willing seller, if that will get us to a rate that will make it survivable for songwriters, over the age of 25.

Because what is happening right now is, we are not getting career songwriters any more. We are getting songwriters that can
live in their parent's basement, okay? Until they have to buy a house, until they have to get health insurance, until they have to have a car, until they decide to get married, or have kids, or, you know, you name it. But the kind of things that everyone else, in any profession, expects to have, or they go to another profession. That is what is happening, right now, with songwriters, okay? And it depends on whether the public thinks that they just want songwriters to be people under 25.

Because that is what is happening.

And I will say one more thing, and then I -- when it comes to the direct licensing situation, I have already stated the problems with lack of transparency, and the payments. And, right now, I'm getting two statements, one from my PRO, and then one from my publisher. I can look at them both and kind of figure out where the money went, okay? If all of a sudden half of that PRO statement disappears, and isn't coming out on the other
side of my publishing, which is what is happening, I'm losing a great benefit of collective licensing, which is that transparency. So I would suggest that the Copyright Office, perhaps, you could issue some statement on best practices, for music publishers that direct license, and how they need to report to songwriters, what happened to the money, that would be very helpful to us.

MS. CHARLESWORTH: Okay. I just wanted to follow-up on -- obviously you stated a lot of your economic concerns.

MR. CARNES: Yes.

MS. CHARLESWORTH: For the songwriters. And I think you said, earlier, that performance is everything. I mean, has -- do you want to elaborate on that, in relation to your mechanicals, and from the perspective of the songwriter, what is going on in terms of the income stream.

MR. CARNES: Well, it used to be
that music publishers would give us an
advance, a draw, a monthly salary, basically,
based on our mechanical earnings, what we
would earn in the future from record sales,
okay? And they were albums. So if you didn't
get a single that year, but you got a couple
of album cuts, your publisher could keep
paying you, you could keep going until you got
a single. The singles were where we got
airplay money. I mean, airplay money has
always been more significant than the
mechanicals, okay? And so you wait until you
get a couple of singles, then that would tide
you over for a few more years, and your
publisher would make the money off the
mechanicals. They are not making the money off
the mechanicals any more, so they are not
signing songwriters, okay? So that is what is
happening. And that is why the songwriter
numbers have been so drastically depleted. And
that is why, as I'm saying you are going to
get songwriters 25 years old, or younger. And
that is a cultural choice that we are making
without knowing we are making that choice.

MS. CHARLESWORTH: Thank you, Mr. Carnes. I think Mr. Rosen was next.

MR. ROSEN: Thank you. Just a couple of points to what Mr. Fakler said. He said that he didn't anticipate that publishers would be withdrawing their works to licensed bars and restaurants. Listen, I think BMI does a great job in that area, but I also know that if a publisher had to face an all or nothing choice, and take out bars and restaurants, in order to license online services, it would find many people willing, and able, and ready to license that. In terms -- and another comment that you made was, that when Universal, or Sony, or any other, I don't know that you named specific publishers. But when they are out there making deals, essentially, they are the same as the PROs.

I mean, I think you put your finger on something, but I don't think it
means what you may have thought it did. It is, we are talking here not about an antitrust monopoly, a monopoly that needs to be disciplined. We are talking, here, about the monopoly that has been recognized, by statute, under copyright. And with that comes the power of any publisher to say no. It is a simple power. Now, I understand if I were Music Choice, if I were Sirius, I would want all the great music that is out there, I get that. There is a difference between must have and really, really want. And at the same time, as you folks really, really want it, these publishers really, really want to license it to you. That is what they are in business to do. That is the free market. But it is a free market where there is the power of no, which really does make it more of a free market than the PROs are in any position to offer.

MS. CHARLESWORTH: Thank you, Mr. Rosen. Mr. Rich?

MR. RICH: Two brief comments on
This. On the aspect of the Songwriter Equity Act, which would reverse the current evidentiary bar on importing information from CRB proceedings, into rate court proceedings, I think we all need to recognize that the music industry made the bed it now lays in, and tries to extricate itself from. I was in the hearing room, on more than one occasion, in the CRB hearing, in the Madison building, when the very same music publishers, and their affiliated sound recording executives, testified at length as to the disparate value, assertedly, between the sound recording performing rights, and the musical works performing rights. Let me be clear. The very same music publishers who now say this is a travesty, and should be reversed, and there is an inequity, stood up under oath, testified beside their recording side colleagues, as to why it was economically logical and, indeed, necessary to create a disparity in favor of sound recording rights.
Based on that sworn testimony more than one CRB panel of judges ruled, creating that disparity -- and, in fact, found that testimony so persuasive, that it found that the musical works benchmark was virtually irrelevant to the comparison. So it is more than a tinge ironic, that having proffered that very testimony, in order to benefit the music recording side of the house, those very same corporate entities are now saying let's leverage that, because we got what we wanted there.

Now the game is, how do we leverage that up? I would make a slightly different suggestion, in light of that history. I would invite that music publishing industry, the NMPA or others, to join users in the next Web IV proceedings, to testify that, to retract that prior testimony, and to support the argument that, as a result of that, sound recording performing rights were artificially inflated in value, and bring
parity. But not bring parity by artificially bootstrapping up the current reasonable, established by Federal Court, musical works performing rights. But rather to assist bringing down, closer to parity, to the musical works right, the sound recording right.

My second, and last, comment is that in response to the suggestion that there is a dramatic difference, automatically, in how the antitrust laws would view the potential anti-competitive consequences of a performing rights organization, versus a major music publishing company, this is not a place for an antitrust seminar, I realize. This is under the auspices of the Copyright Act. But there is something called Section 2 of the Sherman Act, which deals with attempts, and actual acts of monopolization. And there is, at least, a significant question that arises, under the antitrust laws, whether a music publishing company that accretes as much power
as several of the majors do, might tilt up
against Section 2 of the Sherman Act.

MS. CHARLESWORTH: Just a quick
follow-up on that. What about the label side
of the equation, where you have that kind of
concentration that is not regulated?

MR. RICH: Yes, I mean, look -- I
know it has been looked at, in recent mergers
and all, and there is language that everybody
likes to pull out on both sides of what the
regulators have found. I think, again, it is
a whole, it is a very complex industry. The
fact that you have industry concentration, per
se, doesn't make the activity unlawful. But
you have, at a minimum, oligopolistic markets.
And I think the last chapters probably have
not been written on this, especially if we do
move to a world which the performing rights
organizations appear to be signaling is
inevitable. Where there will be either some
partial or full withdrawals on the music
publisher side of the marketplace, it is
conceivable that, you know, the antitrust laws, which have so far been tested, mainly, against the performing right organization conduct, and, as currently as Willard pointed out, the subject of two pending antitrust litigations, adverse to SESAC, it is conceivable that those issues would be tested.

I'm not predicting that, I'm not saying that is happening, I'm not saying we are representing anyone planning to do that, none of which is this case. But I think those are important issues, as industry concentration, on both the music publishing and the recorded music side has grown in recent years.

MS. CHARLESWORTH: Okay, thank you.

So we are running out of time. I think, for those who have your cards up, I want to go around. And if you could limit your remarks to -- well, Mr. Diab you haven't spoken yet, at all. So we are going to give you a full two to three minutes. And then everyone else will get
a minute, and then we will close out this panel.

MR. DIAB: I don't think I need that long. I just want to make one general comment. I'm sort of taking a comment that Mr. Rich made, and something that Mr. Lee Knife said yesterday. The reality is -- and then, just from our perspective we do -- Google sees the value in consent decrees. And these, you know, the reality is that we are in an industry that has developed under that basis, and those consent decrees ensures efficiencies in the market. And I think if they are modified, if there are withdrawals there needs to be a new system in place to ensure the same efficiencies. And then the point that, I don't think, anybody has touched on this morning, but we spent quite a bit of time talking about it yesterday, and I think it is going to be really, really important, whether there are partial or full withdrawals, is importance of data, right? I mean, that was something that
was at issue in the Pandora/ASCAP litigation.
And it is something that is going to be
absolutely imperative, for any of the
services, to actuate licenses.

MS. CHARLESWORTH: Thank you, so
now we will just go quickly, around. Mr. Hoyt?

MR. HOYT: I just wanted to clarify
something. If, in my view, if you require the
producer of the program to clear both the sync
right, and the performance right, you then
have a much better -- because you can decide
whether or not to use the music. You may then
have a competitive price, and maybe I can take
early retirement.

MS. CHARLESWORTH: And is that
something -- I mean, when you are -- this is
a question. When you arrange to buy the show,
I mean, could you require that? I mean, could
--

MR. HOYT: Not in today's world,
and not historically. Economically, it is not
going to work. The producer has no incentive
to clear that performance right.

MS. CHARLESWORTH: Right. But, I
mean, if TV stations said we are not buying
your show unless it was cleared --

MR. HOYT: In a hypothetical world?

MS. CHARLESWORTH: In a
hypothetical world.

MR. HOYT: In a hypothetical world,
that is correct. But it is a truly
hypothetical world, and not the real world.

MS. CHARLESWORTH: Okay. Mr. Diab,
did you have something to add or --

MR. DIAB: That was it.

MS. CHARLESWORTH: Okay. Mr.
Fakler?

MR. FAKLER: Thanks, just to
briefly respond to Mr. Rosen's point that the
market power of the major publishers is just
the direct result of the grant recognized by
the Copyright Law. That is not what causes the
market power. The Copyright Law gives authors
a copyright. What I'm talking about are large
corporations that aggregate these rights, to provide the blanket licenses, that by purchasing them from the author.

So it is a somewhat different thing. And with respect to my friend Mr. Rosenthal's callous disregard for Music Choice's financial picture, I would just -- But the point is, that is part of the problem, right? It is not just Music Choice. We are 25 years into digital music services, none of them have been profitable on a long term basis. So it is not just one service, it is all of them, okay? And with respect to the Songwriter Equity Act, I would just second what Mr. Rich said. I was in those rooms, too, and all that testimony comes in, and it is -- it is something else to hear the opposite argument being made. And he already addressed the unfairness of that. But there are a couple of other quick points on that particular bill. According to -- the way the bill is currently drafted, the sound recording license rates
could now be brought into the rate court. But
only to increase the rates, not to decrease
them. And, at the same time, the music
publishing rates can't be brought into the
Copyright Royalty Board to lower the sound
recording rates. There is nothing equitable
about that bill.

MS. CHARLESWORTH: Can I just ask
you -- I mean, you have made that point. I
mean, if those two restrictions were removed,
and both courts could consider both, would
that be fair?

MR. FAKLER: Part of the problem is
if you -- if there was a way, and I'm not so
sure there is, to do, do the Men in Black
spray on the Copyright Royalty Board judges,
and say none of that precedent where you --
Bear in mind, in the first CARP, the music
publishing rate was used to set the rate for
the pre-existing subscription services. So
there is, actually, precedent for that. And
that -- the Librarian of Congress actually
used that as a benchmark. That all went out
the window. The subsequent webcasting CARP
just didn't follow precedent, and since then
we have been in this, the Copyright Royalty
judges. If there is a way to undo all of that
and say, both of them could, you know, look at
these as benchmarks, that might be a
reasonable thing. But I don't know how you
actually accomplish that.

Because you would have to really
say, you know, you would have to say, forget
all this precedent, when you have said in the
Copyright Royalty Board it can't be used as a
benchmark. Now, that issue is on appeal right
now, so maybe the DC Circuit will solve that
problem for us, who knows.

MS. CHARLESWORTH: Okay, thank you.

Mr. Carnes?

MR. CARNES: I just want to reply,
really quickly, to the concept that we are
talking about copyright owners, instead of
authors. Let us get it on the record that the
only actual owners of the copyright are the authors. And the publishers are just leasing them. They get them for 35 years, still my rights, okay?

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

MR. ROSENTHAL: A quick point on the SEA. Obviously yes, you were in the room, I wasn't in the room. Publishers based those positions that they took, back then, when the law was debated, on assumptions that were not borne out. They have changed their mind. They see the world today, they have the right to do that, it is a free country. Thank you.

MS. CHARLESWORTH: Thank you. Mr. Rosenthal, Mr. Rosen gets a last minute flip.

MR. ROSEN: Down to the wire, right? Just a couple of quick points. My understanding is that the CRB is not precluded from looking at performing rights, first of all. And, second of all, there is -- it is interesting the kind of opposition that we are
hearing here, that rates are necessarily going
to go up. There is nothing, in this bill, that
requires that rates go up a penny. There is a
requirement in this bill that an evidentiary
obstacle go away. All rate court judges can
give a lot of weight or no weight to the sound
recordings.

MS. CHARLESWORTH: Thank you. Mr.
Barron?

MR. BARRON: Thank you. I'd like to
echo some of Mr. Carnes' concerns, and it
possibly address some others. We share the
same belief that mechanical income is
increasingly diminishing, as streaming
services increase in popularity, and people
are going to listen to, for free, what they
can listen to for free, rather than buying it.
There is a huge disparity in income between
performance and these services, and the
mechanical income that writers have,
traditionally, enjoyed. To quell one of your
concerns, I hope, I don't think that the
publishers desire to administer, or rather
negotiate directly with these services is
going to provide less transparency for its
writers.

As Mr. Rosen pointed out, there
were discussions about BMI and ASCAP
continuing to administer those rights. And so
I hope, and we heard this yesterday too, and
I was very surprised to hear from another
songwriter representative, this concern about
transparency. We have the writer's interest at
heart, as well as our own. And I think we are
all just working towards a world in which
songwriters continue to make a living,
songwriters over 25. Thank you.

MS. CHARLESWORTH: Okay. You guys'
signs are up. Is that just leftover? Okay. All
right, that closes out this panel. Thank you
all, that was a very informative discussion.
We will reconvene -- we are going to take a
slightly shorter break and reconvene at five
after. So you have a few minutes. Thank you.
(Whereupon, the above-entitled
matter went off the record at 9:54 a.m. and
went back on the record at 9:10 a.m.)

MR. DAMLE: Okay, so this is the
panel on industry incentives and investment,
which we started talking a little bit about in
the last panel. You know, we've heard today
and we've heard elsewhere sort of two things.
Both that there's less and less money flowing
through to music creators to give them the
incentive to create music, but at the same
time that it's difficult to run a profitable
music service.

Yet, at the same time, I think
it's safe to say that today there's greater
capability to consume music through legal
channels than at any other time in history. I
don't know that's hyperbole. So, how do we
explain this sort of paradox? Maybe it's not
a paradox. And are there ways -- so the broad
question for the group is to think about how
should we think about this problem and how
should we think about ways of encouraging
investment both to those who create the music
and those who deliver that music to the
public. So with that broad question, I'll open
it up. Mr. Gibbs?

MR. GIBBS: Well, you said
something interesting. You were talking about
there were more legal ways to access music
than ever. But I think going forward we can't
really ignore the non-legal ways and ignore
the impact that has had on the creators. And,
addressing the non-legal ways is an important
part of this. And I think that we have to
acknowledge that DMCA notice and take-down
procedures are supposed to eliminate
misappropriation but they do not. This is a
key element in why creator's rights are
undermined and the signature reason for
Congress acting to change the digital
licensing frame-work.

In a sense there's no point in
changing the current licensing framework if
you don't also strengthen the DCMA notice and
take-down procedures. As we understand it, the
multi-stakeholder forum developed by the
Department of Commerce has abandoned the idea
of legislative reform. Instead they are
working on developing guidelines and best
practices for certain stakeholders. This is
regrettable and insufficient. There will be no
improvement and effect in music licensing
without stronger measures against piracy that
is facilitated either inadvertently or
intentionally by corporations that allow,
encourage or misappropriate the creator's
work. This means improving notice and take-
down procedures to make it easier for creators
to file notices, to make sure that creator's
receive timely and fair compensation for the
work before the take-down, to ensure that what
is taken down stays down, and increase fines
and maintaining high statutory damages for
willful and repeated infringement.

We believe there is merit in
continuing and requiring companies to track
the user copyright law. For example, such
tracking could be incorporated in to the
metadata and in Google's Content ID system.
This is feasible. And it needs to be done to
encourage incentives and investment for
creativity in the music licensing framework.
Creators have a symbiotic relationship with
society. And the benefits must be reciprocal
for the incentives to work. The balance is
undone now and must return for the next
generation of music creators, songwriters and
composers and artists of all stripes. Okay. I
want to just get in to the meat and potatoes
of this after addressing that.

State of investment in new
projects and talent. Investment in copyright
creation by businesses that exploit musical
copyrights has dried up. And investment in
developing new talent by the same entities is
created. It is now common for artists on all
level of the business to fund productions of
their recordings themselves, either entirely
with their own money or in collaboration with
their fans, so-called crowd funding. As far as
ability to bring new services to market, the
musicians and songwriters are provided the
materials that have formed the basis of such
musical innovations as remixing and the user
generated content based on it, and copyright
-- and developing copyrighted material that is
the backbone of this business model of ad-
supported sharing sites such as Pirate Bay,
Kickass Torrents, Media Fire, etc. Copyright
creators derive literally no money from these
innovations.

And I just wanted to piggy back on
something Mr. Fakler said in the last thing.
He said in 25 years no digital music company
has been successful. Pirate Bay has been
pretty successful. Mediafire has been
successful. 4Shared has been successful. There
are companies that are successful. But none of
this value is getting down to the musicians,
right? The state of investment, the state of
the business has forced artists to become
producers, as I said earlier. And we're also
becoming investors in record companies either,
as I said, by paying for the records ourselves
or the large artists now have what is called
360 deals, which is they have to give money
from other income streams to pay for their
records.

This increased level of artist
investment should be accompanied by increased
levels of industry-wide transparency and an
increased level in the oversight capabilities
of creators. Addressing division of revenues,
copyrights have become the fuel that sustains
million dollar businesses that generate no
return. I'm not overstating this. There are
million dollar businesses that generate no
returns to musical creators -- either in the
form of licensing fees or add revenue
generated by the fact that our fans want to
hear our music and will visit and frequent the
ad-supported file sharing sites and address
the radio stations that supply it. And, as the
Digital Media Association said in their
comments to the Copyright Office, in the
digital environment, music services are
functionally equivalent to the distributors
and retailers that sold music on historical
business model. That being the case, payment
from the digital music services to copyright
traders should properly reflect this change in
the market dynamic.

MR. DAMLE: Okay, thank you Mr. Gibbs. I failed to give the opportunity for
people new to the panel today the chance to
introduce themselves. What we'll so is, before
you speak, you know, if you've got your
placard up if you could just introduce
yourself that would be great.

MS. CHERTOKF: Hi, I'm Susan
Chertokf and I'm Senior Vice President for
Business and Legal Affairs at RIAA. First I
want to agree with Mr. Gibbs. I'm not sure
that it's the purpose of this discussion to talk about piracy. But that certainly is in the background when you talk about whether digital music services are earning enough money or paying enough money, competing against free remains a problem. But I wanted to start by commenting on some of what was talked about in the last panel where it seemed that people were conflating the sound recording marketplace and the music work marketplace.

And it seems to me that saying that if the price for musical works is going to go up the price for sound recordings has to go down, is kind of like saying if Dunkin' Donuts finds out that the price of coffee is going up that now they are going to tell their flour supplier that they are going to pay less money for donuts. I mean, it just doesn't work that way. And I think, you know, everyone in the music ecosystem brings value. Songwriters bring value, music publishers bring value,
digital music services bring value.

But I want to emphasize the very
critical value that record labels bring. And
today we are releasing a report. And it's on
the -- I have to check what the title of it
is, but it's on investing in music. Let me see
what the title is. Labels That Work, the Music
Business in the Digital Age. And it talks
about all the investments that record labels
make and how record labels really are the
venture capitalists of the music industry. And
we're the ones that invest in creating the
songs, in marketing the songs, in finding the
artists. And, as Lee Miller said, if he writes
a song and it's not recorded, then no one
really hears it. And I just want to hit a
couple of the highlights of the numbers. So
the report mostly focuses on the last decade.
Well, the period from 2003 to 2012. And, over
that period, the major record labels spent 20
billion dollars on royalties for artists and
songwriting.
And, during that same period they spent 13.4 billion on advances and marketing for artists. And, let's see, in addition, royalties that major labels paid to artists over this 10 year period went up 36 percent as a share of net sales revenue. So, as record labels' revenues have gone down -- and if you see this report you'll see a graph where you see record label revenues going down. And artist royalties have stayed essentially level. And so, just to repeat, artist royalties paid by major labels increased over 36 percent as a share of labels' net sales revenue over this period. And the songwriting royalties that major labels paid increased 40 percent as a share of net sales revenue over this period. So, record labels really are pumping a lot of money into the industry and are taking a lot of risk. And as, you know, basic economic theory will tell you, that return follows risk. We are taking a lot of risk. We deserve a reasonable return or our
fair share of the return. So I'll leave it at that.

MR. DAMLE: Thank you, Ms. Chertokf. Mr. Carnes?

MR. CARNES: Yes, songwriters actually the smallest of small business in the music business. And so I think that since the process starts with writing this song we should talk about what it takes to actually demo a song, you know, get the thing ready just to even be able to pitch because we don't have publishers anymore signing pure songwriters. They only sign artist songwriters and they only sign producer songwriters. People who have at some point, you know, are going to put a record out, because, as she's saying, that's where, you know, if it doesn't get recorded, no one hears it, no one makes any money.

Okay. And, over the last two years I was the head of the songwriter department at NTSU University in Murfreesboro, right outside
of Nashville. And, in two years, of all of my
students, I only had two students who ever
actually said they wanted to be pure
songwriters. Everyone else understood that
there are no pure songwriters anymore. And
let's give a shout-out to Gerry Goffin, who
just recently passed away this week, and ask
ourselves what those songs would have been
like that he and Carole King wrote if he
wasn't on those songs.

There's your pure songwriter.

That's what we bring to the table, all right?

We're not there any more. Our incentive is
gone. Let me give you a reason why. Just this
year, okay, just to upgrade my studio, I
bought one microphone, I upgraded my software
and I bought a analog to digital converter.
That's the only three pieces I had to upgrade
of the entire studio. That was 14,000 dollars.
Okay? Let me ask the Spotify guy, how many
airplays do I have to get on Spotify to get to
14,000 dollars?
MR. DUFFETT-SMITH: That's a bit of a leading question.

MR. CARNES: There you go. So that's the problem. There's the music business from the perspective of a songwriter, a pure songwriter, okay? We have no incentive. That's why there aren't any more of us. Okay?

MR. DAMLE: Okay. Thank you. Mr. Mahoney, I think you were next and then Mr. Rinkerman.

MR. MAHONEY: Good morning, I'm Jim Mahoney, Vice President of A2IM, the American Association of Independent Music. A2IM is a collection of small and medium sized business owners who invest and support uniquely American music genres, such as Americana, blues, jazz, bluegrass, Hawaiian, and many other genres that we would all agree unquestionably add to our cultural diversity and enjoyment of music. And our members, collectively and optimistic lot, recognize that piracy is certainly a big issue, probably
without question. But they've identified to A2IM that our number one concern is the digital licensing practices, the legal digital licensing practices of the major labels.

And the market concentration of the largest players in the recorded side of the music industry are creating an un-level playing field in which it creates a chilling effect for independent labels ability to invest in and continue to make a living from their business as the major labels engage with the emerging digital services and seek terms that are referred to as direct profit revenue terms, large advances that renew annually and aren't necessarily intended to recoup, guaranteed quarterly minimum payments regardless of the music's ability or number of plays to generate that sort of revenue, equity stakes and so on and so forth in digital services.

And those terms aren't then being offered to the independent labels. We have a
number of anecdotal pieces of evidence that
some of these terms that the digital service
providers and the major labels are engaging in
come at the expense of the per-play royalty.
But then that per-play royalty, which we would
allege is reduced, gets offered to the
independents as the stand-alone piece of
compensation.

MR. DAMLE: Okay. Thank you, Mr.
Mahoney. Mr. Rinkerman?

MR. RINKERMAN: Yes, I want to
second some of the comments that Mr. Gibbs
made. I produced an album and it was a
limited, concert-only release. And, within
three days, it was available for free online,
including the artwork from a site in Eastern
Europe. We really need to get a little more
serious about enforcing our laws against
piracy and penalizing the individuals
personally who are involved in that, such as
the fellow from Limewire who was held
personally liable. And we're talking about
losing his house for what he did. So I really think we need to get serious. And the reason why I was so happy when Spotify came out was because it was an alternative to piracy. But that's a really low benchmark to say this is great, now somebody is competing with the pirates. And I think that keeps a lot of the revenue very low for the artist when you put them in that world. And one of the solutions is through very heavy enforcement and very serious enforcement.

The second is someone brought up the DMCA. I believe the DMCA take-downs are a useful tool. But they are frequently not implemented properly by the large companies that hide behind them. I've had situations and DMCA take-down type situations where it took days to get a response. And I actually had one major company tell me the other day that photographs aren't covered by copyrights so they wouldn't take down my client's photographs. They were trying to use a German
standard as to whether a photograph created --
contained a creative element. So we really
have to get, I think, more serious. Once a
company starts acting like an advocate they
are no longer an IS -- you know, an
independent service provider under that Act if
they start making counter legal arguments.

Their job is to receive the
notice, take down the content and let the
parties fight it out as to whether or not that
as a fair take down. And then finally I'd like
to hit on a point that I made yesterday. We at
Hard Rock Records took the point of view that
if we don't need the rights we're not going to
keep them. And we are going to encourage our
artists to go out and maybe resell their
masters or whatever they want to do. And I
think some of the larger record companies --
and we heard about how they've concentrated --
need to start thinking about that equitably if
they are not promoting an artist or exploiting
the masters. They should think about letting
them revert to the artist, perhaps maintain a financial interest in them. I did a deal a few weeks ago with a record company where my artist gets his master back in five years and then we give the record company a non-exclusive license so that they can still somehow get some money back from it. But I really think we need to encourage that because there are just so many of our small artists that are not getting promoted. And, even though you can get them online, you can't find them because nobody tells you about them.

So I would recommend that the record companies start thinking seriously about that.

Because, if they don't, there are state laws in certain areas that say if you don't exploit fully an exclusive license you lose it. And that's I think a very important thing to keep in mind for our artists. And, last but not least, there is an issue of fair use that I think we need to think about too.
when we look at licensing. I'd like to read something and then I'll shut up. This is a quote from one of my heroes. We never minded them sampling or covering a song. There's a small amount that you're supposed to pay. But you're not supposed to get sued all over the place for doing it. We'd rather do it together. But the people that stole the rights to our music are suing people all over the world and almost killing the concept of sampling, which is important for a lot of music. But we are still out there fighting for that right. That's George Clinton talking, one of the most sampled artists in history. And he's saying that by over-aggressive licensing practices we've killed a genre of musical art or at least made it hard to practice it. And I really think we need to think seriously about what we are doing. Because, if you look at the cases like Seltzer versus Green Day and Prince versus Cariou, where there's an incredibly
broad fair use right now for collage artists
and appropriation artists, that will come to
music if we don't really straighten out our
act on sampling. Thank you.

MR. DAMLE: Thank you. I think
either Mr. Knife or Mr. Rosenthal was next.
But I'm not exactly sure. Mr. Knife, do you
want to --

MR. KNIFE: Should we arm wrestle
for it? First of all, Lee Knife from the
Digital Media Association, making my first
appearance here today on our last day. A
couple of things. First of all, I just wanted
to pick up on something that was -- that has
been said a few times here. And that is the
whole idea of competing with free and the
existence of piracy. And I think everybody who
is involved in the commercial music business
and trying to make money from the exploitation
of these creative works would agree that
piracy is, you know, a big concern.

But when we talk about things
like, yuk, that being the bar set low and that
it would, you know, it would be a better world
if we didn't have to deal with piracy, it is
what it is. And I think it's important for us
to remember that whatever measures we've taken
so far and likely whatever measures we are
going to take going forward, are going to
have, you know, some kind of limited effect.
The world is what it is in terms of piracy.
And the truth is that any legitimate digital
service right now competes with free. It's
just the way it is. It's difficult, it's not
good, but it is what it is. I wanted to make
two points about this. The first is picking up
on something that Susan was saying when she
used the Dunkin Donuts analogy about not
having whatever, enough money to pay for your
flour is your coffee cost has gone up. I don't
think that analogy is completely applicable
because we are talking about two rights that
are actually subsumed in to a single product.
And they are inexorable because of that.
And I wanted to just reiterate a point that Mr. Duffett-Smith has made several times over the last two days, which is that there is a maximum amount of money that any sustainable business can pay for the content that it is going to be distributing. And, if we are going to look at this in these siloed types of paradigms where music publishers want to get the maximum that they can get, understandably, the PROs want to get the maximum that they can get understandably, the artists want to get the maximum they can get understandably again, and the record labels as well.

If we continue to approach these separate rights and separate financial relationships on a one-to-one basis, what we can end up with very quickly is a collective obligation that makes that Dunkin' Donuts go out of business. Whether you want to call it the cost of coffee or the cost of the flour, or whatever, the bottom line is if it costs
you 1,000 dollars a month to run a business

that you only make 800 dollars on, you're
going to tell all of your suppliers, coffee,
flour or whatever, that you're out of
business. And then, just as a second point,
jumping off to that -- off of that to another
point, one of the ways that I think that we
can possibly loosen up the investment here is
to think about the way statutory damages and
the applicability of statutory damages in a
completely blanket way might be helping to
chill investment and chill innovation. I think
that there are, unlike pirates, there are good
faith actors who are seeking licensing and
they want to pay as much as they can possibly
pay to the rights owners for the exploitation
of those works. And they want to see the
system work.

And they want their businesses to
succeed. And I think as they think about the
fact that statutory damages are
indiscriminately applied to anybody who might
make a licensing error, whether or not they
are acting in good faith is a very chilling
and daunting thing to be faced with. And so I
think it's important. And maybe one of the
things that we can think about is relaxing the
applicability of statutory damages to people
who are for, you know, whatever that standard
might be or seen as good faith actors in the
licensing environment.

MR. DAMLE: Thank you, Mr. Knife.

And I'll go to you Mr. Rosenthal and then back
to you Mr. Huey.

MR. ROSENTHAL: Thank you. First of
all, you know, the issue of I'm very glad to
hear about the investment that the labels make
and that they have made and hopefully will
continue to make. Certainly there is a world
of difference between songwriters and music
publisher's world and that of the artist and
the labels. The labels have had the right
because they do exist, I think, more in a free
market to mitigate the losses because of
piracy and because of faulty licensing procedures. There is a 360 model now that all artists have to sign with major labels where the labels take a piece of live performance. Music publishers don't do that. Artists can go out, they can perform. And, if you ask major managers today, they will talk about where's the money coming from? Live, live, live. That's where the money is coming from. Songwriters like Rick don't have that opportunity. You don't do movies -- I don't think you do movies.

MR. CARNES: I don't sell T-shirts either.

MR. ROSENTHAL: You don't sell T-shirts, that's right. You don't sell T-shirts, you don't do all sorts of things that otherwise artists and labels can take advantage of to get their investment back. If you want publishers to invest more -- and they do invest in quite a lot. They do advances, they invest in IT, there's all sorts of things
they invest at. If you want to get them to
invest more, let them work in a free market.

That's how you're going to get
them to invest more. It is a Catch 22 to look
at a publisher and say you're not investing in
what's going on. And it's like, yes, because
we know that our return is going to be here as
opposed to possibly up here. Why would we
invest on a certain level with those kinds of
restrictions and that kind of future that we
have to look for? So I think that that's the
answer really to publishers getting involved
in investment more. It is really allowing them
to work in the free market. The last quick
point on the issue that was raised about fair
use and sampling. This is an issue out there.
USPTO is looking at this. I can't tell you how
much I think that this is a ridiculous,
unnecessary investigation in to a market that
already works. Digital sampling has been
around forever. It has worked. I have
represented in my career iconic rap artists.
And we have always gone out and licensed and
it has worked well. And I don't think it's
something that really we need to jump in to.
I know George Clinton, I love George Clinton's
music. I'm not quite sure we should base any
public policy on anything George Clinton says.
Thank you.

MR. DAMLE: Mr. Huey?

MR. HUEY: Thank you. So I'd like
to make really two main points. Most I'd like
to rip off what Jim Mahoney said and what Gary
said as well. I may be one of the few people
in the discussion group who has worked for
both a number of small independent record
labels and also for several tech companies. So
I have a perspective that goes across both
sides of some of the issues that we are
discussing. I'd like to speak from the
perspective of a representative of small
label. My main goal as the representative of
a small label is to make sure that if I am in
a negotiation that I'm able to negotiate
similar sales based criteria and that an apple
is an apple, an orange is an orange. The
problem that's emerged as both Jim and Gary
stated is market extortion. We have a variety
of non-sales based criteria which are
artificially changing the definition, I guess,
of for instance what a burst stream rate is.
A burst stream rate sounds very
straightforward until a whole bunch of things
are added on top of it that make the burst
stream rate meaningless. Thirty percent market
share should equate to 30 percent compensation
in some form. It may be in the form of
advances against sales.

But it shouldn't equate to 50 or
60 percent remuneration that is not tied to
individual burst stream rates. Let me give
some other examples. Jim gave several. But,
commissioning seed capital, a crazy practice
that not only contributes to the culture of
digital breakage, which does not get
distributed to artists and in many cases, but
makes the overall question of what a burst
stream rate is all but meaningless. And I
would say that that creates or it puts small
labels in particular at a competitive
disadvantage. And it creates huge barriers to
entry for new services because of costs
associated with the largest players in the
market.

I'd also like to briefly address
the DMCA. I think the DMCA started out as a
construct to allow services to enter the
market without having to bear large licensing
costs, a double gesture and probably a very
valuable gesture. But it's morphed 20 years
down the road in to a defense that's used by
the largest tech companies in some cases to
avoid direct licensing. And avoiding direct
licensing and piling what I consider to be
unreasonable takedown provisions on small
players in the market creates a situation that
is unsustainable in my mind and unfair. Thank
you.
MR. DAMLE: Thank you. I think some folks on this side of the table have been waiting quite patiently. So, we'll go to you, Ms. Coleman and then Mr. Duffett-Smith and then back to you Ms. Carapella and I'll come back around.

MS. COLEMAN: Good morning. I just want to chime in that I appreciate what Mr. Rosenthal is saying about the publishers being an opportunity to invest in the marketplace more fully given the advantages that some of the record companies had. Being both a music company — a music publishing company and a record label, you know, we see the world, you know, in a complete circle. So we look for all opportunities to market and promote both sides of the coin. We go out there and talk to people like Spotify and other lyric companies and look for ways in order to make the best of both scenarios.

We talk about our writers, we talk about our artists. And we are constantly
trying to reinvent the wheel. Music publishers really alone and aside don't have that opportunity. When we do lyric deals, things that we can do in the free market environment, we look to promote as much as possible those songs over and over and over again and those copyrights and those writers so that we can increase the amount of money that they are earning because they are making a pittance right now. And so, you know, whatever we can do in order to grow the support of the music publishing company and give them the opportunity to invest back, that's really, you know, the best way to go. Thank you.

MR. DAMLE: Okay. Thank you, Ms. Coleman. Mr. Duffett-Smith?

MR. DUFFETT-SMITH: Thanks very much. It's great we are talking about incentives and incentives both on the part of songwriters to write songs and artists to record songs, labels to make investments and also incentives for services like Spotify to
develop, invest and maintain themselves. We are competing with piracy. It's a reality that we all face on every level of the ecosystem. We are all competing with free. And so the incentives need to be there for services to develop legally, to develop legal services for the benefit of everybody.

Since Spotify's inception in the end of 2008, in aggregate we've paid over a billion dollars in royalties. And, you know, that number is increasing and we are growing. And I think everybody can agree that that's a good thing. But, in order for us to continue to be able to do that, we have to look at content costs. And I know I've said this many times before. But it is such an important point. We can't look at it in a siloed way. It has to be seen in aggregates, as Lee was saying.

To address Mr. Carnes, first point, you said you don't sell T-shirts but you do license lyrics for use on T-shirts.
That's a little misleading. The question about how many plays you need in order to make money for your studio, you do raise a very good point. The glib answer is that Spotify pays in accordance with the regs. So the 115 regs are there, they are set by law. But the reality is that it is incredibly complex. You know, the regulations are very complex. The amount of money that you receive will depend on your publishing deal. It depends on the number of subscribers for Spotify on a given month. It depends on our ad revenue in a given month. It depends on how successful we've been. It depends on your share of the compositions that we're supporting and ultimately how successful your music is in the service.

And I think as Dick was -- Mr. Huey was saying, trying to reduce this down to a sort of per stream analysis is a little misleading. You know, we've moved from a world where ownership was the dominant paradigm towards more of an access model. And that
means that applying a model that looks at the
number of sales is going to be misleading. We
should be looking instead at bringing more
money in and then making sure that we share it
equitably with everybody and that does include
services.

        MR. DAMLE: Okay. Thank you. Ms.
        Carapella?

        MS. CARAPELLA: As I mentioned
yesterday, I have spent the better part of the
last 30 years working for individuals in
technology companies, electronic companies,
education companies that want to get in to the
music space. So I represent often times
interests of people who aren't publishers or
record companies but that want to use in large
quantity that material. And I go back to what
Spotify said yesterday about sometimes the
best negotiated rate is 125 percent of your
revenue. I think it's important to keep in
mind -- I love the phrase willing
buyer/willing seller. It sounds really nice.
And this is just a quest for a level playing field. It's more of a statement. A lot of times when you're working on one of these projects it's willing buyer/willing seller, seller, seller, seller, seller, seller.

So you have to get a lot of sellers all on the same page in order to make the project happen. And that's very difficult because, even within these tables here, the record companies and the music publishers all have different priorities, all have different agendas, and all have different rates. And this is very discouraging to outside money that want to get in to this market. And it really -- talk about barriers to entry, just sitting down and explaining to some of these companies and corporations what they're likely to encounter and what the process is going to entail, how long it's going to take, and how much money they are going to have to invest in achieving what at best is going to be 75
percent of their goal, they balk.

And they go in to business in
Europe and in Japan where the time and barrier
to entry because of the collection societies,
the hill isn't too steep. And they are
creating revenue for artists and songwriters.
It would be nice if some of that in the terms
of the sound recording flushed over in to
American. But it's a huge barrier to entry,
just the way we do it. I don't know what the
answer is. I've done several of these. I have
about a 500 batting average of being
successful and then not successful. My batting
average goes up when my client is willing to
compromise. And my client has to compromise
when the copyright holders won't. So, maybe if
we looked at this collectively on that front
we could provide some answers and allow more
money in to the market that will hopefully
trickle down to the actual creators of the
content.

MR. DAMLE: Okay, thank you very
Ms. Chertokf?

Ms. CHERTOKF: Hi, I wanted to respond to what a number of people said. So I'll try to go around the table. So, starting with what Cathy was saying, I think that's one of the points that we've been trying to make, that the current system really is overly complex and confusing and that the confusion and the just kind of fear factor that it puts in to investors that want to get in to this space is deterring investors, is sending people overseas or elsewhere or in to other lines of business, which isn't good for anyone.

It's not good for songwriters, it's not good for artists, labels or publishers or digital music services. And that's why we have proposed is to something that would simplify licensing. And it also goes to what Dick was talking about in terms of chilling investment. Let's see, to respond to what Jim had said, as far as the ways that
the independent labels view major labels as leveraging their assets in a way that you don't find appropriate. You know, we think in a free market that business people aught to be able to get the best deal that the market will bear. And major labels happen to have great catalogs. And they have a lot of recordings and artists that services really want and that consumers really want to hear. And I guess the question is, you know, are you proposing that we shouldn't make the best deal that we can make? Are you also suggesting that we would be limited to per-play only deals, which I think James just said a per-play model is a sales kind of model. So those are some of the responses to Jim's comments. I guess to Jay, I'll pick on everyone equally. (Laughter.) It's about the 360 deals. That's just a very sweeping statement. And I don't think it's really true. I think there was a moment in time when things sort of shifted
towards 360 deals. But it's not my understanding that that's the way most artist deals are being done these days, at least at the major labels.

So that's just an overly broad statement. And, yes, you were talking about how labels have the opportunity to mitigate risks because we are in a free market. Well, the way that we do that is that we work with digital music services and license new business models and new services. And we keep pumping investment in to the system. And, let's see, for Lee, as far as statutory damages, our question or our response to that is how do you want to address notice and take down? Because they seem to go together. You can't change the statutory damages system without making notice and take-down a more effective way to protect your rights. And let me see if I had anything else. Oh, and then to the -- I guess it's Lee and James are talking about the siloed licensing system. We think
that our proposal really addresses that. What we have proposed is that the musical work rate would be a percentage of what the sound recording rate is and that that rate would be determined through free market negotiations between labels and publishers.

I think Steve said yesterday if a percentage isn't the way to go some other kind of metric. But, if you have that kind of system, then a service that's negotiating, it has the ability to calculate in advance what their total content cost would be because one is related to the other in some sort of noble way. I think that's it.

MR. DAMLE: Nothing for the Copyright Office?

(Laughter.)

MS. CHERTOKF: No, you're all good.

MR. DAMLE: I'm going to go to Mr. Raff and then Mr. Barker, who haven't had a chance to speak at this panel. And then I'll do a lightening round for everybody, just
because we are running short on time. I'll
just say that I think we're going to talk a
little more about RIAA proposal and some of
the responses to it. As I understand some
people want to make some responses to that in
the last panel of the day. Okay, Mr. Raff.

MR. RAFF: I'll be brief to allow
everyone to respond to the RIAA. But
especially we are a two-sided marketplace for
among creators. And we are fairly new to the
music space. And, one of the things that we
are seeing is that the other creators who are
interested in using music and bringing
additional money in to this ecosystem are
looking for a lot of certainty and simplicity
and want to know how much it's going to cost
to license something and how much they can use
it. And whether it's going to be so film
makers, designers, advertisers, et cetera, the
more that we can make it easy for them to
license music and not have to negotiate
individually with each writer and publisher
and label who is on the track, the more licenses they will generate and the easier it will be to get more money flowing in to the music industry, the system.

MR. DAMLE: Okay, thank you. Mr. Barker and Mr. Albert, I see you too. You haven't had a chance to speak. So you're not restricted to my lightening round rules.

MR. BARKER: Thank you. I want to touch on really about three things related to some of the things talked about.

One is we are competing with piracy. I think we have all understood and agreed with that. At another panel somebody had said what's the value of music? And the answer was whatever the market will bear. Obviously since we are competing with piracy, that's a little bit of a difficult question to answer. Last week in LA I had a very successful and smart songwriter send me an email that he called simple math.

And I've not checked the simple
math. But his math was how much the industry made at a particular point and how many people participated in that. And his simple math led to a number of approximately 35 dollars per year per music consumer. Whether that's true or not or how far base off I don't know. I'm not here to defend that. But it struck me, whatever that number is and however we come up with that, it's probably a lot lower than it needs to be and it's a lot lower than it used to be. And yet today we seem to have more music available to more people than ever before. So I think one thing that we're talking about, which I agree with Mr. Duffett-Smith when we said the idea is to bring more money in and then let's figure out how to split that. I want the Spotifys to succeed as representing songwriters and publishers and owners of copyright. I want to see services succeed that way.

And I think we all need to figure out how to bring whatever that number is up.
and how to deal with piracy. Now, with that in mind, I want to kind of suggest that, from my perspective we kind of back up a little bit. A lot of what we're hearing in the panels is that, in order to create a new business, we need access to all the music. My question is, who are we trying to facilitate? Are we facilitating the owners? The content owners? Even though we may not like to use that word. The creators? Or are we facilitating the providers? Because it seems like it's a given that in order to start a service or a company you must have 100 percent of the content available.

Susan, you just said something that I'll challenge a little bit. You suggested your rate be the RIAA proposal of a percentage of a rate, I would argue that and I'm not on the last panel so I'll put my argument in here. The value of a song is hard to determine if it's the percentage of something that's already existing. For
instance, I may have a new song that is unknown and it has very little value when I attach it to a recording. But ten years later when that song is a very well known song and another artist, a new artist who has no value wants to record my very successful song because it will help their career, why should I not as an owner be able to charge a higher rate for that.

So a tethered percentage or whatever we will, to a license for the value of a song is what I would have an argument with. I think the songwriters and the owners should have the ability to say no to a service or to a use and should have the ability to charge more. So my question really is here -- and going back to the licensing of all services, easy licensing as we've heard, does not necessarily mean all licensing. It does not necessarily mean 100 percent. My question to any of the DSP or service providers or entities around the table would be -- and this
is something that Ms. Charlesworth asked, I
think the last session, maybe in general, and
I'll rephrase it. But, would there be any
services here that could start up and not be
successful if they had at least 90 percent of
the content available. Is it necessary to have
100 percent? Or could you make just as good a
business having less than 100 percent? And
I'll throw out 90 percent.

MR. DAMLE: Okay. Thank you. Mr. Albert?

MR. ALBERT: Thank you. Let me start off by saying that, you know, despite
the complexities and despite the challenges of
the copyright system, the U.S. Copyright
system -- and we are based in Canada and we
operate in just over 100 countries. So we do
have a couple of comparison points. The U.S.
system is actually not as bad, you know, it's
not perfect, but it's not bad. It is possible
for services to come in mainly because of the
compulsory licenses and the blanket licenses
that are available to the ASCAP and SoundExchange and so on. So it is possible for outside services to come in. Where we are challenged is once we start doing direct licensing deals with the labels and with the publishers.

Stingray is not a Spotify, it's not a Pandora, you know, we don't have the clout, we don't have the negotiation power, if you will, that these companies have. And, once you start negotiating with the majors and the independents as well to a certain extent, it is very much challenging. So I agree with what Cathy said. You know, going out and doing these deals when you don't have the checkbooks, when you don't have the resources that some of these other companies have, makes it very difficult if not impossible. So anything that can help and simplify that and make it easier for smaller companies, will benefit the industry at the end of the day.

Because it is already very
concentrated in terms of revenue share, in
terms of who is doing the business. Having
smaller players coming in to the industry can
only be good for everybody because it's going
to, you know, fragment the revenues and it's
going to avoid monopolistic situations.

MR. DAMLE: Okay. Thank you very
much. Okay, now we're going to have our
lightenning round. So, if you could, limit
yourself to just one or two minutes at most,
that would be very helpful to us in keeping on
schedule. So I'll start with you and we'll
just sweep around. Ms. Carapella?

MS. CARAPELLA: I like also to hear
the term best deal, best deal as in, you know,
you've got two sides, three sides of the
table. What is the best deal from an outside
entity? Labels, PROs, and publishers are all
one entity. So a best deal is a deal that
allows the project to get off the ground,
allows the educational company, technology
company to market their product, to make it
successful, to grow like cable television did in America, and become 20 years down the road something that's much more successful than it was at its startup. But, if they are hammered by costs that don't allow that to happen, they never get on to the playing field. And that, 20 years down the road, is revenue that was never received. So just think about what the deal is when these people come to you.

Startup costs are expensive. You want these people to have an audience. You need to look 20 years down the road, not at the next quarter or the next semi-annual P&L sheet.

MR. DAMLE: Thank you. Mr. Knife?

MR. KNIFE: Lighting round! Really quickly, just addressing some of the issues that were made replying to Ms. Chertokf. The DMCA and statutory damages are -- while they are obviously related because they're all part of the same statutory construct, they are very
remote from each other. And I certainly wasn't suggesting that anybody should be absolved from statutory damages. I was saying that we should be thinking about creating a rule that says good faith actors that are obviously simply trying to license should probably not be subject to the potential of statutory damages for simply having made a mistake as a part of their attempt to get complete licensing.

MS. CHARLESWORTH: Mr. Knife, could you elaborate a little bit on what you mean by good faith actors and what -- are you talking about sort of a safe harbor or what's your concept here?

MR. KNIFE: I'm not married to any particular concept of how it would be applied. But yes, something like a safe harbor. In other words, I mean, I think it speaks for itself. I'm not prepared to, whatever, articulate exactly what the standard would be. And maybe it would be left up to judges or
maybe there would be some kind of guiding principles. But again, the point I think is to have a indiscriminately applicable statutory damages regime that doesn't take in to account the distinction between an obvious bad faith act, right, a pirate, and somebody who is simply trying to make sure that they have completely licensed the entire catalog that they want to exploit, would be, I think, beneficial to making sure that an invest continues and that services continue to launch.

MS. CHARLESWORTH: Thank you.

MR. KNIFE: And then, so apologies, just answering Mr. Barker, you know, you asked a good question. And I think Ms. Charlesworth asked it in an earlier panel. You know, is it feasible for a service to launch with less than, you know, the full catalog. I think it's important, the way you phrase the question I kind of think indicates a little bit of the perspective. It's, I don't think, you know,
Mr. Duffett-Smith's company or Pandora, or anybody else, they're not seeking to license the entire catalog so that they can put it on a server and then disconnect that server from the internet. It's not the services that want the catalog.

It's the consumers. It's the marketplace that wants the service to provide the catalog. And so, yes, the ideal is to have the full catalog. I'm not going to speak for Duffett-Smith, but I think he's just shy of complete catalog. And I would imagine that he, you know, is valiantly trying to get as much material as he can on a service to make it that much more attractive for all consumers. So that's the driving force. It's not a service. A service in and of itself doesn't have a desire to consume these musical works and just hold on to them. We are trying to make them available to the consuming public that is making an obvious demand for them.

MS. CHARLESWORTH: Right. But I
think, just to follow-up, I mean, the question is, you know, can a service launch if it doesn't have 100 percent catalog? And is there some, I mean, maybe this is better direct to Mr. Duffett-Smith. I mean, my understanding is you don't have a complete catalog and that there are certain major artists that are not on Spotify. And yet, there you are, and you are considered a success in terms of the current marketplace. So I'd be interested in your thoughts on that.

MR. DUFFETT-SMITH: Sure. I mean, you know, whether you want 100% catalog coverage or not obviously depends on the type of service that you're trying to build, right? In the case of Spotify we are competing with piracy where everything is available for free. So yes, we do want to try to make sure that we have 100 percent if possible. And we work very hard every day to try and make sure that we have the best catalog that we possibly can.

Because, as I said, the
alternative is it's there for free, it will be pirated. And that's not good for anyone. Just, if I may, you mentioned a figure of 35 dollars per consumer per year. I've heard other numbers. I hear 50 dollars sometimes. A Spotify subscriber pays 120 dollars per year. So your number, that's nearly four times the amount. We now have over 10 million subscribers globally. So put those together and that's a lot of money that we are returning to the industry.

MR. DAMLE: Okay. Thank you. Ms. Chertokf?

MS. CHERTOKF: I'll try to make it quick.

MR. DAMLE: Yes, please.

MS. CHERTOKF: I only have a couple people to pick on this time. A quick response to Lee is statutory damages are already on a sliding scale, that's already in the statute. And then to John, your issue about writers wanting to be able to negotiate for their
songs, I think there already is an opportunity to do that at first use. I don't think it happens very often. But, at the point of first use writers are free to negotiate and they are not bound by the statutory right. But, on this issue of 100 percent catalog or 90 percent catalog, the point I want to make there, as I understand what you're talking about, you're not talking about whether songs are out, which is really a record label issue or an artist issue of withholding a song. You're talking about individual writers having a right to say I don't want my song there. And the issue that that creates is that, we've already discussed, is that most songs have fractional ownership.

So, let's say you have a song that has ten owners and then there is an artist. So the artist wants it on Spotify and nine of the ten owners want it on Spotify. You're talking about creating a situation where one owner would be able to withhold that song. And, I mean, I can let Spotify talk to that more than
me. But I don't see how that's workable when on the songwriter side you're talking about fractional ownership.

MR. GIBBS: I have to disagree with that. I mean, when you make a song you're collaborating with a bunch of people. You're in a room, you're making the music. You're a team at that point. And if the team -- if someone on the team decides that what's happening for the team isn't working, they have that right. You know, just like if you had a business and you had a board and the board decides they don't want to make a move, they have that right. I have to disagree with that. And I also have to disagree with this idea that the profits, the money to the creators should trickle down from the top.

Yesterday you mentioned it. I thought about the Giving Tree. I don't know if you people know that book. It's a story where there's a tree and the kid keeps asking for pieces of the tree. He builds a house. He
raises a family, he becomes old. And at the end the tree is gone. The tree gives up everything so this kid can live. That's what's happening with creators in the music business. You keep pulling pieces off the tree and now we are down to a point where we are literally -- the calculation for Spotify is literally in the thousandth of a penny, right? That's where we are. So you're looking at billions of dollars on one side, a thousandth of a penny on the other side. That is just not going to work. I mean, we talk about market distortion. From our standpoint it's great. Some markets are failing it, or not getting paid. So, if we are going to talk about all these things, we have to talk about the failure as well. As far as -- what else do we have on here? It's an ecosystem, you know? You can't really talk about all the other pieces without making sure that the thing that's fueling the system is working. And I literally tell people not to get in to the music business. I mean, I
literally do that.

So, if everybody in this room wants to talk about the music business happening, we really have to make sure that the starting point continues. I mean, all this other conversation is great. But, if I've got to tell my people they should go in to another line of work, what are you guys going to do in five years? Every piece of music is going to be amateur content, you know? I mean, if that's what you guys want, that's what you're going to get. You know, as far as the 360, I mean, right now Lady Gaga's contract is floating around.

She's pretty popular.

She's got a 360 deal. It is still very prevalent. And those are my main points.

MR. DAMLE: Thank you. Mr. Barker?

MR. BARKER: I can do it real quick.

MR. DAMLE: Okay.

MR. BARKER: Okay.
Susan, on your two points, let me first say, on the first right, while that's nice, I have no idea what the value of the song is on the first right because it's yet to be recorded. If I have a song, Come Fly With Me, today I don't know at my first right that it's going to be that kind of song. Today I do. So, if the first right to value it accordingly doesn't work, we have to have the right after that.

For the fractional ownership, understood, good question, I guess. And I may differ a little bit with Mr. Gibbs on this in that something I've thrown out at earlier panels is perhaps we could look at this if there are multiple owners that a majority of owners would be able to facilitate a certain license. Now, I'm throwing that out there because, you know, to comment to Mr. Gibbs, when the creators are in the room together they kind of have an idea what they're coming out with. And they may know that a 10 percent
guy only has 10 percent. And yet he may not
have the right -- maybe he shouldn't have the
right to hold up the whole song. But he knows
not to enter in to the room with those writers
again if he chooses not to do that. So I would
say there's a way to handle that so that a
song cannot be hijacked by a minority holder.

And my last point, going back to
the 100 percent versus 90 percent. I think the
issue, and I just want to remind us all, the
issue here is, for Spotify you clearly know,
based on the record companies, which records
you don't have, because it's clear that you
either have or have not negotiated a deal. I
think under 115 you kind of say, okay, I have
rights to everything. And if we get rid of 115
then the big question is, well then who is in
and who is not in as far as the song owners.
So I think the question for the 90 percent is
not so much I've got to have 100 percent to
start a service, but if I'm only going to have
90, when it comes to the songs I have to know
which 10 percent are not a part of this. So, as a service you don't have that liability. And I think that's the other conversation of how we are going to change, potentially change licensing structure under 115 so that we will be clear to know who those outliers are.

MR. DAMLE: Thank you. We are just -- the lightening round is not so lightening.

(Laughter.)

MR. DAMLE: We are running quite behind so I just want to reiterate if you keep your comments short. We'll get through everyone. Okay. Thank you.

MR. CARNES: I'll do my dead level best.

MR. DAMLE: Okay, thank you very much.

MR. CARNES: To Ms. Carapella, I completely understand the complexity and the difficulty of trying to get in to the music business. And, because people can't get in the music business, we all hurt, we all suffer.
Actually, I'm trying to buy a rock quarry, that's the ultimate thing. It's simple, it's straight ahead. But, being a songwriter, I have a whole basket of rights. And every one of those rights equals a revenue stream for me. And, because I'm making -- this goes back to the value and goes back to piracy.

Because I'm making so little on each one of those rights, I desperately need to hold on to every one of them. And so that makes it a more complex system, okay? But then we start talking about, okay, we're not making enough over here, let's look at collective, you know, licensing. Let's look at direct licensing versus the blanket licensing. That's going to create more complexity if we go to direct licensing, okay? But it all comes back to the fact that we're not making enough money, okay? And that goes back to piracy. And I want to tell Lee, you can say all day long it is what it is, but it is not what it is. It is what it shouldn't be, and it needn't be
that way if we could just get a small claims court -- which I want to come back to.

There's our answer right there.

Let me personally defend my property, not in a federal case, but just my property right in some sort of arbitration opt-in system. Give me a small claims court, then we'll start talking about getting Spotify rights up because they are not competing with piracy any more. I need every one of those rights right now, just to survive. And that's why the system is so complicated, okay?

MR. DAMLE: Thank you. Mr. Rosenthal?

MR. ROSENTHAL: For Susan, I think that what you're doing here with this study and with your points about, you know, the value of what the labels put in to sound recordings and to artists as opposed to what publishers do, is that you are already kind of in front of your proposal and arguing already what is the value between the sound recording
and the musical composition. I think that's pretty presumptuous because we haven't bought in to that idea yet. So later on we will discuss your proposal and we'll talk about whether that makes sense or not. So the issue of, you know, how much you're doing, is really, you know, not really relevant right now in comparison to the music publishers.

The point that I made before is that in a free market system, as we are talking about here, the incentives would be much better for publishers to put money in to it when they know that the value that they are getting is fair and that they would basically understand that there's not a cap, that there's not a preventive for making back their investments. So that's something we'll discuss later in terms of, you know, your ideas in moving forward.

One issue with Spotify. And this is a positive thing. Of all -- you know, there's a lot of controversy with artists in
particular, but songwriters as well with Spotify. And yet there are some folks out there who have a lot of faith in Spotify.

INgrooves is a great digital aggregator. Their president has publicly stated that he has faith that your business model will eventually come around to paying artists and paying songwriters what they think that they should be paid in a fair and free market.

And I think that shows that all these services are not the same. I think that your business model is a better business model in the context of upward mobility. Others are not. And again, this gets back to publishers also have to have the right to deal with different licensees, because each service is different and we assess them differently. And we'd love to be able as publishers in general to be able to be in a system where, hey, maybe we like Spotify, maybe we'll even invest in that, just like the labels do on their side because they are in a free market. That's my
MR. DAMLE: Thank you. Mr. Duffett-Smith.

MR. DUFFETT-SMITH: Thanks. Well, thanks Jay, that's very kind. To Mr. Gibbs and talking about professional songwriters, we, Spotify absolutely wants that. You know, we want a system where people can make a good living from doing what they do best, songwriters, artists, services. And that's why we are a legal service. That's why we play by the rules. You know, we want a thriving music ecosystem. I liked your tree analogy.

That was great. But, you know, the music services are also a tree. There is only so much wood on that tree. And if you take away all the wood then there's nothing left. There's nothing, you know, there's no fruit for next season or however you want to extend the metaphor. In terms of paying thousandths of a penny, you know, as I said to Mr. Carnes, it is a very complex thing, these royalties
are very, very complicated. They are very complex in this jurisdiction. They are very complex overseas. The system is Byzantine.

I don't think anybody would disagree with that. But it means that it's not reducible to simple sound bytes. You know, in order to properly understand it, you need to take a little time to look at it. And I fully accept that it's difficult and the transparency isn't there. But that's something that we'd like to work towards improving.

MR. DAMLE: Thank you. Mr. Mahoney?

MR. MAHONEY: Thank you. So I learned in the last couple days that it's really important to at least once bring up on these panels fair market versus free market. That hadn't come up yet. And that is to Ms. Chertokf, I absolutely support rights holders negotiating their best deal. I also agree that your members of the major labels have great catalogs, because amongst their catalogs that they are representing in their negotiations
are many, many independent labels who are
distributed through the majors.

What I have an issue with is when
your members are negotiating compensation
packages in their direct digital licenses that
take some of the money and some of the
compensation and not pass it through to their
distributed label partners and the artists.
And that would be my quarrel with that
position. But, as is common with the smaller
players in the world, we are always looking
for allies. And we would much rather work with
you then have this squabble. And so our
solution, our suggested solution is to allow
more services to operate within a compulsory
license. We can point to a really healthy
segment of the market, the non-interactive
streaming market of Pandora, - SiriusXM and
how well that's working when we all can work
together on coming up with the rates that
these services should pay. PARTICIPANT:

Somebody has to say this, I will buy a Rick
Carnes T-shirt.

(Laughter.)

PARTICIPANT: But it's got to be willing seller, willing -- and we're running really late. And obviously Jay and I disagree on sampling. I'm sure we'll have another forum to air that out. Just, thank you for hosting this.

MS. CHARLESWORTH: Okay. Well, thank you all. And I guess we are going to resume at what time?

MR. RILEY: At 11:25?

MS. CHARLESWORTH: Yes, 11:25.

(Whereupon, the above-entitled matter went off the record at 11:19 a.m. and went back on the record at 11:32 a.m.)

MR. DAMLE: Okay. So this is our panel on pre-'72 sound recordings. Before I start I wanted to give an opportunity for those who are new to the panels today a chance to introduce themselves. And I will admit I don't know who you are so if you could
volunteer.

MS. CHARLESWORTH: I think Casey, do you want to reintroduce yourself?

MR. DAMLE: Yes.

MR. RAE: Casey Rae from Future Music Coalition. We are a D.C. based advocacy education and research organization for musicians, copyright pragmatists here to enjoy the discussion.

MR. DAMLE: Okay. Mr. Samuels?

MR. SAMUELS: Thank you for having me today. My name is Jon Samuels. And I am, unlike most of you, I am not an attorney. I am a reissue producer and engineer. And today, as pompous as it sounds, I am here to represent the public.

MR. DAMLE: Great. Ms. Finkelstein?

MS. FINKELSTEIN: I am Andrea Finkelstein and I am a Senior Vice President in Business Affairs at Sony Music.

MR. DAMLE: Professor Besek?

MS. BESEK: Hi, I am June Besek. I
am the Executive Director for the Kernochan Center for Law, Media and the Arts at Columbia Law School.


MR. MERRILL: Hi, Tommy Merrill, the Press House here in New York and Nashville. I also work with the #IRespectMusic campaign. I'm excited to hear the conversation today.

MR. RUSHING: Hi, I'm Colin Rushing. I'm the General Counsel of SoundExchange. We administer the statutory license used by digital radio services. And that license is implicated by the Respect Act, which addresses pre->72 sound recordings, which is why I'm here.

MR. DAMLE: Great. I think the rest of you have been on earlier panels here today. So, as you all know, in 2011 the Copyright Office issued a study on pre-1972 sound
recordings and recommended full federalization. And, as Mr. Rushing mentioned, there's pending legislation in Congress that takes a more incremental approach. So, one question for all you is, given what's happening in the marketplace now, what recent developments should we consider, should we highlight for Congress as it considers the benefits of extending federal copyright protection to pre-1972 sound recordings. Mr. Samuels?

MR. SAMUELS: I have a statement here I'd like to read which does answer your -- thank you. I have a statement here I would like to read that for the part answers what you just asked me if you permit me. I want to throw out a few names for you. Homer, Plato, Virgil, William Shakespeare, Ludwig Von Beethoven, Emily Bronte -- and as was mentioned yesterday -- Samuel Clemens/Mark Twain. Name one thing they all have in common. They are all long-dead creators whose works
now belong to the public. Now I want to throw out a few more names. John Philip Sousa, King Oliver, Big Spiderback, Edvard Grieg, Charlie Patton.

These are all long-dead great recording artists whose creation belongs to the record companies who rarely, if ever, release their recordings to the public, and whose recordings will remain in copyright for at least the next 53 years. In Grieg's case all of his recordings will be in copyright in this country for a total of 164 years, even though they were made in France and are out of copyright there. Just as a basis for comparison, in the E.U. they have been out of copyright since 1953, over sixty years ago, longer than many of us here have been alive. I have sat in the audience here for two days and I have really been quite impressed.

You clearly all represent your constituents very ably. I doubt I can match your facility with language or your command of
the facts. But I did notice that there has
been one viewpoint that has been sorely
lacking from this discussion. Nobody has been
representing the public.

Congressman Nadler is a man I have
long admired and, as a matter of fact, at one
time used to be my representative. Yet,
truthfully, I was disappointed by his speech
yesterday. He talked about the Respect Act,
which you mentioned. In my view a shoddy piece
of legislation that deals with only one small
area of pre-1972 recordings.

And it really only protects the
rights holders and not necessarily the
creators. He never mentioned the public
domain. He should have. There's a reason it's
called that. Article 1, section 8, clause 8 of
the United States Constitution empowers the
United States Congress to promote the progress
of science and useful arts by securing for
limited times to authors and inventors the
exclusive right to their respective writings
and discoveries. The earliest recordings currently in copyright date from 1890. And, assuming there are no further extensions, go out of copyright in 2067.

That's some limited time. Did you know that almost everything written before 1923 is now out of copyright and in the public domain? Conversely, did you know that virtually everything recorded before 1923 is now still in copyright and not in the public domain? A number of you have mentioned fairness and doing what's right. I fail to see what's fair and right about this discrepancy that recordings made more than 50 years before most of us were born will go out of copyright after almost all of us here will be dead and gone. I mentioned Edvard Grieg before. He was born back in 1843. Assuming his descendants are still alive, the oldest surviving would be his great, great grandchildren. Yesterday Mr. Kohn made mention of the fact that your representatives of your organizations are
being well paid for --

MR. DAMLE: Mr. Samuels, I'm just going to, I mean, I don't want to cut you off too soon. But, if you could just try to wrap it up so we --

MR. SAMUELS: I will do --

MS. CHARLESWORTH: You can submit that in the reply comment period. But we are trying to have a --

MR. SAMUELS: I will submit it, but I'd like to read at least a little bit more if I may.

MS. CHARLESWORTH: A couple more sentences and then I would recommend that, since it's in writing, that you submit it in the reply comment period and just sort of sum up, if you can sum up your point.

MR. SAMUELS: If I can turn the pages, that is.

Section 307(c) of the 1976 Copyright Act needs to be repealed in full and not piecemealed simply to benefit
organizations such as the RIAA. Recordings made before February 1st, 1972 should be brought under federal copyright laws and protections. Ideally, in my view, the length of copyright for all recordings should match the E.U.'s 70 years and record companies should be required to use it or lose it for recordings over 50 years old. At the very least pre-1972 copyright terms shouldn't be more than the 95 years that exists for recordings made after that date. Thank you.

MR. DAMLE: Thank you, Mr. Samuels.

Professor Besek.

MS. BESEK: I believe that pre-1972 sound recordings should be brought under federal law in the interest of owners, users and the public. A number of comments in this proceeding have suggested that pre-1972 sound recordings be brought under the compulsory license in section 114. On the other hand, if any of you were -- and I'm sure many of you were -- participating in the pre-1972 sound
recording study you'll know that there are a number of folks who just as strongly argue that they should be brought under federal law only for the purpose of certain exceptions. And, the fact is that it's unrealistic to go either route. What we really need is a balanced approach, which is why they should be brought under for all purposes. I know that some people would like to cut off the term. But there are takings issues, as the Copyright Office report observed. That doesn't mean that it can't be done. But it does suggest, certainly to me, that you can't automatically cut off the terms of these older recordings. The Copyright Office had a very constructive proposal for how to bring this about. And I think that that probably should be done. Just one more observation I want to make is that the states currently don't recognize a public performance right for the most part. This is something that could be the subject of an article in itself. They
certainly could do so if they chose, at least in many states, because courts sitting in common law have a broad ability to fashion relief. But that certainly isn't true across all states. Some specifically prohibit a public performance right for sound recordings. And some have a civil law based on their criminal law, which refers only to public, excuse me, to reproduction and distribution. So, if we are going to recognize such a right federally, it should be as part of a federal copyright that these pre-1972 sound recordings get. Thank you.

MR. DAMLE: Thank you. Mr. Rushing?

MR. RUSHING: Sure. So I want to talk sort of with respect to Mr. Samuels' comments, the Respect Act that does address a very specific problem. And it's not really intended to talk about the scope of the public domain and what should or should not be in it. I believe that's sort of a separate question that's worthy of discussion and interesting
sort of consequences. But the Respect Act is intended to address a really specific issue. And it is the way that the statutory license is supposed to operate. And so, Ms. Besek referred to the possibility that there are performance rights implicated within, under state law for pre-1972 sound recordings.

That's an open question, actually, that's being litigated in a number of cases right now. So it's not yet been determined. There are other rights implicated by digital radio services, including in particular making of copies and things of that sort. The reproduction right for pre-1972 sound recordings is very well established. And other data point is, when you have directly licensed services, my impression and understanding is that this distinction between recordings protected by state law and recordings protected by federal law really doesn't exist. It's not an issue in the economics and the practical sort of day-to-day. So what we have
here in the context of the statutory license that we administer, is really a problem. The problem is this. That license is supposed to be a one-stop shop for users of sound recordings who are not supposed to have to worry about how to go about clearing the rights in the sound recordings that they want to use. They are supposed to be able to rely on the statutory license to take care of all of that.

Because of this sort of odd quirk in the law that I think was frankly overlooked or not paid attention to in 1995, there is this open question about where pre-1972 sound recordings fit in to that overall system. And it creates a couple of problems for the people who use these recordings because, one, they have to worry about getting the state law right, if state law rights are implicated. Two, it’s not always clear whether a recording is protected by state law only or if it is also protected by federal law.
Because of the Berne convention and through things that I don't fully understand, but some foreign sound recordings recorded before 1972 are, in fact, federally protected. And then, similarly, it's possible for a recording first made before 1972 to be sufficiently re-engineered that it could enjoy federal protection. These are the sorts of questions that users of sound recordings are, frankly, not supposed to have to worry about when they are using the statutory license. The other important policy point relates to the way that artists are treated and the statutory licensing system.

One of the purposes of the overall system is to ensure that artists participate directly and immediately in the royalties generated by digital radio services using the statutory license. We have a whole, you know, a whole -- the legacy artists, the people that created the music that our industry is based on, because of this quirk in the law that I
think no one intended, don't have the clear
ability to participate in that under the
statutory process. So I think there is a
simple fix to this particular problem, which
is laid out in the Respect Act, which is just
to make it clear that the sound recordings are
in fact part of the statutory licensing
system. It doesn't foreclose tackling these
other more complicated issues. To the
contrary, I think it tees those up more
squarely. But it can close this specific
loophole and, frankly, codify the practice of
a great many services who operate as if the
statutory license does cover those sound
recordings.

   MR. DAMLE: Thank you. Well, Mr.
   Rich I'll call on you. And then I actually am
not sure. I apologize, I am not sure. Is Ms.
Griffin next?

   MR. RICH: Full disclosure, we are
representing both SiriusXM and Pandora in the
pre-1972 state law actions that are pending in
five different jurisdictions, in California, New York and Florida.

Starting with the Respect Act, at least as I parse it and understand it, and I think Colin is not disagreeing, it presupposes a procedure and a statutory administration mechanism predicated on the premise that there is a there-there in terms of the existence of a state law precedent for sound recording performance rights. I couldn't agree more with June Besek. There is no such state law right; the Copyright Office report on federalization acknowledged, at pages 44 and 45, the same general conclusion. And it is, I think, wishful thinking to be yet determined by judges who have the final say, not us, that in fact there is there-there as to state law. And so, it seems to me at best premature to debate the merits of a procedural structure for collecting sound recording royalties, the predicate for which is an assumed state law right when that very premise
is completely shaky, if not utterly
fallacious. So I for one puzzle over the
timeliness of the Respect Act. With respect
more generally to the suggestion that there
ought to be full federal copyright recognition
of pre-1972 recording performance rights,
which is closer to the position that the
Copyright Office has espoused, that's again a
complicated question as to public policy.

We're talking about sound
recordings that are more than 40 years old,
that were created, marketed, exploited, all
with no expectation of any such performance
right associated with them. Many, many, many
have had extraordinary commercial success over
their lives. And, equally importantly from the
standpoint of copyright policy, when one
thinks about first principles of copyright
law, which is first and foremost to stimulate
the creation of new works of authorship, by
definition that very premise doesn't fit or
apply to works which were created 40, 50, 60,
as long as 100 years ago. And so, I think there is ample room to question the societal need in terms of expectations of creators, in terms of furthering the purposes of copyright law. And I think those are very consequential questions as this issue is debated.

MR. DAMLE: Ms. Griffin?

MS. GRIFFIN: Thank you. From Public Knowledge's standpoint we support federalizing pre-1972 sound recordings and preempting state laws in large part because the public loses out when services can't properly license because there's uncertainty or there's, you know, as people have already mentioned, there's ongoing litigation. And there's still a lot of questions up in the air about who needs to give permission, who needs to pay, how much. And all of that I think kind of chills innovation from new services entering the market, particularly online services that are operating obviously across the entire country. So, for that reason we
think that we should federalize pre-1972,
preempt state laws with some provisions that
kind of account for the fact that we are
retroactively federalizing rights.

So we would need, for example, I
think some time of mechanism to help figure
out who the owners are of these rights, and
particularly giving ways for authors to come
forward and say, here I am, this is my right
and this is who you pay or who you talk to get
permission. I think we should look at what the
terms would be. Public Knowledge has proposed
a lifetime term to make sure the artists are
still compensated but we're still maximizing
as much as possible the public's access to
cultural works. And I think we need to look at
damages, particularly for people who have been
-- who maybe are relying on certain uses and
particular states right now that are now going
to be undergoing some sort of change in how
they need to get permission and who they need
to pay when they continue the same uses after
federalization.

In terms of the Respect Act, we support the effort to try to get these works under federal law in some way. But we weren't able to support that particular law because I think basically federalization is important and it's worth doing right. So we should do it kind openly and put the right in 106 and apply all the limitations and exceptions. And, in particular I think that another principle we are always talking about is technology neutrality. If we are talking about just the 114 license then you're just talking about a particular set of licensees and you're not talking about all the other uses that may come in to play for these recordings. And also I think that artists are kind of losing out there.

Because, if there's kind of a pseudo-right under this condition for 114 license, you won't, for example, necessarily have a termination right as the author because
it's not part of the 106 rights that you get. And so I think that, both from the consumer side and from artist side, we would benefit from just doing federalization right, doing it in a comprehensive way, instead of just adding it on to a condition of one type of license.

MR. DAMLE: Okay. Thank you. Mr. Rae?

MR. RAE: Thanks. So the history here I just find incredibly fascinating. A couple of points that Mr. Rich made that I thought were curious and/or provocative, one of which is the fact that the incentive to create new copyrights isn't present in pre-1972's. I mean, I'm a musician and I've got to tell you, I pretty much create everything premised on pre-1972's. So I'm incentivized to create because of the existence of these works.

And therefore I feel morally obligated to do something about the performers who created them or, in my opinion, very much
as deserving as anybody else who makes music in today's marketplace. You know, getting to the feature part of this, last night we talked a lot about registries, databases, unique identifiers. And my head almost exploded. But, when I think about the path to better data management in informational technology sharing and so on and so forth, I think that federalization has to be achieved or else we won't have the proper enumeration of ownership of these very valuable older works. So I think that's another imperative for us to want to solve this problem in a bigger way than just the stop-gap measure.

Obviously there's clarity for other protections and exemptions, including safe harbors, which no one has brought up yet. Termination, obviously, is a big one. And just the ability to enforce these rights under 106, which all rights holders enjoy. Whether the stop-gap measure would be predicated on state law or the digital public performance right is
above my pay grade. But I don't think it's
crazy to think that we could do a temporary
fix to this. I would prefer not missing a
third chance for Congress to give legacy
performers their full protections. I think it
would be an absolute missed opportunity as we
are talking about all these other moving
pieces in the Copyright Act to not approach
full federalization. In the meantime, the
Respect Act is probably better than litigation
and liability because we can't have a
marketplace where this music continues to have
value and people want to hear it and have
issues of questions of, you know, the ability
to perform this music to those audiences.

We already have an asymmetrical
and unwieldy act. That's why we are here right
now, because we are complaining about that,
you know, from our different perspectives and
quarters. To me the fact that we could achieve
partial parody for digital public
performances, you know, that might be good.
But it still leaves out terrestrial. So we still have an incredibly -- we still have an unwieldy system that doesn't reflect true parody. It was a long time ago that I read the Copyright Office recommendations on federalization. So I don't hold it all in my head right now. I probably should have stayed up reading it again or something.

But I do appreciate that it took time to try to resolve issues around public domain taking and termination. And I think that, at the very least, it provides a road map should Congress decide that it doesn't want to skip this issue for another 15 to 35 years, which I think it would be really, really unhelpful as we are considering all the other issues that relate to updating the Act.

MR. DAMLE: Thank you. Mr. Mahoney, I think you were next.

MR. MAHONEY: I'm not an attorney.

And, for that matter, I will probably reveal some ignorance here when I say that there may
be a valid reason to have a discussion about length of copyright in the United States. But I don't think that we are near a point where anyone would suggest that that length be shortened to 42 years. That said, one needn't be an attorney.

One only need to turn on SiriusXM and see the many stations that programmed fully with pre-1972 copyright songs, recordings and conclude that they still have value to listeners. They still want to hear those songs a lot. To programmers who program multiple stations there's a 40's station, a 50's station, a 60's station. There's classic rock, all the pre-1972 sound recordings. So, the public still values them, corporations still value them. They should still maintain a value for the recording artists.

MR. DAMLE: Thank you. I'll admit I've lost track of who was next. So I think what we'll do is start with Ms. Chertokf and then go around.
MS. CHERTOKF: Thank you. I just have a few points to make here. Let's see where they were. On the question of whether or not state law rights exist I think the state law rights, they are a patchwork. I pulled up the Copyright Office report after you cited it. And what I see here on page 45 is it seems to conclude that there are no state law performance rights in North Carolina and South Carolina. That's only two of the 50 states. But, you know, going around the country litigating state-by-state doesn't seem to be in anyone's best interest. And, you know, I think the idea here is we are talking about simplifying licensing and streamlining it and making it so that legacy artists can get their fair share of royalties. And the Respect Act does that. On the issue of whether it makes sense to pick off this one thing and not do a full federalization, you know, our view on it, and we were involved in the pre-1972 study, is that when you start looking at...
full federalization there are a number of
issues that are complicated. We are not saying
that we are opposed to it.

We think that there is probably a
way to get it done. But there is a number of
issues that really require thought, study,
discussion, negotiation, figuring out. And we
think that bringing pre-1972 sound recordings
under 114 is not one of that requires a lot of
thought and a lot of further study. And so,
why hold up legacy artists while we study all
these other much thornier questions? Yes, I
think that's all I had to say.

MR. DAMLE: Okay. Thank you. Mr.
Samuels?

MR. SAMUELS: It seems to me that
the reason that my colleague over here
supports the Respect Act is that in her area
it benefits them. I personally -- my position
is mostly talking about recordings that have
actually a limited interest. You know,
mentioned before, Mr. Mahoney, that there's a
lot of things pre-1972 that are on the radio.

Many of the things I'm interested in are things that aren't on the radio and that you can't get access to, that a record company has the rights to and will not license because it's too much trouble for them, because it's too expensive for them to figure out if they even own it. Right now anything recorded in the first 20 years of the 20th century basically is unavailable to anyone. There are a lot of important recordings then. And a majority of people on this panel don't want to listen to those things. Frankly, I don't want to listen to most of them. They aren't really of interest to me personally. But the fact is that inaccessibility benefits no one. It doesn't benefit the record companies who may or may not own the rights. It doesn't benefit the RIAA. It doesn't benefit the artists who now are not alive but who have something to say to all of us.

If you have a scholar, if you have
a student, if you have a lawyer, if you have anyone who wants to listen to these things they basically can't do it because the records are so rare that almost no one has them. And you can't get the rights. What is the benefit in that? The value of not doing it piecemeal. If you do it piecemeal, then when something comes up that one entity doesn't like they'll fight it. The whole thing should be pre-1972. It should protect the artists who are alive, who would still under copyright. But it also should protect the people who are earlier, whose recordings are simply unavailable and can't be heard by anyone and can't be issued by anyone. They are available in Europe. They are available in Canada. They are not available here. And the performers were Americans. That doesn't make any sense to me.

MR. DAMLE: Thank you. Ms. Chertokf, did you want to respond to that quickly.

MS. CHERTOKF: Yes, I just had one
quick response to that, which is that there is
the National Jukebox Project, which is run by
the Library of Congress. And I believe that
Universal Music and Sony Music both did deals
with the Library of Congress where a lot of
their vault recordings are digitized. And
there's a lot of recordings available through
this National Jukebox Project.

MR. SAMUELS: I can respond to
that.

MR. DAMLE: Yes, quickly, please.

MR. SAMUELS: There are many
problems with the National Jukebox. First of
all, Sony or Universal has to have those
recordings. They don't have a lot of them. A
lot of things they don't even have them to
give to the Library of Congress to duplicate
or the Library of Congress has to have them.

Secondly, the rights are very,
very limited in what people can do with them.
Now, I could go on with what the specifics
are, but since you asked me to be brief,
that's not the answer. Thank you.

MR. DAMLE: Thank you. Mr. Fakler?

MR. FAKLER: Thanks. NAB and Music Choice agree with the comments that Mr. Rich made, so I won't repeat them. But, to add a couple points, the notion of new forms of copyright protection being prospective only is not -- this is not sui generis, it happens, it's happened frequently in the history of the Copyright Act. When musical compositions were first given federal copyright in 1831, that was prospective only. When musical compositions were given the mechanical royalty in 1909 that was prospective only.

With respect to the Respect Act, an additional problem with the Respect Act is that it would seem to -- well, it would require federal payment, require federal payment, for non-existent at this point state law rights. And it also creates a federal cause of action to enforce these non-existent state law rights. So, whatever the approach
is, we don't think the Respect Act is the right way to go. And now, Music Choice has a somewhat more nuanced view of the issue as well. In the sense that Music Choice believes that there should be a safe harbor for digital music services. This chaos that's being sown in the state courts now with these issues is really not good for anybody. As a matter of fact, Music Choice has always paid for pre-1972 sound recordings under the 114-112 licenses. It's a practical thing. The fact is you cannot reliably determine whether a recording is truly pre-1972 or not because of the fact that often times the original -- a recording, as Colin was mentioning before, a recording that's originally issued prior to 1972, it can be remixed from multi-track sources. It can be sweetened in certain ways. There are certain types of processing one can do that creates, voila, a federal copyright out of a pre-1972 sound recording. There are other things that happen
to it that don't rise to that level of authorship. In the -- when CDs were first released the major labels all went and registered their copyrights and the Copyright Office told them how they had to fill out the form to specify remixing from multi-track sources to get a new copyright. So, even the Copyright Office record of these recordings is confusing. The fact of the matter is -- and I know because I've litigated this issue -- the only way to reliably tell whether the recording is truly pre-1972 or not is to track down an old piece of vinyl from the original release, take the digital file that's actually being exploited and do a pure digital master of both and compare the wave forms. And then you can start to determine, you know, whether they really were remixed.

MS. CHARLESWORTH: That sounds like a very practical solution.

MR. FAKLER: Exactly.

MS. CHARLESWORTH: I think we'll be
adopting that.

(Laughter.)

MR. FAKLER: Thank you, exactly.

Which is why I think that certainly the
digital -- given the current state of the law
where there is no performance right for these
recordings, we believe that the music services
should have the right to fight this one out.

But, in the meantime, for those digital music
services that don't have the resources or the
inclination to engage in the fight, there
should be a safe harbor so that if they do pay
for the Apre-1972 sound recordings@ under 114
and 112 they are shielded from liability in
these various state actions.

MR. RAE: Can I ask a quick
question? Does anybody here really truly
believe that a 5.1 remix or like a remaster
actually constitutes new authorship? I'm very
curious about that. For the purposes of
performing or using a pre-1972, right? Like
what are these sweeteners we are talking
about? Because it seems like a real gray area to me. I know nothing about this but I'm curious. I personally don't believe that there's new authorship that's implicated in a remix that is, you know, includes pretty much the same ingredients but is run through modern technology.

MR. FAKLER: That is something that the Copyright Office has taken certain positions on in the context of issuing registrations. It has not been litigated in court. It has come up in certain litigation and ultimately settled. So there was never a -- but my point is this uncertainty -- so I wish I could give you an easy answer to that. The point is that this uncertainty could easily backfire on the labels that are trying to push these law suits.

Because I tell you right now from somebody who represented a defendant who was being sued by a label, once this issue of whether the registration is really covered,
you know, whether there really was post-1972
copyright ownership, caused a settlement to
occur overnight, okay? This is a mess that
nobody should really want to get into. And
that's why I think that, however, there is
this dispute.

Because the record companies are
claiming there are these rights that in our
view don't exist under state law. In the
meantime there should at least be a safe
harbor so that, you know, those services who
are acting in good faith to avoid the dispute
are going to have the resources to fight it
out are going to be protected and, you know,
revenue flows.

MR. DAMLE: Thank you. Ms.
Finkelstein?

MS. FINKELSTEIN: I'll be brief. I
represent Sony Music. And we have a very
broad, deep treasure trove of pre-1972 sound
recordings, including Benny Goodman, Bob
Dylan, Big Bill Broonzy, Rosemary Clooney and
thousands more. And I guess we'd feel that there's a fundamental issue of fairness in being paid for those recordings and having those artists have the ability to participate in royalties from those recordings from new digital services. I wonder if -- I think Ms. Griffin implied that there was a chilling effect on licensing because of the uncertainty. But what's happening in the 114 license is that these recordings are being used whether they are subject to the license or not.

They are being used and they are just not being paid for. In the direct licensing, when we license our catalogs, we always license the entire -- I mean, with a broad based service we'd be licensing the entire catalog and there'd be no distinction made between the compensation for pre-1972 and post-1972 recording. So, from our perspective it is an odd result that a service can take advantage of the 114 license and enjoy the
very easy licensing process and, at the same time, rob us of the opportunity to negotiate for those very precious catalog titles to be part of the license. So, you know, we've had a lot of talk about willing buyer/willing seller, free market, fair market, which I will leave to all the lawyers to explain all the differences. But, in that free, fair, willing buyer market, you know, we see people are willing to license those recordings at the same rate as they license post-72 recordings. And it seems like a travesty that we are put in a position of losing that revenue from the people that are operating under the 114 license.

MR. DAMLE: Thank you. Professor Besek?

MS. BESEK: Well, I certainly think that artists of pre-1972 sound recordings should be able to participate in the revenues that they have -- that are earned from their recordings. But it has to be done more
comprehensively. I just have a problem --
again, I'm a purist, but I have a problem with
granting federal rights without federal
exceptions, just like I would in granting
federal exceptions without federal rights. I
also think it's more problematic. It's just
putting off another problem. As long as a
principal means of exploiting recordings is
through 114, things will be fine. But you'd
always have to change rights for pre-1972
recordings separately if other rights are used
within the federal copyright law. If you bring
them in entirely then you don't have to always
think about whether we want to bring them
within a new means exploitation or not.

I don't think it's correct to say,
well, what should their expectation be? They
never before had expectations of a performing
right because the manner in which works are
being exploited is just changing. Historically
people got their revenues from the sale of
copies of recordings. And now it's coming to
be that it's more from the public performance. So I don't think that that's somehow outside of the constitutional bargain. And I think the Eldred case actually speaks to the nature of the constitutional bargain and expectations in a helpful way.

Finally, it's not quite as complicated as people make out here. I don't want to minimize it either. But, for example, on ownership, if you have the owner of rights under federal law be the owner on the last day it was protected under state law, then you get around most of the ownership problems. There would be no question in my mind that, if the change in law effected a change in ownership, you would have a serious takings problem on your hands.

MR. DAMLE: Okay. Thank you. Mr. Kohn?

MR. KOHN: Thank you. So I do believe that the pre-1972 sound recordings should be added to the federal copyright
regime. And it should be subject to the exceptions along with all the other recordings, mainly because of the thing I was saying yesterday, it reduces transaction cost.

The transaction cost of dealing with 50 different laws and all the litigation that attends with it. And also under, I guess, many of the state laws these copyrights have unlimited terms. So I don't know what the term is that some of the sound recording copyrights under state law. So, if it goes under federal law, at least it would be some term. But, what is the term? And I think that's an interesting question. When you think of -- I mean, the term could be something what they would have been had they been protected in >72 or >76 or whatever period of time you want to make. So what should that term be?

Well, going back to the purpose of the copyright law, the copyright law's purpose is not to compensate the owners, it's to promote the creation and availability of the
works. So, where does that leave you? Well, in
terms of promoting the creation of the works,
these works were created a long, long time
ago. I think in Breyer's descent in the
Eldridge case talked about there is no
incentive to create these works. So you can't
extend the term.

On the other hand, you could make
the argument that extending the term of some
of these copyrights beyond what they would
have been would give some incentive to make
the works available because, if there's no
financial reward for getting these things out
of our archive, to go ahead and remix them to
get them out, and there's only three months
left on the term, it's not worth doing, you
know? On the other hand, an extended term
might promote this. But also, you have to take
in to consideration what Mr. Samuels is saying
here.

Because, if you have these
extended terms, they may never become
available to the public, which is the purpose
of the copyright law. So I do think there
needs to be some mechanism here. Now, either
you treat this as some kind of new right like
you did the public performances of sound
recordings and it doesn't go to the current
owners necessarily, but through some kind of
sound exchange, you know, where the artists
get half, et cetera. But that still doesn't
help you in terms of getting that recording
out there.

So maybe there aught to be a
termination right. But, if you can't find
these errors, and if Mr. Samuels can't find
the heirs, or whatever, maybe that won't help.
So you might consider allowing someone like
Mr. Samuels -- and I think the argument was
made yesterday as well. Let anybody file a
termination right on any recording that's now
protected under the new federal law. Let Mr.
Samuels file a termination right if it's not
being exploited to get it out in to the
public.

And then it's his problem to go
find the heirs to make sure they are properly
paid under the regime that you establish for
the rate. So I think if you just always go
back to the purpose of the copyright law to
promote the creation of the recordings and
promote their availability is your number one
driving theme, you'll always come back to
transaction costs getting in the way. What can
you do to reduce them? And also, what can you
do to make these recordings available where
they otherwise wouldn't be available?

MR. DAMLE: Thanks. Mr. Merrill?

MR. MERRILL: Thank you. Briefly,
we work with a number of these artists. So to
say that this is premature to move forward on
this is a big tough from my perspective. You
know, Horace Silver passing last week not
being paid what is owed to him, it's tough.
And to hear that 90 percent of income is being
lost because of this is fascinating to me. I
don't know anybody at this table that if they lost 90 percent of their income could possibly continue forward. You know, this boils down to the fact that it's a fundamental right to be paid for your work.

There's a lot of right and wrong in this country. And there's good arguments on both sides. But this one for me, this is a pretty easy one. You know, let's pay artists for their work, especially our legends. So, thanks.

MR. DAMLE: Thank you. Mr. Rich?

MR. RICH: Just a few points. I think it's important for the record to note that no major consumer of music, to my knowledge, has advocated the expansion, full federal expansion that's been advocated by certain people around this table. But, more notably for this purpose, neither of the major two trade associations -- both sitting around this table -- in their public positions over a long time has advocated for such a full
federalization either. That is, the RIAA has opposed it and SoundExchange has opposed it in favor of this procedural device. Now, the comments have become a bit more couched in the last round. Which is, we are willing to Aconsider@ getting around the complexities.

It's an unusual circumstance in which neither side of the debate, in terms of the largest constituents whose oxes will be gored and/or who are potential beneficiaries, advocates for full copyright federalization. That I think is a weighty consideration.

Secondly, I found Mr. Kohn's comments interesting. He correctly cites the instigators for copyright, which are creation and availability. If you take a service like SiriusXM, which has been cited in the room, we know it's a given as pointed out that there won't be any creation stimulated. And could anyone doubt but that the broad representation of pre-1972 sound recordings on SiriusXM has promoted their broad availability? So, in that
sense, the purposes of copyright would not be furthered by the new copyright legislation. With respect to transactional efficiencies, the premise of that argument is that there is existing a viable body -- although a Apatchwork@ of state law that otherwise protects it. But that's a very dubious proposition.

Legally it hasn't yet been established. If it were a fact then you could say comparatively we might be better off with a uniform federal scheme. But it sort of loads the legal rabbit in the hat to suggest that there will be transactional efficiencies predicated on a an assumption that there is a pre-existing body of state law, which I think in most thoughtful persons' views does not exist. Lastly, because again we are speaking for the public record, and I know Susan was doing this on the fly, page 44 of the Copyright Office report on federalization says A in general state law does not recognize a
public performance right in sound recordings.@

Thank you.

MR. DAMLE: Mr. Rinkerman?

MR. RINKERMAN: Okay. Mark Twain

once said when you don't know what to do the
right thing. And I think the right thing here
is to recognize the great cultural
contributions these people have made for us.
And I learned how to play the guitar by
listening to Bo Carter who died long before I
was born. But, in any case, if there is an
objection to using Article 1, Section 8, we've
had this problem before in our history with
the trademark law, which we then based on the
commerce clause. So, if there is an incentive
to find a mooring for this law and we lose on
Article 1, Section 8, we're not completely
dead in the water.

I do think that the purpose of
getting these works out and heard and learned
from would be served by making it economically
easy to do that for our, you know, for our
distributors, for our services who are paying anyway for a lot of these pre-1972 works. So I would suggest that we think about copyright as a potential basis. But, if we lose that, we're not completely lost. Again, we've done tricks before with the trademark law. With regard to the Respect Act, I think it's a step in the right direction. If we wait for full federalization I think we may be waiting a long time. So I do think it addresses part of the problem, not all of it. I would prefer that we have a full federal scheme where you'd have termination rights and fair use principles so that we can address some of Jon Samuels' concerns that there may be instances where we'd want the courts to apply the factors that we apply in federal litigation to determine what is and is not fair use. So, anyway, that's basically what I have to say. I think it's something that needs to be done. It's a wrong that needs to be addressed. And there are many ways to do it.
MR. DAMLE: Thank you. I see some, a few more placards up. I will just note that we are now eating in to lunch time, so to speak. So I'll just ask you to keep your comments brief if possible. Ms. Griffin?

MS. GRIFFIN: Well, I'll try not to stand between us and our lunch for too long. But, just to respond to a couple things.

One, the question about what consumer groups have supported federalizing, we at Public Knowledge have. And the Electronic Frontier Foundation has as well. I don't want to speak for them. But my sense is that their concerns are similar to ours of killing speech and innovation because of the uncertainty. I don't think anyone would accuse either of our groups of being copyright maximalists. So, I don't think that's just us being crazy but rather, you know, these are serious concerns. And, kind of related to that, to respond to the note about whether there is a chilling effect or not, I think you
mentioned that there can't be a chilling effect because some services have just not paid. But, as we've seen, some of those services have gotten sued and have potentially, if they lose, are going to be liable for a lot of money. And therein lies the chilling effect because, who knows what's going to happen? If you are a new entrepreneur looking at the space, wanting to bring new competition in, do you really want to get in to that fight.

MS. CHARLESWORTH: Can you turn on your mic?

MS. FINKELSTEIN: The services that are licensing under direct licenses do pay for those uses. So I don't think it's had an effect where people don't want to take out a direct license because they are going to be required to pay for the pre-1972. I think they willingly pay for the full catalog.

MS. GRIFFIN: But it's hard to know exactly what to license because of the
patchwork of state laws and the uncertainty
with the pending litigation about what exactly
the liability is.

MR. DAMLE: Ms. Chertokf?

MS. CHERTOKF: I just wanted to
quickly address the termination issues that
have come up on the question of whether there
should be a termination right in pre-1972
works if they were ever fully federalized or
if the Respect Act passed or whatever. That
was addressed in the Copyright Office study.
And it was acknowledged that allowing a
termination right for grants that were made
prior to any act of federalization would raise
serious issues of retroactivity and takings.
And we would support that view.

And, as to the notion of public
right of termination, this is not an issue
that I discuss with our members. So I guess I
put this as my personal view. But, having a
public right of termination seems somewhat
troubling to me. I mean, the idea that I
understand for termination right is to let the creator or their heirs recapture some of the value. It was not meant as a mechanism for getting works in to the public domain.

MS. CHARLESWORTH: Ms. Chertokf, what about the concept of, you know, if the sound recording isn't going to be exploited, just sitting in a vault? Should there be any part of this scheme that would allow it to be released by the sound recording owner? In other words, there is a concern that, you know, sound recordings are just sitting there. And they may not be very commercially viable. Do you have any thoughts on how that problem might be solved short of termination?

MS. CHERTOKF: I think it's a fair question to ask. I think a lot of the old works, with the advent of digital distribution, it's a lot easier to commercialize things. So you don't have to go through a manufacturing process and ship physical product and all that. And, you know,
it's the whole long-tail question. And so it's easy to put it on iTunes and if it only sells one copy every year or two it doesn't matter because you haven't had to manufacture it. But, beyond that, my understanding is that there have been partnerships between labels and other groups that want to re-release some of these old recordings. And I would say let the marketplace address that.

MR. RAE: I just have a question about what the recommendation was around termination. If after full federalization the right is regranted that sets the termination shock pot going forward. Was that --

MS. CHARLESWORTH: No, the recommendation was that it, as I think Ms. Chertokf summarized, that it would create, that there were significant takings and other concerns with a termination right.

MR. RAE: Retroactively applied.

But, if after full federalization --

MS. CHERTOKF: A new grant, if a
new grant was issued after -- what the
Copyright Office said, if a new grant was
issued after federalization --

MS. CHARLESWORTH: Right.

MS. CHERTOKF: -- then --

MS. CHARLESWORTH: Then that, yes.

MR. RAE: Right, because to me part
of the issue is that you have so much
concentration and consolidation among the
sound copyright owners that there's this
impossible trail of like ownership histories.
It would be nice to have a full federalization
happening, going forward a policy for
termination to occur for any new transfer.

MR. KOHN: Right, when we added the
performance right, the exclusive right of
digital audio transmissions, you could take
the position that there was a taking from the
record companies and giving 50 percent to the
artists. When you're talking about putting up
a new right it shouldn't be a taking by adding
a termination right at all.
MS. CHARLESWORTH: Well, I think there's a dispute about whether it's a new right. I mean, I think that's being litigated.

MR. KOHN: Well, the exclusive right of public performance or digital audio transmission was a new right that just came out of nowhere in the federal law. And they gave half to the record companies and half to the artists. Why wasn't the giving it to the artists a taking from the owner? The owner of the sound recording was clearly the record companies. So there was no taking issue there. So, why would adding, you know, right? People are shaking their heads. So yes, if you add pre-1972 recordings completely to the federal act, then when you add the exclusive right of public performance on there, or any other right on there, because it didn't exist, then you can add a termination right there. If you don't exploit this within five years, boom, anybody in the public or the heirs can file a termination notice. Why not?
MR. DAMLE: Mr. Samuel?

MR. SAMUELS: Thank you. A decade ago a small record company in New York wanted to license some 1930's Philadelphia Orchestra recordings from BMG, which is now part of Sony. They tried to contact BMG's in-house attorneys requesting a license that they wanted to pay for. BMG never responded. I asked one of the attorneys why they didn't respond. And he explained to me that researching BMG's ownership would take some time, that the amount of money that they would get from such a license wouldn't cover the costs of the person hours it would take to determine ownership. So it made more financial sense to simply ignore the request. So the small record receiving no response issued the recording anyway. And it strikes me that, when somebody does the right thing by breaking the law, the system is broken.

MR. KOHN: And may I add, I have personal experience in going to the major
record companies to get licenses to things
from the 1960's or recordings from the 60's.
And I was only able to get the rights to
manufacture. I could never get the digital
rights. Even though so if I didn't even get
the manufacturing rights they might not have
ever come out of the vault.

MR. DAMLE: Mr. Fakler?

MR. FAKLER: Thanks. Just to
briefly respond to a couple of things that
were said earlier, the non-interactive public
performance right, which is what we are
talking about here because, as Ms. Finkelstein
mentioned, in the interactive world they are
already getting the royalties through these
direct deals. That performance income is
nowhere near approaching the primary revenue
sources for recording artists, okay? And it's
certainly not 90 percent of their income. It
just isn't. And, as somebody who has
represented legacy artists and their disputes
with their record companies, I would say that
by far the larger driver of the financial
difficulties that legacy artists have right
now are the terms of their record contracts
and the record company accounting practices
that have been routinely used to share less
and less money with these legacy artists. And
the one example, all you've got to look at is
what's happened for digital downloads. And, by
the way, these legacy artists who stopped
putting out new material, and so they can't
renegotiate the deals to get higher rates,
they tend to have much lower rates than
current artists have to begin with, even for
normal retail channel sales.

But, you have that whole dispute
about downloads where these third party
licenses, under the old agreements they've got
a much better split. But the record companies
fought it and forced them to litigate. Very
few artists can afford to litigate, even after
winning, you know, through two appeals. The
record company still refused to pay legacy
artists that way. So the notion that non-
interactive performance services have to make
up for this maltreatment of these legacy
artists, I don't think is particularly fair.

MR. DAMLE: Okay. Thank you.

We're just going to get these last
two and then we'll go to lunch. Professor
Besek?

MS. BESEK: I just wanted to
clarify a couple things, at least for myself.
When we talk about termination we are
confusing two different things.

One is termination in section 203
or 304, which is termination of a grant. And
the other, which people are calling
termination, is termination of a copyright.
And that's not, I don't think, something that
the report talked about or the statute talks
about or anything like that. Just in terms of
what the proposal -- what the Copyright Office
proposal would say about the expiration of the
copyright term: Currently under state law all
protection for pre-1972 sound recordings has
to end by 2067.

States can choose to end it sooner. But, by 2067 it all has to end. So,
what the Copyright Office proposal was trying to do was for some works end it sooner in the interest of people who want to use old works that aren't being commercially exploited. So, just to take an example, for a pre->23 recording, and we're talking about really old stuff, you would get up to three years of federal protection.

But if you started to exploit it, you continued to exploit it, and you filed in the Copyright Office to indicate you intended to do that, then you could get up to 25 years. It would still cut off some period, the period from 25 years after the effective date of the federalizing act to 2067. So some works would go into the public domain earlier. But that would be old works whose right holders did not have an interest in continuing to exploit
them. For example, bird calls or whatever it may be. But there was nothing in the report about terminating copyrights per se. And no one could go in and terminate somebody else's copyright.

MR. KOHN: I think the concept I was trying to get to, and it would be difficult, is that we need the works for hire for the most part so the copyright owner is the record company. So the termination really isn't a termination. But there was a creator that was a recording artist. And there are heirs of those recording artists. And there is an interest in getting these recordings out there. And I'd rather find a way that they be made available and the portion of the revenue associated with it get paid to the heirs or to the artists.

And whatever mechanism you want to call it, whether it's a termination, certainly wouldn't be a termination of a grant. But it might have been maybe the original recording
agreement would be considered a grant and
still questioned as to whether that was work
for hire. I suppose that's still up in the air
too. But I don't want to get in to all that.

MR. DAMLE: Okay. Thank you. Mr. Rushing.

MR. RUSHING: I'll be quick. So
just one clarification. Mr. Rich suggested
that SoundExchange was opposed to full
federalization. It's actually something we
don't have a position on. It's not our area.
The ins and outs of termination and what not
is not really in our wheel house. What we do
have an interest in is the proper functioning
of the statutory license. And pre-1972 sound
recordings and their treatment just represents
a gigantic hole in the license right now that
can be easily applied. The other thing we have
an interest in is making sure that artists are
participating in the revenue stream. I think
Mr. Fakler is simply wrong when he suggests
that this revenue stream isn't important to
the artists. It's critical and it's a significant problem that legacy artists have had this revenue stream cut off the way that they have.

MS. CHARLESWORTH: Okay. Well, thank you. We will resume at 1:45. We'll give you an extra 15 minutes.

(Whereupon, at 12:33 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

1:50 p.m.

MS. CHARLESWORTH: I hope you had an enjoyable lunch. We are back on the record. Before we start with this last panel John Riley wants to make an announcement.

MR. RILEY: Hello, everyone, for the audience or participants comments at the end if you didn't get to say your peace, please sign up. There is a sign-up sheet on the podium here. Write your name down and we will go through the order giving people two or three minutes to say whatever they would like for the record. Even if you have already participated and we already have your name, please sign your name. It's for the court reporter, it's just for the ease of administration. Thank you.

MS. CHARLESWORTH: Okay. So that concludes our commercial announcement. So I said this in L.A., you know, this is I think the best panel. Why? I hope we'll see.
Because we get to really sort of try and draw on what we've heard for the past couple of days and perhaps make some suggestions for the future. I think we've heard a lot of different perspectives. But there's no one just sort of sitting here saying this system is perfect as is. So, what we are interested in learning during this session is your thoughts and ideas. And feel free to put some creative ideas out there, because we need them, in terms of how to move forward. I think, in addition to substance, if you have ideas about sort of process or how the various stakeholders might continue to engage in a dialogue about how to resolve some of the issues we heard about, that would be useful. But, obviously we are also interested in your thoughts about what sort of comprehensive fix might look like. And I won't take up more of the time, your time, your speaking time. I'll just turn it over right now and ask for
thoughts about the future. Ms. Butler?

MS. BUTLER: Thank you.

MS. CHARLESWORTH: Do you want to,
I'm sorry, I've been very remiss. Can you
introduce yourself and anyone else who is new
to the panel and explain your affiliation.

MS. BUTLER: Sure. My name is Susan
Butler. I was a practicing lawyer in the music
industry for over 20 years. In the mid 1990's
when living in San Francisco added the dot
coms, from boom through bust, to the client
list. So I've worked on both sides at the same
time until I began reporting full time for
Billboard back ten years ago. And, after a few
years there. I launched Music Confidential,
which is an international weekly business
report, subscription-based. And, as of this
morning, I am now in 46 countries with paid
subscribers, who are executives who do
business in music, as well as government
officials and collecting societies, etc.

So, in 1999 when I was practicing
law, so we're looking 15 years ago, one of my clients was a Japanese composer who was known worldwide. And he was commissioned to compose for the millennium a live kind of opera. And this opera included 100 singers from around the world, a live orchestra, compositions by him. It had three movements. It was called Life. It was about, as he described it, man's interaction with matter for the 20th century. He took on small projects.

(Laughter.)

And, as part of that, he incorporated more than 100 independent copyrighted works. Whether it was William Burroughs on a recording put out by Polygram with music in the background reciting the Lord's Prayer or it was the early 1900's movie about the first trip to the moon from France.

MS. CHARLESWORTH: So this was a licensing nightmare.

MS. BUTLER: One hundred rights in three months I had to clear. But the thing was
it was also a live webcast around the world. It was impossible to clear all rights for a worldwide live webcast. We are now 15 years later and it is still the same challenge, surprisingly. If you want to have a live webcast around the world, to clear those rights. So I hope that in the future the digital services have the kinds of products that are so creative that they can be put out on all kinds of digital services so that we’re not just hearing audio only. But, in order to do this, I urge all of you emphatically to please communicate and coordinate with your partners internationally because this is now truly an international business. So I would just like to bring up quickly four points to consider.

One point, withdrawal of rights.

This is not new. It is happening with ASCAP and BMI right now, but in the 1970's the competition authorities in Europe told the collective right societies that they must
allow the right holders the right to withdraw
either certain types of rights or rights for
certain uses. And this is kind of categorizing
for withdrawing rights known as the GEMA
categories, GEMA being the German collective
rights society.

Since the 2005 European
recommendation on cross border licensing there
have been more withdrawal of rights. They are
particular rights, anglo-American mechanical
rights that have been withdrawn by many
publishers from the societies. So you're
talking about European partners having more
than eight years experience now in dealing
with some of the concerns that have been
brought up today about dealing with rights
being withdrawn and I'm sure at your other
roundtables. And, in fact, there are direct
licenses for those particular rights. That's
being done in coordination with the societies.

Whether it's, for example, the
publishers negotiating certain prices and then
societies taking the next step and not just administering, but perhaps also being involved in other ways, societies are also involved. It is not only major publishers, a number of indie publishers have withdrawn rights over there as well. And they have even formed organizations.

One is called Impel. That is based in the U.K. Also we can also look at France where they have an arbitration system. If people are unhappy here with the way the rate court proceedings are being run then perhaps reach out to societies in France and find out how it's working in France for that kind of an arbitration system. So, for withdrawal of rights I urge you to work with those people who have this experience in deciding the step forward in those areas. The second point is on data and databases identifying right holders. It was my privilege to be able to have access to technology systems to demonstrate, to have demos on, and to report on a number of the
collective right societies in Europe. This is back in 2009, 2010. And that includes CISAC, the Paris-based trade group for the collective rights societies. CISAC handles some identifiers and standards for identifiers, which was brought up yesterday, the ISWC. CISAC gave me access to all of that information that a number of right holders, publishers and others did not have access to. As a result of my findings it is imperative that any work done in the areas of standards and repertoire databases in the U.S. please, again, be done while communicating and coordinating with the people who have already begun this work over there.

Because, for every 1,000 dollars spent by any one, by any of the right holders, by anyone who represents right holders, for 1,000 dollars spent that is equivalent of about 11,000 downloads, revenue that will not go to songwriters and publishers if spent on duplicative databases, and 1,000 dollars is is
equivalent to probably a couple hundred thousand streams. So please coordinate with them. Also, the desire to avoid duplication of the systems in Europe is one of the reasons that the Global Repertoire Database, the GRD, was started some years ago. The GRD was begun because European Commissioner Neelie Kroes, who was then head of the competition unit, who put pressure on the societies, the right holders and digital services to work on this. Neelie Kroes then moved from the competition unit over to the digital unit. And the pressure to create the GRD was kind of eased. And recently the GRD splintered for a number of reasons into different sections. But they are still working on a database to identify works. So, again, please understand that experiences in Europe prove that the mapping that was talked about yesterday for data, it is not as easy as it sounds.

There are people that have this experience that have been working on it now.
for a number of years in Europe. So, again, I urge you to connect with the partners over there so the duplication is not occurring.

And, as one person said to me, who was working on the GRD and who understands the importance of one centralized database identifying works as opposed to decentralized, multiple databases with works information, recently, said, you can have two watches. If you have one watch, and he was talking about centralized databases versus decentralized. He said, if you have one watch you know the time. If you have two watches you have uncertainty.

So I urge you to work with your partners in that area of databases identifying copyrighted works. The third point is that is not a European problem that they are working on over there related to identifying works and creating a works database. Up to 50 percent, if not more, of the repertoire that is sold and used over in Europe is American. That's another reason to be working with your
European counterparts to make sure efforts related to copyright are working. The fourth point I’d like to make is actually in the form of raising some questions for you all to consider. Four of them.

One is, should the concept of distribution be looked at in a different way now? We have always looked at broadcasts as performances and the movement of physical units as distribution. But when I think of India, I recall it was once, about 10 or 12 years ago, the largest seller of cassette recordings in the world. India did so well distributing cassettes even. Aside from the physical goods piracy, there was still a huge market for that. However, FM radio was introduced relatively recently in India. And it really got off the ground as privately owned radio stations in the early 2000's came into existence. What they found was that the taxi cab drivers in India started replacing all of the cassettes with radio and there was
a dramatic drop off in cassette sales. So the
question to ask is now is streaming, and is
broadcast, really a form of distribution
today? This is a question you may all want to
think about.

MS. CHARLESWORTH: Ms. Butler, I
want you to get through your points but I just
want to make sure we get to everyone else, so
if we can --

MS. BUTLER: Yes, two more points.

MS. CHARLESWORTH: Okay.

MS. BUTLER: And so the other point
is that there are fewer songwriters today. But
the question is, is that because also a factor
that consumers are buying the hits and so the
songwriters who are writing the album tracks
are the ones who are no longer seeing the
money and no longer making a living like they
once were? And finally I would like to caution
everyone on the use of comparisons. I urge you
to be careful in comparisons because, if you
have, for example, two million streams, that
may seem like a lot and songwriters may be
surprised by how little money they receive for
the streams, but in fact all of those streams
may be only the equivalent of one airplay in
one large city, which songwriters would not
receive any compensation for that you would
not see any. So, as you are looking at
licensing in the digital market, just please
be cautious when using comparisons. It's not
easy to do so accurately with the old with the
new. Thank you.

MS. CHARLESWORTH: Thank you, Ms.
Butler. I'm not sure. Does anyone know who?
Was it Mr. Marks? Mr. Marks, you are the
winner of the next spot.

MR. MARKS: Thank you. So I just --
I'll just say again what I said yesterday
about really more an observation with regard
to some of the themes that I think were coming
together with regard to the music licensing
reform.

One being trying to ensure fair
market value or fair rights, fair rates rather for songwriters and music publishers. And the other is simplifying the licensing and how we thread the needle between those two and pointing to our proposal as one attempt to do that. And I have been waiting anxiously for over a day since then for Mr. Rosenthal's ideas on that. And before I turn the microphone over to him so we can hear them, I just want to reiterate again, I think there's a lot more in common that we have between some of the things that have been discussed and might exist at first blush.

For example, we have stated very specifically we should retain first use, have no pass-through, have an audit right, bundle rights, have transparency for songwriters, have fair market value, get rid of the CRB and the rate court, and have some kind of collective licensing to make it easier for digital music services. And then there's the question of, all right, how do you set that
rate at the right point in time in the market?
You know, we had one idea but we are very open
to discussing others. So, whether it's now or
later I look forward to continuing that
discussion with others on the panel.

MS. CHARLESWORTH: Mr. Rosenthal? I
think Mr. Marks nominated you to go next with
your vision of the future. And then we'll have
Mr. Bengloff.

MR. ROSENTHAL: Yes, he has called
me out.

MS. CHARLESWORTH: So we are all
ears.

MR. ROSENTHAL: Okay. As a general
matter, obviously we have been talking, at
least from our perspective, that the future is
free market, less government regulation.
That's going to be the way we ensure fair
market value. And we could go over more about
that. But I have been saying that for the last
two days. The issue with their proposal, and
I read it three times, their proposal, which
shows how pathetic my life is.

(Laughter.)

Yes, it's a work of art. It is authorship, I'll grant that. I think I was trying to think of, you know, as I was reading this, like, where have I seen this before? And it's kind of like, well this is basically an artist deal. And I think the problem from the basic premise is that there is a divisibility of copyright and that music publishers and songwriters own their copyright.

And if this was more of a proposal whereby we would be partnering in all aspects of it -- and I know you've raised these issues about audit rights. Well, you know, we've had issues about audit rights and partnering on that before. What is the split is going to be, I mean, that negotiation has started before when we heard about all the investments and all of that. And, of course, the key thing is will we be able to approve deals? Will we be part of that process? Will be actually dealing
with having a direct line to licensees? Our position is that the best thing to do is to empower music publishers. And I think that with all of the good intentions that you are talking about in your proposal -- and we can continue to talk about this beyond this meeting.

I think that it really doesn't really approach anything like what we need to create a partnership. We just, you know, artists work for you, songwriters don't. And it's really we need to talk more about where we can empower publisher rights to get involved in this world and to make some things simpler. The bundling of rights, absolutely. The efficiencies of publishers doing what they have to do. All of that is part of all of this.

But the idea that we can deal with these problems ahead of time, deal with the royalty split that is dealt with outside of understanding what services are out there down
the road. I think that's the wrong place to start. So I would recommend a conversation about publishers and labels partnering together and seeing what we can come up with and no what this is, which is really like how could we grant you the rights like artists do to you go out, make the deals and then come back and give us a piece of the pie? That's about as simple as I could, quickly as I could go over that.

MS. CHARLESWORTH: Mr. Rosenthal, so I mean, do you have an alternative sort of vision? I mean, I've heard you say free market. But in terms of how that would function, like would there be a role for the PRO's?

MR. ROSENTHAL: Oh, absolutely.

MS. CHARLESWORTH: Would there be a collective. If you can, do you want to paint your picture a little bit and then we'll turn --

MR. ROSENTHAL: Well, first of all,
when we talk about the free market, it's tough to paint a picture because part of the free market is dealing with situations as they arise in the free market. But, certainly in terms of organizational, we have players out there, the PRO's, in a big sense, a big group, dealing with administration. We have many companies in the marketplace. In our submission we have named many of them, dozens actually, about who are already involved in administering rights on somewhat of a collective basis across the board. That's my vision. I see the free market taking care of the problems that government is trying to take care of and can't and really doesn't comprehend. And it's going to get worse and worse because it's going to get more complicated. So I think that the answer is there's innovation that we have to put our faith in the free market. And that these services will step up to the plate. We already talked about it, public performance where,
okay, withdrawal of rights, well, maybe ASCAP
and BMI can still do administrative services.
HFA does administrative services outside of
what they used to do. This we have to let
happen in a free market without the
restrictions of government. And I think that
we'll be in a better place.

MS. CHARLESWORTH: Okay. Mr.

Bengloff?

MR. BENGLOFF: Thank you.

Susan, by the way, in our
community one of the reasons independents have
grown so much is because they sell a body of
work as opposed to individual singles. So the
songwriters in our community to a large
extent, who often are the same people as the
sound recording owners, are actually doing all
right when we talk to independent publishers
and we know what some of our labels are
paying. But I'm not here to tell Jay how to do
his job here today. So I'm going to talk about
the sound recording instead.
One of the biggest issues for us is, and I think for everyone, is a simpler, more efficient system of licensing to make sure consumers have access to music. I see a number of people I know around this table who would appreciate having a simpler system for licensing. Independent music labels are big supporters of collective licensing and the expansion or modification of the compulsory statutory license. Unfortunately, under U.S. antitrust laws, collective negotiation of interactive, on-demand licenses by independent music labels is limited. You know, we are barred from negotiating collectively because there is a feeling that it would allow consumers -- it would somehow hurt competitiveness in the marketplace when in fact it would allow consumers greater choice and broader music service choices as these barriers are lowered.

Government may be able to encourage this collective licensing by
relaxing certain antitrust laws, which we
believe lead to pro-competitive effects. We'd
be better able to compete with some of the
larger owners of copyrights in the country. If
we could compete with these people it would
bring more things to consumer and make it
easier for a number of the services sitting at
this table and take a lot of cost out of the
system as Mr. Kohn has been discussing over
the past two days. We encourage consideration
of implementation of an expedited business
review process to provide an exemption for
certain voluntary collective licenses which
combine with the expansion or modification of
the definition of services eligible for
compulsory licenses, could promote a more
efficient use of copyrights and make
copyrights more available in general to
consumers.

MS. CHARLESWORTH: Okay. Thank you.
And who was next? I think maybe Peter Brodsky,
Mr. Brodsky.
MR. BRODSKY: Thanks, Peter

Brodsky, Executive Vice President of business
and legal affairs at Sony/ATV Music

Publishing. With respect to the RIAA proposal,
you know, we appreciate there's a lot of good
in there about fair rates and things like
that. But I think what gets lost -- I mean,
the way I read it and I do have some more of
a life more than Jay, because I only read it
twice.

(Laughter.)

But my understanding of it is
they want to expand the scope of rights that
we give to them to license on our behalf. And,
when we look at that, we think that somehow
we're second class citizens in all of this,
that our copyrights aren't as important to us
as a record label's master recordings are to
them.

And it's just not the case. I
mean, we represent songwriters, most of which
are not recording artists. We cherish the
songs, that's why we are music publishers. And we spend a lot of money to acquire the best songs that we can. We spend a lot of money developing songwriters. We spend a lot of money marketing and engaging in licensing activities. And, for the RIA to say, well, you know what? You should just give all of that to us because the market is better served because of that. It's a head scratcher for us. It's not something that we really -- it's not a road we want to go down. That's it.

MS. CHARLESWORTH: Do you see any parts of the proposed -- I mean, you mentioned that you appreciated maybe some parts of the proposal. Is there any part of it that you think is encouraging or --

MR. BRODSKY: Well, the encouraging part is, you know, the part about, you know, fair rates on audit rights and things like that. I think that's obviously things that we are in favor of. But, giving away, giving them more rights to license on our behalf, it
doesn't suit us. And, frankly, in many instances I don't even think it would suit them. I can name dozens of instances where a music publisher through their licensing and marketing activities has broken a record before the label has, getting a sync here or there or putting a song on to American Idol or whatever it is. That would go away under their proposal.

MR. MARKS: I don't think so. I think maybe there's just a misunderstanding of our proposal. And maybe it's just tied up with the way we suggested to do rates. But, if you take that off the table and, you know, start with what Jay ended with, which was, you know, having publishers and labels and songwriters and creators be part of a discussion to figure out what the rates should be, forget the percentage and the ratio, because I think that's what's getting some folks caught up and us in the rights being given to us. Establish whatever rate you want at the beginning. And
say, this is the rate for our products so you
have complete control over that and what that
rate is.

Wouldn't it be easier to do that
and then have that set at that point in time?
Have the label, you know, do its deal.
Everybody has certainty with regard to that.
They have a blanket license, publishers have
a direct relationship with the service. That's
another thing. We're not taking the rights.

We're saying you have the
relationship, you have the license. The
service takes the license through on a blanket
basis for and pays directly to whatever entity
that publishers and songwriters think is the
best to collect. And, you know, all the other
things, bundling the rights and everything
else. So I think there's just a
misunderstanding about what it is. But I don't
think it works to just say, well, we're going
to go in to the free market and then say,
notwithstanding the fact that the label
invested at some point in time this amount of money in order to create this recording, market it and exploit it, that somebody is going to come in later and say, no, you can't exploit that unless we get it. Let's set the market rates at the time they should be set, which is, you know, at the time the decision about using that composition in a particular recording is used. And that free market discussion can happen at that point. And we can set rates up front on an industry basis if it makes it easier. I haven't heard an alternative to that, other than, you know, criticisms. So maybe take the ratio thing off the table if it is clouding the picture too much.

MS. CHARLESWORTH: Well I think, Mr. Brodsky, did you want to respond to that?

MR. BRODSKY: Yes, I don't know. It seems to me that there's this perception that we are blocking commerce, which couldn't be farther from the truth. I mean, we want to
license. That's our lifeblood, is licensing our songs in as many possible ways as possible. The fact that somebody might go to a record label first and then come to us, great. Sometimes they come to us before they go to the record labels. I don't know if I'm misreading the proposal, but I'm still -- what I got out of it is we should grant the labels the right to license on our behalf. We should come up with a percentage of what we get of their share and just close our eyes and make a deal.

MR. MARKS: I'm saying, forget the percentage, but if you're talking about licensing the composition in the free market, the license should occur at the time that the composition is created and then brought to the artist or the label to be put in to a recording. At that point you set the price for whatever that composition, you know, should be and whatever your terms of exploitation are.

The artist and the label can make a decision
about whether, you know, that works and that partnership is going to work and what investments should be made. But what I hear is that you want to come in after all that's been done at a point later in time. So you're basically saying, go ahead and use it and then we'll tell you later what we think we should get. Which, as we've heard from the services, doesn't really work for them.

Because it just creates too much uncertainty.

MR. BRODSKY: I don't know if I'm following that. We want to grant licenses at a time when somebody wants a license. We grant you a mechanical license so you can put our song on to your master recordings. If Google or Spotify wants a license then, at the appropriate time, we grant a license. I don't know how we would grant you this blank license for things that we don't even know are going to happen.

MR. MARKS: But how does a label
make an investment in something without
knowing whether it's going to be able to
exploit it on Google service or somebody
else's service?

MR. BRODSKY: Again, we are not in
the business of saying no. We grant licenses
every single day. I can't even think of one
deal in the digital marketplace that we've
ever -- that's ever fallen apart, that we
didn't do.

MR. MARKS: And I agree with that.
And that was the basis of our proposal. You
are in the business of licensing. And you do
have a history of saying yes and not saying
no. So let's make the saying easy at the point
in the market when the rates should be set,
and make the licensing process easy so that we
get rid of all the inefficiencies that exist
and there's more dollars flowing to both you
and us and hopefully profits for digital music
services instead of, you know, waiting until
later to set some price and doing it on one
off basis.

MS. CHARLESWORTH: Okay. So I think we are going to ask for some other commentors on this or whatever. Mr. Carnes?

MR. CARNES: Yes, I'm going to go back to the topic panel where it says, you know, future developments and particularly unified licensing models, including joint licensing of sound recordings, mechanical rights, musical performance rights. That is something that we've, as you know, because of Sierra and other attempts to have a blended license and trying to either have a general designated agent or whatever we're going to call it this time. I want to remind the Copyright Office and everything involved what songwriters need out of that.

Because we get in to these discussions constantly about how the record labels and publishers and PRO's are going to interact and, you know, make this work with even the data and all this stuff. But, at the
end of the day, songwriters need several things out of some sort of MRO or some sort of general designated agent. What we need, first of all, is efficiencies of scale to lower the transaction cost.

Because the transaction costs come out of our pockets, okay? And right now we are paying transaction costs in every venue. But if we put it all together in one that could save us some money. That's a good idea. It makes it easier for users to come to one place and license one time. There should be one transaction fee. We are good to go, that'll make it easier for everybody and cheaper for us. As long as those fees are controlled -- and the thing that we're concerned about is we have to have songwriters representation on the board. We have to.

Because that's where there's -- the fees are going to be determined, okay? And we have more interest in keeping the fees lower than anybody. So we would like
representation on the board. Then we need a
dispute resolution body of some sort on this
MRO so that when there's questions about
statements we are not completely in the dark,
we can actually go to somebody and question
what's on our statement, whether it's correct,
whether we got paid everything that was coming
to us. And, in terms of transparency, we
really, really need to see the data up stream
from the publishers. We need to see it when it
comes from the service, before it gets in to
the black box. We just want to see how much we
sold, okay? I think that's fair. And, if we
are talking about blending all our rights and
making it easier for all the users, then we
should get something in this return.

One last thing for Ms. Butler. You
said that you think perhaps the songwriters
are losing their jobs because the album cuts
songwriters.

MS. BUTLER: I posed the question.

MR. CARNES: Right, okay. So here's
the answer. The group of songwriters that are writing the album cuts and hits, that's not mutually exclusive groups. That's the same group of people. So you're actually losing songwriters in general, not just specific ones.

MS. CHARLESWORTH: Thank you, Mr. Carnes. I think we'll go to Mr. Donnelly and then Mr. Rosenthal.

MR. DONNELLY: Sorry to interrupt your fight.

MS. CHARLESWORTH: Oh did I?

MR. DONNELLY: I think if we made anything clear from SiriusXM's position is we really believe in three things. We think the time is now for comprehensive reform, continuing some of these piecemeal reforms. Whether it's songwriters, equity or Respect Act makes no sense. It's time for reform. We believe in parity. We believe very strongly in parity among platforms. But, most of all, for the purposes of this panel we think if nothing
comes out of this we need a centralized
database. We really need to focus on, you
know, new standards for reporting and finding
a centralized database where this can exist,
it can exist for the benefit of licensors and
it can exist for the benefits of the users of
music. And, if nothing came out of this other
than a database and improving the information,
that would be a tremendous victory.

MS. CHARLESWORTH: Okay. Here's a
question. I'm going to pick on you Mr.
Donnelly. Assuming we all agreed -- and I
think there is a lot of agreement on that
point -- how should it be funding.

MR. DONNELLY: I pay a lot in
taxes.

MS. CHARLESWORTH: Yes, we'll talk
to the Appropriations Committee. Could you
please double our budget so we can build a
database? No. I mean, it is a serious question
in the sense that I think it seems like
everyone would benefit from it. But it's a
thorny question, sort of how do you, you know, obviously there's the first question of who should build it and how do you obtain the -- question two is how do you obtain the --

MR. DONNELLY: You know, as a technology company, and I know Google has this experience too, we're involved in many standard setting organizations, whether it's wifi standards or LTE standards. There could easily be an interdisciplinary standard setting committee set up to work across licensors and licensees of the music and to agree on how to implement it.

MS. CHARLESWORTH: Okay. I think Mr. Rosenthal and then we'll go down this way.

MR. ROSENTHAL: Okay, just as a quick point. I mean, I think that Peter and I and Steve are like two ships passing in the night. Peter and I believe that publisher certainly has the right and should, and this is the right way to do it, to assess each usage as it comes along. But, as a positive
side to this, we are already discussing micro-
licensing as a proposal for the future, I mean
if we're talking about positive moving
forward. Part of this micro-licensing concept
has been that publishers kind of sit back and
set some kind of a rate for certain types of
usage. And, if it's either the publisher or
the administrator, they would have a rate
card. They would say, well, for this we're
going to do that and you can go out, the
administrators can just cut the deals. That is
at least let's start a conversation in that
context to see how it works on that.

And we have committed to that. We
are talking about moving forward to micro-
licensing. I also think that in the free
market context micro-licensing is the way to
do cover versions of songs. And I know that
this issue has been raised before. How do you
do if you don't have a, you know, a 115, how
do bands do cover versions? Well, you can do
it through a micro-licensing concept, which is
that publishers, songwriters would accept,
okay, this is the rate I want for someone else
to do a cover version of my song. And it would
be out there. It would be granted to the
administrators. And that's how the business
and the market moves forward. So, instead of
this grandiose idea -- and I'll read it for a
fourth time, believe me. I'll look for it. The
fourth time out maybe I'll see the light. But
I think we should be discussing more on a
small level micro-licensing, see how that
works and then see the conversation and where
we could go with that and to see if we can
find some common ground.

MS. CHARLESWORTH: Mr. Duffett-
Smith?

MR. DUFFETT-SMITH: Thanks. So,
yes, Susan really appreciate the European
perspective. You know, we've dealt with a lot
of the issues relating to fragmentation of
rights and repertoires being split around the
European Union. And it's not been easy. It's
not been pretty. And, you know, I don’t think all the problems are resolved there. And, as you said, the recommendation was in 2005. We are nine years later and still there are serious issues to sort out. So I would say that anything that happens going forward, you know, looks to the European perspective as well, understands that there are serious and complex issues. And, you know, hopefully the U.S. can learn from that experience.

Because there are a lot of lessons to be learned there. It’s a very, very challenging landscape to navigate.

Identification of works being particular problem. So, you know, some kind of unified database and principle is a great idea. But just more generally, Mr. Brodsky, Mr. Marks, it’s quite interesting hearing you two interact. I think it raises a very good point, which is that, you know, you have to look at this from both ends as the music producers, the music creators and the services. You know,
we all have to be in this together. What I'm concerned about is that the services become collateral damage in a fight between the different rights holders. And, you know, that suits nobody. It doesn't suit the rights holders. It doesn't suit the services. So whatever it is that is done going forward, I just -- look at everything holistically and make sure you consider everybody.

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

MR. ROSEN: Well thanks. I'll just make a couple of quick points. RIAA proposal, I mean, you have to like the ambition of it. And that's great. I think when you examine it closely I think it starts falling apart. I think publishers and PRO's serve different constituents than the RIAA does. I'm not sure they mesh just because it all falls under the category of music. I think buying in to that proposal buys in to the notion that there is an overall fixed value for music and you kids
fight out what your allocation is of it. And I don't buy into that.

Ultimately I do think it's antithetical to what we are trying -- what at least many of us are trying to pursue here, which is to identify the free market value. I think that we're operating at cross purposes in some of this discussion. The notion that a free market is going to be sleek and streamlined and without problems, I don't buy into that. I think on a macro sense a free market will clarify and sharpen. I think down on the ground it is sloppy and it's unruly and there are winners and there are losers. And I think if we are trying to pursue a painless transition to free market I'm not sure we're going to be able to accomplish what those who are in favor of free market are trying to achieve. And finally, just one last quick point on data. You know, everybody agrees in the need for transparency. And certainly BMI has been a participant in the global
repertoire database and working with ASCAP and so we are developing the Music Mark model to perhaps reconcile data. Where I get a little nervous about this is the notion that the data that BMI has been developing for 75 years, or ASCAP for longer, all of a sudden sort of becomes a public good so that new entrants can leverage off of that. Any solution that works towards transparency, and we are in favor of that, has got to address those, I think, legitimate concerns.

MS. CHARLESWORTH: Okay. Mr. Gibbs?

MR. GIBBS. It was really interesting to me to watch Mr. Marks and Mr. Rosenthal go at it and then Mr. Brodsky jumped in.

Because I'm an artist, you know?

And I found myself in situations where I have to deal with guys, who are on their level.

And, usually, we just find somebody else who is on their level, unless I'm going in a room with those guys, and they hash it out. But
then the problem becomes what happens after
they hash it out? You get a piece of paper, it
has some numbers on it. We don't know where
those numbers came from, we don't know
anything about it, other than the fact that
there is a sheet that usually says you get
zero. So what we really need, as artists, is
transparency through the whole chain, not just
when one guy sends us a statement, and another
guy sends us a statement.

We have to get statements from
everybody along the line. We have to be able
to reconcile them. We have to know -- So we
have a situation, now, from the C3 standpoint,
we can't even really address, on a certain --
that is why, that is one of the reasons we
passed on yesterday. We can't really address
the licensing issue because we don't really
know what is coming from where. So
transparency is the most important thing, for
us, as creators.

Because we need the facts. All --
whatever solution we want, we have to have the facts. What we know is that we are getting less money, right? We don't know why. Everybody has an opinion about why, but what we know, for sure, is that there is less money. So in order to determine what the problem really is we have to see the information, from every person. As far as licensing models that are being presented, there was one recently presented to the MD Creators, from Google/Youtube.

It was not one that we -- it was not something that we want to see more going forward. And, again, we have no -- we have no way of knowing why that particular model was presented as opposed to a different model. So it comes back to the same model of transparency. And it becomes a special problem when you have the black box. When you have, money comes in to somebody, and then it sits there, and then it gets spit out the other end, and you don't know what happened to that
money.

So that is the main thing for us.

And on the same level of transparency,
specific policy things, we would like to see
-- let me get this right, we would like to see
an audit for Section 114. We would like to be
able to know, again on the transparency issue,
to know what every player is singing. We want
to see -- so we can make a fair assessment of
what we want to do. As far as micro licensing
we support regimes that retain value, artistic
and monetary to creators. We are looking for
a system that works across all musical genres,
all songwriting practices, that recognizes
that music can create, and be created in ways
unavailable to it previously, and it returns
value, both again, artistic and monetary to
the creators. And one more thing, talking
about kind of what we are thinking about the
future. As I said, in earlier comments, we as
creators like the SoundExchange model. We
would like to see it expanded. And one thing
that would be really interesting to us is expanding the SoundExchange model to all compulsory licenses.

MS. CHARLESWORTH: Thank you, Mr. Gibbs. Mr. Bengloff, since you spoke earlier, I'm going to skip over and go to Mr. Rae and, Mr. Reimer, we will get back to you.

MR. RAE: First of all sorry I was tardy. Our waiters were way more interested in the World Cup than giving us our check. So I'm going to blame them. This is the Future Panel, right?

MS. CHARLESWORTH: Yes. You have to give the report on the game.

MR. RAE: I have no idea. I'm on team transparency, so that is what -- anyway. So this is the Future Panel. I want you guys to pretend that I just crashed here, in my time machine, I'm from the future. It says so right here, if you can believe this. What I'm observing, in 2014, is an irresistible force in media and technology, corporate media and
technology, in particular. And that is the
convergence of pipe, data, and content.

Big companies that control access
to consumers on this sort of highways of the
internet, big companies that control, and can
manipulate that data, for profit, at
impossible scale. And big companies that have
become multi media empires of global renown
because they have aggregated tons of
copyrights, over the last century, or half a
century. That is what I see, emerging from my
craft.

I also understand, because we are
all so passionate about music, regardless of
where we sit, that content still has value. It
is the actual reason that we all connect to
the network, so the question is, who gets to
participate in that value? I want to see more
people, like Melvin here, because those are
the guys that I think should participate in
that value. And the other question is, who
invests bringing more of it to the
marketplace? And sometimes I think where we are getting hung up is the fact that people are still trying to operate the business models that they are accustomed to, and provide some services that definitely benefit creators, under conditions that have changed and probably are not coming back. We have, in my opinion, too many passive extractors of value in the marketplace today. I would like to think more about what allows the encouragement of creativity, and how creators are able to participate in that value that is generated. This is all high concept stuff. I'm not going to argue about 114 and 115 any more, because I'm bored.

So this convergence, that I was referencing earlier, is going to produce outcomes that we can't even predict here, in 2014, sitting at this table. There are companies that traditionally invested in the creation of copyright, made or enabled its creation, may not be the ones that do that in
the future. So my question is, if we end up in a place where new players, in the marketplace, are invested in the creation of copyright and other forms of IP, how can we guarantee that the creators are beneficiaries of whatever value is created from that investment? We have to, as creators, and those are the people that I talk to, and speak for occasionally. I wouldn't be so presumptuous as to say I speak for all of them or even, you know, five of them. We all have different opinions.

But what we are facing, right now, is the fact that there is a lack of investment in the creation of music, that gets to the creator. And we are also facing a situation where we have little leverage, or even understanding of, how the existing systems function. So the government can do its job by trying to uphold part of the compact, in the Constitution, which is to incentivize authors to create new works, yes, ultimately to benefit the public. And all of your companies,
and your organizations, are part of that
bringing it to the public. Yes, you are doing
it for profit, blah, blah, blah, blah. There
may be new players, you know, from the future,
or in the future, that participate in
investment in that creativity.

They might actually -- I will
stop. They might actually have a different set
of values, completely different set of values.
They might feel, for example, that bifurcated
music copyright is inefficient. Why should we
think, in 2014, from our privileged positions,
that we have the exact right answer just
because we have, historically, existed under
these frameworks. So let's blow up the notion
of reform completely. And if we are going to
start from scratch, and come to some
conclusions, we should go back to the clause,
in the Constitution, that describes the reason
for copyright in the first place. So that is
the view from future or space.

MS. CHARLESWORTH: Okay. Now,
coming back down to Earth, thank you Mr. Rae.

We give the floor to Mr. Reimer.

MR. REIMER: Thank you. It struck me, listening to the debate, on this side of the table, between RIAA and the NMPA, that the RIAA's proposal, and many of the points that Ms. Butler made as well, supports our view that it is imperative that the ASCAP and BMI consent decrees be modified to allow for licensing of multiple rights. And I think, as Ms. Butler pointed out, this is a trend in Europe. We would like to be part of that trend. We can't do it right now, but with the consent decree modification, that may be a possibility that we can pursue. Also, on the subject of the availability of information, at least since the 1950 ASCAP consent decree, we have been under an obligation to advise people, who ask, whether specific works are in the ASCAP repertory. We are all for making information available and we will continue to do so, in the future, and work as Mr. Rosen
said, with others to improve that old system.

MS. CHARLESWORTH: Thank you, Mr. Reimer. I think -- I'm hitting people who haven't spoken yet, and then I will get around. But I think Mr. Rushing, have you -- you haven't spoken on this panel yet.

MR. RUSHING: I will be brief. I just wanted to reiterate a point that Susan actually made, which I thought was really nice. And that came up a little bit yesterday, which is thinking about radio, and other broadcast forums, is the way that music is actually distributed. And I think that is, and when we talk about access models, and moving to access models, from a sales model, really what you are talking about the economic event being to listen to the music. And radio is an enormous part of that. And the radio industry demonstrates that it is an incredibly lucrative method of distributing music. And it that reality needs to animate any policy that the Office is looking at, and that the
Congress is looking at.

Most of it, I think, needs to animate the decisions made by our industry, especially the recorded music industry. I think this is an area that the publishers and, certainly, the songwriters have understood for a long time, the value of having songs on the radio, and they participate in that value. The recorded industry is, obviously, in a different place. But I think that is a really nice way to frame the state of the overall industry and just think about what are all the different ways that music generates value from the economy. And then the question is, does the law ensure that the people who are creating music are actually participating on each of those platforms?

MS. CHARLESWORTH: Thank you, Mr. Rushing. Mr. Harrison? And I think, if you can tell us who you are, too?

MR. HARRISON: I have never --

MS. CHARLESWORTH: You look like
you are at a press conference.

MR. HARRISON: I have never been in front of these many microphones. In fact most of my public speaking has been done without a microphone. I'm not here on behalf of my firm. I'm here as, basically, a music consumer. And the youngest person at this table. This discussion started with an analogy about watches. You have two watches and you don't know what time it is. But, in fact, most people my age use a cell phone. You have two cell phones, everyone knows the same time, because they all come off of the atomic clock out in Boulder. And that is the kind of data, network data driven change that applies to music distribution as well. We are talking about radio airplay. And a lot of the guys here are looking at radio airplay model of licensing. We had a lot of uncertainty about how many people actually listen to the songs, and you do a blanket license.

And after the fact, the musicians
who think their song is successful, want to
come back and say, hey my song is worth more,
because it gets played more. But in fact it is
guys like Google, and Youtube, or Spotify, or
the streaming service I will listen to on my
way home, you know exactly how many times each
song is listened to, who requests it, how much
they are willing to pay, per month, in order
to have your catalog of songs available. Which
songs they pick from that catalog, and how
often they pick each song. You also know how
much advertising you need for those people.

So the old model of licensing
based on a lot of uncertainties, and
salesmanship is, really, on a downward trend
from a consumer's view. I know which ads I
click through when I'm looking at a streaming
service. I know they are getting from that, I
know which musicians I'm listening to, and
which musicians they have tied those ads to,
based on my demographic preferences, and my
listening preferences. So as a consumer I'm
aware that the money that the company is
earning, from my add clicks, links back to
specific musicians, who are related to the
things I want to buy, or who I am as a person.
And it doesn't link to all of ASCAP and BMI's
catalog, only to a select few musicians. And
now my cell phone is telling me that I have to
get out of here, to pick up my kids, who
always buy stuff streaming.

MS. CHARLESWORTH: All right, then.
Thank you, Mr. Harrison. Okay, let's see, I
think Mr. Lee, and then Mr. Diab.

MR. LEE: I promise not to run out
right after I do my --

MS. CHARLESWORTH: I think we
scared him with the three mics. He looked a
little --

MR. LEE: Intimidated, of course.

MS. CHARLESWORTH: No.

MR. LEE: First of all we want to
thank the Copyright Office for organizing this
exchange of ideas, it is always useful in
developing the final product. Copyright reform, I think, can be a scary term to a lot of people.

Because what does it mean? Is it blowing up the existing copyright law and starting from scratch? Which, you know, some people have proposed. But we, really, prefer to look at it as more it is an improvement, it is a step in the process, it is an iteration. I applaud Susan's comments about let's look at what works, that is important. There are models out there that have been effective and efficient. And we should consider that when we are moving forward.

Improvement, to me, implies that it would be great if we could do this all at once. But, realistically, maybe everything can't be done at once. And we have to bite off what we can chew, and improve the process as we go along. It seems, you know, from my participation in the past couple of days, blanket licensing is not really a concept that
is controversial. Blanket licensing brings a lot of efficiencies to the process, both from music users, and creators of music. So it sounds like that is a fundamental and a foundation, you know, for going forward with any kind of improvement in copyrights. So we support that. Direct licensing is an interesting concept. I guess it is in the eye of the beholder. It is, we believe, a valuable alternative, or option that plays into getting to the end game. Where we believe that the free market is, really, the best methodology in order to come up with the appropriate fees and agreements between the music creators and the music users.

MS. CHARLESWORTH: Okay, thank you, Mr. Lee. Mr. Diab?

MR. DIAB: So I just wanted to add one point, and I'm sorry Mr. Harrison left, because he actually sort of built the segue for this. He mentioned that the data about what music is consumed these days, given the
way that the streaming services are operated, and you can go and see how many times a song has been streamed, a lot of that data is already out there. And I agree with him, I think where we should hopefully be trying to get to, is a system that is more transparent, so that creators like Mr. Gibbs said, can see actually what they are really earning, like what the value of their music is.

And I think a lot of that data is out there. So any reforms that we enact should try and promote that sort of transparency.

Because ultimately if we make other reforms that don't, ultimately, benefit the creators and the songwriters, we will just be back here, again, in years to come trying to fix the same problem over and over again. So I think improved transparency so that the process is sort of laid bare. And I think Mr. Duffett-Smith made a comment, earlier, about the sort of conversation happening between the recorded music side, and the publishing side,
in terms of services getting caught in the
middle. I absolutely agree with that. I think
it is something that we face at Youtube. I
think we will all the time. And I think
enhanced transparency into that sort of
holistic picture is something that definitely
would benefit the system.

MS. CHARLESWORTH: Okay, thank you
Mr. Diab. So I think everyone is a repeat
customer now. So we will continue going
around. Mr. Marks?

MR. MARKS: Just a couple of quick
things. Mr. Gibbs, you were saying that you
wanted to expand the collective licenses to
the SoundExchange model. That is exactly what
our proposal was for musical works with one
very important exception. And that is that
there be no government oversight when it came
to publishers and songwriters setting their
rates like SoundExchange has to live with,
with the CRB. And the other comment I want to
make, you know, there has just been a lot of
discussion about free market, and getting into the free market, and eliminating 115, et cetera. I just think, at some point, we need to be practical about the ability to make that happen. I have listened, over the course of six days of these roundtables, to a lot of people say, to the publishers and songwriters, that that just ain't going to happen, unless the system is radically altered. I mean, I think it is pretty clear the writing is on the wall, in terms of their political opposition to that.

And so it is fine to talk about those things, but we have to come up with some practical solutions rather than merely say, you know, let's eliminate 115, or lets bundle rights, and allow withdrawals from a PRO. I just don't see that happening given the statements that have been made around this table for six days. So I hope that at some point we can have the conversation, you know, to figure out, so the uncertainty doesn't
exist, and services don't get caught in the
middle, and labels and publishers can provide,
I think, what the services really want. Which
is some certainty around the rates, you know,
for the music. And I will leave it at that.

MS. CHARLESWORTH: Okay. Mr. Carnes?

MR. CARNES: Thank you. My colleague Mr. Gibbs and then Mr. Diab, and
myself, we have used the word transparency a lot. And I'm afraid that it is just too much
of a concept. And I wanted, like, give you
sort of a real life, right here and now, real
time example of the sort of informational
asymmetry that exists between creators and the
distributors of their work, okay? Yesterday
Mr. Marks said that he was tired of sweeping
statements about how advances in equity
shares, that they are getting from services
like Spotify or Pandora, that we are saying
that, that is not being distributed to the
artists. And he says that is absolutely wrong.
And so now I need to know how and why, okay?
Because this is information that I have received from several sources. And so now I need to know whether your companies are, actually, taking equity positions, in these organizations, and how that money is going to be distributed to the artists.

MR. MARKS: Under my proposal, our proposal, you would find out. You would get the statement, directly from the service, about what was paid to the record company, and I know that.

MR. CARNES: Would that include -- I mean, how about right now, what has happened?

MR. MARKS: I can't, Rick, come on. Rick, I can't, you know, if you -- if I tell you on behalf of my members what individual --

MR. CARNES: See, this is --

MR. MARKS: -- what individual -- I said yesterday --

MR. CARNES: And your members won't
tell me either. And so, see, this is a problem. This is what songwriters and artists are facing, okay? I'm sure he is constrained and he can't tell me, okay? But this is our money, okay? If they receive this money and they -- in the form of equity, in the form of a share of the company, I'm never going to see it. But that is money that was, basically, paid for creative works, okay? So this is the problem. We talk about transparency all the time. But how about actually putting it out there on the table and saying, okay, this is what we got, here is your share, thank you.

MR. MARKS: We would be happy to arrange conversations with the right --

MR. CARNES: Thank you so much.

MR. MARKS: -- people at the company, so that you can ask those questions.

MS. CHARLESWORTH: Okay. Mr. Gibbs,

then Mr. Bengloff.

MR. GIBBS: Thanks, Mr. Carnes, you have brought up a couple of points that were
floating around. I mean, I didn't necessarily
want to touch the equity issue because it is
way outside of this. But, obviously, that is
money that is getting stopped in the chain,
that we will never see. And that we, because
it is basically an investment, it is a micro
investment that we are not seeing our share,
the result of that. I also wanted to thank Mr.
Diab for a shout-out, and I appreciated that.
Unfortunately now I'm going to have to step on
his shout-out, but don't hate me for it. Mr.
Harrison mentioned the add revenue, and
mentioned information. I can go on Google,
right now, and know exactly how many times
everything I have ever played on has been
torrented. It is no problem for me to find
that information out. The torrent companies
are supporting, they are using our music to
support their business model. None of that
money is passing through to us. That may or
may not be outside of the scope of what these
hearings are about. But if we are going to
talk about continued financing of music, we are going to have to talk about -- if the money is going to an ad supported model, we are going to have to talk about how that ad money is going to get to everybody who is involved in creating the music.

MS. CHARLESWORTH: Thank you, Mr. Gibbs. Mr. Bengloff, and then I think you are gesturing. You are gesturing at your own -- I thought you were being polite, Mr. Brodsky. I was saying, why are you pointing at the empty chair? I saw you, I was just going to say that I think you may be our final speaker on this panel, unless others have something to say, because we are just about out of time. Mr. Bengloff?

MR. BENGLOFF: If our constituents were allowed to negotiate collectively there would be more standardization, it would be easier to report, and it would be easier to understand in terms of what is going on. I just want to commend Mr. Gibbs, and that is --
I discussed this yesterday, that in the
testimony of our representative, who is going
to be at the House tomorrow, Darius Van Arman.
He includes these label fair digital deals
which have been endorsed by the International
Committee, WIN, World-Wide Independent
Network.

And as part of that, which you can
all see, it is an exhibit to his testimony
tomorrow, we plan to account to artists, on a
good faith program, a share of any revenues,
and other compensation, from digital services
that stem from the monetization of recordings.
Even if they are not attributable to specific
recordings, or performances. So that, I think,
is a statement by our community about how we
feel about artists. But, that said, we prefer
more compulsory statutory license regimes, and
expansion.

Because music should, actually --
the level of compensation is correct, I think,
all the creators would disagree. Mr. Donnelly
may disagree. But that -- I'm just teasing, Pat. But all kidding aside, we feel it should be, the compensation should be attributable to consumption of music. Whether it be a stream, whether it be a SOW, and that is what the goal of the Copyright Office should be, to -- the level of compensation is correct, let's allocate it to the people who created the music, and invested in that creation.

MS. CHARLESWORTH: Thank you, Mr. Bengloff. And, Mr. Brodsky?

MR. BRODSKY: I just have two quick points. The first on transparency. To me it doesn't seem that transparency, which is really an important issue, is only an issue for copyright reform. I think it is a voluntary activity that publishers can do better at, that record labels can do better at, and that services can do better at. And so it is not only an issue for copyright reform. The other issue, just to respond to what Steve was saying, we agree, the abolishment of
Section 115 is not on the table right now. What is on the table is the Songwriter Equity Act. That is the change to 115 that we want, 801(b), in our opinion, creates artificially deflated rights, and a willing buyer/willing seller standard, we think will create fair market value for us.

MS. CHARLESWORTH: Okay. Well, --
MR. MARKS: If I could respond?
MS. CHARLESWORTH: I'm sure you could. All right, let's have a show of hands, who want to allow -- no, Mr. Marks do you have something, did you want to respond? We don't want to deprive --
MR. MARKS: The only thing I would point out is, you know, we support the change, you know, willing buyer/willing seller so long as we can get it, you know, across the board. I think we all deserve that. But you are still subject to a CRB setting your rates instead of, you know, doing it through a negotiation in the free market. So I -- that may be the
preference, you know, of the publishing and
songwriting community at the end of the day. But I would think, you know, what we were proposing, in concept, might be better than that. So you are not subject to that.

Same with the rate court. You can introduce additional evidence, but at the end of the day, somebody else is still deciding what your rate is, instead of you deciding it for yourself.

MS. CHARLESWORTH: Did you want to respond to that, Mr. Brodsky? I mean, maybe you want to clarify. You are saying the SEA, that that is not the free market. Are you saying that is a short term measure? I just want to make sure I fully --

MR. BRODSKY: I'm saying the SEA is a step towards going towards the free market, from 801(b) to willing buyer/willing seller, will arguably create free market rates.

MS. CHARLESWORTH: Okay. Well, we have one more piece of this roundtable, which
is to allow anyone in the audience to step up and say their peace. I think we will go right to that, John, if you want to call people up?

MR. RILEY: If I can encourage everyone to stay in your seats, if you can. Anybody else interested? We only have four sign-ups right now. Please see Mr. Moore, with that clipboard right there. I will take the people who have signed up in order, and I will let you know that we are going to shoot for about three minutes each, if that is not enough time, and we have time left over, we may be able to include you at the end. And I will meet Mr. Kohn up there first.

MR. KOHN: I am only up here because I wasn't on the panel to join that discussion. But on this notion of free market, and we have heard it from both sides, music publishers as well as the record companies. You know, I'm a libertarian and I'm, really, for free markets, all right? But I have been talking in the past couple of days, about the
problem with the free market and the way music licensing works. I think anyone, and I minored in economics, and I think if you talk to economists they will tell you, that even in a free market there are market failures that government has to fix.

One, and it is generally called externalities. You know, a negative externality would be like Mike lighting up a cigarette, causing cost. If there was a free market I should be able to do that, but I'm imposing costs on you so, therefore, I'm being regulated not to do it. A positive externality is me spending 1,000 dollars on perfume, or whatever, and wearing it, causing a benefit to people that are not being paid. So the externality, the negative externality, the negative externality -- this is economics, what can I tell you? Is that when you have -- when you have the problem of a sound recording and a musical work, together in the same product, and you have the visibility of
rights, that causes, in a free market, causes tremendous negative actionalities which result in, basically, in the transaction costs, that nobody likes, except the people who actually are a transaction cost. Like the individuals, you know, each individual practically in this room.

So, you know, my proposal, what I was talking about yesterday, without getting to the great detail, is to expand 114 and 115 to include all of these kinds of uses, to include the performance right.

Because on can you say like Spotify, they only have 70 percent of the money to pay. They can't pay 120 percent of their revenues. So there is the 70 percent, that would probably be the high, or maybe it could be a little bit higher than that. Others like iTunes might pay 70 percent, book publishers are getting 70 percent for ebooks. Maybe Pandora gets a little less, and Webcasts gets a little less, and terrestrial radio has
to pay, you know, money from these
organizations, a little bit less. But there is
a cap of the amount of money that you can
expect from any of these organizations like
Spotify. Now, if you allow the, let's say, if
you don't include the performance right, this
is just an example, if you don't include the
performance right in the digital license, and
you allow these major publishers to leave the
ASCAP and BMI, and the collective societies,
you are going to cause the same problem that
some of these gentlemen have been saying, that
is occurring in the music industry today.

And that is this parity problem.

That is, the independent record companies are
not getting a share of the equity that the
major record labels get. Even when the
independent record companies make up that
distributed market share. When the indie is
distributed by a major, the major counts that
in their share, that they are asking for, in
terms of the equity of these companies. And,
also, the independent record companies are not
getting better deals, they are not getting the
same deal that the major record companies are
getting. So what happens is, and if the
publishers get out of ASCAP, and they pull all
their rights, they are going to be just like
the major record companies. They are going to
be able to go and get more money out of
Spotify. Remember, Spotify only has 70
percent. So if the major publishers get more
than that, somebody is getting less. And it is
going to be everybody else. So the people,
here, are representing really the majors. And
you have a situation that is called a
monopsony.

If I'm a small publisher, and the
major publishers are getting a bigger share
from Spotify, I have an incentive to have the
major administer -- I know I have three
minutes. But I have an incentive to have the
majors administer my copyright. So the majors
get bigger and bigger. When you have a
situation where you have major publishers, a few number of them, it is called a monopsony. It is a mirror image of a monopoly. So me, as an individual songwriter, or a small copyright owner, have to deal with the monopsony. They will try to pay me less for my copyrighted work. So the Songwriter's Guild, here, and anyone who represents songwriter here, really should be very fearful of this open market, free market scenario.

Because it allows the major publishers to get monopsony power over them. And when they get, when they get that monopsony power, and they get -- they will pay less share to the songwriters, they have no incentive. They are going to keep that themselves. I mean, that is when monopsony power is. So the only way to solve this problem, on the publishing side, is to fold the public performance license into this digital license. And you have to take in, as Spotify was saying, you have to take into
consideration this holistic approach. Here is
the 70 percent, some of it goes to the sound
recording side, some of it goes to the music
publishing side. On the music publishing side,
depending upon the use, some of it goes to the
reproduction, some of it goes to the
performance. It is really the only way that I
can see this happening in the future. So all
this stuff, about free market is wrong. The
free market is broken here because of the
negative externalities. And if we didn't have
that concept we would have no pollution laws
today.

MS. CHARLESWORTH: Thank you, Mr.
Kohn. I think you have inspired some comments
on the panel. And I'm going to, if people
would indulge us, I would like to allow people
to respond. Mr. Brodsky and then Mr.
Rosenthal, briefly though, because we do have
some other speakers.

MR. BRODSKY: I did not study
economics and that is the first time I have
heard the word monopsony, so I'm not going to
address that. What I can say is that when we
did withdraw our rights, we did it on behalf
of songwriters. Songwriters benefitted from
those rights, because we were able to make
deals that we felt were free market deals,
that benefitted songwriters. We were able to
administer those withdrawn performance rights
at a highly reduced rate, that was a benefit
to songwriters. So I'm not sure how this
monopsony situation is anything but good for
songwriters.

MR. ROSENTHAL: As Marybeth Peters
has said, --

MS. CHARLESWORTH: It always comes
down to Marybeth.

MR. ROSENTHAL: It always comes
back to Marybeth. That was a very interesting
performance, Bob. Basically we have had a
compulsory license for 105 years. If there is
a problem it is because of that. No free
market has ever been given a chance. So with
all the theories, with all the thinking, with 
all the monopolies, monopsonies, whatever the 
heck you want to call them, the free market 
has never had a chance to develop anything 
that is in favor of artists' rights, in favor 
of songwriters' rights, against them. It is 
time to give the free market a chance. And 
Peters is absolutely right. That is not on the 
table in terms of the legislative agenda. The 
legislative agenda, right now, is more 
limited, and it is to get the free market 
going here. But let's listen to Marybeth when 
she says that. If we have a problem here, it 
is because of the compulsory, not in spite of 
it.

MR. RILEY: Mr. Knife?

MR. KNIFE: So I'm going to take a 
really long time, I have something to say to 
everybody on the panel. No, I really -- I just 
wanted to say, in closing. Number one, big 
issues, a lot of stuff to talk about. I think 
it has been a healthy discourse over the, you
know, over all three sessions. I thank everybody who has appeared on all the panels, it is a great exchange of ideas, and concerns. And, obviously, we have a lot of work ahead of ourselves. And I just wanted to thank the Copyright Office folks for putting this on, and for making sure that it moved forward with a certain amount of grace, and alacrity. And just, like I said, big job and well done, thanks.

MS. CHARLESWORTH: Thank you, Mr. Knife.

MR. RILEY: Mr. Brooks.

MR. BROOKS: My name is Tim Brooks. I'm the Chair of the Copyright Committee of the Association for Recorded Sound Collections, which represents collectors, scholars, and archivists who preserve these recordings, that we are involved in talking about here, that so often aren't preserved otherwise. And there are a couple of points I would like to make on behalf of our members.
First of all, as has been mentioned by some but not enough, I think, of the panelists I have heard today, we must have availability of our cultural heritage, and our historic recordings, in particular. And specifically a public domain. As far as I know the United States is the only country, in the world, the only country in the world that does not have a public domain for sound recordings. And that is obscene. If my organization, ARSC, who is located in Canada, we could put things on our website. I'm talking about hundred year old recordings now, or Europe, or any other country. But we can't do it here. And that has led to what some call dark archives, which I think you have referenced earlier, the concept at least, of recordings which exist but can't be used by scholars, can't be heard by students because they are under copyright. And nobody can get the, at any reasonable rate, the release of them for that kind of use. So we need a public domain. Licensing, in our
view, is not the answer.

I think a close study of the National Jukebox Agreement would bear that out. Particularly licensing when one party in the licensing negotiations has all the leverage, and the other party does not. That is not a reasonable negotiating position to be in, if you are the licensor. So I don't think licensing is the answer to that. The use it or lose it, which is now the law in Europe, for the latest stages of recording, has a lot of face validity. Whatever kind of structure we have, going forward, at least for the later years of copyright, I think that makes a lot of sense. And I think it does to the general public, too. If you are not going to use it, if you are not going to release it, and if you are not going to make it available to future generations, why have a law that lets you sit on it, and not let anybody hear it? The commercial recording companies were never structured to be cultural custodians, nor
should they be, nor should they be. So that is
where the public comes in, that is where
scholars come in, that is where organizations
like mine come in. And, finally, the -- in
regards to the Respect Act, as we all know, I
hope, copyright is a trade-off.

You get something, you give
something. You get a government-enforced
monopoly, if you are the creator for,
supposedly, limited times. The government will
enforce that, and get big fines for you, if
necessary. But the tradeoff to that is the
public, eventually, gets to build on that work
that you created, many years from now,
probably after you are dead. The Respect Act
strikes me as half of that. We get the part we
want and we will deal with the rest later.
That is not a trade off. And I think, with all
due respect, the fact that yes, it is a start,
and it is an opening offer, and it should be
considered as that. I think we now need to
talk about full federalization of pre-1972
recordings, with the trade offs, including the
public domain, including fair use, including
the other things, the federal law begins, not
just half of the bargain. Thank you.

MS. CHARLESWORTH: Thank you very
much.

MR. RILEY: Mr. Sanders?

MR. SANDERS: Thanks, I'm going to
be really brief, because I made the same point
in Los Angeles last week. But Rick and I were
in a meeting last night with a group of 50 to
60 songwriters. And we promised we would
deliver this message, again. Like my friend,
Peter Brodsky, I did not study economics. But
I did study antitrust law in this building.
And I do know an unlevel playing field, when
I see one. And that was the message that we
were asked to deliver. The last speaker spoke
about inequity in bargaining position, and
that one side may have all the leverage. The
amount of vertical integration, that is taking
place in our industry, sometimes indicates
that it is not a matter of leverage, it is a matter of the same companies, on the same side, on both sides of the same table.

This is a reality that cannot be ignored. The fact is that creators are given the rights, or under Article 1, Section 8, that it is the creators who are supposed to benefit from the Copyright Act, and copyright law. They have not been given the kinds of either respect, or ability to articulate their feelings about many of these issues. It is a wonderful thing to have these meetings, and these roundtables. It is great to be able to articulate the point of view of the actual creator. But without a recognition that there is no free market in this situation, how can there be? Unless, as Mr. Kohn pointed out, there is some type of government oversight that guarantees the rights of those people who are being taken advantage of. We are spinning, again, our wheels over and over, and over again, for a situation that cannot be
resolved. So, again, this is the voice of the
songwriter asking to be recognized, and the
realities of the marketplace asking to be
recognized as well, thanks.

MS. CHARLESWORTH: Thank you, Mr. Sanders. Yes, Ms. Butler?

MS. BUTLER: I would just like to
add one more comment to the free market, on
the international level. The use of
international deals, outside of the U.S., to
be used as benchmarks. Toss that into the
equation.

MS. CHARLESWORTH: We will toss it
right in. No problem. Was there anyone else,
John?

MR. RILEY: This is our last one,
Mr. Rebo.

MR. REBO: Hello. I just wanted to
make a few comments regarding, first regarding
Lee Knife of the Digital Media Association
comments regarding piracy. He commented,
several sessions ago, it is what it is. And I
would like to speak in support of Rick Carnes' comment, it is what it shouldn't be. And I would like to extend that critique, a bit further, by saying it is what commercial ad-based, it meaning commercial ad-based piracy is what the Digital Media Association's corporate members have made it. It is what those ad tech members, who broker ads to ad-based black markets sights, are profiting from its being. And, again, it is what it shouldn't be. In order for the many comments based around the restoration of a market for music, to have any teeth, to make any sense to us, that is the elephant in the room that needs to be addressed. And, furthermore, it can be addressed because, if Mr. Knife's organization members cease brokering those ads, then that piracy would end.

Because over 85 percent of the commercial ad-based pirate sites are ad-funded. So no ads, and then you would get -- the sites would disappear, and you would get
a restoration of the market. I want to stress, again, that I'm talking about commercial ad-based black market sites. I'm not talking about kids in their bedroom, or dorm room.

Second comment I want to return to the beginning of these sessions yesterday. In which Ms. Charlesworth quoted one of my favorite stories, the story of the Zaks. The image presented was of two intransigent opponents unable to move forward. As I think the discussions have made clear, it is more like three or perhaps four different Zaks. But the metaphoric lack of movement still applies.

But I would like to make a point that they are not -- that the equality implied in the Zaks is not exactly the case. And I would like to directly urge the Copyright Office that when, in the due course of time, these comments are redacted into recommendations, and those are cited in the discussion on legislation, I would like you --

I hope that you will acknowledge that one of
the Zaks, the Zaks representing artists, and
musicians are a couple of non-profits with
volunteer members, in the case of our own
organization. And other of the Zaks,
particularly ad-tech corporations will be
dealing with lobby -- will have lobbying power
in the tens, if not approaching hundred
million range.

So the Zaks are not all pushing
with equal force. And, lastly, I would like to
end with another Dr. Seuss story. In this case
I will assert my fair use right to Horton
Hears a Who. In this story a whole planet of
tiny people, who live on a speck of dust are
being threatened with being boiled in oil,
unless -- they are threatened by people who
can't hear them, because they are too small,
being boiled in oil, unless they all scream at
the top of their lungs.

I hope the distinguished members
of the Copyright Office, and other people
here, will see the fact that our organization
even exists. That working artists and musicians are now volunteering and organizing to be present in this room, as a form of screaming. And I hope you will hear us.

MS. CHARLESWORTH: Thank you, thank you very much. I'm not sure I can top Dr. Seuss, especially at this late hour. And I only want to say, thank you, we are extremely grateful to all of you, for your participating. I know we will be continuing our dialogue, within the Copyright Office, with Congress. But I encourage you to do the same. We are here as a resource if you want to talk through ideas. We will be, as I mentioned, announcing a reply comment period so you, you know, if you have further thoughts, or you want to develop some of the ideas, or respond, we will look forward to those written comments. And I guess, in closing, I hope some day we will look back in this meeting and thank God, that those were the meetings that kicked off the big music
reform that benefitted our industry so much.

So with that I bid you good night.

Go have a drink with your neighbor, or whatever, a cup of coffee, and we will see you around.

(Whereupon, at 3:18 p.m., the above-entitled matter was concluded.)
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In the matter of: Music Licensing Public Roundtable

Before: Library of Congress Copyright Office

Date: 06-24-2014

Place: New York, New York

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

__________________
Court Reporter