UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

IN RE PETITION OF PANDORA MEDIA, INC. 12 CV 8035 (DLC)

----------x

Related to

UNITED STATES OF AMERICA,

Plaintiff,

v. 41 CV 1395 (DLC)

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS,

Defendant.

----------x

New York, N.Y.
January 21, 2014
9:30 a.m.

Before:

HON. DENISE COTE,

District Judge

APPEARANCES

KING & SPALDING LLP
Attorneys for Petitioner Pandora Media, Inc.
BY: KENNETH L. STEINTHAL
JEFFREY SEDDON
MARY KATHERINE BATES
JOSEPH WETZEL
-AND-
NORTON ROSE FULBRIGHT LLP
BY: MARC B. COLLIER

PAUL WEISS RIFKIND WHARTON & GARRISON LLP
Attorneys for ASCAP
BY: JAY COHEN
ERIC STONE
AMY ELLYN GOLD
DARREN W. JOHNSON
ALSO PRESENT:

RICHARD H. REIMER, ASCAP

(Case called)

(In open court)

THE COURT: Good morning, everyone.

THE DEPUTY CLERK: The matter of in re: Petition of Pandora Media Inc. Counsel for the petitioner, please state your appearance for the record.

MR. STEINTHAL: Kenneth Steinthal, Joseph Wetzel, Katie Bates, Jeff Seddon from King and Spaulding.

MR. COLLIER: Mark Collier, Fulbright and Jaworski.

MR. HARRISON: Chris Harrison, Pandora.

THE COURT: Thank you.

MR. COHEN: Good morning, your Honor. Jay Cohen from Paul Weiss for ASCAP, with Eric Stone, Darren Johnson and Amy Gold for ASCAP.

THE COURT: Good morning. Give me just one second here to get all the technology up and running. So thank you so much for your participation in the final pretrial conference last week and again for the submission of your papers. We'll hopefully be a little smoother in operating our systems as the trial goes on, but we'll see.

I have approved the proposed redactions and issued an order which will be docketed today and as a result you may file in their proposed redacted form the submissions associated with this trial.

I want to say a couple of things in that regard.

Thank you for narrowing your proposed redactions and working so cooperatively with each other and third parties to do so. But I did not want to suggest my approval is a finding that similar redactions will be permitted for trial testimony or for exhibits received at trial. And certainly should a third party seek access to any of the redacted material I'll feel free to separately review the redactions.

I have a request of the parties. I think it would be helpful to me for you to create a chart which probably contains entirely uncontroversial matters and let me describe the kind of chart I'm thinking of. Down the column would list various rights like the public performance right, mechanical rights, synch rights, lyrics rights, grand performance rights and dramatic public performance rights all of which are referred to in your papers and any other rights that you're going to be discussing with me in one way or another in this trial and then along the column headers you'd give the statutory or other reference to where that right can be identified in the law, the source for the right. Another potential column header is a layman's description of what the right is. Another column header is the original owner's right or the original owner of the right. It's my understanding with respect to some of these rights, of course, they are conveyed to others customarily, and so the next column is -- I'm not suggesting here something other than information you have at your fingertips so if this

is more complicated forget this column heading, but generally speaking who controls those rights through a license. And then the last column, well, not the last, which kinds of users need a license for those rights and what is the process for setting the licensing fee. For instance, a rate court or some other entity or just negotiations between or among the parties. Thank you.

So we just heard from computer systems. Part of the log-in problem is because they're having problems, so I'm hopeful that that won't interfere in the coming days.

I thought I might give you rulings on the motions in limine before we begin,and I'd start with rulings on the motions in limine that Pandora has made with respect to ASCAP's witnesses. There are three that are still being pressed. The first one -- and I should say with respect to all three of these motions in limine I will be denying the motion.

With respect to the Ashenfelter testimony, there are principally two grounds asserted. One is a set of arguments that focus on the fact that Dr. Ashenfelter relied significantly if not entirely on an analysis of feature music and I find the arguments that Pandora is making go to the weight and can be part of its cross-examination. It goes to the weight of the expert testimony.

The second principal argument is a series of arguments that relate to Dr. Ashenfelter's reliance on certain material

from ASCAP, its quarterly detail files and Pandora argues, among other things, that it didn't have access to the data on which Dr. Ashenfelter relied as he -- and I use this term loosely, massaged that data, and complains that in his deposition testimony Dr. Ashenfelter was unable to answer or respond to certain precise questions that were put to him by Pandora's counsel. I find that the methodology was sufficiently disclosed and that the deposition testimony was sufficiently responsive.

The second motion in limine goes to the expert testimony offered by Flynn and this was offered in the context of arguments about whether Pandora's service is similar or not to broadcast radio stations. Flynn has more than 25 years in the broadcasting and media field and is presenting an understanding of prevailing trends. One of the -- and therefore I find that expert is qualified to give the opinions offered in the direct testimony.

One of the complaints that Pandora makes is that the expert uses the terms "interactive" and "non-interactive" in a way that is inconsistent with the legal definitions of those terms and indeed in certain context with ASCAP's own use of these terms in its licensing. This expert testimony is not offered to argue that the legal definition and other contexts of those terms should be other than as it is found in those contexts. This testimony is offered to tease out the features

of Pandora that the expert believes distinguish its services from the RMLC licensees, and I will receive it.

I've been thinking myself about a term that I could use that wouldn't create this kind of difficulty. I haven't settled on a final term but I'm thinking of the term "responsive" as opposed to "interactive." There are other terms I'm thinking about. In any event, I'm anxious for counsel to suggest to me a term that would adequately convey what Pandora does and yet not enter into unnecessarily this debate which is really I think a side show about whether it's interactive or not because of the confusion one can create if you loosely use the term "interactive" in this context when it has a very defined meaning in a different legal context.

Another argument that's made about the Flynn testimony is that Flynn's definition of the radio industry is an arbitrary one. I don't find that this defeats admission of the testimony. How arbitrary it is can be subject to examination. This expert has presented sufficient evidence in direct testimony to support a view that it's a standard use for this witness.

Another series of arguments has to do with the expert's reliance on statistics from I Heart Radio's customized stations and it's an argument about that information being without foundation. It's not being relied upon in this direct testimony, so that argument is moot.

And finally, there's a general argument that the testimony is not helpful because it's simply a vehicle to place hearsay testimony into evidence and of course that is an improper use of expert testimony. But I find that the kinds of evidence and articles to which Flynn is pointing are the kinds that this person uses from day-to-day in working in this field and it's being appropriately used.

I should have begun by providing the parties with the standard I will use in evaluating the admission of expert testimony. Obviously, I'm looking at Rule 702 in particular and to some extent 703 as well of the Federal Rules of Evidence. The law assigns district courts a gatekeeping rule in insuring that expert testimony satisfies the requirements of these rules. United States v. Farhane, 634 F.3d at 168. A Court's inquiry entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and if whether that reasoning or methodology properly can be applied to the facts in issue. U.S. Food service, 729 F.3d at 129. A trial judge should exclude expert testimony if it is speculative or conjectural or based on assumptions that are so unrealistic or contradictory as to suggest bad faith. Zerenga, 571 F.3d at 213 to 14. Moreover, in order to be admissible an expert opinion requires some explanation as to how the expert came to a conclusion and the methodologies are evidence that substantiate the

conclusion. Riegel 451 F.3d at 127. An explanation is necessary because when an expert opinion is based on data, a methodology or studies that are simply inadequate to support the conclusions reached Daubert and Rule 702 mandate the exclusion of that unreliable opinion testimony. Ruggiero, 424 F.3d at 255. Furthermore, Rule 702 requires that expert testimony provide assistance to the trier of fact beyond that afforded by the arguments of counsel. Chin, 685 F.3d at 161. Finally, expert testimony may not usurp the role of the fact finder in applying the law to the facts before it. Lumpkin, 192 F.3d at 289.

As I mentioned, I'm also aware of the requirements of Rule 703. Under that rule experts can testify to opinions based on inadmissible evidence including hearsay if experts in the field reasonably rely on such evidence in forming their opinions. Mejia, 545 F.3d at 197. The expert may not, however, simply transmit that hearsay to the fact finder, ibid. Moreover an expert must analyze the source materials and not simply repeat their contents. Ibid at 198. The Daubert inquiry is flexible and district courts enjoy considerable discretion in deciding on the admissibility of expert testimony. Food Service, 729 F.3d at 130 and United States v. Williams, 506 F.3d at 160 to 61.

Let me turn to the arguments with respect to Pandora's motion concerning testimony from ASCAP expert Murphy. Pandora

makes a series of attacks on Murphy's opinions, all of which it may explore on cross-examination and probe the weight of the testimony. Among other things, Pandora argues that Professor Murphy's analysis fails to consider critical facts including -- and this is not an exhaustive list -- one, the non-competitive world within which public performance rights are negotiated; two, the circumstances in which Pandora had to negotiate with withdrawing publishers and, three, the publisher's actual relationship with ASCAP and the implications for those -- the implications that stem from those relationships. Pandora also argues that Professor Murphy failed to conduct any study or analysis to test his theoretical assertions against the facts that exist on the ground in this industry or marketplace. I don't find that any of these objections make Professor Murphy's use of his economic model inadmissible or make admissible the other opinions he offers in his testimony but it will definitely be part of my analysis about the weight to give such analyses.

Let me turn to ASCAP's motion in limine with respect to Pandora's witnesses. There are four. I'm going to deny those with respect to Marx and Rosenblatt. I will be granting in part the motion addressed to Noll and McIntyre and I'm going to be granting the motion with respect to Pandora's acquisition of a radio station.

The testimony offered by Marx is essentially a

refutation of the analysis offered by ASCAP's expert witness Murphy and it's principally used that testimony by Marx as a critique of Murphy's analysis. To some extent it's a vehicle for Pandora's summation arguments or what I expect to hear on summation regarding the appropriate benchmarks here, but nonetheless it does contain some analysis that is premised on principles of economics and I find that ASCAP may use its cross-examination to explore any perceived deficiencies from the Marx testimony.

The testimony offered by Rosenblatt is principally offered to refute the ASCAP testimony from Flynn. The arguments that are made with respect to this testimony include the following: That there were a number of concessions made in the deposition testimony that Rosenblatt gave that in essence sapped any value from the testimony given by Rosenblatt that Pandora, quote-unquote, "is radio." And in this context ASCAP relies as well on documents from Pandora's own files. ASCAP also argues that Rosenblatt is simply keying the definitions for purposes of this case, that Rosenblatt is not an expert on radio and is simply a media consultant with limited radio experience. It argues in addition that there's insufficient data to support Rosenblatt's opinion and that two studies should be excluded; one is a study about UK listening habits that's no longer being offered and therefore that argument is moot. The other is a study about auto drivers' habits in

southeastern United States cities that concerns their practices in switching radio stations while driving their cars and it's contained in JX 105 and relied on at paragraph 116. I've looked at and read with some care JX 105. And then the last argument that's made is much of the testimony is historical data and discussion that's irrelevant. I find that Rosenblatt is sufficiently qualified in this field to give expert testimony about the issues covered in his direct testimony. I find that he may properly rely on JX 105 and the rest of the arguments can be explored on cross.

Let's turn to the third motion in limine made by ASCAP against Pandora's witnesses. This third motion addresses testimony given by two witnesses, Noll and McIntyre, and it's made in part by indication of Rule 403. ASCAP argues that testimony from these two witnesses simply duplicates testimony already given by Marx and Rosenblatt for ASCAP, that there were two rounds of expert reports in this case, an opening and a rebuttal round, and when Pandora offered the testimony from Noll and McIntyre for the first time on rebuttal that was duplicative and unfair in a variety of ways. It also argues, that is, ASCAP also argues that the testimony from these two witnesses is not truly rebuttal testimony. So I'm going to deny the motion with respect to Noll. I think it is fair to rebut Professor Murphy's model with a new expert. I don't think it would have been fair for me to conclude based on what

I read in the motions in limine that Pandora was in a position to anticipate Murphy's model such that it could have put in with opening expert testimony a significant critique and therefore while I understand its making a critique through two witnesses the fact that it chose a new expert to make that critique in a rebuttal I think is appropriate.

I don't find Pandora's use of McIntyre, however, will survive using the same analysis. I think that the issues to be addressed here, whether Pandora's service is sufficiently comparable to broadcast radio, to say that Pandora is radio is something that everybody anticipated and Pandora did anticipate and presented testimony on that score in its opening expert report. So to the extent McIntyre survives at all it must survive as appropriate true rebuttal.

McIntyre's direct testimony is 25 pages long. Three pages are addressed to qualifications and background. So that's that. I don't think that's impacted in any way by what I'm about to say. I think that Pandora should try to identify what is true rebuttal and unique to McIntyre here. I'm going to give you some assistance that I'm probably going to think that you should eliminate all but five of the pages that have substantive testimony. I'm hoping by this fairly arbitrary listing of five pages to give the parties a signal so your discussions here cannot consume an enormous amount of time. It gives Pandora an opportunity to identify any appropriate

rebuttal testimony so I'm not suggesting a new affidavit. I'm suggesting striking all but eight pages, the three pages which are the qualifications and background and something like five pages more. And I'd like Pandora to present that proposal to ASCAP by Friday. Parties can discuss it over the weekend. I'll hear you Monday if there are any remaining disputes.

Going to the fourth and last motion in limine, this has to do with Pandora's acquisition of a radio station, KXMZ in South Dakota. I don't understand that that radio station has yet been acquired. It's subject to FCC approval, that is, the acquisition is subject to FCC approval and Pandora represents that in the event it's dissatisfied with the rate court determination here, and of course my hope is that either both parties -- I won't complete that sentence. My hope here is that both parties will feel they got a fair opportunity to present their arguments and a reasoned judgment and explanation such that they obviously if they are dissatisfied have an opportunity to test my decision through appeal.

But in any event, it represents that if it is dissatisfied and if it succeeds in acquiring this radio station it will apply to this Court to be governed by the RMLC. Should that day arrive I'd be happy to receive that application, and so I'm going to grant this motion in limine to exclude evidence and argument about the potential effect of that potential acquisition on this rate court proceeding. And I urge this

party to discuss the specifics of how that ruling may affect their presentation of arguments and evidence.

Now, it had been my goal to do all of that, of course, at our final pretrial conference. I apologize that I was not able to do that, but those are the rulings and so we're now at a position, I believe, yes to formally begin this trial.

I want to tell counsel that I have thought about the Section 114 and Rule 408 settlement discussion issues and I don't think I need to share that analysis of the law with you right now, but at the appropriate point when you think it will help in your planning and presentation feel free to raise those issues with me.

So, counsel, I think we had talked about time limits and so we're going to move to opening statements and, counsel, have you agreed on a timekeeper or would you like me to do that?

MR. COHEN: Your Honor, if you would.

THE COURT: Great. Happy to. So I'm going to have ASCAP go first with respect to opening and it will go last with respect to summation, since it bears the burden of proof in a significant way in this rate court proceeding to establish the reasonableness of its proposed fee, at least as a starting point.

Mr. Cohen.

MR. COHEN: Your Honor, we have some demonstratives

we're going to put up on the screen but if it's helpful for the Court I have a bound copy for you and for your clerk.

THE COURT: Thank you.

MR. COHEN: Mr. Steinthal has a copy as well.

May it please the Court. Your Honor, I represent ASCAP and the many thousands of songwriters, composers and music publishers who create the music that forms the lifeblood of Pandora's internet music streaming service. We're here in rate court, which is expensive and protracted for ASCAP, as it is for Pandora, because this matter is of overwhelming importance to ASCAP's members. The significance drives from the fact that Pandora is the largest, I'm going to suggest the term customized internet radio service in the country. It professes to have more than 200 million registered users and more than 70 million active listeners, each of whom, and this is the customization, each of whom has the ability to create personalized stations based on their own listening preferences and tastes. Pandora's listeners consume tens of billions, B for billions, of hours per year and Pandora claims to have more than a 70 percent market share of internet radio, more than double the share of the next 19 competitors involved. It's a service with a market cap approaching $7 billion and annual revenues moving steadily through the hundreds of millions and projected publicly by many analysts to approach a billion dollars by the end of its license period. And that revenue,

your Honor, we believe it generates is generated by programming that contains virtually nothing other than music. It's wall to wall music with a tiny piece of comedy, almost half of which has been written by ASCAP songwriters and composers.

That's why from the perspective of ASCAP's members it's particularly important to get the right rate for Pandora, and when I say the right rate I mean obtain a competitive market rate for the music that's fueling Pandora's success. We're not here, as Pandora has suggested throughout its papers, in some kind of discriminatory witch hunt for Pandora to try to extract super competitive rates. We're here only to seek competitive market rates.

Now, your Honor, I've tried to divide this opening into five parts. I hope it's logical. First, I want to go through the principles which I think are well known to the Court and not much in dispute that govern the determination of a reasonable fee. Second, I want to lay out our proposal for reasonable fees. Third, I want to deal with some -- I don't have time today to deal with all -- but with the principal criticisms of ASCAP's benchmarks by Pandora. I then want to discuss Pandora's argument that it's similarly situated to the RMLC stations that took an ASCAP license and, lastly, I want to suggest to the Court that if the RMLC rate has any relevance at all it has to be adjusted for differences in music intensity between the RMLC licenses and Pandora.

So, your Honor, if I could move to the first, please, the applicable principles of rate setting. There are sharp disputes, as your Honor is aware, between the parties on the rates in this case but I think there's very broad agreement on the basic principles that should govern this Court's determination. There are a number of core principles that were devised from the consent degree in your Honor's prior rulings in Mobi and DMX and we'll go through them quickly for context first. Pandora, of course, has the right to apply to this Court for the determination of a reasonable fee and that's your Honor's task in this proceeding. Second, in this proceeding we bear the burden of proof to establish the reasonableness of our fee proposal. That's a burden that we take on that we think we will discharge in the course of this trial. Third, and this comes from Mobi, in determining the reasonableness of a licensing fee the Court's job is to make a determination of a fair market value, the price that a willing buyer and a willing seller would agree to in an arm's length transaction, and, lastly, and one that's of great significance in this case, something that your Honor observed in DMX, since the task is to come up not just with a willing buyer and willing seller rate but the rate that the applicant would pay in a competitive market, the Court is handicapped by the fact that there's no actual evidence of competitive pricing in most rate court cases.

Your Honor, as I turn to our proposal, what makes this case different than most of those rate court proceedings is that here we have direct evidence of competitive pricing for the rights in question. And that's because we have true competitive benchmarks, licenses that Pandora has entered into with three music publishers, EMI, Sony ATV and Universal Music in 2012 and 2013. We believe that what the evidence will show is that the licenses entered into by Pandora are transactions between a willing buyer and a willing seller and that those transactions constitute the best evidence of what Pandora would pay for music performing rights in a competitive market. So our proposal, I think, although there is a lot of paper in this case, is pretty simple. It's follow the market.

We have a proposal for the five-year period with differing rates that are based on principally the direct licenses entered into by Pandora are not because of competitive issues and the restrictions consistent with the redactions. I'm not going to talk about the specific rates and the specific deals, but our principle is that those rates coupled with some other market benchmarks that I'm going to discuss support a reasonable rate of 1.85 percent for the first two years of the license, 2.5 percent for 2013 and 3 percent for '14 and '15.

Again, if you go to the next slide, Bill, we believe what the evidence will show, and, again, I've omitted the numbers because of confidentiality, is that ASCAP's proposal

follows the market, it follows the trend in the market of increasing prices for music performance rights in a competitive market and I'll talk about why in a moment. The principal explainer of that trend will be Professor Murphy who, of course, your Honor knows from prior trials. He will testify that the ASCAP proposal reflects the developing competitive market in which the demand and competition for music performance rights is increasing in value. Now, Professor Murphy's opinion is supported not only by Pandora's own deals, those three direct deals, but two other sets of competitive benchmarks. The first comes from the Apple agreements that were signed in June of 2013. Apple's new iTunes Radio service entered into a series of agreements in June of 2013 with Sony, EMI, Universal, Warner Chapel, BMG and indeed ASCAP and BMI themselves. The rates in those agreements are of course set out in our pretrial submissions and although they are not agreements between Pandora and music publishers and ASCAP they are useful as benchmarks because they're agreements for the same rights entered into by a customized internet radio service, that's Pandora's closest competitor.

Now, there's not going to be a dispute in this trial I believe that Apple's iTunes Radio is similarly situated to Pandora for the purposes of this Court's task of setting a reasonable fee. It offers users a personalized internet radio experience on both an advertising and ad-free basis, as does

Pandora and Pandora understood even before the launch of iTunes Radio, which it tracked very closely, that Apple's iTunes service could well be Pandora's most formidable and closest competitor.

Here's what Mr. Westergren had to say. He's the founder of Pandora and he'll testify at this trial. This question was asked at his deposition prior to the launch of Apple in September.

"Q. Do you expect the Apple product to be more competitive with Pandora than any existing online radio service that's available today?

"A. That's my expectation, yes." And he was right. So the rates that were paid by Apple we believe demonstrate the reasonableness of ASCAP's fee proposal.

Now, the reasonableness of our proposal we also believe is supported by Pandora's licenses with SESAC. We're relying for an economic underpinning in this case on Professor Murphy again who will explain that an agreement between Pandora and SESAC, SESAC not being subject to an antitrust consent decree, is a competitive benchmark because it transacts freely in the marketplace. That point, your Honor, we believe was underscored by the fact that Pandora has willingly renewed its SESAC license year after year at increasing rates. Now, of course, your Honor, I'm mindful of what you had to say about SESAC in the Mobi opinion and certainly our view of that is

that the circumstances that led to you reject SESAC in Mobi, the threat of a copyright infringement suit and an agreement signed under that threat are not present here. There will be no testimony at this trial that anyone approached Pandora on behalf of SESAC threatening to bring a copyright case if an agreement was not signed. And as we see in slide 13, again with the numbers removed to protect SESAC's confidentiality, when you adjust the SESAC rates for ASCAP's market share since there's a significant difference in market share those rates are essentially spot on with ASCAP's rate court proposal.

Now, Professor Murphy will provide a detailed economic framework for why ASCAP's proposal is consistent with what would be expected in a competitive market. He lays it out in detail in his testimony, the economic principles that talk about why these benchmarks are in fact competitive market agreements, why the fact that your Honor ruled on summary judgment that these agreements, the direct license agreements violated the consent decree, do not affect the utility of those benchmarks as a matter of economics and he proposes a model of competitive pricing of music performance rights that we believe explain why the benchmark deals are at rates in excess of what ASCAP previously charged and was able to obtain from Pandora and at rates in excess of the rates obtained by ASCAP from the RMLC. Unlike Pandora's two economists, Professor Murphy has an actual mathematical model that predicts what would happen in a

competitive market. The model that he sets out in his technical appendix I admit is complicated. We'll have a chance to go through it with him, but it is complicated. I think the basic principles of the model are pretty straightforward and really boil down to two fundamental points that can be explored with him at his testimony.

First, the increasing rates for custom music services, personalized music services such as Pandora are driven by Pandora's demand for variety. Services like Pandora, in contrast to traditional radio, need to provide a vast variety of music to satisfy the personal preferences of their 70 million active listeners, each of whom influences the selection of his or her music by what Pandora calls seeding, thumbing up, thumbing down to shape the listening experience. Essentially users get a chance to either start with a song or start with a genre or start with an artist and then influence what comes next, influence what comes next by giving direction to Pandora's music genome protect which is a computerized algorithm about the type of music he or she would like to hear.

If we go to the next slide. This really demonstrates the point. This comes from what Pandora calls the spin diversity study. I've taken this slide out. What this slide shows, it's right out of the Pandora document minus the numbers, is the enormous diversity of music played on Pandora as opposed to direct terrestrial radio. There are by

significant large factors the depth of music played by Pandora each day, each week, each month is significantly greater than on broadcast radio and they need to do that to provide the personalized listening experience that is the hallmark of Pandora's service. So that's Murphy's first basic principle.

His second basic principle which he will testify to that comes from his model is that Pandora's operating in a rapidly evolving marketplace in which there is increased competition among services that are music users such as Pandora for listeners. What Professor Murphy will testify to is that this increased demand for music and the increased competition among music users would lead in a competitive market to an increase in price.

Now, his model was not developed for the purpose of litigation. It's grounded in core principles of economics and Pandora's principal criticism of that model, that it's too divorced from reality to be useful, really misses the key point. It's divorced from reality because it models what a truly competitive market would predict for performing rights, whereas the actual market, for instance dominated by ASCAP and BMI and a group of other rights resources, so the utility of Professor Murphy's model, like any model, is not its literal application but the fact it predicts what would happen in a competitive market, which of course is the Court's task in this rate court proceeding. And what it predicts is what happened,

that in 2012 and 2013 transacting outside of the consent decree, Pandora entered into agreements at rates that were higher than the pre-existing ASCAP rates and while Pandora has now employed two economists, Professor Marx and Professor Noll, they're both eminent economists, to attack Professor Murphy, who I think they will concede is an eminent economist, the fact of the matter is he is the only economist who will present a true economic mathematical model to the Court for its consideration.

Now, most of my time will be spent with dealing with the criticisms that Pandora has lobbed in at this market analysis because I think our proposal is straightforward and their criticisms are many. Before I do that, I do want to deal with the question the Court raised at the pretrial conference which is how do we deal with the Mobi decision in the context of this rate setting. As your Honor knows, you made clear in the Mobi decision that the 2.5 percent rate was a wholesale rate rather than a retail rate, I think that's quite clear, and it's true that your Honor observed in the Mobi decision that the Music Choice rate was applied to wholesale revenues received by Music Choice and there's no doubt that your Honor concluded that a 2.25 rate applied to retail in Mobi would have yielded a fee that was not reasonable, but, your Honor, I can't tell you what you were thinking about when you wrote those words, but what I read from the opinion was that it was not the

wholesale versus retail issue of rate that governed your Honor's decision, but what governed your Honor's decision was the fact that the retail base that was being argued for there, which was well in excess of the applicant's actual revenues would have made the application of a 2.5 percent rate or your Honor ultimately concluded any reasonable rate to that large revenue base simply not reasonable.

Now, there is more to this story of Music Choice because there is an important decision handed down by the Second Circuit subsequent to Mobi and that's the RealNetworks decision and the Second Circuit handed down RealNetworks four or five months after your Honor's Mobi decision and we know the Court looked at Mobi because it cited the Mobi decision for a different purpose.

THE COURT: I read RealNetworks this morning just to ground myself in Second Circuit law.

MR. COHEN: So did I, your Honor. And RealNetworks I think is a particularly important case for this proceeding if we're thinking about the Music Choice rate and that's because the Second Circuit expressly endorsed the application of the 2.5 percent Music Choice rate to the retail, not the wholesale, to the retail revenue base of all audio services holding -- let's look at that holding, it's quite important. This is a holding with respect to Yahoo! from page 81 of the Second Circuit's opinion, 627 F.3d. "We conclude that the royalty

rate agreed to by Music Choice provides strong support for applying a 2.5 percent royalty rate to those Yahoo! sites and services that provide access to music channels organized around music genre similar to those on Music Choice. Additionally, it provides a basis for a 2.5 percent royalty rate or higher, for Yahoo! sites and services that permit an interactive music experience" -- there's that "interactive" word -- "in which the user may control the selection of music he is hearing, for example, if a user tunes into a more customized station" -- that's Pandora -- "or uses Yahoo! search to listen to songs on demand," which is not Pandora.

2.5 percent or higher.

Now, what does Pandora say about this decision in its brief? It says, and I'm quoting from page 47 of their opposition brief, "The record in the RealNetworks case did not focus on the wholesale/retail revenue base issue." Your Honor, with all due respect, that's just not true. It's just not true. First, we'll be happy to hand the documents up to the Court at the appropriate time. The applicant's post trial contentions specifically argue the retail-wholesale point. Mr. Steinthal's post trial contentions on behalf of RealNetworks said at paragraph 124 0and one of the reasons why Judge Connor should not apply the 2.5 percent Music Choice rate to RealNetworks is that it was an apples and orange comparison because of the retail versus wholesale distinction and the

point was pressed in the Second Circuit as well. Real's brief, and quoting from footnote 30 of Real's opening brief, which we'll be happy to provide to the Court said, quote, "The District Court failed to take into consideration the 2.5 percent rate of Music Choice was a percent of wholesale rate." The issue was therefore squarely before Judge Connor and squarely before the Circuit which nonetheless concluded that with respect to services operated by Yahoo! and RealNetworks, including a service you're going to hear about Launchcast which was an early version of a personalized radio service like Pandora, that a rate of 2.5 percent was applicable and appropriate for a retail base.

(Continued next page)

Of course, the Second Circuit reversed Judge Conner, as we are aware. A fair reading of the Second Circuit was criticism was not of the 2.5 percent rate, but applying that rate to a revenue base that didn't include all audio streaming services.

Your Honor, there is rate court jurisprudence from the Second Circuit that supports the application of the music choice rate, and with all due respect, I don't read the Mobi case being irreconcilably inconsistent with what the Second Circuit said a few months later.

Go to the next slide, please.

Let me turn to Pandora's criticisms and try to go through the principal ones. There is 180 pages of briefs by Pandora that lay out their criticisms. I'll try to do it as expeditiously as I can.

The first point that I think is really critical is that Pandora does not actually disagree that all of the competitive benchmarks relied upon by ASCAP are inapposite. Pandora does not dispute that direct licenses it entered into with music publishers can be appropriate benchmarks for this Court. To the contrary, it argues specifically and relies on Professor Noll for the proposition that one of the three licenses we cite, BEMI license is a competitive benchmark, and here is what Professor Noll says in his written testimony, at Page 30.

Based on the details of the negotiations and without telling with EMI, I agree with professor, I agree with Professor Murphy that the direct license with EMI is a valid competitive benchmark.

Now, Pandora will spend a large part of this trial trying to explain why the EMI agreement is a good benchmark for this Court to employ and the Sony and Universal agreements are not. There are many, many, many reasons that have been offered, but I think they fundamentally boil down to this.

What Pandora is saying, and what I will address next, it was forced into deals with Universal and Sony, withdrew in violation of the consent degree under the compendium amendments and both failed to provide Pandora with the repertoire information it needed to give it an option of taking down the service, and lacking that option, faced ruinous copyright infringement.

I think that is the essence of their argument. I think what we will show your Honor at the trial, the evidence is completely inconsistent with their argument.

Turn to the next slide.

The first thing that is actually striking is the focus for a minute on components of their argument and see how it stacks up between EMI, Sony and Universal because there is no dispute that all three publishers affected the new media withdrawals from ASCAP from the compendium rule changes. In

fact, EMI, the testimony will show, was the precipitating publisher in the amendment of those changes.

There is testimony from Pandora's experts about influence of those withdrawal publishers on the board of ASCAP. Each of the chief executive officers testifying for EMI, testifying by deposition, Mr. Bandier for Sony testifying by deposition, and Mr. Horowitz at Universal testifying live, each was a member of the ASCAP board at the time of the withdrawal.

Were there lists of works provided? There were no lists of works provided for Sony. We have a dispute as to Universal, but Pandora says they did not get a list, they negotiated without a list of works.

THE COURT: They have a list, but the confidentiality agreement?

MR. COHEN: Exactly. They couldn't use it for that purpose. Exactly. The EMI agreement was negotiated without a list of works.

Would Pandora be an infringer if they didn't enter into a deal with these publishers? The answer is clearly yes for each. What we say to your Honor is each of the arguments that has been advanced for why Sony and Universal are not market benchmarks could be advanced with respect to EMI, but Pandora embraces EMI's competitive benchmark.

Why is that? I think the answer again is back with

Professor Noll. If we focus on his language, based on the details of the negotiation and outcome with EMI, the argument that is being made by Pandora, which I respectfully suggest is completely circular, is if I don't have the information, if I am going to face infringement, if the publisher withdrew in violation of the consent decree, but they gave me a rate that was low enough, it is a market benchmark.

That is completely circular. It is completely circular. We don't determine the market benchmark according to Pandora's experts by the rate that they arrived at, but by the tenor and indicia of negotiations which were the same with respect to each of these.

So what I would urge your Honor to think about is that once that Pandora has conceded that EMI is a market benchmark, it leads directly to the conclusion that that is true for Sony and Universal as well because the circumstances really weren't any different.

Let me deal with the details of those circumstances for a few minutes if I may. Their principal argument is that they weren't provided with a repertoire information. Here is what the evidence shows about Sony in the Fall of 2012.

What it shows -- and this testimony will come through the testimony of Mr. Rosenbloum, who negotiated the deal with outside counsel for Pandora, and we say for a moment there is no, there is no written direct testimony of Mr. Rosenbloum.

Mr. Steinthal had to subpoena him. He will call Mr. Rosenbloum on his case, he is a partner of Greenberg Traurig, and we will cross him. Mr. Rosenbloum has been deposed, and through the testimony of Mr. Brodsky, the head of business affairs at Sony.

Here is what happened. It is really not in dispute. Pandora learned that Sony intended to withdraw from ASCAP at the end of 2012 and learned that in late September of 2012. What the evidence will show, and we know this from Mr. Rosenbloum's actual time records which will come into evidence, the discussions with Sony began immediately, the first week in October.

A month later, a month later -- next slide, please -- Pandora lobbed in a request asking for electric listing of the Sony/ATV and EMI repertoire which they said if they would meet in the event they were going to take down the service, and the next time they asked for that data, which they now say was critical to them was December 17th, two weeks before the end of the year, three days before they did a deal with Sony, after term sheets had been exchanged, and what is the significance of that December 17th date?

It was too late, too late for Pandora to actually take down the works of Sony if it actually intended to do that, and we know that from the testimony of Mr. Conrad, who is the chief technology officer of Pandora. He will testify at trial, and he was questioned about how much time he would have needed once

he had the repertoire information from Sony to take down the repertoire, he said I would have asked for a month, a month from the time that you received the list of songs? Yes.

There was no prefatory work done at Pandora to take down the repertoire of Sony. There was a negotiating ploy, it was an e-mail lobbed in at the last minute to remind Sony that Pandora didn't have to do a deal presumably to try to get a better deal; in other words, the hallmark of a classic negotiation.

Now, the story of Pandora and Universal with respect to the repertoire, if anything, is worse for Pandora. As Mr. Horowitz will testify, he reached out to advise Pandora that it was withdrawing as of July 1, 2013 back in early February, five months in advance of the day of withdrawal.

In April, as your Honor observed, the list was actually supplied, and we will have a disagreement at this trial that your Honor will ultimately resolve as to whether or not that list could have been used by Pandora for the purpose of taking down Sony's repertoire.

Here is where there is no dispute again. Pandora did nothing. There is not going to be a single person who will testify, there will not be a single document introduced into evidence to show that Pandora took the first step to take down Universal repertoire. It didn't happen. It didn't happen.

Whatever their understanding was of that

confidentiality agreement and what you're certainly not going to see is an e-mail or a letter in May or June of 2013 to Universal saying hey, we have this list, we don't like your rate. We think we want to take you down. Can we use it for that purpose? We're concerned the confidentiality prevents us from doing that. You're not going to see that evidence. It didn't happen.

The reason why Pandora took no steps in reality to take down Sony and Universal is that it makes total sense in the context of Pandora's business model. The entire -- and I alluded to this in the beginning -- the entire business case of Pandora, the foundation on which this very, very successful service has been built is based on providing a personalized listening experience to users and allowing them to shape the music they're going to hear by giving individual feedback.

Now, to do that, to Pandora's credit, they've curated a group of more than 1 million songs, including the songs of each of the major publishers, but the ability to deliver that broad group of songs, Professor Murphy refers to as variety, it is central to the Pandora experience.

What Pandora -- next slide, please -- here is what they say. On their website and the Music Genome Project is their proprietary algorithm for giving feedback to users in determining what is played. The Music Genome Project, it is updated on a continual basis with the latest releases, emerging

artists, and an ever-deepening collection of catalog titles.

That can't be done without access to the most catalogs and music, most important catalogs and music in the country. That is precisely why Pandora told this Court in its rate court petition -- next slide, please -- Paragraph 21, at a time prior to the December judgment and prior to your Honor's ruling, here is what they said:

As a practical matter, Pandora cannot effectively operate the kind of comprehensive internet radio service which it currently delivers to its end users without access to the huge catalogs of EMI and Sony.

The same would apply to Universal with equal force which is now the second largest music publisher. What the evidence will show, your Honor, is that Pandora never intended to take down Sony and Universal. Whatever information it had or didn't have had nothing to do with the deals that it struck. It struck the best deals it could for music that it needed and wanted in a competitive environment, and those are market benchmarks.

Let me just deal as quickly as I can with some of their other arguments. I have said there are many. First there is an argument that is advanced that these deals were done in haste, it was too much time pressure on Pandora to actually conduct a real market negotiation.

The evidence is really just doesn't support it. Let

me start with Universal. As I said, the negotiations began five months before the withdrawal date, and the memos and notes that will be introduced at trial, back-and-forth between Pandora and Mr. Rosenbloum and Universal will show the parties spoke at least a dozen times about a deal in the five-month period.

Importantly, the evidence will show the reason why the deal wasn't done until the last day. The deal with Pandora was actually signed on July 1, the date of Universal's effective withdrawal. It wasn't done because Pandora had actually dropped out of the negotiations with Universal while it pursued summary judgment in this Court, that motion being filed in June.

Here is what the e-mail said. What you will hear from Mr. Horowitz, and what you will see from the evidence, is a series of e-mails from Universal in June of 2013 imploring Pandora to respond to Universal's request to license them. We haven't heard anything. We're disappointed that Pandora has chosen not to respond. We were frustrated and perplexed when Pandora stopped negotiating.

If this deal was done in haste, it was done in haste because Pandora wanted it that way. It was a timing issue of their own making. The story is not any different with respect to Sony. Again we have heard from the beginning of this case that Pandora had a gun to its head at the end of December, that

once it learned that ASCAP wasn't going to do a deal with Pandora, it was forced to enter a hasty deal with Sony in above-market prices. That is the argument.

That is not what the evidence shows. The evidence shows that those negotiations began in October, that there were intermittent negotiations through October and November with Sony which were not pursued with any great dispatch by Pandora, and, in fact, it was a deliberate strategy on the part of Pandora. Next slide, please.

Mr. Kennedy candidly laid it out at his deposition. Talking about the Fall of 2012, he testified at deposition our Plan A was to complete the agreement with ASCAP. Our Plan B was to see if we could real a deal with Sony/ATV.

So they pursued Plan A. They tried to do a deal with ASCAP. They slow-walked Sony and they only began discussions in earnest with Sony in mid-December, discussions that could have been had in September, late September, October or November, and although Sony, their Plan C, as Mr. Kennedy said, was to take down Sony if the terms got unreasonable, I think we can infer from the deal that they didn't do the deal they struck was unreasonable but rather reasonable because again they never took the first steps to taking down Sony. There was no haste.

Let me deal with something of which Mr. Steinthal has talked a lot about in this case, the allegation of collusion

among the publishers and ASCAP. There has been a lot of colorful language. Maybe we'll hear some more today of collusion, conspiracy, coordination. The evidence tells a far different story.

First I want to strip away the most serious charge because I think it has been withdrawn. There is no evidence whatsoever that any publisher or ASCAP colluded on the price to charge Pandora. Professor Marx has testified at deposition, I am sure she will testify again, that there was no collusion in the formal economic sense. What happened and was there coordination which as the other charge gets made among the various publishers. The evidence will show this was a completely uncoordinated effort among the publishers.

Here is what happened.

In the summer of 2010, EMI advised ASCAP that it was either going to resign or remove its new media rights from ASCAP. ASCAP and the board didn't jump up and down immediately and say this is great, you'll pull out, we'll get higher rates, the charge is that Pandora is making and we'll use those higher rates.

To the contrary, what the evidence shows is ASCAP's board -- and the story will be told right right out in the minutes -- moved slowly and cautiously. They engaged counsel, talked to the Department of Justice and resulted in those compendium changes that were resolved by the court, addressed

by the court on the December summary judgment motion.

Then finally at the end of April 2011, seven months or so after this issue was first raised, the ASCAP board authorized the amendment of the compendium, and EMI withdrew within a few days. The withdrawal was effective May 1, 2011.

Pandora says this was all part of a great plot and scheme to drive prices up. What really happened in the time after EMI withdrawal -- next slide, please -- what it shows is that a complete lack of coordination, a complete absence of a concerted plan to drive up rates.

What it shows, and I have left out the numbers, are individual publishers acting in their own self-interest. EMI withdrew May 1, 2011 and licensed Pandora at the rate that is set forth in the agreement your Honor has.

No other publisher withdrew in 2011. No other publisher withdrew in 2012. Sony withdrew as of 1-1-13, licensed Pandora at the rate your Honor is aware of, and at that time, a time that Pandora focuses on December of 2012, three other publishers gave notice to ASCAP they intended to withdraw as of July 1, 2013. That was the earliest day ASCAP's rules would allow them to withdraw, and Pandora says you see, look at all this collusive, coordinated activity that was going on.

What happened? Universal did the license agreement that we rely on as a benchmark. BMG withdrew. It never did a

license. It never did a license with Pandora. In fact, as of the effective date of this withdrawal, while the summary judgment was pending, it allowed Pandora to continue using its music without any license at all. And Warner Chaplain initially said it was going to withdraw. It had discussions with Pandora about licensing at rates that your Honor will see are consistent with the rates that Pandora says are market rates, and then it ultimately changed its mind and reversed its decision to withdraw.

What I think this shows, your Honor, is there was not a concerted approach with respect to licensing Pandora. What happened was that a number of individual publishers, and these are only five of the thousands of publishers, although they're all major publishers, made different decisions about whether to withdraw or not to withdraw, licensed at different rates, and generally acted in their own self-interest.

Now, there is a lot of noise in Pandora's papers as well about a claim that Sony and Universal somehow prevented ASCAP from completing the deal at the end of 2012, and we'll deal with the 408 issues when we have to. Let's just think about the evidence for a moment.

What the court will hear from Mr. LoFrumento, the CEO of ASCAP, he didn't do the deal because he didn't like the rate. He will refute directly and clearly the notion he knuckled under to the pressure of either Sony or Universal.

What he'll say is ultimately he made the decision on the merits. Although the rate that was offered was an improvement over the preexisting rate, it simply wasn't high enough. The notion he somehow took direction from board members not to do that deal is argument, not evidence.

Now, there are criticisms, of course, lodged to our other benchmarks, and I think we'll deal with that at trial with respect to Apple. We are largely fighting about the revenue base, whether it is too narrow or not. What I'll say to your Honor to think about as we approach that at trial, respecting the confidentiality of those agreements, is that Apple runs the iTunes radio service as a service, ads for the service, a business model that is intended to generate revenue and there are contractual provisions which we'll show your Honor in each of those agreements that gave the publishers and ASCAP some comfort that this wasn't been run as a hobby.

While it is true, and we concede you have to make some adjustments to the revenue base to deal with this subscription issue that has been raised by Pandora, we think Professor Murphy's adjustments are reasonable and Pandora refuses to make any adjustments at all. It simply throws out agreements entered into by its closest competitor in June of 2013.

On SESAC, they make a range of antitrust arguments. SESAC has market power. SESAC is engaged with litigation in radio music licensees over its market power. Your Honor,

SESAC's market share is smaller than EMI's. They come to court and say we did a deal with a music publisher that has a greater market share that SESAC, and that's a direct license, but because they want to avoid the implication of a SESAC rate, they say SESAC is a monopolist even though it doesn't have a consent decree.

In the end, all they can to is say, well, SESAC's market share is really higher than you think. That is based on some testimony that Mr. Kennedy will give. I don't think it is supported by any documents. I think it is inconsistent with SESAC's own view of its market share and I think it is inconsistent with what your Honor had to say about SESAC's market share in the Mobi decision.

If I can go to the next part of this, I want to talk about the fundamental argument made by Pandora in support of its rate which is that it is similarly situated to the RMLC stations that entered into a deal with ASCAP in early January 2012. I think both parties would agree that the question turns first on the consent decree and the meaning of "similarly situated," and here, of course, your Honor is well aware, here is what it says so we have it in mind.

Music users or licensees in the same industry, Section 2 (r) of the consent decree, that perform ASCAP music and then operates similar businesses and use music in similar ways and with similar frequency and then it lays out a series of

factors. The threshold question is whether Pandora is in the same industry. It is not the dispositive question, but it is the threshold question, in the same industry as they are and you'll see licensees.

Pandora has devoted considerable effort and it has two experts, as your Honor is aware, to try to persuade the court there is a quote-unquote radio industry, whatever that means because there is no standard definition of the radio industry.

What I will say is that the definition that has been offered by Pandora's experts are simply made up for the purposes of this litigation. They define the quote-unquote radio industry as they call it solely by reference to whether or not there is an on demand feature available to the listener.

If you can select a specific song, it is not radio; if you can't, it is radio. In their view, all of the features that make Pandora unique and successful have nothing to do with the definition of radio.

They gloss over the enormous differences between the product offered by the 10,000 plus radio stations that signed the RMLC license and Pandora. The ability to personalize the music, thumbing up, thumbing down, picking stations, picking artists, invoking the Genome Project which they say is the heart of their service, has nothing to do with their view of whether or not this music service is radio or not radio.

It is the antithesis of the way they market

themselves, where they say over and over again that the key differentiator between traditional radio and Pandora is the customized, personalized experience enjoyed by their listeners. It comes out of their own documents.

Here is Pandora's 10 Annual Report from 2012. It is the letter from Mr. Kennedy to the shareholders. On top of that report, Mr. Kennedy has stepped down as the chairman, but he will testify. Pandora has created an entirely new category where users can interact with radio, an entirely new category.

They say over and over and over again is that they're better than and different from radio. That is why no doubt Mr. Westergren, who is the founder, wrote this to a board member in August of 2012.

"I actually don't really think of broadcast radio as our primary competition any longer."

Mr. Steinthal says these are sound bites. I would say they're admissions, and they're completely consistent with dozens and dozens of documents your Honor will see including the next one.

Slide 33. Your Honor, what I have excerpted here from ASCAP Exhibit 85 is a discussion from 2011 back-and-forth by e-mail between three of the most senior executives at Pandora, Mr. Westergren we have described, Mr. Kennedy, Mr. Fleming-Wood, chief marketing officer. It starts with Mr. Westergren saying this may sound offensive, but what if we

commission a study that asks people what is Pandora? My guess is the vast majority of people would say radio.

Mr. Kennedy. I'm actually much less confident that consumers would say radio. I actually believe that few of them even think about what category we're in, we're just Pandora.

Mr. Fleming-Wood. I agree with Joe. I see radio as an important advertising and investor story, but less so from the consumer standpoint.

In the end, your Honor, I think what the evidence will really show is, as Ms. Flynn testifies and I think Professor Noll will actually concede, there is a continuum of experiences here from traditional radio where one listens and doesn't include the selection of music other than picking a station, doesn't give any individualized feedback, a one-too many experience to Pandora which goes up to the line of interactive, but does not actually allow you to pick a song, but when you start the station by picking a song, you are probably going to hear it eventually. Then there is on demand radio or or on demand services which clearly have slightly different attributes.

To some extent this isn't radio, is it not radio is a little bit of a semantic argument between dueling experts on both sides. The real question is whether or not Pandora is similarly situated to the RMLC listeners, the vast bulk of which are simply traditional radio.

There we would say no. What Pandora then next argues is well, it is still entitled to the RMLC rate because it is similarly situated to one single RMLC licensee, Clear Channel iHeartRadio service.

And specifically because Clear Channel iHeartRadio service has something called create station, which for all intents and purposes is Pandora, as there are many other services that have not cropped up that allow for user feedback and personalization of music.

Now, first I have to say that the argument you can simply pick one licensee, in our view, misconstrues the definition of similarly situated under the consent decree. Even the facts don't really support the argument.

First it is undisputed that the overwhelming bulk of streams and listenership on iHeart, iHeartRadio, are simulcasts of terrestrial radio. They crate a station feature your Honor will hear is a small fraction of what iHeart transmits both in terms of hours and in terms of revenue.

The mere fact, we would say, that iHeartRadio is able to license its creative station under the RMLC license as written does not make Pandora similarly situated to the RMLC station as a whole. I think, your Honor, here, as we said in our briefs, we are right in the smack of Judge Conner's decision of Salem media, regarding the religious broadcasters 20 minutes ago.

As Mr. Steinthal says, it is an argument advanced without success by ASCAP. Here is what Judge Conner said. The argument that was made in the RMLC, in the religious broadcasting, the Salem case, the Salem applicants were like some of the RMLC applicants. Because they were like some of the RMLC applicants, they were similarly situated to the RMLC purposes of record.

Pandora goes further. It says as long as we're similarly situated to one applicant, Clear Channel, we are similarly situated to the work.

Judge Conner rejected that in language that I think applies here, and he says the fact that ASCAP can construct a subgroup from, and I have bracketed some other language for context, stations covered by the RMLC-negotiated licenses. Whose music users approximate that of the median applicant does not refute applicant's claim that, as to music use, the applicant group is dissimilar to the RMLC group and the rest of the industry.

What the evidence will show, your Honor, is that Pandora is dissimilar, dissimilar to the RMLC stations as a whole. It does not get the rate of 1.7 on the basis of the similarly situated language of the decree, and the circumstances relating to the negotiation of that agreement reinforced why Judge Conner would make any sense in this case.

In their briefs, what Pandora says you shouldn't even

look at the circumstances surrounding the RMLC license. I don't really understand that, your Honor. The next slide. I thought the guidance from this Court, which is consistent with prior courts, is that in considering a benchmark, and they say the one set is a benchmark, we should look at the similarity of economic circumstances affecting the earlier negotiators and the current litigants.

And the circumstances, therefore, of the radio license are critical because they could not have been any more different than those present here, and what they showed was that ASCAP and the RMLC negotiated a license at a time where the new media activities and revenue of the RMLC stations were, in fact, very, very small. That is what ASCAP's experience has been. The next slide, please.

In the first year of the radio license, the red, taking the numbers out, but it is an accurate depiction, indicates the reporting by the RMLC as to what percentage of the revenues they report for fees attributable to terrestrial broadcasting and what portion was attributable to new media.

This was overwhelmingly a terrestrial deal. It was driven by that. It was driven like any deal, as Mr. Candilora will testify, by the economics of this transaction, and ASCAP entered into unitary rate understanding that 95 percent or more of the revenues over the course of that deal would be driven by the terrestrial piece. There are other factors, your Honor.

Next slide, please.

This wasn't just about the rate. If we're going to understand economic circumstances around the deal, the fact of the matter is because of the preexisting radio deal which was a flat-dollar deal, the rate had gone up, and up, and your Honor dealt with that on the interim fee decision you rendered.

ASCAP knew to get a deal, it would have to pay a lot of money back to RMLC, and it negotiated and it was critical to negotiate, a five year interest rate payout which was at economic significance. It negotiated on the heels of the DMX decision an agreement by the RMLC they would not pursue a return for this rate, a carve-out license for the five-year period for the license term. There will be no credit against blanket license fees to account for otherwise licensed ASCAP music and they negotiated the ad deduction taken out of trial, but was an important negotiation.

This was a deal that was about more than the 1.7 percent rate, and the 1.7 percent rate was fundamentally, fundamentally a terrestrial deal.

I have one last point, your Honor.

MR. STEINTHAL: I am fighting a terrible cold, and I have a lot of liquids. Can we take a short break?

THE COURT: Sure, let's take a break. I am very sorry to hear counsel is under the weather. We'll take a 10-minute recess.

(Recess)

THE COURT: So I know, Mr. Steinthal, that you didn't want to interrupt your adversary's opening, and I appreciate that, but anyone should at any time feel free to ask for a break. Obviously, we'll do anything we can accommodate, too, to accommodate someone's health needs.

So that is not an issue.

MR. COHEN: Your Honor, I only have one more topic to cover, so Mr. Steinthal's break was at a perfectly appropriate time.

That is the question of music use. I think it goes both to the question of whether or not Pandora is similarly situated to the RMLC stations and also whether, if you start with the RMLC benchmark as he suggests, you have to make these adjustments.

Let me deal first with the issue of whether or not Pandora is similarly situated. The answer is no. Pandora plays a lot more music than radio. The definition of similarly situated is the frequency of music performances in the consent decree. The evidence on music use really should not be in dispute. It comes right out of the ASCAP survey that ASCAP uses for purposes of paying its members. It will be testified to, as your Honor noted in the in limine notions with Professor Ashenfelter, and although Pandora does its best to try to attack Professor Ashenfelter, I would suggest in the end, in

the end there is no dispute that Pandora plays more music than traditional radio, and Pandora knows it. Here is what Mr. Kennedy had to say.

Slide 34, please.

In May of 2013, we play about 15 songs an hour; FM plays about 10 songs an hour.

That disparity, your Honor, follows just as a matter of logic from the kind of service Pandora is. It is wall-to-wall music. There are no DJ's, no news, no weather, no pattern. They only have three minutes of ads an hour.

It is inconceivable that they would have the same number of songs per hour and the same music intensity as radio. That moves me to the last thing I want to say before sitting down and turning it over to Mr. Steinthal.

If you start, as he urges, with the music, the RMLC benchmark, we still need to make the adjustments for music intensity. We need to make that adjustment. I would have thought that that would not have been a subject of dispute, but I was wrong because Pandora says we shouldn't make those adjustments.

I think the response is: A, in the consent decree, Section 2 (r) which talks about the frequency of music use we just discussed, and it is something your Honor discussed in Mobi, in considering the three cable rates and your comments on Professor Noll's testimony -- Slide 41 -- where you were

summarizing his testimony, which I am sure he will affirm here, that competitive prices -- search for competitive prices -- are based on usage, such that fees for performance rights would be higher for content that contains more music -- Footnote 58 of your Honor's decision -- and that draw on 20 years of rate court jurisprudence. Judge Conner dealt with this issue exactly in the Cap Cities litigation.

We can put up the next slide, please.

And he said thus, on a perspective fee setting basis, one who expects to use large amounts of ASCAP music may be expected to accede to higher rates than those agreed to by one who expects to use lesser amounts. Thus, for the purposes of the rate-setting inquiry, we think it is appropriate to assume that the value of the blanket license to a network will vary in direct proportion to the amounts of music used by that network, all other factors remaining equal. The music use has to matter if you start with the RMLC benchmark.

In conclusion, your Honor, I think Pandora has done much to try to complicate a case that we think at least is relatively simple. We want to follow the market. We're actually proposing rates that are not at the highest end of those market comparables. We believe there are direct competitive benchmarks in the licenses Pandora has entered into with music publishers, with SESAC, the iTunes rates that have been agreed to by Pandora's closest competitors.

While Pandora has given your Honor a whole host of reasons to think about rejecting those benchmarks, in the end what we believe the evidence will show is that ASCAP's rates were reasonable, it supports what would be achieved in the competitive marketplace and we have met our burden under AFJT, proposing a competitive price.

THE COURT: Thank you.

MR. STEINTHAL: Thank your Honor.

Good morning, your Honor. I am here on behalf of Pandora. I am proud to be here on behalf of Pandora. It is a great service. It does use music, but the reason it has a 70 percent market share is because of its technology. It has invested greatly in dollars and in staff to make the single best by far internet radio service, and the internet radio industry is part of the radio industry. It doesn't matter that radio is distributed online as opposed to over the air.

We have already dealt with that issue before your Honor in Mobi TV, when ASCAP sought to justify higher rates based on how the content got to the consumer rather than what the content was. There is a lot to say, and Mr. Cohen was very eloquent in trying to deal. I will try to deal with a lot of his points.

The first thing I thought to myself when I got up, have you ever heard the phrase ships passing in the night? Our economists are ships passing in the night. The notion of a

competitive market, as Dr. Murphy construes it, is a foreign subject to Dr. Marx and Dr. Noll, as you'll hear, and I'll come to that later.

The indicia of lack, lacking in a competitive market that I will go into in some detail surrounding the Sony and Universal deals makes it impossible for our economists to endorse the notion that a marketplace that was so full of imbalance of information and threats of infringement could ever conceivably be a competitive market, and as I'll get into in detail, it flunks the very test of what a fair market value marketplace is that Dr. Murphy set forth in his original testimony.

Now, like Mr. Cohen, I'll just set out at the beginning what I am going to do. I am not going into it all on a slide slow. I have a few on analogue.

I will talk first about the similarly situated issue and why Pandora is entitled as a matter of consent decree interpretation to the 1.7 percent RMLC ASCAP rate.

Then I'll turn to why ASCAP has not met its burden, and then lastly I'll discuss once you decide ASCAP hasn't met its burden, if you haven't decided we are similarly situated, what the right benchmark analysis is, and in our view, that benchmark analysis would start with the RMLC deal and end with a range of reasonable rates that goes from 1.7 percent to 1.85 percent as you're familiar with the market.

If you'll bear with me, I would like to deal with the question you raised about the Mobi TV two and a half percent music service rate in sequence, in the context of where that argument came up in ASCAP's papers. Suffice it to say that the main point that Mr. Cohen did recognize, that I would argue is that the Mobi TV music intensive rate at two and a half percent will against a decidedly wholesale upstream revenue case, revenue service provider and not the retail revenue base that is typified by Pandora whose entire revenue stream is a retail revenue stream.

Now, as a legal market, under the decree, Section 9 (g), ASCAP shall be required to offer a license at a comparable fee to all similarly situated music users. If you find, your Honor, we are similarly situated to ASCAP's RMLC licensees, it is game over, you wouldn't have to deal with all the other arguments in the case.

(Continued on next page)

MR. STEINTHAL: You wouldn't have to deal with ASCAP's benchmarks or our other benchmarks. It's game over. If we're similarly situated, we get that rate.

Why is it that Pandora is similarly situated to the RMLC licensees? Let's start with the unassailable fact that Pandora is and always has been a non-interactive radio service. Now, I'll pause there. I know your Honor put out a responsive radio service. I think, you know, the way we view the world, the way I view the world and I think the way most people view the world of radio, it's either the user requests and demands the music or some service programs the music. We program the music for our listeners. Now, we do it with the latest technology, we do it with input from our users but so do a lot of radio companies including a ton of radio companies that are RMLC members. This is not a brand new technology. This technology has been around since the late 1990s. The notion that Pandora is fundamentally different than radio is just not a credible statement.

You will hear from Mr. Westgen, the founder of Pandora. You'll hear from Tom Conrad, the CTO, the chief technical officer. From them you'll hear how the service works, what it does. Simon Fleming-Wood, the chief marketing officer, will address how Pandora positioned itself in the market and then Mr. Kennedy, who directed the company throughout his formative years but recently retired, will also

testify.

As I said at the outset we're proud of our technology. The notion that we should be chastised as different, I thought that the slide about -- I don't think we would be called radio. We would be called Pandora, your Honor. That's the power of our brand. That's fantastic news for Pandora. If people really think of Pandora by its brand rather than the generic, it falls within that.

But I don't think you're going to have any trouble when you hear the explanations of the context in which those sound bites -- I called them sound bites in our brief and I'll call them sound bites here -- those sound bites when contextualized about who our competition is will dramatically demonstrate where we are in the market. And when you look at the RMLC, this is something ASCAP hates to do, it's like blinders, they just focus on the over-the-air components of the RMLC. I understand that from a revenue perspective the vast majority of their revenue right now is over the air, but there are so many RMLC members that have internet radio, not just simulcast, but we know I Heart Radio, you've heard a lot about that, that's the 12 percent number right under ours in terms of the market for internet radio, that is a company owned and operated by Clear Channel, the largest of the over-the-air broadcasters and obviously a major member of the RMLC. And as your Honor knows from all the papers, the RMLC ASCAP deal made

explicit in the side letter that went with it as well as in the text of the actual agreements that Clear Channel and its I Heart Radio service are covered by the RMLC deal. And I think Jay said in his opening that I Heart Radio is Pandora, just, it's the same as Pandora. It has somewhat different technology. It uses Echo Nest, an outside vendor, but it was all about -- and you'll see some of the articles, the Pandora killer that were written about the launch of the I Heart Radio service. Of course just like the iTunes Radio service, nobody's killed Pandora. Pandora continues notwithstanding what ASCAP's witnesses have said about iTunes Radio, how it was going to totally change the marketplace. And Dr. Murphy suspected the same thing. But what you'll see, your Honor, and hear is we keep going up. ITunes Radio notwithstanding. And I would submit to you it's because we've got great technology and great people.

But in terms of the similarly situated analysis, we're internet radio. We have genre-based stations like so many other internet companies and we have customized radio, responsive radio, personalized radio, whatever you want to call it, but the bottom line is we program the stations. Our listeners do not and there is a sea change, a huge gulf between on demand and non-on demand and that gulf, your Honor, exists as a matter of law, but more importantly for this case, it exists within ASCAP's own licensing decisions continuously.

Let's take a look at slide 2.

So here we have, your Honor, sort of a graphic that lays out ASCAP's history of licensing and as you'll see, when it started licensing on the internet it charged, when it started licensing internet radio was 1.615 percent until 2002. And your Honor will recall what that 1.615 percent relates to, I'm sure. That was the old RMLC rate before they went to a fixed fee in 2004, the lump sum industry fee. So what ASCAP did, and there's no dispute about it, when internet radio started out they applied the radio rate of 1.615 to internet radio. By 2002, you had much richer experience, I would say, with internet radio, and you had the beginning of the on-demand market. There were a few companies like Press Play and Rhapsody, pure on-demand services that launched in 2002.

So what does ASCAP do? They say, okay, let's create a bifurcated rate structure because on demand is more valuable. The economist Dr. Marx will talk about why it's more valuable in the sense that there's lesser opportunity to substitute as a service. If I'm paying 10 or $15 a month, your Honor, to get the world's music on demand and I want to listen to the Beatles and I can't get it or I want to listen to whoever your favored band might be at a given point, you can't substitute away. When you're a service like Pandora and there is no understanding that you will ever get a given song at a given time, you have the ability to substitute away and that ability

to substitute in your playlist generation creates from an economic perspective a basis for there being a lower rate for non-interactive radio than for an on-demand service. There are also issues of substitution. There are concerns that when people are getting whatever they want whenever they want it they're not going to buy albums, any more so there has to be a higher rate for the lessening of the royalties that go to publishers and the record companies. So there's a long history of a bifurcated rate and, your Honor, it's never changed. Since 2002 that bifurcated rate structure for non-interactive at 1.85 and interactive at 3.0, that's ASCAP's form license that has been in existence and is still available today. And as you will hear, Pandora was licensed on the form non-interactive license. And throughout, until Pandora terminated the agreement over an issue that related to -- you read it in the papers and all, there's an alternative minimum fee based on sessions and the way ASCAP calculates sessions was problematic to Pandora and they hadn't been calculating it on that basis and then in 2010 they realized that, uh-oh, if we have to pay them on a sessions basis let's get out of this. But from the perspective of was ASCAP happy to get the payments that Pandora was making at 1.85 percent from 2005 until 2010? You bet they were happy. You'll see evidence where they're extolling the virtues of Pandora as a new media client. And, frankly, Pandora was a willing buyer at 1.85 during that time

period and the only reason it became an unwilling buyer at 1.85 was because its chief competition got 1.7.

So when Clear Channel, our biggest competitor, gets 1.7, we say, hey, wait a minute, we're entitled to not be treated -- whether it's discriminatorily or unfairly, whatever the right word is, the bottom line is when your competitors are getting a better rate and you feel your operating services that are identical in the case of I Heart Radio and comparable in the case of broadcast over the air stations and they're all subject to the same 1.7 rate, that's what caused Pandora to say we should get that 1.7 rate.

But when we talk about -- and we'll come back to this at the end, we talk about what's the range of reasonable rates. At the end of the day it's between 1.7 and 1.85. We believe we're similarly situated. I'm going to argue that point in a minute, but in terms of getting way ahead of ourselves and putting everything in a package and telling you what the end of the story is, it's 1.7 to 1.85. Why 1.85, your Honor? Not just because ASCAP willingly licensed us at 1.85 for all that time, you'll hear from Mr. DeFilippis, and it's actually in that little blurb on the graph that when ASCAP adopted the 1.85 percent rate and they bumped it up from 1.615, the pre-existing internet radio rate. Why did they do it? Because there was an increasing amount of music that was being both offered by services and consumed by their customers. So all

this stuff you're hearing about this music use adjustment, if you adopt the RMLC deal, they already did it. They made the adjustment back in 2002 and they carried it forward since then at a 1.85 rate that incorporates the very music you suggested that they claim is warranted as a bump-up from a broadcast radio benchmark.

So I think it's helpful to have that overlay and I was surprised that Mr. Cohen didn't go at all into the history of ASCAP's licensing here, but I guess because of the absolutely continuous manner in which ASCAP had licensed internet radio it's not something ASCAP wants to really promote here. They're trying, your Honor, to break away from more than a decade of licensing at either 1.85 or 1.7 and they're trying to get us up to 3 percent by the end of this license term and that spike, as you'll hear, your Honor, there's no economic justification for it whatsoever. Dr. Murphy's testimony is absolutely post hoc we got to get somebody in here to justify the rate increase that we're demanding, and I'm going to get into in a moment what I think the record will reflect is what the true motivation for this rate increase is, and it's not based on economic principles.

Now, as your Honor knows from both of our briefs, there are three components of a similarly situated analysis. Are the licensees involved in the same industry? Do they operate similar businesses and do they perform ASCAP music and

use music in similar ways and with similar treatments? The first two issues are hardly worth expending time. The testimony of Pandora's fact witnesses and its expert witnesses, including Mr. McIntyre in five pages will demonstrate that there's not any credible argument that we are not in the same industry as the RMLC entities, nor is there any credible argument that we don't operate similar businesses. We do. There's not -- there's just no question about it. The fact that we have personalization as well as regular old genre-based stations, your Honor, you will see in the evidence that there's been personalized radio for 15 years now and guess what? It's always been licensed by ASCAP at that 1.85 rate, just like any other genre-based internet radio service.

Now, ASCAP's primary attack regarding our similarly situated argument concerns whether Pandora uses music in similar ways and with similar treatments compared, of course, to the RMLC licensees. That we use music in similar ways, again, can't be credibly disputed. There are so many RMLC licensees that have genre-based offerings on the internet and personalized radio offerings, and as our testimony will be, including our experts, will make very clear the industry, your Honor, is what I described at the very outset. Who is programming the radio stream? Is it the listener or the service? Mr. Rosenblatt goes on for great lengths about how even over-the-air radio stations are using various engines and

technology to architect playlists for over-the-air radio stations, they're doing the same thing Pandora is doing. In a somewhat nuanced, different way, perhaps. There are certain things you can do on the internet that you can't do on broadcast, but at the end of the day is it radio, are we in the same industry, do we compete for the same advertising dollars? Do we compete with the same auto manufacturers to get that window of opportunity to be an app in a car that Buick is releasing? Absolutely. You'll hear all that testimony and it will be very, very compelling.

So then it really comes down and I think Mr. Cohen's focus on the music use is what I expected, because that's the issue. It's the only issue I believe that is even debatable about the similarly situated analysis.

Now, I know they cited Mr. Kennedy's offhand 10 to 15, their own data reflects it's 11.3 or something against 15. So it is what it is, but it's one thing that's happening, your Honor, is it's diminishing. Why is it diminishing? There are some things that are happening at Pandora, two things that affect music use. One is as we've gotten a bigger and bigger audience we're able to sell more ads. You know, the ad market reacts to audience.

THE COURT: This is a very sad piece of news for a lot of folks.

MR. STEINTHAL: It's only because we are able once

we've grown our audience we can sell more ads so you're going to have more in-stream ad units per hour and therefore less music per hour. Those two things are directly related to one another. And then there's the comedy programming. I'm not saying comedy programming takes up a lot, but I'll say this, it's a heck of a lot more than Pandora Premiers. That's the service where for up-and-coming artists we have an arrangement with their labels to provide on-demand access before certain songs are released. Your Honor, the notion that this makes us a hybrid service, this is a promotional thing we do with labels. It involves I think 400 or so songs and we have them for a week at a time. And guess what? It's not part of this case. We get all the composition performance rights cleared when it comes to us because the label is anxious to have us perform a promotional bit for them. We're not a hybrid. We're not here to get a rate set for that little tiny piece of what we offer that's on demand.

So back to the music use differential, which is where it's all about. We think the figure is somewhat exaggerated because what ASCAP is counting is just the songs per hour. But there are songs in ads and this is where we get a break. When we have less ads per hour, they have a lot more ads per hour. If you count the songs that are in the commercials, that's going to close the gap. And there's also, your Honor, and I know that ASCAP chides us for it every now and then, but it was

interesting that their composer, Brett James, does exactly what everybody else does as he testified in his deposition, which is when an ad comes on in your car he changes the station. So if you look at music consumption across the RMLC, there's no question that the music consumed per hour is greater than 11.3. No question whatsoever. I can't tell you what exactly it is, but I know it's more than 11.3 per hour because people unequivocally when non-music programming comes in and they want to listen to music, in their car in particular, they change the station. And so the gap that they make so much of becomes narrowed when you get to consider these other issues.

Now, there's also the fact that the RMLC universe consists of radio stations -- music format radio stations that have 6.6 songs per hour up to more than 20 songs per hour. So it's not as if there's a specific profile that has to be met to be eligible for the RMLC rate. It covers a wide gap and I thought Mr. Cohen's point about Dr. Noll's testimony about music use being an important issue in setting fees, well, Dr. Noll's point is, yeah, at a certain level it is, like, let's look at cable where we have a .1375 rate for news and sports, a .375 rate for the vast swath of general entertainment and a .9 rate for music video channels. If you look at the composition of the channels that are within the general entertainment category you've got channels that are documentary driven, you've got channels that are much more music intensive

than others. It's just -- yes, you have to look at general parameters in determining whether the rate should be X or Y for a certain category of music user, but the RMLC has already done that.

The RMLC deal covers 6.6 to 20. Okay, the average is 11.3. Our average is 15. It doesn't make us not similarly situated, even if you accept their numbers. And as I said I think their numbers once you consider all the evidence and look at consumption shrink and the gap is much less than the 3.5 songs per hour, whatever it is that ASCAP is saying it is.

Let's talk about Salem Media. I don't know, your Honor, whether you've spent a lot of time on Salem Media yet. It is a curious case in the sense that the entity arguing for similarly situated treatment was ASCAP. I think the core holding of the case is similarly situated is a sword for a licensee but can't be used as a sword by ASCAP. I think that's the core principle. ASCAP was trying to rope the religious broadcasters into a deal that the religious broadcasters didn't like. And one of the fundamental things is that the religious broadcasters were interested in per program licenses and the RMLC hadn't spent any time on that at all. Now, your Honor, that's just context. When you read the arguments about what should or shouldn't be deemed similarly situated it makes it pretty clear that ASCAP's argument that the median was the right way of approaching this is wrong. In other words, you

don't have to be at the median or the average to be similarly situated. What the decision says, and I think, your Honor, it's probably dicta, to be fair, for both of us, but the dicta suggests strongly that -- and you'll see the language, if you're in the range of the benchmark license -- if the applicant licensee has music use that is within the range of licensees covered by the benchmark license, that's enough. We're right smack in that range, your Honor. No question. We are within that range. And so if you construe Salem Media like we do, all you need to find is that we're in the range. And it's even better, your Honor, for us in the sense that the RMLC deal is really two licenses. There's a group license and there's an individual station license. I've just abandoned my outline so I can't tell you what the exhibit numbers are, but there are two different licenses. The group license basically says that if you own one or more commercial radio stations then you can make new media transmissions unrelated to those stations that you own and pay for them under the group license. Maybe this is one that I should go to my notes and read to you from.

Group license agreement: It enables, quote, "an entity that owns one or more commercial radio stations," unquote, to make, quote, "new media transmissions," unquote, via entities that are, quote, "not otherwise licensed by any station licensed under the radio station license agreement."

So basically you're able if you're Clear Channel and you operate I Heart Radio you can have your I Heart Radio company operate under the group agreement and then all your individual stations operate under the individual station agreements. And you know what, your Honor, the group license has one, universal licensees, it's one, it's Clear Channel for I Heart Radio. So while we submit we are similarly situated to the entities under the station agreement because we're within the range, we satisfy the other two requirements easy. We satisfy we're using music similarly easy. We had this big fight over the volume of our music use. We claim we're in the range under Salem Media. We're similarly situated even under the station agreement, but by God we are definitely similarly situated to the entire universe of licensees operating under the group licenses. And Mr. Cohen said it again. I Heart Radio is us. They're the only licensee under the group agreement. It's game over. We are similarly situated under either way.

And, your Honor, ASCAP seems to suggest that this is some awful result, how could you possibly allow this to happen. Your Honor, if Clear Channel bought Pandora tomorrow there is not a shadow of a doubt that it could put Pandora's streams under that group license just like I Heart Radio is. There is no limit on how many new media transmissions you can make. There's no limit on how much money you can make from new media

transmissions under the group agreement. Not a leg to stand on if Clear Channel bought Pandora or CBS bought Pandora and just put them under the group agreement. So it's an entirely logical -- and I'm fighting against them on this because they're so upset -- but it's so plain from the language of the agreement. And I'm going to come to this in the context of what's the right benchmark, but I can do it now too.

Mr. Cohen makes the argument about, well, it was never intended that the RMLC agreement would cover this situation and he suggests our invocation of the parol evidence rule is kind of hypocritical because we always talked about the context in which a negotiation occurred when we're talking about Sony and Universal, but this is a totally different situation. When we're talking about whether an agreement is reached in a competitive marketplace you have to look at the market and see what the indicia of competitiveness is. We're not arguing in the Sony or Universal case that the agreements don't mean what they are. The terms are what they are. We entered into those agreements. We're not trying to argue that any term doesn't mean what it says. That's what they're arguing. They're arguing, hey, wait a minute, we can't let this happen. We never intended for the group license to cover this situation. We never intended that there would be that many new media transmissions by any RMLC licensee. But that's not what it says. And the parol evidence rule is absolutely applicable

here. There is no ambiguity. What they're trying to do is introduce evidence of intent that would be contrary to the terms of the agreement. That can't happen.

Your Honor, we had this dispute in MobiTV. Dr. Boyle tried to say, well, Judge we didn't intend for Mobi to be covered by the granted rights and your Honor properly, in our view of course, agreed with us that the parol evidence rule barred that kind of evidence. If you're trying to introduce evidence of intent to contradict the unambiguous language of an agreement it doesn't come in. And so we made it clear in our colorful brackets to the written direct testimony what objections we have to certain testimony and we've objected across the board when any of ASCAP's witnesses start talking about the intention of the parties about -- in terms of the RMLC agreement and that new media transmissions by Pandora wouldn't be covered.

But the bottom line, your Honor, I think I've hit most of the things that I've actually written out to make sure I would cover. The only real argument ASCAP advances on similarly situated is the music use one. I think you'll get past all of the, frankly, I think nonsense about that we're not in the same industry. We are and you'll get a chance to examine our people and understand that when they're sending e-mails back and forth and you're only seeing part of the e-mails and they're talking about competition in general, it

will all be very clear that none of that detracts from who we are and what we do. And on this music use issue, I just think that under Salem and under an interpretation of the actual RMLC agreements -- and I think the acquisition point makes it easy to see how strong the argument is. We don't have to go buy a radio station. I know that's out of the case. I understand that. My point is very different. My point is that parties to that agreement could absolutely buy us and we would be paying under that. And once you find that, once you see that that's an outcome that is entirely logical and within the contours of the RMLC ASCAP agreement, how can we not be similarly situated? We have to be. Part of me would suggest to you, you could get to the same result by saying it's the best benchmark and not even tackle the similarly situated point and just say the RMLC agreement is the best benchmark, therefore, we win on that basis, but that would require you to go through all of Dr. Murphy's arguments and whatnot which I'm not going to go through right now, but there you go.

I would note this. Looking at some of my notes from what Mr. Cohen said. You know, you talk about us being similarly situated to iTunes Radio, we're going to deal with the iTunes Radio benchmark in due course, but I found it somewhat ironic that he equates us with iTunes Radio which of course is just a little sliver, tiny sliver of Apple and yet what we're saying is we're similarly situated to I Heart Radio.

It's spot on what we do and as part of an entity that is entirely in the radio business.

Should your Honor get past the similarly situated issue, then there's the question of evaluating ASCAP fees. Obviously the burden is on ASCAP. The law is pretty clear the rate court provision was designed to ensure against excessive fee demands from ASCAP. It allows users like Pandora to automatically obtain a license upon request so that licensees can't be effectively compelled to take a license, lest they risk infringement exposure and it provides for the right to seek a judicial remedy from this Court to set a fee. I've had the privilege of appearing before the ASCAP rate court on a number of occasions and this case is truly unique, perhaps the most unique of any that I've been involved with and important -- as Mr. Cohen says it's important to him, important to his client, it's important to us. The evidentiary record here reflects transparent, unabashed acts by the largest publishers in the world who sit on ASCAP's board and represent due to the accumulation of catalogs and copyrights that they've made over half of ASCAP's repertoire. I speak, of course, of Sony and Universal, each of which control more than a million compositions. The evidence shows that these publishers working with ASCAP's management and with the overt blessing of ASCAP's chairman, Paul Williams, took deliberate steps seeking to circumvent this Court's rate setting authority via

orchestrating and seeking to implement partial withdrawals designed to enable publishers to achieve the benefits of collective licensing of all the works in the ASCAP repertoire including those of the partially withdrawn publishers for motion purposes, your Honor, while permitting limited withdrawals as to a targeted group of new media services, Pandora in particular.

The partial withdrawals are really a euphemism, your Honor, for a plan to deny to those services the automatic licenses and rate court protections of the ASCAP consent decree. It was part of a not-very-secret plan to raise new media performance rights prices in a categorically contrived marketplace. This is plain from the following elements of their activities which ASCAP as publishers don't really contest. As the direct testimony and deposition testimony and documents abundantly cited in our brief reveal the publishers and ASCAP's chairman admit that the plan was to allow the publishers to evade the Court's oversight and to raise new media performing rights prices above the levels that they expected they could ever achieve in this court.

THE COURT: Now, obviously EMI, Sony, Universal have the right to withdraw completely from a PRO.

MR. STEINTHAL: But they didn't.

THE COURT: No, but if they did withdraw completely they'd be withdrawing not just vis-a-vis Pandora, but all music

users, public performance licenses, so they'd have to think through and manage in some way the licensing with respect to every user of their music that needs such a license, which is, of course, lots of licensing negotiations, and then the administration of those licenses. But assuming they did that and then negotiated a fee with Pandora in the context of deciding they were going to run independent of ASCAP this whole licensing program, would that be in your view a fair market rate or at least a potential benchmark?

MR. STEINTHAL: I think, your Honor, you'd be walking down a path that -- it reminds me of what's going on with SESAC right now. Universal and Sony are much bigger than SESAC. At some point when you get an aggregation of copyright rights as large as they have there is the possibility of behavior that could subject you to an antitrust inference. It depends on how you act.

I'm going to get to the whole point Mr. Cohen raises about are we just liking EMI because we like the result. No, it has to do with the fact that and, again, I don't want to get ahead of myself, ASCAP obviously has market power, it's been stated in the Second Circuit again and again. How many cases come to you, your Honor? One out of every hundreds of thousands of licenses. ASCAP doesn't abuse its market power all the time. A publisher with the ability to exercise market power may or may not do that. EMI did not do that. You'll

hear from Dr. Noll, that the reason he isn't troubled by the EMI deal is because of a series of events that occurred that made it clear, the indicia of that negotiation did not reflect the abuse and exploitation of market power and information asymmetry that absolutely characterized the Sony negotiations and the Universal negotiations. Now, hypothetical, your Honor, I'm not here as an antitrust lawyer to analyze when you get so big if you're Sony or Universal that maybe you should have the Department of Justice looking at things and consent decrees and all that kind of stuff. That's not today's argument.

We're here because they want the benefits of collective licensing. Clearly, they'd rather be partially out and what they did here -- and the quotes are vivid. The publisher witnesses repeatedly complained that they were being, quote, "constrained by the consent decree," unquote, from getting the prices they want. Paul Williams, the chairman of ASCAP said, we're going to work beyond the limits of the consent decree. The intention is to make better deals resulting in greater income. Publishers will set a higher market price which will give us bargaining power in the rate court.

This is all orchestrated.

THE COURT: I guess my point was slightly different. If they withdrew entirely and set up their own independent negotiating mechanism with these thousands upon thousands of

music users and the back office operation to support the receipt of income and potentially the distribution that they would need to make pursuant to contract rights, potentially, it's in that context that one could evaluate a rate negotiated with Pandora. It may or may not have antitrust issues. I wasn't really going there directly, but that is the kind of negotiating circumstance that is a potential benchmark, unlike the partial withdrawal negotiation without taking with it all the burden of the separate negotiations with thousands and thousands of music users, etc. to replicate what ASCAP does.

MR. STEINTHAL: Let me address your question in a somewhat different way and focus on what happened here, frankly, whether it's partial or full, this issue is an issue that's unique to the time period.

Your Honor, we've been operating as an industry for decades with blanket licenses, Pandora since it was born. Nobody needs to know whether you have a blanket license from ASCAP, BMI, and you've got a million bus tracks on your Officer you don't need to know and therefore you don't have the information. If your question is more hypothetical, if the world started today what would be so harmful if an individual publisher said to Pandora, look, I'm out of ASCAP you want my repertoire, pay me X. Your Honor, if we didn't have the takedown problem, the circumstance would be a lot different.

What is hugely important here and Dr. Murphy never

addresses this, is that this is not a negotiation like the hypothetical I just said. In that hypothetical you can walk away. If you don't want to pay Sony X and you don't have Sony stuck on your server, you're fine.

THE COURT: I understand that, and I don't mean to cut you off and I'll just give it one more try. Why is the negotiation with, and I'm just using Universal as an example, a fair benchmark to use when the partial withdrawal meant that Universal could escape the full consequences of a decision to withdraw? It was able to negotiate from the stance of a partial withdrawal and therefore didn't have all the burdens on it economically and in other, I guess economically is what's important. Economically of a full withdrawal.

MR. STEINTHAL: Is the question why isn't the specific set of circumstances or why is it possible that under a partial withdrawal scenario there could be a negotiation that's a benchmark? I guess I'm not following your Honor's question.

THE COURT: Let me think about a better way to put it to both counsel later on. It's the beginning of a conversation. Sorry for the interruption.

MR. STEINTHAL: Dr. Marx has addressed this, I believe, and I'm sorry I'm not fully grasping your question.

THE COURT: Not your fault.

MR. STEINTHAL: All right. I think where I was, your Honor, was trying to summarize the evidence of what happened.

I read you some of the quotes. There's no question that the publishers and ASCAP's chairman admitted that the overall purpose here was to use the elevated prices that would be secured by the withdrawing publishers to raise the price and then come to this Court and use those manufactured benchmarks to try to raise the rate. There's no dispute about that. That's exactly what the plan was. The publishers tried to shroud their action under the guise of direct licenses. These are not the kind of direct licenses that you had before you in DMX where the licensee had a true alternative. And the evidence also demonstrates, your Honor that these so-called direct licenses were effectively shams. ASCAP was going to administer the direct licenses. The only thing that was really happening was taking selected rights away from ASCAP's licensing authority under the notion that this Court wouldn't be able to set a rate and protect the licensee, get the higher rate and then march back in. And from a competition perspective the absolute clarity that this was not about competition was when we asked Paul Williams at his deposition well, did you ever consider for the catalog that hadn't been withdrawn negotiating over price so you could drive greater volume at a price somewhat under the level that the withdrawing publishers were charging? And the answer -- the question was: "Did you ever consider that ASCAP could charge a lower price and try to get more people to use the works left in ASCAP

rather than have users use the higher priced EMI repertoire?"

"Answer: Never once did that occur to me."

In other words, it was all about raising the rates. It was not about competition.

Now, your Honor saw through the partial withdrawal scheme and you determined that it was invalid and status quo was restored. Yet ASCAP's proposed model for rate setting relies predominantly on the fruits of this very consent decree violation as it's rooted in the deals extracted by the withdrawing publishers. It is an unprecedented and dubious proposition that ASCAP should benefit from the fruits of a consent decree violation that it and its members perpetrated to raise the new media performance rights rates, as they seem to do here using benchmarks that would not even exist but for the consent decree violation.

Now, I think it's helpful to look at what evidence there is as to why this happened. What was the motive? What on that chart when we looked at a very consistent pattern of licensing for internet radio at 1.85 percent, what happened here that all of a sudden changed everything?

Just catching up because I covered a lot off the outline.

Was there any change in Pandora's service, your Honor, that warranted the sought-after spike in fees? None at all. As I mentioned before, if anything with more ads per hour and

more comedy there's less music per hour. What, then, could it have been? The trial record actually answers the question. It comes down to a matter of resentment or envy, as the case may be, of certain publisher executives sitting on ASCAP's boards with the rates that their brethren, often affiliated companies with a common parent as in the case of Sony and Universal, were generating in fees for the digital radio performances under the compulsory license for sound recording performance under Section 114. Your Honor, this goes to the grid or chart that you were asking about. As your Honor may recall in the mid-1990s the Digital Performing Right and Sound Recordings Act was passed and for the first time there was a limited performance right and sound recordings, limited meaning to digital audio transmissions. There is not a comprehensive or general performance right recognized under U.S. law for the performance of a sound recording, only digital audio performances as of the mid-'90s are subject to that obligation. And the law created a compulsory license for non-interactive digital audio transmission.

Now, what we've heard a lot about in the papers and in the affidavits of ASCAP's publishers is that the major publisher members sitting on ASCAP's board, Mr. Bandier, Mr. Brodsky -- Mr. Brodsky is not on the board but he reports to Mr. Bandier, and Mr. Bandier and Mr. Horowitz, they were fuming about this disparity between what the sound recording

owners were getting under the compulsory license rate for sound recording performances, which was set on a per-play rate basis and started generating as the consequence a fee equivalent to over 50 percent of Pandora's revenues. That's part of their public disclosure.

Now, there are several ironies here. First of all, there's no disparity that way on the publishing side. On the publishing side there's a huge disparity in favor of Mr. Bandier and Mr. Horowitz because the sound recording owners were collecting zero for performances on broadcast radio, over-the-air radio, and let's assume we have a $14 billion radio industry, your Honor, which is pretty much what it is annually, at 1.7 percent revenue, that generates over $225 million a year in ASCAP royalties for public performance of compositions. So in one area of their lives the publishers have a 225 million to zero disparity in their favor. That's why you don't hear about complaints from these publishers about the 1.7 percent rate.

But increasingly what the documents show is an irrational -- not an economically principled but an irrational feeling that if the record companies are getting that much money we have to get more. It's not based in anything in economics, your Honor, and that's what caused this whole mess is this feeling about the disparity.

Now, the irony, another irony here is why does the

disparity exist. The sound recording owners argued to the Copyright Royalty Board that their rights and their industry are fundamentally different than publishing. And they convinced the CRB that sound recording royalties should be rewarded more highly than composition performance royalty. I'm not here to say it's right or it's wrong, but the interesting thing is that the sound recording companies argued that these publishers were in a different industry and the value of their works was much less. So the disparity exists thanks to their brethren making arguments that the CRB adopted so there's this disparity on the sound recording side.

But, your Honor, that disparity is not an economic basis to change the world that we've been living in over the last decade. And yet that is the reason. The evidence will show that is the single driving force as to why the publishers wanted to partially withdraw and raise the roof on prices and then come back into the rate court and try to raise the rates through those ill-gotten, in our view, benchmarks.

Dr. Murphy is here after the fact, post hoc, to come up with some economic theories to support what the publishers have brought.

Now, let's turn to the Sony and Universal deals. The experts in the case agree that fair market value requires that a willing and unrelated buyer would agree to buy and a willing and unrelated seller would agree to sell when neither party is

compelled to act and when both parties have reasonable knowledge of the relevant available information. And I'm quoting from the textbook that Dr. Murphy uses as well which goes on to say, and I quote, "neither party being compelled to act suggests a time frame context, that is, the time frame for the parties to identify and negotiate with each other is such that whatever it happens to be it does not affect the price at which a transaction would take place." And it adds, the definition also indicates the importance of the availability of information, that is value is based on the information set that is assumed to contain all relevant and available information.

The trial evidence has demonstrated that under this definition ASCAP has not carried its burden to demonstrate that the Sony and Universal benchmark agreements upon which its proposal is based qualify as fair market transactions. They fail because these agreements are riddled with information asymmetries, as Pandora did not have sufficient information or ability to effectuate a takedown of Sony's or UMPG, which left Pandora effectively to walk away without doing a deal. Each transaction was characterized by an artificial set of time constraints imposed by the withdrawing publishers such that Pandora would have faced huge copyright infringement exposure if it did not conclude a deal within a constraining time period. Again, these are the factors which effectively compelled Pandora to transact.

And I come back, your Honor, to the different set of circumstances in the world starting today. If it was a negotiation between a publisher and Pandora and it was a question of am I going to add your work to my million plus repertoire that's already embedded on the server, then we wouldn't be compelled to act. What creates the problem here is that with a million different songs in the system already and the looming threat of copyright infringement, if we don't either do a deal by January 1 or take down all the content, if that's conceivable, you have to transact. That's what makes it unique. That's what separates it from Dr. Murphy's hypothetical world of atomistic competitors. We're talking here about a circumstance where without the information necessary to enable a choice there is a direct cost to failing to do a deal. That's the way I would put it. There's a direct cost in failing to do a deal because if I don't do the deal I incur hundreds of millions of dollars of infringement risk. That's why this circumstance is different than the normal sort of start the world from today on day one and have a negotiation. If you can walk away, if you have the ability to not do the deal without a risk of huge infringement exposure, then the deal that flows, if it flows, I would argue is a fine benchmark. But when you don't have that choice, when you are compelled to act because the risk of infringement damages is so great, that's what renders this a non-competitive marketplace.

THE COURT: To return, to try to restate, to what I was trying to get to before, if the publisher at that moment understood it in this negotiation with you its only option was complete withdrawal or no withdrawal? So if in that negotiation the publisher understood that you, Pandora, would have to have the enormous complication in your life of removing whatever percentage of your repertoire it is from the servers, but it would have the complication if it didn't reach an agreement with you, having to completely withdraw from ASCAP and put all its music users on notice that if they played any of their music they would be infringing and therefore the risk that they'd, all of their music would disappear from the marketplace overnight?

MR. STEINTHAL: I guess, your Honor, I don't see where the risk is to them. It's their choice. They can walk away. They can make a decision that does not result in a direct cost to them. They can choose to go down one path or another. The failure to do a deal doesn't put them at risk.

THE COURT: Okay. I hear you.

MR. STEINTHAL: And we're talking, in particular there's no risk of a partial withdrawal, absolutely no risk because your Honor knows the rules of the game under partial withdrawals, you can go right back in. So I think, that's why I said it's like ships passing in the night. Dr. Murphy is fine in his world. He's fine with the characteristics of a

benchmark market where the seller has over a million compositions. He's actually fine with not providing information. Basically justifies it and says, well, jeez, if I can avoid giving the information I get greater leverage and any self-respecting profit-maximizing entity that can get leverage, fine. So he's fine, a million compositions, huge market share. He's fine having the information. So when we talk about that test, all relevant and available information, it's there. It's available to the seller. He's, fine, saying don't give it to him and he's fine even with leveraging the infringement risk in order to drive up the price. So to him it's just, again, he starts out with this hypothetical atomistic competition concept and therefore is unaffected by the very elements of this very negotiation with flunked the test. His test. There's available information that is plainly relevant and it's not being provided to both parties. One party has it and the other doesn't. There's compulsion to act.

THE COURT: But your point, if I understand it, is you have these arguments, factual arguments about not being provided with the information you sought or not having it available for your use. But your point is also separately even if you had the information it would be extraordinarily disruptive to your business to remove the repertoire.

MR. STEINTHAL: No question. But the reality is we never had the good fortune to try to make that choice because

we never had the information in a position where we were able to use it to consider a takedown. But you're absolutely right, your Honor, when you have a publisher that's so big, then the choice is either a takedown or, not a shutdown -- if you can take it down, the choice is taking it down or harming your business. Maybe not gutting it, but harming it. So you have different levels of bad choices here, all of which in our view are not indicia of a competitive market.

THE COURT: On the other hand, if Pandora is a very successful system of distribution of repertoire, then a publisher wants them available to them.

MR. STEINTHAL: I think, your Honor, it goes back to my hypothetical. If the world started today, if we didn't have PRO's around for a century and I think it is the hundredth anniversary of ASCAP this year, if we didn't have that then you would be closer to the world of actual competition. But the problem is we're not in that world right now and this, what Dr. Murphy never grapples with is the direct cost of failing to do a deal.

One of the absolutely undeniable elements of his test is no compelling to act. When there is a direct cost of infringement litigation and exposure if you don't do the deal, that's compulsion to act. You have to transact. You don't have a choice. Or shut down your business. That's not a competitive market.

Now, Dr. Murphy comes up with these really trite examples. So he goes into, for example, in terms of information, we don't need perfect information. When I buy a sack of oranges I don't have to smell and taste every one of them to know what the value of the sack is. And then the house buying example. There was never perfect information between a seller and a buyer, so he says but it doesn't make the negotiation not a competitive one. In both of those examples, your Honor, the easy example is this. You can walk away. There's no direct cost in failing to do the deal. That's the problem. The compulsion to act is equivalent to the direct cost of failing to do a deal and in both of these circumstances there was that direct cost.

Now, let me deal with the EMI situation for a minute. They make so much of it as if we're trying to just take the ones we like and not the ones we don't. As I mentioned before, entities with market power can either choose to exercise it or not. Mr. Cohen actually mentioned Warner Chapel and BMG and entities that had indicated that they were going to withdraw and then they didn't, or they did and they didn't try to put Pandora in the circumstances that Sony and Universal did. That actually helps us, your Honor. It shows you that it's not just EMI, we did do a deal -- EMI made it very clear. Their reasons, Mr. Faxon's reasons for exiting ASCAP were concern and frustrations with the inefficiencies of ASCAP, with some of

their licensing policies. So that's what motivated him. He made it very clear, the testimony is very, very clear that there was a deal reached on economic terms almost immediately after the parties started negotiating. Why didn't we ask them for catalog data? Because, your Honor, the announcement about the EMI withdrawal happened after the withdrawal had taken place. There was no opportunity to ask for the catalog information to take it down when they announced the withdrawal had already occurred. And then it's clear from the testimony that EMI said, look, we're perfectly prepared to honor the same rate you have with ASCAP. So there was no effort to raise the rate here and put Pandora in that position of a direct cost associated with the failure to act.

What Dr. Noll says is if you look at the indicia of that negotiation it does not show indicia of a non-competitive marketplace because there was no effort to take advantage of the market power that EMI may very well have had. And I would put BMG and Warner in that very same bucket. They didn't do what Sony and Universal did.

Now, in our view, if you'll look at the very test that Dr. Murphy sets out to availability of information, compulsion to act, etc., and you apply it to any given market set, negotiation by negotiation, you have to do it negotiation by negotiation. Sony and Universal's negotiations flunk the test. Dr. Noll and Dr. Marx will explain why. Dr. Murphy will try to

explain to you in hypothetical terms why that's not the case. But I'm going to let the experts deal with his hypothetical ideas more than me, and I'm going to focus now briefly on the facts pertaining to the Sony and Universal negotiations. You looked at your watch.

THE COURT: We're quarter to one. We're going to break for lunch if that's okay, counsel?

MR. STEINTHAL: That's fine.

THE COURT: And we'll start again at 2:00. Thank you.

(Luncheon recess)

(Continued next page)

AFTERNOON SESSION

2:00 pm

(Trial resumes)

(In open court)

THE COURT: Please be seated.

So, counsel, I have a question for you. The courthouse is apparently going to close at 3:00 o'clock, and I need to know, and you can consult with each other, whether you wish to continue past 3:00, till 5:00 or not.

Why don't you consult and give me one answer. I don't need to know if you have different positions. Different positions is we stop at 3:00.

(Off-the-record discussion)

MR. COHEN: 5:00, your Honor.

THE COURT: We'll make an effort to see if we can find a court reporter, and Ms. Rojas will report as soon as possible whether or not we're able to find a court reporter who can stay till 5:00. As soon as she knows, I'll know, and then you'll know.

MR. COHEN: Could I just ask, if the courthouse is closed tomorrow, when do they typically post that? Is there a typical time?

THE COURT: There is. It will be posted. I will be here. I am able to continue with the trial. I will do whatever counsel want to do. If counsel want to have a recess

day, that is fine with me, and if you want to continue with the trial, that is fine with me. Ms. Rojas will not only find out whether we can get a court reporter from 3:00 to 5:00 today, but also whether we can get one tomorrow.

MR. COHEN: We are balancing witnesses' travel and the like. We'll fill you in when we can.

(Off-the-record discussion)

THE COURT: I won't impose anyone to stay. I am not going to order a court reporter to stay. If someone is able to conveniently, then great. If not, great. I understand the court reporters in this district are so helpful and service-oriented that I would not impose upon any of them individually in the midst of a snowstorm.

Mr. Steinthal.

MR. STEINTHAL: Your Honor.

I apologize. I think my congestion is getting to me and I apologize for not getting your question. I had a chance to look at the transcript and I would like to try to, after having confused what you were asking me, I think --

THE COURT: I actually, my staff thought I put it very clearly when I put it at lunch today to them, so I wish I had a court reporter with me then. I could read it back to you.

MR. STEINTHAL: I am the one that is apologizing. I just didn't hear it right.

In any event, I think on the issue that you raised, we

agree that there is a significant difference between a negotiation of partially-withdrawing publisher and a fully-withdrawing publisher. The partially-withdrawing publisher faces no real risk, gets to take advantage of the circumstances we complained about, while escaping the risks that a fully-withdrawing publisher would face and that your Honor built into the question and I just wasn't understanding where you were going.

The fully-withdrawing publisher would face its own set of risks that your Honor identified, but I want to be clear -- and I think I tried to answer this part of it -- I am not prepared to say that every deal done with a fully-withdrawing publisher and a licensee like Pandora would be a competitive market outcome. There still may be circumstances that would render a transaction with a fully-withdrawing publisher not competitive, but to be sure, the partially-withdrawing publisher situation, there is not that same set of risks that a fully-withdrawing publisher would face. I hope that addresses what you were asking.

I covered a lot of territory this morning, going in a lot of different directions and not on script. I want to come back to script for a couple of things to make sure I cover them.

Mr. Cohen talked about the negotiations with Sony and Universal factually, so I want to talk a little bit about the

record and what you're going to hear with respect to the Sony and Universal negotiations other than what I already talked about, which is the overarching intent and plan that we believe the evidence reflects.

Pandora did what it could to defend itself against what it perceived to be a decidedly stacked deck of cards, your Honor. On November 1, Pandora outside counsel, Mr. Rosenbloum, sent Mr. Brodsky the e-mail. Mr. Cohen talked about it. It noted that I give the -- the e-mail says given the uncertainties around Sony/ATV and EMI's position with respect to webcasting rates, Pandora has decided that it needs to be prepared to take down all Sony ATV and EMI content in the event we are unable to agree on rates by the end of the year.

That was sent on November 1st, just weeks after Sony announced they were withdrawing. Mr. Rosenbloum will be testifying a lot, as Mr. Cohen advised, we issued a trial subpoena to him after Mr. Brodsky put in his written direct testimony.

You will hear, your Honor, that this was not the only time he discussed with Mr. Brodsky the need for Sony data identifying the to be withdrawn catalog. No one, not even Mr. Brodsky, disputes that neither Sony nor ASCAP after Pandora asked ASCAP to ever provide this data to Pandora. Pandora, thus, was prevented from doing whatever it might conceivably have been able to do to identify and remove Sony songs from the

Music Genome Project.

What does Mr. Brodsky say? He totally belittles the request. In so doing, your Honor, he utterly ignores the fact that Sony never once provided a response to Pandora for seven weeks between Mr. Rosenbloum's November 1 e-mail and late December. Then he testifies his failure to provide the information was based on a phone call to Mr. Rosenbloum in late December, in which he was advised there was no need for Sony/ATV to provide such a list of works because we were very close to finalizing a deal.

I am sure your Honor looks forward to hearing from both Mr. Brodsky and Mr. Rosenbloum in court on this issue. I certainly do. You'll hear also that Pandora genuinely wanted and sought this data for two reasons:

One, to gird for a potential take-down if it got the data. That is what was alluded to in the e-mail on November 1, but also the testimony will be very clear that the second reason they wanted the data was to evaluate Sony's demand for non-approvable advance, an issue you will hear from both Mr. Kennedy and Mr. Rosenbloum, was something that Pandora was not in a position to evaluate without information about the works Sony was planning to withdraw and then directly license to Pandora.

What is truly most amazing about this, and there is no one disputing this, the data was just sitting there the whole

time. ASCAP's compendium has a whole process in Section 112 (4) that requires ASCAP, upon receipt of a notice of withdrawal, to prepare a list of works that ASCAP understands to be the subject of the withdrawal. It then provides for a procedure to deal with any errors or omissions that the withdrawing publisher may wish to note in the initial list it gets from ASCAP. There is a whole procedure for it.

Your Honor, by the time Pandora asked for this information on November 1st, both ASCAP and Mr. Brodsky had in their possession this very list. The deposition testimony from ASCAP was that the list as is could have been delivered to Pandora within 24 hours were it only to get the go-ahead from Sony to do so. ASCAP never received the go-ahead.

We cited much of the internal back-and-forth on this in our briefs. My favorite and let's go to the slide on this, it is Slide 7. My favorite is the following exchange between Mr. DeFilippis and Mr. Reimer of ASCAP on December 19th, 2013. PX 193. You see the question being asked by Mr. DeFilippis, why didn't Sony provide the list to Pandora? Mr. Reimer's response: Ask me tomorrow.

Mr. DeFilippis, right. With drink in hand.

And the inference here is just incredible. This data was sitting there, your Honor, and nobody was willing to give it to Pandora. Now, the refusal to provide this information to Pandora is only one of the many things that makes the

circumstances surrounding the Sony-Pandora benchmark setting the competitive market rate. The evidence of coordination, and Mr. Cohen doesn't want me to talk about collusion, so I'll talk about coordination. We don't have to prove collusion to prove that the circumstances surrounding this negotiation were anything but a free market.

The evidence of coordination among ASCAP and withdrawing publisher sitting on ASCAP's board is cause for great concern. We already spoke about the overall plan behind the limited publisher withdrawal designed to raise prices and manufacture benchmarks. Separately, our submissions demonstrate at length how ASCAP's withdrawing publisher members communicated with one another to disrupt Pandora's ongoing negotiations with ASCAP during the Fall of 2012.

Those negotiations concerned a license that would have been would have included the content of publishers that had not yet withdrawn as of December 31, 2012, including Sony and UMPG, Universal. Despite the testimony in his deposition from Mr. LoFrumento, publisher board members never get involved in ASCAP negotiations. You have seen our citations to e-mails that reflect directly meddling on the part of Mr. Horowitz from Universal to seek to convince Mr. LoFrumento not to do the contemplated deal with Pandora, e-mails that were sent just days before Mr. Horowitz announced that Universal would be partially withdrawing from ASCAP which, of course, would enable

him to force Pandora into the same box that Pandora was facing with Sony.

Mr. Horowitz thought it appropriate to communicate to other venture publishers on ASCAP's board his e-mails to Mr. LoFrumento, urging ASCAP not to do the contemplated deal with Pandora. ASCAP then sat on the ASCAP-Pandora term sheet for two weeks, only advising Pandora it would not proceed on December 14th, leaving Pandora pretty much in the lurch relative to Sony only days before Sony representatives were leaving for the holidays.

Just to make things more colorful, the testimony is that Sony, while this all was unfolding and when Sony got wind of the possibility that ASCAP might do a deal with Pandora before year-end, Sony threatened to sue ASCAP if it did so.

Then within weeks of the New Year, after the Sony-Pandora deal got struck just before the end of the year, Sony leaked the results of the negotiation. It leaked to the press it achieved 25 percent rate increase over the prior PRO fee levels.

No one from Sony acknowledges being the source, your Honor, but with the stories about the leak under a picture of Mr. Bandier smoking his trademark cigar and under a caption of an article saying Martin Bandier knew is quite reasonable the Pandora deal, can there really be any doubt who communicated to his fellow publishers what the new rate was that he achieved?

Our economic experts, Dr. Noll and Marx, will testify that these are decidedly not the workings of a competitive marketplace. The information imbalance in the marketplace where absent a deal Pandora would risk catastrophic infringement exposure, that itself renders the negotiate ill-suited as a benchmark.

The evidence that Pandora was effectively compelled to transact is overwhelming. Certainly ASCAP has not carried its burden of demonstrating otherwise. This is compounded by the evidence of coordination I just went through.

Faced with this evidence that the Sony-Pandora negotiations flunked the very tests that Dr. Murphy articulated for competitive market environment, ASCAP and Dr. Murphy started grasping for straws. First they talked about the concept of Pandora using information it may have received from a company called Lyric Find, which is a company that supplies lyric information that Pandora uses for whatever songs it can to scroll all the songs they're playing.

The notion that the data Pandora gets from Lyric Find would have been a work-around from the actual data from Sony is crazy. The data is not available for all songs and that even Dr. Murphy recognized. The data is decidedly not represented or warranted to be accurate, and there are serious questions in all events as to whether Pandora would have been permitted to use the data for the purpose of taking down content.

ASCAP also now conjures up the notion that Pandora could have secured publishing information from the websites of Sony and Universal, but this information is not complete and is searchable only if you know what title or artist or writer you're looking for. It decidedly does not permit anyone to obtain a comprehensive list of works owned by any given publisher. The availability of this sort of partial publisher information obviously does not constitute evidence sufficient for ASCAP to carry its burden that all relevant information was made available for the buyer and seller here.

Let me address briefly the Universal-Pandora negotiation.

THE COURT: Before you do that, let's just say that you had been timely provided by this information, say, in early November. Is it your position if there was no information symmetry, then the negotiation would have resulted in a reliable benchmark?

MR. STEINTHAL: I don't think I can answer that in a vacuum. I think even if we had perfect information, there are time constraints involved, there are risks associated to Pandora's business. I am not prepared to say it would have been a competitive market negotiation.

I think for sure Pandora would have had some degree of better leverage, your Honor, in that it may have had a greater opportunity to consider alternatives, but without knowing

exactly what the data is and how much time it would have taken in order to effectuate a take-down, and not knowing exactly what the harm to the company would be in terms of an immediate, short-term loss of the repertoire of a given publisher, it would have certainly made the circumstances less heinous than they were, but I don't think I can answer the question.

I assume Dr. Noll and Dr. Marx will have their views as to exactly how that would change the equation, if at all, but I am not prepared to say it would solve the problem. It certainly would have changed the circumstances a little bit and made the circumstances less heinous.

Now, in terms of the Universal negotiation, as I said, this suffers from all of the flaws of the Sony-Pandora negotiation and one major additional flaw that is quite significant. The time constraint issues, the risk of infringement exposure issues, there is a bit of a curve ball here since some information was sent by Universal about their catalog, but your Honor appears to be up to speed from the papers as to the dispute about whether Pandora was free to use the data in order to effectuate a take-down of Universal content.

Pandora certainly understood the terms of the NDA that were insisted upon by Universal to prevent it from doing so, and I am sure you'll hear from Mr. Kennedy on that issue, and I believe you will find that, in fact, Pandora was rightful in

its understanding that it did not have the right to use the data to take down the Universal content.

That said, the terms of the Universal deal are wholly contingent, and our experts make clear that when you have a circumstance where the fee is contingent on, in this case, your Honor's decision on our pending summary judgment motion, and the agreement was if that motion was granted, we would not have to pay the rate that was set forth in the agreement, well, that totally undermines the agreement as a valid benchmark at the rate that was conditional, especially when Pandora's view was that it hoped and expected that it would not have to pay the rate that it conditionally agreed to pay in order to get over the hurdle for the term starting July 1.

So the economists again will address why, under circumstances where you have such a conditional agreement, it is not a good benchmark.

As far as Mr. Cohen's talking about the delays in the negotiations with Universal, you'll hear from Mr. Kennedy on that. Pandora was litigating against ASCAP, getting discovery in the case, preparing summary judgment motion. I think that the dates when people got in touch with each other are what they are, but the agreement itself is not the kind of agreement that the economists feel is worthy of being used as a benchmark for rate setting under the circumstances where it is so, so contingent in the first place.

Now, I talked about some of Dr. Murphy's theoretical responses, and I am going to leave the rest of the responses to Dr. Murphy, to Dr. Marx and Dr. Noll.

Now let's turn to the Apple deal that are put up by Dr. Murphy as a fall-back, so to speak, for rate setting. The Apple deals, your Honor, are no less the product of these decree violations than are the Pandora. They were done in the context of withdrawing publishers telling Apple that their sole way to get licensed was via licensing directly from them, as they have withdrawn that works from ASCAP.

Obviously, Apple also did a deal with ASCAP that is relied upon by ASCAP. There are, as the record will show, there were time constraints associated with those negotiations insofar as Apple was rolling out a new product and was under the gun to get the product launched by the time of the developers' conference in June of 2013 where it intended to market and promote its brand new product.

More fundamentally, the reason why the Apple deal just can't be used as a benchmark here is that the buyer in that situation is just fundamentally non-comparable to Pandora. Dr. Murphy agrees that Pandora and Apple are different, and he concedes he lacks the information necessary to attempt to do an accurate adjustment of Apple's license terms to account for such differences.

Why don't we put up Slide 9. On Slide 9 we have a

pictorial of the various devices and products that we're able to pick up on Apple's website, indicative of what Apple -- just some of the things that Apple sells.

Dr. Marx will lay out, and identify the several complementary sources of revenue that Apple derives from its iTunes radio service such as increased profits and revenues associated with the sales of hardware, sales of subscriptions to the preexisting iTunes subscription service and sales of downloads.

The iTunes match service is a service where you pay something between 20 and $25.00 a year for a subscription, and it enables you to move to the Cloud all of the music that you own and you purchase from the iTunes store, and you can stream to yourself or download to yourself from the Cloud the music that you own.

That is a subscription service, and the reason it is so important is one of the features of the deal between Apple and the publishers and Apple and ASCAP is that, and I won't get into any of the details of these deals, but one feature is simply that Apple is able to make the iTunes radio service available ad free to the iTunes master subscribers. So you have a situation where this is an advertisers' supported service. All of the millions of iTunes match --

MR. COHEN: Your Honor, if I may?

I actually think we are straying into the protective

order. That is up to your Honor, but I don't think these terms are public. It is out of the ASCAP agreement. I know Mr. Steinthal will strive not to do that. There is a reason why I didn't talk about it in the opening. I am concerned, just sitting in the room, I have obligations under the protective order.

MR. STEINTHAL: I didn't realize that particular feature would fall in that. I will just leave it alone from this point other than to say, your Honor, our papers go on at great length about how there are revenues and profits derived by Apple for the complementary music products and hardware products that Apple sells independent of iTunes radio, and the percentage of revenue deals that they have done do not tap into all of the values that are obtained by Apple for these complementary revenue streams.

What the economist will say is if you're deriving revenue and profit for all of these non-iTunes radio features, but the revenues that are being generated for those other features within the Apple ecosystem, if they're not part of the revenue base, then unless you pay a higher percentage on that circumscribed revenue base, then the deal is not going to be comparable.

So what you have here is a situation with Pandora's stand-alone pure play. All of our revenue is from the radio product. When we pay a percentage of revenue, it is for the

radio. We don't get extra value from selling iPods, we don't get extra value from being able to provide the Pandora service without getting revenue to other parts of the ecosystem. So even Dr. Murphy recognizes that's a fundamental difference. You have to make an adjustment, ane he concedes he doesn't have the data to make an accurate adjustment.

I would point to you, your Honor, we are not comparable in the first place because of the fundamentally different businesses. We are a pure play. ITunes radio is a knit within the Apple ecosystem.

In that situation, we are not comparable, and in all events we don't have the data necessary to do any meaningful adjustment, to take the percentage of revenue deal that Apple did which applies to a circumscribed refuse now base relative to the benefits that Apple gets and adjust it. We just don't have the data to do that.

THE COURT: I am going to interrupt you one second, counsel. So I stopped the clock.

It is important to me that I get all the information from you that I need to make the right decision, so whatever confidentiality agreements might be in play here are not going to determine what you say to me as a general proposition. It is important both sides hear that be as wise as I can in making my decision, and I can't do that without you providing me with information I need to accomplish that objective. That said,

there is lots of confidential information that is irrelevant to my task and that everybody agrees is. So we don't need to put that in the record.

There might be information that one of you thinks is relevant and the other one thinks isn't, and then you should discuss that. If there is a disagreement, we'll think about a process in which I can resolve that. There may be information that both of you think is relevant and are happy to get to me without any restrictions, that is -- and we'll talk about restrictions in a moment, how to get me information with appropriate restrictions, but that you are conscious that some third party considers confidential.

Well, they have a right to be heard, we all agree, so that their rights can be protected in this proceeding, so I am going to trust you. You have been, and I trust you will continue to alert those third parties when there's a potential you may be using information they consider confidential in this proceeding. So how do you get me information that either a third party or one of you thinks is confidential, but at least one of you thinks I should get?

There is a possibility of presenting it in the robing room with a sealed transcript. There is a possibility of examining a witness in a closed courtroom with public excluded. In both those situations, I consider those extremes. I would need to make particularized findings to justify closing a

courtroom during a trial.

When it comes to a document, it is a little easier to manage. You can get me the document. I can make that individualized inquiry whether the portion of the document or the entirety of the document should be sealed, and if I do that, I can receive that document.

So I think we're in agreement here. I just didn't -- and I appreciate counsel handling these matters sensitively so that hopefully I'll get all the information and the entire trial will be an open courtroom.

Ultimately the law does permit me to get information I need and still protect parties' very genuine rights. I just have to make the correct findings and make sure I am focusing carefully on them. Thank you.

You may resume, Mr. Steinthal.

MR. STEINTHAL: Your Honor, let me speak now to the other fall-back benchmark of Dr. Murphy, the SESAC agreement. Your Honor objected to the SESAC agreement as potential benchmarket in Mobi TV. It has never been adopted as a court of final fee determination with ASCAP, and with good reason.

As Dr. Noll will testify it is the very unknown nature of what comprises the SESAC repertoire, that information asymmetry yet again coupled with the thrust of infringement for companies like Pandora if they don't take a SESAC license.

You don't have to be threatened to overtly, your

Honor, to know that if you don't do a deal, where you don't have the requisite information to take down the SESAC repertoire, you don't have to be overtly threatened to know that there is a risk of infringement. All of this gives SESAC market power and renders Pandora's SESAC fee an ill-suited benchmark for arriving at a competitive market fee. The secrecy with which SESAC guards the size of its market share and competition of its repertoire is manifest.

Requests for this information at SESAC's deposition in this case were met with objection after objection, as SESAC counsel argued that this is competitive sensitive information that could end up in the hands of attorneys tasked with negotiating against SESAC for their clients.

Perish the thought to SESAC that a music user might have insight into the composition and actual market share of the SESAC repertoire. ASCAP's suggestion this information is available on ASCAP's website and other websites suggestion is nonsense. Again you can only search on a song-by-song basis by first inputting the name of a song or writer to see if the song is in SESAC's repertoire. You can't use it as a resource to generate any sort of comprehensive list of what songs actually comprise the SESAC repertoire, and the SESAC website expressly disclaims the accuracy of the information in all events.

Dr. Marx in her testimony cautioned against reliance on SESAC as a benchmark for the additional reasons that even if

the SESAC and Pandora license were negotiated under competitive market conditions, which is not the case, as she said the SESAC repertoire differs substantially from ASCAP in size and composition. There is no way to adjust for the qualitative differences in the SESAC and ASCAP repertoires and the differences are not amenable to adjustment under circumstances where huge differences in the size and market share of SESAC versus ASCAP make any small variation into a large differential.

What I mean by that, if SESAC's market share ticks up by two percent relative to the assumed amount, you can have a fundamentally different outcome because of that huge delta between the SESAC repertoire and the ASCAP repertoire.

Now, since the final briefing and the direct testimony submitted in December, your Honor, we have actually gotten the benefit of a ruling in one of the pending antitrust lawsuits against SESAC brought by the RMLC. I don't know if your Honor has seen it. We are going to pass it up.

THE COURT: Excuse me one second.

(Off-the-record discussion)

THE COURT: It appears we can continue until 5:00 today. Ms. Rojas, is that right?

THE CLERK: Yes, that's correct.

THE COURT: And we're still investigating whether we have a reporter tomorrow and by what time we would know

tomorrow morning whether we have a reporter. That is all.

MR. SEDDON: May I approach, your Honor?

THE COURT: Yes.

(Pause)

MR. STEINTHAL: Your Honor, this is a decision on December 23, 2013 in the RMLC versus SESAC case in the Eastern District of Pennsylvania on the RMLC motion for preliminary injunction to enjoin SESAC from imposing additional rate increases during the course of the litigation.

THE COURT: Is this an antitrust lawsuit?

What is it?

MR. STEINTHAL: Excuse me?

THE COURT: I am sorry. I am not familiar with the litigation against SESAC.

MR. STEINTHAL: There are two -- the experts have talked about it -- there are two pending antitrust lawsuits against SESAC, one brought by the television and music license committee and one brought by the radio and music license committee.

The RMLC brought on a motion for preliminary injunction. There was an evidentiary hearing, and findings were made, and some of the findings are very spot-on the subjects that we're talking about here, and we thought your Honor would benefit from having a decision.

Among other things, the report and recommendation of

U.S. Magistrate Judge Lynne Sitarsky found as follows, your Honor, first on Paragraph 28, to the subject of the website, the same subject that ASCAP raised.

In theory, SESAC's website permits a station to search the contents of its catalog if it is aware of the artist, writer, publisher or song title. In practice, this website is not an efficient or reliable means of determining the songs in the SESAC's repertoire. Indeed, SESAC essentially disclaims its repertoire database is accurate.

Later on a similar issue the court found, in Paragraph 46, that there was support in the record for the proposition that radio stations could not turn to a substitute if SESAC were to elevate its prices above the competitive level precisely because turning to a substitute such as ASCAP or BMI for SESAC music would require a station to stop playing SESAC music, and stations could not reliably determine whether the music they play was SESAC music or not.

The court also found, in Paragraph 29, that SESAC also enforces their affiliates' rights by filing infringement suits against those who use their works without a license, and that it is the threat of an infringement suit that often motivates radio stations to take SESAC licenses.

On the subject of SESAC's non-comparability with ASCAP, the court noted SESAC's testimony that SESAC is more selective than ASCAP. It is not open to all comers -- unlike

ASCAP -- in choosing its rights or affiliates, claiming to use only those, Paragraph 24, with exceptional skill which enables SESAC to pay more to their affiliates than what market intelligence tells them ASCAP and BMI are paying for their affiliates.

The court found that SESAC, in setting its fees, does not consider the rates that ASCAP and BMI charge for their blanket licenses. Paragraph 35. In fact, it charges rates that are disproportionate to the number of works that it licenses in comparison to ASCAP and BMI. Paragraph 61.

These findings absolutely support the very reasons relied upon by Dr. Noll and Dr. Marx for rejecting use of the Pandora SESAC agreement as a benchmark.

The mystery of what it is that comprises the SESAC repertoire, the infringement risk that exists of a user like Pandora does not take a license, and the fundamental non-comparability of SESAC and its repertoire that ASCAP and its repertoire which renders fruitless any mathematical effort to adjust the SESAC fee based on estimates of SESAC's and ASCAP's size or market share.

Finally, the market share testimony provided by SESAC's expert in that case is really the nail in the coffin to ASCAP's attempt to rely on SESAC. ASCAP's manner of adjustment of Pandora's SESAC fee to arrive at a fee for ASCAP is based on SESAC having an assumed and secret single digit market share

significantly lower than the market share that SESAC actually advised Pandora it had at the time of the Pandora-SESAC negotiations.

In other words, they used a number of the single digits. The testimony from Joe Kennedy is he was advised that SESAC had a double digit market share, and get this, your Honor, the testimony from SESAC's expert in the RMLC case which, of course, is sworn testimony rather than speculation and is the most current data and is applicable to the specific marketplace of radio performances, is that SESAC has a 13 percent market share. I can say it on the record because it is in the decision and it is a public decision.

THE COURT: So this is very interesting. I need counsel to be prepared to address the extent to which I'm permitted to take judicial notice of a ruling in separate litigation. Of course, I've seen references to the fact that there was this ongoing litigation, but I have not reached out to get any of the rulings, get the pleadings, do anything with respect to it. So why don't we just leave it here.

I am not going to consider this decision of December 23rd, 2013 without a brief, a short letter brief or whatever, that gives me the evidentiary analysis that would make this a document that I can turn to and quote from and think about in any considered way.

MR. STEINTHAL: The last point, the testimony recorded

in the decision of SESAC's expert says that SESAC's radio market share is 13 percent. If you plug in 13 percent as the market share number, and then you give ASCAP and BMI remaining 87 percent, and you split it 50-50, and you do the SESAC adjustment assuming the market share they testified about is correct, the figure drops down to 1.51 percent.

(Continued on next page)

MR. STEINTHAL: So the number becomes actually lower than the fee that we, Pandora are seeking and much lower, obviously, than the fee that ASCAP is seeking and it proves as I said before what Dr. Marx testified to which is when you're dealing with a huge variance, a huge delta between the market share of ASCAP and SESAC, if you have any adjustment, especially when you're not sure what the number is and you're speculating as to what the right market share is -- ASCAP speculated low and it got to a number as a consequence that thought it was a favorable number for it in its benchmark. If we used the number that Joe Kennedy was told by SESAC in those negotiations the number would be much closer to our number than their number and if you use SESAC's own expert's number when you do the math it takes us below the 1.7 percent we received. Whenever you're thinking about how to use the decision, even if you don't use the decision-qua-decision, it's a great example of what happens because of the uncertainty associated with the SESAC market share number. It's a decidedly dangerous benchmark to use because nobody knows what that market share is, and if it happens to be 13 like they're testifying, ASCAP would have never offered it as benchmark.

THE COURT: Well, it seems to me that this may be an appropriate avenue of cross-examination of certain of the witnesses how it would affect their calculations and understanding with respect to what the benchmark should be and

whether it's appropriate. But beyond that I don't think this is something I'll turn to without that additional authority from counsel.

MR. STEINTHAL: Your Honor, let me quickly deal with the other benchmarks that ASCAP has proffered outside of Dr. Murphy. The first is the Spotify benchmark and I would say that these are proposals that were raised in the ASCAP briefs or in Mr. DeFilippis's testimony. They're not endorsed by Dr. Murphy. One of them, as I said, is the on-demand service Spotify. I won't go into great detail now. We in our briefs talk about why an on-demand service is not a good benchmark for a non-interactive service. We have the long history of ASCAP itself as we talked about this morning licensing non-interactive services at much lower rate than on demand. We have some, frankly, almost frivolous arguments that Pandora is a hybrid service like Spotify is a hybrid service because it has Pandora Premier, this tiny feature. That really can't be taken seriously. There's also, your Honor, going back to your questions about getting a chart, an on-demand streaming service, I think this bears spending two minutes because it's harder to explain in writing. An on-demand streaming service has to pay a mechanical royalty for the publishing rights as well as a performance royalty. Under Section 115 of the Copyright Law the delivery of an on-demand stream triggers a mechanical licensing obligation and there's a statutory rate

structure, there is litigation for the Copyright Royalty Board and for the first time ever there was a rate structure established in 2009 and that rate structure is very interesting. It says that if you're an on-demand streaming service you're going to pay 10-1/2 percent of your revenue, but you get an offset for your public performance royalties. So it's an all-in 10-1/2 percent of revenue. So from an economic perspective if you're Spotify it doesn't matter whether you agree to pay ASCAP 2-1/2 percent or 3-1/2 percent or 4 percent. It's just a deduct. You're still going to have the same overall obligation for your all-in mechanical and performance right payment. So there's no incentive whatsoever even in the face of an objectively high demand to take ASCAP to rate court or BMI to rate court as long as it's just a different sized deduction. So you have that on top of everything else as to why this is a decidedly bad benchmark.

The Nokia Mix Radio benchmark offered by ASCAP suffers from both the complementary revenue streams that Apple has and the fact that it's an on-demand service, so it suffers from all the same problems that Spotify does. Then, your Honor, there's the MobiTV 2-1/2 percent music rate. At first we were somewhat confused as to what it was about the rate that your Honor was inquiring about. This is not a benchmark endorsed by Dr. Murphy. It was rejected by Dr. Marx and clearly the revenue base involved in the MobiTV case, and if we could put

up slide 10, please, in MobiTV we had the classic Music Choice was the provider all the way on the right. It was distributed by MobiTV through the mobile operators to the consumer. The retail amounts paid were retail amounts paid to the telephone companies for receipt of a bundle and there was a lesser amount of money paid to MobiTV and a still lesser amount of money paid to the upstream program provider which was Music Choice. The 2-1/2 percent rate was applied to the decidedly wholesale rate revenue base and your Honor observed the 2-1/2 percent Music Choice rate is the current rate applied to wholesale revenues in order to obtain a through to the audience license for the distribution of pure music through television. From that perspective alone a 2-1/2 percent rate is an artificially high rate to apply to retail revenue.

Now, retail revenue is all we have for Pandora, advertising revenue and subscription fees paid direct to us. ASCAP in its brief, and Mr. DeFilippis's witness statement says there's no meaningful difference between the revenue subject to fee for Music Choice versus Pandora. That, your Honor, is not true. There's a huge difference. Just look at the chart. One is upstream revenue and one is retail downstream revenue. No question there's a difference. Mr. DeFilippis seeks to confuse the issue when he says that distributors of Music Choice and I'm quoting him, essentially purchase a subscription to the Music Choice service, and I thought maybe that's what your

Honor read and was confused about. Maybe the effort to equate subscription in Mr. DeFilippis's statement against the subscription -- when we use the word subscription revenue, it's usually retail it's usually what the listener pays to get Pandora or Spotify whatever the case may be. But Mr. DeFilippis is not referring to true subscription services by the end consumer buying at retail. He is talking about the payments that are being made, just another way, talking about the affiliate payments that are being made by the distributor upstream. So there can't be any confusion about the fact that our case here presents a fundamentally different revenue base than MobiTV. The RealNetworks case which Mr. Cohen raised with you is a different kettle of fish and I frankly didn't think that's where this discussion was going and I'd be prepared to address that even in a brief if your Honor wants it. Having been intimately familiar with that case, having lived with it, that case was very, very different. That was the case where Judge Connor had at the trial level established a, I think it was a 2-1/2 percent fee, but the key in the case, your Honor, was he was applying his percentage the entire revenue base of a portal. Even the parts of the portal that didn't involve the streaming of content. Search, autos and he recognized that that was overbroad and he came up with a music use adjustment factor, the famous MUAF, and we challenged that and the Second Circuit said yeah, we have to kick this back. And the Second

Circuit set aside the fee determination. The language that was used as part of that setting aside -- first of all, it's plainly dicta, and second of all, the underlying factual situation was so different, so if your Honor would like us to put in a brief addressing the significance of the RealNetworks case and how it discusses, whether it be the language that Mr. Cohen was quoting or any aspect of it that your Honor wishes, we welcome that. I just think it's a fundamentally different case, had different revenue bases and it involved dicta that really was not addressing anything as specifically applicable to the Music Choice service distributed to a distributor like MobiTV as opposed to Pandora being sold retail. So I don't think the case hurts us in any way, shape or form, and I'd be happy to, if your Honor will accept a letter brief, put in a letter brief on the case.

THE COURT: I'd be happy to receive one.

MR. STEINTHAL: Okay. I think I'm almost done because everything I was going to do at the end I did at the beginning. What I was going to do at the end was say having knocked out hopefully ASCAP's benchmarks what do you do? Your Honor has to provide us with a reasonable fee if we're not similarly situated and you reject ASCAP's fee proposal, then it's up to you to find the right benchmarks to establish a rate here. I got way ahead of myself and I think I answered that already. The best benchmark for all the reasons I argued for similarly

situated is the RMLC. To the extent there should be any music adjustment that Mr. Cohen is arguing for, it should be the adjustment that ASCAP made in 2002 when it bumped up the old radio rate that was applied to internet radio at the beginning, it bumped it up from 1.615 to 1.85 precisely to take into account the greater music use that he perceived on internet radio. So the range seems to me is 1.7 to 1.85 we think 1.7 is the right one. If there's any play in that range the cap's got to be 1.85. I say that, the EMI agreement is supportive of this range of outcome. I mentioned before that I don't think it's hypocritical for us to rely on the EMI agreement while we reject the Sony and Universal agreements for the very simple fact that the indicia of the negotiation for the reasons I mentioned before does not reflect the exploitation by EMI of market power even if it had it.

No differently than as Mr. Cohen cited BMG and Warner Chapel that were going to withdraw and may have gone down the same path as Sony and Universal, but they did not. They did not exercise market power that arguably they may have been able to try to do. Sony and Universal did. Warner and BMG did not. And the history of negotiations for so long had a 1.85 rate and the fact that ASCAP has for so long offered and continue to offer non internet radio rates at 1.85 all suggest that the absolute top should be 1.85. I'll conclude with this part of it. I don't think we've seen a case, your Honor, where we have

a crossover. They're at 1.85 for their first two years. In fact, I think Dr. Murphy would say under his theory that the price of a willing buyer and a willing seller would have arrived at in 2011 is 1.85. They're proposing 1.85 for 2011 and 2012. There's no precedent whatsoever to take percentage of revenue rate and bump up the percentage. There's not one ASCAP deal that ASCAP can point to where a percentage of revenue rate escalated year to year. There's no reason for it.

If Pandora is successful, if its technology continues to bring in greater and greater amounts of revenue ASCAP benefits from that. There's no need to have a greater percentage. The notion that personalization creates a benefit for a higher percentage also doesn't hold up, your Honor. You addressed this in MobiTV as well. To the extent that the technology of a service creates a more compelling offering, well, if it's compelling and people will pay more for it, ASCAP gets the benefit of that. But the incremental investments made to generate that additional revenue shouldn't be the subject of an increase in rate because you're getting the bump up as well because you're riding up with Pandora.

So at the end of the day I think all of those factors argue in favor of an absolute cap on the range of reasonableness at 1.85 and the evidence that we'll give you I think will support that. And I apologize for my dry throat and everything else and thank you very much for your patience.

THE COURT: Excuse me one second, counsel. So, counsel, this is the situation. We do have two court reporters who volunteered to come in tomorrow if the courthouse has closed. So I would just ask you to confirm during this break that you will be here because I don't want them to come in if you're not going to be here. Good. We'll take a ten-minute recess.

(Recess)

THE COURT: So, counsel, I understand that you have a joint recommendation that we break for the day but proceed tomorrow morning. Am I right that I understand that is your joint recommendation?

COUNSEL: Yes, your Honor.

THE COURT: Good. Hopefully some very sick people can get a good night's rest. That would be very good. And that's just fine and I want to thank the court reporters who have agreed to stay today and those who will be with us tomorrow.

So let's talk a little bit about logistics. I'm assuming the courthouse will be closed tomorrow. We have commitments from two reporters to be with us in that event. I know we're all planning to be here and start tomorrow morning at 9:30. But just in case something dramatic happens, please call my chambers as soon as you know. You'll communicate with each other as well and we'll be monitoring our chambers voice mail from 7:00 onwards to try to capture any messages and act

on them. So if we need to intercept reporters we will be able to do so. I think that's it.

MR. COHEN: Your Honor, just because I know you're trying to stay ahead of us, the weather even before this delay has kind of changed our order a good deal so let me tell you what I think we're going to try to do tomorrow is start with Mr. Brodsky, who needs to leave to go to the Grammy's rather than Mr. DeFilippis, then move to Mr. DeFilippis. Mr. Horowitz was unable to get into town. He was going to testify after that. We have agreed that Mr. Horowitz will testify out of order on the 30th of January which is the next day that he can get back which is also the day that we've agreed that Mr. Rosenbloum has been subpoenaed. He's not out of order but we will keep you as up to date as we can but the witnesses are doing the best they can with travel plans.

THE COURT: So after Mr. DeFilippis we'll have Mr. LoFrumento.

MR. COHEN: Yes, your Honor. Then Mr. Saltzman and Mr. Kenmore. We'll proceed in that order. I don't know if we will get to Mr. LoFrumento tomorrow.

THE COURT: Fine. Let me tell you what I've done with respect to your evidentiary objections and thank you for getting me this markup with these revised objections. One, we need to file as part of our trial exhibits the copy of the witnesses' direct testimony that has these objections reflected

in it because they are part of the record of what objections were made. Some witnesses have very few objections, others have more, and what I'm thinking about doing is ignoring objections made to a topic heading. I'm going to assume the topic headings are not testimony but simply markers that counsel have inserted to help me work my way through the testimony. And I might, depending on what it is or whose testimony it is, give you just my indications of what objections are sustained and you can assume that the rest are overruled, and I'm thinking of doing the following: I've gone through all the objections with respect to the ASCAP witnesses, not that I won't do it again, but I have tentative rulings and I'm thinking of what I would do at the right point is give you the tentative rulings for a witness and then if anybody -- without oral argument, just rule, and then if anyone feels that they would like me to revisit one of those rulings I'd give you an opportunity and that might save us some time and so that's my recommendation. You'll have overnight to think about it.

Good. I don't think there's anything more to do today. Am I getting copies of your exhibits of the Pandora opening testimony slides?

MR. STEINTHAL: Yes.

THE COURT: Thank you. Good. See you all tomorrow at 9:30.

(Adjourned to January 22, 2014 at 9:30 a.m.)