

UNITED STATES OF AMERICA

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U.S. COPYRIGHT OFFICE

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MUSIC LICENSING PUBLIC ROUNDTABLE

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TUESDAY, JUNE 24, 2014

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

PRESENT

JACQUELINE CHARLESWORTH, General Counsel, U.S. Copyright Office
 KARYN TEMPLE CLAGGETT, Director of Policy and International Affairs, U.S. Copyright Office
 SY DAMLE, Special Advisor to the General Counsel, U.S. Copyright Office
 JOHN R. RILEY, Attorney-Advisor, U.S. Copyright Office
 ERIC ALBERT, Stingray Digital Group
 CHRISTOS P. BADAVAS, The Harry Fox Agency, Inc.
 JOHN BARKER, Interested Parties Advancing Copyright (IPAC)
 GREGG BARRON, BMG Rights Management
 RICHARD BENGLOFF, American Association of Independent Music (A2IM)
 JEFFREY BENNETT, SAG-AFTRA
 JUNE BESEK, Columbia Law School

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CATHY CARAPELLA, Global ImageWorks
RICK CARNES, Songwriters Guild of America
ALISA COLEMAN, ABKCO Music & Records, Inc.
JOE CONYERS III, Downtown Music Publishing
MATT DEFILIPPIS, ASCAP
WALEED DIAB, Google/YouTube
JAMES DUFFETT-SMITH, Spotify USA, Inc.
TODD DUPLER, The Recording Academy
PAUL FAKLER, National Association of
Broadcasters/Music Choice
ANDREA FINKELSTEIN, Sony Music Entertainment,
Inc.
CYNTHIA GREER, SiriusXM Radio Inc.
JODIE GRIFFIN, Public Knowledge
WILLARD HOYT, Television Music License
Committee, LLC DICK HUEY, Toolshed Inc.
FRITZ KASS, Intercollegiate Broadcasting
System, Inc.
BOB KOHN, Kohn On Music Licensing
LEE KNIFE, Digital Media Association (DiMA)
BILL LEE, SESAC
LYNN LUMMEL, ASCAP
JIM MAHONEY, American Association of
Independent Music (A2IM)
WILLIAM MALONE, Intercollegiate Broadcasting
System, Inc.
ALDO MARIN, Cutting Records, Inc.
STEVEN MARKS, Recording Industry Association
of America (RIAA)
TOMMY MERRILL, The Press House/#IRespectMusic
CHERYL POTTS, Crystal Clear Music & CleerKut
CASEY RAE, Future of Music Coalition
ANDREW RAFF, Shutterstock
COLIN RAFFEL, Prometheus Radio Project
PERRY RESNICK, RZO
GARY RINKERMAN, Drinker, Biddle & Reath LLP
JAY ROSENTHAL, National Music Publishers
Association
COLIN RUSHING, SoundExchange, Inc.
MICHAEL G. STEINBERG, Broadcast Music, Inc.
(BMI)
DOUG WOOD, National Council of Music Creator
Organizations

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

8:30 a.m.

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

That we have found these discussions to be very productive, very illuminating, and helpful to our thinking about these issues. And we look forward to another such discussion today. A few housekeeping matters, apart from the fact that we are off the record here. If you could limit

1 your remarks to two to three minutes? We were
2 running a little long yesterday, and I know it
3 is a long day. And so we want to try to stay
4 as close to the schedule as we can. For those
5 of you who are observing, and who may wish to
6 make comments for the record, we will have a
7 period, at the very end of the day, to do
8 that. There is a sign-up sheet.

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

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

18 MS. CHARLESWORTH: Okay. And for
19 those of you who may be interested, in
20 supplementing the record with either
21 additional written comments, or written
22 comments if you haven't previously submitted

1 them, we will be having a reply comment
2 period. It hasn't been announced, yet, in
3 terms of the dates. But we are looking at mid-
4 August as a due date, for those of you who may
5 want to, as I said, submit additional
6 comments. And, finally, I just want to thank
7 NYU Law School and Professor Barton Beebe. We
8 have another beautiful room today. Hopefully
9 we will be able to take advantage of this to
10 move our conversation forward, and in a
11 positive direction.

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

22 One of the key concerns is that

1 the courts ruled that music publishers could
2 not partially withdraw their rights. They
3 sought to withdraw their digital rights from
4 the PROs and license those uses directly. The
5 courts both held, in slightly different
6 opinions, or different opinions, but from a
7 practical standpoint essentially the same
8 thing. Which was that, that was not
9 permissible, under the consent decree system.
10 And those rulings, and the decision that came
11 out of the Pandora litigation have, I think,
12 it is fair to say caused some serious
13 thinking, in the music community, on all
14 sides. And what I would like to do is open the
15 floor to those of you who may wish to comment
16 on that. We are particularly interested in
17 hearing about what people see is the potential
18 impact of those rulings, and the possibility
19 that we are aware of -- which is that major
20 publishers, and perhaps others, might choose
21 to withdraw their catalogues, entirely, from
22 the PROs. And how that would affect our

1 licensing system, and the people who are
2 currently relying on the PROs. So with that
3 very broad question I will open up the
4 discussion. And before we do that, thank you
5 for reminding me, can we go around the room
6 and introduce ourselves? And please explain
7 your interest in this proceeding, and
8 affiliation. I will start with you, Mr. Hoyt.

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

14 MS. CHARLESWORTH: Thank you. Ms.
15 Griffin?

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

1 label.

2 MS. CHARLESWORTH: Mr. Lee?

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

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

10 MS. CHARLESWORTH: Mr. Donnelly?

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

19 MS. CHARLESWORTH: Okay, Mr. Diab?

20 MR. DIAB: Waleed Diab, Senior
21 Counsel for Music at Google/Youtube. And our
22 interest is we, obviously, take many licenses

1 from the PROs, for our various products and
2 services, and given the changes in the
3 landscape, we are interested in seeing where
4 this develops.

5 MS. CHARLESWORTH: Mr. Reimer?

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

12 MS. CHARLESWORTH: Mr. Gibbs?

13 MR. GIBBS: I'm Melvin Gibbs, I'm a
14 songwriter, musician, composer, and I'm here
15 today representing C3, the Content Creators
16 Coalition. I just want to say that using the
17 word content, in the name, is not a statement
18 of what we believe ourselves to be, or a
19 statement of policy. It is a statement about
20 the temporary historical position we find
21 ourselves in, as creators. We represent
22 musicians, photographers, anyone whose finding

1 themselves dealing with the issues we are
2 dealing with today.

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

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

15 MS. CHARLESWORTH: Okay. Mr.
16 Carnes?

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

1 seconds, and 3:15.

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

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

10 MS. CHARLESWORTH: Okay, Mr.
11 Rosenthal?

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

16 MS. CHARLESWORTH: Okay. Mr. Rosen?

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

21 MS. CHARLESWORTH: Just a small
22 interest, then. Mr. Duffett-Smith?

1 MR. DUFFETT-SMITH: Hi, I'm James
2 Duffett-Smith, I'm here representing Spotify.
3 We are a big music user, and I also have a
4 great interest in today's discussions.

5 MS. CHARLESWORTH: Mr. Rich?

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

14 MS. CHARLESWORTH: Thank you, Mr.
15 Barron?

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

21 MS. CHARLESWORTH: Mr. Rinkerman?

22 MR. RINKERMAN: Yes, I'm Gary

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

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

19 MS. CHARLESWORTH: Well, thank you.
20 It sounds like everyone here is a significant
21 interest in, I think, what is a very
22 significant topic. And we, as I mentioned, at

1 the Copyright Office are really interested in
2 learning what people think, or what people
3 foresee as happening in the event,
4 particularly in the event that music
5 publishers choose to withdraw from the PROs.
6 What does the future look like for the people
7 who are dependent on the PROs today, how that
8 might affect them. We are interested in a sort
9 of broad discussion of ultimately the impact
10 of the consent decrees on the PROs, and in
11 turn, the PROs role in our music licensing
12 system. So does anyone want to speak up? Mr.
13 Reimer and then Mr. Rinkerman.

14 MR. REIMER: I think we, as you've
15 said Ms. Charlesworth, we are at a key point
16 here, in where we are in licensing, these
17 areas. The Pandora decision, I think, as
18 everyone knows is on appeal. There has been
19 much discussion as to what our major publisher
20 members intend to do, depending on where the
21 appeal comes out. We are at a point, now,
22 where major publishers are telling us they are

1 going to withdraw their rights, whether they
2 will give us back some rights, if they can,
3 isn't clear.

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

19 A major concern, of our members,
20 both the large publishers, small publishers
21 and, particularly, the songwriter members, is
22 that they be able to get fair value for their

1 copyrights. And we have seen, in the Pandora
2 Decision, and in the earlier decisions, that
3 the rate court is really hamstrung by the
4 language of the consent decree. Certainly
5 Judge Stanton's approach vis a vis Judge
6 Cote's approach on the withdrawal issue, tells
7 everybody that the decrees have to be
8 modified. And two different judges can't come
9 to completely different results, at least
10 reach those results differently, by reading
11 the same language as the consent decrees. That
12 just doesn't make any sense. So we think,
13 given the context in which we are asking for
14 the review by the Department of Justice, it is
15 imperative that we have the kinds of changes
16 that we've asked for, and we are happy to
17 discuss those this morning.

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

22 MR. REIMER: Yes. Basically we have

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

17 So that is one ask, the
18 modification of the consent decree in respect
19 to the process. And, also, a substantive
20 change, as well. And the substantive change is
21 to give the Court the ability to consider all
22 licenses, all agreements negotiated in the

1 free market. Right now, and as we have seen
2 again, from the Pandora decision, Judge Cote
3 couldn't consider some of the existing
4 licenses out there. We would like that
5 changed. We would also like the right to be
6 able to license what we call multiple rights.
7 Right now the ASCAP consent decree precludes
8 ASCAP from licensing anyone, or from obtaining
9 from its members, any rights, other than the
10 rights of public performance. And, of course,
11 as everybody knows there are many rights
12 involved in licensing music.

13 Our third ask is, let me come back
14 to that in a minute. That members be able to
15 withdraw or limit their rights. We have seen,
16 from the effort before Judge Cote, and the
17 Pandora Decision, that the existing decree
18 does not provide, at least in her judgment,
19 for that right. We think it is essential that
20 members be able to grant us limited rights.
21 The alternative is as you have expressed, Ms.
22 Charlesworth, complete withdrawal and,

1 perhaps, an implosion of the entire collective
2 licensing system for performing rights. So
3 those are our three principal asks.

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

6 MR. RINKERMAN: Yes. In the
7 interest of full disclosure I should mention
8 that I have had some tangles with SESAC
9 recently, and I have a partner who works with
10 BMI on occasion. But I did want to say, based
11 on what we heard yesterday, and today, we can
12 all acknowledge that the content creators are
13 the engine of our industry. But an engine
14 won't get very far without wheels. And the
15 PROs, in my view, are the wheels that help
16 distribute the assets among us, both upstream
17 to the creators, and downstream to the
18 distributors in some sense. Now, as a
19 participant in the music businesses I like to
20 have a lot of choices of services that are
21 offered to me, because I believe that creates
22 a competitive market, and I get the benefit of

1 that. When I look at these consent decrees,
2 and how they have been applied, recently, it
3 puzzles me, in that we have entities that
4 can't offer multiple services, multiple
5 rights, or you can't withdraw a limited amount
6 of my rights from them. That doesn't seem, to
7 me, to emulate the free market that we all
8 aspire to.

9 As a side note, in terms of
10 regulation of these entities, we do have
11 antitrust laws that can remedy future or
12 current violations. And as our experience in
13 the patent anti-troll controversy shows that
14 the courts are very, very sensitive when we
15 have abuses in the intellectual property
16 arena. As I mentioned to a few friends,
17 yesterday, we have seen those laws, the anti-
18 troll laws, even bleed over into copyright.
19 Illinois now has a proposed anti-copyright
20 troll law, which will make it a deceptive, or
21 unfair business practice, to send out an
22 infringement letter without a reasonable

1 basis. So we do have plenty of regulation. And
2 I don't think having a series of regimens,
3 that deprives me of my choice of services, and
4 service providers, is very healthy for the
5 market. Now, I did want to say one thing about
6 the PROs, from yesterday's data comment. I
7 think, as we saw yesterday, I refer to these
8 entities as wheels. But sometimes they go
9 slow, and get stuck in the mud. And it looks,
10 to me, like in order to make sure that the
11 artists are paid promptly, and fairly, we need
12 a better system of calculating when the money
13 is due, when it comes in, and who it goes to.
14 And I think the Copyright Office should be
15 commended in taking the leadership role in
16 spotting that issue, and trying to help us get
17 this all organized, to some degree.

18 I would suggest we look to other
19 industries, and look at their models. I work
20 with the world's largest retailer, Wal-Mart,
21 and we have a computer system that tracks
22 millions of sales a day. And our vendors can

1 open up a portal and see, in almost real time,
2 whether their product has been sold in Iowa,
3 or New Jersey, or other parts. And I don't see
4 why those types of systems can't be adapted to
5 our world of entertainment. I'm not
6 denigrating the problem, I realize there are
7 millions of records, and old records, and they
8 are improperly coded. But I think that rather
9 than looking at that system, and figuring out
10 how to patch it, perhaps we should look to
11 other industries. And I think the Copyright
12 Office can play a great role in helping with
13 those studies, and pointing out examples for
14 us to look at and consider. And, again, I'm
15 not suggesting that the Copyright Office needs
16 to propound legislation or regulation. I think
17 that they can help us study the problem and
18 come together. In closing I will say a few
19 years ago I was sitting next to the fellow
20 from Time-Warner, who does all those great
21 collections of soul music from the '70s, and
22 stuff like that.

1 Stuff I love, and stuff that
2 annoys my wife. But I said to him, why don't
3 the record companies get together and do this
4 themselves? Why do they need you? And he said,
5 well, this is in their interest, but they are
6 competitors, and they don't like to talk to
7 each other very much. So what we need is an
8 honest broker like them. So I think the
9 Copyright Office can serve a great role in
10 facilitating our dialogue and showing us
11 alternative models to look at. That is it.

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

19 MR. RICH: Thank you. I think in
20 trying to sort out the panoply of issues, that
21 you have teed up, relating to the most
22 immediate rulings on publisher withdrawals, I

1 think it is important to separate out several
2 distinct concepts. Mr. Reimer suggested that
3 one offshoot of the Pandora case rulings was
4 the inability of Judge Cote, as the ASCAP rate
5 judge, to arrive at what he termed fair value
6 for ASCAP's members performance rights.
7 Certainly in our experience, and we have
8 tilted with Paul Weiss, and Hughes, Hubbard,
9 and Reed, and other leading law firms in this
10 arena, it seems to me that while it is a
11 terribly imperfect process by nature, which is
12 to figure out the value of something as
13 ethereal as a music performing right,
14 nonetheless the current structure,
15 particularly I would say, as supervised by a
16 judge as diligent and intelligent as Denise
17 Cote, has worked quite well. She keeps the
18 trains running on time.

19 She rarely will afford extensions,
20 even when mutually sought by the parties, when
21 she feels adequate time for preparation has
22 run. More importantly, these have been very

1 sophisticated proceedings. So the world's
2 leading forensic economists, some reasonably
3 good lawyers, some competent witnesses for all
4 sides, issue joinder has been at a very high
5 level. And I think whether one agrees or
6 disagrees with the substantive outcomes, one
7 need only read the jurisprudence, at the level
8 of comprehensiveness of someone like Judge
9 Cote, to appreciate that far from being
10 broken, I think the process of adjudicating
11 rates is working quite well. So I think we
12 risk confusing unhappiness with results, with
13 branding that as inherently unfair, or below
14 market value, or other sort of labels that I
15 think can mask something quite different. That
16 is a separate issue, in my estimation, from
17 the publisher withdrawal issue. And I find
18 that and the clients we've discussed it with,
19 find it an extremely complicated issue, how to
20 think about it. In principle, certainly,
21 everyone would support the idea that direct
22 licensing opportunities should be fostered and

1 encouraged. And, indeed, part of the
2 rationales of the ASCAP and BMI consent
3 decrees is to accomplish exactly that.

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

22 Because we have to deal with the

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

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

18 MR. RICH: There is no doubt about
19 it. And that is why I find it very
20 complicated. Wearing my radio music license
21 committee hat, there is no doubt that the
22 committee benefits from having one stop

1 shopping or, really, two stop or three stop
2 shopping, when you add SESAC into the mix.
3 There is no doubt about it, it has enormously
4 positive benefits, even though those come with
5 a price, which is why the rate court
6 supervision is so important and, really,
7 integral to the process. There is no doubt
8 that the prospect of dealing, in addition to
9 that, with a diminished scale of performance
10 rights organization, and then a series of very
11 powerful music publishers.

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

22 MS. CHARLESWORTH: Okay. Mr. Carnes

1 and then Mr. Rosen.

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

1 serious money, right?

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

17 And, right now, we are more or
18 less dying, okay? And so when the major
19 publishers decide, well we have to do
20 something to get a higher rate, and they
21 decide to direct license, I understand that
22 completely. They need some leverage, okay? And

1 the consent decree, being 70 or whatever years
2 old, it is just horse and buggy ruling, and we
3 are in a high tech internet age. Digital music
4 has changed a lot of things. And one of the
5 situations we are dealing with is the rates
6 are too low, for where we are trying to make
7 a living at. So when you talk about the
8 leverage of a major publisher, let's talk
9 about the leverage of a Pandora, you know?

10 How much of the market are they? I
11 mean, when they didn't like the rates that
12 they got, you know, that the artists got, they
13 threatened to go to Congress and, you know,
14 try to get the legislation to change it. Hey,
15 I don't see any publishers being able to do
16 that. I mean, that is a lot of leverage, okay?
17 So let's talk about everybody's market share,
18 and everybody's leverage. But my caveat about
19 direct licensing, I have many problems with
20 it. And first, and foremost, no partial
21 withdrawal. If you start cherry picking, from
22 the PROs, just the good stuff, just the stuff

1 that you can make money on, and then you leave
2 the stuff that is too expensive to collect, to
3 the PROs, you are going to put the PROs out of
4 business. And that is going to be a disaster
5 for songwriters.

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

22 One of the things that we like is

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

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

16 MR. ROSEN: Well, good morning and
17 thanks for having the opportunity to speak
18 today. I will start with what you asked, at
19 the beginning, which is what was the effect of
20 last year's decisions by Judge Cote and by
21 Judge Stanton. And I think what it did,
22 ultimately, was just turbo charge a process

1 that was happening, already. The notion of a
2 partial withdrawal obviously was in place
3 before either of the Judges had to deal with
4 it. And I think it reflects that, in a larger
5 sense, our world is absolutely changing, and
6 it is not our choice whether it is going to
7 change or not. Publishers are insistent that
8 they want to make, do their own deals.

9 And I think that publisher
10 withdrawal is an absolute inevitability, in
11 the sense that it is either going to happen
12 because the Decree will be modified to allow
13 it or I think publishers are going to
14 seriously think about walking away from the
15 PROs model, in order to take advantage of
16 direct deals that they would like to make. At
17 the same time, publishers are poising
18 themselves to be another player, out there,
19 making deals you are going to see new entrants
20 into the market. And we have heard some talk,
21 in previous panels, about that. So I think,
22 you know, the landscape I think has changed

1 inexorably. And in that new landscape, I'm
2 sort of surprised to have read the comments
3 that I read from most of the major user
4 groups. Not only what was there, but what
5 wasn't there. Let's just assume, for the
6 purposes of this discussion, that BMI is a
7 monopoly, and we extract supra-competitive
8 pricing. I don't think that is the case, but
9 certainly the major user groups do. You would
10 think with the possibility of going out there,
11 and being able to make deals with BMG, or
12 other music publishers, that the line would
13 form to the left.

14 And we found that that is not the
15 case. We found, in fact, that Pandora fought
16 tooth and nail, I mean, really willing to
17 bring us to the brink that we are at today,
18 rather than simply having to make the deal
19 with Universal or Sony. And I think that is
20 telling. We have heard, for decades, that they
21 want direct deals, as a competitive check on
22 supposedly monopoly power of the PROs. We have

1 heard, in these filings, about the burdens of
2 making a bunch of individual deals when, after
3 all, that is really what the major users have
4 been looking to do for decades. So I think
5 there is a gap between what the PROs are
6 perceived to be, or characterized to be, and
7 the insistence of the user groups, on
8 maintaining the status quo.

9 So I think that is notable. But
10 let -- just to answer, or to attempt to answer
11 the implicit question of where does BMI stand
12 on decree reform. We are very similar to where
13 ASCAP is. But let's be clear, we are not
14 looking to eradicate a rate setting mechanism.
15 We are not looking to eradicate mandatory
16 licensing. Here is what we are asking, let's
17 have the flexibility so that publishers who
18 want to use the PROs for what they want to,
19 and don't for what they don't want to, that
20 they have that freedom. Let's not force
21 publishers to have to choose between walking
22 away from all the advantages that a PRO

1 offers, in order to pursue direct deals, which
2 you would think that it is something that they
3 are entitled to do. Let's have the flexibility
4 to bundle rights. And it is important to
5 stress, here, we are not requiring publishers
6 to give us multiple rights, we are not
7 requiring users to take multiple rights.

8 So this will work, or it won't
9 work. Let's see how it plays in the
10 marketplace. But I think the way we are
11 structuring it, it does not raise antitrust
12 concerns. And, finally, let's keep the rate
13 setting mechanism, but move it to something
14 like an arbitration, which will be quicker,
15 and which will be cheaper. These are
16 incredibly expensive proceedings for all
17 parties, not just the PROs. And even from the
18 -- and to go to the point of direct deals and
19 whether they ought to be benchmarks in a
20 proceeding. I can't speak for Judge Cote, but
21 I can say that I have heard Judge Stanton
22 voice his frustration that, really, the only

1 benchmarks he gets to look at are his own. So
2 there is an echo chamber quality that, I
3 think, partial withdrawal will help remedy. So
4 as to whether the decrees have to exist or
5 not, or ought to exist, I mean I think let's
6 see how this plays out. If the marketplace
7 goes the way I suspect it might, and you have
8 many additional players, and you have
9 publishers out there making significant deals,
10 and significant markets, then you have to just
11 ask yourself whether the whole predicate for
12 the decree, the notion that BMI or ASCAP have
13 purported market power, what happens when that
14 market power goes away?

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

21 MS. CHARLESWORTH: Well, now I'm
22 going to take up some of your time. A couple

1 of things. When you say both you and ASCAP
2 mentioned, you know, the ability to license
3 additional rights, can you be a little more
4 specific about which rights you are talking
5 about, in addition to performance?

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

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

20 MR. REIMER: I just wanted to add
21 that as recently as a week, or so, ago we got
22 a phone call, or an email from someone who

1 raised the issue of, in addition to the
2 performing right can I get, from you, the
3 rights I need to record the performance? And
4 we would like to be able to do that. And we
5 are not, necessarily, talking about the major
6 music users out there, we are talking about
7 even the smallest users, somebody who is
8 running a nightclub, or a concert venue, and
9 would like to have all of these rights, and
10 not have to contact everybody and his uncle to
11 get seven or eight different rights.

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

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

18 MS. CHARLESWORTH: Okay. And then
19 the other question, I think, for both of you
20 is, if the majors were to withdraw entirely,
21 or a significant piece of their rights, that
22 would impact your collections, how would that

1 impact your cost of providing services to the
2 people who remained in the organization? I
3 mean, what is your thought on that?

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

11 MS. CHARLESWORTH: Is that --

12 MR. ROSEN: I mean, obviously, that
13 is the same for BMI. But I guess where I land
14 on this is, at the end of the day, we find
15 ourselves, then, in the same position as, I
16 don't know, every company in America, every
17 company in the world. We have to continue to
18 provide good service, innovate. You have to
19 provide things at a good price. I mean, I'm
20 betting on BMI's ability to retain a lot of
21 its business. So the notion that someone is
22 free to walk away, well at BMI they are free

1 to walk away every three years. I think one
2 year at ASCAP. It is a pressure we are under.
3 We want to make our customers happy the same
4 as any other business.

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

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

20 Sure, I think providing
21 administrative services is a part of what we
22 ought to offer. As to what the cost is, I can

1 tell you that we make every effort that the
2 folks who stay with BMI don't pay the penalty
3 for people who are leaving BMI. That the rate
4 would be the same, and we would endeavor to
5 make it as low as we can. And if I can just
6 speak a little bit more about administration?
7 I have heard in previous panels, I was at LA,
8 I was in Nashville as well. This suggestion
9 that there is something either sinister, or
10 conspiratorial with the notion that publishers
11 may go out and set their rates, and yet look
12 to BMI to do administration, first of all, if
13 there is any sin, of the PROs, and I'm not
14 saying there is, but if there is, it is the
15 concern about collective licensing. So when a
16 publisher goes off and makes its own deal, it
17 is not doing an end run around the decree, it
18 is really eliminating the need for the decree
19 in that transaction. And when they come back
20 to me, to BMI, and want to do administrative
21 work, what we are doing is no different than
22 a payroll company that process the payroll for

1 any number of businesses. It doesn't have a
2 say in that business, it is the pipes.

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

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

20 MR. REIMER: No, I think Mr. Rosen
21 has said it very well. And it is a competitive
22 world. And in a competitive world you do your

1 best to get the best price for your members
2 and, at the same time, provide the best
3 service to those who have asked you to do the
4 administrative work.

5 MS. CHARLESWORTH: Okay.

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

18 MS. CHARLESWORTH: Okay, thank you.

19 Mr. Fakler?

20 MR. FAKLER: Thank you. The problem
21 is that blanket licenses of music performance
22 rights are inherently anti-competitive. There

1 is no fair market for these blanket licenses
2 because there is no competition. There may be
3 competition between the PROs for attracting
4 members. But from a licensee's perspective, an
5 ASCAP license is not a substitute for a BMI
6 license. Music Choice cannot negotiate with
7 ASCAP and BMI, on the grounds of saying, well,
8 if you don't give us a fair rate, we are just
9 going to go with your competitor BMI.

10 Everybody knows it doesn't work
11 that way. And that inherent anti-competitive
12 problem with the blanket licenses has been
13 recognized for a long time. The Copyright
14 Office has recognized it in the past. And it
15 is the reason, one of the reasons for the
16 consent decrees. Nothing about, we hear a lot
17 of talk about new technology, old consent
18 decrees. Nobody said what new technology has
19 changed that part of the problem. Nothing
20 about any new technology has changed the fact
21 that the PRO licenses are not in competition
22 with each other, they don't substitute for one

1 another. So when you talk about a sunset,
2 there is no need for that, you know, these
3 antitrust concerns don't stop, they don't have
4 a shelf life, unless somehow competition comes
5 into the market.

6 But that can't happen in the
7 context of blanket licenses. Of course there
8 are tremendous benefits from the blanket
9 licenses. Those benefits don't flow only to
10 the licensees, okay? They flow, also, to the
11 copyright owners. That is part of the reason
12 that the DOJ, back in the day, said you know
13 what? Even though they are anti-competitive,
14 we are going to find a way to make them work,
15 because there are all of these positives,
16 along with the negatives. As far as the age of
17 the consent decrees, they have been amended
18 dozens of times. There are ways to adjust
19 them, if there is a good cause to adjust them.
20 But throwing them out, and trying to paint
21 them as just anachronistic, and no longer
22 applying, I just don't think is particularly

1 accurate. Music Choice would also disagree
2 with the premise that the rates that have been
3 set in rate court are not fair market value.
4 The legal standard, in both of the rate
5 courts, is fair market value. That is the
6 legal standard. And it is a willing
7 buyer/willing seller, in a competitive market,
8 a hypothetical competitive market. And that is
9 the part of the standard that is essential to
10 deal with the inherent antitrust and anti-
11 competitive problems created by allowing these
12 blanket licenses. Now, the fact of the matter
13 is you have two separate, sophisticated,
14 neutral federal judges who are experienced
15 both in copyright law, and antitrust law. Who
16 are experienced with very complex commercial
17 cases. Both sides have been represented by
18 excellent counsel, I will go a little further
19 than Mr. Rich, perhaps in his modesty. But on
20 both sides, certainly, by excellent counsel.
21 You have had two District Court judges, you
22 have had multiple panels of the Second Court

1 of Appeals, due process and federal
2 litigation.

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

1 to that. I don't want to take up too much
2 time, right now.

3 But the question of what happens
4 if the major publishers are allowed to
5 withdraw is a very important question, okay?
6 Now, naturally Music Choice doesn't think,
7 thinks both courts got it right. They
8 certainly shouldn't be allowed to partially
9 withdraw, to cherry pick and discriminate
10 against certain types of services. It is not
11 like there are different rights that they are
12 pulling out. It is all the public performance
13 right, it is just they want to be able to keep
14 their benefits of collective licensing when,
15 in their view, the pros outweigh the cons.
16 For example, bars and restaurants, they could
17 never withdraw their rights and go around and
18 license every bar and restaurant. But if they
19 did withdraw their rights, whether it was
20 partially, if somehow they were allowed, if
21 the law changed, or if they withdrew entirely.
22 If you want to know what would happen all you

1 have to do is read the Pandora decision.

2 Because within moments of getting
3 -- before the ink was even dry, on the changes
4 to the ASCAP and BMI rules, that allowed,
5 purported to allow the partial withdrawals,
6 all you have to do is read the Pandora
7 decision. They went out, there was evidence
8 from the record, of collusion, strong arm
9 tactics to inflate the rates, sharing
10 confidential information about negotiations.
11 And, afterwards, bragging about, and including
12 to the trade press, about how the major
13 publishers used their size, as leverage, to
14 raise the rates substantially. So the point
15 is, major publishers when they are issuing
16 blanket licenses, are really the same as PROs.
17 They are no different. And they would
18 ultimately have to be subject to some sort of
19 consent decree, or some sort of rate court
20 supervision.

21 Because if they are completely
22 unregulated we already have seen, exactly,

1 what will happen. They have absolute market
2 power. It is the same. And, in fact, some of
3 the majors, you look at Kobalt, it doesn't
4 even own its own copyrights. So they are still
5 aggregating large numbers of copyrights to the
6 degree where a licensee really has no ability
7 to forego the license. There is still no
8 competition. UMG's blanket license for its
9 songs is not a substitute for Warner
10 Chappell's license of its songs. So we are
11 really all back in the same problems. And
12 there is going to have to be, the answer can't
13 be that they are just allowed to exercise that
14 market power.

15 MS. CHARLESWORTH: You know, I
16 think that is an interesting, that raises a
17 very interesting question which, you know, as
18 we go around the room I'd like to hear
19 comments on. It is whether sort of implicit in
20 what you are saying, is that there seems to be
21 some right to, to have a license for,
22 basically, all music. I think it is the

1 premise that you -- or that it is a necessity
2 in operating a service. And I think that, that
3 is an interesting question, it is sort of a
4 philosophical question. So I would encourage
5 people to share their thoughts on that. I hear
6 your thoughts on it, Mr. Fakler. So if you
7 have something further to say?

8 MR. FAKLER: I promise very
9 briefly.

10 MS. CHARLESWORTH: No, that is
11 okay.

12 MR. FAKLER: I would not couch it
13 as the services, the licensees claiming they
14 have a right to a license, okay? But what I'm
15 saying is that everybody wants these licenses
16 to happen. There have to be these licenses if
17 the copyright owners are going to make money
18 in this field, right? Otherwise we would go
19 back to the pre-PRO days, when everybody was
20 -- you talk about stealing music, every bar
21 and restaurant in the country was playing
22 music, and nobody was getting paid, right?

1 That is a good reason why the PROs came into
2 existence, and they serve a great purpose. All
3 I'm saying is that when you do allow that sort
4 of blanket license, which is in everybody's
5 interest, there are antitrust laws, there has
6 to be -- you know, there has to be a
7 protection. So that licensees get a fair
8 market value in the sense of what would take
9 place in a competitive marketplace.

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

12 MR. HOYT: Just a couple of
13 comments about arbitration, and the speed of
14 the courts. It has been our experience that
15 arbitration is not, necessarily, less
16 expensive than the rate court. And so I'm not
17 certain I might buy the argument. And in
18 addition I think the speed with which the rate
19 court process happens, depends on the
20 attorneys on each side, and the clients on
21 each side, on how much they want to push the
22 evidence. And one of the concerns, I think we

1 would have about an arbitration, versus a rate
2 court would be the discovery rules, and what
3 is allowed, and what is not. So it would
4 depend a great deal on what those rules were,
5 from our perspective. Getting into what I
6 consider the major issue, you asked what would
7 happen if the publishers were allowed to
8 withdraw their rights.

9 We would have a great deal of
10 concern about the fact that these publishers,
11 given the third party content, the third party
12 producers, who have had the music, we would
13 have a concern that we would be in the same
14 position as we are with SESAC, with BMI, and
15 with ASCAP today. So they would, as Mr. Fakler
16 points out, become a PRO. And I think what you
17 will end up with is, if they start down that
18 road, we will end up with more antitrust
19 action than we have today. Which is
20 unfortunate. So one of the reasons that we
21 think the rate court works the way it does
22 today is because it does allow a, if you will,

1 a third party to kind of oversee what is
2 happening. And I would also say that it is the
3 aggregation of the copyrights that cause us
4 problems. If you couldn't aggregate those
5 copyrights, and each one of the PROs today
6 aggregates those copyrights separately. So
7 they don't sell them individually. There is no
8 way that you can buy, you can't, you have to
9 buy the blanket license, the traditional
10 blanket license from ASCAP.

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

1 down the direct licensing path.

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

16 One of the things that I did
17 notice in, I think, it was ASCAP's filing,
18 they suggested that the evidence from the
19 publishers, who withdraw their rights, should
20 become part of the market rate. But if that
21 market rate, that they establish, is a
22 monopolistic price, then it doesn't do us any

1 good. And I know ASCAP, BMI especially, and
2 SESAC for that matter, have fought using the
3 competitive direct licensing that we do at the
4 local program level, have fought that as not
5 being meaningful in terms of establishing a
6 fair market value price. We would disagree
7 with that. So what they want to do is bring
8 the publishers price in, this potentially
9 large publishers price in. But they don't want
10 the local program direct licenses to be
11 included in the competitive pricing
12 evaluation. So I have a problem with that.

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

16 MR. HOYT: Well, I think what you
17 should have to do, is figure out how you get
18 to a competitive price. So in answer to your
19 question, maybe. If that publisher's price is
20 not based on a power, a power that they have,
21 I won't say monopolistic, but a huge leverage
22 they have. Let's get back to one of the

1 problems we have, is this third party producer
2 decides what music goes into the program. If
3 we said that the program producer is the one
4 responsible for clearing the performance
5 right, and perhaps clearing, since he already
6 clears the synchronization right, then you get
7 into a more competitive world. When I have
8 talked with composers, or people who represent
9 composers, they say we don't want to do that
10 because, gee, those composers will just sell
11 themselves out. Well, that is the competitive
12 world. But, right now, we have to take the
13 program with the music imbedded in it. We
14 can't change it. And so that gives, that is,
15 in our view, that is a non-competitive world,
16 if you will. So if you can show that those
17 publisher's prices are competitive, then yes,
18 then yes I would say that is correct. I don't
19 think those publishers prices will be
20 competitive, truly competitive.

21 MS. CHARLESWORTH: Okay, thank you
22 Mr. Hoyt. Ms. Griffin?

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

20 And also, I think Judge Cote
21 mentioned that the songwriters, and at least
22 some of the independent publishers voiced

1 concerns about partial withdrawal of rights.
2 That they were concerned that, that would lead
3 to less transparency, potential payment
4 dispute with publishers, and it would
5 contribute to problems of overall
6 consolidation in the industry. So, from my
7 perspective, I feel like these issues of
8 market power hurt both the musicians and the
9 consumers that are, ultimately, using the
10 services. And kind of on that note, it brings
11 me back to when BMI was being sold, and the
12 FTC ultimately decided not to try to block the
13 acquisitions, either on the sound recording,
14 or the publishing side. And one argument we
15 saw there, a lot, on the publishing side was,
16 well, this is entirely different because we
17 have this PRO licensing structure. And when we
18 see that argument, perhaps, go -- when we see
19 that argument, perhaps, support the decision
20 to let the acquisition go through, and then
21 later we see efforts to take those licensing
22 structures away, it feels a lot like a shell

1 game. In that the individuals, on either side
2 of the licensing market, are going to get left
3 out. In terms of the specific modifications,
4 that ASCAP and BMI are asking for, we are
5 still researching a lot of them. But I do have
6 some concerns, like, if we go to arbitration
7 what does that mean for transparency, what
8 does that mean for, again, either the
9 consumers, or the songwriters, or both, and
10 their ability to understand what is going on,
11 and where their interest lie in the
12 proceedings.

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

15 MR. GIBBS: First I want to thank
16 the Copyright Office and you, Ms.
17 Charlesworth, for the opportunity to speak. I
18 think there has been a lot of talk about
19 process, about how the actual consent decree
20 process has been set up and how it is working.
21 On that side, from my side as an individual
22 creator, it is really very basic.

1 The rates are too low, they are
2 artificially too low. It is making it
3 impossible for us to get a reasonable return,
4 especially in this electronic transmission
5 environment. Assuming the consent decree is
6 not rescinded, then we should go to a willing
7 buyer/willing seller standard. The C3 supports
8 the rate setting approach taken in the
9 Songwriter Equity Act, which requires the
10 copyright royalty judges to use a willing
11 buyer/willing seller standard. We also support
12 a limited rights grant for a PRO member that
13 would authorize publishing companies to
14 withdraw their digital rights, allow for
15 negotiating of licensing fees for streaming
16 services, and replace the federal rate court
17 with binding arbitration. That expressly
18 influence fair market valuation for rate
19 setting. Also, as far as new entrance, the
20 members of C3 have been impressed by the model
21 adopted by SoundExchange. We believe that it
22 can profitably be replicated in other areas,

1 as digitalization spreads. And beyond that
2 just, really, basically I think we have to --
3 I'm hearing a lot about competition, about
4 these very large organizations. I think we
5 have to remember that the songs have to be
6 created for any of this other stuff to happen.
7 And if the songwriters cannot get a return
8 that allows them to create, the rest of this
9 process is just going to fall apart.

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

13 MR. DUFFETT-SMITH: Okay, thanks.
14 So Spotify opposes partial withdrawal and
15 thinks the consent decrees are generally
16 working. Licensing a digital music service is
17 a very tricky business. And I think everybody
18 here would agree that successfully legal
19 digital music services are a good thing.
20 Digital music services are the future of our
21 industry. And anything that makes it more
22 difficult for music services to be licensed

1 should be resisted. As I said, digital music
2 licensing is already a very complex process,
3 and partial withdrawal, as Mr. Rich said,
4 raises extremely complex issues. And that is
5 something that we think should be resisted.
6 Mr. Rosen talked about major users wanting
7 direct licenses, and we are becoming a major
8 user, and I don't think we want that, at the
9 moment.

10 Mr. Reimer talked about multiple
11 rights licensing. And I think he said that it
12 would be great if people could come to ASCAP
13 and get mechanical and performing rights,
14 because that reduces the complexity. Well, of
15 course, if you have partial withdrawals then
16 that increases the complexity. So it seems a
17 little inconsistent. Just as a general
18 perception, as well, the idea that the rates
19 are too low, as I said yesterday, for a
20 service like Spotify, which is a pure music
21 service, we don't have any other services that
22 we can cross-subsidize against. We pay out 70

1 percent of what comes in through the door, in
2 royalties. And so if we are looking at raising
3 any of the rates, that needs to be seen in the
4 context of overall what rates we are paying,
5 on both sound recording and on the publishing
6 side, and can't be seen in isolation.

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

19 MR. DUFFETT-SMITH: I mean, they
20 are both -- we wouldn't like either of those
21 scenarios, really. I mean, collective
22 licensing as I say, reduces complexity for

1 licenses, identification of works is a very,
2 very difficult business. And the PROs, and
3 societies overseas, are best placed in order
4 to be able to do that. And that is their
5 business, and they are good at it. Partial
6 withdrawal, full withdrawal, I think they are
7 both bad results for music users.

8 MS. CHARLESWORTH: Okay. Mr.
9 Rosenthal?

10 MR. ROSENTHAL: A couple of quick
11 points. First of all, it has been talked about
12 a little bit, and that is Songwriter Equity
13 Act. There is a portion of that Act that deals
14 directly with the issue of evidence being
15 presented to the Court. To me that is the
16 least controversial issue out there. And I
17 think that, you know, Congress should be
18 dealing with this, and passing it, and I hope
19 that the Office supports that. The idea that,
20 you know, one would allow for a court not to
21 hear certain evidence is, just, everyone's
22 sense of what justice is all about. In

1 particular in dealing with trying to create
2 fair market rates. So I think that, you know,
3 we should keep in mind that, that already is
4 in front of Congress.

5 And that we should, at least, get
6 behind that. The second issue is, and this
7 kind of follows on Stewart's question and
8 Richard's points about what is going to happen
9 with the business. What, you know, if some
10 publishers withdraw rights, what about the
11 cost to everybody? Well, we are going to have
12 to innovate, and promote innovation. And there
13 are examples, out there, in the marketplace
14 for example, what the Harry Fox Agency does
15 with their slingshot business. This is a
16 situation where, in pretty rough times, they
17 have decided, we can offer more administrative
18 services, and they have, and they have done
19 very well at it. And I don't think there is
20 anything stopping, or should stop HFA from
21 actually dealing with public performance as
22 well. We should be dealing with the free

1 market, as much as possible, right across the
2 board. You asked the question about music and,
3 you know, should everyone have a right to it?

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

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

1 Mr. Fakler.

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

20 Because what is happening right
21 now is, we are not getting career songwriters
22 any more. We are getting songwriters that can

1 live in their parent's basement, okay? Until
2 they have to buy a house, until they have to
3 get health insurance, until they have to have
4 a car, until they decide to get married, or
5 have kids, or, you know, you name it. But the
6 kind of things that everyone else, in any
7 profession, expects to have, or they go to
8 another profession. That is what is happening,
9 right now, with songwriters, okay? And it
10 depends on whether the public thinks that they
11 just want songwriters to be people under 25.

12 Because that is what is happening.
13 And I will say one more thing, and then I --
14 when it comes to the direct licensing
15 situation, I have already stated the problems
16 with lack of transparency, and the payments.
17 And, right now, I'm getting two statements,
18 one from my PRO, and then one from my
19 publisher. I can look at them both and kind of
20 figure out where the money went, okay? If all
21 of a sudden half of that PRO statement
22 disappears, and isn't coming out on the other

1 side of my publishing, which is what is
2 happening, I'm losing a great benefit of
3 collective licensing, which is that
4 transparency. So I would suggest that the
5 Copyright Office, perhaps, you could issue
6 some statement on best practices, for music
7 publishers that direct license, and how they
8 need to report to songwriters, what happened
9 to the money, that would be very helpful to
10 us.

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

14 MR. CARNES: Yes.

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

22 MR. CARNES: Well, it used to be

1 that music publishers would give us an
2 advance, a draw, a monthly salary, basically,
3 based on our mechanical earnings, what we
4 would earn in the future from record sales,
5 okay? And they were albums. So if you didn't
6 get a single that year, but you got a couple
7 of album cuts, your publisher could keep
8 paying you, you could keep going until you got
9 a single. The singles were where we got
10 airplay money. I mean, airplay money has
11 always been more significant than the
12 mechanicals, okay? And so you wait until you
13 get a couple of singles, then that would tide
14 you over for a few more years, and your
15 publisher would make the money off the
16 mechanicals. They are not making the money off
17 the mechanicals any more, so they are not
18 signing songwriters, okay? So that is what is
19 happening. And that is why the songwriter
20 numbers have been so drastically depleted. And
21 that is why, as I'm saying you are going to
22 get songwriters 25 years old, or younger. And

1 that is a cultural choice that we are making
2 without knowing we are making that choice.

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

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

21 I mean, I think you put your
22 finger on something, but I don't think it

1 means what you may have thought it did. It is,
2 we are talking here not about an antitrust
3 monopoly, a monopoly that needs to be
4 disciplined. We are talking, here, about the
5 monopoly that has been recognized, by statute,
6 under copyright. And with that comes the power
7 of any publisher to say no. It is a simple
8 power. Now, I understand if I were Music
9 Choice, if I were Sirius, I would want all the
10 great music that is out there, I get that.
11 There is a difference between must have and
12 really, really want. And at the same time, as
13 you folks really, really want it, these
14 publishers really, really want to license it
15 to you. That is what they are in business to
16 do. That is the free market. But it is a free
17 market where there is the power of no, which
18 really does make it more of a free market than
19 the PROs are in any position to offer.

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

22 MR. RICH: Two brief comments on

1 This. On the aspect of the Songwriter Equity
2 Act, which would reverse the current
3 evidentiary bar on importing information from
4 CRB proceedings, into rate court proceedings,
5 I think we all need to recognize that the
6 music industry made the bed it now lays in,
7 and tries to extricate itself from. I was in
8 the hearing room, on more than one occasion,
9 in the CRB hearing, in the Madison building,
10 when the very same music publishers, and their
11 affiliated sound recording executives,
12 testified at length as to the disparate value,
13 assertedly, between the sound recording
14 performing rights, and the musical works
15 performing rights. Let me be clear.

16 The very same music publishers who
17 now say this is a travesty, and should be
18 reversed, and there is an inequity, stood up
19 under oath, testified beside their recording
20 side colleagues, as to why it was economically
21 logical and, indeed, necessary to create a
22 disparity in favor of sound recording rights.

1 Based on that sworn testimony more than one
2 CRB panel of judges ruled, creating that
3 disparity -- and, in fact, found that
4 testimony so persuasive, that it found that
5 the musical works benchmark was virtually
6 irrelevant to the comparison. So it is more
7 than a tinge ironic, that having proffered
8 that very testimony, in order to benefit the
9 music recording side of the house, those very
10 same corporate entities are now saying let's
11 leverage that, because we got what we wanted
12 there.

13 Now the game is, how do we
14 leverage that up? I would make a slightly
15 different suggestion, in light of that
16 history. I would invite that music publishing
17 industry, the NMPA or others, to join users in
18 the next Web IV proceedings, to testify that,
19 to retract that prior testimony, and to
20 support the argument that, as a result of
21 that, sound recording performing rights were
22 artificially inflated in value, and bring

1 parity. But not bring parity by artificially
2 bootstrapping up the current reasonable,
3 established by Federal Court, musical works
4 performing rights. But rather to assist
5 bringing down, closer to parity, to the
6 musical works right, the sound recording
7 right.

8 My second, and last, comment is
9 that in response to the suggestion that there
10 is a dramatic difference, automatically, in
11 how the antitrust laws would view the
12 potential anti-competitive consequences of a
13 performing rights organization, versus a major
14 music publishing company, this is not a place
15 for an antitrust seminar, I realize. This is
16 under the auspices of the Copyright Act. But
17 there is something called Section 2 of the
18 Sherman Act, which deals with attempts, and
19 actual acts of monopolization. And there is,
20 at least, a significant question that arises,
21 under the antitrust laws, whether a music
22 publishing company that accretes as much power

1 as several of the majors do, might tilt up
2 against Section 2 of the Sherman Act.

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

7 MR. RICH: Yes, I mean, look -- I
8 know it has been looked at, in recent mergers
9 and all, and there is language that everybody
10 likes to pull out on both sides of what the
11 regulators have found. I think, again, it is
12 a whole, it is a very complex industry. The
13 fact that you have industry concentration, per
14 se, doesn't make the activity unlawful. But
15 you have, at a minimum, oligopolistic markets.
16 And I think the last chapters probably have
17 not been written on this, especially if we do
18 move to a world which the performing rights
19 organizations appear to be signaling is
20 inevitable. Where there will be either some
21 partial or full withdrawals on the music
22 publisher side of the marketplace, it is

1 conceivable that, you know, the antitrust
2 laws, which have so far been tested, mainly,
3 against the performing right organization
4 conduct, and, as currently as Willard pointed
5 out, the subject of two pending antitrust
6 litigations, adverse to SESAC, it is
7 conceivable that those issues would be tested.

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

16 MS. CHARLESWORTH: Okay, thank you.
17 So we are running out of time. I think, for
18 those who have your cards up, I want to go
19 around. And if you could limit your remarks to
20 -- well, Mr. Diab you haven't spoken yet, at
21 all. So we are going to give you a full two to
22 three minutes. And then everyone else will get

1 a minute, and then we will close out this
2 panel.

3 MR. DIAB: I don't think I need
4 that long. I just want to make one general
5 comment. I'm sort of taking a comment that Mr.
6 Rich made, and something that Mr. Lee Knife
7 said yesterday. The reality is -- and then,
8 just from our perspective we do -- Google sees
9 the value in consent decrees. And these, you
10 know, the reality is that we are in an
11 industry that has developed under that basis,
12 and those consent decrees ensures efficiencies
13 in the market. And I think if they are
14 modified, if there are withdrawals there needs
15 to be a new system in place to ensure the same
16 efficiencies. And then the point that, I don't
17 think, anybody has touched on this morning,
18 but we spent quite a bit of time talking about
19 it yesterday, and I think it is going to be
20 really, really important, whether there are
21 partial or full withdrawals, is importance of
22 data, right? I mean, that was something that

1 was at issue in the Pandora/ASCAP litigation.
2 And it is something that is going to be
3 absolutely imperative, for any of the
4 services, to actuate licenses.

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

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

15 MS. CHARLESWORTH: And is that
16 something -- I mean, when you are -- this is
17 a question. When you arrange to buy the show,
18 I mean, could you require that? I mean, could
19 --

20 MR. HOYT: Not in today's world,
21 and not historically. Economically, it is not
22 going to work. The producer has no incentive

1 to clear that performance right.

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

5 MR. HOYT: In a hypothetical world?

6 MS. CHARLESWORTH: In a
7 hypothetical world.

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

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

13 MR. DIAB: That was it.

14 MS. CHARLESWORTH: Okay. Mr.
15 Fakler?

16 MR. FAKLER: Thanks, just to
17 briefly respond to Mr. Rosen's point that the
18 market power of the major publishers is just
19 the direct result of the grant recognized by
20 the Copyright Law. That is not what causes the
21 market power. The Copyright Law gives authors
22 a copyright. What I'm talking about are large

1 corporations that aggregate these rights, to
2 provide the blanket licenses, that by
3 purchasing them from the author.

4 So it is a somewhat different
5 thing. And with respect to my friend Mr.
6 Rosenthal's callous disregard for Music
7 Choice's financial picture, I would just --
8 But the point is, that is part of the problem,
9 right? It is not just Music Choice. We are 25
10 years into digital music services, none of
11 them have been profitable on a long term
12 basis. So it is not just one service, it is
13 all of them, okay? And with respect to the
14 Songwriter Equity Act, I would just second
15 what Mr. Rich said. I was in those rooms, too,
16 and all that testimony comes in, and it is --
17 it is something else to hear the opposite
18 argument being made. And he already addressed
19 the unfairness of that. But there are a couple
20 of other quick points on that particular bill.
21 According to -- the way the bill is currently
22 drafted, the sound recording license rates

1 could now be brought into the rate court. But
2 only to increase the rates, not to decrease
3 them. And, at the same time, the music
4 publishing rates can't be brought into the
5 Copyright Royalty Board to lower the sound
6 recording rates. There is nothing equitable
7 about that bill.

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

13 MR. FAKLER: Part of the problem is
14 if you -- if there was a way, and I'm not so
15 sure there is, to do, do the Men in Black
16 spray on the Copyright Royalty Board judges,
17 and say none of that precedent where you --
18 Bear in mind, in the first CARP, the music
19 publishing rate was used to set the rate for
20 the pre-existing subscription services. So
21 there is, actually, precedent for that. And
22 that -- the Librarian of Congress actually

1 used that as a benchmark. That all went out
2 the window. The subsequent webcasting CARP
3 just didn't follow precedent, and since then
4 we have been in this, the Copyright Royalty
5 judges. If there is a way to undo all of that
6 and say, both of them could, you know, look at
7 these as benchmarks, that might be a
8 reasonable thing. But I don't know how you
9 actually accomplish that.

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

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

19 MR. CARNES: I just want to reply,
20 really quickly, to the concept that we are
21 talking about copyright owners, instead of
22 authors. Let us get it on the record that the

1 only actual owners of the copyright are the
2 authors. And the publishers are just leasing
3 them. They get them for 35 years, still my
4 rights, okay?

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

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

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

17 MR. ROSEN: Down to the wire,
18 right? Just a couple of quick points. My
19 understanding is that the CRB is not precluded
20 from looking at performing rights, first of
21 all. And, second of all, there is -- it is
22 interesting the kind of opposition that we are

1 hearing here, that rates are necessarily going
2 to go up. There is nothing, in this bill, that
3 requires that rates go up a penny. There is a
4 requirement in this bill that an evidentiary
5 obstacle go away. All rate court judges can
6 give a lot of weight or no weight to the sound
7 recordings.

8 MS. CHARLESWORTH: Thank you. Mr.
9 Barron?

10 MR. BARRON: Thank you. I'd like to
11 echo some of Mr. Carnes' concerns, and it
12 possibly address some others. We share the
13 same belief that mechanical income is
14 increasingly diminishing, as streaming
15 services increase in popularity, and people
16 are going to listen to, for free, what they
17 can listen to for free, rather than buying it.
18 There is a huge disparity in income between
19 performance and these services, and the
20 mechanical income that writers have,
21 traditionally, enjoyed. To quell one of your
22 concerns, I hope, I don't think that the

1 publishers desire to administer, or rather
2 negotiate directly with these services is
3 going to provide less transparency for its
4 writers.

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

16 MS. CHARLESWORTH: Okay. You guys'
17 signs are up. Is that just leftover? Okay. All
18 right, that closes out this panel. Thank you
19 all, that was a very informative discussion.
20 We will reconvene -- we are going to take a
21 slightly shorter break and reconvene at five
22 after. So you have a few minutes. Thank you.

1 (Whereupon, the above-entitled
2 matter went off the record at 9:54 a.m. and
3 went back on the record at 9 10:10 a.m.)

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

14 Yet, at the same time, I think
15 it's safe to say that today there's greater
16 capability to consume music through legal
17 channels than at any other time in history. I
18 don't know that's hyperbole. So, how do we
19 explain this sort of paradox? Maybe it's not
20 a paradox. And are there ways -- so the broad
21 question for the group is to think about how
22 should we think about this problem and how

1 should we think about ways of encouraging
2 investment both to those who create the music
3 and those who deliver that music to the
4 public. So with that broad question, I'll open
5 it up. Mr. Gibbs?

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

21 In a sense there's no point in
22 changing the current licensing framework if

1 you don't also strengthen the DCMA notice and
2 take-down procedures. As we understand it, the
3 multi-stakeholder forum developed by the
4 Department of Commerce has abandoned the idea
5 of legislative reform. Instead they are
6 working on developing guidelines and best
7 practices for certain stakeholders. This is
8 regrettable and insufficient. There will be no
9 improvement and effect in music licensing
10 without stronger measures against piracy that
11 is facilitated either inadvertently or
12 intentionally by corporations that allow,
13 encourage or misappropriate the creator's
14 work. This means improving notice and take-
15 down procedures to make it easier for creators
16 to file notices, to make sure that creator's
17 receive timely and fair compensation for the
18 work before the take-down, to ensure that what
19 is taken down stays down, and increase fines
20 and maintaining high statutory damages for
21 willful and repeated infringement.

22 We believe there is merit in

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

16 State of investment in new
17 projects and talent. Investment in copyright
18 creation by businesses that exploit musical
19 copyrights has dried up. And investment in
20 developing new talent by the same entities is
21 created. It is now common for artists on all
22 level of the business to fund productions of

1 their recordings themselves, either entirely
2 with their own money or in collaboration with
3 their fans, so-called crowd funding. As far as
4 ability to bring new services to market, the
5 musicians and songwriters are provided the
6 materials that have formed the basis of such
7 musical innovations as remixing and the user
8 generated content based on it, and copyright
9 -- and developing copyrighted material that is
10 the backbone of this business model of ad-
11 supported sharing sites such as Pirate Bay,
12 Kickass Torrents, Media Fire, etc. Copyright
13 creators derive literally no money from these
14 innovations.

15 And I just wanted to piggy back on
16 something Mr. Fakler said in the last thing.
17 He said in 25 years no digital music company
18 has been successful. Pirate Bay has been
19 pretty successful. Mediafire has been
20 successful. 4Shared has been successful. There
21 are companies that are successful. But none of
22 this value is getting down to the musicians,

1 right? The state of investment, the state of
2 the business has forced artists to become
3 producers, as I said earlier. And we're also
4 becoming investors in record companies either,
5 as I said, by paying for the records ourselves
6 or the large artists now have what is called
7 360 deals, which is they have to give money
8 from other income streams to pay for their
9 records.

10 This increased level of artist
11 investment should be accompanied by increased
12 levels of industry-wide transparency and an
13 increased level in the oversight capabilities
14 of creators. Addressing division of revenues,
15 copyrights have become the fuel that sustains
16 million dollar businesses that generate no
17 return. I'm not overstating this. There are
18 million dollar businesses that generate no
19 returns to musical creators -- either in the
20 form of licensing fees or add revenue
21 generated by the fact that our fans want to
22 hear our music and will visit and frequent the

1 ad-supported file sharing sites and address
2 the radio stations that supply it. And, as the
3 Digital Media Association said in their
4 comments to the Copyright Office, in the
5 digital environment, music services are
6 functionally equivalent to the distributors
7 and retailers that sold music on historical
8 business model. That being the case, payment
9 from the digital music services to copyright
10 traders should properly reflect this change in
11 the market dynamic.

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

19 MS. CHERTOKF: Hi, I'm Susan
20 Chertokf and I'm Senior Vice President for
21 Business and Legal Affairs at RIAA. First I
22 want to agree with Mr. Gibbs. I'm not sure

1 that it's the purpose of this discussion to
2 talk about piracy. But that certainly is in
3 the background when you talk about whether
4 digital music services are earning enough
5 money or paying enough money, competing
6 against free remains a problem. But I wanted
7 to start by commenting on some of what was
8 talked about in the last panel where it seemed
9 that people were conflating the sound
10 recording marketplace and the music work
11 marketplace.

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

1 digital music services bring value.

2 But I want to emphasize the very
3 critical value that record labels bring. And
4 today we are releasing a report. And it's on
5 the -- I have to check what the title of it
6 is, but it's on investing in music. Let me see
7 what the title is. Labels That Work, the Music
8 Business in the Digital Age. And it talks
9 about all the investments that record labels
10 make and how record labels really are the
11 venture capitalists of the music industry. And
12 we're the ones that invest in creating the
13 songs, in marketing the songs, in finding the
14 artists. And, as Lee Miller said, if he writes
15 a song and it's not recorded, then no one
16 really hears it. And I just want to hit a
17 couple of the highlights of the numbers. So
18 the report mostly focuses on the last decade.
19 Well, the period from 2003 to 2012. And, over
20 that period, the major record labels spent 20
21 billion dollars on royalties for artists and
22 songwriting.

1 And, during that same period they
2 spent 13.4 billion on advances and marketing
3 for artists. And, let's see, in addition,
4 royalties that major labels paid to artists
5 over this 10 year period went up 36 percent as
6 a share of net sales revenue. So, as record
7 labels' revenues have gone down -- and if you
8 see this report you'll see a graph where you
9 see record label revenues going down. And
10 artist royalties have stayed essentially
11 level. And so, just to repeat, artist
12 royalties paid by major labels increased over
13 36 percent as a share of labels' net sales
14 revenue over this period. And the songwriting
15 royalties that major labels paid increased 40
16 percent as a share of net sales revenue over
17 this period. So, record labels really are
18 pumping a lot of money in to the industry and
19 are taking a lot of risk. And as, you know,
20 basic economic theory will tell you, that
21 return follows risk. We are taking a lot of
22 risk. We deserve a reasonable return on our

1 fair share of the return. So I'll leave it at
2 that.

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

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

20 Okay. And, over the last two years
21 I was the head of the songwriter department at
22 NTSU University in Murfreesboro, right outside

1 of Nashville. And, in two years, of all of my
2 students, I only had two students who ever
3 actually said they wanted to be pure
4 songwriters. Everyone else understood that
5 there are no pure songwriters anymore. And
6 let's give a shout-out to Gerry Goffin, who
7 just recently passed away this week, and ask
8 ourselves what those songs would have been
9 like that he and Carole King wrote if he
10 wasn't on those songs.

11 There's your pure songwriter.
12 That's what we bring to the table, all right?
13 We're not there any more. Our incentive is
14 gone. Let me give you a reason why. Just this
15 year, okay, just to upgrade my studio, I
16 bought one microphone, I upgraded my software
17 and I bought a analog to digital converter.
18 That's the only three pieces I had to upgrade
19 of the entire studio. That was 14,000 dollars.
20 Okay? Let me ask the Spotify guy, how many
21 airplays do I have to get on Spotify to get to
22 14,000 dollars?

1 MR. DUFFETT-SMITH: That's a bit of
2 a leading question.

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

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

11 MR. MAHONEY: Good morning, I'm Jim
12 Mahoney, Vice President of A2IM, the American
13 Association of Independent Music. A2IM is a
14 collection of small and medium sized business
15 owners who invest and support uniquely
16 American music genres, such as Americana,
17 blues, jazz, bluegrass, Hawaiian, and many
18 other genres that we would all agree
19 unquestionably add to our cultural diversity
20 and enjoyment of music. And our members,
21 collectively and optimistic lot, recognize
22 that piracy is certainly a big issue, probably

1 without question. But they've identified to
2 A2IM that our number one concern is the
3 digital licensing practices, the legal digital
4 licensing practices of the major labels.

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

21 And those terms aren't then being
22 offered to the independent labels. We have a

1 number of anecdotal pieces of evidence that
2 some of these terms that the digital service
3 providers and the major labels are engaging in
4 come at the expense of the per-play royalty.
5 But then that per-play royalty, which we would
6 allege is reduced, gets offered to the
7 independents as the stand-alone piece of
8 compensation.

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

11 MR. RINKERMAN: Yes, I want to
12 second some of the comments that Mr. Gibbs
13 made. I produced an album and it was a
14 limited, concert-only release. And, within
15 three days, it was available for free online,
16 including the artwork from a site in Eastern
17 Europe. We really need to get a little more
18 serious about enforcing our laws against
19 piracy and penalizing the individuals
20 personally who are involved in that, such as
21 the fellow from Limewire who was held
22 personally liable. And we're talking about

1 losing his house for what he did. So I really
2 think we need to get serious. And the reason
3 why I was so happy when Spotify came out was
4 because it was an alternative to piracy. But
5 that's a really low bench mark to say this is
6 great, now somebody is competing with the
7 pirates. And I think that keeps a lot of the
8 revenue very low for the artist when you put
9 them in that world. And one of the solutions
10 is through very heavy enforcement and very
11 serious enforcement.

12 The second is someone brought up
13 the DMCA. I believe the DMCA take-downs are a
14 useful tool. But they are frequently not
15 implemented properly by the large companies
16 that hide behind them. I've had situations and
17 DMCA take-down type situations where it took
18 days to get a response. And I actually had one
19 major company tell me the other day that
20 photographs aren't covered by copyrights so
21 they wouldn't take down my client's
22 photographs. They were trying to use a German

1 standard as to whether a photograph created --
2 contained a creative element. So we really
3 have to get, I think, more serious. Once a
4 company starts acting like an advocate they
5 are no longer an IS -- you know, an
6 independent service provider under that Act if
7 they start making counter legal arguments.

8 Their job is to receive the
9 notice, take down the content and let the
10 parties fight it out as to whether or not that
11 as a fair take down. And then finally I'd like
12 to hit on a point that I made yesterday. We at
13 Hard Rock Records took the point of view that
14 if we don't need the rights we're not going to
15 keep them. And we are going to encourage our
16 artists to go out and maybe resell their
17 masters or whatever they want to do. And I
18 think some of the larger record companies --
19 and we heard about how they've concentrated --
20 need to start thinking about that equitably if
21 they are not promoting an artist or exploiting
22 the masters. They should think about letting

1 them revert to the artist, perhaps maintain a
2 financial interest in them. I did a deal a few
3 weeks ago with a record company where my
4 artist gets his master back in five years and
5 then we give the record company a non-
6 exclusive license so that they can still
7 somehow get some money back from it. But I
8 really think we need to encourage that because
9 there are just so many of our small artists
10 that are not getting promoted. And, even
11 though you can get them online, you can't find
12 them because nobody tells you about them.

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

16 Because, if they don't, there are
17 state laws in certain areas that say if you
18 don't exploit fully an exclusive license you
19 lose it. And that's I think a very important
20 thing to keep in mind for our artists. And,
21 last but not least, there is an issue of fair
22 use that I think we need to think about too

1 when we look at licensing. I'd like to read
2 something and then I'll shut up. This is a
3 quote from one of my heroes. We never minded
4 them sampling or covering a song. There's a
5 small amount that you're supposed to pay.

6 But you're not supposed to get
7 sued all over the place for doing it. We'd
8 rather do it together. But the people that
9 stole the rights to our music are suing people
10 all over the world and almost killing the
11 concept of sampling, which is important for a
12 lot of music. But we are still out there
13 fighting for that right. That's George Clinton
14 talking, one of the most sampled artists in
15 history. And he's saying that by over-
16 aggressive licensing practices we've killed a
17 genre of musical art or at least made it hard
18 to practice it. And I really think we need to
19 think seriously about what we are doing.

20 Because, if you look at the cases
21 like Seltzer versus Green Day and Prince
22 versus Cariou, where there's an incredibly

1 broad fair use right now for collage artists
2 and appropriation artists, that will come to
3 music if we don't really straighten out our
4 act on sampling. Thank you.

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

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

22 But when we talk about things

1 like, yuk, that being the bar set low and that
2 it would, you know, it would be a better world
3 if we didn't have to deal with piracy, it is
4 what it is. And I think it's important for us
5 to remember that whatever measures we've taken
6 so far and likely whatever measures we are
7 going to take going forward, are going to
8 have, you know, some kind of limited effect.
9 The world is what it is in terms of piracy.
10 And the truth is that any legitimate digital
11 service right now competes with free. It's
12 just the way it is. It's difficult, it's not
13 good, but it is what it is. I wanted to make
14 two points about this. The first is picking up
15 on something that Susan was saying when she
16 used the Dunkin Donuts analogy about not
17 having whatever, enough money to pay for your
18 flour is your coffee cost has gone up. I don't
19 think that analogy is completely applicable
20 because we are talking about two rights that
21 are actually subsumed in to a single product.
22 And they are inexorable because of that.

1 And I wanted to just reiterate a
2 point that Mr. Duffett-Smith has made several
3 times over the last two days, which is that
4 there is a maximum amount of money that any
5 sustainable business can pay for the content
6 that it is going to be distributing. And, if
7 we are going to look at this in these siloed
8 types of paradigms where music publishers want
9 to get the maximum that they can get,
10 understandably, the PROs want to get the
11 maximum that they can get understandably, the
12 artists want to get the maximum they can get
13 understandably again, and the record labels as
14 well.

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

1 you 1,000 dollars a month to run a business
2 that you only make 800 dollars on, you're
3 going to tell all of your suppliers, coffee,
4 flour or whatever, that you're out of
5 business. And then, just as a second point,
6 jumping off to that -- off of that to another
7 point, one of the ways that I think that we
8 can possibly loosen up the investment here is
9 to think about the way statutory damages and
10 the applicability of statutory damages in a
11 completely blanket way might be helping to
12 chill investment and chill innovation. I think
13 that there are, unlike pirates, there are good
14 faith actors who are seeking licensing and
15 they want to pay as much as they can possibly
16 pay to the rights owners for the exploitation
17 of those works. And they want to see the
18 system work.

19 And they want their businesses to
20 succeed. And I think as they think about the
21 fact that statutory damages are
22 indiscriminately applied to anybody who might

1 make a licensing error, whether or not they
2 are acting in good faith is a very chilling
3 and daunting thing to be faced with. And so I
4 think it's important. And maybe one of the
5 things that we can think about is relaxing the
6 applicability of statutory damages to people
7 who are for, you know, whatever that standard
8 might be or seen as good faith actors in the
9 licensing environment.

10 MR. DAMLE: Thank you, Mr. Knife.
11 And I'll go to you Mr. Rosenthal and then back
12 to you Mr. Huey.

13 MR. ROSENTHAL: Thank you. First of
14 all, you know, the issue of I'm very glad to
15 hear about the investment that the labels make
16 and that they have made and hopefully will
17 continue to make. Certainly there is a world
18 of difference between songwriters and music
19 publisher's world and that of the artist and
20 the labels. The labels have had the right
21 because they do exist, I think, more in a free
22 market to mitigate the losses because of

1 piracy and because of faulty licensing
2 procedures. There is a 360 model now that all
3 artists have to sign with major labels where
4 the labels take a piece of live performance.
5 Music publishers don't do that. Artists can go
6 out, they can perform. And, if you ask major
7 managers today, they will talk about where's
8 the money coming from? Live, live, live.
9 That's where the money is coming from.
10 Songwriters like Rick don't have that
11 opportunity. You don't do movies -- I don't
12 think you do movies.

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

15 MR. ROSENTHAL: You don't sell T-
16 shirts, that's right. You don't sell T-shirts,
17 you don't do all sorts of things that
18 otherwise artists and labels can take
19 advantage of to get their investment back. If
20 you want publishers to invest more -- and they
21 do invest in quite a lot. They do advances,
22 they invest in IT, there's all sorts of things

1 they invest at. If you want to get them to
2 invest more, let them work in a free market.

3 That's how you're going to get
4 them to invest more. It is a Catch 22 to look
5 at a publisher and say you're not investing in
6 what's going on. And it's like, yes, because
7 we know that our return is going to be here as
8 opposed to possibly up here. Why would we
9 invest on a certain level with those kinds of
10 restrictions and that kind of future that we
11 have to look for? So I think that that's the
12 answer really to publishers getting involved
13 in investment more. It is really allowing them
14 to work in the free market. The last quick
15 point on the issue that was raised about fair
16 use and sampling. This is an issue out there.
17 USPTO is looking at this. I can't tell you how
18 much I think that this is a ridiculous,
19 unnecessary investigation in to a market that
20 already works. Digital sampling has been
21 around forever. It has worked. I have
22 represented in my career iconic rap artists.

1 And we have always gone out and licensed and
2 it has worked well. And I don't think it's
3 something that really we need to jump in to.
4 I know George Clinton, I love George Clinton's
5 music. I'm not quite sure we should base any
6 public policy on anything George Clinton says.
7 Thank you.

8 MR. DAMLE: Mr. Huey?

9 MR. HUEY: Thank you. So I'd like
10 to make really two main points. Most I'd like
11 to rip off what Jim Mahoney said and what Gary
12 said as well. I may be one of the few people
13 in the discussion group who has worked for
14 both a number of small independent record
15 labels and also for several tech companies. So
16 I have a perspective that goes across both
17 sides of some of the issues that we are
18 discussing. I'd like to speak from the
19 perspective of a representative of small
20 label. My main goal as the representative of
21 a small label is to make sure that if I am in
22 a negotiation that I'm able to negotiate

1 similar sales based criteria and that an apple
2 is an apple, an orange is an orange. The
3 problem that's emerged as both Jim and Gary
4 stated is market extortion. We have a variety
5 of non-sales based criteria which are
6 artificially changing the definition, I guess,
7 of for instance what a burst stream rate is.
8 A burst stream rate sounds very
9 straightforward until a whole bunch of things
10 are added on top of it that make the burst
11 stream rate meaningless. Thirty percent market
12 share should equate to 30 percent compensation
13 in some form. It may be in the form of
14 advances against sales.

15 But it shouldn't equate to 50 or
16 60 percent remuneration that is not tied to
17 individual burst stream rates. Let me give
18 some other examples. Jim gave several. But,
19 commissioning seed capital, a crazy practice
20 that not only contributes to the culture of
21 digital breakage, which does not get
22 distributed to artists and in many cases, but

1 makes the overall question of what a burst
2 stream rate is all but meaningless. And I
3 would say that that creates or it puts small
4 labels in particular at a competitive
5 disadvantage. And it creates huge barriers to
6 entry for new services because of costs
7 associated with the largest players in the
8 market.

9 I'd also like to briefly address
10 the DMCA. I think the DMCA started out as a
11 construct to allow services to enter the
12 market without having to bear large licensing
13 costs, a double gesture and probably a very
14 valuable gesture. But it's morphed 20 years
15 down the road in to a defense that's used by
16 the largest tech companies in some cases to
17 avoid direct licensing. And avoiding direct
18 licensing and piling what I consider to be
19 unreasonable takedown provisions on small
20 players in the market creates a situation that
21 is unsustainable in my mind and unfair. Thank
22 you.

1 MR. DAMLE: Thank you. I think some
2 folks on this side of the table have been
3 waiting quite patiently. So, we'll go to you,
4 Ms. Coleman and then Mr. Duffett-Smith and
5 then back to you Ms. Carapella and I'll come
6 back around.

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

21 We talk about our writers, we talk
22 about our artists. And we are constantly

1 trying to reinvent the wheel. Music publishers
2 really alone and aside don't have that
3 opportunity. When we do lyric deals, things
4 that we can do in the free market environment,
5 we look to promote as much as possible those
6 songs over and over and over again and those
7 copyrights and those writers so that we can
8 increase the amount of money that they are
9 earning because they are making a pittance
10 right now. And so, you know, whatever we can
11 do in order to grow the support of the music
12 publishing company and give them the
13 opportunity to invest back, that's really, you
14 know, the best way to go. Thank you.

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

17 MR. DUFFETT-SMITH: Thanks very
18 much. It's great we are talking about
19 incentives and incentives both on the part of
20 songwriters to write songs and artists to
21 record songs, labels to make investments and
22 also incentives for services like Spotify to

1 develop, invest and maintain themselves. We
2 are competing with piracy. It's a reality that
3 we all face on every level of the ecosystem.
4 We are all competing with free. And so the
5 incentives need to be there for services to
6 develop legally, to develop legal services for
7 the benefit of everybody.

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

20 To address Mr. Carnes, first
21 point, you said you don't sell T-shirts but
22 you do license lyrics for use on T-shirts.

1 That's a little misleading. The question about
2 how many plays you need in order to make money
3 for your studio, you do raise a very good
4 point. The glib answer is that Spotify pays in
5 accordance with the regs. So the 115 regs are
6 there, they are set by law. But the reality is
7 that it is incredibly complex. You know, the
8 regulations are very complex. The amount of
9 money that you receive will depend on your
10 publishing deal. It depends on the number of
11 subscribers for Spotify on a given month. It
12 depends on our ad revenue in a given month. It
13 depends on how successful we've been. It
14 depends on your share of the compositions that
15 we're supporting and ultimately how successful
16 your music is in the service.

17 And I think as Dick was -- Mr.
18 Huey was saying, trying to reduce this down to
19 a sort of per stream analysis is a little
20 misleading. You know, we've moved from a world
21 where ownership was the dominant paradigm
22 towards more of an access model. And that

1 means that applying a model that looks at the
2 number of sales is going to be misleading. We
3 should be looking instead at bringing more
4 money in and then making sure that we share it
5 equitably with everybody and that does include
6 services.

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

9 MS. CARAPELLA: As I mentioned
10 yesterday, I have spent the better part of the
11 last 30 years working for individuals in
12 technology companies, electronic companies,
13 education companies that want to get in to the
14 music space. So I represent often times
15 interests of people who aren't publishers or
16 record companies but that want to use in large
17 quantity that material. And I go back to what
18 Spotify said yesterday about sometimes the
19 best negotiated rate is 125 percent of your
20 revenue. I think it's important to keep in
21 mind -- I love the phrase willing
22 buyer/willing seller. It sounds really nice.

1 And this is just a quest for a level playing
2 field. It's more of a statement. A lot of
3 times when you're working on one of these
4 projects it's willing buyer/willing seller,
5 seller, seller, seller, seller, seller,
6 seller.

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

1 percent of their goal, they balk.

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

22 MR. DAMLE: Okay, thank you very

1 much. Ms. Chertokf?

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

15 It's not good for songwriters,
16 it's not good for artists, labels or
17 publishers or digital music services. And
18 that's why we have proposed is to something
19 that would simplify licensing. And it also
20 goes to what Dick was talking about in terms
21 of chilling investment. Let's see, to respond
22 to what Jim had said, as far as the ways that

1 the independent labels view major labels as
2 leveraging their assets in a way that you
3 don't find appropriate. You know, we think in
4 a free market that business people ought to be
5 able to get the best deal that the market will
6 bear. And major labels happen to have great
7 catalogs. And they have a lot of recordings
8 and artists that services really want and that
9 consumers really want to hear. And I guess the
10 question is, you know, are you proposing that
11 we shouldn't make the best deal that we can
12 make? Are you also suggesting that we would be
13 limited to per-play only deals, which I think
14 James just said a per-play model is a sales
15 kind of model. So those are some of the
16 responses to Jim's comments. I guess to Jay,
17 I'll pick on everyone equally.

18 (Laughter.)

19 It's about the 360 deals. That's
20 just a very sweeping statement. And I don't
21 think it's really true. I think there was a
22 moment in time when things sort of shifted

1 towards 360 deals. But it's not my
2 understanding that that's the way most artist
3 deals are being done these days, at least at
4 the major labels.

5 So that's just an overly broad
6 statement. And, yes, you were talking about
7 how labels have the opportunity to mitigate
8 risks because we are in a free market. Well,
9 the way that we do that is that we work with
10 digital music services and license new
11 business models and new services. And we keep
12 pumping investment in to the system. And,
13 let's see, for Lee, as far as statutory
14 damages, our question or our response to that
15 is how do you want to address notice and take
16 down? Because they seem to go together. You
17 can't change the statutory damages system
18 without making notice and take-down a more
19 effective way to protect your rights. And let
20 me see if I had anything else. Oh, and then to
21 the -- I guess it's Lee and James are talking
22 about the siloed licensing system. We think

1 that our proposal really addresses that. What
2 we have proposed is that the musical work rate
3 would be a percentage of what the sound
4 recording rate is and that that rate would be
5 determined through free market negotiations
6 between labels and publishers.

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

15 MR. DAMLE: Nothing for the
16 Copyright Office?

17 (Laughter.)

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

19 MR. DAMLE: I'm going to go to Mr.
20 Raff and then Mr. Barker, who haven't had a
21 chance to speak at this panel. And then I'll
22 do a lightening round for everybody, just

1 because we are running short on time. I'll
2 just say that I think we're going to talk a
3 little more about RIAA proposal and some of
4 the responses to it. As I understand some
5 people want to make some responses to that in
6 the last panel of the day. Okay, Mr. Raff.

7 MR. RAFF: I'll be brief to allow
8 everyone to respond to the RIAA. But
9 essentially we are a two-sided marketplace for
10 among creators. And we are fairly new to the
11 music space. And, one of the things that we
12 are seeing is that the other creators who are
13 interested in using music and bringing
14 additional money in to this ecosystem are
15 looking for a lot of certainty and simplicity
16 and want to know how much it's going to cost
17 to license something and how much they can use
18 it. And whether it's going to be so film
19 makers, designers, advertisers, et cetera, the
20 more that we can make it easy for them to
21 license music and not have to negotiate
22 individually with each writer and publisher

1 and label who is on the track, the more
2 licenses they will generate and the easier it
3 will be to get more money flowing in to the
4 music industry, the system.

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

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

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

22 And I've not checked the simple

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

21 And I think we all need to figure
22 out how to bring whatever that number is up

1 and how to deal with piracy. Now, with that in
2 mind, I want to kind of suggest that, from my
3 perspective we kind of back up a little bit.
4 A lot of what we're hearing in the panels is
5 that, in order to create a new business, we
6 need access to all the music. My question is,
7 who are we trying to facilitate? Are we
8 facilitating the owners? The content owners?
9 Even though we may not like to use that word.
10 The creators? Or are we facilitating the
11 providers? Because it seems like it's a given
12 that in order to start a service or a company
13 you must have 100 percent of the content
14 available.

15 Susan, you just said something
16 that I'll challenge a little bit. You
17 suggested your rate be the RIAA proposal of a
18 percentage of a rate, I would argue that and
19 I'm not on the last panel so I'll put my
20 argument in here. The value of a song is hard
21 to determine if it's the percentage of
22 something that's already existing. For

1 instance, I may have a new song that is
2 unknown and it has very little value when I
3 attach it to a recording. But ten years later
4 when that song is a very well known song and
5 another artist, a new artist who has no value
6 wants to record my very successful song
7 because it will help their career, why should
8 I not as an owner be able to charge a higher
9 rate for that.

10 So a tethered percentage or
11 whatever we will, to a license for the value
12 of a song is what I would have an argument
13 with. I think the songwriters and the owners
14 should have the ability to say no to a service
15 or to a use and should have the ability to
16 charge more. So my question really is here --
17 and going back to the licensing of all
18 services, easy licensing as we've heard, does
19 not necessarily mean all licensing. It does
20 not necessarily mean 100 percent. My question
21 to any of the DSP or service providers or
22 entities around the table would be -- and this

1 is something that Ms. Charlesworth asked, I
2 think the last session, maybe in general, and
3 I'll rephrase it. But, would there be any
4 services here that could start up and not be
5 successful if they had at least 90 percent of
6 the content available. Is it necessary to have
7 100 percent? Or could you make just as good a
8 business having less than 100 percent? And
9 I'll throw out 90 percent.

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

12 MR. ALBERT: Thank you. Let me
13 start off by saying that, you know, despite
14 the complexities and despite the challenges of
15 the copyright system, the U.S. Copyright
16 system -- and we are based in Canada and we
17 operate in just over 100 countries. So we do
18 have a couple of comparison points. The U.S.
19 system is actually not as bad, you know, it's
20 not perfect, but it's not bad. It is possible
21 for services to come in mainly because of the
22 compulsory licenses and the blanket licenses

1 that are available to the ASCAP and
2 SoundExchange and so on. So it is possible for
3 outside services to come in. Where we are
4 challenged is once we start doing direct
5 licensing deals with the labels and with the
6 publishers.

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

22 Because it is already very

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

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

14 MS. CARAPELLA: I like also to hear
15 the term best deal, best deal as in, you know,
16 you've got two sides, three sides of the
17 table. What is the best deal from an outside
18 entity? Labels, PROs, and publishers are all
19 one entity. So a best deal is a deal that
20 allows the project to get off the ground,
21 allows the educational company, technology
22 company to market their product, to make it

1 successful, to grow like cable television did
2 in America, and become 20 years down the road
3 something that's much more successful then
4 than it was at its startup. But, if they are
5 hammered by costs that don't allow that to
6 happen, they never get on to the playing
7 field. And that, 20 years down the road, is
8 revenue that was never received. So just think
9 about what the deal is when these people come
10 to you.

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

16 MR. DAMLE: Thank you. Mr. Knife?

17 MR. KNIFE: Lighting round! Really
18 quickly, just addressing some of the issues
19 that were made replying to Ms. Chertokf. The
20 DMCA and statutory damages are -- while they
21 are obviously related because they're all part
22 of the same statutory construct, they are very

1 remote from each other. And I certainly wasn't
2 suggesting that anybody should be absolved
3 from statutory damages. I was saying that we
4 should be thinking about creating a rule that
5 says good faith actors that are obviously
6 simply trying to license should probably not
7 be subject to the potential of statutory
8 damages for simply having made a mistake as a
9 part of their attempt to get complete
10 licensing.

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

16 MR. KNIFE: I'm not married to any
17 particular concept of how it would be applied.
18 But yes, something like a safe harbor. In
19 other words, I mean, I think it speaks for
20 itself. I'm not prepared to, whatever,
21 articulate exactly what the standard would be.
22 And maybe it would be left up to judges or

1 maybe there would be some kind of guiding
2 principles. But again, the point I think is to
3 have a indiscriminately applicable statutory
4 damages regime that doesn't take in to account
5 the distinction between an obvious bad faith
6 act, right, a pirate, and somebody who is
7 simply trying to make sure that they have
8 completely licensed the entire catalog that
9 they want to exploit, would be, I think,
10 beneficial to making sure that an invest
11 continues and that services continue to
12 launch.

13 MS. CHARLESWORTH: Thank you.

14 MR. KNIFE: And then, so apologies,
15 just answering Mr. Barker, you know, you asked
16 a good question. And I think Ms. Charlesworth
17 asked it in an earlier panel. You know, is it
18 feasible for a service to launch with less
19 than, you know, the full catalog. I think it's
20 important, the way you phrase the question I
21 kind of think indicates a little bit of the
22 perspective. It's, I don't think, you know,

1 Mr. Duffett-Smith's company or Pandora, or
2 anybody else, they're not seeking to license
3 the entire catalog so that they can put it on
4 a server and then disconnect that server from
5 the internet. It's not the services that want
6 the catalog.

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

22 MS. CHARLESWORTH: Right. But I

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

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

22 Because, as I said, the

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

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

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

16 MR. DAMLE: Yes, please.

17 MS. CHERTOKF: I only have a couple
18 people to pick on this time. A quick response
19 to Lee is statutory damages are already on a
20 sliding scale, that's already in the statute.
21 And then to John, your issue about writers
22 wanting to be able to negotiate for their

1 songs, I think there already is an opportunity
2 to do that at first use. I don't think it
3 happens very often. But, at the point of first
4 use writers are free to negotiate and they are
5 not bound by the statutory right. But, on this
6 issue of 100 percent catalog or 90 percent
7 catalog, the point I want to make there, as I
8 understand what you're talking about, you're
9 not talking about whether songs are out, which
10 is really a record label issue or an artist
11 issue of withholding a song. You're talking
12 about individual writers having a right to say
13 I don't want my song there. And the issue that
14 that creates is that, we've already discussed,
15 is that most songs have fractional ownership.

16 So, let's say you have a song that
17 has ten owners and then there is an artist. So
18 the artist wants it on Spotify and nine of the
19 ten owners want it on Spotify. You're talking
20 about creating a situation where one owner
21 would be able to withhold that song. And, I
22 mean, I can let Spotify talk to that more than

1 me. But I don't see how that's workable when
2 on the songwriter side you're talking about
3 fractional ownership.

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

18 Yesterday you mentioned it. I
19 thought about the Giving Tree. I don't know if
20 you people know that book. It's a story where
21 there's a tree and the kid keeps asking for
22 pieces of the tree. He builds a house. He

1 raises a family, he becomes old. And at the
2 end the tree is gone. The tree gives up
3 everything so this kid can live. That's what's
4 happening with creators in the music business.
5 You keep pulling pieces off the tree and now
6 we are down to a point where we are literally
7 -- the calculation for Spotify is literally in
8 the thousandth of a penny, right? That's where
9 we are. So you're looking at billions of
10 dollars on one side, a thousandth of a penny
11 on the other side. That is just not going to
12 work. I mean, we talk about market distortion.
13 From our standpoint it's great. Some markets
14 are failing it, or not getting paid. So, if we
15 are going to talk about all these things, we
16 have to talk about the failure as well. As far
17 as -- what else do we have on here? It's an
18 ecosystem, you know? You can't really talk
19 about all the other pieces without making sure
20 that the thing that's fueling the system is
21 working. And I literally tell people not to
22 get in to the music business. I mean, I

1 literally do that.

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

15 She's pretty popular.

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

18 MR. DAMLE: Thank you. Mr. Barker?

19 MR. BARKER: I can do it real
20 quick.

21 MR. DAMLE: Okay.

22 MR. BARKER: Okay.

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

11 For the fractional ownership,
12 understood, good question, I guess. And I may
13 differ a little bit with Mr. Gibbs on this in
14 that something I've thrown out at earlier
15 panels is perhaps we could look at this if
16 there are multiple owners that a majority of
17 owners would be able to facilitate a certain
18 license. Now, I'm throwing that out there
19 because, you know, to comment to Mr. Gibbs,
20 when the creators are in the room together
21 they kind of have an idea what they're coming
22 out with. And they may know that a 10 percent

1 guy only has 10 percent. And yet he may not
2 have the right -- maybe he shouldn't have the
3 right to hold up the whole song. But he knows
4 not to enter in to the room with those writers
5 again if he chooses not to do that. So I would
6 say there's a way to handle that so that a
7 song cannot be hijacked by a minority holder.

8 And my last point, going back to
9 the 100 percent versus 90 percent. I think the
10 issue, and I just want to remind us all, the
11 issue here is, for Spotify you clearly know,
12 based on the record companies, which records
13 you don't have, because it's clear that you
14 either have or have not negotiated a deal. I
15 think under 115 you kind of say, okay, I have
16 rights to everything. And if we get rid of 115
17 then the big question is, well then who is in
18 and who is not in as far as the song owners.
19 So I think the question for the 90 percent is
20 not so much I've got to have 100 percent to
21 start a service, but if I'm only going to have
22 90, when it comes to the songs I have to know

1 which 10 percent are not a part of this. So,
2 as a service you don't have that liability.
3 And I think that's the other conversation of
4 how we are going to change, potentially change
5 licensing structure under 115 so that we will
6 be clear to know who those outliers are.

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

9 (Laughter.)

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

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

16 MR. DAMLE: Okay, thank you very
17 much.

18 MR. CARNES: To Ms. Carapella, I
19 completely understand the complexity and the
20 difficulty of trying to get in to the music
21 business. And, because people can't get in the
22 music business, we all hurt, we all suffer.

1 Actually, I'm trying to buy a rock quarry,
2 that's the ultimate thing. It's simple, it's
3 straight ahead. But, being a songwriter, I
4 have a whole basket of rights. And every one
5 of those rights equals a revenue stream for
6 me. And, because I'm making -- this goes back
7 to the value and goes back to piracy.

8 Because I'm making so little on
9 each one of those rights, I desperately need
10 to hold on to every one of them. And so that
11 makes it a more complex system, okay? But then
12 we start talking about, okay, we're not making
13 enough over here, let's look at collective,
14 you know, licensing. Let's look at direct
15 licensing versus the blanket licensing. That's
16 going to create more complexity if we go to
17 direct licensing, okay? But it all comes back
18 to the fact that we're not making enough
19 money, okay? And that goes back to piracy. And
20 I want to tell Lee, you can say all day long
21 it is what it is, but it is not what it is. It
22 is what it shouldn't be, and it needn't be

1 that way if we could just get a small claims
2 court -- which I want to come back to.

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

13 MR. DAMLE: Thank you. Mr.
14 Rosenthal?

15 MR. ROSENTHAL: For Susan, I think
16 that what you're doing here with this study
17 and with your points about, you know, the
18 value of what the labels put in to sound
19 recordings and to artists as opposed to what
20 publishers do, is that you are already kind of
21 in front of your proposal and arguing already
22 what is the value between the sound recording

1 and the musical composition. I think that's
2 pretty presumptuous because we haven't bought
3 in to that idea yet. So later on we will
4 discuss your proposal and we'll talk about
5 whether that makes sense or not. So the issue
6 of, you know, how much you're doing, is
7 really, you know, not really relevant right
8 now in comparison to the music publishers.

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

20 One issue with Spotify. And this
21 is a positive thing. Of all -- you know,
22 there's a lot of controversy with artists in

1 particular, but songwriters as well with
2 Spotify. And yet there are some folks out
3 there who have a lot of faith in Spotify.
4 INgrooves is a great digital aggregator. Their
5 president has publicly stated that he has
6 faith that your business model will eventually
7 come around to paying artists and paying
8 songwriters what they think that they should
9 be paid in a fair and free market.

10 And I think that shows that all
11 these services are not the same. I think that
12 your business model is a better business model
13 in the context of upward mobility. Others are
14 not. And again, this gets back to publishers
15 also have to have the right to deal with
16 different licensees, because each service is
17 different and we assess them differently. And
18 we'd love to be able as publishers in general
19 to be able to be in a system where, hey, maybe
20 we like Spotify, maybe we'll even invest in
21 that, just like the labels do on their side
22 because they are in a free market. That's my

1 point.

2 MR. DAMLE: Thank you. Mr. Duffett-
3 Smith.

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

14 That was great. But, you know, the
15 music services are also a tree. There is only
16 so much wood on that tree. And if you take
17 away all the wood then there's nothing left.
18 There's nothing, you know, there's no fruit
19 for next season or however you want to extend
20 the metaphor. In terms of paying thousandths
21 of a penny, you know, as I said to Mr. Carnes,
22 it is a very complex thing, these royalties

1 are very, very complicated. They are very
2 complex in this jurisdiction. They are very
3 complex overseas. The system is Byzantine.

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

12 MR. DAMLE: Thank you. Mr. Mahoney?

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

1 are many, many independent labels who are
2 distributed through the majors.

3 What I have an issue with is when
4 your members are negotiating compensation
5 packages in their direct digital licenses that
6 take some of the money and some of the
7 compensation and not pass it through to their
8 distributed label partners and the artists.
9 And that would be my quarrel with that
10 position. But, as is common with the smaller
11 players in the world, we are always looking
12 for allies. And we would much rather work with
13 you then have this squabble. And so our
14 solution, our suggested solution is to allow
15 more services to operate within a compulsory
16 license. We can point to a really healthy
17 segment of the market, the non-interactive
18 streaming market of Pandora, - SiriusXM and
19 how well that's working when we all can work
20 together on coming up with the rates that
21 these services should pay. PARTICIPANT:
22 Somebody has to say this, I will buy a Rick

1 Carnes T-shirt.

2 (Laughter.)

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

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

12 MR. RILEY: At 11:25?

13 MS. CHARLESWORTH: Yes, 11:25.

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

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

1 volunteer.

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

4 MR. DAMLE: Yes.

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

10 MR. DAMLE: Okay. Mr. Samuels?

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

17 MR. DAMLE: Great. Ms. Finkelstein?

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

21 MR. DAMLE: Professor Besek?

22 MS. BESEK: Hi, I am June Besek. I

1 am the Executive Director for the Kernochan
2 Center for Law, Media and the Arts at Columbia
3 Law School.

4 MR. KOHN: I am Bob Kohn. I am
5 coauthor of Kohn On Music Licensing. I founded
6 E Music in >97, royalty share in 2006. Thanks.

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

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

19 MR. DAMLE: Great. I think the rest
20 of you have been on earlier panels here today.
21 So, as you all know, in 2011 the Copyright
22 Office issued a study on pre-1972 sound

1 recordings and recommended full
2 federalization. And, as Mr. Rushing mentioned,
3 there's pending legislation in Congress that
4 takes a more incremental approach. So, one
5 question for all you is, given what's
6 happening in the marketplace now, what recent
7 developments should we consider, should we
8 highlight for Congress as it considers the
9 benefits of extending federal copyright
10 protection to pre-1972 sound recordings. Mr.
11 Samuels?

12 MR. SAMUELS: I have a statement
13 here I'd like to read which does answer your
14 -- thank you. I have a statement here I would
15 like to read that for the part answers what
16 you just asked me if you permit me. I want to
17 throw out a few names for you. Homer, Plato,
18 Virgil, William Shakespeare, Ludwig Von
19 Beethoven, Emily Bronte -- and as was
20 mentioned yesterday -- Samuel Clemens/Mark
21 Twain. Name one thing they all have in common.
22 They are all long-dead creators whose works

1 now belong to the public. Now I want to throw
2 out a few more names. John Philip Sousa, King
3 Oliver, Big Spiderback, Edvard Grieg, Charlie
4 Patton.

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

20 You clearly all represent your
21 constituents very ably. I doubt I can match
22 your facility with language or your command of

1 the facts. But I did notice that there has
2 been one viewpoint that has been sorely
3 lacking from this discussion. Nobody has been
4 representing the public.

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

13 And it really only protects the
14 rights holders and not necessarily the
15 creators. He never mentioned the public
16 domain. He should have. There's a reason it's
17 called that. Article 1, section 8, clause 8 of
18 the United States Constitution empowers the
19 United States Congress to promote the progress
20 of science and useful arts by securing for
21 limited times to authors and inventors the
22 exclusive right to their respective writings

1 and discoveries. The earliest recordings
2 currently in copyright date from 1890. And,
3 assuming there are no further extensions, go
4 out of copyright in 2067.

5 That's some limited time. Did you
6 know that almost everything written before
7 1923 is now out of copyright and in the public
8 domain? Conversely, did you know that
9 virtually everything recorded before 1923 is
10 now still in copyright and not in the public
11 domain? A number of you have mentioned
12 fairness and doing what's right. I fail to see
13 what's fair and right about this discrepancy
14 that recordings made more than 50 years before
15 most of us were born will go out of copyright
16 after almost all of us here will be dead and
17 gone. I mentioned Edvard Grieg before. He was
18 born back in 1843. Assuming his descendants
19 are still alive, the oldest surviving would be
20 his great, great grandchildren. Yesterday Mr.
21 Kohn made mention of the fact that your
22 representatives of your organizations are

1 being well paid for --

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

6 MR. SAMUELS: I will do --

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

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

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

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

20 Section 307(c) of the 1976
21 Copyright Act needs to be repealed in full and
22 not piecemealed simply to benefit

1 organizations such as the RIAA. Recordings
2 made before February 1st, 1972 should be
3 brought under federal copyright laws and
4 protections. Ideally, in my view, the length
5 of copyright for all recordings should match
6 the E.U.'s 70 years and record companies
7 should be required to use it or lose it for
8 recordings over 50 years old. At the very
9 least pre-1972 copyright terms shouldn't be
10 more than the 95 years that exists for
11 recordings made after that date. Thank you.

12 MR. DAMLE: Thank you, Mr. Samuels.
13 Professor Besek.

14 MS. BESEK: I believe that pre-1972
15 sound recordings should be brought under
16 federal law in the interest of owners, users
17 and the public. A number of comments in this
18 proceeding have suggested that pre-1972 sound
19 recordings be brought under the compulsory
20 license in section 114. On the other hand, if
21 any of you were -- and I'm sure many of you
22 were -- participating in the pre-1972 sound

1 recording study you'll know that there are a
2 number of folks who just as strongly argue
3 that they should be brought under federal law
4 only for the purpose of certain exceptions.

5 And, the fact is that it's
6 unrealistic to go either route. What we really
7 need is a balanced approach, which is why they
8 should be brought under for all purposes. I
9 know that some people would like to cut off
10 the term. But there are takings issues, as the
11 Copyright Office report observed. That doesn't
12 mean that it can't be done. But it does
13 suggest, certainly to me, that you can't
14 automatically cut off the terms of these older
15 recordings. The Copyright Office had a very
16 constructive proposal for how to bring this
17 about. And I think that that probably should
18 be done. Just one more observation I want to
19 make is that the states currently don't
20 recognize a public performance right for the
21 most part. This is something that could be the
22 subject of an article in itself. They

1 certainly could do so if they chose, at least
2 in many states, because courts sitting in
3 common law have a broad ability to fashion
4 relief. But that certainly isn't true across
5 all states. Some specifically prohibit a
6 public performance right for sound recordings.
7 And some have a civil law based on their
8 criminal law, which refers only to public,
9 excuse me, to reproduction and distribution.
10 So, if we are going to recognize such a right
11 federally, it should be as part of a federal
12 copyright that these pre-1972 sound recordings
13 get. Thank you.

14 MR. DAMLE: Thank you. Mr. Rushing?

15 MR. RUSHING: Sure. So I want to
16 talk sort of with respect to Mr. Samuels'
17 comments, the Respect Act that does address a
18 very specific problem. And it's not really
19 intended to talk about the scope of the public
20 domain and what should or should not be in it.
21 I believe that's sort of a separate question
22 that's worthy of discussion and interesting

1 sort of consequences. But the Respect Act is
2 intended to address a really specific issue.
3 And it is the way that the statutory license
4 is supposed to operate. And so, Ms. Besek
5 referred to the possibility that there are
6 performance rights implicated within, under
7 state law for pre-1972 sound recordings.

8 That's an open question, actually,
9 that's being litigated in a number of cases
10 right now. So it's not yet been determined.
11 There are other rights implicated by digital
12 radio services, including in particular making
13 of copies and things of that sort. The
14 reproduction right for pre-1972 sound
15 recordings is very well established. And other
16 data point is, when you have directly licensed
17 services, my impression and understanding is
18 that this distinction between recordings
19 protected by state law and recordings
20 protected by federal law really doesn't exist.
21 It's not an issue in the economics and the
22 practical sort of day-to-day. So what we have

1 here in the context of the statutory license
2 that we administer, is really a problem. The
3 problem is this. That license is supposed to
4 be a one-stop shop for users of sound
5 recordings who are not supposed to have to
6 worry about how to go about clearing the
7 rights in the sound recordings that they want
8 to use. They are supposed to be able to rely
9 on the statutory license to take care of all
10 of that.

11 Because of this sort of odd quirk
12 in the law that I think was frankly overlooked
13 or not paid attention to in 1995, there is
14 this open question about where pre-1972 sound
15 recordings fit in to that overall system. And
16 it creates a couple of problems for the people
17 who use these recordings because, one, they
18 have to worry about getting the state law
19 right, if state law rights are implicated.
20 Two, it's not always clear whether a recording
21 is protected by state law only or if it is
22 also protected by federal law.

1 Because of the Berne convention
2 and through things that I don't fully
3 understand, but some foreign sound recordings
4 recorded before 1972 are, in fact, federally
5 protected. And then, similarly, it's possible
6 for a recording first made before 1972 to be
7 sufficiently re-engineered that it could enjoy
8 federal protection. These are the sorts of
9 questions that users of sound recordings are,
10 frankly, not supposed to have to worry about
11 when they are using the statutory license. The
12 other important policy point relates to the
13 way that artists are treated and the statutory
14 licensing system.

15 One of the purposes of the overall
16 system is to ensure that artists participate
17 directly and immediately in the royalties
18 generated by digital radio services using the
19 statutory license. We have a whole, you know,
20 a whole -- the legacy artists, the people that
21 created the music that our industry is based
22 on, because of this quirk in the law that I

1 think no one intended, don't have the clear
2 ability to participate in that under the
3 statutory process. So I think there is a
4 simple fix to this particular problem, which
5 is laid out in the Respect Act, which is just
6 to make it clear that the sound recordings are
7 in fact part of the statutory licensing
8 system. It doesn't foreclose tackling these
9 other more complicated issues. To the
10 contrary, I think it tees those up more
11 squarely. But it can close this specific
12 loophole and, frankly, codify the practice of
13 a great many services who operate as if the
14 statutory license does cover those sound
15 recordings.

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

20 MR. RICH: Full disclosure, we are
21 representing both SiriusXM and Pandora in the
22 pre-1972 state law actions that are pending in

1 five different jurisdictions, in California,
2 New York and Florida.

3 Starting with the Respect Act, at
4 least as I parse it and understand it, and I
5 think Colin is not disagreeing, it pre-
6 supposes a procedure and a statutory
7 administration mechanism predicated on the
8 premise that there is a there-there in terms
9 of the existence of a state law precedent for
10 sound recording performance rights. I couldn't
11 agree more with June Besek. There is no such
12 state law right; the Copyright Office report
13 on federalization acknowledged, at pages 44
14 and 45, the same general conclusion. And it
15 is, I think, wishful thinking to be yet
16 determined by judges who have the final say,
17 not us, that in fact there is there-there as
18 to state law. And so, it seems to me at best
19 premature to debate the merits of a procedural
20 structure for collecting sound recording
21 royalties, the predicate for which is an
22 assumed state law right when that very premise

1 is completely shaky, if not utterly
2 fallacious. So I for one puzzle over the
3 timeliness of the Respect Act. With respect
4 more generally to the suggestion that there
5 ought to be full federal copyright recognition
6 of pre-1972 recording performance rights,
7 which is closer to the position that the
8 Copyright Office has espoused, that's again a
9 complicated question as to public policy.

10 We're talking about sound
11 recordings that are more than 40 years old,
12 that were created, marketed, exploited, all
13 with no expectation of any such performance
14 right associated with them. Many, many, many
15 have had extraordinary commercial success over
16 their lives. And, equally importantly from the
17 standpoint of copyright policy, when one
18 thinks about first principles of copyright
19 law, which is first and foremost to stimulate
20 the creation of new works of authorship, by
21 definition that very premise doesn't fit or
22 apply to works which were created 40, 50, 60,

1 as long as 100 years ago. And so, I think
2 there is ample room to question the societal
3 need in terms of expectations of creators, in
4 terms of furthering the purposes of copyright
5 law. And I think those are very consequential
6 questions as this issue is debated.

7 MR. DAMLE: Ms. Griffin?

8 MS. GRIFFIN: Thank you. From
9 Public Knowledge's standpoint we support
10 federalizing pre-1972 sound recordings and
11 preempting state laws in large part because
12 the public loses out when services can't
13 properly license because there's uncertainty
14 or there's, you know, as people have already
15 mentioned, there's ongoing litigation. And
16 there's still a lot of questions up in the air
17 about who needs to give permission, who needs
18 to pay, how much. And all of that I think kind
19 of chills innovation from new services
20 entering the market, particularly online
21 services that are operating obviously across
22 the entire country. So, for that reason we

1 think that we should federalize pre-1972,
2 preempt state laws with some provisions that
3 kind of account for the fact that we are
4 retroactively federalizing rights.

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

1 federalization.

2 In terms of the Respect Act, we
3 support the effort to try to get these works
4 under federal law in some way. But we weren't
5 able to support that particular law because I
6 think basically federalization is important
7 and it's worth doing right. So we should do it
8 kind openly and put the right in 106 and apply
9 all the limitations and exceptions. And, in
10 particular I think that another principle we
11 are always talking about is technology
12 neutrality. If we are talking about just the
13 114 license then you're just talking about a
14 particular set of licensees and you're not
15 talking about all the other uses that may come
16 in to play for these recordings. And also I
17 think that artists are kind of losing out
18 there.

19 Because, if there's kind of a
20 pseudo-right under this condition for 114
21 license, you won't, for example, necessarily
22 have a termination right as the author because

1 it's not part of the 106 rights that you get.
2 And so I think that, both from the consumer
3 side and from artist side, we would benefit
4 from just doing federalization right, doing it
5 in a comprehensive way, instead of just adding
6 it on to a condition of one type of license.

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

9 MR. RAE: Thanks. So the history
10 here I just find incredibly fascinating. A
11 couple of points that Mr. Rich made that I
12 thought were curious and/or provocative, one
13 of which is the fact that the incentive to
14 create new copyrights isn't present in pre-
15 1972's. I mean, I'm a musician and I've got to
16 tell you, I pretty much create everything
17 premised on pre-1972's. So I'm incentivized to
18 create because of the existence of these
19 works.

20 And therefore I feel morally
21 obligated to do something about the performers
22 who created them or, in my opinion, very much

1 as deserving as anybody else who makes music
2 in today's marketplace. You know, getting to
3 the feature part of this, last night we talked
4 a lot about registries, databases, unique
5 identifiers. And my head almost exploded. But,
6 when I think about the path to better data
7 management in informational technology sharing
8 and so on and so forth, I think that
9 federalization has to be achieved or else we
10 won't have the proper enumeration of ownership
11 of these very valuable older works. So I think
12 that's another imperative for us to want to
13 solve this problem in a bigger way than just
14 the stop-gap measure.

15 Obviously there's clarity for
16 other protections and exemptions, including
17 safe harbors, which no one has brought up yet.
18 Termination, obviously, is a big one. And just
19 the ability to enforce these rights under 106,
20 which all rights holders enjoy. Whether the
21 stop-gap measure would be predicated on state
22 law or the digital public performance right is

1 above my pay grade. But I don't think it's
2 crazy to think that we could do a temporary
3 fix to this. I would prefer not missing a
4 third chance for Congress to give legacy
5 performers their full protections. I think it
6 would be an absolute missed opportunity as we
7 are talking about all these other moving
8 pieces in the Copyright Act to not approach
9 full federalization. In the meantime, the
10 Respect Act is probably better than litigation
11 and liability because we can't have a
12 marketplace where this music continues to have
13 value and people want to hear it and have
14 issues of questions of, you know, the ability
15 to perform this music to those audiences.

16 We already have an asymmetrical
17 and unwieldy act. That's why we are here right
18 now, because we are complaining about that,
19 you know, from our different perspectives and
20 quarters. To me the fact that we could achieve
21 partial parody for digital public
22 performances, you know, that might be good.

1 But it still leaves out terrestrial. So we
2 still have an incredibly -- we still have an
3 unwieldy system that doesn't reflect true
4 parody. It was a long time ago that I read the
5 Copyright Office recommendations on
6 federalization. So I don't hold it all in my
7 head right now. I probably should have stayed
8 up reading it again or something.

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

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

20 MR. MAHONEY: I'm not an attorney.
21 And, for that matter, I will probably reveal
22 some ignorance here when I say that there may

1 be a valid reason to have a discussion about
2 length of copyright in the United States. But
3 I don't think that we are near a point where
4 anyone would suggest that that length be
5 shortened to 42 years. That said, one needn't
6 be an attorney.

7 One only need to turn on SiriusXM
8 and see the many stations that programmed
9 fully with pre-1972 copyright songs,
10 recordings and conclude that they still have
11 value to listeners. They still want to hear
12 those songs a lot. To programmers who program
13 multiple stations there's a 40's station, a
14 50's station, a 60's station. There's classic
15 rock, all the pre-1972 sound recordings. So,
16 the public still values them, corporations
17 still value them. They should still maintain
18 a value for the recording artists.

19 MR. DAMLE: Thank you. I'll admit
20 I've lost track of who was next. So I think
21 what we'll do is start with Ms. Chertokf and
22 then go around.

1 MS. CHERTOKF: Thank you. I just
2 have a few points to make here. Let's see
3 where they were. On the question of whether or
4 not state law rights exist I think the state
5 law rights, they are a patchwork. I pulled up
6 the Copyright Office report after you cited
7 it. And what I see here on page 45 is it seems
8 to conclude that there are no state law
9 performance rights in North Carolina and South
10 Carolina. That's only two of the 50 states.

11 But, you know, going around the
12 country litigating state-by-state doesn't seem
13 to be in anyone's best interest. And, you
14 know, I think the idea here is we are talking
15 about simplifying licensing and streamlining
16 it and making it so that legacy artists can
17 get their fair share of royalties. And the
18 Respect Act does that. On the issue of whether
19 it makes sense to pick off this one thing and
20 not do a full federalization, you know, our
21 view on it, and we were involved in the pre-
22 1972 study, is that when you start looking at

1 full federalization there are a number of
2 issues that are complicated. We are not saying
3 that we are opposed to it.

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

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

16 MR. SAMUELS: It seems to me that
17 the reason that my colleague over here
18 supports the Respect Act is that in her area
19 it benefits them. I personally -- my position
20 is mostly talking about recordings that have
21 actually a limited interest. You know,
22 mentioned before, Mr. Mahoney, that there's a

1 lot of things pre-1972 that are on the radio.

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

22 If you have a scholar, if you have

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

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

22 MS. CHERTOKF: Yes, I just had one

1 quick response to that, which is that there is
2 the National Jukebox Project, which is run by
3 the Library of Congress. And I believe that
4 Universal Music and Sony Music both did deals
5 with the Library of Congress where a lot of
6 their vault recordings are digitized. And
7 there's a lot of recordings available through
8 this National Jukebox Project.

9 MR. SAMUELS: I can respond to
10 that.

11 MR. DAMLE: Yes, quickly, please.

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

19 Secondly, the rights are very,
20 very limited in what people can do with them.
21 Now, I could go on with what the specifics
22 are, but since you asked me to be brief,

1 that's not the answer. Thank you.

2 MR. DAMLE: Thank you. Mr. Fakler?

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

15 With respect to the Respect Act,
16 an additional problem with the Respect Act is
17 that it would seem to -- well, it would
18 require federal payment, require federal
19 payment, for non-existent at this point state
20 law rights. And it also creates a federal
21 cause of action to enforce these non-existent
22 state law rights. So, whatever the approach

1 is, we don't think the Respect Act is the
2 right way to go. And now, Music Choice has a
3 somewhat more nuanced view of the issue as
4 well. In the sense that Music Choice believes
5 that there should be a safe harbor for digital
6 music services. This chaos that's being sown
7 in the state courts now with these issues is
8 really not good for anybody. As a matter of
9 fact, Music Choice has always paid for pre-
10 1972 sound recordings under the 114-112
11 licenses. It's a practical thing. The fact is
12 you cannot reliably determine whether a
13 recording is truly pre-1972 or not because of
14 the fact that often times the original -- a
15 recording, as Colin was mentioning before, a
16 recording that's originally issued prior to
17 1972, it can be remixed from multi-track
18 sources. It can be sweetened in certain ways.

19 There are certain types of
20 processing one can do that creates, voila, a
21 federal copyright out of a pre-1972 sound
22 recording. There are other things that happen

1 to it that don't rise to that level of
2 authorship. In the -- when CDs were first
3 released the major labels all went and
4 registered their copyrights and the Copyright
5 Office told them how they had to fill out the
6 form to specify remixing from multi-track
7 sources to get a new copyright. So, even the
8 Copyright Office record of these recordings is
9 confusing. The fact of the matter is -- and I
10 know because I've litigated this issue -- the
11 only way to reliably tell whether the
12 recording is truly pre-1972 or not is to track
13 down an old piece of vinyl from the original
14 release, take the digital file that's actually
15 being exploited and do a pure digital master
16 of both and compare the wave forms. And then
17 you can start to determine, you know, whether
18 they really were remixed.

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

21 MR. FAKLER: Exactly.

22 MS. CHARLESWORTH: I think we'll be

1 adopting that.

2 (Laughter.)

3 MR. FAKLER: Thank you, exactly.

4 Which is why I think that certainly the
5 digital -- given the current state of the law
6 where there is no performance right for these
7 recordings, we believe that the music services
8 should have the right to fight this one out.
9 But, in the meantime, for those digital music
10 services that don't have the resources or the
11 inclination to engage in the fight, there
12 should be a safe harbor so that if they do pay
13 for the pre-1972 sound recordings under 114
14 and 112 they are shielded from liability in
15 these various state actions.

16 MR. RAE: Can I ask a quick
17 question? Does anybody here really truly
18 believe that a 5.1 remix or like a remaster
19 actually constitutes new authorship? I'm very
20 curious about that. For the purposes of
21 performing or using a pre-1972, right? Like
22 what are these sweeteners we are talking

1 about? Because it seems like a real gray area
2 to me. I know nothing about this but I'm
3 curious. I personally don't believe that
4 there's new authorship that's implicated in a
5 remix that is, you know, includes pretty much
6 the same ingredients but is run through modern
7 technology.

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

19 Because I tell you right now from
20 somebody who represented a defendant who was
21 being sued by a label, once this issue of
22 whether the registration is really covered,

1 you know, whether there really was post->72
2 copyright ownership, caused a settlement to
3 occur overnight, okay? This is a mess that
4 nobody should really want to get into. And
5 that's why I think that, however, there is
6 this dispute.

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

16 MR. DAMLE: Thank you. Ms.

17 Finkelstein?

18 MS. FINKELSTEIN: I'll be brief. I
19 represent Sony Music. And we have a very
20 broad, deep treasure trove of pre-1972 sound
21 recordings, including Benny Goodman, Bob
22 Dylan, Big Bill Broonzy, Rosemary Clooney and

1 thousands more. And I guess we'd feel that
2 there's a fundamental issue of fairness in
3 being paid for those recordings and having
4 those artists have the ability to participate
5 in royalties from those recordings from new
6 digital services. I wonder if -- I think Ms.
7 Griffin implied that there was a chilling
8 effect on licensing because of the
9 uncertainty. But what's happening in the 114
10 license is that these recordings are being
11 used whether they are subject to the license
12 or not.

13 They are being used and they are
14 just not being paid for. In the direct
15 licensing, when we license our catalogs, we
16 always license the entire -- I mean, with a
17 broad based service we'd be licensing the
18 entire catalog and there'd be no distinction
19 made between the compensation for pre-1972 and
20 post->72 recording. So, from our perspective
21 it is an odd result that a service can take
22 advantage of the 114 license and enjoy the

1 very easy licensing process and, at the same
2 time, rob us of the opportunity to negotiate
3 for those very precious catalog titles to be
4 part of the license. So, you know, we've had
5 a lot of talk about willing buyer/willing
6 seller, free market, fair market, which I will
7 leave to all the lawyers to explain all the
8 differences. But, in that free, fair, willing
9 buyer market, you know, we see people are
10 willing to license those recordings at the
11 same rate as they license post->72 recordings.

12 And it seems like a travesty that
13 we are put in a position of losing that
14 revenue from the people that are operating
15 under the 114 license.

16 MR. DAMLE: Thank you. Professor
17 Besek?

18 MS. BESEK: Well, I certainly think
19 that artists of pre-1972 sound recordings
20 should be able to participate in the revenues
21 that they have -- that are earned from their
22 recordings. But it has to be done more

1 comprehensively. I just have a problem --
2 again, I'm a purist, but I have a problem with
3 granting federal rights without federal
4 exceptions, just like I would in granting
5 federal exceptions without federal rights. I
6 also think it's more problematic. It's just
7 putting off another problem. As long as a
8 principal means of exploiting recordings is
9 through 114, things will be fine. But you'd
10 always have to change rights for pre-1972
11 recordings separately if other rights are used
12 within the federal copyright law. If you bring
13 them in entirely then you don't have to always
14 think about whether we want to bring them
15 within a new means exploitation or not.

16 I don't think it's correct to say,
17 well, what should their expectation be? They
18 never before had expectations of a performing
19 right because the manner in which works are
20 being exploited is just changing. Historically
21 people got their revenues from the sale of
22 copies of recordings. And now it's coming to

1 be that it's more from the public performance.
2 So I don't think that that's somehow outside
3 of the constitutional bargain. And I think the
4 Eldred case actually speaks to the nature of
5 the constitutional bargain and expectations in
6 a helpful way.

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

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

20 MR. KOHN: Thank you. So I do
21 believe that the pre-1972 sound recordings
22 should be added to the federal copyright

1 regime. And it should be subject to the
2 exceptions along with all the other
3 recordings, mainly because of the thing I was
4 saying yesterday, it reduces transaction cost.

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

19 Well, going back to the purpose of
20 the copyright law, the copyright law's purpose
21 is not to compensate the owners, it's to
22 promote the creation and availability of the

1 works. So, where does that leave you? Well, in
2 terms of promoting the creation of the works,
3 these works were created a long, long time
4 ago. I think in Breyer's descent in the
5 Eldridge case talked about there is no
6 incentive to create these works. So you can't
7 extend the term.

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

21 Because, if you have these
22 extended terms, they may never become

1 available to the public, which is the purpose
2 of the copyright law. So I do think there
3 needs to be some mechanism here. Now, either
4 you treat this as some kind of new right like
5 you did the public performances of sound
6 recordings and it doesn't go to the current
7 owners necessarily, but through some kind of
8 sound exchange, you know, where the artists
9 get half, et cetera. But that still doesn't
10 help you in terms of getting that recording
11 out there.

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

1 public.

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

14 MR. DAMLE: Thanks. Mr. Merrill?

15 MR. MERRILL: Thank you. Briefly,
16 we work with a number of these artists. So to
17 say that this is premature to move forward on
18 this is a big tough from my perspective. You
19 know, Horace Silver passing last week not
20 being paid what is owed to him, it's tough.
21 And to hear that 90 percent of income is being
22 lost because of this is fascinating to me. I

1 don't know anybody at this table that if they
2 lost 90 percent of their income could possibly
3 continue forward. You know, this boils down to
4 the fact that it's a fundamental right to be
5 paid for your work.

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

12 MR. DAMLE: Thank you. Mr. Rich?

13 MR. RICH: Just a few points. I
14 think it's important for the record to note
15 that no major consumer of music, to my
16 knowledge, has advocated the expansion, full
17 federal expansion that's been advocated by
18 certain people around this table. But, more
19 notably for this purpose, neither of the major
20 two trade associations -- both sitting around
21 this table -- in their public positions over
22 a long time has advocated for such a full

1 federalization either. That is, the RIAA has
2 opposed it and SoundExchange has opposed it in
3 favor of this procedural device. Now, the
4 comments have become a bit more couched in the
5 last round. Which is, we are willing to
6 Aconsider@ getting around the complexities.
7 It's an unusual circumstance in which neither
8 side of the debate, in terms of the largest
9 constituents whose oxes will be gored and/or
10 who are potential beneficiaries, advocates for
11 full copyright federalization. That I think is
12 a weighty consideration.

13 Secondly, I found Mr. Kohn's
14 comments interesting. He correctly cites the
15 instigators for copyright, which are creation
16 and availability. If you take a service like
17 SiriusXM, which has been cited in the room, we
18 know it's a given as pointed out that there
19 won't be any creation stimulated. And could
20 anyone doubt but that the broad representation
21 of pre-1972 sound recordings on SiriusXM has
22 promoted their broad availability? So, in that

1 sense, the purposes of copyright would not be
2 furthered by the new copyright legislation.
3 With respect to transactional efficiencies,
4 the premise of that argument is that there is
5 existing a viable body -- although a
6 patchwork@ -- of state law that otherwise
7 protects it. But that's a very dubious
8 proposition.

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

1 public performance right in sound recordings.@

2 Thank you.

3 MR. DAMLE: Mr. Rinkerman?

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

19 I do think that the purpose of
20 getting these works out and heard and learned
21 from would be served by making it economically
22 easy to do that for our, you know, for our

1 distributors, for our services who are paying
2 anyway for a lot of these pre-1972 works. So
3 I would suggest that we think about copyright
4 as a potential basis. But, if we lose that,
5 we're not completely lost. Again, we've done
6 tricks before with the trademark law. With
7 regard to the Respect Act, I think it's a step
8 in the right direction. If we wait for full
9 federalization I think we may be waiting a
10 long time. So I do think it addresses part of
11 the problem, not all of it. I would prefer
12 that we have a full federal scheme where you'd
13 have termination rights and fair use
14 principles so that we can address some of Jon
15 Samuels' concerns that there may be instances
16 where we'd want the courts to apply the
17 factors that we apply in federal litigation to
18 determine what is and is not fair use. So,
19 anyway, that's basically what I have to say.
20 I think it's something that needs to be done.
21 It's a wrong that needs to be addressed. And
22 there are many ways to do it.

1 MR. DAMLE: Thank you. I see some,
2 a few more placards up. I will just note that
3 we are now eating in to lunch time, so to
4 speak. So I'll just ask you to keep your
5 comments brief if possible. Ms. Griffin?

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

9 One, the question about what
10 consumer groups have supported federalizing,
11 we at Public Knowledge have. And the
12 Electronic Frontier Foundation has as well. I
13 don't want to speak for them. But my sense is
14 that their concerns are similar to ours of
15 killing speech and innovation because of the
16 uncertainty. I don't think anyone would accuse
17 either of our groups of being copyright
18 maximalists. So, I don't think that's just us
19 being crazy but rather, you know, these are
20 serious concerns. And, kind of related to
21 that, to respond to the note about whether
22 there is a chilling effect or not, I think you

1 mentioned that there can't be a chilling
2 effect because some services have just not
3 paid. But, as we've seen, some of those
4 services have gotten sued and have
5 potentially, if they lose, are going to be
6 liable for a lot of money. And therein lies
7 the chilling effect because, who knows what's
8 going to happen? If you are a new entrepreneur
9 looking at the space, wanting to bring new
10 competition in, do you really want to get in
11 to that fight.

12 MS. CHARLESWORTH: Can you turn on
13 your mic?

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

21 MS. GRIFFIN: But it's hard to know
22 exactly what to license because of the

1 patchwork of state laws and the uncertainty
2 with the pending litigation about what exactly
3 the liability is.

4 MR. DAMLE: Ms. Chertokf?

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

17 And, as to the notion of public
18 right of termination, this is not an issue
19 that I discuss with our members. So I guess I
20 put this as my personal view. But, having a
21 public right of termination seems somewhat
22 troubling to me. I mean, the idea that I

1 understand for termination right is to let the
2 creator or their heirs recapture some of the
3 value. It was not meant as a mechanism for
4 getting works in to the public domain.

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

16 MS. CHERTOKF: I think it's a fair
17 question to ask. I think a lot of the old
18 works, with the advent of digital
19 distribution, it's a lot easier to
20 commercialize things. So you don't have to go
21 through a manufacturing process and ship
22 physical product and all that. And, you know,

1 it's the whole long-tail question. And so it's
2 easy to put it on iTunes and if it only sells
3 one copy every year or two it doesn't matter
4 because you haven't had to manufacture it.
5 But, beyond that, my understanding is that
6 there have been partnerships between labels
7 and other groups that want to re-release some
8 of these old recordings. And I would say let
9 the marketplace address that.

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

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

20 MR. RAE: Retroactively applied.
21 But, if after full federalization --

22 MS. CHERTOKF: A new grant, if a

1 new grant was issued after -- what the
2 Copyright Office said, if a new grant was
3 issued after federalization --

4 MS. CHARLESWORTH: Right.

5 MS. CHERTOKF: -- then --

6 MS. CHARLESWORTH: Then that, yes.

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

15 MR. KOHN: Right, when we added the
16 performance right, the exclusive right of
17 digital audio transmissions, you could take
18 the position that there was a taking from the
19 record companies and giving 50 percent to the
20 artists. When you're talking about putting up
21 a new right it shouldn't be a taking by adding
22 a termination right at all.

1 MS. CHARLESWORTH: Well, I think
2 there's a dispute about whether it's a new
3 right. I mean, I think that's being litigated.

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

1 MR. DAMLE: Mr. Samuel?

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

21 MR. KOHN: And may I add, I have
22 personal experience in going to the major

1 record companies to get licenses to things
2 from the 1960's or recordings from the 60's.
3 And I was only able to get the rights to
4 manufacture. I could never get the digital
5 rights. Even though so if I didn't even get
6 the manufacturing rights they might not have
7 ever come out of the vault.

8 MR. DAMLE: Mr. Fakler?

9 MR. FAKLER: Thanks. Just to
10 briefly respond to a couple of things that
11 were said earlier, the non-interactive public
12 performance right, which is what we are
13 talking about here because, as Ms. Finkelstein
14 mentioned, in the interactive world they are
15 already getting the royalties through these
16 direct deals. That performance income is
17 nowhere near approaching the primary revenue
18 sources for recording artists, okay? And it's
19 certainly not 90 percent of their income. It
20 just isn't. And, as somebody who has
21 represented legacy artists and their disputes
22 with their record companies, I would say that

1 by far the larger driver of the financial
2 difficulties that legacy artists have right
3 now are the terms of their record contracts
4 and the record company accounting practices
5 that have been routinely used to share less
6 and less money with these legacy artists. And
7 the one example, all you've got to look at is
8 what's happened for digital downloads. And, by
9 the way, these legacy artists who stopped
10 putting out new material, and so they can't
11 renegotiate the deals to get higher rates,
12 they tend to have much lower rates than
13 current artists have to begin with, even for
14 normal retail channel sales.

15 But, you have that whole dispute
16 about downloads where these third party
17 licenses, under the old agreements they've got
18 a much better split. But the record companies
19 fought it and forced them to litigate. Very
20 few artists can afford to litigate, even after
21 winning, you know, through two appeals. The
22 record company still refused to pay legacy

1 artists that way. So the notion that non-
2 interactive performance services have to make
3 up for this maltreatment of these legacy
4 artists, I don't think is particularly fair.

5 MR. DAMLE: Okay. Thank you.

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

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

13 One is termination in section 203
14 or 304, which is termination of a grant. And
15 the other, which people are calling
16 termination, is termination of a copyright.
17 And that's not, I don't think, something that
18 the report talked about or the statute talks
19 about or anything like that. Just in terms of
20 what the proposal -- what the Copyright Office
21 proposal would say about the expiration of the
22 copyright term: Currently under state law all

1 protection for pre-1972 sound recordings has
2 to end by 2067.

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

13 But if you started to exploit it,
14 you continued to exploit it, and you filed in
15 the Copyright Office to indicate you intended
16 to do that, then you could get up to 25 years.
17 It would still cut off some period, the period
18 from 25 years after the effective date of the
19 federalizing act to 2067. So some works would
20 go into the public domain earlier. But that
21 would be old works whose right holders did not
22 have an interest in continuing to exploit

1 them. For example, bird calls or whatever it
2 may be. But there was nothing in the report
3 about terminating copyrights per se. And no
4 one could go in and terminate somebody else's
5 copyright.

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

19 And whatever mechanism you want to
20 call it, whether it's a termination, certainly
21 wouldn't be a termination of a grant. But it
22 might have been maybe the original recording

1 agreement would be considered a grant and
2 still questioned as to whether that was work
3 for hire. I suppose that's still up in the air
4 too. But I don't want to get in to all that.

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

7 MR. RUSHING: I'll be quick. So
8 just one clarification. Mr. Rich suggested
9 that SoundExchange was opposed to full
10 federalization. It's actually something we
11 don't have a position on. It's not our area.
12 The ins and outs of termination and what not
13 is not really in our wheel house. What we do
14 have an interest in is the proper functioning
15 of the statutory license. And pre-1972 sound
16 recordings and their treatment just represents
17 a gigantic hole in the license right now that
18 can be easily applied. The other thing we have
19 an interest in is making sure that artists are
20 participating in the revenue stream. I think
21 Mr. Fakler is simply wrong when he suggests
22 that this revenue stream isn't important to

1 the artists. It's critical and it's a
2 significant problem that legacy artists have
3 had this revenue stream cut off the way that
4 they have.

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

8 (Whereupon, at 12:33 p.m., the
9 above-entitled matter was recessed for lunch.)

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

1:50 p.m.

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

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

MS. CHARLESWORTH: Okay. So that concludes our commercial announcement. So I said this in L.A., you know, this is I think the best panel. Why? I hope we'll see.

1 Because we get to really sort of
2 try and draw on what we've heard for the past
3 couple of days and perhaps make some
4 suggestions for the future. I think we've
5 heard a lot of different perspectives. But
6 there's no one just sort of sitting here
7 saying this system is perfect as is.

8 So, what we are interested in
9 learning during this session is your thoughts
10 and ideas. And feel free to put some creative
11 ideas out there, because we need them, in
12 terms of how to move forward. I think, in
13 addition to substance, if you have ideas about
14 sort of process or how the various
15 stakeholders might continue to engage in a
16 dialogue about how to resolve some of the
17 issues we heard about, that would be useful.
18 But, obviously we are also interested in your
19 thoughts about what sort of comprehensive fix
20 might look like. And I won't take up more of
21 the time, your time, your speaking time. I'll
22 just turn it over right now and ask for

1 thoughts about the future. Ms. Butler?

2 MS. BUTLER: Thank you.

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

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

22 So, in 1999 when I was practicing

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

11 (Laughter.)

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

19 MS. CHARLESWORTH: So this was a
20 licensing nightmare.

21 MS. BUTLER: One hundred rights in
22 three months I had to clear. But the thing was

1 it was also a live webcast around the world.
2 It was impossible to clear all rights for a
3 worldwide live webcast. We are now 15 years
4 later and it is still the same challenge,
5 surprisingly. If you want to have a live
6 webcast around the world, to clear those
7 rights. So I hope that in the future the
8 digital services have the kinds of products
9 that are so creative that they can be put out
10 on all kinds of digital services so that we're
11 not just hearing audio only. But, in order to
12 do this, I urge all of you emphatically to
13 please communicate and coordinate with your
14 partners internationally because this is now
15 truly an international business. So I would
16 just like to bring up quickly four points to
17 consider.

18 One point, withdrawal of rights.
19 This is not new. It is happening with ASCAP
20 and BMI right now, but in the 1970's the
21 competition authorities in Europe told the
22 collective right societies that they must

1 allow the right holders the right to withdraw
2 either certain types of rights or rights for
3 certain uses. And this is kind of categorizing
4 for withdrawing rights known as the GEMA
5 categories, GEMA being the German collective
6 rights society.

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

21 Whether it's, for example, the
22 publishers negotiating certain prices and then

1 societies taking the next step and not just
2 administering, but perhaps also being involved
3 in other ways, societies are also involved. It
4 is not only major publishers, a number of
5 indie publishers have withdrawn rights over
6 there as well. And they have even formed
7 organizations.

8 One is called Impel. That is based
9 in the U.K. Also we can also look at France
10 where they have an arbitration system. If
11 people are unhappy here with the way the rate
12 court proceedings are being run then perhaps
13 reach out to societies in France and find out
14 how it's working in France for that kind of an
15 arbitration system. So, for withdrawal of
16 rights I urge you to work with those people
17 who have this experience in deciding the step
18 forward in those areas. The second point is on
19 data and databases identifying right holders.
20 It was my privilege to be able to have access
21 to technology systems to demonstrate, to have
22 demos on, and to report on a number of the

1 collective right societies in Europe. This is
2 back in 2009, 2010. And that includes CISAC,
3 the Paris-based trade group for the collective
4 rights societies. CISAC handles some
5 identifiers and standards for identifiers,
6 which was brought up yesterday, the ISWC.
7 CISAC gave me access to all of that
8 information that a number of right holders,
9 publishers and others did not have access to.
10 As a result of my findings it is imperative
11 that any work done in the areas of standards
12 and repertoire databases in the U.S. please,
13 again, be done while communicating and
14 coordinating with the people who have already
15 begun this work over there.

16 Because, for every 1,000 dollars
17 spent by any one, by any of the right holders,
18 by anyone who represents right holders, for
19 1,000 dollars spent that is equivalent of
20 about 11,000 downloads, revenue that will not
21 go to songwriters and publishers if spent on
22 duplicative databases, and 1,000 dollars is is

1 equivalent to mnprobably a couple hundred
2 thousand streams. So please coordinate with
3 them. Also, the desire to avoid duplication of
4 the systems in Europe is one of the reasons
5 that the Global Repertoire Database, the GRD,
6 was started some years ago. The GRD was begun
7 because European Commissioner Neelie Kroes,
8 who was then head of the competition unit, who
9 put pressure on the societies, the right
10 holders and digital services to work on this.
11 Neelie Kroes then moved from the competition
12 unit over to the digital unit. And the
13 pressure the create the GRD was kind of eased.
14 And recently the GRD splintered for a number
15 of reasons into different sections. But they
16 are still working on a database to identify
17 works. So, again, please understand that
18 experiences in Europe prove that the mapping
19 that was talked about yesterday for data, it
20 is not as easy as it sounds.

21 There are people that have this
22 experience that have been working on it now

1 for a number of years in Europe. So, again, I
2 urge you to connect with the partners over
3 there so the duplication is not occurring.
4 And, as one person said to me, who was working
5 on the GRD and who understands the importance
6 of one centralized database identifying works
7 as opposed to decentralized, multiple
8 databases with works information, recently,
9 said, you can have two watches. If you have
10 one watch, and he was talking about
11 centralized databases versus decentralized. He
12 said, if you have one watch you know the time.
13 If you have two watches you have uncertainty.

14 So I urge you to work with your
15 partners in that area of databases identifying
16 copyrighted works. The third point is that is
17 not a European problem that they are working
18 on over there related to identifying works and
19 creating a works database. Up to 50 percent,
20 if not more, of the repertoire that is sold
21 and used over in Europe is American. That's
22 another reason to be working with your

1 European counterparts to make sure efforts
2 related to copyright are working. The fourth
3 point I'd like to make is actually in the form
4 of raising some questions for you all to
5 consider. Four of them.

6 One is, should the concept of
7 distribution be looked at in a different way
8 now? We have always looked at broadcasts as
9 performances and the movement of physical
10 units as distribution. But when I think of
11 India, I recall it was once, about 10 or 12
12 years ago, the largest seller of cassette
13 recordings in the world. India did so well
14 distributing cassettes even. Aside from the
15 physical goods piracy, there was still a huge
16 market for that. However, FM radio was
17 introduced relatively recently in India. And
18 it really got off the ground as privately
19 owned radio stations in the early 2000's came
20 into existence. What they found was that the
21 taxi cab drivers in India started replacing
22 all of the cassettes with radio and there was

1 a dramatic drop off in cassette sales. So the
2 question to ask is now is streaming, and is
3 broadcast, really a form of distribution
4 today? This is a question you may all want to
5 think about.

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

10 MS. BUTLER: Yes, two more points.

11 MS. CHARLESWORTH: Okay.

12 MS. BUTLER: And so the other point
13 is that there are fewer songwriters today. But
14 the question is, is that because also a factor
15 that consumers are buying the hits and so the
16 songwriters who are writing the album tracks
17 are the ones who are no longer seeing the
18 money and no longer making a living like they
19 once were? And finally I would like to caution
20 everyone on the use of comparisons. I urge you
21 to be careful in comparisons because, if you
22 have, for example, two million streams, that

1 may seem like a lot and songwriters may be
2 surprised by how little money they receive for
3 the streams, but in fact all of those streams
4 may be only the equivalent of one airplay in
5 one large city, which songwriters would not
6 receive any compensation for that you would
7 not see any. So, as you are looking at
8 licensing in the digital market, just please
9 be cautious when using comparisons. It's not
10 easy to do so accurately with the old with the
11 new. Thank you.

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

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

22 One being trying to ensure fair

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

14 For example, we have stated very
15 specifically we should retain first use, have
16 no pass-through, have an audit right, bundle
17 rights, have transparency for songwriters,
18 have fair market value, get rid of the CRB and
19 the rate court, and have some kind of
20 collective licensing to make it easier for
21 digital music services. And then there's the
22 question of, all right, how do you set that

1 rate at the right point in time in the market?
2 You know, we had one idea but we are very open
3 to discussing others. So, whether it's now or
4 later I look forward to continuing that
5 discussion with others on the panel.

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

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

12 MS. CHARLESWORTH: So we are all
13 ears.

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

1 shows how pathetic my life is.

2 (Laughter.)

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

12 And if this was more of a proposal
13 whereby we would be partnering in all aspects
14 of it -- and I know you've raised these issues
15 about audit rights. Well, you know, we've had
16 issues about audit rights and partnering on
17 that before. What is the split is going to be,
18 I mean, that negotiation has started before
19 when we heard about all the investments and
20 all of that. And, of course, the key thing is
21 will we be able to approve deals? Will we be
22 part of that process? Will be actually dealing

1 with having a direct line to licensees? Our
2 position is that the best thing to do is to
3 empower music publishers. And I think that
4 with all of the good intentions that you are
5 talking about in your proposal -- and we can
6 continue to talk about this beyond this
7 meeting.

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

19 But the idea that we can deal with
20 these problems ahead of time, deal with the
21 royalty split that is dealt with outside of
22 understanding what services are out there down

1 the road. I think that's the wrong place to
2 start. So I would recommend a conversation
3 about publishers and labels partnering
4 together and seeing what we can come up with
5 and no what this is, which is really like how
6 could we grant you the rights like artists do
7 to you go out, make the deals and then come
8 back and give us a piece of the pie? That's
9 about as simple as I could, quickly as I could
10 go over that.

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

17 MR. ROSENTHAL: Oh, absolutely.

18 MS. CHARLESWORTH: Would there be a
19 collective. If you can, do you want to paint
20 your picture a little bit and then we'll turn
21 --

22 MR. ROSENTHAL: Well, first of all,

1 when we talk about the free market, it's tough
2 to paint a picture because part of the free
3 market is dealing with situations as they
4 arise in the free market. But, certainly in
5 terms of organizational, we have players out
6 there, the PRO's, in a big sense, a big group,
7 dealing with administration. We have many
8 companies in the marketplace. In our
9 submission we have named many of them, dozens
10 actually, about who are already involved in
11 administering rights on somewhat of a
12 collective basis across the board. That's my
13 vision. I see the free market taking care of
14 the problems that government is trying to take
15 care of and can't and really doesn't
16 comprehend. And it's going to get worse and
17 worse because it's going to get more
18 complicated. So I think that the answer is
19 there's innovation that we have to put our
20 faith in the free market. And that these
21 services will step up to the plate. We already
22 talked about it, public performance where,

1 okay, withdrawal of rights, well, maybe ASCAP
2 and BMI can still do administrative services.
3 HFA does administrative services outside of
4 what they used to do. This we have to let
5 happen in a free market without the
6 restrictions of government. And I think that
7 we'll be in a better place.

8 MS. CHARLESWORTH: Okay. Mr.
9 Bengloff?

10 MR. BENGLOFF: Thank you.

11 Susan, by the way, in our
12 community one of the reasons independents have
13 grown so much is because they sell a body of
14 work as opposed to individual singles. So the
15 songwriters in our community to a large
16 extent, who often are the same people as the
17 sound recording owners, are actually doing all
18 right when we talk to independent publishers
19 and we know what some of our labels are
20 paying. But I'm not here to tell Jay how to do
21 his job here today. So I'm going to talk about
22 the sound recording instead.

1 One of the biggest issues for us
2 is, and I think for everyone, is a simpler,
3 more efficient system of licensing to make
4 sure consumers have access to music. I see a
5 number of people I know around this table who
6 would appreciate having a simpler system for
7 licensing. Independent music labels are big
8 supporters of collective licensing and the
9 expansion or modification of the compulsory
10 statutory license. Unfortunately, under U.S.
11 antitrust laws, collective negotiation of
12 interactive, on-demand licenses by independent
13 music labels is limited. You know, we are
14 barred from negotiating collectively because
15 there is a feeling that it would allow
16 consumers -- it would somehow hurt
17 competitiveness in the marketplace when in
18 fact it would allow consumers greater choice
19 and broader music service choices as these
20 barriers are lowered.

21 Government may be able to
22 encourage this collective licensing by

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

20 MS. CHARLESWORTH: Okay. Thank you.

21 And who was next? I think maybe Peter Brodsky,
22 Mr. Brodsky.

1 MR. BRODSKY: Thanks, Peter
2 Brodsky, Executive Vice President of business
3 and legal affairs at Sony/ATV Music
4 Publishing. With respect to the RIAA proposal,
5 you know, we appreciate there's a lot of good
6 in there about fair rates and things like
7 that. But I think what gets lost -- I mean,
8 the way I read it and I do have some more of
9 a life more than Jay, because I only read it
10 twice.

11 (Laughter.)

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

20 And it's just not the case. I
21 mean, we represent songwriters, most of which
22 are not recording artists. We cherish the

1 songs, that's why we are music publishers. And
2 we spend a lot of money to acquire the best
3 songs that we can. We spend a lot of money
4 developing songwriters. We spend a lot of
5 money marketing and engaging in licensing
6 activities. And, for the RIA to say, well, you
7 know what? You should just give all of that to
8 us because the market is better served because
9 of that. It's a head scratcher for us. It's
10 not something that we really -- it's not a
11 road we want to go down. That's it.

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

17 MR. BRODSKY: Well, the encouraging
18 part is, you know, the part about, you know,
19 fair rates on audit rights and things like
20 that. I think that's obviously things that we
21 are in favor of. But, giving away, giving them
22 more rights to license on our behalf, it

1 doesn't suit us. And, frankly, in many
2 instances I don't even think it would suit
3 them. I can name dozens of instances where a
4 music publisher through their licensing and
5 marketing activities has broken a record
6 before the label has, getting a sync here or
7 there or putting a song on to American Idol or
8 whatever it is. That would go away under their
9 proposal.

10 MR. MARKS: I don't think so. I
11 think maybe there's just a misunderstanding of
12 our proposal. And maybe it's just tied up with
13 the way we suggested to do rates. But, if you
14 take that off the table and, you know, start
15 with what Jay ended with, which was, you know,
16 having publishers and labels and songwriters
17 and creators be part of a discussion to figure
18 out what the rates should be, forget the
19 percentage and the ratio, because I think
20 that's what's getting some folks caught up and
21 us in the rights being given to us. Establish
22 whatever rate you want at the beginning. And

1 say, this is the rate for our products so you
2 have complete control over that and what that
3 rate is.

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

11 We're saying you have the
12 relationship, you have the license. The
13 service takes the license through on a blanket
14 basis for and pays directly to whatever entity
15 that publishers and songwriters think is the
16 best to collect. And, you know, all the other
17 things, bundling the rights and everything
18 else. So I think there's just a
19 misunderstanding about what it is. But I don't
20 think it works to just say, well, we're going
21 to go in to the free market and then say,
22 notwithstanding the fact that the label

1 invested at some point in time this amount of
2 money in order to create this recording,
3 market it and exploit it, that somebody is
4 going to come in later and say, no, you can't
5 exploit that unless we get it. Let's set the
6 market rates at the time they should be set,
7 which is, you know, at the time the decision
8 about using that composition in a particular
9 recording is used. And that free market
10 discussion can happen at that point. And we
11 can set rates up front on an industry basis if
12 it makes it easier. I haven't heard an
13 alternative to that, other than, you know,
14 criticisms. So maybe take the ratio thing off
15 the table if it is clouding the picture too
16 much.

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

19 MR. BRODSKY: Yes, I don't know. It
20 seems to me that there's this perception that
21 we are blocking commerce, which couldn't be
22 farther from the truth. I mean, we want to

1 license. That's our lifeblood, is licensing
2 our songs in as many possible ways as
3 possible. The fact that somebody might go to
4 a record label first and then come to us,
5 great. Sometimes they come to us before they
6 go to the record labels. I don't know if I'm
7 misreading the proposal, but I'm still -- what
8 I got out of it is we should grant the labels
9 the right to license on our behalf. We should
10 come up with a percentage of what we get of
11 their share and just close our eyes and make
12 a deal.

13 MR. MARKS: I'm saying, forget the
14 percentage, but if you're talking about
15 licensing the composition in the free market,
16 the license should occur at the time that the
17 composition is created and then brought to the
18 artist or the label to be put in to a
19 recording. At that point you set the price for
20 whatever that composition, you know, should be
21 and whatever your terms of exploitation are.
22 The artist and the label can make a decision

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

10 Because it just creates too much
11 uncertainty.

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

22 MR. MARKS: But how does a label

1 make an investment in something without
2 knowing whether it's going to be able to
3 exploit it on Google service or somebody
4 else's service?

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

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

1 off basis.

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

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

18 Because we get in to these
19 discussions constantly about how the record
20 labels and publishers and PRO's are going to
21 interact and, you know, make this work with
22 even the data and all this stuff. But, at the

1 end of the day, songwriters need several
2 things out of some sort of MRO or some sort of
3 general designated agent. What we need, first
4 of all, is efficiencies of scale to lower the
5 transaction cost.

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

19 Because that's where there's --
20 the fees are going to be determined, okay? And
21 we have more interest in keeping the fees
22 lower than anybody. So we would like

1 representation on the board. Then we need a
2 dispute resolution body of some sort on this
3 MRO so that when there's questions about
4 statements we are not completely in the dark,
5 we can actually go to somebody and question
6 what's on our statement, whether it's correct,
7 whether we got paid everything that was coming
8 to us. And, in terms of transparency, we
9 really, really need to see the data up stream
10 from the publishers. We need to see it when it
11 comes from the service, before it gets in to
12 the black box. We just want to see how much we
13 sold, okay? I think that's fair. And, if we
14 are talking about blending all our rights and
15 making it easier for all the users, then we
16 should get something in this return.

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

21 MS. BUTLER: I posed the question.

22 MR. CARNES: Right, okay. So here's

1 the answer. The group of songwriters that are
2 writing the album cuts and hits, that's not
3 mutually exclusive groups. That's the same
4 group of people. So you're actually losing
5 songwriters in general, not just specific
6 ones.

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

10 MR. DONNELLY: Sorry to interrupt
11 your fight.

12 MS. CHARLESWORTH: Oh did I?

13 MR. DONNELLY: I think if we made
14 anything clear from SiriusXM's position is we
15 really believe in three things. We think the
16 time is now for comprehensive reform,
17 continuing some of these piecemeal reforms.
18 Whether it's songwriters, equity or Respect
19 Act makes no sense. It's time for reform. We
20 believe in parity. We believe very strongly in
21 parity among platforms. But, most of all, for
22 the purposes of this panel we think if nothing

1 comes out of this we need a centralized
2 database. We really need to focus on, you
3 know, new standards for reporting and finding
4 a centralized database where this can exist,
5 it can exist for the benefit of licensors and
6 it can exist for the benefits of the users of
7 music. And, if nothing came out of this other
8 than a database and improving the information,
9 that would be a tremendous victory.

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

15 MR. DONNELLY: I pay a lot in
16 taxes.

17 MS. CHARLESWORTH: Yes, we'll talk
18 to the Appropriations Committee. Could you
19 please double our budget so we can build a
20 database? No. I mean, it is a serious question
21 in the sense that I think it seems like
22 everyone would benefit from it. But it's a

1 thorny question, sort of how do you, you know,
2 obviously there's the first question of who
3 should build it and how do you obtain the --
4 question two is how do you obtain the --

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

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

16 MR. ROSENTHAL: Okay, just as a
17 quick point. I mean, I think that Peter and I
18 and Steve are like two ships passing in the
19 night. Peter and I believe that publisher
20 certainly has the right and should, and this
21 is the right way to do it, to assess each
22 usage as it comes along. But, as a positive

1 side to this, we are already discussing micro-
2 licensing as a proposal for the future, I mean
3 if we're talking about positive moving
4 forward. Part of this micro-licensing concept
5 has been that publishers kind of sit back and
6 set some kind of a rate for certain types of
7 usage. And, if it's either the publisher or
8 the administrator, they would have a rate
9 card. They would say, well, for this we're
10 going to do that and you can go out, the
11 administrators can just cut the deals. That is
12 at least let's start a conversation in that
13 context to see how it works on that.

14 And we have committed to that. We
15 are talking about moving forward to micro-
16 licensing. I also think that in the free
17 market context micro-licensing is the way to
18 do cover versions of songs. And I know that
19 this issue has been raised before. How do you
20 do if you don't have a, you know, a 115, how
21 do bands do cover versions? Well, you can do
22 it through a micro-licensing concept, which is

1 that publishers, songwriters would accept,
2 okay, this is the rate I want for someone else
3 to do a cover version of my song. And it would
4 be out there. It would be granted to the
5 administrators. And that's how the business
6 and the market moves forward. So, instead of
7 this grandiose idea -- and I'll read it for a
8 fourth time, believe me. I'll look for it. The
9 fourth time out maybe I'll see the light. But
10 I think we should be discussing more on a
11 small level micro-licensing, see how that
12 works and then see the conversation and where
13 we could go with that and to see if we can
14 find some common ground.

15 MS. CHARLESWORTH: Mr. Duffett-
16 Smith?

17 MR. DUFFETT-SMITH: Thanks. So,
18 yes, Susan really appreciate the European
19 perspective. You know, we've dealt with a lot
20 of the issues relating to fragmentation of
21 rights and repertoires being split around the
22 European Union. And it's not been easy. It's

1 not been pretty. And, you know, I don't think
2 all the problems are resolved there. And, as
3 you said, the recommendation was in 2005. We
4 are nine years later and still there are
5 serious issues to sort out. So I would say
6 that anything that happens going forward, you
7 know, looks to the European perspective as
8 well, understands that there are serious and
9 complex issues. And, you know, hopefully the
10 U.S. can learn from that experience.

11 Because there are a lot of lessons
12 to be learned there. It's a very, very
13 challenging landscape to navigate.

14 Identification of works being particular
15 problem. So, you know, some kind of unified
16 database and principle is a great idea. But
17 just more generally, Mr. Brodsky, Mr. Marks,
18 it's quite interesting hearing you two
19 interact. I think it raises a very good point,
20 which is that, you know, you have to look at
21 this from both ends as the music producers,
22 the music creators and the services. You know,

1 we all have to be in this together. What I'm
2 concerned about is that the services become
3 collateral damage in a fight between the
4 different rights holders. And, you know, that
5 suits nobody. It doesn't suit the rights
6 holders. It doesn't suit the services. So
7 whatever it is that is done going forward, I
8 just -- look at everything holistically and
9 make sure you consider everybody.

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

12 MR. ROSEN: Well thanks. I'll just
13 make a couple of quick points. RIAA proposal,
14 I mean, you have to like the ambition of it.
15 And that's great. I think when you examine it
16 closely I think it starts falling apart. I
17 think publishers and PRO's serve different
18 constituents than the RIAA does. I'm not sure
19 they mesh just because it all falls under the
20 category of music. I think buying in to that
21 proposal buys in to the notion that there is
22 an overall fixed value for music and you kids

1 fight out what your allocation is of it. And
2 I don't buy into that.

3 Ultimately I do think it's
4 antithetical to what we are trying -- what at
5 least many of us are trying to pursue here,
6 which is to identify the free market value. I
7 think that we're operating at cross purposes
8 in some of this discussion. The notion that a
9 free market is going to be sleek and
10 streamlined and without problems, I don't buy
11 into that. I think on a macro sense a free
12 market will clarify and sharpen. I think down
13 on the ground it is sloppy and it's unruly and
14 there are winners and there are losers. And I
15 think if we are trying to pursue a painless
16 transition to free market I'm not sure we're
17 going to be able to accomplish what those who
18 are in favor of free market are trying to
19 achieve. And finally, just one last quick
20 point on data. You know, everybody agrees in
21 the need for transparency. And certainly BMI
22 has been a participant in the global

1 repertoire database and working with ASCAP and
2 so we are developing the Music Mark model to
3 perhaps reconcile data. Where I get a little
4 nervous about this is the notion that the data
5 that BMI has been developing for 75 years, or
6 ASCAP for longer, all of a sudden sort of
7 becomes a public good so that new entrants can
8 leverage off of that. Any solution that works
9 towards transparency, and we are in favor of
10 that, has got to address those, I think,
11 legitimate concerns.

12 MS. CHARLESWORTH: Okay. Mr. Gibbs?

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

17 Because I'm an artist, you know?
18 And I found myself in situations where I have
19 to deal with guys, who are on their level.
20 And, usually, we just find somebody else who
21 is on their level, unless I'm going in a room
22 with those guys, and they hash it out. But

1 then the problem becomes what happens after
2 they hash it out? You get a piece of paper, it
3 has some numbers on it. We don't know where
4 those numbers came from, we don't know
5 anything about it, other than the fact that
6 there is a sheet that usually says you get
7 zero. So what we really need, as artists, is
8 transparency through the whole chain, not just
9 when one guy sends us a statement, and another
10 guy sends us a statement.

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

22 Because we need the facts. All --

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

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

1 money.

2 So that is the main thing for us.
3 And on the same level of transparency,
4 specific policy things, we would like to see
5 -- let me get this right, we would like to see
6 an audit for Section 114. We would like to be
7 able to know, again on the transparency issue,
8 to know what every player is singing. We want
9 to see -- so we can make a fair assessment of
10 what we want to do. As far as micro licensing
11 we support regimes that retain value, artistic
12 and monetary to creators. We are looking for
13 a system that works across all musical genres,
14 all songwriting practices, that recognizes
15 that music can create, and be created in ways
16 unavailable to it previously, and it returns
17 value, both again, artistic and monetary to
18 the creators. And one more thing, talking
19 about kind of what we are thinking about the
20 future. As I said, in earlier comments, we as
21 creators like the SoundExchange model. We
22 would like to see it expanded. And one thing

1 that would be really interesting to us is
2 expanding the SoundExchange model to all
3 compulsory licenses.

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

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

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

15 MR. RAE: I have no idea. I'm on
16 team transparency, so that is what -- anyway.
17 So this is the Future Panel. I want you guys
18 to pretend that I just crashed here, in my
19 time machine, I'm from the future. It says so
20 right here, if you can believe this. What I'm
21 observing, in 2014, is an irresistible force
22 in media and technology, corporate media and

1 technology, in particular. And that is the
2 convergence of pipe, data, and content.

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

13 I also understand, because we are
14 all so passionate about music, regardless of
15 where we sit, that content still has value. It
16 is the actual reason that we all connect to
17 the network, so the question is, who gets to
18 participate in that value? I want to see more
19 people, like Melvin here, because those are
20 the guys that I think should participate in
21 that value. And the other question is, who
22 invests bringing more of it to the

1 marketplace? And sometimes I think where we
2 are getting hung up is the fact that people
3 are still trying to operate the business
4 models that they are accustomed to, and
5 provide some services that definitely benefit
6 creators, under conditions that have changed
7 and probably are not coming back. We have, in
8 my opinion, too many passive extractors of
9 value in the marketplace today. I would like
10 to think more about what allows the
11 encouragement of creativity, and how creators
12 are able to participate in that value that is
13 generated. This is all high concept stuff. I'm
14 not going to argue about 114 and 115 any more,
15 because I'm bored.

16 So this convergence, that I was
17 referencing earlier, is going to produce
18 outcomes that we can't even predict here, in
19 2014, sitting at this table. There are
20 companies that traditionally invested in the
21 creation of copyright, made or enabled its
22 creation, may not be the ones that do that in

1 the future. So my question is, if we end up in
2 a place where new players, in the marketplace,
3 are invested in the creation of copyright and
4 other forms of IP, how can we guarantee that
5 the creators are beneficiaries of whatever
6 value is created from that investment? We have
7 to, as creators, and those are the people that
8 I talk to, and speak for occasionally. I
9 wouldn't be so presumptuous as to say I speak
10 for all of them or even, you know, five of
11 them. We all have different opinions.

12 But what we are facing, right now,
13 is the fact that there is a lack of investment
14 in the creation of music, that gets to the
15 creator. And we are also facing a situation
16 where we have little leverage, or even
17 understanding of, how the existing systems
18 function. So the government can do its job by
19 trying to uphold part of the compact, in the
20 Constitution, which is to incentivize authors
21 to create new works, yes, ultimately to
22 benefit the public. And all of your companies,

1 and your organizations, are part of that
2 bringing it to the public. Yes, you are doing
3 it for profit, blah, blah, blah, blah. There
4 may be new players, you know, from the future,
5 or in the future, that participate in
6 investment in that creativity.

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

22 MS. CHARLESWORTH: Okay. Now,

1 coming back down to Earth, thank you Mr. Rae.

2 We give the floor to Mr. Reimer.

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

1 said, with others to improve that old system.

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

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

1 Congress is looking at.

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

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

21 MR. HARRISON: I have never --

22 MS. CHARLESWORTH: You look like

1 you are at a press conference.

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

22 And after the fact, the musicians

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

13 So the old model of licensing
14 based on a lot of uncertainties, and
15 salesmanship is, really, on a downward trend
16 from a consumer's view. I know which ads I
17 click through when I'm looking at a streaming
18 service. I know they are getting from that, I
19 know which musicians I'm listening to, and
20 which musicians they have tied those ads to,
21 based on my demographic preferences, and my
22 listening preferences. So as a consumer I'm

1 aware that the money that the company is
2 earning, from my add clicks, links back to
3 specific musicians, who are related to the
4 things I want to buy, or who I am as a person.
5 And it doesn't link to all of ASCAP and BMI's
6 catalog, only to a select few musicians. And
7 now my cell phone is telling me that I have to
8 get out of here, to pick up my kids, who
9 always buy stuff streaming.

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

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

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

18 MR. LEE: Intimidated, of course.

19 MS. CHARLESWORTH: No.

20 MR. LEE: First of all we want to
21 thank the Copyright Office for organizing this
22 exchange of ideas, it is always useful in

1 developing the final product. Copyright
2 reform, I think, can be a scary term to a lot
3 of people.

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

15 Improvement, to me, implies that
16 it would be great if we could do this all at
17 once. But, realistically, maybe everything
18 can't be done at once. And we have to bite off
19 what we can chew, and improve the process as
20 we go along. It seems, you know, from my
21 participation in the past couple of days,
22 blanket licensing is not really a concept that

1 is controversial. Blanket licensing brings a
2 lot of efficiencies to the process, both from
3 music users, and creators of music. So it
4 sounds like that is a fundamental and a
5 foundation, you know, for going forward with
6 any kind of improvement in copyrights. So we
7 support that. Direct licensing is an
8 interesting concept. I guess it is in the eye
9 of the beholder. It is, we believe, a valuable
10 alternative, or option that plays into getting
11 to the end game. Where we believe that the
12 free market is, really, the best methodology
13 in order to come up with the appropriate fees
14 and agreements between the music creators and
15 the music users.

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

18 MR. DIAB: So I just wanted to add
19 one point, and I'm sorry Mr. Harrison left,
20 because he actually sort of built the segue
21 for this. He mentioned that the data about
22 what music is consumed these days, given the

1 way that the streaming services are operated,
2 and you can go and see how many times a song
3 has been streamed, a lot of that data is
4 already out there. And I agree with him, I
5 think where we should hopefully be trying to
6 get to, is a system that is more transparent,
7 so that creators like Mr. Gibbs said, can see
8 actually what they are really earning, like
9 what the value of their music is.

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

13 Because ultimately if we make
14 other reforms that don't, ultimately, benefit
15 the creators and the songwriters, we will just
16 be back here, again, in years to come trying
17 to fix the same problem over and over again.
18 So I think improved transparency so that the
19 process is sort of laid bare. And I think Mr.
20 Duffett-Smith made a comment, earlier, about
21 the sort of conversation happening between the
22 recorded music side, and the publishing side,

1 in terms of services getting caught in the
2 middle. I absolutely agree with that. I think
3 it is something that we face at Youtube. I
4 think we will all the time. And I think
5 enhanced transparency into that sort of
6 holistic picture is something that definitely
7 would benefit the system.

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

12 MR. MARKS: Just a couple of quick
13 things. Mr. Gibbs, you were saying that you
14 wanted to expand the collective licenses to
15 the SoundExchange model. That is exactly what
16 our proposal was for musical works with one
17 very important exception. And that is that
18 there be no government oversight when it came
19 to publishers and songwriters setting their
20 rates like SoundExchange has to live with,
21 with the CRB. And the other comment I want to
22 make, you know, there has just been a lot of

1 discussion about free market, and getting into
2 the free market, and eliminating 115, et
3 cetera. I just think, at some point, we need
4 to be practical about the ability to make that
5 happen. I have listened, over the course of
6 six days of these roundtables, to a lot of
7 people say, to the publishers and songwriters,
8 that that just ain't going to happen, unless
9 the system is radically altered. I mean, I
10 think it is pretty clear the writing is on the
11 wall, in terms of their political opposition
12 to that.

13 And so it is fine to talk about
14 those things, but we have to come up with some
15 practical solutions rather than merely say,
16 you know, let's eliminate 115, or lets bundle
17 rights, and allow withdrawals from a PRO. I
18 just don't see that happening given the
19 statements that have been made around this
20 table for six days. So I hope that at some
21 point we can have the conversation, you know,
22 to figure out, so the uncertainty doesn't

1 exist, and services don't get caught in the
2 middle, and labels and publishers can provide,
3 I think, what the services really want. Which
4 is some certainty around the rates, you know,
5 for the music. And I will leave it at that.

6 MS. CHARLESWORTH: Okay. Mr.
7 Carnes?

8 MR. CARNES: Thank you. My
9 colleague Mr. Gibbs and then Mr. Diab, and
10 myself, we have used the word transparency a
11 lot. And I'm afraid that it is just too much
12 of a concept. And I wanted, like, give you
13 sort of a real life, right here and now, real
14 time example of the sort of informational
15 asymmetry that exists between creators and the
16 distributors of their work, okay? Yesterday
17 Mr. Marks said that he was tired of sweeping
18 statements about how advances in equity
19 shares, that they are getting from services
20 like Spotify or Pandora, that we are saying
21 that, that is not being distributed to the
22 artists. And he says that is absolutely wrong.

1 And so now I need to know how and why, okay?
2 Because this is information that I have
3 received from several sources. And so now I
4 need to know whether your companies are,
5 actually, taking equity positions, in these
6 organizations, and how that money is going to
7 be distributed to the artists.

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

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

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

19 MR. CARNES: See, this is --

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

22 MR. CARNES: And your members won't

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

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

16 MR. CARNES: Thank you so much.

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

19 MS. CHARLESWORTH: Okay. Mr. Gibbs,
20 then Mr. Bengloff.

21 MR. GIBBS: Thanks, Mr. Carnes, you
22 have brought up a couple of points that were

1 floating around. I mean, I didn't necessarily
2 want to touch the equity issue because it is
3 way outside of this. But, obviously, that is
4 money that is getting stopped in the chain,
5 that we will never see. And that we, because
6 it is basically an investment, it is a micro
7 investment that we are not seeing our share,
8 the result of that. I also wanted to thank Mr.
9 Diab for a shout-out, and I appreciated that.
10 Unfortunately now I'm going to have to step on
11 his shout-out, but don't hate me for it. Mr.
12 Harrison mentioned the add revenue, and
13 mentioned information. I can go on Google,
14 right now, and know exactly how many times
15 everything I have ever played on has been
16 torrented. It is no problem for me to find
17 that information out. The torrent companies
18 are supporting, they are using our music to
19 support their business model. None of that
20 money is passing through to us. That may or
21 may not be outside of the scope of what these
22 hearings are about. But if we are going to

1 talk about continued financing of music, we
2 are going to have to talk about -- if the
3 money is going to an ad supported model, we
4 are going to have to talk about how that ad
5 money is going to get to everybody who is
6 involved in creating the music.

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

17 MR. BENGLOFF: If our constituents
18 were allowed to negotiate collectively there
19 would be more standardization, it would be
20 easier to report, and it would be easier to
21 understand in terms of what is going on. I
22 just want to commend Mr. Gibbs, and that is --

1 I discussed this yesterday, that in the
2 testimony of our representative, who is going
3 to be at the House tomorrow, Darius Van Arman.
4 He includes these label fair digital deals
5 which have been endorsed by the International
6 Committee, WIN, World-Wide Independent
7 Network.

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

20 Because music should, actually --
21 the level of compensation is correct, I think,
22 all the creators would disagree. Mr. Donnelly

1 may disagree. But that -- I'm just teasing,
2 Pat. But all kidding aside, we feel it should
3 be, the compensation should be attributable to
4 consumption of music. Whether it be a stream,
5 whether it be a SOW, and that is what the goal
6 of the Copyright Office should be, to -- the
7 level of compensation is correct, let's
8 allocate it to the people who created the
9 music, and invested in that creation.

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

12 MR. BRODSKY: I just have two quick
13 points. The first on transparency. To me it
14 doesn't seem that transparency, which is
15 really an important issue, is only an issue
16 for copyright reform. I think it is a
17 voluntary activity that publishers can do
18 better at, that record labels can do better
19 at, and that services can do better at. And so
20 it is not only an issue for copyright reform.
21 The other issue, just to respond to what Steve
22 was saying, we agree, the abolishment of

1 Section 115 is not on the table right now.
2 What is on the table is the Songwriter Equity
3 Act. That is the change to 115 that we want,
4 801(b), in our opinion, creates artificially
5 deflated rights, and a willing buyer/willing
6 seller standard, we think will create fair
7 market value for us.

8 MS. CHARLESWORTH: Okay. Well, --

9 MR. MARKS: If I could respond?

10 MS. CHARLESWORTH: I'm sure you
11 could. All right, let's have a show of hands,
12 who want to allow -- no, Mr. Marks do you have
13 something, did you want to respond? We don't
14 want to deprive --

15 MR. MARKS: The only thing I would
16 point out is, you know, we support the change,
17 you know, willing buyer/willing seller so long
18 as we can get it, you know, across the board.
19 I think we all deserve that. But you are still
20 subject to a CRB setting your rates instead
21 of, you know, doing it through a negotiation
22 in the free market. So I -- that may be the

1 preference, you know, of the publishing and
2 songwriting community at the end of the day.
3 But I would think, you know, what we were
4 proposing, in concept, might be better than
5 that. So you are not subject to that.

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

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

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

21 MS. CHARLESWORTH: Okay. Well, we
22 have one more piece of this roundtable, which

1 is to allow anyone in the audience to step up
2 and say their peace. I think we will go right
3 to that, John, if you want to call people up?

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

15 MR. KOHN: I am only up here
16 because I wasn't on the panel to join that
17 discussion. But on this notion of free market,
18 and we have heard it from both sides, music
19 publishers as well as the record companies.
20 You know, I'm a libertarian and I'm, really,
21 for free markets, all right? But I have been
22 talking in the past couple of days, about the

1 problem with the free market and the way music
2 licensing works. I think anyone, and I minored
3 in economics, and I think if you talk to
4 economists they will tell you, that even in a
5 free market there are market failures that
6 government has to fix.

7 One, and it is generally called
8 externalities. You know, a negative
9 externality would be like Mike lighting up a
10 cigarette, causing cost. If there was a free
11 market I should be able to do that, but I'm
12 imposing costs on you so, therefore, I'm being
13 regulated not to do it. A positive externality
14 is me spending 1,000 dollars on perfume, or
15 whatever, and wearing it, causing a benefit to
16 people that are not being paid. So the
17 externality, the negative externality, the
18 negative externality -- this is economics,
19 what can I tell you? Is that when you have --
20 when you have the problem of a sound recording
21 and a musical work, together in the same
22 product, and you have the visibility of

1 rights, that causes, in a free market, causes
2 tremendous negative externalities which result
3 in, basically, in the transaction costs, that
4 nobody likes, except the people who actually
5 are a transaction cost. Like the individuals,
6 you know, each individual practically in this
7 room.

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

13 Because one can you say like
14 Spotify, they only have 70 percent of the
15 money to pay. They can't pay 120 percent of
16 their revenues. So there is the 70 percent,
17 that would probably be the high, or maybe it
18 could be a little bit higher than that. Others
19 like iTunes might pay 70 percent, book
20 publishers are getting 70 percent for ebooks.
21 Maybe Pandora gets a little less, and Webcasts
22 gets a little less, and terrestrial radio has

1 to pay, you know, money from these
2 organizations, a little bit less. But there is
3 a cap of the amount of money that you can
4 expect from any of these organizations like
5 Spotify. Now, if you allow the, let's say, if
6 you don't include the performance right, this
7 is just an example, if you don't include the
8 performance right in the digital license, and
9 you allow these major publishers to leave the
10 ASCAP and BMI, and the collective societies,
11 you are going to cause the same problem that
12 some of these gentlemen have been saying, that
13 is occurring in the music industry today.

14 And that is this parity problem.
15 That is, the independent record companies are
16 not getting a share of the equity that the
17 major record labels get. Even when the
18 independent record companies make up that
19 distributed market share. When the indie is
20 distributed by a major, the major counts that
21 in their share, that they are asking for, in
22 terms of the equity of these companies. And,

1 also, the independent record companies are not
2 getting better deals, they are not getting the
3 same deal that the major record companies are
4 getting. So what happens is, and if the
5 publishers get out of ASCAP, and they pull all
6 their rights, they are going to be just like
7 the major record companies. They are going to
8 be able to go and get more money out of
9 Spotify. Remember, Spotify only has 70
10 percent. So if the major publishers get more
11 than that, somebody is getting less. And it is
12 going to be everybody else. So the people,
13 here, are representing really the majors. And
14 you have a situation that is called a
15 monopsony.

16 If I'm a small publisher, and the
17 major publishers are getting a bigger share
18 from Spotify, I have an incentive to have the
19 major administer -- I know I have three
20 minutes. But I have an incentive to have the
21 majors administer my copyright. So the majors
22 get bigger and bigger. When you have a

1 situation where you have major publishers, a
2 few number of them, it is called a monopsony.
3 It is a mirror image of a monopoly. So me, as
4 an individual songwriter, or a small copyright
5 owner, have to deal with the monopsony. They
6 will try to pay me less for my copyrighted
7 work. So the Songwriter's Guild, here, and
8 anyone who represents songwriter here, really
9 should be very fearful of this open market,
10 free market scenario.

11 Because it allows the major
12 publishers to get monopsony power over them.
13 And when they get, when they get that
14 monopsony power, and they get -- they will pay
15 less share to the songwriters, they have no
16 incentive. They are going to keep that
17 themselves. I mean, that is when monopsony
18 power is. So the only way to solve this
19 problem, on the publishing side, is to fold
20 the public performance license into this
21 digital license. And you have to take in, as
22 Spotify was saying, you have to take into

1 consideration this holistic approach. Here is
2 the 70 percent, some of it goes to the sound
3 recording side, some of it goes to the music
4 publishing side. On the music publishing side,
5 depending upon the use, some of it goes to the
6 reproduction, some of it goes to the
7 performance. It is really the only way that I
8 can see this happening in the future. So all
9 this stuff, about free market is wrong. The
10 free market is broken here because of the
11 negative externalities. And if we didn't have
12 that concept we would have no pollution laws
13 today.

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

21 MR. BRODSKY: I did not study
22 economics and that is the first time I have

1 heard the word monopsony, so I'm not going to
2 address that. What I can say is that when we
3 did withdraw our rights, we did it on behalf
4 of songwriters. Songwriters benefitted from
5 those rights, because we were able to make
6 deals that we felt were free market deals,
7 that benefitted songwriters. We were able to
8 administer those withdrawn performance rights
9 at a highly reduced rate, that was a benefit
10 to songwriters. So I'm not sure how this
11 monopsony situation is anything but good for
12 songwriters.

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

15 MS. CHARLESWORTH: It always comes
16 down to Marybeth.

17 MR. ROSENTHAL: It always comes
18 back to Marybeth. That was a very interesting
19 performance, Bob. Basically we have had a
20 compulsory license for 105 years. If there is
21 a problem it is because of that. No free
22 market has ever been given a chance. So with

1 all the theories, with all the thinking, with
2 all the monopolies, monopsonies, whatever the
3 heck you want to call them, the free market
4 has never had a chance to develop anything
5 that is in favor of artists' rights, in favor
6 of songwriters' rights, against them. It is
7 time to give the free market a chance. And
8 Peters is absolutely right. That is not on the
9 table in terms of the legislative agenda. The
10 legislative agenda, right now, is more
11 limited, and it is to get the free market
12 going here. But let's listen to Marybeth when
13 she says that. If we have a problem here, it
14 is because of the compulsory, not in spite of
15 it.

16 MR. RILEY: Mr. Knife?

17 MR. KNIFE: So I'm going to take a
18 really long time, I have something to say to
19 everybody on the panel. No, I really -- I just
20 wanted to say, in closing. Number one, big
21 issues, a lot of stuff to talk about. I think
22 it has been a healthy discourse over the, you

1 know, over all three sessions. I thank
2 everybody who has appeared on all the panels,
3 it is a great exchange of ideas, and concerns.
4 And, obviously, we have a lot of work ahead of
5 ourselves. And I just wanted to thank the
6 Copyright Office folks for putting this on,
7 and for making sure that it moved forward with
8 a certain amount of grace, and alacrity. And
9 just, like I said, big job and well done,
10 thanks.

11 MS. CHARLESWORTH: Thank you, Mr.
12 Knife.

13 MR. RILEY: Mr. Brooks.

14 MR. BROOKS: My name is Tim Brooks.
15 I'm the Chair of the Copyright Committee of
16 the Association for Recorded Sound
17 Collections, which represents collectors,
18 scholars, and archivists who preserve these
19 recordings, that we are involved in talking
20 about here, that so often aren't preserved
21 otherwise. And there are a couple of points I
22 would like to make on behalf of our members.

1 First of all, as has been
2 mentioned by some but not enough, I think, of
3 the panelists I have heard today, we must have
4 availability of our cultural heritage, and our
5 historic recordings, in particular. And
6 specifically a public domain. As far as I know
7 the United States is the only country, in the
8 world, the only country in the world that does
9 not have a public domain for sound recordings.
10 And that is obscene. If my organization, ARSC,
11 who is located in Canada, we could put things
12 on our website. I'm talking about hundred year
13 old recordings now, or Europe, or any other
14 country. But we can't do it here. And that has
15 led to what some call dark archives, which I
16 think you have referenced earlier, the concept
17 at least, of recordings which exist but can't
18 be used by scholars, can't be heard by
19 students because they are under copyright. And
20 nobody can get the, at any reasonable rate,
21 the release of them for that kind of use. So
22 we need a public domain. Licensing, in our

1 view, is not the answer.

2 I think a close study of the
3 National Jukebox Agreement would bear that
4 out. Particularly licensing when one party in
5 the licensing negotiations has all the
6 leverage, and the other party does not. That
7 is not a reasonable negotiating position to be
8 in, if you are the licensor. So I don't think
9 licensing is the answer to that. The use it or
10 lose it, which is now the law in Europe, for
11 the latest stages of recording, has a lot of
12 face validity. Whatever kind of structure we
13 have, going forward, at least for the later
14 years of copyright, I think that makes a lot
15 of sense. And I think it does to the general
16 public, too. If you are not going to use it,
17 if you are not going to release it, and if you
18 are not going to make it available to future
19 generations, why have a law that lets you sit
20 on it, and not let anybody hear it? The
21 commercial recording companies were never
22 structured to be cultural custodians, nor

1 should they be, nor should they be. So that is
2 where the public comes in, that is where
3 scholars come in, that is where organizations
4 like mine come in. And, finally, the -- in
5 regards to the Respect Act, as we all know, I
6 hope, copyright is a trade-off.

7 You get something, you give
8 something. You get a government-enforced
9 monopoly, if you are the creator for,
10 supposedly, limited times. The government will
11 enforce that, and get big fines for you, if
12 necessary. But the tradeoff to that is the
13 public, eventually, gets to build on that work
14 that you created, many years from now,
15 probably after you are dead. The Respect Act
16 strikes me as half of that. We get the part we
17 want and we will deal with the rest later.
18 That is not a trade off. And I think, with all
19 due respect, the fact that yes, it is a start,
20 and it is an opening offer, and it should be
21 considered as that. I think we now need to
22 talk about full federalization of pre-1972

1 recordings, with the trade offs, including the
2 public domain, including fair use, including
3 the other things, the federal law begins, not
4 just half of the bargain. Thank you.

5 MS. CHARLESWORTH: Thank you very
6 much.

7 MR. RILEY: Mr. Sanders?

8 MR. SANDERS: Thanks, I'm going to
9 be really brief, because I made the same point
10 in Los Angeles last week. But Rick and I were
11 in a meeting last night with a group of 50 to
12 60 songwriters. And we promised we would
13 deliver this message, again. Like my friend,
14 Peter Brodsky, I did not study economics. But
15 I did study antitrust law in this building.
16 And I do know an unlevel playing field, when
17 I see one. And that was the message that we
18 were asked to deliver. The last speaker spoke
19 about inequity in bargaining position, and
20 that one side may have all the leverage. The
21 amount of vertical integration, that is taking
22 place in our industry, sometimes indicates

1 that it is not a matter of leverage, it is a
2 matter of the same companies, on the same
3 side, on both sides of the same table.

4 This is a reality that cannot be
5 ignored. The fact is that creators are given
6 the rights, or under Article 1, Section 8,
7 that it is the creators who are supposed to
8 benefit from the Copyright Act, and copyright
9 law. They have not been given the kinds of
10 either respect, or ability to articulate their
11 feelings about many of these issues. It is a
12 wonderful thing to have these meetings, and
13 these roundtables. It is great to be able to
14 articulate the point of view of the actual
15 creator. But without a recognition that there
16 is no free market in this situation, how can
17 there be? Unless, as Mr. Kohn pointed out,
18 there is some type of government oversight
19 that guarantees the rights of those people who
20 are being taken advantage of. We are spinning,
21 again, our wheels over and over, and over
22 again, for a situation that cannot be

1 resolved. So, again, this is the voice of the
2 songwriter asking to be recognized, and the
3 realities of the marketplace asking to be
4 recognized as well, thanks.

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

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

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

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

18 MR. REBO: Hello. I just wanted to
19 make a few comments regarding, first regarding
20 Lee Knife of the Digital Media Association
21 comments regarding piracy. He commented,
22 several sessions ago, it is what it is. And I

1 would like to speak in support of Rick Carnes'
2 comment, it is what it shouldn't be. And I
3 would like to extend that critique, a bit
4 further, by saying it is what commercial ad-
5 based, it meaning commercial ad-based piracy
6 is what the Digital Media Association's
7 corporate members have made it. It is what
8 those ad tech members, who broker ads to ad-
9 based black markets sights, are profiting from
10 its being. And, again, it is what it shouldn't
11 be. In order for the many comments based
12 around the restoration of a market for music,
13 to have any teeth, to make any sense to us,
14 that is the elephant in the room that needs to
15 be addressed. And, furthermore, it can be
16 addressed because, if Mr. Knife's organization
17 members cease brokering those ads, then that
18 piracy would end.

19 Because over 85 percent of the
20 commercial ad-based pirate sites are ad-
21 funded. So no ads, and then you would get --
22 the sites would disappear, and you would get

1 a restoration of the market. I want to stress,
2 again, that I'm talking about commercial ad-
3 based black market sites. I'm not talking
4 about kids in their bedroom, or dorm room.

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

14 But I would like to make a point
15 that they are not -- that the equality implied
16 in the Zaks is not exactly the case. And I
17 would like to directly urge the Copyright
18 Office that when, in the due course of time,
19 these comments are redacted into
20 recommendations, and those are cited in the
21 discussion on legislation, I would like you --
22 I hope that you will acknowledge that one of

1 the Zaks, the Zaks representing artists, and
2 musicians are a couple of non-profits with
3 volunteer members, in the case of our own
4 organization. And other of the Zaks,
5 particularly ad-tech corporations will be
6 dealing with lobby -- will have lobbying power
7 in the tens, if not approaching hundred
8 million range.

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

20 I hope the distinguished members
21 of the Copyright Office, and other people
22 here, will see the fact that our organization

1 even exists. That working artists and
2 musicians are now volunteering and organizing
3 to be present in this room, as a form of
4 screaming. And I hope you will hear us.

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

1 reform that benefitted our industry so much.

2 So with that I bid you good night.

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

6 (Whereupon, at 3:18 p.m., the
7 above-entitled matter was concluded.)

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