

**RIAA Ex. N-102-DP**

**RIAA Ex. N-102-DP - Transcripts from the  
proceedings of UK Copyright Tribunal – Day 1**

1 Wednesday, 15th November 2006

2 (2.00 pm)

3 THE CHAIRMAN: Good afternoon everybody. May I thank you  
4 very much first of all for the dramatis personae and the  
5 list of witnesses, very useful indeed. We have had  
6 a quick look at it. For those of you who have not  
7 attended before, on my left is Rear Admiral Carine and  
8 on my right is Colonel Arnold, who are the lay assessors  
9 in this Tribunal, and I am Judge Fysh and I am the  
10 Chairman of the Tribunal.

11 A couple of housekeeping items, which there always  
12 are on these occasions.

13 In no particular order, the general rule is that I  
14 would like to sit at 10.30 and rise between 4 and  
15 5 o'clock, preferably around 4.30. It is my belief,  
16 based on experience, both as counsel and a judge, that  
17 people work a little less efficiently after about 4.30  
18 so I am not inclined to sit for much longer after that.

19 Lunch, one hour, 1300 hours to 1400 hours, but again  
20 we will play it by ear -- if there is a witness hanging  
21 over or one way or another we can change that.

22 Thank you for your list of witnesses. I do not have  
23 a batting order yet but we can perhaps -- here it is,  
24 thank you very much.

25 Documents. We did not get our skeletons of argument

1 in time, but I am treating that as water under the  
2 bridge. It is quite serious water under the bridge as  
3 far as we are concerned because frankly we have not read  
4 them all and originally I asked for skeletons last  
5 Wednesday, then it became Friday, then it became Monday,  
6 so that we could use them on Monday, and the only one  
7 who got it in arguably within time was Mr Car.

8 Everybody else's skeletons of arguments came in  
9 dribs and drabs at different times, some of them  
10 delivered to my chambers up the road. Apropos please  
11 note that my judge's clerk is not my clerk of the  
12 Tribunal and what she does for me as a clerk is purely  
13 out of kindness and it is not in her terms of employment  
14 to give one finger of assistance to this Tribunal.  
15 There were some misunderstandings over that.

16 Also, the courts close at 4.00, certainly my court  
17 and the Immigration Tribunal up the road close at 4.00.  
18 If you want to deliver documents, it is still good to  
19 deliver them to me there.

20 Please no faxes over ten pages. 60 pages of fax  
21 have ruined the machine and, in addition, as my clerk  
22 points out, with the 8 per cent reduction in the civil  
23 litigation bill, we have a limit each month on the  
24 amount of paper we can use. I will not tell you what  
25 happens if we exceed that.

1           We may at some time ask you for another  
2 demonstration. We do not ask for a Cecil B de Mille  
3 cast of thousands. Let us play it by ear but we may  
4 want another demonstration in due course. In the  
5 meantime, as I showed you before, I have my little  
6 machine and I am becoming familiar with the art of  
7 downloading.

8           I mentioned the question, the possibility, of  
9 agreeing a joint history, which I could use as a crib  
10 for my judgment. Those of you who do not know how it  
11 works, unlike most foreign tribunals who have legal  
12 assistance to help the Chairman, I have absolutely none  
13 and therefore I would very much like, if not treasure,  
14 a history, if you could please agree one, the dates, the  
15 disagreements, the agreements, what happened, who  
16 agreed, who dropped out, when, all these things -- maybe  
17 some of you have sat as judges but it does take  
18 an incredible amount of time to look through all the  
19 documents to get the dates right and all that.

20           One thing we have noticed in the latest round of  
21 dealings, for want of a better word, is the question of  
22 the length of time of the licence.

23           I of course under the provisions of the Act can  
24 specify the time; often in the past, in cases that I  
25 have been in, the time has been agreed and we have all

1 worked to that, but of course there can be an indefinite  
2 period of time, as you know, and I just wondered if that  
3 might be a matter which you might like to think about.  
4 You remember most of the sections say something like  
5 this:

6 "The order may be made so as to be enforced  
7 indefinitely or for such period as the Tribunal may  
8 determine."

9 Speaking perhaps personally, I have always found  
10 that somewhat artificial, when people have argued  
11 vigorously about timings, save where there is truly new  
12 technology literally around the corner. Because after  
13 all, you can always make an application under one of the  
14 sections if you feel material facts have changed. I do  
15 not ask for an immediate answer to that.

16 The new JOL, we have got amendments to the new JOL  
17 which we have seen but we cannot find the new JOL  
18 anywhere.

19 MR WEISSELBERG: Bundle H.

20 THE CHAIRMAN: It just shows, you see, we have not had  
21 enough time to do this.

22 If you want to ask us any questions, I mean, this is  
23 the Tribunal, I do not want you to feel that it is  
24 an informal get together, but it perhaps does not have  
25 the formality of the august British Chancery Division

1           and its equivalent in Scotland, but do ask us questions,  
2           and if you think anything is going amiss please be free  
3           to tell us about it.

4           We are in session, then. Who is going to begin?

5   MR STEINTHAL: I am.

6   THE CHAIRMAN: You can address me sitting down.

7   MR STEINTHAL: Thank you.

8   THE CHAIRMAN: One thing I should say, if there is any  
9           timing problem at any particular time at the end of the  
10          day, you must let me know -- witnesses and so on who  
11          have to get away. Also perhaps we could collectively  
12          remember to deal with timings for the following day at  
13          the end of the previous day. Then we will all know  
14          where we are. Thank you.

15   MR STEINTHAL: Good afternoon. First of all, thank you for  
16          providing me with a right of audience to appear on  
17          behalf of AOL and Yahoo and RealNetworks. I would like  
18          to introduce my team. That includes Mr Salvo to my  
19          right, who --

20   THE CHAIRMAN: Mr Salvo I remember from the previous case.

21   MR STEINTHAL: The panel has given him a right of audience  
22          as well. Behind me I have Mr Larizadeh, who is  
23          a barrister in our London office and Miss Field who is  
24          a solicitor in our London office.

25          I think you will hear primarily from me and Mr Salvo

1 and Mr Larizadeh, and again I thank you for not only the  
2 right of audience but patience in connection with the  
3 obvious difficulties in scheduling by having two  
4 proceedings running at once.

5 Okay. First I want to talk about who we are. I  
6 think Judge Fysh's comment about downloading is  
7 an interesting segway into that.

8 We are the webcasters. We are not the remaining  
9 MSPs, as the alliance and BACS like to refer to us.  
10 I say that with meaning. The webcasters provide  
11 internet radio and they provide to some extent internet  
12 music television. That is what they provide in terms of  
13 what they are here to get a licence from the alliance  
14 for.

15 It is not semantics because the Internet music  
16 distribution business is not a monolith. It is not all  
17 one thing. It consists of three very, very, very  
18 discrete lines of business that have different issues  
19 raised by them: there are the download services,  
20 typified by iTunes and Sony Connect to a lesser extent.  
21 There are the ODS services. I am going to start using  
22 some of the initials -- in the event that you have not  
23 gotten through all the skeletons I think we all use  
24 certain initials and it is good to identify things, and  
25 being the first one out of the box I think I bear

1 somewhat of a burden.

2 THE CHAIRMAN: ODS.

3 MR STEINTHAL: They are not odious, they are ODS. It stands  
4 for On-Demand Streaming. The ODS subscription services,  
5 which are those that typify that part of the market,  
6 were represented in this case by Napster, meaning the  
7 new Napster service not that old file-sharing service.

8 THE CHAIRMAN: I remember, yes.

9 MR STEINTHAL: And MusicNet, which is a name that you will  
10 never hear in the market but is what we call a white  
11 label service. It is like when you go to a department  
12 store and buy a television that bears the name of the  
13 department store, you know for sure it was manufactured  
14 by some other company, typically a Japanese company,  
15 that supplies it on a white label basis. MusicNet is  
16 the white label provider for these on-demand  
17 subscription services in the UK principally for HMV and  
18 Virgin.

19 Then there is webcasting, which is basically as  
20 I said companies that engage in the transmission, the  
21 streaming, of music via internet radio and internet  
22 music video television.

23 We will come to the differences between them in more  
24 detail later. But the key thing at the outset is that  
25 the companies that settled with the alliance represented



1 the two fundamentally different business models of  
2 permanent downloads and on-demand streaming. And the  
3 BPI, which is the trade association for the labels, was  
4 in this case essentially the cause of their interest in  
5 the sale of digital downloads, and for no other reason.

6 So all the people that settled, settled on behalf of  
7 and in consideration of business models that had zero to  
8 do with webcasting.

9 One little footnote on Vodafone which we will come  
10 to later, one of the four MNOs which is now launching  
11 an extremely small webcasting service, no one else has  
12 any interest whatsoever, whatsoever in webcasting.

13 Now, regarding the mountain of written evidence and  
14 submissions that have been put before you.

15 THE CHAIRMAN: Mountain range.

16 MR STEINTHAL: You have my sympathies; there is a lot to  
17 sort through.

18 My goal today is to help distill for you what the  
19 overarching issues and evidence are to help you sift  
20 through that evidence and sift through the written  
21 submissions.

22 The good news is that the written submissions  
23 suggest that some issues really are not in dispute at  
24 all. I will identify those. Also some issues appear,  
25 even to somebody like me that has been living in this

1 world for quite some time, to be extremely dense. The  
2 gross revenue definition language and the issues debated  
3 back and forth on that are extremely dense.

4 THE CHAIRMAN: "Dense" means difficult to understand or?

5 MR STEINTHAL: Difficulty to understand and difficult even  
6 to identify what the issue is.

7 If you look at the red lines, God forbid, I would  
8 not wish that on anyone, especially the three of you, to  
9 try to figure out whose language better fits  
10 an appropriate resolution of an issue. So what  
11 I suggest to you, respectfully, is that when it comes to  
12 the dense issues, in particular gross revenue  
13 definition, that we present to you conceptual issues for  
14 resolution with the notion that the parties and counsel  
15 would then act upon your conceptual resolution and  
16 embody those resolutions in a final licence scheme,  
17 without coming back to you, with respect to the  
18 resolution of drafting issues unless we reach  
19 an impasse.

20 So in essence, as I get to that at the very end of  
21 my opening, I will identify the concepts that I believe  
22 to be disputed between the webcasters and the alliance  
23 on gross revenue definition issues, suggest to the panel  
24 that you resolve the conceptual issues and the specific  
25 examples that may be provided by the parties as examples

1 of those concepts and then leave it to us to go back  
2 through the red lines and come up with something that  
3 comports with your resolution. Otherwise I honestly do  
4 not know how you would expect, especially given the lack  
5 of staff, to go through the red lines, the dense reds  
6 lines, and figure out which is the correct language  
7 embodiment of what you would like us to do.

8 So, again, I will come back to that at the end.

9 THE CHAIRMAN: You will also indicate to us what is common  
10 ground or what you believe to be common ground?

11 MR STEINTHAL: Yes, absolutely.

12 Briefly, to introduce the webcasting issues before  
13 you. In our opening written submission we identify  
14 eight issues; in paragraph 27A through H there is  
15 a listing of the eight issues.

16 THE CHAIRMAN: It is quite helpful if you keep us more or  
17 less on line with your skeleton.

18 MR STEINTHAL: I will try to do that. Paragraph 27A through  
19 to H is a list of the issues.

20 Now, today I am going to address the issues in the  
21 same order as in the skeleton, except with respect to  
22 the issue of minima.

23 I will focus on the issue of minima immediately  
24 after discussing the headline royalty rate issues  
25 because, as I will discuss soon, minima as here proposed

1 by the alliance are not minima at all. They are plainly  
2 designed, and inappropriately we submit, to overtake the  
3 headline rate. Make no mistake about it, the rate issue  
4 and the minima issue are at the heart of this dispute.

5 Not to belittle the other issues, in particular how  
6 one defines revenue base, and not to belittle issues  
7 regarding cost of ad sales reductions and reductions for  
8 audio visual content, where the fact of a reduction is  
9 agreed, the only question is how much.

10 But the difference in the parties' positions on  
11 these other issues are not as stark as they are  
12 regarding rate and minima.

13 Initially let me address the legal framework. I, as  
14 an American lawyer, have done my best to read the  
15 precedents of the tribunal and I am happy to say that  
16 the legal framework is largely undisputed. Our position  
17 seems to be not very much at odds with any other party's  
18 position on what that framework is.

19 The Tribunal is guided to reach a determination  
20 based on what is "reasonable in the circumstances". It  
21 is instructed by the statute, section 129 of the CDPA,  
22 to have regard to other schemes or other licences issued  
23 to parties in similar circumstances. I underscore  
24 "similar circumstances".

25 THE CHAIRMAN: Yes.

1 MR STEINTHAL: And the Tribunal is guided also:

2 "To secure that there is no unreasonable  
3 discrimination between licensees under the scheme or  
4 licence to which the reference relates, on the one hand,  
5 and licensees under other schemes operated by the  
6 licensing body".

7 THE CHAIRMAN: 129.

8 MR STEINTHAL: 129, and BSkyB v PRS.

9 The nub of the dispute is this, although the legal  
10 framework is not disputed there is a huge gulf between  
11 the parties regarding its application to the facts.

12 From the very outset the webcasters have argued that  
13 they are in direct competition principally with who?  
14 Radio broadcasters for advertising spend, meaning where  
15 advertisers are going to spend their dollars. They have  
16 to choose between different media in which to spend  
17 their advertising -- I should say pounds not dollars --  
18 and --

19 THE CHAIRMAN: Euros you could say.

20 MR STEINTHAL: When it comes to this market we, the  
21 webcasters, are competing directly with terrestrial  
22 radio and the simulcasted signals of terrestrial radio.  
23 Simulcasting -- you will hear that term a lot -- is  
24 essentially when a broadcast or terrestrial radio  
25 station puts its signal out on the internet. So you go

1 to XYZ.com or Virgin.com, whatever it is, and presto you  
2 will hear the same music you would be hearing in your  
3 car or at home but on the web. No differently than when  
4 you go to Yahoo.com or AOL.com or real.com and can  
5 access music on the web from their webcasting offering.

6 So simulcasting is technologically identical to  
7 webcasting, it is simply that the programming is  
8 comprised of the terrestrial radio's programming,  
9 delivered in that same identical fashion as webcasting.

10 THE CHAIRMAN: Do you pick it up by going to the relevant  
11 sites and following the instructions?

12 MR STEINTHAL: Sure. You can do it on the computer, and any  
13 internet-enabled device. You will hear a lot from the  
14 MNOs about how their devices can now do a lot of  
15 different things, including access streams of content.

16 Basically the webcasting and simulcasting are the  
17 identical technological mode of delivery to the consumer  
18 of music, one being terrestrial radio programming, the  
19 other being programming created for the Internet as its  
20 initial destination.

21 Now, as I mentioned, the evidence will show that the  
22 webcasters believe and do in fact compete primarily with  
23 terrestrial radio for audience. They want the people to  
24 listen to their music programming instead of the  
25 terrestrial music programming that is delivered on the

1 web, and they want to get the dollars or pounds or euros  
2 from advertisers in their medium of webcasting instead  
3 of putting those dollars into the traditional broadcast  
4 radio medium.

5 As the evidence will show, they deliver to their  
6 audience essentially the online equivalent of broadcast  
7 radio.

8 THE CHAIRMAN: They make the programme up though.

9 MR STEINTHAL: Correct. That is the difference. They are  
10 the programmer instead of the terrestrial radio station.  
11 There are some differences and costs involved. There  
12 are some differences in how the broadcast signal,  
13 putting aside simulcasting, is delivered as opposed to  
14 delivered on the web. We will talk about that later.  
15 What the evidence will show is that these distinctions  
16 do not make a difference for rate setting purposes.

17 Tellingly, many of these distinctions, as I said, do  
18 not exist at all with respect to simulcasting.

19 The alliance's chief witness, Ms Enders, has  
20 essentially conceded the close affinity as between  
21 broadcasting and simulcasting on the one hand, and  
22 webcasting.

23 In paragraph 217 of her second report, at page 72,  
24 she acknowledges that:

25 "Listening to webcasts is a supplementary experience

1 to mainstream radio."

2 For most users. Then she acknowledges at  
3 paragraph 220 and 221 of her second report:

4 "Commercial radio stations have started to simulcast  
5 their existing AM and FM channels on a growing number of  
6 delivery platforms including the Internet."

7 After she makes an error about saying that there is  
8 no advertising on simulcast delivery platforms she  
9 acknowledges, and I quoted again:

10 "These additional platforms are presently viewed as  
11 ancillary to the broadcast stations main AM and FM  
12 broadcasts. She goes on to say:

13 "Listening via these additional platforms has  
14 started to be included within a station's overall  
15 ratings by the RAJAR audience research organisation."

16 The point of this is that web streaming is now part  
17 of the same industry research as broadcast radio is. It  
18 is the same industry. It is viewed as such by our  
19 clients. You will hear from our clients about it and  
20 they are in direct competition for eyeballs and ears in  
21 terms of music video and radio with those broadcast  
22 brethren.

23 THE CHAIRMAN: For the shorthand note it is ENDERS.

24 Claire Enders. You will hear more about her.

25 MR STEINTHAL: Indeed.



1           In stark contrast to the consistent and we believe  
2           amply supported comparable provided by the PRSSs existing  
3           and prior licensing of broadcast radio and simulcasting,  
4           under a scheme by the way that provides for a percentage  
5           of revenue royalty of between 3 and 5.25 per cent, which  
6           Miss Enders calculates averages out to 4 per cent of net  
7           advertising revenue, to be contrasted with our  
8           consistent position on that comparable from the very  
9           first pleading in this case, the alliance has followed,  
10          in the lyrics of The Beatles -- and I think we can use  
11          some music analogies now and then -- quite a long and  
12          winding road to their current trial position, and it is  
13          an extremely important long and winding road that I  
14          believe bears some laying out in today's opening.

15           We discussed this odyssey in our skeleton. When the  
16          webcasters filed their initial reference in June of 2005  
17          the alliance position was that the webcasters should pay  
18          12 per cent of an extremely broadly defined revenue  
19          base. You will see this in the 2005 JOL. They asked  
20          for the same 12 per cent that they asked from permanent  
21          download services and from on-demand streaming, the ODS  
22          services. Only after the statements of case were filed  
23          by our clients did the alliance back off from its one  
24          size fits all scheme approach.

25           They promulgated the 2006 JOL. They promulgated it

1 with their answers to our statements of case. In that  
2 document, 2006 JOL, which is what all the evidence  
3 addressed up until September 28th of this year, the  
4 alliance recognised that what it called pure or  
5 non-interactive webcasting warranted a one third reduced  
6 rate as compared to permanent downloads and on-demand  
7 streaming.

8 So it proposed an 8 per cent of revenue rate as  
9 against the 12 per cent rate that it was proposing for  
10 permanent downloads and on-demand streaming. Still  
11 there was no principled basis or comparable offer for  
12 that 8 per cent rate.

13 The alliance's winding road took another twist on  
14 the eve of trial. The alliance announced its deal with  
15 the BPI, iTunes and the MNOs, a by product of which was  
16 the new JOL, that the alliance now relies virtually to  
17 the exclusion of all else.

18 We will discuss shortly why the webcasting terms and  
19 conditions of the new JOL, promulgated as it was from  
20 negotiations without the presence of anyone with  
21 a meaningful interest in the webcasting business, cannot  
22 reasonably be viewed as a comparable for setting  
23 webcasting terms in this reference.

24 The new JOL represented a huge further position  
25 change by the alliance however. The alliance dropped

1 its headline rates for permanent downloads and on-demand  
2 streaming services by one third, from 12 per cent to 8  
3 per cent. That effectively represented acquiescence in  
4 the position of the BPI, the MNOs and the MSPs engaged  
5 in permanent download distribution, that online rates  
6 should conform to offline comparables.

7 Why do I say that? You may recall from the initial  
8 skeletons, if you had had a chance to review them before  
9 we were about to go to trial, that this whole case was  
10 about whether the offline comparables should apply to  
11 online distribution.

12 That is what the mountain of Enders and Boulton and  
13 MacGregor addressed. Boulton addressed some other  
14 things on webcasting, as did Enders, but most of the  
15 fray was whether offline distribution vehicles should be  
16 used as a comparable for online distribution, and the  
17 big dividing line between these two sides of the room  
18 was we said "yes". In all the forms of distribution,  
19 all three of the business models, one thing is clear,  
20 there are analogs to offline distribution, CD sales for  
21 permanent --

22 THE CHAIRMAN: That is for the physical audio?

23 MR STEINTHAL: Right. Our colleagues on the other side  
24 contested: no, offline is a totally different business  
25 all through. You cannot use offline as a comparable.

1           But what does this settlement tell us about the  
2           offline position?

3   THE CHAIRMAN:   What is the position now?

4   MR STEINTHAL:   The position now is that the only comparable  
5           is the new JOL.   What is extremely interesting is while  
6           they dispute the offline comparable of broadcast radio  
7           and simulcasting for us, the settlements they entered  
8           into represent an acknowledgment, an acquiescence in the  
9           principle that offline distribution constitutes a proper  
10          comparable here, and why do I say that?

11           You will recall from all the prior pleadings that  
12          what the BPI and iTunes and Sony Connect and the MNOs  
13          were saying, with respect to permanent download sales  
14          and distribution, is: look at AP1, look at the offline  
15          comparable for the sale of physical product.   This is  
16          just the online distribution, the online experience of  
17          the offline old model.

18           And no differently than when we went from cassettes  
19          to CDs, to different format changes, the royalty rate  
20          does not change merely because the distribution vehicle  
21          or medium may change somewhat; if the experience is  
22          essentially the same for the consumer, there is no  
23          reason not to use the pre-existing framework that has  
24          been either ruled upon by the Tribunal or accepted by  
25          the parties in analogous circumstances.

1 THE CHAIRMAN: Just stopping there. What about the terms of  
2 these settlements? Do we know about them?

3 MR STEINTHAL: They have been put before you, your Honour.

4 THE CHAIRMAN: All of them? We had a draft, did we not?

5 MR CARINE: I think they are in folder H.

6 THE CHAIRMAN: That is what we asked about this morning.

7 MR STEINTHAL: But what I would like to emphasise again,  
8 because it does not strike at face value, there is  
9 nothing that says: this 8 per cent rate for permanent  
10 downloads in the new JOL is meant to be a reflection of  
11 the offline market. But if you go back and look at what  
12 everybody said, what the BPI and the permanent download  
13 services said was that the offline rate, which we  
14 believe is the comparables, 8.5 per cent of PPD. PPD is  
15 the price paid by the dealer.

16 So there is not a directly analogous retail number  
17 because that depends on what in fact the retail prices  
18 are going to be.

19 There was this big dispute between the experts on  
20 the alliance side and the parties here as to what was  
21 the retail equivalent of that 8.5 per cent of PPD rate.

22 One thing became clear when the dust settled with  
23 all the expert testimony: the offline equivalent of that  
24 8.5 per cent of PPD rate, when converted to a retail  
25 rate, was 8 per cent.

1           So what do we have? We have a settlement for  
2 permanent downloads at 8 per cent of retail which  
3 conforms identically to what the offline rate is on  
4 a percentage of retail equivalent basis. So at the end  
5 of this long and winding road we have the alliance  
6 accepting an 8 per cent of retail rate for permanent  
7 downloads and for the on-demand streaming subscription  
8 services that everyone concerned believes to be very  
9 much akin to permanent downloads in the sense that you  
10 get to consume the music you want when you want it.

11           This is done on the basis of a subscription to the  
12 world's music that you can either get on a download  
13 basis to your computer or portable devices, and as long  
14 as you pay the subscription you have it; you stop paying  
15 the subscription and, voila, due to the technologists  
16 that create DRM you can no longer access it.

17           The concept is the same: you get the specific music  
18 you want, when you want it, track by track. You can buy  
19 it on a permanent download basis, you can rent it on  
20 a condition basis through these ODS services.

21           Interestingly, as I mentioned at the outset, the  
22 only parties at the table during those negotiations that  
23 led to the new JOL were parties engaged in permanent  
24 download sales and on-demand streaming subscriptions.

25           So, while they had no meaningful interest in

1 negotiating webcasting terms, the alliance plainly had  
2 a dilemma. It could have just settled on terms relating  
3 to permanent downloads and on-demand streaming and left  
4 for further negotiation or decision by this Tribunal  
5 appropriate webcasting terms.

6 But, no, that is not what the alliance wanted to do.

7 What is clear from the settlement document is that  
8 the alliance offered a deal on a package basis only.

9 If I can find the reference in the settlement  
10 agreements to the appropriate paragraph, I will come to  
11 that later. I do have it.

12 Unequivocally the alliance offered a package deal  
13 that included webcasting terms and conditions. Now the  
14 dilemma that the alliance had was that it had already  
15 conceded months before when it promulgated the 2006 JOL  
16 that webcasting did not warrant the same rate as  
17 permanent downloads or on-demand streaming services.

18 As I mentioned before, it previously dropped the  
19 rate for webcasting to a point that was two thirds of  
20 the permanent download on-demand streaming rate. They  
21 recognised it was because there was a material  
22 difference in the experience of the consumer in  
23 accessing webcasting as distinguished from this: get  
24 what you want when you want it, possession model  
25 reflected by permanent downloads and on-demand streaming

1 services.

2 So, out of the new JOL comes a 6.5 per cent rate for  
3 all non on-demand webcasting.

4 Put aside special webcasting. There is a lot of  
5 stuff in the documents about special webcasting, it is  
6 not something you should worry about. We do not know of  
7 anybody doing it right now in this market. It consists  
8 of webcasting where you can access the streams of only  
9 one artist or more than 50 per cent artist. This is a  
10 footnote issue for this Tribunal. We will deal with it  
11 later.

12 The question, however, is: where did the 6.5  
13 per cent come from? How is it arrived at? We submit it  
14 is an entirely arbitrary figure.

15 The alliance had to lower the rate below 8 per cent,  
16 let us face it, it had already conceded that the  
17 experience for webcasting was different, materially  
18 different, and warranted a lower rate which they had put  
19 at two thirds the value in a 2006 JOL of permanent  
20 downloads and on-demand streaming.

21 So it had to lower the rate from 8 per cent even  
22 though nobody there was a webcaster at those  
23 negotiations otherwise it would have had zero  
24 credibility. But it has articulated not one principled  
25 basis for picking a 6.5 per cent rate. That 6.5



1 per cent rate is 162 per cent of the 4 per cent average  
2 rate for radio broadcasts and simulcasts.

3 We noted in our submission that had the alliance  
4 merely lowered the webcasting rate by the same  
5 proportion as it lowered the permanent download and  
6 on-demand streaming rates for the entities with whom  
7 they were negotiating and who were concerned about  
8 permanent downloads and on-demand streaming, guess where  
9 we would end up? We would end up with a rate of 5.33  
10 per cent, which is two thirds, the same ratio as the  
11 alliance previously proposed. 5.33 per cent of revenue.  
12 Right smack in the zone of the 5 per cent for general  
13 webcasting to 5.5 per cent for premium webcasting  
14 proposal that the webcasters have put forward from the  
15 very beginning.

16 So what do we take from this long and winding road?  
17 From 12 per cent for webcasting when we filed in  
18 June 2005 to 8 per cent after the webcaster statements  
19 of case were presented, with, I believe, a very  
20 compelling written case for a lower rate to the 6.5  
21 per cent rate for all forms of non-on-demand streaming,  
22 which was promulgated without the input of anybody in  
23 the webcasting industry.

24 What do we take from it? We submit that this  
25 enormous position-changing by the alliance reflects

1 a fundamental lack of credibility associated with the  
2 alliance and its witnesses.

3 Put aside the position change from the 2005 to the  
4 2006 JOL. After the 2006 JOL was promulgated the  
5 alliance's witnesses swore up and down about how the 12  
6 per cent permanent download on-demand streaming rate was  
7 warranted and necessary lest the entities engaged in  
8 permanent download and on-demand streaming distribution  
9 would be gravely short changing the alliance and its  
10 members.

11 Who can forget the mountain of publisher statements  
12 and Miss Porter's statement to that effect? And they  
13 swore up and down about how the arguments of the BPI and  
14 the MNOs and the MSPs engaged in permanent download and  
15 on-demand streaming distribution. As I mentioned  
16 before, those arguments to the effect that the online  
17 rate structure should be based on offline music  
18 distribution comparables. The Alliance's witnesses over  
19 and again said, "That is flat out wrong because", so  
20 said the alliance witnesses, "the online distribution  
21 platform is oh so different from offline distribution".

22 But at the end of the day the alliance now  
23 accepts -- indeed it trumpets -- that an 8 per cent of  
24 retail headline rate is quite reasonable.

25 And both its expert and Mr Boulton agree, as

1 I mentioned before, that that 8 per cent rate is exactly  
2 the same equivalent as the offline retail rate for  
3 physical CDs.

4 It is no wonder under the circumstances that the  
5 alliance has withdrawn all of its lay witness statements  
6 for this case. They would be exposed for a wholesale  
7 lack of credibility.

8 So at the end of the long and winding road the  
9 alliance was left with a decidedly simplistic  
10 presentation to make to this panel. Namely, that the  
11 new JOL should be accepted as a comparable for itself.

12 Let us turn to whether that is a supportable  
13 proposition. It fundamentally is not. We spend much  
14 time in the skeleton explaining why not both as a matter  
15 of fact and law.

16 THE CHAIRMAN: Roughly where is that?

17 MR STEINTHAL: It starts with the legal section. We refer  
18 to it in a background section, with a whole discussion  
19 of the eve of trial settlement agreements, then the  
20 legal standard and the summary of the webcasters' case.

21 Basically up through page 13 is directed principally  
22 at the new settlements as an alleged comparable. Then  
23 we address that in more detail in section sub (i) of II  
24 which starts at page 20 and goes to page 34.

25 THE CHAIRMAN: Yes.

1 MR STEINTHAL: I want to talk first of all about the facts  
2 that will be adduced, or will not be adduced as the case  
3 may be, with respect to what happened with those  
4 settlements and why that reality reflects that there is  
5 no basis for inferring reasonable webcasting terms and  
6 conditions from the settlements upon which the alliance  
7 relies.

8 What is the premise of their argument? The premise  
9 of the argument, and I think we have all heard it  
10 before, is that the terms advanced as reasonable were  
11 the subject of give and take, the subject of arm's  
12 length negotiation. Thus, having survived the crucible  
13 of such give and take, the terms should be viewed as  
14 reasonable.

15 That is the general proposition. It is in the  
16 specifics that it falls down. Over and again the  
17 alliance refers to so-called extensive "negotiations".  
18 Paragraph 1.9.1, paragraph 5.8 of the Alliance's  
19 skeleton, in which the parties assertedly:

20 "... gave ground on the rates... "

21 And other terms, including specifically the minima.

22 Again, paragraph 5.5 of the Alliance's skeleton.  
23 These are direct quotes. Here is the fallacy of the  
24 argument. The alliance is putting forth the settlement  
25 agreements with the settling parties as evidence of the

1           reasonableness of the webcasting terms and conditions  
2           contained in the new JOL, not the reasonableness of the  
3           permanent download rates or the on-demand streaming  
4           rates which are outside the scope of this reference as  
5           of now.

6           Yet there is not a shred of evidence, not one iota  
7           of evidence, that the webcasting terms and conditions in  
8           the new JOL in fact were the subject of any "extensive  
9           negotiations" or any "giving of ground" that the  
10          alliance repeatedly invoked.

11          Indeed, there are abundant indications to the very  
12          contrary; plainly, no entity with a meaningful interest  
13          in webcasting was at the table.

14          This is where the very different business models  
15          that I talked about at the beginning as between the  
16          permanent download and on-demand streaming subscription  
17          services on the one hand and webcasting on the other are  
18          critical to acknowledge.

19          Webcasting, especially when offered as one aspect of  
20          a portal's business, and that is what we have here in  
21          Yahoo, AOL and Real, is a fundamentally different  
22          business proposition in permanent download and on-demand  
23          streaming services.

24          Permanent download and on-demand streaming  
25          subscriptions are almost exclusively a pay business.

1       You pay for a download. You pay for a subscription. It  
2       is not an advertiser-supported business. Not one of the  
3       entities that engaged in the negotiations leading to the  
4       new JOL were engaged in advertiser-supported webcasting.  
5       Not one. The only entity that had the remotest  
6       connection to the concept of webcasting was Vodafone,  
7       who was about to launch a pay subscription service which  
8       it is clear was nothing, de minimis, compared to its  
9       core business.

10       Even the alliance's own experts concede that the  
11       online music distribution business is dominated by the  
12       pay-for-music model, particularly in relation to  
13       downloads as popularised by iTunes.

14       Indeed, if you ask a hundred people about legitimate  
15       online music distribution, they immediately think of  
16       what? They think of iTunes. They think of what His  
17       Honour Judge Fysh said at the beginning: familiarising  
18       themselves with what? Downloading.

19       That is what people think of. They think of the old  
20       Napster and file-sharing, they think of the new models  
21       where you buy permanent downloads from iTunes and you  
22       put them on a player and you sort your music and you  
23       listen to it when you want, and they think about all the  
24       advertising, the new Napster service and HMV and Virgin.

25       I was listening last night when I was preparing my

1 opening and there were all these advertisements for  
2 Napster and for subscription on-demand streaming and  
3 conditional download services.

4 But if you ask those hundred people what webcasting  
5 is they will look at you curiously and ask you: what is  
6 that? It is a totally different business. It is online  
7 radio. It has nothing to do with people's concept of  
8 online music distribution and it is fundamentally  
9 different in terms of how it generates revenues, and  
10 what it is as a consumer experience from the businesses  
11 that are at the table.

12 THE CHAIRMAN: What are the different consumers then? Tell  
13 me about that.

14 MR STEINTHAL: The consumer, when it buys a download or when  
15 it engages in a subscription to get music on demand, is  
16 basically saying: I am going to plonk down dollars, it  
17 is worth it for me to own this piece of music or have  
18 access to music like -- I do not know if you have HBO  
19 here but you may have the same version of it. If people  
20 decide they want to spend £15 a month for accessing  
21 on-demand movies, or a slate of programming that they  
22 cannot otherwise get, then that is a decision you make:  
23 I want this music, I am willing to pay X dollars, X  
24 pounds a month for it, either to buy it or to have it  
25 on-demand.

1           That is a fundamentally different consumer  
2           experience than turning on the radio, or turning on your  
3           computer and saying: you know what, I think I will  
4           listen to some music now. And instead of turning on the  
5           button to hear terrestrial radio you turn on AOL.com or  
6           Yahoo! LAUNCHcast.com and you have the music streamed to  
7           you that way. It is a passive experience.

8           In the jargon, the difference is the difference  
9           between push and pull. It is a very key difference. It  
10          underscores the whole value proposition in the music  
11          industry. Radio is push. Webcasting is push. The  
12          consumer does not know the next song. The consumer is  
13          there for a combination of reasons, to get music they do  
14          not know about yet perhaps, or because they are lazy, or  
15          because they do not want to pay for something at that  
16          moment. They do not want to go to the trouble of buying  
17          the latest CD, or spending £15 a month for the Napster  
18          or HMV or Virgin service. They are content to have  
19          a passive listening experience where someone else pushes  
20          music to them. So it is the push versus pull. The  
21          economics are totally different.

22          Push, advertiser supported, some modest degree of  
23          subscription for push services but very little. The  
24          evidence will be that what people believe is that radio  
25          historically is free, therefore webcasting is going to



1           have a very hard time generating consistent demand on  
2           a pay basis for ad-supported radio where you, the  
3           consumer, do not pull the music.

4   THE CHAIRMAN:  Not always free in this country.

5   MR STEINTHAL:  That is what we are finding now in this  
6           industry, that webcasting is having trouble trying to  
7           monetise on a subscription basis.  Can it do so to some  
8           degree?  Yes, Realnetworks has a subscription service,  
9           but you will hear from RealNetworks that there is very  
10          little take up.  Because people generally, if they want  
11          webcasting, want it for free.

12  THE CHAIRMAN:  Are we going to hear anything from the sort  
13          of sociological point of view or demographic point of  
14          view what the subscribers to your client's product are  
15          like, as opposed to the thousands we see walking the  
16          streets with products like Ipods?

17  MR STEINTHAL:  I think what you will hear about is in the  
18          context of the bundled services, where people buy --  
19          principally like the BT-Yahoo service, where you pay  
20          your money for internet access and connectivity and  
21          included within the bundle is a variety of services,  
22          including webcasting.

23                One of the things you will hear, and I will come to  
24                this very importantly in the unbundling part of the  
25                revenue issues, is that an extremely small number of

1 people who are buying access to the internet ever go and  
2 use the webcasting service that is bundled within it.  
3 So I think that shows a little bit about consumer  
4 behaviour. People are using online connectivity for  
5 portable devices, not for webcasting, not to have stuff  
6 pushed to them, but to pull. To pull to them music on  
7 demand.

8 THE CHAIRMAN: It is not the only thing they will be  
9 interested in.

10 MR STEINTHAL: No, they are interested in tons of things not  
11 related to music.

12 The point is two things, one is that in the bundled  
13 environment most people are buying connectivity. They  
14 are buying fast access to the internet to do whatever  
15 they want on the internet. In the small sliver of the  
16 reason why people subscribe to these bundled services to  
17 use it for music purposes, it is predominantly for pull  
18 purposes. It is predominantly to get the download,  
19 whether illegally frankly, if they use high-speed  
20 internet access to use file sharing services, like  
21 Kazaa, and the services that followed in the old  
22 Napster, or they use it for purposes of managing their  
23 online music and then listening on demand to the music  
24 they own or that they rent from these other services.

25 I think you will hear that in the evidence. I think

1 it is relevant principally to this bundled service  
2 scenario and why you have to be very cautious in looking  
3 at the revenues that somebody pays for a bundle in which  
4 music is a tiny portion. It is very perilous to try to  
5 ascribe a specific value to the music component when the  
6 individual elements of the bundle are not separately  
7 priced. We will come back to that.

8         Setting the stage, just before the trial was about  
9 to begin, on 28th September we learn -- pretty much at  
10 the same time that His Honour Judge Fysh learned, I  
11 think he may have learned before I did -- that there  
12 were negotiations between iTunes, BPI and the MNOs and  
13 the alliance, representing as I said, permanent download  
14 services; the BPI, a trade association whose members are  
15 predominantly concerned only with the sale of sound  
16 recordings, and the MNOs, whose music activities were  
17 virtually exclusively in connection with permanent  
18 downloads.

19         This is all in paragraphs 87 to 93 of our skeleton.

20         The alliance readily concedes that the terms of the  
21 new JOL, including the webcasting terms and conditions,  
22 were offered on a package basis as I mentioned. Here is  
23 the citation for that, paragraph 11.1(d)(i) of the  
24 settlement agreements. It is in volume H. I am  
25 informed it is tabs 1, 6 and 8.

1 THE CHAIRMAN: Shall we try it out and have a look at it?

2 MR STEINTHAL: You can. I am going to quote the one passage

3 that is relevant, if we can avoid having to go through

4 finding the documents. I am not going to spend a lot of

5 time with it. If you would like to have it in front of

6 you I will take a break for a minute and have you pull

7 it out.

8 Let us take the Apple settlement, which is tab 1,

9 H1.

10 THE CHAIRMAN: Let us try it out. Where?

11 MR STEINTHAL: This will be paragraph 11.1(d). Sorry, it is

12 12.1. Some of the agreements have different paragraph

13 numbering.

14 THE CHAIRMAN: I have bundle H, I am going to tab 1.

15 MR STEINTHAL: Tab 1 and go to paragraph 12.

16 MR CARINE: Page 29.

17 MR STEINTHAL: Page 9. It may be that there are multiple

18 copies.

19 MR CARINE: Page 9, I have it.

20 MR STEINTHAL: If you look at that it states in paragraph

21 (d)(i):

22 "The settlement agreement, including the scheme, is

23 a package deal."

24 What does a package deal mean? Package deal means

25 very simply you cannot have the permanent download and

1 on-demand streaming terms that you had negotiated that  
2 are of meaning to you because that is the business you  
3 operate unless you accept the new JOL as a whole,  
4 including its webcasting terms and conditions.

5 The alliance must concede as well that  
6 notwithstanding that the settling parties -- this is sub  
7 (ii) -- notwithstanding that the settling parties  
8 acceptance of the new JOL as a whole was:

9 "... not to be treated as any acceptance that any  
10 individual element of the settlement agreement,  
11 including the new JOL, viewed in isolation is fair and  
12 reasonable."

13 Again, unfortunately the numbers change from some of  
14 these settlements. This is now (e) in the document we  
15 are looking at in tab 1:

16 "Notwithstanding clause 12.1(d) above, the execution  
17 of the settlement agreement shall not be treated as any  
18 acceptance by any of the MCPS, PRS, the Academy or the  
19 settling applicants that any individual element of the  
20 settlement agreement, including the scheme, viewed in  
21 isolation, fair and reasonable."

22 This deal is offered as a package even though the  
23 companies at the table are doing two lines of business  
24 that they care about, they were only offered the deal  
25 with a package that included terms concerning webcasting

1 that were not -- that were simply not relevant to their  
2 current lines of business.

3 Also undermining the alliance's position is the fact  
4 that even the document itself makes clear that you are  
5 not supposed to take an individual term in isolation, or  
6 set of terms, from the new JOL in isolation and say that  
7 they are fair and reasonable.

8 Yet that is exactly what they are doing here and  
9 that is why we are here.

10 The only comparable they are offering is the JOL for  
11 itself, saying that the webcasting terms and conditions  
12 are fair and reasonable. They have routed it out of the  
13 new JOL and put before you in isolation the webcasting  
14 terms and conditions as being reasonable.

15 Just to make matters worse, each of the settlement  
16 agreements has what we refer to in our skeleton as  
17 a silencer clause. I think the MNOs refer to it in  
18 their skeleton as a gag clause.

19 THE CHAIRMAN: Slightly more emotive.

20 MR STEINTHAL: Yes.

21 Each of these conclusions provides that no  
22 settlement party may assist any applicant to continue to  
23 challenge the JOL. In the document you are looking at  
24 page 9, 12.1(b):

25 "Save for clause 9.2 above, no settling applicant

1 shall refer nor assist, save and to the extent required  
2 by any order of the copyright tribunal or a court of  
3 competent jurisdiction or by law so to do a third party  
4 in referring nor intervene in any reference made by  
5 a third party preferring the scheme."

6 Hence our need to issue summonses to a few local  
7 representatives of the settling parties from which we  
8 expect to demonstrate, first, that the new JOL's  
9 webcasting terms and conditions were not a meaningful  
10 issue for them in determining to settle with the  
11 alliance.

12 THE CHAIRMAN: It made no difference to them?

13 MR STEINTHAL: Right. Second, that instead they were  
14 concerned either exclusively, maybe no difference -- it  
15 is either no difference or a tiny difference, but  
16 certainly their concerns at that bargaining table were  
17 either exclusively or predominantly associated with  
18 permanent downloads and on-demand streaming because that  
19 is the only business they were in.

20 Thirdly, that the new JOL was offered only as  
21 a package inclusive of webcasting terms that were not  
22 the subject of any meaningful give and take. Let us  
23 remember, the alliance has put forward over and again in  
24 their papers: why should you look at the new JOL's  
25 webcasting terms as reasonable? Because the terms of

1 new JOL were the subject of extensive negotiations,  
2 extensive give and take, they survived the crucible of  
3 negotiation with sophisticated parties.

4 If there is no evidence that the webcasting terms  
5 and conditions were subjected to that crucible, that  
6 they were of any meaning to the settling parties  
7 relevant to the businesses they were in, how in the  
8 world can one draw an inference that those webcasting  
9 terms and conditions, improperly routed from what was  
10 supposedly not to be taken out in isolation, how can we  
11 conclude that those webcasting terms and conditions  
12 taken in isolation were reasonable?

13 We suggest to the panel two things: as a matter of  
14 fact that is inappropriate, there is no basis to  
15 conclude that there was any give and take associated  
16 with the webcasting terms and conditions, or that those  
17 webcasting terms and conditions were subjected to any  
18 crucible or any determination meaningfully by any of the  
19 settling parties.

20 You will hear hopefully from Mr Taylor of the BPI,  
21 Mr Lee from the MNOs, from T-Mobile, and from  
22 Mr Mooradian of MusicNet on this score. I say  
23 "hopefully" because we have summonsed them, we cannot  
24 really reach representatives of other settling parties  
25 that are not domiciled here in London or the UK, we



1 think that hearing from three of the companies will be  
2 exemplary of all the companies that were at the table.

3 I say "hopefully" because we have had some back and  
4 forth with counsel for the alliance about their  
5 objections to our eliciting certain of this testimony  
6 from the witnesses, we will worry about later. It is  
7 our intention to call them, they are on the witness  
8 schedule.

9 You will also hear expert testimony from Mr Boulton  
10 that under all of these circumstances the settlement  
11 agreements relied upon by the alliance do not form from  
12 an economic perspective a viable comparable for the  
13 webcasting terms and conditions of the new JOL. He will  
14 explain how the alliance's theory might hold water, if  
15 at all, only as against entities of the same vested  
16 business interests as the settling parties.

17 In other words, the settlements might be comparables  
18 were another entity to challenge the permanent download  
19 or on-demand streaming terms and conditions of the new  
20 JOL, which clearly were subject to the crucible.

21 But given that none of the settling parties had any  
22 meaningful interest in webcasting, coupled with the lack  
23 of any evidence whatsoever that the webcasting terms and  
24 conditions were the subject of any give and take, there  
25 is simply no economic basis upon which to draw

1 an inference of reasonableness regarding the webcasting  
2 terms and conditions sought by the alliance as part of  
3 the new JOL package.

4 One more thing on this issue. I devote a lot of  
5 time to it because, let us face it, it is their case.  
6 Their sole comparable.

7 The alliance asserts and I quote the answer,  
8 paragraph 3.3:

9 "Almost all of the major participants in the  
10 relevant market", except at the new JOL, "almost all of  
11 the major participants in the relevant market"  
12 disingenuous at best.

13 As I mentioned at the outset, this is not  
14 a homogenous online music market. None of the parties  
15 at the table were engaged in the webcasting industry.  
16 Only by sleight of hand, by suggesting that the online  
17 music market is an amorphous, homogenous market could  
18 you try to get away with a statement like that. But the  
19 evidence will show that webcasting is just plain  
20 different and therefore you cannot draw the inference  
21 that the alliance would suggest that you draw.

22 To the contrary, instead of drawing an inference  
23 from settlement negotiations in which not one webcaster  
24 participated, the testimony you will hear from the three  
25 webcasters that are still in this case, AOL, Real and

1 Yahoo, but also from two other webcasters, Pandora and  
2 MusicChoice.

3 Mr Brown from Pandora, and Mr Johnstone from  
4 MusicChoice.

5 THE CHAIRMAN: No, Brown from MusicChoice.

6 MR STEINTHAL: The other way round I think, Paul Brown from  
7 Pandora and Mr Johnstone from MusicChoice.

8 THE CHAIRMAN: It is the wrong way round on the song sheet.  
9 Very well, not to worry, we will hear them all the same.

10 MR STEINTHAL: The point is simply that you will hear from  
11 the existing dominant players in webcasting, which are  
12 the three entities in this case, and two other companies  
13 that are wishing to be webcasting in the UK, that  
14 contrary to this notion of inference that the alliance  
15 suggest, the actuality of the webcasting terms and  
16 conditions is a horror for webcasters.

17 THE CHAIRMAN: The actualities?

18 MR STEINTHAL: In other words, the application of the actual  
19 terms and conditions of webcasting, including both the  
20 headline rate and more specifically the penal aspects of  
21 the minima that are being proposed by the alliance,  
22 change the economics of this business drastically. So  
23 much so that a company like Pandora, which has  
24 a successful operation outside of the UK, as Mr Brown  
25 says, probably will not launch in the UK if the terms

1 and conditions of the current webcasting portion of the  
2 JOL were applied.

3 You will hear specifically with numbers -- I do not  
4 want to go into the numbers, as much as I can I would  
5 like to stay on the public record. When I get to one  
6 thing later on minima I am going to have to ask people  
7 who are not class 2 recipients to leave. For the most  
8 part I will try to steer clear of actual data --

9 THE CHAIRMAN: Yes, please, that is how I want it done. I  
10 do not want huge drifts of people coming in and out of  
11 the room all the time.

12 MR STEINTHAL: Just a final word about application of the  
13 prior precedents to the asserted use of the settlement  
14 agreements as a comparable for the new JOL's webcasting  
15 terms and conditions.

16 The Tribunal is to have regard to "other licences"  
17 to parties "in similar circumstances".

18 THE CHAIRMAN: Yes.

19 MR STEINTHAL: The gist of the factual presentation is that  
20 the parties that settled on terms that included the new  
21 JOL were not in similar circumstances to the webcasters.

22 They have very different business models that  
23 motivated their decisions to the new JOL -- so the new  
24 JOL might be deemed, as I say, a comparable for  
25 permanent download and on-demand streaming businesses,

1 but it is not so for a business that is not meaningful  
2 to the settling parties.

3 I note also that where there are asserted benchmarks  
4 which are not entirely comparable, the Tribunal may  
5 follow the course described in the BPI v MCPS case and  
6 take the asserted comparables into account "but scale  
7 them down because of the differences".

8 At best, you would take the 6.5 per cent and scale  
9 it down because of the differences, and as I will get  
10 to, if it is used as a comparable at all it should be  
11 scaled down to the 5 and 5.5 per cent.

12 THE CHAIRMAN: That is your case?

13 MR STEINTHAL: That is our case. Our case is you should not  
14 look to that as a comparable at all. Let me be clear,  
15 our comparable comes from this licensing body's existing  
16 and historic licensing of broadcast radio and  
17 simulcasting, which is a direct comparable to us. That  
18 is the business we are in. We are the online  
19 equivalent. We do not have to go near the new JOL as  
20 a comparable. What I am saying is that even if you were  
21 minded to look at the new JOL as a comparable, I would  
22 suggest to you that you do not even look at it; given  
23 the factual circumstances where there is not one  
24 webcaster there in the whole history of the long and  
25 winding road down to the new JOL, it is not

1 a comparable.

2 How can anything be a comparable for itself  
3 I wonder? I have never seen a case like that. They are  
4 proposing that something that they did on September 28th  
5 is now going to be a comparable for itself. Unheard of.

6 Beyond that, for the reasons that I have just laid  
7 out in great detail, and the evidence will show, it is  
8 just not a proper comparable because webcasters were not  
9 involved in those circumstances and webcasters are not  
10 similarly situated with respect to the interests of  
11 on-demand streaming and conditional download and  
12 permanent download services. To the contrary, broadcast  
13 radio, simulcasting, is the right comparable and we are  
14 going to get to that in just a moment.

15 We can even get to it right now, because on the  
16 other side of the coin the unequivocal dictate is that  
17 there be no unreasonable discrimination between the  
18 licensees under the scheme in question and licensees  
19 under other schemes operated by the alliance. That is  
20 very clear from CDPA section 129 and from the BSKyB  
21 case.

22 Here it would be plainly discriminatory to  
23 webcasters as against their broadcaster simulcaster  
24 competitors to have the webcasters paying at a headline  
25 rate that is 162 per cent for the average rate under the

1 CRCA licences.

2 What does the alliance say about that? They seek to  
3 argue that the webcasters are different. But the record  
4 will show that that is not so in all meaningful  
5 respects. To be clear, we are not saying that the  
6 webcasters' and broadcasters' simulcasters are  
7 identical. But they surely provide a product that is  
8 the online version of what webcasting does of broadcast  
9 radio and music television.

10 As noted before, Ms Enders herself acknowledged that  
11 listening to webcasts is a supplementary experience to  
12 mainstream radio. Even in the alliance skeleton,  
13 paragraph 8.2.4, they concede that the pure webcasting  
14 experience, the non-interactive webcasting experience,  
15 8.2.4 of their skeleton is --

16 THE CHAIRMAN: Just a minute, hold on. Can I read that.

17 MR STEINTHAL: Where they concede that the experience of  
18 non-interactive pure webcasting is experience "in the  
19 same way as if the user turned on the radio". Their own  
20 words. We are talking about functionally an equivalent  
21 experience. The evidence from the witnesses from Yahoo  
22 and AOL and Real show that from a consumer perspective  
23 webcasting offers a pre-programmed listener experience  
24 on the basis of music genres or artists, the key being  
25 that the playlists are selected by the webcaster. It is

1 a push.

2 Webcasting neither offers the consumer the ability  
3 to hear tracks of their own choosing or on demand or to  
4 make copies or downloads of music. Just playlists  
5 preselected by the webcaster, the quintessential push  
6 experience versus the quintessential pull on the other  
7 side.

8 Most importantly as I have said, and the testimony  
9 will be, from a competition perspective the eyeballs and  
10 the earballs we are seeking are those same ones that  
11 broadcast radio and simulcasters are seeking.

12 THE CHAIRMAN: Mr Steinthal, I am puzzled as to why somebody  
13 should want this service. I know we are here -- this is  
14 not an imaginary service you are entertaining us with --  
15 but if there is a galaxy of radio stations of all kinds  
16 broadcasting every conceivable kind of music --

17 MR STEINTHAL: Here is the answer, and I think this is true  
18 of a lot of different industries, but it is  
19 a multi-billion dollar market, the radio advertising  
20 market. It is huge. Advertisers spend fortunes getting  
21 messages through to people.

22 THE CHAIRMAN: I have begun to listen to it since I have  
23 taken this job.

24 MR STEINTHAL: What Yahoo and AOL and Real will tell you is  
25 they think they can provide a somewhat better listening



1       experience than terrestrial radio. They are competing  
2       for the same ad dollars, but if they can get the word  
3       out, if they can get a lot of people to come to this  
4       Tribunal and hear what it is all about, maybe more  
5       people will listen to webcasting.

6             But the answer to your question is that it is a huge  
7       market, it is a huge ad spend. Billions and billions of  
8       pounds per year.

9             So what Yahoo and AOL and Real are saying is: our  
10       programmers, our computer algorithms, some of the  
11       features we can offer, because of the technology of  
12       simulcasting as well as webcasting, you can do some  
13       things a little differently. It does not change the  
14       overall experience. So the alliance takes the position:  
15       oh you can skip a song, a huge difference. Well, it is  
16       not a huge difference, you can change stations on your  
17       preset dial. The alliance says: oh, you can have  
18       consumer influence, it totally changes the proposition.  
19       Again, call-in radio and requests are a fundamental part  
20       of the playlist generation on terrestrial radio. It is  
21       just that we can do some of those things a little bit  
22       better.

23             We cannot do some things as well as terrestrial  
24       radio and we are not, as I said, arguing that we are  
25       identical to terrestrial radio, but the experience is

1 fundamentally the same. It is the push experience and  
2 we think if people learn about who we are and what we  
3 do, we can crack that advertising budget and get more  
4 dollars from it.

5 That is the dream. That is why people do it. That  
6 is why AOL and Yahoo and Real are doing it.

7 Coming back to the comparable, the differences that  
8 the alliance puts forth are not meaningful differences  
9 in terms of looking at the terrestrial radio simulcaster  
10 rate as a comparable. Do some differences exist? Of  
11 course. There are viable differences, if you will,  
12 between the broadcast radio delivery and the simulcasted  
13 delivery of the same station yet they are both subject  
14 to the same CRCA scheme. So the mere fact there are  
15 some differences does not take you away from the fact  
16 that the right comparable is the radio comparable.

17 As far as the alleged lower costs that the alliance  
18 talks about as between webcasting on the one hand and  
19 terrestrial radio, two things: they are either factually  
20 wrong or overstated in certain respects, or they are  
21 different in kind.

22 So we have bandwidth cost for radio. We do not have  
23 licence cost in terms of regulatory licences, but unlike  
24 terrestrial radio every stream you make costs you money  
25 because you have to pay for bandwidth. There are cost

1 differences. But at the end of the day the notion that  
2 this is a cheap business to be in is totally belied by  
3 the evidence. The evidence from Yahoo, AOL and Real  
4 will show you that it is not a cheap business to be in.

5 Indeed Yahoo's costs, as you will hear, are  
6 fundamentally no different than a large market radio  
7 station. I am not going to get into the specific  
8 numbers, but again it is not a difference that means  
9 anything for purposes of your rate-setting purposes and  
10 requirements.

11 THE CHAIRMAN: There is going to be a dispute presumably  
12 between this issue we are talking about, what you can do  
13 and what you cannot do?

14 MR STEINTHAL: There is a dispute to some degree. There  
15 should not be, because ultimately we could show you what  
16 we do and you could make up your mind as to what it is  
17 and what it is not.

18 THE CHAIRMAN: Put this on your shopping list then,  
19 Mr Steinthal. When we have -- I thought we would be  
20 coming to this sooner or later -- a resumed  
21 demonstration, perhaps I speak for my colleagues, we  
22 would like to try this out and listen to some of your  
23 famous simulcast or ordinary webcasting.

24 MR STEINTHAL: We would love to demonstrate it.

25 Mr Larizadeh is just waiting to do it.

1 MR CARINE: I would particularly welcome it because I missed  
2 the earlier demonstration because I was in Syria.

3 MR STEINTHAL: We would like to do that. We may, in order  
4 to demonstrate certain specific issues, be up and  
5 running with certain witnesses so they can show you how  
6 their service works, and that may be the best way to do  
7 it if the panel would like us to do it that way, rather  
8 than a separate date, as long as we do not take up lot  
9 of time doing it. We could just have the witnesses  
10 themselves walk you through what they do and answer any  
11 questions that you have about their service, rather than  
12 having the lawyers answer the questions. We are happy  
13 to do it that way.

14 THE CHAIRMAN: Speaking for myself, I would be very happy to  
15 do it without lawyers.

16 MR CARINE: I was in Syria on business so I missed the  
17 earlier demonstration.

18 THE CHAIRMAN: We could maybe even do it ourselves.

19 MR STEINTHAL: Yes. Nothing would make our clients happier  
20 than to get you addicted to webcasting.

21 THE CHAIRMAN: Is it free?

22 MR STEINTHAL: It is free.

23 MR CARINE: I have to say I would break it.

24 MR STEINTHAL: Just briefly, some of the other differences  
25 that are posited by the alliance in their effort to

1       disincline you to apply the broadcast radio simulcaster  
2       comparable.

3             They talk about the second right issue, as I call  
4       it. They claim that there is a separate right, the  
5       server copy being necessary to facilitate the stream of  
6       music to the listener through webcasting.

7             They say this is a multiplicity of rights not really  
8       existing in the broadcast environment.

9             That is just both factually and legally wrong.

10            First of all, the evidence will be that broadcast  
11       radio does not spin records any more. They burn the CDs  
12       onto a server and they point. You do not have people  
13       sitting in a radio station spinning records or putting  
14       CDs in cartridges. It is all on a server. They are  
15       already doing precisely the same copying to facilitate  
16       a performance as what webcasters do.

17            A simulcaster, by definition, is doing the same  
18       thing, and they are covered by the CRCA agreement that  
19       we talk about. Mr Porter in his withdrawn testimony  
20       acknowledges that the broadcasters are doing that, and  
21       he says, rather timidly: we intend to seek more money  
22       for that activity. But they have not done it.

23            So what we have is essentially the same activity,  
24       the second right is not a second right at all. It is  
25       the same activity that broadcast radio and certainly

1 simulcasters are already doing, and if you go back to  
2 the case BPI v MCPS, from which the AP1 ruling came,  
3 precisely the same argument had been made back then and  
4 the Tribunal correctly held at that point that -- we  
5 have to look at the value of what is being delivered,  
6 not whether there is more than one right involved in the  
7 distribution of the product, and the value is the value  
8 of the delivery of the music.

9 THE CHAIRMAN: How do they define the second right?

10 MR STEINTHAL: It is the mechanical right. In other words,  
11 radio is quintessentially a performance medium as is  
12 webcasting. You cannot copy. The consumer does not get  
13 the copy. So unlike permanent downloads and conditional  
14 downloads, where the mechanical right is the dominant  
15 right in what is being delivered to the consumer, with  
16 radio the dominant right is the performance right  
17 because you do not get a copy.

18 The fact that you make a copy to facilitate the  
19 delivery is incidental. It adds no value to the  
20 consumer. It is just incidental to get from here to  
21 there.

22 All the point is here is that the alliance is  
23 arguing: oh, online distribution, second right, more  
24 value, we got to be paid more. The answer to that is:  
25 no, as a fact actual matter, because the entities under

1 the CRCA agreement are doing the identical thing, and as  
2 a legal matter that argument has been rejected already.

3 THE CHAIRMAN: Are we going near the public performance then  
4 of a webcast? Rather like -- you may not be aware of  
5 section 72 of the Copyright Act, but there is an issue  
6 sometimes about the playing in public of a broadcast,  
7 which is a separate right.

8 MR STEINTHAL: No differently; the JOL does not confer  
9 a right for that retransmission, if you will. So that  
10 just as if I am a store owner and I play a radio for the  
11 patrons, that might be deemed a public performance  
12 subject to a separate alliance right to licence that  
13 store.

14 No differently if the store owner is using internet  
15 radio on the speakers instead of broadcast radio,  
16 neither is covered by the new JOL.

17 THE CHAIRMAN: Is that within the terms of this reference?

18 MR STEINTHAL: It is not. It is an exclusion from the new  
19 JOL, precisely because the alliance wishes to separately  
20 licence those further transmissions.

21 THE CHAIRMAN: That is the next reference. I like to know  
22 what is coming up.

23 MR STEINTHAL: We have no quarrel with that, not today.

24 The other and probably the most significant  
25 difference that the alliance points to as between

1 webcasting and broadcast radio and simulcasting is the  
2 current reality that webcasters tend to use more music  
3 per hour than does commercial radio. It is between 20  
4 and 25 per cent right now. Basically just in crass  
5 terms you probably have 11 or 12 songs per hour on  
6 broadcast radio, versus 15 or 14 or so on webcasting, in  
7 part because we do not have the advertiser volume yet  
8 that broadcast radio has.

9 As a practical matter, the CRCA precedents upon  
10 which we rely would suggest that it does not matter.  
11 Why do I say that?

12 The CRCA agreement provides that as long as you have  
13 more than 15 per cent music content, as a radio  
14 broadcaster you pay the same rate whether you have 50,  
15 70, 90 per cent music content. It does not  
16 differentiate.

17 What we have done in part to try to make things  
18 uniform and easy in application and in part to deal with  
19 the argument that we expected, that there is more  
20 currently in terms of music content on webcasting and  
21 broadcast radio, is propose a 5 per cent rate instead of  
22 the average 4 per cent rate under the CRCA agreement, so  
23 that in essence even if you uplift on the basis of  
24 greater music content, you would uplift from the average  
25 4 per cent rate for broadcast radio to 5 per cent at



1 a max and you would have it covered.

2 Yes, we concede the difference here. No, we do not  
3 believe it has any legal meaning. Just look at the CRCA  
4 agreement, and even if you did find factually it wads a  
5 compelling reason to make an adjustment we have already  
6 done it for you by proposing the 5 per cent rate.

7 My colleagues tell me if you want the CRCA agreement  
8 as a cite, it is in tab E3 at pages 755 to 773.

9 THE CHAIRMAN: Thank you very much.

10 MR STEINTHAL: Finally, there is the issue of greater choice  
11 of stations. The alliance points out that you can get  
12 a choice of 100 or more stations on certain webcast  
13 outlets, they are more narrowly defined genres, so if  
14 you are a fan of celtic music you can get a celtic radio  
15 station that might be harder to get on terrestrial  
16 radio, and they point to some of the features I talked  
17 about before, skipping from one song to the next.

18 THE CHAIRMAN: You mean, for example to take your celtic  
19 point, you could webcast, could you, here in London  
20 something like an Irish radio station in the west of  
21 Ireland?

22 MR STEINTHAL: You could do one of two things. You could  
23 broadcast that Irish radio station --

24 THE CHAIRMAN: Which you could not get here.

25 MR STEINTHAL: But you could online. In other words, it is

1 not necessarily what we are doing. You could go to --  
2 if it was Celtic.com, they could have their own website.  
3 Many, many radio stations do. So you could go to  
4 Celtic.com, not through AOL or Yahoo or Real, or perhaps  
5 Real does provide you with links to a lot of these  
6 terrestrial simulcasters.

7 THE CHAIRMAN: What you are saying is you could do  
8 Radio Celtic, and Radio Celtic would go direct through  
9 the --

10 MR STEINTHAL: If you wanted the hometown feel of that Irish  
11 celtic station you could go to Celtic.com or you could  
12 pick up that celtic terrestrial station on Realpass or  
13 Radiopass if it is a RealNetworks offering, or you could  
14 go to AOL Radio or Yahoo radio launch cast, and they  
15 would have in their genre classification of stations,  
16 they would have some regional music stations.

17 MR CARINE: When you are outside of the range of the radio  
18 station itself.

19 MR STEINTHAL: Either one, either outside the range -- that  
20 is one --

21 THE CHAIRMAN: They would not be the same though, would  
22 they? You would put advertising on yours.

23 MR STEINTHAL: Two things on that. One is, I want to be  
24 very clear what the differences are and are not. The  
25 terrestrial radio station in the town -- your first

1 question -- pays under the CRCA agreement. They are not  
2 us. Even if RealNetworks provides you a link as part of  
3 its panoply of offerings, RealNetworks does not pay  
4 under the new JOL for that because all we are doing is  
5 flowing traffic to Celtic.com.

6 THE CHAIRMAN: You are funnelling, yes.

7 MR STEINTHAL: In that respect they are still under the CRCA  
8 agreement and you get the identical experience you would  
9 have had for terrestrial radio if you were in the town;  
10 without any geographic limitation whatsoever you can  
11 access it around the world. So the notion that there is  
12 this huge difference between webcasting and simulcasting  
13 is nonsense. Simulcasts are available everywhere around  
14 the world, just by going to Celtic.com, in our example,  
15 just as the "created for the Internet-only" channels are  
16 available everywhere around the world.

17 The difference is that the stations programmed by  
18 AOL or Yahoo Radio would be programmed by their  
19 programmers instead of the guy who runs the station up  
20 in Ireland. Their programmers are going to pick what  
21 they feel consumers are going to want, which may be  
22 somewhat different than what the guy up in Ireland  
23 thinks consumers up in Ireland want.

24 But it is the same experience in the sense that it  
25 is a push experience to the consumer. If you want the

1 local flavour, if you want to hear the traffic reports,  
2 you want to hear what is going on with the disc jockey  
3 in that town in Ireland, you can go there. If you  
4 prefer not to have that disc jockey and prefer to get  
5 the stream of celtic music from the Internet-only  
6 station you go there.

7 THE CHAIRMAN: The same genre of music.

8 MR STEINTHAL: Exactly, and the same concept of push rather  
9 than pull.

10 THE CHAIRMAN: So it is different to that extent.

11 MR STEINTHAL: It is different in that respect but it is not  
12 a difference that means anything when it comes to your  
13 responsibility.

14 Because the value of the music is no different. It  
15 is being delivered in two different kinds of stations  
16 but that difference does not compel a different outcome  
17 than the CRCA agreement.

18 The RealNetworks example is a great example. You go  
19 to RealNetworks and you will have side by side that  
20 celtic station from Ireland and their celtic station.

21 Why in the world should Real be paying multiples  
22 more for a licence, and that is what would happen when  
23 the minima kick in, and I am going to spend a lot of  
24 time on minima. Apart from the 162 per cent rate that  
25 they are proposing as a headline rate, there are no

1 minima under the CRCA agreement and there are punitive  
2 minima under the new JOL.

3 The end result is, as you will see later, payments  
4 six or seven times higher in some cases, or two or three  
5 times higher in others, if the minima kick in.

6 The bottom line is: that is discrimination. Going  
7 back to the law, it is totally discriminatory without  
8 justification for the station that is being linked to on  
9 Real.com from Ireland to be paying at the average 4  
10 per cent rate while side by side Real's own  
11 internet-only station with the same genre of music,  
12 perhaps with a few more songs per hour which is  
13 accommodated for in our adjustment, at the 5 per cent  
14 rate. There is simply no justification for the  
15 discrimination that the alliance is proposing.

16 To move on. Far and away we believe the best  
17 comparable obviously is the CRCA broadcast agreement and  
18 that the alleged differences are, as I said before, and  
19 as the jargon goes, distinctions without a difference.

20 Yes, there are distinctions but they should be of no  
21 difference to you in exercising your responsibilities to  
22 set a rate.

23 I mentioned this and now we get to talk about it.  
24 Minima.

25 Before getting to the vitriol, and there is a lot of

1 vitriol about minima in our skeleton --

2 THE CHAIRMAN: Tell us what you mean by minima, first of  
3 all.

4 MR STEINTHAL: A minimum fee, so that notwithstanding what  
5 the 5 per cent rate would generate, or what the 6.5 rate  
6 would generate, you would have to pay a minimum fee  
7 irrespective of what your revenues are and what that  
8 headline royalty would be.

9 The alliance's position in the new JOL is  
10 interesting. There is this whole thing about  
11 categories, again I do not want to get bogged down about  
12 this, but there is pure webcasting, there is premium and  
13 interactive webcasting, and there is special webcasting  
14 according to the alliance's world. In our world we  
15 prefer to call them general webcasts and premium  
16 webcasts.

17 THE CHAIRMAN: They are all set out in part 8 of their  
18 skeleton, are they?

19 MR STEINTHAL: I want to try to simplify things as much as I  
20 can for the panel.

21 First of all, these differences in terminology under  
22 the new JOL are irrelevant as to headline rate. They  
23 are only relevant as to minima.

24 Again, put aside the special webcasting category.  
25 If you have a station that is more than 50 per cent

1 dominated by one artist or one band, and as I talk about  
2 general webcasting in a minute you will hear why that is  
3 nothing to worry about.

4 Put that aside for the moment.

5 We can avoid differences about what is the  
6 difference between pure webcasting and general  
7 webcasting. Where do you draw the line between pure or  
8 premium and interactive as the alliance would draw it,  
9 or we would draw it between general and premium?

10 You can avoid line drawing if there is one unified  
11 rate and if there is no differentiation for minima  
12 purposes between these sides of webcasting services.

13 We would submit to you, and we do in our skeleton,  
14 we explain where we would draw the line, and in  
15 a nutshell let me explain this.

16 Webcasting started in the United States. You can  
17 blame us for this bad product. We started it. Under  
18 the US law, and we are taken to task for referring you  
19 to US law. We are not referring you to US law for  
20 anything other than the recognition of custom and  
21 practice in this industry which has been carried into  
22 the UK. We are not saying: go set a rate based on rates  
23 in the United States. We are saying this industry grew  
24 out of services that developed in the United States and  
25 because it is --

1 THE CHAIRMAN: Do not worry about that, it is not a mortal  
2 sin to refer to US law in this country. Some counsel do  
3 it.

4 MR STEINTHAL: Anyway, for reasons relating to how much you  
5 pay the sound recording honours for performances of  
6 digital music, in the US we have a world in which,  
7 believe it or not, you do not pay sound recording owners  
8 for terrestrial radio. The feeling in the US is that  
9 the record companies get such a boost from the  
10 promotional value of radio that there is no performance  
11 right in sound recordings.

12 But because of digital transmission and their higher  
13 quality, or whatever the reason was, Congress in its  
14 infinite wisdom granted to the record companies in the  
15 late 1990s a performance right in sound recordings, but  
16 at the same time they said "We do not want to have  
17 a situation where the labels can charge whatever they  
18 wish, so we are going to have a compulsory licence  
19 that basically exists so that if the record companies  
20 and the services do not reach an agreement on what the  
21 right value of webcasting is, the CRB, the Corporate  
22 Royalty Board, or the Corporate Arbitration Royalty  
23 Panel would make that determination".

24 But in order to comply with the statutory licence,  
25 what Congress did is it said: "Look, this compulsory



1 licence exists only for radio-like things. If it is  
2 on-demand, if it is downloads labels charge whatever  
3 they want. In order to be compliant with the statutory  
4 licence you have to follow all these limitations: you  
5 cannot have more than three songs from the same album in  
6 a three hour period; you cannot have more than four  
7 songs from the same artist in a three hour period".  
8 Hence the special webcasting category is irrelevant to  
9 a DMCA limitation, because by definition they have more  
10 than four songs from the same artist in a three-hour  
11 period.

12 There is a variety of these limitations in the DMCA.  
13 And while we are being chastised for making reference to  
14 it, it is interesting that the pure webcasting  
15 definition in the very new JOL literally imports from  
16 the DMCA most of the very same programming limitations  
17 that are associated with that seminal set of limitations  
18 coming from the DMC.

19 The important point is that it is a known commodity.  
20 It is what webcasting grew out of and it is those  
21 channels and those kinds of programming that have been  
22 imported here in the UK. So it makes sense if we are  
23 going to draw lines between interactive premium types of  
24 webcasts and non-interactive general webcasts we should  
25 draw the line as it was initially drawn.

1           That is why in our Statement of Case and in the red  
2 line what we have said is: if there is going to be  
3 a distinction, let us use the distinction from which  
4 this all was born.

5           The alliance makes this argument that the Yahoo  
6 service is interactive and should be deemed premium.  
7 They pick up one sentence out of the statute which  
8 defines what is interactive and what is not interactive.

9           I do not want to spend a lot of time today on that  
10 issue.

11 THE CHAIRMAN: The Yahoo service is interactive?

12 MR STEINTHAL: No, it is not. According to Yahoo it is not.

13           According to them it is. They are laughing over there.

14           I laughed when I read their citations because they  
15 deliberately did not cite the following sentence from  
16 what they do cite. I will try not to laugh during their  
17 presentation.

18           What they quoted to you about what an interactive  
19 service is under the DMCA, they read through the first  
20 part, and this is in the authorities volume 1, tab 2 in  
21 section 7, the definition of an interactive service  
22 under the DMCA. It says:

23           "An interactive service is one that enables a member  
24 of the public to receive a transmission of a programme  
25 specially created for the recipient for on request

1 a transmission of a particular sound recording."

2 So they quote to you: well, Yahoo gives you  
3 specially created to the recipient programmes.

4 They do not read you the next sentence, and I quote:

5 "The ability of individuals to request that  
6 particular sound recordings be performed for reception  
7 by the public at large, or in the case of a subscription  
8 service by all subscribers of the service, does not make  
9 a service interactive if the programming on each channel  
10 of the service does not substantially consist of sound  
11 recordings that are performed within one hour of the  
12 request, or at a time designated by either the  
13 transmitting entity or the individual making the  
14 request."

15 It could not be any more clear. So Yahoo does not  
16 allow you to hear the product of the feedback you give  
17 in a manner that conflicts with the second sentence.

18 Their programming does say not substantially consist  
19 of sound recordings performed within an hour of the  
20 request or at a time designated. In fact the  
21 programming complies with those limitations about no  
22 more than four songs per artist in a three hour period.

23 So the quotation is routed out of the longer  
24 provision of interactive service. I think we would be  
25 getting off into territory we do not need to get off

1 into if we are going to have huge debates about what is  
2 the right definition? We think the DMCA can be adopted  
3 lock, stock and barrel, that is what everybody is  
4 basically abiding by as the dividing line between  
5 general and premium. Having said that, we are not  
6 vehemently and violently committed to having a separate  
7 rate among non-on-demand programming.

8 Remember, the alliance's headline rate proposal is  
9 that, putting aside special webcasting which we agree is  
10 not DMCA compliant, and we do not know who is doing that  
11 if anybody is doing that -- we are not. Put that aside,  
12 all other forms of non-on-demand webcasting are now in  
13 one bucket for headline rate purposes in the alliance's  
14 proposal.

15 We have proposed a dividing line for headline  
16 purposes between general and premium.

17 If the panel decides: let us not get into any  
18 line-drawing like that, who needs it? We are perfectly  
19 happy to split the difference and have all of it come in  
20 at the mid-point between 5 and 5.5 per cent. I noted  
21 earlier that if you just took the same proportionate  
22 reduction that occurred from the new JOL between the  
23 download rate that existed in the 2006 JOL and the new  
24 JOL of one third, you would end up with 5.33 per cent.

25 I leave to a later day the wisdom of drawing lines

1 or not. For headline rate purposes, we are not  
2 committed to the need for there to be this kind of  
3 line-drawing.

4 I think as we move on in the trial you may say to  
5 us: let us focus on doing it that way.

6 THE CHAIRMAN: You see it in a much more simple way really?

7 MR STEINTHAL: Yes. I think there is a much easier line to  
8 draw. It is based on an existing statute from which all  
9 these services emerged.

10 If we are going to draw a line, let us draw it on  
11 that basis and leave it at that. But we do not have to  
12 draw lines unless, as the alliance proposes, the minima  
13 be tiered in a very, very penal way based on whether you  
14 comply with their definition of "pure" or their  
15 definition of "premium and interactive", or their  
16 definition of "on-demand" for that matter.

17 I will come to the minima in a minute, because if  
18 there are no minima, as we believe there should not be,  
19 again it disappears entirely. If you look at it from  
20 that perspective, if you buy our position, which I will  
21 come to very momentarily, that it is not required or  
22 warranted that you impose minima, then you do not need  
23 to have distinctions at all. Just non-on-demand or  
24 on-demand.

25 We can deal with this question of special



1           you have not read their --

2   THE CHAIRMAN: Contentious.

3   MR STEINTHAL: Yes, that is another way of putting it. I  
4           think it is worse than contentious actually. Over and  
5           again, the alliance and BACs accuse the webcasters of  
6           trying to use their repertoire and pay near zero for it.

7           That is simply not the case. Let me start with the  
8           law on minima. Let me be brief. It is covered in our  
9           opening skeleton at paragraphs 179 to 182, which address  
10          how historically minima had been disfavoured by this  
11          Tribunal.

12          Citing the BPI v MCPS case, plainly the precedent is  
13          that absent a commercial justification for special  
14          treatment, minima are not warranted.

15          Now, prior to the settlements with the  
16          non-Webcasters, the alliance and BACs had focused their  
17          venom about the need for minima on iTunes, and the  
18          permanent download on-demand streaming models in  
19          particular.

20          How often did we see in the written submissions  
21          things about loss-leading of Ipod, of music to sell  
22          Ipods, or voucher systems, the effect of which was to  
23          minimise the value of music when sold as downloads?

24          That was their primary argument to support a per  
25          unit or per subscriber minimum for permanent downloads

1 and on-demand streaming subscription sales.

2 As the iTunes statement makes clear, iTunes does not  
3 accept that it ever underpriced but the point is the  
4 issue as it was presented for the need for minima was  
5 presented in the context of download sales and  
6 subscription sales and the concern that services  
7 operating those kinds of businesses would underprice the  
8 units being sold, the unit of music, or the unit of  
9 subscription, in order to drive some other business  
10 interest.

11 The new JOL solves that problem, to the extent it is  
12 a problem, with the minima that exist for permanent  
13 downloads and on-demand streaming subscriptions.

14 Significantly that structure, as the evidence will  
15 show, is not intended to supplant the headline rates for  
16 permanent downloads or on-demand subscriptions.

17 At the normal 79 pence per download price for  
18 a permanent download, the 8 per cent royalty rate yields  
19 a royalty well above the 4 pence per unit minimum.

20 Similarly, at the current £10 or £15 per month  
21 subscription for the on-demand streaming services of  
22 Napster or powered by MusicNet, the 8 per cent royalty  
23 would yield royalties well above the 40 pence or  
24 60 pence minima in the new JOL for either non-portable  
25 services or portable subscription services respectively.



1       In short, the minima that were adopted in the new JOL by  
2       entities that were there to negotiate them for their  
3       business, permanent downloads and on-demand streaming,  
4       were designed to address explicit loss-leading concerns  
5       articulated by the alliance and they will not kick in  
6       unless there is demonstrable price-cutting relative to  
7       existing price levels for sale of permanent downloads  
8       and on-demand subscriptions.

9             But we have a fundamentally different proposition  
10       being presented by the alliance in respect of the new  
11       JOL's webcasting minima.

12            The supplementary evidence from the webcasters shows  
13       just how stifling the per-stream minima proposed by the  
14       alliance would be for advertiser-supported services.

15            Without getting into specific numbers, AOL's witness  
16       statement reflects that the minima would yield royalties  
17       five times higher than the headline rate.

18            A net effective percentage rate of 33 per cent of  
19       revenue. The Yahoo witness statement reflects that the  
20       minima, even assuming an over-broad definition of  
21       revenue for purposes of calculating what the headline  
22       rate would yield -- so if we take the alliance's  
23       argument and we plus it up to get the highest possible  
24       rate, the highest possible royalty, with the definition  
25       of revenue they want, even with that the minimums as

1 applied by the alliance would be 2.5 to 3 times what the  
2 headline rate would yield over that over-broad revenue  
3 base. An effective rate of almost 20 per cent.

4 Pandora, Mr Brown's witness statement, estimates it  
5 would work out to about 35 per cent of revenue, the  
6 minima as applied to their service based on what would  
7 be anticipated in the revenue per hour that they could  
8 drive.

9 The incendiary comments of the alliance and BACs  
10 essentially claim that the problem is not what they say  
11 are small per stream minima, they say the problem  
12 instead is that the webcasters are not adequately  
13 monetising their services, essentially challenging the  
14 viability of their business models.

15 They ridicule AOL and Yahoo in particular for the  
16 paltry, in the publishers' minds, payments that would  
17 flow from application of the headline 6.5 per cent  
18 royalty rate structure of the new JOL without the  
19 requested per stream minimum.

20 The alliance and the BACs's written statements make  
21 it seem, first, that minima of 0.06 pence and  
22 0.085 pence per stream are tiny fractional amounts of no  
23 genuine cause for the Tribunal's concern. And that, as  
24 well, they take the position that the stream volumes  
25 that we are talking about, to the tune of 289 million

1 streams per year, in 2005, on Yahoo Radio is usage of  
2 their repertoire of, and I quote BACs at paragraph 83 of  
3 their opening submission:

4 "... usage of an enormous scale."

5 They suggest what is the harm at 0.085 pence per  
6 stream of a royalty of only £245,000, for application of  
7 a 0.085 pence per stream minimum to 289 million streams.  
8 That is in footnote 45 of their opening skeleton.

9 But the evidence at trial will negate both these  
10 assertions, meaning both the assertion that these 0.06  
11 and 0.085 numbers are tiny and fractional and that this  
12 is a huge scale of usage; how will the evidence so  
13 reflect, you might ask.

14 289 million streams is a drop in the bucket in terms  
15 of broadcast radio simulcasting usage. It is nowhere  
16 near the kind of usage that you see under the CRCA  
17 agreement. Once you take scale into account, the  
18 hyperbole of the alliance and BACs positions comes into  
19 focus.

20 I ask you to look at one of Ms Enders' exhibits. I  
21 will try --

22 THE CHAIRMAN: Is this the one that is before us here?

23 MR STEINTHAL: Yes, this is appendix G to Enders 2.

24 THE CHAIRMAN: This is a confidential one?

25 MR STEINTHAL: It is a confidential document. For a short

1 bit, because I am going to make reference to specific

2 numbers on it, I am going to have to ask --

3 THE CHAIRMAN: Can you not just say "the third figure down"

4 or? Otherwise we are going to have --

5 MR STEINTHAL: I will try to do it that way.

6 THE CHAIRMAN: See what we can do.

7 MR STEINTHAL: I will pause. I wonder why aggregate data of

8 the broadcast industry would be class 2 confidential in

9 the first place.

10 THE CHAIRMAN: I was wondering that too, but never mind,

11 that is what they say it is. But it is against my

12 inclination to empty courts of people.

13 MR STEINTHAL: And mine as well.

14 THE CHAIRMAN: Let us see where we can go.

15 MR STEINTHAL: This appendix G to Enders 2 is a document

16 referred to as "Webcasting Analysis of PRS Revenue for

17 Commercial Radio". Let us all focus on what this is.

18 These are figures about the PRS's licensing of

19 commercial radio under the CRCA agreement.

20 You will see in the second column that is

21 highlighted, it says:

22 "Hours listened: 0s per year."

23 So you will see that there is a number in the double

24 digit billions of hours per year.

25 THE CHAIRMAN: I can see that.

1 MR STEINTHAL: Even if you were to use a conservative number  
2 like ten songs per hour on commercial radio, which is  
3 what this document uses, and it probably understates it,  
4 you would have hundreds of billions -- I am trying to do  
5 this -- we can all do the math, add one zero to the  
6 first line. You would have hundreds of billions of  
7 songs, of plays, because it would be the double digit  
8 billions of hours times ten, you would get to hundreds  
9 of billions of songs.

10 So that is hundreds of billions of plays under the  
11 CRCA agreement versus 289 million by Yahoo that BACs  
12 talked about.

13 So the so-called enormous scale of Yahoo is  
14 de minimis relative to the kind of streaming or  
15 broadcast activity under the CRCA agreement. So much so  
16 for that enormous scale, but let me go on. By the way,  
17 AOL's and Real's numbers in terms of volume of streaming  
18 is much less than Yahoo's.

19 Let us look at the far right column, it shows  
20 an effective per song royalty under the CRCA agreement.  
21 We all see that? That is 0.0 something per song. P,  
22 that is pence, not pounds.

23 That is clearly less than or approximately one sixth  
24 of the lowest of the minima that the alliance is  
25 proposing in this case. It is less than one eighth of

1 the minima that the alliance would charge to Yahoo for  
2 all of Yahoo's streams. Again this assumes a relatively  
3 small ten songs per hour for broadcast radio.

4 It is interesting, this per song royalty drawn from  
5 the CRCA agreement, Mr Boulton calculated a number that  
6 was somewhat less by 1400ths or so of a P compared to  
7 Ms Enders. So Ms Enders' number is somewhat larger than  
8 Boulton's number. So let us use Enders' number.

9 The point is this, in a mature industry, like  
10 broadcast radio, where the annual royalty and an average  
11 of 4 per cent headline rate reach the royalties -- is  
12 this a confidential number? The aggregate royalties  
13 under the CRC numbers. We have double digit millions of  
14 pounds. PRS royalty, millions of pounds.

15 THE CHAIRMAN: I see.

16 MR STEINTHAL: We have a mature industry generating double  
17 digit millions of pounds in royalties at a 4 per cent  
18 headline rate on average, which works out to a per play  
19 equivalent rate of at most the number in the right-hand  
20 column.

21 A number that is less than one eighth of the rate  
22 that the alliance would charge Yahoo and most other  
23 webcasting performances.

24 What does this tell us? This is the important bit  
25 here. The reason the 6.5 per cent headline rate yields

1        what appears like a small royalty to the alliance or  
2        BACs is not because the 6.5 per cent rate is too low,  
3        and not because of the lack of a per stream minimum in  
4        the range the alliance suggests, it is because the  
5        volume of activity and the audience in webcasting today  
6        is so darn small. At a volume of 300 million radio  
7        streams in a year at 15 songs per hour, which is the  
8        average of what webcasting is, you would have  
9        20 million hours of programming. 20 million hours  
10       compared to the double digit billions of hours that is  
11       in the second column.

12       Now, put another way, if the audience of webcasting  
13       were to grow to the size of the audience of broadcast  
14       radio and simulcasting, the revenues would grow  
15       enormously too.

16       As the evidence will show, ad spend is directly  
17       related to the size of the audience you reach, and of  
18       course the volume of streams would grow as the audience  
19       increases.

20       So if the webcasters were fortunate enough to grow  
21       to the double digit billions of hours of streaming as  
22       reflected under the CRCA agreement then at the per song  
23       equivalent under the CRCA rate, which is one sixth the  
24       lowest of the minima proposed by the alliance, the  
25       webcaster royalties would be commensurate with broadcast

1 radio. They would be paying double digit millions of  
2 pounds per year.

3 The converse is also true. Were you to apply the  
4 lowest minimum that the alliance is proposing on a per  
5 stream minimum fee basis to broadcast radio -- get  
6 this -- their fees would go from double digit millions  
7 of pounds to a staggering -- big number. This is hard.

8 THE CHAIRMAN: Yes, yes.

9 MR STEINTHAL: Six times the number in the top line under  
10 PRS royalties.

11 THE CHAIRMAN: Yes, I can see.

12 MR STEINTHAL: So if the webcasters were saddled with this  
13 lowest per-stream minimum of 0.06 pence per play, while  
14 terrestrial radio and simulcasters are paying at the  
15 current scheme right under the CRCA agreement, and the  
16 webcasters somehow were able to grow to the same volume  
17 of plays, they would be paying the same amount of money.  
18 Versus, under the alliance's suggestion, we would be  
19 paying that huge amount of money for the same number of  
20 performances, six times as much, in the hundreds of  
21 millions of pounds. How in the world is that not  
22 discriminatory?

23 The CRCA agreement has no minimum at all, and the  
24 minima they are talking about would make it utterly  
25 impossible -- and this is not exaggeration -- utterly



1 impossible to compete with broadcast radio for the same  
2 advertisers and the same audience.

3 THE CHAIRMAN: Which is a mature industry.

4 MR STEINTHAL: Yes, it is.

5 If anything, the fact that we are not mature under  
6 the new format discount cases and the like would suggest  
7 we should have a lower rate. We are not asking for  
8 a lower rate. We are not asking to be discriminated  
9 against other than on a new format discount for a short  
10 period. We are not asking for a lower rate than 4  
11 per cent even plus up to 5 per cent. Yes, we are asking  
12 for a new format discount as we are going through this  
13 transitional period.

14 But the bottom line is, these numbers that they are  
15 proposing would cripple the industry and there is no  
16 recognition whatsoever of that on the alliance's part.

17 All they do is they say: oh Lord, you would only be  
18 paying us this double digit amount of royalty under your  
19 system for 289 million streams. Well, 289 million  
20 streams, as I said, is a drop in the bucket compared to  
21 a mature radio industry.

22 THE CHAIRMAN: Yes, I see.

23 MR STEINTHAL: The simple fact is that for the alliance and  
24 BACs, to get the volume of royalties they would like  
25 from internet radio and webcasting, they would need to

1 have the industry grow. They do not need these minima,  
2 in fact, as the Pandora and MusicChoice statements  
3 reflect as well, these minima will stifle the very  
4 growth that is necessary to drive up the royalties to  
5 their members.

6 Let me turn to some of the other attacks by the  
7 alliance and BACs regarding the minima issues.

8 They malign us for not proposing specific minima in  
9 the red line. As noted, there are no minima in the CRCA  
10 agreement. MusicChoice notes that there is no minima in  
11 its agreement. So the webcasters do have a principled  
12 basis for saying there should not be minima here.

13 But we did not stop there. We had Mr Boulton opine  
14 on a legitimate minimum if the Tribunal is inclined to  
15 award one. He calculated a per stream rate based on the  
16 very CRCA data in the exhibit that you are looking at,  
17 which equated to what we all know in his report, and he  
18 suggested that the minimum -- because it is not supposed  
19 to supplant the headline rate -- should be half of what  
20 the per stream equivalent is under the CRCA agreement.

21 So our position, very clearly, is not what the  
22 alliance attributes to us, it is if you are inclined to  
23 have a minimum we should be paying a minimum on a per  
24 stream basis of half of what the CRCA -- and the BVC  
25 agreement he takes into consideration as well -- yield

1 on a per stream equipment basis.

2 Let me address briefly the alliance and BACs's  
3 arguments based on the PPL rates for minima.

4 There are several flaws; PPL of course is the  
5 collective licensing body of the sound recording owners  
6 and they have a limited mandate in the space of  
7 webcasting which they licence at a rate -- that is not  
8 confidential is it, PPL rate? -- of 0.05p per song.

9 First of all, let us focus on what the PPL rate is  
10 and is not. It is not a minimum fee. It is the  
11 exclusive fee basis under the PPL webcasting licence.  
12 To be sure, webcasters would object to a 30.05p rate in  
13 and of itself for the alliance, but the alliance  
14 position takes the concept of wanting your cake and  
15 eating it too to a new level.

16 They want the 6.5 per cent headline rate, 162  
17 per cent of the CRCA equivalent, and they want a minimum  
18 fee that is higher than the maximum fee that the PPL  
19 gets.

20 That, where I come from, is chutzpah.

21 The alliance's position based on the PPL sound  
22 recording rate is flawed for other reasons as well.  
23 First, it is based on the presumption that in the online  
24 digital distribution market, publishers are entitled to  
25 royalties no less than the sound recording rates. That

1 is the premise of their position on this. We are  
2 entitled to no less than the sound recording companies  
3 get. I cite a passage from a prior tribunal case in  
4 another context that made such an assumption.

5 But here we have evidence in two digital online  
6 distribution markets that this assumption does not hold.

7 First, the facts will be that the PPL rate was based  
8 on the first ever of those US copyright royalty cases  
9 that we talked about earlier.

10 We talked about the fact that rates for webcasting  
11 in the US were subject to a statutory licence procedure.  
12 And in fact the PPL rate was derived from the  
13 point 0.762 cents per performance rate that came out of  
14 the CARP decision in 2002. We do not have the time to  
15 go into the bundles and get it. It is cited in our  
16 papers. With the currency at that time it was literally  
17 the translation of that rate.

18 Most importantly, that CARP decision shows on its  
19 face that the panel there in the online performance  
20 market rejected the very proposition upon which the  
21 alliance relies for minima here. Specifically, the CARP  
22 rejected the notion that musical work performance rates,  
23 meaning the publishing performance rates, should be no  
24 less than the sound recording performance rate for  
25 digital distribution in a webcasting.

1           Absolutely rejected it.

2           Cited in paragraph 193 of our skeleton, the panel  
3           established rates for sound recording performances that  
4           were three and a half times the musical work rates for  
5           the same performances in webcasting.

6           They held, and I quote:

7           "The panel is not required to justify why the rates,  
8           if ultimately recommended here, are greater than the  
9           rate for the use of musical works."

10          Paragraph 193 in our skeleton.

11          This as against a 0.02 cents per performance rate  
12          for musical works that was the evidence in that case,  
13          which incidentally is fairly equivalent at current  
14          exchange rates to the right-hand column of the exhibit  
15          we looked at as to what the performance rates are for  
16          radio with the PRS in this country.

17          Again, I am not injecting the US precedent to  
18          suggest we should follow the rates that come out of the  
19          US. I am merely pointing out that the very PPL rate  
20          that the alliance cites as evidence to support its  
21          minimum proposal was based on findings about a sound  
22          recording to musical work, rate structure flatly at odds  
23          with the premise of the alliance's position that it must  
24          get no less for webcasting than sound recording owners  
25          get for webcasting.

1           There is further evidence negating the alliance's  
2           presumption on that issue as well. The existing US  
3           sound recording rate is subject to ongoing trials. As  
4           you all know, that is why I am shuttling between this  
5           proceeding and a US proceeding. The very per  
6           performance rate in the UK for sound recording is  
7           subjected to a new CRB proceeding where the webcasters  
8           are trying to drive it down and the sound recording  
9           owners are trying to drive it up, surprise, surprise.

10           We put in the latest round of evidence. The written  
11           testimony in that case, dated September 28th, 2006, of  
12           the chief financial officer of Universal Music Group, Mr  
13           Ciongoli, he is responsible for Universal Music Group's  
14           publishing and sound recording business. So he is  
15           an employee, the CFO, of both. A rare guy. Does  
16           publishing and sound recording and he is the CFO for  
17           both. The very Universal Music Group that has  
18           affiliates -- international affiliates are members of  
19           the alliance and members of BPI.

20           Mr Ciongoli's evidence in no uncertain terms flatly  
21           contradicts the now withdrawn testimony of the alliance  
22           and the BACs members about the publisher's presumed  
23           entitlement to royalties of no less than what sound  
24           recording owners get.

25           His evidence is directed precisely at the online

1       webcasting market and his evidence posits that there are  
2       fundamentally different risks, investments and rewards  
3       associated with the distribution via webcasting as  
4       between the sound recording owners and the publishers,  
5       justifying a much higher webcasting royalty for labels  
6       than for the publishers.

7             I will not read from his testimony given the press  
8       of time. It is part of the evidence submitted with the  
9       latest round of evidence.

10            Finally, the alliance, its own conduct reveals  
11       acceptance that in the digital online market royalties  
12       of a fraction of the sound recording rate are reasonable  
13       for publishers. Contrary to the initially stated views  
14       in this very case, that rates for permanent downloads  
15       and on-demand streaming should be set by reference to  
16       the label deals that permanent downloads services and  
17       on-demand streaming services had entered into, now, in  
18       the new JOL, they have accepted royalty rates of  
19       one-sixth of prevailing headline rate for on-demand  
20       streaming services, and one-eighth of the prevailing  
21       rate for permanent downloads in terms of what the sound  
22       recording owners received.

23            In sum, the evidence shows that the premise of the  
24       minima proposal advanced by the alliance is  
25       fundamentally flawed, whether by reference to the PPL

1 rate or by reference to certain voluntary deals that  
2 Yahoo did with certain labels which Miss Ferguson will  
3 attest to.

4 I am going to blow through very quickly the  
5 remaining issues.

6 On gross revenue base --

7 THE CHAIRMAN: Do not race through it. Looking at the time  
8 now, it has gone 4.30. I do not think we are going to  
9 have time to start anyone else tonight. If you can do  
10 it in a quarter of an hour --

11 MR STEINTHAL: I definitely can do that.

12 Obviously I focused on the two main issues. I think  
13 that shows the priorities we have in terms of what we  
14 want to focus on and what we want to focus you on.

15 The gross revenue base, briefly, our problem is with  
16 its over-breadth and its ambiguity.

17 As I mentioned at the very outset, we suggest the  
18 best way to resolve the issue is for you to rule on  
19 certain concepts presented by specific examples and then  
20 have the parties incorporate your rulings on those  
21 concepts into the final version of the JOL.

22 THE CHAIRMAN: Could I say this, that at the end of the day,  
23 things change in these tribunal hearings. I know that  
24 from experience. I am going to ask you all to present  
25 us with a list of issues to be determined at the end of



1 the day because I often find in these hearings they are  
2 not the same as they were at the beginning always. In  
3 parenthesis.

4 But go ahead as they are now at any rate.

5 MR STEINTHAL: I will leave the discussion of the law, when  
6 it comes to the gross revenue issues, to my learned  
7 colleagues representing the MNOs and iTunes. Suffice to  
8 say here that an adequate nexus seems to be the right  
9 buzz words coming from the Tribunal precedent.

10 THE CHAIRMAN: Yes, that was in the BskyB case, I well  
11 remember it. I lost it.

12 MR STEINTHAL: I think we all know that!

13 Suffice it to say that an adequate nexus is required  
14 as between the revenue sought to be captured in the base  
15 and the use of the alliance's repertoire.

16 We raise three specific issues within this ambit of  
17 dispute in our skeleton. One relates to home page and  
18 other non-music page revenues. This will come a lot  
19 more clear when we get some demos; we do not know how  
20 familiar you are with portals and how they monetise on a  
21 home page, but when you go to a home page basically you  
22 are bombarded with opportunities to move from the home  
23 page to travel to search to music to sports to news,  
24 whatever.

25 THE CHAIRMAN: We all have home pages on our computers.

1 MR STEINTHAL: Some of them are portal home pages, some of  
2 them might be a different kind of home page. But portal  
3 home pages; remember, AOL, Yahoo and Real are portals.  
4 Different kinds of portals but they are all portals.  
5 Interestingly, the alliance has largely conceded the  
6 issue of portal home page revenue for Yahoo and AOL. It  
7 conceded that as currently constituted there is no  
8 sufficient nexus between the home page revenues of Yahoo  
9 and AOL and the revenue base for the new JOL.

10 We need, however, to more broadly clarify this  
11 principle and its application for companies other than  
12 AOL and Yahoo and that remains to be determined on the  
13 issue of home page revenue.

14 THE CHAIRMAN: On the basis that different home pages  
15 could --

16 MR STEINTHAL: I think we need to have more of a principle  
17 of general application. RealNetworks, for example, is  
18 a portal. The settlement agreements as they have been  
19 articulated or written are specific as to AOL and Yahoo,  
20 they are not specific as to RealNetworks. If we have  
21 a dispute with them about Real we will have to put  
22 evidence in on it. If it turns out that they are not  
23 going to press that the RealNetworks home page should  
24 come into the revenue bucket then we can shorten the  
25 evidence on that issue.

1           The other aspect of this part of the revenue  
2           definition relates to pages within a music service that  
3           are served up that do not serve music. So, for example,  
4           you can be on a text page, entirely text, not listening  
5           to music, checking out information about your favourite  
6           artist, when that artist is coming to town, and if there  
7           are ads served on those pages, should the ad impressions  
8           generated on those pages come into the revenue base?  
9           Even when you are not being delivered music that comes  
10          within the ambit of what they are licensing. Our  
11          position is no, their position is yes. There will be  
12          some evidence on that and you will make a decision.

13        THE CHAIRMAN: Are you envisaging a snippet, for advertising  
14          purposes, of a movie or something?

15        MR STEINTHAL: No. What we are saying is that on those  
16          pages where there is no activity occurring, comprised of  
17          the exploitation of the alliance's repertoire, the  
18          revenue should not come in.

19                I think what we have here are some issues that are  
20          black and white and some issues that are not. I think  
21          the home page revenue issue is black and white and that  
22          is why the alliance has conceded it.

23        THE CHAIRMAN: Alright, we will put that down on the menu  
24          for having a look at.

25        MR STEINTHAL: I think this issue of whether within the

1 music area of a portal, if you have non-music pages,  
2 whether the revenue should come in, I would concede that  
3 is a tougher issue. It is a closer call. But we do not  
4 believe it should come in, they believe it should. We  
5 will address it at trial.

6 Our biggest concern is the overarching language of  
7 the general revenue definition. The mere fact, for  
8 example, that you can go from one page of a portal to  
9 another and at that second page listen to music does not  
10 mean that at the prior page, if there is money being  
11 generated, when you are not listening to music it should  
12 come in.

13 That is our view.

14 The second category of revenue definition that is of  
15 concern to the webcasters is product sales.

16 THE CHAIRMAN: Where are these definitions to be found,  
17 incidentally?

18 MR STEINTHAL: We address the issue in section 2 that starts  
19 on page 36. We talk there about the legal standard  
20 first, on page 36. On pages 37, 40 and 41 we address  
21 the three issues under royalty base that we are putting  
22 forward to the Tribunal as examples of the problems with  
23 the gross revenue definitions.

24 Schedule 3 of the new JOL is what creates the gross  
25 revenue definition that we challenge and that apparently

1 every applicant challenges in some fashion.

2 So the product sale issue, I am glad to say, is not  
3 as big an issue as the alliance says it is.

4 The alliance says that we object to click-through  
5 revenues coming into the base. We do not. If the basis  
6 for an ad is instead of somebody saying: I am going to  
7 pay you X thousand pounds for Y number of impressions on  
8 your site, on the pages of your site. Instead it is: I  
9 am going to pay you for every click on that ad, I am  
10 going to pay you Y number of pounds. And so the manner  
11 in which the advertiser gets paid, the monetisation, is  
12 on a per click basis instead of on a lump sum basis for  
13 a number of impressions, we are totally comfortable that  
14 click-through in the music area of the website it comes  
15 in.

16 THE CHAIRMAN: Your case is different to somebody else's  
17 case?

18 MR STEINTHAL: I think we are all in agreement that if it is  
19 part of the exploitation of music and there is  
20 a click-through, that comes in.

21 MR RABINOWITZ: Mr Steinthal is right, the other parties  
22 have always accepted click-through. We had understood  
23 that Mr Steinthal's clients had not. If they do then  
24 there is no issue as to that.

25 THE CHAIRMAN: Excellent. What a happy exclusion.

1 MR STEINTHAL: The issue relates to commission income.

2 THE CHAIRMAN: Yes, that is all coming back.

3 MR STEINTHAL: That is the issue that we object to with  
4 product sales. It is very simple; if the money  
5 associated with buying a product does not come into the  
6 revenue base if we sell it directly, why in the world  
7 should it come into the revenue base if we are paid  
8 a commission when somebody else sells the same product?

9 It is that simple. We just do not believe that  
10 there is the sufficient nexus between getting paid  
11 a commission if we push traffic to somebody else's  
12 website where something is going to be bought, if it was  
13 purchased directly at our website, they concede it would  
14 not come into the revenue base, they conceded that in  
15 the negotiations with the MNOs and iTunes, but they want  
16 the commission, if that same product is sold elsewhere.  
17 We think there is no sufficient nexus either way and our  
18 evidence will address that and we will talk about  
19 offline examples where similarly --

20 THE CHAIRMAN: Let us see where we go on that one.

21 MR STEINTHAL: Perhaps the most interesting area of evidence  
22 on gross revenue associated with our services is the  
23 bundling area. This is where, for example, BT sells for  
24 15 to 20 to 25 pounds, depending on what you buy,  
25 connectivity, high speed broadband access. And as part

1 of the money you pay, embedded within the service is  
2 a Yahoo media package. Not just music, enhanced e-mail  
3 and lots of other features, and within that is embedded  
4 Yahoo's webcasting service also available.

5 THE CHAIRMAN: How can you disembed it?

6 MR STEINTHAL: Exactly. You can do it in two ways. If each  
7 element of the bundle had a legitimate standalone price,  
8 so for example if you had just two things in the bundle  
9 and each of them was a viable product in the market and  
10 there was a webcasting service that people were paying  
11 £4 for per month, and there was a games service that you  
12 were paying £8 a month for, and you packaged them  
13 together for £10, you could say in that situation that  
14 since both products have a standalone value, when they  
15 are purchased separately they have a ratio of 1:2, you  
16 could take the £10 and allocate what is paid on a 1:2  
17 basis. That is what Mr Boulton says, that is what the  
18 alliance says.

19 We are all in agreement; where everything has a  
20 standalone legitimate market value that is the way to do  
21 it. The problem is we do not see very much in the  
22 market like that. What we see are these total bundles  
23 where there is no standalone price for virtually all the  
24 elements of the bundle.

25 In that situation, Mr Boulton has looked at it and

1 his testimony is there is just no good way to do it,  
2 there is no sound way to unbundle, and so we propose  
3 that there be an alternative usage fee based precisely  
4 on the CRCA per stream rates that we looked at before.  
5 We looked at the CRCA and the BVC rates and Boulton  
6 addresses that, and we would be paying X pence per song,  
7 the equivalent of what the CRCA rate works out to be,  
8 for bundle uses of music.

9 One specific thing I want to address on this is that  
10 the suggestion has been made in the new JOL that the  
11 alliance would be permitted to ascribe values based on  
12 their discretion, their views, of what similar products  
13 in the market would command.

14 Now, this is fraught with peril. The real thing  
15 that the alliance wants to do is say that if Yahoo's  
16 music package looks like the RealNetworks subscription  
17 music package and people are willing to pay  
18 hypothetically £5 a month for that other non-on-demand  
19 webcasting service. The alliance might say: we will  
20 just take that standalone value and ascribe it to  
21 webcasting within the bundle. That does not work for  
22 the following reasons: first and foremost, if someone is  
23 paying for an a la carte subscription service they have  
24 made a unilateral individual decision, they want the  
25 product, and they want to use it and they are willing to



1 pay X pounds per month.

2 When you then move into the bundle like the BT Yahoo  
3 bundle, (1) the product is different, and (2) even if it  
4 was the same product, if 90 per cent of the people that  
5 buy the bundle -- and that is what the data suggests --  
6 never use the music service because the driving force of  
7 the BT Yahoo bundle is connectivity, how can you say  
8 that the value on a standalone basis within that bundle  
9 is what the individual that wants to use it is willing  
10 to pay when 90 per cent of the people buying the bundle  
11 do not use that product?

12 Mr Boulton is very clear on this: when you do not  
13 have standalone prices legitimately for each of the  
14 items in the bundle, you cannot unbundle, you default to  
15 an usage metric. Again we are not trying to pay  
16 nothing. We are not trying to pay less than market  
17 value. We are willing to pay on a per stream basis the  
18 identical amount that is yield from the CRCA agreement.

19 That is the nub of the unbundling issue.

20 THE CHAIRMAN: Well, we will see what is said about that.

21 MR STEINTHAL: Other issues, rapid fire. There is the  
22 advertising commission issue. This is one of those two  
23 issues where there is no dispute that a reduction is  
24 required, the question is how much.

25 Basically the new JOL provides that to the extent

1       there is advertising, there is a five per cent  
2       reduction. Of course, as we have said before, none of  
3       the entities that negotiated that deal presently have  
4       any advertising associated with their websites, and  
5       their concerns are more down the road and conceptually  
6       about certain issues that are addressed in their  
7       particular submissions.

8               But the comparable we have urged, for us the  
9       different business of webcasting is broadcasting, and it  
10      is quite clear that the broadcasting benchmark has a 15  
11      per cent reduction for the cost of selling ads.

12             The mere fact that AOL and Yahoo have their own  
13      staffs and their own costs associated with ad sales  
14      instead of out of pocket commissions does not mean that  
15      they do not have such costs. They do. The evidence  
16      will reflect what those costs are, and the 15 per cent  
17      precedent coming from the CRCA agreement is the right  
18      one to adopt. Simple enough.

19             As far as the audiovisual reduction is concerned,  
20      let me state it this way. Again it is no dispute that  
21      it is warranted. Audiovisual works have something that  
22      audio only -- meaning radio-like works -- do not. They  
23      have video. That is why, for example, when you purchase  
24      a DVD of music, meaning a music video in which the sound  
25      recording is embodied, you pay a lot more. You pay

1 almost two times what you would pay for the audio-only  
2 CD. Why? Because the video component enhances the  
3 value.

4 In the prior precedent from the DVD1 negotiations  
5 between the BPI and the MCPS this was recognised, and so  
6 the DVD rate is 25 per cent lower than the CD rate for  
7 the same piece of music.

8 Again, it is a recognition that when you are buying  
9 an audiovisual product part of the value is a video.  
10 Therefore the royalty should attach only to the  
11 audio-only music component and, hence, 75 per cent of  
12 that.

13 THE CHAIRMAN: 75 per cent goes to the --

14 MR STEINTHAL: 75 per cent of the full value goes to them,  
15 and another is a 25 per cent reduction in royalty as  
16 a consequence.

17 THE CHAIRMAN: Yes.

18 MR STEINTHAL: The other issue here on the audiovisual issue  
19 is the alliance's position is that the royalty reduction  
20 for audiovisual usage should only apply to headline rate  
21 and not to minima. Especially in this situation, where  
22 they are seeking minima that would supplant the headline  
23 rate as all the evidence shows, it is just not  
24 principled and not appropriate to not apply this 25  
25 per cent reduction to the royalty however it gets

1       calculated.

2             Let us remember the reason there is this reduction  
3       at all is because part of the value being delivered is  
4       video, and therefore you have to take that into  
5       consideration, the royalty.

6             You should not pay the same for the royalty for  
7       an audio-only work as you would an audiovisual work. It  
8       should apply equally whether the royalty is generated by  
9       a minimum fee or by a headline rate fee, and we believe  
10      it should be 25 per cent based on the precedents. They  
11      believe it should be 15 per cent based on the new JOL.

12            I would point out that none of the entities that  
13      settled, just like my arguments earlier, have any  
14      meaningful video streaming business. The video  
15      streaming in the UK is done by AOL, Yahoo and Real.  
16      There is not a meaningful amount of video streaming on  
17      any of the companies that settled.

18   THE CHAIRMAN: We are going to have evidence on that?

19   MR STEINTHAL: Yes.

20            There are two more issues that I think are basically  
21      taken off the table.

22            There is the issue of non-alliance repertoire.  
23      Paragraph 5.9 of the new scheme affords a specific  
24      carve-out, if you will, or credit or reduction when  
25      on-demand streaming services or permanent download

1 services pay, based on a hundred per cent alliance  
2 repertoire, and it turns out that they paid for a  
3 repertoire which is not licensed within the repertoire.  
4 They get a credit or their money back.

5 We have asked for the same thing. They say  
6 paragraph 5.10 is the rough equivalent. We do not think  
7 we should be the ugly stepchildren here, we should get  
8 the same benefit that the on-demand streaming and  
9 permanent download services are getting when it comes to  
10 a carve-out or reduction associated with our paying for  
11 product that it turns out is not within the alliance's  
12 repertoire.

13 I read their skeletons as conceptually agreeing with  
14 us but they are bickering with us a little bit about  
15 whether 5.10 really covers the same thing as 5.9.

16 THE CHAIRMAN: I hope you will be able to resolve that.

17 MR STEINTHAL: Yes. Similarly the proper licensee issue.

18 MusicNet has done an arrangement, part of the  
19 documents in your binders. I mentioned before, MusicNet  
20 is a white label service, so that you go to HMV, you go  
21 to Virgin. It is really MusicNet that is in charge of  
22 getting the licences from the labels, paying and  
23 reporting to the alliance. They did an arrangement with  
24 the alliance whereby the alliance agreed that as long as  
25 you adhere to certain conditions, including a direct

1 right of audit and all sorts of things to make sure that  
2 information flow goes to the alliance, and the alliance  
3 has audit rights not only against us but against any  
4 third party distributors, that it is okay for MusicNet  
5 to be a licensee.

6 We want the same benefit for companies like Yahoo  
7 when they distribute their service through BT. BT is  
8 the one that "owns" the relationship with the customer  
9 but Yahoo is the one that provides the music service.

10 I read their skeletons as basically saying: we do  
11 not really have a problem with Yahoo as long as they  
12 adhere to the same limitations as MusicNet, and we think  
13 at the end of the day this is for a JOL, for application  
14 to everyone; it should provide that as long as anyone  
15 wants to do this in the fashion that adheres to the  
16 conditions that were required of MusicNet, it ought to  
17 be available as an option for distribution online on  
18 that basis.

19 Finally, new format discount. Webcasting is in its  
20 infancy. Prior precedence suggests it is appropriate.

21 THE CHAIRMAN: Well, they recognise the existence of it at  
22 any rate. Would it not be better to see what they say?

23 MR STEINTHAL: Yes. I know what they are going to say.

24 THE CHAIRMAN: You have got your toe in the door there.

25 MR STEINTHAL: A new format, I do not think so.

1 THE CHAIRMAN: No?

2 MR STEINTHAL: No. I do not think they believe they have  
3 opened the door one fraction of an inch.

4 THE CHAIRMAN: All right.

5 MR STEINTHAL: I hate to speak for the alliance but on that  
6 one I feel confident.

7 THE CHAIRMAN: You are going to give the door a boot.

8 MR STEINTHAL: Housekeeping. The new JOL is an attachment  
9 to each of the settlement agreements that we referred to  
10 earlier.

11 H1/1, H1/6 and H1/8 have the new JOL for each of  
12 the settlement parties. I just thank the Tribunal for  
13 allowing me to both participate generally and go a  
14 little bit over today.

15 THE CHAIRMAN: Thank you very much indeed. Could I just  
16 raise one or two points. First of all, may we give you  
17 back this confidential document.

18 MR STEINTHAL: You may. Unless you wanted to take it home  
19 and study it.

20 THE CHAIRMAN: Well, keep it because we may want to use it  
21 again.

22 The proposed trial timetable, would you like to have  
23 a look at that? We were a little surprised to see that  
24 27th and 28th had been blacked out. Why is that?

25 MR STEINTHAL: That was the accommodation for when I had to

1           be back in the States for sure during that week, and we  
2           felt that we would still be able to finish by the  
3           self-imposed and Tribunal-imposed requirement that we  
4           finish the week of the 4th December. It may be, I have  
5           to consult with the schedule over there, that one of  
6           those days comes back in which event I would be happy to  
7           let everybody know if people want to sit on one of those  
8           days.

9   THE CHAIRMAN: For example, on the 4th, I can tell you now I  
10          have a one-day case on the 4th so that there will not be  
11          any demonstration.

12   MR CARINE: I cannot possibly do it.

13   THE CHAIRMAN: The Rear Admiral cannot do it either. I am  
14          not coming on my own.

15   MR CARINE: The 1st and the 4th are absolute no-no days for  
16          me.

17   MR STEINTHAL: What I am advised is a good idea is, to the  
18          extent we do not cover the demos adequately during  
19          witness testimony, on 27th or 28th we could certainly do  
20          demos.

21   THE CHAIRMAN: Yes, if you could put that down.

22                While you were telling me about the interaction or  
23          interrelation of the audio and visual components of an  
24          audiovisual production, you might like to take a look at  
25          a case in which that was in issue before the Singapore



1 Copyright Tribunal called Singapore Broadcasting  
2 Corporation v Compass, which is the Singapore equivalent  
3 of the Performing Rights Society. It was about ten  
4 years ago and is reported in the Fleet Street Reports.

5 MR STEINTHAL: My recollection is we take that rate. I  
6 think it was a one per cent rate or something like that.

7 THE CHAIRMAN: That is right, it was. I just mention it  
8 without giving away who was winning or who was losing on  
9 that one.

10 MR STEINTHAL: I actually had the privilege of dealing with  
11 the Singapore Copyright Tribunal once, part of my  
12 international travels.

13 THE CHAIRMAN: In the morning we are down for 10 o'clock.

14 MR CARR: Can could I raise a point on that. It is nothing  
15 to do with Mr Steinthal's presentation at all, but if  
16 you look at the programme for today, it did contemplate  
17 half an hour of me. Now, obviously, inevitably one has  
18 to take a ten minute break and we did not start actually  
19 until 2.15 so inevitably it overran a bit.

20 THE CHAIRMAN: You are feeling compressed?

21 MR CARR: Not at the moment, but if someone else is required  
22 at 11 o'clock I might do. There are a number of ways  
23 round this, because I do have -- I do not know how the  
24 Tribunal feel, but I feel that for each party to do  
25 these openings is very, very important. Otherwise one

1 has a whole lot of evidence and nobody quite knows where  
2 it is going. It is more important than a lot of the  
3 evidence. So I was going to suggest either you start at  
4 9.30, I do not know whether it is possible, or if we had  
5 a slightly shorter lunch or something we could fit  
6 everything in.

7 THE CHAIRMAN: We will start at 9.30 then, is that all  
8 right? Mr Aldous does not look too happy about that.

9 MR ALDOUS: I am quite content.

10 THE CHAIRMAN: So 9.30 tomorrow. Thank you very much.

11 (5.00 pm)

12 (The court adjourned until 9.30am  
13 on Thursday, 16th November, 2001)

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