

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

DETERMINATION OF RATES AND
TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(PHONORECORDS III)

Docket No. 16–CRB–0003–PR
(2018–2022)

**WITNESS STATEMENT OF
THOMAS KELLY**

PUBLIC VERSION

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WITNESS STATEMENT OF THOMAS KELLY

1. My name is Thomas Kelly and I am Executive Vice President, Finance and Administration, at Sony/ATV Music Publishing LLC (“SATV”).

2. While everything in music starts with the writers and composers of the songs, music publishers play a critical role in helping to discover and nurture the development of those writers and composers. Indeed, as I will explain below, but for the ability of music publishers to financially support the investment in new songwriters – many of whom will never achieve any commercial success – through the income generated by the publishers’ existing catalogues of successful songs, I believe that the creation of future generations of “evergreen” songs will inevitably be diminished. If the income being generated by existing catalogues diminishes, the ability of music publishers to continue to make risky investments in the creation of new music will similarly be diminished.

3. But the role of music publishers is not limited to finding writers and composers and helping them to develop their talents. Music publishers provide financial support to both new and existing writers and composers by paying advances against royalties that may or may not be earned in the future, advances that music publishers have been able to fund by virtue of the income

generated by their existing catalogues. Music publishers market, promote and arrange for the world-wide sub-publication and licensing of the songs. They track the exploitation of the songs, collect and process all of the income received from thousands of users and issue royalty statements to the writers and composers. They protect the copyrights against unauthorized use, both through their in-house counsel and through outside litigation counsel.

4. Individual writers could not afford to bear the costs of performing all of these functions. Without music publishers, the music industry would be disrupted and the output of new music would inevitably be reduced. And like any other business, unless music publishers can earn a return on their investment in new and existing writers that is at least equal to or more than the return they would earn were they to pay down debt or make alternative investments, at some point their investors will undoubtedly require that their income be deployed other than by investing in the creation of new songs.

5. Accordingly, I make this statement to document, from a financial perspective, the investment that SATV makes in identifying, signing and then supporting the creative efforts of writers and composers. I will also identify and explain the financial investment that SATV makes in marketing, promoting, licensing the songs and assuring that they are exploited and licensed not merely in the United States but also on a world-wide basis through sub-publishers. Further, I will explain and document the financial investment SATV makes in tracking the exploitation of the songs, collecting and processing the income paid by thousands of users and assuring that the writers and composers are then accounted to and paid their share of the income generated by their songs. Finally, I will explain and document the financial investment that SATV makes to protect the copyrights against unauthorized use.

Professional Background

6. I began my career in music publishing at EMI Music Publishing in November 1991, after having worked in public accounting at Ernst and Young. While at EMI Music Publishing, I held a number of positions, including Senior Vice President of Finance for North America and Executive Vice President of Worldwide Financial Operations. In January 2008, I was appointed Chief Financial Officer and became responsible for EMI Music Publishing's accounting and financial operations worldwide. I held that position until the company was sold to a consortium of investors, including Sony Corporation of America, on June 29, 2012, at which time I assumed my current position at Sony/ATV Music Publishing. I am a Certified Public Accountant and have a degree in accounting from Rutgers University.

7. As Executive Vice President, Finance and Administration at SATV, part of my responsibilities include the overseeing of Financial Planning and Analysis and the Global Copyright and Royalty Administration functions. I report directly to the CFO of SATV, Joseph Puzio, and, as needed, to the Chairman and CEO of SATV, Martin Bandier.

8. In this witness statement, I will be referring to financial information and attaching documents that are derived from the books and records of both SATV and the EMI Music Publishing Companies ("EMI"), which, as I will explain below, have been administered by SATV since June 29, 2012. In my capacity as Executive Vice President, Finance and Administration, I have access to and knowledge of the financial records of both SATV and EMI. It is my understanding that the financial information to which I will refer has been provided to the other parties in this proceeding, although some of the specific information and documents to which I will refer drill down deeper into some of the financial categories of information that have been previously produced.

SATV and EMI Music Publishing

9. SATV is one of the largest music publishing companies in the world, owning or administering (not including the EMI catalogue) approximately [REDACTED] songs written by [REDACTED] songwriters. It controls many of the most successful and valuable music catalogues of all time. As Peter Brodsky states in his witness statement, SATV’s catalogue includes songs written by iconic writers such as John Lennon and Paul McCartney of The Beatles, Leonard Cohen and Bob Dylan. SATV also administers and/or co-publishes songs written by contemporary artist/writers such as Taylor Swift and Lady Gaga. While these contemporary artist/writers are all now household names, responsible for some of the most popular songs and recordings of recent years, they started out as unknowns and were nurtured, promoted and supported by SATV.

10. In June of 2012, following the purchase of the EMI Music Publishing companies (“EMI”) by a consortium of investors including Sony Corporation of America (along with the Estate of Michael Jackson),¹ SATV became the exclusive world-wide administrator of the EMI catalogue on behalf of the owners of EMI. While all of the EMI world-wide publishing companies remain separately owned and maintain their own corporate existence, SATV’s employees around the world are now responsible for managing the publishing interests of the EMI companies, and perform all of the administrative functions, including creative (also sometimes referred to as artist and repertoire), synchronization licensing, grand rights licensing, mechanical licensing, copyright administration, business affairs and legal, income tracking and royalty accounting.

11. EMI’s catalogue, which consists of approximately [REDACTED] songs written by [REDACTED] writers, includes some of the most famous songs of all time, including the incredible Jobete (Motown) catalogue (with songs by Holland, Dozier, Holland, Smokey

¹ [REDACTED]

Robinson, Norman Whitfield and Stevie Wonder, among others), classic motion picture songs written by Harry Warren and by Yip Harburg and Harold Arlen (including “Over The Rainbow”), songs written by Carole King and Gerry Goffin, and the Duke Ellington catalogue. Similar to SATV, EMI’s roster of writers also includes contemporary artists like Alicia Keys and Pharrell Williams, who started out as unknowns and who were nurtured, promoted and supported by EMI.

12. Including the administration of the EMI catalogue, SATV now owns or administers the largest catalogue of musical compositions in the world, with some ██████████ songs. While not all of the songs continue to generate income, ██████████ continue to generate some level of income from public performances, live theatrical performances and mechanical reproduction, including streaming.

The Role of Music Publishers In The Creation and Exploitation of Music

13. As explained in more detail in the accompanying witness statement of Peter Brodsky, music publishers like SATV and EMI employ ██████████ people who are responsible for all of the activities that ultimately assure the continuing availability to the public of not only existing songs but also a constant stream of new songs by both established writers and new writers.

14. Again, as Mr. Brodsky explains in his witness statement, the critical functions performed by music publishers start with the creative department, which is dedicated to searching for new and unknown writers and then working with them to hone their talents and to identify recording artists interested in recording their songs. The business affairs and legal departments perform a broad array of critical services, including negotiating and drafting contracts with new writers, extending agreements with existing writers, acquiring catalogues of songs, securing extended renewal term agreements under the United States Copyright Act with writers and their heirs, negotiating agreements with prospective licensees for the exploitation of songs (including

with interactive streaming services), and protecting the rights in the songs along with outside litigation counsel.

15. Music publishers also have finance and business development departments which focus on, among other things, modeling deals for the acquisition of rights from both new and existing writers, including making financial determinations regarding advances to be paid to writers as well as valuing rights for purposes of acquiring catalogues and purchasing extended renewal term rights.

16. As I will explain below, the financial modeling that is done, both for computing advances and for acquisitions, including the purchase of extended renewal term rights and catalogues, has always involved uncertainty and requires a great deal of experience and judgment.

[REDACTED]

17. These forecasting problems are compounded with new writers. [REDACTED]

[REDACTED]

[REDACTED] Ultimately, entering into agreements with unknown new writers involves something of a leap of faith. Yet, unless there were music publishers willing to back up their belief in the talent of unknown writers with advance payments against royalties that may never be earned, the public would likely be deprived of the next Smokey Robinson, John Lennon, Paul McCartney or Carole King. Music publishers take these financial risks, many of

which never pay off, because they can fund these risky advances, which are investments in the future of music, through the income being generated by their existing catalogues of songs. Because music publishers have been able to take these risks, the public and the streaming services enjoy the benefits of the music that the successful new writers create, without having to bear the costs associated with the failed investments made in the many new writers who prove unsuccessful.

18. As stated in detail in Mr. Brodsky's witness statement, music publishers also have departments devoted to the administration of the copyrights, including making sure that the copyrights are protected and registered with the United States Copyright Office, as well as with mechanical and performing rights collecting societies around the world. In addition, they ensure that the copyrights are licensed to both affiliated and unaffiliated foreign sub-publishers for exploitation abroad.

19. The copyright administration department also performs critical research roles with respect to historical catalogues. Copyrights currently endure for the life of the author plus 70 years. For older works that were copyrighted under the 1909 Copyright Act, the term of United States copyright protection is now 95 years. EMI, in particular, has a very significant historical catalogue, owning and administering songs that were written as early as the 1920s. The copyright administration department is responsible for maintaining and frequently researching the records relating to these songs in order to ensure that they are protected and that they continue to generate income.

20. SATV employs nearly [REDACTED] employees in its Copyright Department worldwide, including [REDACTED] in the United States.

21. Music publishers also have large departments dedicated to licensing. In order for both writers and publishers to generate income from songs, the songs must be licensed for

exploitation. Songs generate income from a variety of uses. In the United States, music publishers issue, directly or through agents such as The Harry Fox Agency, mechanical licenses, which authorize the exploitation of songs on phonorecords, digital downloads and streaming services. Music publishers have employees devoted to seeking to secure synchronization licenses for the use of songs in commercial advertisements and in television programs and motion pictures. Of increasing importance are the licensing of what is known as “grand rights,” which is the use of songs in a live theatrical presentation (such as “Mamma Mia,” “Jersey Boys” “Beautiful, The Carole King Story” and “Motown The Musical”).

22. Music publishers have also been required to make significant investments in music rights management and royalty accounting systems. The exploitation of songs is a world-wide business and publishers like SATV and EMI receive royalty statements and payments from [REDACTED] licensees. All of this data has to be processed and royalty statements have to be generated, either quarterly or semi-annually (depending upon the terms of the specific songwriter agreement), to each of the [REDACTED] writers and co-publishers of the songs owned and administered by SATV and EMI.

23. SATV’s Copyright and Royalty Administration departments employs a proprietary system known as TEMPO that manages copyright and royalty information for its catalogue and now that of EMI.² SATV installed the TEMPO system in 2007, and through fiscal year 2016 (SATV and EMI are both on a fiscal year that ends on March 31 of each year so that fiscal 2016 concluded on March 31, 2016), it has invested nearly [REDACTED]. In addition, as I will explain below, SATV employs a large number of people in Nashville who are engaged in the receipt and processing of the royalty statements and payments we receive

² EMI’s data has been migrated to SATV’s TEMPO system.

from around the world and the generation and rendition of royalty statements to our writers and co-publishers.

Discovery and Development of Songwriters

24. One of the most significant contributions of music publishers like SATV and EMI to the music industry is the investment they make in discovering and developing new songwriting talent. As with all creative endeavors, the public is constantly seeking new music to listen to, to sing and to frame the events of their lives. Music publishers like SATV employ people whose sole role is to discover great writers and who, after signing such writers to agreements, work with them and with recording artists to secure the exploitation of the songs they create.

25. Again, Mr. Brodsky's witness statement explains how SATV's employees in our Creative Department undertake to discover and develop new songwriting talent. SATV employs some ■ Creative professionals in the United States alone and an additional ■ professionals worldwide, who are dedicated to discovering and developing fresh and diverse songwriting talent.

26. These activities of our Creative Department, which are crucial to SATV's development of songwriters and crucial to the expansion of the music available to the public (and some of which comes to be the "inventory" that attracts the listening public to the streaming services), entail a significant cost to SATV ■

■ which are discussed in detail below.

27. Discovering new writers would not mean very much unless SATV and EMI were also able to enter into contracts with them. In order to secure the right to publish or administer the songs to be written in the future by a new writer (as well as to acquire the right to publish or administer the songs already written by successful writers whose catalogues of existing songs and songs to be written in the future may become available), SATV is almost always required to pay

an advance against the hoped-for future royalty earnings that may be earned by the songwriter's songs. SATV's Business Development Department is responsible for [REDACTED]

[REDACTED]

28. As I have said, with existing writers who have a proven body of work, [REDACTED]

[REDACTED]. Over the past few years, SATV and EMI have paid lump sum advances of as much as [REDACTED]

[REDACTED]

[REDACTED] The financial risks that must be assumed by a music publisher to find the writers of the "hits" of the future, the income from which will, in turn, support the continued search for succeeding generations of new great writers are therefore increasing. Attached as **CO Ex. 4.1** is a schedule reflecting the total advances paid by SATV and EMI for the past four fiscal years and the portion of those advances paid to new

unproven writers.

29. Music publishers have no choice but to continue to make advances, both to unproven new writers and to acquire rights from existing and successful writers. These advances are paid not only to effectively compete but to also enable writers to work. Advances are essential to the development of new and established songwriters. As explained by the writers who have submitted witness statements in this proceeding, advances enable writers to write by financing their day-to-day expenses, including professional bills, management commissions, equipment costs, transportation, taxes and general living expenses.

30. The advances paid by SATV to their songwriters constitute risky but necessary investments in the songwriter's talent. Based on our experience, while we always hope that these advances will eventually be recouped from the income that may be produced if the writers are successful, in fact, many of the advances we make are never recouped and must be written off. Even where we pay advances to successful writers to acquire their existing songs, with the changes in the music industry's landscape, there is no assurance that the advances we pay will be recouped in any reasonable period of time. For new writers, the risks are obviously compounded. There is no guarantee that their songs will ever be recorded, or, if recorded, that the recordings will be successful. [REDACTED]

[REDACTED]

31. Attached as **CO Ex. 4.2** is a schedule prepared from our financial records which reflects the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

32. Despite this risk, SATV's payment of advances are crucial to the signing and development of songwriters. These advances constitute a substantial yearly expenditure by SATV. In 2013, in the United States alone, [REDACTED] [REDACTED]. As reflected on CO Ex. 4.1, SATV paid out [REDACTED] in advances during the year and it recouped [REDACTED] [REDACTED]. By 2015 and 2016, [REDACTED] [REDACTED]. For example, in 2015, [REDACTED] [REDACTED]. (CO Ex. 4.1.) In [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

33. In fiscal year 2015, SATV's and EMI's advance spend on new and existing writers equated to [REDACTED] of their total revenue, respectively. (CO Ex. 4.1.) In fiscal year 2016, SATV and EMI's advance spend equated to [REDACTED] of their total revenue, respectively. [REDACTED] [REDACTED] [REDACTED]

34. In addition to discovering new songwriting talent and evaluating their potential, the Creative Department is also involved with developing the new songwriters, which presents further overhead costs. For example, SATV operates three recording studios in the United States. One

studio, located in Nashville, [REDACTED].
[REDACTED]. The other two studios are located in Los Angeles, California [REDACTED].

35. In addition to the Creative Department, discovery and development of songwriting talent also involves the Business and Legal Affairs Department. SATV employs over [REDACTED] people in its Business and Legal Affairs Department in the United States and has more than [REDACTED] Business and Legal Affairs employees worldwide. The Business and Legal Affairs department consists primarily of lawyers and other professionals with deep experience in the music industry. Not only do they negotiate and draft songwriter agreements with both new writers and with writers who have already achieved success, but they also supervise outside counsel in litigations involving the protection of the songs in SATV's catalogue and in the negotiation and drafting of the more complicated license agreements (including those for live theatrical productions such as "Jersey Boys," "Beautiful, The Carole King Story," "Motown: The Musical" and "The Wizard Of Oz").

36. Also entrusted to the supervision of the Business and Legal Affairs Department is the negotiation and drafting of agreements to acquire catalogues of songs from songwriters and other publishers and to purchase what are known as extended renewal term rights, which are rights arising under two complex and little-understood provisions of the United States Copyright Act which enable writers and their heirs to recapture rights they have granted and to then resell them. Understanding and being able to address extended renewal term rights is especially critical for older catalogues such as EMI where the grants of rights made decades ago are entering into the period where the extended renewal term rights are coming due and it is increasingly becoming an issue for SATV as well.

37. While the work and expense SATV is required to incur in order to maintain control

and supervision over a large body of proven songs may not appear to be directly linked to the financial investment SATV makes in discovering and signing new artists who may write the songs that everyone will be listening to in the future, the reality is that without the revenues produced by SATV's and EMI's successful catalogues of songs, we would not have the ability to make risky investments in unproven writers.

38. The costs associated with all of these activities fall within the overheads costs of these departments, which in turn constitute a large portion of SATV's overhead. In 2015 and 2016, the overhead expenses for the creative departments across the United States totaled [REDACTED], respectively. The Business and Legal Affairs Department incurred overhead expenses of [REDACTED]. Attached as **CO Ex. 4.3** is a schedule reflecting SATV's operating costs. I have drilled down into the financial statements to extract the foregoing specific departmental costs referred to herein.

39. While SATV's Film & Television/Synch Department engages in generating income through the negotiation and issuance of what are known as synchronization licenses, which authorize the use of songs in motion pictures, television programs, television commercials, video games or any other audiovisual medium. SATV's Film & Television/Synch Department employs approximately [REDACTED] people in the United States and approximately [REDACTED] people worldwide. In 2015 and 2016, the department's overhead expenses were approximately [REDACTED], respectively. (CO Ex. 4.3.) Again, the specific expense of this department is derived from and contained within the financial statements we provided to the parties.

40. The costs of maintaining this department are part of the investment SATV makes to maximize the exposure of the works of our songwriters and to help generate income from their songs. [REDACTED]

██████████. Similarly, in December 2012, EMI acquired the extended renewal term rights (and future songwriter royalties) of the songs written in part by ██████████

██████████
██████████
██████████
██████████.

45. For all of the reasons I have already described and for the reasons set forth in Peter Brodsky’s witness statement regarding the changes in the music industry, there is no assurance that these songs will continue to generate the same level of income as in the past. There is no assurance that the amounts that EMI paid will be recouped in any reasonable period of time, if at all. In order to support the necessary investment in the continued search for and development of new songwriters who hopefully will write the “evergreen” songs of the future, we continue to make investments in order to retain as large a body of proven songs as possible. Hopefully, they will continue to generate income for years to come and SATV and EMI will not be forced to deploy their financial resources in ways that may offer a better or less risky return on investment.

46. Thus, since the beginning of fiscal year 2015, SATV has spent ██████████ to acquire the extended renewal rights of existing catalogues and songs. EMI, ██████████ ██████████ spent ██████████ in acquisitions of extended renewal rights of existing catalogues.

47. As I have said, in addition to the risk associated with valuing existing compositions or catalogues, there is another risk in a publisher’s decision to invest its capital into existing compositions or catalogues. The music publisher acquiring the existing composition or catalogue must evaluate and decide whether the capital being expended might be better used for other

business expenses, such as paying down debt. [REDACTED]

[REDACTED]

[REDACTED]

48. Thus, just as investing in new and unproven writers entails great risk, there is also a large assumption of risk by the publisher in making acquisitions of existing compositions or catalogues. Yet, as explained in more detail below, with the changes in the music industry, specifically the change from an ownership model to an on-demand model [REDACTED] [REDACTED] forecasting future revenues that will be earned from the exploitation of even “evergreen” songs has become increasingly difficult.

49. As a result of these changes in the music business, determining how much should be offered to acquire either or both songwriter royalties or extended renewal term rights (or even current rights in an existing catalogue of songs) carries far greater risk than in the past. Yet there is little choice because, if the music industry is to continue to identify and develop the new “evergreen” songs of the future, music publishers must continue to invest not only in finding, signing and developing new writers but in retaining and acquiring the rights to the successful existing songs that will support the investment in the future of music.

Protecting Songwriters’ Works and Right to Revenue

50. Publishers like SATV and EMI are responsible for administering the rights in the musical compositions in their catalogues, including by licensing mechanical rights, synchronization rights, performance rights and print rights. SATV and EMI license mechanical rights to users both directly and through The Harry Fox Agency in the United States and through foreign societies such as MCPS in the United Kingdom and GEMA in Germany.

51. SATV and EMI license public performance rights in the United States through the performance rights organizations, ASCAP, BMI or SESAC as well as directly. Indeed, over the past four years, EMI and SATV (and other publishers) have spent [REDACTED] participating in what are known as “rate court” proceedings and in a United States Department of Justice inquiry into what are known as the ASCAP and BMI “Consent Decrees” in an effort to protect and enhance the value of the catalogues of music they control and to protect the income to be generated for writers and publishers now and in the future. These “investments” could not be made by individual writers but are effectively made on their behalf by the publishers at the publishers’ expense.

52. One of the most important services provided by a music publisher is the processing of royalties that are received from users of songs and the generation of statements and payments to writers. As I have said, this is a world-wide business in which SATV and EMI receive statements and payments from [REDACTED] users of music every year.

53. These royalty services are administered by SATV’s Royalty Administration Department. In the United States, SATV employs some [REDACTED] employees who audit and administer songwriter royalties within the Royalty Administration Departments. SATV also employs approximately [REDACTED] people outside the United States in this area.

54. The overhead expenses associated with the day-to-day administration of copyrights and royalties is significant. In the United States during fiscal year 2016, the overhead costs associated with these functions exceeded [REDACTED]. (CO Ex. 4.3.) Again, this information is a departmental segment within the financial statements and is part of the operating costs of SATV.

55. As evidenced by the sheer number of employees in the Royalty Administration Department, the processing of royalties is not simply a computerized activity. While many of the statements are electronic and are coded to songs, the output still has to be examined and there are

always significant statements or parts of statements that cannot be matched. These all have to be examined by our employees [REDACTED]. In addition, there are thousands of statements and payments that continue to come in paper form [REDACTED].

56. Further, [REDACTED] there are always questions raised by writers, their heirs and their representatives about their royalty statements, both in writing and by telephone. The employees of the Royalty Administration Department handle these calls and communications. There are also audits regularly conducted on behalf of writers and the employees of the Royalty Administration Department also address the audit inquiries and provide responses to audit reports and participate in the resolution of any audit disputes.

57. In addition to the foregoing departments, SATV also incurs additional costs in connection with the day-to-day administration of its catalogue and that of EMI, including SATV's Finance Department and Business Development Department, which provide the financial modeling work with respect to new writer deals, the acquisition of existing catalogues and the purchase of writer royalty streams and extended renewal term rights. These departments obviously also manage the overall financial and business affairs of SATV (and EMI). In the United States, these departments incurred more than [REDACTED] in overhead costs in 2016. (CO Ex. 4.3.) Again, as with the other financial information referred to herein, this information is a departmental segment within the financial statements and is part of the operating costs of SATV.

58. Sitting atop the overall business of the world-wide SATV business is the Global Management Department, which is responsible for supervising and managing all of the separate departments, including royalty, copyright, licensing, income tracking, financial planning and administration activities and each of the world-wide music publishing affiliates of both SATV and

EMI (which are located in most of the major countries in the world). The overhead costs associated with the Global Management Department in 2015 were [REDACTED] and rose to [REDACTED] in 2016. These costs too are embodied within the operating costs reflected in SATV's financial statements. (CO Ex. 4.3.)

Changes to Music Publishing With the Rise of Digital Music Streaming Services

59. Over the past five years, [REDACTED] the sale of physical albums and digital downloads [REDACTED]. [REDACTED] SATV's United States-based mechanical income from the sale of physical recordings and digital downloads in 2014 was [REDACTED], by 2016 [REDACTED]. During that same period, SATV's mechanical income from streaming services [REDACTED]. Attached as **CO Ex. 4.4** is a spreadsheet reflecting the various categories of income, including mechanical income earned from various forms of exploitation of songs for the years 2014 through 2016.

60. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (See *id.*)

61. To illustrate what I mean, mechanical income from physical recordings and digital downloads [REDACTED]
[REDACTED] mechanical income from streaming services [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

62. With the shift in revenues from the sale of physical recordings and digital downloads to digital streaming services, music publishers like SATV and EMI are facing new difficulties in managing their business and continuing to acquire the services of new writers and existing catalogues and songs. As I have explained, the income from existing and successful works supports the ability of music publishers to continue to identify, sign and develop new writers. Yet the ability to do so requires some level of confidence in predicting the future revenue that may be generated from both as-yet unwritten songs and even from existing songs.

63. Moreover, I have discovered that digital streaming services have difficulty in matching their streaming data to a particular recording and hence to a particular song. Consequently, we have found that writers and publishers often fail to be paid or are long delayed in receiving even the reduced amount of income that should be forthcoming from these streaming services. Based on my review of reports that have been issued by Spotify (for example), I have seen that, in some instances, the duration of these delays in paying royalties earned has spanned [REDACTED].

64. I am aware that the Copyright Owners in this proceeding contend that the “late fee” provisions that exist in the regulations are applicable to the streaming services and, if for some reason they are not, they should prospectively be applicable. I concur with the application of a late fee. There is no reason why the publishers and writers should effectively be making interest-free loans to the streaming services to help subsidize their businesses.

65. Not only do these delayed payments create even more problems for both writers and publishers (especially for those writers who are dependent on the declining income they are

receiving for the exploitation of their songs), the delayed payments further increase the difficulty in forecasting income from both new and existing songs. I also believe that these delayed payments may be exacerbating the [REDACTED]

[REDACTED].

66. As I stated above, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] not only negatively affects the publishers' ability to evaluate deals and support the discovery and development of new writers but it also negatively affects new songwriters [REDACTED]

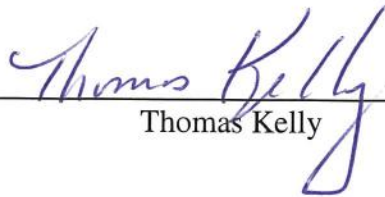
[REDACTED]. It obviously also negatively affects even established writers without recoupable advances.

67. Beyond the inadequacy of the rates paid by streaming services – for which I respectfully refer the Judges to the analyses provided by the expert economists and to the witness statement of Peter Brodsky – I believe that some of the delays in payment and accounting would be alleviated by a simpler and more straightforward means of calculating royalties, more akin to how mechanical income has been paid in the physical and digital download world for more than a century. If the rate were paid on a per-play and per-user basis, a writer and publisher would only have to know the identity of the song and the number of plays, and the number of users of the digital service during the relevant accounting period, to determine the income payable to the publisher and songwriter.

68. Again, while I defer to others for what that rate should be, given the hard data I have described herein and given the costs that music publishers must incur and the risks that they must run, in my view, it is imperative that the rates paid by streaming services for the mechanical reproduction of songs be increased if we are to be able to continue to find, develop and make available the new songs that will enrich the lives of the public in the future. Without healthy and thriving music publishers who effectively finance the creative base on which the entire music industry is built – the songs – the public will be deprived of at least some of the great music of the future which may never be written. In my view, this is precisely the disruption that the Copyright Act seeks to avoid in the setting of mechanical rates.

I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge, information and belief.

Dated: October 28, 2016



Thomas Kelly

CO Ex. 4.1

RESTRICTED DOCUMENT

**Subject to Protective Order in
Docket No. 16-CRB-0003-PR (2018-2022)
(Phonorecords III)**

CO Ex. 4.2

RESTRICTED DOCUMENT

**Subject to Protective Order in
Docket No. 16-CRB-0003-PR (2018-2022)
(Phonorecords III)**

CO Ex. 4.3

RESTRICTED DOCUMENT

**Subject to Protective Order in
Docket No. 16-CRB-0003-PR (2018-2022)
(Phonorecords III)**

CO Ex. 4.4

RESTRICTED DOCUMENT

**Subject to Protective Order in
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DISTRIBUTING PHONORECORDS
(PHONORECORDS III)

Docket No. 16–CRB–0003–PR
(2018–2022)

**WITNESS STATEMENT OF
DAVID KOKAKIS**

PUBLIC VERSION

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:

DETERMINATION OF RATES AND
TERMS FOR MAKING AND
DISTRIBUTING PHONORECORDS
(PHONORECORDS III)

Docket No. 16–CRB–0003–PR
(2018–2022)

WITNESS STATEMENT OF DAVID KOKAKIS

1. My name is David Kokakis. I am Executive Vice President/Head of Business & Legal Affairs, Business Development and Digital, Universal Music Publishing Group (“UMPG”). I make this statement to provide: (1) an overview of the role of UMPG and other publishers in the music industry; (2) an explanation of the reasons digital music services that can obtain mechanical rights by complying with the compulsory mechanical license provisions of Section 115 of the Copyright Act (“Digital Services”), including participants Amazon, Apple, Google and Spotify, do not fairly compensate songwriters and publishers under the current rate structure; and (3) a summary of rates obtained in direct licenses that UMPG has entered into both with Digital Services that are subject to the compulsory license, and digital music services that are not subject to the compulsory license and were therefore negotiated in the free market.

I. My Professional Background

2. I have held my current title at UMPG since July 1, 2015. Previously, I was Senior Vice President, Head of Business & Legal Affairs and Business Development, a position I had held since November 14, 2011. In my current capacity as Executive Vice President, my responsibilities include overseeing all contract negotiations and legal matters.

3. I have over twenty years of experience in the entertainment industry. Before joining UMPG, I practiced entertainment law for over a decade at various firms, including Greenberg Traurig LLP. I also served as an executive for several years at branding and talent management companies whose clients included television celebrities, entertainers, authors, book publishing imprints and professional athletes.

4. I have been involved in negotiating digital media agreements since joining UMPG in 2009. Among other responsibilities, I oversee the licensing of digital services in the United States, including the licensing of Digital Services that make and distribute limited downloads and interactive streams via the various service offerings identified in the regulations implementing the compulsory license provisions of Section 115 of the U.S. Copyright Act (“Section 115”), codified at 37 C.F.R. § 385, Subparts B and C, including, *inter alia*, subscription and non-subscription interactive streaming and limited download services, limited offerings, and locker services (the “Subpart B & C Configurations”).

II. The Role Of UMPG And Music Publishers Generally In The Industry

A. Overview

5. Music publishers are a fundamental driving force in music’s creation and dissemination. While the general public may be more familiar with the roles of the record label, the artist, and the songwriter, music publishers also play a vital role by developing songwriters’ careers, licensing their works so that their songs may be heard, protecting their intellectual property rights, and making sure they are properly paid.

6. Music publishers discover new talent. When they find talented songwriters, music publishers sign them and support them financially through the payment of advances. Music publishers promote their songwriters to recording artists and record labels as well as to outlets in other industries like film, television, and advertising who are looking to incorporate

songs into their works. They match their songwriters with other songwriters for writing collaborations, as well as with the artists and producers who ultimately record the songs. They negotiate and administer licenses for the songs on behalf of their songwriters. They protect their songwriters' legal rights through copyright registrations, anti-piracy efforts and litigation.

B. UMPG's Business

7. UMPG is one of the leading music publishing companies in the world.

8. Today, UMPG represents music in every genre from some of the world's most important songwriters and catalogs. UMPG's current roster includes over [REDACTED] active songwriters and over [REDACTED] active producers.

9. Some of our most widely known and successful songwriters are: ABBA, Adele, Alabama Shakes, The Beach Boys, Beastie Boys, Leonard Bernstein, Justin Bieber, Mariah Carey, The Clash, Coldplay, Elvis Costello, Neil Diamond, Eminem, Gloria and Emilio Estefan, Florence + the Machine, Ariana Grande, Al Green, Jimi Hendrix, Sam Hunt, Imagine Dragons, Demi Lovato, Carly Rae Jepsen, Billy Joel, Elton John, Joe Jonas, Nick Jonas, The Mamas and The Papas, Pearl Jam, Maroon 5, Shawn Mendes, Miguel, Mumford & Sons, Randy Newman, New Order, Ne-Yo, Steve Perry, Otis Redding, R.E.M., Gustavo Santaolalla, Sex Pistols, Paul Simon, Britney Spears, Stax (East Memphis Music), Justin Timberlake, U2, Keith Urban, Diane Warren, Andrew Lloyd Webber and many others. UMPG is also a global leader in production music, which is music composed primarily for film, television, and advertising.

10. UMPG currently owns and/or administers an interest in over [REDACTED] musical compositions.

C. UMPG's Services

11. UMPG provides a wide range of services to songwriters that enable them to create songs and develop their careers. A key aspect of our business is talent discovery and

development. We find and sign talented songwriters early in their careers and help them actualize their ambitions and realize their potential, both creatively and professionally. This is no simple task. UMPG employs a staff of ■ artist and repertoire (“A&R”) professionals in the United States, and approximately ■ worldwide, whose job it is to identify talent. They do so largely by scouting live performances, by listening to demos that are submitted to UMPG, by scouring the internet, and via relationships with other artists and writers.

12. The costs of the search for talented songwriters is high, both in dollars and time. As we often sign songwriters at the earliest stages in their careers, a significant percentage of the songwriters we sign have not yet appeared on a commercially successful recording at the time of signing. Of course, signing unproven talent carries substantial business risk, and some songwriters do not go on to generate major hits or significant revenue in their careers. On average, only ■ songwriters achieves commercial success, but that is the nature of our business model.

13. UMPG signs approximately ■ songwriters a year, on average. In 2015, UMPG signed ■ songwriters. In 2016, through the end of September, UMPG has signed ■ new songwriters.

14. Among the songwriters we signed to new deals in 2015 and 2016 (and the hit songs they wrote or co-wrote) are songwriter/artists Demi Lovato (“Cool For The Summer” and “Confident”), DNCE/Joe Jonas (“Cake By The Ocean”), and Shawn Mendes (“I Know What You Did Last Summer”); and pure songwriters Talay Riley (“Levels,” recorded by Nick Jonas), DeHeala (the Grammy- and Oscar-nominated “Earned It,” recorded by The Weeknd), and Lawrence Taylor (“Feels,” recorded by Kiara, and “Weekend,” recorded by Icona Pop).

15. As is usually the case, many of the songwriters we signed in 2015 and 2016 were relatively unknown when we signed them.

16. Some examples will illustrate the many different ways that UMPG's creative teams go about discovering and signing songwriters.

17. David Gray, our Executive Vice President/Head of West Coast A&R (and a former songwriter and recording artist), knew Demi Lovato from working with her when she was on the television show "The X Factor." Songwriters Paro and Delacey were referred to David by, respectively, a producer manager and an attorney.

18. Sterling Simms, a Grammy-nominated songwriter and UMPG's Director of Creative, had been tracking the career of producer-songwriter Charlie Handsome following the success of the rapper Post Malone, who Charlie had a hand in helping to develop creatively. He soon learned that our Chairman, Jody Gerson, was also a fan of Charlie's work and quickly set up meetings to hear more of his music. Sterling next arranged a few sessions with Charlie to establish a creative flow, determined that he could add value to Charlie's career, and signed him. Charlie has since been incredibly active and UMPG was able to secure placements for four of Charlie's songs, including two on Lee Daniels' upcoming series, "Star," which will soon air on FOX.

19. Our A&R staff also monitors a host of websites in an effort to identify new talent, including [REDACTED]

[REDACTED]. Lewis Del Mar – a self-sustained rock band who writes 100% of their songs – was discovered by our A&R professional, Jen Fierman, during a daily research routine on [REDACTED]. Recognizing growing demand for alternative music with big driving beats, especially for film and television projects, Jen went to see them perform live

on several occasions. It was clear to her that the energy of their live performances matched what she had heard on [REDACTED], and so we signed them. Our A&R professional, Nick Maya, found Lawrence Taylor from [REDACTED]. Nick played Lawrence's music at an A&R meeting and the entire team was in agreement that Lawrence's music was special and he should be signed. Nick has told me that he frequently discovers songwriters on blogs. He checks [REDACTED] blogs on a daily basis; from blogs as well-followed as [REDACTED], to [REDACTED].

20. Once we sign a songwriter, we provide her with an array of services to help her write great songs and develop her career. We generally pay her an advance. The purpose of the advance is to enable the songwriter to support herself while she writes, and to focus full-time on songwriting, before she has generated an income from license fees and other sources. The advances we pay typically run from [REDACTED] for a newly discovered, not yet successful songwriter, and as much as [REDACTED] for experienced songwriters with a proven track record. The amount of the advance varies and is subject to negotiation.

21. UMPG typically seeks to recoup the cost of the advance from the royalties earned from licenses of the songwriter's works (generally, mechanical, synchronization, print, merchandising, and the publisher's share of public performance royalties; the writer's share of public performance royalties is almost always paid directly to the songwriter by the songwriter's performing rights organization and is not in any instance used to recoup the advance), if and when the songwriter's songs generate such royalties. Of course, the royalties earned may be less than the amount of the advance paid by UMPG – in some cases significantly less – in which case UMPG is, with rare exception, never repaid by the songwriter concerned.

22. We assign each of the songwriters we sign to a professional creative team. The creative team, among other things, identifies co-writing opportunities and songwriter-producer collaborations for the songwriter.

23. Many of our songwriters have found great success through such collaborations. UMPG has assisted songwriters in putting together successful writing teams of all sizes and for all genres of music. For example, “Love The Way You Lie” by Eminem and Rihanna, which reached Number 1 on several record charts worldwide, resulted from an introduction made by UMPG A&R professional Jessica Rivera of songwriter Skylar Grey to producer Alex Da Kid. Similarly, David Gray paired the artist Halsey with writers DaHeala and Nasri, and the resulting song is slated to be in a key scene in the “50 Shades of Grey” sequel.

24. Our creative team also promotes our songwriters to recording artists and producers who may be looking for a musical composition of a certain genre or style, and to record labels who may be interested in having a particular songwriter record as an artist. Our songwriters benefit from UMPG’s decades of industry experience and connections, which enable us to connect our songwriters with the labels, artists and producers who can help to achieve their goals.

25. For example, David Gray introduced producer-songwriter Ido to Hollywood Records artists Sabrina Carpenter and Bea Miller. As a result, Ido has four songs on Sabrina’s upcoming album and three on Bea’s, including the first single on each. He also introduced producer-songwriter Kid Harpoon to Shawn Mendes. Kid Harpoon now has a song on Shawn’s album, which reached Number 1 on the Billboard charts. Another member of our A&R team, Brandra Ringo, pitched songwriter Sebastian Kole to work with new artist Stanaj. Stanaj later recorded “Ain’t Love Strange,” which Sebastian wrote, and put it out on his first project, released

by Lava/Republic Records. A writing camp that we held for an album by Chris Brown resulted in us placing several songs by our writers on that album. At a recent camp we held for an upcoming Nicki Minaj album, we were able to establish a new working relationship with Nicki and two of our other writers.

26. UMPG has also been instrumental in helping many artist-songwriters obtain record deals by introducing them to our many contacts in the record industry. In fact, on numerous occasions, an artist-songwriter was dropped from a label, signed with UMPG, and after working with a UMPG creative team wrote one or more hits and was able to get a new label deal. By way of example, Skylar Grey was previously known as Holly Brook. She was signed to Warner Bros. and then dropped. After signing with UMPG and working with UMPG's creative team, she achieved success writing singles for Dr. Dre, Eminem, Puff Daddy and T.I. She was ultimately signed to a new record deal with Alex Da Kid's label imprint at Interscope.

27. Sterling Simms was signed to Def Jam as an artist and then dropped. He signed with UMPG shortly after and was soon nominated for a Grammy for writing "Far Away," recorded by Marsha Ambrosius, which led to him signing his second label deal with RCA. Prince Charlez was also signed as an artist at Def Jam and dropped. He recently co-wrote "Needed Me," which became a Number 1 hit for Rihanna, and he just finalized a new record deal with Republic.

28. One important tool for songwriters is the creation of demo recordings. It is imperative that the demo recordings be of the highest quality. Songwriters often market their songs by showing their demos to artists, producers, managers, and record companies, and singer-songwriters use their demos both when seeking a deal from a record company, as well as when promoting their act. We provide our songwriters with substantial resources for recording the

perfect demos. One way we help our songwriters is through the feedback and suggestions of the professional UMPG creative team assigned to the songwriter. We also provide state-of-the-art recording studios and writing rooms to our songwriters.

29. UMPG also promotes its songwriters' works through synchronization licensing. This work is done both for our current songwriters and emerging talent as well as for classic catalog titles. Our Film and Television Department provides creative services, clearance, and synchronization licensing for songs used in films, television programs, commercials, video games, and virtually all other forms of audio-visual use. Our creative executives in London, Los Angeles, Nashville, New York, Paris, and many other international cities leverage their contacts in the motion picture, television, and advertising industries to get songs placed in film, television, and advertising projects. Our website, www.umpg.com, features a phenomenal search engine tool for sifting through our massive song catalog, enabling audio-visual project creators to find the perfect song for their works based on genre, mood, tempo, chart position, lyrical theme, artist, writer, and many other criteria.

30. In many cases, synchronization licenses do more than just earn royalties for a writer. They sometimes draw the attention of record labels to a singer-songwriter whom had previously been neglected. For example, on a trip to Nashville, Frankie Pine, the music supervisor for the television series "Nashville," heard the country music singer-songwriter duo Striking Matches (Justin Davis and Sarah Zimmerman) perform at our studios and decided to use several of their songs on the show. That propelled their career and lead to a record deal with Capitol Records. Similarly, the popularity of A Great Big World (singer-songwriters Ian Axel and Chad King) soared after their song "Say Something" was performed by Christina Aguilera on "The Voice."

31. In other cases, synchronization uses licensed by UMPG have resulted in a resurgence of interest in a song that had slipped from the spotlight, and which ultimately led to increased sales of recordings of the song. Examples include M.I.A.'s "Paper Planes" after its use in "Pineapple Express" trailers; the Dandy Warhols' "We Used to Be Friends" after it was featured as the theme song to the TV show "Veronica Mars"; and perhaps most famously, Feist's "1234" after it was featured in a 2007 Apple iPod nano commercial. (Before the Apple advertisement, the indie-pop songwriter's track was averaging [REDACTED] downloads a week. After the advertisement, average downloads per week improved to around [REDACTED]. This propelled the song onto the U.S. Billboard Hot 100 and to Number 8 on the UK singles chart.)

32. In addition to synchronization licensing, UMPG engages in a host of other licensing activities relating to its writers' works, including mechanical licensing, sample licensing, lyric reprint and sheet music licensing, and, of course, digital licensing. Although performance rights are generally licensed by performing rights organizations or societies ("PROs"), UMPG in some cases also licenses those rights directly.

33. Another one of UMPG's roles is song administration. When one of UMPG's branch offices obtains rights in a song, the branch office inputs writer share, publisher share, and territory of control information (among other information relating to UMPG's rights in the applicable song) into a global song administration database developed by UMPG and utilized by all of UMPG's worldwide offices. The UMPG database also automatically creates electronic song registration files, which are submitted monthly to PROs around the world, including in the United States. In territories where electronic song registrations are not accepted by the relevant PRO, UMPG manually registers the songs with the applicable PRO utilizing the protocol required by that society. UMPG also registers with the PROs its contract summaries, which

contain details about UMPG's new signings, and cue sheets, if required, which help track music used in movies and television.

34. UMPG collects royalties for its songwriters in every country in the world that enforces copyright laws. UMPG has made special efforts to collect royalties in developing market countries, including in Eastern Europe and Asia. After UMPG branch offices have collected royalties in their territories, the London center acts as a royalty clearing house. Once London has processed the royalties for a song, it pays out the royalties to the appropriate branch offices around the world. By centralizing royalty processing in this manner, UMPG is able to maintain a database of global earnings history for every one of its songs.

35. UMPG also provides its songwriters with access to their royalty and copyright information through a secure online web environment, which contains data on royalty history, income trends, and sources of revenue on a global basis, among other figures. We were the first major, global music publisher to provide this service. Additionally, the income tracking departments monitor payments worldwide to verify that all songs on a release are paid at the correct rate and that proper payments are received and credited for performance royalties.

36. UMPG further advances its songwriters' interests by handling copyright-related tasks. This involves, among other things, registering our songwriters' works with the U.S. Copyright Office and monitoring those registrations, and other copyright related tasks such as enforcing and maintaining our ownership claims vis-à-vis other copyright owners. In the United States, UMPG employs approximately ■ employees in its Copyright Department, and ■ employees that administer the copyrights within its Royalty, Income Tracking and Copyright Departments. UMPG also employs approximately ■ employees in its Royalty, Income Tracking and Copyright Departments worldwide.

37. UMPG also monitors online infringement of its songwriters' works and issues DMCA take-down notices. With the help of Universal Music Group's corporate litigation team and outside counsel, UMPG expends significant financial and other resources to deter infringers and protect our songwriters' copyrights. Over the past two years, UMPG has received monies for our songwriters through lawsuits, claims, and settlements from companies such as [REDACTED]

38. During this time of volatility in the music industry, recent events have threatened to diminish the value of our catalog, prompting UMPG to strengthen our efforts in areas such as rate court and consent decree litigation. In these limited areas alone, UMPG has paid approximately [REDACTED] in legal fees to outside counsel.

D. UMPG's Revenues and Costs

39. UMPG's success rises and falls with that of its songwriters. The company's compensation originates from our agreements with our songwriters, which provide for payment to UMPG of a share of the songwriters' royalties in exchange for the services I describe above. In a "traditional" songwriting contract, the songwriter's share of royalties is 50% and the music publisher's share is 50%. However, the "traditional" songwriting contract, as the name would imply, has become far less commonplace these days. It has been replaced with "co-publishing" agreements, where the songwriter's share is usually 75% and the publisher's share is 25%, and "administration agreements," where the songwriter receives 100% of the royalties after the publisher deducts an administration fee of generally [REDACTED], sometimes less. With the exception of the recoupment of the advance paid to the songwriter (discussed below), our agreements generally do not call for significant deductions against the songwriters' royalties, differentiating them from typical agreements between recording artists and record companies,

which usually call for deductions against artist royalties for various costs incurred by the record company like packaging, manufacturing, recording and video costs.

40. Our songwriter contracts typically include an advance payment to the songwriter. An advance is a means to ensure that a songwriter can focus on his or craft rather than having to find other means of support. Advances are critical to enabling songwriters to write full-time as a profession, particularly as it can take a year or two from the time a song is actually created and recorded for it to generate any revenue.

41. The payment of an advance is, of course, a risky endeavor. While UMPG generally expects to recoup the advance from the royalties earned from licenses of the songwriter's works, frequently the royalties earned are less than the amount of the advance, and so UMPG is in many cases never repaid. Nevertheless, UMPG recognizes that the payment of advances is critical to the signing and development of songwriters, and advances constitute a substantial yearly expenditure by UMPG.

42. While we hope that in any given year we will recoup an amount equal or greater than the amount we advanced to songwriters in that year, as further described in the witness statement of UMPG's Executive Vice President - Operations and Chief Financial Officer, Michael Sammis, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

43. Over the past five years, UMPG has spent, on average, approximately [REDACTED] of its yearly revenue on payment of advances to new and existing songwriters each year. [REDACTED]

[REDACTED]

44. In addition to advances, we incur other substantial costs in fulfilling the important roles discussed above. As set forth in greater detail in Michael Sammis' statement, in 2015, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

III. The Inadequacy of Current Subpart B & C Mechanical Rates

A. The Shift To Digital Streaming

45. In the past two decades, technology has transformed the way that music reaches the general public. As recently as the first half of the last decade (2000 – 2005), sales of physical albums (generally in the form of compact discs) accounted for an overwhelming majority of mechanical royalties. For a period thereafter, royalties from digital downloads from services like iTunes overtook physical phonorecords as the predominant source of mechanical income paid to publishers and songwriters. In the past few years, however, interactive streaming and limited download services have overtaken the purchase of CDs and permanent downloads to become the primary way in which consumers enjoy music.¹

46. The Digital Services have benefitted tremendously from this massive shift in the industry. Technology giants like Apple and Google, and music-specific services like Spotify, Rhapsody and Pandora, are positioned to benefit greatly from increased consumer demand brought about by major technological changes over the past 15 to 20 years. Those changes include the increased access to high-speed Internet connections and the popularity and now near-

¹ See, e.g., U.S. Copyright Office, Copyright and the Music Marketplace, at 70-72 (Feb. 2015) (discussing “meteoric rise of streaming” which has “corresponded with a sharp decline in physical and digital download sales” which “has been accompanied by a commensurate drop in mechanical revenues for music publishers and songwriters”).

ubiquity of portable devices capable of playing electronic song files. The success of the Digital Services is in no doubt due in part to their own technological investments, market positions, and business savvy, but without our songs as the driving force for growth and consumer interest, the same Digital Services would not have achieved their tremendous success.

47. To consumers, the value of the Digital Services lies in significant part in the on-demand access they provide to our songs. Users are willing to pay Digital Services for on-demand access to the millions of songs that the music publishers and songwriters create and license to these services. Advertisers pay Digital Services to serve targeted advertisements to those users, who are willing to listen to those advertisements only so that they may access those songs.

48. Yet the Digital Services do not adequately compensate songwriters and publishers for the use of their songs. As discussed in the witness statement of Michael Sammis, the mechanical revenues paid by streaming services have not compensated for the loss in mechanical revenues from digital downloads and physical recordings that those services have engendered, and the effective per-stream payments paid to UMPG by certain of the services, particularly Spotify, are shockingly low: ██████ for Spotify's subscription tier and ██████ for its free-to-the-user, "advertiser-supported" tier.

49. Indeed, even when one of our songwriters writes a hit song, he or she often receives a pittance from the Digital Services.

50. "Rolling in the Deep" peaked at Number 1 on the Billboard Hot 100 Chart, was written by Adele and Paul Epworth and performed by Adele, and is controlled ██████ by UMPG. In 2011, before streaming became hugely popular, "Rolling in the Deep" (grossing our ██████ share up to ██████ for comparison purposes) earned less than ██████ in royalties from all

interactive streaming services (for both mechanical and performance rights). It also earned, however, a total of [REDACTED] in mechanical royalties from physical product, and another [REDACTED] from digital downloads.

51. Compare this to a similar hit in 2015. “I Bet My Life,” written and performed by Imagine Dragons, peaked at Number 3 on the Billboard Hot Rock chart. That year, it was streamed over [REDACTED] times on Spotify. We control [REDACTED] of the song (which means we receive [REDACTED] of the publishing royalties -- other than performance royalties, which the writers receive directly from their PROs – and we in turn pay the writers their share). We received a total of [REDACTED] in mechanical royalties from Spotify for those [REDACTED] streams, which we shared with the songwriters. We received an additional [REDACTED] in performance royalties (and the writers would have received roughly the same amount from their PROs). So, for a song that was played over [REDACTED] times on Spotify, Spotify paid UMPG and its songwriters, collectively, roughly [REDACTED]. The total royalties (mechanical and performance) earned by “I Bet My Life” in 2015 from all interactive streaming services (including Spotify) was [REDACTED]. The total mechanical royalties earned by “I Bet My Life” in 2015 from the sale of physical copies and digital downloads totaled just [REDACTED].

52. Similarly, in 2015, “Jealous,” written by Nick Jonas, Sire Nolan and Simon Wilcox and performed by Nick Jonas, peaked at Number 5 on the Billboard Hot 100 chart. We control [REDACTED] of the song, which was streamed on Spotify [REDACTED] times that year. Again, grossing up our one-third to [REDACTED], for nearly [REDACTED] streams of “Jealous,” Spotify paid a total of [REDACTED] in mechanical royalties and [REDACTED] in performance royalties to all publishers and songwriters. The total royalties (mechanical and performance) earned by “Jealous” in 2015 from all interactive streaming services (including Spotify) was [REDACTED]. The total mechanical

royalties earned by “Jealous” in 2015 from the sale of physical copies and digital downloads totaled merely [REDACTED].

53. Compare this to “Baby,” written by Justin Bieber, Christopher Stewart, Terius Nash, Christopher Bridges and Christina Milian, and performed by Justin Bieber, which also peaked at Number 5 on the Billboard Hot 100 chart, but had the good fortune to do so in 2010 rather than in 2015. We control [REDACTED] of the song. Again grossing up to [REDACTED] for comparison purposes, while the song earned roughly [REDACTED] in interactive streaming royalties in 2010 (for both mechanical and performance rights), it also earned a total of [REDACTED] in mechanical royalties from physical product, and another [REDACTED] from digital downloads.

54. These comparisons demonstrate the deleterious effect that interactive streaming has had on the sale of physical product and digital downloads, and on the overall mechanical royalties earned by publishers and songwriters. The royalties paid by the interactive streaming services (taking into account both the mechanical and performance royalties paid) are not making up for the huge loss of mechanical revenue on the sale of physical and digital product.

B. Overview Of The Current Rate and Rate Structure

55. The current rate and rate structure does not fairly compensate songwriters and publishers for their efforts and for the contributions they make to the Digital Services, which are profiting handsomely from those contributions.

56. While the calculations are complex and vary by Subpart B and C Configuration, by way of example, the mechanical royalties to be paid by subscription streaming services are the greatest of (x) the greater of (i) 10.5% of service’s “service revenue” (defined in 37 C.F.R. § 385.11), and (ii) the lesser of a per-subscriber per-month rate and a percentage of the consideration paid by the service to record labels for the right to stream the sound recordings (the

“total content costs” or “TCC” prong), in either case less performance royalties paid by the service; and (y) a mechanical-only per-subscriber per-month minimum.

57. The mechanical royalties to be paid by free, non-subscription advertiser-supported services are the greater of (x) a percentage of the service’s “service revenue,” and (y) a percentage of the consideration paid by the service to record labels for the right to stream the sound recordings, in either case less performance royalties paid by the service.

58. The current rate structure was largely established almost ten years ago. The publishers and songwriters at the time did not know which companies would be providing streaming services, how those companies would operate their streaming businesses, or what effects streaming would have on the sale of physical phonorecords and permanent downloads. Back then, publishers and songwriters frankly had no idea that the companies that would control music streaming would decide against maximizing revenue from streaming in order to benefit their other business interests, and would take other measures that would result in lower rates.

C. The Percentage of Revenue Prong Of The Current Rate Structure

59. The percentage of revenue prong of the current rate structure does not provide songwriters and publishers with sufficient royalties because the Digital Services have apparently made the business decision not to maximize revenues.

60. Apple, Amazon, and Google do not raise the subscription fees for their respective music services because, rather than focus on driving revenue and profits from their music services higher, they appear to be more interested in growing their base of customers to whom they can then market their other products and services. Apple’s streaming service operates as a gateway into the iTunes ecosystem, which Apple uses to sell iPhones, apps, and other products. Amazon, likewise, leverages its streaming service to sell other of its services and products, like its Amazon Prime delivery service and Echo speakers. In fact, Amazon just launched a music

subscription service priced at \$3.99 a month for use on Amazon's voice-activated Echo speakers.² Google, the colossus of the tech world, has many different avenues for monetizing its users' data, including data from its music streaming service. These tech giants are using our music to benefit their non-music commercial ventures, without providing fair compensation to UMPG and its songwriters.

61. Spotify has a similar strategy. It has kept subscription fees low (and, on its free tier, non-existent) and has sold less advertising inventory on its free tier than it can with the apparent goal of obtaining the largest possible user base. A larger user base will increase Spotify's already quite large \$8-plus billion enterprise value, which will inure to the benefit of Spotify and its owners and investors when it completes its (highly-publicized) initial public offering.³ While Spotify's IPO will likely make its owners very wealthy, the songwriters and publishers who have fueled Spotify's rise will not receive any payment from the IPO.

62. I believe that the Digital Services could charge higher subscription fees and host more advertising than they presently do without a loss of net revenue. I understand that Pandora executives have stated that consumers can and would pay more than \$9.99 per month, the current subscription fee for Spotify and Google Play Music, for a music streaming service.⁴ Also, my understanding is that Spotify serves far fewer advertisements on its free, interactive streaming

² See Hannah Karp & Laura Stevens, *Amazon's Music-Streaming Service Competes on Price and Robotic Assistance*, The Wall Street Journal (Oct. 12, 2016), <http://www.wsj.com/articles/new-amazon-music-streaming-service-costs-echo-speaker-owners-4-a-month-1476255600>.

³ Madeleine Johnson, *Is Spotify the Next Big IPO Candidate for 2016?*, Yahoo! Finance (July 18, 2016), <http://finance.yahoo.com/news/spotify-next-big-ipo-candidate-213709655.html>.

⁴ John Paul Titlow, *Inside Pandora's Plan To Reinvent Itself—And Beat Back Apple And Spotify*, Fast Company (Apr. 26, 2016), <https://www.fastcompany.com/3058719/most-innovative-companies/inside-pandoras-plan-to-reinvent-itself-and-beat-back-apple-and-sp>.

service than does broadcast radio.⁵ The Digital Services could increase their music service revenues if they were focused on music service revenues, but they appear to be more intent on focusing on other business interests in which the publishers and songwriters do not and will not share.

63. The Digital Services have also arbitrarily determined a total amount (reportedly, roughly 70% of revenues⁶) that they are willing to pay, in the aggregate, to all music rightsholders – record labels, artists, publishers and songwriters – and, because of the availability of the compulsory license, they pay the labels a far greater share of that “content pool” than they do the publishers and songwriters. I believe that if the Digital Services focused more intently on growing music service revenues and managing internal costs, such as overhead and marketing expenses, they would be able to pay publishers and songwriters at the rates proposed by the Copyright Owners and still be able to keep their total content costs at around 70%, or even be able to exceed that arbitrary threshold so the content owners as a whole receive a larger share of the pie.

D. The Consideration-To-Labels Prong Of The Current Rate Structure

64. One way that the current rate structure was supposed to ensure that the publishers and songwriters would be paid at a fair relative value when compared to payments to labels was the inclusion of the “total content costs” (or “TCC”) prong of the calculation, which requires that

⁵ Audio, Ad Specs, Spotify: For Brands (Mar. 2015) (Spotify serves 4 30-second ads, i.e., 2 minutes of ads, per hour) (CO Ex. 5.5); Bret Kinsella, *Are Broadcast Radio Ad Loads Sustainable?*, XAPP Media (Mar. 24, 2015), <https://xappmedia.com/are-broadcast-radio-ad-loads-sustainable/> (broadcast radio serves 10-14 minutes of ads per hour).

⁶ Sai Sachin R, *Apple to Pay 70 Percent of Music Subscription Revenue to Labels, Publishers*, Reuters (June 15, 2015), <http://www.reuters.com/article/us-apple-music-idUSKBN0OV1VX20150615>; Gabriela Tully Claymore, *Spotify Explains Royalty Payments*, Stereogum (Dec. 3, 2013), <http://www.stereogum.com/1587932/spotify-explains-royalty-payments/news/>.

the Digital Services pay licensors of musical works, at a minimum, a fixed percentage of the amounts paid to record labels for the sound recording rights. Unfortunately, this basis for calculating rates has proven problematic and has not resulted in adequate compensation for songwriters and publishers.

65. One primary reason is that the statute caps the amount calculated under the TCC prong by making the calculation the “lesser of” the TCC percentage share and a per-subscriber per-month minimum (*e.g.*, in the case of standalone portable services, \$0.80 per subscriber per month). This rate cap structure unfairly limits the potential upside for publishers and songwriters, even, for example, in instances where the Digital Service enjoys higher margins because of increased retail pricing or where the labels enjoy escalated rates.

66. Moreover, I do not believe Digital Services include all of the consideration that they pay to the labels in the calculation of mechanical royalties payable to songwriters and publishers. For example, I believe that in cases where Digital Services have provided the labels with equity, they have not included this consideration when calculating the rate owed to songwriters and publishers, even though under 37 C.F.R. §§ 385.13 and 385.23 the amount of consideration paid to the record labels is considered “applicable consideration,” which is defined as “anything of value given for the identified rights to undertake the licensed activity” and expressly includes “ownership equity.” *See* 37 C.F.R. §§ 385.11 and 385.21.

E. The Digital Services Do Not Accurately Account And Pay

67. Additionally, a global problem that affects the calculation of royalties both under the consideration paid to the labels prong and the percentage of revenue prong of the existing rate structure is that the Digital Services do not pay songwriters and music publishers the total amount owed, and at times they pay the wrong entity. While the Digital Services blame incomplete copyright ownership data for these payment shortcomings, the law imposes the

obligation of determining copyright ownership on the services, not on the copyright owners. A licensee must obtain a license prior to making and distributing phonorecords. *See, e.g.*, 17 U.S.C. § 115(b)(2). It cannot make and distribute phonorecords with the hope of sorting out the licensing issues later. Moreover, in my experience I have seen that the source of the “data problems” lies not with the publishers, but instead at the Digital Service level because of poor data management practices, bad data merges once clean data is ingested by the Digital Services, and sloppy practices maintained by third party vendors to whom the Digital Services outsource the responsibility of matching publishing data to usage within the Digital Services concerned. So, placing the blame on publishers for “bad data” is a flawed argument to begin with, but at any rate does not absolve Digital Services of responsibility for making conscious decisions to use content that they know is unmatched (which, in many if not all instances, means the content is unlicensed).

F. Per-User Rate

68. For subscription streaming services, under the current rate structure, the applicable royalty rate can be based on the number of the Digital Service’s subscribers in a particular accounting period. Unlike the percentage of revenue and the capped TCC prong, the per-subscriber prong in the current structure is useful and should be maintained. Indeed, a per-subscriber or per-user royalty – provided it is set at an adequate level – serves several useful purposes.

69. First, it is the interest of most Digital Services to build a user or a subscriber base, even for those who have chosen to pursue other interests over maximizing revenue. Thus, a per-subscriber or per-user royalty ensures that, at least as to one of the prongs of the royalty calculation, the interests of the licensors and licensees are aligned. Second, there may be circumstances where there is a low level of streaming on a particular Digital Service, but the

Digital Service is still benefiting in other ways from the value derived from the provision of access to our music catalogs. Third, there may be circumstances where users convert interactive streams or limited downloads into permanent downloads or otherwise circumvent the Digital Service's ability to track individual interactive streams or plays of limited downloads, in which case the licensor will not be paid for them under either a per-play calculation or a revenue allocation calculation.

70. While I believe it is important to retain in the rate structure a per-subscriber or per-user minimum, the current per-subscriber minimum is, in my view, too low. In fact, as noted below, we have made a direct deal with one Digital Service that includes a higher per-subscriber minimum.

G. The Current Rate Structure's Detrimental Impact On Publishers and Songwriters

71. Consumers' growing preference for streaming music platforms over physical phonorecords and permanent downloads has made those platforms all the more significant as a source of revenue for the songwriting and music publishing industry. Yet, the Digital Services' business practices discussed above greatly reduce royalties payable to songwriters and music publishers under the current rate structure, so even if music consumption through streaming music platforms increases, it cannibalizes other music consumption outlets that have historically yielded a much higher return for songwriters and publishers.

72. The effect on the songwriting and music publishing industry has been quite unfavorable. As more fully set forth in the statement of Michael Sammis, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

73. As noted above, the current rate structure has also resulted in strikingly low payments to songwriters for even the biggest of hits. Those songwriters and their publishers have suffered economically because of this.

IV. UMPG's Direct Licensing

74. Direct deals are attractive to the Digital Services notwithstanding the availability of the compulsory license because they enable the Digital Services to dispense with various statutory requirements that would otherwise apply to their licensing. Those requirements include the "notice of intent" provisions in 17 U.S.C. § 115(b), which require the licensee to identify the copyright owner and serve the owner with a notice of intention to obtain a compulsory license prior to making or distributing any phonorecords of the owner's work, or file the notice with the Copyright Office if the service is unable to determine the owner and owner's address from the Copyright Office's records. Failure to follow these steps forecloses the possibility of a compulsory license and renders the service liable for infringement. 17 U.S.C. § 115(b)(2). The statute also, among other things, requires the services to make monthly accountings of royalties owed. *Id.* § 115(c)(5). By entering into a direct deal with UMPG, the services avoid having to follow the notice of intent requirements altogether, are shielded from section 115(b)(2)'s infringement liability provision, and generally do not have to make monthly accountings.

75. UMPG also has incentives to make direct deals. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

A. Direct Licensing In The Shadow of the Compulsory License.

76. UMPG has made deals with several Digital Services making and distributing interactive streams and/or limited downloads (and other Subpart B & C Configurations). [REDACTED]

[REDACTED]

77. The Digital Services with which we have entered into direct licenses [REDACTED] for interactive streaming and limited download services (*i.e.*, Subpart B services) include [REDACTED]

[REDACTED].⁷

78. In our direct deal with [REDACTED] for its interactive streaming service, which we made on [REDACTED], we negotiated a royalty [REDACTED]

[REDACTED]

⁷ CO Ex. 5.1, [REDACTED]; CO Ex. 5.2, [REDACTED]; CO Ex. 5.3, [REDACTED]; CO Ex. 5.4, [REDACTED]; CO Ex. 5.5, [REDACTED]; CO Ex. 5.6A, [REDACTED]; CO Ex. 5.6B, [REDACTED]; CO Ex. 5.7, [REDACTED].

[REDACTED]

79. The agreements we have made with Subpart B services that would be considered “bundled subscription services” under 37 C.F.R. § 385.13(a)(4) are [REDACTED]

[REDACTED] The challenge with bundled services – faced by both licensors and licensees – is how to determine what revenues are attributable to the subscription music service and what revenues are attributable to the other products or services in the bundle. I understand that some bundled subscription services, [REDACTED]

[REDACTED]

80. For this reason, when we made our direct deal with [REDACTED]

[REDACTED]

⁸ CO Ex. 5.8, [REDACTED]

[REDACTED]

81. We encountered a similar issue with [REDACTED]

[REDACTED]

We also

[REDACTED]

¹⁰

⁹ CO Ex. 5.9, [REDACTED]

¹⁰ CO Ex. 5.1, [REDACTED]; CO Ex. 5.10, [REDACTED]

82. We have also entered into direct licenses [REDACTED] for the following Subpart C services: [REDACTED]

[REDACTED]

[REDACTED]¹¹ Our deal with [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹²

83. Note that, although there is no obligation under the statute to pay an advance, we received advances or minimum revenue guarantees from [REDACTED]

[REDACTED].¹³ The level of these advances and minimum guarantees in many instances exceed actual royalties that would have been earned out

¹¹ CO Ex. 5.1, [REDACTED]; CO Ex. 5.11, [REDACTED]; CO Ex. 5.4, [REDACTED]; CO Ex. 5.12, [REDACTED].

¹² CO Ex. 5.3, [REDACTED].

¹³ CO Ex. 5.9, [REDACTED]; CO Ex. 5.2, [REDACTED]; CO Ex. 5.3, [REDACTED]; CO Ex. 5.4, [REDACTED]; CO Ex. 5.5, [REDACTED]; CO Ex. 5.13, [REDACTED]; CO Ex. 5.14, [REDACTED].

under the current statutory rate structure, which pushes our “effective rate” beyond what is prescribed in the statute.

B. Direct Licensing Outside Of The Shadow of the Compulsory License

84. While we are not mandated to license any digital service that is not subject to compulsory licensing provisions, UMPG has negotiated hundreds of licenses with non-compulsory digital services.

85. From UMPG’s perspective, it is important that we foster a robust and competitive digital ecosystem, allowing new digital initiatives to come to market and provide consumers with a variety of options to consume music. Neither UMPG nor our songwriters make money if we do not broadly license our music, so we have a clear incentive to do so. Moreover, we compete vigorously with other music publishers to sign songwriters. Many songs are co-written, and if a UMPG writer’s royalty statement reflects that he or she received less money for his or her share of a song co-written with a writer signed to a different publisher (because that publisher licensed a particular platform but we did not), our writer may be critical of us. It is also our duty to seek fair value for the use of our songwriters’ works.

86. Thus, we have been able to make deals licensing our catalog to digital services offering video, videogames, karaoke, lyric notation, sheet music and music instructional concepts, whether accessible through mobile apps, stand-alone kiosks or websites.

87. In many of these deals, where we are licensing our musical works to services that are also licensing sound recordings from record labels, we are paid at the same royalty rate as the record labels. This is consistent with what has historically been the case with synchronization licensing, where each of the publisher and record label generally receives 50% of the total content licensing pool. That makes sense because in both situations the publisher and label are

each licensing an input to a third party – *i.e.*, the third party must obtain a license from the publisher for the song, and a license from the label for the sound recording – in a free market where there is no compulsory license to depress the rate obtainable by one or the other licensor.

88. For example, we entered into a direct license with [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]¹⁴

89. As examples of [REDACTED], we have reached license agreements with [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]¹⁵ While the economic models for each of these games are

¹⁴ CO Ex. 5.15, [REDACTED].

¹⁵ CO Ex. 5.16, [REDACTED]; CO Ex. 5.17, [REDACTED]; CO Ex. 5.18A, [REDACTED]; CO Ex. 5.18B, [REDACTED]; CO Ex. 5.18C, [REDACTED]; CO Ex. 5.19, [REDACTED].

different due to their unique business models, all of these licenses contain a most favored nations provision that ensures our royalties are computed on the same basis as any other participating publisher or label. The presence of such most favored nation provisions in these agreements shows that these licensees consider the musical work to have the same value as the sound recording.

90. The same is true for our deals with [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

Each of these agreements includes an MFN provision requiring the label and publisher royalties to be computed in the same manner and at the same headline rates.¹⁶

91. We have also entered into “microsynch” deals pursuant to which our licensees agreed to pay us at the same rate it pays record labels for the sound recording rights. One such example is with [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

[REDACTED]. We and Universal Music Group (“UMG”) made a similar “microsynch”

¹⁶ CO Ex. 5.20, [REDACTED]
[REDACTED]; CO Ex. 5.21, [REDACTED].

agreement with [REDACTED] which ensures that we and UMG (a record label) are each paid the same amount of consideration.¹⁷

92. In situations where there the Digital Service does not need to obtain sound recording licenses – *e.g.*, digital karaoke licenses (where the karaoke company records its own masters), or lyric, sheet music, or guitar tablature licenses – we usually receive far greater than 10.5% of revenue. Indeed, in many cases, we receive closer to [REDACTED] of revenue.

93. For example, with digital sheet music licenses it is common for the publisher to receive [REDACTED] of the gross revenues. For instance, our agreement with [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁸

94. As an example of lyric display licenses, we have a deal with [REDACTED]

[REDACTED]
[REDACTED]

¹⁷ CO Ex. 5.22, [REDACTED]; CO Ex. 5.23, [REDACTED]; CO Ex. 5.24, [REDACTED].

¹⁸ CO Ex. 5.25, [REDACTED]; CO Ex. 5.26, [REDACTED].

[REDACTED]

[REDACTED]¹⁹

95. Additionally, we have agreements with the instructional music services [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In each of these deals, the royalty rate was [REDACTED] of receipts [REDACTED].²⁰ While no master recordings are used in these examples, there is a high production cost for the creation of the instructional videos (*i.e.*, compensating the on-screen talent, camera crew, etc.).

96. We also have a wide variety of digital karaoke licenses allowing consumers to stream on-demand karaoke versions of UMPG songs (*i.e.*, not record label recordings, but re-recordings by karaoke studio musicians, with scrolling lyrics), such as those we have made with

[REDACTED]

[REDACTED]

[REDACTED]. In each of these deals we have received our pro rata share of between [REDACTED]

of the service's gross revenues [REDACTED]

[REDACTED]

¹⁹ CO Ex. 5.27, [REDACTED].

²⁰ CO Ex. 5.28, [REDACTED]; CO Ex. 5.29, [REDACTED].

[REDACTED]
[REDACTED].²¹

97. In many of the above-referenced deals, we also received advances or minimum guarantees.

98. I believe that the digital deals we have made outside of the shadow of the compulsory license and that are described above are free market deals that reflect what the parties believed at the time to provide both a fair return for UMPG and its songwriters and a fair income to the digital service.

99. Our deal with the user-generated video service [REDACTED] also demonstrates the value assigned to sound recordings and musical compositions outside of the context of the compulsory license. We licensed to [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

²¹ CO Ex. 5.30, [REDACTED]
[REDACTED]; CO Ex. 5.31, [REDACTED]
[REDACTED]; CO Ex. 5.32,
[REDACTED]; CO Ex. 5.33,
[REDACTED]; CO Ex. 5.34, [REDACTED]
[REDACTED]; CO Ex. 5.35,
[REDACTED];
CO Ex. 5.36, [REDACTED].

[REDACTED]

100. [REDACTED]

[REDACTED]

101. [REDACTED]

[REDACTED]

102. [REDACTED]

[REDACTED]

²² CO Ex. 5.37, [REDACTED].

²³ *See, e.g.*, [REDACTED]

[REDACTED]

[REDACTED] This, too, puts us at a disadvantage and leaves us with little recourse.

V. Conclusion

103. Based on the considerations above, I strongly believe that adopting the Copyright Owners' proposed rates and terms is integral for the health of the songwriting and publishing industries and would advance the statutory factors set forth in section 801(b)(1).

104. Songwriters clearly play an integral role in the music ecosystem. A fair royalty rate for songwriters is necessary to achieve the section 801(b)(1) factors. Songwriters will not

create new works, and cannot be expected to do so, without fair compensation. (§ 801(b)(1) factors (A) and (B).) Companies that operate Digital Services, most of which are flourishing (despite their decisions to focus on customer acquisition, stock price, attracting new investments, or exit strategy, as opposed to music service revenue generation), would not exist but for the contributions of songwriters. (§ 801(b)(1) factor (C).) Failure to pay adequate compensation to songwriters has a disruptive impact on the industry by forcing many songwriters out of work.

105. On the other hand, existing Digital Services have paid effective per stream rates at levels that are consistent with the Copyright Owners' proposed rates. For example, for individual subscriptions, Apple has paid UMPG an average effective mechanical per stream rate of approximately [REDACTED] (from 4Q15 through 2Q16). The average effective mechanical per stream rate paid by Amazon has been roughly [REDACTED] (from June 2014 through January 2016). Google has paid an even higher effective mechanical per stream rate of [REDACTED] (from 3Q13 through 2Q15). Rhapsody has paid an effective mechanical per stream rate of [REDACTED] (from 3Q12 though 2Q15) for its portable subscription tier and [REDACTED] for its all-access tier. New Digital Services companies are rushing to enter into this market, and venture capitalists are making significant investments in such services. This demonstrates that neither the current rates nor the Copyright Owners' proposed rates are or would be disruptive. (§ 801(b)(1) factor (D).)

106. Music publishers must also be fairly compensated for the value they bring to the industry and the risks and costs they assume, as detailed above. Through such services, publishers help to maximize the availability of creative works to the public (§ 801(b)(1) factor (A)), and they should be compensated in a manner that affords them a fair return for their talents, costs, and risks assumed, and that reflects their contributions in making songs available to the

public through digital music services (§ 801(b)(1) factors (B) and (C)). Moreover, inadequate rates disrupt publishers' ability to provide these services to songwriters. (§ 801(b)(1) factor (D)).

107. I believe that songwriters and publishers are not adequately compensated under the current rate structure. As the handful of examples I have included in this statement suggest, songwriters receive inadequate compensation from the Digital Services even when they write hits that are streamed tens of millions of times. Part of the problem is structural: rates that are tied to the Digital Services' revenue and consideration paid to the record labels turn out to be too low because the Digital Services forego maximizing subscription fees or advertising revenue, fail to account properly for certain forms of consideration paid to record labels such as equity, and other issues I have identified. Including a per-play royalty as part of the rate calculation will help rectify the inadequacies of the current rate structure, as will raising the per-subscriber minimum and extending such minimum to include users of advertising-supported services.

108. The rates proposed by the Copyright Owners will, I believe, afford the songwriters and publishers with a fair return for their creative works and provide the Digital Services with a fair income. The proposed per play rate is consistent with what many of the Digital Services have already paid, and the other proposed rates and terms are supported by market-based transactions made outside of the context of the compulsory license.

109. For these reasons, I strongly urge the Board to adopt the rates and terms that the Copyright Owners have proposed.

I declare under penalty of perjury that the foregoing testimony is true and correct to the best of my knowledge, information and belief.

Dated: October 28, 2016

A handwritten signature in black ink, appearing to read 'David Kokakis', written over a horizontal line.

David Kokakis

CO Ex. 5.1

RESTRICTED DOCUMENT

**Subject to Protective Order in
Docket No. 16-CRB-0003-PR (2018-2022)
(Phonorecords III)**

CO Ex. 5.2

RESTRICTED DOCUMENT

**Subject to Protective Order in
Docket No. 16-CRB-0003-PR (2018-2022)
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CO Ex. 5.3

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CO Ex. 5.6A

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CO Ex. 5.6B

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