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

In the matter of:	
The Digital Performance Right in Sound Recordings	Docket No.
and Ephemeral Recordings (Webcasting Rate Adjustment Proceeding)	2005-1 CRB DTRA

Volume 11

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Wednesday,
May 17, 2006

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge

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I-N-D-E-X

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1 SoundExchange and, having been first duly
2 sworn, assumed the witness stand, was examined
3 and testified as follows:
4 CHIEF JUDGE SLEDGE: Thank you.
5 Be seated.
6 DIRECT EXAMINATION
7 BY MR. FREEDMAN:
8 Q Good morning.
9 A Hi.
10 Q Could you please state your name
11 for the record?
12 A My name is Jonatha Brooke.
13 Q Where do you live, Ms. Brooke?
14 A I live in New York City.
15 Q What is your profession?
16 A I am a musician, singer,
17 songwriter, guitar player, piano player,
18 record producer, record label owner.
19 Q You mentioned a couple of
20 instruments in there. What instruments do you
21 play?
22 A I mostly play guitar and piano,

1 and I sing.
2 Q How old were you when you started
3 playing the guitar?
4 A I got a guitar for Christmas from
5 my father when I was 12.
6 Q And how about the piano, when did
7 you start playing?
8 A I was six when I started piano
9 lessons.
10 Q And you also mentioned you sing.
11 When did you start singing?
12 A I think I have always been
13 singing.
14 Q Can you describe for the judges
15 here today how you got your start as a
16 musician?
17 A Well, in seventh grade I had a
18 rock band that my science teacher started. It
19 was called Science Function, and we had a big
20 hit at our school which was, "She's a Fool to
21 be Cool."
22 But after that, I didn't start

1 writing songs until college, and that was when
2 I really realized that this was something that
3 was my calling.
4 Q Can you describe for us what
5 happened in college to start you career then
6 as a musician?
7 A I took a songwriting course and I
8 got an A. I then auditioned for a gig at a
9 local club. I did an open mike night and sang
10 three songs and was invited back for a full
11 evening of my own, and that was my first gig
12 in North Hampton, Massachusetts.
13 Q And how did that first gig go?
14 A It went very, very well. I was
15 terrified, but it was quite a success.
16 Q After you played that first show,
17 what happened next for your career?
18 A I, basically, for the rest of
19 college kept getting gigs in the area and
20 playing around the different schools in
21 western Massachusetts and just working hard on
22 trying to find venues to perform at and write

1 more songs.
2 Q Did you continue with your musical
3 career after college?
4 A I did. I was also a modern
5 dancer. So I was trying to juggle both
6 careers. I was an English major in college,
7 but I went back to modern dance afterwards and
8 I did gigs in New York and Boston and wherever
9 I could find a gig. But I also had to work
10 many other jobs to support my arts.
11 Q At that time how were you finding
12 gigs? When you say you found gigs, how did
13 you do that?
14 A Well, I made a demo tape. I sent
15 it to every club, radio station person that I
16 could find. I sent out little pictures and
17 resumes, and I think I had my father, who was
18 a journalist, write a very compelling blurb
19 about how fabulous I was, and that's how I got
20 gigs.
21 Q Where were you at this time?
22 A I was living in Boston.

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1 Q At that time was playing gigs --
2 were you able to support yourself playing
3 gigs?
4 A I was not able to support myself
5 playing gigs at that point, no.
6 Q So how were you supporting
7 yourself?
8 A I was a cleaning lady. I was a
9 waitress. I was a nanny. I edited indexes
10 for Houghton Mifflin textbook division, and I
11 painted houses.
12 Q How long did this period in Boston
13 last, approximately, of playing gigs and doing
14 these other jobs?
15 A From after college -- I graduated
16 in 1985 from college, and it wasn't until
17 about `92 or `93 that I actually was starting
18 to make a living solely by my music.
19 Q When did you release your first
20 album?
21 A `91 was my first album on Elektra
22 Records.

1 Q What was that album called?
2 A "Grace and Gravity."
3 Q How did you get a deal with
4 Elektra Records?
5 A I was actually performing as a
6 dancer and met a record producer who was I
7 guess a fan of the arts, and he became a fan
8 of mine. I actually had a demo tape with me
9 and I handed it to him. He ended up working
10 in New York at Elektra Records with Tommy
11 LiPuma, who fell in love with this demo,
12 called me up and wanted to make a record deal.
13 Q Who's Tommy LiPuma?
14 A Tommy LiPuma is a very successful
15 producer. His biggest successes have been
16 Diana Krall, George Benson. I can't think of
17 who else right now, but he's one of the most
18 respected music guys, producers.
19 Q When you released that album, did
20 it get any media coverage?
21 A "Grace and Gravity" didn't get a
22 lot of coverage. It was basically groundwork

1 for releasing the next record, which was
2 called "Angel in the House."
3 Q Do you remember when that was
4 released?
5 A I believe that was `93.
6 Q Did that album get any media
7 coverage?
8 A That album did pretty well. It
9 was right around the time that the AAA radio
10 format was coming into existence, and Elektra
11 actually did a pretty good job of promoting
12 the record and helping me tour, helping me
13 with tour support. It had some success with
14 AAA radio.
15 Q Now since that time, have you
16 released other albums?
17 A I have.
18 Q How many albums in all?
19 A Five more.
20 Q And have you released them all
21 with Elektra?
22 A No. After Elektra and I parted

1 ways, I had a record deal with Universal and
2 had two records on Universal Records.
3 Q And after that?
4 A After that, I started my own
5 label, Bad Dog Records, and I have three
6 records that I have released on my own on Bad
7 Dog Records.
8 Q When did you start Bad Dog
9 Records?
10 A That was `98.
11 Q And I should have asked you this
12 earlier: How would you characterize the kind
13 of music that you play?
14 A I play, I write, and I play and I
15 -- I try to write really good pop songs but
16 not dumb ones. I try to write literate,
17 intelligent, crafted pop songs.
18 Q How have your albums been received
19 in the press?
20 A I've always done well in the
21 press. I am somewhat of a -- I've done well
22 with the press. The journalists usually like

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1 what I do.
2 Q You mentioned Bad Dog Records.
3 Who operates Bad Dog Records?
4 A I do.
5 Q And whose music does it release?
6 A Right now Bad Dog Records is only
7 releasing Jonatha Brooke music.
8 (Laughter.)
9 We can't really afford other
10 artists. I would love to at some point
11 expand, but for now we're having trouble
12 keeping up with me.
13 Q Do you go on tour?
14 A I do.
15 Q How often do you play live shows?
16 A Probably anywhere from 50 to 75
17 shows a year?
18 Q In geographic terms, where do you
19 tour?
20 A I tour all over the states. I
21 have toured in Europe pretty extensively in
22 the last few years as well, wherever I can get

1 a gig.
2 Q And when you're playing in the
3 states, what kinds of venues are you playing?
4 A In the states it's anywhere from a
5 small club, 250 to 300 people, to a 1500-seat
6 theater in my better cities.
7 Q What are your better cities?
8 A Philly is big. Boston is big,
9 hometown. The West Coast is good. San
10 Francisco, LA, Portland, Seattle. D.C. is
11 pretty good, actually. East Coast, West
12 Coast, and a few clumps in the middle.
13 Q When you tour, are there costs
14 associated with touring?
15 A There are huge costs associated
16 with touring.
17 Q What are some of those costs?
18 A Well, I have to pay for airfare
19 and hotels. I have to pay for my band
20 salaries, insurance, rental cars, gear rental.
21 I have to feed everybody. It's a huge
22 expense.

1 Q And who covers those costs?
2 A I pay those costs.
3 Q You mentioned a band. Do you play
4 with a band when you tour?
5 A I try to play with my band as much
6 as I can if the gigs afford it. Some of the
7 better-paying gigs I'm able to bring everybody
8 and afford it. Much of the time I need to go
9 out and play solo, so that I can bring home
10 something.
11 Q What is the difference? Why does
12 it cost more to tour with a band?
13 A All of the hotels and airfares and
14 salaries and food. They eat a lot.
15 (Laughter.)
16 Q Do you get paid when you tour?
17 A I do.
18 Q Do those payments that you earn
19 for touring cover the costs associated with
20 touring?
21 A Sometimes they cover the costs and
22 sometimes they don't. I'm lucky sometimes to

1 come home with a little bit extra, and usually
2 that goes back into Bad Dog Records to pay
3 whatever was still unpaid from the last month.
4 Q You mentioned in your written
5 testimony touring in Europe with Joe Cocker.
6 A Uh-hum.
7 Q Who is Joe Cocker?
8 A Joe Cocker is a fabulous singer,
9 artist, British performer. I'm a huge fan.
10 Q And when did you tour with him?
11 A I toured with Joe from last May
12 off and on through October.
13 Q Where was that?
14 A Mostly in Europe. We toured a lot
15 in France, Germany, Austria, Switzerland,
16 Denmark, Holland, a couple of Croatian gigs,
17 Slovenia.
18 Q What kind of venues do you play
19 when you're touring with him?
20 A We were playing in anywhere from a
21 6,000-seat arena to a 10-12,000 seat arena.
22 Q So bigger than when you tour by

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1 yourself here in the states?
2 A Way bigger than when I tour by
3 myself.
4 Q What is that experience like,
5 playing a bigger venue?
6 A It's awesome. It's terrifying
7 because I was alone with my guitar on stage in
8 front of 10,000 Parisians trying to speak
9 French, but it was a great experience. Oddly
10 enough, our audiences, his audience really
11 appreciated what I did, and it was a great
12 experience.
13 Q Do you receive equal billing on
14 the tour when you're with him?
15 A No. I don't think I received any
16 billing at all. I was kind of the surprise
17 chick with a guitar who came out and tried to
18 sing for 30 minutes, but usually it went
19 pretty well.
20 Q Do you open for him?
21 A I did. I was the opening act.
22 Q And are you paid when you play

1 with him?
2 A Sometimes I'm paid; sometimes I
3 wasn't paid, anywhere from 300 bucks to 500
4 bucks a night.
5 Q When you're touring with Joe
6 Cocker in Europe, did you have expenses?
7 A I had a lot of expenses. I was
8 paying my own airfare, my own inter-European
9 flights. I was paying for rental cars and
10 hotels and all of my own food.
11 Q At the end of each show in Europe,
12 how did you get from one venue to the next
13 one?
14 A I would usually drive my rental
15 car with my map and my bottled water and try
16 to find the next city.
17 I also had to pay the lighting guy
18 and the sound engineer and the monitor
19 engineer and the guitar tech every night
20 because they were helping me do my show. So
21 I usually would -- any money I got paid
22 certainly went back into affording to do the

1 tour.
2 Q When you're on tour do you have
3 the opportunity to sell CDs?
4 A I do. Usually, I would rush off
5 the stage and run out to the concessions hall
6 and stand there and hope that people would
7 come buy my CD.
8 Q And do they?
9 A Sometimes, yes.
10 Q How many do you sell at a show?
11 A Well, in Croatia they were more
12 interested in beer (laughter), but I would
13 sell anywhere from 12 to 80 CDs sometimes. On
14 the good cities I would sell 70 or 80.
15 Q In your written direct statement,
16 one of the things you said is that there's no
17 formula for building a recording career. What
18 did you mean by that?
19 A I mean that it's so elusive to
20 make a living doing what I do. It's any
21 number of things that get you through the
22 month. You work your butt off. You tour.

1 You make a record. You release it. You hope
2 to get radio airplay. You hope that the ASCAP
3 checks can supplement some of your income.
4 I've been lucky enough to write
5 songs for Disney. I've written three songs
6 for Disney now, and that has helped a great
7 deal.
8 But it's just kind of a mystery
9 how it comes together in the end.
10 Q I'd like to ask you a few
11 questions about the process of creating a
12 sound recording, which you discuss in your
13 written testimony. What is the first step in
14 creating a sound recording?
15 A Hopefully, you have a bunch of
16 songs that you're in love with, and then you
17 book some studio time and you call your band
18 and hope that they're free, and set up a
19 recording session to start putting things down
20 and seeing if the songs -- it's like that
21 David Letterman show, "Will It Float?"
22 Q Are there other musicians involved

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1 in your recording sessions?
2 A Yes. Usually, this time -- well,
3 I just finished a new record. My band is
4 involved in this one. But I also sometimes
5 call other musicians that I think would be
6 amazing for a specific task, like Mitchell
7 Froom, or Joe Sample played piano on one of my
8 records. Marcus Miller played the bass on one
9 record. So the song will tell you perhaps
10 what it needs.
11 Q On your most recent albums today,
12 how many different musicians perform on that
13 album?
14 A Oh, gosh, there are probably 15 or
15 20 different musicians.
16 Q In addition to the musicians, are
17 there other people who are involved with
18 creating the sound recording?
19 A Yes. You have to pay for the
20 studio. There's an engineer. There's usually
21 an assistant engineer. There's rental gear.
22 There's any number of people that are involved

1 down to the people who make you lunch every
2 day.
3 Q Who is paying for the studio time?
4 A I pay for the studio time.
5 Q And the musicians?
6 A I pay the musicians.
7 Q And the other people you
8 mentioned, including the sound engineers, who
9 pays for those?
10 A I have to pay for all those costs.
11 Q So you do a recording session.
12 How do you go from doing a recording session
13 to having a finished product?
14 A Well, when you have your bunch of
15 songs and you're happy with the arrangements
16 and who played what, then you need to mix
17 them, which involves just making the final
18 decisions about what your sonic landscape will
19 be.
20 Q After you mix the songs, what is
21 the next step?
22 A Then you need to master the songs.

1 That involves the final EQing and levels and
2 making sure that it makes sense as a package
3 of sound.
4 Q When the mastering is done, what
5 do you have?
6 A You have an ugly CD master ref
7 that you listen to.
8 Q So what is the next thing you do
9 in the process of creating an album?
10 A Then you need to create a package
11 that will, hopefully, attract people to it,
12 attract their attention. You need an image.
13 You need a CD booklet. You need to find
14 images that will be part of the promotion of
15 the record. So you need a photographer. You
16 need photos. You need a designer to create
17 something that you can put your CD in and send
18 it out into the world.
19 Q Are there costs associated with
20 creating that physical product?
21 A Yes, you have to pay the
22 photographer and the stylist and the makeup

1 person and the designer, and then you have to
2 manufacture it. So you have to pay the
3 manufacturer for however many you choose to
4 press up, 30,000, 50,000, depending on your
5 enthusiasm.
6 Then you have to market the thing.
7 It's not going to just get out there by
8 itself. So you have to hire a publicist who
9 will let it be known that you have a new
10 product on the market and that journalists
11 should listen to it and review it, and that
12 there will be a tour.
13 Then you send it to radio and you
14 send it to press. You hope that that
15 generates some kind of momentum that will help
16 you do your thing.
17 Q All of the costs you just
18 described, who pays for those?
19 A I have to pay for all of that.
20 Q How do you afford all of these
21 costs?
22 A I don't. My credit cards are

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1 completely maxed. I'm pretty much in debt,
2 but I can't complain. I'm enjoying it. I'm
3 actually at a great point in my career. I
4 just finished two new records that I'm
5 completely in love with. So I gamble every
6 day.
7 Q You refer to yourself in your
8 written statement as a mid-level artist. What
9 do you mean by that?
10 A I think the bulk of people who do
11 what I do are struggling every day to make
12 ends meet and figure out how to keep doing
13 what we would love, because I'm not really
14 qualified to do anything else at this point.
15 So I think a mid-level artist
16 who's just piecing it together from all of the
17 different income streams. You know, there's
18 ASCAP. Sometimes ASCAP saves my life. Once
19 in a while I'll get a SoundExchange check, and
20 I note they're getting bigger every time, and
21 it saves my life. It's just I never know kind
22 of week to week what will come in that might

1 make the difference.
2 Q Have you ever recorded an album
3 that was a commercial hit?
4 A I have not had that luxury.
5 Q But you said you consider yourself
6 a recording artist?
7 A I do.
8 Q I'm sorry, excuse me. A
9 successful artist?
10 A I do. I do consider myself
11 successful. I don't have to clean houses
12 anymore. I am able to tour with my band. I'm
13 able to write songs and record and release
14 records, even though I'm not raking it in.
15 Q You may have mentioned this
16 earlier, so forgive me, but how long did it
17 take until you were able to support yourself
18 with your music?
19 A I think it was about eight years.
20 Q Do you earn income as a musician?
21 A I do.
22 Q What are the ways in which you

1 earn income?
2 A I get income from record sales. I
3 get income from ASCAP. I get income from
4 SoundExchange. I write songs, thank goodness,
5 for Disney. I've written a couple of songs
6 for other pop artists recently, and I tour,
7 although that doesn't really bring me in too
8 much.
9 Q Are you able to rely on any one of
10 those sources of income to support you?
11 A No. No, no one alone would
12 sustain my career.
13 Q You mentioned you receive payments
14 from SoundExchange. Are those payments
15 important to you?
16 A They are.
17 Q And can you explain why?
18 A You just never know when it's
19 going to be down to the last penny and the
20 credit cards won't run anymore. You get $400
21 and that's the difference that week between
22 groceries and not. I mean it sounds so

1 maudlin, but there are times when it really is
2 that serious.
3 MR. FREEDMAN: I have nothing
4 further, Your Honor.
5 CHIEF JUDGE SLEDGE: Mr.
6 Steinthal?
7 MR. STEINTHAL: Your Honor, Mr.
8 Larson, Todd Larson, from our office is going
9 to handle this cross examination.
10 MR. LARSON: Thank you. If I
11 could just have one second, Your Honor?
12 CROSS EXAMINATION
13 BY MR. LARSON:
14 Q Hello, Ms. Brooke. How are you
15 today?
16 A Hi. I'm well, thanks. How are
17 you?
18 Q I'm doing well. My name is Todd
19 Larson, and I'm here representing DiMA and
20 DiMA's members, including Yahoo, AOL,
21 Microsoft, Live365.
22 Let me start by asking you, are

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1 you familiar that there's a statute that
2 guides the Board in their decisionmaking in
3 this proceeding?
4 A Uh-hum.
5 Q And you're aware that certain
6 services follow requirements in the statute to
7 either qualify or not qualify for the
8 statutory license, is that right?
9 A Yes.
10 Q Okay. Are you familiar with what
11 services actually do qualify for the license?
12 A I believe that it is the non-
13 interactive streaming on the internet.
14 Q So, like my clients again that I
15 mentioned before, Yahoo, AOL --
16 A That's what qualifies.
17 Q Okay. We don't have your
18 statement handed out already.
19 MR. LARSON: I'd like to mark for
20 identification Ms. Brooke's statement. I
21 believe this is Services Exhibit 79.
22 [Whereupon, the document

1 was marked as Services
2 Exhibit 79 for
3 identification.]
4 BY MR. LARSON:
5 Q Okay, now, Ms. Brooke, could you
6 turn to page 8 of your statement? On page 8,
7 starting in the second paragraph, you describe
8 there an experiment, as you call it, that you
9 undertook for a year and a half of making
10 songs of yours available on your website,
11 correct?
12 A Yes, I did. Sorry.
13 Q That's right, could you just
14 answer audibly?
15 A I have to answer.
16 MR. LARSON: Just so we have an
17 idea, a little bit better idea of what we're
18 talking about there, I'd like to mark another
19 exhibit. This would be Services Exhibit 80.
20 These are some screenshots from Ms. Brooke's
21 website.
22 [Whereupon, the document

1 was marked as Services
2 Exhibit 80 for
3 identification.]
4 THE WITNESS: Thanks.
5 BY MR. LARSON:
6 Q Ms. Brooke, does this look
7 familiar to you?
8 A Yes.
9 Q It's your website?
10 A This is my website.
11 Q In fact, this is the music, the
12 first page of this is the music page of your
13 website?
14 A I believe it is, yes.
15 Q Okay. So just so it's clear, you
16 get to there from your home page by clicking
17 the Music button up in the upper left?
18 A Yes.
19 Q And you see that on the right you
20 have a section called "Releases"?
21 A Yes.
22 Q Under that, that's each of your

1 albums that's listed there, correct?
2 A Yes.
3 Q Okay. If you hit the More link
4 under any one of those album titles, then it
5 takes you to a page for that particular album,
6 is that right?
7 A Yes.
8 Q So if you'll turn to page 3, now
9 that's -- if I were to hit the More link under
10 the "Back to the Circus" or "Back in the
11 Circus" -- excuse me -- it would take me to
12 this page, is that correct?
13 A Yes.
14 Q Now looking at this page, to the
15 right you've got the tracks listed on the
16 right that are the tracks that are on that
17 particular record?
18 A Right.
19 Q And so you make these songs
20 available essentially on demand to --
21 A To stream. I did.
22 Q Okay. So a user, basically, can

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1 click on the Listen link under one of these
2 song titles and hear that?
3 A Yes, they can, yes.
4 Q At the moment that they click on
5 it, it comes right up and they can listen to
6 it, right?
7 A Yes.
8 Q Okay. Now that's different than
9 the functionality of the webcasters that
10 qualify for the statutory license, is it not?
11 A I believe it is.
12 Q Right.
13 A It was my choice to do that.
14 Q Right. In fact, if a webcaster,
15 like one of my clients, were to offer an on-
16 demand link like this, that would not fall
17 under the statutory license, right?
18 A Can you repeat the question?
19 Q Yes. If a webcaster were to offer
20 on-demand links like this where you could
21 listen to the song right when you click the
22 link, they wouldn't qualify for the statutory

1 licenses that we're talking about in this
2 proceeding, is that right?
3 A They wouldn't qualify? I think
4 that they should pay.
5 Q No, I don't mean they wouldn't
6 pay.
7 A Oh.
8 Q In fact, they wouldn't be able to
9 take advantage of the statutory license,
10 right?
11 A Okay.
12 Q Is that your understanding?
13 A Right. I think so.
14 Q Now with the webcasters, again
15 like Yahoo or AOL or others that are taking
16 part in this proceeding, essentially, you tune
17 in to a given channel and then you listen to
18 what happens to be playing on that channel at
19 that time.
20 A Right.
21 Q Is that your understanding?
22 A That's my understanding.

1 Q Okay. So there's no ability with
2 those to select a particular song and hear it
3 right on the spot?
4 A I don't know. I actually haven't
5 been there.
6 Q So let's talk about the stream
7 ripping that you discuss on page 8 of your
8 statement. Now, as you explain it there,
9 you've had people tell you that they rip the
10 songs, as you call it, that you provide on
11 demand on your site, is that correct?
12 A That's true.
13 Q Okay. So, essentially, these
14 users that have told you this know that one of
15 your songs is going to play because they can
16 actually select it from the link on your site,
17 is that right?
18 A Right.
19 Q Okay. That's different, is it
20 not, than attempting to stream rip a song from
21 a webcasting station where you don't know what
22 song is going to play when you select the

1 station?
2 A I suppose it's different.
3 Q Now later in the third paragraph
4 on page 8, if you could take a look, you say,
5 "The fact that a music fan can listen to a
6 streamed webcast and rip it as well highlights
7 the importance of the digital performance
8 royalty for me and artists like me." Do you
9 see that?
10 A I'm sorry, where are you again?
11 Q I'm in the second full
12 paragraph --
13 A Okay.
14 Q -- that starts with the net
15 result.
16 A Uh-hum.
17 Q And I'm looking at the last
18 sentence.
19 A Okay.
20 Q Okay, do you see that?
21 A Yes.
22 Q So I'll read it just one more

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1 time, so we've got it. "The fact that a music
2 fan can listen to a streamed webcast and rip
3 it as well highlights the importance of the
4 digital performance royalty for me and artists
5 like me."
6 So, basically, Ms. Brooke, my
7 question is that you've talked about what
8 happens on your site and drawn a conclusion
9 about that, and then you, essentially, lump in
10 all streamed webcasts with that conclusion
11 that you've drawn, is that right?
12 A I think that fans can figure out
13 how to rip anything from anywhere. So since
14 we took tons of safeguards when we put up the
15 streams on my website to, hopefully, keep this
16 from happening, and yet it happened, and my
17 fans would boast to me about it, I kind of
18 have to assume that there are plenty of
19 hackers out there that are going to be ripping
20 streamed webcasts as well.
21 Q Okay.
22 A I made an assumption.

1 Q Right. But, again, as you have
2 said before, when they rip something from your
3 website, that happens when they are able to
4 choose the song, essentially, on the spot and
5 record it, and that's not what happens with
6 the ripping of an internet radio stream on a
7 webcasting service.
8 A Right. They may know what they're
9 going to rip at the moment of ripping.
10 Q Right. Okay. Let me ask you
11 this: You describe here --
12 A Can I make one distinction also
13 between my website and perhaps a webcast? I
14 chose to make my songs available for
15 streaming, hoping that it would lead people to
16 buy. I put a lot of things on my site
17 encouraging people, hey, if you like this,
18 please go buy my record; it really makes a
19 difference to me.
20 If someone's ripping a webcast and
21 my songs happen to be in the broadcast, I
22 didn't necessarily choose to have them ripped

1 for free. I didn't know they were perhaps on
2 the webcast. I think there's a difference in
3 choosing to make something available and not
4 having any control over it.
5 Q Okay. We'll talk about the
6 ripping of the other webcasts in a little bit.
7 Now, as you say, you chose to put
8 these on your site. In fact, despite the
9 stream-ripping activity that we have been
10 talking about, you actually continue to offer
11 those songs on your website?
12 A I actually have been meaning to
13 take them down for a long time now, and it's
14 embarrassing because I have not been able to
15 pay my webmaster for a few months, and so have
16 not done it yet. But I think it was a big
17 disaster to have done the streaming in the
18 first place and I regret it.
19 Q Okay. Can you take a look back at
20 Exhibit -- your web page, the music page, I
21 think it was Exhibit 81 (sic), is that right?
22 I marked every copy but my own.

1 You see on the front page, if you
2 can look down to the paragraph that starts,
3 "One of the reasons" --
4 A Uh-hum.
5 Q It says, "One of the reasons that
6 I decided to have all the albums available for
7 streaming in the music section is so that you
8 can send your friends here, urge them to check
9 out the music." And then a little bit later
10 in that paragraph you say, "Here's a chance to
11 try them out before you buy."
12 A Uh-hum.
13 Q And then towards the end you say,
14 "If you like it, buying it and turning someone
15 else onto it is the best way to help me do
16 what I do." So that's still up on your
17 website, correct?
18 A Yes.
19 Q And does that not reflect your
20 belief, at least when you wrote that, that
21 providing the music, providing these streams
22 on your website would, in fact, expose people

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1 to the music and potentially lead to them --
2 A Lead to sales, yes.
3 Q Okay.
4 A I was hoping.
5 Q Okay, right. Let's move on.
6 A But I have to say, if I can add, I
7 have witnessed a real drop in sales, actually,
8 on my website. It's pretty much 50 percent of
9 what it was on the last record since I started
10 streaming.
11 Q Do you have any evidence
12 suggesting that the drop has anything to do
13 with the fact that these streams are on your
14 website?
15 A I can only imagine that it does.
16 Q Now you're familiar with the fact
17 that the statute that's governing this
18 proceeding instructs that the Board should
19 consider promotional value of webcasting in
20 making its determination, correct?
21 A Yes.
22 Q I just want you to take a look

1 again at this page we were just looking at.
2 A The music page?
3 Q Yes, the music page.
4 A Okay.
5 Q It says, "Call your radio stations
6 and ask them to play the latest single." I
7 assume, Ms. Brooke, if I'm correct, that you
8 make that request because you feel that radio
9 play promotes sales of albums, correct?
10 A I have to say that I wish that it
11 did promote sales of albums more than I've
12 actually experienced myself.
13 Q Now you mentioned in Philadelphia
14 and the fact that Philly is a good town for
15 you to perform.
16 A Philly is a good city for me.
17 Q Okay. Now I remember first
18 hearing of the story on WXPN in Philadelphia,
19 and "Angel in the House" was actually what
20 they called the featured album of the week.
21 Do you remember that?
22 A Yes.

1 Q For the benefit of the panel, can
2 you tell them what WXPN is?
3 A WXPN is, I believe it's an NPR
4 station in Philadelphia. It's based at the
5 University there, and it's a great radio
6 station.
7 Q Okay. And being featured album
8 means essentially that they put the album into
9 the --
10 JUDGE WISNIEWSKI: Excuse me. Is
11 that the University of Pennsylvania?
12 THE WITNESS: Yes, UPENN, yes.
13 BY MR. LARSON:
14 Q Being featured album, then, meant
15 that WXPN basically put your album into heavy
16 rotation for the week and provided some
17 promotional plugs for the album, is that
18 right?
19 A Well, I think that it's a two-way
20 street. I think that they also know that I
21 have a certain cache in their market and will
22 draw listeners to their radio station. So

1 it's promotional probably for both WXPN and
2 for myself.
3 Q Right, but at the time that "Angel
4 in the House" was their featured album, you
5 were a relatively new artist, correct?
6 A Relatively new, yes.
7 Q Okay. In fact, that album ended
8 up being voted by WXPN listeners as the top
9 album of 1993 among those listeners, is that
10 right?
11 A Well, I had forgotten that.
12 Q Right. So let me ask you this:
13 Is it your opinion that being the featured
14 album of the week and being voted the top
15 album of 1993 helped your sales?
16 A I suppose it helped my sales.
17 Q Are you aware that webcasters like
18 AOL and Yahoo offer essentially similar
19 programs, "Who's Next?" on Yahoo, AOL
20 "Breakers," programs like that?
21 A I've never been offered anything
22 like that.

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1 Q Okay. So you just don't know
2 whether they do or not?
3 A Well, my impression is that web
4 radio as well as terrestrial radio is more
5 about selling advertising than really about
6 selling music.
7 Q Okay.
8 A So I'm providing content perhaps,
9 but it's more about building a business, and
10 that's what I'm trying to do by being paid for
11 what I do.
12 MR. LARSON: Now let me just see.
13 I want to pass out another exhibit, if I
14 could.
15 Actually, before I do that, Your
16 Honor, I would like to move Exhibit -- I'm
17 sorry, the music page. Is it 81? Eighty?
18 Exhibit 80 into evidence.
19 CHIEF JUDGE SLEDGE: Any objection
20 to the offer of Exhibit 80?
21 MR. FREEDMAN: No, Your Honor.
22 CHIEF JUDGE SLEDGE: Without

1 objection, the exhibit is admitted.
2 [Whereupon, the document
3 marked as Services
4 Exhibit 80 for
5 identification was
6 received in evidence.]
7 MR. LARSON: I'm going to pass out
8 what I've labeled as Services Exhibit 81.
9 [Whereupon, the document
10 was marked as Services
11 Exhibit 81 for
12 identification.]
13 BY MR. LARSON:
14 Q Ms. Brooke, do you recognize this?
15 A Yes, I do.
16 Q Can you tell us what it is?
17 A This is my March 2006 journal
18 entry that I put up on my website.
19 Q That's something you regularly do
20 on your website?
21 A I try to do it pretty regularly.
22 Q Okay. Down in, I think it's the

1 third paragraph, you mention that the WB show
2 "Related" has licensed a song called "No Net
3 Below" for two episodes this February and
4 March?
5 A Yes.
6 Q Okay. That's a song that you
7 recorded on your album "Back in the Circus,"
8 correct?
9 A Yes.
10 Q And that album is from 2003, 2004?
11 A That's from 2004, I believe.
12 Q Okay. When you wrote and recorded
13 "No Net Below" two or three years ago, you
14 included that song on the album without
15 knowing that in 2006 it was going to be
16 licensed for use in this WB television
17 program, is that right?
18 A That's right.
19 Q Okay. Now you've also mentioned
20 -- just one second, please.
21 A They actually only ended up using
22 it for one episode.

1 Q Sorry.
2 A We just found out last week.
3 Q You also mentioned in your
4 statement, I think, that you have licensed
5 songs of yours for use in the show "Dawson's
6 Creek"?
7 A Yes.
8 Q Okay, and the show that you
9 licensed that for in "Dawson's Creek," that
10 was a song called "Walking"?
11 A I believe it was.
12 Q Okay. That's from your "Steady
13 Pull" album?
14 A Yes.
15 Q You licensed a song called "Your
16 House" for the show "Once and Again"?
17 A Yes.
18 Q That's also on the "Steady Pull"
19 album?
20 A Yes.
21 Q Okay.
22 MR. LARSON: At this point, Your

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1 Honor, I want to ask Ms. Brooke about the
2 actual financial payments that were made for
3 use of those songs, which is I think is
4 restricted material. So I would move to apply
5 the protective order for a few minutes while
6 we discuss that financial material.
7 CHIEF JUDGE SLEDGE: Where are
8 those other songs, on this exhibit?
9 MR. LARSON: No, they're actually
10 on an exhibit that I haven't handed out and
11 wasn't planning to unless Ms. Brooke needed me
12 to refresh her recollection, but I was
13 planning to discuss it orally.
14 CHIEF JUDGE SLEDGE: Which songs?
15 MR. LARSON: The first song is
16 called "Walking," and the second song is
17 called "Your House."
18 CHIEF JUDGE SLEDGE: Any objection
19 to the motion to apply the protective order to
20 questions on the revenue derived from the
21 songs "Walking" and "Your House"?
22 (No response.)

1 Without objection, the motion is
2 granted.
3 (Whereupon, the proceedings went
4 into Closed Session.)
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1 BY MR. LARSON:
2 Q As I understand it, Ms. Brooke,
3 the money, the financial investment that you
4 make recording the CD is essentially an
5 investment that you hope to recoup by some CD,
6 is that right?
7 A I hope to recoup it in many ways.
8 Q Right, right. Like downloads and
9 iTunes have become a part of --
10 A iTunes has been a really great
11 source.
12 Q Right, right. The gamble, as you
13 described it in your testimony earlier, is
14 that you won't end up selling enough CDs to
15 make up for your investment?
16 A It's always a gamble.
17 Q Right, right. As you say, you
18 lose your shirt and hope it comes back?
19 A I've lost so many shirts.
20 Q Okay.
21 A I'm banking on pants now.
22 (Laughter.)

1 Q Can you look back, again, back to
2 Exhibit 80, your music page? And, actually,
3 to page 3 of that exhibit? There's a
4 paragraph at the end that starts with
5 "Anyway." Do you see that? I'm just going to
6 read that, so it's clear.
7 You say, "Making records has
8 certainly changed since I started." Do you
9 see that in the second sentence?
10 A Yes.
11 Q All right. I'm sorry, I actually
12 would like to start before that. You say,
13 "Anyway, it was bizarre flying across country
14 with all of this work in one Firewire Drive.
15 Making records has certainly changed since I
16 started."
17 Can you tell the panel what a
18 Firewire Drive is?
19 A It's a drive that you can store
20 information on. So if you are working in the
21 digital realm, in the recording studio, if you
22 have files that you have put into a -- like we

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1 work in Pro Tools a lot in the recording
2 studio. So once you've recorded something,
3 you can actually condense it into a Firewire
4 Drive, into a hard drive that you can travel
5 with and then open up again in the next
6 recording studio that you go to, where you
7 maybe want to add, you know, a horn trio or a
8 bass player that couldn't come to Los Angeles.
9 So you're back in New York and you want to
10 work on the record some more. A hard drive
11 can actually contain all that information
12 that's on your record.
13 Q Okay. And you say a little bit
14 below in that paragraph, "The really good part
15 of the technology is being able to try crazy
16 ideas quickly by shifting parts and sections
17 around, and you just undo it if it doesn't
18 work." Right?
19 A Yes.
20 Q Okay. Just before I ask a
21 question, I want to show you one other thing,
22 if I could.

1 MR. LARSON: Okay, I'll mark this
2 as Services Exhibit 82 or 3, right? Eighty-
3 two.
4 [Whereupon, the document
5 was marked as Services
6 Exhibit 82 for
7 identification.]
8 THE WITNESS: You've been on my
9 website quite a bit.
10 BY MR. LARSON:
11 Q Yes, I have. Don't get the wrong
12 idea.
13 (Laughter.)
14 Now down in the fourth paragraph
15 that starts with, "And speaking of new songs"
16 --
17 A Yes.
18 Q Towards the middle of that, again,
19 similar to the other page we just looked at,
20 you say, "Making records is such a different
21 beast now. No more months of planning an away
22 time at the studio. No big budget. It's all

1 about catching stuff on the fly on the laptop
2 at whomever's house, wherever. I travel with
3 my Firewire Drive full of completely tracked
4 songs, and it's so strange."
5 Now when you talk about traveling
6 around with your Firewire Drive and no more
7 months of planning and time at the studio,
8 what you're saying -- correct me if I'm wrong
9 -- is, basically, that advances in technology
10 have worked to cut the cost of recording for
11 you in some respects, is that true?
12 A That depends on what kind of
13 record you're making.
14 Q Okay.
15 A In 2003 I was, as usual, penniless
16 and I had to make a record very much on the
17 fly that way, very much in Pro Tools, very
18 contained. In fact, I ended up playing a lot
19 of the instruments on the record because I
20 just couldn't afford to bring in more people.
21 This time I chose to make a record
22 a different way. I brought in my band to the

1 studio and we tracked all at once, and it was
2 a much more expensive record to make.
3 You kind of choose which way
4 you're going to go at any given time. There's
5 still crazy amounts of costs. Even if you're
6 doing it in Pro Tools in your laptop in a
7 hotel room, there are still costs.
8 Q Right.
9 A And I bear those costs as the
10 record label.
11 Q But in some respects, as you say,
12 what used to take weeks and weeks in the
13 studio may in some respects be done now
14 outside the studios?
15 A Yes, it still may take weeks and
16 weeks. I don't have the luxury of Elektra
17 Records giving me a quarter of a million
18 dollars.
19 Q Once a recording is done, it's the
20 case, is it not, that the internet has made it
21 possible for you to take music that you've
22 recorded and essentially distribute it without

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1 additional costs to you, is that right?
2 A Yes.
3 Q Okay. That's to be contrasted
4 with physical CDs where, as you mentioned
5 before, there are costs like packaging and
6 manufacturing and photo sleeves and things
7 like that?
8 A Yes. Even for iTunes, though, you
9 have to provide a photograph, you know, a
10 quality JPEG that would accompany each song.
11 They won't even take your music unless you
12 have an appropriate image that will accompany
13 whichever song you're offering for
14 downloading.
15 Q You mentioned touring expenses in
16 your statement and in your testimony. Let me
17 just ask this: You spend that money and, as
18 you said, sometimes lose money touring, in an
19 effort to generate sales of your CDs, is that
20 right?
21 A Yes, and also in an effort to keep
22 a presence in the marketplace.

1 Q Right, right.
2 A To keep the audience that I've
3 managed to build over the years.
4 Q In fact, as you say in places on
5 your blog or on your journal on your website,
6 touring in itself is in some ways your reward,
7 right?
8 A It's one of my rewards, yes. I
9 love to tour.
10 Q So even above and beyond the
11 financial considerations, it's rewarding to
12 you?
13 A Yes.
14 Q Now let's just move quickly on to
15 another topic. You talk in your statement
16 about your concern or your belief that fans
17 will get more of their music -- this is on
18 page 7, if you want to take a look -- fans
19 will get more of their music by listening to
20 various kinds of streaming services rather
21 than by purchasing music in the form of CDs.
22 A Seven, oh, on listening. Sorry.

1 Q Yes, I'm sorry. We've got lots of
2 exhibits.
3 A And I'm sorry, where are you?
4 Q Well, I just had it written in my
5 notes. The bottom paragraph, the sentence
6 that starts, "As more people use webcasting
7 service."
8 A Okay.
9 Q Let me just ask you this: Did you
10 consult any evidence or any studies or
11 anything of that matter when you made this
12 statement?
13 A No, I did not consult any studies.
14 I was speaking from personal experience.
15 Q From what people have told you
16 about ripping your --
17 A Yes, from just knowing my own
18 band.
19 Q Right. When you wrote this
20 statement, when you used the term "streaming
21 services" in that sentence, did you mean to --
22 were you discussing all types of streaming

1 services or specifically statutorily-compliant
2 webcasts like those that we're dealing with in
3 this proceeding?
4 A I don't think I was being
5 specific.
6 Q Okay. Are you aware, Ms. Brooke,
7 that a lot of the major webcasters offer
8 stations that are actually fairly general in
9 nature, top 40 stations, country hits, those
10 types of stations?
11 A Yes.
12 Q That's in addition to some of the
13 more narrow or niche stations that they offer?
14 A Yes.
15 Q Are you aware of the listing
16 habits or data in terms of who's listening to
17 the more general stations versus the more
18 narrow stations?
19 A I don't really have access to that
20 kind of data.
21 Q Okay. You mentioned before that
22 your music -- well, let me rephrase that. You

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1 described your music as pop, right, before?
2 A Yes.
3 Q And you mentioned that the
4 stations, so-called AAA stations, sort of
5 embraced when you came out in the early
6 nineties?
7 A Yes.
8 Q What are AAA stations?
9 A AAA stands for Adult Alternative
10 -- I don't really remember what the third "A"
11 is.
12 Q Okay.
13 A Adult --
14 Q That's okay.
15 A Shame on me for not knowing my own
16 format.
17 Q Adult alternative, though, is a
18 genre that is --
19 A Oh, certainly.
20 Q There are webcasts that feature
21 adult alternative music, right?
22 A I believe there are, yes.

1 Q Okay. Some of those, in fact,
2 play your music, is that right?
3 A I hope they play my music.
4 Q Right. So when you make the
5 statement that fans will listen to streaming
6 services rather than purchasing music, are you
7 suggesting that a listener to, say, the adult
8 alternative station on a webcasting service
9 would be just as happy listening to that
10 service as buying your CD?
11 A They might.
12 Q So is that to say that your music
13 is interchangeable with the other music that's
14 on that station?
15 A I don't think I said that.
16 Q But isn't that the essence of
17 substitution, if they would, instead of buying
18 your CD, listen to the station? They're just
19 as happy with one or the other?
20 A I don't think it's the same thing.
21 MR. LARSON: Okay. One more topic
22 and then I'll be done with Ms. Brooke. I'll

1 finish before lunch.
2 BY MR. LARSON:
3 Q Could you turn to page 8 of your
4 statement? You say at the bottom that the
5 availability of free music on the internet
6 cuts into your and other artists' ability to
7 sell music. Do you see that?
8 A Yes.
9 Q All right. Then you go on in the
10 next sentence to describe that recordings on
11 peer-to-peer sites have fostered certain ideas
12 in the marketplace about music being free,
13 right?
14 A Right.
15 Q And when you say, "peer-to-peer
16 sites," you're talking about services like
17 Kazaa, Morpheus, and --
18 A Yes.
19 Q Right? Those are services where
20 people can search song by title or by artist
21 and then download it on the spot, right?
22 A Yes.

1 Q So, again, those are not the kind
2 of services that we're dealing with in this
3 proceeding, is that right?
4 A No, but I know that most of my
5 friends are listening to web streams pretty
6 much every day when they work --
7 Q Right.
8 A -- or wherever they are, and I
9 have to say they're not buying many records
10 these days.
11 Q But that's not, when you're
12 talking about peer-to-peer piracy here or
13 peer-to-peer sharing of files, you're talking
14 about something different than webcasting?
15 A Yes.
16 MR. LARSON: Just give me one
17 second, Your Honor?
18 (Pause.)
19 THE WITNESS: I think in my
20 statement I was -- am I allowed to speak? No?
21 (Pause.)
22 BY MR. LARSON:

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1 Q Ms. Brooke, we were talking a bit
2 before about the costs involved with
3 recording, or you testified to them, recording
4 costs, distribution cost, packaging,
5 manufacturing. It's true, is it not, that
6 those costs are costs that are often incurred
7 by the record company?
8 A Well, I'm the artist and the
9 record company.
10 Q Right. But in situations where
11 there's a record -- where you're essentially
12 signed to another record company that's not
13 your own, those would be costs that would be
14 paid for by the record company?
15 A Well, I believe even if you're on
16 another record company, a lot of those costs
17 are recoupable to the artist, so they would
18 come out of the artist royalty.
19 Q What about touring expenses?
20 That's not the case with --
21 A Touring expenses, sometimes --
22 well, that sometimes a 50/50 label/artist

1 cost, but in my case it's 100/100.
2 MR. LARSON: I have no more
3 questions, Your Honor.
4 CHIEF JUDGE SLEDGE: Thank you,
5 sir.
6 That completing your cross
7 examination and it being near our scheduled
8 break time, we'll recess and return at 2:00
9 p.m.
10 (Whereupon, the foregoing matter
11 went off the record at 12:25 p.m. for lunch
12 and went back on the record at 2:03 p.m.)
13 CHIEF JUDGE SLEDGE: Thank you.
14 We'll come to order.
15 MR. LARSON: Your Honor, Todd
16 Larson for DiMA.
17 Just before we move on to the next
18 cross examination, if I could, I would like to
19 move Exhibits 81 and 82 into evidence.
20 CHIEF JUDGE SLEDGE: You have
21 completed your cross? Do you want to do more?
22 MR. LARSON: I would ask -- these

1 were exhibits that we already dealt with. I
2 just wanted to move them into evidence, yes.
3 CHIEF JUDGE SLEDGE: Which one?
4 MR. LARSON: Exhibit 81, which is
5 a March 2006 journal entry from Ms. Brooke's
6 website.
7 CHIEF JUDGE SLEDGE: Any objection
8 to Exhibit 81?
9 MR. FREEDMAN: No, Your Honor.
10 MR. LARSON: And Exhibit 82, which
11 is an August 2003 journal entry.
12 CHIEF JUDGE SLEDGE: Without
13 objection, Exhibit 81 is admitted.
14 [Whereupon, the document
15 marked as Services
16 Exhibit 81 for
17 identification was
18 received in evidence.]
19 MR. LARSON: And Exhibit 82 was an
20 August 2003 journal entry from the website.
21 CHIEF JUDGE SLEDGE: Is there any
22 objection to admission of Exhibit 82?

1 MR. FREEDMAN: No, Your Honor.
2 CHIEF JUDGE SLEDGE: Without
3 objection, Exhibit 82 is admitted.
4 MR. LARSON: Thank you, Your
5 Honor.
6 [Whereupon, the document
7 marked as Services
8 Exhibit 82 for
9 identification was
10 received in evidence.]
11 CHIEF JUDGE SLEDGE: All right,
12 next from the broadcasters.
13 MR. WOOD: Thank you, Your Honor.
14 CROSS EXAMINATION
15 BY MR. WOOD:
16 Q Good afternoon, Ms. Brooke. My
17 name is Seth Wood. I represent a number of
18 radio broadcasters.
19 A Hi, Seth.
20 Q Your manager is named Patrick
21 Raines, is that right?
22 A Uh-hum.

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1 Q Okay. Are you married to him
2 currently?
3 A I am.
4 Q Oh, all right.
5 A Currently.
6 Q You sound happy.
7 (Laughter.)
8 That's good.
9 Is he on the board currently at
10 SoundExchange?
11 A At SoundExchange, yes, he is.
12 Q Okay, that's all I have.
13 MR. WOOD: Thank you, Your Honor.
14 Thank you.
15 JUDGE ROBERTS: Before you start,
16 Ms. Brown, what did you say the name of your
17 husband was again?
18 THE WITNESS: Patrick Raines.
19 JUDGE ROBERTS: Thank you.
20 CHIEF JUDGE SLEDGE: Ms. Brown?
21 CROSS EXAMINATION
22 BY MS. BROWN:

1 Q Good afternoon, Ms. Brooke.
2 A Hi.
3 Q I just have a few questions for
4 you. My name is Kris Brown, and I'm
5 representing NPR.
6 A Hi, Kris.
7 Q Are you familiar with NPR?
8 A Yes, I love NPR.
9 Q Wonderful. That's good to hear.
10 I think you testified earlier that
11 you hope to promote sales of your sound
12 recordings by exposing your music to as many
13 new listeners as possible, is that correct?
14 A Uh-hum. Yes, yes.
15 Q Over the years you've given many
16 interviews to NPR, haven't you?
17 A Yes, I have.
18 Q And you've performed some of your
19 songs live in NPR Studio 4A, haven't you?
20 A Yes, I have.
21 Q Can you describe to the panel
22 Studio 4A?

1 A Is that one in Washington?
2 Q Yes.
3 A I think that that's the new one,
4 right?
5 Q Right.
6 A There's a beautiful, new, state-
7 of-the-art studio, if I recall right, where
8 they record "All Things Considered."
9 Q Right.
10 A And I was lucky enough to do a
11 performance there. I brought my band from LA
12 and drove down to D.C. to do an "All Things
13 Considered" show with Michele Norris. I think
14 it was a couple of years ago.
15 Q Uh-hum.
16 A It's a beautiful, state-of-the-art
17 facility. They record on multi-track and it
18 sounds great, and it was a great opportunity.
19 Q Have you visited NPR's website?
20 A I don't think that I have, no.
21 MS. BROWN: What number are we for
22 Services exhibits? I would like to mark

1 Services Exhibit 83, which is a screenshot
2 from NPR's website.
3 [Whereupon, the document
4 was marked as Services
5 Exhibit 83 for
6 identification.]
7 BY MS. BROWN:
8 Q It says at the top here, "Jonatha
9 Brooke Live in Studio 4A"?
10 A Uh-hum. Yes.
11 Q As you read down on the lefthand
12 column, it says, "Jonatha Brooke and her band.
13 Hear full-length cuts performed live in NPR's
14 Studio 4A"?
15 A Uh-hum. Yes.
16 Q And then there are links to
17 several songs there, "War," "Steady Pull,"
18 "Your House," "So Much Mine," "A New Dress."
19 Are those songs you recall performing in
20 Studio 4A?
21 A Yes, I think I did.
22 Q Then the main body of the text

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1 here is an article from our "All Things
2 Considered" about you and about your music and
3 the song "War," in particular.
4 A Right.
5 Q Isn't that right? Okay.
6 A Yes.
7 Q In fact, Ms. Brooke, you wouldn't
8 give interviews to NPR or perform in Studio 4A
9 if you didn't believe there was a benefit
10 associated with that, would you?
11 A I would not do it, no, if there
12 was no benefit.
13 Q And is it possible that
14 individuals may be listening to news and
15 educational content through NPR's website,
16 hear an interview with you on a program like
17 "Morning Edition" or "All Things Considered,"
18 and learn about you for the first time because
19 of hearing about you on NPR?
20 A It's possible that they would.
21 Q And that such exposure, therefore,
22 increases your potential fan base and music

1 sales related thereto?
2 A It has the potential to do that.
3 It also has the potential to bring more
4 listeners to NPR that perhaps might not have
5 listened otherwise, because I think I give to
6 them a certain value of being on their
7 programming.
8 Q I think that you said in your
9 written statement, if you turn to page 7 of
10 your written statement, in the last full
11 paragraph, the second sentence says, "The
12 digital streaming services like the ones in
13 this proceeding offer people a different way
14 to listen to music, hundreds of channels
15 playing thousands of artists performing every
16 genre and type of recording." Is it your
17 understanding that NPR offers that kind of
18 service to its listeners?
19 A Yes.
20 Q Offers hundreds of channels?
21 A I don't -- actually, I'm not aware
22 of how many channels NPR offers.

1 Q Would it surprise you to learn
2 that the programming that's offered on NPR in
3 terms of web streaming mirrors the NPR
4 broadcasts that you hear on the radio?
5 A No, that would be what I expected.
6 MS. BROWN: Your Honor, I'd like
7 to move Services Exhibit 83 into evidence,
8 please.
9 CHIEF JUDGE SLEDGE: On what
10 basis?
11 MS. BROWN: That it's an NPR
12 screenshot that Ms. Brooke recognized --
13 CHIEF JUDGE SLEDGE: No, Ma'am.
14 She said she wasn't familiar with it.
15 Any other questions?
16 MS. BROWN: No other questions,
17 Your Honor.
18 CHIEF JUDGE SLEDGE: Without
19 foundation, Exhibit 83 is not admitted.
20 Any other cross examination?
21 MR. FREUNDLICH: No cross, Your
22 Honor.

1 CHIEF JUDGE SLEDGE: Thank you.
2 That completes the cross examination.
3 Are there any other redirect
4 questions to this witness?
5 MR. FREEDMAN: May I have your
6 indulgence for 30 seconds, please?
7 CHIEF JUDGE SLEDGE: Yes, sir.
8 (Pause.)
9 MR. FREEDMAN: Just one question,
10 Your Honor.
11 CHIEF JUDGE SLEDGE: All right.
12 REDIRECT EXAMINATION
13 BY MR. FREEDMAN:
14 Q Ms. Brooke, after appearing on
15 those various shows on NPR, have you
16 experienced an uptake in your sales?
17 A I can't say that I have, no.
18 Q Thank you.
19 MR. FREEDMAN: Nothing further.
20 CHIEF JUDGE SLEDGE: Thank you,
21 Ms. Brooke.
22 THE WITNESS: Thank you.

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1 (Witness excused.)
2 MR. SMITH: We are just getting
3 Mr. Simson at this point.
4 CHIEF JUDGE SLEDGE: Mr.
5 Steinthal, we completed the day of Mr. Simson
6 on the stand just about as you were almost
7 through with your examination. So if you
8 would complete that little bit of examination
9 you have left?
10 MR. STEINTHAL: And, Your Honor,
11 it is a little bit -- famous last words, I
12 know.
13 WHEREUPON,
14 JOHN SIMSON
15 resumed the witness stand, and, having been
16 previously duly sworn, was examined and
17 testified as follows:
18 CONTINUED CROSS EXAMINATION
19 BY MR. STEINTHAL:
20 Q Good afternoon, Mr. Simson.
21 A Good afternoon.
22 CHIEF JUDGE SLEDGE: Mr. Simson, I

1 remind you that you have been sworn and you
2 remain under oath.
3 THE WITNESS: Yes, sir.
4 BY MR. STEINTHAL:
5 Q I hope you had a good trip to
6 Europe.
7 A I did.
8 Q There's only one subject I want to
9 raise with you this afternoon that I didn't
10 get to the last time.
11 In your direct testimony, sir, you
12 testified that the Librarian in the first CARP
13 rejected the viability of using a musical
14 works benchmark for piece-setting purposes.
15 Do you recall testifying to that?
16 A Yes, I do.
17 Q Now, in fact, you're familiar, as
18 you walk through the history of the
19 proceedings, that the musical works benchmark
20 was initially offered as a benchmark in the
21 1998 pre-existing services CARP proceeding,
22 was it not, involving digital cable radio?

1 A That's correct.
2 Q It's correct, is it not, that in
3 the 1998 decision, in that proceeding the
4 Librarian actually utilized the licensee's
5 musical works fee as a relevant benchmark for
6 setting that licensee's digital sound
7 recording fees, correct?
8 A As I think I mentioned earlier, I
9 wasn't at SoundExchange -- that happened pre-
10 my-time. So I know there was some discussion
11 about the musical work, but I don't know that
12 it was actually a benchmark in that.
13 [Whereupon, the document
14 was marked as Services
15 Exhibit 84 for
16 identification.]
17 Q Let me ask you to take a look at
18 what we've marked as Services Exhibit 84,
19 which is a copy of the Librarian's decision in
20 the pre-existing services case in 1998.
21 Now take a look, if you would, at
22 page 25404 from The Federal Register. See,

1 starting in the middle column of that page, at
2 the bottom, it says, "In this proceeding the
3 Registrar finds that both the negotiated DCR
4 license fee and the marketplace licensee fee
5 for the performance of the musical works are
6 useful at least in circumscribing the possible
7 range of values under consideration for the
8 statutory performance license in sound
9 recordings."?
10 A I do see that.
11 Q And then it goes on, "While the
12 DCR license fee purports to represent a
13 negotiated value for a right to which by law
14 the record companies were not entitled, in
15 addition to the recognition that the right
16 should exist, the Registrar acknowledges that
17 the value of the DCR license provides minimal
18 information as to the value of the performance
19 right ultimately granted in the DPRSA,
20 although it does provide some guidance for
21 assessing the proposed rate."
22 Then if you skip down a little bit

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1 to the next paragraph, it says, "On the other
2 hand, the second reference point, the
3 negotiated license fees for the performance of
4 music embodied in sound recordings, offers
5 specific information on what the services
6 actually pay for the already-established
7 performance rate of one component of the sound
8 recording."
9 Then if you skip, if you would, to
10 the conclusions on page 25409 --
11 A Twenty-four --
12 Q 25409.
13 A Okay.
14 Q At the third column to the right,
15 starting with "In formulating," way down in
16 the third column, where it says, "In
17 formulating her recommendation as to the
18 appropriate rate for the digital performance
19 license, the Registrar, like the panel,
20 considered the relevant marketplace points of
21 reference offered into evidence. These
22 reference points guided the Registrar in her

1 task of setting a reasonable rate for the
2 performance of digital sound recordings, but,
3 unlike the panel, the Registrar gave more
4 consideration to the rates paid for the
5 performance rate in the musical compositions
6 because these rates represent an actual
7 marketplace value for a public performance
8 rate in the digital arena, albeit not the
9 digital performance rate in sound recordings."
10 That refers to footnote 33, which
11 states, "The values of the relevant
12 marketplace reference points, the DCRA
13 negotiated license fee, and the license for
14 the performance of the musical works are
15 subject to a protective order and, hence,
16 their numerical values have been omitted.
17 Nevertheless, the values of the performance
18 rights embodied in these licenses figure
19 prominently in the determination of the value
20 for the digital performance right in sound
21 recordings. In fact, the sum of these license
22 fees establishes the outer boundary of the

1 zone of reasonableness for this proceeding."
2 Do those passages in the
3 Librarian's decision in the pre-existing
4 services case refresh your recollection that,
5 in fact, the Librarian did rely on the musical
6 works fees of the licensees in that case as a
7 benchmark for rate-setting?
8 A That it was a relevant item to
9 look at? Yes.
10 Q Now you also testified that the
11 value of the sound recording performance is
12 greater than the value of a musical works
13 performance, did you not?
14 A Yes.
15 Q Let's take a look at page 25404 in
16 the Librarian's decision in the pre-existing
17 services case.
18 CHIEF JUDGE SLEDGE: Mr.
19 Steinthal, I'm puzzled. Are you asking him,
20 are you reviewing this just so you can read
21 from the exhibit or are you asking him if
22 reading this makes him remember something that

1 occurred before he was involved in the
2 business?
3 MR. STEINTHAL: Your Honor, he
4 testified unequivocally that the Librarian
5 rejected the musical works benchmark in the
6 prior CARP. There is jurisprudence in the
7 prior CARPs from 1998 to the last CARP on this
8 precise issue. I'm trying to refresh his
9 recollection, upon looking at these decisions,
10 as to whether, in fact, he has a basis for the
11 conclusion he testified to on direct.
12 CHIEF JUDGE SLEDGE: The last CARP
13 was the time that he was involved in
14 SoundExchange. This decision is before he was
15 involved in SoundExchange.
16 MR. STEINTHAL: Your Honor, I
17 understand that. However, he testified on
18 direct about his experience in the business
19 spanning many decades, and I think that he
20 testified generally about the subject matter
21 of what is referenced in these decisions. It
22 may or may not help him form a basis for

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