Before the
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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

Room LM-414
Library of Congress
First and Independence Ave,, S.E.
Washington, D.C. 20540

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

Transcript of:

Date: May 17, 2006
Volume: 11

Case: Digital Performance Rights

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9:34 a.m.

CHIEF JUDGE SLEDGE: Good morning. Thank you. We'll come to order.

The first matter to consider this morning is the pending motion to strike portions of the direct testimony of Cathy Fink, and we have received a response to that motion.

Mr. Joseph, would you like to address that motion to begin?

MR. JOSEPH: Your Honor, I would like to introduce my colleague Seth Wood who would like to address that motion this morning.

CHIEF JUDGE SLEDGE: Seth?

MR. JOSEPH: Wood.

CHIEF JUDGE SLEDGE: Wood?

MR. JOSEPH: Yes, sir.

CHIEF JUDGE SLEDGE: All right, Mr. Wood.

MR. WOOD: Thank you, Your Honor.

As you say, we have a motion before you right now. It's a motion to strike and a motion in limine to restrict portions of Ms. Fink's testimony.

The motion is made on this basis: Ms. Fink has, basically, willfully chosen to defy --

CHIEF JUDGE SLEDGE: Just let me say something.

MR. WOOD: Yes, sir, Your Honor. I'm sorry.

CHIEF JUDGE SLEDGE: I meant to say before you began -- perhaps I can save something -- we have read your motion and we have read the opposition. So I invite you not to feel like you need to restate your motions, and simply, if you will, add any comments that you think are necessary in light of the opposition and/or anything that you feel like is not clear from your motions.

MR. WOOD: Yes, sir. I'm sorry.

CHIEF JUDGE SLEDGE: Thank you.

MR. WOOD: In response to the SoundExchange arguments, three points that we want to make:

One is that they're essentially initially rearguing the same points that have been raised twice and rejected twice by this Board. The statement about the need to show prejudice on our part turns this own inquiry on its head.

This is a discovery dispute. Discovery standards apply. This isn't an admissibility question. There's reasons why you have a broader reach for discovery.

In this instance, Ms. Fink made a specific statement in her testimony that, "I'm not rich. I earn a modest living." From that, we sought discovery, and this Board approved it twice, once directly and once rejecting the motion for reconsideration. So that portion.

The third point, they state that we are seeking an overbroad remedy. Our

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1 MR. STEINTHAL: All right.
2 CHIEF JUDGE SLEDGE: Thank you,
3 sir.
4 Mr. Freedman?
5 Ms. Fink, before you seat, would
6 you please raise your right hand?
7 WHEREUPON,
8 CATHY ANN FINK
9 was called as a witness by Counsel for the
10 SoundExchange and, having been first duly
11 sworn, assumed the witness stand, was examined
12 and testified as follows:
13 CHIEF JUDGE SLEDGE: Thank you.
14 Be seated.
15 MR. FREEDMAN: Good morning, Your
16 Honor. It is Jared Freedman for
17 SoundExchange.
18 DIRECT EXAMINATION
19 BY MR. FREEDMAN:
20 Q Good morning. Can you please
21 state your name for the record?
22 A Cathy Ann Fink.

1 Q And where do you live?
2 A Kensington, Maryland.
3 Q What is your profession?
4 A I'm a musician, a music producer,
5 recording artist, and performer.
6 Q What instruments do you play?
7 A I play the banjo, the guitar,
8 accordion, fiddle, and assorted other things.
9 Q Do you also sing?
10 A Yes, I do.
11 Q How long have you been a recording
12 musician?
13 A I've been a recording musician
14 since about 1974, so over 30 years.
15 Q Can you describe for the Court how
16 you got your start as a recording musician?
17 A My very first recording was
18 probably right around 1974, a transcription
19 recording for the Canadian Broadcasting
20 Corporation in Canada. They called me up and
21 said, "We're recording some artists that we
22 want to have everyone to hear and we'd love to

1 have you be on that."
2 Q At that time in 1974, how had you
3 begun your career as a musician generally?
4 A My career as a musician really
5 began by attending a lot of coffee houses and
6 folk clubs in Montreal, where I was going to
7 school, McGill University; falling in love
8 with the music that I heard there. I already
9 played a lot of music, but it seems like I
10 found some genres that I really enjoyed. So
11 I started attending open mike nights and
12 eventually getting myself booked at many of
13 those coffee houses and places, and slowly
14 finding new venues, creating venues and
15 finding new venues.
16 Q Do you today perform with a
17 partner?
18 A I do.
19 Q And who is that?
20 A Her name is Marcy Marxer.
21 Q How long have the two of you
22 performed together?

1 A We started playing music together
2 in 1980 and formed a full-time dual
3 partnership in 1984.
4 Q What kind of music do you and Ms.
5 Marxer perform and play?
6 A We play a lot of folk, traditional
7 and contemporary folk, country, swing, Celtic,
8 and one of our focuses is on music for
9 children and families.
10 Q Do you play live performances?
11 A Yes, we do.
12 Q How often would you say?
13 A There are some years where we do
14 50 or 60 shows. There's other years where we
15 do as many as 250.
16 Q What kind of venues do you perform
17 in?
18 A Well, I've actually performed in
19 this building here with Patsy Montana, the
20 first woman in country music to sell 1 million
21 records. I performed this year at Strathmore
22 Hall at the Kennedy Center. I have performed

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1 at lots of elementary schools. I was at the
2 Culpepper Library last night. It's a wide and
3 varied career.
4 Q Have you also performed outside
5 the United States?
6 A Yes.
7 Q Where are some of the places
8 outside of the United States you've performed?
9 A Japan, Israel, New Zealand,
10 Australia, the United Kingdom, and Canada.
11 Q Do you ever perform with other
12 musicians?
13 A Yes.
14 Q Who are some of the notable
15 musicians with whom you've performed?
16 A Well, I'll start with Patsy
17 Montana, since she was the first woman in
18 country music to sell 1 million records, but
19 also Peter Seeger, Tom Paxton, Sweet Honey in
20 the Rock, Mike Seeger, tons and tons of people
21 in folk music.
22 Q During your career have you been

1 nominated for any professional awards?
2 A I'm lucky to say yes.
3 Q What are some of the awards for
4 which you have been nominated?
5 A I've been nominated for 10 or 11
6 Grammy Awards. I've won two of those awards.
7 I've been nominated for over 40 awards by the
8 Washington Area Music Association and actually
9 probably received about 45 WAMI awards. I've
10 also won awards from the American Library
11 Association, Parents' Choice Foundation,
12 Openheim Toy Portfolio, Early Childhood News
13 Directors' Choice Awards, and National
14 Association of Independent Record
15 Distributors.
16 Q You mentioned a moment ago you've
17 won two Grammys.
18 A Yes.
19 Q What were the Grammys you won?
20 A In 2004 for a CD called "Bon
21 Appetit! Musical Food Fun," and in 2005 for a
22 CD called "Celebration: A Tribute to Ella

1 Jenkins."
2 Q What was the category of Grammy
3 that you won those for?
4 A Best Recorded Music for Children.
5 Q How many Albums have you released
6 during your career?
7 A I think around 30.
8 Q I'd like to ask you some questions
9 about the process of creating a sound
10 recording. In your written testimony and you
11 just mentioned an album called "Bon Appetit."
12 What is that album "Bon Appetit"?
13 A That album is all on health and
14 nutrition and the fun of food. It is a
15 musical way to make some important messages
16 and lessons in health and nutrition accessible
17 to kids and families.
18 Q How did that album originate?
19 A That album actually originated
20 starting about 15 years ago with a fan of
21 Cathy Fink and Marcy Marxer from the World
22 Bank who attended a lot of our music workshops

1 and concerts. He had heard some of our other
2 children's music, and he sort of came up to me
3 and said, "Hey, when are you going to do an
4 album on health and nutrition for kids?" Once
5 a year I would run into Allen at some event
6 and he'd go, "Are you thinking about my
7 album?"
8 About, oh, I can't remember how
9 many years ago, five or six, seven years ago,
10 he said, "Are you still thinking about my
11 album," and I said, "Look, Allen, I'm thinking
12 about your album. Here's how much money I
13 need. Don't ask me again until you find the
14 money."
15 And the next morning he called me
16 up and he said, "Okay, I have your funding."
17 I said, "Hey, why didn't we talk about that 15
18 years ago?"
19 So he, basically, planted that
20 seed, found a funder in Canada, the
21 Micronutrient Initiative, and we embarked on
22 what really turned out to be another year and

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1 a half to two years of negotiations and
2 discussions to take the project off the idea
3 plate into the we're really going to do this,
4 and then we did. We embarked on it.
5 Q What were the first steps of
6 embarking on creating this album?
7 A Once we were past the contract
8 issue and the sort of proposal part, which was
9 just about a two-year deal, we created an
10 advisory board of people, respected people in
11 children's health and nutrition from the
12 Center for the Science and Public Interest,
13 the World Bank, the USDA, as well as a pool of
14 parents who come to our concerts where we
15 could bounce ideas off of them.
16 We interviewed all of these
17 people, spent a lot of time with them. We
18 also went to the internet and library
19 resources that they recommended for us to sort
20 of get a good background on the issues having
21 to do with health and nutrition for kids,
22 created a gigantic wishlist of what the songs

1 might be about and sort of how the project
2 might take shape.
3 Then Marcy and I went off into our
4 own corners to do the research and start
5 writing the songs. We did that over the
6 course of a couple of months, reconnecting
7 with the advisors when we had questions.
8 Eventually, we created a very sort
9 of stark demo tape, working tape or CD, of
10 what those songs were starting to look like to
11 get their input, to make sure that it
12 accurately reflected the information that we
13 needed. Then, simultaneously, from our point
14 of view, that we could take this stuff and
15 make it be a fun sound recording for kids and
16 families.
17 So we continued that process for a
18 while, and eventually we said, okay, we've
19 decided on the songs. The next step was to
20 outline and figure out the actual process for
21 recording the songs.
22 Q Let me ask you a follow-up

1 questions on one of the things you just
2 mentioned. You mentioned a demo tape. What
3 is a demo tape?
4 A A demo tape is really the simplest
5 of tapes. It's not a sort of five days of
6 recording one song. You're just going to sit
7 down with your guitar or your keyboard or your
8 drum and sing through it with vocal and maybe
9 one instrument to give an outline picture of
10 what that song will be.
11 Q So once you had this demo tape in
12 place, how did you go from there to creating
13 a final version of the sound recordings?
14 A The demo tape, we still took back
15 lots of information from the various different
16 advisors, made some adjustments once again to
17 the songs, but then we sit down with the demo
18 tape and we start creating our wishlist of
19 what we want each song to sound like. This is
20 sort of where the biggest fun part comes. We
21 use our dreams. We use our imagination. We
22 listen to other recordings and say, "Wow, I

1 love how that sounds. I'd like to do an
2 arrangement like that," all that kind of
3 stuff.
4 We spend a fair amount of time
5 brainstorming what we want each song to sound
6 like. As we are doing that, we have to start
7 creating a chart of what musicians will play
8 a part in making that arrangement happen.
9 So we end up with a kind of giant
10 chart of that for each of the songs, and then
11 we organize that into what the studio sessions
12 are going to look like.
13 Q Now on "Bon Appetit" are all of
14 the songs in the same musical style?
15 A No, I think we have probably
16 between eight and ten different musical styles
17 on that recording.
18 Q What are some of those styles?
19 A There's some folk-sounding stuff.
20 There's some old-time country string band
21 stuff. There's some big band music. There's
22 some blues. There's a steel drum calypso band

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1 and big band swing.
2 Q Do you know how many different
3 instruments are played on the album?
4 A I really don't, but if it's
5 anything under 50, I'd be surprised.
6 Q Does recording an album with so
7 many different styles pose any particular
8 challenges?
9 A It poses a lot of challenges
10 because on a lot of sound recordings, when you
11 have one genre being recorded, you have the
12 same unit of people recording each of the
13 songs. In our case, with children's music,
14 because we like to represent eight to ten
15 different genres within one sound recording,
16 you may use eight to ten different musical
17 band combinations to make that happen.
18 Q Do you and Ms. Marxer play all of
19 the instruments on the album?
20 A We don't. We play quite a few of
21 them. Ms. Marxer's quite talented and she
22 probably plays 20 instruments on that album,

1 and I probably play three, but I'm a very good
2 typist.
3 Q What are the three that you think
4 you may have played on that album?
5 A Well, I know I played the guitar
6 and I know I played the banjo, and I sang. I
7 also played the bouzouki, an Irish long-neck
8 mandolin, and did a lot of harmony singing.
9 Q How long have you been playing
10 those instruments that you just mentioned?
11 A Well, let's see, I've been playing
12 the guitar for 40 years. I've been playing
13 the banjo for about 35 years. I've been
14 playing the bouzouki for eight or nine years.
15 Q Now you mentioned a minute ago
16 that you create your dream arrangement, I
17 think. How do you go from there to creating
18 an actual sound recording? What's the next
19 step?
20 A Well, the next step is often we
21 make a more elaborate demo because we need to
22 then get our ideas across to the musicians

1 before they're going to come into the studio.
2 Sometimes we create musical charts. Neither
3 of us read music particularly well. So we use
4 more of the demos for people to hear what we
5 want to do. We create charts with the cord
6 progressions. We give everybody the lyrics.
7 In some cases we have rehearsals
8 prior to going into the studio. In other
9 cases, because we're drawing musicians from so
10 many different places, it's more cost-
11 efficient to just spend an extra hour or two
12 of studio time, give everybody the stuff to
13 listen to before they come in, rehearse for an
14 hour or two, go, "Wow, this sounds great now.
15 Let's push the record button." So that's sort
16 of how it works.
17 Q How long would you say it takes to
18 -- for "Bon Appetit" how long would you say it
19 took to record the album?
20 A You know, I know that we spent at
21 least 100 hours. We, at the top of every
22 project, have every great intention of

1 punching the time clock and keeping a detailed
2 log, but because we're in the freelance world
3 of doing 20 different things at a time and
4 they overlap, and they this and that, you
5 know, after a while you've been in studio
6 seven hours and you go, "I'm not opening that
7 spreadsheet. I just spent more time. What
8 the heck."
9 So at least 100 hours, but it
10 could be more.
11 CHIEF JUDGE SLEDGE: I'm sorry,
12 the last question was, how long does it take
13 to record?
14 MR. FREEDMAN: Yes, sir.
15 CHIEF JUDGE SLEDGE: And what do
16 you mean? What are you referring to when you
17 say, "record"? It is used to describe a lot
18 of things.
19 MR. FREEDMAN: Yes, well, maybe we
20 should clarify.
21 THE WITNESS: Sure.
22 BY MR. FREEDMAN:

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1 Q When we're speaking of the time
2 spent recording, what part of the process are
3 you referring to there when you talk about the
4 100 hours?
5 A You know, I would say that that
6 doesn't include the organizing time. It would
7 include any time spent in the studio or
8 preparing arrangements for the studio. I
9 would say that it's not including things like
10 setting up the schedule for everybody to come
11 into the studio, but everything outside of
12 that.
13 Q When you mention setting up the
14 schedule to have people come into the studio,
15 can you expand on that a little bit and
16 describe what that is?
17 A Sure. If we've got 40 different
18 musicians on this recording, what we need to
19 do is put together a schedule that the right
20 people are in the studio together at the right
21 time. It's just a whole lot of phone calls
22 and emails and scheduling and rescheduling,

1 and that's what's involved.
2 Q And is that time spent in addition
3 to the 10 hours you mentioned a minute ago?
4 A Yes.
5 Q Do the songs on "Bon Appetit" have
6 multiple tracks on them?
7 A Yes, they do.
8 Q What is a track?
9 A Well, my best way of explaining
10 that is, when you listen to a CD or a cassette
11 in the old days, there's basically two tracks.
12 You have stereo speakers. You have your left
13 track, your right track.
14 These days people record in
15 multiple tracks, thanks to Les Paul. So you,
16 instead of having -- you know, what you hear
17 is the mix-down of multiple tracks going down
18 to the two tracks that your machine, your
19 speakers, your iPod, whatever it is, can
20 handle.
21 But prior to that, most of these
22 things have multiple tracks where each vocal

1 part, each instrumental part goes on its own
2 separate track.
3 Q Why do you record separate tracks
4 for a song?
5 A You get a much cleaner-sounding
6 recording by doing that and more opportunity
7 for perfection.
8 Q You mentioned a song in your
9 written testimony called "Banana." Do you
10 recall how many tracks are recorded on that
11 song?
12 A I believe that we hit the 48
13 tracks mark.
14 Q How long does it take to record
15 each track?
16 A Well, you know, if a song is two
17 minutes long, you can say it takes two minutes
18 to record each track, except you're probably
19 going to record it, re-record it, fix it,
20 improve it, fuss with it, and go back to it.
21 So, you know, each track could
22 take as little time as starting from the

1 beginning to the end, whatever the length of
2 the song is. The "Banana" song is probably
3 about, I'm going to guess, three and a half to
4 four minutes long. But you could also spend
5 three hours getting one track and saying, "I'm
6 happy with it." That might often be the case
7 on a vocal track.
8 Q Once you've recorded all of the
9 tracks on a song, what do you do with them?
10 A You go, "Wow, now I have to get
11 these all down to two tracks, so that the
12 general public can listen to it because they
13 don't have a multi-track machine that can hear
14 all 48 tracks like on "Banana."
15 So, basically, you start the
16 process called mixing. You individually in
17 that process listen to every single track and
18 do a variety of treatments to do it. You
19 might do equalization. You might do
20 compression. You might do all different kinds
21 of things to manipulate the sound of that
22 track, and then at some point you're going to

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1 put that track into the mix and also
2 manipulate the volume of it in different
3 places, the panning, whether it comes out of
4 the left speaker or the right speaker. As you
5 add more tracks, you continue adjusting the
6 other ones because it is a delicate balance to
7 make the final product sound as good as you
8 want it to sound.
9 Q Once you've done that mixing for a
10 song, do you have a finished product?
11 A Well, you sort of have a finished
12 product, although in our case you have mix No.
13 1, version No. 1.
14 Q What do you do with version No. 1?
15 A What we like to do is take a break
16 from listening to it and then go back and
17 listen to it on multiple different sound
18 systems and speakers, listen to it in the car,
19 listen to it in all the different contexts
20 where the consumer might listen to it, so we
21 can hear it and say, "Oh, yeah, it sounds
22 really good" or "Oops, there's too much base,"

1 "Oops, the vocal's not loud enough,"
2 "Everything's over on the right side." We
3 take notes as we listen to things in all the
4 different circumstances, and then we come back
5 to the studio and make adjustments.
6 Q When those adjustments are done
7 and you have all of the songs fully recorded
8 and mixed, what is the next step of your
9 involvement in creating a final product?
10 A The next step is what we call
11 mastering. In that step you take all of your
12 final mixes to a professional mastering
13 engineer who dumps them into his or her
14 system. You sequence the songs, which means
15 what order do you want to hear them in. Then
16 the mastering engineering goes through them
17 one by one to make even further adjustments to
18 make sure that -- the first thing you really
19 do is something that we call top and tail.
20 It probably takes about five
21 minutes per song, but the top and the end of
22 each song is sort of in a raw form, and you

1 want to have a little fade-in and a little
2 fade-out. It's the kind of thing that you
3 wouldn't hear, but you would hear if somebody
4 hadn't done it.
5 You adjust how much time is
6 between each song. You adjust the volume from
7 song to song. You want to make sure that the
8 listener, when you're listening, doesn't have
9 to change the volume because one song is so
10 much louder than the next one.
11 You can make equalization changes,
12 so that the -- let's say the bass is quieter
13 on one song than on another song, and if you
14 want to make them closer to the same, you can
15 adjust that.
16 You can do what we call squash it,
17 compress it. That's how rock-and-roll bands
18 create tons and tons of energy, by using a lot
19 of compression.
20 So there are multiple levels of
21 things that you can do in the mastering
22 process to try to put the finishing touches on

1 a project that you're going to be happy with.
2 Q When that mastering is done, is
3 your role complete in creating a final
4 product?
5 A It's not.
6 Q What is the next thing you do?
7 A The next thing we do, which we're
8 sort of working on in the background while
9 we're doing everything else, too, is that we
10 are involved in creating the liner notes and
11 we are involved in overseeing the packaging.
12 Q Can you expand on what the
13 packaging means?
14 A The packaging is the actual
15 physical packaging of the CD. So it includes
16 the artwork. It includes all of the written
17 liner notes that are inside that give people
18 information about the project.
19 Q We were talking about the album
20 "Bon Appetit." How long did it take kind of
21 soup to nuts on that album, start to finish,
22 from when you started working on it until when

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1 you had a final physical product done?
2 A I believe we started early in the
3 summer, and I believe we delivered the final
4 project just before Christmas.
5 Q I would like to switch topics and
6 ask you a couple of questions about the
7 SoundExchange. Have you selected
8 SoundExchange as the agent to collect and pay
9 digital performance royalties?
10 A Yes, I have.
11 Q Now in your written testimony you
12 mentioned you were impressed with the lengths
13 to which SoundExchange goes to locate artists.
14 Can you explain what you meant by that?
15 A I had received several phone
16 calls, emails, and even in-person requests
17 from people at SoundExchange looking for
18 performers that they think I might know where
19 to find because they've got money for these
20 folks and they want to make sure it gets to
21 the right people. I'm always impressed with
22 that.

1 Q You also expressed concern in your
2 written testimony about allowing webcasters to
3 report performances of songs based on sampling
4 techniques. What is your concern about that?
5 A Well, sampling is extremely
6 incomplete, and I have a lot of concern that
7 sampling will not aptly represent some of the
8 music that doesn't get as heavy airplay or --
9 I'm using the word "airplay," but webplay, or
10 whatever it may be. I'm certainly concerned
11 that it won't accurately represent what is
12 getting played, and that if you actually have
13 to report everything that's getting played,
14 then everybody is being represented.
15 MR. FREEDMAN: If I may have the
16 Court's indulgence for just a moment?
17 (Pause.)
18 I have nothing further, Your
19 Honor.
20 CHIEF JUDGE SLEDGE: Thank you.
21 Any cross examination by DiMA?
22 MR. STEINTHAL: Yes, Your Honor.

1 David Taylor.
2 CHIEF JUDGE SLEDGE: Thank you.
3 Mr. Taylor?
4 CROSS EXAMINATION
5 BY MR. TAYLOR:
6 Q Good morning, Ms. Fink. I'm David
7 Taylor, counsel for DiMA and the webcasters.
8 How are you doing?
9 A Just fine.
10 Q Are you nervous?
11 A No.
12 Q That's good to hear. I'm a little
13 nervous here, so if my voice shakes, I
14 apologize.
15 (Laughter.)
16 Have you testified before?
17 A I won't do anything bad to you.
18 (Laughter.)
19 Q Okay, and I hope not to do
20 anything bad as well.
21 (Laughter.)
22 With that said, my intention is

1 just to ask you some basic, simple questions,
2 elicit yes-or-no responses, and nothing
3 difficult, I assure you.
4 CHIEF JUDGE SLEDGE: Mr. Taylor,
5 you remind me of my first jury trial ever
6 which was a capital murder trial, and my voice
7 was shaking quite a bit in that first trial.
8 So I empathize with you.
9 THE WITNESS: Well, I hope I don't
10 remind you of anyone in that trial.
11 (Laughter.)
12 BY MR. TAYLOR:
13 Q Ms. Fink, you don't have a copy of
14 your direct testimony, but on page 4 of your
15 direct testimony you had talked about the
16 songs you had written and about them receiving
17 critical acclaim. Could you tell the panel
18 what those songs were?
19 A Well, I've probably written about
20 300 songs, but I think in the testimony I
21 specifically referred to a song called
22 "Names," about the AIDS Memorial Quilt, which

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1 won a Songwriters' Association Award, Mid-
2 Atlantic Songwriters' Association Award.
3 I've received lots of other awards
4 for different songs. A recent one, if you'll
5 let me brag --
6 Q Sure.
7 A -- from the John Lennon
8 Songwriting Contest, which gets 12,000
9 entries. I just received their Lennon Award
10 for a song called, "Scat Like That: A Musical
11 Word Odyssey."
12 Q Are there any other songs that
13 you've written that have won awards?
14 A Specific songs that have won
15 awards, I'm not recalling. Entire recording
16 projects have won lots of awards.
17 Q And those were recording projects
18 that you wrote?
19 A Many of them, yes.
20 Q Were the Grammys, did you write
21 the songs that you won Grammys for?
22 A The first Grammy, "Bon Appetit!

1 Musical Food Fun," I believe we wrote eight or
2 nine of the songs on that project, and
3 "Celebration: A Tribute Ella Jenkins," I
4 didn't write any of the songs. It was a
5 tribute to another songwriter.
6 Q Do you understand the purpose of
7 this proceeding is to set a royalty rate for
8 webcasting?
9 A I do.
10 Q Do you understand that file-
11 sharing is different than webcasting?
12 A Yes, I do.
13 Q And do you understand that the
14 particular webcasting that's the subject of
15 this proceeding is non-interactive webcasting?
16 A Yes.
17 Q Good. So you're familiar with
18 internet radio?
19 A Yes.
20 Q Are you familiar with the internet
21 radio services offered by DiMA member
22 companies?

1 A Can you name which specific
2 companies?
3 Q Sure, of course. Like AOL's
4 internet radio.
5 A Uh-hum. Yes.
6 Q How about Yahoo's internet radio?
7 A Yes.
8 Q And how about Live365?
9 A I'm familiar with it. I haven't
10 listened to it, but I'm familiar with it.
11 Q Okay.
12 MR. TAYLOR: I am going to pass
13 out Services Exhibits 73 and 74.
14 [Whereupon, the
15 documents were marked as
16 Services Exhibits 73 and
17 74 for identification.]
18 BY MR. TAYLOR:
19 Q It's your testimony, is it not,
20 that you're not aware of any promotional value
21 of webcasting?
22 A I'm not aware of any research that

1 proves the promotional value of webcasting.
2 Q But are you aware -- but is it
3 your testimony that there is no promotional
4 value to webcasting?
5 A I believe my testimony says I'm
6 not aware of research that proves that, but
7 you can correct me about what I said.
8 Q I direct you to -- which you don't
9 have; I apologize. You are correct; you state
10 on page 14, "I'm not aware of any evidence
11 that shows that webcasting promotes the sale
12 of music."
13 A I'm glad I remembered what I said.
14 Q Are you familiar with internet
15 search features that allow listeners to search
16 by artist or song?
17 A I am familiar -- you know, I use
18 Google. There may be many other ways of doing
19 it, but I haven't used them.
20 Q Okay. I direct you to what's
21 marked as Services Exhibit 73. It's a Live365
22 screenshot.

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1 A Okay.
2 Q It says, "Find Stations that Play"
3 -- is that consistent with something like
4 Google would have?
5 A I have never used this.
6 Q Okay. But you are familiar with
7 the search feature?
8 A Right.
9 Q And who is the artist that's being
10 searched for on this screenshot?
11 A Cathy Fink.
12 Q Okay. If you turn to Services
13 Exhibit 74, that returns four different
14 stations that offered Cathy Fink music. Can
15 you tell us what the four stations are?
16 A It says what the shows are. It
17 doesn't really say what the stations are,
18 unless I'm missing that somewhere.
19 Q It says station title and
20 description, and underneath it has like a
21 little --
22 A James Rambles, Roots Music, Loopy

1 Moose Radio, Internet Folk Festival.
2 Q Okay. Do each of those list your
3 name next to them?
4 A Yes, they do.
5 Q Okay, if you could turn to the
6 next page on Exhibit 74, this is another
7 screenshot. Which service is this? Is this
8 one of the four that you mentioned?
9 A Yes, it is, James Rambles.
10 Q Are you familiar with the player
11 feature on internet radio?
12 A With the what feature?
13 Q The player feature.
14 A Yes.
15 Q Okay. In the middle of the page,
16 what does this player say is now playing?
17 A Maddy Pryor and June Tabor, "The
18 Grey Funnel Line," and Cathy Fink and Marcy
19 Marxer, "Time to Learn."
20 Q And is there anything else?
21 A "Finest Kind," which is then
22 partly not there.

1 Q Okay. Perhaps it says, "Fa So
2 La"?
3 A Yes.
4 Q Are you familiar with the song?
5 A No, but I know the group.
6 Q But you know the group. And "Time
7 to Learn," is that a song of yours?
8 A No, it was written by Tim O'Brien.
9 Q But is it a song that you
10 performed?
11 A Yes.
12 Q Okay. Are you familiar with the
13 Buy button to the left?
14 A Yes.
15 Q And what is your understanding of
16 the Buy button?
17 A If you push that button, you have
18 an opportunity to purchase that song.
19 Q Would you collect a royalty from
20 that?
21 A A tricky question. Officially,
22 yes. That is on a label Rounder Records who

1 have yet to figure out how to stream those
2 royalties down to the artists.
3 (Laughter.)
4 Q Okay, I apologize for that. Let
5 me clarify my question. Are you supposed to
6 receive a royalty from that?
7 (Laughter.)
8 A Yes.
9 Q Okay, great. If you could turn to
10 the next page, there's another screenshot.
11 Could you tell us what the internet service or
12 the broadcaster that's identified there is?
13 A The Internet Folk Festival?
14 Q Yes. Is that one of the four that
15 was identified on the first page?
16 A I believe it was.
17 Q Are you familiar, other than the
18 player on an internet radio site, that
19 internet radio providers also have other areas
20 of the website that allow people, allow
21 listeners to purchase your music?
22 A I don't understand your question.

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1 Q Oh, that's perfectly
2 understandable because I barely understand it
3 myself.
4 (Laughter.)
5 I refer you to the bottom of the
6 page. My question is, are you familiar with
7 the fact that internet radio providers also
8 provide other areas of their site other than
9 the play area that we just previously
10 discussed as possible areas where music could
11 be purchased?
12 A Sure. Yes.
13 Q And down at the bottom, are there
14 any artists that are offered there?
15 A Yes, there are.
16 Q And who are they?
17 A Jim Murray, Cathy Fink and Marcia
18 Marxer, and Joan Baez.
19 Q And the Cathy Fink is you, right?
20 A Yes.
21 Q What's the song?
22 A "Daughters of Feminists."

1 Q Is that a song that you performed?
2 A Yes.
3 Q Did you write the song as well?
4 A No.
5 Q Okay. If you hit the -- and over
6 to the left again, what is there?
7 A The Buy button.
8 Q Again, is your testimony that you
9 have the option to purchase the music when you
10 click on that button?
11 A Yes, you do.
12 Q Okay. Do you know if -- one
13 second.
14 (Pause.)
15 [Whereupon, the document
16 was marked as Services
17 Exhibits 75 for
18 identification.]
19 Q I think you testified a little bit
20 earlier ago that listeners have an opportunity
21 to buy music once they click on the Buy
22 button. In this case are you familiar with

1 what are the options for people to buy the
2 music as -- excuse me. Are they able to buy
3 a CD or a digital download? Do you know?
4 A In this case it looks like they
5 buy a download per song.
6 Q A download per song? So you
7 recognize what this document is?
8 A I do.
9 Q And what is the document?
10 A It looks like a list of everything
11 that MSN Music Entertainment offers under the
12 name of Cathy Fink and Marcy Marxer. It's
13 just astounding.
14 Q It's prolific, to say the least.
15 Now at the top of this page,
16 what's the top of the page -- what's the song
17 that's listed?
18 A "Daughters of Feminists."
19 Q Is that the same song that was on
20 the service?
21 A Yes.
22 Q So it looks like you were led to

1 the Microsoft website?
2 A Yes.
3 Q Okay. So, again, the very first
4 song that's listed in the chart is?
5 A "Daughters of Feminists."
6 Q And if you go all the way over to
7 the right, how much would you pay for it?
8 A Ninety-nine cents.
9 Q Okay. Are you supposed to --
10 would a listener be able to purchase all your
11 other songs here?
12 A I'm not looking to see if all of
13 my songs are here, but they can certainly
14 purchase anything that's listed.
15 Q Okay. Would you -- it looks like
16 to me just that the search result led to 260
17 matches. So it's possible that up to 260
18 matches could be purchased, is that correct?
19 A Yes, it is.
20 Q All right. And you would receive
21 royalties from that? You're supposed to
22 receive royalties from that?

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1 A You've done a good self-correct.
2 MR. TAYLOR: Your Honor, I move
3 to --
4 THE WITNESS: Now wait a minute.
5 There's a lot of songs on here that aren't us.
6 So are you counting them?
7 BY MR. TAYLOR:
8 Q When you say aren't you, what did
9 you mean by that?
10 A Well, if you go to the last couple
11 of pages, it lists all kinds of songs that
12 have the word "daughters" but doesn't have
13 Cathy Fink or Marcy Marxer. It's lots of
14 other artists. So I think 260 is not accurate
15 on this service.
16 "In Your Absence" from something
17 by the Autistic Daughters, "Daughters of
18 Aaron," "The Secret Garden."
19 Q Okay.
20 A So the Cathy Fink and Marcy Marxer
21 stuff ends -- now these pages aren't actually
22 numbered because it's always "page 1 of 2."

1 Q Yes.
2 A But I would say that the last four
3 or five, six, seven pages or so starts
4 reflecting songs that don't have Cathy Fink
5 and Marcy Marxer. And, actually, earlier than
6 that. If you look here, there's --
7 Q I look at -- it's 61 through 80 is
8 where the first time it deviates from Marcy
9 Marxer.
10 A Uh-hum.
11 Q Is that fair to say?
12 A Well, I haven't had time to study
13 it like you have. All I'm doing is glancing
14 and noticing that there's a lot of acts here
15 that aren't Cathy Fink and Marcy Marxer.
16 Q Okay. So if you want, we can go
17 through the document.
18 A In fact, they're all over the
19 place.
20 Q If you --
21 A So if all songs here is 260
22 matches, I think we'd have to take the time to

1 count how many of them are actually Cathy Fink
2 and Marcy Marxer.
3 Q All right, but you do say that
4 some part of this document represents songs
5 that you have recorded and performed?
6 A Some part of it, yes.
7 Q Okay.
8 MR. TAYLOR: Your Honor, at this
9 time I move Services Exhibit 75 into evidence.
10 CHIEF JUDGE SLEDGE: On what
11 basis?
12 MR. TAYLOR: She identified that
13 she did recognize the document to be an
14 offering by Microsoft MSN's music site and
15 it's an offering of some part of the songs
16 that she has recorded.
17 CHIEF JUDGE SLEDGE: Within this
18 document are some songs that can be purchased
19 that she has recorded?
20 MR. TAYLOR: Yes.
21 CHIEF JUDGE SLEDGE: Any
22 objection?

1 MR. FREEDMAN: No, Your Honor.
2 CHIEF JUDGE SLEDGE: Without
3 objection, Exhibit 75 is admitted.
4 [Whereupon, the document
5 marked as Services
6 Exhibit 75 for
7 identification was
8 received in evidence.]
9 BY MR. TAYLOR:
10 Q Earlier on your direct testimony,
11 Ms. Fink, you were describing what you do.
12 JUDGE ROBERTS: Mr. Taylor, one
13 moment before we move away from Exhibit 75.
14 MR. TAYLOR: Sure.
15 JUDGE ROBERTS: Ms. Fink, if you
16 would look at Exhibit 75, where it's
17 identified as the artist Fink, and in
18 particular I'm looking at "Son of Finkenstein"
19 or "Finkenstein."
20 THE WITNESS: No children that I
21 know of.
22 (Laughter.)

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1 JUDGE ROBERTS: Is that your work?
2 THE WITNESS: No, it's not.
3 JUDGE ROBERTS: Or is that another
4 Fink?
5 THE WITNESS: That's not my work.
6 JUDGE ROBERTS: That is not your
7 work? Okay. Thank you.
8 THE WITNESS: I'm going to tell
9 you the majority of stuff in this is not my
10 work.
11 JUDGE ROBERTS: Is not your work?
12 THE WITNESS: The first few pages
13 represent stuff that looks like my work, and
14 then there are many pages that have none of my
15 work and a few pages that have one or two
16 songs.
17 JUDGE ROBERTS: One more minute,
18 Mr. Taylor.
19 And where Ms. Marxer is identified
20 as Marcy Marxer --
21 THE WITNESS: Yes.
22 JUDGE ROBERTS: -- is that her

1 work or is that co-authored work?
2 THE WITNESS: I would really -- if
3 it just says her name, that's her sound
4 recording.
5 JUDGE ROBERTS: But that does not
6 involve you?
7 THE WITNESS: Right.
8 JUDGE ROBERTS: Okay. Okay, Mr.
9 Taylor.
10 BY MR. TAYLOR:
11 Q Earlier in your direct testimony
12 you were describing what it took for you to
13 record "Bon Appetit," is that correct?
14 A Uh-hum.
15 Q And a lot of what you described is
16 what a record company would do for an artist
17 that they had signed, is that correct?
18 A My record company never does that
19 for me.
20 Q Okay.
21 A And I'm signed with a record
22 company. So specifically what did I say that

1 you think a record company would normally do?
2 Q So do you run your own record
3 company?
4 A We do have several records on our
5 own small, independent label, although the
6 majority of our recordings are on Rounder
7 Records, an independent label.
8 Q For those recordings that are on
9 your own label, on your own record company,
10 there would be -- you're responsible to
11 produce all of your albums, is that correct?
12 A We're responsible for what?
13 Q The production of your albums?
14 A The --
15 Q As the record company.
16 A The artistic production? The
17 manufacturing? What --
18 Q The artistic production.
19 A Yes, we're responsible of that
20 regardless of who puts it out.
21 Q But artists generally -- to be a
22 performing artist, you don't have to do

1 everything that you did, that you do in your
2 situation, is that correct? There are
3 circumstances where an artist has come into a
4 studio and performed?
5 A I guess.
6 Q Okay.
7 A I don't live in that world; I
8 don't know.
9 Q Okay. So your statements don't
10 necessarily reflect the circumstances for all
11 performing artists?
12 A No.
13 MR. TAYLOR: There's nothing
14 further.
15 CHIEF JUDGE SLEDGE: Mr. Wood,
16 will you handle cross?
17 MR. WOOD: Yes, Your Honor.
18 CROSS EXAMINATION
19 BY MR. WOOD:
20 Q Good morning, Ms. Fink.
21 A Hi.
22 Q Seth Wood on behalf of the

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1 broadcasters, and I hope you'll give me about
2 as much indulgence as you gave the last
3 gentleman. It's my first shot at this as
4 well. So we'll see how this goes.
5 I wanted to ask you about, I
6 guess, your statement at 5, on page 5 of your
7 statement there. On the second full paragraph
8 and the second sentence, would you mind
9 reading that?
10 A "Our audiences may never be aware
11 of just how long an idea must germinate in an
12 artist's creative consciousness or
13 subconscious before it is ripe for
14 expression."
15 Q You gave a specific example of a
16 "Bon Appetit" album. That's in your testimony
17 and your statement, right?
18 A Uh-hum. Yes. Sorry.
19 Q How many months would you say you
20 spent writing the recording? I'm sorry, not
21 writing it. Writing, putting together,
22 conceptualizing your album?

1 A About four.
2 Q About four? Okay.
3 A I would say four in official terms
4 because we knew this contract was coming up.
5 Once the contract was signed, even though we
6 hadn't said, okay, now that we're working on
7 this project -- you walk around with a
8 constant awareness that this project's coming
9 up, and anything you see, hear, or do that
10 could be worthwhile goes into a little
11 notebook, so that you can refer back to it.
12 But in terms of the official this is what
13 we're really going to spend our time on, I'd
14 say about four months.
15 Q Okay. So it's kind of a constant
16 process of writing kind of in the back of your
17 head?
18 A Right.
19 Q Okay. You originally kind of
20 summarized this idea in a kind of proposal to
21 the funding entity. What's the name of it?
22 A The Micronutrient Initiative.

1 Q Thank you. I'm afraid I'd
2 mispronounce that.
3 In that piece you estimated, like
4 you said, about four to five months for
5 writing?
6 A Uh-hum.
7 Q Okay. That's a yes, right?
8 A Yes.
9 Q I'm sorry.
10 A I'm sorry, I keep forgetting.
11 You're so nice; I'm just keep looking at you
12 and nodding.
13 Q And let's see, I would like to
14 take a look at your statement on page 6. If
15 you could, I would appreciate it.
16 The first full paragraph and the
17 sentence beginning, "We spent," to the end of
18 the paragraph, could you read that?
19 A "We spent months choosing and
20 writing songs for Bon Appetit. It might have
21 taken longer except for the fact that we've
22 spent years honing our command of language and

1 music, learning how to let artistic ideas
2 percolate in our heads, so that when the time
3 is right to develop them fully, we are not
4 really starting completely from scratch."
5 Q So for newer or less-experienced
6 artists, they might even require more time to
7 put it together, quality --
8 A Absolutely. Yes.
9 Q Now I want to just briefly talk
10 about the advisory committee. Is that a fair
11 description of it?
12 A Sure. Yes.
13 Q Okay. I wasn't sure if it had a
14 good title or something.
15 What was the major purpose of the
16 committee?
17 A The advisory committee was
18 comprised of people who are experts in the
19 field of children's nutrition. So the purpose
20 of getting their expertise and advice was so
21 that we could create songs that accurately
22 reflected both the information and the need

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1 for specific information having to do with
2 nutrition for children.
3 Q Okay. Do you remember when you
4 put that committee together? Roughly? Not
5 the exact date or anything.
6 A We began contacting that committee
7 early in the spring, probably in April of that
8 year. Then, not unlike scheduling studio
9 sessions with tons of musicians, we had to go
10 back and forth quite a bit to schedule phone
11 meetings, in-person meetings, et cetera. The
12 committee as a whole never came together to
13 sit in one room. We individually met with
14 them at their places of work, spent lots of
15 time on the phone, and email with them.
16 Q Did you write, I guess it would be
17 called, a memorandum or a proposal January the
18 3rd of `02 discussing this committee?
19 A Yes.
20 Q Okay, and the goals and all these
21 things --
22 A Yes.

1 Q -- you'd laid out? Okay.
2 And you were in communication with
3 them, it looks like March 14th you sent a
4 memorandum to them?
5 A Yes.
6 Q Does that sound about right?
7 A If you have a copy of it, I'm sure
8 it's right.
9 Q Oh, right. It saves trouble. I
10 had to write down all these numbers on these
11 things.
12 Now you produced a bunch of ideas,
13 about 34? Thirty-five? Does that sound about
14 right?
15 A Yes.
16 Q Okay. There was even an idea to
17 have a scripted project, like almost like a --
18 A Yes, there was.
19 Q Okay, what would that be? What is
20 a scripted project --
21 A We were trying to decide the best
22 way to present this fun recording to kids, and

1 one idea that we had was to create essentially
2 a script, as if you would have like a piece of
3 radio theater with characters and a script,
4 and drama and comedy lines that would tie the
5 songs together that would tell the story.
6 Q They even, it looks like they
7 suggested to have like a celebrity come in to
8 talk, maybe a Gold Medal Winner or something
9 like that?
10 A Yes, they did.
11 Q Ultimately, in the end of May it
12 looks like you and the gentleman from the
13 Micro --
14 A Nutrient Initiative.
15 Q -- thank you -- corresponded and
16 kind of narrowed down the list?
17 A Yes.
18 Q That's fair? Okay.
19 So from that point forward, then
20 you started to, I guess, kind of finalize your
21 list of topics and all that?
22 A Yes.

1 Q So we're talking about four, four
2 and a half months just to get the topics down?
3 A Yes.
4 Q Okay. Page 6, again, if you don't
5 mind. Okay, could you read the third
6 sentence?
7 A The third sentence?
8 Q Yes, Ma'am. Oh, sorry, the first
9 full paragraph. Sorry.
10 A "That is not unusual."?
11 Q Yes, sorry. "For each song we
12 recorded," those two sentences there. "For
13 each song we" --
14 A "For each song we recorded we
15 wrote another two that didn't make the cut.
16 That is not unusual."
17 Q So you wrote 13 of the 16 tracks
18 in this album, is that right?
19 A Yes.
20 Q So you wrote about 39 potential
21 items? Just about a third of them made it in?
22 A That's about right.

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Q Now I'm sorry I'm making you jump around. The same paragraph, though, could you read the second sentence?
A "Most of those went through many revisions, some as many as 15 or 20, before we were satisfied with them."
Q Okay, and that's the songs that ultimately went on this thing? You went through many revisions, went through many --
A Even some of the songs that didn't make the final cut went through lots of revisions before we decided they weren't going to cut it.
Q Right, okay. Now if I understand your testimony just earlier this morning, you said you spent about 100 hours recording, doing a variety of other tasks involving kind of putting stuff on the CD, I guess, or on the tracks?
A The process of making the sound recordings.
Q Yes, Ma'am. Could you give me the

list of the things that you said were included in that? I'm sorry, I want to make sure I've got the list. You had like three or four things.
A Oh, no, there's way more than three or four things.
Q Oh, excellent. Give me more.
A Well, the list of things, obviously, once the songs are completed, we create a list of what the arrangements are going to be, come up with arrangements, sometimes hire arrangers. We have to then contact the studio and book studio time. We have to book the musicians. We have to get the musicians all of the rehearsal materials that they're going to need in order to come into the studio familiar with the tunes.
Then we actually do the recordings. We re-record things that need to be re-recorded. We also in this process do all of our own recording in terms of, you know, there's lots of stuff that we do the

actual recording for, not just hiring other musicians.
We also work with a children's chorus, and that brings in another entire dimension. We create a rehearsal CD and booklet of the lyrics, so that this fabulous children's chorus can learn all of the songs. They each, all the 25 to 30 kids, get their own copy of this. We send it home with them. Their music teacher rehearses with them. We go in and rehearse with them two or three times.
We have one or two more sessions of recording the kids' chorus, and then we buckle down to the hard work of doing all of the mixing.
Q All that within 100 hours?
A Well, like I said, we don't actually count all of our time, but the 100 hours would account for time spent in the studio.
Q Okay.

A Time spent outside of the studio it might not account for.
Q How much of the time of that 100 would you say was spent actually playing the songs, doing the recording itself as opposed to the other tasks that you've --
A Oh, about 100.
Q About 100 total. Okay. All right. So once you got this album complete, I guess you probably want to sell it.
A First I want a nap.
Q Fair enough. So the answer is, no, you'd like a nap. After your nap, would you like to sell your CD?
A Yes, I would.
Q Okay, and I guess there's a certain degree of promotion involved in trying to get that thing sold?
A Yes, there is.
Q All right. Now have you and Ms. Marxer engaged in any coordinated efforts, media efforts, to promote, I'll just stick

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1 with, "Bon Appetit"?
2 A Yes.
3 Q Okay. Could you give me an
4 example?
5 A Well, our record label, Rounder
6 Records, hires PR, a person who specializes in
7 children's music who gets the record out to a
8 variety of different sources. We are always
9 available to do interviews and to talk with
10 the media as appropriate.
11 Q According to your statement, you
12 were on the Food Channel, got on the Today
13 Show, even the Early Show on CBS?
14 A Actually, we were never on the
15 Food Channel.
16 Q Oh.
17 A But two of the songs from "Bon
18 Appetit," one of them was on CBS.
19 Q Okay, very good. I guess if you
20 can increase your audience size, that's a very
21 good thing in terms of promoting --
22 A You can hope to.

1 Q Yes, you can hope to. Have you
2 used streaming at all to promote your music?
3 A No.
4 Q Have you made songs available on
5 your website for streaming purposes?
6 A No.
7 Q Okay. Does your -- well, I'll
8 start with this. Could you describe your
9 website to me? Just any -- like what's the
10 address? If I want to go to your website,
11 where do I go to?
12 A www.cathymarcy.com.
13 Q Could you give sections or
14 features that are unique to it? What kind of
15 stuff would I find if I went to your website?
16 A I think it's a pretty standard
17 website in that you would find biographical
18 material. You would find information on the
19 live programs that we offer. You would find
20 an online store. You would find snippets of
21 everything that we've recorded that people can
22 listen to to decide if they want to buy it.

1 We do not sell songs individually, so we sell
2 our entire recordings.
3 And you would find some fun stuff.
4 You would find how you can make a pirate ship
5 out of two milk cartons and two straws.
6 Q What does that -- how heavy can
7 that thing stand?
8 A How heavy?
9 Q How much weight can that take?
10 A I wouldn't sit in it, but I'd put
11 it in the bathtub.
12 Q Okay, fair enough. But you did
13 say you make snippets available, is what you
14 say?
15 A Yes.
16 Q Okay. Of all your songs?
17 A Most of them.
18 Q So the person who comes on to the
19 website just goes on and clicks and they can
20 listen. How long are those snippets, do you
21 think?
22 A They're between one minute and a

1 minute and a half. They're shorter than the
2 entire song.
3 Q All right. Now does your section
4 have -- or sorry -- website have a link to
5 some NPR articles, I guess?
6 A Yes, it does.
7 MR. WOOD: Okay. Now we don't
8 need to enter that then. Well, actually, yes,
9 let's go ahead. Sorry.
10 [Whereupon, the document
11 was marked as Services
12 Exhibit 76 for
13 identification.]
14 BY MR. WOOD:
15 Q What I'm giving you is what we've
16 marked as Exhibit 76. And I wanted to check
17 here. The third item there on your -- do you
18 recognize this? I'm sorry.
19 A Yes.
20 Q Okay. The third item there, Bob
21 Edwards' interview with Cathy and Marcy, do
22 you remember that?

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A Yes.
Q Okay, that's good.
[Whereupon, the document was marked as Services Exhibit 77 for identification.]
Q I'm going to hand you what is 77, marked as Exhibit 77. I apologize for the strange formatting. I know the format is a little strange, but does this look familiar to you at all?
A My website's familiar to me.
Q Sure.
A I'm going to assume that when you click on that link, this is where it takes you.
Q Okay. I'm glad you assume that. But on the second page of this, and I guess right before your picture there with Ms. Marxer, we've got four links there. Do you see those?
A Yes.

Q Okay. Would you be surprised to learn that one can listen to the entire song on those four?
A No.
Q So an individual listener at NPR could just click on and go there and get at least four of your songs? Not "Bananas" though. I didn't put "Bananas" on there.
A I didn't have control of this content.
Q Fair enough. And you mentioned that your income, you're paid through Rounder in addition, I guess, to some other sources, but your record label, one of them is Rounder, is that right?
A One record label we work with is Rounder Records, yes.
Q Does all that money appear or come through Community Music?
A Yes.
Q Just so I'm clear, every musical dollar from whatever source, all streams flow

through Community Music --
A Correct.
Q -- for your purposes? Okay.
(Whereupon, the proceedings went into Closed Session.)

MR. FREEDMAN: Your Honor, I'm sorry, but I think we're getting into the area of restricted information. I'm sorry, I should have --
MR. WOOD: Oh, I'm sorry. I was just going to ask, and if she didn't agree, I was going to bring stuff up.
MR. FREEDMAN: Her income information for Community Music we've marked restricted. It's sensitive and private information.
MR. WOOD: I'm sorry. I'm happy to close it if you'd like.
MR. FREEDMAN: If you are going to cover that, I prefer we go into closed session.
MR. WOOD: I'm sorry, would you like to close it now?
MR. FREEDMAN: If you have further questions --
MR. WOOD: No, we're good. We're fine. Thank you.

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1 Actually, I'm sorry, I think I've
2 got about maybe one more question. Whatever
3 you'd like to do.
4 MR. FREEDMAN: If you're going to
5 use restricted information, we prefer to go
6 into closed session.
7 MR. WOOD: Okay, I'm sorry. If
8 you don't mind, Your Honor, I just have one
9 question to ask.
10 CHIEF JUDGE SLEDGE: If I don't
11 mind what?
12 MR. WOOD: I would just like to
13 ask one question regarding Ms. Fink's -- the
14 Community Music, Incorporated's income.
15 SoundExchange wants this restricted, and I'm
16 happy to allow them to move to close, if
17 they'd like to close.
18 CHIEF JUDGE SLEDGE: Any objection
19 to the motion to apply the protective order to
20 a question concerning the income received by
21 Community Music?
22 (No response.)

1 Without objection, that motion is
2 granted.
3 MR. WOOD: I think after all that,
4 I think I'm probably just happy with the
5 answer I got. So I apologize.
6 Thank you for your time, Ms. Fink.
7 I appreciate it.
8 That's all I have, Your Honor.
9 CHIEF JUDGE SLEDGE: The question
10 not being asked in protective order
11 application is ended.
12 (Laughter.)
13 All right, Ms. Brown?
14 MR. FREEDMAN: Your Honor, I'm
15 sorry. I'm sorry to interrupt. I think Ms.
16 Fink gave an answer before I was able to get
17 my objection out that included some restricted
18 information. If there's a way to have the
19 written transcript reflect that, we would so
20 move.
21 CHIEF JUDGE SLEDGE: What answer
22 do you want the protective order to apply?

1 MR. FREEDMAN: It was the answer
2 in which she gave the financial figures
3 regarding the income for Community Music
4 immediately preceding my objection.
5 CHIEF JUDGE SLEDGE: Any objection
6 to the motion to apply the protective order to
7 the answer given as to the average income
8 received from Community Music?
9 (No response.)
10 Without objection, the motion is
11 granted.
12 Ms. Brown?
13 CROSS EXAMINATION
14 BY MS. BROWN:
15 Q Good morning, Ms. Fink.
16 A Good morning.
17 Q I'm Kris Brown on behalf of NPR,
18 and I just have a few questions for you.
19 You're familiar with NPR, are you
20 not?
21 A Absolutely, yes.
22 Q And you said that you operate a

1 website, is that correct?
2 A Yes.
3 MS. BROWN: Okay. I would like to
4 pass out Services Exhibit 78.
5 [Whereupon, the document
6 was marked as Services
7 Exhibit 78 for
8 identification.]
9 BY MS. BROWN:
10 Q Ms. Fink, do you recognize this as
11 a screenshot from your website?
12 A Yes, I do.
13 Q Okay. If you look down the
14 lefthand column of this screenshot, about six
15 buttons down or six links down, there's a link
16 there called "NPR Links," correct?
17 A Yes.
18 Q Why did you put that on your
19 website?
20 A There's some interesting
21 interviews and links that we thought our fans
22 might be interested in hearing.

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1 Q And, in fact, if you click on "NPR
2 Links," it takes you to each of those
3 interesting features that you're describing,
4 is that correct?
5 A Where they were available. Some
6 of them aren't available.
7 Q I'd like to draw your attention
8 back to Services Exhibit --
9 CHIEF JUDGE SLEDGE: Ms. Brown,
10 let me ask something.
11 When you say, "available," does
12 that mean for which you've gotten permission
13 to add a link?
14 THE WITNESS: No. The last one,
15 "Patsy Montana Remembered - May 10, 1996," you
16 can order this as a transcript from NPR, as we
17 say, but it doesn't have an audible link. So
18 you can't click on that, but you can click on
19 the rest of them.
20 CHIEF JUDGE SLEDGE: The rest of
21 them you have gotten permission from NPR Link
22 to add to your site?

1 THE WITNESS: That's a good
2 question. No, I don't.
3 CHIEF JUDGE SLEDGE: All right.
4 BY MS. BROWN:
5 Q To clarify, Ms. Fink, drawing your
6 attention to Services Exhibit 78, which is the
7 screenshot from your website, when you click
8 on "NPR Links," it takes you to what you're
9 referring to as Services Exhibit 76, correct?
10 A Yes.
11 Q Okay. Can you describe to me each
12 of the links beginning with the December 12th,
13 2003 link listed at the top, what each of
14 these links are?
15 A Sure.
16 Q It says, "Minnesota Public Radio's
17 Holiday Pageant."
18 A That was a live concert at the
19 Fitzgerald Theater in Minnesota that Marcy
20 Marxer and I were a part of, and I believe
21 they have on their website the entire thing.
22 Q Okay. I'm sorry, go ahead.

1 A Do you want me to just go down the
2 line?
3 Q Sure.
4 A Bob Edwards' Interview with Cathy
5 and Marcy on "Bon Appetit" is exactly as it
6 says. Bob Edwards interviewed us about that
7 CD.
8 Jackie Judd interview with Cathy
9 and Marcy about "All Wound Up! A Family Music
10 Party!", collaboration with Brave Combo on
11 Morning Edition, the same thing, an interview
12 about a specific recording.
13 Grammy songwriting, the song "Here
14 Is the Chorus," by Bernard Carney, this was a
15 pre-Grammy commentary on "Morning Edition."
16 And then it mentions the "All Things
17 Considered" where I did a eulogy for Patsy
18 Montana, the first woman in country music to
19 sell a million records.
20 Q So from your descriptions of each
21 of these, it sounds like it's -- I'll
22 characterize it and you can tell me whether

1 you agree or disagree with the
2 characterization, but a mix of both
3 commentary, some news interviews, and actually
4 some musical performances by you? Is that
5 fair?
6 A It's a mix of those, yes.
7 Q Okay. So in providing the link
8 from your website, which is Services Exhibit
9 78, to these NPR links, you are drawing
10 interested persons who may visit your site to
11 these NPR sites, is that correct?
12 A Yes.
13 Q Okay. That contain these mix of
14 news and performances?
15 A Yes.
16 MS. BROWN: Your Honor, I would
17 like to move into evidence Services Exhibits
18 76 and 78.
19 CHIEF JUDGE SLEDGE: Any objection
20 to Exhibit 78?
21 MR. FREEDMAN: No, Your Honor.
22 [Whereupon, the document

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1 marked as Services
2 Exhibit 78 for
3 identification was
4 received in evidence.]
5 BY MS. BROWN:
6 Q Ms. Fink, would you agree --
7 CHIEF JUDGE SLEDGE: Ms. Brown,
8 just a minute.
9 MS. BROWN: I'm sorry.
10 CHIEF JUDGE SLEDGE: Any objection
11 to Exhibit 76?
12 MR. FREEDMAN: No, Your Honor.
13 CHIEF JUDGE SLEDGE: Without
14 objection, Exhibit 76 is admitted.
15 MS. BROWN: Thank you, Your Honor.
16 [Whereupon, the document
17 marked as Services
18 Exhibit 76 for
19 identification was
20 received in evidence.]
21 BY MS. BROWN:
22 Q Ms. Fink, you would agree, would

1 you not, that performing on NPR, providing
2 commentaries and exposing the NPR audience to
3 your music has the ability to introduce your
4 music to new fans?
5 A Yes.
6 Q Who would potentially purchase
7 your music?
8 A Yes.
9 Q In fact, you would not link to the
10 NPR website or seek to have your work on NPR
11 unless you believed that there was benefit
12 from doing so, would you?
13 A No.
14 Q And based on your work with NPR,
15 you are familiar with the fact that NPR is a
16 non-commercial, non-profit entity, correct?
17 A Well, I have a different view on
18 that. Officially, I guess that's the case.
19 Q Okay. And that it's not a
20 webcaster that founded its business on your
21 music, is that correct?
22 A It is certainly a webcaster that

1 uses my music to create some of its
2 programming. It didn't found it on my
3 personal music, but it is well-founded on the
4 music of tons of musicians who are providing
5 them with lots of their programming.
6 Q And news and commentary such as
7 you cited?
8 A Yes.
9 Q Have you visited the NPR
10 website --
11 A Yes.
12 Q -- or NPR member stations'
13 websites? Don't you think the fact that NPR
14 invests significant time and effort in
15 exposing the public to music that you would
16 not otherwise find on commercial radio is an
17 important benefit to artists like yourself?
18 A Yes.
19 Q Are you aware that NPR puts
20 substantial time and effort into featuring
21 artists like yourself as part of its
22 programming to present the artist material in

1 a meaningful way and to give context to the
2 artist's work through interviews with "Morning
3 Edition," reviews of CDs, and other content?
4 A I'm not actually aware of what
5 NPR's effort in that line is.
6 MS. BROWN: May I just have one
7 moment, Your Honor?
8 CHIEF JUDGE SLEDGE: Yes, Ma'am.
9 MS. BROWN: No further questions.
10 Thank you.
11 CHIEF JUDGE SLEDGE: Any
12 questions, Mr. Freundlich?
13 MR. FREUNDLICH: I have a few
14 questions. I see we're at 11 o'clock. Do you
15 want me just to continue through?
16 CHIEF JUDGE SLEDGE: No, sir.
17 Thank you for bringing that to my attention.
18 This would be a good time to take a morning
19 recess. We'll recess for 10 minutes.
20 (Whereupon, the foregoing matter
21 went off the record at 11:01 a.m. and went
22 back on the record at 11:15 a.m.)

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1 CROSS EXAMINATION
2 BY MR. FREUNDLICH:
3 Q Good morning, Ms. Fink.
4 A Good morning.
5 Q I am Ken Freundlich. I represent
6 Royalty Logic, Inc. Do you know about my
7 client?
8 A I have heard of your client.
9 Q Do you know what my client does?
10 A Not exactly.
11 Q Are you aware that my client is
12 here in this proceeding to establish itself as
13 an alternative collective for your website
14 royalties?
15 A Yes, I am.
16 Q Now you have joined SoundExchange,
17 is that correct?
18 A Yes, I have.
19 Q When did you join SoundExchange?
20 A I don't remember exactly.
21 Q How did you learn about
22 SoundExchange?

1 A I learned about SoundExchange from
2 John Simson.
3 Q Can you describe those
4 conversations?
5 A No, because they're such a long
6 time ago. I just remember John telling me
7 about a new organization that was going to
8 collect these kinds of royalties and
9 suggesting that I learn about it.
10 Q Do you have a manager?
11 A No. Me.
12 Q So you're the only person on your
13 behalf who would have had those conversations
14 with John Simson?
15 A Yes.
16 Q Okay. Over what period of time
17 did that occur?
18 A I can't remember.
19 Q Were there many conversations?
20 A No.
21 Q Just one?
22 A I can't remember.

1 Q Okay. Was it more than five?
2 A I can't remember.
3 Q Okay. On page 14 of your written
4 statement you have said that, "We" -- "We"
5 meaning, I guess, you and Marcy --
6 A Yes.
7 Q -- "have chosen SoundExchange as
8 the agent to collect and pay royalties." I
9 believe you testified this morning that you
10 selected SoundExchange to collect and pay your
11 royalties in this context? Is that true?
12 A Yes.
13 Q And when you say chose them, what
14 was the choice?
15 A We made a choice, when
16 SoundExchange sent us information, about
17 whether or not we wanted to sign up.
18 Q Did they tell you that there were
19 any other alternatives?
20 A No.
21 Q Did you know anything at that time
22 about this stream of royalties?

1 A I was aware that they're in new
2 media formats going to be plenty of new
3 streams of royalties and not aware of where we
4 would find our income through them.
5 Q So you chose a collective instead
6 to help you to find that income?
7 A Yes.
8 Q Did you have, in fact, a choice of
9 collectives at that time?
10 A I did not do any further research.
11 Q Okay. So when you say you've
12 chosen SoundExchange, it means you didn't
13 really have a choice, did you? I mean it was
14 either SoundExchange or nothing?
15 CHIEF JUDGE SLEDGE: Which is a
16 choice.
17 BY MR. FREUNDLICH:
18 Q Okay, was that your choice?
19 SoundExchange or nothing?
20 A I chose SoundExchange.
21 Q Okay. Now you don't record on a
22 major label, do you, Ms. Fink?

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1 A It depends on your definition of
2 major.
3 Q Is Rounder Records a major label?
4 A No.
5 Q Have you ever recorded on any
6 labels other than Rounder Records?
7 A Yes.
8 Q And which ones would those be?
9 A I've recorded on Sugar Hill
10 Records. I've recorded on Rooster Records.
11 I've recorded on A&M Records. I've recorded
12 on High Windy Audio and I've recorded on
13 Community Music.
14 Q Was A&M Records a complete Cathy
15 Fink album?
16 A It was a Cathy -- it was three
17 complete Cathy Fink and Marcy Marxer albums.
18 Q In connection with a compilation?
19 A Not to my knowledge.
20 Q Okay. Are you aware that
21 SoundExchange has a limited number of
22 employees?

1 A Every company has a limited number
2 of employees.
3 Q Do you know --
4 A Limited to the number of
5 employees.
6 Q Do you know how many employees
7 SoundExchange has?
8 A No, I don't.
9 Q Okay. Are you aware that they
10 represent all the major labels?
11 A Yes.
12 Q Now you're a songwriter also?
13 A Yes.
14 Q Is that correct, Ms. Fink? And
15 are you affiliated with a performing rights
16 organization?
17 A I am.
18 Q And which one is that?
19 A ASCAP.
20 Q Okay. Have you ever been
21 affiliated with either BMI or SESAC?
22 A No.

1 Q Are you aware that you have a
2 choice to affiliate with any one of those
3 three?
4 A Yes, but not because they made me
5 aware.
6 Q How did you find out that they had
7 a choice? How did you find out that you had
8 a choice, I should say?
9 A Through industry trades.
10 Q Are you aware that you have a
11 choice of collecting societies in connection
12 with your webcasting royalties?
13 A Now I am.
14 Q Did you just find out from me?
15 A No, I was, as I mentioned earlier,
16 somewhat aware of your organization.
17 Q When you say, "now I am," can you
18 tell us when the now was? When did you
19 become --
20 A Not exactly.
21 Q Was it within the last six months?
22 A Probably.

1 Q In preparing for your testimony
2 here?
3 A I don't know that it's related to
4 the testimony.
5 Q Okay, but you didn't know about
6 it, say, a year ago?
7 A No.
8 Q You didn't know about it when you
9 joined SoundExchange, did you?
10 A No.
11 Q Are you aware that SESAC is one of
12 the competing performing rights organizations
13 that has offered advances to artists if they
14 want to become a member of SESAC, for
15 instance, and switch from BMI or ASCAP?
16 A No.
17 Q You hadn't heard that Bob Dylan,
18 for instance, got a big advance to move his
19 catalog over to SESAC?
20 A No.
21 Q Okay. Would you be interested in
22 such an advance if, in fact, it was offered to

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1 you for your performing rights? Would you
2 consider switching?
3 A I'd check the information, but
4 that wouldn't be necessarily a factor that
5 would influence me.
6 Q But it is something you would
7 investigate, isn't it?
8 A Possibly.
9 Q What if there were -- oh, go
10 ahead. I'm sorry.
11 A An advance doesn't mean you're
12 going to get more income. It just means that
13 they're going to advance you the income. So
14 there's a lot of research to be done there.
15 Q Okay. But you didn't do any of
16 that research when you decided to join
17 SoundExchange, did you?
18 A At that time, no.
19 Q Because you weren't aware there
20 was an alternative?
21 A Correct. It seems like somebody
22 -- sorry.

1 Q I have to ask the questions.
2 A Go ahead.
3 Q What if after today's hearing
4 SoundExchange was to make an announcement, for
5 instance, that they're going to increase their
6 costs and they're going to deduct those costs
7 from all the artists' royalties, including
8 yours? Would you want to have anything to say
9 about that?
10 A I don't know.
11 Q Do you know whether or not
12 SoundExchange, in fact, deducts any costs from
13 the royalties they pay to you?
14 A I suspect they do.
15 Q Do you have any idea what those
16 costs are?
17 A No.
18 Q Have you ever done anything to
19 investigate those costs?
20 A No.
21 Q What if an alternative collective,
22 for instance, my client, Royalty Logic, was

1 available and that they, in fact, didn't
2 deduct the same amount of costs from the
3 royalties they were going to pay you than
4 SoundExchange? Wouldn't that be a factor in
5 your choice between collectives, Ms. Fink?
6 You would end up getting more net dollars, for
7 instance.
8 A It's not proof that I would get
9 more net dollars.
10 Q But wouldn't you, indeed, want to
11 investigate that?
12 A I might investigate it.
13 Q You would agree, would you not,
14 that generally it would be better for you to
15 have a choice of collectives in this
16 situation, wouldn't you?
17 A Not necessarily.
18 Q Why not?
19 A I'm not convinced that the choice
20 of phone companies has helped us out.
21 Q So you don't think that
22 competition in this area like the competition

1 in the performing rights organizations area
2 would be beneficial to you?
3 A I don't actually find that the
4 competition in the performing rights area has
5 benefitted me personally. So I might, you
6 know, I'm willing to pay attention to
7 information and investigate, but I'm not
8 willing to say on the front end that that's
9 going to result in something better, and in
10 the phone companies I don't think it did.
11 Q Now you testified earlier that
12 when the Buy button was pressed that -- let me
13 rephrase the question.
14 You said something about how
15 Rounder Records, who owns the masters on the
16 record that that Buy button produced a sale
17 for, has not figured out how to stream the
18 money down to artists. What did you mean by
19 that?
20 A As all of these new revenue
21 streams happen, the record labels have to
22 figure out how they're going to incorporate

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1 them into their bookkeeping, reporting, and
2 payment to artists. Sometimes that takes
3 longer than your most immediate statement.
4 Q So you haven't seen any royalties
5 from those digital sales yet?
6 A I'm not going to say I haven't
7 seen any. My royalty statements are about as
8 thick as my taxes. So when I get them, I have
9 to spend a lot of time going through them to
10 see what is and isn't there.
11 Q If it were offered to you, would
12 you like to have a collective that would
13 investigate those royalties to see if, in
14 fact, they're being paid properly?
15 A Possibly.
16 Q Have you ever asked anyone at
17 SoundExchange to look into it for you?
18 A I have, in fact, asked
19 SoundExchange to look into some royalty issues
20 for me.
21 Q And have they done anything for
22 you?

1 A Yes, they have.
2 Q Can you describe that?
3 A They did some research to find
4 that, in fact, there were some recordings that
5 I hadn't been paid on, and they retroactively
6 took care of that.
7 Q And you're talking about
8 recordings that you haven't been paid on for
9 downloads?
10 A I don't remember what the
11 circumstances were.
12 Q Well, was it involving webcasting?
13 A I don't remember what the
14 circumstances were.
15 Q Okay. Do you remember who you
16 spoke to at SoundExchange?
17 A I directed my initial inquiry to
18 John Simson, who passed it on to whoever at
19 SoundExchange dealt with it.
20 MR. FREUNDLICH: I have nothing
21 further.
22 CHIEF JUDGE SLEDGE: Any other

1 party wish to cross examine Ms. Fink?
2 (No response.)
3 Mr. Freedman, any further direct?
4 MR. FREEDMAN: I have one
5 question, Your Honor.
6 CHIEF JUDGE SLEDGE: All right,
7 sir.
8 REDIRECT EXAMINATION
9 BY MR. FREEDMAN:
10 Q Ms. Fink, in your cross
11 examination you were asked about NPR being a
12 non-profit, and you said you had a different
13 view. Can you explain what you meant?
14 A Well, although -- it's not that I
15 have a different view about them being non-
16 profit; I have a different view about whether
17 or not they're a commercial station at this
18 point because I feel that NPR has morphed into
19 creating credits for funders that essentially
20 sound like commercials to me. So, you know,
21 the difference between a jingle commercial and
22 a minute and a half telling you the work of

1 whoever it is that is funding their
2 programming, and their website and their phone
3 number and what exactly they offer you, isn't
4 that different to me.
5 MR. FREEDMAN: Nothing further,
6 Your Honor.
7 CHIEF JUDGE SLEDGE: That
8 completes the questions of Ms. Fink. Thank
9 you, Ma'am.
10 THE WITNESS: Thank you.
11 (Witness excused.)
12 CHIEF JUDGE SLEDGE: Mr. Freedman,
13 your next witness?
14 MR. FREEDMAN: Yes, Your Honor,
15 Jonatha Brooke will be our next witness, and
16 we're getting her from the hallway.
17 CHIEF JUDGE SLEDGE: Ms. Brooke,
18 before you seat, would you please raise your
19 right hand?
20 WHEREUPON,
21 JONATHA BROOKE
22 was called as a witness by Counsel for the

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