RIAA Ex. N-103-DP - Transcripts from the proceedings of UK Copyright Tribunal – Day 2
(9.34 am)

THE CHAIRMAN: Good morning, ladies and gentlemen. We are just about on time, Mr Carr.

Opening submissions by MR CARR

MR CARR: Thank you. Good morning, gentlemen.

As you know, the MNOs remain in this reference in respect of one issue, and that issue relates to the treatment of advertising revenue under the new JOL. And you will have seen that it is referred to in the settlement agreement and in the skeletons as the MNOs' disputed contention.

Put simply, the MNO's disputed contention is that the new JOL seeks to levy a royalty on too wide a revenue base. Think of the revenue base as a pie, possibly a cherry pie. Broadly speaking, the alliance gets 8 per cent of that pie. If they succeed in their advertising contentions, the pie gets very, very big; so does the slice, and that has a profound effect on the proposed business of the MNOs.

If I can turn to the position of the other applicants, or former applicants. iTunes, represented by my learned friend Mr Weis selberg, also challenge the treatment of the revenue base under the JOL.

Furthermore, Sony, Napster and Music Choice, you will
recall, are the three MSPs who have withdrawn from this
reference so they are not before you today. They have
made it a condition of their settlements, with the
alliance, that they get the benefit of any gains made by
iTunes on this issue. The webcasters, you heard from
Mr Steinthal yesterday, they put forward commercial
radio as a comparable, and the revenue base in
commercial radio is advertising. That is because, when
one thinks about it, commercial radio is free. There is
no other revenue stream.

But even for the webcasters, the revenue base --

THE CHAIRMAN: Faut de mieux.

MR CARR: Exactly. But even for the webcasters, the revenue
base in the new JOL is too wide. The BPI have accepted
the definition of gross revenue, including the new JOL’s
treatment of advertising revenue, and that is because it
is unlikely to make any practical difference to their
members.

THE CHAIRMAN: Why is that?

MR CARR: I will show you. If you go, please, to our
skeleton, and you turn to annexe 1. You will see
here --

THE CHAIRMAN: Mr Carr, can I stop you a second. I noticed
a number of these annexes in your skeleton are labelled
"highly confidential".
MR CARR: Yes, they are not anymore.

THE CHAIRMAN: Can that be true?

MR CARR: No. Because now that the intention has been announced in the press they are no longer confidential so we will just discuss them openly.

THE CHAIRMAN: I mention it because, and you should perhaps all know this, I am highly conscious in a big case like this that it is very difficult for the tribunal to remember all the time what is confidential. A fortiori, if there are different classes of confidentiality -- and I know you have tried your best with colours and otherwise to keep us au fait with the thing, but it is difficult.

MR CARR: Exactly.

THE CHAIRMAN: All right. So --

MR CARR: Now, if you --

THE CHAIRMAN: Annexe 1.

MR CARR: You will see agreed facts. Now, what has happened here is that a series of facts has been agreed between the MNOS and the alliance. And in this agreement we suggest that you will find this very helpful.

Now, if you look at agreed fact number 11 on page 39. I will read it out.

THE CHAIRMAN: Well, I will read it. Let us read it.

MR CARR: Fine, if you read it to yourself. (Pause).
THE CHAIRMAN: Yes.

MR RABINOWITZ: So.

MR CARR: So the BPI's members are most commonly not music service providers, and therefore, as it says, as it is agreed, their members will generally not be licensed under the new JOL. There is no evidence that any BPI member intends to generate advertising revenue from any online music or other content service where it is the licensee. So there is no commercial reason why they should care about this issue. As it says, they are not music service providers.

So, as such, we have a position where all the parties, across different industry sectors, who will be licensees under the new JOL, said in relation to the revenue base: no, we cannot accept that. Everybody will be licensees.

Now, let me deal with the importance of the advertising issue to the MNOs. You will have seen that Orange, T-Mobile and Vodafone, there have been press reports that they have conducted or are in the process of conducting trials of advertising on their mobile phones. And that you will see in agreed fact number 1.

THE CHAIRMAN: Yes.

MR CARR: Now, if I can just ask you to look at one of the press reports, the recent press report. If you turn to
page 41, and you should have "The Future is Orange" for
mobile phone ads, and if you just read that to
yourselves.

THE CHAIRMAN: I will certainly read it. (Pause). This is
what date?

MR CARR: This is the 7th August.

THE CHAIRMAN: This year. Yes, I have read it.

MR CARR: So some might think this represents a nightmare
vision and others might think it terribly useful. But
one can see the commercial rationale: adverts can be
tailored to your personal preferences and will then
appear on your mobile phones and obviously these adverts
could be about anything from cars to holidays to
restaurants, based on what it is perceived that you will
like.

Now, it is also worth noting the estimates --

THE CHAIRMAN: And if those perceptors are of that fact view
you will get it whether you like it or not.

MR CARR: Precisely. So you might get, no doubt in your
case, Mr Chairman, an advert for the complete works of
Jean Paul Sartre but I suspect it may be more mundane
than that in reality.

THE CHAIRMAN: Maybe a new edition of Archbold. Go for it,
Rushmere gross.

MR CARR: It is already happening. If you order something
from Amazon you will see, when you next go to Amazon,
clicking up: you have ordered X, you may like the
following titles.

THE CHAIRMAN: ITunes is something like this. Amazon does
it, certainly.

MR CARR: I just draw attention to the estimates for the
market size. It is a rapid growth rate, rising to more
than £5 billion by 2010.

THE CHAIRMAN: Has it started yet?

MR CARR: No, but it is about to very soon.

Now, Mr Bill of Vodafone, who is going to be
a witness before you, giving evidence on behalf of the
MNOs, suggests that these things tend to be
overestimated in the short term and underestimated in
the long term. But he does give you an idea of the
ballpark in which this dispute is being played out.
That is why I said the pie potentially becomes very,
very big indeed.

Now, the alliance have presented this dispute as one
issue against a background where everything else has
been settled. If they succeed on this issue, however,
the new JOL will not just entitle them to 8 per cent of
the price of each track purchased by a consumer on his
mobile. It will entitle them to 8 per cent of much of
the advertising revenue earned by the MNOs as well.
Now, let me just give you an example. Say that

an MNO --

THE CHAIRMAN: Yes. Give an actual example as you see that

it may happen.

MR CARR: Say the music service on Orange, 100,000 tracks

are sold for £1 each. Ignoring VAT and discounts, the

royalties going to the alliance will be £8,000. Now, if

on the other hand -- never mind this estimate of

5 billion overall, let us say one adds £10 million of

advertising to that. So a relatively conservative

figure, bearing in mind the size of the market, £10

million. The whole nature of the licence has changed.

The alliance, in my example, gets an extra £80,000 in

royalty.

So the total royalty is now £88,000. It has

multiplied by a factor of 11 -- it could be a lot more

than that -- because the advertising revenue, which is

going to be included, may be much, much more. But one

gets an idea of what effect this is going to have.

Now, in their original skeleton, the alliance

accepted that the off-line CD licence was a starting

point for the Tribunal's considerations and we agreed.

And it remains so on this issue as well.

Now, in my skeleton at paragraphs 23 to 26, I have

set out a summary of the history of the mechanical
royalty for musical works.

THE CHAIRMAN: 23?

MR CARR: I am going to summarise it for you, rather than have you read it again. It is all from the BPI v MCPS case.

THE CHAIRMAN: I remember this, yes.

MR CARR: The position is that since 1928 the royalty rate for off-line music has always been based on the price for the product being sold.

THE CHAIRMAN: Retail originally.

MR CARR: Originally retail. In 1928, it was 6.25 per cent, as you say, of retail price. Then we had the Francis Inquiry in 1977, recommended no change.

THE CHAIRMAN: Then RPM.

MR CARR: Exactly. We had the BPI v MCPS case. There was a slight raise to 6.5 per cent of retail price.

THE CHAIRMAN: Because you went from retail to --

MR CARR: Well, it was 8.5 per cent of PPD, which was equivalent to 6.5 per cent of retail price.

THE CHAIRMAN: And there it stayed.

MR CARR: It stayed there, and the royalty was always calculated per product. Normally per CD or other physical media.

THE CHAIRMAN: Yes. The royalty price was levied to the monies changing hands for the musical world.
MR CARR: Correct. In over 75 years, it has never been suggested that other revenue streams which may in some way be derived from the sale of music, such as advertising revenue, should be included in the revenue base where the consumer pays for the music.

Now, obviously if you have the kind of system that you have in the off-line world, the royalty base is clear. The revenue stream, it is a revenue stream received from the consumer in respect of the product containing the music. And that makes sense, because if you think about it, the licence is required in order to copy musical works onto a CD, that is why you need a licence. So the revenue base is tied to the revenue stream from the acts requiring the licence. The sales of products containing the works. It is clear, it is easy to apply.

Now, the alliance say: well, off-line, the MCFS licences the record company who do not engage in retail activities which might generate other revenue streams. But that is the alliance's choice. They have changed the identity of the licensee for online to the retail, again their choice. They insist that the ultimate retailer should be the licensee, rather than the record company. And that is so that they can get access to the extra revenue streams like advertising which are not
available under the off-line scheme. But we say that
a change in identity of the licensee does not justify
a radical increase in the royalty base, compared to that
which the tribunal awarded in BPI v MCPS which, as
I said, has existed for over 75 years.

I can illustrate this. Take the case where two
consumers buy a Robbie Williams album. One goes to his
local High Street store and purchases a CD and the other
buys it online in digital format. But it is the same
music. The contribution of the alliance's members
obviously is exactly the same because it is the same
music. And the different method of delivery does not
justify an enormous expansion to the royalty bearing
base and the kind of multiple extra royalty that I have
just suggested to you.

A further example, because I think examples really
help to focus the mind, we say illustrates the point
even more starkly. If I can invite you to look, please,
at paragraph 58 of my skeleton on page 21. Now, there
is A and B, as you see. And if we look at example A,
let us assume that a Robbie Williams CD is available for
sale on Amazon, so you can order it. At the top of the
page, do you see where it says "Advert A"?

THE CHAIRMAN: Yes.

MR CARR: Let us imagine there is an advert for a Vauxhall
car. In this example, the royalty will be calculated on
the wholesale price of the CD, and the revenue received
by Amazon from the Vauxhall advert is not
royalty-bearing.

Now look at example B. A consumer purchases the
same Robbie Williams album, illegality us say online on
let us say online on his mobile phone. Let us say we
have the same advert for a Vauxhall car on the page of
the mobile service. Suddenly not only is the royalty
calculated on the price of the music, but on the
advertising revenue for the Vauxhall car as well.
A welcome windfall to the alliance, but it is exactly
the same situation: the same advert, the same music.

Now, as we know, the Copyright Tribunal had to
confront this very problem in the BSKyB v PRS case, and
that decision provides one of the most detailed
considerations of revenue base by the tribunal. It
considers all the previous cases and ends up with
a conclusion. And we say it is very relevant, it is
a good touchstone to bear in mind when you are hearing
all these days and days of evidence. So if I can
hopefully assist you just by taking you through some
passages of that with this issue in mind.

Can I just set the relevant --

THE CHAIRMAN: Authorities bundle?

THE CHAIRMAN: Now, help me. What does it look like?

MR CARR: I think it is a bundle which says "Denton Wilde Sapte". And in the colonel's pile, I can see, I think, in the second from top right row.

THE CHAIRMAN: Okay, got it.

MR CARR: It is volume 1. And it is tab 9.

THE CHAIRMAN: This was Mr Floyd, was it not?

MR CARR: It was. So if I can just set the scene for you.

The PRS wanted the royalty to be calculated as a percentage of what they called BSkyB's relevant revenues. So you can imagine subscriptions and so on would come in, whereas Sky wanted to pay a lump sum based on their share of total UK audience viewing. If you look at paragraph 1.3 on page 198 you can see those contentions set out and the difference it made in money.

So on Sky's proposals, the figure was about 1.9 million a year royalty. Whereas on the PRS's it was £17 million, a difference of £15 million. And over the years, 75 million, a fundamental divergence. That difference was caused by the width of the revenue base that the PRS was contending.

The position is, if anything, is even more dramatic in the present case because of the potential figures that will come in. Now, the tribunal rejected the PRS's
approach to revenue base, and the reasons for that,
which I am going to take you to in a little more detail,
but they are summarised. Beginning at page 194 in the
headnote, can I invite you to read page 194 over to 195,
numbered paragraphs 5 to 7.

THE CHAIRMAN: On the holdings?

MR CARR: Yes, on the holdings.

THE CHAIRMAN: Why do we not read the headnote and the
holdings?

MR CARR: If you wish. But it is paragraphs 5 to 7 that are
particularly relevant.

THE CHAIRMAN: Let us do that. I mean we will do it
ourselves.

MR CARR: Can I invite you to stop when you reach number 7.

THE CHAIRMAN: Yes. I have not got there yet.

MR CARINE: Including 7?

MR CARR: Including 7, yes. (Pause).

THE CHAIRMAN: Yes.

MR CARR: Oh yes, the figures I gave you earlier, when
I used my £10 million example.

THE CHAIRMAN: Probably too little.

MR CARR: Yes, it is £800,000 extra of royalty.

THE CHAIRMAN: I rather thought that.

MR CARR: So it is an awful lot extra.

THE CHAIRMAN: Could I ask you just as a matter of interest,
in terms of repertoire, we are of course dealing with
the PRS in this case, taking in foreign copyrights as
well, that covered virtually everything imaginable. Is
that the same position here?

MR CARR: I believe so, yes. Because we are looking at the
alliance here.

THE CHAIRMAN: It is a different right we are talking about.
We are looking at the same spectrum.

MR CARR: We are looking here -- the alliance is the PRS and
MCPS, exactly.

THE CHAIRMAN: Yes, it must be.

MR CARR: The particular points I wanted to emphasise.

Holding 6:

"The need for an adequate nexus between the use of
music and the revenues earned."

THE CHAIRMAN: Yes.

MR CARR: And holding number 7:

"The role that the music played in the applicant's
television service was typical of other television
services, one creative ingredient amongst many of
greater or lesser importance."

When you think of the music service on a mobile
phone and what a mobile phone does, that is going to be
particularly apposite in this case.

I am going to take you through a little of the
detailed reasoning. Could you turn to page 216. This was a review of previous decisions of the tribunal considering a revenue-based proposal, and the tribunal began by reviewing the ITCA v PRS decision. If you look at that citation, it is easiest if I read it to you. Can you see about three lines down, it says:

"The question is ..."

THE CHAIRMAN: Yes.

MR CARR: "The question is whether the fact that music is or may be to a greater or lesser extent part of the package which attracts the television audience and accordingly generates revenues, establishes or helps to establish a sufficient connection between the music and the revenue to make it reasonable."

So it is sufficient connection.

Then at paragraph 6.5, they went on to consider the PRS v BEDA case, and that concerned the use of music in discotheques.

THE CHAIRMAN: This is the one that went to Mr Justice Hoffman.

MR CARR: It did. As the tribunal observed, at the bottom of the page, one would have thought that the correlation between the use of music and the revenues in the discotheque would be somewhat stronger than in the case of television. But even in that case, the tribunal
rejected the PRS's approach, even for discotheques, and if you look at the quote, you can see on about the fourth line, again the test of the close direct relationship between the value of the input and the value of the output and the finding at the end of that quote:

"We find there is no close direct relationship between PRS's music and the total receipts of the disco; no risk sharing, no incentive."

So, again, I suppose music is a very important element in a discotheque, but the reasons why people go to a discotheque and why the discotheque earns its revenue are more complex than simply music.

We then see what happened when it went on appeal to Mr Justice Hoffman, as he then was. He said that insufficient causal relationship --

THE CHAIRMAN: Let us read the quote because it is quite important. (Pause). Yes.

MR CARR: Now, the tribunal in the PRS case, if you just look under the quote, they did not think the analogy with electricity was entirely fair, although I have to say that Lord Hoffmann is no slouch on these points. But then they said something that is very important to the present case. They said:

"What offends one's common sense is that a single
component of a complex final product, such as

a television programme, should be remunerated on a basis

which rise and falls with the revenues obtained from the

final product where that component may have had nothing

at all to do with those changes in revenue."

Now, we are going to explore what mobile phones do

in a moment. You make calls on them, you send text

messages. It is much more complex.

THE CHAIRMAN: You use them as a calculator.

MR CARR: You do all sorts of things.

Now, continuing with this decision. As we see, the

tribunal reasoned that there was no risk sharing as the

PRS were not co-adventurers in the business of

television. The same is true here, the alliance are not

coco-adventurers in the mobile phone business, nor in the

advertising revenue generated from it.

Going over, please, to paragraph 6.7. They then

considered the decision in AIRC v PPL, which is relied

on heavily by the alliance in the present case. They

noted that the tribunal expressed serious reservations

about the advertising revenue base there. But, and we

can take this quickly, if you go over to page 219, they

said:

"The reasons were historical and faut de mieux."

There was no other alternative in radio because
there was no other revenue base.

Now, the position, just continuing with the BSkyB
decision, if you turn to paragraph 6.10.

THE CHAIRMAN: 6.9 is the Singapore case.

MR CARR: 6.9 is the Singapore you were referring to. 6.10
is the requirement for an adequate nexus.

6.12, they say at the end of that paragraph:

"Where revenues may be rising or falling rapidly,
for reasons connected with the introduction of new
technology and entrepreneurial risk-taking, and
unconnected with music, we think the revenue base may be
less appropriate."

Now, we say that, just to summarise, a revenue base
royalty is appropriate in the present case because it
has an established precedent in relation to off-line
music; on the physical product. It has worked for many
years.

However, once one broadens that revenue base from
that which applies off-line to revenue streams which do
not have a close direct relationship with the licensed
music, all of the objections to revenue-based licences
referred to in all these decisions clearly arise. It is
simply not reasonable to extend the revenue base to
these additional streams of revenue where the requisite
nexus between the music and the revenue does not exist.
And the reason why it does not exist I am now going to show you.

First of all --

THE CHAIRMAN: It is a matter of degree.

MR CARR: It is a matter of degree. But if we now look at what the alliance are planning, you will see exactly why we say the MNOs are deeply concerned about it.

THE CHAIRMAN: In a sense, the PRS had a slightly stronger case too. Because what we did there, in the case as I did for the PRS, was we demonstrated it dramatically by ripping out the music content from movies and things and --

MR CARR: Saying it was --

THE CHAIRMAN: I took out the music from the beginning, for example, of Jaws 1 and you were left with a group of American teenagers drinking beer, pulling cans open and belching. It was quite funny. It did not have quite the same effect as that insistent thumping music.

MR CARR: That is a very good point. If you imagine that your mobile phone does not have a music service on it, many, many mobile phones do not have music services.

THE CHAIRMAN: That is the point. I do not listen much --

MR CARR: You are absolutely right, that the MNOs here, because if you bring in all their advertising revenues which you see they intend to do, the music component in
a film is much, much more important. And yet here the
alliance's case is: never mind that, we are going to
attribute everything to music even on a mobile phone and
stick it all in.

THE CHAIRMAN: That is what I was getting it. At the moment
the only music you hear is when you ring up somebody and
they have got music on the wait. But of course, that
has been the subject of another reference.

MR CARR: Exactly. That we will come on to briefly.

But let me look at -- I mean, in order to understand
the scope of what the alliance are planning, I do want
to take you through the definition of "gross revenue".
It is not that complicated.

THE CHAIRMAN: Yes, please.

MR CARR: And then I will show some practical examples about
the effect that would have on MNO advertising.
So if you turn to page 14 of my skeleton.

THE CHAIRMAN: Mr Carr, we are going to hear evidence about
this. But I mean, I speak for myself, I know my
colleagues have got mobile telephones.

MR CARR: Oh yes, you will hear it. These points are not
very difficult because we are not dealing with a case
where people have no experience of these products. We
all know broadly what we are talking about.

If you turn, please, to page 14 of my skeleton. We
have here highlighted some part of the definition of
gross revenue. So this is what now comes in.
THE CHAIRMAN: Wait, wait. Yes.
MR CARR: Let me take you through it. Now, A --
THE CHAIRMAN: Just let me -- this has been lifted, has it,
from the --
MR CARR: Exactly. It is from schedule 3 of the new JOL,
you have the reference to where you will find it in the
bundle.
THE CHAIRMAN: You have marked it here, all right, good.
MR CARR: Let us go through it. A:
"All revenue received or receivable by the licensee
from users in relation to the provision of the licence
services."
So that is intended to be the revenue stream from
consumers, like the off-line world. It would be a bit
better if it said "in consideration for the provision",
but that is what it is intended to be.
THE CHAIRMAN: Consumers you call them, and that is
analogous to --
MR CARR: That is analogous to off-line. And all the rest
of it expands that.
THE CHAIRMAN: The rest is extra.
MR CARR: The rest is extra. If we look at the first one,
B, this is where advertising is first mentioned:
"All revenue received or receivable as a result of placement of advertising on or within the licensed services."

If we just think about this, this expands the definition of revenue base from any licence or act of access to or purchase of music by the consumer. Let me explain that.

THE CHAIRMAN: On or within the licence services.

MR CARR: Indeed. I am going to come on to what the licence service means in a minute.

THE CHAIRMAN: Oh yes, because you expand on that later.

MR CARR: Because it does not mean you have to be able to buy music at all, I will come on to that. But let us focus on this for a moment.

Because it is as a result of placement of advertising, no-one actually needs to purchase a single FTD for this to kick in. The advertising comes in irrespective of whether a single musical work is purchased. So the issue here which I am going to explain is: what does licence service actually mean? Also, is it reasonable for advertising to be included in the revenue base --

THE CHAIRMAN: Mr Carr, sorry to interrupt you. Is what is going to happen, then, that we turn on our mobile telephones and instead of seeing the wallpaper, the
grandchild, the sunset, the whatever, we are going to
see an advertisement?

MR CARR: Not quite. I will show you some examples in
a moment. What you will actually see generally is
a sort of banner or block across the bottom of your
screen which has the advertisement. You click on it, it
then expands. I will show you some examples.

THE CHAIRMAN: What you are saying then is there it is, like
your Jag advertisement.

MR CARR: Or an advert for a restaurant. Nobody buys any
music --

THE CHAIRMAN: You would say that the normal use of
a telephone is to --

MR CARR: Make a call.

THE CHAIRMAN: -- ring up, make a call. And you just go
straight through it and you do not use the music.

MR CARR: You or I may have absolutely no interest in
purchasing --

THE CHAIRMAN: And you do not use even the advertisements.

MR CARR: Exactly, and they still get money. And yet unless
there is a purchase of music, there is nothing to
licence.

THE CHAIRMAN: Yes, but then your point is there is a double
feature.

MR CARR: Absolutely.
THE CHAIRMAN: Because you have purchased the music and you get --

MR CARR: Exactly. It kicks in -- if nobody purchases music they still get this welcome windfall. If somebody does purchase music they not only get the royalty on the music, they get --

THE CHAIRMAN: It is a double feature programme.

MR CARR: Exactly.

THE CHAIRMAN: I have got it.

MR CARR: Now, if you look at C. Sponsorship fees we need not worry about because the parties have agreed they are the same thing as advertising.

THE CHAIRMAN: Wait a minute, yes.

MR CARR: But the wording in the square brackets then relates to the home page, and we all know what the home page is. It has a whole series of content, and it apparently reflects a concession made to Napster and so on.

The problem for the MNOs, just in relation to this, is it is entirely unclear whether the MNO's home page would come within this exemption or not. Because if you look at it, there are two conditions to take a home page out of the definition of "gross revenue". The first is that the content relating to the licence service has to be an insubstantial part of the entire content displayed
on such home page. Do you see that in the bold? An
insubstantial part. And secondly, the licence service
has to be an insubstantial part of the entire service of
the licensee, as is accessible via the home page.

THE CHAIRMAN: So two conditions.

MR CARR: Two insubstantials. So --

THE CHAIRMAN: You say how do you --

MR CARR: How do we know? Those familiar with copyright law
know that the question of insubstantiality is
extraordinarily difficult to judge. It is a value
judgment based on many factors. Our best guess is the
alliance contend that if you get advertising on MNO's
home page — it has got 12 things and one of them is
music, you could have games, all sorts — it should be
included within gross revenue because music is not an
insubstantial part of the whole service, whatever. But
nobody knows on this definition. No-one can tell. And
as I will explain, the alliance have refused to clarify.
In request they will not say.

Turning to the definition, let us look at D. D is
concerned with commissions from third parties. And let
me explain to you an example. The most common form of
commissions an MNO will earn are what is known as
click-through commissions. So let us say that
a consumer clicks on a link. You have got the page of
your mobile phone and there is a link to a third party service or site. It could be anything. And you sometimes see them, if you use the internet you see at the side links to other places. You click on it.

THE CHAIRMAN: Incidentally, how will you click with the phone?

MR CARR: You press your thing in the middle.

THE CHAIRMAN: I see, all right.

MR CARR: Now, consider a link -- you click on it, it leads you to book a table at a restaurant. The MNO gets paid when that occurs but not before. It is what is called success-based advertising. So somebody clicks, somebody books the table, the restaurant can then say: I see I got that from my MNO advert, my MNO click, so I owe the MNO a bit of money.

THE CHAIRMAN: Is that really how it is going to happen?

You are telling me --

MR CARR: That is.

THE CHAIRMAN: -- the Bengal Lancer, having received a booking for two people for a curry, will then report the fact back to --

MR CARR: Have you ever --

THE CHAIRMAN: Will they ever do that?

MR CARR: I think so. Because have you ever used Lastminute.com where you book tables?
THE CHAIRMAN: Yes.

MR CARR: They already do it in a big, big way.

Lastminute.com is a huge success and that is how it works. The restaurant comes back and gives them some money when they are booked.

THE CHAIRMAN: But does that rely on the honesty of the restaurant? Is there an electronic --

MR CARR: There will be an electronic way. Do not ask me what it is, but --

THE CHAIRMAN: I will not ask you, Mr Carr. But maybe somebody in the evidence might just enlighten us.

MR CARR: Look at D. It contemplates a royalty going to the alliance where a consumer wanted to book a table at a restaurant and had no interest at all in buying music. Where the link is to the restaurant, so you have got this link, on what is called "via the licence services" whatever that may mean. Because I am going to come on to show you licence services in a moment. So I booked a table at a restaurant, suddenly I owe money to the alliance --

THE CHAIRMAN: Via the licence services.

MR CARR: Via the licence services.

THE CHAIRMAN: So you have booked a table at a restaurant.

MR CARR: You do not want to buy music.

THE CHAIRMAN: You have no music at all.
MR CARR: And they got a royalty. Is that the close direct
relationship that one normally expects?

THE CHAIRMAN: That is a question for us.

MR CARR: Now look at E. E is very important because it is
a catch-all. Do you see the words:
"... any other revenue received or receivable by the
licensee, arising in relation to the provision to users
of the licence services."

So if you are not within B, C or D, that E gets you.

Just in case something might have been missed E gets
you.

THE CHAIRMAN: Are all these, as a matter of construction --
I have not re-read and re-read this -- sort of sub-units
of the general proposition higher up in the definition?

MR CARR: Well, because it says "any other revenue", it is
everything we have not got so far.

THE CHAIRMAN: So what are C and D, just an explanation?

MR CARR: No. Because B says "advertising", and I suppose
the idea is to cover sponsorship fees, click-through
commissions and anything else.

THE CHAIRMAN: All right.

MR CARR: Now, the lack of clarity in this catch-all part of
the definition is obvious. It covers not only the
licence services, but anything arising in relation to
their provision.
Now, in the context of offerings like the MNOs, even their content services, which may be games, it may be news, sport, entertainment, a catch-all like this is very, very significant.

Now, what is clear from the alliance's definition is that licence services goes well beyond the actual delivery of licence content to consumers. We have been seeing this word "licence services" and the mind naturally thinks: that must be something you require a licence to do. But it is not.

If I can show you. If you turn to --

THE CHAIRMAN: That goes back to the act.

MR CARR: Indeed, indeed. This is all well beyond anything the act would licence. If you look at page 15 of my skeleton.

THE CHAIRMAN: What are you required? I say this for my colleagues perhaps. Perhaps one of you could turn to this -- looking at CDPA to 88, what are the forbidden acts?

MR CARR: The acts that are being licensed here. PRS, so the performance right. And it is MCPS, so it is the mechanical copying right. And that is it.

So it is always specific to the particular musical work that one is talking about.

THE CHAIRMAN: Yes.
MR CARR: Particular track. Now, if you look at my skeleton, page 15. I have set out other parts of the new JOL which are supposed to clarify, and if you look at B:

"By way of clarification, advertising and sponsorship revenue shall be included within the definition of gross revenue if it is derived in relation to a page within the licence service, including music-related pages which do not contain or enable direct access to the repertoire works content, e.g. content consisting of concert or music reviews."

Now, let us just --

THE CHAIRMAN: So these are sort of live concerts.

MR CARR: No, no, this is simply --

THE CHAIRMAN: I see what you mean, yes.

MR CARR: Robbie Williams is going to turn up at Olympia on Tuesday. They get a royalty on the advertisements for that. So they are including what they call within their licensed service, concert or music reviews.

But of course the alliance has no right to licence such pages; news about a concert, it is nothing to do with the acts under the statute that they are licensing.

Now, once one appreciates the breadth and vagueness of the definition of "gross revenue", it becomes apparent that the treatment of advertising revenue in
the new JOL is about securing a windfall on revenue
streams which have insufficient nexus with any act
requiring a licence.

We agree it should be a sufficient nexus. In order
to narrow the area of dispute, the MNOs have accepted
that there are two scenarios in which advertising should
be included within the definition of "gross revenues",
they have tried to be reasonable, thinking: where is
there a sufficient nexus? Let me show you where we have
accepted that there is.

The first is what is known as in-stream advertising.
Now, this is where an advert appears immediately before
or after a full track download. So say you buy a full
track download. The advert is delivered to your mobile
as part of the same content package. So the consumer
may have to watch the advert before accessing the music,
and he has to receive the advert with the music. And if
you look at an example --

THE CHAIRMAN: And when you are listening to the music, does
the advertisement stay there?

MR CARR: We do not know yet. It will certainly be there
the first time, bit because it is this still in a state
of flux it may or may not be there.

THE CHAIRMAN: What will you see, then, when you listen to
the music?
MR CARR: I will show you. If you turn to, in tab 1 of my skeleton, page 48. If you look at A, you have bought, let us say, a Robbie Williams track. And before or immediately after the content is delivered to you, so you get your track, you see this Visa advert. You may see it every time you try and use it or you may see it once, but the point is you see it and you have to see it.

The second case of in-stream advertising is where adverts appear as part of a webcast stream akin to adverts on the radio. If you look at 48B, that illustrates that. So you are listening to, for example, Vodafone's -- I think it is called Radio DJ service. And you get this advert, a bit like you get an advert if you are listening to Capital Radio. We suggest there too, that comes within. Because they are so closely connected they are sufficiently closely connected.

Now, a second advertising that is also possible on mobiles is called banner advertising, and this is where an advert appears on a page of a service, as opposed to coming as part of the actual delivery of content. And if you look at page 44 of my skeleton, if you look at example A1, which is the Jaguar example, and I think this may answer the chairman's question earlier. Can you see that on the left, the Jaguar advert is what we
call a banner advertisement. It is appearing as a kind of band across the screen. It is called a banner advert because it appears on the top of the page, rather like a banner at the top of a store. Do you see?

THE CHAIRMAN: Yes.

MR CARR: In this illustration you click on it and a larger advert appears. It does not have to be the case on all banner adverts, but because mobile screens are small that is likely to be the case. The enlarged advert is a bit like an advert that you find in a hard copy newspaper.

Now, banner advertising may also include adverts that appear in between pages. Suppose, for example, we are still looking at this example, Orange World, example A1, can you see the entry for news?

THE CHAIRMAN: Yes.

MR CARR: Suppose you clicked on news and an advert appeared before you were taken to the news page, that would also be considered a banner advert. And you see that, for example, in the example C on page 46. So it is a little hard to see, but you can see that there is a Visa advert, just about.

THE CHAIRMAN: It is the same as the other, yes.

MR CARR: Just before you get to e.g. the page about music news or wallpaper, you see that advert.
THE CHAIRMAN: And you say that is --

MR CARR: We say that revenue from this sort of advertising should only be included in the revenue base, first where a music service is offered to the consumer for free. So you avoid the double hit effect. And secondly, where the banner advert appears on or immediately before a page from which music can actually be consumed. Because if you think about it, there may be free adverts, I do not know, for Kleinwort Benson, which appear five or six pages away from anywhere where you can access music. Why should they get a royalty on that?

An example of the sufficient nexus where the two conditions could be met is if you look at page 47, if you look at example D1, you are contemplating that immediately before the page where you can buy these tracks, you have an advert for Visa. Do you see what I mean? Page 47, 1, you have got an advert for Visa that comes up just before those tracks.

THE CHAIRMAN: Those are your bits of music, The Killers.

MR CARR: Let us say those tracks were being offered for free and that advert appeared immediately before then. Then we accept, for the purposes of trying to compromise, that the revenue on that advert should be included.
And similarly, if you look at D2, the advert actually appears, I think you can see it is a Mercedes advert, at the top of the page. If the advert is free and it has that advert on that page and there is revenue from the advert we also accept that there is sufficient nexus.

But apart from those two very clear cases, we say advertising should not be included in the revenue base. And I now want to show you some examples of what we say are the unfair and arbitrary consequences if you do include advertising and other circumstances.

I showed you a moment ago this business about music-related pages, concert news, whatever. If you look at page 46, you will see two music-related pages. So they come within what the alliance regard as the licence service because they have something to do with music.

THE CHAIRMAN: Yes, there is music wallpapers, so you could access that. And, Usher, is it "My Boo"?

MR CARR: You would then get that. If you bought that --

THE CHAIRMAN: What would happen? You get this gentleman as a wallpaper?

MR CARR: And each time you look at your mobile you would have the attractive sight of Usher "My Boo" staring back at you.
THE CHAIRMAN: I think I might prefer Christina!

MR CARR: Or Shakira.

THE CHAIRMAN: But that is purely a personal preference.

MR CARR: Now that, of course, buying an image of an artist to use as your wallpaper, has absolutely nothing to do with this licence. This licence is about online downloads of music.

THE CHAIRMAN: But would the wallpaper sing each time?

MR CARR: No, this is just an image. But somehow if it has an advert on it, nothing to do with the licence, the alliance say: we would like a cut of that advert, please.

Look at the other page, which says, if you can read it, "What's up next? There's going to be a great gig, make no mistake". And it announces The Killers' concert.

Let us imagine that somebody thought: I want to have a look at what is happening, see if I want to go to the concert. I will access that page. And it has got an advert on. Say it has an advert for a holiday, nothing to do with any licensed act, it will not require a licence from the alliance to tell us what is happening in the music world. But suddenly the revenue comes into the definition. That is what is supposed to be music-related.
Now, obviously under the new JOL's approach it would not just catch adverts on this page. It would catch them on pages before, apparently because they are music-related. Where is the licensed act? Where is the close nexus?

Now, the alliance's position seems to go even further than this. Can I ask you to look, please, at the alliance's skeleton which you will hopefully have before you.

THE CHAIRMAN: I think I do. I may have it somewhere else.

Wait a minute.

MR CARR: I am going to ask you to turn to paragraph 8.37.

MR CARINE: 37?

MR CARR: 37, correct.

THE CHAIRMAN: Shall we read it?

MR CARR: Yes. (Pause).

Now, it is quite important, there is a reference here to the finance section, and then it says:

"Don't suggest income should form part of ... provided that the three-part test is satisfied."

So there are certain circumstances where adverts on a finance page will form part of gross revenue.

Now let us have a look at what the three-part test is. So we are imagining now a page that talks about the stock market.
The three-part test for the exemption, so it does not form part of gross revenue, you find at 8.33 and we are going to apply this to a finance.

THE CHAIRMAN: Let me read this. (Pause).

MR CARR: So you have got to satisfy each of those conditions for the advert on the finance page not to form part of gross revenue.

So there must not be music offered from the finance page. And very importantly, in C, music has to be only an insubstantial part of the suite of services offered. Do you see that?

So let me illustrate the effect of this. Let us bear that in mind. Music is only an insubstantial part of the suite of services offered, otherwise the advertising on the finance page is in.

Look back at my skeleton, please, and I want you to look again at page 46. Now, let us imagine --

THE CHAIRMAN: Yes. Put that to the test.

MR CARR: Let us imagine that this page was about finance, okay. Stock market news. And it had an advert on for Kleinwort Benson Bank or Goldman Sachs. Apparently, unless the alliance judge that music -- and we are assuming here that the MNO offers a music service somewhere else on the mobile -- unless the alliance judge that music is only an insubstantial part of the
suite of services offered, the advert on the finance page comes in because that is one of the conditions that has to be satisfied for it not to be.

THE CHAIRMAN: What is a suite of services?

MR CARR: Well, I assume, and no doubt the alliance will try and explain it, but I assume it may be they have to say: well, in our judgment, music is only an insubstantial part of the total content offering, perhaps, of the mobile.

THE CHAIRMAN: But what worried me about this when I read it is: where are the limits?

MR CARR: There are not any limits because it is all in their discretion.

THE CHAIRMAN: Is there a suite of services on this page for example? Here we have wallpapers, various other things. We have animations, we have concert advertisements, we have a free holiday. That is a suite of services.

MR CARR: I have to tell you that because of the alliance's evidence where they talk about how important the music services is to mobile phones, they will always say that the music services are a substantial part of the total service offered by an MNO and therefore all advertising comes in because you have this test: let us look at the whole thing. Is it insubstantial? We do not think so. We have all the advertising. Kleinwort Benson Bank? It
does not matter, it is all in. And that presumably is a
result of the effect of the catch-all that I showed you
earlier.

    It just shows what is going on here. It shows how
wide the alliance intend to apply the definition, if
they get it. Some kind of judgment about the
significance of the service to the overall mobile phone
company.

    Now, I just want to pause on that for a minute. If
we think about the finance page, the alliance have no
rights in respect of the finance page. They have no
rights in respect of the page about music news. So why
do they seek to claim a royalty on advertising revenue
earned by a licensee for such a page? As we say, it is
completely unreasonable.

    Now, let me explain why we say that where the advert
is immediately before or on a page from which music is
accessible, and the music is free, we accept that it
should be in.

    Now, we have already seen from the PRS case that the
tribunal has consistently in all its decisions been
sceptical about expanding the revenue base. There has
to be this sufficient nexus. Where it is free and the
advert is closely related to it, it is a bit like radio,
it is a faut de mieux. There is no other alternative.
So it is as simple as that.

But I want to illustrate why the more expansive definition that we just looked at, including, for example, finance pages, is, we say, completely unreasonable. One needs first, and we have touched on this, to consider the complexity of a mobile phone service.

Why will advertisers want to advertise on mobile phones at all? What attracts them?

THE CHAIRMAN: Yes.

MR CARR: Well, it is much more complex than simply offering music for sale. The first point is if you think about advertising, it is how many people are going to look at the advert? How many people are going to look at an advert on a mobile?

THE CHAIRMAN: What struck me was that because of the small screen -- I am not saying that everybody is myopic, but by the same token you have to look rather carefully.

MR CARR: You do. But the first point is: what is the mobile phone's, the MNO's, let us say Orange's ability to secure subscribers to their network? If you go to a shop and ask for a mobile phone and you become a subscriber, that is generally how you see any of this. What is that way? The first and most important consideration when you go and buy a mobile phone is the
voice and text services. You may have seen these plans
and you see you get 500 minutes of talk and 1,000 texts.
And that is the first thing that people want to know, in
return for, let us say, £17.99. That is why you become
a subscriber.

Also very important, and if you have ever tried
this, if one of your children wants a particularly
expensive mobile phone, you go in and are told: you can
have that model for free if you take this package.

So the next very important thing is: what mobile
phone do you want? It is the whole hardware aspect.
You only have to go to a Carphone Warehouse to work this
out. You only have to try.

THE CHAIRMAN: They give you a magazine.

MR CARR: Yes, and it is all extremely complicated, and if
you go with Orange you get one package, and if you go
with T-Mobile you get another.

THE CHAIRMAN: Columns with dots showing you what you do can
and what you cannot.

MR CARR: Yes, all that stuff.

There is also content offering, but even within
content offering there is lots of different kinds of
content; music is one component, games, wallpaper. Now,
the problem with the alliance's argument is that they
just assume that all advertising, as they put it: the
advertising is attracted by the music. Well, how do you know that? How can you show that when you are dealing with a complex product like a mobile phone? We say it is simply an assertion, and it is totally contrary to the approach of BSkyB.

Now, if you go back, please, to page 44 of my skeleton. We are going to look at the Jaguar example.

THE CHAIRMAN: Mr Carr, we have been just about an hour. When you come to a pause, it might be time for a little break.

MR CARR: Right.

THE CHAIRMAN: I do not want to interrupt you. When do you think you can --

MR CARR: Well, if I finish about ten past 11. If you feel the need of a break, we can have one now. Or if you are happy to continue until I finish.

Let us go back to page 44 of my skeleton, and we have seen this, the Jaguar advert, on a home page.

THE CHAIRMAN: Hang on, we are going back to 44. Right, I have it.

MR CARR: We can see there is a banner advert for a Jaguar halfway down. If you look the at the entries, the user can click on links to news, sport, football. Do you see what I mean?

THE CHAIRMAN: Yes, I see it.
MR CARR: There is not a music entry here but let us assume there was. Let us assume that in between film and TV
guide, it said music. Okay?

Now, there is a whole variety of other content
available from this page. And, as we know, the MNO will
receive money from Jaguar to place the advert on the
home page. Now, if we had a music entry here, under the
new JOL the alliance could claim that revenue from the
Jaguar advert forms part of the revenue base, first, if
the licence service is not an insubstantial part of the
wider content and information service.

And the double negative is deliberate, "not
insubstantial". It assumes that revenue is in, and then
provides an exception if the licence service is
insubstantial in the context of a whole.

In fact, looking at their three-part test, if we had
a music entry there, it appears that it would be in
because you could access music ultimately from that
page.

THE CHAIRMAN: Well, I mean, yes.

MR CARR: So the advertising revenue in relation to Jaguar,
some part of it would come in because it arises in
relation to the provision to users of the licence
service. We say this shows an obvious problem. Let us
say you had music on this page as an entry.
THE CHAIRMAN: As it is at the moment, or as you --
MR CARR: It is not there but if we imagine it is there.
THE CHAIRMAN: Right, okay, yes.
MR CARR: A user like me goes to that page with absolutely
no interest in buying an PTD. No interest in the music
services whatsoever. He may want to watch the news, he
may want to find out about sport. But it is the mere
presence of a link from this page to the MNO's music
service, which may indeed be music news, that entitled
the alliance to a cut of the advertising revenue. It
cannot be right. And the purported justification is
that Jaguar is attracted to the MNO by the music
service. How can one ever say that?

Now look at example C.
THE CHAIRMAN: Incidentally, when I touch the Jaguar banner
and up comes the Jaguar page, there will surely be some
music with that, will there not?
MR CARR: No.
THE CHAIRMAN: It will be a silent Jaguar, will it?
MR CARR: Even if there was, it would be a different
licence. It is not covered by this licence.
THE CHAIRMAN: Jaguar may well have supplied the whole
advertisement via their advertising and they will
already have paid money --
MR CARR: Of course, but the Jaguar leader licence -
exactly -- they will have already paid.

Let me take a more extreme example. Say you have an advert for MTV, which we see on one or other of these pages, MTV will have paid the royalty because it is a different licence. They pay the royalty for the music. What the alliance is claiming is: I do not just want to just a royalty from MTV, I want a royalty from MNO as well when that advert pops up, let us say, on a finance page. It cannot be right.

Now, let us just continue with these examples. If you look at page 46, which we have looked at, I have got a music news page here with no music accessible. Now let us assume there was a song on the page you could buy and at the bottom of the page it said: hit of the week, Robbie Williams, okay? And you could click on that. The alliance claims, they say: well, that is an obvious case where they are entitled to a royalty on any advertising revenue on that page.

But if the user buys the song, the alliance will get a royalty from the song, the purchase. In other words, the music is not being offered for free; they get the royalty. Why should they be entitled to extra royalty on the advertising?

THE CHAIRMAN: This is one of your double recovery arguments.
MR CARR: It is another double recovery point.

THE CHAIRMAN: You have got another three.

MR CARR: Lots, there are a few more I am going to show you.

Now let us assume that, as the alliance might say, it is the music news that attracted the consumer to the page. He wanted to find out about The Killers concert. Then he thinks: good, here is a Killers track, I will buy it.

In those circumstances, the presence of the news feature for which no licence is required benefits the alliance because it has sold a song, so they get the royalty. But they wanted to be paid more than that, they want a percentage of any advertising at all. So even more stark if you think of this as a finance page.

Now consider over the page, please, page 45, back a page. Example B2. And you can see, for example, there is an XKR advert at the top, and we are on what we call a multiple content page. From this page the consumer, as you see, can buy music and he can buy music videos, ringtones or wallpaper. There is a whole lot of different stuff one can buy. One sees that probably even more clearly on the Vodafone live page. Do you see, on the left hand side we have got "Music sale", then we have got "Games sale", "More games", then we have got "Tracks" and then we have got "Pics and vid
zone". Do you see?

THE CHAIRMAN: I see, yes.

MR CARR: So lots and lots of different content.

Now, if the user buys an FTD, there is no dispute
that the alliance get a royalty. Say he buys ringtones,
now, that is music. The alliance get a royalty but
under a separate licence, the ringtones licence. They
cannot claim an extra royalty for that sale under this
licence.

Say he buys wallpaper, as I said, the alliance do
not get a royalty at all because the wallpaper does not
require a licence from their members.

So how is the revenue that the MNO receives for the
Jaguar advert treated under the new JOL? They get a cut
of the Jaguar advertising revenue even if the user buys
wallpaper or if he buys nothing at all. None of this,
we say, can be right.

Now, another point I want to show you now is that
one needs to consider the purpose of the advertising by
the MNO. The facts that I just want to bring out are
class 2 confidential information so I am simply going to
ask you to read them in Mr Bill's statement and then
I will make a point about it. So if you could take out
bundle I, please, and turn to tab 8.

THE CHAIRMAN: Is this supplemental?
MR CARR: Yes, it is bundle I, it says "Supplementary Evidence", and you will find the statement of a Mr Jonathan Bill at tab 8. If you turn, please, to paragraph 19. I will ask you to read the paragraph, the highlighted bit is confidential. Tab 8, please, and turn to page 94, paragraph 19.

THE CHAIRMAN: Let me read it. (Pause).

MR CARR: Now, the point of particular importance to my present submission is the reference to the down side of advertisements. In these circumstances, it is obviously wrong that the alliance should be entitled to claim a royalty in respect of advertising where the MNO is positively seeking to avoid any connection between the advertising and the music. Yet under their definition of gross revenue they do, simply by virtue of the fact that the MNO offers a music service from some other page.

I now want to give you another double recovery example. Let us assume that on a mobile screen you see a click-through advert for iTunes, so you click on it and on your mobile screen up pops iTunes, and iTunes pays the MNO 10p.

THE CHAIRMAN: In the present format, Mr Carr, I am having some -- because I look at iTunes, I really have great difficulty in understanding how anyone who is not
equipped with a magnifying glass can ever see what is on
the page.

MR CARR: Mr Bill makes some points about that, that it is
quite tricky to do that. But you will already find on
mobiles that you can go onto the internet with this WAP
zone. I find it impossible, personally, because
I cannot see anything. But on the other hand, I am
always amazed at my children's facility for texting and
looking at the internet on mobiles. People do it.

THE CHAIRMAN: Yes.

MR CARR: They are special pages. They are different,
special pages.

THE CHAIRMAN: And they are slightly bigger too. But even
so, I notice that when I get e-mail messages from
a mobile, the spelling mistakes and the errors are --
well.

MR CARR: We could go on about this like two grumpy old men
for ages but we had better not.

THE CHAIRMAN: Let us assume that a new generation equipped
after this reference with biotic eyes can somehow read
the iTunes.

MR CARR: So iTunes pays the MNO let us say 10p for each
consumer that clicks on the advert, so they are on the
iTunes site on their MNO screen.

So I am -- not me, but somebody is a consumer, comes
to the MNO's music service. Sees the iTunes
advertisement, clicks on it and purchases a song from
iTunes for 79p. He has chosen not to buy the song from
the MNO's route possibly because it is cheaper to do it
on iTunes, as you know. If he does so, the new JOL
would result -- what the alliance would pose is that
they get a royalty on 79p from iTunes, plus the 10p,
even though the 10p, the iTunes advert, relates to no
act for which the MNO would need a licence from the
alliance.

Now, let me take it a little bit further. Assume
when the consumer went to iTunes there was an advert on
iTunes for a holiday. What happens then under the
alliance scheme? They get a royalty on the 79p, on the
10p, and on the holiday advert on iTunes. Where does it
ever stop? It goes on and on and on.

Now, another example I want to show you, if you turn
to page 49, please, of my skeleton.

THE CHAIRMAN: Shall I put Mr Bill away?
MR CARR: Yes, please. Put Mr Bill away.
THE CHAIRMAN: Just a moment.
MR CARR: Now, you will see here a Google search page.
THE CHAIRMAN: Which page again?
MR CARR: Page 49. And I am sure we have all looked at this
in the past, are all familiar with this from our
computers. And imagine now, please, that every page on
a mobile phone, including the music page, has the Google
search bar on it that you see near the top of this page.
So it has the little Google thing in the search bar on
every page of the mobile, which is a possibility, and
the user can therefore do a Google search from any page
on his mobile, and we will say that Google pays the MNO
either a fee or a revenue share for allowing this
facility to be provided.

Under the definition of "gross revenue", the
alliance lay claim to a share of the money paid by
Google to the MNO. There is no doubt about that
because, in my example, the Google search bar is on the
music page.

Now, on what possible basis could they lay claim to
the revenue under the Google search facility? The first
point is that the Google search facility becomes part of
the overall functionality of the MNO search. You can do
a Google search. Now, let us assume that a user is on
any page of his mobile, we can take the music page, any
page, the finance page. He has not bought anything but
he is bored of it. He thinks: I will do a Google
search. I would like to do a Google search about the
Albigensian Crusades because I am writing a book about
it.
THE CHAIRMAN: It assumes you are Jonathan Sumption.

MR CARR: Exactly, I thought you might pick that one up. So there is Mr Sumption and he thinks: I will do a bit of research. Apparently the alliance get a royalty as a result of Mr Sumption searching about Albigensian Crusades. It cannot be right.

Let us assume it is a Google search about music. You see an example on page 49. Somebody has clicked in Robbie Williams. Why should the alliance get a royalty? Users do not require a licence from the alliance to do Google searches for Robbie Williams. The case is: it is a music-related thingy, so we get it. If it is on a music page, we definitely get it.

THE CHAIRMAN: That is the only thing one does with Robbie Williams. It is music.

MR CARR: So even though nobody is buying anything, we still get a royalty.

So we say that cannot be right.

Now, let me now deal with the alliance’s point which is: what happens if the MNOs subsidise music, rather than making it free, they subsidise it. They give an example. They say: what if the FDP price -- so the price you will be charged -- drops, let us say, from £1 to only 10p, and the 90p, as they put it, is made up by advertising. What happens?
Well, there are several answers to this. We say it is a particularly bad example from the alliance's point of view. The first point is that you know, I think, that the alliance sought minimum royalties and got them in the new JOL. Not as much as they originally asked for but they got minimum royalties. And the purpose of why they sought and obtained minimum royalties is very important at this point.

If I can invite you to look at the agreed facts again. So my skeleton, page 39, agreed fact 12. You say that one of the alliance's stated purposes was to provide a minimum level of compensation, and another was to protect the alliance's members against extreme underpricing. And that is what it has done. If the price drops to 10p, as they have suggested in their example, the minimum royalty kicks in. If the price drops to 20p or 30p, the minimum royalty kicks in. The minimum royalty kicks in because you will recall it is 4p, it kicks in all the way up to 59p.

Now, that is what the parties have agreed for this purpose. That is what is in the new JOL and that is what has apparently satisfied the alliance's members against this underpricing problem. But they want to have the advertising as well, because of fears of underpricing. That cannot be right. They have already
covered it. And I pick on their example of 10p because it shows how they have already got it. It cannot be excused for expanding the revenue base as well.

My second point is if you include advertising in the revenue base, the royalty increases even where there is no price drop. So the fear is we have got to have it in, in case prices drop. But let us say the price stays at £1. They still get their £800,000 extra in the example I showed you. It does not matter whether there is a price drop.

Furthermore, let us say there was a price drop that cost them, I do not know, £8,000 in royalties. The effect of including advertising is they get that back plus a huge, many, many multiples more. That cannot be right either.

And the alliance seem to assume that all of the applicants, including the MNOs, will somehow manipulate their pricing structure with the aim of avoiding royalty payments. The minimum royalty would kick in if they did. But of course, the MNOs' position is that it is a complete misunderstanding of their business. They are going to choose the pricing structure that is most attractive to advertisers and consumers. Their object is to make money out of PTD sales.

Now, a further point that I want now, a separate
point I want to return to is the fact that in correspondence, I have shown you lots of examples. Mr Bill has confirmed in his evidence that these examples are realistic representations of what the MNOs intend to do. And the alliance were asked repeatedly in correspondence, as I have mentioned in my skeleton, to say: all right, which ones do you say fall within your definition. Which ones are you actually claiming royalties on? And they refused to say. Their position is: we do not want to discuss examples. We want to discuss general principles.

Now, there are three obvious problems to that. The first is, it is essential to have clarity in respect of the revenue base; otherwise the licence becomes unworkable. It is a bit like a patent claim where you cannot tell whether or not you infringe. It is unworkable.

THE CHAIRMAN: Well, we obviously do not want to put anything in our decision which implicitly requires people to keep disputing and coming back all the time.

MR CARR: Quite.

THE CHAIRMAN: Nothing is perfect.

MR RABINOWITZ: Perhaps I can help on this. We are producing, and my learned friend will have by the end of day or tomorrow morning -- there are all kinds of
reasons why it was not appropriate to do it before,
including the time pressure -- but my learned friend
will have by tomorrow morning a response in relation to
each of the examples he has given, identifying whether
we accept it is or is not.

THE CHAIRMAN: That is very helpful.

MR CARR: Very helpful. What I would say is that --

THE CHAIRMAN: But I think then by tomorrow morning, I will
anticipate Mr Carr and his team will be thinking up yet
further examples.

MR RABINOWITZ: No doubt. We will just have to deal with
that then; which is one of the reasons it is better to
deal with it on principle, which is our original
position.

MR CARR: Do you know what? It is a very interesting point,
there. The alliance have had these examples since the
31st October. They have a definition which they say is
clear, simple and workable. They have QCs considering
whether these examples fall within their definition or
not. Due to time pressure, they have repeatedly said,
"We are not going to tell you". Apparently they will be
able to deal with it tomorrow.

MR RABINOWITZ: I am going to respond to that now, because
Mr Carr is making, with respect, a very unfair
complaint. It may be that Mr Carr, in his position
dealing with simply one issue in this case, has all the

time in the world. On our side, we are dealing with

complaints not only by Mr Carr and iTunes, but a whole

raft of complaints as you have seen by the MSVs and --

THE CHAIRMAN: Up until recently, others.

MR RABINOWITZ: Indeed. And we do not have all the time in

the world; and even in relation to this dispute, we do

not have all the time in the world simply to please

Mr Carr. We are doing what we can. And as I have tried

to indicate, he will have by tomorrow morning

a response. If there is something else he wants to say

about the position, that is fine. But that is the

position.

THE CHAIRMAN: Thank you. That is understood.

MR CARR: Well, that is very helpful. As I say, the answer

in correspondence --

THE CHAIRMAN: I mentioned it because one finds that if in,

particularly an opening, there is a sort of "tit for

tat" answer, answer, answer, reply, reply, et cetera.

You often find that you get nowhere at the end of

day and that you do need a point of principle. The

only thing is that human nature and the limits of

language being what they are, there may be a limit to

a point of principle. That is our problem.

MR CARR: Exactly. And the problem, the position the
alliance have stated in correspondence is not that they did not have time, but that they only wanted to discuss the general principle.

Now, the problem with only discussing the general principle is that what we are concerned with here is the practical effects of what this definition will have, from my point of view, on the business of the MNOs. So I look forward to hearing what my learned friend will tell me and I may well wish to say more about it.

Now, the final bit of confusion, we say, arises from paragraph 8.33 of the alliance's skeleton. They have had a little go of at least looking at one of the examples.

THE CHAIRMAN: Just a minute. 8.33. This is the tripartite test?

MR CARINE: You are on page 35, are you?

MR CARR: I am, I am on page 35. And they say:

"A home page not within the scope of gross revenue where ..."

And they have got the three-part test. And they say:

"An example of such a home page is at annexe B to the alliance's statement."

So I thought: good, I am now going to find an example where they actually accept it is not within.
Let us have a look at annexe B again, please, the
eexample they are talking about, which is page 44 of my
skeleton.

THE CHAIRMAN: Your skeleton, yes. This is not within.

MR CARR: Not within. If you look at it, it does not have
a music service at all. Do you remember, it is the one
where I told you. It does not have a music service at
all.

THE CHAIRMAN: Yes, you had to suppose that one had been
inserted.

MR CARR: The reason why this example is being conceded as
"not within" is precisely because it does not have one.
It is not surprising, we say, that the alliance
say: yes, we accept that this particular home page is
not within, because it does not appear that the MNO is
offering a music service at all.

The question that arises is of course: what if music
was listed in between film and TV guide? Well then, it
would not satisfy the three-part test, because music is
actually offered from the home page and we do not
believe that the alliance yet accept that music is only
an insubstantial part of the suite of services offered.

Maybe I am sure that Mr Rabinowitz will clarify that
point, on the basis that music was actually there.

MR RABINOWITZ: In fact, it is clarified at paragraph 8.34.
THE CHAIRMAN: 8.34?

MR RABINOWITZ: Indeed. He showed you 8.33. Look at 8.34 too.

MR CARR: That is very helpful. So if music is in there, in between film and TV guide, I assume the home page is in there.

THE CHAIRMAN: Say again?

MR CARR: 8.34 appears to be suggesting that in my example, if you had a music entry between film and TV guide, the home page is in.

THE CHAIRMAN: Is it? Yes.

MR CARR: With all of the problems that I just suggested about putting home pages like that in. You could have no interest whatsoever in music.

What I believe is the position is that the alliance, particularly because of their insubstantial part of the suite test, basically contend that all of the -- it enables them to contend that all advertising is in.

Now, there is only other main matter.

THE CHAIRMAN: Just a minute. (Pause). Yes.

MR CARR: Now, the alliance in their skeleton seek to suggest that there is a complete disharmony between the MNOS, webcasters and iTunes in relation to the treatment of gross revenue. We do not accept that that is the position at all; to sort of drive a wedge between
everybody. If you look at my skeleton, please, at
paragraph 92 and 93.

THE CHAIRMAN: Yes, there is a divide and rule.

MR CARR: Exactly, there is a divide and rule policy.

THE CHAIRMAN: 92?

MR CARR: Yes, 92, page 36. You have a table here and you
have what I will call "the second row" which says
"banner adverts on pages for which music can actually be
consumed". Do you say where I am looking at?

THE CHAIRMAN: Yes.

MR CARR: And we have the various solutions proposed by the
different parties; in if music is free, in if music is
subsidised, in if directly attributable.

The position is that each of the applicants or
potential licensees have proposed slightly different
triggers to where the advertising should come in. But
the principles are all the same. They all object to the
way that the alliance are treating it at the moment.
And we fully accept that all of these proposals are
infinitely preferable to that suggested by the alliance.

It is quite interesting. The alliance attack the
MNO's proposal on the basis that it prevents them from
what they call "participating in the advertising
revenue". That is what they say.

They attack itunes' proposal on the basis that it is
far too complicated. They attack the webcasters' proposal on the basis that it is the worst of all and they are totally unreasonable for not having agreed with the BPI. They end up with a solution which, subject to a few fig leaves, which make no difference in practice, as soon as an MNO offers a music service as part of a wider or more complex whole, its advertising revenue is going to become subject to the 8 per cent royalty for the reasons I have shown you.

Now, the final matter that I wish to deal with, I just have time to do, is this in some ways is a very unusual case; because prior to cross-examination in the alliance's skeleton, there is an extremely personal and serious attack on Mr Boulton and I want to say a few words about that. And I want to refer you to it.

In the alliance's current submissions, they say they are also relying on their current -- on their previous opening submissions. And I want to show you some of the things that are said there.

You will find if you can dig out, please, folder X2. And turn to tab 7 which appears to be the first tab. This is the alliance's original opening submissions.

And turn, please, to page 28.

I will just read this out if I may.

THE CHAIRMAN: Just stop a second.
MR CARR: Page 28, paragraph 6.5.3. This is what is said:

"Surprisingly, Mr Boulton's reports agree exactly
with each of the applicants' cases in every detail,
including the precise rates proposed by the applicants,
except one minor issue. In the matter of this
complexity, it would be a surprising coincidence to find
a genuinely independent expert who agreed with his
client's case in virtually every detail, down to the
last percentage point."

None of this is accurate, but we will come to that
later:

"The reality is, however, that Mr Boulton has not
attempted to exercise independent judgment, but instead
is principally an advocate for his client's case."

So an accusation of bias prior to cross-examination.

I want to show you one more point, page 55.

THE CHAIRMAN: Yes, Mr Boulton is a barrister.

MR CARR: He is a barrister. He is a highly distinguished
expert and a barrister. If you now look, please, at
page 55, paragraph 8.4.1.

THE CHAIRMAN: Just a moment.

MR CARR: They accuse Mr Boulton of accountancy slight of
hand.

Now, the courts have observed in the past --

THE CHAIRMAN: It is not the first time I have seen this
where accountants are involved.

MR CARR: Absolutely, but the courts have observed in the past; one needs to be very careful about attacking an expert witness because an attack of this nature is an attack on his reputation. What is striking about this case, which I have never seen before, is that this attack is being made before he has been asked a single question in cross-examination.

And a further concern we have about this approach is the amount of money that appears to have been expended in attacking, a preparatory attack on Mr Boulton's credibility.

Please go to my skeleton, please, back to my skeleton.

THE CHAIRMAN: Put X2 away?

MR CARR: Please put X2 away, please.

THE CHAIRMAN: Your skeleton. Yes, where?

MR CARR: Paragraph 81 and 82. Let me just set the scene for this.

You may remember or you may be aware that Mr MacGregor, another accountant, prior to the settlement with the BPI and so on, served two very, very lengthy reports. They were essentially directed to what in patent cases have been called "profits available". How much profit --
THE CHAIRMAN: I spent some time reading them.

MR CARR: Yes. Profits available are generally regarded, as
the court said, as the last resort because of the
difficulties.

THE CHAIRMAN: Are you thinking back to extension cases?

MR CARR: I am thinking back to the licence of right cases
like Semeta Dean(?), for example.

THE CHAIRMAN: Yes, those sorts of cases. I can tell you
all now that I was in those cases, as you have been, and
we have seen in the hands of able expert witnesses who
are chartered accountants, like the late
Mr Giddley-Kitchen, enormous profits of millions
disappearing and becoming losses of millions.

MR CARR: Or on the other hand --

THE CHAIRMAN: I do not regard that as being dishonest as
such. I mean, it is good subject for cross-examination.

MR CARR: But there was this huge lengthy thing --

THE CHAIRMAN: Accountants do it.

MR CARR: They do. This huge lengthy thing about what are
the MNO's costs and profits. All relevant, apparently,
to royalty rate. Royalty rate has now been settled.
Royalty rate has now gone, we are agreed, 8 per cent.
Mr MacGregor has served a third report going on
about costs and profits after the settlement, which
continues to go on about the MNO's costs and profits.
It has gone. It is a bit like one of those Japanese
soldiers who are lost in the jungle. They have not been
told the Second World War is finished.

They are still spending money going on and on and on
about MNO's costs and profits. The reason for this, if
there is a reason, appears from the correspondence
bundle. If I can invite you to look, please --

THE CHAIRMAN: There is an unstoppable quality about some of
these.

MR CARR: It is like a dog with a bone. It will never end.

Anyway, let me look at what the supposed justification
is. If you look at, please, at correspondence bundle 3,
which hopefully you have. (Pause).

This is a letter, if you turn to page 778, where the
alliance identify what evidence from the previous --
prior to the settlement they are going to rely on at
this hearing. Page 778.

THE CHAIRMAN: Just a moment.

MR CARR: If you turn, please, to page 779.

THE CHAIRMAN: I have not read this.

MR CARR: No. The alliance say they are going to rely on
various parts of Mr MacGregor's evidence. In
particular, relating to B:

"Mr Boulton's overall approach to the preparation of
his reports."
So we are going to get a whole lot of stuff in here about costs and profits in respect of an issue that is settled, because of an attack on Mr Boulton's overall approach to his reports.

As I have just said, it is not only the previous evidence; they have continued the battle with a new report. I have no doubt that this cost vast amounts of money to produce; and when it comes to cost, depending on the way Mr Boulton's cross-examination is handled, I would like to refer back to that a little more.

Now, I said I would finish.

THE CHAIRMAN: Yes.

MR CARR: I have finished. Subject to any questions that you gentlemen may have, that is what I want to say.

THE CHAIRMAN: You have signalled that in the light of the replies to your examples that apparently will be forthcoming, you would like to reserve the right to make some comments on those.

MR CARR: Exactly.

THE CHAIRMAN: That seems to be reasonable.

MR CARR: I was, I must say, very heartened by Mr Rabinowitz's view that I have infinite time, and I may well take a cruise in the light of that. But assuming I am still here.

THE CHAIRMAN: At the end of this, everyone will take
a cruise.

MR CARR: I would just like to hand in. A few of the bundle references have changed since we handed our skeletons to you. Can I hand in a little sheet where there are updates on where you will find things in bundles.

THE CHAIRMAN: That will be very helpful. And when you have done that, I have a question. (Handed).

I would like to borrow, if I may, Amber for a few minutes to go to some papers that I have in the tribunal's room, to see whether or not they have been incorporated into this bundle.

During the month or nearly a month that we adjourned, I received about three or four inches of papers. And although with some enthusiasm I from time to time looked at them, I certainly did not read them all. And I can see one copied to "His Honour Judge Fysh (in chambers)" that I cannot remember reading this letter at all.

So perhaps you would just come with us and we will have a look. I have got a pile of papers this big in our room.

MR CARR: Are we going to take our break?

THE CHAIRMAN: Now, let us take ten minutes. Let us come back at half past. Thank you.

(11.16 am)
(A short break)

(11.32 am)

MR ARNOLD: Mr Carr, I have a question arising out of your last thing. You may not know the answer, but perhaps if someone could look at it.

On page 44 of your skeleton; when we were looking at the Orange World on the top left hand one and you said that there might well be a music click through in there, what does the situation say with the film click through, with the people who collect royalties for films? Are they treated the same way as the alliance are proposing to treat --

MR CARR: That would be under a separate licence.

MR ARNOLD: I agree. Do you know what they actually do in terms of including the advertising in the revenue base?

MR CARR: Under whatever licence, for example, the film studio has. I do not know. I can try and find out.

MR ARNOLD: It is just interesting to see how they are dealt with.

MR CARR: I do know, and we will explore to some extent in cross-examination, what the record companies do. We will explore that. The films, I can try and find out about that.

THE CHAIRMAN: Also, Mr Carr. One thing we have been discussing, and I am not inviting you to go into the
thing with your witnesses or any of your witnesses in
great detail. But we are intrigued as to how the
reporting is effected.

I recall once that I spent an amusing afternoon in
the top floor of Berners Street, the Performing Rights
Society, with a pair of earphones on, monitoring all
kinds of radio stations all over the world. And they
had people actually physically checking the reporting.
I would be just interested to know how this is done. If
hits are recorded automatically and --

MR CARR: I will have a look and see what the new JOL says
about that.

MR CARINE: There must be an electronic link triggering it.
You cannot rely on paper in this day and age.

MR CARR: But I do not know the answer to that question,
because of course it is not something I have been
thinking about.

THE CHAIRMAN: Do not worry, Mr Carr, at the moment. But if
somebody could just give us a little goon's guide to how
that works.

MR CARR: Certainly.

THE CHAIRMAN: Thank you very much. So thank you, Mr Carr.

Jet let me put this party correspondence away and we can
get on with Mr Rabinowitz.

MR RABINOWITZ: Mr Weisselberg firstly.
Opening submissions by MR WEISSELBERG

MR WEISSELBERG: Coming at the end of a line of detailed
openings, I am obviously aware of the need not to tread
ground that has been covered.

What I will attempt to do is just to show where
iTunes comes at this position, this question from, and
to adopt, where appropriate, the submissions made
particularly by my learned friend, Mr Carr, in relation
to such matters as the actually offered point.

What I would propose to do is structure my opening
in the following way. I deal first with the question as
to why iTunes is here.

THE CHAIRMAN: Yes.

MR WEISSELBERG: The second question will be to look at the
contours of the iTunes dispute in detail.

Third, look briefly at the legal framework and the
approach that iTunes says this tribunal should take.
Fourth, look at the issue of principle and the question
of nexus. Fifth, then briefly deal with comparables.
And sixth and finally, the issue of practicality, what
iTunes says is the appropriate practical answer to the
issue of principle that is raised on this side of the
room, as to how you establish nexus and what you do when
nexus is established.

THE CHAIRMAN: So why are you here?
MR WEISSELBERG: Why are we here? Rather than being overly philosophical or esoteric, what I would like to say is that what we see is that new technologies have created a more complex process than perhaps has been seen in the past. What the MNOs and the MSPs offer is a range of services, the services are provided in a multitude of ways. There are often multiple revenue streams, and they are not always linked in a straightforward manner to any particular service.

So in the face of that apparent complexity, what should the tribunal do? One option is to shut your eyes to the complexity and go for something that appears to be simple and fits all.

THE CHAIRMAN: Certainly there have been suggestions in past decisions of this tribunal that we should really try and, in spite of imperfection, go for what is simplest. Because there is less scope for dispute in the future.

MR WEISSELBERG: And that is certainly what the alliance and the academy argue in this case on one level. What they say is in the face of the complexity of revenue streams, bring it all in.

We say the option is simple, but we say on this side of the room, it is more than simple; it is actually simplistic because it ignores what are the true nexuses between the revenue streams and the use of the
alliance's rights.

As Mr Carr has outlined, the test endorsed in case after case is whether there is a sufficient connection or nexus between a particular revenue stream. iTunes says that, generally speaking, no sufficient connection between advertising revenues in dispute and the licensed being brought into the royalty base. Because that is the position the alliance adopts in respect of iTunes. Effectively, it says, because you provide a music-related service all of your advertising revenues should come in, subject to some form of apportionment apparently between music and non-music related items.

The question then is: if you are unsatisfied with the simplistic analysis that the alliance puts forward, what should you do? The alliance’s response to the three options that you are presented with in this tribunal is the following: the MSP’s proposal is said to be too vague. The MNO’s proposal is said to be too big, and the iTunes proposal is said to be too complex or difficult.

We invite the tribunal on this side of the table, this side of the room, to cut through that type of submission and to look at the detailed reasons why the three particular parties put forward the answers that they do, while accepting that the reason why we put
forward these different analyses is because we do not
accept the extremity of the position that the alliance
is seeking to put forward.

We say there is an easy way to come up with
something more nuanced and that is what the tribunal
should do. To use a terrible buzz phrase, we invite the
tribunal to produce a model that fits the particular
purposes for which the alliance's rights are being used.

Now, of course this may appear to be more complex
than the all-in answer contended for by the alliance.
That is inevitable. But we say that is no reason why
the tribunal should shy away from grappling with the
issues of principle that everyone on this side of the
room raises, and also engaging with the particular
practical solutions that the parties put forward.

As to the particular services offered by iTunes, and
why iTunes is here, there is a dispute between the
alliance and iTunes as to whether or not iTunes
currently gets advertising revenue at all. iTunes
says: we do not. And Mr Cue's third witness statement
makes that clear. The alliance have suggested that we
do, and that is a matter that will need to be raised in
evidence and by cross-examination.

If iTunes does not raise advertising revenue, why is
iTunes here? iTunes considers that it is important to
establish now the framework within which advertising
revenue will be treated in the future should iTunes
decide to raise revenue in that sort of way.

THE CHAIRMAN: Now, stopping there. At the moment iTunes,
I will be quite frank, maybe I should have told you all
about it at the beginning. I subscribe to iTunes and
you saw me flash my little machine around. At the
moment they tell me -- every week, I think it is, I have
an update of what is available, what people think about
various pieces of music, pop, classical, folk, the lot.
It is a shop, as you know, it is the iShop. You can
pick up what you want, buy what you want. You are sent
your account. It is debited, that sort of thing. I do
not see anything but iTunes business on that site at the
moment.

Now, are you telling me that they may want to do
something in the future?

MR WEISSELBERG: Exactly. They may want to have banner
advertisements in the form that Mr Carr showed you in
his skeleton argument.

THE CHAIRMAN: You have answered my next question. That
sort of thing, a strip along the top.

MR WEISSELBERG: They may want click-throughs, you click on
the advert and you get a product as a result of clicking
through and they may earn commission as a result of the
click-through.

But what iTunes says is: if it decides to go down that route of obtaining advertising in that way, the reason for iTunes being able to secure advertising revenue is not about the music that it offers; it is about the strength of the iTunes brand, it is about the strength of the Apple brand. It is about the ubiquity of the iTunes software; both the jukebox and the iTunes store that you were talking about a moment ago, sir.

It is also about the presence and availability of things other than music, so a whole spectrum of content: films, games, other things that people might want to have access to, look at consider buying. And advertisers want to have access to those eyeballs, as Mr Steinfeld pointed out.

The question as to why people might advertise with iTunes, as against somebody else, is related to those matters. It is not related to music. Why come to us rather than Google? Why come to us rather than Yahoo? The answer would be: because of who iTunes is, not because of the music that is being offered on the site.

So why are we here?

THE CHAIRMAN: You are just offering music, are you not?

MR WEISSELBERG: We also offer games.

THE CHAIRMAN: Of course.
MR WEISSELBERG: So there are there other types of things iTunes offers.

THE CHAIRMAN: It may not be relevant to know what they are.

I could always go to my site and look. But games I do remember, I looked at that. Also you do some video stuff?

MR WEISSELBERG: Both music and I think non-music video.

THE CHAIRMAN: Exactly so.

MR WEISSELBERG: So I accept that the presence of music is something that makes iTunes, to an extent, what it is.

It is, at least in part, a music store.

THE CHAIRMAN: That is how you start it.

MR WEISSELBERG: Absolutely. But the question as to what is a driver for us to receive advertising revenue, the answer cannot be the music, we say. The answer must be who we are.

And so in answer to your question as to what else we offer, we also offer books.

THE CHAIRMAN: Books?

MR WEISSELBERG: Audio books.

Turning then to my second issue.

THE CHAIRMAN: I see, audio books.

MR WEISSELBERG: Spoken word.

THE CHAIRMAN: Yes. And they would be in the form, so you would obviously put them in the usual way on your
 MR WEISSELBERG: So you could listen to Jonathan Sumption's
 book on your iTunes.

 THE CHAIRMAN: Yes, I cannot wait to hear Mr Sumption's book
 on the Albigensian Crusades.

 MR WEISSELBERG: I would like to turn to my second issue,
 the nature of the iTunes disputed contention. For that,
 I would invite the tribunal to take up bundle H.

 THE CHAIRMAN: I have it.

 MR WEISSELBERG: And turn to tab 1, please. Yesterday, sir,
 you were asking where the new JOL was and how the
 settlement agreement fit together. If I could show you
 very briefly in this tab how it works.

 THE CHAIRMAN: That would be very helpful, yes.

 MR WEISSELBERG: Tab 1, one sees from page 1, the agreement
 reached between the alliance, the academy and number 4,
 the BPI, and iTunes and others -- the other six to nine
 being the MNOs -- on the 28th September.

 The agreement runs from page 1 to page 12. You have
 already been shown some of the non-assistance clauses by
 Mr Steinthal, but what starts at page 13 is the
 beginning of the new JOL, and pages 13 to 48 --

 THE CHAIRMAN: Thank you.

 MR WEISSELBERG: -- contain the new JOL.

 THE CHAIRMAN: Yes. Speaking for myself, I have not read
the whole thing at all.

MR WEISSELBERG: I do not intend to take you through it in minute detail. What I would just show you, sir, is page 44 of the bundle. My learned friend Mr Carr set out in his skeleton argument the definition of "gross revenue". There it is in the JOL.

THE CHAIRMAN: Just a moment. This is what is reproduced in Mr Carr's skeleton?

MR WEISSELBERG: Absolutely.

THE CHAIRMAN: Yes.

MR WEISSELBERG: The only other thing I need to show the tribunal is over the page at 45. What Mr Carr set out in his skeleton was the definition of gross revenue.

THE CHAIRMAN: Yes --

MR WEISSELBERG: And then 2, A, B and C.

THE CHAIRMAN: He put B and C.

MR WEISSELBERG: And those paragraphs in amended form are also included in both Mr Carr's supplemental statement of case and in iTunes' supplemental statement of case, showing the amendments that we would make to those clauses.

THE CHAIRMAN: To this.

MR WEISSELBERG: To this clause.

THE CHAIRMAN: Mr Carr, for example, has got that in annexe 3. Mr Carr just confirmed that is correct. His
suggestions, green lining, if I may call it, yes? And
you have got a green liner too.

MR WEISSELBerg: Yes, sir. And our green line appears in
our supplemental statement of case.

THE CHAIRMAN: Yes.

MR WEISSELBerg: Which is in A6, if it is convenient to go
to that now.

THE CHAIRMAN: Right. Let us do that. I am going to make
a note, see A6 for ITunes. Is this again, are we
looking really at definitions?

MR WEISSELBerg: What we are looking at --

THE CHAIRMAN: Tab 2?

MR WEISSELBerg: Tab 6 -- is our supplemental statement of
case. And at page 126, we have the proposed amendments
to the new JOL.

THE CHAIRMAN: What is green-lined and what is red-lined
here?

MR WEISSELBerg: It is shown in deletions and underlinings.

THE CHAIRMAN: But it would be very helpful to have --
because this is going to feature strongly in what is
going to happen at this hearing, to have each party's
contentions in green line and red line. Because they
are not the same. That is correct, is it not?

MR ARNOLD: Yours is underlined, is your words, and
deleted -- there are no deletions.
MR WEISSELBERG: There are deletions.

THE CHAIRMAN: The deletions are the old red linings.

MR ARNOLD: Over the page.

THE CHAIRMAN: And if you could do that, not immediately, but it would be quite useful for everybody's versions. Because ultimately this is one of the things we are going to have to work on. All right, sorry to interrupt you.

MR WEISSELBERG: Absolutely; sir. What we would envisage doing is: iTunes contend this, MNO contend this, all on one.

THE CHAIRMAN: We might even have them in a little booklet.

MR WEISSELBERG: So, sir, we can put away the H bundle and we can put away the I bundle for the time being.

THE CHAIRMAN: Mr Weisselberg, I have not cross-checked all these different versions. I am hoping that in due course somebody will perhaps -- the alliance will draw my attention to the different versions and the inferences and consequences that result therefrom. Okay, so we will put this away?

MR WEISSELBERG: Put A6 away.

THE CHAIRMAN: Yes, thank you.

MR WEISSELBERG: So what has iTunes agreed with the alliance? iTunes has agreed to pay 8 per cent of the retail price of permanent downloads. It has agreed to
pay 8 per cent of in-stream advertisements. We have called them in-download advertisements to reflect the nature of the service that we provide, but there is no difference or no material difference between in-download and in-stream advertising. And we have also agreed to pay minima of 4p per download.

Why have we reached the above agreement? We have reached the above agreement because we accept that the retail price of permanent downloads and of in-stream advertisements have sufficient nexus with the use of the alliance's rights to mean that it is reasonable for a royalty to be paid.

In relation to minima, we have agreed them again. For commercial reasons, they were not part of the original schemes that the alliance promulgated. They appeared first in the alliance's answer to the various statements of case in December last year. But by introducing and agreeing to minima, the alliance and iTunes have effectively closed off the dispute that they had over extremes of underpricing.

THE CHAIRMAN: Yes. That was the stated purpose. Yes.

MR WEISSELBERG: So a solution has been found to meet the concern that the alliance had over underpricing generally within the music service provider community, and in respect of iTunes in particular. iTunes did not
accept those allegations but was prepared for commercial
reasons to agree to minima at an appropriate level, and
what BACS and the alliance made clear is that the
importance of minima is to protect the alliance from
extremes of underpricing, and to provide a workable and
cost-effective solution to potential unbundling
problems.

So that is what we have all agreed, what is in
dispute.

THE CHAIRMAN: Would you accept with unbundling, that could
give rise to complications?

MR WEISSELBERG: Unbundling can be complicated. Unbundling
may be necessary, notwithstanding the existence of
minima. And the current new JOL anticipates some form
of apportionment in the alliance's terms, unbundling in
our terms, of various types of revenue in any case.

What is the dispute? The dispute is set out in the
settlement agreement that we looked at a moment ago in
paragraph 3.2. So it is back in bundle H, page 3 of
tab 1.

THE CHAIRMAN: Shall we read 3.2?

MR WEISSELBERG: Sir, I think that might be sensible.

(Pause).

THE CHAIRMAN: So you call that iTunes' disputed contention.

MR WEISSELBERG: Absolutely. If one looks at 3.1
immediately above that paragraph, we say the MNOs' disputed contention also set out.

THE CHAIRMAN: Yes. Could I ask, is this document confidential?

MR WEISSELBERG: No.

THE CHAIRMAN: Thank you.

MR WEISSELBERG: The way that we characterise the iTunes disputed contention is, in effect, a question as to the dividing line as to sufficient connection. Where does adequate nexus arise for the alliance to have access to advertising revenue?

What iTunes does is it uses the alliance's rights by selling copies of musical works to members of the public. Members of the public pay iTunes for the sale of those works, and as a result of that deal, the alliance receives its royalty share. That revenue stream, we say, is plainly sufficiently connected to the use of the alliance's rights to mean that they should be entitled to royalty.

What we then do is perhaps contrary to the comparable, the immediately comparable position off-line of the CD retailer, is we offer the alliance an additional revenue stream. We say we are being generous, the alliance say we are being complex and seeking to cheat composers and publishers out of fair
return for their work.

I say it is an additional revenue stream, because if we were a retailer of CDs they would not be entitled to that revenue stream at all. See Mr Carr's example of the Amazon website and the iTunes website, the banner; one pays royalty, one does not.

We are offering royalty, but only in particular circumstances.

THE CHAIRMAN: A limited offer, in other words.

MR WEISSELBERG: A limited offer. And we say that that reflects a reasonable position between the extreme position adopted by the alliance and the "they get nothing at all" which no-one is saying on this side of the table they should get nothing at all. It is only: in what circumstances should they get nothing?

And we say there are two conditions. The first condition is that the licence service is actually offered from the web page on which the advert actually appears. That has been characterised as the "actually offered" point. And on that Mr Carr and I walk hand in hand towards the sunset of the judgment that this tribunal will give. We do not disagree on "actually offered" at all.

The second point is iTunes says: where the licence service is being offered at a discount which reflects
the receipt of advertising revenue, then it is
appropriate to bring that advertising revenue within the
royalty base. And that can be characterised as the
artificially depressed point. Indeed, another way of
putting it is the subsidisation point where the price
paid by the user is subsidised by the receipt of
advertising revenue. iTunes accepts, subject to the
point one of "actually offered", that those advertising
revenues should be brought within the royalty base.

We have done that to be reasonable.

THE CHAIRMAN: Just stop a second. Yes, all right.

MR WEISSELBERG: We have done that to be reasonable. As
I said, it is a concession from a strict comparables
position. But we do it because we are willing to offer
something to the alliance where advertising revenues
begin to be generated by iTunes.

The alliance, on the other hand, wants this
additional revenue stream in all the types of example
that Mr Carr gave you. He gave you predominantly
examples derived from mock-up MNO pictures. There is no
difference in reality between the iTunes' position and
the MNO position in terms of what is on the screen.
There is dispute, there is difference as to size of
screen, how you deal with the type of service that the
MNOs provide. But in terms of whether you determine
that advertising revenue is related to music or not, there is no material difference between the examples given to you in some detail by my learned friend, Mr Carr, and the position that iTunes adopts.

So for iTunes, the position on the alliance's case is that iTunes' home page, where no licence service is offered but an advert appears, should fall within the royalty base. It is a music-related page so despite the fact that you cannot access music from the iTunes home page, the alliance should be entitled to a share of that revenue.

Similarly with Mr Carr's examples about reviews of artists. The alliance says it should be entitled to receive royalties on adverts that appear on such pages despite the fact that no licence service is actually offered from that site, that page.

We say where the licence service is not being offered at a discount there can be no justification for that leap. The alliance is continuing to be paid its 8 per cent on the main service that iTunes provides, which is downloads.

So why should the alliance be entitled to that additional revenue stream? Their answer appears to be: because the adverts relate to music. We say that approach is unprincipled and is contrary to particularly
the BSkyB case that the tribunal were shown earlier by Mr Carr.

THE CHAIRMAN: And also, presumably, you would say that it has nothing to do with the act.

MR WEISSELBERG: Absolutely.

THE CHAIRMAN: I mean, CDFA.

MR WEISSELBERG: Absolutely, sir. What the alliance repeatedly says is that iTunes is attempting to secure discriminatory low rates. What they do not ever really properly say, at least in their skeleton argument, is against whom these rates discriminate. Based on their supplemental answer, it appeared that it was discriminatory against ringtone providers, so Mr Carr's clients, wearing a different hat. Otherwise it is said to be repeatedly unfair.

But one looks in vain to find a principled reason why it is unfair. Merely suggesting that something is unfair and ignoring, as the alliance do, the line of authority best put together in BSkyB, merely repeating it does not mean that it is so. And, in effect, what the alliance does in this bit of the reference is say to the tribunal: let the applicants and interveners explain why we should not have this revenue stream. Otherwise we should have it, and we will criticise the proposals that are put to us, but you are not going to hear very
much from us in terms of what other mechanisms could be
used to address the issue of nexus.

THE CHAIRMAN: Where is the onus?

MR WEISSELBERG: There is no onus of proof in the tribunal.
So it is for the tribunal to determine what is
reasonable in all the circumstances. In BPI, the
allegation that was made was on behalf of the MCPS: it
is for the applicants to approve that the scheme is
unreasonable; held not so.

THE CHAIRMAN: No onus generally?

MR WEISSELBERG: So it is for the tribunal to determine what
it considers to be reasonable in the circumstances, and
what iTunes says is in circumstances where, on any view,
the alliance's proposal is extreme and unsatisfactory
the tribunal is going to have to work out a better way
of doing it. And, effectively, what you are offered on
this side of the court is a number of different ways of
doing it; some of us share one part of the answer,
Mr Carr and I share the "actually offered" part, and we
only differ on Mr Carr says where it is for free and
iTunes says where it is subsidised.

So we say it is for the tribunal to consider all the
evidence that you will hear over the next few weeks and
to determine where the best line for nexus truly lies.
And from iTunes' perspective, on any view, it cannot be
that which is put forward by the alliance.

Turning then to my third issue, the law.

I obviously do not intend to take you through the cases
in any detail. Mr Carr has taken you to BSkyB which
best summarises the authorities to date.

THE CHAIRMAN: You like BSkyB as well, do you?

MR WEISSELBERG: We do, sir. In summary, from BSkyB, what
one gets, and from the previous authorities, is that the
percentage of revenue has been adopted as the least
worst approach on a number of occasions. The question
posed in this case is: is it really the least worst
approach when you look at the type of services that the
MNOs offer, that iTunes offered and that the webcasters
offer?

And the reason why it is important to bear in mind
the question of assumption, do you assume, as the
alliance seeks to contend, that it is all in unless you
can justify it is out, or should it be assumed that fees
will only be included when it is reasonable in the
circumstances?

It is that assumption that underlines BSkyB and that
we say this tribunal should bear in mind when it comes
to consider the rival contentions.

Because running through the alliance's case is an
assumption that they should be entitled to share all
revenues unless there is a special reason as to why not.

They attack any deviation from the totality of the
revenue as an attempt to deprive composers or publishers
of what is rightfully theirs.

From iTunes' perspective, we cannot accept that the
concept of "fair share of revenue" is an answer to the
problem being posed here. The phrase is used by the
alliance as if it is an obvious and unproblematic
proposition that just because they have contributed one
component of a final product, they should be paid for
their contribution by reference to revenues. And we
simply say that is not right, and that cannot be the
right approach for this tribunal to take.

THE CHAIRMAN: Well, that is classic BSkyB stuff.

MR WEISSELBERG: Absolutely.

So, making four very brief submissions. First, the
novelty of the alliance and academy's position is
revealed by their approach to authority in their
skeleton argument. We do not see references to BSkyB,
to ICTA to ARI, PRS. We simply do not see a grappling
with the question of nexus or sufficient connection,
despite the fact that Mr Carr's original skeleton
argument for the hearing in September went to town on
that particular issue.

Second. I have sought to summarise the position in
the cases, BSkyB and its forebears, in paragraph 31.4 of
my skeleton argument. And there are two key factors,

I do not intend to turn it up.

THE CHAIRMAN: Just epitomise it.

MR WEISSELBERG: There are two key factors. One, what
factors drive the revenue stream in respect of which
a copyright holder wants to have access? And two, is
there risk sharing in relation to that revenue stream?

It is those two particular principles that the tribunal
should bear in mind when it comes to look at the
submissions that the alliance makes.

THE CHAIRMAN: Again, BSkyB stuff.

MR WEISSELBERG: Third, the tribunal has traditionally
disliked revenue-based royalties, and I have dealt with
that already.

And fourth, the question for you, in iTunes'
submission, is should you extend the anomalies further,
i.e. should you adopt a revenue-based blanket
entitlement where a more nuanced approach is available
to you?

I would like to turn then to my fourth issue, which
is sufficient connection. Adequate nexus. How do the
alliance and the academy define "sufficient connection"?
What reason do they give for arguing, as they must, that
there is a sufficient connection between the advertising
revenue that they seek and their works? And, as I have
already said, effectively it comes down to an allegation
of fairness. Why is it fair that they should be
entitled to iTunes' advertising revenue? The alliance's
answer seems to be simply: you are making money out of
the works, we insist on getting a fixed proportion of
that money. They want it even where revenues are
generated only in part by the use of their works, and we
say that is simply not the correct approach to adopt.
Why?

For four reasons. The availability of music alone
is not the reason why iTunes would be able to raise
advertising revenue. First, users will be there for
a host of reasons. They may be there to read an
interview with a musician, and as Mr Carr has pointed
out, why should the alliance be entitled to a royalty on
that use? Advertisers will be interested in placing
adverts on someone like iTunes for a host of reasons
unconnected to the use of musical works, and certainly
unconnected to the use of the alliance's rights in those
musical works.

Second, the alliance seem to suggest that the
availability of music alone should be sufficient to mean
that there is a nexus. The mere availability of
a right, we say, should not be seen to be adequate
connection with the rights controlled by the alliance.

Third, the alliance ask the question: if there were no musical works, would people come to iTunes? The answer might be yes, for the types of reasons I have pointed out earlier. There are other things that are also offered by iTunes and iTunes has other credit than merely offering musical works. But in any event, as Mr Justice Hoffman pointed out, that is not really the question. That is not the way to look at it. The question is actually different.

Fourth, iTunes says that the alliance is wanting to extend the scope of their royalty base quite radically. They are looking for a mere relationship with music. Not a relationship with their own works, but with music itself. And you can test that by saying: well, shops may be related to music, should the alliance receive a revenue-based royalty on that? Nightclubs are related to music, should there be a royalty based on the revenue of nightclubs? And the answer quite simply is no.

So what factors drive, going back to one of the first questions, what factors drive the receipt of advertising revenue by iTunes? We say it is not the musical works. We say that the factors that drive the receipt of advertising by someone like iTunes are a host of different reasons; and the alliance is not able to
claim a blanket entitlement, as it seeks to do, to those revenue streams.

Then in relation to risk sharing, the second limb of the BSkyB authorities. The risk of seeking and obtaining adverts is quite plainly iTunes'. It has to go into the market of other advertisers and compete to obtain those adverts. It may be diluting its brand by doing so; that is a risk that iTunes may or may not decide to run. It may cause people to move away from iTunes, to click through from the iTunes website onto other sites. And iTunes may then have people being distracted to go elsewhere, to shop or do other things. But that is a risk that iTunes decides to run, and the academy and the alliance are not co-adventurers in that particular exercise.

Turning fifthly to the issue of comparables. iTunes wants to be treated, as far as possible, in a manner comparable to its main competitors, and iTunes sees its main competitors as being the retailers of off-line product. Those retailers may be shops in your High Street, those retailers may be people like Amazon who sell CDs on the web.

The alliance does not seek, and has never sought, a royalty based on advertising revenues that may be gained by those types of retailers.
Four reasons are articulated by the alliance as to why that is not a good comparable. The first is that advertising is prohibited under the terms of API, and I have dealt with that in my skeleton argument and I will not rehearse those arguments here. Shortly, iTunes says there is nothing in that difference.

Second, the royalties paid on wholesale are not retail prices. Again, I have dealt with that in my skeleton argument and I do not intend to rehearse those arguments again.

The third point is actually made belatedly by BACS, by the British Academy, in paragraph 54 of their skeleton argument. It is not something that they said in their statement of case. To summarise it, they say: well, retailers of off-line product are not licensed by the alliance.

It is a point that my learned friend, Mr Carr, referred to during his submissions.

THE CHAIRMAN: Just stop a second. (Pause). Yes, I see.

MR WEISSELBERG: The alliance has chosen to licence the last link in the chain to the user in the online world. That choice should not adversely affect those retailers who are that last link in the chain. The alliance has fought tooth and nail to protect its right to do so. It
was a point raised by the BPI, it was not conceded by
the alliance in their settlement agreement with the BPI,
and should not be a reason for this tribunal to treat
online retailers and retailers of off-line product in
a different way.

Fourth, again this is a new point made by BACS, this
time in paragraph 14 of their skeleton argument, which
is that the rates between online and off-line differ.
So what is said is: well, the off-line rate is
6.5 per cent of retail, and the online rate is
8 per cent of retail. Therefore you cannot compare like
with like.

THE CHAIRMAN: Can you stop a second? (Pause). Okay.
MR WEISSELBERG: Insofar as a higher rate has been agreed
online than off-line, which we do not accept, and as
I pointed out in my skeleton argument, you get that from
Mr Boulton's third report, which effectively says that
8.5 per cent of PPD, which is the rate, translates to an
effective retail rate off-line of about 8 per cent. So
we do not accept that there is a difference. But even
if there is a difference, that does not weaken the force
of the argument on the part of iTunes that there should
be comparability. There is no reason why online
retailers should pay yet more, which is the logical
consequence of the BACS argument.
As to the other comparables, I dealt with ringtones
in my skeleton argument, I have dealt with record
company deals in my skeleton argument, and I have dealt
with the PRS CRCA deal also in my skeleton argument.

THE CHAIRMAN: The CRCA deal?

MR WEISSELBERG: The radio rate, the commercial radio rate.
The point about the radio deal is there were no other
revenue streams available.

THE CHAIRMAN: This is faut de mieux.

MR WEISSELBERG: Exactly.

Finally, I would like to look at the issue of
practicality. How in practice does iTunes suggest the
tribunal should resolve the issues of principle that are
raised on this side of the room in relation to nexus?
The first answer is actually offered, and Mr Carr
has already dealt with that and I do not intend to go
over that in any more detail.
The second limb to our test is artificially
depressed pricing. If we look at our statement of case,
which is in A6, tab 6, paragraph 3.2, we have the way in
which iTunes summarises its case.

THE CHAIRMAN: Paragraph?

MR WEISSELBERG: 3.2, sir. It is iTunes' case that only
where the licence service is offered to the user at
a price which has been subsidised as a result of receipt
of such revenue, and therefore artificially depressed, will advertising revenue be brought into the royalty base.

As we saw earlier, the iTunes disputed contention referred simply to artificially depressed pricing. We have defined there what we mean by "artificially depressed pricing", it means where the price paid by the user has been subsidised as a result of the receipt of advertising revenue.

We have been accused of using, to use the academy's terms, a slippery term. And it said that artificially depressed pricing, as defined there, is slippery. iTunes does not accept that. We have done what we can to say when we think a nexus arises.

We have actually gone further than that, and if one looks on at page 126 we see why we have gone further. At paragraph 16 we have given our proposed mark-up for the definition of "gross revenue". Subparagraph (c) deals with the subsidy point. If one looks five lines down:

"... actually be consumed by a user, but only, (i), for the period during which the price payable by the user for a musical work has been artificially depressed or subsidised to reflect the receipt of that revenue."

And we will look at the next bit in a moment, but
that is how we have defined it in the scheme.

We have gone further by offering a deeming
provision, and one sees the deeming provision in
subparagraph (d). We have said that it will be deemed
to have been artificially depressed for the purposes of
clause (c) where 8 per cent of the ex-VAT price to be
paid by the user for a musical work would have produced
a royalty of less than half of the applicable minimum
payment.

I will put that in other words: what (d) is doing is
setting a floor.

THE CHAIRMAN: Yes.

MR WEISSELBERG: If prices go below that floor, it will be
deemed that the musical work is being underpriced for
the purposes of subsidy. If the alliance get to that
point, or if prices get to that point, no more argument.

And why should we set it at that level? We have set
it midway between the minimum and 0, because we say that
reflects a proper attitude towards risk and reward.

Minima are there already to protect the alliance.
Would it be right that they receive advertising revenue
as soon as the minimum is hit? The answer must be no
because the minima is there, as the alliance concede, to
protect them from extremities of underpricing. We
say: between 4p and 0, so if there had been a royalty of
2p then the alliance is entitled to assume that advertising revenue is being brought into the pot to subsidise the price. And it is at that stage that they should be entitled to get their hands on the advertising revenue.

And we say that strikes the right sort of balance, a reasonable balance, between the interest of the alliance in having some advertising revenue and not.

Now, there may be some areas of dispute. In particular, where the deeming provision does not apply then it will be for the alliance and the licensee to decide, if they can between themselves, whether the price paid by the user has been subsidised by the receipt of advertising revenue.

Now, that is not perfect. I cannot think of a better way of doing it. ITunes cannot think of a better way of doing it. We say it reflects the balance that needs to be struck. It provides sufficient comfort to the alliance that they can get hold of the royalty monies if they can show that the price being paid by the user is subsidised.

It is interesting that the example given by the alliance in their own statement of case, where the price is 55p, 12p is received by way of advertising revenue and as a result, the price drops; would, we say, be
caught by our provision in (c). What the alliance has
done is sought to suggest that we have changed our case.
The alliance misread our proposal, or appears to have
misread the proposal, and thought that the deeming
provision was the only situation in which advertising
revenue would come into the equation. That is simply
not right. That has never been iTunes' contention.
That has never been the way in which we have approached
it, and it is quite wrong to suggest that we have
changed our case.

What the alliance realises is the example they have
given in their statement of case is exactly the type of
case that we say sub (c) of our proposal would catch.
The upside for the alliance is clearly huge. If
they can show that the price being paid by the user is
subsidised by advertising revenue, then it comes into
the equation. It comes into the equation in the manner
that we have suggested in sub (c), sub 2, and that seeks
to set an apportionment for advertising revenue A, and
how do we apportion the advertising revenue? We
apportion the advertising revenue in accordance with our
principal position which is: there has to be a nexus
between the underpriced work and the advertising
revenue. So you divide the money of underpriced works
by the total number of works sold, and that gives you
the nexus that you need for the purposes of giving the
alliance an entitlement to the upside.

THE CHAIRMAN: So the NUMW means number of underpriced
musical works.

MR WEISSELBERG: UMW* means the number of underpriced
musical works sold, NUMW means the number of musical
works sold.

So if 100 tracks are sold and they are sold at an
underprice, and 100 tracks are sold in total, UMW would
be 100, NUMW would be 100. So the entire advertising
revenue stream would come into the equation.

If only 10 per cent of the tracks sold in total by
iTunes are sold at a price that reflects the advertising
revenue, then only 10 per cent of the advertising
revenue comes into the pot. And we say that strikes
a balance.

There is a nexus in that case between the
advertising revenue and the underpricing of musical
works, and it is in that case that iTunes is content,
and I do not say willing or happy, but content to bring
that into the pot. It is a concession and it gives the
alliance an entitlement to upside that in the off-line
world it would not be entitled to at all.

So, in conclusion, the alliance seeks to suggest
that because revenue streams are complicated in the
online world, the tribunal should simply adopt an
inclusive approach. We say that that is sloppy, it is
unreasonable and cannot be sustained. The tribunal
needs to ask itself in relation to individual streams of
revenue: are they related to the use of the alliance's
rights. If they are, in; if they are not, out.

THE CHAIRMAN: In each case.

MR WEISSELBERG: So we say that simply shouting unfairness
begins to sound a bit like the child in the playground.
Simply shouting, "it is unfair" does not make it so.
A principled approach needs to be adopted. We have
adopted a principled approach and we have also sought to
give a practical way out for this difficult problem, but
one that is, we say, reasonable in all the
circumstances.

Unless you have any questions, sir, those are my
submissions.

THE CHAIRMAN: Thank you very much. Thank you,
Mr Weisselfberg.

As I say, I would like to see your different
versions in colour.

MR WEISSELBERG: Certainly, sir.

THE CHAIRMAN: And also you, Mr Steinthal, too please.
Right.
Opening submissions by MR RABINOWITZ

MR RABINOWITZ: Well, sir, the tribunal has heard for the last day a number of accusations and allegations made about what the alliance and BACS are seeking to do. We have been called many things -- "principled" I think is probably the best of them. Our case has been represented and sadly misrepresented on a number of occasions this morning and we will have to deal with these issues.

What I propose to do, in light of where we are, is to start at the beginning and to take the tribunal to some of the statutory provisions. I know the chairman is very familiar with them but I need to put these things into context. And the other panel members may actually appreciate seeing exactly what it is we are talking about.

THE CHAIRMAN: I am happy to go head with your proposition.

MR RABINOWITZ: I will then take you to some of the authorities you have not been shown yet, talk about the principles which we say you ought to apply because we have been called unprincipled, as I say. With respect, it is not us who are unprincipled.

There is a genuine dispute, and one heard it for the first time from Mr Weisselberg -- one did not actually hear it from others. There is a genuine dispute between
the parties in relation to gross revenue as to the
appropriate approach to be taken, and I am grateful to
Mr Weisselberg for that. And this tribunal will have to
look at the authorities and identify what principle it
is that should determine how one deals with revenues.

THE CHAIRMAN: Do you think this is the most important issue
of the case?

MR RABINOWITZ: Well, it may be, in terms of revenue. I do
not want to say anything which suggests that the issues
raised by Mr Steinfeld are not important. They are
certainly important to his clients and they are also
important to the alliance, and there are a number of
those issues. But Mr Steinfeld raises this issue as
well, the gross revenue point. But there is an issue of
principle which is important, and if that is what your
question addresses, then absolutely, there is an
important question of principle here. And although
Mr Carr is obviously very upset that he did not get his
answers because we say it is a question of principle
which we need to deal with, that is our position. He
will get his answers, but there is a question of
principle and that is what we want to address.

The other thing I ought to say is this, and this is
by way of general introduction before I take you to the
specifics. Again, Mr Weisselberg I think -- and
probably Mr Steinfeld as well -- made it absolutely
clear that we are in a very different world to the
off-line world. It is much more complicated. He says
it is complicated and I think Mr Steinfeld says it is
complicated. It is more complicated
because the number of business models which are out
there are multiplied compared to the off-line world.
And we will talk and I will address you on some of
those. But the idea that one can simply look to the
off-line world and say: there we have people selling
CDs, and on radio we have people selling adverts and
never the twain shall meet. All I have to do is apply
those two things, and I am not going to diverge, is
simply to shut one's eyes as I think Mr Steinfeld
acknowledged.

One is in unchartered territory in relation to the
business models, in relation to the nature of the
revenue streams that these business models will
generate, in relation to the mix of these revenue
streams which the business models will generate.

You will hear evidence in due course that some
people are permanently downloading CDs or music, simply
funding that by way of advertising. In other words, one
cannot say someone is always going to pay a price to buy
the CD, because we will talk and you will hear about
someone called SpiralProg to be a competitor to iTunes.

You, Mr Chairman, will have the choice. Instead of
simply paying your 75p and getting music, you can sit
there, if you want to, and be deluged with adverts and
get your music for free and download your music for
free.

THE CHAIRMAN: What is that called?

MR RABINOWITZ: SpiralProg.

THE CHAIRMAN: Is that up and running at the moment?

MR RABINOWITZ: They have signed all their agreements and it
is about to be up and running in the US, and about to
come here. We will see a little bit of evidence about
it.

But the idea, which is I think what Mr Carr was
saying, the idea that one can shut one's eyes to this
big revenue stream as being something which is generated
by music is simply absurd. It is there. The difficulty
for the tribunal is you have got mixed models. You are
going to have mixed models. Really, what is being
talked about by iTunes and by the MNOs and to some
extent by Mr Steinthal as well, but less so, I think, in
relation to the webcasts, are mixing of models. Not
simply a payment for a permanent download, not simply
advertising funded, but some mix between the two. That
is why this is a difficult point of principle in
relation to the gross revenue because how do you deal
with that?

Effectively what is said on the other side is you
should close off the revenue stream from advertising to
whatever extent it benefits the person who is exploiting
the musical rights because there is another revenue
stream, or may be another revenue stream. And it is
said that you can make limited concessions to that, but
that is the general principle.

What we will make clear in relation to our position
is that the general principle, as established by the
authorities, is that one must look to the benefit to the
licensee of exploiting the rights which they are being
licensed to use. And if the benefit to the licensee is
advertising revenue, as it is certainly in the case of
Spiral Frog, and indeed will be in the case of the MNOS,
one cannot shut that out. There is no principle reason
for shutting it out.

So to some extent, just to step back, they call us
unprincipled and we call them unprincipled. Now, I do
not mean that in a derogatory way. It is simply that in
our submission we are asking for an entitlement to this
revenue on the basis of a principle, which is the
principle I will take you to in cases like the AEI case.
And they on the other hand are saying; you should not be
entitled to that revenue. And they say: we do not have
a principle by reference to which we are entitled to
this, and that is really one of the key areas of
dispute.

Now, I have focussed on the gross revenue point
because that is what we have been hearing this morning.
But it is a part, not a small part, but it is a part of
a much greater existence. So if I can just, if you
like, draw back the focus. Let us just see where we
are. Let us just focus on what the tribunal is here to
do in relation to all the issues and we can go and close
in on particular issues later on, if we may.

So can we then start by going to the authorities
bundle and just having a very quick look at the act
itself, the Copyright Designs and Patent Act of 1988,
and I apologise to those who are very familiar to it.

THE CHAIRMAN: No, I am always discovering things in that

Now, you want us first of all to look at the Act.

MR RABINOWITZ: To go to the Copyright Act.

MR CARINE: Is that bundle 1 or 2?

MR RABINOWITZ: It is bundle 1 and tab 1.

And as the chairman will know, if you go to tab 1,
you have a covering page from Coppinger and Skone James
on Copyright.
THE CHAIRMAN: Tab?

MR RABINOWITZ: It should be tab 1. You have copyright licensing?

THE CHAIRMAN: No.

MR CARINE: You have got a different bundle to me.

THE CHAIRMAN: I have got the Act.

MR RABINOWITZ: Hang on. I think what may have happened is someone has inserted section 6 in front of -- you should be in bundle 1 and it should be tab 1. (Pause).

Now, from section 116 to section 126, one has the jurisdictional provisions. Those are the provisions which identify the circumstances in which, and the schemes in relation to which, a reference can be made. There is no issue about that and so I am not going to refer you to anything in particular in those sections. What I would ask you to look at is section 125 which you will find in the top left hand corner, page 108. You will see in subparagraph 3.

THE CHAIRMAN: Do not go too fast because I have got my own chairman's copy of this. Yes, okay.

MR RABINOWITZ: In subparagraph 3 you see the reference to:

"Where the tribunal does entertain a reference, what it has to do is confirm the terms of a proposed licence as it may be determined to be reasonable in the circumstances."
THE CHAIRMAN: That is repeated in quite a number of
sections.

MR RABINOWITZ: 126.4. You get similar language in relation
to the expiry licence. And so the task for the
tribunal, as I think --

THE CHAIRMAN: One is a proposed licence, one is an expiry.

MR RABINOWITZ: But in any case, the task for the tribunal
is to decide whether the licence referred to it,
proposed or existing or expiring, is in relation to its
terms reasonable in the circumstances.

Now, that is obviously a very wide discretion. It
is narrowed in parts by the Act, in the sense that it
gives you some indication of how you are to approach
this task. And of course you have some assistance from
the authorities.

THE CHAIRMAN: Yes.

MR RABINOWITZ: So far as the Act is concerned --

THE CHAIRMAN: 129.

MR RABINOWITZ: 129, it is about four pages on. You see it
says, I do not know whether you would prefer it read to
you or whether you want to read it to yourself. It is
page 129, paragraph 135. What you are told is:

"In determining what is reasonable, the Copyright
Tribunal shall have regard to the availability of other
schemes or the granting of other licences to other
persons in similar circumstances..."

Mr Steintoshal referred you to that in his opening, and the terms of those schemes of licences:

"... and shall exercise its powers so as to secure that there is no unreasonable discrimination between licensees or prospective licensees."

And I think Mr Steintoshal said, and that was right, the two guiding principles which one gets out of here are 1, comparables and 2, you must avoid unreasonable discrimination. This is the provision where one finds it.

I think one provision you were not referred to is section 135 which is two pages on. In a sense, the Lord giveth and the Lord taketh away here:

"The mention in section 129 to 134 of specific matters to which the Copyright Tribunal is to have regard in certain classes of case does not affect the tribunal's general obligation in any case to have regard to all relevant considerations."

So you look at everything, not just comparables, not just the question of discrimination. Everything that may be relevant, and your job is to decide whether it is reasonable in the circumstances.

Now, as I say, that involves a very broad discretion and you have been referred to a number of authorities
which are intended to give the tribunal, and indeed the
parties, some guidance as to how that discretion ought
to be exercised in the sense of how does the tribunal
ordinarily approach the question of what is reasonable
in the circumstances? And I am going to take you to one
or two. Mr Carr has taken you to BSkyB. There are
some, which in my respectful submission, are --

THE CHAIRMAN: I am in your hands.

MR RABINOWITZ: Before I do that can I just, while we are in
the Act and on section 135, refer you to a section which
in fact I am sure you have not been referred to before,
which is section 135A on the following page. Now, this
is not relevant to the issues that concern Mr Carr and
Mr Weissselberg, but it is relevant to an issue which
concerns Mr Steinthal. And that is the --

THE CHAIRMAN: The webcaster point?

MR RABINOWITZ: -- webcaster point.

MR CARR: Sorry to interrupt, unfortunately we cannot hear.

I just cannot hear.

MR RABINOWITZ: I will speak as loud as I can.

THE CHAIRMAN: You have got 135A written out fully on the
next page.

MR RABINOWITZ: 135A is on the next page. And I think
section 135A to 135G are all about circumstances in
which one can claim that use of a right is granted as of
right in relation to broadcasting.

THE CHAIRMAN: Yes, these were inserted later, were they not?

MR RABINOWITZ: They were inserted later. I think they were inserted in 1990 by the Broadcasting Act of 1990. Now, for present purposes, the only point that I would like to draw to your attention relates to subparagraph 5 of section 135A, where having been told in the initial sections of section 135A that it is about broadcasting, subparagraph 5 says:

"In the group of sections from this section to section 135G, 'broadcast' does not include any broadcast which is a transmission of the kind specified in section 6(1) A, B and C:

" we 'need to look at section 6(1) A, B or C which I hope is at the beginning of this tab. It should have been inserted in the bundles, and that may have led to the initial confusion as to what was in this tab.

THE CHAIRMAN: Just a moment. Give me a chance to ... right, 6A.

MR RABINOWITZ: 6(1)A. What it says is:

"Accepted from the definition of broadcast is any internet transmission unless it is A, a transmission taking place simultaneously on the internet and by other means."
That is a simulcast, and we do not have to worry about B or C.

The point is this. Mr Steinthal says that radio broadcasts, simulcasts, webcasting, it is all the same.
Now, we will have to deal with that and you will hear evidence as to whether that is so or not. But the only point I would make at this stage is this.
Mr Steinthal may say it is the same and should be dealt with the same, but that is plainly not the view of the legislature as one sees from 6(1)A.

THE CHAIRMAN: Yes.

MR RABINOWITZ: Now, back to the authorities.

THE CHAIRMAN: So that is really, you say, dealing just with Mr Steinthal.

MR RABINOWITZ: It is very specific. And part of the difficulty I have is that, one always has this difficulty when one is facing three opponents, all of them are dealing with three different arguments. I am, I am afraid, going to have to jump around. I will do it as little as possible and be very clear as to whose arguments I am addressing. But that is specific to Mr Steinthal's position which plainly says nothing at all about the debate between myself, Mr Carr and Mr Weiselberg.

THE CHAIRMAN: It is quite difficult. If you just identify
which is which.

MR RABINOWITZ: I will do it as carefully as I can.

THE CHAIRMAN: In the European Patent Office we frequently find ourselves with -- in one case I was in -- 20 opponents. So I have some sympathy with you.

MR RABINOWITZ: One has to sit and listen to them, and that is not easy.

THE CHAIRMAN: Yes.

MR RABINOWITZ: I am about to go to the authorities. I do not know whether this is a convenient moment rather than starting and breaking.

THE CHAIRMAN: Yes. So shall we put volume 1 away?

MR RABINOWITZ: No, because the authorities I am going to refer you to are in --

THE CHAIRMAN: Okay, so we will reconvene at 2 o'clock then.

Thank you.

(12.55 pm)

(The luncheon adjournment)

(2.02 pm)

THE CHAIRMAN: Mr Rabinowitz, we would like to stop at about 4.30 this afternoon. I have a meeting and my colleagues have got to go and do various things.

MR RABINOWITZ: Can I begin by asking you, please, to go to the authority at tab 3 of the authority bundle 1.

THE CHAIRMAN: I have it.
MR RABINOWITZ: It is the AIRC v PPL case.

THE CHAIRMAN: Yes.

MR RABINOWITZ: And since, as you have heard from
Mr Steinfeld, the MSP’s case, particularly in relation
to royalties, is largely based on a suggested analogy
with the position of radio, this is obviously a very
important case to look at.

THE CHAIRMAN: Yes, it is the decision of Lord Gill, as he
is now.

MR RABINOWITZ: Can I ask you, I am very happy to read it,
but I was going to take you to quite a lot of this case
just to see exactly what it says.

THE CHAIRMAN: All right, fine.

MR RABINOWITZ: If we start with the headnote:

"The applicants were the holders of all but one of
the commercial radio broadcasting licences which had
been issued to the date of the applications. All but
one of the applicants were members of and represented by
the AIRC. The respondents represented virtually all of
the record companies whose records were distributed in
the United Kingdom. The respondent licensed the
broadcasting of its members’ sound recordings and
collected and distributed the royalties payable under
its licences.

"The applicants applied to the tribunal under
section 135D and E of the Copyright Act for settlement
of the terms on which the applicants were to be licensed
to broadcast sound recordings in the respondents'
repertoire. The applicants proposed a royalty of 3.5
per cent of net advertising revenue subject to three
qualifications: one, that during the first year of
operation any new licence should pay 2 per cent; two
that during the second year of operation such a licensee
should pay 3 per cent; and three, that any licensee
making any nominal use of the respondent's repertoire
that is less than 10 per cent of broadcast hour should
pay 0.4 per cent.

"The respondent proposed royalties of up to
15 per cent of relevant revenue, calculated by reference
to revenue bands and usage bands. The respondent's
alternative proposal was a flat rate of 15 per cent of
relevant review. The respondent's primary contention in
support of these proposals was that its repertoire had
increased in value to the applicants, in particular due
to the abolition of needle-time restrictions which had
formerly limited the applicants to nine hours use of the
respondent's repertoire per day."

Now, what I would ask you to read next, if you
would, are the findings from paragraph 9, or point 9.
So the main finding:
"The tariff should be as simple as possible. Any tariff would produce anomalies and a complex rate structure would be more likely to produce anomalies, especially at the margin of its rates."

And then 10:

"The tariff should recognise the fundamental difference between talk stations whose incidental use of recorded music what not a significant attractor of audiences, and music stations whose use of recorded music was the principal constituent of their output."

11:

"In the absence of any evidence which would justify adopting a different approach, the tribunal accepted the parties' agreement that a revenue-based tariff was appropriate."

And then I was going to take you next to 13:

"Usage", and this is usage of music, "was only relevant in one context; namely, to determine whether a station was a music or talk station. Any station having a usage of the respondent's repertoire of less than 15 per cent of total broadcast hours would be dealt with separately in the tariff and charged a nominal rate."

The purpose of taking you to that, what it illustrates is that the extent to which one uses the
music was a material aspect of what the tribunal decided.

Then if I can go to point 15:

"The existing definition of the revenue base was no longer appropriate. The applicants now received significant revenue from sponsorship. The applicants had accepted that sponsorship revenue from music programming should be taken into account, this was insufficient. Much advertising revenue", and this is important, "was derived from advertising placed during speech programmes. The same principle should be applied to sponsorship revenue."

As we will see when we come to it, the tribunal had to deal with an argument by the applicant here that:

"... the respondent should not share in any of the revenues attributable to adverts, save where those adverts were placed in a music segment", and that is not dissimilar to some of the submissions you have already heard and you will see that that was rejected:

"A fixed deduction of 15 per cent from gross advertising revenue to cover costs would be made in all cases, save where it applies to sponsorship revenue."

That is obviously relevant to a point Mr Steinthal makes. He has already drawn your attention to the position in relation to a net advertising deduction, and
he relies on that, perfectly reasonably he relies on it, we will have to come to it. This is where one finds it. Then if I can take you to 18: "In assessing the value of the licence to the applicants, the starting point was the fact that the use of the respondent's repertoire was crucial to the success of every commercial music station..."

And that is obviously material in this context, given some of the submissions we have made. Plainly the music is going to be crucial not only to iTunes but indeed to the webcasters:

"... but the value of the licence was severely restricted by the following considerations: the broadcaster also required a licence from PRS, the licence was non-exclusive."

Skip the bit in brackets, and then the third was:

"The stations added considerable value to the repertoire by their own skill and effort, and although the royalty was assessed on revenue, much of the revenue was obtained for reasons unconnected with the attraction of the respondents' repertoire."

And again, that is plainly material in the context of the present case. Because contrary to some of the submissions which have been made from the other side of the court, the alliance does not for a moment suggest
that there is no input into a product by iTunes, by the
webcasters, by the MNOs when they eventually start
rolling out on advertising and the like. We accept
that.

But what this case shows is that that is not a basis
for saying: you cannot share in the value which is
derived by the licensee at all. It will affect the
rate. It is something that will go into the mix of
determining the rate that the royalty is fixed at.

And that is one of the fundamental differences of
principle between the alliance and the applicants, if
I can call them that collectively. Their general
submission to you has been: you must recognise that when
iTunes sells music and attracts advertisements, iTunes
is putting something into that. We do not dispute that
for a second. We never have. But it does not follow
from that that because they are putting something into
the mix, that we should be excluded entirely from the
value which is derived by the licensee from the
exploitation of the music rights.

And there is another point which is plainly material
in relation to Mr Steinthal's position. Because whereas
in the context of the AIRC case you see that there was
a substantial input by the radio stations into the mix
of products, Mr Steinthal's clients produce music, music
and nothing but music. That is their output.

Now, I need to be absolutely clear what I am not saying. I am not for a moment suggesting that Mr Steinthal's clients are not very clever, industrious people who have come up with a good concept, and indeed that they have spent money on it. What we are looking at here is the output. What is provided to the users and what attracts the revenue?

Now, what attracts the revenue in the context of the radio case was not just the music, and this is an absolutely fundamental part of the tribunal's decision in that case. It was the mix -- and I will show you a passage in the judgment where this is made absolutely clear -- it was the mix of news, of weather, of traffic reports, local content. Mr Steinthal cannot rely on any of that.

THE CHAIRMAN: Music, music, music.

MR RABINOWITZ: Music, music, music. He acknowledged that, I think he said, the music output was about 96 per cent or so. He said it might go down when there is advertising. But he has not for a moment suggested, and nor do I think he can, that it is the same output that a commercial radio station is putting out. That in the context of the dispute we have with Mr Steinthal would be very relevant to fixing the relevant rate.
Now, having taken you through point 18, can I then ask you to look at point 24 which is over the page. And the PRS tariff was of value as a comparison, it related to the other two copyrights interests for which the applicants required licences:

"The applicants had not challenged the tariff before the tribunal, or before the PRT. Although the tribunal had adopted a different tariff structure, the overall yield of the PRS tariff was relevant. It was not possible to make a precise comparison but the tribunal was in a position to make a general assessment of the approximate impact of the two tariffs."

Then paragraph 25, which makes the same point:

"There was no reason to assert a priori that one licence had a higher value than the other. The tribunal did not accept the applicants' argument that the PRS licence was more because it related to the primary product, the song, whereas the respondent's licence related to its secondary exploitation, the recording. In many cases, a hit succeeded because of the artist's treatment of the song and, in many cases, the artist was the composer. Nor should allowance be made for the greater extent of the PRS repertoire; the royalty yield of both tariffs should be in the same general range."

And again, why do I highlight that? I highlight
that because there is evidence before you, again in the
context of my dispute or my clients' dispute with
Mr Steinfeld; there is evidence before you of what PPL,
the other collective society, are charging the
webcasters. And we rely on that as a relevant
comparator.

Now, we rely on that and we refer to and rely on
this authority, and this is not the only authority which
has made this point. As your Honour knows, this is
a point which has been oft repeated in the context of
the English cases.

THE CHAIRMAN: Oh yes.

MR RABINOWITZ: Mr Steinfeld as you will see, or as you will
have heard, urges this tribunal to adopt a position
which accords with a US decision in favour of the
position as established by the English authorities. You
will recall yesterday he referred you to a case in the
US which was to that effect.

One of our submissions will be, and is, that this
tribunal should resist Mr Steinfeld's suggestion that we
should disregard English law in favour of the American
position in relation to this. So I just wanted to
remind you of what was said about this in this case.

Then if I can ask you, please, to go to -- I am
trying to keep the references down to a minimum --
page 205. I am going to read from "The Use of Music by Commercial Stations", because this is obviously very material in the context of Mr Steinthal's comparator point:

"Each station is constrained by a promise of performance and undertaking enforceable by the radio authority which specifies the characteristic output and the nature of programme items which it undertakes to broadcast. By means of promises of performance, the radio authority is able to maintain an appropriate diversity in local broadcasting and to maintain broadcasting standards. The great majority of the stations are music driven. Popular music has been shown to be the best attractor of audiences. Live music, studio recordings and non-PPL records form a relatively small part of their output. Nevertheless, among the music stations there is considerable variation in the balance between music, features and sport."

Again, we emphasise that. We emphasise two things here. One, the great majority of stations are music driven because it has been shown to be a big attractor of audiences, and we emphasise the fact that there is in the radio stations considerable variation in the balance between music, features, sport and talk:

"Some stations are out and out music stations. The
principal of these is Capital, but a similarly high
usage can be found in some of the specialist incremental
stations such as Jazz FM and Kiss FM. In their
different ways, the stations deliver what the mass
audiences wish to hear. They maximise audiences and the
advertising revenue on which PPL's income depends, and
they expose recordings to the target audience and
buyers. In every case the applicant's stations need
only a small part of the PPL repertoire. They play
little or no classical music. Their primary interest is
in most cases the playing of popular music and in
particular of hits, past and present. Specialist
stations play an even more restricted repertoire. In
most cases the listener is interested only in the hit
version of a particular item rather than a cover version
by other artists or in a sound-alike imitation
recording. Since almost all of the hits are on the PPL
repertoire use of it is, as ARC told the Woodford
Committee, of vital and fundamental importance to them.
It is their most popular form of programming, they could
not survive without it in a present form. Nor could
they comply with the promise of performance."

We say the same is true of the webcasters:
"The music content of their programmes is part of
a range of services such as news", again I emphasise
this, "information and discussion. It is part of a programming system in which the presentation, the presenter and the music choice are all matters of judgment and expertise."

And then that they do not play only established hits, there is some discussion about what they play, which may have been important in the context of that case, it is less important here:

"The stations obtain a product of considerable value to them, in that they obtain a ready-made and particularly cost-effective programme item having taken no risk in its production, and having the benefit of the record company’s choice of talent and repertoire, the station takes risks of a different kind. Nevertheless for many advertisers who take a run of broadcast spots, it is a matter of indifference whether those spots are inserted in music or in talk. In contemporary commercial broadcasting scheduling is a sophisticated art involving the choice of presenters, the character of the station’s playlist and the playing of items for the target audience at different times of day, but the competitive edge is not in the music output but in local features such as traffic, local news and community service features. In the smaller stations there is a greater emphasis on local service features."
A significant amount of listener loyalty is generated by the speech content alone.

"It has been suggested to us that these stations are merely jukeboxes of the air. Such a description ignores the contribution which the presentation and selection of the music makes to the success of a station and the considerable attraction of its talk and features. However, although a revenue-based tariff is urged by both sides and has been adopted by us in the decision, it is an oversimplification to see a direct causal connection between a use of PPL repertoire and the achievement of advertising revenue. Applying of PPL repertoire would not result in a level of advertising revenue which the stations obtain without the station's programming mix, a sales strategy and then marketing and programming efforts."

Now, those are particularly important passages, we would respectfully submit. First, you will see the clear indication that the tribunal gives in this decision that they were not there dealing with jukeboxes of the air. That is very different to what we are dealing with here, because that is precisely what the webcasters are providing. I am not suggesting it is anything other than sophisticated and an excellent product, because it is. I listen to it constantly. It
is excellent. But it is a jukebox of the air. There is no speech content.

THE CHAIRMAN: The net?

MR RABINOWITZ: It is the net, and you hear, as I say, music, music, music. And that is why I like it. But it is a jukebox of the air. Very different to what the tribunal was dealing with here.

THE CHAIRMAN: Well, we will listen to it.

MR RABINOWITZ: I hope so.

THE CHAIRMAN: That is one of the things that we are going to be treated to in the future.

MR RABINOWITZ: The second important aspect of these passages is this. You will see the tribunal making absolutely clear that it is an oversimplification of the position to suggest that there is a direct relationship between the music and the generation of the revenue through advertising. It is much more complicated than that. And, notwithstanding that, they fix the royalty at 5 per cent, as you will see, and they include in it all the advertising; including adverts which are plainly attracted by the sport or the news or the personality of the DJ. And what we would respectfully submit this establishes is that there is no such proposition, as is suggested by the other side, which is that unless you can find a direct link, a direct causal link between the
music and the generation of revenue, the alliance or the
owners of the right are to be excluded entirely from
that revenue. Because that is the submission.

THE CHAIRMAN: Mr Floyd used the word "nexus", no doubt
deliberately.

MR RABINOWITZ: It is a sufficient nexus. And we will see
when we come to the AEI case what it is that describes
the nexus. It does not tell you where to draw the line.
That, I am happy to say, is a matter for the tribunal
because it is not easy. But one is given an indication
of what is the principle underlying the search, as it
were, that you have to undertake. It is not directly
attributable, which is a phrase which one sometimes sees
in the other side's openings. It is a sufficient nexus,
as Mr Justice Hoffman pointed out, and it is simply
wrong to say that as soon as you find a mix of products
you must exclude the owners of the rights from a share
of the revenue. That is simply not in accordance with
the authority.

I know that my learned friends rely on BSkyB. That
was a decision which went the other way. But as your
Honour will know, that was a very different case. The
suggestion there was that PRS, my clients, in one guise
should share in all the revenue generated by BSkyB.
Now, at one stage, that seemed to be what was being
suggested on the other side was our submission. With
respect, that is nonsense. That has never been our
position, it is not our position. And were it our
position it would be untenable. We try and define, by
reference to principled analysis, where the divider line
should be between what falls within the revenue and what
falls without the revenue rate.

Mr Weisselberg at least was willing to acknowledge
that there is an issue of principle, and that is what it
is about. Where do you draw the line? This is not an
unprincipled grab for money.

Can I ask you then, please, to go to page 229. I am
going to pick it up in the second paragraph on that
page, page 229:

"We approached this decision with a preference that
the tariff should be as simple as possible with
a straightforward rate structure based on
straightforward definitions. Any tariff will produce
anomalies. Whatever tariff is adopted some stations
will fare better than others, but in our view a complex
rate structure is more likely to produce anomalies,
especially at the margins of its rates. We consider
that the tariff should recognise the fundamental
difference between talk stations, whose incidental use
of music is not a significant attractor of audiences,
and music stations whose use of recorded music is the
principal constituent of their output."

And then just reading on actually:

"The first question to be decided is what is the
appropriate basis on which the royalties should be
assessed? Both of the principal parties agree that
a revenue-based approach is appropriate."

Now, just pausing there. That is the case here as
well. The parties have all agreed -- both

Mr Steinthal's remaining clients, the webcasters and
iTunes and MNOs and the BPI -- that both in relation to
webcasting and in relation to the offer online of music,
because that is what we are talking about, online music,
the appropriate basis of the royalty is a revenue-based
approach. And so authorities which go to whether
a revenue-based approach is right or not right are, with
respect to some of my learned friends, irrelevant. It
has been agreed on all sides that a revenue-based
approach is appropriate.

THE CHAIRMAN: This is your distinction, then, for BSkyB or
one of them?

MR RABINOWITZ: Indeed:

"The applicants provide a service in which most of
the revenue is derived from advertising and there is
a broad correspondence between advertising revenue and
audience size. MMC took a similar view. We recognise that audiences and revenue are generated by programmes other than music, such as news and current affairs programmes and live sports transmissions. This fact must be taken into account in the framing of the definition of the revenue on which the royalty will be based and in the assessment of the percentage of revenue which is payable as royalty. A revenue-based approach has been applied to both PPL and PRS since commercial radio began. It proceeds on the reasonable assumption basis the station will seek to maximise the revenue for sound commercial reasons. It is an imperfect measure of value because the revenue on which the royalty is based is created by the station's entire broadcast output, its promotion of itself and its image as an advertising media. PPL's music is only part of this."

And again, I am repeating myself, but this is a fundamental point of principle here. The point of principle is this: we say that as with that case, our music, whether one is dealing with the MNOs -- and one needs to be careful when one is dealing with the MNOs, what our submissions are, because they have not always been fairly represented. Whether one is dealing with the MNOs, iTunes or the webcasters, we acknowledge substantial input by these parties. And that is why the
rate is where it is.

The rate is not, compared to some of the record companies' rates which are very high, this rate is a low rate relative to a total amount of 100 per cent. One is either dealing with in relation to the MNOs' 8 per cent or in relation to the webcasters', we would say, 6.5 per cent. So it is not as if, as has sometimes been suggested on the other side, we are trying to snatch all the revenues. On the contrary, there is a small share, and we say that is the fair share, and I do not hesitate to use the word "fair". I can say "reasonable" instead. It is a reasonable share, given the value to the licensees of exploiting the rights that we own. And the fact that they have put substantial amounts into the mix is not a reason for keeping us out of any share at all; which is the way the point is being put.

Page 233. Sorry, I ought to read on, just to the next page:

"The revenue base is also of advantage to small specialist stations such as Kiss FM, which have extensive music use and attract good audiences but have poor advertising revenue. Under a revenue-based system the licensing body has the disadvantage that its royalty income may be adversely affected by economic recession or commercial misjudgments of the licensee. On the
other hand, there is no direct connection between revenue and profit and under this system the licensing body shares in revenue whether or not the management skills of the station turn it into profit.

"While both sides recognise the limitations of a revenue-based system they accept that there is a logic to it and that it should remain the basis on which royalty should be assessed."

And again that is plainly the position here.

Now, page 233 is where I wanted to take you next.

The definition of the revenue base:

"The next question is to decide on what definition of revenue the royalty should be based, and the interim licence, NAR", which is the advertising revenue, "gross revenue derived and actually received by the licensee from the sale of advertising time within its broadcasting time, less actual agency discounts in relation to such sales, but such deductions shall not exceed 15 per cent. This definition originates in the IBA/PPL agreement. The applicants accept that the existing definition of the revenue base is out of date. It fails to take into account the new form of revenue now available to them. They therefore propose a revised definition which would include in revenue certain of the sponsorship revenue which they can now lawfully receive.
They define this as follows."

And you will see there, it is referring to the
sponsorship revenue being caught in it:

"PPL goes further, it argues that payment of
royalties should be based on the total revenue received
by the applicants for their broadcast output. It
expresses this as relevant revenue which is defined as
follows: all valuable consideration whether in money or
monies worth received or derived directly or indirectly
by the licensee from programmes broadcast by the
licensee including advertising, sponsorship,
subscription, barter or contra deals and any other form
of valuable consideration hereinafter devised, received
or derived from programme broadcast. The reference to
subscription income is of no relevance to this part of
the decision since none of the applicants receives or,
so far as we are aware, proposes to receive such income.
The question of subscription income has been raised in
the context of operating terms and we deal with it in
that part of our decision.

"In our judgment, the existing definition of the
revenue base is no longer appropriate. The applicants
now receive significant revenue from sponsorship. The
applicants in their revised definition of NAR accept the
principle that sponsorship revenue should be taken into
account but their proposal will extend NAR to sponsorship revenue derived from music programming only. In our view, this proposal is insufficient. Under the definition of NAR hitherto, all advertising revenue has been brought into account. Much of that revenue is derived from advertisements broadcast during speech programmes. Some of it may even be derived from advertisements which the advertisers will not have placed during music programmes. In our view, the same principles should apply to sponsorship revenue. We have decided therefore that in consequence of the wider range of revenue now lawfully available to the applicants the revenue-based tariff will be that of gross broadcasting revenue, consisting of revenue from advertising plus revenue from sponsorship, other than off-air sponsorship. From each of these elements certain specified deductions will be made", et cetera."

Now, pausing there. What this shows is that --

THE CHAIRMAN: And the royalty is then imposed on the net broadcasting --

MR RABINOWITZ: Indeed. What this shows is that contrary to some of the submissions which have been made to you, this tribunal has never shut its eyes to the fact that the way in which revenue may be attracted to the exploiters of the rights can change over time. And it
has never taken the approach, contrary to what has been
urged on you by some on the other side, it has never
taken the approach that since traditionally this is the
only revenue stream which has fallen into the base, that
will continue to be the position, whatever the current
factual position on the ground is. It is alive to
changes in the market. And if, as a result of changes
into the market the nature of the revenue streams
changes, increases, multiplies, this tribunal, in fixing
or determining what is a reasonable royalty base, will
take that into account. That is point 1.

Point 2 is a point which we saw in the headnote
conclusions. This tribunal, in this case, rejected the
submission that you should limit the advertising revenue
to adverts placed in the music segment. In fact it went
so far as to say: you will include in the advertising
revenue adverts which specifically would not have been
placed. They asked not to be placed in the music
segments.

And again, it would be clear to you why that is
relevant in the present context. The suggestion that if
the advert has to be on one particular page and not on
the page before or the page after, in circumstances
where it is plain that the only reason anyone goes to
that site is to download the music, is, with respect,
not consistent with this decision. And I want to be

clear about this for fear of being misrepresented again

as to what our position is.

Our position is not and never has been that all

advertising revenue which would accrue to the MNOs will

fall within the pots of royalty base. That has never

been our position. I will come and delineate precisely

the principles that we rely on and what, practically

speaking, that results in --

Pages 238 to 239. This is the passage which is

reflected in, I think, points 24 to 25 of the headnote

summary of the decision where it is made clear that

there is no reason a priori why the PPL rates should be

different from the PRS rates, that is to say the value

of the sound recording should be different to the value

of the rights which are owned by my clients in the

composition. I am very happy to take you through it,

I do not believe it says anything else and I do not want

to take up more time than I have to on that.

So we would respectfully submit that this is a very

important case which establishes some key principles

which ought to affect the way in which this tribunal

deals with the submissions in this case.

Can I then come to the next authority, which is at

tab 5. It is the AEI Rediffusion.
THE CHAIRMAN: Yes.

MR RABINOWITZ: Now, this was a case about a rate to be charged to a person for narrowcasts via satellite to people who then use the music as background music. And the narrowcasters argued that the rate should be the same as commercial radio, 5 per cent. PPL argued that the rate should be 15 per cent. And the tribunal decided that the rate should be 15 per cent.

THE CHAIRMAN: 15?

MR RABINOWITZ: 15. And if I can just refer you to holding number 1. We would respectfully submit that this is a key principle which is relevant to the approach that this tribunal should take in this case:

The tribunal had to arrive at a figure from the licensee's overall receipts which was both fair to the licensor in terms of the value to the licensee of having access to the copyrights and recordings, and fair to the licensee in giving him proper award for the effort put in to the exploitation of his rights."

Just pausing there. We were lacerated this morning for suggesting that we had an entitlement to royalties where it was fair. And, with respect, that was unfair. Because as is absolutely clear from this authority what is fair, as one would expect, underlies precisely what this tribunal is looking for in fixing the reasonable
And if I could just finish the paragraph and then
make another point about this:
"That included in particular making full allowance
of the added value provided by the licensee in terms of
selection, presentation and additional services such as
messaging. It might be that in the final result, the
appropriate sum was achieved by levying the royalty on
any part of the licensee's income stream, but that did
not mean that the overall picture had not been taken
into account."

THE CHAIRMAN: Yes.

MR RABINOWITZ: If I can just ask you before I make my
points to go to page 250 where this is expanded upon.

THE CHAIRMAN: 250?

MR RABINOWITZ: 250. At the bottom of the page, "General
Observations when Setting a Royalty Rate":
"It is notoriously difficult to arrive at a decision
as to an appropriate royalty..."

And pausing there, we would say: and it is equally
difficult in arriving at a decision as to the
appropriate royalty base:
"... in the absence of equivalent consensual
licenses in that there are no fixed guidelines, and at
the end of the day it is ultimately a judgment call
taking into account a large number of factors. There
have been in this case, as in many cases before the
tribunal, a tendency from both sides to approach the
matter on the basis that assessing the royalty depends
on first deciding the correct royalty rate, 5 or
15 per cent, and having decided what rate is applicable,
to decide on what revenue the royalty should be placed.
We find this approach unattractive in that ultimately
what we have to determine", this is the key part, "is
that of the total profit made by the licensee how much
should be paid to PPL for the right to use their
recordings? In so doing, the tribunal has to arrive at
a figure from the overall receipts which is both fair to
the licensor in terms of the value to the licensee of
having access to the copyright sound recordings, and
also fair to the licensee in giving him a proper award
for the effort put into the exploitation of the
licensor's intellectual property rights. This includes
in particular making full allowance for the added value
provided by the licensee, be it in terms of selection",
et cetera:

"It may be that in the final result the appropriate
sum is achieved by levying the royalty on any part of
the licensee's income stream but that does not mean that
the overall picture has not been taken into account."
So we respectfully submit that this is the principle which underlies our licence, the current terms. We would respectfully submit that what the tribunal has to have in mind is that the licensees here are exploiting the rights of the alliance, and indeed the sound recording rights. And they are exploiting it and acquiring a great deal of value.

Now, we will come to this in a minute. Some of the value is in the revenue stream, which is simply a cash payment; one is dealing with someone downloading and paying cash. Some of the value, and this is actually conceded but we will have to develop this, some of the value is in the form of advertising revenue. There is no question about that at all. Some advertising revenue, not only with radios because I will show you the Spiral Frog example. So some of the value comes in the form of advertising, a revenue stream in relation to advertising.

The question for this tribunal is: if all of that revenue is in part the consequence of the exploitation of the right which is being licensed, what good reason is there for not allowing that to fall within the revenue base? Again, it is not our case that we are entitled to all of that revenue. It is simply that one has to have regard to those different revenue streams.
which are undoubtedly the results, in part at least, of
the exploitation of the rights we are licensing. One
has to have regard to all of the revenue streams in
fixing a fair revenue base.

And that, with respect, has not always been
recognised on the other side. They want to exclude
willy nilly certain revenue streams, and we say that
that is unprincipled.

THE CHAIRMAN: But they accept the basic principle of levy
on the revenue.

MR RABINOWITZ: Indeed. And not only do they accept -- they
accept two basic principles here. The first is that
there ought to be a levy on revenue, the royalty base.
The second, we will see this, they accept that
advertising can be part of the revenue which is
attracted by the music.

THE CHAIRMAN: Yes, yes.

MR RABINOWITZ: So what one asks is --

THE CHAIRMAN: The issue then is where you draw the line.

MR RABINOWITZ: Indeed. Given that, it is plainly not
principled to exclude all of the revenue. As your
Honour says, the issue is: where do you draw the line?
And we accept what Mr Weisselberg says. That is not an
easy issue. But what should guide you in relation to
that issue is what is fair, given that this is all --
the revenue is at least in part, we would say in great
part in many respects, certainly in relation to iTunes,
in great part the consequence of the exploitation of our
rights. Where you draw the line we will have to come
to.

THE CHAIRMAN: Oh yes. But then that is the most important
question of the case, really.

MR RABINOWITZ: Where you draw the line, absolutely. What
we needed to establish from the outset, given some of
the submissions that were made, was that all of this can
fall within the pot. Where you draw the line is
different. On some submissions we are not entitled to
any advertising at all save as a gift or concession.
That, with respect, is nonsense.

THE CHAIRMAN: I do not think they are in the mood to give
gifts.

MR RABINOWITZ: Also, in relation to this case, if I can ask
you to go back to the third page. That is page 242.

THE CHAIRMAN: Yes.

MR RABINOWITZ: If we can start at page 241, just very
briefly glance at findings 3 and 4.

THE CHAIRMAN: I will just read. (Pause). Just read what
your minimum royalty was.

MR RABINOWITZ: Indeed, that is the point:

"It followed that the minimum royalty would be based
on the tribunal's assessment of the minimum proper
monetary return to PPL."

You will see in relation to 4:
"The minimum royalties imposed, notwithstanding that
it retrospectively deprived the applicants of
profits..."

So it may have harsh consequences, but ultimately
what this tribunal is concerned about is ensuring that
the minimum royalty should result in a minimum proper
monetary return to the PPL.

Now, why have I referred you to this case? I have
referred you to this case because it was suggested,
I think, by Mr Steinthal yesterday that there is
a hostility towards minima in this tribunal. With
respect, that is not right. There is no hostility
towards minima as a general principle. It will depend
on the circumstances. The BPI v MCPS case was in
circumstances in which Lord Justice Jacob, I think it
was -- he was not that then -- came to the view that
minima were unnecessary. And the reason he came to the
view that it was not necessary in that case was because,
if you stand back and think about it, that was a case
between the record companies and the owners of the
composition rights. The record companies wanted to use
the composition rights to produce CDs which would be
sold. There was an absolute alignment of the commercial interests of the two. It was obvious that the record companies would want to maximise sales of the CDs, and therefore there was no possibility that the record companies would do something which was not consistent with the greatest possible revenue which would be attracted, not only to them but to MCPS as well.

In the new world that we are in, there is no longer -- and in particular where the licensee is the retailer, there is no longer that absolute alignment of rights and interests. The analogy to have in mind when one is thinking about Mr Steinthal's clients, Yahoo and AOL, is that what one is actually dealing with is an owner of a shopping centre. Yahoo is like a shopping centre. You go onto its portal and you are directed, you have the offer of going to a whole lot of different shops which offer you a whole lot of different things. And as some people may like, some people like going to a shopping centre and having music playing when you are there, some people loath it. The music facility plainly enhances the value of the shopping centre as a whole -- lest it be said that I am saying as a result you are entitled to advertising revenue from anywhere in the shopping centre, that is not our case.

But the point I am trying to illustrate is that
there is no longer the exact coincidence of interests in
terms of maximising revenue from the music. Because
Mr Steinfeld's clients can use the music to maximise
revenue from some different part of the portal. For
example, someone goes onto the music part of the portal
and then becomes interested because there is a
click-through to some other part of the portal and goes
there and sees adverts, and there is a whole lot of
lovely revenue for Mr Steinfeld's clients which my
clients do not share in. Fine, that is absolutely fine.

But what that tells you is you cannot simply rely on
Mr Steinfeld's -- my clients cannot rely on
Mr Steinfeld's clients to have an exact coincidence of
interest to maximise our revenue jointly. And that is
why there is still a need for minima.

Now, I will come back to minima in a minute but this
well illustrates the point that it is simply wrong to
say that this tribunal as a matter of general approach
is hostile to minima. There is a time and a place for
minima.

And just finally, very briefly, I was going to refer
you to point 5; simply for this, that as is so often the
case --

THE CHAIRMAN: Shall we read it first?

MR RABINOWITZ: If you wish. (Pause).
THE CHAIRMAN: Yes, I like the last sentence.

MR RABINOWITZ: Indeed. So we make two points about this. Number 1, one does have to be alive to the commercial reality of the position. If in fact the exploitation of music can now be used to generate substantial advertising revenues, one should not shut one's eyes to that. That is now the value of the music -- whatever it was off-line, that is now the value of the music and the new commercial reality in which we are.

The second point, as you will see is, as is so often the case in cases like this, the parties always say: we are just like a commercial radio and therefore the royalties should be 5 per cent. That was rejected in this case for similar reasons to the ones we urge on you now for rejecting it in the case before you. Commercial radio was not just the music, there is more.

Finally, so far as authorities are concerned, I can make this point without referring to the authority; to some extent I have already made it. A point which has been urged upon you in some of the written submissions is that you should only allow revenue to the extent that you can say it is directly attributable to the music. That is a test, as I have suggested, which was referred to in BSkyB. It was originally the result of --

THE CHAIRMAN: Well, rather more than referred to.
MR RABINOWITZ: Indeed, it was fundamental to the decision as to why there should not be a revenue-based royalty.

It arises out of the case of FRS v BEDA, which was the discotheque case, which again decided there should not be a revenue-based royalty. That is, with respect, quite a useful test to see whether or not this should be a revenue-based royalty. But in the present case --

THE CHAIRMAN: That is water under the bridge.

MR RABINOWITZ: Yes, they have accepted it should be a revenue-based royalty.

So far as the causation test is concerned, it is not about directly attributable at all. It is about seeing, as was decided in the BSkyB case, whether there is an adequate nexus between the use of music and the revenues concerned. Sufficient nexus, adequate nexus. And there is no disagreement about that. We would not suggest and do not suggest that if there is no nexus we should still get the revenue. That is not our case.

Now, those are the authorities. Can I just identify one other set of principles that are relevant in relation to the issues before you, to do with the royalty rate. And I would like to mention at this stage, again just so one gets the ground rules clear. The reason I am not referring you to any authority bundles is because it is common ground. And
nonetheless, they are important.

The first point is this, that where one is being asked to fix a royalty rate in respect of an exploitation of a right, and the royalty base that is taken to attract the royalty does not include the full benefit enjoyed by the licensee as a result of that exploitation, this fact, that is to say the full benefit enjoyed by the licensee is not within the royalty base, will tend to argue in favour of an increase in the rate itself.

Take a shopping centre where music is to the general benefit of the whole shopping centre. Take Yahoo, for example. There will be adverts on parts of the Yahoo portal which, on any basis, do not fall within the revenue base. But if in fact people are attracted to that portal because of the music, for instance, it is undoubtedly an incremental side benefit which Yahoo are getting by virtue of having the music.

Now, if that falls without the revenue base, that is nonetheless something that you should take into account in deciding what the royalty rate should be. And that is perhaps an obvious point, but in any event it is a point which Mr Boulton, the expert which the MSRs rely on, has made clear that he accepts. For your note, the reference to that is at B7, page 1484 and
paragraphs 8.20 and 8.21.

THE CHAIRMAN: Can I have a look at it.

MR RABINOWITZ: If you would like to, I can show you that now.


THE CHAIRMAN: Let us read them. (Pause). Yes, we often get this sort of argument in enquiries as to damages.

Garment cutting machines.

MR RABINOWITZ: That is the first principle. And if you can keep Mr Boulton open because the second principle is again common ground. And the second element is as follows: where you are being asked to fix a royalty rate in respect of an exploitation of a right, and the effect of allowing the exploitation of the right in the particular manner sought by the licensee --

THE CHAIRMAN: Yes.

MR RABINOWITZ: -- will be to cut into an existing revenue stream, that is to say an existing revenue stream the result of an existing exploitation of rights through an existing licensee, we are talking about cannibalisation here, and I think I am expressing it badly, but if I say cannibalisation you will know what I mean. If the consequence of granting a right to, for example, the webcasters is that they will eat into the commercial
radio advertising revenue, the effect of doing that will be that our revenues from the commercial radio revenue stream will be diminished. They will be cannibalised because some of that advertising revenue will go to the webcasters and we will therefore get less from commercial radio. This is the -- I am trying to illustrate the principle.

If one has a situation where the grant of a right will lead to an exploitation which results in a cannibalisation of an existing revenue stream, that is again something which will affect the royalty rate in the sense that it is a reason to adjust it upward, so as to compensate for the possibility of the cannibalisation effect.

And again, one finds that in Mr Boulton at 1449, so same volume, just go back. It is paragraph 6.3, but it has got a series of bullet points. And the bullet point I am referring to here is the penultimate one: impact of the licensor.

THE CHAIRMAN: Let me read it. (Pause).

MR RABINOWITZ: So that is, if you like, the backdrop of principles against which we would respectfully submit --

THE CHAIRMAN: Are matters to be assessed.

MR RABINOWITZ: Exactly. Can I then say something.

THE CHAIRMAN: So let us put Boulton away, shall we, for the
moment? Is there a B6, I have just noticed?

MR RABINOWITZ: It has probably been taken away. Withdrawn evidence.

MR STEINHAL: It is withdrawn evidence.

THE CHAIRMAN: Okay. Now we know.

MR RABINOWITZ: What I would like to do, having set the legal context in which the issues arise with I hope sufficient clarity for this stage of the proceedings, is again to narrow the focus of my submissions and return to the facts of the present applications.

Obviously one of the key points to note from the outset is that the licence which is currently before you is not the licence which was originally promulgated and indeed which threatened to be before you in September.

I am going to take you through the terms of the new licence in a minute, because I do not think anyone has done that and I think it is important that you see that.

But before I do that, I would like to be crystal clear about one or two things. In particular, in light of some of the submissions made by Mr Steinthal, what I particularly want to be crystal clear about is this. That the new licence follows and is the consequence of detailed and prolonged discussion and negotiation on all sides. And why do I emphasise that?

I emphasise it because the MSPs in their opening,
and Mr Steinhall again yesterday, consistently seeks to portray the terms contained in the licence as if they were, if you like, handed down from on high without any knowledge or involvement on the part of anyone with an interest in webcasting or the webcasting issues whatever.

THE CHAIRMAN: Yes. He effectively said it was a fait accompli.

MR RABINOWITZ: Indeed. What one needs to be very clear about is when he says it is a fait accompli, there were times when he suggested it was a fait accompli so far as the other negotiating parties were concerned as well, but he certainly says it is a fait accompli so far as his clients are concerned. I will address that in a moment.

Part of his submission is that it was a fait accompli in relation to all webcasting issues, in this sense. That it was an agreement made by them, by parties who had no interest in any of the webcasting issues. That is why he says this is a terrible comparator. He says no-one with any interest in any of those issues was a party to the agreement. And that, with respect, is nonsense and I will seek to show you why in a minute.

Now, I want it to be clear that I am not suggesting
that Mr Steinthal was a party to the negotiations in
September. He was not. And one can speculate as to why
that was the case, but he definitely was not. But
Mr Steinthal himself acknowledged, and acknowledged very
fairly when we were before this tribunal on the
28th September, that he had been a party to negotiations
in relation to these terms. He was not a party when the
deal closed, but it is wrong to suggest or to give any
impression that all of these terms came out of the blue.
And I need to correct that misimpression.

And insofar as you want a reference, I am not going
to turn it up, but Mr Steinthal acknowledged that in the
transcript of the hearing on the 28th September. I will
give you a reference for your note. It is at A5,
tab 91, page 13, between lines 11 and 12. And as I say,
not only did Mr Steinthal yesterday seek to give the
impression that this all came out of the blue, handed on
from on high as regards his own parties; he suggested at
times yesterday, or portrayed at times yesterday,
although as if this were imposed even on the parties who
were signatories to this agreement. That is to say the
BPI, iTunes and the MNOS. And that, with respect, so
far as that was the impression created, again is a wrong
impression. And so far as that is concerned, I do not
need to do anything more than show you what, for
example, Mr Carr for the MNOs says in his written opening about this.

If I can ask you to pick up Mr Carr's skeleton.
I do not know whether you have a bundle Y, because we all have a bundle Y which has got all the skeleton arguments together.

THE CHAIRMAN: I have not. But I have got lots of little ones. It does not matter. I like them like this.


THE CHAIRMAN: Yes, Mr Carr.


THE CHAIRMAN: They are all in bundle Y, are they? And in addition we have got them separately.

MR RABINOWITZ: Whatever you find most convenient.

THE CHAIRMAN: Those behind you are not looking positively.

Page 4 I have got.

MR RABINOWITZ: If you look at paragraph 6 and 7, it says:

"Originally there were 14 headline issues in dispute between the MNOs and the alliance."

THE CHAIRMAN: Oh yes.

MR RABINOWITZ: "These issues were the royalty rate, the revenue base, the MNO delivery charge, minimum royalties, promotional use, new format discount, audiovisual discount, discount for the cost of securing advertising, the identity of the licensee, transactional
licensing, podcasting, synchronisation rights, controlled compositions and the term of the licence. On 28th September, and after extensive negotiations, the MNOs settled their disputes in respect of all the issues in the reference bar one."

So lest the impression was created that this was not the subject of some hard -- I think we in our skeleton said there was give and take, and Mr Steinfeld talked about the cauldron of the negotiations.

THE CHAIRMAN: I got the atmosphere quite well when we met in September.

MR RABINOWITZ: That is what happened. Again, I do not want Mr Steinfeld to think I am misrepresenting his own position. He was not there in September. He was there earlier, but he was not there in September.

Now, why does any of this matter? It matters for this reason. As you will have seen, as I will show you again, the licence which has been agreed has been agreed on behalf of the substantial part of the music industry and it contains detailed terms and conditions about all matters that the parties to that agreement envisaged might arise during the period of the licence.

THE CHAIRMAN: This is on the topic of appropriate comparators?

MR RABINOWITZ: Appropriate comparators. Our submission is
that this is an appropriate comparator.


MR RABINOWITZ: It is not as a strong comparator for some aspects of Mr Steinthal's case as for others. I accept that. But for some aspects of his case we say it is not only appropriate, it is compelling.

Now, what it covers, as I will show you, is it covers the period of the licence, the relevant rates, it covers minima, advertising discounts, audiovisual discounts, the identity of the party issue, and indeed just about every point. Indeed, in fact every point that was at issue.

And contrary to what appeared to be suggested yesterday by Mr Steinthal, there was indeed movement on all sides, give and take, and indeed an agreement emerging out of the cauldron. Everyone had sensibly yielded in relation to some issues and not in relation to others. That is the nature of a negotiation. Because we heard yesterday about how lacking in credibility the alliance were because their position had changed. Well, exactly the same could be made about every other case who was a party to that. It is not a question of a lack of credibility, it is a question of the party being reasonable, seeing the other side's argument and agreeing what, in the context of
negotiation, is to be regarded as a reasonable outcome taken as a whole. And, again, we were lacerated for the fact that these contracts, as I will show you, talk about having to view the contract as a whole, as a package.

With respect, that laceration was again entirely unfair. That is the consequence, the inevitable consequence of a negotiation where some people have to give up on some arguments in relation to some point, because they want to do a deal.

THE CHAIRMAN: I have done this too. I have been in negotiations ... MR RABINOWITZ: But the key point about this settlement agreement, and the licence that results, is that Mr Steinthal's position is that there is nothing at all in the new JOL that is of any relevance to his remaining clients.

THE CHAIRMAN: Now, what do you say about that? MR RABINOWITZ: I say, with respect, that is nonsense.

THE CHAIRMAN: Nonsense.

MR RABINOWITZ: And I will show you. He says this on the basis that the parties that settled had no interest in any of the terms, and he calls them webcasting terms. What he means by webcasting terms are the terms which affect his clients.
Now, one needs to be very clear about this. If I can just show you what he says, if we go to his opening at paragraph 12, page 4.

THE CHAIRMAN: Yes. Just a minute. (Pause). Could we have, Mr Steinthal, copies of your work of art bound, please?

MR STEINTHAL: Absolutely.

THE CHAIRMAN: Like the others.

MR STEINTHAL: Okay.

MR CARINE: We have only got to staple them. They are falling apart.

THE CHAIRMAN: Same pearls might drop out. So if we can give Ms Short these things after the adjournment then maybe you could do it overnight. Thank you.

Sorry, Mr Rabinowitz.

MR RABINOWITZ: We are just looking to understand. Page 4, paragraph 12. We are looking to understand what Mr Steinthal means when he says webcasting terms. As I say, his case is that the new JOL has nothing at all to say to this tribunal as a comparator for any of the webcasting terms. Paragraph 12, what does he mean by webcasting terms:

"Headline rate, minima, gross revenue definition, reduction provided for advertising commission, the audiovisual content rate. Other operative provisions challenged therein."
So basically, webcasting terms mean any term that he objects to.

THE CHAIRMAN: Those he says are inconsistent with the other licensing schemes that have been promulgated. As far as he is concerned.

MR RABINOWITZ: He says a number of things. But what he also says is, and he used fairly strong language in being very dismissive of our contention, which is that the settlement agreement in the new JOL is indeed a useful and we say compelling comparator in relation to the great majority of the points that he raises. And we say, with respect to Mr Steinthal, that is unfair because in fact the new licence is a compelling comparator. And, in particular, it is a compelling comparator because notwithstanding what Mr Steinthal says, as I will demonstrate, it is simply wrong to suggest that the parties to that agreement had no interest in the audiovisual discount, had no interest in advertising and the advertising content, had no interest in gross revenue and how that was defined. With respect, that is just absurd.

Now, let us just start with advertising. The idea that the MNOs and the iTunes, who are here specifically to argue about advertising, who are here specifically because they are worrying about their advertising
revenue and how much of it falls into gross revenue; we heard Mr Carr for the first 20 minutes of his submissions explaining to the tribunal just how important advertising revenue was to Vodafone, referring you to what Mr Bill said about just how big a pot the advertising revenue was. The suggestion that Vodafone had no interest in advertising and therefore no interest in the advertising deduction is, with respect, absurd. And so too is the suggestion that Vodafone, who has always made it clear that it is very interested in the webcasting business. It says that -- it is all over the evidence. Vodafone from the very beginning has said that it has an interest in webcasting. The idea that Vodafone would have gone into this negotiation not caring at all about the webcasting terms again, with respect, is absurd. And so too is the suggestion that iTunes, who is by far and away the biggest seller of audiovisual products, the suggestion that iTunes, with the interest that it has in audiovisual products, would have had no interest at all in the audiovisual deduction is again, with respect, absurd. They plainly would have been interested in it. They were the ones who were most affected by it. And so, just standing back, the suggestion that one
should just disregard as a comparator what iTunes, for
e example, accepted to be appropriate in relation to the
audiovisual deduction, is just misconceived beyond
belief.

THE CHAIRMAN: Mr Rabinowitz, it is now quarter past 3,
shall we have a little break, would that be a good time?

MR RABINOWITZ: Can I finish this part, because I am going
to take you to the licence. I was just going to round
off my very restrained response to Mr Steinfeld's
submission. It will take two minutes.

THE CHAIRMAN: I rather thought the licence, if you were
going to take us through it, is a chapter on its own.

MR RABINOWITZ: It is, so if I can just finish this point
and I will come back and summarise what we say about the
new licence.

THE CHAIRMAN: Introductory coda.

MR RABINOWITZ: Indeed. We say this. We say the new
licences are important, they represent the most current
and the most obviously relevant comparator that one can
imagine. They are not, after all, as current as they
could possibly be.

They are also an agreement made, and we would
respectfully suggest they are the only agreement made in
this country at least, in the context of the
exploitation of online music. And it involves the
central players in the industry, the record companies; iTunes, by far the dominant retailer of music in the online market by an extremely long way; the MNOs, huge powerful companies, dominant in the mobile music market, and other key players like Napster and Sony.

What perhaps makes the comparator even more compelling is the fact that all the issues which are before this tribunal would, contrary to what is suggested by Mr Steinfeld, have been issues for those parties, which they have now agreed. What I am going to do next is take you to the licence and that is a very good place to stop.

THE CHAIRMAN: Just to whet our appetite, are there actual items within the settlement, I mean the agreements as a result of the settlement, which directly impinge on what Mr Steinfeld has told me?

MR RABINOWITZ: Well, indeed. One of the things Mr Steinfeld says, just to whet your appetite. Mr Steinfeld asks for an audiovisual deduction of 25 per cent. And he relies in this regard on the physical, the off-line DVD, I think, comparator where some time ago, some substantial time ago, that was the reduction that was agreed. What he asks you to do is to ignore the fact that the same parties who were involved in that agreement and agreed 25 per cent,
and additional parties and in particular iTunes who, as
I say, is the biggest retailer of these products, have
now agreed 15 per cent.

And as an example of something which plainly affects
what Mr Steinthal wants to do, Mr Steinthal still wants
to rely on the 25 per cent deduction. If you like, the
prior agreement between these parties. And we
respectfully say it is a very good comparator to look at
what people agreed and here is the most current, up to
date one, and it applies to online music and it is
15 per cent.

THE CHAIRMAN: Those are all in volume H.

MR RABINOWITZ: I am going to take you through that in
volume H when we return.

THE CHAIRMAN: We were a little puzzled. We discussed this
over the short adjournment. It is only yesterday that
we saw for the first time the final versions of these
agreements and licences. We saw a draft, if you
remember, of one of them. Then, if I am not mistaken,
we were told that there was some dispute about them
being confidential or something. And so it is probably
water under the bridge now, but we have all the
agreements here, do we, all --

MR RABINOWITZ: You have all the agreements.

THE CHAIRMAN: And they are not confidential.
MR RABINOWITZ: I ought to make it clear. The only thing which is confidential in relation to the agreements are some side letters which are attached to the agreements.

THE CHAIRMAN: Okay. And they are in there, are they?

MR RABINOWITZ: They are in there. The agreements are not confidential. So far as I can recollect, they have never been confidential from the point in time that they were signed. And as to the fact that you only had them yesterday, again I can only say in fact I think you were provided with them on the 28th September --

THE CHAIRMAN: They may have been sitting here, but we do not have biotic whatever.

MR RABINOWITZ: And I am very conscious that nobody has actually taken you to these agreements. After all, that is what this hearing is about and that is why I want to take you through these agreements carefully so you see exactly what this is about.

THE CHAIRMAN: Yes. Let us come back at half past 3. Thank you.

(3.20 pm)

(A short break)

(3.35 pm)

THE CHAIRMAN: Before we rise this evening, Mr Rabinowitz, I want to do about two or three minutes worth of housekeeping, if we could bear that in mind.
MR RABINOWITZ: Would you like me to try and wind up by 25
past?

THE CHAIRMAN: Yes, please.

MR RABINOWITZ: I was proposing now to take you to the
licence, which you will find in bundle H.

THE CHAIRMAN: Got it already.

MR RABINOWITZ: Right. Tab 1. First, you have the
settlement agreement, I am less concerned with that at
the moment, but if you go to page 13, this is in fact
the scheme that is before you.

MR ARNOLD: The scheme what?

MR RABINOWITZ: The scheme which is before this tribunal,
which is in issue.

And the first page, page 13, identifies that it is
the online agreement. If you look at 2.1, again just
highlighting in particular issues which have been raised
by the parties for you to determine. You will see
a reference to the online agreement being available:
"... to providers of online and mobile music
services, who in relation to such services are the music
service providers."

Now, that is an issue, and I will need to take you
to the definition of "music service providers". But one
of the issues which Mr Steinfeld raised relates to that.

And if I can then ask you, you will see the
territory is what you would expect, that is clause 3.

Clause 6 on page 14 identifies the time, the period of
the licence. It is three years. That has been accepted
not only by all the settling parties but Mr Steinfeld
has accepted that as well.

THE CHAIRMAN: Right, three years. So that is not an issue.

MR RABINOWITZ: Not an issue at all. That is part of the
give and take. You will remember that at some point,
people were saying it should be indefinite.

If I can then ask you to look, Appendix 1 sets
out -- it is where the agreement proper starts. If
I can ask you to look at page 17.

THE CHAIRMAN: No problems on definitions?

MR RABINOWITZ: Well, we are on page 17 in the definitions.

THE CHAIRMAN: I am sorry, yes.

MR RABINOWITZ: You will want to mark "gross revenue", top
of page 17. We will go to schedule 3 in due course, but
you will see, you were told it is in schedule 3.

At the bottom of page 17 you have the definition of
"music service provider". You may want to glance at
that.

Before we turn the page, "Licence Services", still
on page 17, we are into music services. That is still
in schedule 6. That is something you will want to have
a look at.
Now, just on music service provider, as I have suggested, we thought that was an issue until yesterday, and it may be that it is not an issue anymore. Mr Steinfeld I think indicated that it may not be an issue.

THE CHAIRMAN: Let us ask. Is it an issue?

MR STEINFELD: Well, I think it depends on what the alliance says as to the proposition that I asserted yesterday, which is whether they were prepared to offer to any entity that abides by the terms and conditions of the MusicNet agreement, MusicNet being a white label supplier. And just to be clear, MusicNet does not contract with the customer in the case of HMV and Virgin for example. They supply the back end, they supply the entire product. They report, et cetera. But they do not contract with the website visitor to HMV or Virgin, that contracts if they want the subscription on-demand service with HMV or Virgin respectively.

THE CHAIRMAN: I have an idea, Mr Rabinowitz. Perhaps I could ask you both to discuss this when we rise.

MR RABINOWITZ: If we say what our position is, it may help us.

THE CHAIRMAN: Would you still have a word with Mr Steinfeld?

MR RABINOWITZ: Absolutely. We have not really understood
why this point has been taken this far. Because in
their pleadings, Mr Steinfeld's clients raised the music
service provider point in relation to Yahoo. And in our
pleadings, now quite a long time ago, we made it
absolutely clear that we would give Yahoo a letter in
identical terms if they could satisfy us of the same
things as MusicNet have, and I will show you the
MusicNet letter. We made it perfectly clear that they
too could get a side letter like MusicNet and there
would be no problem. It would be discriminatory of us,
and we would not do this --

THE CHAIRMAN: And therefore --

MR RABINOWITZ: Withhold that sort of letter from anyone
else, if they could satisfy the same requirements.

MR STEINTHAL: As long as it is not company by company. So
for, example, RealNetworks may very well in the future
bundle their service together with a broadband supplier.
We cannot have a situation where everything is subject
to a side letter, and then an entity that does not have
access --

THE CHAIRMAN: All right. You cannot see this, but this has
promoted a lot of discussion behind you. I am going to
ask you both, please, to meet up after this session
today and see if we cannot clear this one. Because
I just --
MR STEINTHAL: Sounds like we should be able to. Feeling
like it --

MR RABINOWITZ: It does not sound like it is very far apart.

THE CHAIRMAN: Yes, exactly.

MR RABINOWITZ: It may or may not matter, but that is the
current definition of "music service provider".

On page 19, you have a definition of "repertoire
work", and it is what you would expect. It simply
identifies what is the work that falls within the
repertoire.

THE CHAIRMAN: And PRS, MCPS, yes.

MR RABINOWITZ: "Term" and "territory" you may want to note.

Nothing is going to turn on them.

THE CHAIRMAN: I often see Gibraltar with these, but never
mind, it is up to you.

MR RABINOWITZ: Clause 2, page 20. Clauses 2.1 and 2.2 are
in a sense the operative part of the licence. This is
the grant of rights. And there is a grant of rights by
MCPS in clause 2.1:

"To reproduce the repertoire works", et cetera,
"authorise the pre-loaded copies of the musical works on
database storage devices."

Clause 2.2 is the grant of rights by the PRS.

THE CHAIRMAN: Yes.

MR RABINOWITZ: And just pausing here, because this is going
to be relevant to a point which I think Mr Carr made,
Mr Weisselberg made as well.

It was suggested at some point that in relation to
the online/off-line analogies, which you saw make up an
important part of the argument: can you translate
online? One of the points we make is a different person
is being licensed here. Here, online, the retailer is
being licensed, not the record company. That is an
important point that I will go back to.

It was said at some point: well, you know, you have
chosen to licence the retailer, rather than the record
company. With respect, that is a misconceived point
because it is not a question of choosing to licence
anyone. We need to identify the people who are doing
the licence acts. And in the context of online, we are
not talking about the --

THE CHAIRMAN: That are required to be licensed acts.
MR RABINOWITZ: That are required to be licensed acts. In
the context of online we are not talking about producing
CDs. We are not talking about the record company
requiring the licence to produce the CD and therefore
requiring a licence to do the mechanical copying of it.
We are talking about the retailer who is doing the
licensed acts. And that is why it is the last person in
the line who has to get the licence. I will have to
return to that, because it is important to some of the
analogies and arguments which were made. But I thought
it worth pointing that out here where you have the fact
before you, what it is that is actually being licensed.

Now, clause 5.9 and 5.10.

THE CHAIRMAN: Just a moment, hold on.

MR RABINOWITZ: What you have immediately after clause 2 are
exceptions and limitations to a licence, nothing turns
on those.

THE CHAIRMAN: Yes. What you have not drawn our attention
to we are assuming, if not hoping, that we do not need
to worry about.

MR RABINOWITZ: That would be a correct assumption, or
hopeful.

So you have got the exceptions and limitations which
follow the grants at section 3. There is nothing in
there I need to show you.

At section 4, you have got further restrictions.

I do not think there is anything there that I need to
show you. Section 5 deals with payments and accounting.
And what I need to show you in the context of section 5,
or sections 5.9 and 5.10, this relates to a point that
Mr Steinfeld takes about non-repertoire works. If I can
just read those to you. It is on page 25.

THE CHAIRMAN: I have it.
MR RABINOWITZ: "In relation to permanent download services and ability to download on-demand services only, if and insofar as, 1, a musical work is not in copyright in the relevant part of the territory, or 2, it is not a repertoire work, credit shall be given by either or both of the licensors as the case may be for any overpayment of royalties. The parties shall discuss in good faith the mechanism for calculating and granting any rebate for musical works which are not repertoire works. Unless and until agreed otherwise, the terms set out in this agreement shall apply, if being acknowledged by the licensors that it may then be necessary to make adjustments to payments that have already been made by the licensees to the licensors as from the commencement date as to allow for royalties paid on musical works that are not repertoire works."

THE CHAIRMAN: All seems straightforward to me.

MR RABINOWITZ: It is straightforward. But what is important, and I think the objection that Mr Steinthal takes to this is in the opening words:

"In relation to permanent download services and ability to download on-demand services only", that is an important restriction. In other words, what the parties to this agreement have done is to identify services where it would be possible to identify particular songs.
which --

THE CHAIRMAN: That are not in the repertoire.

MR RABINOWITZ: -- are not in the repertoire and which have been sold and money obtained and paid for them.

THE CHAIRMAN: Yes.

MR RABINOWITZ: When we come on to 5.10.

THE CHAIRMAN: Notwithstanding the amount.

MR RABINOWITZ: 5.10 is a general application. It does not just apply to permanent downloads, and limited download services. And as I understood Mr Steinthal's objection until yesterday, it is that he wanted the benefit of 5.9 as well. And our position on that, just so that one is clear about this, is that 5.9 is not apposite for a webcaster who is streaming music and not paying for specific songs, but just paying primarily by reference to advertising --

THE CHAIRMAN: By reference to?

MR RABINOWITZ: By reference to advertising revenue. It is not apposite to apply 5.9, which works perfectly simply if you have got a permanent download service and an on-demand service. It is not apposite to apply that to radio and indeed it does not apply to radio at the moment.

But 5.10 we accept should apply and would apply.

THE CHAIRMAN: You are worrying me now because I thought
I understood permanent download services and limited
download ODS.

MR RABINOWITZ: On-demand service.

THE CHAIRMAN: On-demand.

MR RABINOWITZ: I am going to explain it to you in a little
more detail. Permanent download you do understand
because that is what you do on iTunes. A limited
download service, it would be permanent except it is
not.

THE CHAIRMAN: Yes, I know. Yes.

MR RABINOWITZ: But it expires.

THE CHAIRMAN: It is like my security pass that for some
reason expired yesterday, mysteriously during the
afternoon.

MR RABINOWITZ: The way in which this would work, it is
a sort of webcasting service in the sense that you pay
a subscription and you get a download. You think it is
permanent unless you stop paying your subscription. And
then "wham bam" it goes.

THE CHAIRMAN: It fades by some astonishing process. I do
not know it does that.

MR RABINOWITZ: On-demand is similar in concept in that what
it enables you to do is not to get a track which is
permanently yours but you can play the track. It never
becomes permanently yours but you can play it wherever
you like. It is as good as having it permanently yours,
because although you cannot put it in your pocket and
walk away; whenever you want it, it is there.

MR CARINE: So I have made a note: like a library book.
MR RABINOWITZ: It is like a library book and you can always
go to the library whenever you want to take it out.
MR CARINE: It will always be on the shelf.
The CHAIRMAN: That is a good analogy.
MR ARNOLD: It is overdue because you have to pay for it.
MR RABINOWITZ: And one of the things we are going to have
to talk about very shortly is how all of these
services -- it is a spectrum. You start with permanent
downloads, you go to pure webcasting and there are
little changes along the way.
The CHAIRMAN: Are you not all agreed about that?
MR RABINOWITZ: No. I thought we were.
The CHAIRMAN: I thought there were diagrams and so on to
help.
MR RABINOWITZ: Indeed. But Mr Steinthal's position -- I am
slightly taking this out of turn -- Mr Steinthal's
position for the moment is that webcasters is a wholly
different business where it has nothing to do with
anything that the permanent downloaders might want to do
and have done. And, indeed, what the limited download
and on-demand service was. We say this is a spectrum.
And why does this matter? It matters that in the context of setting royalty rates, once you accept that there is a spectrum and you are starting with permanent downloads at one end and pure webcasting at the other end, then the rate that you fixed for permanent downloads does tell you quite a lot about what the other rates might be.

THE CHAIRMAN: Well, you take a look at the original pleadings, which I always do. Take a look at the original pleadings, because BPI was the leader.

MR RABINOWITZ: They said exactly said.

THE CHAIRMAN: To save time, ink, money -- dare I say it, everybody chipped in and said: yes, I agree with paragraph 15, I just wish to add the following. Now, I have not been through all the minutiae of supplemental and amended pleadings.

MR RABINOWITZ: It never changed.

THE CHAIRMAN: That is what I thought. You take a look at that. Somebody did a diagram, was it --

MR RABINOWITZ: I think it was BPI.

THE CHAIRMAN: BPI did a diagram.

MR RABINOWITZ: In fact, as you will see in due course, the MSPs in their written opening for the hearing that was due to start in September made exactly the spectrum point. This is a continuing spectrum --

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THE CHAIRMAN: And webcasting and so on was in the middle.

MR RABINOWITZ: And we say that is --

THE CHAIRMAN: General webcasting was at the other end.

MR RABINOWITZ: Pure webcasting.

THE CHAIRMAN: Yes.

MR RABINOWITZ: This is all part of a style of offering.

And why do we say it matters? It matters because, as I say, you have agreed the royalty rate at the top. It does tell you something about what should happen below in terms of royalty rates.

So in any event, let us go back to 5.9 and 5.10.

THE CHAIRMAN: We got to the phrase "notwithstanding the above" and I interrupted you. I am sorry.

MR RABINOWITZ: Not at all:

"Notwithstanding the above, more music services where a significant portion of musical works accessed by users are either no longer in copyright in the relevant part of the territory or are otherwise not repertoire works, by way of example, services specialising in classical music, the licensor shall agree an appropriate deduction to the gross revenue and minimum royalties to apply as from the commencement date. The deduction shall be reviewed every six months."

Now, that is a term that we accept should apply to the webcasters. And the difference between us, just so
I can identify what the difference is, is that
Mr Steinhall wants specific deductions in relation to
every piece of music which turns out not to have been a
repertoire work. He wants a credit for that. We
say: no, the appropriate way to deal with this, given
the nature of the business you are running, which is
streaming music, is: yes, if it is right that
a significant proportion of musical works turn out not
to be repertoire works you ought to have a deduction.
But not on each specific work. It works for permanent
downloads, it works for limited downloads and on-demand
services, it is not really appropriate for that
business. That is a short issue and that is the
difference.

THE CHAIRMAN: Just a minute, stop. (Pause).
Musical works which are not repertoire works. That
suggests to me, if I understand your argument right,
that means not just a general bunch of musical works --
I see, but then you would read "notwithstanding the
above" as the mechanism for achieving it.

MR RABINOWITZ: Indeed.

THE CHAIRMAN: So it is going to be done in terms of a sort
of brushstroke approach rather than an item by item
approach.

MR RABINOWITZ: Item by item.
THE CHAIRMAN: Let me ask you this -- sorry, I am severely
interrupting your argument. We are intrigued and
somebody will no doubt deal with it in evidence about
the accounting, as my colleague said. But how are you
going to itemise every single download or stream item
that is not within the repertoire?

MR RABINOWITZ: Well, I think, let us just talk first about
how you itemise every item which is streamed or
downloaded. The MSP will do that because it
electronically will take into account when there is
a download or a streaming of a particular song.

THE CHAIRMAN: Of a particular song. So it can be done
song-by-song.

MR RABINOWITZ: I suspect it can be done song-by-song. I am
speaking on the hoof at the moment. But if it can be
done for permanent download song-by-song, then I would
have thought the technology would exist.

THE CHAIRMAN: Yes. Well, then, why can't it be done
with --

MR RABINOWITZ: With the webcaster.

THE CHAIRMAN: But then why, Mr Steinthal wants it done
song-by-song. You want it done by --

MR RABINOWITZ: This is for the purposes of a deduction,
though. The primary payment in relation to permanent
downloads will be for each download which is made.
1 THE CHAIRMAN: Yes, of course.
2 MR RABINOWITZ: Whereas for webcasting, it is much more in
3 the style of a constant stream of music.
4 THE CHAIRMAN: Yes.
5 MR RABINOWITZ: And therefore attributing a specific value
6 to each piece of music will be a much more complex
7 process; not really matching the revenue stream, as it
8 would for permanent downloads.
9 THE CHAIRMAN: This is, in other words, a matter of
10 counting. Of accounting, if you like.
11 MR RABINOWITZ: It would be a matter of accounting in the
12 first place, but principle as well. In the sense of
13 saying: if your business involved just providing
14 a constant streaming of music, should there be
15 a deduction every time you find out that one piece of
16 work was not a repertoire work?
17 THE CHAIRMAN: All right. Well, look --
18 MR STEINTHAL: I do not want to interrupt the opening, but
19 I would, if permitted, explain where on this particular
20 issue, where the issue is.
21 THE CHAIRMAN: Well, look, can I suggest that you both --
22 this is another matter. You both talk about it.
23 Because as I see it at the moment, it does not seem that
24 there is a yawning gulf between you here.
25 MR ARNOLD: Just seems to me. I may be getting this totally
the wrong way around. You are talking about webcasting and permanent streaming. Surely at some stage, the webcaster must have permanently downloaded the music in order to give a continuous stream.

MR RABINOWITZ: He would have copied onto his server all the music.

MR ARNOLD: So it is actually a permanent download as well, but it is not coming out.

MR RABINOWITZ: He is not selling a permanent download, so the service he is offering the user --

MR ARNOLD: Presumably when he downloads your permanent copy, he is paying royalties on that?

MR RABINOWITZ: No.

MR STEINTHAL: That was what I explained yesterday; that there was the mechanical part. This is the second right argument. That there is a copy made on the server to facilitate the performance, but there is never a distribution by a webcaster to a consumer of something to be downloaded. It is only a stream. There is a server copy made to facilitate the stream, not unlike the server copy made by simulcasters and broadcasters for their performances as well.

THE CHAIRMAN: This is sort of less PRS and more MCPS. Surely you can come to some arrangement --

MR RABINOWITZ: You would have thought so.
THE CHAIRMAN: -- about this. I will leave it at that.

I want you just to talk about it afterwards, please.

All right, on you go. Thank you both.

MR RABINOWITZ: Again, just passing very quickly through
terms which are not in issue. Fees and payments, those
monthly accounting reports. Section 6. And there will
also be quarterly accounting; that is dealt with by
section 7, nothing turns on that. Section 8 is supply
of information. And again, that may answer part of your
question about: how are you going to know what has been
produced and what music? 8.1 might give you the answer
there. Late reporting, what happens if you report late
on what royalties are due. 10 deals with credits and
notice. I do not think anything turns on that. 11 is
an auditing provision. Again that is not material. 12,
security and encryption. We do not need to worry about
that either. 13.1 simply reiterates the period of the
licence.

THE CHAIRMAN: That was in dispute, but now no longer.

MR RABINOWITZ: It was in dispute, now no longer in dispute.

And then if I can ask you to go to page 35, where
you will find schedule 1. This might be helpful in
terms of understanding exactly what is involved in each
of these services. Just picking up:

"Limited download, on-demand streaming services or
ODS service."

That is the second block.

"The service ..."

Other than excluded service, leave aside that.

"... whereby a user may receive a musical work by streaming on-demand via a network. The time and place at which such a musical work is received is selected by the user [that is important] and/or may download via a network that musical work, but where such download may not be retained by the user on a permanent basis."

So I hope that reflects what I said to you, the concerts of limited download and on-demand streaming. The second one is limited download; I would characterise as "limited download". And the first one is the on-demand streaming.

You can choose: I want to listen to Bob Dylan or Frank Sinatra, press a button, choose the song you want to listen to. You do not own it, but you can listen to it whenever you like. It is as good as owning it.

The definition of "music service" you see immediately below that. It comprises all of the services we are looking at, and any combination of them. "Permanent download service" is what you would expect, but we can just have a look at what it says:

"A service, other than an excluded service, by which
a musical work is communicated to the public via
a network in the form of a download and where such
a download may be retained by the user on a permanent
basis."

Again it is being communicated to the public. That
is the right which is being licensed here. That is why
the suggestion which is made, that is all our choice
about who is the licensee and therefore ignore the point
about what the revenue is, is simply a bad point. This
is the licensed act. In the online world, it is an act
which is being carried out by the retailers, if we can
call it that. iTunes is the one selling it and
communicating it.

Then we get podcasting on the next page which
happily you do not have to worry about.

THE CHAIRMAN: Yes, we have not heard about that. It looks
as though it might loom in the ...

MR RABINOWITZ: It is again very interesting technology, but
does not have to detain us.

Premium and interactive webcasting services:
"Premium and interactive webcasting services are
actually defined by reference to them being neither pure
nor limited demand, unlimited download and on-demand."

In other words, it is interactive. The best way of
describing it is to say: it is not any of the other
categories. It is the category between the others. And so it is then important to look at what pure webcasting services are:

"A service other than an excluded service of simulcast service, by which musical works are broadcast to users via a network. For the avoidance of doubt, it constitutes a pure webcasting service. There must be no interactive functionality; for example, without limitation. No use of controls to then enable the user to pause, skip, move forward or backwards through the stream. No personalisation of the service by the user or the ability for the user to offer preferences which then dictate the tracks which are provided to that user. For example, without limitation, no ability for the user to rate tracks as to influence subsequent tracks that are subsequently played."

The advance notification of what you are going to play. And then there are restrictions on how many songs of a particular artist you can play in particular periods. And you will have heard yesterday and seen in some of the documents that there has been an ongoing debate between the alliance and Yahoo about whether Yahoo's service is interactive.

Now, I ought to be clear about what is in debate, what is in issue or where there is a disagreement and
where there is not a disagreement. Because what is
absolutely clear about Yahoo’s service; and I have no
doubt my learned friend will interrupt me if I am saying
something which is not right about this. Yahoo’s
service, you can skip songs. In other words, you get
a stream of music. Let me start from the beginning.

THE CHAIRMAN: I think I know what you mean in relation to
CDs.

MR RABINOWITZ: In relation to CDs.

THE CHAIRMAN: Bands, tracks.

MR RABINOWITZ: Indeed. But you can never do it in relation
to radio. The idea of sitting listening to Radio 1,
saying: I really hate this, I am skipping to the next
song, you cannot do that.

But Yahoo’s service is a fantastic service. But it
is more sophisticated, even than that. Because what you
can do is, and Pandora is the same. It is also
fantastic. You can create your own station. It is
called "my station", and what you do is you feed in your
preferences. You say: I like Frank Sinatra, Bob Marley,
Bruce Springsteen and Laurence Welk. And it will find
a way of streaming that music to you and other music
which shares an algorithm, which is to be found in that
music. So you can affect the music that you get.

And if, for example, they start playing you the
songs and something comes on which does not sound anything like the songs that you like, you can hit a button and you can skip it.

You can also rate music. You can say, "I really, really, really like this song", and then it knows for next time: this person really, really, really likes that song. You can ban, prohibit certain --

THE CHAIRMAN: And can you get repeats, Bridge Over Troubled Waters, five times?

MR RABINOWITZ: Over and over again. I do not think you can, I do not think you can.

THE CHAIRMAN: Well then, you can put the skip button on that one.

MR RABINOWITZ: You can skip. What you can do is create a new "my radio".

THE CHAIRMAN: Yes.

MR RABINOWITZ: And then hear it again.

Now, you will have seen that Mr Steinthal in his opening says: this is no different to radio, because with radio, you can just turn it off if you do not like a particular song or you can change the channels. With respect, this is entirely different.

Your Honour asked Mr Steinthal yesterday: why would anyone go for a webcast rather than a radio? There are so many radio stations? And he did not quite answer the
question. He talked about the advertising world and how much advertising there was and how much money there was to be made from the adverts. The reason people will go in webcastings rather than radio is because you can interact, it is interactive. You can effect, you can create "my own radio station". Pandora, you can put in your preferences and get a stream of music which is exactly the sort of music that you want, because you have told them what you want.

THE CHAIRMAN: Is this available in England now?

MR RABINOWITZ: Pandora, you have to feed in, as I understand it. Mr Brown from Pandora is going to give evidence. But what you need to do in order to get it is to put in a US --

THE CHAIRMAN: Did we see this at all?

MR RABINOWITZ: I am not sure you saw Pandora.

THE CHAIRMAN: No, we did not. Can we see this then? This is one of the things I want to talk to you about at the end.

MR RABINOWITZ: Undoubtedly. That is what makes it so different from radio. You can not only customise your station, but if it plays a song you do not like, you can skip. And I think on Yahoo, you can skip as many times as you like. Just skip and skip and skip until it until it comes to another song you like. You may not want to
do that, because you are working or doing whatever else, but you can.

And that, I do not believe any of that is in issue. There has been a difference between the parties, funnily enough, about terminology. And one understands this. Because Yahoo think that they are DCMA compliant and they are using, I think when they use "interactive", they use it in the sense in which they say it is used in the American legislation. Whereas the DCMA act, which Mr Steinthal mentioned yesterday, we are going to have a look at that very briefly at some point.

We, when we use the word "interactive", with respect, use it in the ordinary English sense that you interact and affect what is going on, and indeed we use it in the sense that it is used in the licence. You can skip it and you can do things with it.

And that is a key difference between radio and webcasting. And that is one of the things, one of the reasons we say radio, of course it is a comparable in the sense that it tells you something, but it is not as strong a comparable as Mr Steinthal's clients say it is.

Because there are key differences. We saw one difference when we looked at the AIRC case which is the mix of things. Music, music, music on the one hand, that is the MSPs; on the other hand, you have radio
which has the mix of sport. This is the other key
difference, the interactivity about it.

THE CHAIRMAN: That is a content difference.

MR RABINOWITZ: The first is a content difference. This is
a control over the music difference.

THE CHAIRMAN: Yes.

MR RABINOWITZ: Because just so that one understands,
because I am not sure that anyone has actually explained
this. What underlines the different royalty rates in
the scheme is the extent to which the user gets to own
or control what is being played.

At the top end, you have permanent downloads where
you own and therefore control. You go down to limited
downloads and on-demand streaming where it is slightly
less, and so on, until you get to pure webcasting where
it is about as close to radio as you are going to get,
I suppose, in the webcasting world. You cannot
influence it because it is not interactive.

THE CHAIRMAN: I think the best thing to do is if somebody
could fix one of these things up and we could have
a look and see, experience, we will soon decide about
that.

MR RABINOWITZ: I think we should do that sooner rather than
later, so that we are not just talking about it, but so
you see it.
MR CARINE: Can I just ask. The interactivity that you
postulate, Yahoo and Pandora, does it also apply to AOL
and the other clients?

MR STEINThAL: I can answer that. There are differences in
the services. The services, Real and AOL, their radio
services do not have the degree of ability to provide
ratings and information that Yahoo has.

MR CARINE: Thank you very much.

THE CHAIRMAN: Sorry, page 36.

MR RABINOWITZ: So that was page 36, and we have seen pure,
you have seen premium and interactive; which you now
understand why it is, by reference to not being pure.

And then if you go over the page, you find special
webcasting services. And just picking that up:

"A pure webcasting service of premium and
interactive webcasting service, with more than
50 per cent of the sound recordings of the musical works
communicated to the public or by a single artist or band
or comprising a live performance by a single artist or
band, with related performances by other artists and/or
bands."

So it is a sort of dense offering of particular
artists. And again, that is getting closer to the
on-demand service in relation to a particular artist.

Now, in relation to this, some of the MSP witnesses,
and it may be in their pleading, say, "Well, this is all irrational because why is 50 per cent the right figure? That means that at 49 per cent, it is not special webcasting, but at 51 per cent it is."

And with respect, they are entirely right. What they say is true. If you take 50 per cent as the benchmark, anything falling on one side of the line would be out and anything falling on the other side of the line would be in.

But that is true of any attempt to identify a point of time at which you treat something as a specific category. If you are trying to create categories, you have to delineate them by reference to certain characteristics. And the point that they make would be true of any figure that you take. It does not make it an irrational category. The fact that some things fall within and some things fall without does not mean that it is irrational.

THE CHAIRMAN: Or may go right up to it.

MR RABINOWITZ: It does not make it irrational. You have to draw the line somewhere, and the alliance have drawn the line at 50 per cent because that seemed an appropriate place. If the debate was: well, it ought to be at 60 per cent, no doubt if they had set it at 60 per cent we would have exactly the same debate. It is not
realistic to say it has to be 100 per cent.

THE CHAIRMAN: Do not we are worry. We often have this in patent claims where you have a figure and then the defendant puts in 49.9 per cent and says: ha, ha, I am not infringing. We know about this one.

MR RABINOWITZ: We have drawn the line at 50 per cent, and that is the special webcasting category. I think yesterday Mr Steinfeld seemed to suggest that he is not actually concerned about the special webcasting category because his clients are not engaged in that. If that is right, good, that is another debate which can fall away.

THE CHAIRMAN: Maybe you could discuss that point too.

MR RABINOWITZ: Maybe. But if that is not going to happen, then now you know what special webcasting is and where it comes up.

THE CHAIRMAN: Thank you.

MR RABINOWITZ: The next page is schedule 2 and the royalty fee.

THE CHAIRMAN: Yes.

MR RABINOWITZ: The definitions that matter, applicable revenue.

THE CHAIRMAN: What was the title of schedule 1? Just remind me, oh, definition of music. Good. Schedule 2.

MR RABINOWITZ: Applicable revenue means the gross revenue less VAT. We are going to have a look at gross revenue
shortly. And "minimum royalties" is what it says, I suppose. If I can take you to clause 2, page 39; some parts of this may have been taken. I am not sure you have, actually. But at page 39, you have the royalty fees which are set out.

THE CHAIRMAN: Yes.

MR RABINOWITZ: And it starts with the permanent download service at clause 2.1. You see it is the higher of 8 per cent of the applicable revenue which we know to be gross revenue.

THE CHAIRMAN: Less VAT.

MR RABINOWITZ: Less VAT. And either, and then you have a series of minima which are set out. The minima are set out and differentiated, depending on how much music is being downloaded at any one point in time. Is it one track, is it a package of tracks, et cetera?

THE CHAIRMAN: And it is the same point.

MR RABINOWITZ: It is the same point.

THE CHAIRMAN: Yes.

MR RABINOWITZ: And since the royalty fee in relation to permanent download service is not an issue, it is all agreed, we do not have to bother about the detail which follows. Unless anyone wants me to refer you to any of these subparagraphs, I was going to refer you to clause 2.2 next.
THE CHAIRMAN: And you are going to treat B, subparagraphs 1 to 5 as an entity.

MR RABINOWITZ: On minima.

THE CHAIRMAN: On minima, yes, I see.

MR RABINOWITZ: What is important is that you will remember that minima was a very hotly debated issue.

THE CHAIRMAN: Yes.

MR RABINOWITZ: And we were told there were all sorts of intellectual and other justifications as to why, including from Mr --

THE CHAIRMAN: It was not in the original proposal.

MR RABINOWITZ: It was not in the original proposal. It then came in and there was a huge ruckus about it because it was said: this is inappropriate, you cannot have this, it is not right. The alliance said: we are in a different world now, minima are important because our interests are not always aligned and we need the minima.

What you see arising out of the cauldron of the negotiations are minima. And that is important, we would say, as a comparator when one deals with the concept. The fact they have been agreed is important when one looks at Mr Steinithal's clients because they still resist minima.

THE CHAIRMAN: I was going to say, he is the only one who
resists.

MR RABINOWITZ: He is the only one who resists.

THE CHAIRMAN: Minima. Yes. Anyway, for present purposes, what you say is that there they are, and they are set out.

MR RABINOWITZ: Indeed.

THE CHAIRMAN: And we can --

MR RABINOWITZ: I am just showing you the lay of the land, as it were.

THE CHAIRMAN: Yes, yes, I have the point. Mr Steinfeld is the only one on minima.

MR RABINOWITZ: He represents the only party. Let me put it that way because it is slightly unfair to characterise him as the only one.

MR STEINFHAL: I am getting used to it.

THE CHAIRMAN: You wear a lot of hats, Mr Steinfeld.

MR RABINOWITZ: It is just the shorthand. Everyone knows what we mean. But other than his parties, there has been -- and those who have tied themselves, I ought to make that clear to --

THE CHAIRMAN: I understand that.

MR RABINOWITZ: -- to his position. Everyone else is agreed on minima, and that is in relation to permanent downloads. Now, 2.2 has the royalty rate for limited download on-demand service and you will see again it is...
an 8 per cent applicable revenue. And again, if you
look at the minima here, you will see that they are all
by reference to subscription services. Sorry, that is
wrong: 1, 2 and 3 are all minima which attach to
subscription services, and then 4 is for a limited
download on-demand service which is not a subscription
service. And one of the issues in the case which we are
going to have to hear about is an objection which is
made by one of Mr Steinthal's clients to the fact that
minima are occasionally on the basis of a per
subscription, and occasionally on the basis of a per
stream. Generally, just so you understand the logic of
the licence, where the service is a subscription service
then the minima relates to the subscription. And where
it is not a subscription service, then since there is
not a subscription to which the minima can relate, it
relates to the music which is provided.

And I suppose just a general point to make in
relation to 2.2. I have said, and I know the tribunal
has understood, that limited demand and on-demand
service is not as good for the user, it is not as full
a product for the user as permanent downloads. And you
may ask yourself: well, why is it 8 per cent? Because
8 per cent is the same royalty as was applicable to
permanent downloads. And that, when one first thinks
about it, looks anomalous. When one thinks about it
a little bit more and realises that the retailer is
going to be charging a different price, obviously
a greater price for permanent downloads than for limited
downloads, the take to the alliance will be smaller.
I think there was a tribunal case where the tribunal say
that what matters in the end is the money. You can get
carried away by looking at percentages.

THE CHAIRMAN: That was a quotation from a person called
Mr Nicholas Lowe, who was formerly with PRS and founded
the Irish equivalent of PRS. I remember it extremely
well.

MR RABINOWITZ: It was Mr Lowe who said that. And that is,
with respect, absolutely right. What matters in the end
is the money and one must not get carried away by the
percentage royalties here; 8 per cent and 8 per cent is
the same. But of course if the retailer is charging
less for the one, the take is going to be less.

And that is again the position in relation to
limited downloads. Now, you get to 2.3, and special
webcasting services. Again, it is an 8 per cent. And
you are now familiar with the minima, and again the
difference between the subscription services and other
services. You may just want to glance at that.

THE CHAIRMAN: Yes.
MR RABINOWITZ: And then 2.4, premium and webcasting services, 6.5 per cent. This is the rate to which Mr Steinfeld objects, he says that should be 5 per cent.

Just glancing down, because the point is the same, if you look at pure webcasting services, again 6.5 per cent is the rate of the licence. And again Mr Steinfeld I think says 5 per cent.

THE CHAIRMAN: In 2.5.

MR RABINOWITZ: Indeed. Mr Steinfeld says we should not have these two categories. It should be one category, call it general webcasting, and let us take 5 per cent.

In fact, even Mr Boulton thought that the rate for interactive should have been higher than pure. He put it at 5.5 per cent. But be that as it may, Mr Steinfeld has gone for the lower amount but to apply to both categories.

THE CHAIRMAN: Yes, he is saying put them together.

MR RABINOWITZ: Put them together and let us take the lower amounts.

MR CARINE: I think he said 4 per cent but would concede 5 per cent.

MR RABINOWITZ: Indeed. I think what he said is that radio is 4.1 but he would concede 5. That is, I think, the way the argument goes.

And then just again, so that what is clear about
this, the difference between premium and pure in terms
of the take, you see in the minima, the minima are
different.

THE CHAIRMAN: Yes.

MR RABINOWITZ: And that reflects the difference in the
value of the services. Because whilst it is right to
say that if the retailer charges more than 6.5 per cent
on more, it will be more than 6.5 per cent on less, you
would have to actually adjust the amounts of the minima
otherwise you are going to get the same and that would
be wrong, because interactive is a greater use of the
music or a fuller use of the music than pure.

And Mr Steinthal, as you know, not only objects to
the principle of minima in relation to webcasting, he
also says these rates are too high and we will have to
come back to that.

THE CHAIRMAN: 0.6 of a pence to three other decimal places.

MR RABINOWITZ: Indeed, yes.

So then I think, if I can just take you to this very
quickly because you have seen it. Bundling, at the
bottom of the page.

THE CHAIRMAN: Yes. This seems to have fallen out of
contention.

MR RABINOWITZ: Well, I am not sure. Again, this may be
something that we need to talk about, Mr Steinthal and
I. Because I am told yesterday -- very quickly, what
the alliance says is, and this is similar to what
Mr Steinthal says, in the first instance if there is
a bundle what you should do is to see if there is
a stand-alone price for each product. If there is, you
scale it up or down proportionally. It is very unlikely
you would scale it up, probably scale it down.

Then the alliance says: look, if there are no
stand-alone prices being offered by that supplier, then
what you need to do is see whether you can find some
separate comparable service which is being offered for
each of them so you can get a sense of the value. And
in each case there will be minima, and you either take
the stand-alone price scaled up or down, or the minima,
or the comparable prices scaled up or scaled down, or
the minima.

We had understood until yesterday that
Mr Steinthal's position, based on Mr Boulton, had three
stages. First, the comparable, see if they are
stand-alone products which are, you can scale up or
scale down. He had a second stage, Mr Boulton has
a second stage, which is ascertaining the residual value
if there is no stand-alone price. And only then does
Mr Boulton go to the quantity-based approach, which is
similar to minima. He gives it a different name because
he does not want to conceded that you can have minima
but it is effectively the same, it is identifying
a fixed value.

Yesterday Mr Steinthal, and I will deal with this in
more detail, seemed to suggest that the middle step had
gone away and that if you did not have the stand-alone
prices you went straight to the quantity base. If that
is the position, and I can talk to him about it in due
course, then we need to have a discussion just to see
exactly what is between us on this. Because who knows.

THE CHAIRMAN: I would encourage that.

MR RABINOWITZ: But in all events, just so that you have it,
this is the provision in the licence, which is currently
under attack, to do with bundling.

THE CHAIRMAN: Good.

MR RABINOWITZ: I think given that you want to pick up some
housekeeping points, I will just stop there.

THE CHAIRMAN: Thank you, Mr Rabinowitz. Thank you very
much.

Housekeeping

A couple of points. First of all, we got today our
first transcript. It would be very useful, we feel, if
we could have some lever arch files for the transcripts.
Let us have them with dividers so that we can do it day
by day, or maybe a coloured divider to divide the
witnesses out. And if they can be in loose leaf form, because that is the way they have come in the envelopes. If we could have some sets of those in there, then we can take them away if we need them. I do not know who will do that, but I am looking at Ms Short again.

Then the two days, the 27th and 28th. We have talked about these days which are blackened out in my timetable. We would like a demonstration, we will discuss as we go along; I think somebody has been putting down on a shopping list what we want to see. There were a few items this afternoon, somebody I am sure got them down.

For the afternoon of the 27th, Monday 27th. Now, we do not need everybody to be present at that. We just want to see what happens. I mean, obviously all the parties should be there. But I do not want to cause a huge amount of expenditure of money. I mean, really, we can have a sensible gathering of people.

MR CARR: Can I just ask on that. Obviously we cannot demonstrate advertising on mobile phones because there is not any. But would particularly Rear Admiral Carine like to see the demonstration we showed last time?

THE CHAIRMAN: That is what I had in mind.

MR CARINE: I was in Syria last time so I missed it and
I willingly admit to a certain deal of ignorance in these matters. I can put my finger in the telephone and turn it round.

MR CARR: And you have a car where one of the indicators flick out. What I was going to say in relation to that was that we cannot demonstrate here in this courtroom.

THE CHAIRMAN: No.

MR CARR: Because I do not think the projector is compatible, so if we can do that at possibly the solicitor's offices.

THE CHAIRMAN: I will leave it to you. So we are gradually building up a shopping list, and we liked what we saw last time, but now it is going to mean a lot more to us. And of course Rear Admiral Carine has not seen any of it. So that will be good. We have all afternoon. We will start at 2 o'clock. Yes.

MR RABINOWITZ: Can I mention something else which subject to the tribunal may usefully be put on the 27th and 28th.

There is a risk that we are going to have a time problem tomorrow. The reason is this. I have still got a way to go, as you would expect. Mr Aldous does not have much to say but is going to have something to say. Tomorrow we have Mr Levy and, as I understand it, this is the only day that Mr Levy can give evidence during
the whole period.

MR STEINTHAL: I believe that is true. I mean, he is coming
from the States. He used to be here at the RealNetworks
office in London and he has been transferred back to the
States so we are trying to organise his testimony at
a time when he can make it.

MR RABINOWITZ: That is fine, because I do not anticipate
any problem dealing with Mr Levy tomorrow. But we are
told that Mr Cue must also be taken tomorrow. Mr Cue is
on a videolink from the States, and that may prove
problematic. Cue the music.

But I anticipate we are going to run out of time for
Mr Cue tomorrow, and I have --

THE CHAIRMAN: If he is going by video, I mean, we have
got -- there are other --

MR RABINOWITZ: There are other days.

THE CHAIRMAN: And he is going to be in the States all the
time.

MR RABINOWITZ: Apparently there is a Thanksgiving holiday
and that is fair enough.

THE CHAIRMAN: That is on Thursday.

MR WEISSELBERG: My understanding, and this is something
that the alliance has known for some time, is Mr Cue is
not available next week and the only day he could do was
tomorrow, Friday 17th. My learned friend suggested to
me shortly before I started my submissions that he might
want to examine Mr Cue at another time. I cannot make
enquiries of Mr Cue now because he is in California --
he might now be awake but not yet in the office.
Enquiries will be made as to whether he is available
elsewhere, but at the moment the day he is available to
give evidence is tomorrow. Substantial efforts have
been made to make sure there are documents available for
him to be cross-examined on, and indeed substantial
efforts have been made to make sure the videolink
facilities are available and able to used from iTunes'
offices in California and also here in the tribunal. We
have made substantial efforts to make sure Mr Cue will
be here to give evidence tomorrow and I hope very much
that can indeed take place.

THE CHAIRMAN: We will keep our fingers crossed and I do not
want to interfere with his Thanksgiving. But if he is
doing this by video from California, I mean, we do have
a lot of other days.

MR WEISSELBERG: The problem is the only requirement that we
had in relation to this timetable was Mr Cue's
availability. Other than that, we have been incredibly
flexible. I have returned briefs, we have bent over
backwards. The only issue that we had was Mr Cue's
availability, and we said that Mr Cue was only available
on the Friday. We will make enquiries.

THE CHAIRMAN: What is his occupation? What is his status?

MR WEISSELBERG: He works for iTunes. Effectively he runs
or is in charge of iTunes, the music store.

MR RABINOWITZ: I did not want to put pressure. I did not
raise this in order to put pressure on my learned
friend, and if he thinks I did, I do apologise, because
that was not the purpose and I am sure he has gone to
a lot of trouble about this.

    The reason I raise this now is you raised what we do
with the 27th and 28th. Indeed, the 27th. We are going
to be here anyway on the 27th. I have no idea whether
Mr Cue will or will not be able to do the 27th. But
what I wanted to raise for discussion is that if he
could do, if he is back from his holiday or whatever it
is, the 27th and the 28th, then that would be certainly
a fallback plan which we should think about. Because
with all respect to my learned friend I do not know what
he wants us to do. We have to open this case. We are
going as fast as we can. We are told that Mr Levy can
only do the third day of the trial.

THE CHAIRMAN: Yes, I have that on board.

MR RABINOWITZ: Mr Cue is only going to be an hour, hour and
      a half maximum. So we are not going to inconvenience
      his life particularly. But iTunes have made this
application and it is not as if we are dragging him here
and insisting that he comes, or indeed we are going to
keep him here.

THE CHAIRMAN: That is why I asked. He is an in-house
person, is he not?

MR RABINOWITZ: We do not want to be unreasonable but we
want to cross-examine Mr Cue a little bit. On the other
hand I am concerned about time tomorrow. We are told
this is the only time we can deal with Mr Levy.

THE CHAIRMAN: You will please tell him what the problem is,
and would you say that we have the 27th and
28th available, and we --

MR CARINE: I do not think Roderick is available.

MR ARNOLD: I can be available on the 28th but I do not want
to be.

THE CHAIRMAN: I think we have been through this. One of us
has to drop out; I will not, you will be happy to know
the captain does not leave the ship. I will defer to
that.

I will be here at all times. But basically, if you
are not here one afternoon does that matter if, for
example --

MR RABINOWITZ: There will be a transcript. There is less
than an hour, there is about -- I do not want to say
less than an hour.

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MR ARNOLD: I am fairly flexible.

MR RABINOWITZ: There is not that much I want to ask Mr Cue.

THE CHAIRMAN: And there will be a transcript.

MR RABINOWITZ: There will be a transcript.

THE CHAIRMAN: There it is. If you can tell him the 27th and 28th. But I must put my foot down. He is your man, it is your case and this is the Copyright Tribunal of the United Kingdom.

MR WEISSELBERG: May I just make clear what troubles we face in relation to this uncertainty raised now.

We have prepared on the basis of Mr Cue giving evidence tomorrow, at some point tomorrow afternoon by videolink. Enquiries were made of Mr Cue's availability, and at the moment I understand that he is not available in the week commencing the 20th, and I also understand that when last enquiries were made as to his availability he was not available on the 27th.

THE CHAIRMAN: Why?

MR WEISSELBERG: I do not know.

THE CHAIRMAN: Well, find out would you, please.

MR WEISSELBERG: The difficulty that I face, sir, is that if Mr Cue is going to give evidence tomorrow he will need to get up 7 o'clock his time, or he will need to be in iTunes at 7 o'clock his time on Friday, to give evidence.
THE CHAIRMAN: So what?

MR WEISSELBERG: If he is unable to appear on the week commencing the 20th and is unable to appear on the 27th, what then do we tell Mr Cue?

MR RABINOWITZ: Maybe we can help. Let us just say we will not deal with Mr Cue tomorrow, there is too much of a risk we will not have time. That may mean we finish early. But if Mr Cue needs to know whether he can sleep late or not tomorrow, rather than not appearing here.

THE CHAIRMAN: Happily Mr Cue is not in Hong Kong. You have the benefit of the other way around, so you can talk to him now. I think we have had a discussion. I hear what Mr Rabinowitz says, he wants to cross-examine him. He will be, let us say, an hour and a half or so by videolink in California, so it is not as if he is having to rush across on executive jets two continents or something. It is his case, it is his evidence. He is the party. And we are the tribunal of the United Kingdom, a smaller country than the United States, but I do insist that you find some way of getting him into this. I am sympathetic with Thanksgiving and the day before it and the day after it, but I am sure we can get him in somewhere.

MR WEISSELBERG: Sir, I will obviously do my best to work out how best.
THE CHAIRMAN: It is up to you.

MR ARNOLD: Presumably the priority of tomorrow is Levy.

MR STEINTHAL: He is a webcaster, he has already flown here.

MR ARNOLD: He has already come here.

MR STEINTHAL: He has come here, so he will testify tomorrow.

THE CHAIRMAN: You see, this happens. People take longer.

You ask any judge who has been at it for a while on the bench, and you will know that all these estimates are, in general -- almost all of them -- useless. We are constantly having cases that are underestimated. Well, we have not done too badly so far and I think we will just play it by ear, that having been said.

Okay.

MR CARR: Could I just raise one final small housekeeping point before you rise. Mr Levy's evidence does not really concern our part of the case and Mr Allgrove and I were hoping that we, when various openings are finished, and I might say a word when my learned friend clarifies the position, when that is finished I hope you will not think it a discourtesy if Mr Allgrove and I slipped away while Mr Levy's evidence is being given. Would that be alright?

THE CHAIRMAN: No, Mr Carr. What if I said I did?

MR WEISSELBERG: I would make a similar request on behalf of
iTunes in relation to particularly webcaster evidence.

MR STEINTHAL: I do not think our witnesses are going to be
offended.

THE CHAIRMAN: All right, yes, yes. Of course. Okay, so we
are starting at 9.30 am then. Is that right, everybody?

Yes, 9.30 tomorrow. Thank you all very much indeed.

(4.37 pm)

(The hearing adjourned until 9.30 am on Friday,
November 17th, 2006)
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