

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

In the Matter of:

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

Docket No. 16–CRB–0003–PR
(2018–2022)

**WITNESS STATEMENT OF
PETER BRODSKY**

PUBLIC VERSION

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WITNESS STATEMENT OF PETER S. BRODSKY

1. My name is Peter Brodsky and I am Executive Vice President, Business and Legal Affairs at Sony/ATV Music Publishing LLC (“SATV”). I make this statement to:

- a) explain the important role that SATV and other music publishers play in the discovery and development of songwriters and the creation and distribution of music;
- b) discuss the value that songwriters and publishers like SATV provide to interactive streaming and limited download services (“Digital Services” or “Services”), record labels and music consumers;
- c) explain why and how I believe the Digital Services, and the current statutory rate structure, have failed to adequately compensate songwriters and publishers for the value they provide to the Digital Services and their users;
- d) discuss SATV’s considerations in granting licenses, including to Digital Services and other online services, and the rates and terms of some of the direct license agreements that SATV has made with such services; and
- e) explain why I believe that, applying the criteria set forth in Section 801(b) of the Copyright Act, the mechanical royalty rates paid by Digital Services and record labels need to be increased.

I. PROFESSIONAL BACKGROUND

2. I am an attorney by training and was admitted to the New York State bar in 1990. I graduated from Skidmore College in 1986, and earned my law degree from Brooklyn Law School in 1990. From 1990 to 1996, I was an associate at the law firm White & Case LLP.

3. I was hired by BMG Music Publishing in 1996. At BMG Music Publishing, I ultimately rose to Head of Business and Legal Affairs. I left BMG in 2007 to join SATV in my current role, and I have now been involved in the music publishing industry for twenty years.

4. As Executive Vice President, Business and Legal Affairs at SATV, I oversee the business and legal affairs department, which is responsible for, among other things, the licensing of SATV's musical works to various music users, including Digital Services. I am personally responsible for SATV's licensing of online services in the United States (and I also play a role in such activities outside of the United States), including Digital Services such as participants Amazon, Apple Music, Google Play and Spotify. I report to the CEO of SATV, Martin Bandier.

II. SATV AND EMI

5. In June 2012, following the purchase of the EMI Music Publishing companies ("EMI") by a group of investors including Sony Corporation of America (which now owns SATV), SATV undertook administration of EMI on behalf of the owners of EMI. The various EMI music publishing companies as a group remain separate entities but, under the relevant administration agreement, SATV is now responsible for managing the business of the EMI companies, including licensing EMI's catalog, promoting EMI's songwriters, and collecting and distributing royalties on their behalf. I believe that, including the administration of the EMI catalog, SATV now owns or administers the largest catalog of musical compositions in the world, with over [REDACTED] songs written by [REDACTED] songwriters.

6. SATV and EMI, together, control many of the most successful and valuable music catalogs of all time, including Jobete (Motown), Lennon/McCartney, Leonard Cohen, Bob Dylan, Duke Ellington, Leiber/Stoller and Carole King, and songs written by countless contemporary artists such as Alicia Keys, Lady Gaga, Miranda Lambert, Pharrell Williams, Sara Bareilles and Taylor Swift.

7. The catalog of works owned or administered by SATV and EMI includes many of the world's best known and most popular songs, including "Ain't No Mountain High Enough," "All You Need Is Love," "Blue Moon," "Bohemian Rhapsody," "Can't Take My Eyes Off You," "Daydream Believer," "Every Breath You Take," "Have Yourself A Merry Little Christmas," "Hey Jude," "How Sweet It Is," "I Heard It Through The Grape Vine," "The James Bond Theme," "Let's Get It On," "Let It Be," "Mamma Mia," "Maggie May," "Over The Rainbow," "Shout," "Singin' In The Rain," "Start Me Up," "That's The Way (I Like It)," "The Loco-Motion," "We Are The Champions," "We Will Rock You," "What's Going On," "Wild Thing," "Yesterday," "You've Got A Friend" and "You've Lost That Loving Feeling," to name just a few.

III. THE PUBLISHERS' ROLE IN THE CREATION AND DISSEMINATION OF MUSIC

8. Without songs, there would be nothing for musicians to record or for artists to perform. Without songs, the record industry could not produce and distribute billions of dollars' worth of music each year. Without songs, Digital Services would have no content to offer to music fans and to build their consumer base and their enterprise values. In truth, there would be no Digital Services if there were no sound recordings for them to stream to consumers, and there would be no sound recordings if there were no songs to record. Much of the music industry and its value ultimately derives from the unique and irreplaceable creativity of songwriters.

9. Music publishers, like SATV, play a significant role in the creation and dissemination of songs. They discover new songwriters. They provide advances and other financial support to songwriters so that they can focus on writing music. They arrange collaborations and provide other creative support to songwriters. They promote songs to recording artists and record labels so that they may be recorded, and to other licensees such as filmmakers, television producers and advertisers. They negotiate and administer licenses for the reproduction, performance, synchronization and/or distribution of the songs, including licenses with Digital Services. And they take other steps to protect songwriters' interests in their copyrights (such as copyright registration and litigation). In sum, publishers support songwriters' creation of songs, work to make those songs widely available so that they may be enjoyed and experienced by as many people as possible and help songwriters realize the economic value from their creative works so that they have a strong incentive to continue to create. Each of these roles of the music publisher is discussed in greater detail below.

10. At the outset, it should be noted that there are several different types of songwriters. There are "pure" songwriters who only write songs that are recorded and performed by others. For these writers – who do not sell records, concert tickets or merchandise – their income and ability to support themselves and their families is largely dependent on the license fees earned from the songs they write. There are "singer-songwriters" or "artist-songwriters" who both write and perform their own music (and therefore also generate income from recordings, concerts, merchandise and/or personal appearances). There are also "producer-songwriters" who, in addition to writing songs, perform the functions typically ascribed to music producers, such as selecting and arranging songs, coaching and guiding the recording artists, and

supervising the recording, mixing and mastering process (and therefore, unlike “pure” songwriters, also participate in royalties from recordings).

11. SATV also represents the songs of countless retired or deceased songwriters. Many retired songwriters (and heirs of retired or deceased songwriters) are elderly and, like the “pure” songwriters, their income and ability to support themselves and their families is largely dependent on the license fees earned from their compositions.

A. Discovering Songwriters and the Role of A&R

12. Discovering talented songwriters is one of the most important functions of a music publisher.

13. SATV and other music publishers spend a substantial amount of time and money looking for new talent. They frequently take risks on unproven songwriters, discovering and signing new talent at the earliest stages of their careers. And they incur significant expenses developing the talents of those songwriters that they have signed, with little certainty as to whether those writers will ultimately become commercially successful.

14. The most common way that we (and other music publishers) discover musical talent is through Artist & Repertoire (“A&R”) staff. At SATV, we refer to our A&R staff as our “Creative Department.” In the United States alone, we employ ■ full-time employees in our Creative Department and ■ additional full-time employees worldwide. SATV has Creative/A&R teams strategically positioned in the five main music hubs of North America: New York, Los Angeles, Nashville, Miami and Toronto. SATV also has Creative/A&R teams in twenty-one countries around the world, with major international hubs in London, Stockholm and Sydney.

15. Our Creative Department discovers talent in a variety of ways. They attend or “scout” live performances of up-and-coming bands and singer-songwriters at live venues, showcases and similar events throughout the world. They search the Internet, including on sites such as [REDACTED] in an effort to identify new talent and to collect data on trends that will help them determine whether a particular type of song or songwriter will be successful. And, because discovering new talent is largely relationship-based, and because of the reputation we have developed over the years, our creative professionals (and other members of our executive team) frequently discover songwriters through their relationships with managers, attorneys, record label executives and producers. Managers and others with whom we have relationships often bring leads to our attention or send us demos made by young or aspiring songwriters, and our Creative Department staff comb through these demos looking for the next great songwriter. New songwriters whom we may be interested in signing or developing are often invited to our offices to showcase their material.

16. We frequently identify and sign talent at the earliest possible stage, which in many cases is before a record deal is entered into. In fact, record companies typically will invest in talent only when their abilities are obvious and prospects for commercial success are more assured. For example, before Lady Gaga became a world famous recording artist, she was an intern at Famous Music, which was later acquired by SATV. After she was dropped by her record label, she worked with SATV producer RedOne and SATV writer Rob Fusari to refine her sound and to create her breakthrough hit “Just Dance” (in fact, she calls out RedOne by name at the start of the track), and, as a result, signed a new record deal with Interscope Records.

17. The search for talent is an exhaustive process. Few leads bear fruit. Our Creative Department must sift through hundreds of prospects to discover one songwriter with whom

SATV wishes to enter into a contract and to develop. Most “pure” songwriters that we sign are relatively unknown at the time we sign them.

18. Despite the overwhelming odds, by virtue of the efforts of our Creative Department, we have been able to find and sign talented songwriters from all over the world. Some of our Creative Department’s most successful signings and the artists they placed songs with (in parentheses) are Greg Kurstin (Adele, Pink, Beck), Jack Antonoff (Taylor Swift, Lorde, Sarah Bareilles), Pharrell Williams (Kendrick Lamar, Little Big Town, Robin Thicke), Rick Nowels (Lana del Rey, Rachel Platten), Boi-1da (Drake, Rihanna, Chris Brown) and J.R. Rotem (Fall Out Boy, Gwen Stefani).

19. SATVs and EMI’s roster currently includes [REDACTED] active songwriters and producers. Notable signings during 2015 and 2016 include Cam, Fetty Wap, French Montana, Leon Bridges, The Struts and Walk The Moon.

20. A few examples of recent signings illustrate the different ways we find previously unknown talents and assess their abilities.

21. We frequently discover songwriters through relationships with managers. Our Senior Vice President, Head of East Coast A&R, Rich Christina, discovered Jessie J through two managers who work with young songwriters. We signed Jessie after she had recorded an album for the label Gut Records, which went bankrupt before any material was released. Rich helped Jessie set up songwriting and recording sessions and helped her write songs for Chris Brown and Miley Cyrus. Rich then helped Jessie get a record deal with Lava Records by showcasing her songs for Lava’s president, Jason Flom, with whom he had a relationship. Another recent signing who we discovered through a relationship with a manager is Phoebe Ryan, who now has a song called “Chronic” which is starting to do well.

22. We discovered the songwriters Olivia O'Brien and Julia Brennan through our proprietary data research program [REDACTED]

[REDACTED] Olivia O'Brien now has a big hit with the song "I Hate U, I Love U," which she co-wrote with the songwriter-artist Gnash (also signed to SATV), who produced and recorded it. Julia Brennan has recently started to have success with her song, "Inner Demons," which she also recorded.

23. We also discover songwriters through our relationships with other writers who are on our roster. The hugely successful songwriter-artist Drake is an example. We publish Drake. Drake has built a team of songwriters to help him write and produce his songs. Because of our relationship with Drake and his team, [REDACTED] of those writers are signed to us. Some of the writers we brought to Drake's team and some were brought by him to us. We maintain the relationships with these writers and help them get work with artists in addition to Drake.

B. Supporting Songwriters – Advances and Other Financial Support

24. Once we discover a talented songwriter we wish to work with and develop, we negotiate an agreement with the writer (in most cases through his or her legal representative and manager).

25. The terms of the agreement vary under the circumstances. Typically, they are for a fixed period of time (e.g., for three years, with an option to extend the term for one or two years if the songwriter's career is developing well), or until delivery of a certain number of songs or an album (e.g., ten full songs, with the option for SATV to pick up the next album or group of songs). Generally, the relationship between songwriter and publisher lasts for many years.

26. The agreements confer upon the publisher various rights to exploit the creative output of the songwriter, including: the right to license the reproduction and distribution of the songwriter's musical works (in sound recordings or in audio-visual works); the right to license the public performance of such works (and to register such works with relevant performing rights organizations ("PROs"), such as ASCAP and BMI, so that such societies can grant performing rights licenses); the right to license the synchronization of such works in timed relation with visual images; and the right to license the publication or display of the lyrics and/or sheet music of such works. The publisher has an obligation to collect the royalty revenues from these licenses and to account and pay them to the songwriter in accordance with the revenue allocation ("split" or "share") provisions of the agreement.

27. While the revenue allocation provisions vary from agreement to agreement, there are typically three types of agreements. Under what was previously the "standard" or "traditional" songwriting contract, the writer's share of royalties was typically 50%. Such deals are now a rarity. Today, most agreements embody "co-publishing" deals, where the writer's share is typically 75% (i.e., the songwriter receives his or her 50% writer's share plus 50% of the (50%) publisher's share for a total of 75%). Also common are administration agreements, where no shares of the copyright are transferred, and the songwriter receives 100% of the royalties after deduction by the publisher of an administration fee [REDACTED].

28. The average publisher's share of royalties has been decreasing over time. As I mentioned, the previously "standard" 50-50 split is no longer the starting point in our negotiations with songwriters. Negotiations now typically start at 75% (in favor of the writer), and some of the most successful writers now demand and obtain shares as large as [REDACTED]. (Note also that, unlike agreements between recording artists and record

companies, which often contain significant deductions against artist royalties for items such as promotional goods, packaging and video costs, publishers typically don't contract for significant deductions against songwriter royalties.)

29. The contracts that we sign with songwriters almost always require that we pay the songwriter a recoupable – but not returnable – advance against future earnings. A recoupable advance means that if and when the songwriter begins to earn royalties, those royalties are retained by us until the advance is paid back. Note that the (50%) “writer’s share” of performance royalties is collected and paid directly by the PRO to the songwriter and is therefore not used by the publisher to recoup the advance. Thus, advances are, for the most part, recouped from mechanical royalties, the (50%) “publisher’s share” of performance royalties and synchronization royalties (discussed below) to the extent the songwriter’s works are the subject of synchronization licenses.

30. Advances act as a means of providing songwriters with an income so that they may concentrate on writing and developing their talents (rather than having to work one or more jobs in addition to songwriting). These advances help ease the considerable financial challenges faced by songwriters and help make songwriting a more sustainable career choice, particularly since it often takes several years for a song to actually earn any revenue, even after it is recorded and released. Advances are necessary to finance the day-to-day requirements of the songwriter’s career, including for professional bills, management commissions, equipment costs, transportation to and from performances, taxes and general living expenses. In sum, advances enable songwriters to survive financially so they can concentrate on developing their talent and creating the musical compositions that are a fundamental source of value for the music industry, and are critical to the survival of songwriters, particularly at the earliest stages of their careers.

31. The size of the advance is freely negotiated and varies depending on a variety of factors, including the perceived risk associated with the financial success of the songwriter. If the songwriter is better-known and/or has already released profitable records in the marketplace, the advance will be on the higher end. If the songwriter is newly-discovered, lesser-known or untested, the advance will typically be less. Competition is also a factor. When there is competition between or among publishers to sign a songwriter, the advance, and the writers' share of royalties, is likely to be greater. Our advances to new and unproven songwriters have in recent years ranged from as little as [REDACTED]. We have in recent years paid advances of as much as [REDACTED] to more established writers.

32. As detailed more fully in the witness statement of SATV's Executive Vice President, Finance and Administration, Tom Kelly, in the United States alone, SATV paid [REDACTED] in new advances in FY2015, and [REDACTED] in new advances in FY2016. These advances constituted, respectively, [REDACTED] of SATV's total revenue in those years.

33. Advances are investments in the songwriter's talent based on the anticipated success of the songwriter. There is, however, no guarantee that a particular songwriter's song will be recorded or, if it is recorded, that it will be a success. In fact, only a small percentage of songwriters signed to publishing contracts achieve any significant success. Thus, in most cases, the prospects of fully recouping an advance are uncertain. [REDACTED]

[REDACTED] Again, as detailed more fully in Tom Kelly's statement, [REDACTED]

[REDACTED].

C. Developing and Nurturing Songwriters – Non-Financial Support

34. Once a publisher such as SATV signs a songwriter, it works to help the writer fully develop his or her talent and to create songs and have them recorded. This requires a substantial investment in time, money and expertise.

35. SATV's Creative Department is dedicated to working with songwriters to develop their songwriting skills. Each of our songwriters works with one or more individuals in that department who review and offer constructive feedback on songs as they are being created and polished.

36. We have built a professional quality recording studio in our Nashville office and lease additional studios in Los Angeles. Our new signings frequently work with their SATV creative teams in one of those studios or in one of our offices to develop their writing skills and, in the case of singer-songwriters, also their performance skills. Our creative teams spend many hours listening to our songwriters' compositions and working with them to create new songs that can eventually be marketed to record labels and artists.

37. Publishers also contribute to the creative process by suggesting collaborations with other artists and songwriters. Many successful songwriters are part of a songwriting team. Teams often include two or more collaborators (co-writers) but, in some genres of music, such as rap or hip hop, teams of as many as eight to ten songwriters create individual songs. We have assisted songwriters in putting together successful writing teams of all sizes and for all genres of music. Some of the successful collaborations we have facilitated include Charli XCX with Selena Gomez and with Carly Rae Jepsen; Brett McLaughlin with the band Capital Cities and with Troye Sivan; and Nolan Sipe with new artist James TW.

38. Frequently, collaborations and song placements result from songwriting camps that we host several times a year. We usually host these camps to assist in the creation of a particular type of song. For example, we host a film and commercial songwriting camp where we invite some of our songwriters who write best for those mediums.

39. While our investments in songwriters – in the form of time, money, human resources and facilities – are substantial, they are, unfortunately, no guarantee of success. Though a very small number of songwriters find success relatively “overnight,” most require time and nurturing by our creative staff. Even with our professional guidance, it can take from [REDACTED] for a writer to achieve commercial success. Our investments, including the advances we pay songwriters who turn out not to be commercially successful are, with rare exception, never returnable. But regardless of our level of success, our investments result in the creation of music which is of fundamental value to record labels and Digital Services and, ultimately, consumers.

**D. Promotion of Songwriters and Songs –
Licensing, Promotion, Pitching and Placement**

40. The financial success of a songwriter to a large degree depends on the promotion of the writer’s songs by his or her music publisher. One of the primary responsibilities of publishers like SATV is to promote its songwriters’ works to artists, producers and A&R people at record labels; film and television companies; advertisers; and others.

41. Our promotional role is particularly crucial early in the careers of singer-songwriters and producer-songwriters who have not yet been signed to record labels. We have been instrumental in helping many such songwriters obtain record deals by introducing them to our many contacts in the record industry. For producer-songwriters in particular, we help find the best artists for them to work with and seek out opportunities for them to co-write or co-produce

on existing projects. For singer-songwriters, we frequently guide them through the process of obtaining their own contracts with record companies at the appropriate time. Our creative teams are skilled in making the personal and artistic decisions as to songwriters, producers, artists and record companies who will work well together.

42. For example, as noted above, Rich Christina helped Jessie J get her record deal with Lava Records. Rich has, in fact, been instrumental in forging major label artist deals for many of our previously unknown or unsigned artist-writers, including Matthew Koma (Interscope and now RCA), Brian Fallon (Island), The Neighborhood (Columbia) and Young Rising Sons (Interscope). Our creative team also introduced Julia Brennan to several record labels, and helped her choose Columbia Records, which they believed offered her the strongest artist development team. And, in some cases, where we have not been able to find a suitable label, we have released the artist-songwriter's music ourselves. Examples include Elliott Yamin, Ruben Studdard, Roberta Flack and Marc Scibilia.

43. In addition to promoting songs to record companies, we also seek out opportunities to license the synchronization rights ("synch rights") to our songs. Synch rights involve the pairing of a musical work with an audiovisual work, such as a motion picture, television program, television or Internet commercial, or videogame. We have a staff of approximately ■ people in the United States, and ■ worldwide, dedicated to synchronization placement, which is a critical part of our efforts to increase exposure and obtain financial remuneration for songwriters and their works.

44. In addition to earning revenue for the songwriter from the synch license itself, synchronization uses of songs, on occasion, draw the attention of record labels to singer-songwriters who had previously been neglected. For example, Morgan Dorr's song "4x4ever,"

which he specifically wrote for a Chrysler commercial that we found for him, earned him a label deal with BMG. The inclusion of “Walking On A Dream” by Empire of the Sun in a Honda Civic commercial in 2016 catapulted the band. And Marc Scibilia and Rachel Platten, both of whom we had championed for years, developed their repertoires through our synch writing camp before they were eventually signed to Capitol Records and Columbia Records, respectively.

45. In some cases, synch licenses result in a resurgence of interest in songs that may have slipped from the spotlight, which ultimately leads to increased sales of the full-length recordings. The Honda synch of “Walking On A Dream,” discussed above, took place more than seven years after the song’s original release, and led the song to finally chart in the United States, making it the band’s first Alternative Songs hit here. On May 14, 2016, the rereleased single reached Number 1 on *Billboard*’s Dance Club Songs chart, seven years after having peaked at Number 18 in its first chart run. Similarly, Europe’s “Final Countdown” – prominently featured in a GEICO ad – put the song back on the Modern Rock chart during the commercial’s airing. The Queen catalog has also received renewed attention, thanks in large part to synch uses of “Bohemian Rhapsody” (Mountain Dew, Cosmopolitan Casino of Las Vegas, Heineken), “We Are The Champions” (Audi, Gatorade) and “You’re My Best Friend” (Petco).

46. We also issue public performance licenses for our songs. While most public performance licensing is currently done through performing rights societies, such as ASCAP and BMI, we frequently issue “grand” or “dramatic” performing rights licenses (i.e., licenses to use our musical works in “dramatico-musical” works such as musicals, revues and other works that tell a story). We are fortunate to represent many iconic songs and songwriters, some of whom have been featured in successful theatrical productions which we have licensed and promoted, including “Jersey Boys,” “Beautiful: The Carole King Story,” “Mamma Mia!,” “Motown: The Musical” and

“The Wizard of Oz.” These productions have also generated renewed interest in and infused new life in already iconic songs.

E. Protection of Copyrights – Registration and Litigation

47. Music publishers like SATV also invest considerable time, money and expertise in performing vital administrative roles for songwriters, including efforts to protect the copyrights in their songs. These efforts are crucial to songwriters’ livelihoods and, ultimately, to the health of the music industry.

48. As a starting point, we register our songwriters’ works in our worldwide internal database, with the U.S. Copyright Office and with collecting societies around the world. This ensures that our songwriters’ works are licensed through compulsory licensing schemes, where applicable, and the national and foreign collecting societies. These functions are performed by our Copyright Department, which is tasked to manage and monitor our copyrights. Given that we have over [REDACTED] songs in our catalog, this requires a dedicated staff of nearly [REDACTED] employees worldwide, approximately [REDACTED] of whom are in the United States.

49. Another significant administrative obligation of a music publisher is the tracking, collection, payment and auditing of royalties owed to songwriters for the use of their works. This too is a substantial undertaking given the number of songs in our catalog that are earning such royalties, and we have invested in numerous systems and procedures to enable us to do so, and to ensure that our songwriters are being paid all to which they are entitled. For example, we have developed a proprietary copyright and royalty system called “TEMPO,” in which I understand we invested [REDACTED] to build and upgrade. Some of those upgrades were necessitated by the growth of interactive streaming, with its complex royalty formulae and the resulting micro-penny payments it generates. During a typical royalty accounting period, we process

hundreds of millions of lines of data, a number that has been rising exponentially with the growth of streaming.

50. We also serve the important function of protecting the value of our songwriters' works. We accomplish this by representing their interests in copyright infringement actions, other cases that present important issues of copyright law and, of course, proceedings such as this one to establish fair and reasonable royalty rates. For example, we have been significantly involved in ASCAP and BMI rate court proceedings, as well as the Department of Justice's recent inquiry with respect to certain aspects of the ASCAP and BMI consent decrees, the results of which can have a significant effect on the value of our songwriters' works. We have litigated against karaoke and other online infringers, including Grooveshark and (on behalf of EMI) MP3tunes. And we monitor internet infringement and serve take down notices under the Digital Millennium Copyright Act.

51. In sum, our efforts to discover, develop, promote and protect our songwriters in the marketplace is a significant – indeed, critical – portion of our business. Our company is critically engaged in the creative process, and we are proud of the contributions that we have made, and are continuing to make, to the creation and dissemination of music.

IV. THE VALUE THAT SONGWRITERS AND PUBLISHERS PROVIDE TO DIGITAL SERVICES AND THEIR USERS

52. During the time I have worked in the music publishing industry, the music industry has undergone an enormous sea change. Digital Services – including interactive or “on-demand” streaming and limited download services whereby a user can play any song at any time on any device – have become both the present and future of music distribution and consumption. As discussed in more detail below, these types of Digital Services have overtaken both the purchase of compact discs and the digital downloading of music (from services such as iTunes) as the primary way in which people consume music digitally, and are increasing in popularity.

53. For the modern user, connectivity (and portability) is king. Users want to be able to listen to music anywhere, on any one of their many digital devices (including their smart phones and other mobile devices). The ability to play virtually any song at any time in any location is of great value to consumers. Such value is vigorously promoted to consumers by Digital Services, and consumers have paid and are willing to pay for that value. Similarly, advertisers have paid and are willing to pay for the privilege of pitching their wares to consumers using these services.

54. For example, Spotify touts the availability of “millions of songs” on its service, to play “on-demand, anywhere,” including on or via mobile, computer, tablet, car, speaker, Playstation®, TV, Android Wear and Web Player.¹ Apple Music promotes “access to over 30 million songs”² through iCloud, “so not only will you always be able to access all of your music, but it won’t take up any space on your devices.”³

55. As discussed below, Digital Services’ ability to offer all of this music would not be possible without the contributions of publishers and songwriters.

**V. THE FAILURE OF THE CURRENT STATUTORY RATE
STRUCTURE TO ADEQUATELY COMPENSATE SONGWRITERS
AND PUBLISHERS FOR SUCH VALUE**

56. Because of the value proposition of “all of the music, anywhere,” interactive streaming and limited download services have the potential to create for songwriters and music publishers – who make essential contributions to that value – greater revenues than they are currently receiving. Unfortunately, to date, that potential has not been realized.

¹ Spotify, <https://www.spotify.com/us/> (last visited Oct. 22, 2016).

² Apple Music, <http://www.apple.com/music/> (last visited Oct. 22, 2016).

³ Apple iCloud, <http://www.apple.com/icloud/> (last visited Oct. 22, 2016).

57. In fact, one would expect that the growth in streaming and the additional value provided to consumers from being able to access virtually any song on any device in any location would result in an increase in mechanical royalties payable to publishers and songwriters. That has not been the case. As detailed in Tom Kelly's statement, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

58. There are multiple reasons why the growth in, and the additional value provided to consumers from, interactive streaming has not inured to the benefit of songwriters and their publishers. They are discussed in turn below.

A. Explanation of the Current Rate Structure

59. The current rate structure was largely established (by negotiation) nearly ten years ago, when streaming was in its infancy. At that time, no one knew for certain whether streaming would be successful, what effect streaming would have on Subpart A products, such as physical phonorecords and permanent downloads, or even what companies would be doing the streaming (at the time, it was largely believed that the record labels themselves would be providing the streaming services). Also unknown was how the services would ultimately choose to structure

their businesses. For example, the publishers and songwriters did not and could not foresee that some streaming services would be operated by companies that appear to be focused more on customer acquisition than on generating streaming revenue.

60. The current rate structure is, for example, for subscription streaming services, the greater of (x) the greater of (i) a percentage of “service revenue” (as defined in 37 C.F.R. § 385.11) and (ii) the lesser of a per subscriber fee and a percentage of the consideration paid by the service to record labels for the right to stream the sound recordings, in either case, less performance royalties paid by the service; and (y) a per subscriber minimum. The greater amount is the payable royalty pool, which is then allocated to the owners or administrators of the rights in the musical compositions based on the number of plays.

61. Using Spotify’s paid subscription service as an example, the rate structure applicable to such service is the “standalone portable subscription service: mixed use” rate calculated as set forth in 37 C.F.R. §§ 385.11-12 with the minimum royalty rate and subscriber-based royalty floor set forth in § 385.13(a)(3). Under that rate structure, Spotify pays the greater of (x) the greater of (i) 10.5% of service revenue and (ii) the lesser of a per subscriber fee of \$0.80 and 21% of the consideration paid by Spotify to record labels for the right to stream the sound recordings (the “total content costs” or “TCC” prong), in either case, less performance royalties paid by the service; and (y) a per subscriber minimum of \$0.50.

62. For free, non-subscription advertiser-supported services (such as Spotify’s free tier), the current rate structure is the greater of (x) the greater of (i) a percentage of “service revenue” (as defined in 37 C.F.R. § 385.11) and (ii) a percentage of the consideration paid by the service to record labels for the right to stream the sound recordings, in either case, less performance royalties paid by the service. There is no per subscriber minimum, presumably

because there are no subscribers (although there are users, which a service could track). The greater amount is the payable royalty pool, which is then allocated to the owners or administrators of the rights in the musical compositions based on the number of plays.

63. While the regulations provide for some differences in the way rates are calculated depending on the particular offering, the discussion below applies generally to all of the rate structures that contain a percentage of revenue tier and/or a TCC subminimum.

B. The Percentage of Revenue Tier Results In Inadequate Compensation To Songwriters and Publishers

64. It appears to me that for at least some of the Digital Services, revenue is less important than building a customer base.

65. Amazon, for example, appears to be using its streaming services to sell its Amazon Prime delivery service and its Echo hand-free, voice-controlled speakers. In fact, Amazon just launched a music subscription service, for which it will charge only \$3.99 a month when used on Amazon's Echo hardware.⁴ Apple also appears to be using its streaming service to lock consumers into its iTunes ecosystem in order to sell them iPhones, apps and other non-music products. Of course, music publishers and songwriters do not share in the sales of Amazon Echos or Apple iPhones.

66. Even Spotify, which is a "pure" music service, appears to be less focused on generating revenue than on obtaining customers to increase its enterprise value because it is

⁴ Now Streaming: Amazon Music Unlimited, Amazon Press Releases (Oct. 12, 2016), http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle_pf&ID=2211067; Hannah Karp & Laura Stevens, *Amazon's Music-Streaming Service Competes on Price and Robotic Assistance*, The Wall Street Journal (Oct. 12, 2016), <http://www.wsj.com/articles/new-amazon-music-streaming-service-costs-echo-speaker-owners-4-a-month-1476255600>.

contemplating an IPO.⁵ For example, I understand that Spotify has argued that one of its motivations for offering a free service tier is to convert free users to paid subscribers to its “premium” tier. But if Spotify was truly focused on converting free users to paid subscribers, it would differentiate its free tier from its premium tier in a more meaningful way in order to entice consumers to upgrade to a subscription. Spotify could, for example, limit the catalog on its free tier, thereby enticing users who want access to “all of the music” to subscribe. Spotify could enable “background play” – the ability to listen to the music while engaging in other digital tasks, such as e-mailing, instant messaging or web surfing on a mobile device – only for users of its paid premium service. Spotify could limit the number of times a user of the free tier could play the same song, or songs by the same artist. Spotify could also limit a user’s access to the free tier to a limited period of time. Spotify does none of these things. Moreover, I believe that Spotify can sell more advertisements than it does. I understand from public reports that Spotify’s level of advertising falls well below that of terrestrial radio: Spotify plays approximately 4 ads per hour and broadcast radio 25 ads per hour.⁶ These factors lead me to believe that Spotify is more focused on growing and keeping a user base (even if it is largely a non-paying user base) than in growing revenues.

67. The Digital Services’ strategies discussed above have resulted in royalties paid by subscription services that, I believe, are very low relative to what we could obtain if negotiations were we not constrained by the compulsory license. The fact that the statutory rate is tied to the Services’ revenues as opposed to consumers’ consumption – the basis for the rates for Subpart A

⁵ Madeleine Johnson, *Will Spotify Stream Into an IPO in 2017?*, NASDAQ.com (Sept. 23, 2016), <http://www.nasdaq.com/article/will-spotify-stream-into-an-ipo-in-2017-cm683941>.

⁶ Audio, Ad Specs, Spotify: For Brands (Mar. 2015) (Spotify serves 4 30-second ads, i.e., 2 minutes of ads, per hour); Bret Kinsella, *Are Broadcast Radio Ad Loads Sustainable?*, XAPP Media (Mar. 24, 2015), <https://xappmedia.com/are-broadcast-radio-ad-loads-sustainable/> (broadcast radio serves 10-14 minutes of ads per hour).

products such as downloads and ringtones (among other rates) – results in publishers and songwriters being paid less on an effective per play basis as consumption increases. I understand that in the fourth quarter of 2015, the effective per play mechanical rate paid to us by Apple for individual users was approximately [REDACTED]. As consumption increased in the first quarter of 2016, that number was reduced to [REDACTED]. The effective per play mechanical rate paid by Spotify during the fourth quarter for its subscription service was significantly lower [REDACTED], and lower still in the first quarter of 2016 (around [REDACTED]). The effective per play rates paid to us by Spotify for its free service in the fourth quarter of 2015 and the first quarter of 2016 were a microscopic [REDACTED] and [REDACTED], respectively. (Note that the large disparity between the effective per play rates paid by Apple and Spotify are due in part to [REDACTED] [REDACTED] [REDACTED].)

68. The percentage of revenue prong is problematic precisely because it is not tied to a fixed per play rate. Musical works have inherent value and the Digital Services should pay more when their users stream or play more music.

C. The TCC Subminimum Has Proven Ineffective to Ensure Adequate Compensation to Copyright Owners

69. The subminimum based on a percentage of the consideration paid by the service to record labels for the right to stream the sound recordings (the “total content costs” or “TCC” subminimum) has also proven ineffective to ensure that the publishers and songwriters receive at least a percentage of what the services pay the labels.

70. First, the TCC is capped in the statute. For interactive streaming on standalone portable subscription services, for example, the calculation requires the Digital Services to

compare the percentage of amounts expended for sound recording rights to an \$0.80 per subscriber pool and then use the “lesser of” the two to make the comparison to the 10.5% of revenue prong. Thus, the TCC prong does not actually fix payments for musical works rights to a percentage of payments to labels for sound recording rights. Moreover, because of the per subscriber cap, the TCC subminimum rarely, if ever, comes into play for standalone portable and non-portable subscription services.

71. Second, the Digital Services do not include in the calculation all consideration paid to labels. For example, I understand that some record labels have received equity from Digital Services, including Spotify. My understanding is that the Digital Services have not accounted for that consideration in their TCC calculations, even though the relevant regulation appears to require that it be included. *See* 37 C.F.R. § 385.11 (defining “applicable consideration” to include “anything of value given for the identified rights to undertake the licensed activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or monetary consideration”).

**D. The Per Subscriber Prong Serves a Useful Purpose But
Should Be Increased and Also Applied to Ad-Supported Services**

72. The per subscriber minimum, while in our view too low, should be retained as an alternative to a per play rate, in a “greater of” structure, for several reasons.

73. First, it is the current statutory rate prong that is the least subject to manipulation. The Services have to pay the minimum (if it is the greatest of) regardless of whether they have chosen to forgo revenue or to not expense consideration paid to record labels. Second, the per subscriber prong pays copyright owners based on a metric – the number of subscribers – that both the Services and the copyright owners have an interest in growing. [REDACTED]

[REDACTED]

Not only should the per subscriber minimum, in my view, be retained as an alternative to the per play rate, the regulations should be modified so that it also applies to ad-supported services (i.e., it should be modified to be a “per user” minimum). Ad-supported services provide their customers with access to the exact same catalogs of musical works that the subscription services provide and there is no reason why they should pay less.

E. Services Do Not Even Pay All of the Money Owed to Songwriters and Publishers at Even These Low Rates

74. Another problem is that a significant percentage of the money earned by songwriters and music publishers is not being paid to them by the Digital Services. These Services, despite their status as technology and data companies, have not been able to adequately fulfill their tracking and payment obligations. Indeed, based on recovery of past mechanical royalties for its clients, Audiam – a service that audits, collects and distributes interactive streaming royalties – projects that between 7% to 15% of all earned U.S. streaming mechanicals are either not paid at all, paid in part or paid to the wrong entity.⁷

75. The services claim that their accounting problems are caused by the fact that they have incomplete copyright ownership data. But that is turning copyright law on its head. A copyright user needs to determine ownership and obtain a license prior to copying and distributing a copyrighted work. Indeed, a copyright user cannot even obtain a compulsory mechanical license unless it (a) serves a notice of intention (“NOI”) on the copyright owner or (b) if the Copyright Office records do not identify the copyright owner and include an address at

⁷ Analysis of Music Streaming Services for 2014, Audiam (2015), *available at* <https://docs.google.com/file/d/0BwsIBPX1QCEWTTdqaDNPQnp3UDQ/>.

which notice can be served, files an NOI with the Copyright Office. 17 U.S.C. § 115(b)(1). SATV and other publishers recently entered into a settlement agreement with Spotify releasing prior claims relating to this failure, which is also the subject of two currently pending lawsuits that are seeking class certification: *Lowery v. Spotify*, 15-cv-9299-BRO-RAOx (C.D. Cal.); *Ferrick v. Spotify*, 16-cv-0180-BRO-RAOx (C.D. Cal.).

76. The current rate structure also makes it very difficult for songwriters and publishers to determine whether they are being paid correctly. The statutory calculation is complex and many of the required inputs are not easily verifiable by songwriters and publishers and/or are at the discretion of the Digital Services. For example, the calculation gives Digital Services discretion in some cases to decide what constitutes “service revenue” (for example, in the case of allocating revenue to parts of a bundle). Further, it requires that payments of performance royalties be deducted from amounts that are inclusive of mechanical and performance royalties, and that the result be compared to mechanical-only minima. Adopting the Copyright Owners’ proposed rates will alleviate the lack of transparency engendered by the current rate structure, as accounting statements will need only show the number of plays of each work and the number of users in a given accounting period.

**F. The End Result Is Low Royalty
Payments for Even the Most Successful Songs**

77. “Fight Song” was a big hit for EMI writer Rachel Platten in 2015. The song was Rachel’s breakthrough hit: her first entry on the Billboard 100, where it peaked at Number 6. While we anticipate that Rachel will have a fantastic career, for some songwriters, a hit as big as “Fight Song” represents a once-in-a-lifetime opportunity. Even as recently as five years ago, a song as popular as “Fight Song” would have earned significantly greater mechanical royalty

revenues than those earned by “Fight Song,” and I believe the reason is the lower royalties paid by interactive streaming services.

78. “Fight Song” was streamed over [REDACTED] in 2015 on interactive streaming services. For all of those streams, the interactive streaming services paid just [REDACTED] in royalties. That includes all mechanical royalties paid to us (on behalf of EMI, which owns [REDACTED] of “Fight Song” and whose rights we administer), and all performing royalties paid through the PROs to us and to Rachel Platten. Of the [REDACTED], Rachel received approximately [REDACTED] (for [REDACTED] streams). The mechanical royalties earned in 2015 from “Fight Song” from the sales of physical copies and digital downloads totaled [REDACTED] (of which Rachel received approximately [REDACTED]). Of course, it appears that the sale of physical copies and digital downloads will only continue to decline.

79. Compare this to a similar hit just five years earlier. “Give Me Everything” by Pitbull peaked at Number 1 on the Hot 100. SATV controls [REDACTED] of the song. It was streamed approximately [REDACTED] times in 2011 on interactive streaming services, and (grossing our share up to [REDACTED] for comparison purposes) the streaming services paid [REDACTED] in royalties (for all mechanical and performing rights to the publishers and songwriters). However, the song earned [REDACTED] in mechanical revenues from physical copies and digital downloads.

80. The above clearly demonstrates the negative effect that interactive streaming services have had on the sale of physical product and digital downloads, and the overall mechanical royalties earned by songwriters and their publishers. The royalties paid by the interactive streaming services (taking into account both the mechanical and performance royalties paid) are not making up for the loss of mechanical revenue from the sale of physical

and digital product. This also demonstrates that our revenues do not rise incrementally as streaming activity increases.

81. It is clear that the current structure is broken and must be changed, including to incorporate a per play rate. Without such a change, the increasingly diminishing return to songwriters and music publishers may ultimately lead to a place where it is no longer possible for songwriters and publishers to invest in the creation of new musical works. Without such a change, the industry of creating songs will continue to take a back seat to the fiscal objectives of some of the wealthiest companies on earth, including Google, Apple and Amazon.

VI. DIGITAL SERVICES AND DIRECT LICENSING

A. Incentives to Direct Licensing

82. The currently low statutory rates suppress the rates that we are able to obtain in private negotiations with the Digital Services for direct licenses. It is difficult to convince someone to pay more for something than they have to. Nevertheless, both SATV and the Digital Services do have incentives to negotiate direct licensees, and SATV has entered into numerous direct agreements with Digital Services for interactive streaming and limited downloads and other Subpart B & C Configurations which are covered by the Section 115 compulsory license and for which statutory rates are to be determined in this proceeding.

83. There are several incentives for Digital Services to negotiate direct deals with publishers like SATV. One incentive is to not have to comply with the statutory compulsory license provisions. Those provisions require the service of a notice of intention to obtain a compulsory license (“NOI”) for each musical work that a Service wishes to license. 17 U.S.C. § 115(b)(1). Such NOIs must be served *prior to* streaming the work. *Id.* A Service’s failure to timely serve an NOI with respect to any particular work renders its streaming of such work an

infringing act. *Id.* § 115(b)(2). By entering into a direct blanket license with a music publisher such as SATV, a Digital Service avoids the burden of having to timely serve NOIs prior to streaming works owned or controlled by SATV and, more significantly, obtains blanket protection against an infringement action from the use of any of our works without having served an NOI.

84. The compulsory licensing provisions further require that a Digital Service deliver to the copyright owners monthly statements of account. *Id.* § 115(c)(5). When publishers and Digital Services make direct deals, accounting is generally required on a quarterly, rather than monthly, basis.

85. SATV likes to make direct deals for several reasons. We like to have a direct contractual relationship with an online service. We also are sometimes able to obtain terms that are not available to us were the Digital Service to obtain a compulsory license. For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. Direct Licensing In The Shadow of the Compulsory License

86. Because direct licenses for Subpart B & C Configurations are made in the shadow of the compulsory license – again, it is difficult to get someone to pay more for something than they have to, and in these cases, if a Service does not like a deal we are proposing it can just serve NOIs – the statutory rate generally acts as a ceiling on what the copyright owners can obtain in a negotiation.

87. In that context, SATV has made deals with virtually every Digital Service making and distributing interactive streams and/or limited downloads (and other Subpart B & C Configurations). [REDACTED]

[REDACTED]

[REDACTED]

88. The Digital Services with which we have entered into direct licenses [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁸

⁸ CO Ex. 3.1A, [REDACTED] ; CO Ex. 3.1B, [REDACTED]
[REDACTED] ; CO Ex. 3.2A, [REDACTED] ; CO Ex. 3.2B, [REDACTED]
[REDACTED] ; CO Ex. 3.3A, [REDACTED] ; CO
Ex. 3.3B, [REDACTED] ; CO Ex. 3.4A, [REDACTED]
CO Ex. 3.4B, [REDACTED]
[REDACTED]

89. We also made a direct deal with [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹

CO Ex. 3.5A, [REDACTED]
[REDACTED] ; CO Ex. 3.5B, [REDACTED]
[REDACTED] ; CO Ex. 3.6A, [REDACTED]
[REDACTED] ; CO
Ex. 3.6B, [REDACTED]
[REDACTED] ; CO Ex. 3.7A, [REDACTED]
[REDACTED] ; CO Ex. 3.7B, [REDACTED]
[REDACTED] ; CO Ex. 3.8A, [REDACTED]
[REDACTED] ; CO
Ex. 3.8B, [REDACTED]
[REDACTED] ; CO Ex. 3.9A, [REDACTED]
[REDACTED] ;
CO Ex. 3.9B, [REDACTED]
[REDACTED] ; CO Ex. 3.10A, [REDACTED]
[REDACTED] ; CO Ex. 3.10B, [REDACTED]
[REDACTED].

⁹ CO Ex. 3.11A, [REDACTED]
[REDACTED] ; CO Ex. 3.11B, [REDACTED]
[REDACTED].

90. A lesser-known interactive streaming service with whom we made a direct deal is

[REDACTED]

91. Per our agreement with [REDACTED]

[REDACTED]

[REDACTED]¹⁰

92. Note that, although there is no obligation under the statute to pay an advance, we received advances from [REDACTED].¹¹

¹⁰ CO Ex. 3.12A, [REDACTED]; CO Ex. 3.12B, [REDACTED].

¹¹ CO Ex. 3.5A, [REDACTED]; CO Ex. 3.B, [REDACTED]; CO Ex. 3.4A, [REDACTED]; CO Ex. 3.4B, [REDACTED]; CO Ex. 3.6A, [REDACTED].

93. We have also entered into direct licenses [REDACTED]
[REDACTED] with the following companies for the
following Subpart C services: [REDACTED]
[REDACTED]
[REDACTED].¹²

C. Direct Licensing Outside of the Shadow of the Compulsory License

94. While we are not mandated to license any digital service that is not subject to compulsory licensing provisions, in my time at SATV, where I am responsible for licensing digital services, there has never been a situation where a non-infringing digital service that needed a license and could not obtain one via a compulsory licensing regime was unable to obtain a direct license from SATV at a negotiated rate.

95. The reason for this is simple. From SATV's perspective, it is important that Digital Services succeed so that our music is used on as many platforms as possible. We and our songwriters do not make money if we do not broadly license our music. Moreover, we compete vigorously with other music publishers to sign songwriters. Many songs are co-written and, if an

[REDACTED]; CO Ex. 3.6B, [REDACTED]; CO Ex. 3.7A,
[REDACTED]; CO Ex. 3.7B, [REDACTED]; CO Ex. 3.8A, [REDACTED]
[REDACTED]; CO Ex. 3.8B, [REDACTED]; CO Ex. 3.10A, [REDACTED]
[REDACTED]; CO Ex. 3.10B, [REDACTED].

¹² CO Ex. 3.13, [REDACTED]
[REDACTED]; CO Ex. 3.14A, [REDACTED]; CO Ex. 3.14B, [REDACTED]
[REDACTED]; CO Ex. 3.6A, [REDACTED]
[REDACTED]; CO Ex. 3.6B, [REDACTED]; CO Ex. 3.15A, [REDACTED]
[REDACTED]; CO Ex. 3.15B, [REDACTED]
[REDACTED]; CO Ex. 3.16A, [REDACTED]; CO Ex. 3.16B, [REDACTED]
[REDACTED].

SATV writer's royalty statement reflects that he or she received less money for his or her 50% share of a song co-written with, for example, a Warner/Chappell writer (as reflected on the Warner/Chappell writer's statement) because Warner/Chappell licensed a particular platform but we did not, we will be at a competitive disadvantage. Additionally, as stewards of the [REDACTED] [REDACTED] songs in the SATV and EMI catalogs, written and composed by [REDACTED] composers and songwriters, it is also our duty to seek fair value for the use of those works.

96. Thus, we have been able to make deals licensing our catalog to digital video services, digital karaoke services, digital music games, digital lyric sites and mobile music apps, none of which are covered by the Section 115 compulsory license.

97. In some of these deals, where we are licensing our musical works to services that are also licensing sound recordings from record companies, we are paid the same royalty as the record companies, consistent with what has historically been the case with synch licensing. In these deals, as is the case with synch licensing, we and the record company are each licensing an intellectual property right to a third party that needs both rights and neither right is subject to a compulsory license that serves to depress the rate obtainable by the licensor.

98. For example, we have entered into direct licenses with [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]¹³ Our ability to negotiate such a most favored nation provision demonstrates that these licensees, negotiating in a free market, consider the musical works to have the same value as the sound recordings.

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

100. For example, we have a deal with

¹³ CO Ex. 3.17A, [REDACTED]
[REDACTED]; CO Ex. 3.17B, [REDACTED]
[REDACTED]; CO Ex. 3.18A, [REDACTED]
[REDACTED]; CO Ex. 3.18B, [REDACTED]
[REDACTED]; CO
Ex. 3.19A, [REDACTED]
[REDACTED]; CO Ex. 3.19B, [REDACTED]

[REDACTED]

[REDACTED]¹⁴

101. Our deal with [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁵

102. Similarly, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁶

103. We have granted a lyric license to [REDACTED]

[REDACTED]

[REDACTED]

¹⁴ CO Ex. 3.20A, [REDACTED]

[REDACTED]; CO Ex. 3.20B, [REDACTED].

¹⁵ CO Ex. 3.21A, [REDACTED]

[REDACTED]; CO Ex. 3.21B, [REDACTED].

¹⁶ CO Ex. 3.22A, [REDACTED]

[REDACTED]; CO Ex. 3.22B, [REDACTED].

[REDACTED]

[REDACTED]¹⁷

104. In our digital streaming karaoke deals, where users can stream on-demand karaoke versions of SATV songs (i.e., not record label recordings, but re-recordings by karaoke studio musicians with scrolling lyrics), such as those we have made with [REDACTED], we have received our pro rata share of between [REDACTED] of the service's gross revenues [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁸

105. We have a deal with the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁷ CO Ex. 3.23, [REDACTED].

¹⁸ CO Ex. 3.24A, [REDACTED]

[REDACTED]; CO Ex. 3.24B, [REDACTED]

[REDACTED]; CO

Ex. 3.25A, [REDACTED]

[REDACTED]; CO Ex. 3.25B, [REDACTED]

[REDACTED]; CO Ex. 3.26A, [REDACTED]

[REDACTED]; CO

Ex. 3.26B, [REDACTED].

[REDACTED]

[REDACTED]¹⁹

106. I believe that the digital deals we have made outside of the shadow of the compulsory license and that are described in paragraphs 98 - 105 above are free market deals that reflect what the parties believed at the time to provide both a fair return for SATV and its songwriters and a fair income to the digital service.

107. Our deal with the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁹ CO Ex. 3.27A, [REDACTED]
[REDACTED]; CO Ex. 3.27B, [REDACTED].

²⁰ CO Ex. 3.28, [REDACTED]
[REDACTED].

²¹ *See, e.g.*, [REDACTED]
[REDACTED].

108. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**VII. FOR THE REASONS DISCUSSED ABOVE, AND
APPLYING THE SECTION 801(B) CRITERIA,
MECHANICAL ROYALTY RATES NEED TO BE INCREASED**

109. The increase in mechanical rates proposed by the Copyright Owners is supported by the facts discussed above and adopting the Copyright Owners' rates and terms would further the objectives of Section 801(b) of the Copyright Act, as I understand them, for several reasons.

110. First, providing the services that music publishers like SATV provide – including, as discussed above, discovering, nurturing and providing financial and creative support to songwriters, promoting and making their songs available (by licensing them) to a wide audience, and protecting the copyrights in songs – is an expensive endeavor, and one which is fraught with risk. Although the costs of providing these services, including our A&R costs and the costs of tracking royalties and accounting to songwriters, continue to rise, [REDACTED]

[REDACTED]. The proposed increase would help to stem the decline in mechanical royalty revenues, which would help to ensure that songwriters and particularly “pure” songwriters who have no other source of income from their music, can continue to create great new music, which would satisfy two of the objectives of Section 801(b): maximizing the availability of creative works to the public and affording copyright owners a fair return for their creative works. *See* 17 U.S.C. §§ 801(b)(1)(A), (B).

111. Second, as noted above, the current rate structure results in songwriters and publishers being undercompensated for the value they provide. All value in the music industry begins with songs. All other value in the industry derives from the songs. This includes the value of recordings of the songs. It includes the value of Digital Services that depend on the existence of music to sell subscriptions and advertising, to build their user bases and enterprise values and, in many cases, to sell other products and services such as consumer electronics and delivery and other services. And it includes the value to the consumer of access to the massive catalogs of songs that are licensed by the publishers through blanket licenses with the Services or via the compulsory license process.

112. Indeed, one of the greatest values to the consumer of a Digital Service is that the consumer has access to all of the music, everywhere. Both the publishers’ direct blanket licenses with the Digital Services and the Digital Services’ ability to obtain compulsory licenses for all non-directly licensed works provide the massive catalogs of songs that contribute a substantial part of that value.

113. Under the current rate structure, it appears that some Digital Services have chosen not to maximize revenue. This results in the songwriters and publishers being undercompensated

for the reasons and in the manner discussed above. Adopting a rate structure that ensures a fair return to the songwriters and publishers, regardless of the Services' business models or motives, would achieve one of the objectives of Section 801(b)(1)(B).

114. A rate structure that includes a per play royalty and an alternative per user royalty will go a long way towards alleviating this problem. The CRJs have never had the occasion to decide what is the appropriate royalty to be paid to songwriters and publishers for interactive streaming and limited downloading in order to afford them a fair return for their creative work, and taking into account the other factors in Section 801(b) of the Copyright Act. The current rate structure needs to be changed so that each play of a song is subject to the payment of a fair mechanical royalty.

115. Each song – and, indeed, each stream of a song – has an intrinsic value that does not and should not depend on the fiscal needs or desires of the Digital Services. The intrinsic value of the song, or the stream in which it is embodied, should not be reduced or minimized to enable Digital Services to increase their profits, or to increase their enterprise value in search of a greater share price or an IPO. In establishing the compulsory license, Congress surely could not have had as a goal forcing songwriters and music publishers to subsidize through miniscule royalty payments the growth and consumer acquisition strategies of some of the largest, most profitable companies in the world.

116. The value of the music, which I believe is reflected in market-based transactions made outside of the shadow of the compulsory license, exceeds the current statutory mechanical rate. I believe that the rates proposed by the Copyright Owners are supported by market-based transactions. I further understand that they address the shortfall in the current rates and should be sufficient to ensure that songwriters will have the incentive to create and that publishers will have

adequate resources to nurture and develop songwriters so that music that can be enjoyed by the public will continue to be created and disseminated.

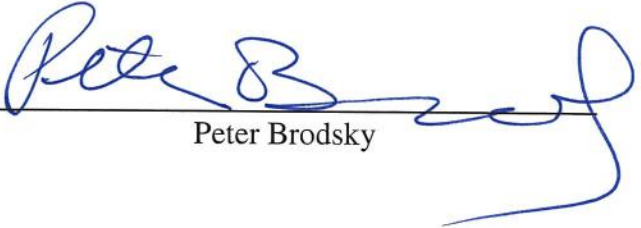
117. At the same time, I believe that the rates proposed by the Copyright Owners will not have any disruptive impact on the Digital Services. I understand that some Digital Services have [REDACTED]
[REDACTED]. *See* 17 U.S.C. §§ 801(b)(1)(D).

118. Finally, a rate structure that includes a per play royalty and an alternative per user royalty will result in greater transparency in the accountings by Digital Services to publishers and songwriters as royalties will be easily calculated based on the numbers of streams and users.

119. I urge the CRJs to adopt the Copyright Owners' proposed rates as well as the proposed terms which are designed to ensure that songwriters and publishers realize the full value of those rates.

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

Dated: October 28, 2016



Peter Brodsky

CO Ex. 3.1A

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

CO Ex. 3.1B

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

CO Ex. 3.2A

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(Phonorecords III)**

CO Ex. 3.2B

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

CO Ex. 3.3A

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

CO Ex. 3.3B

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

CO Ex. 3.4A

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

CO Ex. 3.5A

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

CO Ex. 3.6A

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

CO Ex. 3.7A

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

CO Ex. 3.8A

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

CO Ex. 3.8B

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

CO Ex. 3.9A

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

CO Ex. 3.10A

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

CO Ex. 3.11A

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

CO Ex. 3.12A

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

CO Ex. 3.12B

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

CO Ex. 3.13

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Docket No. 16–CRB–0003–PR (2018–2022)
(Phonorecords III)**

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(Phonorecords III)**

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