In the Matter of:

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


WITNESS STATEMENT OF ANNETTE YOCUM

PUBLIC VERSION
In the Matter of:
DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (PHONORECORDS III)


WITNESS STATEMENT OF ANNETTE YOCUM

1. My name is Annette Yocum and I am the Vice President of Finance of Warner/Chappell Music, Inc. ("Warner/Chappell").

2. Music publishers play a critical role in helping to discover and develop writers and composers across all music genres. As I will explain below, music publishers assume the financial risk that many of the writers and composers they sign will never achieve any significant commercial success. Yet, without the financial support and investment by music publishers in new and existing writers and composers, the creation of new music would be reduced. Consequently, if diminishing income from existing catalogues prevents or reduces the ability of music publishers to continue to invest in new songwriters, I believe the creation of music in the future will also be diminished.

3. As also set forth below, in addition to discovering and developing new talents, music publishers: (a) provide financial support to writers and composers by paying advances against royalties that a writer hopes to earn in the future; (b) market, license and promote the songs on a worldwide basis, including through subpublishing or administration agreements; (c) track the exploitation of the songs; (d) collect and process all of the income received from
thousands of users and issue royalty statements to the writers and composers; and (e) protect the
copyrights against unauthorized use, both through their in-house counsel and through outside
litigation counsel.

4. Accordingly, I make this statement to document, from a financial perspective, the
investment that Warner/Chappell makes in discovering, developing and then supporting the
creative efforts of both new and existing writers and composers, including describing the
financial investment that Warner/Chappell makes in marketing, promoting and licensing songs in
the United States and throughout the world. I will also describe the financial investment
Warner/Chappell makes in tracking the exploitation of the songs, collecting and processing the
income derived from use of those songs, and accounting to the writers and paying their share of
the income generated by their songs. I will also discuss the financial investment that
Warner/Chappell makes to protect the copyrights against unauthorized use.

5. Finally, I will discuss the financial impact that interactive streaming and limited
download services have had on mechanical revenues, and I will explain why I believe that the
mechanical royalty rates paid by digital services need to be increased if the critical role
performed by music publishers in facilitating and enabling the continual creation of new music is
to be supported and not disrupted so that the public can be assured that the body of music of the
future will be as rich as in the past.

**Professional Background**

6. I have a bachelor’s degree in finance from Western Michigan University and a
master’s degree from Walsh College. I am also a certified public accountant.

7. As Vice President of Finance for Warner/Chappell, I am responsible for several
areas of the financial affairs of the company, including budgeting and forecasting, financial
analysis, accounting, financial reporting and reviewing deals with the company’s songwriters. I report to the Chief Financial Officer of Warner/Chappell, Paul Kahn.

**Warner/Chappell Music**

8. Warner/Chappell is one of the largest music publishing companies in the world. It controls many of the most successful and recognizable songs and music catalogues. For example, Warner/Chappell’s catalogue includes songs written by iconic writers such as Led Zeppelin, Cole Porter, John Williams and James Brown. Warner/Chappell also administers and/or co-publishes songs written by contemporary artists such as Katy Perry, Kendrick Lamar, Twenty One Pilots and Vance Joy. It owns and/or administers approximately compositions written by thousands of songwriters.

**Music Publishers’ Contribution To Creation and Exploitation of Music**

9. Music publishers like Warner/Chappell employ people who are responsible for all of the activities that allow the public to have access to existing songs and to experience a constant stream of new songs by both established writers and new writers.

**Finding and Developing Songwriting Talent**

10. One of the most significant contributions of music publishers like Warner/Chappell to the music industry is the investment they make in discovering and developing new songwriting talent. There is always a demand for new music. Music publishers like Warner/Chappell employ people who are tasked with finding and developing the next great songwriter.

11. The artist and repertoire (“A&R”) department is one of the departments which performs these activities. The A&R department is dedicated to searching for and discovering
new and unknown songwriters, and then helping to develop their talents. The A&R department may also identify recording artists to record the writer’s songs.

12. Warner/Chappell’s A&R Department employees are responsible for discovering and developing new songwriting talent. Warner/Chappell employs some R professionals in the United States alone and R professionals worldwide, who are dedicated to discovering and developing fresh and diverse songwriting talent.

13. The activities of our A&R Department, which are crucial to Warner/Chappell’s development of songwriters and to making more music available to the public, entail a significant cost to Warner/Chappell and , which are discussed in detail below.

14. Once the A&R Department has discovered a new writer, Warner/Chappell undertakes to “sign” the writer by entering into a contract with the writer. Such contracts allow Warner/Chappell to publish or administer the songs to be written in the future by a new or established writer. These and other contracts may also allow Warner/Chappell to publish or administer existing songs or catalogues. Almost invariably, in order to sign either a new or existing writer, Warner/Chappell is required to pay an advance against the hoped-for future royalty earnings that may be earned by the songwriter’s songs.

15. Warner/Chappell’s Finance Department, among other things, financially models deals for the acquisition of rights from both new and existing writers, and in connection therewith, makes financial determinations regarding advances to be paid to those writers. It also values the rights in catalogues and extended renewal term rights that it wishes to acquire. Extended renewal term rights are rights arising under the United States Copyright Act pursuant to which writers and their heirs can terminate grants they have made and then renegotiate new
deals to sell or administer the reclaimed rights to the same publisher or, after a certain period of
time, to someone else.

16. In determining the amount of such an advance, Warner/Chappell’s Finance Department

17. The financial modeling for computing new and existing writer advances, and purchasing extended renewal term rights or existing catalogues, requires a great deal of experience and judgment.

18. Financial modeling and deal evaluations present meaningful challenges and entail financial risk.

Thus, a determination as to what amount of an advance should be paid is not an exact science. It
is more a function of experience and market competition. Specifically, in recent years, thus, Warner/Chappell’s determination and payment of advances to both new and existing writers entail growing financial risks that we must assume if we are to remain in the business of protecting the future of our business and the future of the music industry by finding the writers of tomorrow’s standards.

20. But to compete for talented writers and to enable writers to work, we must continue to make advances, despite the growing risks and uncertainties. Indeed, advances are an essential part of developing the talents of new and established songwriters. As explained by the writers who have submitted witness statements in this proceeding, advances enable writers to write by financing their day-to-day expenses, including professional bills, management commissions, equipment costs, transportation, taxes and general living expenses.

21. Determining an appropriate advance is necessary but the risk that the advance will not be fully recouped is ever-present. Warner/Chappell pays advances to promising talent or established writers with the hope that the advance will eventually be recouped from the income generated by the writer’s successful songs. However, it is unavoidable that many of the advances we pay are never recouped and must be written off. There is a
significant risk that the advances paid will not be recouped within a reasonable time period, if ever, and for Warner/Chappell to be successful, the new writers that do succeed (and the already successful and proven writers) essentially have to be sufficiently successful to compensate for the ones that do not succeed.

22. Nonetheless, as mentioned, payment of advances is crucial to the signing and development of Warner/Chappell’s songwriters, and accordingly, Warner/Chappell must assume the risks associated with such advances. These advances constitute a substantial yearly expenditure by Warner/Chappell. For example, in 2014, in the United States alone, 

However, since that time, while the advances paid have been fairly steady, the rate of recoupment has dropped significantly. For example, in 2015 

In 2016 

The foregoing is demonstrated on the spreadsheets, including U.S. Comparative Cash Flow Analysis, produced in this proceeding and attached as CO Ex. 8.1.

23. Over the past five years, Warner/Chappell has spent, on average, of its yearly revenue on payment of advances to new and existing songwriters each year.
If the number of new writers signed diminishes, the songs that might have been written by these unsigned writers may never be written (or, if written, may never be exploited).

24. In addition to the advances paid, there is significant cost in reaching deals with new and existing songwriters, as well as licensing the songs in Warner/Chappell’s catalogue to generate income from the songwriters’ works.

25. Warner/Chappell’s Legal and Business Affairs Department performs a broad array of critical services, including negotiating and drafting contracts with new writers, renewing or extending agreements with existing writers, acquiring catalogues of songs, securing extended renewal term agreements under the United States Copyright Act with writers and their heirs, negotiating agreements with prospective licensees for the exploitation of songs and protecting the rights in the songs along with outside litigation counsel.

26. Warner/Chappell employs people in its Business and Legal Affairs Department (which includes a department focused on digital licensing deals) in the United States and has more than Business and Legal Affairs employees worldwide, most of whom are lawyers experienced in the music industry. Not only do they negotiate and draft songwriter agreements with both new and established writers, but they also supervise outside counsel in litigations to protect the songs in Warner/Chappell’s catalogue and negotiate and draft the more complicated license agreements (including those for live theatrical productions such as “Hamilton”).

27. The Business and Legal Affairs Department also supervises the negotiation and preparation of agreements to acquire existing song catalogues from songwriters and other publishers and to purchase extended renewal term rights. Understanding and being able to
address extended renewal term rights is especially important when dealing with older catalogues, where the grants of rights made decades ago are entering into the period where the extended renewal term rights are coming due.

28. Warner/Chappell incurs significant expense to maintain control and supervision over a large body of proven songs. The maintenance of these existing catalogues and the income they generate is directly linked to Warner/Chappell’s ability to discover and sign new songwriting talent, because the generated income provides the financial wherewithal necessary to enable Warner/Chappell to make the risky investments in unproven writers. In effect, the income being generated by existing songs helps fund the development of new writers and, thus, new songs.

29. The costs associated with all of these activities fall within the overhead costs of these departments, making up a large portion of Warner/Chappell’s overhead. In fiscal year 2015 (Oct – Sep) and fiscal year 2016 (Oct – Sep), the overhead expenses for the A&R Departments across the United States totaled [redacted], respectively. The Business and Legal Affairs Department (including the digital department mentioned earlier) incurred overhead expenses of [redacted] in fiscal year 2015 and [redacted] in fiscal year-to-date 2016. The overhead costs and other expenses for each department are set forth on CO Ex. 8.2, a version of which was previously produced in this proceeding, but which has been updated with additional figures now available for fiscal year 2016.

Building and Maintaining The Value of Songs Through Licensing

30. Because the revenues from existing catalogues allow music publishers such as Warner/Chappell to support the creation of the new songs, we also invest in the acquisition of
existing songs written by established writers and the acquisition of the United States extended copyright renewal terms of existing musical compositions.

31. For proven songs with a long history of consistently generating income (which are often referred to as “evergreen” songs), the cost of acquiring extended renewal term rights can be incredibly expensive, involving purchase prices in the range of historical income. By way of example, this year, Warner/Chappell acquired the extended renewal term rights (and future songwriter royalties) of the songs written by

32. While there is no assurance that the acquired songs will continue to generate the same level of income as in the past, and thus, no assurance Warner/Chappell will be able to recoup the purchase price in any reasonable period of time, the investment in the acquisition of these songs and catalogues is necessary to support the search for and development of new songwriters.

33. Thus, in 2015, Warner/Chappell spent to acquire or administer the extended renewal term rights of existing catalogues and songs. That number rose to in 2016, and is expected to grow in 2017. The 2015 and 2016 expenditures for acquisition of such extended renewal term rights are set forth on the schedule attached as CO Ex. 8.3.

34. Warner/Chappell assumes the substantial risk in making acquisitions of existing compositions or catalogues. And changes in the music industry such as has made forecasting future revenues that will be earned from the exploitation of even classic and widely popular songs increasingly difficult.
35. Thus, determining how much should be offered to acquire either or both songwriter royalties or extended renewal term rights (or even current rights in an existing catalogue of songs) carries far greater risk than in the past. Yet there is little choice, if the music industry is to continue to identify and develop the new songs of the future, for music publishers to continue to invest not only in finding, signing and developing new writers but in retaining and acquiring the rights to successful existing songs to support the investment in the future of music.

36. In addition to the activities discussed above, Warner/Chappell also has an Administration Division, which includes the following departments: Royalties, Copyright, Mechanical Licensing, Tracking and Audit & Client Services.

37. Once a songwriter has been signed, Warner/Chappell is responsible for administering the rights in his or her musical compositions including licensing mechanical rights, synchronization rights, performance rights and print rights. The licensing activities of Warner/Chappell comprise a large portion of the day-to-day activities of Warner/Chappell’s Business and Legal Affairs, Mechanical Licensing and Synch Departments. Warner/Chappell has large departments dedicated to licensing songs in its catalogues for a variety of uses in order generate income from the songs. Music publishers issue, directly or through agents, mechanical licenses, which authorize the exploitation of songs on phonorecords, digital downloads and streaming services like the digital services involved in this proceeding. In addition, Warner/Chappell has employees devoted to seeking to secure synchronization licenses for the use of songs in films, television programs, commercial advertisements and other audiovisual media. Music publishers also secure licensing of songs for use in live theatrical presentations.
38. In the United States, Warner/Chappell licenses mechanical rights to users both
directly and through The Harry Fox Agency in the United States and through foreign societies
such as MCPS in the United Kingdom and GEMA in Germany.

39. Warner/Chappell licenses public performance rights in the United States through
the performance rights organizations – ASCAP, BMI or SESAC – as well as directly. Indeed,
over the past four years, music publishers like Warner/Chappell have spent responding to discovery requests in a United States Department of Justice inquiry into
what are known as the ASCAP and BMI “Consent Decrees,” and in addressing the Department
of Justice in industry-wide meetings in an effort to protect and enhance the value of the
copyrights such publishers control, and the future income to be generated from such copyrights
for songwriters and publishers. Individual writers, with very few exceptions, could not afford to
participate in these proceedings (in which the digital services have been very active participants)
and, but for the efforts of the publishers (and BMI and ASCAP), the writers would be left
unrepresented and their rights unprotected.

40. Warner/Chappell also endeavors to exploit the works of their writers through,
among other things, the exploitation and issuance of synchronization licenses for use of songs in
television, films, commercials and other audiovisual media. Warner/Chappell does so through
its Synch Department. Warner/Chappell’s Synch Department combined with Warner Music
Group’s Master Synch Department in 2014 (in the United States only) and employs
approximately people in the United States and approximately people worldwide. In 2015
and 2016, the U.S. Synch Department’s overhead expenses for publishing only were
approximately and , respectively. (CO Ex. 8.2.)
41. The overhead costs associated with the Synch Department are a necessary investment to maximize the exposure of our songwriters’ works and to help generate income from the songs. However, despite all of Warner/Chappell’s best efforts, most songwriters’ songs will not be successfully exploited in film or television.

42. I believe that individual songwriters, even successful ones, would not be able to perform these services for themselves. Indeed, the time and effort dedicated to exposing the songs of our new writers to the film, television and advertising communities would not be possible but for the fact that

Songwriters’ Works and Right to Revenue

43. In addition to its licensing activities, Warner/Chappell’s Copyright Department is devoted to the administration of the copyrights, including making sure that the copyrights are protected and registered with the United States Copyright Office, registered with one of the performing rights societies (most commonly, ASCAP or BMI in the United States) and licensed to both affiliated or unaffiliated foreign subpublishers for exploitation abroad.

44. The Copyright Department performs critical research with respect to historical catalogues. Generally, copyrights currently endure for the life of the author plus 70 years. The Copyright Department is responsible for maintaining the records for these songs in order to ensure that they are protected and that they continue to generate income.

45. In the United States, Warner/Chappell employs employees in its Copyright Department, and employees within its Administration Division. Warner/Chappell employs employees in its Administration Division worldwide.

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1 For older works that were copyrighted under the 1909 Copyright Act, the term of United States copyright protection is now 95 years.
46. Warner/Chappell also makes significant investments in music rights management systems and royalty accounting. The exploitation of songs is a worldwide business and publishers like Warner/Chappell receive royalty statements and payments from licensees several times a year. All of this data has to be processed and royalty statements have to be generated, twice yearly or, in some cases, quarterly, to each of the co-publishers of the songs owned and administered by Warner/Chappell.

47. In addition to the administration of its catalogue, one of the most important services provided by a music publisher is the processing of royalties that are received from users of songs and the generation of statements and payments to writers.

48. These royalty services are administered by Warner/Chappell’s Royalties Department and Audit & Client Services Department. In the United States, Warner/Chappell employs within its Royalties Department some employees who process royalties, and create and review statements and employs within its Audit & Client Services Department approximately people who audit and administer songwriter royalties.

49. The overhead expenses associated with the day-to-day administration of copyrights and royalties are significant. In 2015, the overhead for Warner/Chappell’s Administration Division, which includes Copyright, Royalties, Tracking, Mechanical Licensing and Audit & Client Services (the work of which I mentioned above), totaled, which decreased to in 2016 due to implementation of a new royalty and copyright system and severance being paid in 2015. The overhead for this division is expected to remain about the same for 2017. (CO Ex. 8.2.)

50. It is important to note that the processing of royalties is not simply a computerized activity. Statements must be examined and often there are errors in matching songs to royalty
51. Further, with [redacted] of writers and their heirs, Warner/Chappell is often responding to questions raised about royalty statements, both in writing and by telephone. The employees of the Royalty and Audit & Client Services Departments handle these calls and communications. There are also audits regularly conducted on behalf of writers and the employees of the Royalty and Audit & Client Services Departments address the audit inquiries and provide responses to audit reports and participate in the resolution of any audit disputes.

52. In addition to the foregoing departments, Warner/Chappell also incurs additional costs in connection with the day to day administration of its catalogue, including by its Finance Department, which provides the financial modeling work with respect to new writer deals, the acquisition of catalogues and the purchase of writer royalty streams and extended renewal term rights. The department also manages the overall financial and business affairs of Warner/Chappell. In the United States, the finance department incurred [redacted] in overhead costs in 2015, [redacted] in overhead costs in 2016 and is expected to incur approximately [redacted] in overhead costs in 2017. (CO Ex. 8.2.)

53. Finally, Warner/Chappell’s Executive Department is responsible for supervising and managing all of the separate departments, including royalty, copyright, licensing, income tracking, financial planning and administration activities and each of Warner/Chappell’s worldwide music publishing affiliates (which are located in most of the major countries in the world). The overhead costs associated with the Executive Department in 2015 was [redacted] and decreased to [redacted] in 2016. The overhead expenses for the department are expected to rise to [redacted] in 2017.
The Increase in Digital Streaming

54. Over the past five years, the sale of physical albums and digital downloads have steadily declined. Whereas Warner/Chappell’s U.S.-based mechanical income from the sale of physical recordings and digital downloads in 2014 was some $\text{XXXXXX}$, by 2016 it had declined sharply to $\text{XXXXXX}$. During that same period, Warner/Chappell’s mechanical income from streaming services grew from slightly less than $\text{XXXXXX}$ to slightly less than $\text{XXXXXX}$. (CO Ex. 8.1.)

55. $\text{XXXXXX}$

56. Mechanical income from physical recordings and digital downloads $\text{XXXXXX}$
57. As a result, music publishers like Warner/Chappell are facing new difficulties in managing their business and continuing to acquire the services of new writers and existing catalogues and songs. Because the income from existing works supports the ability of music publishers to continue to discover, sign and develop new writers, the erosion of revenue from mechanical income has made it difficult to predict future revenue that may be generated from both as-yet unwritten songs and even from existing songs.

58. In addition, the digital services often profess to have or do have difficulty in matching their streaming data to a particular song. Consequently, we have found that writers and publishers often fail to be paid or are long delayed in receiving even the reduced amount of income that should be forthcoming from these streaming services.

59. These delayed payments create even more problems for both writers and publishers (especially for those writers who are dependent on the declining income they are receiving for the exploitation of their songs) and may be causing a delay in the recoupment of advances paid out by Warner/Chappell to its writers. The delayed payments also further increase the difficulty in forecasting income from both new and existing songs.

60. Importantly, the growing delay in recoupment of advances resulting from both diminishing mechanical income from streaming services and reporting delays not only
61. I believe that some of the delays in payment and accounting would be alleviated by a simpler and more straightforward means of calculating royalties, more akin to how mechanical income has been paid in the physical and digital download world for decades. If the rate were paid on a greater of a per-play and per-user basis, a writer and publisher would only have to know the number of times each song was streamed and the number of users to determine the income payable to the publisher and songwriter.

62. Again, while I defer to others for what that rate should be and how it corresponds to a rate for physical recordings and digital downloads, based on the hard data I have described herein and given the costs that music publishers must incur and the risks that they must run, in my view, it is imperative that the rates paid by the Digital Services for the mechanical reproduction of songs must be increased if we are to be able to continue to find, develop and make available the new songs that will enrich the lives of the public in the future.
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

[Signature]
Annette Yocum
CO Ex. 8.1

RESTRICTED DOCUMENT

Subject to Protective Order in Docket No. 16–CRB–0003–PR (2018–2022) (Phonorecords III)
CO Ex. 8.2

RESTRICTED DOCUMENT

Subject to Protective Order in Docket No. 16–CRB–0003–PR (2018–2022) (Phonorecords III)
CO Ex. 8.3

RESTRICTED DOCUMENT

Subject to Protective Order in
(Phonorecords III)
In the Matter of:

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

WITNESS STATEMENT OF
JUSTIN KALIFOWITZ

PUBLIC VERSION
In the Matter of:

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


WITNESS STATEMENT OF JUSTIN KALIFOWITZ

1. My name is Justin Kalifowitz and I am the founder and Chief Executive Officer (CEO) of Downtown Music Publishing (“Downtown”). As CEO of Downtown, I am responsible for determining and communicating the company’s strategic direction, recruiting and developing our executive management team, ensuring our values are applied across all facets of the business and ultimately overseeing the company’s performance and responsibilities to our songwriter clients and investors.

2. I have been working in the music industry since I first started managing a band at the age of 13. In high school, I interned at local radio stations, record labels and management companies in New York City. At the age of 19, I joined Spirit Music Group in an entry level administration role and ultimately rose to the position of Head of A&R. In my role at Spirit, I worked directly with catalog clients such as the Estate of Bob Marley, Lou Reed and Chaka Khan as well as emerging and active songwriters on the pop and R&B charts. In 2007, at the age of 25, I launched Downtown Music Publishing, which has since developed into one of the world’s leading independent music publishers and royalty collection platforms. Since 2015, I have served as a Board Member of the National Music Publishers’ Association and previously
served as a Board Member of the Association of Independent Music Publishers. I have been named to *Crain’s* 40 Under 40 Rising Stars of New York Business and *Billboard Magazine’s* 30 Under 30 Top Executives lists. I am a graduate of the City University of New York – Baruch College and have been a guest lecturer at New York University, Columbia University and the University of Montana on issues relating to songwriting, music publishing and music technology.

3. I make this statement to: (a) describe the vital role independent music publishers such as Downtown play in the music and entertainment industries; (b) describe the various costs and expenses incurred by Downtown in fulfilling that role; (c) identify the various license agreements that Downtown has entered into with interactive streaming and limited download services (“Digital Services”) for rights covered by the Section 115 compulsory license, as well as with other digital music services that are not subject to that license; and (d) emphasize the need for an increase in the statutory mechanical rate.

**Downtown**

4. I founded Downtown in 2007 with one employee. Downtown now employs over \[\text{omitted}\] in offices in New York, Los Angeles, Nashville, London and Amsterdam. Downtown represents an impressive array of catalogs, including those of John Lennon & Yoko Ono, Bruce Springsteen, Hans Zimmer, Motley Crue, Imogen Heap, Jason Isbell, Sturgill Simpson and One Direction. The success of our songwriters has led *Billboard Magazine* to repeatedly rank Downtown as one of the top ten music publishers in the United States.

**The Vital Role of Independent Music Publishers**

5. I have read redacted, public versions of the witness statements of David Kokakis of Universal Music Publishing Group and Peter Brodsky of Sony/ATV Music Publishing. I agree with their statements about the role of the music publisher, including their statements
regarding the significant amount of time that publishers spend, and the costs they incur, to
develop and support songwriters, help songwriters create great songs, promote those songs (and
those songwriters) and their wide dissemination, and ensure that songwriters are fairly
compensated for their creative work.

6. I will add, however, that in my view, independent publishers play an even greater
role in developing songwriters than the major publishers. Downtown maintains one of the most
favorable song-to-staff ratios in the industry. We represent approximately [REDACTED] (most are
active songwriters; some are estates or heirs of songwriters, such as John Lennon, for example)
and have approximately [REDACTED], half of whom spend the majority of their time providing
creative services to writers. Thus, we have approximately [REDACTED]. This allows each of our songwriters to form a much more
personal relationship with his or her representative.

7. Because we sign fewer songwriters than major publishers, each songwriter is a
priority to us, and we will not choose to work with a songwriter unless there are several people at
the company who are enthusiastic about that songwriter’s music and career. Because we are not
affiliated with a record label, we feel no pressure to sign songwriters who are already affiliated
with a particular label or distributor.

8. We devote considerable resources to discovering and developing songwriters. From
its inception, Downtown has provided (and continues to provide) our songwriters with the full range
of services they need to launch their careers and build upon their successes. Our creative staff is
dedicated to finding new talent, working with the writers on our roster, producing demos and
pitching new songs and catalog titles to artists and their managers, music producers and record
companies. We also provide opportunities for our songwriters to write directly for film,
television and commercial advertising productions. We work with our writers on a daily basis to help them hone their talent, improve their works and promote their songs. In many instances we play the role of manager and publicist for our songwriters.

9. Indeed, the creative partnerships we develop with our songwriter clients are at the heart of our business. Our relationship with our writers has evolved alongside the evolving nature of the business itself. Recognizing that record companies have substantially reduced their investments in artist development and record production, we now shoulder much of the production process costs – a significant expense – as well as pay for traditional songwriter development costs.

10. Our offices each have their own profiles servicing Downtown’s global clientele and local music communities. All our offices are outfitted with writing and recording facilities for use by our songwriters. In particular, our New York headquarters contains two state-of-the-art recording studios with a full time staff where we produce broadcast-ready master recordings of our song copyrights. The substantial real estate that we dedicate to studio facilities within our five offices (over 40% of the New York office’s floor plan and over 50% of the Nashville office’s) is a significant annual expenditure that we absorb.

11. Equally important is how our offices work together for the benefit of our songwriters. For example, the head of our Nashville hub, Steve Markland, a 20-year industry veteran, has prioritized this element of our business. Many of our Nashville-based writers and artists typically come into our office to write daily in our six full-scale writing rooms from 10 a.m. to 6 p.m. If they are not working at our facility, they have been scheduled to work at another publisher’s studio facility. When not working in Nashville, we arrange for their travel to Los Angeles, New York and Amsterdam – not only to meet our staff but also to co-write and
collaborate on country and pop songs. We provide them with opportunities to write for film and television and take part in songwriting camps that we set up in all over the world. Of course, we also regularly send writers signed through our other offices to Nashville to work in one of the world’s greatest songwriting towns.

12. We also host songwriter camps internationally at locations such as Amsterdam, Jamaica and Iceland. At these camps, we provide instruction and foster collaboration and partnerships among our writers. But perhaps most importantly, we handle all of the logistics and cover of the costs associated with these career-development opportunities.

13. Downtown manages other time-consuming and expensive tasks on behalf of its songwriters as well, including registering their songs for copyright protection, licensing their catalogs for various uses and, when necessary, taking legal action to protect their income and the ownership rights vested in their works. These efforts allow our songwriters to focus on writing songs. Everything we do carries the twin aims of supporting our writers and offering quality music to the listening public.

14. Of course, the support we provide songwriters goes beyond artistic development and copyright management. Any individual with creative talent needs time to develop his or her abilities. Quality songwriting cannot be relegated to a part-time hobby; it is a calling and a career. We make it possible for songwriters to work on their craft on a full-time basis by providing them significant advances on future royalties, often at very early stages of their careers, and in many cases prior to their exposure to record companies or other artists. These advances range from
15. In many cases, the advances we pay our songwriters are their main source of income to cover living expenses, allowing them to dedicate as much of their time as possible to songwriting instead of having to take other work to make ends meet. Due to our size, it is even more important that the writers we sign reach a level of commercial success that results in the recoupment of these advances. We cannot afford to have as many “misses” as a major publisher. Even though it requires a substantial and risky financial investment on our part, we know that the financial support we provide is as important as the creative support and we remain committed to helping our writers in this way. Unfortunately, we also know that often our advances alone are hardly enough to sustain a songwriter.

16. One recent example of a songwriter investment

17. Songwriters, including singer-songwriters, are increasingly looking to music publishers, and particularly independent music publishers, for the financial support that labels
used to provide. We not only furnish advances to songwriters, but also often finance the creation of recordings for our singer-songwriters prior to their obtaining a record deal. Even artist-songwriters with record deals are increasingly looking to us for other forms of financial support, including tour support, which we have regularly provided.

18. For example,

19. Frequently, singer-songwriters now forego signing with a label entirely, so as to retain ownership of their master recordings, and instead use a music distribution service, like Tunecore or Thirty Tigers, to release their record. In these instances, their publishing advances represent virtually 100% of their cash flow until income from their master recordings comes in many months later.

The Costs and Expenses Downtown Incurs In Performing Its Critical Role

20. The “high touch” service that we (and other independent publishers) give to our writers is costly to provide. Downtown makes a significant investment in identifying, signing and then supporting the creative efforts of writers. Also significant are the investments that we make in marketing, promoting and licensing our songwriters’ works, and assuring that they are exploited and licensed not merely in the United States but also worldwide.
21. Additionally, we incur substantial costs in tracking the exploitation of the songs, collecting and processing the income paid by users, and guaranteeing that the writers and composers are then accounted to and paid their share of the income generated by their songs. This has become a substantially more complicated exercise than the administration of recorded music. By way of example, when I first started working at Spirit Music in 2001, Spirit Music had just a small handful of agents who could viably represent its song copyrights globally. Today, by contrast, a typical hit song can derive income from thousands of unique sources around the world, which requires investment of significant resources to ensure accurate collection.

22. To handle this critical task of royalty collection, we developed Songtrust, Downtown’s technology platform. This platform does not just power global royalty collection for our own songwriters – it is utilized by more than 100,000 individual songwriters, as well as companies such as CD Baby and The Orchard, in over 90 countries around the world. Between 2011 and 2016 we invested [REDACTED] to develop Songtrust.

23. We also incur outside legal costs in protecting our writers’ copyrights against unauthorized use and regularly conduct audits of our licensees utilizing outside auditors.

24. In fiscal year 2015 alone, the aggregate, itemized costs that we incurred discovering and supporting our songwriters included:

   Talent discovery and signing: [REDACTED];

   Advances paid: [REDACTED];

   Demo expenses: [REDACTED];

   Copyright Registration: [REDACTED].
25. Despite the risks involved, the advances we pay are crucial to the signing and development of songwriters, and they constitute Downtown’s largest yearly expenditure by far. Over the past five years, Downtown has consistently spent more than [redacted] of its yearly revenue on payment of advances to new and existing songwriters. However, because of the shift to streaming and the reduced mechanical royalties that streaming services pay, advances have become more difficult to recoup, and fewer and fewer publishers make such advances. Publishers are also less able or willing to invest in early-stage deals, which I believe has resulted in fewer people pursuing a songwriting career — a widely shared sentiment among many publishers.

26. For the period commencing January 1, 2013 through the period ending September 30, 2016, [redacted].

27. [redacted]. To the extent we continue to fail to recoup our aggregate advances [redacted], and in the absence of higher statutory rates allowing us a chance to recoup our advances at previous levels, Downtown will inevitably have to decrease the amount of advances it pays, which will adversely affect the number of new writers that Downtown will be able to sign.

28. The royalty rate affects all of the decisions we make on behalf of our songwriters — including the number and amount of advances we are able to pay. If statutory rates were higher, we would have more money to put back into the publishing process and the songwriters

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1 CO Ex. 9.1, [redacted].
on our roster would undoubtedly benefit. We would be able to pay out larger advances and draws to our writers, and we would also likely sign additional writers.

29. As many independent music publishers can tell you anecdotally, given the relatively miniscule payments we receive from streaming services, every year proves harder for us financially.

**Diminished Payments to Songwriters and Publishers Resulting From Consumers’ Shift To Digital Music Streaming Services**

30. The usage of songs on Digital Services – and the value of those songs to those services – is high, but the compensation songwriters and publishers receive from those services for those songs is low relative to the compensation received from licensees a decade ago.

31. To illustrate what I mean, despite the fact that mechanical income from physical recordings and digital downloads [10], Between [10], During that same time period, mechanical income from streaming services [10]. We expect revenue from physical recordings and digital downloads [10], while mechanical income from streaming services [10] [10].

\[CO \text{ Ex. 9.2,}\]
32. Again, I have read redacted versions of the witness statements of David Kokakis and Peter Brodsky and I agree with their conclusion that the Digital Services and the current statutory rate and rate structure have failed to adequately compensate songwriters and publishers for the significant value they provide to the Digital Services and their consumers, as well as their assessment of some of the reasons for such failure. It is true that the ability to play virtually any song at any time in any location is of great value to consumers, that such value is vigorously promoted to consumers by the Digital Services and that 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 those services. The Digital Services would not have access to tens of millions of songs without the work and investment of the publishers and songwriters who provided those songs. Yet the publishers and songwriters have, for the reasons described by Mssrs. Kokakis and Brodsky, not been adequately compensated for their contribution.

33. Moreover, digital streaming services profess to have difficulty matching their streaming data to a particular recording and hence to a particular song. Consequently, we have found that these Digital Services often fail to pay or greatly delay in paying writers and publishers even the reduced amount of income that is owed. Spotify and the National Music Publishers’ Association recently reached a [redacted] settlement to compensate songwriters and music publishers for years of unmatched songs and unpaid royalties.

34. More broadly, it is my opinion that the Digital Services have grossly under-invested in their partnership with songwriters and publishers, and that this lack of investment is
directly attributable to the compulsory licensing regime. Labels have more lucrative deals with the Digital Services, and there has been an emphasis on developing services for that side of the music industry. Thus, while labels receive real-time data feeds regarding the use of their master recordings, publishers are given extraordinarily convoluted royalty statements after the fact. Similarly, on the consumer side, while fans have long enjoyed the ability to search by artist, a search by songwriter has yet to appear on any Digital Service.

35. Given the costs that music publishers must incur and the risks they must run, in my view it is imperative that the rates paid by streaming services for the mechanical reproduction of songs be increased. Publishers require such an increase if we are to continue to find, fund, develop and disseminate new songs that will enrich the lives of the public in the future.

**Downtown’s Agreements With Digital Services**

36. Downtown has made direct deals with several Digital Services making and distributing interactive streams and/or limited downloads (and other Subpart B & C Configurations). The Digital Services with which we have entered into direct licenses entered into a direct license with where the rate is

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3 CO Ex. 9.3, CO Ex. 9.4,
37. Despite the compulsory license, in my time at Downtown, we have always been able to enter into a direct license, at a negotiated rate, with non-infringing digital services. This is because, from our perspective, it is important that Digital Services succeed so that our music is used on as many platforms as possible. Our songwriters do not make money if we do not broadly license our music.

38. Moreover, we compete vigorously with other music publishers to sign songwriters, and songwriters want us to license their songs (as long as we are fulfilling our duty to obtain fair value for our licensees’ use of those songs).

39. For example, we have been able to make deals licensing our catalog to services and products as diverse as digital video platforms, video games, digital lyric sites, music instruction services, and remix apps.

40. When licensing our musical works to services that are also licensing sound recordings from record labels,  

41. For example, we entered into a direct license 

4 CO Ex. 9.5,
42. Similarly, we have an agreement with [redacted].

43. In situations where 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 [redacted].

44. For example, we have a deal with [redacted].

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

46. Our deal with the is also illustrative, even though

47. Nevertheless, our deal with demonstrates the value assigned to sound recordings and musical compositions outside of the context of the compulsory license. We also licensed our rights to
Based on publicly available data, [redacted] pays the labels anywhere from [redacted], for [redacted] using both the master and the composition, and so we are paid somewhere between [redacted] of what the label is paid.

For the Reasons Discussed Above,
Mechanical Royalty Rates Need to Be Increased

48. 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.

49. First, discovering, nurturing and providing financial and creative support to songwriters, promoting and making their songs available (through licensing) to a wide audience, and protecting the copyrights in songs is an expensive endeavor that is fraught with risk. While our costs of providing these services continue to rise, our mechanical royalties have been declining as a percentage of our total domestic income in recent years, and our rate of recoupment has been slowing. The proposed increase would help stem the decline in mechanical royalty revenues, which would in turn help us continue to pay advances to songwriters and ensure that songwriters can continue to create great new music, thereby maximizing the availability of creative works to the public and affording copyright owners a fair return for their creative works.

50. Second, one of the greatest values to the consumer of the Digital Services is that the consumer has access to all music, everywhere and anytime. Publishers and songwriters provide the massive catalogs of songs that contribute a substantial part of that value and should
be compensated for it accordingly. They are not currently compensated for that value because
the Digital Services have chosen not to focus on revenue but, rather, on the acquisition and
“lock-in” of customers. Some have done this in an effort to obtain market share and an edge in
an increasingly crowded and competitive field – a strategy that may also help them grow their
enterprise values. Others have done this so that they may sell to those customers other, non-
music products and services, the revenues from which songwriters and publishers do not share.
A rate structure based on the greater of a per-play and a per-user royalty will go a long way
towards alleviating this problem.

51. Third, I believe that the value of the music is reflected in market-based
transactions made outside of the shadow of the compulsory license.

52. Fourth, I believe that the rates proposed by the Copyright Owners will provide the
Digital Services with a fair income, and will not have any disruptive impact. The Digital
Services are some of the largest, most profitable companies in the world. I understand that many
of them have already paid royalties at an effective per-play rate similar to that proposed by the
Copyright Owners.

53. I urge the Copyright Royalty Judges to adopt the Copyright Owners’ proposed
rates and late fee terms
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

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Justin Kalifowitz
CO Ex. 9.1

RESTRICTED DOCUMENT

Subject to Protective Order in Docket No. 16–CRB–0003–PR (2018–2022) (Phonorecords III)
CO Ex. 9.2

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Subject to Protective Order in
(Phonorecords III)
CO Ex. 9.3

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Subject to Protective Order in
(Phonorecords III)
CO Ex. 9.4

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Subject to Protective Order in
(Phonorecords III)
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(Phonorecords III)
CO Ex. 9.9

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(Phonorecords III)