

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  
ANNETTE YOCUM**

**PUBLIC VERSION**

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**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 [REDACTED] compositions written by thousands of songwriters.

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

9. Music publishers like Warner/Chappell employ [REDACTED] 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



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 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

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. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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

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. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

19. Specifically, in recent years, [REDACTED]

[REDACTED]

[REDACTED]. 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. [REDACTED]

[REDACTED], 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,

[REDACTED]

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

[REDACTED]. In 2016 [REDACTED]

[REDACTED] 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, [REDACTED] of its yearly revenue on payment of advances to new and existing songwriters each year. [REDACTED]

[REDACTED]



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 overheads 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 [REDACTED] 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 [REDACTED].

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 [REDACTED] to acquire or administer the extended renewal term rights of existing catalogues and songs. That number rose to [REDACTED] 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 [REDACTED]  
[REDACTED]  
[REDACTED] 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 [REDACTED] [REDACTED] 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 [REDACTED] people in the United States and approximately [REDACTED] people worldwide. In 2015 and 2016, the U.S. Synch Department’s overhead expenses for publishing only were approximately [REDACTED] and [REDACTED], 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 [REDACTED]

*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.<sup>1</sup> 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 [REDACTED] employees in its Copyright Department, and [REDACTED] employees within its Administration Division. Warner/Chappell employs [REDACTED] employees in its Administration Division worldwide.

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<sup>1</sup> 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 ██████ of 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 ██████ of writers and 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

income. In addition, there are statements and payments that continue to come in paper form [REDACTED].

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.



[REDACTED]

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

[REDACTED]

[REDACTED]

[REDACTED]

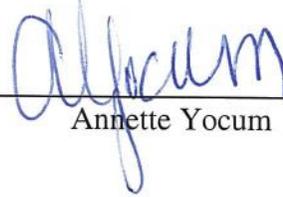
[REDACTED]

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



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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  
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# **CO Ex. 8.3**

**RESTRICTED DOCUMENT**

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

**WITNESS STATEMENT OF  
JUSTIN KALIFOWITZ**

**PUBLIC VERSION**

Before the  
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In the Matter of:

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(PHONORECORDS III)

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(2018–2022)

**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 [REDACTED] 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] [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



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 [REDACTED]

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, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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]

[REDACTED]

27. [REDACTED]

[REDACTED]<sup>1</sup> 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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<sup>1</sup> CO Ex. 9.1, [REDACTED].





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). [REDACTED]

[REDACTED]

[REDACTED]

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

[REDACTED]<sup>3</sup> We also entered into a direct license with [REDACTED] where the rate is [REDACTED]

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<sup>3</sup> CO Ex. 9.3, [REDACTED]; CO Ex. 9.4, [REDACTED].

[REDACTED]<sup>4</sup>

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, [REDACTED]

[REDACTED]

41. For example, we entered into a direct license [REDACTED]

[REDACTED]

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<sup>4</sup> CO Ex. 9.5, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>5</sup>

42. Similarly, we have an agreement with [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>6</sup>

43. 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 [REDACTED]

[REDACTED]

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

[REDACTED]

[REDACTED]

[REDACTED]<sup>7</sup>

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

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<sup>5</sup> CO Ex. 9.6, [REDACTED].

<sup>6</sup> CO Ex. 9.7, [REDACTED].

<sup>7</sup> CO Ex. 9.8, [REDACTED].

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 [REDACTED] is also illustrative, even though [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

47. Nevertheless, our deal with [REDACTED] demonstrates the value assigned to sound recordings and musical compositions outside of the context of the compulsory license [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. We also licensed our rights to [REDACTED]

[REDACTED]

[REDACTED]

██<sup>8</sup> Based on publicly available data, ██████████ pays the labels anywhere from ██████████, for ██████████ using both the master and the composition, and so we are paid somewhere between ██████████ 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

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<sup>8</sup> CO Ex. 9.9, ██████████  
██████████.

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**

**RESTRICTED DOCUMENT**

**Subject to Protective Order in  
Docket No. 16-CRB-0003-PR (2018-2022)  
(Phonorecords III)**

# **CO Ex. 9.3**

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# **CO Ex. 9.4**

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# **CO Ex. 9.5**

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# **CO Ex. 9.6**

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# **CO Ex. 9.7**

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# **CO Ex. 9.8**

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# **CO Ex. 9.9**

**RESTRICTED DOCUMENT**

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