

RIAA Ex. N-103-DP

**RIAA Ex. N-103-DP - Transcripts from the
proceedings of UK Copyright Tribunal – Day 2**

1 Thursday, November 16, 2006

2 (9.34 am)

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

5 Opening submissions by MR CARR

6 MR CARR: Thank you. Good morning, gentlemen.

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

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

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

25 Furthermore, Sony, Napster and Music Choice, you will

1 recall, are the three MSPs who have withdrawn from this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

11 But even for the webcasters, the revenue base --

12 THE CHAIRMAN: Faut de mieux.

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

19 THE CHAIRMAN: Why is that?

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

23 THE CHAIRMAN: Mr Carr, can I stop you a second. I noticed
24 a number of these annexes in your skeleton are labelled
25 "highly confidential".

1 MR CARR: Yes, they are not anymore.

2 THE CHAIRMAN: Can that be true?

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

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

14 MR CARR: Exactly.

15 THE CHAIRMAN: All right. So --

16 MR CARR: Now, if you --

17 THE CHAIRMAN: Annexe 1.

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

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

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

25 MR CARR: Fine, if you read it to yourself. (Pause).

1 THE CHAIRMAN: Yes.

2 MR RABINOWITZ: So.

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

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

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

23 THE CHAIRMAN: Yes.

24 MR CARR: Now, if I can just ask you to look at one of the
25 press reports, the recent press report. If you turn to

1 page 41, and you should have "The Future is Orange" for
2 mobile phone ads, and if you just read that to
3 yourselves.

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

6 MR CARR: This is the 7th August.

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

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

16 Now, it is also worth noting the estimates --

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

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

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

25 MR CARR: It is already happening. If you order something

1 from Amazon you will see, when you next go to Amazon,
2 clicking up: you have ordered X, you may like the
3 following titles.

4 THE CHAIRMAN: iTunes is something like this. Amazon does
5 it, certainly.

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

9 THE CHAIRMAN: Has it started yet?

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

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

19 Now, the alliance have presented this dispute as one
20 issue against a background where everything else has
21 been settled. If they succeed on this issue, however,
22 the new JOL will not just entitle them to 8 per cent of
23 the price of each track purchased by a consumer on his
24 mobile. It will entitle them to 8 per cent of much of
25 the advertising revenue earned by the MNOs as well.

1 Now, let me just give you an example. Say that

2 an MNO --

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

4 it may happen.

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

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

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

8 on the other hand -- never mind this estimate of

9 5 billion overall, let us say one adds £10 million of

10 advertising to that. So a relatively conservative

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

12 million. The whole nature of the licence has changed.

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

14 royalty.

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

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

17 than that -- because the advertising revenue, which is

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

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

20 Now, in their original skeleton, the alliance

21 accepted that the off-line CD licence was a starting

22 point for the Tribunal's considerations and we agreed.

23 And it remains so on this issue as well.

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

25 set out a summary of the history of the mechanical

1 royalty for musical works.

2 THE CHAIRMAN: 23?

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

6 THE CHAIRMAN: I remember this, yes.

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

10 THE CHAIRMAN: Retail originally.

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

14 THE CHAIRMAN: Then RPM.

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

17 THE CHAIRMAN: Because you went from retail to --

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

20 THE CHAIRMAN: And there it stayed.

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

24 THE CHAIRMAN: Yes. The royalty price was levied to the
25 monies changing hands for the musical world.

1 MR CARR: Correct. In over 75 years, it has never been
2 suggested that other revenue streams which may in some
3 way be derived from the sale of music, such as
4 advertising revenue, should be included in the revenue
5 base where the consumer pays for the music.

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

17 Now, the alliance say: well, off-line, the MCPS
18 licences the record company who do not engage in retail
19 activities which might generate other revenue streams.
20 But that is the alliance's choice. They have changed
21 the identity of the licensee for online to the retails,
22 again their choice. They insist that the ultimate
23 retailer should be the licensee, rather than the record
24 company. And that is so that they can get access to the
25 extra revenue streams like advertising which are not

1 available under the off-line scheme. But we say that
2 a change in identity of the licensee does not justify
3 a radical increase in the royalty base, compared to that
4 which the tribunal awarded in BPI v MCPS which, as
5 I said, has existed for over 75 years.

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

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

24 THE CHAIRMAN: Yes.

25 MR CARR: Let us imagine there is an advert for a Vauxhall

1 car. In this example, the royalty will be calculated on
2 the wholesale price of the CD, and the revenue received
3 by Amazon from the Vauxhall advert is not
4 royalty-bearing.

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

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

24 Can I just set the relevant --

25 THE CHAIRMAN: Authorities bundle?

1 MR CARR: Exactly. You want authorities bundle 1.

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

3 MR CARR: I think it is a bundle which says "Denton Wilde

4 Sapte". And in the colonel's pile, I can see, I think,

5 in the second from top right row.

6 THE CHAIRMAN: Okay, got it.

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

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

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

10 The PRS wanted the royalty to be calculated as

11 a percentage of what they called BSkyB's relevant

12 revenues. So you can imagine subscriptions and so on

13 would come in, whereas Sky wanted to pay a lump sum

14 based on their share of total UK audience viewing. If

15 you look at paragraph 1.3 on page 198 you can see those

16 contentions set out and the difference it made in money.

17 So on Sky's proposals, the figure was about

18 1.9 million a year royalty. Whereas on the PRS's it was

19 £17 million, a difference of £15 million. And over the

20 years, 75 million, a fundamental divergence. That

21 difference was caused by the width of the revenue base

22 that the PRS was contending.

23 The position is, if anything, is even more dramatic

24 in the present case because of the potential figures

25 that will come in. Now, the tribunal rejected the PRS's

1 approach to revenue base, and the reasons for that,
2 which I am going to take you to in a little more detail,
3 but they are summarised. Beginning at page 194 in the
4 headnote, can I invite you to read page 194 over to 195,
5 numbered paragraphs 5 to 7.

6 THE CHAIRMAN: On the holdings?

7 MR CARR: Yes, on the holdings.

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

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

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

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

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

16 MR CARINE: Including 7?

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

18 THE CHAIRMAN: Yes.

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

21 THE CHAIRMAN: Probably too little.

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

23 THE CHAIRMAN: I rather thought that.

24 MR CARR: So it is an awful lot extra.

25 THE CHAIRMAN: Could I ask you just as a matter of interest,

1 in terms of repertoire, we are of course dealing with
2 the PRS in this case, taking in foreign copyrights as
3 well, that covered virtually everything imaginable. Is
4 that the same position here?

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

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

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

11 THE CHAIRMAN: Yes, it must be.

12 MR CARR: The particular points I wanted to emphasise.

13 Holding 6:

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

16 THE CHAIRMAN: Yes.

17 MR CARR: And holding number 7:

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

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

25 I am going to take you through a little of the

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

7 "The question is ..."

8 THE CHAIRMAN: Yes.

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

15 So it is sufficient connection.

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

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

21 MR CARR: It did. As the tribunal observed, at the bottom
22 of the page, one would have thought that the correlation
23 between the use of music and the revenues in the
24 discotheque would be somewhat stronger than in the case
25 of television. But even in that case, the tribunal

1 rejected the PRS's approach, even for discotheques, and
2 if you look at the quote, you can see on about the
3 fourth line, again the test of the close direct
4 relationship between the value of the input and the
5 value of the output and the finding at the end of that
6 quote:

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

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

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

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

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

25 "What offends one's common sense is that a single

1 component of a complex final product, such as
2 a television programme, should be remunerated on a basis
3 which rise and falls with the revenues obtained from the
4 final product where that component may have had nothing
5 at all to do with those changes in revenue."

6 Now, we are going to explore what mobile phones do
7 in a moment. You make calls on them, you send text
8 messages. It is much more complex.

9 THE CHAIRMAN: You use them as a calculator.

10 MR CARR: You do all sorts of things.

11 Now, continuing with this decision. As we see, the
12 tribunal reasoned that there was no risk sharing as the
13 PRS were not co-adventurers in the business of
14 television. The same is true here, the alliance are not
15 co-adventurers in the mobile phone business, nor in the
16 advertising revenue generated from it.

17 Going over, please, to paragraph 6.7. They then
18 considered the decision in AIRC v PPL, which is relied
19 on heavily by the alliance in the present case. They
20 noted that the tribunal expressed serious reservations
21 about the advertising revenue base there. But, and we
22 can take this quickly, if you go over to page 219, they
23 said:

24 "The reasons were historical and faut de mieux."

25 There was no other alternative in radio because

1 there was no other revenue base.

2 Now, the position, just continuing with the B SkyB
3 decision, if you turn to paragraph 6.10.

4 THE CHAIRMAN: 6.9 is the Singapore case.

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

7 6.12, they say at the end of that paragraph:

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

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

18 However, once one broadens that revenue base from
19 that which applies off-line to revenue streams which do
20 not have a close direct relationship with the licensed
21 music, all of the objections to revenue-based licences
22 referred to in all these decisions clearly arise. It is
23 simply not reasonable to extend the revenue base to
24 these additional streams of revenue where the requisite
25 nexus between the music and the revenue does not exist.

1 And the reason why it does not exist I am now going to
2 show you.

3 First of all --

4 THE CHAIRMAN: It is a matter of degree.

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

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

13 MR CARR: Saying it was --

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

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

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

23 MR CARR: You are absolutely right, that the MNOs here,
24 because if you bring in all their advertising revenues
25 which you see they intend to do, the music component in

1 a film is much, much more important. And yet here the
2 alliance's case is: never mind that, we are going to
3 attribute everything to music even on a mobile phone and
4 stick it all in.

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

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

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

14 THE CHAIRMAN: Yes, please.

15 MR CARR: And then I will show some practical examples about
16 the effect that would have on MNO advertising.

17 So if you turn to page 14 of my skeleton.

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

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

25 If you turn, please, to page 14 of my skeleton. We

1 have here highlighted some part of the definition of
2 gross revenue. So this is what now comes in.

3 THE CHAIRMAN: Wait, wait. Yes.

4 MR CARR: Let me take you through it. Now, A --

5 THE CHAIRMAN: Just let me -- this has been lifted, has it,
6 from the --

7 MR CARR: Exactly. It is from schedule 3 of the new JOL,
8 you have the reference to where you will find it in the
9 bundle.

10 THE CHAIRMAN: You have marked it here, all right, good.

11 MR CARR: Let us go through it. A:

12 "All revenue received or receivable by the licensee
13 from users in relation to the provision of the licence
14 services."

15 So that is intended to be the revenue stream from
16 consumers, like the off-line world. It would be a bit
17 better if it said "in consideration for the provision",
18 but that is what it is intended to be.

19 THE CHAIRMAN: Consumers you call them, and that is
20 analogous to --

21 MR CARR: That is analogous to off-line. And all the rest
22 of it expands that.

23 THE CHAIRMAN: The rest is extra.

24 MR CARR: The rest is extra. If we look at the first one,
25 B, this is where advertising is first mentioned:

1 "All revenue received or receivable as a result of
2 placement of advertising on or within the licensed
3 services."

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

8 THE CHAIRMAN: On or within the licence services.

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

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

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

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

23 THE CHAIRMAN: Mr Carr, sorry to interrupt you. Is what is
24 going to happen, then, that we turn on our mobile
25 telephones and instead of seeing the wallpaper, the

1 grandchild, the sunset, the whatever, we are going to
2 see an advertisement?

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

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

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

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

14 MR CARR: Make a call.

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

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

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

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

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

25 MR CARR: Absolutely.

1 THE CHAIRMAN: Because you have purchased the music and you
2 get --

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

7 THE CHAIRMAN: It is a double feature programme.

8 MR CARR: Exactly.

9 THE CHAIRMAN: I have got it.

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

13 THE CHAIRMAN: Wait a minute, yes.

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

19 The problem for the MNOs, just in relation to this,
20 is it is entirely unclear whether the MNO's home page
21 would come within this exemption or not. Because if you
22 look at it, there are two conditions to take a home page
23 out of the definition of "gross revenue". The first is
24 that the content relating to the licence service has to
25 be an insubstantial part of the entire content displayed

1 on such home page. Do you see that in the bold? An
2 insubstantial part. And secondly, the licence service
3 has to be an insubstantial part of the entire service of
4 the licensee, as is accessible via the home page.

5 THE CHAIRMAN: So two conditions.

6 MR CARR: Two insubstantials. So --

7 THE CHAIRMAN: You say how do you --

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

20 Turning to the definition, let us look at D. D is
21 concerned with commissions from third parties. And let
22 me explain to you an example. The most common form of
23 commissions an MNO will earn are what is known as
24 click-through commissions. So let us say that
25 a consumer clicks on a link. You have got the page of

1 your mobile phone and there is a link to a third party
2 service or site. It could be anything. And you
3 sometimes see them, if you use the internet you see at
4 the side links to other places. You click on it.
5 THE CHAIRMAN: Incidentally, how will you click with the
6 phone?
7 MR CARR: You press your thing in the middle.
8 THE CHAIRMAN: I see, all right.
9 MR CARR: Now, consider a link -- you click on it, it leads
10 you to book a table at a restaurant. The MNO gets paid
11 when that occurs but not before. It is what is called
12 success-based advertising. So somebody clicks, somebody
13 books the table, the restaurant can then say: I see
14 I got that from my MNO advert, my MNO click, so I owe
15 the MNO a bit of money.
16 THE CHAIRMAN: Is that really how it is going to happen?
17 You are telling me --
18 MR CARR: That is.
19 THE CHAIRMAN: -- the Bengal Lancer, having received
20 a booking for two people for a curry, will then report
21 the fact back to --
22 MR CARR: Have you ever --
23 THE CHAIRMAN: Will they ever do that?
24 MR CARR: I think so. Because have you ever used
25 Lastminute.com where you book tables?

1 THE CHAIRMAN: Yes.

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

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

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

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

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

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

21 THE CHAIRMAN: Via the licence services.

22 MR CARR: Via the licence services.

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

24 MR CARR: You do not want to buy music.

25 THE CHAIRMAN: You have no music at all.

1 MR CARR: And they got a royalty. Is that the close direct
2 relationship that one normally expects?

3 THE CHAIRMAN: That is a question for us.

4 MR CARR: Now look at E. E is very important because it is
5 a catch-all. Do you see the words:

6 "... any other revenue received or receivable by the
7 licensee, arising in relation to the provision to users
8 of the licence services."

9 So if you are not within B, C or D, that E gets you.
10 Just in case something might have been missed E gets
11 you.

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

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

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

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

21 THE CHAIRMAN: All right.

22 MR CARR: Now, the lack of clarity in this catch-all part of
23 the definition is obvious. It covers not only the
24 licence services, but anything arising in relation to
25 their provision.

1 Now, in the context of offerings like the MNOs, even
2 their content services, which may be games, it may be
3 news, sport, entertainment, a catch-all like this is
4 very, very significant.

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

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

12 THE CHAIRMAN: That goes back to the act.

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

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

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

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

25 THE CHAIRMAN: Yes.

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

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

12 Now, let us just --

13 THE CHAIRMAN: So these are sort of live concerts.

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

15 THE CHAIRMAN: I see what you mean, yes.

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

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

23 Now, once one appreciates the breadth and vagueness
24 of the definition of "gross revenue", it becomes
25 apparent that the treatment of advertising revenue in

1 the new JOL is about securing a windfall on revenue
2 streams which have insufficient nexus with any act
3 requiring a licence.

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

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

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

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

24 THE CHAIRMAN: What will you see, then, when you listen to
25 the music?

1 MR CARR: I will show you. If you turn to, in tab 1 of my
2 skeleton, page 48. If you look at A, you have bought,
3 let us say, a Robbie Williams track. And before or
4 immediately after the content is delivered to you, so
5 you get your track, you see this Visa advert. You may
6 see it every time you try and use it or you may see it
7 once, but the point is you see it and you have to see
8 it.

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

18 Now, a second advertising that is also possible on
19 mobiles is called banner advertising, and this is where
20 an advert appears on a page of a service, as opposed to
21 coming as part of the actual delivery of content. And
22 if you look at page 44 of my skeleton, if you look at
23 example A1, which is the Jaguar example, and I think
24 this may answer the chairman's question earlier. Can
25 you see that on the left, the Jaguar advert is what we

1 call a banner advertisement. It is appearing as a kind
2 of band across the screen. It is called a banner advert
3 because it appears on the top of the page, rather like
4 a banner at the top of a store. Do you see?

5 THE CHAIRMAN: Yes.

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

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

16 THE CHAIRMAN: Yes.

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

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

24 MR CARR: Just before you get to e.g. the page about music
25 news or wallpaper, you see that advert.

1 THE CHAIRMAN: And you say that is --

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

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

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

21 MR CARR: Let us say those tracks were being offered for
22 free and that advert appeared immediately before then.
23 Then we accept, for the purposes of trying to
24 compromise, that the revenue on that advert should be
25 included.

1 And similarly, if you look at D2, the advert
2 actually appears, I think you can see it is a Mercedes
3 advert, at the top of the page. If the advert is free
4 and it has that advert on that page and there is revenue
5 from the advert we also accept that there is sufficient
6 nexus.

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

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

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

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

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

23 MR CARR: And each time you look at your mobile you would
24 have the attractive sight of Usher "My Boo" staring back
25 at you.

1 THE CHAIRMAN: I think I might prefer Christina!

2 MR CARR: Or Shakira.

3 THE CHAIRMAN: But that is purely a personal preference.

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

8 THE CHAIRMAN: But would the wallpaper sing each time?

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

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

17 Let us imagine that somebody thought: I want to have
18 a look at what is happening, see if I want to go to the
19 concert. I will access that page. And it has got an
20 advert on. Say it has an advert for a holiday, nothing
21 to do with any licensed act, it will not require a
22 licence from the alliance to tell us what is happening
23 in the music world. But suddenly the revenue comes into
24 the definition. That is what is supposed to be
25 music-related.

1 Now, obviously under the new JOL's approach it would
2 not just catch adverts on this page. It would catch
3 them on pages before, apparently because they are
4 music-related. Where is the licensed act? Where is the
5 close nexus?

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

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

11 Wait a minute.

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

13 MR CARINE: 37?

14 MR CARR: 37, correct.

15 THE CHAIRMAN: Shall we read it?

16 MR CARR: Yes. (Pause).

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

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

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

23 Now let us have a look at what the three-part test
24 is. So we are imagining now a page that talks about the
25 stock market.

1 The three-part test for the exemption, so it does
2 not form part of gross revenue, you find at 8.33 and we
3 are going to apply this to a finance.

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

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

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

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

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

18 THE CHAIRMAN: Yes. Put that to the test.

19 MR CARR: Let us imagine that this page was about finance,
20 okay. Stock market news. And it had an advert on for
21 Kleinwort Benson Bank or Goldman Sachs. Apparently,
22 unless the alliance judge that music -- and we are
23 assuming here that the MNO offers a music service
24 somewhere else on the mobile -- unless the alliance
25 judge that music is only an insubstantial part of the

1 suite of services offered, the advert on the finance
2 page comes in because that is one of the conditions that
3 has to be satisfied for it not to be.

4 THE CHAIRMAN: What is a suite of services?

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

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

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

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

18 MR CARR: I have to tell you that because of the alliance's
19 evidence where they talk about how important the music
20 services is to mobile phones, they will always say that
21 the music services are a substantial part of the total
22 service offered by an MNO and therefore all advertising
23 comes in because you have this test: let us look at the
24 whole thing. Is it insubstantial? We do not think so.
25 We have all the advertising. Kleinwort Benson Bank? It

1 does not matter, it is all in. And that presumably is a
2 result of the effect of the catch-all that I showed you
3 earlier.

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

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

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

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

1 So it is as simple as that.

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

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

10 THE CHAIRMAN: Yes.

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

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

19 MR CARR: You do. But the first point is: what is the
20 mobile phone's, the MNO's, let us say Orange's ability
21 to secure subscribers to their network? If you go to
22 a shop and ask for a mobile phone and you become
23 a subscriber, that is generally how you see any of this.
24 What is that way? The first and most important
25 consideration when you go and buy a mobile phone is the

1 voice and text services. You may have seen these plans
2 and you see you get 500 minutes of talk and 1,000 texts.
3 And that is the first thing that people want to know, in
4 return for, let us say, £17.99. That is why you become
5 a subscriber.

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

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

14 THE CHAIRMAN: They give you a magazine.

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

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

20 MR CARR: Yes, all that stuff.

21 There is also content offering, but even within
22 content offering there is lots of different kinds of
23 content; music is one component, games, wallpaper. Now,
24 the problem with the alliance's argument is that they
25 just assume that all advertising, as they put it: the

1 advertising is attracted by the music. Well, how do you
2 know that? How can you show that when you are dealing
3 with a complex product like a mobile phone? We say it
4 is simply an assertion, and it is totally contrary to
5 the approach of BSKyB.

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

8 THE CHAIRMAN: Mr Carr, we have been just about an hour.

9 When you come to a pause, it might be time for a little
10 break.

11 MR CARR: Right.

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

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

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

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

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

25 THE CHAIRMAN: Yes, I see it.

1 MR CARR: There is not a music entry here but let us assume
2 there was. Let us assume that in between film and TV
3 guide, it said music. Okay?

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

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

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

20 THE CHAIRMAN: Well, I mean, yes.

21 MR CARR: So the advertising revenue in relation to Jaguar,
22 some part of it would come in because it arises in
23 relation to the provision to users of the licence
24 service. We say this shows an obvious problem. Let us
25 say you had music on this page as an entry.

1 THE CHAIRMAN: As it is at the moment, or as you --

2 MR CARR: It is not there but if we imagine it is there.

3 THE CHAIRMAN: Right, okay, yes.

4 MR CARR: A user like me goes to that page with absolutely

5 no interest in buying an FTD. No interest in the music

6 services whatsoever. He may want to watch the news, he

7 may want to find out about sport. But it is the mere

8 presence of a link from this page to the MNO's music

9 service, which may indeed be music news, that entitled

10 the alliance to a cut of the advertising revenue. It

11 cannot be right. And the purported justification is

12 that Jaguar is attracted to the MNO by the music

13 service. How can one ever say that?

14 Now look at example C.

15 THE CHAIRMAN: Incidentally, when I touch the Jaguar banner

16 and up comes the Jaguar page, there will surely be some

17 music with that, will there not?

18 MR CARR: No.

19 THE CHAIRMAN: It will be a silent Jaguar, will it?

20 MR CARR: Even if there was, it would be a different

21 licence. It is not covered by this licence.

22 THE CHAIRMAN: Jaguar may well have supplied the whole

23 advertisement via their advertising and they will

24 already have paid money --

25 MR CARR: Of course, but the Jaguar leader licence -

1 exactly -- they will have already paid.

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

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

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

24 THE CHAIRMAN: This is one of your double recovery
25 arguments.

1 MR CARR: It is another double recovery point.

2 THE CHAIRMAN: You have got another three.

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

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

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

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

1 zone". Do you see?

2 THE CHAIRMAN: I see, yes.

3 MR CARR: So lots and lots of different content.

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

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

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

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

25 THE CHAIRMAN: Is this supplemental?

1 MR CARR: Yes, it is bundle I, it says "Supplementary
2 Evidence", and you will find the statement of
3 a Mr Jonathan Bill at tab 8. If you turn, please, to
4 paragraph 19. I will ask you to read the paragraph, the
5 highlighted bit is confidential. Tab 8, please, and
6 turn to page 94, paragraph 19.

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

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

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

23 THE CHAIRMAN: In the present format, Mr Carr, I am having
24 some -- because I look at iTunes, I really have great
25 difficulty in understanding how anyone who is not

1 equipped with a magnifying glass can ever see what is on
2 the page.

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

10 THE CHAIRMAN: Yes.

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

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

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

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

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

25 So I am -- not me, but somebody is a consumer, comes

1 to the MNO's music service. Sees the iTunes
2 advertisement, clicks on it and purchases a song from
3 iTunes for 79p. He has chosen not to buy the song from
4 the MNO's route possibly because it is cheaper to do it
5 on iTunes, as you know. If he does so, the new JOL
6 would result -- what the alliance would pose is that
7 they get a royalty on 79p from iTunes, plus the 10p,
8 even though the 10p, the iTunes advert, relates to no
9 act for which the MNO would need a licence from the
10 alliance.

11 Now, let me take it a little bit further. Assume
12 when the consumer went to iTunes there was an advert on
13 iTunes for a holiday. What happens then under the
14 alliance scheme? They get a royalty on the 79p, on the
15 10p, and on the holiday advert on iTunes. Where does it
16 ever stop? It goes on and on and on.

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

19 THE CHAIRMAN: Shall I put Mr Bill away?

20 MR CARR: Yes, please. Put Mr Bill away.

21 THE CHAIRMAN: Just a moment.

22 MR CARR: Now, you will see here a Google search page.

23 THE CHAIRMAN: Which page again?

24 MR CARR: Page 49. And I am sure we have all looked at this
25 in the past, are all familiar with this from our

1 computers. And imagine now, please, that every page on
2 a mobile phone, including the music page, has the Google
3 search bar on it that you see near the top of this page.
4 So it has the little Google thing in the search bar on
5 every page of the mobile, which is a possibility, and
6 the user can therefore do a Google search from any page
7 on his mobile, and we will say that Google pays the MNO
8 either a fee or a revenue share for allowing this
9 facility to be provided.

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

15 Now, on what possible basis could they lay claim to
16 the revenue under the Google search facility? The first
17 point is that the Google search facility becomes part of
18 the overall functionality of the MNO search. You can do
19 a Google search. Now, let us assume that a user is on
20 any page of his mobile, we can take the music page, any
21 page, the finance page. He has not bought anything but
22 he is bored of it. He thinks: I will do a Google
23 search. I would like to do a Google search about the
24 Albigensian Crusades because I am writing a book about
25 it.

1 THE CHAIRMAN: It assumes you are Jonathan Sumption.

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

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

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

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

18 So we say that cannot be right.

19 Now, let me now deal with the alliance's point which
20 is: what happens if the MNOs subsidise music, rather
21 than making it free, they subsidise it. They give an
22 example. They say: what if the FDP price -- so the
23 price you will be charged -- drops, let us say, from £1
24 to only 10p, and the 90p, as they put it, is made up by
25 advertising. What happens?

1 Well, there are several answers to this. We say it
2 is a particularly bad example from the alliance's point
3 of view. The first point is that you know, I think,
4 that the alliance sought minimum royalties and got them
5 in the new JOL. Not as much as they originally asked
6 for but they got minimum royalties. And the purpose of
7 why they sought and obtained minimum royalties is very
8 important at this point.

9 If I can invite you to look at the agreed facts
10 again. So my skeleton, page 39, agreed fact 12. You
11 say that one of the alliance's stated purposes was to
12 provide a minimum level of compensation, and another was
13 to protect the alliance's members against extreme
14 underpricing. And that is what it has done. If the
15 price drops to 10p, as they have suggested in their
16 example, the minimum royalty kicks in. If the price
17 drops to 20p or 30p, the minimum royalty kicks in. The
18 minimum royalty kicks in because you will recall it is
19 4p, it kicks in all the way up to 59p.

20 Now, that is what the parties have agreed for this
21 purpose. That is what is in the new JOL and that is
22 what has apparently satisfied the alliance's members
23 against this underpricing problem. But they want to
24 have the advertising as well, because of fears of
25 underpricing. That cannot be right. They have already

1 covered it. And I pick on their example of 10p because
2 it shows how they have already got it. It cannot be
3 excused for expanding the revenue base as well.

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

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

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

25 Now, a further point that I want now, a separate

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

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

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

21 MR CARR: Quite.

22 THE CHAIRMAN: Nothing is perfect.

23 MR RABINOWITZ: Perhaps I can help on this. We are
24 producing, and my learned friend will have by the end of
25 day or tomorrow morning -- there are all kinds of

1 reasons why it was not appropriate to do it before,
2 including the time pressure -- but my learned friend
3 will have by tomorrow morning a response in relation to
4 each of the examples he has given, identifying whether
5 we accept it is or is not.

6 THE CHAIRMAN: That is very helpful.

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

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

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

15 MR CARR: Do you know what? It is a very interesting point,
16 there. The alliance have had these examples since the
17 31st October. They have a definition which they say is
18 clear, simple and workable. They have QCs considering
19 whether these examples fall within their definition or
20 not. Due to time pressure, they have repeatedly said,
21 "We are not going to tell you". Apparently they will be
22 able to deal with it tomorrow.

23 MR RABINOWITZ: I am going to respond to that now, because
24 Mr Carr is making, with respect, a very unfair
25 complaint. It may be that Mr Carr, in his position

1 dealing with simply one issue in this case, has all the
2 time in the world. On our side, we are dealing with
3 complaints not only by Mr Carr and iTunes, but a whole
4 raft of complaints as you have seen by the MSVs and --

5 THE CHAIRMAN: Up until recently, others.

6 MR RABINOWITZ: Indeed. And we do not have all the time in
7 the world; and even in relation to this dispute, we do
8 not have all the time in the world simply to please
9 Mr Carr. We are doing what we can. And as I have tried
10 to indicate, he will have by tomorrow morning
11 a response. If there is something else he wants to say
12 about the position, that is fine. But that is the
13 position.

14 THE CHAIRMAN: Thank you. That is understood.

15 MR CARR: Well, that is very helpful. As I say, the answer
16 in correspondence --

17 THE CHAIRMAN: I mentioned it because one finds that if in,
18 particularly an opening, there is a sort of "tit for
19 tat" answer, answer, answer, reply, reply, et cetera.

20 You often find that you get nowhere at the end of
21 the day and that you do need a point of principle. The
22 only thing is that human nature and the limits of
23 language being what they are, there may be a limit to
24 a point of principle. That is our problem.

25 MR CARR: Exactly. And the problem, the position the

1 alliance have stated in correspondence is not that they
2 did not have time, but that they only wanted to discuss
3 the general principle.

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

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

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

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

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

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

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

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

24 So I thought: good, I am now going to find an
25 example where they actually accept it is not within.

1 Let us have a look at annexe B again, please, the
2 example they are talking about, which is page 44 of my
3 skeleton.

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

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

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

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

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

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

25 MR RABINOWITZ: In fact, it is clarified at paragraph 8.34.

1 THE CHAIRMAN: 8.34?

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

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

7 THE CHAIRMAN: Say again?

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

11 THE CHAIRMAN: Is it? Yes.

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

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

19 Now, there is only other main matter.

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

21 MR CARR: Now, the alliance in their skeleton seek to
22 suggest that there is a complete disharmony between the
23 MNOs, webcasters and iTunes in relation to the treatment
24 of gross revenue. We do not accept that that is the
25 position at all; to sort of drive a wedge between

1 everybody. If you look at my skeleton, please, at
2 paragraph 92 and 93.

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

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

5 THE CHAIRMAN: 92?

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

10 THE CHAIRMAN: Yes.

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

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

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

25 They attack iTunes' proposal on the basis that it is

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

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

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

20 You will find if you can dig out, please, folder X2.
21 And turn to tab 7 which appears to be the first tab.
22 This is the alliance's original opening submissions.
23 And turn, please, to page 28.

24 I will just read this out if I may.

25 THE CHAIRMAN: Just stop a second.

1 MR CARR: Page 28, paragraph 6.5.3. This is what is said:

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

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

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

15 So an accusation of bias prior to cross-examination.

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

17 THE CHAIRMAN: Yes, Mr Boulton is a barrister.

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

21 THE CHAIRMAN: Just a moment.

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

24 Now, the courts have observed in the past --

25 THE CHAIRMAN: It is not the first time I have seen this

1 where accountants are involved.

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

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

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

15 THE CHAIRMAN: Put X2 away?

16 MR CARR: Please put X2 away, please.

17 THE CHAIRMAN: Your skeleton. Yes, where?

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

20 You may remember or you may be aware that
21 Mr MacGregor, another accountant, prior to the
22 settlement with the BPI and so on, served two very, very
23 lengthy reports. They were essentially directed to what
24 in patent cases have been called "profits available".
25 How much profit --

1 THE CHAIRMAN: I spent some time reading them.

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

5 THE CHAIRMAN: Are you thinking back to extension cases?

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

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

14 MR CARR: Or on the other hand --

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

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

18 THE CHAIRMAN: Accountants do it.

19 MR CARR: They do. This huge lengthy thing about what are
20 the MNO's costs and profits. All relevant, apparently,
21 to royalty rate. Royalty rate has now been settled.
22 Royalty rate has now gone, we are agreed, 8 per cent.

23 Mr MacGregor has served a third report going on
24 about costs and profits after the settlement, which
25 continues to go on about the MNO's costs and profits.

1 It has gone. It is a bit like one of those Japanese
2 soldiers who are lost in the jungle. They have not been
3 told the Second World War is finished.

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

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

10 MR CARR: It is like a dog with a bone. It will never end.
11 Anyway, let me look at what the supposed justification
12 is. If you look at, please, at correspondence bundle 3,
13 which hopefully you have. (Pause).

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

18 THE CHAIRMAN: Just a moment.

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

20 THE CHAIRMAN: I have not read this.

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

24 "Mr Boulton's overall approach to the preparation of
25 his reports."

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

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

11 Now, I said I would finish.

12 THE CHAIRMAN: Yes.

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

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

19 MR CARR: Exactly.

20 THE CHAIRMAN: That seems to be reasonable.

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

25 THE CHAIRMAN: At the end of this, everyone will take

1 a cruise.

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

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

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

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

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

22 MR CARR: Are we going to take our break?

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

25 (11.16 am)

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(A short break)

(11.32 am)

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

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

MR CARR: That would be under a separate licence.

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

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

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

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

THE CHAIRMAN: Also, Mr Carr. One thing we have been discussing, and I am not inviting you to go into the

1 thing with your witnesses or any of your witnesses in
2 great detail. But we are intrigued as to how the
3 reporting is effected.

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

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

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

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

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

21 MR CARR: Certainly.

22 THE CHAIRMAN: Thank you very much. So thank you, Mr Carr.
23 Jet let me put this party correspondence away and we can
24 get on with Mr Rabinowitz.

25 MR RABINOWITZ: Mr Weisselberg firstly.

1 Opening submissions by MR WEISSELBERG

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

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

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

13 THE CHAIRMAN: Yes.

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

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

25 THE CHAIRMAN: So why are you here?

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

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

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

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

22 We say the option is simple, but we say on this side
23 of the room, it is more than simple; it is actually
24 simplistic because it ignores what are the true nexuses
25 between the revenue streams and the use of the

1 alliance's rights.

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

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

21 We invite the tribunal on this side of the table,
22 this side of the room, to cut through that type of
23 submission and to look at the detailed reasons why the
24 three particular parties put forward the answers that
25 they do, while accepting that the reason why we put

1 forward these different analyses is because we do not
2 accept the extremity of the position that the alliance
3 is seeking to put forward.

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

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

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

24 If iTunes does not raise advertising revenue, why is
25 iTunes here? iTunes considers that it is important to

1 establish now the framework within which advertising
2 revenue will be treated in the future should iTunes
3 decide to raise revenue in that sort of way.

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

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

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

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

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

1 click-through.

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

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

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

22 So why are we here?

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

24 MR WEISSELBERG: We also offer games.

25 THE CHAIRMAN: Of course.

1 MR WEISSELBERG: So there are there other types of things
2 iTunes offers.

3 THE CHAIRMAN: It may not be relevant to know what they are.
4 I could always go to my site and look. But games I do
5 remember, I looked at that. Also you do some video
6 stuff?

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

8 THE CHAIRMAN: Exactly so.

9 MR WEISSELBERG: So I accept that the presence of music is
10 something that makes iTunes, to an extent, what it is.
11 It is, at least in part, a music store.

12 THE CHAIRMAN: That is how you start it.

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

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

19 THE CHAIRMAN: Books?

20 MR WEISSELBERG: Audio books.

21 Turning then to my second issue.

22 THE CHAIRMAN: I see, audio books.

23 MR WEISSELBERG: Spoken word.

24 THE CHAIRMAN: Yes. And they would be in the form, so you
25 would obviously put them in the usual way on your

1 machine.

2 MR WEISSELBERG: So you could listen to Jonathan Sumption's
3 book on your iTunes.

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

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

9 THE CHAIRMAN: I have it.

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

14 THE CHAIRMAN: That would be very helpful, yes.

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

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

23 THE CHAIRMAN: Thank you.

24 MR WEISSELBERG: -- contain the new JOL.

25 THE CHAIRMAN: Yes. Speaking for myself, I have not read

1 the whole thing at all.

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

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

9 MR WEISSELBERG: Absolutely.

10 THE CHAIRMAN: Yes.

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

14 THE CHAIRMAN: Yes --

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

16 THE CHAIRMAN: He put B and C.

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

22 THE CHAIRMAN: To this.

23 MR WEISSELBERG: To this clause.

24 THE CHAIRMAN: Mr Carr, for example, has got that in annexe
25 3. Mr Carr just confirmed that is correct. His

1 suggestions, green lining, if I may call it, yes? And
2 you have got a green liner too.

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

5 THE CHAIRMAN: Yes.

6 MR WEISSELBERG: Which is in A6, if it is convenient to go
7 to that now.

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

11 MR WEISSELBERG: What we are looking at --

12 THE CHAIRMAN: Tab 2?

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

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

18 MR WEISSELBERG: It is shown in deletions and underlinings.

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

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

1 MR WEISSELBERG: There are deletions.

2 THE CHAIRMAN: The deletions are the old red linings.

3 MR ARNOLD: Over the page.

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

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

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

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

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

21 MR WEISSELBERG: Put A6 away.

22 THE CHAIRMAN: Yes, thank you.

23 MR WEISSELBERG: So what has iTunes agreed with the
24 alliance? iTunes has agreed to pay 8 per cent of the
25 retail price of permanent downloads. It has agreed to

1 pay 8 per cent of in-stream advertisements. We have
2 called them in-download advertisements to reflect the
3 nature of the service that we provide, but there is no
4 difference or no material difference between in-download
5 and in-stream advertising. And we have also agreed to
6 pay minima of 4p per download.

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

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

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

22 MR WEISSELBERG: So a solution has been found to meet the
23 concern that the alliance had over underpricing
24 generally within the music service provider community,
25 and in respect of iTunes in particular. iTunes did not

1 accept those allegations but was prepared for commercial
2 reasons to agree to minima at an appropriate level, and
3 what BACS and the alliance made clear is that the
4 importance of minima is to protect the alliance from
5 extremes of underpricing, and to provide a workable and
6 cost-effective solution to potential unbundling
7 problems.

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

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

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

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

21 THE CHAIRMAN: Shall we read 3.2?

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

23 (Pause).

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

25 MR WEISSELBERG: Absolutely. If one looks at 3.1

1 immediately above that paragraph, we say the MNOs'
2 disputed contention also set out.

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

5 MR WEISSELBERG: No.

6 THE CHAIRMAN: Thank you.

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

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

20 What we then do is perhaps contrary to the
21 comparable, the immediately comparable position off-line
22 of the CD retailer, is we offer the alliance an
23 additional revenue stream. We say we are being
24 generous, the alliance say we are being complex and
25 seeking to cheat composers and publishers out of fair

1 return for their work.

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

7 We are offering royalty, but only in particular
8 circumstances.

9 THE CHAIRMAN: A limited offer, in other words.

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

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

24 The second point is iTunes says: where the licence
25 service is being offered at a discount which reflects

1 the receipt of advertising revenue, then it is
2 appropriate to bring that advertising revenue within the
3 royalty base. And that can be characterised as the
4 artificially depressed point. Indeed, another way of
5 putting it is the subsidisation point where the price
6 paid by the user is subsidised by the receipt of
7 advertising revenue. iTunes accepts, subject to the
8 point one of "actually offered", that those advertising
9 revenues should be brought within the royalty base.

10 We have done that to be reasonable.

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

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

17 The alliance, on the other hand, wants this
18 additional revenue stream in all the types of example
19 that Mr Carr gave you. He gave you predominantly
20 examples derived from mock-up MNO pictures. There is no
21 difference in reality between the iTunes' position and
22 the MNO position in terms of what is on the screen.
23 There is dispute, there is difference as to size of
24 screen, how you deal with the type of service that the
25 MNOs provide. But in terms of whether you determine

1 that advertising revenue is related to music or not,
2 there is no material difference between the examples
3 given to you in some detail by my learned friend,
4 Mr Carr, and the position that iTunes adopts.

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

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

17 We say where the licence service is not being
18 offered at a discount there can be no justification for
19 that leap. The alliance is continuing to be paid its
20 8 per cent on the main service that iTunes provides,
21 which is downloads.

22 So why should the alliance be entitled to that
23 additional revenue stream? Their answer appears to
24 be: because the adverts relate to music. We say that
25 approach is unprincipled and is contrary to particularly

1 the BskyB case that the tribunal were shown earlier by
2 Mr Carr.

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

5 MR WEISSELBERG: Absolutely.

6 THE CHAIRMAN: I mean, CDPA.

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

16 But one looks in vain to find a principled reason
17 why it is unfair. Merely suggesting that something is
18 unfair and ignoring, as the alliance do, the line of
19 authority best put together in BskyB, merely repeating
20 it does not mean that it is so. And, in effect, what
21 the alliance does in this bit of the reference is say to
22 the tribunal: let the applicants and interveners explain
23 why we should not have this revenue stream. Otherwise
24 we should have it, and we will criticise the proposals
25 that are put to us, but you are not going to hear very

1 much from us in terms of what other mechanisms could be
2 used to address the issue of nexus.

3 THE CHAIRMAN: Where is the onus?

4 MR WEISSELBERG: There is no onus of proof in the tribunal.

5 So it is for the tribunal to determine what is
6 reasonable in all the circumstances. In BPI, the
7 allegation that was made was on behalf of the MCPS: it
8 is for the applicants to approve that the scheme is
9 unreasonable; held not so.

10 THE CHAIRMAN: No onus generally?

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

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

1 that which is put forward by the alliance.

2 Turning then to my third issue, the law.

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

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

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

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

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

24 Because running through the alliance's case is an
25 assumption that they should be entitled to share all

1 revenues unless there is a special reason as to why not.
2 They attack any deviation from the totality of the
3 revenue as an attempt to deprive composers or publishers
4 of what is rightfully theirs.

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

14 THE CHAIRMAN: Well, that is classic BskyB stuff.

15 MR WEISSELBERG: Absolutely.

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

25 Second. I have sought to summarise the position in

1 the cases, BSkyB and its forebears, in paragraph 31.4 of
2 my skeleton argument. And there are two key factors,
3 I do not intend to turn it up.

4 THE CHAIRMAN: Just epitomise it.

5 MR WEISSELBERG: There are two key factors. One, what
6 factors drive the revenue stream in respect of which
7 a copyright holder wants to have access? And two, is
8 there risk sharing in relation to that revenue stream?
9 It is those two particular principles that the tribunal
10 should bear in mind when it comes to look at the
11 submissions that the alliance makes.

12 THE CHAIRMAN: Again, BSkyB stuff.

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

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

21 I would like to turn then to my fourth issue, which
22 is sufficient connection. Adequate nexus. How do the
23 alliance and the academy define "sufficient connection"?
24 What reason do they give for arguing, as they must, that
25 there is a sufficient connection between the advertising

1 revenue that they seek and their works? And, as I have
2 already said, effectively it comes down to an allegation
3 of fairness. Why is it fair that they should be
4 entitled to iTunes' advertising revenue? The alliance's
5 answer seems to be simply: you are making money out of
6 the works, we insist on getting a fixed proportion of
7 that money. They want it even where revenues are
8 generated only in part by the use of their works, and we
9 say that is simply not the correct approach to adopt.
10 Why?

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

22 Second, the alliance seem to suggest that the
23 availability of music alone should be sufficient to mean
24 that there is a nexus. The mere availability of
25 a right, we say, should not be seen to be adequate

1 connection with the rights controlled by the alliance.

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

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

20 So what factors drive, going back to one of the
21 first questions, what factors drive the receipt of
22 advertising revenue by iTunes? We say it is not the
23 musical works. We say that the factors that drive the
24 receipt of advertising by someone like iTunes are a host
25 of different reasons; and the alliance is not able to

1 claim a blanket entitlement, as it seeks to do, to those
2 revenue streams.

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

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

23 The alliance does not seek, and has never sought,
24 a royalty based on advertising revenues that may be
25 gained by those types of retailers.

1 Four reasons are articulated by the alliance as to
2 why that is not a good comparable. The first is that
3 advertising is prohibited under the terms of AP1, and
4 I have dealt with that in my skeleton argument and
5 I will not rehearse those arguments here. Shortly,
6 iTunes says there is nothing in that difference.

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

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

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

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

20 I just read paragraph 54.

21 MR WEISSELBERG: The alliance has chosen to licence the last
22 link in the chain to the user in the online world. That
23 choice should not adversely affect those retailers who
24 are that last link in the chain. The alliance has
25 fought tooth and nail to protect its right to do so. It

1 was a point raised by the BPI, it was not conceded by
2 the alliance in their settlement agreement with the BPI,
3 and should not be a reason for this tribunal to treat
4 online retailers and retailers of off-line product in
5 a different way.

6 Fourth, again this is a new point made by BACS, this
7 time in paragraph 14 of their skeleton argument, which
8 is that the rates between online and off-line differ.
9 So what is said is: well, the off-line rate is
10 6.5 per cent of retail, and the online rate is
11 8 per cent of retail. Therefore you cannot compare like
12 with like.

13 THE CHAIRMAN: Can you stop a second? (Pause). Okay.

14 MR WEISSELBERG: Insofar as a higher rate has been agreed
15 online than off-line, which we do not accept, and as
16 I pointed out in my skeleton argument, you get that from
17 Mr Boulton's third report, which effectively says that
18 8.5 per cent of PPD, which is the rate, translates to an
19 effective retail rate off-line of about 8 per cent. So
20 we do not accept that there is a difference. But even
21 if there is a difference, that does not weaken the force
22 of the argument on the part of iTunes that there should
23 be comparability. There is no reason why online
24 retailers should pay yet more, which is the logical
25 consequence of the BACS argument.

1 As to the other comparables, I dealt with ringtones
2 in my skeleton argument, I have dealt with record
3 company deals in my skeleton argument, and I have dealt
4 with the PRS CRCA deal also in my skeleton argument.

5 THE CHAIRMAN: The CRCA deal?

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

9 THE CHAIRMAN: This is faut de mieux.

10 MR WEISSELBERG: Exactly.

11 Finally, I would like to look at the issue of
12 practicality. How in practice does iTunes suggest the
13 tribunal should resolve the issues of principle that are
14 raised on this side of the room in relation to nexus?

15 The first answer is actually offered, and Mr Carr
16 has already dealt with that and I do not intend to go
17 over that in any more detail.

18 The second limb to our test is artificially
19 depressed pricing. If we look at our statement of case,
20 which is in A6, tab 6, paragraph 3.2, we have the way in
21 which iTunes summarises its case.

22 THE CHAIRMAN: Paragraph?

23 MR WEISSELBERG: 3.2, sir. It is iTunes' case that only
24 where the licence service is offered to the user at
25 a price which has been subsidised as a result of receipt

1 of such revenue, and therefore artificially depressed,
2 will advertising revenue be brought into the royalty
3 base.

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

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

15 We have actually gone further than that, and if one
16 looks on at page 126 we see why we have gone further.

17 At paragraph 16 we have given our proposed mark-up
18 for the definition of "gross revenue". Subparagraph (c)
19 deals with the subsidy point. If one looks five lines
20 down:

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

25 And we will look at the next bit in a moment, but

1 that is how we have defined it in the scheme.

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

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

12 THE CHAIRMAN: Yes.

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

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

20 Minima are there already to protect the alliance.
21 Would it be right that they receive advertising revenue
22 as soon as the minimum is hit? The answer must be no
23 because the minima is there, as the alliance concede, to
24 protect them from extremities of underpricing. We
25 say: between 4p and 0, so if there had been a royalty of

1 2p then the alliance is entitled to assume that
2 advertising revenue is being brought into the pot to
3 subsidise the price. And it is at that stage that they
4 should be entitled to get their hands on the advertising
5 revenue.

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

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

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

22 It is interesting that the example given by the
23 alliance in their own statement of case, where the price
24 is 55p, 12p is received by way of advertising revenue
25 and as a result, the price drops; would, we say, be

1 caught by our provision in (c). What the alliance has
2 done is sought to suggest that we have changed our case.
3 The alliance misread our proposal, or appears to have
4 misread the proposal, and thought that the deeming
5 provision was the only situation in which advertising
6 revenue would come into the equation. That is simply
7 not right. That has never been iTunes' contention.
8 That has never been the way in which we have approached
9 it, and it is quite wrong to suggest that we have
10 changed our case.

11 What the alliance realises is the example they have
12 given in their statement of case is exactly the type of
13 case that we say sub (c) of our proposal would catch.

14 The upside for the alliance is clearly huge. If
15 they can show that the price being paid by the user is
16 subsidised by advertising revenue, then it comes into
17 the equation. It comes into the equation in the manner
18 that we have suggested in sub (c), sub 2, and that seeks
19 to set an apportionment for advertising revenue A, and
20 how do we apportion the advertising revenue? We
21 apportion the advertising revenue in accordance with our
22 principal position which is: there has to be a nexus
23 between the underpriced work and the advertising
24 revenue. So you divide the money of underpriced works
25 by the total number of works sold, and that gives you

1 the nexus that you need for the purposes of giving the
2 alliance an entitlement to the upside.

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

5 MR WEISSELBERG: UMW" means the number of underpriced
6 musical works sold, NUMW means the number of musical
7 works sold.

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

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

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

24 So, in conclusion, the alliance seeks to suggest
25 that because revenue streams are complicated in the

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

7 THE CHAIRMAN: In each case.

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

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

18 THE CHAIRMAN: Thank you very much. Thank you,
19 Mr Weisselberg.

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

22 MR WEISSELBERG: Certainly, sir.

23 THE CHAIRMAN: And also you, Mr Steinthal, too please.
24 Right.

25

1 Opening submissions by MR RABINOWITZ

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

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

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

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

23 There is a genuine dispute, and one heard it for the
24 first time from Mr Weisselberg -- one did not actually
25 hear it from others. There is a genuine dispute between

1 the parties in relation to gross revenue as to the
2 appropriate approach to be taken, and I am grateful to
3 Mr Weisselberg for that. And this tribunal will have to
4 look at the authorities and identify what principle it
5 is that should determine how one deals with revenues.

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

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

23 The other thing I ought to say is this, and this is
24 by way of general introduction before I take you to the
25 specifics. Again, Mr Weisselberg I think -- and

1 probably Mr Steinthal as well -- made it absolutely
2 clear that we are in a very different world to the
3 off-line world. It is much more complicated. He says
4 it is complicated and I think Mr Steinthal says it is
5 complicated. It is complicated. It is more complicated
6 because the number of business models which are out
7 there are multiplied compared to the off-line world.
8 And we will talk and I will address you on some of
9 those. But the idea that one can simply look to the
10 off-line world and say: there we have people selling
11 CDs, and on radio we have people selling adverts and
12 never the twain shall meet. All I have to do is apply
13 those two things, and I am not going to diverge, is
14 simply to shut one's eyes as I think Mr Steinthal
15 acknowledged.

16 One is in uncharted territory in relation to the
17 business models, in relation to the nature of the
18 revenue streams that these business models will
19 generate, in relation to the mix of these revenue
20 streams which the business models will generate.

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

1 someone called SpiralFrog to be a competitor to iTunes.
2 You, Mr Chairman, will have the choice. Instead of
3 simply paying your 75p and getting music, you can sit
4 there, if you want to, and be deluged with adverts and
5 get your music for free and download your music for
6 free.

7 THE CHAIRMAN: What is that called?

8 MR RABINOWITZ: SpiralFrog.

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

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

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

1 relation to the gross revenue because how do you deal
2 with that?

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

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

19 So to some extent, just to step back, they call us
20 unprincipled and we call them unprincipled. Now, I do
21 not mean that in a derogatory way. It is simply that in
22 our submission we are asking for an entitlement to this
23 revenue on the basis of a principle, which is the
24 principle I will take you to in cases like the AEI case.
25 And they on the other hand are saying: you should not be

1 entitled to that revenue. And they say: we do not have
2 a principle by reference to which we are entitled to
3 this, and that is really one of the key areas of
4 dispute.

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

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

17 THE CHAIRMAN: No, I am always discovering things in that
18 Act. Could I just stop you one second. (Pause).

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

20 MR RABINOWITZ: To go to the Copyright Act.

21 MR CARINE: Is that bundle 1 or 2?

22 MR RABINOWITZ: It is bundle 1 and tab 1.

23 And as the chairman will know, if you go to tab 1,
24 you have a covering page from Coppinger and Skone James
25 on Copyright.

1 THE CHAIRMAN: Tab?

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

4 THE CHAIRMAN: No.

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

6 THE CHAIRMAN: I have got the Act.

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

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

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

21 MR RABINOWITZ: In subparagraph 3 you see the reference to:
22 "Where the tribunal does entertain a reference, what
23 it has to do is confirm the terms of a proposed licence
24 as it may be determined to be reasonable in the
25 circumstances."

1 THE CHAIRMAN: That is repeated in quite a number of
2 sections.

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

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

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

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

16 THE CHAIRMAN: Yes.

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

18 THE CHAIRMAN: 129.

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

23 "In determining what is reasonable, the Copyright
24 Tribunal shall have regard to the availability of other
25 schemes or the granting of other licences to other

1 persons in similar circumstances..."

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

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

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

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

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

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

24 Now, as I say, that involves a very broad discretion
25 and you have been referred to a number of authorities

1 which are intended to give the tribunal, and indeed the
2 parties, some guidance as to how that discretion ought
3 to be exercised in the sense of how does the tribunal
4 ordinarily approach the question of what is reasonable
5 in the circumstances? And I am going to take you to one
6 or two. Mr Carr has taken you to BSkyB. There are
7 some, which in my respectful submission, are --

8 THE CHAIRMAN: I am in your hands.

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

16 THE CHAIRMAN: The webcaster point?

17 MR RABINOWITZ: -- webcaster point.

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

19 I just cannot hear.

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

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

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

1 right in relation to broadcasting.

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

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

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

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

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

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

22 "Accepted from the definition of broadcast is any
23 internet transmission unless it is A, a transmission
24 taking place simultaneously on the internet and by other
25 means."

1 That is a simulcast, and we do not have to worry
2 about B or C.

3 The point is this. Mr Steinthal says that radio
4 broadcasts, simulcasts, webcasting, it is all the same.

5 Now, we will have to deal with that and you will
6 hear evidence as to whether that is so or not. But the
7 only point I would make at this stage is this.

8 Mr Steinthal may say it is the same and should be dealt
9 with the same, but that is plainly not the view of the
10 legislature as one sees from 6(1)A.

11 THE CHAIRMAN: Yes.

12 MR RABINOWITZ: Now, back to the authorities.

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

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

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

1 which is which.

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

3 THE CHAIRMAN: In the European Patent Office we frequently

4 find ourselves with -- in one case I was in -- 20

5 opponents. So I have some sympathy with you.

6 MR RABINOWITZ: One has to sit and listen to them, and that

7 is not easy.

8 THE CHAIRMAN: Yes.

9 MR RABINOWITZ: I am about to go to the authorities. I do

10 not know whether this is a convenient moment rather than

11 starting and breaking.

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

13 MR RABINOWITZ: No, because the authorities I am going to

14 refer you to are in --

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

16 Thank you.

17 (12.55 pm)

18 (The luncheon adjournment)

19 (2.02 pm)

20 THE CHAIRMAN: Mr Rabinowitz, we would like to stop at about

21 4.30 this afternoon. I have a meeting and my colleagues

22 have got to go and do various things.

23 MR RABINOWITZ: Can I begin by asking you, please, to go to

24 the authority at tab 3 of the authority bundle 1.

25 THE CHAIRMAN: I have it.

1 MR RABINOWITZ: It is the AIRC v PPL case.

2 THE CHAIRMAN: Yes.

3 MR RABINOWITZ: And since, as you have heard from

4 Mr Steinthal, the MSP's case, particularly in relation
5 to royalties, is largely based on a suggested analogy
6 with the position of radio, this is obviously a very
7 important case to look at.

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

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

13 THE CHAIRMAN: All right, fine.

14 MR RABINOWITZ: If we start with the headnote:

15 "The applicants were the holders of all but one of
16 the commercial radio broadcasting licences which had
17 been issued to the date of the applications. All but
18 one of the applicants were members of and represented by
19 the AIRC. The respondents represented virtually all of
20 the record companies whose records were distributed in
21 the United Kingdom. The respondent licensed the
22 broadcasting of its members' sound recordings and
23 collected and distributed the royalties payable under
24 its licences.

25 "The applicants applied to the tribunal under

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

13 "The respondent proposed royalties of up to
14 15 per cent of relevant revenue, calculated by reference
15 to revenue bands and usage bands. The respondent's
16 alternative proposal was a flat rate of 15 per cent of
17 relevant revenue. The respondent's primary contention in
18 support of these proposals was that its repertoire had
19 increased in value to the applicants, in particular due
20 to the abolition of needle-time restrictions which had
21 formerly limited the applicants to nine hours use of the
22 respondent's repertoire per day."

23 Now, what I would ask you to read next, if you
24 would, are the findings from paragraph 9, or point 9.
25 So the main finding:

1 "The tariff should be as simple as possible. Any
2 tariff would produce anomalies and a complex rate
3 structure would be more likely to produce anomalies,
4 especially at the margin of its rates."

5 And then 10:

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

11 11:

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

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

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

24 The purpose of taking you to that, what it
25 illustrates is that the extent to which one uses the

1 music was a material aspect of what the tribunal
2 decided.

3 Then if I can go to point 15:

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

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

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

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

23 That is obviously relevant to a point Mr Steintal
24 makes. He has already drawn your attention to the
25 position in relation to a net advertising deduction, and

1 he relies on that, perfectly reasonably he relies on it,
2 we will have to come to it. This is where one finds it.

3 Then if I can take you to 18:

4 "In assessing the value of the licence to the
5 applicants, the starting point was the fact that the use
6 of the respondent's repertoire was crucial to the
7 success of every commercial music station..."

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

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

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

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

22 And again, that is plainly material in the context
23 of the present case. Because contrary to some of the
24 submissions which have been made from the other side of
25 the court, the alliance does not for a moment suggest

1 that there is no input into a product by iTunes, by the
2 webcasters, by the MNOs when they eventually start
3 rolling out on advertising and the like. We accept
4 that.

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

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

21 And there is another point which is plainly material
22 in relation to Mr Steinthal's position. Because whereas
23 in the context of the AIRC case you see that there was
24 a substantial input by the radio stations into the mix
25 of products, Mr Steinthal's clients produce music, music

1 and nothing but music. That is their output.

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

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

17 THE CHAIRMAN: Music, music, music.

18 MR RABINOWITZ: Music, music, music. He acknowledged that,
19 I think he said, the music output was about 96 per cent
20 or so. He said it might go down when there is
21 advertising. But he has not for a moment suggested, and
22 nor do I think he can, that it is the same output that
23 a commercial radio station is putting out. That in the
24 context of the dispute we have with Mr Steinthal would
25 be very relevant to fixing the relevant rate.

1 Now, having taken you through point 18, can I then
2 ask you to look at point 24 which is over the page. And
3 the PRS tariff was of value as a comparison, it related
4 to the other two copyrights interests for which the
5 applicants required licences:

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

13 Then paragraph 25, which makes the same point:

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

25 And again, why do I highlight that? I highlight

1 that because there is evidence before you, again in the
2 context of my dispute or my clients' dispute with
3 Mr Steinthal; there is evidence before you of what PPL,
4 the other collective society, are charging the
5 webcasters. And we rely on that as a relevant
6 comparator.

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

12 THE CHAIRMAN: Oh yes.

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

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

24 Then if I can ask you, please, to go to -- I am
25 trying to keep the references down to a minimum --

1 page 205. I am going to read from "The Use of Music by
2 Commercial Stations", because this is obviously very
3 material in the context of Mr Steinthal's comparator
4 point:

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

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

25 "Some stations are out and out music stations. The

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

23 We say the same is true of the webcasters:

24 "The music content of their programmes is part of
25 a range of services such as news", again I emphasise

1 this, "information and discussion. It is part of
2 a programming system in which the presentation, the
3 presenter and the music choice are all matters of
4 judgment and expertise."

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

9 "The stations obtain a product of considerable value
10 to them, in that they obtain a ready-made and
11 particularly cost-effective programme item having taken
12 no risk in its production, and having the benefit of the
13 record company's choice of talent and repertoire, the
14 station takes risks of a different kind. Nevertheless
15 for many advertisers who take a run of broadcast spots,
16 it is a matter of indifference whether those spots are
17 inserted in music or in talk. In contemporary
18 commercial broadcasting scheduling is a sophisticated
19 art involving the choice of presenters, the character of
20 the station's playlist and the playing of items for the
21 target audience at different times of day, but the
22 competitive edge is not in the music output but in local
23 features such as traffic, local news and community
24 service features. In the smaller stations there is
25 a greater emphasis on local service features.

1 A significant amount of listener loyalty is generated by
2 the speech content alone.

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

17 Now, those are particularly important passages, we
18 would respectfully submit. First, you will see the
19 clear indication that the tribunal gives in this
20 decision that they were not there dealing with jukeboxes
21 of the air. That is very different to what we are
22 dealing with here, because that is precisely what the
23 webcasters are providing. I am not suggesting it is
24 anything other than sophisticated and an excellent
25 product, because it is. I listen to it constantly. It

1 is excellent. But it is a jukebox of the air. There is
2 no speech content.

3 THE CHAIRMAN: The net?

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

8 THE CHAIRMAN: Well, we will listen to it.

9 MR RABINOWITZ: I hope so.

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

12 MR RABINOWITZ: The second important aspect of these
13 passages is this. You will see the tribunal making
14 absolutely clear that it is an oversimplification of the
15 position to suggest that there is a direct relationship
16 between the music and the generation of the revenue
17 through advertising. It is much more complicated than
18 that. And, notwithstanding that, they fix the royalty
19 at 5 per cent, as you will see, and they include in it
20 all the advertising; including adverts which are plainly
21 attracted by the sport or the news or the personality of
22 the DJ. And what we would respectfully submit this
23 establishes is that there is no such proposition, as is
24 suggested by the other side, which is that unless you
25 can find a direct link, a direct causal link between the

1 music and the generation of revenue, the alliance or the
2 owners of the right are to be excluded entirely from
3 that revenue. Because that is the submission.

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

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

20 I know that my learned friends rely on BSkyB. That
21 was a decision which went the other way. But as your
22 Honour will know, that was a very different case. The
23 suggestion there was that PRS, my clients, in one guise
24 should share in all the revenue generated by BSkyB.
25 Now, at one stage, that seemed to be what was being

1 suggested on the other side was our submission. With
2 respect, that is nonsense. That has never been our
3 position, it is not our position. And were it our
4 position it would be untenable. We try and define, by
5 reference to principled analysis, where the divider line
6 should be between what falls within the revenue and what
7 falls without the revenue rate.

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

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

15 "We approached this decision with a preference that
16 the tariff should be as simple as possible with
17 a straightforward rate structure based on
18 straightforward definitions. Any tariff will produce
19 anomalies. Whatever tariff is adopted some stations
20 will fare better than others, but in our view a complex
21 rate structure is more likely to produce anomalies,
22 especially at the margins of its rates. We consider
23 that the tariff should recognise the fundamental
24 difference between talk stations, whose incidental use
25 of music is not a significant attractor of audiences,

1 and music stations whose use of recorded music is the
2 principal constituent of their output."

3 And then just reading on actually:

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

8 Now, just pausing there. That is the case here as
9 well. The parties have all agreed -- both
10 Mr Steinthal's remaining clients, the webcasters and
11 iTunes and MNOs and the BPI -- that both in relation to
12 webcasting and in relation to the offer online of music,
13 because that is what we are talking about, online music,
14 the appropriate basis of the royalty is a revenue-based
15 approach. And so authorities which go to whether
16 a revenue-based approach is right or not right are, with
17 respect to some of my learned friends, irrelevant. It
18 has been agreed on all sides that a revenue-based
19 approach is appropriate.

20 THE CHAIRMAN: This is your distinction, then, for BskyB or
21 one of them?

22 MR RABINOWITZ: Indeed:

23 "The applicants provide a service in which most of
24 the revenue is derived from advertising and there is
25 a broad correspondence between advertising revenue and

1 audience size. MMC took a similar view. We recognise
2 that audiences and revenue are generated by programmes
3 other than music, such as news and current affairs
4 programmes and live sports transmissions. This fact
5 must be taken into account in the framing of the
6 definition of the revenue on which the royalty will be
7 based and in the assessment of the percentage of revenue
8 which is payable as royalty. A revenue-based approach
9 has been applied to both PPL and PRS since commercial
10 radio began. It proceeds on the reasonable assumption
11 basis the station will seek to maximise the revenue for
12 sound commercial reasons. It is an imperfect measure of
13 value because the revenue on which the royalty is based
14 is created by the station's entire broadcast output, its
15 promotion of itself and its image as an advertising
16 media. PPL's music is only part of this."

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

1 rate is where it is.

2 The rate is not, compared to some of the record
3 companies' rates which are very high, this rate is a low
4 rate relative to a total amount of 100 per cent. One is
5 either dealing with in relation to the MNOs' 8 per cent
6 or in relation to the webcasters', we would say,
7 6.5 per cent. So it is not as if, as has sometimes been
8 suggested on the other side, we are trying to snatch all
9 the revenues. On the contrary, there is a small share,
10 and we say that is the fair share, and I do not hesitate
11 to use the word "fair". I can say "reasonable" instead.
12 It is a reasonable share, given the value to the
13 licensees of exploiting the rights that we own. And the
14 fact that they have put substantial amounts into the mix
15 is not a reason for keeping us out of any share at all;
16 which is the way the point is being put.

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

19 "The revenue base is also of advantage to small
20 specialist stations such as Kiss FM, which have
21 extensive music use and attract good audiences but have
22 poor advertising revenue. Under a revenue-based system
23 the licensing body has the disadvantage that its royalty
24 income may be adversely affected by economic recession
25 or commercial misjudgments of the licensee. On the

1 other hand, there is no direct connection between
2 revenue and profit and under this system the licensing
3 body shares in revenue whether or not the management
4 skills of the station turn it into profit.

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

9 And again that is plainly the position here.

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

11 The definition of the revenue base:

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

1 They define this as follows."

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

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

21 "In our judgment, the existing definition of the
22 revenue base is no longer appropriate. The applicants
23 now receive significant revenue from sponsorship. The
24 applicants in their revised definition of NAR accept the
25 principle that sponsorship revenue should be taken into

1 account but their proposal will extend NAR to
2 sponsorship revenue derived from music programming only.
3 In our view, this proposal is insufficient. Under the
4 definition of NAR hitherto, all advertising revenue has
5 been brought into account. Much of that revenue is
6 derived from advertisements broadcast during speech
7 programmes. Some of it may even be derived from
8 advertisements which the advertisers will not have
9 placed during music programmes. In our view, the same
10 principles should apply to sponsorship revenue. We have
11 decided therefore that in consequence of the wider range
12 of revenue now lawfully available to the applicants the
13 revenue-based tariff will be that of gross broadcasting
14 revenue, consisting of revenue from advertising plus
15 revenue from sponsorship, other than off-air
16 sponsorship. From each of these elements certain
17 specified deductions will be made", et cetera."

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

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

21 MR RABINOWITZ: Indeed. What this shows is that contrary to
22 some of the submissions which have been made to you,
23 this tribunal has never shut its eyes to the fact that
24 the way in which revenue may be attracted to the
25 exploiters of the rights can change over time. And it

1 has never taken the approach, contrary to what has been
2 urged on you by some on the other side, it has never
3 taken the approach that since traditionally this is the
4 only revenue stream which has fallen into the base, that
5 will continue to be the position, whatever the current
6 factual position on the ground is. It is alive to
7 changes in the market. And if, as a result of changes
8 into the market the nature of the revenue streams
9 changes, increases, multiplies, this tribunal, in fixing
10 or determining what is a reasonable royalty base, will
11 take that into account. That is point 1.

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

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

1 not consistent with this decision. And I want to be
2 clear about this for fear of being misrepresented again
3 as to what our position is.

4 Our position is not and never has been that all
5 advertising revenue which would accrue to the MNOs will
6 fall within the pots of royalty base. That has never
7 been our position. I will come and delineate precisely
8 the principles that we rely on and what, practically
9 speaking, that results in --

10 Pages 238 to 239. This is the passage which is
11 reflected in, I think, points 24 to 25 of the headnote
12 summary of the decision where it is made clear that
13 there is no reason a priori why the PPL rates should be
14 different from the PRS rates, that is to say the value
15 of the sound recording should be different to the value
16 of the rights which are owned by my clients in the
17 composition. I am very happy to take you through it,
18 I do not believe it says anything else and I do not want
19 to take up more time than I have to on that.

20 So we would respectfully submit that this is a very
21 important case which establishes some key principles
22 which ought to affect the way in which this tribunal
23 deals with the submissions in this case.

24 Can I then come to the next authority, which is at
25 tab 5. It is the AEI Rediffusion.

1 THE CHAIRMAN: Yes.

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

9 THE CHAIRMAN: 15?

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

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

20 Just pausing there. We were lacerated this morning
21 for suggesting that we had an entitlement to royalties
22 where it was fair. And, with respect, that was unfair.
23 Because as is absolutely clear from this authority what
24 is fair, as one would expect, underlies precisely what
25 this tribunal is looking for in fixing the reasonable

1 term.

2 And if I could just finish the paragraph and then
3 make another point about this:

4 "That included in particular making full allowance
5 of the added value provided by the licensee in terms of
6 selection, presentation and additional services such as
7 messaging. It might be that in the final result, the
8 appropriate sum was achieved by levying the royalty on
9 any part of the licensee's income stream, but that did
10 not mean that the overall picture had not been taken
11 into account."

12 THE CHAIRMAN: Yes.

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

15 THE CHAIRMAN: 250?

16 MR RABINOWITZ: 250. At the bottom of the page, "General
17 Observations when Setting a Royalty Rate":

18 "It is notoriously difficult to arrive at a decision
19 as to an appropriate royalty..."

20 And pausing there, we would say: and it is equally
21 difficult in arriving at a decision as to the
22 appropriate royalty base:

23 "... in the absence of equivalent consensual
24 licenses in that there are no fixed guidelines, and at
25 the end of the day it is ultimately a judgment call

1 taking into account a large number of factors. There
2 have been in this case, as in many cases before the
3 tribunal, a tendency from both sides to approach the
4 matter on the basis that assessing the royalty depends
5 on first deciding the correct royalty rate, 5 or
6 15 per cent, and having decided what rate is applicable,
7 to decide on what revenue the royalty should be placed.
8 We find this approach unattractive in that ultimately
9 what we have to determine", this is the key part, "is
10 that of the total profit made by the licensee how much
11 should be paid to PPL for the right to use their
12 recordings? In so doing, the tribunal has to arrive at
13 a figure from the overall receipts which is both fair to
14 the licensor in terms of the value to the licensee of
15 having access to the copyright sound recordings, and
16 also fair to the licensee in giving him a proper award
17 for the effort put into the exploitation of the
18 licensor's intellectual property rights. This includes
19 in particular making full allowance for the added value
20 provided by the licensee, be it in terms of selection",
21 et cetera:

22 "It may be that in the final result the appropriate
23 sum is achieved by levying the royalty on any part of
24 the licensee's income stream but that does not mean that
25 the overall picture has not been taken into account."

1 So we respectfully submit that this is the principle
2 which underlies our licence, the current terms. We
3 would respectfully submit that what the tribunal has to
4 have in mind is that the licensees here are exploiting
5 the rights of the alliance, and indeed the sound
6 recording rights. And they are exploiting it and
7 acquiring a great deal of value.

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

19 The question for this tribunal is: if all of that
20 revenue is in part the consequence of the exploitation
21 of the right which is being licensed, what good reason
22 is there for not allowing that to fall within the
23 revenue base? Again, it is not our case that we are
24 entitled to all of that revenue. It is simply that one
25 has to have regard to those different revenue streams

1 which are undoubtedly the results, in part at least, of
2 the exploitation of the rights we are licensing. One
3 has to have regard to all of the revenue streams in
4 fixing a fair revenue base.

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

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

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

17 THE CHAIRMAN: Yes, yes.

18 MR RABINOWITZ: So what one asks is --

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

20 MR RABINOWITZ: Indeed. Given that, it is plainly not
21 principled to exclude all of the revenue. As your
22 Honour says, the issue is: where do you draw the line?
23 And we accept what Mr Weisselberg says. That is not an
24 easy issue. But what should guide you in relation to
25 that issue is what is fair, given that this is all --

1 the revenue is at least in part, we would say in great
2 part in many respects, certainly in relation to iTunes,
3 in great part the consequence of the exploitation of our
4 rights. Where you draw the line we will have to come
5 to.

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

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

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

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

19 THE CHAIRMAN: Yes.

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

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

24 MR RABINOWITZ: Indeed, that is the point:

25 "It followed that the minimum royalty would be based

1 on the tribunal's assessment of the minimum proper
2 monetary return to PPL."

3 You will see in relation to 4:

4 "The minimum royalties imposed, notwithstanding that
5 it retrospectively deprived the applicants of
6 profits..."

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

11 Now, why have I referred you to this case? I have
12 referred you to this case because it was suggested,
13 I think, by Mr Steinthal yesterday that there is
14 a hostility towards minima in this tribunal. With
15 respect, that is not right. There is no hostility
16 towards minima as a general principle. It will depend
17 on the circumstances. The BPI v MCPS case was in
18 circumstances in which Lord Justice Jacob, I think it
19 was -- he was not that then -- came to the view that
20 minima were unnecessary. And the reason he came to the
21 view that it was not necessary in that case was because,
22 if you stand back and think about it, that was a case
23 between the record companies and the owners of the
24 composition rights. The record companies wanted to use
25 the composition rights to produce CDs which would be

1 sold. There was an absolute alignment of the commercial
2 interests of the two. It was obvious that the record
3 companies would want to maximise sales of the CDs, and
4 therefore there was no possibility that the record
5 companies would do something which was not consistent
6 with the greatest possible revenue which would be
7 attracted, not only to them but to MCPS as well.

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

25 But the point I am trying to illustrate is that

1 there is no longer the exact coincidence of interests in
2 terms of maximising revenue from the music. Because
3 Mr Steinthal's clients can use the music to maximise
4 revenue from some different part of the portal. For
5 example, someone goes onto the music part of the portal
6 and then becomes interested because there is a
7 click-through to some other part of the portal and goes
8 there and sees adverts, and there is a whole lot of
9 lovely revenue for Mr Steinthal's clients which my
10 clients do not share in. Fine, that is absolutely fine.

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

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

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

24 THE CHAIRMAN: Shall we read it first?

25 MR RABINOWITZ: If you wish. (Pause).

1 THE CHAIRMAN: Yes, I like the last sentence.

2 MR RABINOWITZ: Indeed. So we make two points about this.

3 Number 1, one does have to be alive to the commercial
4 reality of the position. If in fact the exploitation of
5 music can now be used to generate substantial
6 advertising revenues, one should not shut one's eyes to
7 that. That is now the value of the music -- whatever it
8 was off-line, that is now the value of the music and the
9 new commercial reality in which we are.

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

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

25 THE CHAIRMAN: Well, rather more than referred to.

1 MR RABINOWITZ: Indeed, it was fundamental to the decision
2 as to why there should not be a revenue-based royalty.
3 It arises out of the case of PRS v BEDA, which was the
4 discotheque case, which again decided there should not
5 be a revenue-based royalty. That is, with respect,
6 quite a useful test to see whether or not this should be
7 a revenue-based royalty. But in the present case --

8 THE CHAIRMAN: That is water under the bridge.

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

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

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

1 nonetheless, they are important.

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

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

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

1 paragraphs 8.20 and 8.21.

2 THE CHAIRMAN: Can I have a look at it.

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

5 THE CHAIRMAN: Yes, D7.

6 MR RABINOWITZ: B7. Page 1484.

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

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

17 THE CHAIRMAN: Yes.

18 MR RABINOWITZ: -- will be to cut into an existing revenue
19 stream, that is to say an existing revenue stream the
20 result of an existing exploitation of rights through an
21 existing licensee, we are talking about cannibalisation
22 here, and I think I am expressing it badly, but if I say
23 cannibalisation you will know what I mean. If the
24 consequence of granting a right to, for example, the
25 webcasters is that they will eat into the commercial

1 radio advertising revenue, the effect of doing that will
2 be that our revenues from the commercial radio revenue
3 stream will be diminished. They will be cannibalised
4 because some of that advertising revenue will go to the
5 webcasters and we will therefore get less from
6 commercial radio. This is the -- I am trying to
7 illustrate the principle.

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

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

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

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

23 THE CHAIRMAN: Are matters to be assessed.

24 MR RABINOWITZ: Exactly. Can I then say something.

25 THE CHAIRMAN: So let us put Boulton away, shall we, for the

1 moment? Is there a B6, I have just noticed?

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

3 evidence.

4 MR STEINTHAL: It is withdrawn evidence.

5 THE CHAIRMAN: Okay. Now we know.

6 MR RABINOWITZ: What I would like to do, having set the

7 legal context in which the issues arise with I hope

8 sufficient clarity for this stage of the proceedings, is

9 again to narrow the focus of my submissions and return

10 to the facts of the present applications.

11 Obviously one of the key points to note from the

12 outset is that the licence which is currently before you

13 is not the licence which was originally promulgated and

14 indeed which threatened to be before you in September.

15 I am going to take you through the terms of the new

16 licence in a minute, because I do not think anyone has

17 done that and I think it is important that you see that.

18 But before I do that, I would like to be crystal

19 clear about one or two things. In particular, in light

20 of some of the submissions made by Mr Steintal, what

21 I particularly want to be crystal clear about is this.

22 That the new licence follows and is the consequence of

23 detailed and prolonged discussion and negotiation on all

24 sides. And why do I emphasise that?

25 I emphasise it because the MSPs in their opening,

1 and Mr Steinthal again yesterday, consistently seeks to
2 portray the terms contained in the licence as if they
3 were, if you like, handed down from on high without any
4 knowledge or involvement on the part of anyone with an
5 interest in webcasting or the webcasting issues
6 whatever.

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

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

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

25 Now, I want it to be clear that I am not suggesting

1 that Mr Steinthal was a party to the negotiations in
2 September. He was not. And one can speculate as to why
3 that was the case, but he definitely was not. But
4 Mr Steinthal himself acknowledged, and acknowledged very
5 fairly when we were before this tribunal on the
6 28th September, that he had been a party to negotiations
7 in relation to these terms. He was not a party when the
8 deal closed, but it is wrong to suggest or to give any
9 impression that all of these terms came out of the blue.
10 And I need to correct that misimpression.

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

1 example, Mr Carr for the MNOs says in his written
2 opening about this.

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

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

9 MR RABINOWITZ: Page 4.

10 THE CHAIRMAN: Yes, Mr Carr.

11 MR RABINOWITZ: Tab 2. Mr Carr, page 4.

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

14 MR RABINOWITZ: Whatever you find most convenient.

15 THE CHAIRMAN: Those behind you are not looking positively.
16 Page 4 I have got.

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

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

20 THE CHAIRMAN: Oh yes.

21 MR RABINOWITZ: "These issues were the royalty rate, the
22 revenue base, the MNO delivery charge, minimum
23 royalties, promotional use, new format discount,
24 audiovisual discount, discount for the cost of securing
25 advertising, the identity of the licensee, transactional

1 licensing, podcasting, synchronisation rights,
2 controlled compositions and the term of the licence. On
3 28th September, and after extensive negotiations, the
4 MNOs settled their disputes in respect of all the issues
5 in the reference bar one."

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

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

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

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

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

25 MR RABINOWITZ: Appropriate comparators. Our submission is

1 that this is an appropriate comparator.

2 THE CHAIRMAN: Is? I thought so.

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

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

13 And contrary to what appeared to be suggested
14 yesterday by Mr Steinthal, there was indeed movement on
15 all sides, give and take, and indeed an agreement
16 emerging out of the cauldron. Everyone had sensibly
17 yielded in relation to some issues and not in relation
18 to others. That is the nature of a negotiation.
19 Because we heard yesterday about how lacking in
20 credibility the alliance were because their position had
21 changed. Well, exactly the same could be made about
22 every other case who was a party to that. It is not
23 a question of a lack of credibility, it is a question of
24 the party being reasonable, seeing the other side's
25 argument and agreeing what, in the context of

1 negotiation, is to be regarded as a reasonable outcome
2 taken as a whole. And, again, we were lacerated for the
3 fact that these contracts, as I will show you, talk
4 about having to view the contract as a whole, as
5 a package.

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

11 THE CHAIRMAN: I have done this too. I have been in
12 negotiations ...

13 MR RABINOWITZ: But the key point about this settlement
14 agreement, and the licence that results, is that
15 Mr Steintal's position is that there is nothing at all
16 in the new JOL that is of any relevance to his remaining
17 clients.

18 THE CHAIRMAN: Now, what do you say about that?

19 MR RABINOWITZ: I say, with respect, that is nonsense.

20 THE CHAIRMAN: Nonsense.

21 MR RABINOWITZ: And I will show you. He says this on the
22 basis that the parties that settled had no interest in
23 any of the terms, and he calls them webcasting terms.
24 What he means by webcasting terms are the terms which
25 affect his clients.

1 Now, one needs to be very clear about this. If
2 I can just show you what he says, if we go to his
3 opening at paragraph 12, page 4.

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

6 MR STEINTHAL: Absolutely.

7 THE CHAIRMAN: Like the others.

8 MR STEINTHAL: Okay.

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

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

14 Sorry, Mr Rabinowitz.

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

22 "Headline rate, minima, gross revenue definition,
23 reduction provided for advertising commission, the
24 audiovisual content rate. Other operative provisions
25 challenged therein."

1 So basically, webcasting terms mean any term that he
2 objects to.

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

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

22 Now, let us just start with advertising. The idea
23 that the MNOs and the iTunes, who are here specifically
24 to argue about advertising, who are here specifically
25 because they are worrying about their advertising

1 revenue and how much of it falls into gross revenue; we
2 heard Mr Carr for the first 20 minutes of his
3 submissions explaining to the tribunal just how
4 important advertising revenue was to Vodafone, referring
5 you to what Mr Bill said about just how big a pot the
6 advertising revenue was. The suggestion that Vodafone
7 had no interest in advertising and therefore no interest
8 in the advertising deduction is, with respect, absurd.

9 And so too is the suggestion that Vodafone, who has
10 always made it clear that it is very interested in the
11 webcasting business. It says that -- it is all over the
12 evidence. Vodafone from the very beginning has said
13 that it has an interest in webcasting. The idea that
14 Vodafone would have gone into this negotiation not
15 caring at all about the webcasting terms again, with
16 respect, is absurd.

17 And so too is the suggestion that iTunes, who is by
18 far and away the biggest seller of audiovisual products,
19 the suggestion that iTunes, with the interest that it
20 has in audiovisual products, would have had no interest
21 at all in the audiovisual deduction is again, with
22 respect, absurd. They plainly would have been
23 interested in it. They were the ones who were most
24 affected by it.

25 And so, just standing back, the suggestion that one

1 should just disregard as a comparator what iTunes, for
2 example, accepted to be appropriate in relation to the
3 audiovisual deduction, is just misconceived beyond
4 belief.

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

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

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

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

16 THE CHAIRMAN: Introductory coda.

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

22 They are also an agreement made, and we would
23 respectfully suggest they are the only agreement made in
24 this country at least, in the context of the
25 exploitation of online music. And it involves the

1 central players in the industry, the record companies;
2 iTunes, by far the dominant retailer of music in the
3 online market by an extremely long way; the MNOs, huge
4 powerful companies, dominant in the mobile music market,
5 and other key players like Napster and Sony.

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

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

17 MR RABINOWITZ: Well, indeed. One of the things
18 Mr Steinthal says, just to whet your appetite.
19 Mr Steinthal asks for an audiovisual deduction of
20 25 per cent. And he relies in this regard on the
21 physical, the off-line DVD, I think, comparator where
22 some time ago, some substantial time ago, that was the
23 reduction that was agreed. What he asks you to do is to
24 ignore the ignore the fact that the same parties who
25 were involved in that agreement and agreed 25 per cent,

1 and additional parties and in particular iTunes who, as
2 I say, is the biggest retailer of these products, have
3 now agreed 15 per cent.

4 And as an example of something which plainly affects
5 what Mr Steinthal wants to do, Mr Steinthal still wants
6 to rely on the 25 per cent deduction. If you like, the
7 prior agreement between these parties. And we
8 respectfully say it is a very good comparator to look at
9 what people agreed and here is the most current, up to
10 date one, and it applies to online music and it is
11 15 per cent.

12 THE CHAIRMAN: Those are all in volume H.

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

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

24 MR RABINOWITZ: You have all the agreements.

25 THE CHAIRMAN: And they are not confidential.

1 MR RABINOWITZ: I ought to make it clear. The only thing
2 which is confidential in relation to the agreements are
3 some side letters which are attached to the agreements.

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

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

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

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

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

20 (3.20 pm)

21 (A short break)

22 (3.35 pm)

23 THE CHAIRMAN: Before we rise this evening, Mr Rabinowitz,
24 I want to do about two or three minutes worth of
25 housekeeping, if we could bear that in mind.

1 MR RABINOWITZ: Would you like me to try and wind up by 25
2 past?

3 THE CHAIRMAN: Yes, please.

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

6 THE CHAIRMAN: Got it already.

7 MR RABINOWITZ: Right. Tab 1. First, you have the
8 settlement agreement, I am less concerned with that at
9 the moment, but if you go to page 13, this is in fact
10 the scheme that is before you.

11 MR ARNOLD: The scheme what?

12 MR RABINOWITZ: The scheme which is before this tribunal,
13 which is in issue.

14 And the first page, page 13, identifies that it is
15 the online agreement. If you look at 2.1, again just
16 highlighting in particular issues which have been raised
17 by the parties for you to determine. You will see
18 a reference to the online agreement being available:

19 "... to providers of online and mobile music
20 services, who in relation to such services are the music
21 service providers."

22 Now, that is an issue, and I will need to take you
23 to the definition of "music service providers". But one
24 of the issues which Mr Steinthal raised relates to that.

25 And if I can then ask you, you will see the

1 territory is what you would expect, that is clause 3.
2 Clause 6 on page 14 identifies the time, the period of
3 the licence. It is three years. That has been accepted
4 not only by all the settling parties but Mr Steinthal
5 has accepted that as well.

6 THE CHAIRMAN: Right, three years. So that is not an issue.

7 MR RABINOWITZ: Not an issue at all. That is part of the
8 give and take. You will remember that at some point,
9 people were saying it should be indefinite.

10 If I can then ask you to look, Appendix 1 sets
11 out -- it is where the agreement proper starts. If
12 I can ask you to look at page 17.

13 THE CHAIRMAN: No problems on definitions?

14 MR RABINOWITZ: Well, we are on page 17 in the definitions.

15 THE CHAIRMAN: I am sorry, yes.

16 MR RABINOWITZ: You will want to mark "gross revenue", top
17 of page 17. We will go to schedule 3 in due course, but
18 you will see, you were told it is in schedule 3.

19 At the bottom of page 17 you have the definition of
20 "music service provider". You may want to glance at
21 that.

22 Before we turn the page, "Licence Services", still
23 on page 17, we are into music services. That is still
24 in schedule 6. That is something you will want to have
25 a look at.

1 Now, just on music service provider, as I have
2 suggested, we thought that was an issue until yesterday,
3 and it may be that it is not an issue anymore.

4 Mr Steinthal I think indicated that it may not be an
5 issue.

6 THE CHAIRMAN: Let us ask. Is it an issue?

7 MR STEINTHAL: Well, I think it depends on what the alliance
8 says as to the proposition that I asserted yesterday,
9 which is whether they were prepared to offer to any
10 entity that abides by the terms and conditions of the
11 MusicNet agreement, MusicNet being a white label
12 supplier. And just to be clear, MusicNet does not
13 contract with the customer in the case of HMV and Virgin
14 for example. They supply the back end, they supply the
15 entire product. They report, et cetera. But they do
16 not contract with the website visitor to HMV or Virgin,
17 that contracts if they want the subscription on-demand
18 service with HMV or Virgin respectively.

19 THE CHAIRMAN: I have an idea, Mr Rabinowitz. Perhaps
20 I could ask you both to discuss this when we rise.

21 MR RABINOWITZ: If we say what our position is, it may help
22 us --

23 THE CHAIRMAN: Would you still have a word with
24 Mr Steinthal?

25 MR RABINOWITZ: Absolutely. We have not really understood

1 why this point has been taken this far. Because in
2 their pleadings, Mr Steinthal's clients raised the music
3 service provider point in relation to Yahoo. And in our
4 pleadings, now quite a long time ago, we made it
5 absolutely clear that we would give Yahoo a letter in
6 identical terms if they could satisfy us of the same
7 things as MusicNet have, and I will show you the
8 MusicNet letter. We made it perfectly clear that they
9 too could get a side letter like MusicNet and there
10 would be no problem. It would be discriminatory of us,
11 and we would not do this --

12 THE CHAIRMAN: And therefore --

13 MR RABINOWITZ: Withhold that sort of letter from anyone
14 else, if they could satisfy the same requirements.

15 MR STEINTHAL: As long as it is not company by company. So
16 for, example, RealNetworks may very well in the future
17 bundle their service together with a broadband supplier.
18 We cannot have a situation where everything is subject
19 to a side letter, and then an entity that does not have
20 access --

21 THE CHAIRMAN: All right. You cannot see this, but this has
22 promoted a lot of discussion behind you. I am going to
23 ask you both, please, to meet up after this session
24 today and see if we cannot clear this one. Because
25 I just --

1 MR STEINTHAL: Sounds like we should be able to. Feeling
2 like it --

3 MR RABINOWITZ: It does not sound like it is very far apart.

4 THE CHAIRMAN: Yes, exactly.

5 MR RABINOWITZ: It may or may not matter, but that is the
6 current definition of "music service provider".

7 On page 19, you have a definition of "repertoire
8 work", and it is what you would expect. It simply
9 identifies what is the work that falls within the
10 repertoire.

11 THE CHAIRMAN: And PRS, MCPS, yes.

12 MR RABINOWITZ: "Term" and "territory" you may want to note.
13 Nothing is going to turn on them.

14 THE CHAIRMAN: I often see Gibraltar with these, but never
15 mind, it is up to you.

16 MR RABINOWITZ: Clause 2, page 20. Clauses 2.1 and 2.2 are
17 in a sense the operative part of the licence. This is
18 the grant of rights. And there is a grant of rights by
19 MCPS in clause 2.1:

20 "To reproduce the repertoire works", et cetera,
21 "authorise the pre-loaded copies of the musical works on
22 database storage devices."

23 Clause 2.2 is the grant of rights by the PRS.

24 THE CHAIRMAN: Yes.

25 MR RABINOWITZ: And just pausing here, because this is going

1 to be relevant to a point which I think Mr Carr made,
2 Mr Weisselberg made as well.

3 It was suggested at some point that in relation to
4 the online/off-line analogies, which you saw make up an
5 important part of the argument: can you translate
6 online? One of the points we make is a different person
7 is being licensed here. Here, online, the retailer is
8 being licensed, not the record company. That is an
9 important point that I will go back to.

10 It was said at some point: well, you know, you have
11 chosen to licence the retailer, rather than the record
12 company. With respect, that is a misconceived point
13 because it is not a question of choosing to licence
14 anyone. We need to identify the people who are doing
15 the licence acts. And in the context of online, we are
16 not talking about the --

17 THE CHAIRMAN: That are required to be licensed acts.

18 MR RABINOWITZ: That are required to be licensed acts. In
19 the context of online we are not talking about producing
20 CDs. We are not talking about the record company
21 requiring the licence to produce the CD and therefore
22 requiring a licence to do the mechanical copying of it.
23 We are talking about the retailer who is doing the
24 licensed acts. And that is why it is the last person in
25 the line who has to get the licence. I will have to

1 return to that, because it is important to some of the
2 analogies and arguments which were made. But I thought
3 it worth pointing that out here where you have the fact
4 before you, what it is that is actually being licensed.

5 Now, clause 5.9 and 5.10.

6 THE CHAIRMAN: Just a moment, hold on.

7 MR RABINOWITZ: What you have immediately after clause 2 are
8 exceptions and limitations to a licence, nothing turns
9 on those.

10 THE CHAIRMAN: Yes. What you have not drawn our attention
11 to we are assuming, if not hoping, that we do not need
12 to worry about.

13 MR RABINOWITZ: That would be a correct assumption, or
14 hopeful.

15 So you have got the exceptions and limitations which
16 follow the grants at section 3. There is nothing in
17 there I need to show you.

18 At section 4, you have got further restrictions.
19 I do not think there is anything there that I need to
20 show you. Section 5 deals with payments and accounting.
21 And what I need to show you in the context of section 5,
22 or sections 5.9 and 5.10, this relates to a point that
23 Mr Steinthal takes about non-repertoire works. If I can
24 just read those to you. It is on page 25.

25 THE CHAIRMAN: I have it.

1 MR RABINOWITZ: "In relation to permanent download services
2 and ability to download on-demand services only, if and
3 insofar as, 1, a musical work is not in copyright in the
4 relevant part of the territory, or 2, it is not
5 a repertoire work, credit shall be given by either or
6 both of the licensors as the case may be for any
7 overpayment of royalties. The parties shall discuss in
8 good faith the mechanism for calculating and granting
9 any rebate for musical works which are not repertoire
10 works. Unless and until agreed otherwise, the terms set
11 out in this agreement shall apply, if being acknowledged
12 by the licensors that it may then be necessary to make
13 adjustments to payments that have already been made by
14 the licensees to the licensors as from the commencement
15 date as to allow for royalties paid on musical works
16 that are not repertoire works."

17 THE CHAIRMAN: All seems straightforward to me.

18 MR RABINOWITZ: It is straightforward. But what is
19 important, and I think the objection that Mr Steinthal
20 takes to this is in the opening words:

21 "In relation to permanent download services and
22 ability to download on-demand services only", that is an
23 important restriction. In other words, what the parties
24 to this agreement have done is to identify services
25 where it would be possible to identify particular songs

1 which --

2 THE CHAIRMAN: That are not in the repertoire.

3 MR RABINOWITZ: -- are not in the repertoire and which have
4 been sold and money obtained and paid for them.

5 THE CHAIRMAN: Yes.

6 MR RABINOWITZ: When we come on to 5.10.

7 THE CHAIRMAN: Notwithstanding the amount.

8 MR RABINOWITZ: 5.10 is a general application. It does not
9 just apply to permanent downloads, and limited download
10 services. And as I understood Mr Steintal's objection
11 until yesterday, it is that he wanted the benefit of 5.9
12 as well. And our position on that, just so that one is
13 clear about this, is that 5.9 is not apposite for
14 a webcaster who is streaming music and not paying for
15 specific songs, but just paying primarily by reference
16 to advertising --

17 THE CHAIRMAN: By reference to?

18 MR RABINOWITZ: By reference to advertising revenue. It is
19 not apposite to apply 5.9, which works perfectly simply
20 if you have got a permanent download service and an
21 on-demand service. It is not apposite to apply that to
22 radio and indeed it does not apply to radio at the
23 moment.

24 But 5.10 we accept should apply and would apply.

25 THE CHAIRMAN: You are worrying me now because I thought

1 I understood permanent download services and limited
2 download ODS.

3 MR RABINOWITZ: On-demand service.

4 THE CHAIRMAN: On-demand.

5 MR RABINOWITZ: I am going to explain it to you in a little
6 more detail. Permanent download you do understand
7 because that is what you do on iTunes. A limited
8 download service, it would be permanent except it is
9 not.

10 THE CHAIRMAN: Yes, I know. Yes.

11 MR RABINOWITZ: But it expires.

12 THE CHAIRMAN: It is like my security pass that for some
13 reason expired yesterday, mysteriously during the
14 afternoon.

15 MR RABINOWITZ: The way in which this would work, it is
16 a sort of webcasting service in the sense that you pay
17 a subscription and you get a download. You think it is
18 permanent unless you stop paying your subscription. And
19 then "wham bam" it goes.

20 THE CHAIRMAN: It fades by some astonishing process. I do
21 not know it does that.

22 MR RABINOWITZ: On-demand is similar in concept in that what
23 it enables you to do is not to get a track which is
24 permanently yours but you can play the track. It never
25 becomes permanently yours but you can play it wherever

1 you like. It is as good as having it permanently yours,
2 because although you cannot put it in your pocket and
3 walk away; whenever you want it, it is there.

4 MR CARINE: So I have made a note: like a library book.

5 MR RABINOWITZ: It is like a library book and you can always
6 go to the library whenever you want to take it out.

7 MR CARINE: It will always be on the shelf.

8 THE CHAIRMAN: That is a good analogy.

9 MR ARNOLD: It is overdue because you have to pay for it.

10 MR RABINOWITZ: And one of the things we are going to have
11 to talk about very shortly is how all of these
12 services -- it is a spectrum. You start with permanent
13 downloads, you go to pure webcasting and there are
14 little changes along the way.

15 THE CHAIRMAN: Are you not all agreed about that?

16 MR RABINOWITZ: No. I thought we were.

17 THE CHAIRMAN: I thought there were diagrams and so on to
18 help.

19 MR RABINOWITZ: Indeed. But Mr Steinthal's position -- I am
20 slightly taking this out of turn -- Mr Steinthal's
21 position for the moment is that webcasters is a wholly
22 different business where it has nothing to do with
23 anything that the permanent downloaders might want to do
24 and have done. And, indeed, what the limited download
25 and on-demand service was. We say this is a spectrum.

1 And why does this matter? It matters that in the
2 context of setting royalty rates, once you accept that
3 there is a spectrum and you are starting with permanent
4 downloads at one end and pure webcasting at the other
5 end, then the rate that you fixed for permanent
6 downloads does tell you quite a lot about what the other
7 rates might be.

8 THE CHAIRMAN: Well, you take a look at the original
9 pleadings, which I always do. Take a look at the
10 original pleadings, because BPI was the leader.

11 MR RABINOWITZ: They said exactly said.

12 THE CHAIRMAN: To save time, ink, money -- dare I say it,
13 everybody chipped in and said: yes, I agree with
14 paragraph 15, I just wish to add the following. Now,
15 I have not been through all the minutiae of supplemental
16 and amended pleadings.

17 MR RABINOWITZ: It never changed.

18 THE CHAIRMAN: That is what I thought. You take a look at
19 that. Somebody did a diagram, was it --

20 MR RABINOWITZ: I think it was BPI.

21 THE CHAIRMAN: BPI did a diagram.

22 MR RABINOWITZ: In fact, as you will see in due course, the
23 MSPs in their written opening for the hearing that was
24 due to start in September made exactly the spectrum
25 point. This is a continuing spectrum --

1 THE CHAIRMAN: And webcasting and so on was in the middle.

2 MR RABINOWITZ: And we say that is --

3 THE CHAIRMAN: General webcasting was at the other end.

4 MR RABINOWITZ: Pure webcasting.

5 THE CHAIRMAN: Yes.

6 MR RABINOWITZ: This is all part of a style of offering.

7 And why do we say it matters? It matters because, as

8 I say, you have agreed the royalty rate at the top. It

9 does tell you something about what should happen below

10 in terms of royalty rates.

11 So in any event, let us go back to 5.9 and 5.10.

12 THE CHAIRMAN: We got to the phrase "notwithstanding the

13 above" and I interrupted you. I am sorry.

14 MR RABINOWITZ: Not at all:

15 "Notwithstanding the above, more music services

16 where a significant portion of musical works accessed by

17 users are either no longer in copyright in the relevant

18 part of the territory or are otherwise not repertoire

19 works, by way of example, services specialising in

20 classical music, the licensor shall agree an appropriate

21 deduction to the gross revenue and minimum royalties to

22 apply as from the commencement date. The deduction

23 shall be reviewed every six months."

24 Now, that is a term that we accept should apply to

25 the webcasters. And the difference between us, just so

1 I can identify what the difference is, is that
2 Mr Steintal wants specific deductions in relation to
3 every piece of music which turns out not to have been a
4 repertoire work. He wants a credit for that. We
5 say: no, the appropriate way to deal with this, given
6 the nature of the business you are running, which is
7 streaming music, is: yes, if it is right that
8 a significant proportion of musical works turn out not
9 to be repertoire works you ought to have a deduction.
10 But not on each specific work. It works for permanent
11 downloads, it works for limited downloads and on-demand
12 services, it is not really appropriate for that
13 business. That is a short issue and that is the
14 difference.

15 THE CHAIRMAN: Just a minute, stop. (Pause).

16 Musical works which are not repertoire works. That
17 suggests to me, if I understand your argument right,
18 that means not just a general bunch of musical works --
19 I see, but then you would read "notwithstanding the
20 above" as the mechanism for achieving it.

21 MR RABINOWITZ: Indeed.

22 THE CHAIRMAN: So it is going to be done in terms of a sort
23 of brushstroke approach rather than an item by item
24 approach.

25 MR RABINOWITZ: Item by item.

1 THE CHAIRMAN: Let me ask you this -- sorry, I am severely
2 interrupting your argument. We are intrigued and
3 somebody will no doubt deal with it in evidence about
4 the accounting, as my colleague said. But how are you
5 going to itemise every single download or stream item
6 that is not within the repertoire?

7 MR RABINOWITZ: Well, I think, let us just talk first about
8 how you itemise every item which is streamed or
9 downloaded. The MSP will do that because it
10 electronically will take into account when there is
11 a download or a streaming of a particular song.

12 THE CHAIRMAN: Of a particular song. So it can be done
13 song-by-song.

14 MR RABINOWITZ: I suspect it can be done song-by-song. I am
15 speaking on the hoof at the moment. But if it can be
16 done for permanent download song-by-song, then I would
17 have thought the technology would exist.

18 THE CHAIRMAN: Yes. Well, then, why can't it be done
19 with --

20 MR RABINOWITZ: With the webcaster.

21 THE CHAIRMAN: But then why, Mr Steinthal wants it done
22 song-by-song. You want it done by --

23 MR RABINOWITZ: This is for the purposes of a deduction,
24 though. The primary payment in relation to permanent
25 downloads will be for each download which is made.

1 THE CHAIRMAN: Yes, of course.

2 MR RABINOWITZ: Whereas for webcasting, it is much more in
3 the style of a constant stream of music.

4 THE CHAIRMAN: Yes.

5 MR RABINOWITZ: And therefore attributing a specific value
6 to each piece of music will be a much more complex
7 process; not really matching the revenue stream, as it
8 would for permanent downloads.

9 THE CHAIRMAN: This is, in other words, a matter of
10 counting. Of accounting, if you like.

11 MR RABINOWITZ: It would be a matter of accounting in the
12 first place, but principle as well. In the sense of
13 saying: if your business involved just providing
14 a constant streaming of music, should there be
15 a deduction every time you find out that one piece of
16 work was not a repertoire work?

17 THE CHAIRMAN: All right. Well, look --

18 MR STEINTHAL: I do not want to interrupt the opening, but
19 I would, if permitted, explain where on this particular
20 issue, where the issue is.

21 THE CHAIRMAN: Well, look, can I suggest that you both --
22 this is another matter. You both talk about it.
23 Because as I see it at the moment, it does not seem that
24 there is a yawning gulf between you here.

25 MR ARNOLD: Just seems to me. I may be getting this totally

1 the wrong way around. You are talking about webcasting
2 and permanent streaming. Surely at some stage, the
3 webcaster must have permanently downloaded the music in
4 order to give a continuous stream.

5 MR RABINOWITZ: He would have copied onto his server all the
6 music.

7 MR ARNOLD: So it is actually a permanent download as well,
8 but it is not coming out.

9 MR RABINOWITZ: He is not selling a permanent download, so
10 the service he is offering the user --

11 MR ARNOLD: Presumably when he downloads your permanent
12 copy, he is paying royalties on that?

13 MR RABINOWITZ: No.

14 MR STEINTHAL: That was what I explained yesterday; that
15 there was the mechanical part. This is the second right
16 argument. That there is a copy made on the server to
17 facilitate the performance, but there is never
18 a distribution by a webcaster to a consumer of something
19 to be downloaded. It is only a stream. There is
20 a server copy made to facilitate the stream, not unlike
21 the server copy made by simulcasters and broadcasters
22 for their performances as well.

23 THE CHAIRMAN: This is sort of less PRS and more MCPS.
24 Surely you can come to some arrangement --

25 MR RABINOWITZ: You would have thought so.

1 THE CHAIRMAN: -- about this. I will leave it at that.

2 I want you just to talk about it afterwards, please.

3 All right, on you go. Thank you both.

4 MR RABINOWITZ: Again, just passing very quickly through
5 terms which are not in issue. Fees and payments, those
6 monthly accounting reports. Section 6. And there will
7 also be quarterly accounting; that is dealt with by
8 section 7, nothing turns on that. Section 8 is supply
9 of information. And again, that may answer part of your
10 question about: how are you going to know what has been
11 produced and what music? 8.1 might give you the answer
12 there. Late reporting, what happens if you report late
13 on what royalties are due. 10 deals with credits and
14 notice. I do not think anything turns on that. 11 is
15 an auditing provision. Again that is not material. 12,
16 security and encryption. We do not need to worry about
17 that either. 13.1 simply reiterates the period of the
18 licence.

19 THE CHAIRMAN: That was in dispute, but now no longer.

20 MR RABINOWITZ: It was in dispute, now no longer in dispute.

21 And then if I can ask you to go to page 35, where
22 you will find schedule 1. This might be helpful in
23 terms of understanding exactly what is involved in each
24 of these services. Just picking up:

25 "Limited download, on-demand streaming services or

1 ODS service."

2 That is the second block.

3 "The service ..."

4 Other than excluded service, leave aside that.

5 "... whereby a user may receive a musical work by
6 streaming on-demand via a network. The time and place
7 at which such a musical work is received is selected by
8 the user [that is important] and/or may download via
9 a network that musical work, but where such download may
10 not be retained by the user on a permanent basis."

11 So I hope that reflects what I said to you, the
12 concerts of limited download and on-demand streaming.
13 The second one is limited download; I would characterise
14 as "limited download". And the first one is the
15 on-demand streaming.

16 You can choose: I want to listen to Bob Dylan or
17 Frank Sinatra, press a button, choose the song you want
18 to listen to. You do not own it, but you can listen to
19 it whenever you like. It is as good as owning it.

20 The definition of "music service" you see
21 immediately below that. It comprises all of the
22 services we are looking at, and any combination of them.
23 "Permanent download service" is what you would expect,
24 but we can just have a look at what it says:

25 "A service, other than an excluded service, by which

1 a musical work is communicated to the public via
2 a network in the form of a download and where such
3 a download may be retained by the user on a permanent
4 basis."

5 Again it is being communicated to the public. That
6 is the right which is being licensed here. That is why
7 the suggestion which is made, that is all our choice
8 about who is the licensee and therefore ignore the point
9 about what the revenue is, is simply a bad point. This
10 is the licensed act. In the online world, it is an act
11 which is being carried out by the retailers, if we can
12 call it that. iTunes is the one selling it and
13 communicating it.

14 Then we get podcasting on the next page which
15 happily you do not have to worry about.

16 THE CHAIRMAN: Yes, we have not heard about that. It looks
17 as though it might loom in the ...

18 MR RABINOWITZ: It is again very interesting technology, but
19 does not have to detain us.

20 Premium and interactive webcasting services:

21 "Premium and interactive webcasting services are
22 actually defined by reference to them being neither pure
23 nor limited demand, unlimited download and on-demand."

24 In other words, it is interactive. The best way of
25 describing it is to say: it is not any of the other

1 categories. It is the category between the others. And
2 so it is then important to look at what pure webcasting
3 services are:

4 "A service other than an excluded service of
5 simulcast service, by which musical works are broadcast
6 to users via a network. For the avoidance of doubt, it
7 constitutes a pure webcasting service. There must be no
8 interactive functionality; for example, without
9 limitation. No use of controls to then enable the user
10 to pause, skip, move forward or backwards through the
11 stream. No personalisation of the service by the user
12 or the ability for the user to offer preferences which
13 then dictate the tracks which are provided to that user.
14 For example, without limitation, no ability for the user
15 to rate tracks as to influence subsequent tracks that
16 are subsequently played."

17 The advance notification of what you are going to
18 play. And then there are restrictions on how many songs
19 of a particular artist you can play in particular
20 periods. And you will have heard yesterday and seen in
21 some of the documents that there has been an ongoing
22 debate between the alliance and Yahoo about whether
23 Yahoo's service is interactive.

24 Now, I ought to be clear about what is in debate,
25 what is in issue or where there is a disagreement and

1 where there is not a disagreement. Because what is
2 absolutely clear about Yahoo's service; and I have no
3 doubt my learned friend will interrupt me if I am saying
4 something which is not right about this. Yahoo's
5 service, you can skip songs. In other words, you get
6 a stream of music. Let me start from the beginning.

7 THE CHAIRMAN: I think I know what you mean in relation to
8 CDs.

9 MR RABINOWITZ: In relation to CDs.

10 THE CHAIRMAN: Bands, tracks.

11 MR RABINOWITZ: Indeed. But you can never do it in relation
12 to radio. The idea of sitting listening to Radio 1,
13 saying: I really hate this, I am skipping to the next
14 song, you cannot do that.

15 But Yahoo's service is a fantastic service. But it
16 is more sophisticated, even than that. Because what you
17 can do is, and Pandora is the same. It is also
18 fantastic. You can create your own station. It is
19 called "my station", and what you do is you feed in your
20 preferences. You say: I like Frank Sinatra, Bob Marley,
21 Bruce Springsteen and Laurence Welk. And it will find
22 a way of streaming that music to you and other music
23 which shares an algorithm, which is to be found in that
24 music. So you can affect the music that you get.

25 And if, for example, they start playing you the

1 songs and something comes on which does not sound
2 anything like the songs that you like, you can hit
3 a button and you can skip it.

4 You can also rate music. You can say, "I really,
5 really, really like this song", and then it knows for
6 next time: this person really, really, really likes that
7 song. You can ban, prohibit certain --

8 THE CHAIRMAN: And can you get repeats, Bridge Over Troubled
9 Waters, five times?

10 MR RABINOWITZ: Over and over again. I do not think you
11 can, I do not think you can.

12 THE CHAIRMAN: Well then, you can put the skip button on
13 that one.

14 MR RABINOWITZ: You can skip. What you can do is create
15 a new "my radio".

16 THE CHAIRMAN: Yes.

17 MR RABINOWITZ: And then hear it again.

18 Now, you will have seen that Mr Steinthal in his
19 opening says: this is no different to radio, because
20 with radio, you can just turn it off if you do not like
21 a particular song or you can change the channels. With
22 respect, this is entirely different.

23 Your Honour asked Mr Steinthal yesterday: why would
24 anyone go for a webcast rather than a radio? There are
25 so many radio stations? And he did not quite answer the

1 question. He talked about the advertising world and how
2 much advertising there was and how much money there was
3 to be made from the adverts. The reason people will go
4 in webcastings rather than radio is because you can
5 interact, it is interactive. You can effect, you can
6 create "my own radio station". Pandora, you can put in
7 your preferences and get a stream of music which is
8 exactly the sort of music that you want, because you
9 have told them what you want.

10 THE CHAIRMAN: Is this available in England now?

11 MR RABINOWITZ: Pandora, you have to feed in, as
12 I understand it. Mr Brown from Pandora is going to give
13 evidence. But what you need to do in order to get it is
14 to put in a US --

15 THE CHAIRMAN: Did we see this at all?

16 MR RABINOWITZ: I am not sure you saw Pandora.

17 THE CHAIRMAN: No, we did not. Can we see this then? This
18 is one of the things I want to talk to you about at the
19 end.

20 MR RABINOWITZ: Undoubtedly. That is what makes it so
21 different from radio. You can not only customise your
22 station, but if it plays a song you do not like, you can
23 skip. And I think on Yahoo, you can skip as many times
24 as you like. Just skip and skip and skip until it until
25 it comes to another song you like. You may not want to

1 do that, because you are working or doing whatever else,
2 but you can.

3 And that, I do not believe any of that is in issue.
4 There has been a difference between the parties, funnily
5 enough, about terminology. And one understands this.
6 Because Yahoo think that they are DCMA compliant and
7 they are using, I think when they use "interactive",
8 they use it in the sense in which they say it is used in
9 the American legislation. Whereas the DCMA act, which
10 Mr Steinthal mentioned yesterday, we are going to have
11 a look at that very briefly at some point.

12 We, when we use the word "interactive", with
13 respect, use it in the ordinary English sense that you
14 interact and affect what is going on, and indeed we use
15 it in the sense that it is used in the licence. You can
16 skip it and you can do things with it.

17 And that is a key difference between radio and
18 webcasting. And that is one of the things, one of the
19 reasons we say radio, of course it is a comparable in
20 the sense that it tells you something, but it is not as
21 strong a comparable as Mr Steinthal's clients say it is.
22 Because there are key differences. We saw one
23 difference when we looked at the AIRC case which is the
24 mix of things. Music, music, music on the one hand,
25 that is the MSPs; on the other hand, you have radio

1 which has the mix of sport. This is the other key

2 difference, the interactivity about it.

3 THE CHAIRMAN: That is a content difference.

4 MR RABINOWITZ: The first is a content difference. This is

5 a control over the music difference.

6 THE CHAIRMAN: Yes.

7 MR RABINOWITZ: Because just so that one understands,

8 because I am not sure that anyone has actually explained

9 this. What underlines the different royalty rates in

10 the scheme is the extent to which the user gets to own

11 or control what is being played.

12 At the top end, you have permanent downloads where

13 you own and therefore control. You go down to limited

14 downloads and on-demand streaming where it is slightly

15 less, and so on, until you get to pure webcasting where

16 it is about as close to radio as you are going to get,

17 I suppose, in the webcasting world. You cannot

18 influence it because it is not interactive.

19 THE CHAIRMAN: I think the best thing to do is if somebody

20 could fix one of these things up and we could have

21 a look and see, experience, we will soon decide about

22 that.

23 MR RABINOWITZ: I think we should do that sooner rather than

24 later, so that we are not just talking about it, but so

25 you see it.

1 MR CARINE: Can I just ask. The interactivity that you
2 postulate, Yahoo and Pandora, does it also apply to AOL
3 and the other clients?

4 MR STEINTHAL: I can answer that. There are differences in
5 the services. The services, Real and AOL, their radio
6 services do not have the degree of ability to provide
7 ratings and information that Yahoo has.

8 MR CARINE: Thank you very much.

9 THE CHAIRMAN: Sorry, page 36.

10 MR RABINOWITZ: So that was page 36, and we have seen pure,
11 you have seen premium and interactive; which you now
12 understand why it is, by reference to not being pure.

13 And then if you go over the page, you find special
14 webcasting services. And just picking that up:

15 "A pure webcasting service of premium and
16 interactive webcasting service, with more than
17 50 per cent of the sound recordings of the musical works
18 communicated to the public or by a single artist or band
19 or comprising a live performance by a single artist or
20 band, with related performances by other artists and/or
21 bands."

22 So it is a sort of dense offering of particular
23 artists. And again, that is getting closer to the
24 on-demand service in relation to a particular artist.

25 Now, in relation to this, some of the MSP witnesses,

1 and it may be in their pleading, say, "Well, this is all
2 irrational because why is 50 per cent the right figure?
3 That means that at 49 per cent, it is not special
4 webcasting, but at 51 per cent it is."

5 And with respect, they are entirely right. What
6 they say is true. If you take 50 per cent as the
7 benchmark, anything falling on one side of the line
8 would be out and anything falling on the other side of
9 the line would be in.

10 But that is true of any attempt to identify a point
11 of time at which you treat something as a specific
12 category. If you are trying to create categories, you
13 have to delineate them by reference to certain
14 characteristics. And the point that they make would be
15 true of any figure that you take. It does not make it
16 an irrational category. The fact that some things fall
17 within and some things fall without does not mean that
18 it is irrational.

19 THE CHAIRMAN: Or may go right up to it.

20 MR RABINOWITZ: It does not make it irrational. You have to
21 draw the line somewhere, and the alliance have drawn the
22 line at 50 per cent because that seemed an appropriate
23 place. If the debate was: well, it ought to be at
24 60 per cent, no doubt if they had set it at 60 per cent
25 we would have exactly the same debate. It is not

1 realistic to say it has to be 100 per cent.

2 THE CHAIRMAN: Do not we are worry. We often have this in
3 patent claims where you have a figure and then the
4 defendant puts in 49.9 per cent and says: ha, ha, I am
5 not infringing. We know about this one.

6 MR RABINOWITZ: We have drawn the line at 50 per cent, and
7 that is the special webcasting category. I think
8 yesterday Mr Steinthal seemed to suggest that he is not
9 actually concerned about the special webcasting category
10 because his clients are not engaged in that. If that is
11 right, good, that is another debate which can fall away.

12 THE CHAIRMAN: Maybe you could discuss that point too.

13 MR RABINOWITZ: Maybe. But if that is not going to happen,
14 then now you know what special webcasting is and where
15 it comes up.

16 THE CHAIRMAN: Thank you.

17 MR RABINOWITZ: The next page is schedule 2 and the royalty
18 fee.

19 THE CHAIRMAN: Yes.

20 MR RABINOWITZ: The definitions that matter, applicable
21 revenue.

22 THE CHAIRMAN: What was the title of schedule 1? Just
23 remind me, oh, definition of music. Good. Schedule 2.

24 MR RABINOWITZ: Applicable revenue means the gross revenue
25 less VAT. We are going to have a look at gross revenue

1 shortly. And "minimum royalties" is what it says,
2 I suppose. If I can take you to clause 2, page 39; some
3 parts of this may have been taken. I am not sure you
4 have, actually. But at page 39, you have the royalty
5 fees which are set out.

6 THE CHAIRMAN: Yes.

7 MR RABINOWITZ: And it starts with the permanent download
8 service at clause 2.1. You see it is the higher of
9 8 per cent of the applicable revenue which we know to be
10 gross revenue.

11 THE CHAIRMAN: Less VAT.

12 MR RABINOWITZ: Less VAT. And either, and then you have
13 a series of minima which are set out. The minima are
14 set out and differentiated, depending on how much music
15 is being downloaded at any one point in time. Is it one
16 track, is it a package of tracks, et cetera?

17 THE CHAIRMAN: And it is the same point.

18 MR RABINOWITZ: It is the same point.

19 THE CHAIRMAN: Yes.

20 MR RABINOWITZ: And since the royalty fee in relation to
21 permanent download service is not an issue, it is all
22 agreed, we do not have to bother about the detail which
23 follows. Unless anyone wants me to refer you to any of
24 these subparagraphs, I was going to refer you to
25 clause 2.2 next.

1 THE CHAIRMAN: And you are going to treat B, subparagraphs 1
2 to 5 as an entity.

3 MR RABINOWITZ: On minima.

4 THE CHAIRMAN: On minima, yes, I see.

5 MR RABINOWITZ: What is important is that you will remember
6 that minima was a very hotly debated issue.

7 THE CHAIRMAN: Yes.

8 MR RABINOWITZ: And we were told there were all sorts of
9 intellectual and other justifications as to why,
10 including from Mr --

11 THE CHAIRMAN: It was not in the original proposal.

12 MR RABINOWITZ: It was not in the original proposal. It
13 then came in and there was a huge ruckus about it
14 because it was said: this is inappropriate, you cannot
15 have this, it is not right. The alliance said: we are
16 in a different world now, minima are important because
17 our interests are not always aligned and we need the
18 minima.

19 What you see arising out of the cauldron of the
20 negotiations are minima. And that is important, we
21 would say, as a comparator when one deals with the
22 concept. The fact they have been agreed is important
23 when one looks at Mr Steinthal's clients because they
24 still resist minima.

25 THE CHAIRMAN: I was going to say, he is the only one who

1 resists.

2 MR RABINOWITZ: He is the only one who resists.

3 THE CHAIRMAN: Minima. Yes. Anyway, for present purposes,
4 what you say is that there they are, and they are set
5 out.

6 MR RABINOWITZ: Indeed.

7 THE CHAIRMAN: And we can --

8 MR RABINOWITZ: I am just showing you the lay of the land,
9 as it were.

10 THE CHAIRMAN: Yes, yes, I have the point. Mr Steinthal is
11 the only one on minima.

12 MR RABINOWITZ: He represents the only party. Let me put it
13 that way because it is slightly unfair to characterise
14 him as the only one.

15 MR STEINTHAL: I am getting used to it.

16 THE CHAIRMAN: You wear a lot of hats, Mr Steinthal.

17 MR RABINOWITZ: It is just the shorthand. Everyone knows
18 what we mean. But other than his parties, there has
19 been -- and those who have tied themselves, I ought to
20 make that clear to --

21 THE CHAIRMAN: I understand that.

22 MR RABINOWITZ: -- to his position. Everyone else is agreed
23 on minima, and that is in relation to permanent
24 downloads. Now, 2.2 has the royalty rate for limited
25 download on-demand service and you will see again it is

1 an 8 per cent applicable revenue. And again, if you
2 look at the minima here, you will see that they are all
3 by reference to subscription services. Sorry, that is
4 wrong: 1, 2 and 3 are all minima which attach to
5 subscription services, and then 4 is for a limited
6 download on-demand service which is not a subscription
7 service. And one of the issues in the case which we are
8 going to have to hear about is an objection which is
9 made by one of Mr Steinthal's clients to the fact that
10 minima are occasionally on the basis of a per
11 subscription, and occasionally on the basis of a per
12 stream. Generally, just so you understand the logic of
13 the licence, where the service is a subscription service
14 then the minima relates to the subscription. And where
15 it is not a subscription service, then since there is
16 not a subscription to which the minima can relate, it
17 relates to the music which is provided.

18 And I suppose just a general point to make in
19 relation to 2.2. I have said, and I know the tribunal
20 has understood, that limited demand and on-demand
21 service is not as good for the user, it is not as full
22 a product for the user as permanent downloads. And you
23 may ask yourself: well, why is it 8 per cent? Because
24 8 per cent is the same royalty as was applicable to
25 permanent downloads. And that, when one first thinks

1 about it, looks anomalous. When one thinks about it
2 a little bit more and realises that the retailer is
3 going to be charging a different price, obviously
4 a greater price for permanent downloads than for limited
5 downloads, the take to the alliance will be smaller.
6 I think there was a tribunal case where the tribunal say
7 that what matters in the end is the money. You can get
8 carried away by looking at percentages.

9 THE CHAIRMAN: That was a quotation from a person called
10 Mr Nicholas Lowe, who was formerly with PRS and founded
11 the Irish equivalent of PRS. I remember it extremely
12 well.

13 MR RABINOWITZ: It was Mr Lowe who said that. And that is,
14 with respect, absolutely right. What matters in the end
15 is the money and one must not get carried away by the
16 percentage royalties here; 8 per cent and 8 per cent is
17 the same. But of course if the retailer is charging
18 less for the one, the take is going to be less.

19 And that is again the position in relation to
20 limited downloads. Now, you get to 2.3, and special
21 webcasting services. Again, it is an 8 per cent. And
22 you are now familiar with the minima, and again the
23 difference between the subscription services and other
24 services. You may just want to glance at that.

25 THE CHAIRMAN: Yes.

1 MR RABINOWITZ: And then 2.4, premium and webcasting
2 services, 6.5 per cent. This is the rate to which
3 Mr Steinthal objects, he says that should be 5 per cent.

4 Just glancing down, because the point is the same,
5 if you look at pure webcasting services, again
6 6.5 per cent is the rate of the licence. And again
7 Mr Steinthal I think says 5 per cent.

8 THE CHAIRMAN: In 2.5.

9 MR RABINOWITZ: Indeed. Mr Steinthal says we should not
10 have these two categories. It should be one category,
11 call it general webcasting, and let us take 5 per cent.
12 In fact, even Mr Boulton thought that the rate for
13 interactive should have been higher than pure. He put
14 it at 5.5 per cent. But be that as it may, Mr Steinthal
15 has gone for the lower amount but to apply to both
16 categories.

17 THE CHAIRMAN: Yes, he is saying put them together.

18 MR RABINOWITZ: Put them together and let us take the lower
19 amounts.

20 MR CARINE: I think he said 4 per cent but would concede
21 5 per cent.

22 MR RABINOWITZ: Indeed. I think what he said is that radio
23 is 4.1 but he would concede 5. That is, I think, the
24 way the argument goes.

25 And then just again, so that what is clear about

1 this, the difference between premium and pure in terms
2 of the take, you see in the minima, the minima are
3 different.

4 THE CHAIRMAN: Yes.

5 MR RABINOWITZ: And that reflects the difference in the
6 value of the services. Because whilst it is right to
7 say that if the retailer charges more than 6.5 per cent
8 on more, it will be more than 6.5 per cent on less, you
9 would have to actually adjust the amounts of the minima
10 otherwise you are going to get the same and that would
11 be wrong, because interactive is a greater use of the
12 music or a fuller use of the music than pure.

13 And Mr Steinthal, as you know, not only objects to
14 the principle of minima in relation to webcasting, he
15 also says these rates are too high and we will have to
16 come back to that.

17 THE CHAIRMAN: 0.6 of a pence to three other decimal places.

18 MR RABINOWITZ: Indeed, yes.

19 So then I think, if I can just take you to this very
20 quickly because you have seen it. Bundling, at the
21 bottom of the page.

22 THE CHAIRMAN: Yes. This seems to have fallen out of
23 contention.

24 MR RABINOWITZ: Well, I am not sure. Again, this may be
25 something that we need to talk about, Mr Steinthal and

1 I. Because I am told yesterday -- very quickly, what
2 the alliance says is, and this is similar to what
3 Mr Steinthal says, in the first instance if there is
4 a bundle what you should do is to see if there is
5 a stand-alone price for each product. If there is, you
6 scale it up or down proportionally. It is very unlikely
7 you would scale it up, probably scale it down.

8 Then the alliance says: look, if there are no
9 stand-alone prices being offered by that supplier, then
10 what you need to do is see whether you can find some
11 separate comparable service which is being offered for
12 each of them so you can get a sense of the value. And
13 in each case there will be minima, and you either take
14 the stand-alone price scaled up or down, or the minima,
15 or the comparable prices scaled up or scaled down, or
16 the minima.

17 We had understood until yesterday that
18 Mr Steinthal's position, based on Mr Boulton, had three
19 stages. First, the comparable, see if they are
20 stand-alone products which are, you can scale up or
21 scale down. He had a second stage, Mr Boulton has
22 a second stage, which is ascertaining the residual value
23 if there is no stand-alone price. And only then does
24 Mr Boulton go to the quantity-based approach, which is
25 similar to minima. He gives it a different name because

1 he does not want to conceded that you can have minima
2 but it is effectively the same, it is identifying
3 a fixed value.

4 Yesterday Mr Steinthal, and I will deal with this in
5 more detail, seemed to suggest that the middle step had
6 gone away and that if you did not have the stand-alone
7 prices you went straight to the quantity base. If that
8 is the position, and I can talk to him about it in due
9 course, then we need to have a discussion just to see
10 exactly what is between us on this. Because who knows.

11 THE CHAIRMAN: I would encourage that.

12 MR RABINOWITZ: But in all events, just so that you have it,
13 this is the provision in the licence, which is currently
14 under attack, to do with bundling.

15 THE CHAIRMAN: Good.

16 MR RABINOWITZ: I think given that you want to pick up some
17 housekeeping points, I will just stop there.

18 THE CHAIRMAN: Thank you, Mr Rabinowitz. Thank you very
19 much.

20 Housekeeping

21 A couple of points. First of all, we got today our
22 first transcript. It would be very useful, we feel, if
23 we could have some lever arch files for the transcripts.
24 Let us have them with dividers so that we can do it day
25 by day, or maybe a coloured divider to divide the

1 witnesses out. And if they can be in loose leaf form,
2 because that is the way they have come in the envelopes.
3 If we could have some sets of those in there, then we
4 can take them away if we need them.

5 I do not know who will do that, but I am looking at
6 Ms Short again.

7 Then the two days, the 27th and 28th. We have
8 talked about these days which are blackened out in my
9 timetable. We would like a demonstration, we will
10 discuss as we go along; I think somebody has been
11 putting down on a shopping list what we want to see.
12 There were a few items this afternoon, somebody I am
13 sure got them down.

14 For the afternoon of the 27th, Monday 27th. Now, we
15 do not need everybody to be present at that. We just
16 want to see what happens. I mean, obviously all the
17 parties should be there. But I do not want to cause
18 a huge amount of expenditure of money. I mean, really,
19 we can have a sensible gathering of people.

20 MR CARR: Can I just ask on that. Obviously we cannot
21 demonstrate advertising on mobile phones because there
22 is not any. But would particularly Rear Admiral Carine
23 like to see the demonstration we showed last time?

24 THE CHAIRMAN: That is what I had in mind.

25 MR CARINE: I was in Syria last time so I missed it and

1 I willingly admit to a certain deal of ignorance in
2 these matters. I can put my finger in the telephone and
3 turn it round.

4 MR CARR: And you have a car where one of the indicators
5 flick out. What I was going to say in relation to that
6 was that we cannot demonstrate here in this courtroom.

7 THE CHAIRMAN: No.

8 MR CARR: Because I do not think the projector is
9 compatible, so if we can do that at possibly the
10 solicitor's offices.

11 THE CHAIRMAN: I will leave it to you. So we are gradually
12 building up a shopping list, and we liked what we saw
13 last time, but now it is going to mean a lot more to us.
14 And of course Rear Admiral Carine has not seen any of
15 it. So that will be good. We have all afternoon. We
16 will start at 2 o'clock. Yes.

17 MR RABINOWITZ: Can I mention something else which subject
18 to the tribunal may usefully be put on the 27th and
19 28th.

20 There is a risk that we are going to have a time
21 problem tomorrow. The reason is this. I have still got
22 a way to go, as you would expect. Mr Aldous does not
23 have much to say but is going to have something to say.
24 Tomorrow we have Mr Levy and, as I understand it, this
25 is the only day that Mr Levy can give evidence during

1 the whole period.

2 MR STEINTHAL: I believe that is true. I mean, he is coming
3 from the States. He used to be here at the RealNetworks
4 office in London and he has been transferred back to the
5 States so we are trying to organise his testimony at
6 a time when he can make it.

7 MR RABINOWITZ: That is fine, because I do not anticipate
8 any problem dealing with Mr Levy tomorrow. But we are
9 told that Mr Cue must also be taken tomorrow. Mr Cue is
10 on a videolink from the States, and that may prove
11 problematic. Cue the music.

12 But I anticipate we are going to run out of time for
13 Mr Cue tomorrow, and I have --

14 THE CHAIRMAN: If he is going by video, I mean, we have
15 got -- there are other --

16 MR RABINOWITZ: There are other days.

17 THE CHAIRMAN: And he is going to be in the States all the
18 time.

19 MR RABINOWITZ: Apparently there is a Thanksgiving holiday
20 and that is fair enough.

21 THE CHAIRMAN: That is on Thursday.

22 MR WEISSELBERG: My understanding, and this is something
23 that the alliance has known for some time, is Mr Cue is
24 not available next week and the only day he could do was
25 tomorrow, Friday 17th. My learned friend suggested to

1 me shortly before I started my submissions that he might
2 want to examine Mr Cue at another time. I cannot make
3 enquiries of Mr Cue now because he is in California --
4 he might now be awake but not yet in the office.
5 Enquiries will be made as to whether he is available
6 elsewhere, but at the moment the day he is available to
7 give evidence is tomorrow. Substantial efforts have
8 been made to make sure there are documents available for
9 him to be cross-examined on, and indeed substantial
10 efforts have been made to make sure the videolink
11 facilities are available and able to be used from iTunes'
12 offices in California and also here in the tribunal. We
13 have made substantial efforts to make sure Mr Cue will
14 be here to give evidence tomorrow and I hope very much
15 that can indeed take place.

16 THE CHAIRMAN: We will keep our fingers crossed and I do not
17 want to interfere with his Thanksgiving. But if he is
18 doing this by video from California, I mean, we do have
19 a lot of other days.

20 MR WEISSELBERG: The problem is the only requirement that we
21 had in relation to this timetable was Mr Cue's
22 availability. Other than that, we have been incredibly
23 flexible. I have returned briefs, we have bent over
24 backwards. The only issue that we had was Mr Cue's
25 availability, and we said that Mr Cue was only available

1 on the Friday. We will make enquiries.

2 THE CHAIRMAN: What is his occupation? What is his status?

3 MR WEISSELBERG: He works for iTunes. Effectively he runs
4 or is in charge of iTunes, the music store.

5 MR RABINOWITZ: I did not want to put pressure. I did not
6 raise this in order to put pressure on my learned
7 friend, and if he thinks I did, I do apologise, because
8 that was not the purpose and I am sure he has gone to
9 a lot of trouble about this.

10 The reason I raise this now is you raised what we do
11 with the 27th and 28th. Indeed, the 27th. We are going
12 to be here anyway on the 27th. I have no idea whether
13 Mr Cue will or will not be able to do the 27th. But
14 what I wanted to raise for discussion is that if he
15 could do, if he is back from his holiday or whatever it
16 is, the 27th and the 28th, then that would be certainly
17 a fallback plan which we should think about. Because
18 with all respect to my learned friend I do not know what
19 he wants us to do. We have to open this case. We are
20 going as fast as we can. We are told that Mr Levy can
21 only do the third day of the trial.

22 THE CHAIRMAN: Yes, I have that on board.

23 MR RABINOWITZ: Mr Cue is only going to be an hour, hour and
24 a half maximum. So we are not going to inconvenience
25 his life particularly. But iTunes have made this

1 application and it is not as if we are dragging him here
2 and insisting that he comes, or indeed we are going to
3 keep him here.

4 THE CHAIRMAN: That is why I asked. He is an in-house
5 person, is he not?

6 MR RABINOWITZ: We do not want to be unreasonable but we
7 want to cross-examine Mr Cue a little bit. On the other
8 hand I am concerned about time tomorrow. We are told
9 this is the only time we can deal with Mr Levy.

10 THE CHAIRMAN: You will please tell him what the problem is,
11 and would you say that we have the 27th and
12 28th available, and we --

13 MR CARINE: I do not think Roderick is available.

14 MR ARNOLD: I can be available on the 28th but I do not want
15 to be.

16 THE CHAIRMAN: I think we have been through this. One of us
17 has to drop out; I will not, you will be happy to know
18 the captain does not leave the ship. I will defer to
19 that.

20 I will be here at all times. But basically, if you
21 are not here one afternoon does that matter if, for
22 example --

23 MR RABINOWITZ: There will be a transcript. There is less
24 than an hour, there is about -- I do not want to say
25 less than an hour.

1 MR ARNOLD: I am fairly flexible.

2 MR RABINOWITZ: There is not that much I want to ask Mr Cue.

3 THE CHAIRMAN: And there will be a transcript.

4 MR RABINOWITZ: There will be a transcript.

5 THE CHAIRMAN: There it is. If you can tell him the
6 27th and 28th. But I must put my foot down. He is your
7 man, it is your case and this is the Copyright Tribunal
8 of the United Kingdom.

9 MR WEISSELBERG: May I just make clear what troubles we face
10 in relation to this uncertainty raised now.

11 We have prepared on the basis of Mr Cue giving
12 evidence tomorrow, at some point tomorrow afternoon by
13 videolink. Enquiries were made of Mr Cue's
14 availability, and at the moment I understand that he is
15 not available in the week commencing the 20th, and
16 I also understand that when last enquiries were made as
17 to his availability he was not available on the 27th.

18 THE CHAIRMAN: Why?

19 MR WEISSELBERG: I do not know.

20 THE CHAIRMAN: Well, find out would you, please.

21 MR WEISSELBERG: The difficulty that I face, sir, is that if
22 Mr Cue is going to give evidence tomorrow he will need
23 to get up 7 o'clock his time, or he will need to be in
24 iTunes at 7 o'clock his time on Friday, to give
25 evidence.

1 THE CHAIRMAN: So what?

2 MR WEISSELBERG: If he is unable to appear on the week
3 commencing the 20th and is unable to appear on the 27th,
4 what then do we tell Mr Cue?

5 MR RABINOWITZ: Maybe we can help. Let us just say we will
6 not deal with Mr Cue tomorrow, there is too much of
7 a risk we will not have time. That may mean we finish
8 early. But if Mr Cue needs to know whether he can sleep
9 late or not tomorrow, rather than not appearing here.

10 THE CHAIRMAN: Happily Mr Cue is not in Hong Kong. You have
11 the benefit of the other way around, so you can talk to
12 him now. I think we have had a discussion. I hear what
13 Mr Rabinowitz says, he wants to cross-examine him. He
14 will be, let us say, an hour and a half or so by
15 videolink in California, so it is not as if he is having
16 to rush across on executive jets two continents or
17 something. It is his case, it is his evidence. He is
18 the party. And we are the tribunal of the
19 United Kingdom, a smaller country than the
20 United States, but I do insist that you find some way of
21 getting him into this. I am sympathetic with
22 Thanksgiving and the day before it and the day after it,
23 but I am sure we can get him in somewhere.

24 MR WEISSELBERG: Sir, I will obviously do my best to work
25 out how best.

1 THE CHAIRMAN: It is up to you.

2 MR ARNOLD: Presumably the priority of tomorrow is Levy.

3 MR STEINTHAL: He is a webcaster, he has already flown here.

4 MR ARNOLD: He has already come here.

5 MR STEINTHAL: He has come here, so he will testify

6 tomorrow.

7 THE CHAIRMAN: You see, this happens. People take longer.

8 You ask any judge who has been at it for a while on the

9 bench, and you will know that all these estimates are,

10 in general -- almost all of them -- useless. We are

11 constantly having cases that are underestimated. Well,

12 we have not done too badly so far and I think we will

13 just play it by ear, that having been said.

14 Okay.

15 MR CARR: Could I just raise one final small housekeeping

16 point before you rise. Mr Levy's evidence does not

17 really concern our part of the case and Mr Allgrove and

18 I were hoping that we, when various openings are

19 finished, and I might say a word when my learned friend

20 clarifies the position, when that is finished I hope you

21 will not think it a discourtesy if Mr Allgrove and I

22 slipped away while Mr Levy's evidence is being given.

23 Would that be alright?

24 THE CHAIRMAN: No, Mr Carr. What if I said I did?

25 MR WEISSELBERG: I would make a similar request on behalf of

1 iTunes in relation to particularly webcaster evidence.

2 MR STEINTHAL: I do not think our witnesses are going to be
3 offended.

4 THE CHAIRMAN: All right, yes, yes. Of course. Okay, so we
5 are starting at 9.30 am then. Is that right, everybody?

6 Yes, 9.30 tomorrow. Thank you all very much indeed.

7 (4.37 pm)

8 (The hearing adjourned until 9.30 am on Friday,
9 November 17th, 2006)

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