

COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
UNITED STATES OF AMERICA, :

Plaintiff, :

- against - :

AMERICAN SOCIETY OF COMPOSERS, AUTHORS
AND PUBLISHERS, et al., :

Defendants. :

----- X
In the Matter of the Application of
AMERICA ONLINE, INC., :

Applicant, :

for the Determination of Reasonable
License Fees :

----- X
In the Matter of the Application of
REALNETWORKS, INC., :

Applicant, :

for the Determination of Reasonable
License Fees. :

----- X
In the Matter of the Application of
YAHOO! INC., :

Applicant, :

for the Determination of Reasonable
License Fees. :

----- X

A P P E A R A N C E S :

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- and -

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Civil Action
No. 41-1395 (WCC)

**OPINION
AND ORDER**

A P P E A R A N C E S : (continued)

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Conner, Sr. D.J.:

This decision is the culmination of a hearing conducted by this Court in its capacity as the “rate court” pursuant to Section IX of the Second Amended Final Judgment (“AFJ2”) entered June 11, 2001 in *United States v. American Society of Composers, Authors and Publishers* (“ASCAP”), Civ. Action 41-1395 (WCC), 2001 WL 1589999 (S.D.N.Y. Jun. 11, 2001), to determine reasonable fees for blanket licensees for the performance of ASCAP-repertory music by AOL LLC f/k/a America Online, Inc. (“AOL”), RealNetworks, Inc. (“RealNetworks”) and Yahoo! Inc. (“Yahoo”), three internet service providers who have applied to ASCAP for such licenses but have been unable to reach agreement on such fees.

The rate hearing was conducted for 13 days during the period from October 25, 2007 to November 15, 2007. Testimony was heard from 12 witnesses, and depositions of 12 additional witnesses were designated for inclusion in the record. The Court received in evidence 203 exhibits. The parties’ post-hearing proposed findings and briefs totaled over 600 pages, not counting the affidavits and supporting documents submitted with them. After due consideration of all the evidence and arguments and weighing the credibility of the witnesses, the Court makes the following Findings of Fact and Conclusions of Law, pursuant to FED. R. CIV. P. 52(a).

FINDINGS OF FACT¹

I. The Development of the Online Industry

¹ Citations to “SF” refer to the Amended Stipulation of Facts. Citations to “Tr.” refer to the trial transcript in these proceedings. Each citation to the transcript includes the last name of the testifying witness. Citations to “[name] Dep. Tr.” refer to the deposition transcripts of witnesses whose testimonies were designated for inclusion in the record of these proceedings.

A. Growth of the Internet and Broadband

1. The Internet is a worldwide, publicly accessible network of interconnected computer networks that transmit data. (SF ¶ 1.) In just over a decade, the Internet has grown from its relatively obscure roots to become a major information and entertainment medium that rivals television and radio. It has transformed our culture in innumerable ways, changing how we shop, how we watch television and movies, and how we listen to music.

2. Several technological developments facilitated the Internet's rapid and widespread adoption as a new medium. Personal computers have grown in popularity and are now in most homes. The percentage of households with a computer increased from 15.0% in 1989 to 51.0% a decade later. (SF ¶ 7.) By 2006, some 77% of homes had at least one personal computer, and 32% had more than one. (*Id.*) During this time, computers grew increasingly powerful, and their ability to receive, process, and store an ever-larger volume of information increased correspondingly. (SF ¶ 8.) In addition, the number of people with connections to the Internet has grown substantially, and today most homes have Internet access. (SF ¶¶ 5, 8, 9, 12.) By 1998, more than a quarter of households had an Internet connection, and by 2006, 81% of the population had some form of Internet access. (SF ¶¶ 12, 29.)

3. By the end of the 1990's, a new technology emerged that enabled the delivery of large files, especially music and audiovisual files, on a widespread basis for commercial gain to a large segment of the public — high-speed Internet access. (SF ¶¶ 27, 39, 41.) High-speed Internet connections, often referred to as “broadband” connections, are advanced communications systems capable of providing high-speed transmission of data, audio, and video, and other content over the Internet, often by means of digital subscriber line (“DSL”), fiber optic cable, coaxial cable, or

wireless technology. (SF ¶ 33.) Unlike traditional dial-up Internet access that was carried through telephone lines and modems, broadband connections allow the rapid transmission of large quantities of data, including audio and audiovisual files. (*Id.*)

4. Because music and audiovisual files are far larger than text files, the transmission of such files over dial-up lines or narrow-band was slow and resulted in poor sound quality. (Tr. 17:4-25 (Kohn).) The development and widespread adoption of Internet connections with greater bandwidth meant that large data files could be transmitted at much faster, and commercially practicable, speeds.

5. The number of broadband Internet connections has grown dramatically in the past eight years. (AsX.² 365 (Chart), 149 (at ASCAP 009883, 009893).)

6. There were 2.48 million high-speed Internet lines in the U.S. at the end of 1999, but by the middle of 2006, there were 64.61 million high-speed lines. (*Id.*) Only 13% of households with Internet access had high-speed broadband connections in January 2001, but by January 2006, some 58% had broadband access. (SF ¶ 34.) Of those with dial-up access in 2006 who did not yet have a broadband connection, some 25% said they planned to obtain high-speed Internet access in the next twelve months. (SF ¶ 35.) Today, virtually everyone with access to cable television in the home can subscribe to high-speed Internet access. (SF ¶ 36.)

7. In addition, wireless broadband connections, once rare, have become increasingly available. Wireless high-speed connections are now accessible in public locales such as Internet cafes and public parks, and an increasing number of municipalities are undertaking efforts to offer all their residents access to low-cost, or free, wireless broadband connections. (SF ¶ 38.) According

² “AsX” refers to the numbered ASCAP Exhibit; “ApX” refers to the numbered Applicants’ Exhibit.

to one survey, more than 300 U.S. cities have plans underway to provide some form of public wireless broadband access. (*Id.*)

8. At the same time, broadband speeds have increased geometrically, enabling audio and audio/visual content to be transmitted to consumers even faster. (SF ¶ 39.) The larger the “pipe” through which data can be transmitted, the faster those data files will be transmitted. (Tr. 17:4-25 (Kohn).) As a result, with faster broadband speeds, music and video files can be transmitted faster and at a higher quality. (*Id.*)

B. The Early Years of Online Music Streaming

9. Broadband has transformed the Internet from a text-based medium to an audiovisual medium and has had a material impact on the amount and quality of audio and audiovisual content available online. (Tr. 124:19-125:24 (Amenita).)

10. The first music streaming services emerged in the mid-1990s. (SF ¶ 21.) These early music streaming services were often individual, single-channel webcasts, similar to a radio station broadcast. (SF ¶ 17.) One type of webcasting is “simulcasting,” the streaming of a terrestrial radio station’s broadcast programming simultaneously with the station’s over-the-air broadcast. (SF ¶ 18.) Another type of webcasting is Internet-only webcasting, which offers musical content that is not available anywhere except on the Internet. (SF ¶ 19.) Webcasts differ from on-demand streams, which are transmissions of specific recordings selected by the user. (SF ¶ 20.)

11. In the early years of webcasting, not many music performances were available online, narrow-band Internet connections were choppy and slow, sound quality was poor, users had far fewer music channels available for streaming, and users could not interact with the music. (Tr. 87:22-24;

88:9-12; 88:20-90:8 (Amenita).)

12. In the late 1990s, “aggregators” emerged and began to offer, in a single location accessible via a Web browser, listings of simulcast terrestrial radio stations and/or Internet-only webcasts propounded by others. (SF ¶ 23.) A single aggregator might offer hundreds or thousands of available listening channels. (*Id.*) Broadcast.com was an early example of an aggregator that retransmitted terrestrial broadcast content, usually radio broadcasts. (SF ¶ 24; Tr. 1191:23-1192:5 (Roback); AsX. 39, at 3.) Yahoo! acquired Broadcast.com in 1999 for about \$5.4 billion. (AsX. 39, at 33; Tr. 96:21-24 (Amenita).) Aggregators currently active in the marketplace include SHOUTcast, which is owned and operated by AOL.

13. The early streaming services attempted to monetize their offerings in a number of ways, including the sale of advertising. (SF ¶ 25.) For example, Broadcast.com offered, in connection with its streaming music and other content services, “gateway ads with guaranteed click-throughs, channel and sponsorships and multimedia and traditional banner ads,” as well as “the ability to insert Internet-only commercials within existing broadcast.com programming.” (SF ¶ 26; AsX. 39, at 4.) In 1998, the last year for which it publicly reported financial information, Broadcast.com had about \$8.4 million in advertising revenue. (SF ¶ 26.)

C. Increased Demand for Online Audio and Video Content

14. As Americans gained more and faster Internet connections, they streamed more music into their homes and workplaces. (SF ¶ 41.) The Internet has experienced significant growth in the number of online music performances. (Tr. 122:19-123:1 (Amenita).) For example, an estimated 8.2 billion music video streams were served in 2005, an increase of nearly 3,000% from the

approximately 270 million music video streams served in 2000. (SF ¶ 42.)

15. Broadband has fueled this demand for music and video. Internet users with broadband connections listen to radio online and view programming such as television and movies at twice the rate of Internet users who just have dial-up connections. (*See e.g.*, AsX. 207, at 1.) Responding to consumer demand, producers of video programming have begun to make many of their offerings now available on the Internet, rather than only on television. (SF ¶ 40.)

16. Meanwhile, the last few years have witnessed rapid growth of “user-generated content,” consisting of audio and video materials, often with music, created by individuals and uploaded to Internet sites, where they are made available to the public for streaming or downloading. (SF ¶ 43.)

17. YouTube, which offers streaming video clips, is the most popular site on the Internet for streaming user-generated content. (SF ¶ 44.) Google purchased YouTube in 2007 for a reported \$1.65 billion. (*Id.*) Both AOL and Yahoo! operate Internet sites that stream user-generated content to the public. (*Id.*)

18. Today, there are a number of ways in which users can experience music that were not available through any medium a decade ago. The Internet has transformed users’ experience of music, as compared to the experience available via traditional analog media like radio or television. (Tr. 124:19-125:24 (Amenita).) Users can interact with the Internet source by selecting the particular songs, recordings, artists, and videos they want to see and hear. (Tr. 125:11-19 (Amenita).) For the first time in history, everyone with a device connected to the Internet can play virtually any song, anywhere, at any time, entirely on demand.

D. Internet Business Models

19. As the 1990s drew to a close, the public increasingly gained access to the Internet, and the medium moved into the American mainstream. (SF ¶ 27.) At the same time, two business models began to emerge for websites offering access to content—the subscription model and the advertising model. (SF ¶¶ 28, 45.)

1. Subscription Model

20. A number of Internet companies offer their content to the public on a subscription basis—meaning that users receive access to a variety of offerings for a recurring, usually monthly, fee. (SF ¶ 46.) An increasingly diverse array of subscription content is available online, including sports, entertainment, and news programming. (SF ¶¶ 47-48.)

21. Music has become the largest category of online subscription services. (Tr. 57:19-21 (Kohn).)

2. Advertising Model

(a) Types of Online Advertising

22. Internet companies also generate revenues through various forms of advertising, including display advertising (which includes “banner” advertisements), rich media advertising, and sponsorships, among others. (SF ¶¶ 50-51.)

23. Banner ads may be displayed in many different forms, including on a selected webpage, in pop-up or pop-under windows, on an interstitial page (an ad page that appears between two content pages), in floating windows (which move across the user’s screen or float above the content),

or expanding ads (ads that change in size and may alter the contents of the webpage). (SF ¶ 52.)

24. Rich media advertising, also known as streaming advertising, is advertising that consists of some form of streaming audio or video. (SF ¶ 54; Tr. 56:20-23 (Kohn).) For example, a video clip might be preceded by a 15- or 30-second video streaming advertisement, sometimes referred to as a “pre-roll” or “in-stream” ad. (SF ¶ 55.)

25. Advertisers typically pay for display advertising, in part, based on the number of “impressions” or views of that advertisement by users of the page where the advertising appears. (SF ¶ 53.) Impressions are frequently sold on a cost-per-thousand, or “CPM,” basis. (*See, e.g.*, Tr. 979:1-8 (Wan).) In other words, if the CPM for an ad is \$5, then the cost to an advertiser to purchase 1,000 impressions is \$5. (*Id.*)

26. All of these forms of Internet advertising have an obvious common element—the larger the audience, and the more times they visit the site, the greater the revenue. (Tr. 34:8-12 (Kohn); Tr. 1118:1-3 (Rogers).) Any person or company that sells advertising, therefore, has an incentive to build a large audience that will generate revenue from impressions, click-throughs, sponsorships, and the like. (SF ¶ 59.)

(b) **Online Companies Use of House Ads to Promote Their Own Goods and Services**

27. Many Internet companies also run “house ads,” which are advertisements for products or services from the company that is operating the website. (SF ¶ 60.) These house ads allow Internet sites to promote additional goods and services, which they offer to online users with the hope of drawing those users. (*Id.*) The house ads generate no revenue and their value to the company is not included in its reported revenues. (SF ¶ 61.)

28. Internet companies use house ads to draw users to other pages on their sites, with paid advertisements that generate more ad impressions and click-throughs, and therefore more revenue. For example, Yahoo! runs house ads that promote other parts of the Yahoo! site and drive traffic to other Yahoo! pages. (Tr. 1116:3-7 (Rogers).) These house ads may draw users into other Yahoo! sites and increase user engagement. (Tr. 1118:11-13 (Rogers).) Yahoo! generates revenue when a user clicks on a house ad that links the user to a page that contains a paid banner ad.

29. Yahoo! also uses house ads to promote its own fee-based services. For example, by clicking on a Yahoo! Small Business house ad that appears on the Yahoo! Music page, a user is taken to the Yahoo! Small Business page where he or she is presented with an offer to buy Yahoo! Internet hosting services, and shown paid advertisements that generate revenue for Yahoo!. (Tr. 1119:3-1120:7 (Rogers).) Yahoo! also runs house ads promoting the Yahoo! Music Unlimited subscription service, a separate fee-based service. (Tr. 1129:9-16 (Rogers).) If Yahoo! ran the same ads for Yahoo! Small Business or Yahoo! Music Unlimited on a non-Yahoo! website, it would have to pay for those advertisements. (Tr. 1120:9-11 (Rogers).)

30. The Yahoo! Music section also contains links that are not house ads, but rather fixed in-house promotions for other parts of the Yahoo! site. (Tr. 1115:11-19 (Rogers).) These promotions, for example, invite Yahoo! Music users to “Flirt on Yahoo! Personals while you listen” and “Play Games while you listen” to music streamed by Yahoo! and are designed to lead traffic from Yahoo! Music to other parts of the Yahoo! portal. (AsX. 118A, at Yahoo! ch. 2, 00:45-00:55.)

(c) **Unique Advantages of Internet Advertising**

31. The Internet affords advertisers the ability to target their advertisements to consumers and

monitor their campaigns more precisely than in traditional media. (SF ¶ 67.) In traditional media, such as radio or television, the potential effectiveness of an ad is difficult to measure, as there is no way to track whether a person viewing the advertisement actually purchases the product. The Internet, in contrast, is highly interactive and trackable with technology, providing the opportunity for an advertiser to know exactly how many users viewed a particular ad, how many expressed interest by clicking on the ad and linking to the advertiser's site, and how many went on to make a purchase. (*See, e.g.*, SF ¶¶ 62-64, 66.)

32. Some Internet advertising generates, for the referring website, a share of the revenue generated from purchases by consumers who bought after viewing the website advertisement and linking to the advertiser's site. (SF ¶ 63.) This is called "affiliate marketing." (*Id.*)

33. Online companies like Yahoo! have developed software to track users' clickstreams. (SF ¶ 64.) A clickstream is the path, or sequence of mouse clicks, that a user has taken in navigating Internet sites. (SF ¶ 65.) Internet companies may use that information to serve up targeted advertisements based on a user's past behavior. (SF ¶ 66; Tr. 1064:21-1065:21 (Rogers).)

According to one news article:

[B]y analyzing "click streams" on its network, Yahoo can spot potential buyers at various stages of the consideration process. In other words, by looking at the billions of user clicks that flow through its servers every day, Yahoo is getting better and better at figuring out that a given pattern—say, a user who's looked up football on Yahoo Sports, checked out adventure movies on Yahoo Entertainment, and compared truck prices on Yahoo Autos—means the browser is interested in buying a Jeep and is just beginning to think about a purchase. Another pattern might mean a user is interested in minivans and is just a few days from buying. Such information is hugely valuable, says [Chrysler's director of marketing communications]: Once Yahoo knows where a potential customer is in the car-buying process, it can serve up the appropriate Chrysler ad.

Fred Vogelstein, *Yahoo's Brilliant Solution*, FORTUNE (Aug. 19, 2005). (SF ¶ 66.)

(d) Increase of Internet Advertising Revenue

34. Advertisers have devoted increasing shares of their advertising budgets to Internet advertisements in recent years. According to PricewaterhouseCoopers, in 1996 spending on Internet advertising stood at about \$270 million, and reached about \$6 billion in 2002. (AsX. 363.) By the end of 2006, Internet advertising expenditures totaled approximately \$16.8 billion, representing a 34% increase over 2005 and a nearly 180% increase over 2002. (SF ¶ 68; AsX. 363.) Internet advertising expenditures are projected to reach \$20 billion by the end of 2007. (AsX. 113, 363.)

35. The rapid growth of Internet advertising expenditures is graphically portrayed by ASCAP Exhibit 363. (*See also* AsX. 28.)

36. The growth in Internet advertising revenue has recently outpaced the growth in advertising on other traditional media. (SF ¶ 70.) Between 2004 and 2005, Internet advertising revenues grew by 29.2%, compared with 19.6% for cable television, 4.8% for radio, and 4.5% for broadcast and syndicated television. (*Id.*) Not coincidentally, the amounts spent on Internet advertising and the number of high-speed Internet connections have grown in tandem over the past decade. (AsX. 366 (Sources: AsX. 28, 149.))

(e) AOL and Yahoo! Shares of Internet Advertising Revenue

37. Revenue from online advertising is primarily concentrated among a few top advertising-selling Internet companies. (AsX. 28, at 7; Tr. 106:19-23 (Amenita).) According to PricewaterhouseCoopers, in the fourth quarter of 2005, the ten leading advertising-selling companies received about 72% of total Internet advertising dollars, and the top 50 companies commanded about 95% of Internet advertising. (SF ¶ 71; AsX. 28, at 7; Tr. 106:19-23 (Amenita).)

38. The four largest Internet companies—Google, Yahoo!, AOL, and MSN—commanded two-thirds of the online advertising spending in 2007, according to published estimates. (SF ¶ 72; AsX. 113.) Yahoo! was predicted to earn 18.7%, and AOL is predicted to earn 9.1% of all dollars spent on Internet advertising in 2007. (SF ¶ 73; AsX. 113; Tr. 108:23-109:2 (Amenita).) Thus, two of the three Applicants here—AOL and Yahoo!—were predicted to earn a combined 27.8% of all Internet advertising revenue, or about \$5.56 billion in ad revenue in 2007.

(f) **Reliance of Internet Companies and Their Advertisers on comScore and/or Nielsen NetRatings to Measure Internet Audience**

39. As the use of the Internet — and the amounts spent on the new medium — have rapidly grown, so has the demand for objective measurements of the size and characteristics of online audiences. Consequently, Internet companies and their advertisers rely on Nielsen/NetRatings (“Nielsen”) and comScore Media Metrix (“comScore”), two Internet audience measurement firms that measure the traffic to and time spent on Internet sites and services, including Applicants’ Internet properties. (SF ¶ 85; Tr. 1090:23-1091:5 (Rogers); Tr. 1425:9-12 (Conroy); Tr. 1469:5-12 (Winston).) Employing proprietary technology, both comScore and Nielsen have devised panels of Internet users in order to determine audience sizes, demographics, activities and habits. (Tr. 331:21-332:4 (Boyle).)

40. Nielsen and comScore measure such information as the number of unique visitors to, reach of, and the average and total time spent on Internet sites. (*See, e.g.*, AsX. 65, 170, 306.) A “unique visitor” is a person who visits an Internet site at least once within a specified period of time. (SF ¶ 78.) “Reach” is the percentage of the total Internet population that viewed a particular site at

least once. (SF ¶ 80.) For example, comScore estimated that more than [REDACTED] million unique visitors accessed the Yahoo! Site in the month of June 2006, meaning that [REDACTED] million individuals visited at least one page of the Yahoo! Site in June 2006. (SF ¶ 79.) In that same month, Yahoo!'s reach was [REDACTED]% in June 2006, meaning that Yahoo! was visited by [REDACTED]% of the approximately [REDACTED] million total Internet users in the United States that month. (AsX. 306.)

41. The average time spent on a site is the average amount of time— typically expressed in minutes or hours—that a unique visitor spent on a site in a given period of time. (SF ¶ 81.) Total time spent on a site is the total amount of time all unique visitors spent on a particular site. (SF ¶ 82.) For example, in June 2006, each unique visitor to Yahoo! spent, on average, [REDACTED] minutes (about [REDACTED] hours) on that site, and all the visitors to Yahoo! spent a total of about [REDACTED] minutes on the site. (AsX. 306.) These metrics gauge the level of audience engagement with the site. (*See, e.g.*, Tr. 1404:14-17 (Conroy); 1469:5-17; 1559:6-13 (Winston).)

42. Nielsen and comScore function in the Internet industry much as Nielsen Media Research and Arbitron do in the television and terrestrial radio industries, respectively. (SF ¶ 84.) While these services are not without critics, such criticisms are not unlike criticisms of network television ratings, where broadcasters claim that television ratings services undercount network viewers. (Tr. 336:10-12 (Boyle).) Nevertheless, comScore and Nielsen are generally regarded as having the best publicly available Internet audience measurement data on sites and services like AOL and Yahoo!. (Tr. 336:23-337:2 (Boyle).)

43. Both advertisers and Internet companies, including Applicants, purchase and use Nielsen and comScore audience data. (*See, e.g.*, SF ¶ 85; Tr. 1425:9-12 (Conroy); 1469:5-23 (Winston).) Indeed, online companies pay substantial amounts for access to detailed data from comScore and

Nielsen. AOL, for example, paid between [REDACTED] and [REDACTED] for comScore data in 2006. (Tr. 1555:3-5 (Winston).)

44. Online companies use these data to attract advertisers. Applicants, in particular, rely on comScore and Nielsen data. Yahoo! subscribes to comScore, and formerly subscribed to Nielsen. (Tr. 1090:21-22, 1091:9-14 (Rogers).) Yahoo! uses such data to market itself to investors, potential advertisers, and the public. (Tr. 1093:8-24; 1094:18-1099:23 (Rogers); AsX. 306.) Yahoo! uses comScore data because it is a publicly available data source that is “trusted.” (Tr. 1105:14-18 (Rogers).) Indeed, Yahoo! has called comScore the “global standard in Internet audience measurement.” (SF ¶ 83.) Similarly, comScore is the principal data source for AOL’s public reporting of traffic and usage. (Tr. 1425:2-12, 21-25 (Conroy).) AOL reports several comScore metrics in its publicly-filed trending schedules, including unique users, page views, and revenue per page. (Tr. 1469:5-17 (Winston).)

II. ASCAP

45. The American Society of Composers, Authors and Publishers is an unincorporated membership association. (SF ¶ 89.) ASCAP has more than 295,000 United States members who are composers, songwriters, lyricists, and music publishers on whose behalf ASCAP licenses the non-dramatic public performing rights in copyrighted musical works. (*Id.*; Tr. 80:9-10 (Amenita); AsX. 358 (Articles of Association).) It is the only American performing rights organization wholly owned and managed by and for writers and publishers of music.

46. ASCAP’s members own the copyrights to a vast number of musical compositions, and have granted ASCAP a non-exclusive right to license performing rights in these compositions. (SF

¶ 89.) In addition, ASCAP has entered into agreements with foreign performing rights organizations that authorize ASCAP to license United States performances of musical works on their behalf. (*Id.*)

47. The ASCAP repertory of musical works includes millions of musical compositions. (*Id.*) No other performing rights organization licenses the same musical works in its repertory as ASCAP does. (SF ¶ 90.)

48. ASCAP licenses public performing rights to a wide variety of users, including, among others, Internet service providers and sites, local television and radio stations, broadcast and cable/satellite television networks, cable systems operators and direct broadcast satellite services, restaurants, night clubs, universities and colleges, hotels, concert promoters, sports arenas, roller skating rinks and other businesses that perform music publicly. (SF ¶ 91.)

49. The overwhelming majority of online music performances (well over 90%) comprise compositions in either the ASCAP repertory or the repertory of Broadcast Music Inc. (“BMI”). (SF ¶ 92.) ASCAP and BMI have roughly equal shares of these performances. (*Id.*) Most of the remainder of the performances of music online are of compositions in the SESAC repertory, public domain works, and works by copyright owners who are unaffiliated with a performing rights organization. (*Id.*) SESAC’s share of the market for music performances on radio is significantly less than 10%. (Tr. 2214:1-7 (Boyle).)

50. By joint motion of the United States and ASCAP, and following a period of notice and public comment, the Amended Final Judgment entered in *United States v. American Society of Composers, Authors and Publishers*, 41-1395, S.D.N.Y., was further amended on June 11, 2001 (“Second Amended Final Judgment” or “AFJ2”). (SF ¶ 93.)

51. AFJ2 permits ASCAP to obtain from its members only a nonexclusive right to issue

licenses for non-dramatic public performance of the members' copyrighted musical works. (SF ¶ 94.) ASCAP's members are free to license their performance rights directly or to assign their rights to another entity. (*Id.*)

A. ASCAP's Representation of the Interests of Its Members

52. ASCAP was formed in 1914 by and for the benefit of composers and music publishers. (AsX. 358 (Art. I).) Its members are all composers, lyricists and music publishers. (*Id.* (Art II); SF ¶ 89.) Its Board of Directors is comprised of songwriters, composers and music publishers. (Tr. 80:21-23 (Amenita); AsX. 358 (Art. IV, § 1).) ASCAP's Directors are elected by the ASCAP membership, (Tr. 80:24-81:3 (Amenita); AsX. 358 (Art. IV, § 4(g))), and its Officers are in turn elected by ASCAP's Board of Directors (Art. VI, § 2)).

53. ASCAP has a contractual duty to represent the interests of its members – composers, lyricists and publishers – in its license negotiations with third parties. (AsX. 359.) Under ASCAP's membership agreement, which each member signs, ASCAP is obligated “in good faith, to use its best endeavors to promote and carry out the objects for which it was organized.” (AsX. 359, § 3.) ASCAP's Articles of Association, which are incorporated by reference in the Membership Agreement, (*id.*) state that ASCAP's objects for which it was organized include “to promote and foster by all lawful means the interest of composers, authors and publishers of musical works.” (AsX. 358, Art. I, § 1(f).) Christopher Amenita (“Amenita”), the head of ASCAP's Enterprises Group, which encompasses new media licensing, testified that his goal as part of ASCAP's management is to protect and further the interests of ASCAP's members. (Tr. 81:4-6 (Amenita).)

B. ASCAP's Differences From BMI

54. Broadcast Music, Inc. ("BMI") is a New York corporation formed in 1939 by and for the benefit of broadcasters. *See United States v. Am. Soc'y of Composers, Authors and Publishers*, Civ. 13-95 (ELP), 1982 WL 1265, at *3 (S.D.N.Y. May 26, 1982). Its shareholders are comprised exclusively of persons or entities who are or were broadcasters. (Tr. 2000:19-21 (Boyle); AsX. 476.) BMI's Board of Directors is comprised almost entirely of executives of major radio and local television broadcasters. (Tr. 2000:19-21 (Boyle); AsX. 476.) Indeed, the Chairman of BMI's Board of Directors simultaneously serves as the Joint Chairman of the National Association of Broadcasters. (AsX. 476.)

55. BMI's Board members include senior executives from Clear Channel Radio. (AsX. 476.) Clear Channel Radio is one of the largest online music providers. It is frequently listed as one of the top five Internet radio webcasters, along with AOL and Yahoo!. (Tr. 2089:20-2090:1 (Conroy); AsX. 170 at 50.) In 2005 and 2006, Clear Channel Radio was ranked by comScore as first in total unique visitors. (AsX. 169, 170.) As such, Clear Channel is a direct competitor of Applicants. Indeed, AOL's former Vice President Christine Winston testified that the nature and amount of music available on AOL Radio is similar to that of a radio conglomerate like Clear Channel. (Tr. 1529:1-25 (Winston).) Other radio and television broadcasters who own and control BMI also offer their content on the Internet. (AsX. 476.)

56. BMI's agreements with its writers and publishers contain no contractual obligation for BMI to represent the interests of writers and publishers in BMI's license negotiations with third parties. (AsX. 475.) Moreover, the BMI Affiliate Agreement expressly disclaims any fiduciary duty to its contracting composer and publisher affiliates, stating:

You acknowledge that the relationship between you and us which is created by this agreement is one of ordinary contracting parties and is not intended to be a fiduciary relationship with respect to any of the rights or obligations hereunder.

(AsX. 475, § 24.)

57. BMI operates under a separate consent decree that differs from AFJ2 in many respects. Importantly, AFJ2 requires that ASCAP offer to its online licensees the option of a per-segment license, while the BMI consent decree does not give BMI licensees the option of a per-segment license. (Tr. 1999:22-25 (Boyle).)

III. The Applicants

A. AOL

58. Applicant AOL is a global Internet services company that operates a number of Internet sites and services, including the AOL.com portal. (SF ¶ 95.) An Internet portal is a website that often serves as a user's gateway to multiple content offerings. (*Id.*) From the AOL.com portal, AOL provides users access to email accounts, instant messaging, chat rooms, music, news, shopping, games, real estate, entertainment, autos, sports, money and finance, mobile phone services, jobs, personals, and video, among other features. (SF ¶¶ 95-96.)

59. During the open period, AOL has streamed music contained in audio and audiovisual performances across its network of subscription- and advertising-supported sites and services, in areas including but not limited to:

- the members-only portion of AOL (*see, e.g.*, Tr. 1477:12-1478:6 (Winston); JX 28, at 3);
- the AOL homepage (*see, e.g.*, Tr. 203:3-12 (DeFilippis); 760:17-25 (Guerin-Calvert); Tr. 1422:23-1423:12 (Conroy); Tr. 1525:19-1526:13 (Winston); AsX. 118A, at AOL ch. 9, 00:18-01:06, 01:10- 01:45);
- AOL Music (*see, e.g.*, SF ¶ 97; Tr. 205:3-8 (DeFilippis); Tr. 1446:7-13 (Winston);

- AsX. 118A, at AOL ch. 5);
- AOL Television and In2TV (*see, e.g.*, SF ¶ 95; Tr. 2060:14-16 (Conroy); AsX. 118A, at AOL ch. 6, 02:40-03:15, 03:55-04:15; AsX. 411 at 1, 2);
 - AOL Video (*see, e.g.*, SF ¶ 95; Tr. 1415:21-1416:1, 2061:21-25 (Conroy));
 - Moviefone (*see, e.g.*, Tr. 1397:9-13, 1435:12-16 (Conroy); AsX. 118A, at AOL ch. 4, 03:33-04:20);
 - AOL Kids (*see, e.g.*, Tr. 761:19-25 (Guerin-Calvert); Tr. 1580:1-10, 1582:1-10 (Winston); Tr. 1822:19-25 (Candell); Tr. 2125:4-17, 2126:7-17 (Conroy); AsX. 118A, at AOL ch. 7);
 - Red (*see, e.g.*, Tr. 203:14-204:5 (DeFilippis); Tr. 1808:3-12 (Candell));
 - SHOUTcast (*see, e.g.*, SF ¶¶ 24, 178);
 - AOL Autos (*see, e.g.*, Tr. 1801:18-1802:20, 1802:10-20 (Candell); AsX. 118A, at AOL ch. 9, 08:30-09:00);
 - AOL Finance, AOL Food, and AOL Games (*see, e.g.*, Tr. 1382:21-1383:10, 1394:16-1395:2 (Conroy));
 - AOL News (*see, e.g.*, Tr. 740:7-10 (Guerin-Calvert); Tr. 1394:16-1395:2 (Conroy));
 - Love@AOL (*see, e.g.*, Tr. 200:19-201:4, 202:13-203:1 (DeFilippis); Tr. 1805:2-9 (Candell); AsX. 118A, at AOL ch. 9, 06:56-07:18);
 - AOL Weather (*see, e.g.*, AsX. 118A, at AOL ch. 3, 01:15-02:00, 03:20-03:51, 04:28-04:43);
 - UnCut Video (*see, e.g.*, AsX. 118A, at AOL ch. 2);
 - AOL Search (*see, e.g.*, Tr. 1794:18-20 (Candell));
 - AOL Toolbar (*see, e.g.*, Tr. 204:11-25 (DeFilippis); Tr. 2055:18-24 (Conroy));
 - AIM (*see, e.g.*, Tr. 205:16-206:8 (DeFilippis); Tr. 765:2-3 (Guerin-Calvert); Tr. 1795:19-24 (Candell); Tr. 2076:7-20, 2135:11-23 (Conroy));
 - AOL widgets and third-party sites (*see, e.g.*, Tr. 207:21-208:7 (DeFilippis); Tr. 2070:1-15, 2070:25-2071:10, 2081:4-10, 2083:3-23, 2084:11-18, 2109:6-11, 2148:7-11 (Conroy); AsX. 429); and
 - AOL Music Now (*see, e.g.*, SF ¶ 95).

1. AOL's Application for an ASCAP License

60. AOL applied for a single blanket license commencing January 1, 2005 and covering the following sites and services: AOL (members only); AOL.com, including all sub-domains, such as AOL Music, AOL Radio, AOL Sessions, AOL Videos, AOL Video-on-Demand, AOL MusicNow, iTunes on AOL, AOL G-Sides, AOL Search Hub, AIM (including AIM "Triton"), AOL CityGuide,

AOL Mobile, and In2TV; Netscape Netcenter; Netscape.com; Radio@Netscape; Moviefone; SHOUTcast; TMZ.com; Compuserve; Compuserve.com; ICQ; Winamp; and Gateway's and Walmart's versions of the AOL subscription service. (SF ¶ 177-78.)

61. ASCAP entered into negotiations with AOL, but the parties were unable to agree on final fees for the open period. (SF ¶ 179.) Consequently, on November 1, 2005, ASCAP applied to the Court for a determination of interim and final license fees for AOL. (SF ¶ 180.) After ASCAP filed its application, AOL agreed to pay to ASCAP interim fees of ██████████ in 2005, ██████████ in 2006, and ██████████ annually after that. (SF ¶ 181.)

62. AOL remains open with regard to final fees for the period January 1, 2005 to the present. (SF ¶ 182.)

2. Sites and Services for Which AOL Seeks an ASCAP Blanket License

63. AOL has applied for an ASCAP blanket license that covers a wide array of AOL sites and services containing music performances, not just the so-called "music areas" of AOL.com. (SF ¶ 178.) These sites and service use music to attract users and to enhance the portal experience.

(a) AOL (Members Only)

64. Until July 2005, AOL was primarily a subscription service that provided AOL members access to both Internet connections and a "walled garden" of exclusive content available only to AOL subscribers. (Tr. 1450:3-14 (Winston).) This exclusive content included streaming audio-only music and audiovisual programming containing music, such as premieres of songs and music videos, AOL Sessions features, and enhanced AOL Radio features, such as more music channels and

streaming music without advertisements. This music content was available only to AOL subscribers and not to the general public. (Tr. 1477:11-1478:6 (Winston).)

65. During the open period, AOL has used such exclusive content, including music, to attract new subscribers and thereby generate subscription revenue. According to AOL's 2005 10-K filing:

In the first quarter of 2006, AOL entered into a number of agreements with high-speed [Internet] access providers to offer the AOL service along with high-speed Internet access. Members connecting to the AOL service through a high-speed connection such as cable or digital subscriber lines ("DSL") can take advantage of expanded multimedia content, including streaming music, CD-quality radio and other audio, full-motion video, and streaming news clips.

(JX 28, at 3.)

66. AOL's efforts to use music content to sell subscriptions is also evident from its dealings with XM Satellite Radio. At the end of 2005, AOL entered into an arrangement whereby XM agreed to supply a number of streaming music channels to AOL Radio. (ASCAP Ex. 439.) AOL's objective in obtaining such music was to "mitigate operating costs while augmenting the content offerings on its AOL Properties as a marketing effort to increase the number of AOL Members."

(*Id.*, at 1.)

67. Indeed, all of AOL's exclusive content—which included music streams and streams of audiovisual programming containing feature, theme, and background music—was obviously designed to serve this function. And it did so; by offering access to content, features, and services, AOL enhanced the sale of its subscriptions. (JX 28, at 3.)

68. AOL's exclusive music content was also a significant factor in satisfying and retaining its members. According to AOL, "AOL for Broadband members cite Radio@AOL as a major contributor to satisfaction and retention." (AsX. 156, at 13.) AOL Radio listeners were far more satisfied with AOL than non-listeners, spent twice as much time as non-listeners on AOL as a whole,

and were less likely to cancel their AOL subscriptions. (*Id.* at 13.) According to an AOL survey, AOL Broadband subscribers ranked the “Music Archive” and “Sessions@AOL” parts of AOL as popular areas that made them less likely to cancel their AOL subscriptions. (AsX. 155, at ASCAP AOL 02416.)

69. AOL has also recognized that the music and other content it made available exclusively to AOL subscribers required an ASCAP license. As early as 2001, and continuing into the open period, AOL applied to ASCAP for a blanket license. (Tr. 1952:25-1953:2, 1954:9-11 (Candell); JX 21; SF ¶ 178.)

70. In July 2005, AOL began to transition from a subscription service to an advertising-supported, free-to-the-user service, and started to make all of its content available for free to all Internet users, not just AOL subscribers. (Tr. 1450:13-14 (Winston).) By August 2006, the transition was complete and all of AOL’s content was available for free. (Tr. 1450:15-21 (Winston).) Millions of AOL subscribers, however, continued their AOL subscriptions (Tr. 1450:22-1451:1 (Winston)), having originally signed up with AOL for access to an Internet connection and AOL’s exclusive content offerings.

(b) AOL.com Portal

71. The AOL.com portal currently offers all Internet users access to AOL’s content without charge. AOL has integrated music into its portal offerings and performs music in many areas of the portal. (Tr. 2075:13-16 (Conroy); AsX. 118A.) AOL streams music and audiovisual content containing music on such site sections as the AOL homepage, AOL Music, AOL Television, In2TV, AOL Video, AOL Kids, Red, AOL Autos, AOL Finance, AOL Games, AOL News, Love@AOL,

and AOL Search, to name only a few. A sampling of this music use is demonstrated on AsX. 118A, a DVD that shows some of the myriad uses of music made by Applicants as of March 14, 2007. AOL's portal is also publicly accessible on the Internet at <http://www.aol.com>.

(i) **AOL Homepage**

72. The AOL homepage is a hub from which users can access all of AOL's offerings and content. (AsX. 118A.) The AOL homepage is a popular destination. At the end of 2006, it was the fourth-most visited homepage on the Internet, with more than 46 million monthly unique visitors. (AsX. 170, at 34.)

73. AOL users can launch music streams directly from the AOL homepage, where this feature is prominently displayed. (*See, e.g.*, AsX. 118A, at AOL ch. 9, 00:18-01:06, 01:10-01:45.) The homepage highlights four "super tabs" for Mail, Weather, AOL Radio with XM, and Video. (Tr. 1422:23-1423:2 (Conroy).) Super tabs are links that let users instantly access, preview, and launch popular AOL features without leaving the homepage. (Tr. 1402:12-19 (Conroy).)

74. Users can click the "AOL Radio with XM" super tab to launch a streaming music channel player that appears on top of the AOL portal homepage. (Tr. 1422:23-1423:12 (Conroy); Tr. 1525:19-1526:13 (Winston).) After launching music from the AOL Radio with XM super tab, users are free to explore the rest of the AOL homepage and the entire AOL portal while AOL continuously streams music.

75. AOL users can also stream videos on the AOL homepage by moving the cursor over the Video super tab and clicking on the "Clip of the Day." (Tr. 203:3-12 (DeFilippis); Tr. 1422:23-1423:2 (Conroy).) The "Clip of the Day" video is frequently a movie trailer that contains theme and

background music, a music video or some other audiovisual content that contains music. (Tr. 203:3-12 (DeFilippis); Tr. 760:17-25 (Guerin-Calvert).)

76. AOL has also enabled users to launch music performances from elsewhere on the AOL homepage. For example, the AOL homepage has featured a section called “Watch and Listen” under which AOL has offered streams of music videos directly from the homepage. (AsX. 118A, at AOL ch. 9, 00:18-01:06 (stream of Lily Allen music video “Smile”).) AOL also has a button on the homepage, “Launch AOL Radio,” that, when clicked, will cause a streaming music channel to launch. (AsX. 118A, at AOL ch. 9, 01:10-01:45.)

77. The AOL homepage also provides links to other sections of the AOL portal and other AOL services such as movies, television, instant messaging, and search, most if not all of which contain music performances. (See, e.g., AsX. 118A, at AOL ch.1, 03:05-03:20; AOL ch. 4, 00:05-00:20; AOL ch. 6, 00:05-00:25.)

(ii) **AOL Music**

78. AOL Music offers a wide selection of “free,” advertising-supported, streaming webcasting and on-demand music services, including AOL Radio, Top 11 video countdown, AOL Sessions, live concerts, music videos and performances of full CDs. (SF ¶ 97.) AOL Music users can stream music webcasts, music videos, and individual songs on demand. (Tr. 205:3-8 (DeFilippis); Tr. 1446:7-13 (Winston); AsX. 118A, at AOL ch. 5.)

79. AOL Music has a separate AOL Radio section that features a directory of webcast music channels and music categories. (Tr. 204:20-25 (DeFilippis).) AOL Radio streams 200 music channels that are preprogrammed by AOL and twenty music channels that are preprogrammed by

XM Satellite Radio. (Tr. 1487:7-10 (Winston); AsX. 118B, at 02:38-02:50.) AOL's streams of the XM stations are re-broadcasts of XM's satellite programming, and do not contain in-stream advertising. (Tr. 1487:11-17 (Winston).) AOL apparently requires and seeks an ASCAP license for its re-broadcasts of XM radio programming.

80. AOL Music also offers streams of music videos. AOL boasts that it has the "world's largest music video archive, featuring thousands of videos and artists from nearly every genre." (AsX. 118B, at 02:52-03:20.) As of November 8, 2007, AOL offered 15,580 music videos at AOL Music. (Tr. 1570:14-20 (Winston).)

81. AOL Music also offers AOL Sessions, which features exclusive music videos of performances by popular artists recorded in AOL's studios. (Tr. 205:8-9 (DeFilippis); AsX. 118B, at 02:52-03:20; AsX. 118A, at AOL ch. 5, 02:43-03:30 (AOL Sessions music video featuring a performance by Carrie Underwood).)

82. Users of AOL Music can also access "Full CD Listening Parties," a feature that lets users listen to entire music albums. (Tr. 1423:21-1424:9 (Conroy).) For example, at trial ASCAP demonstrated how a user could stream, on demand, a newly-released full-length CD by Celine Dion, entitled "Taking Chances," or choose to play individual songs from the CD. (Tr. 1562:12-23 (Winston).) After initiating the CD performance, a user could visit other parts of the AOL portal, such as e-mail, AIM, or news, while the CD continues to play in its entirety. (Tr. 1562:24-1563:2 (Winston).)

83. AOL Music also offers other features with many music performances, such as the PopEater music blog and Spinner, where users can listen to free music and watch free music videos, concerts, and live performances. (Tr. 205:9-13 (DeFilippis); AsX. 118A, at AOL ch. 8.) On

Spinner's "3x3" section, for example, users can stream videos of concert performances. (AsX. 118A, at AOL ch. 8, 01:45-02:15 (concert video of the band Silversun Pickups).)

84. Song downloads are not available on AOL Music (Tr. 1454:20-21 (Winston)), and AOL does not offer downloads of music videos. (Tr. 2156:16-18 (Conroy).)

(iii) AOL Television and In2TV

85. AOL also offers a substantial amount of streaming television programming on the AOL Television and In2TV parts of the AOL portal. In 2006, AOL transmitted [REDACTED] streams of videos in its "TV" category of video streams. (AsX. 207, at 31-70.)

86. AOL offers streams of thousands of full-length television shows. (Tr. 2060:14-16 (Conroy); AsX. 411, at 1.) These television shows include thousands of episodes on AOL's In2TV feature. (Tr. 2060:17-21 (Conroy); Tr. 1806:24-1807:1 (Candell).)

87. AOL has described In2TV as a visitor's "own personal network." (AsX. 411, at 2.) According to Kevin Conroy, AOL's Executive Vice President, "[w]ith In2TV, we are enabling Web users to experience and interact with television programming in an entirely new way, and creating a new distribution platform for TV content." (AsX. 411, at 1.) In2TV is "yet another demonstration of our commitment to making our next-generation AOL.com portal the best destination for video on the Web." (AsX. 411, at 1.)

88. In addition to full-length television episodes, In2TV offers a variety of audiovisual programming where music is the primary focus of attention. In2TV streams "TV Karaoke," sing-alongs with favorite television show themes. (AsX. 411, at 2.) In2TV also offers "Rock 'n Flix," videos of notable music performances. (AsX. 118A, at AOL ch. 6, 02:40-03:15 (Whitney Houston's

performance of “I Will Always Love You” from the film, “The Bodyguard”); AsX. 118A, at AOL ch. 6, 03:55-04:15 (Fats Domino’s performance of “Wait and See”).)

89. AOL is responsible for securing the performance rights for music in all In2TV programming. (Tr. 2060:17-2061:5 (Conroy).)

(iv) **AOL Video**

90. AOL offers audiovisual content on AOL Video, a “hub” page where users can stream and watch any video that is available elsewhere on the AOL portal. (Tr. 1415:21-1416:6, 2061:21-25 (Conroy); AsX. 118A, at AOL ch. 1, 04:50-04:53.) On AOL Video, users can, among other things, browse videos by subject, source, or by what people are watching the most. (AsX. 118B, at 01:53-02:01.)

91. AOL Video categorizes all its videos, and users can select “music” among the categories. (Tr. 1416:13-20 (Conroy).) A user need not visit an AOL Music page to launch a music video performance on AOL. At trial, ASCAP demonstrated how a user can stream Carrie Underwood and Bobby Darin music videos from AOL Video. (Tr. 1417:21-1418:3 (Conroy); Tr. 1575:8-17 (Winston).) The videos available on AOL Video include user-uploaded videos, as well. (Tr. 1439:7-18 (Conroy).)

(v) **Moviefone**

92. AOL also operates a popular movie site called Moviefone, where users can access streams of movie trailers and clips. At the end of 2006, Moviefone was the second most visited movie site on the Internet. (AsX. 170, at 42.)

93. In addition to providing information about movies, including reviews and timetables, AOL allows users to watch hundreds of movie trailers, most of which contain music. (AsX. 118A, at AOL ch. 4, 03:33-03:49; Tr. 1397:9-13, 1435:12-16 (Conroy).)

94. AOL streams a significant number of movie clips and trailers. In all of 2006, AOL transmitted [REDACTED] such streams in its “Movies - Trailers & Clips” category of video streams. (AsX. 207, at 28-70.)

(vi) **AOL Kids**

95. AOL Kids is a part of the AOL portal that offers a variety of music and other programming, including cartoons, movie and television clips. (AsX. 118A, at AOL ch. 7.) As part of its music offerings, AOL Kids streams music features such as “Radio KOL,” an Internet radio station. (Tr. 2126:7-10 (Conroy).) Music is instantly available on AOL Kids: when users visit the AOL Kids homepage, music automatically starts playing from a Radio KOL player. (Tr. 761:19-25 (Guerin-Calvert); Tr. 1582:1-10 (Winston); Tr. 2125:4-17 (Conroy).)

96. AOL Kids also offers “Listening Parties,” which are on-demand streams of audio-only songs (Tr. 2126:7-2127:17 (Conroy)) and of music videos. (Tr. 1823:13-18 (Candell)). Once a user selects a song or video, the player on AOL Kids “Listening Parties” will automatically continue streaming additional songs or videos without any user input. (Tr. 1825:16-25 (Candell).)

97. AOL Kids also streams audiovisual programming that contains music. For example, at trial ASCAP streamed video clips from the film “High School Musical 2” available on AOL Kids. (Tr. 1580:1-10 (Winston).)

(vii) AOL Red

98. Red is a section of the AOL portal aimed at teenagers. It, too, provides users with audio and audiovisual content that contains music. Users can launch a streaming AOL Radio station directly from Red. (Tr. 203:14-22 (DeFilippis).)

99. ASCAP demonstrated at trial that Red hosts a segment called “Project Freshman”—an AOL-produced show about college students—whose episodes contain theme music. (Tr. 203:23-204:5 (DeFilippis); Tr. 1809:10-12 (Candell).)

(viii) SHOUTcast

100. SHOUTcast is an aggregator of streaming music channels that AOL operates, and for which AOL has applied to ASCAP for a license. (SF ¶¶ 24, 178.) SHOUTcast webcasts are accessible at <http://www.shoutcast.com>.

(ix) Audiovisual Programming Containing Music across the AOL Network

101. Millions of videos that contain music are accessible through AOL’s portal and network of sites. (Tr. 2058:4-24 (Conroy).) According to AOL, “you bring an Internet connection, and we’ll bring millions of high-quality videos, including music videos, on-demand news clips, full-length TV shows, movie trailers, and videos people create on their own.” (AsX. 118B, at 01:15-01:40). Of these videos, thousands are streamed directly from AOL. (Tr. 2058:4-24 (Conroy).)

102. As ASCAP demonstrated at trial, video streams are available throughout the AOL portal, including in AOL Autos, AOL Finance, AOL Food, AOL Games (Tr. 1382:18-1383:4 (Conroy)), AOL News (Tr. 740:7-10 (Guerin-Calvert)), and as described above, on the AOL

homepage, AOL Television, In2TV, AOL Video, Moviefone, AOL Kids, and Red.

103. In fact, there is video in most, if not all, of the categories of content offered by AOL. (Tr. 1383:4-10 (Conroy).) Video on AOL often includes theme music or background music. (Tr. 1394:16-1395:2 (Conroy).)

104. For example, as ASCAP demonstrated at trial, the AOL Autos site can stream hundreds of videos that contain music, including professional car reviews that contain theme and background music. (Tr. 1801:19-1802:16 (Candell); AsX. 118A, at AOL ch. 9, 08:30- 09:00.)

105. Love@AOL, which is devoted to people seeking mates or information about dating, is another part of the AOL portal that features audiovisual programming that contains music. (Tr. 200:19-201:4 (DeFilippis).) Love@AOL is “one of the big breakout hits of AOL.” (Tr. 1304:21-22 (Conroy).) For example, at trial ASCAP streamed episodes of “Pulse” that contain theme and background music. (Tr. 202:13-203:1 (DeFilippis); Tr. 1806:15-22 (Candell); AsX. 118A, at AOL ch. 9, 06:56-07:18.)

106. AOL also offers an array of user-generated videos that contain music. (AsX. 118A, at AOL ch. 2.) For example, AOL allows users to upload their own videos that incorporate music to the UnCut Video part of the portal. From UnCut Video, AOL streams user-generated content including videos about news, sports, pets, music, personals, short films, and autos. (AsX. 118A, at AOL ch. 2.) According to AOL, such user-generated, or “viral,” videos are “funny,” “bizarre,” and “fascinating,” and “you just can’t stop yourself from watching them.” (AsX. 118B, at 05:12-05:46.) AOL promotes itself as the “best place to look” on the Internet for such viral videos. (AsX. 118B, at 05:12-05:46.)

107. AOL produced little information on the amount of audiovisual streams that occur

outside of the music areas of its site. One AOL document, however, indicates that almost [REDACTED] videos streamed by AOL in the month of December 2006 ([REDACTED]) were streamed through areas outside of AOL Music, including the areas Movies, TV, TMZ, Living, Community and Kids On Line (KOL). (AsX. 207; 445.) In the same month, about [REDACTED] streams were streamed from AOL Music (or were music video streams from AOL Latino and KOL). (AsX. 207, at 26-70.)

(x) **AOL Search**

108. AOL has integrated music into its search features, as well. If a user searches the web for a performer or musician using AOL Search, the search results page will often provide links to streaming music and music videos on AOL, in addition to the search results and sponsored links. (Tr. 1794:8-1795:11 (Candell).)

109. For example, ASCAP demonstrated at trial that a search for “Bruce Springsteen” on AOL Search produces links to music videos and audio-only song streams on AOL. (*Id.*) When a user clicks on one of those links, a music player appears on top of the search results page, and plays the song or video. (*Id.*)

110. In addition, if a user searches for a movie title, the AOL Search results page will often include links to clips and trailers from the movie. Users, for example, can search for “Bee Movie” and then access the movie’s clips and trailers. (AOL Search results for “Bee Movie,” at [http://search.aol.com/aol/search?invocationType=comsearch30&query=bee+movie&do=Search.](http://search.aol.com/aol/search?invocationType=comsearch30&query=bee+movie&do=Search))

111. AOL also offers a specialized video search feature, which AOL touts as “the most powerful video search on the Web.” (Tr. AsX. 118B, at 01:43-01:52.) AOL promotes its video

search feature as allowing users to “[s]earch now for millions of high-quality videos” including music videos, news clips, movie trailers, “viral videos,” and full-length television shows. (AsX. 427.)

112. In addition, AOL operates a search feature and webpage known as Truveo, which allows users to search for, browse through, and play different kinds of videos. (Tr. 1354:10-19, Tr. 1430:12-1431:3 (Conroy).) Users can stream AOL music videos on Truveo, and at trial, ASCAP demonstrated an example of such a stream with the music video, “Crank That Soulja Boy.” (Tr. 1431:25-1432:4 (Conroy).) To the extent AOL provides video programming streamed on Truveo, AOL is responsible for securing the performing rights. (Tr. 1432:5-9 (Conroy).)

(xi) AOL’s Use of Music to Promote Other AOL Features

113. AOL uses music audiovisual programming that contains music to promote the entire AOL portal and AOL’s other offerings. AOL Music directs traffic to other areas of the AOL network. (Tr. 1457:12-17 (Winston).) For example, when it streams music content, AOL Music invites users to send music to others via AOL’s instant messenger and e-mail features. AOL prompts users to “IM This” performance (AsX. 118A, at AOL ch. 5, 03:15-03:25), “IM to a Friend” or “E-mail to a Friend” a music video (AsX. 118A, at AOL ch. 5, 04:46- 05:00), and to “IM to a Friend” and “E-mail to a Friend” an audio on-demand stream. (AsX. 118A, at AOL ch. 5, 06:13-06:26). AOL offers similar links to AOL instant messaging and e-mail in streaming audiovisual content as well. (AsX. 118A, at AOL ch. 6, 01:25-01:40.) In this way, AOL uses music and music videos to promote its instant messaging and e-mail services.

114. Users can listen to AOL webcasts, on-demand songs, and music videos while they are

using other AOL features, such as instant messaging, sending and receiving e-mails, reading news, shopping, looking at job listings, or checking stock quotes. (Tr. 1525:9-12 (Winston); Tr. 2066:18-2067:3 (Conroy); AsX. 118A, at AOL chs. 1, 9.) AOL encourages users to “surf,” or browse, AOL and other Internet sites while listening to music streamed by AOL. Indeed, AOL promotes its AOL Radio with XM feature by touting that “you’ll never have to surf in silence again.” (AsX. 118B, at 02:38-02:50.)

115. AOL also prominently features music in its advertisements for the AOL.com portal. When AOL marketed the launch of the new, free AOL, one of the features that AOL promoted was the availability of music on the site. (Tr. 2051:8-12 (Conroy).) AOL also highlights music in its own paid sponsored links on third-party search sites. One such sponsored link on Google states: “The New AOL.com – Now Free Online Radio, Free Video & More.” (Tr. 2052:4-25 (Conroy).) AOL has also used its music offerings to promote the entire AOL site on billboards. (AsX. 165A; Tr. 2053:9-15 (Conroy).)

(c) AOL Toolbar

116. AOL offers a toolbar application that users can install into their browsers and that offers shortcuts to a variety of AOL features, including video and radio. (Tr. 204:11-25 (DeFilippis).) The AOL toolbar offers the ability to launch AOL Radio quickly and easily from any place on the web. (Tr. 2055:18-24 (Conroy).)

(d) AIM Instant Messenger

117. AOL offers an instant messenger application known as AIM. AIM users install the

application on their computers and use it to communicate with each other instantaneously over the Internet. (Tr. 205:14-20 (DeFilippis).) AIM is used by millions of people and is one of the most popular areas on AOL. (Tr. 2078:15-20 (Conroy).)

118. The AIM application comes with a pre-installed button that allows users to stream music channels and video directly from the AIM window. (Tr. 205:21-206:8 (DeFilippis); Tr. 1795:19-24 (Candell).) AOL Radio is integrated into the AIM Instant Messenger buddy list (Tr. 2076:7-20 (Conroy)), and AIM users can listen to music while sending and receiving instant messages. (Tr. 765:2-3 (Guerin-Calvert); Tr. 2135:11-23 (Conroy)). The AOL Radio player in the AIM application does not have any space for any banner ads, but the AIM application window displays ads above the AOL Radio button. (Tr. 2079:22-2080:10 (Conroy).)

119. AIM also offers a feature known as AIM Tunes, which is a downloadable plug-in that allows two users on each other's buddy lists to share their favorite music with each other. (Tr. 2077:24-2078:11 (Conroy).) Using AIM Tunes, a user can stream music directly to his or her "buddies." (Tr. 2079:3-12 (Conroy).) AOL does not currently monetize AIM Tunes. (Tr. 2079:17-21 (Conroy).) However, when users install the AIM Tunes upgrade—which streams music to and from a user's AIM buddies—they are automatically prompted to install the AOL Toolbar for AIM and QQ Games applications, as well as to make AOL.com the browser's default homepage and to use AOL Search as the default search application for the browser. (AsX. 423; Tr. 2081:16-2082:12 (Conroy).) In this way, AOL uses music to promote customer adoption of its other services.

120. On the AIM.com webpage, music is the first product highlight presented, and AOL invites users to try the feature with the following text: "Hey music lovers, time to tune in, stream your favorite tunes to and from your buddies on AIM." (Tr. 207:6-15 (DeFilippis).) AOL offers

users the ability to send others, via instant messenger and e-mail, links to songs and music videos on AOL. (Tr. 206:15-24 (DeFilippis).)

(e) **AOL music on widgets and third-party sites**

121. AOL offers “widgets” that stream AOL music programming. (Tr. 207:16-19 (DeFilippis).) A widget is a software application that gives users access to featured content. (Tr. 207:20-24 (DeFilippis).)

122. The “AOL Music Top 100 Videos” is a widget that appears on the computer’s desktop and allows users to stream any one of AOL’s 100 most popular music videos directly to a player on the user’s desktop, without having to visit the AOL website. (Tr. 208:2-14 (DeFilippis); Tr. 2081:4-10 (Conroy); Tr. 1800:12-18 (Candell).) The user can also continuously stream all 100 videos in sequence automatically. (Tr. 208:15-21 (DeFilippis); Tr. 754:19-22 (Guerin-Calvert); Tr. 1800:19-22 (Candell).) Users of the “AOL Music Top 100 Videos” widget can send links to particular AOL music videos to others via AIM or e-mail. (Tr. 209:8-14 (DeFilippis).) There are no pre-roll or banner advertisements on the “AOL Music Top 100 Videos” widget. (Tr. 208:22-209:1 (DeFilippis).)

123. AOL offers a similar widget for users of Facebook, one of the largest social networking sites on the Internet. (Tr. 2083:14-2084:21 (Conroy); AsX. 429.) AOL’s “My Favorite Artists Facebook Widget” allows Facebook users to stream music videos from AOL directly to the user’s Facebook profile page. (Tr. 2084:2-18, Tr. 2109:6-11 (Conroy).) AOL is responsible for performance rights fees associated with such streaming music videos. (Tr. 2084:19-21 (Conroy).) Facebook is not owned by or affiliated with AOL or Time Warner. (Tr. 2083:24-2084:1 (Conroy).)

124. AOL also allows users to “snag,” or stream, AOL music videos on other social networking sites like MySpace or any other webpage controlled by the user. (Tr. 2070:1-15 (Conroy).) Like Facebook, MySpace is one of the most popular social networking sites on the Internet and allows users to post information about themselves and view information posted by others. (Tr. 2069:15-25 (Conroy).) At the end of 2006, MySpace was the fourth-most-visited Internet portal. (AsX. 170, at 49.)

(f) **AOL Music Now**

125. AOL owned and operated AOL Music Now between November 2005 and March 2007. (Tr. 1455:25-1456:6 (Winston); Tr. 1935:18-19 (Candell); SF ¶ 98.) At that time, AOL Music Now was a subscription service. (Tr. 1455:25-1456:3 (Winston).) For one flat monthly fee, an AOL Music Now subscriber had unlimited access to streaming on-demand audio music and music videos, webcasts, and conditional downloads. (Smith Dep. Tr. 35:2-24.) Users did not pay separate fees for access to the on-demand streaming, music video, and webcasting features of AOL Music Now. (*Id.*)

126. In January 2007, AOL entered into an agreement with Napster, Inc. to transfer AOL Music Now subscribers to Napster, a transition that was complete by March 31, 2007. (SF ¶ 98.) AOL, however, is responsible for securing performance rights for the AOL Music Now services from November 2005 through March 2007. (*Id.*)

3. **AOL’s Streams of Music and Music Videos**

127. AOL generally tracks the number and duration of audio-only on-demand streams, audio-only webcast streams, and music video streams on its sites and services. (SF ¶ 109.) AOL generally

does not track the number or duration of feature, theme, and background music performances contained in audiovisual programming such as television programs and movies, or the number or duration of music performances contained in promotional advertisements or streaming advertisements, on its sites and services. (SF ¶ 110.)

(a) Hours of Music Streaming

128. AOL provided ASCAP with music streaming data for all of its audio-only webcasts (except for streams from its SHOUTcast webcasting service), audio-only on-demand streams, and music video streams. (Tr. 121:22-122:7 (Amenita).)

129. In 2003, AOL streamed [REDACTED] hours of audio-only music webcasts (excluding SHOUTcast) and [REDACTED] hours of on-demand audio-only and music video streams, for a total of [REDACTED] streaming hours. (SF ¶ 111; AsX. 344.)

130. In 2004, AOL streamed [REDACTED] hours of audio-only music webcasts (excluding SHOUTcast) and [REDACTED] hours of on-demand audio-only and music video streams, for a total of [REDACTED] streaming hours. (SF ¶ 112; AsX. 344.)

131. In 2005, AOL streamed [REDACTED] hours of audio-only music webcasts (excluding SHOUTcast) and [REDACTED] hours of on-demand audio-only music and music video streams, for a total of [REDACTED] streaming hours. (SF ¶ 113; AsX. 344.)

132. In 2006, AOL streamed [REDACTED] hours of audio-only music webcasts (excluding SHOUTcast) and [REDACTED] hours of on-demand audio-only music and music video streams, for a total of [REDACTED] streaming hours. (SF ¶ 114; AsX. 344.)

4. AOL's Audience Visits to AOL Music

133. According to Nielsen, the total time users spent on all AOL sites and services in 2005 was [REDACTED] hours. (AsX. 65.)

134. According to Nielsen, the total time users spent on all AOL sites and services in 2006 was [REDACTED] hours. (AsX. 65.)

135. According to comScore, the total time spent on all AOL sites and services in 2005 was [REDACTED] hours. (AsX. 168.)

136. According to comScore, the total time spent on all AOL sites and services in 2006 was [REDACTED] hours. (AsX. 168.)

137. A significant percentage of all unique visitors to the AOL portal visit AOL Music pages, as reflected in the comScore data provided by AOL. (AsX. 350.) According to comScore, for the month of December 2003, the number of unique visitors to AOL Music was [REDACTED], and the number of unique visitors to the AOL portal was [REDACTED]. (*Id.*) Thus, roughly [REDACTED] people visited the AOL portal in December 2003, and [REDACTED]% of them ([REDACTED] people per month) also visited AOL Music. (*Id.*)

138. The popularity of AOL Music continued to increase in 2004 through 2006. According to comScore, in 2004, the average number of monthly unique visitors to AOL Music was [REDACTED] per month, and the average number of monthly unique visitors to the AOL portal was [REDACTED] per month. (SF ¶ 106; AsX. 350.) Thus, on average in 2004 approximately [REDACTED] people visited the AOL portal each month, and about [REDACTED]% of them ([REDACTED] people per month) visited AOL Music. (AsX. 350.)

139. According to comScore, in 2005, the average number of monthly unique visitors to AOL

Music was [REDACTED], and the average number of monthly unique visitors to the AOL portal was [REDACTED]. (SF ¶ 107; AsX. 350.) Thus, on average in 2005, approximately [REDACTED] people visited the AOL portal each month, and about [REDACTED]% of them ([REDACTED] people per month) visited AOL Music. (AsX. 350.)

140. According to comScore, in 2006, the average number of monthly unique visitors to AOL Music was [REDACTED], and the average number of monthly unique visitors to the AOL portal was [REDACTED]. (SF ¶ 108; AsX. 350.) Thus, on average in 2006, approximately [REDACTED] people visited the AOL portal each month, and about [REDACTED]% of them ([REDACTED] people per month) visited AOL Music. (AsX. 350.)

5. AOL's Revenue

141. In 2005, AOL's domestic United States advertising revenue was \$ [REDACTED], and domestic United States subscription revenue (excluding Music Now) was \$ [REDACTED], for a total of \$ [REDACTED]. (SF ¶ 100; AsX. 355.) In November and December 2005, AOL Music Now's revenue was \$ [REDACTED]. (AsX. 355.)

142. In 2006, AOL's estimated domestic United States advertising revenue was \$ [REDACTED], and estimated domestic United States subscription revenue (excluding MusicNow) was \$ [REDACTED], for a total of \$ [REDACTED]. (SF ¶ 101; AsX. 355.) In 2006, AOL Music Now's revenue was \$ [REDACTED]. (AsX. 355.)

B. RealNetworks

143. Applicant RealNetworks is a provider of media delivery software and services, and is