

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);

