NOT YET SCHEDULED FOR ORAL ARGUMENT
No. 19-1028
Consolidated with 19-1058, 19-1059, 19-1060, 9-1061, and 19-1062

IN THE

United States Court of Appeals for the District of Columbia Circuit

GEORGE JOHNSON,

Appellant,

v.

COPYRIGHT ROYALTY BOARD and LIBRARIAN OF CONGRESS,

Appellees.

NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL; PANDORA MEDIA, LLC; GOOGLE LLC; SPOTIFY USA INC.; NATIONAL MUSIC PUBLISHERS' ASSOCIATION; and AMAZON DIGITAL SERVICES LLC,

Appellants/Intervenors.

On Appeal From a Final Determination of the Copyright Royalty Board (No. 16-CRB-0003-PR (2018-2022))

BRIEF OF *AMICI CURIAE* SONGWRITERS OF NORTH AMERICA AND MUSIC ARTISTS COALITION IN SUPPORT OF APPELLEES COPYRIGHT ROYALTY BOARD AND LIBRARIAN OF CONGRESS, SUPPORTING AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Federal Rule of Appellate Procedure 29(a)(4) and D.C. Circuit Rule 28(a)(1), *amici curiae* Songwriters of North America ("SONA") and Music Artists Coalition ("MAC") certify as follows:

A. Parties and *Amici*

All parties, intervenors, and *amici* appearing before the Copyright Royalty Judges ("CRJs") and this Court of which SONA and MAC are aware are listed in the Public Initial Brief for Appellees filed by the U.S. Department of Justice ("DOJ Brief"), except that SONA and MAC seek to participate as *amici* in the present appeal before this Court. SONA, which is not a party to this appeal, initially appeared as a party in the proceeding before the CRJs, but withdrew in the early stages of the proceeding. *See* Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), 84 Fed. Reg. 1918, 1920 (Feb. 5, 2019) ("Determination"). MAC did not participate in the proceeding before the CRJs.

B. Rulings Under Review

References to the rulings at issue appear in the DOJ Brief.

C. Related Cases

The case under review has not previously been before this Court or any other court. Apart from the consolidated cases included in this appeal, SONA and MAC

are not aware of any other related case currently pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, SONA, a non-profit trade association that advocates for the interests of professional songwriters, states that it has no parent corporation, and no publicly held corporation holds ten percent or more of its stock. MAC, a non-profit trade association that advocates for the interests of music artists, states that it has no parent corporation, and no publicly held corporation that holds ten percent or more of its stock.

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GLOSSARY OF ABBREVIATIONS

CMM	U.S. Copyright Office, *Copyright and the Music Marketplace* (2015)
CRB	Copyright Royalty Board
CRJs	Copyright Royalty Judges
DOJ	Department of Justice
MMA	Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018)
Services	The online streaming music services offered by Amazon Digital Services LLC, Google LLC, Pandora Media, LLC and Spotify USA Inc.
SONA	Songwriters of North America
TCC	"Total content cost," a component of the section 115 streaming rate formula

STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY TO FILE

Amicus Songwriters of North America ("SONA") is a non-profit trade organization founded in 2015 by songwriting partners Michelle Lewis and Kay Hanley along with music attorney Dina LaPolt. SONA advocates on behalf of professional songwriters before Congress, in the courts, and in other arenas where songwriter interests are at stake. SONA has over 600 working songwriter and composer members. An overarching concern for SONA and its members has been the precipitous drop in songwriter income in the digital age. Through its advocacy efforts, SONA was instrumental in helping to secure passage of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) ("MMA"), landmark legislation to modernize the U.S. music licensing system and achieve fairer compensation for songwriters that was signed into law in October 2018.

Amicus Music Artists Coalition ("MAC") is a non-profit trade organization dedicated to protecting the interests of music artists—both performers and songwriters. MAC was founded in 2019 by a group of music performers, career songwriters and veteran talent representatives who were determined that music creators have an advocacy organization to represent their collective voice. In the brief period since its formation, MAC has grown to over 100 members, attracting today's most successful artists as well as aspiring music creators. *See* MAC,

Mission, https://www.musicartistscoalition.com/#!/who-we-are (last visited Nov. 17, 2019) (listing members). MAC advocates on issues impacting music creators at both the national and state levels. Among other concerns, MAC is focused on ensuring that songwriters receive fair compensation.

Pursuant to Federal Rule of Appellate Procedure 29(a)(2) and D.C. Circuit Rule 29(b), SONA and MAC sought and obtained consent from all parties to this appeal to file this brief as *amici curiae*.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), SONA and MAC state that no counsel for a party to this appeal authored this brief in whole or in part, and no party to this appeal or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than SONA, MAC and their counsel, made a monetary contribution intended to fund the preparation or submission of the brief.[1]

[1] As noted above, SONA was briefly a party to the proceeding before the CRJs, but withdrew from the proceeding and is not a party to this appeal. SONA is represented by different counsel as an *amicus* in this appeal.

SUMMARY OF ARGUMENT

Amici curiae SONA and MAC respectfully submit this brief in support of appellees the Copyright Royalty Board and Librarian of Congress. SONA and MAC urge this Court to affirm the decision of the Copyright Royalty Judges ("CRJs") below, which increases the royalty rates payable to music copyright owners under the section 115 compulsory license.

The mechanical rate proceeding that is the subject of this appeal was the first time the CRJs had an opportunity to review evidence and consider the royalty rates to be paid under section 115 of the Copyright Act by online streaming services, such as those operated by appellants Spotify USA Inc. ("Spotify"), Amazon Digital Services LLC ("Amazon"), Google LLC ("Google") and Pandora Media, LLC ("Pandora") (together, "Services").[2] After carefully weighing all of the evidence, the CRJs determined that songwriters should be paid more, and increased the rate for interactive streaming under section 115. *See* Determination, 84 Fed. Reg. at 1960.[3] Songwriters deserved that raise. Indeed, for some, the added income will be a critical factor in their ability to continue in their careers as professional songwriters.

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[2] In the two preceding rate proceedings for the rate periods commencing in 2008 and 2013, the CRJs adopted rates pursuant to a settlement submitted by the parties. *See* Determination, 84 Fed. Reg. at 1919.

[3] Judge Strickler dissented from the majority opinion.

For over a century, songwriters have been subject to a compulsory license, now embodied in section 115 of the Copyright Act, that determines the price to be paid for reproduction and distribution of the musical works they create. There is no comparable example of a profession where the government sets the price for one's labors. Even though under the Copyright Act copyright owners are permitted to negotiate "voluntary" licenses outside of section 115, the compulsory rate functions as a "ghost in the attic," effectively imposing a ceiling on any negotiated rate. Since the compulsory license was enacted in 1909, the original 2-cent rate established by Congress to make and distribute a copy of a musical work—then in the form of a piano roll, now as a CD or digital download—has risen to only 9.1 cents, which is well below the 50-plus cent rate that would apply today if adjusted for inflation.

But the compulsory rate for interactive streaming services, such as those operated by the Services, poses an even greater concern for songwriters, as such services now dominate the U.S. music market. Under section 115, there is no fixed penny rate for interactive streaming; since 2008, streaming has been subject to a percentage-of-revenue formula. The percentage-based compulsory rate yields meager payouts that, as the CRJs found, are too low to support professional songwriters who seek to write on a full-time basis. As a result, many songwriters have had to take second jobs or are leaving the profession entirely.

Record labels own a separate copyright in the sound recording that embodies a musical work. Unlike music publishers and songwriters, record companies are able to negotiate with the Services for the use of their sound recordings in the free market, without the constraint of a compulsory license. Accordingly, as the CRJs found, sound recording owners are able to achieve greater value for their sound recordings than music publishers and songwriters receive for the use of the underlying musical works. Based on extensive expert testimony from both sides below, the CRJs determined that, in the interactive streaming context, the musical work has been undervalued in comparison to the sound recording and that the compulsory rate for musical works should be higher.

Based on the evidence before them, the CRJs, in a carefully reasoned opinion, adjusted the section 115 rate formula applicable to streaming uses to increase the royalties paid to music publishers and songwriters. In so doing, they took a balanced approach, rejecting the copyright owners' proposal for a fixed per-stream rate and, over copyright owners' objection, maintaining the Services' ability to deduct royalties paid for public performance rights. To protect music publishers and songwriters against unduly low royalty payments under the percentage-of-revenue structure, the CRJs maintained a per-subscriber minimum payment, or "mechanical floor." Moreover, to minimize the risk of industry disruption, the CRJs chose to phase the rate increase in gradually over the five-year rate period.

Finally, in updating the formula, the CRJs included as a factor to be considered the value of music services' payments to record labels for the use of sound recordings (referred to as "total content cost" or "TCC"). In so doing, they rejected a limit or "cap" on the amount of TCC to be considered. In this way, the CRJs reasonably sought to ensure that songwriters would be able to benefit from higher rates obtained by record labels in the free market, notwithstanding the adverse consequences of the compulsory license. Contrary to the Services' claims, the CRJs' approach was reasonable, balanced and well supported by the voluminous record below, and should be upheld.

ARGUMENT

I. The 110-Year-Old Compulsory License Has a Depressive Effect on Songwriter Income

A. The Price of a Song Is Set by the Government

For over a century, songwriters have had no ability to determine the license fee to be charged for the reproduction and distribution of the works they create. There is no comparable example of a profession where the government sets the price for the fruits of one's labors. Imagine if the government were to establish a maximum fee for any photograph a professional photographer might take, or any brief a lawyer might write; substitute songs, and that is the world of a professional songwriter.

Many songwriters choose to assign their copyrighted compositions, in whole or in part—or to exclusively license the administration rights for their songs—to a music publisher, who in turn handles licensing and collection of royalties in exchange for a share of the royalties. Other songwriters retain their copyrights and license their works themselves. Either way, under the section 115 of the Copyright Act, once a song is first distributed to the public, the songwriter is required to allow others to reproduce and distribute that song pursuant to the statutory compulsory license. 17 U.S.C. § 115(a)(1)(A)(i). The rate for the compulsory license is not the result of a market-based transaction, but rather an administrative proceeding before the CRJs such as the one now on appeal.

Traditionally, record labels have been the primary users of the section 115 license, but as interactive streaming has come to supplant physical records and even digital downloads, the licensee market is now dominated by online music providers such as those operated by the Services. *See* Joshua P. Friedlander, *Mid-Year 2019 RIAA Music Revenue Report* (Sept. 5, 2019), *https://www.riaa.com/wp-content/uploads/2019/09/Mid-Year-2019-RIAA-Music-Revenues-Report.pdf* (last visited Nov. 16, 2019) (as of mid-2019, streaming represents 80% of U.S. recorded music market). Given the market dominance of the Services, the CRJs' decision regarding the interactive streaming rate will determine whether some songwriters have sufficient royalty income to practice their craft full time or instead (like many

songwriters today) need a second job to make ends meet. *See* Determination, 84 Fed. Reg. at 1957 ("[T]he Judges find that the evidence in this proceeding supports a conclusion that the existing rates for mechanical royalties from interactive streaming are a contributing factor in the decline in songwriter income, and that this decline has led to fewer songwriters.")

To be sure, section 115 of the Copyright Act permits users to enter into "voluntary" agreements with music copyright owners in lieu of relying on the statutory compulsory license. *See* 17 U.S.C. § 115(c)(2)(A), (d)(9)(C). But as the CRJs themselves have recognized, even if the user is willing to enter into a voluntary license, the government rate acts as a "ghost in the attic," effectively imposing a maximum rate for any resulting license. *See* Mechanical and Digital Phonorecord Delivery Rate Determination (Phonorecords I), 74 Fed. Reg. 4510, 4513 (Jan. 26, 2009) ("*Phonorecords I*") ("[T]he section 115 license exerts a ghost-in-the-attic like effect on all those who live below it."). The reason for this is obvious: if the use falls within the compulsory license, there is no reason to pay more. *See* U.S. Copyright Office, COPYRIGHT AND THE MUSIC MARKETPLACE 29 (2015) ("*CMM*") ("While copyright owners and users are free to negotiate voluntary licenses that depart from the statutory rates and terms, in practical effect the CRB-set rate acts as a ceiling for what the owner may charge.") In this way, "'the statutory rate effectively removes the musical works rightsholders from the bargaining table with

the services.'" Determination, 84 Fed. Reg. at 1951-52 (quoting expert witness Richard Watt).

B. The Compulsory Rate Has Failed to Keep Pace With the Actual Value of Musical Works

When the compulsory license was first established in 1909 (to ward off a perceived threat of monopoly in the piano roll market), Congress set the royalty rate at 2 cents per copy. *CMM* at 26; Copyright Act of 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075, 1076 (1909). That rate did not change for almost 70 years, when it was increased by 3/4 of a cent with the adoption of the 1976 Copyright Act. Copyright Act of 1976, Pub. L. No. 94-553, § 115(c)(2), 90 Stat. 2541, 2562 (1976). One hundred and ten years later, the license fee to reproduce and distribute a musical work stands at just 9.1 cents,[4] even though adjusted for inflation, the 2-cent rate would be over 50 cents today. *See* CPI Inflation Calculator, http://www.in2013dollars.com/us/inflation/1909?amount=0.02 (last visited Nov. 14, 2019); *CMM* at 105-06. The cumulative adverse impact on songwriters of a flat penny rate for nearly 70 years, with only modest adjustments in the decades since the 1970s, is readily apparent.

[4] As discussed below, for interactive streaming, the section 115 rate is not a flat per-penny rate, but is instead based on a percentage-of-revenue formula that yields a per-stream rate that is a small fraction of a penny.

In contrast to music publishers and songwriters, record companies are able to engage in free market negotiations to license their separate copyright interests in the sound recordings in which musical works are embodied. *See* Determination, 84 Fed. Reg. at 1951. Without the constraint of a compulsory license, record labels are able to achieve greater relative value in licensing their recordings. Here, for instance, relying on extensive testimony from expert witnesses from both sides, the CRJs concluded that music publishers' inability to negotiate rates in the free market had resulted in significant undervaluation of the musical work copyright. *See* DOJ Br. at 36; Determination, 84 Fed. Reg. at 1934, 1952 (both sides' experts "appear[ed] to be in agreement" that musical works should be valued more highly in relation to sound recordings).

Another revealing example is the much higher rate established under section 115 for the use of musical works in ringtones (snippets of recorded songs that users may download to their phone as an alert for incoming calls), which rate since 2008 has been 24 cents. *See* Determination, 84 Fed. Reg. at 1919, 2035. Intuitively, the use of only a brief excerpt of a musical work would seem to command a lower fee than use of the complete work. But for a period of time, it was not clear that ringtones—which alter the original musical work by excerpting only a portion—were eligible for the section 115 license. *See* 17 U.S.C. § 115(a)(2) (compulsory license includes privilege of making a musical arrangement, "but the arrangement

shall not change … the fundamental character of the work"); Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding, 71 Fed. Reg. 64303, 64313-15 (Nov. 1, 2006). During the period of uncertainty, music publishers were able to negotiate agreements with ringtone providers in the marketplace at rates much higher than the compulsory mechanical rate for full-length songs. *CMM* at 30. Subsequently, the Copyright Office ruled the ringtones were subject to compulsory licensing, and the CRJs proceeded to set a statutory rate. Looking to the marketplace deals as benchmarks, the ringtone rate was established at 24 cents—almost three times the rate for full-length copies. *Id.*; *Phonorecords I*, 74 Fed. Reg. at 4529. This higher rate would not have been achieved but for the fortuitous opportunity to negotiate early ringtone licenses outside of section 115.[5]

C. Compulsory Streaming Rates Have Been Inadequate to Support Professional Songwriters

While the 9.1-cent rate for physical copies and digital downloads has remained the same since 2006 (including under the current Determination, 84 Fed. Reg. at 1919), an even greater concern for songwriters is the rates applicable to interactive streaming services, as such services have come to replace sales of CDs and digital downloads.[6] Under the compulsory rates, a song has to be streamed

[5] Notwithstanding the illustrative value of this example, the ringtone market is not a significant market today.

[6] Notably, Apple Inc. ("Apple"), whose iTunes service dominated the download market, recently discontinued iTunes in favor of its subscription-based streaming

millions of times before it generates any appreciable income for the songwriter. Ed Christman, *The CRB Rate Trial Explained: How Publishers, Digital Services Weighed In At The Time*, BILLBOARD (Mar. 22, 2019), https://www.billboard.com/articles/business/8503682/crb-rate-trial-explained-how-publishers-digital-services-weighed-in (citing average 2018 per-stream payout by Spotify of $0.0011 per stream) ("Christman, *The CRB Rate Trial Explained*"). In addition, in many cases, songs are written by multiple songwriters, which means that the meager earnings from streaming are even less because they are shared with one or more co-writers.[7]

In the first two CRJ proceedings to address interactive streaming rates (for the rate periods commencing 2008 and 2013), the market for streaming was less developed and copyright owners opted to settle with the online services rather than litigate against well-financed digital services. *See* Determination, 84 Fed. Reg. at 1919. But as reflected in the CRJs' Determination, the royalty rates for interactive

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offering, Apple Music. *See* Randall Roberts, *Apple will shut down iTunes, ending download era, report says*, L.A. TIMES (May 31, 2019), https://www.latimes.com/entertainment/music/la-et-ms-apple-kills-itunes-20190531-story.html.

[7] As further elucidated by Ed Christman of *Billboard*: "[I]f a song has four songwriters, with each having a 25 percent credit for the song, and each songwriter has a straight 50-50 publishing deal, then Spotify's average $0.0011 per stream paid out in 2018 would mean that the four songwriters get to split $0.00055. Divided between the four of them, that would come out to $0.0001375 per stream. That means it would take 291 streams of that song for all four songwriters to each earn a penny in royalty payments." Christman, *The CRB Rate Trial Explained.*

streaming adopted via settlement in those predecessor proceedings have been too low to sustain professional songwriters. Citing "ample, uncontroverted testimony," the CRJs found that songwriters "have seen a marked decline in mechanical royalty income over the past two decades, and that this decline has rendered it increasingly difficult for non-performing songwriters … to earn a living practicing their craft." *Id*. at 1957. The decline in mechanical royalties is especially concerning because mechanical revenue streams serve as the basis of advances against future income that allow songwriters to spend their days writing new songs instead of working at a second job. *See id.* at 1957 ("'[T]he advances we pay our songwriters are their main source of income to cover living expenses ….'") (quoting publisher witness Justin Kalifowitz)). The record before the CRJs also cataloged an alarming decrease in the number of professional songwriters over the last decade, with fewer new songwriters seeking to enter the profession. *Id.*; *see also* Nate Rau, *Nashville's Musical Middle Class Collapses*, THE TENNESSEAN (Jan. 3, 2015), http://www.tennessean.com/story/entertainment/music/2015/01/04/nashville-musical-middle-class-collapses-new-dylans/21236245.

The CRJs had ample basis to increase the rates paid by the Services for interactive streaming under section 115. Without the increase, fewer professional songwriters will be writing songs.

II. The CRJs Made Reasonable and Balanced Adjustments to Correct for the Undervaluation of Songwriters' Contributions

The CRJs quite properly looked to the real-world impact of mechanical royalty rates on those who create the songs that are essential to the Services' existence. Based on a voluminous record—including extensive findings that songwriters are undervalued and underpaid—the CRJs concluded that the mechanical royalty rate for streaming should be higher.

The CRJs did not act precipitously, however, in revising the rates, instead adopting a balanced approach that did not fully embrace any one party's proposal. Rejecting the copyright owners' proposal for a per-stream rate, they re-adopted a percentage-based rate structure, as advocated by the Services. Determination, 84 Fed. Reg. at 1934. And despite the copyright owners' request, the CRJs preserved the Services' ability to deduct payments for public performance rights in calculating their section 115 royalties. *Id.* at 1934, 2035.[8] At the same time, the CRJs continued the existing "mechanical floor"—*i.e.*, a minimum per-subscriber rate—to ensure that mechanical royalties "will not vanish." *Id.* at 1935, 2036. And finally,

[8] Over the copyright owners' objection, the CRJs also altered the manner in which family and student plan royalties are calculated, resulting in a reduction in payments for such plans. *See* Determination, 84 Fed. Reg. at 1961-62. As a result, at least one of the Services has demanded a refund of previously paid royalties from publishers and songwriters. *See* Ed Christman, *Spotify Says It 'Overpaid Most Publishers' Last Year, Taking CRB Discount for Family Plans*, BILLBOARD (Jun. 21, 2019), https://www.billboard.com/articles/business/8517025/spotify-crb-overpaid-publishers-family-plans.

notwithstanding their finding that songwriters needed higher pay, the CRJs determined that the increase in rates should be phased in over a five-year period so as to "mitigate the risk of short-term disruption." *Id*. at 1960.

As noted in the DOJ Brief, the updated and simplified rate structure adopted by the CRJs "depends in significant part on the value of the copyright licenses that are directly negotiated in the open market" by the record labels. DOJ Br. at 31-32. This is because the ratesetting formula includes consideration of "total content cost," or "TCC"—the amount paid by the licensee to a record company for use of a sound recording embodying a musical work—which is not subject to a compulsory rate. *See* Determination, 84 Fed. Reg. at 1953, 2034. A critical aspect of the CRJs' Determination—to which the Services object—is that the TCC metric is not limited or "capped." *See id*. at 1934. In this way, the CRJs sought to mitigate the inequitable effects of the compulsory license so extensively documented in the proceeding before them. *Id.* at 1934-35 ("uncapped TCC prong" helps to avoid "undue diminution" of mechanical revenue).

Under the updated formula adopted by the CRJs, if the record labels negotiate a better rate in the marketplace, songwriters may benefit even though they are otherwise living under the "ghost in the attic." Far from being unreasonable, as the Services suggest, the revised rate formula represents an important corrective to

properly value the work of songwriters and ensure a fair return for their creative contributions.[9]

CONCLUSION

For the foregoing reasons, the Determination of the Copyright Royalty Judges should be affirmed.

Dated: November 19, 2019

Respectfully submitted,

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[9] It is worth highlighting that Apple Music is one of the most successful and fastest-growing streaming services. Apple was a party below but chose not to appeal the CRJs' pay increase for songwriters. This is further evidence that the rates set by the CRJs are reasonable and can be accommodated by the Services.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7), because it contains 3,656 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). The brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman, 14 point.

Dated: November 19, 2019

/s/ Jacqueline C. Charlesworth

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2019 I caused to be filed electronically the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit, using the appellate CM/ECF system. I further certify that to my knowledge all participants in the case are registered CM/ECF users so service on them will be accomplished through the CM/ECF system.

Dated: November 19, 2019

/s/ Jacqueline C. Charlesworth