

Notes - Orientation & Initial meeting
2/3/98

3118 Conf Call

January 14, 1998 (10 a.m.)

Payfile, cue sheet database,

Ruling on page 7, Dr. Bayle's testimony.

Cue sheets - 337 boxes

Pay file - 38 million performances

- interpretive codes

- formula credit interpreter (describes how credits are given)

Title databases

Program header file

Cue Sheet database ✓

Trying to match cue sheets that appear in pay file.

1980 -

1990 -

3rd quarter of 1995 gives best match

ATTACHED NOTES

Mike Salzman, BMT

Jonathan Weiss,
Joan McGovern }
Ben Willett }

pay file, reference file Rick Lilligard

Eric Zetmeyer (722) 602 0833

418-1047

~~477 235 3936~~

(417) ~~477~~-235 3936

ASCAP

⁶
Issues:

- 1) applied the 1978 revenue date instead of 1976 date before the CRT
- 2) excluded 172 million in auxiliary income from 1976 pass
- 3) did not give a CPI adjustment
- 4) incorrectly inferred a relationship between ASCAP's fee and its music share, thereby reducing ASCAP's fee for presumed drop in its music share
- 5) Record supports ASCAP appeal
- 6) Panel misallocated costs

1) CRT used 1976 date, not 1978 while wanted calculations until 1977.

p 5 - using 1978 date understates the effective license rate for 1978. Pass rate increased, the 1978 rate is a lower % of pass than if you use the 1976 data.

p 6 - objective % is 30.5%, not 28% used by the Panel

p 6 - Panel's statement that using 1976 data makes adjustment "too high" is incorrect under Panel's conclusion that change in PPS fees "is the best indication of relevant change in market."

p 8 2) Panel acknowledged ancillary income of \$122 million in 1996, but then deleted it w/o explanation (p. 30 Rpt)
- all gross fees must be included

A p 9 ~~11~~ Librarian still use \$2,077,776,000 for gross fees in 1996 instead of \$1,955,726,000

3) No interim adjustments is arbitrary
- Panel concluded such increases were speculative
p 7 But, Panel "should have allowed for interim adjustments to the total fee"

Panel "could" have state raised as a rate of 3.03% of PB fees and applied that against 1998, 1999 to 2000

p 10 C's, could have done CPI
- Panel didn't say why not CPI, said must carry over CPI precedent

4) Downward adjustment of music would not be supported by record, CTR decision, at \$115

p 12 B "Music share" is irrelevant. You must look at music use. Plus, this approach ignores the determination of fair market value. Section 115 required the music pool model and requires individualized valuations of performances.

p13 Panel erred in assuming music use was static prior to 1992 (year which digital records of music use began)

- even though no evidence on "music price index",
p14 Panel should have drawn this inference

Also, Panel's conclusion on static music use ignores the fact that the number of US broadcast houses has dramatically increased since 1975, but the number of PP stations has gone way up, and the number per station has gone up

Thus, total number of A&P music numbers has gone way up since 1975, even if its "share" of music dropped 25% from 1975 to 1996. (Note: 11% requires explanation for actual performance)

4) There is insufficient evidence to show music share prior to 1992.

- could use the fact that ASCAP negotiated for 4 times that of BMI in 1982 but ASCAP did not negotiate in that fashion.

And you can't infer that ratio to 1975 because BMI reported using BMI's own total agreement to determine what ASCAP demanded.

Also, there was no evidence of music share on radio

Panel was arbitrary to infer that 10 was a proxy for more work on radio

p18 - esp. when Panel find that numbers which prior times were negotiated were not appropriate precedent for current times.

p20 Making ASCAP adjustment to grades and amount tax at \$6,302,400, subject to CRA adjustment to

5) Costs

p28 Panel violated CARP precedent by splitting 1/3 hrs satellite and 2/3 split costs mainly between carriers and users.

and Panel do a lot from that can split, if wanted to explain itself

p29 Record doesn't support NITE or PBS as being a party to cost program.

p30 1/3 split is disproportionate on carriers and is contrary to public policy

BMI

p10 BMI argues that Panel's appraisal is flawed in every respect and is especially arbitrary to BMI's loss. BMI was not in the 1975 case

5 errors

- 1) 1975 CRT fee was not fair market value
- 2) using 1975 fees instead of 1976 was flawed
- 3) Panel failed to adjust for small increase in value was since 1975
- 4) the Panel acknowledged minimal commercialization but made no adjustment for it
- 5) Panel made an arbitrary assumption about value was shown prior to 1972

- 1) CRT decision was not fair market value to BMI
- BMI was not in 1975 case, and it could have a chance to present evidence in 1975 but didn't since it didn't know that was what the Panel was doing

p20 "The Panel went to the extent it felt itself bound by the 1975 fee as to BMI. It is called that any finding made by the CRT cannot come within of law bind BMI, as BMI was not a party to the 1975 proceeding."

p22 2.) The circumstances of the 1975 CRT decision show that it was not fair market value
a) decision was short + unexplained as to its approach.

b) ASEA representative noted in a subsequent article that they made clear to the CRT that they wanted to give 7% a discount for the 1975-82 period.

c) The 1978 fee contained a subsidy.

d) CRT made clear that fee was experimental when it said that it will consider other approaches in the future.

p23
p24 Panel should thus have rejected the 1978 decision for some reason that voluntary agreements were non-precedential.

p25 Further, Panel should have affirmed 1978 decision was fair value, but should have made an independent determination as to whether it was

2) Using 1975 fees is arbitrary

1) 1975 of 1975 is wrong here

1) CRT should have 1975 data for 7% fees

2) Panel should have used a 70 year period (1906-1976) since its setting of rate commencing in 1976.

p26

Using 1970, BMI fee goes up to \$2.545 million -

3) Panel failed to account for increased music use

p 29 - There is no music use info for 1975 and the Panel ignored it
- That's contrary to the record which shows that there's a lot more stations now than in 1974.

With so much more music used, you get programs that way. (as a % of Δ) is the same.

Panel should account for increase in music usage per station. BMI said 13%, PB said 7%. 2 million is 10%.

p 33 - so still be a 10% increase in BMI's fee yielded by the Panel formula

A p 31 Using 1976, esp, and 10% increase in music, BMI's annual fee is \$3.135 million

4) It was arbitrary for PB to pay same rate of fees as they did in 1975 when you take into account commercialization:

- Panel would be saying they were paying private fees

p 37 If Panel formula is used, using private fees is the way to adjust for commercialization

p 38 - using 1978 private fees, BMI fee is \$5.520 mil

p 39 - adjusting for 10% increase in music use, fee is \$3.57 million

→

p 40 4) Because music use shows a significant increase for 1978, Panel could be assuming they use the same as 1992-1996 (period for which data exists)

p 55 If Librarian doesn't choose to adopt a methodology based on commercial fees, "he shall make clear that BMI is free to argue in a future (ATR) proceeding that Section 115 license fees shall be set on the basis of a comparison to local broadcasting