COPYRIGHT ARBITRATION ROYALTY PANEL

+ + + +

LIBRARY OF CONGRESS

+ + + +

HEARING

+ + + +

In the Matter of:	
Adjustment of the Rates for Noncommercial Educational Broadcasting Compulsory License	Docket No. 96-6 CARP NCBRA

ORIGINAL

Library of Congress
James Madison Building
101 Independence Avenue, S.E.
Room LM414
Washington, D.C. 20540

Wednesday,
April 1, 1998

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE LEWIS HALL GRIFFITH, Chairperson
THE HONORABLE EDWARD DREYFUS
THE HONORABLE JEFFREY S. GULIN

Copyright Arbitration
Royalty Panel

Noncommercial Compulsory
License

04-01-98

p2494-2825 WP5.1

Neal R. Gross & Co.
(202) 234-4433

APPEARANCES:

On Behalf of Broadcast Music, Inc.:

JOHN FELLAS, ESQ.
NORMAN C. KLEINBERG, ESQ.
MICHAEL E. SALZMAN, ESQ.
of: Hughes, Hubbard & Reed, LLP
One Battery Park Plaza
New York, New York 10004-1482
(212) 837-6075 (JF)
6680 (NCK)
6833 (MES)

and

JOSEPH J. DiMONA, ESQ. (Asst. V.P.)
MARVIN L. BERENSON, ESQ.
Legal and Regulatory Affairs
BMI
320 West 57th Street
New York, New York 10019-3790
(212) 830-3847

On Behalf of ASCAP:

I. FRED KOENIGSBERG, ESQ.
PHILIP H. SCHAEFFER, ESQ.
J. CHRISTOPHER SHORE, ESQ.
SAMUEL MOSENKIS, ESQ.
of: White & Case, LLP
1155 Avenue of the Americas
New York, New York 10036-2787
(212) 819-8740 (PHS)
8394 (JCS)

BEVERLY A. WILLETT, ESQ.
ASCAP Building
Sixth Floor
One Lincoln Plaza
New York, New York 10023
(212) 621-6289

APPEARANCES (continued):

On Behalf of ASCAP:

JOAN M. McGIVERN, ESQ.
Assistant Vice President of Legal Affairs
Office of the CEO
ASCAP
One Lincoln Plaza
New York, New York 10023
(212) 621-6289

On Behalf of the Public Broadcasters:

R. BRUCE RICH, ESQ.
JONATHAN T. WEISS, ESQ.
MARK J. STEIN, ESQ.
TRACEY I. BATT, ESQ.
ELIZABETH FORMINARD, ESQ.
of: Weil, Gotshal & Manges, LLP
767 Fifth Avenue
New York, New York 10153-0119
(212) 310-8170 (RBR)
8885 (JTW)
8969 (MJS)
8405 (TIB)

and

KATHLEEN COX, ESQ. (General Counsel)
ROBERT M. WINTERINGHAM, ESQ. (Staff Atty)
Corporation for Public Broadcasting
901 E Street, N.W.
Washington, D.C. 20004-2037
(202) 879-9701 (KC)
9707 (RMW)

and

APPEARANCES (continued):

On Behalf of the Public Broadcasters:

GREGORY FERENBACH, ESQ.,
(Vice Pres. & Acting General Counsel)
ANN W. ZEDD, ESQ. (Asst. Gen. Counsel)
KAREN C. RINDNER, ESQ. (Asst. Gen. Counsel)
PBS
1320 Braddock Place
Alexandria, Virginia 22314
(703) 739-5063 (GF)
5170 (AWZ)

NEAL A. JACKSON, ESQ.
DENISE B. LEARY, ESQ.
GREGORY A. LEWIS, ESQ.
Deputy General Counsel
National Public Radio
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 414-2000 (NPR)
2049 (DBL)

ALSO PRESENT:

GINA GIUFFREDA, CARP Specialist
TAMALA T. BOYD, Legal Assistant,
White and Case
ALBERT ALDERETE, Legal Assistant,
Weil, Gotshal & Manges, LLP

I-N-D-E-X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Peter Jablow				
By Mr. Schaeffer		2501		2586
By Mr. Kleinberg		2560		
By Mr. Rich			2580	
Paula Jameson				
By Mr. Rich	2590		2692	
By Mr. Kleinberg		2639		
By Mr. Schaeffer		2682		2698
Adam Jaffe				
By Mr. Rich	2700			

Exhibit No.	Description	Mark	Recd
ASCAP			
312			2499
23X	Current 07-07-97	2501	
24X	Web sites	2515	2517
316X	"What's Unique about NPR"	2520	2520
25X	"What's Unique about NPR"	2521	
320, 321		2535	2535
26X	Chart	2553	
27X	Article	2556	2560
28X	Article 03-16-98	2565	
BMI			
3X	FAQs about Public Broadcasting	2567	2567
4X	New York Times 03-02-98	2573	

1 P-R-O-C-E-E-D-I-N-G-S

2 (9:31 a.m.)

3 CHAIRPERSON GRIFFITH: Ladies and

4 gentlemen, good morning. Let the record reflect that

5 the court reporter and the witness have previously

6 been sworn and they remain under oath.

7 I am trying to identify the person who

8 called me earlier this morning and informed me that

9 this matter was settled, and then said "April Fool's."

10 And if I find out, I'll let you know.

11 For those of you who have been dealing

12 with Ms. Grafitta, Gina, she will not be in today.

13 She'll be in tomorrow.

14 Last night we considered the issue with

15 respect to the introduction of ASCAP's Exhibit 312.

16 The motion to strike and deny the admission of this

17 document, the motion to strike is denied; the document

18 is admitted into evidence.

19 (The periodical referred to,

20 previously marked for

21 identification as ASCAP's

22 Exhibit No. 312, was received

1 in evidence.)

2 CHAIRPERSON GRIFFITH: We think that this
3 witness, Mr. Jablow, is an adequate sponsoring
4 witness. We think tat the document is material and
5 relevant. We're mindful, however that there is no
6 current evidence before the Panel as to the use of
7 this document in any way. And we assess the probative
8 value versus the prejudicial effect of the document
9 and we're inclined to admit it, and we do so.

10 MR. RICH: Thank you.

11 CHAIRPERSON GRIFFITH: Anything else? Any
12 other preliminary matters? If not, Mr. Schaeffer, you
13 sit. And even if it takes 45 minutes --

14 MR. SCHAEFFER: I'm going to take -- I'm
15 going to go as close as I can. I think I'll just get
16 this out of the way. I would like to put in front of
17 the witness a document which was in "Current" on July
18 7th, 1997, and which appears as 519.14 in the original
19 ASCAP exhibits and which I think now is -- is this 21?

20 MR. SHORE: Twenty-three.

21 MR. SCHAEFFER: Twenty-three, I'm sorry,
22 ASCAP 23.

1 CHAIRPERSON GRIFFITH: It will be marked
2 as ASCAP Exhibit 23X.
3 (The document referred to was
4 marked for identification as
5 ASCAP Exhibit No. 23X.)
6 Whereupon,
7 PETER JABLOW
8 was recalled as a witness herein, and having been
9 previously duly sworn, was examined and testified
10 further as follows:
11 CROSS-EXAMINATION
12 BY MR. SCHAEFFER:
13 Q Would you take a look at 23 for
14 identification, Mr. Jablow? And excuse me for not
15 saying good morning.
16 A Good morning.
17 (Pause)
18 BY MR. SCHAEFFER:
19 Q Thank you. What is the Development
20 Exchange, which is abbreviated here as DEI? Is there
21 such a thing?
22 A Yes.

1 Q What is it?

2 A It is a small service organization that

3 basically advises public radio stations throughout the

4 country on their fundraising. That's why it's called

5 the Development Exchange.

6 Q Is it a for-profit organization?

7 A No.

8 Q And is it associated in any way with

9 either the Committee for -- the Corporation for Public

10 Broadcasting or NPR?

11 A No. It is -- receives funding support

12 from the Corporation for Public Broadcasting.

13 Q Do you know who the members of DEI are?

14 A The members, I believe, are public radio

15 stations who are basically providing a member support

16 for their development directors. I think it caters

17 specifically to development directors of public radio

18 stations.

19 Q And do you recall this event taking place?

20 Did it come to your attention?

21 A They regularly sponsor meetings around the

22 country. I -- I don't know about this specific event,

1 but they -- it's a very common practice.

2 Q And are they usually attended or are they

3 sponsored by the Corporation for Public Broadcasting?

4 A I wouldn't know the answer to that. I

5 think the events are sponsored by the Development

6 Exchange, and it depends who they get to support it,

7 whether it's CPB or some other source.

8 Q The -- now, do you know something -- have

9 you ever heard of something called DEI's Revenue

10 Development Initiative?

11 A No.

12 Q That's new to you?

13 A Well, yes. The specific name of that is

14 not -- is new to me, but, again, it's very much in

15 line with their standard operating function.

16 Q What is their standard operating function?

17 A To help support the public radio system by

18 advising and guiding them in ways to more effectively

19 raise money.

20 Q The -- and are you familiar with the

21 expression "high intensity marketing," as it's used in

22 this "Current" article?

1 A No.

2 Q Did anyone from NPR, as far as you know,

3 attend this conference?

4 A I have no idea.

5 Q Would it be customary for members of NPR

6 to attend the DEI conferences that you've said take

7 place from time to time?

8 A Normally, if we attend DEI conferences

9 it's because somebody on our staff is invited to speak

10 or teach a seminar.

11 Q Now, there's a listing here, a general

12 session the second day led by CPB Senior Vice

13 President Fred DeMarco. I assume you know DeMarco?

14 A I do.

15 Q And who is he?

16 A He's the Senior Vice President of CPB.

17 Q And what was -- what is his area of

18 responsibility, or at least in 1997?

19 A I actually think most of Fred's

20 responsibility is on the television side.

21 Q You don't have any understanding as to

22 why, if this is true, DeMarco is asked to discuss the

1 future of public radio broadcasting?

2 MR. RICH: Objection.

3 CHAIRPERSON GRIFFITH: . Do you have any

4 response, Mr. Schaeffer?

5 MR. SCHAEFFER: Yeah. I've asked if he

6 knows. If he doesn't know, he'll tell us. If he does

7 know, he will.

8 MR. RICH: It assumes a fact. It's only

9 a reported fact.

10 MR. SCHAEFFER: Well, I said that. I

11 withdraw the question them.

12 CHAIRPERSON GRIFFITH: Okay.

13 BY MR. SCHAEFFER:

14 Q Assuming that it is true, according to

15 this "Current" article, that DeMarco would discuss the

16 future of public radio fundraising, do you know why he

17 would be doing that if, as you say, his primary

18 responsibilities are television?

19 A No, I do not.

20 Q Do you know Brenda Pennell, Doug Eichten

21 and Mark Fuerst, or any of them?

22 A I know all of them, yes.

1 Q And what are their relationships, if any,
2 to public radio?
3 A Brenda Pennell is now the general manager
4 of KUSC at the University of Southern California.
5 Doug Eichten is now actually the head of the
6 Development Exchange. He succeeded Ann Llewellyn.
7 And Mark Fuerst is an independent consultant who used
8 to run a station in Philadelphia.
9 Q And what -- finally, what are the nine --
10 is there something called the DEI Awards for
11 Development in Marketing?
12 A I believe so.
13 Q What is it?
14 A I really don't know.
15 Q From time to time in the public radio
16 industry, are there conferences about how best to
17 raise money from pledge drives or attract better
18 audiences?
19 A Those are regular subjects for Development
20 Exchange conferences, yes.
21 Q And how frequently are there such
22 conferences during a -- during a calendar year, in

1 your experience?

2 A I -- I don't know the specific frequency,

3 but I would presume it's anywhere from one to three

4 times a year, if not more.

5 Q And some of those are -- what are the

6 agencies that sponsor such conferences?

7 A Normally, depending upon the support the

8 Development Exchange gathers, the Development Exchange

9 will sponsor a conference itself. People will pay to

10 attend their conference. Upon occasion, they may get

11 sponsorship support, but I'm not sure specifically

12 from who.

13 Q From -- has it been your experience that

14 from time to time the local stations confer both with

15 NPR, between themselves or with anyone else as to how

16 best to do underwriting?

17 A Certainly.

18 Q Would you tell us as best you can, let's

19 take a year like 1997, what do you -- what events do

20 you recall at -- or what -- what -- withdrawn. Let me

21 try -- I'm trying to get you to say it because I want

22 to save a little time.

1 Would you tell us as best you can recall,
2 in 1997 what was done by local radio stations in the
3 public sector about improving their underwriting
4 techniques?
5 MR. RICH: Object to this line of
6 questioning as outside, well outside the scope of
7 direct.
8 CHAIRPERSON GRIFFITH: Do you have a
9 response, Mr. Schaeffer?
10 MR. SCHAEFFER: Yes. It -- the question -
11 - the ability of the radio stations to attract money
12 is critical to Mr. Jablow's testimony. He said
13 they're underfunded, they're having difficulty funding
14 what they've got in their programs.
15 CHAIRPERSON GRIFFITH: The objection is
16 overruled.
17 BY MR. SCHAEFFER:
18 Q Would you like the question again?
19 A Please.
20 MR. SCHAEFFER: I don't remember what I
21 said. Would it be possible -- I've not asked this
22 before -- for the reporter to repeat the question? I

1 would appreciate it.

2 (Whereupon, the pending question was

3 played back.)

4 THE WITNESS: Underwriting is a

5 significant issue for the public radio industry.

6 There are -- it's always a subject of discussion for

7 local radio stations. There are a number of service

8 organizations besides NPR and the Development

9 Exchange.

10 Indeed, there are regional groupings of

11 radio stations, Eastern Public Radio, Public Radio

12 Mid-America, California Public Radio, Rocky Mountain

13 Public Radio; these are regional groups that regularly

14 get together. And when they get together I would say,

15 among the many things discussed, underwriting is

16 always for -- significantly on the agenda, appear

17 significantly on the agenda on most occasions.

18 BY MR. SCHAEFFER:

19 Q Is -- as far -- have you attended any of

20 these conferences or meetings?

21 A I've attended -- I have never attended a

22 Development Exchange conference. I certainly extend -

1 - attend the Public Radio Conference and I've attended
2 virtually all of the regional at least once a year.
3 Q And I assume underwriting has been
4 discussed in your presence?
5 A Upon occasion.
6 Q Is it your understanding that the stations
7 exchange between themselves different tacts as to how
8 best underwrite solicitation kits, things of that
9 sort?
10 A Yes.
11 Q What is a solicitation kit? Have you
12 heard that expression before?
13 A I've heard that expression before, and I
14 don't think there's any one standard definition of
15 what a solicitation kit is. But in generic terms, it
16 is a packet of information that a station would
17 provide to a prospective underwriter.
18 Q Has it come to your attention in recent
19 times that solicitations of potential underwriters
20 are carried by the local public radio stations on
21 their websites?
22 A Yes.

1 Q How do you know that?

2 A From documents I've seen distributed here.

3 Q Did you ever know that before?

4 A No, I did not.

5 Q Have you examined the web sites that have

6 been distributed here, the purported web sites?

7 A I've looked at some of the documents that

8 were distributed here. I have not looked at the web

9 sites.

10 Q Do you have any reason to believe that any

11 of those materials are feigned or counterfeited?

12 A No. No, I guess not.

13 Q Are the ones that you have seen consistent

14 with your understanding as to the means of

15 solicitation that are presently being used by the

16 local radio stations?

17 MR. RICH: May I ask the Panel for a

18 clarification for the intent of that question?

19 MR. SCHAEFFER: Yes.

20 MR. RICH: And, namely, is the intent to

21 ask whether these are representative of industrywide

22 practice or the practice of the specific stations

1 whose web sites you sampled?

2 MR. SCHAEFFER: I hadn't reached that

3 question. I thought I would -- that's a good

4 question. I'll ask both of them when he has answered

5 this question.

6 MR. RICH: I'm asking for what this

7 question is intended of the witness.

8 CHAIRPERSON GRIFFITH: What is the intent

9 of this question?

10 MR. SCHAEFFER: The intent of the witness

11 (sic) is to -- is to ascertain to what degree what he

12 has seen looks like what is generically solicitations

13 and, also, if he knows, which I -- maybe he knows, if

14 they're specific to those stations. I thought I would

15 explore that.

16 MR. RICH: Perhaps we could ask Mr.

17 Schaeffer to break down his question into two parts?

18 MR. SCHAEFFER: Well, sure.

19 CHAIRPERSON GRIFFITH: All right.

20 BY MR. SCHAEFFER:

21 Q To what extent do those solicitations seem

22 consistent in your mind to industry practice in the

1 public radio system of soliciting underwriting?

2 A What I have seen I don't think makes any

3 generic statement to industry practice, I think, a

4 statement for what a particular station is doing

5 relative to its own underwriting efforts.

6 Q Did you discern a commonality in the

7 solicitations that you saw in this proceeding?

8 A One commonality that I saw from the

9 documents was the Statement of Underwriting Guidelines

10 as issued by the FCC.

11 Q Good. And, also, did you notice that a

12 number of the stations -- I don't wan.t to say tout --

13 set forth the alleged advantages on a business basis

14 for the underwriters to subscribe to the public radio

15 stations?

16 A I did see from the ones I perused that

17 they were suggesting there are advantages to

18 underwriting on that particular station.

19 Q Has it been your experience in the --

20 during the period of time that you've been in the

21 public radio sector that those are the kinds of

22 solicitations that are frequently made by public radio

1 stations?

2 A Public radio stations, depending upon

3 their affiliation -- two-thirds of public radio

4 stations are university-owned. Depending upon their

5 affiliation and their particular market and their role

6 in that market, they do different things to engender

7 underwriting support.

8 Some stations don't pursue it. Other

9 stations do it in an extremely professional manner.

10 Again, I don't think there is one standard, but I do

11 think the stations are very good, as well they should

12 be, about sharing information between themselves.

13 Q Is there any -- do you have any reason to

14 believe that the web sites, copies of the web sites

15 that have been provided to you in this proceeding, are

16 not representative of solicitations made by public

17 radio stations to the extent they appear on web sites?

18 A I think the -- what I -- again, what I

19 read, each of the stations' documents are

20 representative of that particular -- that particular

21 station.

22 MR. SCHAEFFER: I'm now going to offer as

1 Exhibit 24X a collection of -- I think it's 20 web
2 sites. And I believe, I respectfully believe, that
3 this witness has stated enough to make him a
4 sponsoring -- should be a sponsoring witness of these
5 documents.
6 I'm going to spare his -- if these are
7 admitted, I'm going to spare his going into each and
8 every one of the web sites and leave that for the
9 briefing later on. Although I will say I believe it
10 is going to be relevant to the previous exhibit that
11 was marked in evidence.
12 CHAIRPERSON GRIFFITH: Will you mark ASCAP
13 Exhibit 24X?
14 (The document referred to was
15 marked for identification as
16 ASCAP Exhibit No. 24X.)
17 MR. RICH: May I ask Mr. Schaeffer if his
18 last series of questions implicating a set of exhibits
19 that the witness had been offered as a courtesy the
20 other day is an exact duplicate of this set?
21 MR. SCHAEFFER: Yes. As far as I know it
22 is. I believe it is. If it isn't, it certainly

1 should be.

2 MR. RICH: I would appreciate it if Mr.
3 Jablow would ascertain whether his answers, to his
4 best recollection, relate to the same group of
5 documents that he thought Mr. Schaeffer was referring
6 to, with the Panel's consent?

7 CHAIRPERSON GRIFFITH: Please.

8 MR. SCHAEFFER: If you want to save time;
9 I would be glad to do it.

10 MR. RICH: In terms of my position, Your
11 Honor, as I think you have heard me fully, I am not
12 going to repeat it, I think this is a reprise of the
13 document collection that Mr. Downey was shown as to
14 the web sites.

15 And I'm cognizant of the Panel's ruling as
16 to that, although I would again ask that the Panel in
17 -- if you decide to take these in evidence, again
18 recognize the witness', by definition, limited ability
19 to speak to actual practice at the stations as opposed
20 to what they advertise their practices to be.

21 CHAIRPERSON GRIFFITH: Right.

22 MR. RICH: On that basis, rather than

1 press my objection, anticipating a reality, and I
2 would assume, the documents can come in.
3 CHAIRPERSON GRIFFITH: They will be
4 admitted and the record reflect the comment concerning
5 -- that Mr. Rich has made concerning the weight to be
6 given to the document by the Panel.
7 MR. RICH: Thank you.
8 (The documents referred to,
9 previously marked for
10 identification as ASCAP Exhibit
11 No. 24X, was received in
12 evidence.)
13 THE WITNESS: Yeah. The -- these do
14 appear to be the same group as I saw the other day.
15 MR. SCHAEFFER: Excuse me. Let me see.
16 It should be in here. Here it is. Would you put
17 before the witness ASCAP Exhibit 316, which I think
18 there's no objection to it being in evidence. And I
19 will now offer it in evidence. That's from NBR.
20 MR. RICH: No objection.
21 CHAIRPERSON GRIFFITH: All right. Exhibit
22 No. 306, please?

1 MR. SCHAEFFER: 316.

2 CHAIRPERSON GRIFFITH: -- 316 will be

3 admitted as ASCAP's Exhibit -- 316 is admitted, 316X.

4 MR. SCHAEFFER: Yes. I'm advised these

5 are excerpts that I am going to be using. So -- yeah,

6 I'm going to do that because I think we'll have to

7 mark that as a PBX -- as an ASCAP cross-examination

8 exhibit. I realize now Mr. Gibbon is right. It's

9 only pieces of it.

10 It's 316.1, .3, .5, .6, .7, .8, .9, .10,

11 .14, .16, .18, .20, .26, and .28. Is it in front of

12 the witness?

13 JUDGE GULIN: I'm a little bit confused.

14 MR. SCHAEFFER: Three -- 316 is the whole

15 web site at NPR and Mr. Rich has agreed --

16 MS. McGIVERN: No, no, no.

17 MR. RICH: No, that's not correct.

18 MR. SCHAEFFER: 316 -- this is mine.

19 MS. McGIVERN: Oh, I apologize.

20 MR. SCHAEFFER: No. 316 is the -- this is

21 not 316. Exhibit 316 is the entire web site at NPR

22 which we printed out in, I think it's August of 1997,

1 August or September.

2 CHAIRPERSON GRIFFITH: Take your time.

3 MR. STEIN: Let me just comment that the

4 document I have in front of me labeled ASCAP Exhibit

5 316 does not appear to be any document from a web

6 site. It looks to be a document from NPR entitled

7 "What's Unique About NPR," which was not obtained from

8 a web site. Looks more like a pamphlet to me. We do

9 not have any objection to the document.

10 MR. RICH: And it's on NPR letterhead.

11 MR. STEIN: Yes.

12 MR. SCHAEFFER: There's a full 316 or --

13 MS. McGIVERN: I'm sorry. Six --

14 MR. SCHAEFFER: What is 316?

15 MS. McGIVERN: My understanding is 316 is

16 ---- that is handed out by NPR and was picked up by a

17 legal assistant at White & Case as the behest of NPR.

18 MR. SCHAEFFER: Okay. And what I have in

19 front of the witness is not the full 316. And the

20 reason I wanted it to be marked for identification is

21 because it's excerpts from that document.

22 MR. RICH: May I ask for a clarification,

1 whether we're -- whether Mr. --

2 JUDGE GULIN: Anything else you want to

3 add?

4 MR. SCHAEFFER: No.

5 MR. RICH: Just so I'm clear, is the sole

6 document that will be offered in evidence the complete

7 as opposed to the excerpted version?

8 MR. SCHAEFFER: That's right.

9 MR. RICH: Thank you.

10 MR. SCHAEFFER: That's right. This is

11 just for use on this cross-examination.

12 CHAIRPERSON GRIFFITH: Then you have no

13 objection?

14 MR. RICH: No objection.

15 CHAIRPERSON GRIFFITH: It is admitted into

16 evidence.

17 (The documents referred to,

18 previously marked for

19 identification as ASCAP Exhibit

20 No. 316X, were received in

21 evidence.)

22 BY MR. SCHAEFFER:

1 Q Would you look at the first page of 316?
2 There's a distinction, as you'll see, between cultural
3 and news programming. And I'm going to ask you a
4 couple of questions about that.
5 JUDGE GULIN: Do you want to mark this,
6 then, as 25X?
7 MR. SCHAEFFER: Yes. I thought I had.
8 I'm sorry. I apologize.
9 (The document referred to,
10 previously marked for
11 identification as ASCAP Exhibit
12 No. 25X, was received in
13 evidence.)
14 BY MR. SCHAEFFER:
15 Q Just read the section on news programming
16 and cultural programming; refresh your recollection.
17 A Okay.
18 Q Just sort of to enlighten -- enlighten me,
19 I mean, I gather this says it's not -- that they're
20 both important to NPR. I don't think there's any
21 dispute about that, that cultural programming and news
22 programming are both important features of what NPR

1 feeds to its stations. Correct?

2 A Correct.

3 Q Okay. And would cultural programming and

4 news programming be considered formats by NPR or by

5 you?

6 A Well, they're two separate functions. A

7 format is really more geared to what a specific

8 station chooses to run on its air. Cultural

9 programming breaks down into a number of formats like

10 jazz and classical. News programming, you can have a

11 station that runs news but is not necessarily a news

12 talk station.

13 Q Well, all right. Maybe you can help me a

14 little bit because I'm new to this business. When you

15 use the word "format," what do you mean? What do you,

16 personally, mean?

17 A If a station chooses a particular type of

18 music or news that will be predominantly what it airs

19 to the America -- to its audience.

20 Q Now, are there a set of universally

21 accepted formats in the commercial and in the public

22 radio business?

1 A I think there are probably more formats in
2 the commercial radio business than there are in the
3 public radio business. The public radio business is,
4 quite frankly, limited to formats that are not
5 necessarily commercially viable.
6 Q Well, if I were going to look for a list
7 of public broadcasting formats in a directory or in a
8 reference book, where would I look?
9 A I'm not sure.
10 Q Is it possible that formats described as
11 formats are a little bit subjective with the public
12 radio broadcaster who is using the particular
13 expression of the format?
14 A I -- I guess, depending on which market
15 you go to in which part -- part of this country, it
16 could be deemed as subject -- subjective. We -- I
17 believe in -- let me see what we do at the back of
18 this document.
19 Q Sure. Why --
20 A We do not in this particular document.
21 We, I think, provide a listing that summarizes what a
22 predominant format is at a particular station. If

1 it's news-jazz, if it's news-classical, if it's all
2 news, we might have that information that we put next
3 to the station's call letters and frequency.
4 Q Well, I note in this particular brochure
5 of cultural -- on cultural programming, music is
6 included in cultural programming as opposed to news
7 programming, right?
8 A That's correct.
9 Q Now, have you -- are you aware of any
10 study over any period of time made by NPR or CPB of
11 how much music is carried in any particular format?
12 A I believe the carriage survey that is done
13 through the support of CPB by NPR comes up with
14 approximations. In fact, I believe those
15 approximations were shown in my written testimony on
16 page seven.
17 Q Now, is it your testimony that all of the
18 -- the programming which you've -- I'm sorry, which
19 NPR has described as news program does not include
20 music? All things considered, Morning Edition?
21 A Well, music is used -- well, first of all,
22 we report on music regularly in our news magazines.

1 In fact, if you listened to Morning Edition this
2 morning, we did a report on a new show that has opened
3 in Arlington, Virginia. And we regularly interview
4 musicians and artists. We regularly interview
5 authors.
6 We also use music as interludes between
7 segments, as music beds, in our news magazines. But,
8 basically, that's a signal to the local station where
9 they can cover it with local news and traffic. It's
10 used as a segue.
11 Q So that -- we'll get to and maybe ths will
12 come up a little later and maybe it's come up already
13 in other people's testimony, those things which you've
14 described as news programming aren't all talk,
15 necessarily; they include sometimes some element of
16 music, right, especially in the magazines?
17 A The news magazines will certainly at times
18 discuss music, interview an artist, discuss a work,
19 discuss a play, review a book, review a musical,
20 cultural -- cultural -- we have a cultural desk in our
21 news division. So -- but that covers great -- a broad
22 latitude of things from religion to music to books to

1 culture in general.

2 Q I don't want you to misspeak. And

3 sometimes, as I think you've already said, some of

4 these shows that you have described here as news

5 programming also have musical compositions played for

6 some length of time for the entertainment of the

7 audience, isn't that correct?

8 A No. That really -- the shows are -- if

9 music is played, it's much more illustrative than it

10 is for the entertainment of the audience. Normally,

11 in the music magazine it is used to show a specific

12 point or to discuss a particular technique with an

13 artist.

14 Q The -- let me ask -- well, I'm still a

15 little confused. The amount of music that even will

16 be played on a music format will also depend upon, for

17 example, the person who is running the show. If you

18 have a talkative disc jockey, presumably, you'll have

19 less music, right?

20 A That's not the way NPR works.

21 Q I'm not talk -- I'm talking now -- I'm

22 sorry, I don't want to just confine this to NPR. That

1 would be true -- NPR doesn't, after all, provide 75
2 percent of the programming.
3 A Correct.
4 Q So I'm talking about throughout the
5 industry. There's -- in fact -- let me withdraw my
6 question.
7 Of the 75 percent of non-NPR programming,
8 do you have any idea how much of that is, in
9 accordance with your parlance, music formatted?
10 A Well, to -- to look at the industry
11 overall, which includes NPR, and, again, I think I
12 touched this on page seven of my written testimony,
13 about a third of the formats used are classical
14 formats. A little less than a third are news formats.
15 The remainder is -- is very eclectic, between jazz and
16 AAA music.
17 There's a great diversity. And, of
18 course, there's a great blend of formats depending
19 upon the particular market and the particular
20 station's choice.
21 Q So, in a sense, now I'm talking about the
22 overall spectrum of public radio programming, not

1 confining ourselves to the 25 percent that's NPR, do
2 you have any idea of how much of that is musically
3 formatted?
4 MR. RICH: Object to the form.
5 MR. SCHAEFFER: Okay. I'll withdraw the
6 question.
7 BY MR. SCHAEFFER:
8 Q Isn't it a fact that you don't know how
9 much of the balance of 75 is subject to strict music
10 formats?
11 MR. RICH: Object to the form.
12 CHAIRPERSON GRIFFITH: Mr. Schaeffer, do
13 you want to respond?
14 MR. SCHAEFFER: I don't know what the
15 objection is. I don't understand the -- what --
16 what's the grounds?
17 MR. RICH: I don't know what Mr. Schaeffer
18 means when he keeps referring to music formats, strict
19 music formats.
20 MR. SCHAEFFER: Oh, okay.
21 BY MR. SCHAEFFER:
22 Q You have an understanding of what a music

1 format shows, or don't you?

2 A Yes, I do.

3 Q Okay. Now, using your understanding of

4 what is a music format -- musically formatted show,

5 can you tell me of the 75 percent of shows which are

6 not produced by NPR, how many of them are musically

7 formatted, either in terms of hours or in terms of

8 shows or any other convenient measure?

9 A Okay. If you break down the 75 percent

10 that is not NPR produced -- you're mixing apples and

11 oranges again because --

12 Q Tell me --

13 A -- format, again, is what a local station

14 chooses, which is a blend of national programming and

15 local programming.

16 Q I see.

17 A Okay? A -- NPR provides about 25 percent

18 of the programming to the public radio system. PRI,

19 which is another distributor, provides about ten

20 percent of the programming to public radio system. A

21 variety of independent producers provide another ten

22 to 15 percent. The remainder is locally produced

1 programming.

2 The stations, by blending national and

3 local programming, create their own format which

4 ranges from all news to news-classical, to classical,

5 to news-jazz, to all jazz. It is -- do I know

6 specifically what is -- the predominant format in

7 public radio is classical, with classical news a very

8 --

9 Excuse me. classical-news I think is the

10 predominant format, with classical second and all-news

11 third. Then trailing far behind is jazz.

12 Q Do you have any numbers or any figures

13 that will tell us how many broadcast hours are music

14 and how many broadcast hours are not music?

15 A I don't. I'm sure there are numbers like

16 that.

17 Q Somewhere?

18 A Somewhere.

19 JUDGE DREYFUS: Doesn't this chart have

20 that?

21 THE WITNESS: Not by broadcast hours; by

22 percentages.

1 JUDGE DREYFUS: Measured in broadcast
2 hours.
3 THE WITNESS: Are you talking about my
4 testimony, page seven?
5 JUDGE DREYFUS: Yes, page seven.
6 THE WITNESS: But it's not the number.
7 It's by -- isn't it by percentages?
8 MR. SCHAEFFER: It's not hours there.
9 THE WITNESS: Percentages of hours.
10 JUDGE DREYFUS: You're asking for the
11 MR. SCHAEFFER: Hours.
12 JUDGE DREYFUS: -- specific hours?
13 THE WITNESS: Yeah. He was asking for
14 specific hours.
15 JUDGE DREYFUS: Okay.
16 BY MR. SCHAEFFER:
17 Q In fact, page seven is based on format,
18 isn't it?
19 A Page seven is based upon -- no. It's
20 based upon carriage and what programs are being run at
21 what hours of the day throughout all of the stations
22 that are public radio stations.

1 Q But it's not based on cue sheets, it's
2 based upon an estimate of what kind of a show will be
3 highly musical and highly prominent and those that
4 won't be, isn't that true?
5 A It's based upon what the stations provide
6 to CPB and NPR as to the program they are running and
7 the nature of that program during a specific hour or
8 half-hour of the day.
9 Q But it's not based, for example, as the
10 ASCAP Survey is, on somebody taping or counting cue
11 sheets, is it?
12 A I don't believe so.
13 Q Now, you are familiar with a show called
14 "All Things Considered"?
15 A I am.
16 Q That's a show you're very proud of?
17 A Yes.
18 Q And what format is that show?
19 A It's what we refer to as a news magazine.
20 Q You wouldn't consider that to be one that
21 carries -- that -- to which music is particularly
22 important, is that correct?

1 A Music is important to NPR. Music is -- is
2 not only a topic of all things considered and,
3 therefore, important; but it is also used very
4 cleverly to provide segues between pieces.
5 Q Incidentally, is -- in the range of shows
6 produced or distributed by NPR, what's the ranking of
7 "All Things Considered"?
8 A It's the second most important show in
9 public radio.
10 Q Do you have any idea of how many broadcast
11 hours that accounts for --
12 A No.
13 Q -- during a year or a month?
14 A That -- the number of hours that we
15 produce?
16 Q No. The number of hours which it's
17 broadcast.
18 A I don't know the number of hours that it's
19 totally broadcast throughout the system.
20 Q Would you say that -- assuming that 25
21 percent, or assuming we accept your figure that 25
22 percent of programming of public radio emanates from

1 NPR, what -- what proportion of that is "All Things
2 Considered," a tally, or can't you tell me?
3 A Well, it's hard to break it down tat way.
4 "Morning Edition" and "All Things Considered" are the
5 two largest, most carried programs in public radio.
6 They're on 550 stations each. And stations broadcast
7 them anywhere from two hours a day to six hours a day
8 each. So of the 25 percent, probably, between the two
9 it might be ten to 15 percent.
10 Q Would we -- would you put before the Panel
11 320 and -- ASCAP 320 and 321, which is from the -- I
12 know that is from the NPR web site. So I assume
13 there's no objection to it being in evidence.
14 MR. RICH: There is no objection.
15 MR. SCHAEFFER: It's fairly fixed.
16 CHAIRPERSON GRIFFITH: 320 will be marked
17 as ASCAP's Exhibit No. 26X.
18 JUDGE GULIN: This is just --
19 MR. SCHAEFFER: Well, it's in evidence.
20 We might just as well keep it in evidence and then we
21 don't have to --
22 JUDGE GULIN: All right. The motion to

1 strike is withdrawn?

2 MR. SCHAEFFER: Yeah. I think with

3 respect to that. You don't have to renumber it.

4 CHAIRPERSON GRIFFITH: All right, fine.

5 Thank you.

6 MR. SCHAEFFER: 320 and 321, Your Honor.

7 CHAIRPERSON GRIFFITH: The motion to

8 strike is withdrawn.

9 JUDGE GULIN: I don't think he heard you.

10 CHAIRPERSON GRIFFITH: The motion to

11 strike is withdrawn as to these two documents.

12 (The documents referred to,

13 previously marked for

14 identification as ASCAP

15 Exhibits No. 320 and 321, were

16 received in evidence.)

17 BY MR. SCHAEFFER:

18 Q Take a moment, would you, to look at 320

19 and 321. I'm going to ask you some questions about

20 it. But I'd like you just to familiarize yourself

21 briefly, as you can, without -- without prejudicing

22 yourself.

1 A Okay.

2 Q Have you ever seen these before?

3 A No.

4 Q Okay. Were you aware that NPR was putting

5 it on the web?

6 A I was aware that it was our intent because

7 we -- we receive a huge amount of phone calls from

8 people who will hear a music bed. We -- we refer to

9 these as zippers or buttons. A zipper or a button is

10 a -- is a musical segue between two pieces, sometimes

11 because we're changing from a hard-news subject to a

12 soft-news subject, also sometimes to give local

13 stations a cue so they can use that music bed to

14 provide local news, weather or traffic.

15 A lot of the music that we use as a zipper

16 or a button is used -- appears in the same context

17 with the piece that was just on. And, in fact, you --

18 this morning, again, there was a piece that Susan

19 Tamboerg did on this new show that opened, and the

20 music zipper that was used was from that show itself,

21 as the segue out.

22 Q Now, would you explain, then -- do you

1 understand, since you knew about the planning even if
2 you didn't know the execution, what these are intended
3 to convey to the listeners?
4 A Basically, they answer questions about
5 what was that piece I heard on NPR.
6 Q And just so I -- we've only given you it
7 for three months for, I believe, September, December
8 of 1997 and January of 1970 -- (pause) -- oh, okay.
9 One week in -- I"m sorry, I stand corrected. One week
10 in December of 1996, you've got four weeks in
11 September of 1997, and what do we have in January? A
12 day in January, which I don't think counts.
13 As I turn this, I -- I take it that the
14 beginning of each one of these for the days is a kind
15 of precis or a summary of what went on on "All Things
16 Considered." And then there's -- there's music
17 described in intervals.
18 And then for each day there's then one of
19 these sheets that lists the composer, the record
20 label, the label catalogue, the date released, and the
21 logo "Thanks" -- the legend "Thanks for your interest
22 in 'All Things Considered.'

1 "If you would like to write ATC" -- which
2 I assume is "All Things Considered" -- "please send e-
3 mail to," and then gives your address. "We encourage
4 you to support the artists that perform the music we
5 play on the show."
6 This is, I take, then designed to
7 accommodate the audience's interest, as you have said,
8 about the music. So if they want to, they can go out
9 and purchase it or they can do whatever else they
10 want, or learn about it. Is that correct?
11 A That is correct.
12 Q Now, I've done a -- or what caused to be
13 done a box score. Well, before I do that, that would
14 indicate to some extent music is a matter of interest
15 to the listeners of "All Things Considered," whether
16 we call them zippers or buttons or anything else,
17 isn't that so? Or else you wouldn't be doing this.
18 A Absolutely right. We have a very curious
19 and interested audience.
20 Q So that one of the attractions to that
21 audience of "All Things Considered," it follows, at
22 least it seems to me, is music, isn't that so?

1 A I think the audience --

2 Q I think you can answer that "yes" or "no."

3 CHAIRPERSON GRIFFITH: Well, if you can

4 answer "yes" or "no," do so. But then you may explain

5 your answer completely.

6 THE WITNESS: I'm not sure I can answer

7 that "yes" or "no."

8 CHAIRPERSON GRIFFITH: All right.

9 THE WITNESS: The -- I think the

10 attraction of the listener is to the substance of the

11 show "All Things Considered," much as it is to the

12 substance of the show "Morning Edition." We get huge

13 amounts of questions about everything we have on the

14 air, including music, because that's the nature of our

15 audience.

16 BY MR. SCHAEFFER:

17 Q Well, you really don't do -- have you ever

18 done a survey as to why people ask you questions about

19 the music on the show or is that your own idea of why

20 they are interested in music on the show?

21 A I don't believe we've ever done a survey.

22 I --

1 Q And, in fact -- I'm sorry.

2 A I think our role is to serve the American

3 public. And when we get people asking us questions,

4 we like to provide answers.

5 Q Is it at least conceivable to you that

6 some of your membership -- some of your listening

7 audience turns on "All Things Considered" because in

8 addition to talk there's music that they like to hear,

9 or is that not conceivable to you?

10 A I don't think people listen to "All Things

11 Considered" for the music. I think people listen to

12 "All Things Considered" because of the substance of

13 what it provides and how it aids and abets their

14 everyday life.

15 Q You don't know that. You're just

16 hypothesizing.

17 A That was the question you asked, Mr.

18 Schaeffer.

19 Q No, it wasn't. I asked you whether or not

20 --

21 MR. RICH: Objection. Yes, it was.

22 MR. SCHAEFFER: I'm not --

1 MR. RICH: -- being argumentative with the
2 witness.
3 MR. SCHAEFFER: I think I'll ask the
4 question again, then, so we can all --
5 CHAIRPERSON GRIFFITH: All right.
6 BY MR. SCHAEFFER:
7 Q Maybe that will -- is it conceivable,
8 conceivable to you, that one of the reasons listeners
9 turn on "All Things Considered," at least to some
10 degree, is the music that is contained on the show
11 which is combined with the talk, or is that not
12 conceivable?
13 MR. RICH: I'll object.
14 CHAIRPERSON GRIFFITH: Is it conceivable
15 to him?
16 MR. SCHAEFFER: That's right.
17 JUDGE GULIN: In other words, is it
18 possible --
19 MR. SCHAEFFER: Of course.
20 JUDGE GULIN: -- is that basically it?
21 BY MR. SCHAEFFER:
22 Q Is it possible --

1 MR. RICH: I don't know what's probative,
2 Your Honor, of a question as to what's theoretically
3 possible. I suppose we could spend a long time
4 talking about what is theoretically possible --
5 MR. SCHAEFFER: Well, I --
6 MR. RICH: -- probative of reasonable fees
7 in this proceeding.
8 MR. SCHAEFFER: I -- I -- I'd like an
9 answer to my question and I'll follow up on it.
10 CHAIRPERSON GRIFFITH: I'm not sure how
11 it's going to help us, but the witness can answer.
12 MR. RICH: I'll withdraw the objection.
13 THE WITNESS: Yes, Mr. Schaeffer, it's
14 possible.
15 BY MR. SCHAEFFER:
16 Q When you -- when the producer who -- or
17 director, whatever it is who makes up this program
18 crafts it, he crafts it to maximize the appeal of the
19 show, doesn't he?
20 A I would hope. And, "appeal," again is a
21 tough word. He -- he or she crafts it to maximize the
22 content in the appropriate context.

1 Q He tries to interest his audience in the
2 high quality things that are going on on the show,
3 doesn't he?
4 A Tries to keep the audience engaged, yes.
5 Q Is it your judgment or -- withdrawn. Let
6 me make something easier. The person who produces or
7 creates this show, what is he called in your business?
8 A Well, we have a -- it's not just one
9 person. We have an executive producer, producer, and
10 then there are a variety of editors and assistant
11 producers.
12 Q Who would determine the content of the
13 show? Who has the ultimate responsibility?
14 A Gosh. I guess it would go to the vice
15 president of the news ultimately. But each show has
16 its own producer. Each desk has a senior editor.
17 They work collaboratively as a team. It is very much
18 team effort to produce this amount of news on a daily
19 basis.
20 Q When a team puts together a particular
21 show, I assume -- is it fair to assume that they try
22 to make a show that is attractive as possible within

1 the guidelines of NPR to its listening audience?

2 A "Attractive" is a very -- frankly,

3 "attractive," I think, appeals much more to commercial

4 radio than it does to NPR or public radio. We try to

5 provide as much information, as much content within

6 the format that we have developed, which we hope

7 engages the listener and keeps the listener there.

8 In fact, we hope the people stay in their

9 cars at night when they drive home in their garages.

10 If we've done that, then we've succeeded at our job.

11 Q Well, then let me use your terminology.

12 When the show is crafted by the team, I assume the

13 team tries to put on it material that will engage the

14 member of the audience so that he or she will listen

15 to the program, isn't that correct?

16 A Yes. But my point is we will deal with --

17 Q But I --

18 A -- subjects --

19 Q -- didn't ask you for an explanation.

20 MR. RICH: The witness can answer.

21 JUDGE DREYFUS: He is entitled to explain

22 his answer, sir. Go ahead.

1 THE WITNESS: Yes. But we know we will
2 deal with subjects that will make our audience
3 uncomfortable. That is part and parcel with what NPR
4 is in business to do.
5 BY MR. SCHAEFFER:
6 Q Do you include music in order to make your
7 listeners uncomfortable?
8 A No.
9 Q And do your -- your -- does the team pick
10 particular musical pieces to be on the show?
11 A Absolutely.
12 Q And do they pick pieces at random or do
13 they consider whether that music will -- whether the
14 listeners will want to listen to that music or,
15 because you think it's a -- they think it's
16 appropriate, should listen to that music?
17 MR. RICH: Objection.
18 CHAIRPERSON GRIFFITH: What is your basis?
19 MR. RICH: He's asking for what's in the
20 mind what he testified were numerous individual
21 producers. He can only testify if he knows what's in
22 those producers minds.

1 CHAIRPERSON GRIFFITH: Mr. Schaeffer?

2 MR. SCHAEFFER: It seems to me he's the

3 Chief Operations Officer of NPR. He knows how they

4 pick material for a show. He's already said so. He

5 said it goes all the way up to the top. So I don't

6 see why he wouldn't know that. And if he doesn't, he

7 can say so.

8 CHAIRPERSON GRIFFITH: The objection is

9 sustained. You can rephrase the question if you wish,

10 Mr. Schaeffer.

11 BY MR. SCHAEFFER:

12 Q When music is -- do you understand on what

13 principles music is chosen to be put into "All Things

14 Considered"? Or don't you?

15 A Frankly, I don't understand the specific -

16 - how the specific selections are made on a daily

17 basis. I truly believe that they are made as

18 creatively as possible by the individuals involved in

19 making the selection, based upon the content of the

20 show.

21 Q Do you have an understanding that the

22 music that's put on the show is appropriate for the

1 listeners to hear?

2 A My understanding is that, certainly, the

3 intent of the producers to make it appropriate for

4 listeners to hear.

5 Q And do you understand or is it in your

6 understanding that the team or producers -- now you've

7 used the word "producers" -- pick music carefully?

8 A Yes.

9 Q And they pick music out of the vast

10 repertoire of music that's available because they

11 think it would fit the show and it would do something

12 for the listener, either give him pleasure, him or her

13 pleasure or educate him or her, isn't that correct?

14 A They very much try to make the music fit

15 the content and the context of the show.

16 Q And so it is a significant choice,

17 wouldn't you agree, as to what music goes on "All

18 Things Considered," significant enough so that if a

19 listener wants -- you expect listeners may want to

20 find out what particular piece was on the show?

21 A I think there are two different questions

22 there. Let me answer the first. It is very important

1 to us -- we take everything we do very seriously
2 editorially. And the selection of music is very
3 important to us, as much as the selection of every
4 piece we put on the air is important to us.
5 We -- we have received numerous requests
6 from listeners of -- for tapes and transcripts of our
7 shows, as well as information on music played because
8 we play only a very brief snippet of music as a segue.
9 And, therefore, we provide that information as a
10 service to the American public.
11 Q Is there somebody associated with "All
12 Things Considered" who has a particular responsibility
13 for choosing the music that's played on the show?
14 A Yes, I believe so.
15 Q What is that person's job title?
16 A I presume -- and, again, I don't know
17 specifically, but I presume they have a music producer
18 or a music -- presume it's a music producer.
19 Q And that -- do you know who the music
20 producer is at the present time for "All Things
21 Considered"?
22 A I do not.

1 Q Are there any other shows that have been
2 classified as magazines by NPR that have a music
3 producer?
4 A "Morning Edition," I believe.
5 Q And is the function of the music producer
6 on "Morning Edition" similar to the function of the
7 music producer on "All Things Considered"?
8 A I believe -- I -- I believe so.
9 Q Are there any other shows which are
10 produced or distributed by NPR that have a -- that are
11 called news shows or news magazine shows that utilize
12 the services of the music producer or something
13 equivalent?
14 A I really, truly don't know. The directors
15 of the show may in fact do the music selection. I'm
16 not sure if they -- I frankly think the selection of
17 what music plays rotates among staff. But I do
18 believe that ATC has a music producer.
19 Q And you said ATC. Are you now changing
20 your testimony as to "Morning Edition"?
21 A I would assume that somebody is
22 responsible for that in "Morning Edition." I don't

1 know if they have a person with a title. In fact, I'm
2 not even sure if -- but I believe they have somebody
3 who is responsible for the selection of music.
4 Q You've -- you mentioned in this brochure
5 something called "Fresh Air With Terry Gross" as a
6 news programming show. Does that have any music on
7 it?
8 JUDGE DREYFUS: Which brochure?
9 MR. SCHAEFFER: Exhibit 316.
10 BY MR. SCHAEFFER:
11 Q Does that have any music on it?
12 A I believe "Fresh Air" occasionally has
13 music on it. I think the -- it's primarily a news
14 talk show that deals with book reviews --
15 Q And what about --
16 A -- and author interviews.
17 Q What about "On the Media," does that have
18 any music in it?
19 A I do not believe it does. But, quite
20 frankly, I never listen to the show.
21 Q Well, I assume the weekend editions of
22 "All Things Considered" and "Weekend Edition" itself

1 also has music played on it?

2 A They would use music segues much as

3 "Morning Edition" and "All Things Considered."

4 Q And they would either have one person or

5 another acting as a music producer or something

6 equivalent to a music producer, correct?

7 A Because those are only -- those aren't

8 five-day -- those are one day a week shows. I would

9 doubt that they would have somebody who's specifically

10 assigned that task. That would be among the many task

11 of the other people.

12 MR. SCHAEFFER: I had -- I had done a box

13 score, only intending to be illustrative for the

14 benefit of the Panel, of the amount of musical pieces

15 which were -- appear from Exhibits 320 and 321 in the

16 month of September 1997, and in the week that we have

17 submitted in December of 1997, and the one day in

18 January.

19 The numbers are in bold, and I would offer

20 that as an exhibit, only as illustrative. It is not

21 in itself evidence. We just totaled it up for your

22 convenience.

1 MR. RICH: I'm not sure on what basis it's
2 being offered or --
3 MR. SCHAEFFER: It's merely being offered
4 --
5 MR. RICH: -- illustrative --
6 MR. SCHAEFFER: -- to show the count of
7 how much music was on "All Things Considered" on those
8 days. The bold figures indicate the number of pieces
9 which we simply counted from the exhibits.
10 MR. RICH: We obviously have no basis, not
11 having seen this document before, to validate the --
12 the data on it.
13 MR. SCHAEFFER: Well, why don't you -- you
14 can always do it. And, obviously, if there's a
15 problem, I'll take it -- we can take it off the Panel.
16 It's really just intended to be an illustrative to
17 spare you, if you wanted to do it --
18 JUDGE GULIN: Is this something that
19 counsel feels should be marked, or is it something
20 that --
21 MR. SCHAEFFER: I -- I --
22 JUDGE GULIN: -- in order of a chart that

1 --

2 MR. SCHAEFFER: It's like a chart, but I
3 would mark it for identification because I don't want
4 it to get lost in the scheme of things, which is my
5 usual practice. I would ask that it be 26 for
6 identification. It is not in itself evidence. It is
7 just our totaling. It's kind of like a -- a chart.
8 It is a chart, except it's not a big thing.

9 CHAIRPERSON GRIFFITH: Marked as 26X for
10 identification.

11 (The document referred to was
12 marked for identification as
13 ASCAP Exhibit No. 26X.)

14 JUDGE DREYFUS: What are these numbers
15 again?

16 MR. SCHAEFFER: These numbers are the --
17 the numbers in bold points on the dates indicates are
18 the -- in the first case in -- the whole month of
19 September is here for the daily show of "All Things
20 Considered." That's why there's nothing on the
21 weekends.

22 The bold numbers are the numbers of

1 musical pieces which were carried on that day. We
2 also did it for a week in December, and that similarly
3 appears there on bold, the 23rd through the 31st. I -
4 - there's one for January 15th which -- for January 1,
5 which fills out, I guess that week. And that's the
6 same thing.
7 The bold numbers are the numbers of
8 musical pieces which correspond to the musical pieces
9 which are set forth in these exhibits.
10 CHAIRPERSON GRIFFITH: When you say they
11 were used, how were they used?
12 MR. SCHAEFFER: Well, I don't know. It
13 says "music" in the script, as I'm sure you will read
14 when you see the document. And that's presumably the
15 music because NPR reported these were the musical
16 pieces.
17 JUDGE DREYFUS: This is for the two-hour -
18 - it's a two-hour show?
19 THE WITNESS: It's a two-hour show, but
20 it's rolled over for a number of hours.
21 JUDGE DREYFUS: Right. So this is for a
22 single two-hour show? For example, September 1st,

1 Monday, would be 11 pieces in that two-hour show?

2 THE WITNESS: And you can see it from --

3 yes. And you can see it from the script itself.

4 JUDGE DREYFUS: Now, the 8th of September

5 had no pieces?

6 THE WITNESS: I don't -- to be honest with

7 you, I think it was Labor Day and they didn't run the

8 show on that day, or it was a holiday or something.

9 We don't have the 8th in here for some reason. it

10 wasn't on the web or we missed it.

11 But every other day, as you can see,

12 carries music. There may be a day or two when -- when

13 we don't have the -- the script.

14 BY MR. SCHAEFFER:

15 Q By the way, are you aware that certain

16 public broadcasting stations in recent times have

17 switched from news formats back to music?

18 A I'm aware that there has been -- that the

19 primary switch has been from music to news. I am not

20 aware of any stations, first-hand knowledge, that have

21 gone the other way.

22 Q Have you got any secondhand knowledge

1 about the Oregon Public Broadcasting System?

2 A The Oregon Public Broadcasting System has

3 been trying desperately to make the switch from

4 classical music to news. And it has been struggling

5 with its Board because of the local politics involved

6 in that switch. That's my knowledge.

7 MR. SCHAEFFER: Would you put before the

8 witness a document dated December 9th, 1997, on

9 something called "Business Wire." Put it before the

10 Arbitrators, too. And this will be our next exhibit

11 in cross-examination.

12 CHAIRPERSON GRIFFITH: All right. The

13 document will be marked as Exhibit 27X, ASCAP.

14 (The article referred to was

15 marked for identification as

16 ASCAP Exhibit No. 27X.)

17 BY MR. SCHAEFFER:

18 Q Have you ever -- did you ever hear of

19 "Business Wire" before?

20 A No, I have not.

21 Q Okay. Why don't you read the article and

22 tell me if it refreshes your recollection as to what's

1 going on in Oregon.

2 A Yes. I'm well aware of this particular

3 case.

4 Q Isn't it in fact -- or is the article

5 inaccurate to the extent that the board of directors

6 of Oregon Public Broadcasting voted to today to accept

7 the staff recommendation to add additional music?

8 A The article is accurate for what it -- it

9 says. It's just inaccurate in terms of what is

10 actually going on in Oregon Public Radio.

11 Q Well, why don't you explain that

12 inaccuracy.

13 A Oregon Public Radio is trying desperately

14 to make the shift from music to news-talk. But the

15 politics of doing it -- they -- whenever you switch a

16 format in radio it creates a furor among the listeners

17 who have been listening to your station for years, no

18 matter how few that might be.

19 Any change -- when we had a station in Ann Arbor

20 make the shift recently, a year ago, from classical to

21 news, the regents of the University wrote in

22 opposition to it even though the University owned the

1 station itself. Eventually, the switch was made, the
2 furor calmed down, and the station is reaching a far
3 broader audience than it ever reached before.
4 In this particular situation, the -- the
5 station didn't handle the politics of handling the
6 switch very well. And, initially, when they said they
7 were switching to news, they were rebuffed by a number
8 of people on their board who weren't appropriately
9 informed in advance and who were heavily lobbied by
10 their audience.
11 Therefore, choosing what I -- they
12 consider short-term political expediency, they came
13 back and indicated to the board that they were
14 retaining music for a -- for a period of time. It is
15 their intent as far -- to the best of my knowledge to
16 ultimately make the switch to news-talk sometime after
17 the first of the year.
18 Q What's your source of --
19 JUDGE DREYFUS: First of next year?
20 THE WITNESS: First of next year.
21 BY MR. SCHAEFFER:
22 Q What is the source of your knowledge about

1 what you've just described to the Panel?

2 A The general manager of the station.

3 MR. SCHAEFFER: I offer the document in

4 evidence since it's been identified. And, apparently,

5 what it says you say is true, and it's subject to the

6 explanations you've already given.

7 MR. RICH: I -- I -- I'm not sure I heard

8 the witness to say it accurately depicts the

9 situation. If he did, I wouldn't object to this

10 document. But may I ask for a clarification?

11 CHAIRPERSON GRIFFITH: I think the witness

12 said it was true for what it said, but not for what --

13 what the problem is.

14 MR. RICH: And, therefore, I completely

15 object to it. It's also a publication the witness

16 said he's totally unfamiliar with.

17 MR. SCHAEFFER: I think that subject to

18 the -- he's explained what he thinks it's inaccurate,

19 and I think it's for you to decide what's true.

20 CHAIRPERSON GRIFFITH: The objection is

21 overruled. It will be received for what the witness

22 has said about it, and that weight, whatever is given

1 to it.

2 JUDGE DREYFUS: What number is this?

3 CHAIRPERSON GRIFFITH: 27X.

4 (The article referred to,

5 previously marked for

6 identification as ASCAP Exhibit

7 No. 27X, was received in

8 evidence.)

9 BY MR. SCHAEFFER:

10 Q NPR makes more money on selling news

11 programs than they do on selling cultural programs,

12 don't they?

13 A Yes.

14 Q I think -- what did you say the ratio was

15 between the charges for news programs and the charges

16 for cultural programs?

17 A The total charge -- if people purchase the

18 entire news package, the charge is 11.5 percent of

19 total station revenue. If people choose to purchase

20 the entire cultural package, the total charge, which

21 includes the cultural access fee, is 2.1 percent, and

22 that includes their being able to get "Car Talk." And

1 there is a ceiling on the cultural side.

2 JUDGE GULIN: Excuse me, Mr. Schaeffer.

3 Could you give us some idea how much longer this is

4 going to go?

5 MR. SCHAEFFER: I'm trying to cut it to

6 about 15 minutes.

7 JUDGE GULIN: We have to be cognizant that

8 we have the schedule to deal with, and we only have

9 until Thursday. And we're going to be in a lot of

10 trouble if we don't get through this. And it is

11 getting a little bit redundant and repetitive, I

12 think.

13 MR. SCHAEFFER: I thought I was getting

14 into a new area. I think what NPR gets for its shows

15 is perfectly relevant to what we're talking about now.

16 JUDGE GULIN: Oh, I think it's relevant.

17 BY MR. SCHAEFFER:

18 Q The -- all right. Let me move on to a

19 slightly different subject, and I'm mindful of what

20 the Arbitrators' views on. Although I will ask, have

21 you ever done a calculation or a study of how much

22 money NPR receives from it's so-called news

1 programming during a given year as opposed to the
2 cultural programming?
3 MR. RICH: Object to the form.
4 CHAIRPERSON GRIFFITH: In what way, Mr.
5 Rich?
6 MR. RICH: "So-called news programming."
7 CHAIRPERSON GRIFFITH: "So-called"?
8 Please --
9 BY MR. SCHAEFFER:
10 Q Has -- during any year that you have been
11 the chief operating officer, has anyone segregated the
12 receipts that NPR receives from what it calls news
13 programming and it calls cultural programming?
14 A The majority of what we receive from our
15 member institutions for our member public radio
16 stations stems from news and information programming.
17 Q Can you tell us the relative ratio?
18 A I would say close to 90 percent.
19 Q So it would be fair to say that at least
20 it's in the economic interest of NPR to encourage
21 stations to switch to news programming from cultural
22 programming, isn't that correct?

1 A It's in the economic interest of NPR if
2 you look at it solely from what we receive from the
3 stations. We also -- but that is not how NPR solely
4 operates.
5 Q Are you familiar with something called
6 Audience '98?
7 A I am.
8 Q What is Audience '98?
9 A It's an analytic study of carriage and
10 Arbitron information done specifically for public
11 radio by a gentleman named David Giovonni and his
12 staff.
13 Q In fact, CPB financed it, did it not?
14 A Yes. Well, Audience '98 is -- there was
15 a -- every ten years CPB funds, or has for the last 20
16 years, a -- a study that summarizes the past ten years
17 in public radio.
18 Q Would it be fair to say it surveyed 8,000
19 people who listened to public radio in the Fall of
20 1996 and kept Arbitron diaries?
21 A I don't know the specific numbers, but I
22 wouldn't doubt that that might be true.

1 Q And would it be fair to say that one of
2 the purposes of the survey was to design, to elicit
3 the pledging behavior of those listeners and their
4 attitude toward public radio?
5 A I -- I think -- yes. I think the survey
6 was geared to find as much about the public radio
7 listener as was possible.
8 Q And did it also attempt to ascertain what
9 the pledge return was and the underwriting return on
10 formats such as classical, jazz and very -- various
11 news formats as well as news?
12 A I think it was more show-specific than
13 that. But by -- by tabulating it, you could make it
14 format-specific.
15 Q And that -- the result of Audience of '98
16 have been the subject of conferences limited to public
17 radio broadcasters, have they not?
18 A I believe so.
19 Q Let me move on to what will be my last
20 subject. Do you know approximately what the cost of
21 the Giovonni study was?
22 A No, I do not.

1 MR. SCHAEFFER: Would you put this in
2 front of the Arbitrators and the witness? This is an
3 article that appeared on March 16th, 1998
4 CHAIRPERSON GRIFFITH: Mr. Schaeffer, you
5 want this marked as --
6 MR. SCHAEFFER: Twenty-eight.
7 CHAIRPERSON GRIFFITH: -- 28X?
8 MR. SCHAEFFER: Yes. This is my last one.
9 (The article referred to was
10 marked for identification as
11 ASCAP Exhibit No. 28X.)
12 CHAIRPERSON GRIFFITH: Do you refer to the
13 article on the left side?
14 BY MR. SCHAEFFER:
15 Q I'd like you to look at the -- and look to
16 yourself -- at the "amazing shrink dis" list. If you
17 would just read that article to yourself, and you can
18 skip the big art -- the article about WKOO.
19 A Okay.
20 Q Have you seen this article before?
21 A Yes, I have.
22 Q Okay. And, now, let's see if I can move

1 it along. Is it -- is it -- as far as you know, is it
2 true that CPB has denied some funds and put on
3 probation six of 35 stations that were declared to be
4 at risk in January of 1996?
5 A I believe that would be the case.
6 Q And as far as you know -- well, withdrawn.
7 (Whereupon, the proceedings in the
8 foregoing matter went off the record at 11:03 a.m. and
9 went back on the record at 11:15 a.m.)
10 MR. KLEINBERG: May I proceed?
11 CHAIRPERSON GRIFFITH: Yes. Mr.
12 Kleinberg, are you ready to proceed?
13 MR. KLEINBERG: Yes. I just have a few
14 questions for you, Mr. Jablow.
15 CROSS EXAMINATION
16 BY MR. KLEINBERG:
17 Q I want to focus your attention on the
18 subject of audience size. Would you agree with me
19 that the size or the amount of weekly listeners to
20 public radio in total has increased by 25 percent
21 since 1992?
22 A I don't know the exact percentage, but I

1 agree that it has increased, yes.

2 Q Let me have handed to you and the Panel --

3 we'll have marked as the next BMI exhibit -- a

4 document entitled "Frequently Asked Questions About

5 Public Broadcasting 1997 for the Corporation for

6 Public Broadcasting."

7 MR. KLEINBERG: It was BMI Exhibit 6, but

8 it hasn't yet been offered into evidence. To save

9 time, I was just --

10 CHAIRPERSON GRIFFITH: BMI 3X.

11 (Whereupon, the above-referred

12 to document was marked as BMI

13 Exhibit No. 3X for

14 identification.)

15 MR. RICH: No objection.

16 CHAIRPERSON GRIFFITH: Are you offering it

17 into evidence?

18 MR. KLEINBERG: Yes, I am.

19 CHAIRPERSON GRIFFITH: And no objection.

20 It will be received.

21 (Whereupon, the above-referred

22 to document, previously marked

1 as BMI Exhibit No. 3X for
2 identification, was received in
3 evidence.)
4 BY MR. KLEINBERG:
5 Q Mr. Jablow, I'd like you to turn your
6 attention to page 14 of that document. There are two
7 pages for every page, given the way this document is
8 constructed.
9 A What page?
10 Q Number 14. It would appear in the top
11 half of the --
12 A Yes.
13 Q -- page.
14 MR. KLEINBERG: Does the Panel have their
15 page?
16 BY MR. KLEINBERG:
17 Q And I want to focus you on the bar graph
18 which appears on page 14. And as I understand it,
19 that refers to the number of weekly listeners to
20 public radio in millions, and in 1992 there were
21 16 million weekly listeners to public radio; in 1996,
22 20 million, which according to my rudimentary math was

1 a 25 percent increase. Is that correct?

2 A Your math is correct. I'm not sure that

3 I agree with the total numbers here. I have not heard

4 the 20 million number. This -- this is the first time

5 I've heard that.

6 Q Do you see the source there, CPB --

7 A Yes.

8 Q -- and Arbitron data for listeners ages 12

9 plus?

10 A Yes.

11 Q Well, regardless of whether you agree with

12 it, I guess you would agree with me that the

13 Corporation for Public Broadcasting thought it was

14 accurate enough to put it in one of its publications,

15 correct?

16 A Yes.

17 Q Okay. You testified yesterday with

18 respect to the chart on page 7 of your testimony,

19 which was referred to, I think, by Judge Dreyfus

20 before which has to do with the percentage of system

21 broadcast hours, and in your testimony yesterday you

22 indicated what the percentage of changes were in music

1 format since 1987 to 1996.

2 And I'd like to focus your attention on

3 the period the spring of 1992 to 1996, which is a

4 period that we've heard a lot about in this proceeding

5 so far. And I take it you would agree with me that in

6 that period, 1992 to 1996, the music formatted

7 programming, in terms of broadcast hours, has declined

8 from 68 percent to 65 percent. Is that correct?

9 A Yes.

10 Q And all of that decline, in fact, has been

11 the result of a decline in the classical music genre,

12 is that correct, which actually went from 39 percent

13 in the spring of '92 to 34 percent in '96? So that

14 would be a drop of four -- five percentage points,

15 correct?

16 A Correct.

17 Q And, actually, some of the other music

18 formats increased in that same period, like the pop

19 music base went from five percent in the spring of '92

20 to six percent in the spring of '96?

21 A Yes.

22 Q And the jazz base went up from 16 percent

1 in the spring of '92 to the -- yes. It stayed the
2 same; ended up in the same place.
3 You have indicated also, I think, in your
4 testimony that the classical format includes more
5 public domain music than the other musical format
6 programming, isn't that correct?
7 A That is correct.
8 Q That also does include copyrighted
9 programming music, does it not?
10 A I believe so.
11 Q Also, yesterday you testified about the
12 growth or increase in system-wide programming
13 expenditures in the time period 1992 to 1996, and
14 that's on page 11 of your testimony. And you
15 indicated that in that time period, those expenditures
16 had increased by only six percent from 152.5 million
17 to 161.9 million. And I believe you testified that
18 those figures came from Dr. Jaffe's analysis and
19 testimony, correct?
20 A That is correct.
21 Q You probably don't know this yet, but Dr.
22 Jaffe has -- or is submitting a corrected version of

his testimony, which Mr. Rich was kind enough to give me this morning. And just so the record is correct here, one of the corrections that Dr. Jaffe makes to his testimony was to change the number of 161.9 million to 166.41 million for the system-wide public radio expenditures for 1996.

And, again, doing my quick math, that would result in an increase in the '92 to '96 time period of 9.1 percent, instead of the six percent referred to in your testimony. I think the record should reflect that, so that we have corrected testimony. You have no problem with that correction, I take it, Mr. Jablow, to your testimony?

MR. RICH: I'll represent as counsel that that's an accurate characterization of the correction.

Thank you, Mr. Kleinberg.

CHAIRPERSON GRIFFITH: Thank you.

BY MR. KLEINBERG:

Q Mr. Jablow, I want you to take a look at one --

JUDGE DREYFUS: Before you leave that point --

1 MR. KLEINBERG: Yes.

2 JUDGE DREYFUS: -- then, is there anything

3 else you want to change in your testimony as a result

4 of this change in percentage, or the correction of Mr.

5 Jaffe's figures?

6 THE WITNESS: I don't believe so.

7 JUDGE DREYFUS: Okay.

8 BY MR. KLEINBERG:

9 Q I'd like for you to take a look at one

10 news article, which we'll mark, if you would, please,

11 as BMI 4X.

12 CHAIRPERSON GRIFFITH: All right. BMI

13 Exhibit 4X.

14 (Whereupon, the above-referred

15 to document was marked as BMI

16 Exhibit No. 4X for

17 identification.)

18 BY MR. KLEINBERG:

19 Q This is an article from The New York Times

20 on Monday, March 2, 1998, entitled "Rivalry Grows at

21 Low End of Dial." Have you seen that article before,

22 Mr. Jablow?

1 A Yes, I have.

2 Q I wanted to focus your attention on the --

3 strike that.

4 The article generally refers to the

5 growing competition between NPR and PRI. And I think

6 you've already acknowledged there is that competition,

7 is that correct, sir?

8 A I don't think I acknowledged the

9 competition. We are -- we are both national

10 distributors of programming. We are primarily a

11 producer; they are primarily a distributor. We also

12 collaborate on a variety of levels.

13 Q Are you not in competition with PRI with

14 respect to the distribution and sale of programming to

15 public radio stations?

16 A On some levels, upon occasion, yes.

17 Q The first paragraph of this article

18 indicates that, "Whatever reputation public radio has

19 for polish and low key aplomb derived at Public Radio

20 International as a challenger to national public

21 radio's programming dominance is making life in the

22 non-profit time slot trenches as brutal as any

1 scheduling fight between Fox and NBC." Would you
2 agree with that characterization?
3 A Not in the least.
4 Q Okay.
5 A I think it's ludicrous.
6 Q I want to focus your attention on the
7 fourth --
8 JUDGE DREYFUS: Excuse me, counsel. I
9 have the same question that I posed to Mr. Schaeffer,
10 and that is, what is the interest of the Panel in
11 this? This came up during Mr. Schaeffer's cross, and,
12 once again, I'd like to know how it fits in.
13 MR. KLEINBERG: Well, this was only for
14 context to the -- what the article is. What I'm
15 focusing on right now is the sentence that I want the
16 witness to react to, which is the fourth paragraph,
17 which contains a quote from Steve Behrens, editor of
18 Current, whom we've heard before. And the quote
19 attributed to him is, "They may be non-profit, but
20 they don't survive if they don't have listeners,"
21 referring to public radio stations.
22 The article goes on to say, "He" --

1 Behrens -- "points out that public broadcasting is
2 ruled by the same iron law -- be heard or be gone --
3 as commercial broadcasting."
4 BY MR. KLEINBERG:
5 Q I'll ask you, Mr. Jablow, whether you
6 agree with those characterizations as reported in here
7 in this article from March 2nd?
8 A No, not at all. If that rule applied to
9 public radio, hundreds of public radio stations would
10 be gone by now.
11 Q Lastly, you testified yesterday that the
12 fee increase that was being sought by BMI and ASCAP
13 was, in your words, "ludicrous." And you indicated
14 you had done some quick look at the increase insofar
15 as it applied to public radio and had concluded that
16 the financial impact would be substantial and that
17 many stations couldn't afford $500 or $1,000 that
18 might be called for as a result of those increases.
19 And my question to you, sir, as to how you
20 did that calculation, in order to reach the
21 determination that there would be any financial affect
22 in any particular dollar amount on public radio

1 stations.

2 A In brief, it was done on this basis. At
3 what level can CPB no longer afford to support the
4 public broadcasting industry by paying the fees to the
5 music royalty agencies? At that point, what becomes
6 the responsibility of the public radio stations and
7 the public television stations to contribute to that
8 pool, to provide the support for the music royalties
9 agencies.

10 And if that -- those leftover millions of
11 dollars are passed through to the system, what might
12 the impact be on individual stations. It was all
13 done, you know, by me by projection, and I thought
14 there would be a substantial impact, especially among
15 the -- at the smaller station level.

16 Q What did you use as your base for the
17 current fee for public radio as to which you applied
18 this 3- to 400 percent increase to reach the
19 conclusion that that was going to be too substantial
20 and too difficult and burdensome?

21 A Well, I didn't use the fee for public
22 radio; I used the fee for public broadcasting. And I

1 just took some educated guesses.

2 Q Well, what amount of the fee for public

3 broadcasting in total did you attribute to public

4 radio in making this analysis that you led you down to

5 the micro level that $500 --

6 A I see what you're getting at.

7 Q -- or $1,000 would be too much?

8 A I spread it across the base number of

9 stations, public radio and public television stations.

10 I didn't try to do an educated split between public

11 television and public radio, other than a 50/50.

12 Q Well, how much of the increase -- strike

13 that.

14 What was the base number that you used or

15 you worked with in terms of the amount that you were

16 going to spread to the public radio stations?

17 A The base amount I used was the base amount

18 that public broadcasting is paying on an annualized

19 basis now to ASCAP and BMI. And I took that base

20 amount, and I increased it by some 3- to 400 percent.

21 JUDGE DREYFUS: Did I understand in your

22 prior response you said that -- you said other than a

1 50/50 split, you allocated -- did I misunderstand you?
2 CHAIRPERSON GRIFFITH: A 50/50 --
3 THE WITNESS: I just took that number --
4 JUDGE GULIN: You allocated 50 percent of
5 the current rate to public radio?
6 THE WITNESS: Correct.
7 JUDGE GULIN: Okay.
8 MR. KLEINBERG: Oh, I'm sorry. I missed
9 that.
10 JUDGE GULIN: I thought you missed that.
11 MR. KLEINBERG: Yes, I did miss it.
12 BY MR. KLEINBERG:
13 Q Is it not generally correct, Mr. Jablow,
14 that the funding provided by the Corporation for
15 Public Broadcasting -- the split, if you will, between
16 radio and television -- is 25 percent radio/75 percent
17 television, generally speaking, in fact?
18 A That is correct.
19 Q But you took the 50/50 split, not 25/75?
20 A That was the basis on which I used.
21 MR. KLEINBERG: No further questions.
22 CHAIRPERSON GRIFFITH: All right.

1 Any redirect?

2 MR. RICH: Very brief, if I may.

3 CHAIRPERSON GRIFFITH: Okay.

4 REDIRECT EXAMINATION

5 BY MR. RICH:

6 Q Mr. Jablow, Mr. Schaeffer asked you any

7 number of questions trying to elicit the degree to

8 which NPR operates as a business. Does NPR operate as

9 a business?

10 A We --

11 MR. SCHAEFFER: Objection. This is

12 redirect.

13 CHAIRPERSON GRIFFITH: The objection is

14 sustained.

15 BY MR. RICH:

16 Q Mr. Jablow, does NPR function as a

17 business?

18 MR. SCHAEFFER: Objection.

19 JUDGE GULIN: This is redirect.

20 CHAIRPERSON GRIFFITH: Does -- it's a

21 foundation --

22 JUDGE GULIN: Yes, it's a foundation

1 question.

2 THE WITNESS: My answer is very much so.

3 We try to be as good and as efficient a business as we

4 possibly can be.

5 BY MR. RICH:

6 Q Is there any distinction --

7 MR. SCHAEFFER: Sorry, Bruce.

8 BY MR. RICH:

9 Q Is there any distinction in your mind

10 between operating as a business -- strike that.

11 Is operating as a business, in your

12 conception, synonymous with operating in a commercial

13 manner?

14 A Absolutely not.

15 Q What is the distinction?

16 A We have a whole different motivation than

17 commercial radio. We are not in the business of

18 making money. We are in the business of providing a

19 service to the American public. We don't use music to

20 make money. We play music because it's a worthwhile

21 cultural expression. We are -- we try to most

22 efficiently and as effectively as possible provide a

1 service as a non-profit corporation to our member
2 stations and to the American public that they and we
3 serve together.
4 Q How comparable, in your three years of
5 experience with public broadcasting, are the economics
6 of public radio and commercial radio?
7 A They're not in the least bit comparable.
8 Commercial radio is driven by advertising dollars.
9 Public radio is driven by its mission. It's money
10 primarily at the station level from listeners that
11 support it, from foundations that support it, from
12 businesses that contribute to it, and by underwriting.
13 At the national level, for NPR, we operate
14 from fees that our stations pay us for the programs we
15 provide and from corporate and foundation support.
16 Some of that corporate support is for underwriting.
17 But that is primarily how we operate, and I think the
18 financial model is distinctly different, and I think
19 the way we do business is distinctly different.
20 Q To your knowledge, for what period of
21 years have public radio stations sought, as part of
22 their funding sources, underwriting monies?

1 A I believe from day one, since 1971. When
2 public radio was first instituted, underwriting was a
3 component and a significant component of need.
4 Q Now, Mr. Schaeffer asked you some
5 questions concerning the use of music on news and
6 information format programs such as All Things
7 Considered and Morning Edition. Do you recall that?
8 A Yes.
9 Q Do you know, with respect to the theme
10 music appearing on such programming, whether there is
11 any obligation on the part of NPR to make any payment
12 whatsoever to the music performing rights
13 organizations, with respect to performances of that
14 music?
15 A There is no obligation whatsoever.
16 Q Why is that?
17 A Because we have all -- we have privately
18 commissioned all of that work, for Morning Edition,
19 for All Things Considered, for Talk of the Nation, for
20 Weekend Edition Saturday and Weekend Edition Sunday,
21 as well as Weekend Edition All Things Considered.
22 Q And by "privately commissioned," do you

1 mean you have acquired the necessary rights to allow
2 you to perform it without further license?
3 A That is correct.
4 Q Now, you also, I believe, testified in
5 response to Mr. Schaeffer that in connection with --
6 help me here -- zippers or buttons, that there was a
7 practice, you indicated, by which stations sometimes
8 cover such music. Can you explain what you meant by
9 that?
10 A Yes. The -- the music zipper is, in
11 essence, a cue to the station that they can cut away.
12 I guess that is the term used in radio. And they can
13 -- and it is the standard practice to cover that music
14 bed, the majority of the music bed, which is -- is not
15 heard on the local level, with local news, with local
16 traffic report, local weather, or any other
17 information which the local station chooses to
18 provide, which might include forward promotion of
19 another show it has on its own schedule.
20 Q So do you have ASCAP Exhibit 321 within
21 reach? It's one of those thick excerpts from All
22 Things Considered.

1 A One of these tomes, yes.

2 Q Would you just flip to the third page of

3 that document, please?

4 A 320 -- 321. I have it.

5 Q Do you have it?

6 A Yes.

7 Q The third page of that document --

8 A Correct.

9 Q -- there is, as you've testified, what

10 appears to be something of a summary of the program

11 content and references to music content. Do you see

12 that?

13 A Yes, I do.

14 Q And down under bracketed number 3, there's

15 a reference to cutaway 1A, it looks like 59 seconds.

16 Do you see that?

17 A That is correct.

18 Q Is that the kind of music bed or zipper or

19 button to which you have just testified stations

20 commonly overlay other programming?

21 A It is. It is, yes.

22 Q And in that situation, that music would

1 not be heard?

2 A The majority of the music would not be

3 heard.

4 Q Finally, to your knowledge, has the format

5 of All Things Considered, respecting use of music,

6 changed over the life of that programming?

7 A The program was created as a news magazine

8 back in 1972 when it first aired. The format has not

9 changed. If anything, the use of music, I would

10 presume, has slightly declined because our news staff

11 has grown significantly since that period of time.

12 MR. RICH: I have no further questions.

13 CHAIRPERSON GRIFFITH: Anything further?

14 MR. SCHAEFFER: Yes, I have a couple.

15 RECROSS EXAMINATION

16 BY MR. SCHAEFFER:

17 Q On this last point, I don't understand

18 what you mean by "the music is never heard."

19 Certainly, the music is heard by some listeners and

20 not others maybe, but you can't say that it's not

21 heard at all in the full amount. Some people may

22 listen to the whole thing. There may not be any local

1 station.

2 A It depends on what happens at the local

3 level.

4 Q Right.

5 A The majority of stations will cover the

6 majority of the cutaway. That's what it's there for.

7 There are some stations who are so small or don't have

8 the staff or don't have the specific report in place

9 who will not cover it;, and, therefore, the music bed

10 will live as it is.

11 Q How do you know -- you don't listen to all

12 the stations. How do you know what the local stations

13 are doing on any particular day with respect to any

14 particular programming?

15 A It's -- well, what I'm giving you is

16 what's standard operating practice within the public

17 radio industry. That's what it's there for, and

18 that's how the clock was created for the particular

19 show.

20 Q Okay. It is true, is it not, that

21 although NPR is itself -- I'm not talking about NPR

22 that you are the chief operating officer -- is not a

1 for-profit organization. It is true, is it not, that
2 there is a dispute with Congress at the present time
3 about the payment of bonuses to NPR officers, isn't
4 there?
5 MR. RICH: Objection. Outside the scope
6 of the redirect.
7 MR. SCHAEFFER: On the contrary. What we
8 were talking about before was that NPR, not the public
9 broadcasting system, but NPR is a not-for-profit, and,
10 therefore, is only interested in no money going
11 anyplace else, just enriching the public broadcasting
12 system.
13 The fact of the matter is NPR is run by
14 human beings who are getting bonuses, which Congress
15 is complaining about. I wouldn't have raised this,
16 except you did it --
17 CHAIRPERSON GRIFFITH: All right. Just a
18 minute.
19 The objection is sustained.
20 MR. SCHAEFFER: No further questions.
21 CHAIRPERSON GRIFFITH: All right.
22 May this witness be excused?

1 MR. RICH: Yes, Your Honor.

2 CHAIRPERSON GRIFFITH: Mr. Jablow, you are

3 free to go, sir. Thank you.

4 THE WITNESS: Thank you.

5 (Whereupon, the witness was excused.)

6 CHAIRPERSON GRIFFITH: All right.

7 MR. RICH: We would call Paula Jameson as

8 our next witness.

9 MR. SCHAEFFER: Could you just give me a

10 moment?

11 CHAIRPERSON GRIFFITH: All right.

12 Good morning, ma'am.

13 MS. JAMESON: Good morning.

14 CHAIRPERSON GRIFFITH: Would you raise

15 your right hand to be sworn, please?

16 WHEREUPON,

17 PAULA ANN JAMESON

18 was called as a witness and, having been first duly

19 sworn, assumed the witness stand, was examined and

20 testified as follows:

21 CHAIRPERSON GRIFFITH: All right. Mr.

22 Rich?

1 MR. RICH: Thank you.

2 DIRECT EXAMINATION

3 BY MR. RICH:

4 Q Would you state your name for the record,

5 please?

6 A Paula Ann Jameson.

7 Q Until January 15 of this year, Ms.

8 Jameson, by whom were you employed?

9 A The Public Broadcasting Service.

10 Q And what was your position?

11 A I was Senior Vice President, General

12 Counsel, and Secretary.

13 Q All right. For what period of years did

14 you hold that position?

15 A I took that position in March of 1986, so

16 it was not quite 12 years.

17 Q Where are you presently employed?

18 A I am presently employed -- I'm a partner

19 in the law firm of Arter & Hadden here in Washington,

20 the Washington office.

21 Q Can you generally describe your functions

22 during your tenure as Senior Vice President and

1 General Counsel of PBS?

2 A I was responsible for managing all of the

3 legal activities of the corporation. I was also

4 responsible for managing the copyright activities, not

5 only of the Public Broadcasting Service but on behalf

6 of the public television system, as it were, including

7 the station, including the negotiations with the music

8 performing rights societies.

9 And, in addition, as Secretary of the

10 corporation, I was responsible for managing the

11 affairs of the Board of Directors.

12 Q Specifically focusing on music matters,

13 did you have any other overall responsibilities,

14 administratively or otherwise?

15 A Well, as part of our -- as part of the

16 management of the negotiations of the music licensing

17 agreements, we would also collect cue sheets from

18 producers of PBS programs. And the folks who are

19 responsible for inputting that data into the database

20 reported to me and produced the reports as a result of

21 those activities.

22 Q Let me ask you preliminary, since this is

1 covered in your written direct testimony, on whose
2 behalf -- as a technical matter, on whose behalf are
3 PBS and NPR seeking rates in this proceeding?
4 A Well, it's on behalf of all of public
5 broadcasting, on behalf of public -- public television
6 producers, to the extent that they need performing
7 rights on behalf of PBS as a network, NPR as a
8 network, and on behalf of all the public television
9 and public radio stations nationwide.
10 Q Do you have an understanding whether the
11 listing of entities at Exhibit 1 of the PB exhibit
12 group is a listing of the CPB qualified television and
13 radio stations on whose behalf NPR --
14 A Right.
15 Q -- and PBS are proceeding?
16 A Actually, Mr. -- Mr. Rich, you've
17 refreshed my recollection, because it really is on
18 behalf of just those stations that are qualified by
19 the Corporation for Public Broadcasting. And this
20 Exhibit 1 is a list of all of those public radio and
21 public television stations so qualified.
22 Q Thank you.

1 And in your experience, and to your
2 knowledge, in prior negotiations -- at least in which
3 you've been involved -- have PBS, NPR, and the
4 Corporation for Public Broadcasting represented a
5 similar constituency?
6 A They have.
7 Q Now, in relation to negotiations with
8 ASCAP and BMI, did you participate in the negotiations
9 that culminated in the last license agreements with
10 each of those organizations -- namely, those covering
11 the 1993 through 1997 period?
12 A I did. I did not attend every single
13 negotiating session, but I attended many of them.
14 Q And did you, similarly, participate in the
15 preceding negotiations with ASCAP and with BMI --
16 namely, those pertaining to the 1988 through 1992
17 period?
18 A Again, my answer would be the same. I
19 think I attended many of the early meetings. As they
20 went on, I didn't go so frequently.
21 Q Were you familiar during each of those
22 prior negotiations with the various positions espoused

1 by the parties at the bargaining table?

2 A Generally, because even when I wasn't

3 attending the meetings, there were people within my --

4 who reported to me who were coming back to me and

5 discussing positions that we were taking and the

6 positions of others as the negotiations progressed.

7 MR. SCHAEFFER: I'm going to interpose,

8 because I'm anticipating that there may be a

9 discussion of the communications that went across the

10 bargaining table. My understanding of those

11 communications is that they were done in confidence

12 and that the meetings were intended to be

13 confidential.

14 Obviously, the outcome of the meeting is

15 the form of the license. But it's -- I am advised

16 certainly the one meeting -- the one set of meetings

17 that Mr. Rich and I shared, which I was told were no

18 different than any others, everybody made it clear

19 that the communications that were made to each other

20 across the bargaining table were confidential.

21 CHAIRPERSON GRIFFITH: Mr. Kleinberg?

22 MR. KLEINBERG: I have a slightly

1 different concern. I'm not sure where Mr. Rich may be
2 going with this. But it relates to deviation from the
3 written testimony which has no revelation of what was
4 said or exchanged in terms of discussions at any of
5 the negotiations, and --
6 JUDGE DREYFUS: Let's ask him. Where are
7 you going, Mr. Rich?
8 MR. RICH: Well, I mean, we can do this
9 two ways. I can do it in oral argument and tell you
10 where I'm going, or we could do the more traditional
11 technique and I can ask my questions, and these
12 objections could be raised at an appropriate time.
13 But let me say as a general matter --
14 CHAIRPERSON GRIFFITH: Let's hear the
15 question first, then.
16 MR. RICH: Let me just say, if I may, in
17 response to -- so the record is clear, that Ms.
18 Jameson's testimony does, of course, cover aspects of
19 the negotiations, including specifically
20 representations that were made about respective music
21 use shares during those, point one.
22 Point two, I am not going to ask any

1 questions about the most recent unsuccessful round of
2 negotiations because I agree with Mr. Schaeffer's
3 characterization of those. And to the extent I would
4 propose to get into any other details of prior
5 negotiations, I propose to refrain, as I agreed to do
6 in cross examining ASCAP's and BMI's witnesses, from
7 putting forward any of the numbers that were put
8 forward, but, rather, seek to elicit only what I would
9 regard as admissions that came forward from one or
10 both of ASCAP and BMI on subjects relevant to this
11 proceeding, which any reading of any rules of evidence
12 that I'm aware of would take well outside of any rules
13 about compromised negotiations or anything else. And
14 that's, at the general level, all I would say.
15 I would, finally, add that for the limited
16 extent I do propose to go into negotiation subjects,
17 I think the Panel will readily recognize that these
18 are topics which were raised on the direct cases by
19 our friends across the aisle. And obviously, it will
20 be in the judgment of the Panel as to whether you wish
21 to hear from this witness something that is centrally
22 relevant to this proceeding, which is well within,

1 obviously, the ken of the Panel to do under 251.47(e).
2 But perhaps having said all of that, I
3 ought to proceed and take it a step --
4 CHAIRPERSON GRIFFITH: Let's hear the
5 question.
6 MR. RICH: Thank you.
7 BY MR. RICH:
8 Q So I take it, just to conclude this point,
9 Ms. Jameson, that you were briefed on a regular basis
10 about the status and progress of the last two rounds
11 of negotiations preceding this most recent
12 unsuccessful round, correct?
13 A I certainly was. Don't test me on how
14 many of those conversations I'm going to specifically
15 remember.
16 Q Now, focusing on the negotiations
17 pertaining to the most recent licenses -- namely, the
18 1993 through 1997 licenses -- when is your
19 recollection that the negotiations with ASCAP and BMI
20 physically occurred, timewise?
21 A Well, we were jumpstarted by the Copyright
22 Office, as I recollect. We're talking about '93, the

1 current agreement, or --

2 Q The '93 through -- the --

3 A Oh, I'm sorry.

4 Q -- covering the period of '93 through --

5 A I'm thinking about --

6 Q -- 1997.

7 A -- I was thinking about these --

8 Q When did those start?

9 A When did they start? My recollection is

10 is they began in the summer of '92, I think sometime

11 around July.

12 Q To your recollection --

13 MR. SCHAEFFER: I move to strike. There

14 is nothing about this at all in the direct testimony,

15 as to when they were and what the circumstances were.

16 At least -- maybe I'm misreading, but show me where --

17 withdrawn.

18 I object. There's nothing in the direct

19 testimony about these details.

20 CHAIRPERSON GRIFFITH: All right.

21 Mr. Rich?

22 MR. RICH: If we're down to Your Honors'

1 problems with eliciting -- there were about three
2 pages of testimony from this witness about her
3 involvement in these things. As a foundation
4 question, to set the timeframe when they occurred, I
5 -- it seems to me it's not a material deviation from
6 the written direct testimony.
7 CHAIRPERSON GRIFFITH: The objection is
8 overruled as to this question.
9 MR. RICH: Thank you.
10 CHAIRPERSON GRIFFITH: July of '92.
11 BY MR. RICH:
12 Q Did the negotiations occur jointly, with
13 ASCAP and BMI in a room together, or separately?
14 A No. I mean, historically, they have
15 always been in separate negotiations, with the two --
16 well, not just the two licensing societies, these and
17 others.
18 Q And in terms of sequence, is it your
19 recollection that you began with one society and
20 concluded negotiations, and then began with the other?
21 Or what were the dynamics and sequencing?
22 A The dynamic, historically, like I said --

1 and I think it was true with the previous negotiations
2 as well -- is that he would have -- he would have
3 meetings ongoing with both of the societies at the
4 same time, because you had an obligation, as we all
5 well know, to try to meet -- there was a different
6 statutory framework in place at the time, but you
7 still had deadlines. And you knew that there was
8 going to have to be a case filed at some point.
9 So, really, you didn't have the luxury, as
10 it were, of sort of beginning one, waiting until it
11 was concluded to begin the other. So you might have
12 a meeting with, you know, ASCAP on one day, and a week
13 later with BMI, or even back to back. But they would
14 be separate meetings. But they were, you know, in
15 some ways almost like a dance. It was trying to keep
16 it in sequence, so that at the end of the day you
17 ended up with agreements with ASCAP, BMI, SESAC, all
18 of them. And in meeting the deadlines, that works out
19 as well.
20 Q You said "might have" in your answer. Is
21 it your best recollection that --
22 A We did.

1 Q -- that's, in fact, the process that
2 occurred?
3 A Indeed. Indeed.
4 Q And looking in the exhibit book, please,
5 at two different tabs -- first, Tab PB 13, which is an
6 ASCAP agreement for the period '93 to '97. Can you
7 tell me the date on which this agreement was executed?
8 A 19th of October 1992.
9 Q And if you would turn to PB 16, which is
10 the BMI agreement covering the same time period, can
11 you tell me when that agreement was executed?
12 A The date on the very first page says
13 October 19, 1992. It seems to be October 19th for
14 BMI. Do I say the same thing for ASCAP?
15 Q Yes. Thank you.
16 A All right.
17 Q Now, as covered in your written direct
18 testimony, what was PBS', NPR's, and CPB's overall
19 objective in the 1992 negotiations?
20 MR. SCHAEFFER: I don't see how this is
21 binding on ASCAP. What their private communications
22 were among themselves is what their objectives are.

1 It seems to me that that's their business. This is
2 rank hearsay. What particular -- what their public --
3 their internal idea was of where they're going is
4 legally binding on us.
5 JUDGE DREYFUS: I'm sorry. I missed the
6 question. I missed the first couple of words of the
7 question.
8 MR. RICH: What were the NPR, PBS, and CPB
9 objectives --
10 CHAIRPERSON GRIFFITH: The objectives.
11 MR. RICH: --- overall objectives in
12 connection with the 1992 negotiations? This is a
13 foundation question as to what transpired --
14 CHAIRPERSON GRIFFITH: The objection is
15 overruled.
16 THE WITNESS: As we begin to prepare for
17 these negotiations, I mean, what -- what we are --
18 what we looked at was what were the fees we were
19 paying to all of the performing rights societies for
20 the right to use music and programs, and looking to
21 achieve, you know, a -- for the coming five-year
22 license term -- a reasonable rate of fees on the whole

1 with respect to all of the licensing societies, one
2 that hopefully was reasonable from where they sat, as
3 well as one that was reasonable from where we sat.
4 BY MR. RICH:
5 Q And how did the negotiating team of which
6 you were a part set about to achieve the objective you
7 just testified to?
8 A We looked at, obviously, what we were
9 paying on the whole to all of them collectively. We
10 looked at the music usage data that we had in hand to
11 try to determine, as amongst the various licensing
12 societies, who -- you know, whose music we're using.
13 We looked at, you know, a variety of factors as you
14 would, I think, in most negotiations.
15 You looked at, you know, what has happened
16 with respect to your programming hours over the course
17 of the -- of previous years, where were you now
18 compared to where were you at the time that you had
19 entered into the previous agreements, what had
20 happened to the cost of living generally.
21 I mean, just a variety of economic and,
22 you know, other factors that would relate to what

1 would be a reasonable fee to go into these
2 negotiations and suggest -- you might be willing to
3 pay on a whole to all of the societies for use of
4 music.
5 Q In your written testimony, Ms. Jameson, at
6 page 4, you state under paragraph C, a sentence into
7 it, "Well, the negotiations with ASCAP and BMI were
8 conducted separately. PBS, NPR, and CPB always
9 recognized that at the end of the day, the total
10 license fees arrived at were what ultimately mattered,
11 not the division per se between ASCAP and BMI." Do
12 you see that?
13 A I do.
14 Q Explain to the Panel what you meant by
15 that.
16 A And effectively, it's not very different
17 from what I just said. What mattered to us was --
18 MR. SCHAEFFER: I renew my objection. I
19 assume it's going to be overruled, but this is -- this
20 is a contract action. It's unthinkable.
21 CHAIRPERSON GRIFFITH: I didn't hear the
22 last --

1 MR. SCHAEFFER: It's a contract action,
2 essentially. And to say the internal thoughts of one
3 of the parties violates all of the rules of contract
4 law -- now, we're in arbitration, so I guess you'll do
5 what you want. But no contract lawsuit would allow
6 this kind of testimony on interpretation of a
7 document.
8 JUDGE GULIN: In any event, Mr. Schaeffer,
9 notwithstanding that, certainly it's in her direct
10 testimony. She is within the scope of her direct
11 testimony, almost repeated it verbatim. There was no
12 objection interposed.
13 MR. SCHAEFFER: I think, in fact, there
14 may have been.
15 JUDGE GULIN: She is not talking at this
16 point.
17 MR. SCHAEFFER: I think there was, and we
18 referred to the Arbitrators. But you do what you see
19 fit, but I -- this is unthinkable. How could you have
20 a contract action where one party testifies that their
21 internal thoughts of what -- without -- you testified
22 -- it violates the whole objective man notion of

1 Williston, Corbin, and everybody else.

2 CHAIRPERSON GRIFFITH: Well, I mean,

3 you're referring to the fact that the contract itself

4 speaks for itself?

5 MR. SCHAEFFER: One, the contract speaks

6 for itself. But to the extent that you interpret if

7 there was an ambiguity, which I don't believe there

8 is, the answer -- it can only be reflected upon by

9 communications between the parties, so the objective

10 man standard could be used. It is not -- subjective

11 intent is not relevant in interpreting contracts.

12 CHAIRPERSON GRIFFITH: Now, where was it

13 objected to by you, Mr. Schaeffer, and your --

14 MR. SCHAEFFER: I don't have the document

15 here, but it was objected to, I know, in our prior --

16 CHAIRPERSON GRIFFITH: I'll start over.

17 Where was it referred to you -- objected to by you,

18 Mr. Schaeffer, and referred to the Panel for

19 determination?

20 MR. SCHAEFFER: I think there's an opinion

21 by the Copyright Office.

22 CHAIRPERSON GRIFFITH: I have a copy -- I

1 have a summary of all the orders here, and I'm
2 interested to see where that was.
3 JUDGE DREYFUS: It was overruled. Was it
4 overruled?
5 MR. RICH: Indeed, it was.
6 MR. SCHAEFFER: I don't recall, and I have
7 to have it in front of me. I'll take a look at the
8 break.
9 MR. RICH: It did not pertain to this
10 particular testimony, in any event.
11 CHAIRPERSON GRIFFITH: All right. The
12 objection is overruled.
13 All right. Go ahead.
14 THE WITNESS: At the end of the day, the
15 object of these negotiations -- to figure out what it
16 was we were going to pay for the use of music. So it
17 was a total fee, you know, with respect to all of
18 these societies. You know, what was it that we were
19 ultimately going to hopefully be able to agree that we
20 would pay, what would be reasonable.
21 BY MR. RICH:
22 Q Did PBS and NPR have occasion to examine

1 certain music use in connection with the 1992
2 negotiations?
3 A We did. As I -- as I said earlier, my
4 department was responsible for collecting the music
5 use data. Prior to beginning our negotiations, we
6 examined that music use data so that we would have,
7 you know, some intelligent idea of the music being
8 used on PBS -- PBS programs, originally broadcast PBS
9 programs.
10 And historically, it was the music used on
11 PBS program servers, that it served in the
12 negotiations as sort of the marker for music usage.
13 I guess one reason was is it was the best-kept data of
14 music usage in public broadcasting.
15 Q To your recollection and consistent with
16 your written testimony, what is your recollection of
17 what that music data depicted, in terms of the
18 relative music use shares of ASCAP and BMI?
19 A As I recollect -- and I think it is in
20 here, isn't it? For the year 1991, which was at that
21 point -- we were doing these negotiations in 1992, so
22 it was the most recent complete annualized data we

1 had. ASCAP music represented 79 percent of the music
2 on PBS originally broadcast programs, and BMI, 21
3 percent. That was between the two. The total
4 ASCAP/BMI music, that was the breakdown.
5 Q And would you look at what is --
6 JUDGE DREYFUS: Excuse me. That's 100
7 percent.
8 THE WITNESS: Yes. Because I'm talking
9 about 100 percent of ASCAP and BMI music.
10 JUDGE DREYFUS: Oh, I see.
11 THE WITNESS: Yes. As the total between
12 the two of them, not including SESAC.
13 BY MR. RICH:
14 Q And could you --
15 MR. KLEINBERG: I'm sorry. I didn't hear
16 the last trail.
17 THE WITNESS: Not including SESAC. Just
18 the ASCAP/BMI total.
19 BY MR. RICH:
20 Q So let me -- so there's no ambiguity, let
21 me see if I understand what you're saying. Looking at
22 combined ASCAP/BMI use, it was -- PBS's data suggested

1 the split was 79 percent, roughly, ASCAP, 21 percent
2 BMI, is that correct?
3 A That's correct.
4 Q And would you look at Exhibit 10 in the
5 exhibit book, please? And can you identify what those
6 documents represent, please?
7 A Let's see. The first page is a performing
8 rights report for the period of January through July
9 of 1991. And at the bottom of that page, in the last
10 column, it gives you a grand total of I guess total
11 tunes of ASCAP. This is -- this, I presume -- this
12 looks to be total cues. Is that correct? Let me just
13 make sure I'm right, because there's cues and there's
14 duration.
15 That's for the first -- anyway, the first
16 two pages are for the first six months of 1991. The
17 second two pages --
18 Q I believe you said January through July?
19 Actually --
20 A I did. I'm sorry.
21 Q -- it was seven months?
22 A You're right. January through July, as

1 well as August, and then the second two pages are
2 August through December 31st of 1991.
3 Q Do you recall whether total tunes is a
4 reflection of the cue count that --
5 A That's my recollection is they're cues as
6 opposed to duration. I think it's --
7 Q Did this information, to your
8 recollection, come out of the PBS --
9 A It did.
10 Q -- cue sheet database as its own exhibit?
11 A This did. It came from our music usage
12 database.
13 Q And do you have a recollection whether
14 these are the data which were known to and relied upon
15 by PBS and NPR during the 1992 negotiations?
16 A They are.
17 Q Now, in the meetings with BMI, Ms.
18 Jameson, do you recall that BMI contested the accuracy
19 of this music share data in any way?
20 MR. KLEINBERG: I'm going to lodge an
21 objection at this point, because this is not in the
22 direct testimony.

1 CHAIRPERSON GRIFFITH: All right. Mr.
2 Rich, do you want to respond, sir?
3 MR. RICH: Your Honors, I, again, believe
4 it's certainly within the material scope of the
5 testimony that this witness indicated that she
6 presented this data, that PBS presented this data
7 during the negotiations, that historically PBS data of
8 this type was used by all parties in the negotiations.
9 That's in the testimony.
10 And I'm merely trying to flesh out, at
11 this point, within the scope of that and spirit of
12 that testimony, what, if any, responsive music data
13 was elicited during the negotiations from any of the
14 other parties. I don't think this is profoundly
15 outside the scope of, at all, Ms. Jameson's testimony.
16 MR. KLEINBERG: I'll withdraw the
17 objection.
18 CHAIRPERSON GRIFFITH: All right. The
19 objection is withdrawn.
20 THE WITNESS: The -- now, I will -- in the
21 course of our negotiations with BMI, I mean, it was
22 always very important for BMI to be assured that with

1 respect to any fees we might agree upon that they were
2 being adequately compensated for -- adequately
3 compensated for the percentage of music in use, BMI
4 music being used on PBS. So they were looking for
5 assurances from us.
6 One thing that might be helpful for you to
7 know is that these cue sheets that we collect from
8 producers we also furnish to ASCAP and BMI. So they
9 have the benefit of the same data. How they -- what
10 they do with it I'm not so sure, but they did have
11 these same music sheets.
12 Now, it's fair to say we never shared
13 these specific tables here with either party, but we
14 discussed the percentages of music usage. We had
15 gathered from our own internal --
16 MR. SCHAEFFER: Insofar as this is --
17 THE WITNESS: -- music usage data.
18 MR. SCHAEFFER: I'm sorry. Insofar as
19 this is intended to be communications to ASCAP in
20 connection with the settlement of the proceedings that
21 we are here -- for the licensee fee, both for the --
22 the provision that everybody knows about that's in the

1 ASCAP license fee, and also the general principle that
2 this was supposed to be confidential. Indeed, ASCAP
3 didn't know what BMI was doing. BMI didn't know what
4 ASCAP was doing.
5 And these were all under the umbrella of
6 confidence. I object to these -- any effort to state
7 what the communications were between ASCAP and the
8 public broadcasters. This was not what was the
9 understanding when the negotiations were apparently
10 taking place. And to do that retroactively is not
11 right.
12 MR. RICH: Again, I would urge the Panel
13 to view these objections against the specific
14 questions. At least my specific question right now,
15 questions go to the degree to which one or more of BMI
16 -- and then I was going to ask the same question as to
17 ASCAP -- how they reacted to the music use data.
18 I don't think any understanding of any
19 confidentiality that I'm aware of from anything I see
20 would at all preclude, in this proceeding, any
21 admission from being tendered here that doesn't go to
22 the dollar fees or offers to compromise any legal

1 disputes. That's in the Rules of Evidence, that it
2 has no bearing on admissions that otherwise are
3 proffered during negotiations. I'm trying to be
4 extremely careful in my questioning to avoid any even
5 suggestion that we might be getting into the who-shot-
6 Johns of offers at the table.
7 MR. SCHAEFFER: That's not the rule, as I
8 understand it. We may have a disagreement about 408
9 of the Federal Rules of Evidence. It is true
10 collateral matters can be established, but in this
11 case what we're talking about is the precise issue of
12 setting the fee and how the fee was set, which was
13 barred both by the language of the ASCAP license
14 agreements and also is barred by the Rules of
15 Evidence. If you had a negligence case, and somebody
16 came in and settled the negligence case and said what
17 their reasons were for settling the negligence case,
18 then coming back and going into that detail. This
19 isn't the same thing at all.
20 If there was a question of ownership, or
21 there was a question of a collateral issue, such as
22 whether somebody is somebody's child or something

1 along those lines, then settlement negotiations are
2 relevant. But it's certainly not true with the -- for
3 the fact -- for the negotiations themselves, and
4 reaching the agreement itself when there is no reason
5 why that should be. If we had a reformation case, or
6 something like that, it would be different.
7 CHAIRPERSON GRIFFITH: Let me interrupt
8 you just a moment.
9 Mr. Kleinberg, the question pertained to
10 BMI. Do you have any position with respect to this?
11 MR. KLEINBERG: I did not have an
12 objection to the question as I heard it.
13 MR. SCHAEFFER: I thought she was
14 answering as to both licensing --
15 CHAIRPERSON GRIFFITH: You were talking
16 about BMI, were you not?
17 MR. RICH: I believe she was.
18 MR. SCHAEFFER: She started talking about
19 ASCAP. That's why I --
20 CHAIRPERSON GRIFFITH: Oh. Did --
21 THE WITNESS: I've forgotten.
22 MR. KLEINBERG: My recollection is it was

1 a question about --

2 CHAIRPERSON GRIFFITH: She said she didn't

3 share the things with either group.

4 THE WITNESS: Didn't share these specific

5 pieces of paper.

6 CHAIRPERSON GRIFFITH: Of paper with

7 either group.

8 THE WITNESS: But the results of them --

9 these studies we did share.

10 MR. SCHAEFFER: Yes. She's talking

11 about --

12 CHAIRPERSON GRIFFITH: You're talking

13 about percentages?

14 THE WITNESS: That's correct.

15 MR. SCHAEFFER: Yes, and that's what I

16 object to. I object to this -- the going into the

17 communications between the groups when there was an

18 addition to the 408 rule, which is, frankly, the least

19 of the hierarchy. There is no dispute that all of

20 these agreements -- all of these negotiations were

21 done under the umbrella of confidentiality.

22 JUDGE DREYFUS: So you're moving to

1 strike?

2 MR. SCHAEFFER: I'm moving to strike.

3 Well, I'm now -- yes. I mean, I'm trying to alert

4 everybody to what our position is, because I don't

5 want it coming out. Yes, I move now to strike,

6 because it came in by surprise. And so it's -- I

7 don't know if it was intentional.

8 CHAIRPERSON GRIFFITH: The motion to

9 strike is denied.

10 BY MR. RICH:

11 Q Let me -- because we may have meandered,

12 and certainly I've gotten lost through the colloquy,

13 Ms. Jameson, let's come back for the moment to your

14 best recollection, please, of whether and to what

15 degree BMI contested the accuracy of the PBS music

16 share data about which you testified. We're focusing

17 now on the 1992 negotiations.

18 A There was no dispute about the number.

19 MR. SCHAEFFER: I assume I don't have to

20 continuously move to strike.

21 JUDGE GULIN: Only the last question, and

22 that's the question you objected to, and that's what

1 we were --

2 MR. RICH: Okay.

3 BY MR. RICH:

4 Q And to your best recollection, did ASCAP

5 present any of its own music data to PBS during the

6 1992 negotiations?

7 MR. SCHAEFFER: I object. I object again.

8 CHAIRPERSON GRIFFITH: All right. Let me

9 just -- the question is, did ASCAP produce any of its

10 own music data?

11 MR. RICH: Yes, sir.

12 MR. SCHAEFFER: Presumably to the CARP.

13 CHAIRPERSON GRIFFITH: The objection is

14 overruled.

15 BY MR. RICH:

16 Q You can answer.

17 A During these negotiations -- I mean,

18 that's always a pivotal piece of information. So both

19 parties are -- of the negotiations are going to be

20 representing what their data reflects with respect to

21 music use data.

22 Q Did ASCAP make any assertions as to what

1 it's own data reflected as to its overall music share,
2 to your recollection?
3 MR. SCHAEFFER: Do you want me to have a
4 continuing objection? Because this is all --
5 CHAIRPERSON GRIFFITH: Yes, please.
6 THE WITNESS: My recollection is is that
7 they did, and that wasn't any -- any different from
8 the data that we have.
9 CHAIRPERSON GRIFFITH: Well, the question
10 was, I think, did they --
11 MR. RICH: Yes.
12 CHAIRPERSON GRIFFITH: -- and not what it
13 was.
14 MR. RICH: Yes, that's correct. That was
15 my question.
16 THE WITNESS: They did.
17 BY MR. RICH:
18 Q And did their proffer of music use share,
19 to your best recollection, differ in any -- differ in
20 any significant way from the 79/21 share that you've
21 testified about that PBS' own data showed?
22 A My recollection is it did not.

1 Q Now, how did the ratio of final fee levels
2 arrived at with ASCAP and BMI compare with PBS' own
3 79 percent/21 percent music share data, to your
4 recollection, when the negotiations finally concluded?
5 A They're very, very close, if not almost
6 exact.
7 Q Now, in your written --
8 JUDGE GULIN: Let me just clarify now.
9 The data that you have is only for television. It's
10 only for the PBS -- the public television system,
11 correct? Music use on public television system?
12 THE WITNESS: It is. But that is the data
13 that both parties have always relied upon, and --
14 JUDGE GULIN: For both TV and radio?
15 THE WITNESS: -- for both television and
16 radio. The radio data just -- and I can't begin to
17 tell you historically why that's the case. But there
18 really isn't any radio data, whereas with respect to
19 television there is. I think for -- like I said, for
20 historical reasons, it was that way when I -- when I
21 did my first negotiation. Music data was collected
22 for television, and it was used as the marker for

1 music usage in public broadcasting as a whole.

2 JUDGE GULIN: Then your testimony is is

3 that neither ASCAP nor BMI contested using those

4 figures for radio in addition to television?

5 THE WITNESS: No. We were using them on

6 behalf of the whole negotiation.

7 MR. SCHAEFFER: How does she know what

8 ASCAP and BMI did? I mean --

9 JUDGE GULIN: I'm asking if they contested

10 at the negotiations.

11 THE WITNESS: They didn't. I mean, you've

12 heard I think throughout this case -- I mean, they --

13 well, I can't talk about the negotiations, I guess,

14 can I? So --

15 MR. RICH: No. The most recent --

16 THE WITNESS: No. But that -- that has

17 always been the moniker for public broadcasting

18 performing --

19 MR. SCHAEFFER: I object. How does she

20 know what -- ASCAP may have done it because it was the

21 path of least resistance, and they -- and because they

22 knew they had a reservation clause. I mean, I think

1 -- because then to say ASCAP never contested it is
2 completely --
3 JUDGE GULIN: Well, I mean -- any concerns
4 about that data with respect to applying it to radio?
5 THE WITNESS: I'm sorry. I didn't --
6 JUDGE GULIN: Did ASCAP or BMI express any
7 concerns about -- at the negotiations, about using
8 that data for radio in addition to television?
9 THE WITNESS: No. It was both parties'
10 assumption. That was one of the underlying premises
11 of the negotiation, that you would use the television
12 music usage data for all of public broadcasting.
13 BY MR. RICH:
14 Q Now, at page 4 of your written testimony,
15 Ms. Jameson --
16 A Page 4, yes.
17 Q -- you state right under C, "The most
18 recent ASCAP and BMI license agreements covering the
19 1993 to 1997 period, were the product of separate arms
20 length negotiations," and so forth. Do you see that?
21 A I do.
22 Q When you say they were the product of arms

1 length negotiations, could you tell the Panel a little
2 bit about the dynamics of the negotiations?
3 MR. SCHAEFFER: I don't even know what
4 that question means.
5 CHAIRPERSON GRIFFITH: Dynamics -- do you
6 want to explain what you mean by that?
7 MR. RICH: Just the interplay between the
8 parties, how vigorously contested these negotiations
9 were.
10 MR. SCHAEFFER: I object. It's both
11 misleading and also subjective and --
12 JUDGE GULIN: Doesn't it go to the issue
13 of whether these were arms length negotiations?
14 MR. SCHAEFFER: Well, admit if they were
15 arms length. Of course, they were arms length. We
16 don't have anything to do with PBS, and anything to do
17 with us.
18 JUDGE GULIN: I think some of your
19 witnesses have talked about the hard-fought
20 negotiations in the past.
21 MR. SCHAEFFER: Not -- we haven't, not
22 with PBS and NPR. We have --

1 JUDGE GULIN: I know. In the context of
2 the commercial stations.
3 MR. RICH: Well, represented by counsel,
4 etcetera, etcetera, etcetera.
5 MR. SCHAEFFER: What does that have --
6 MR. RICH: All of a sudden these are
7 impermissible questions on this side of the ledger
8 now.
9 MR. SCHAEFFER: No. This is impermissible
10 because of the way they've been asked; and, secondly,
11 they're impermissible because we can't make agreements
12 now without prejudice. I mean, I don't know what
13 they're going to do next time.
14 CHAIRPERSON GRIFFITH: Do you have any
15 comment?
16 JUDGE DREYFUS: Is there an objection to
17 the question?
18 MR. SCHAEFFER: Yes, there's an objection
19 to the question.
20 CHAIRPERSON GRIFFITH: The objection is
21 overruled, and we acknowledge an ongoing objection on
22 behalf of ASCAP with respect to this particular line

1 of inquiry.

2 BY MR. RICH:

3 Q Could you characterize the nature of the

4 negotiations, please?

5 A As a participant in these negotiations,

6 and in innumerable other business negotiations -- both

7 at PBS and previously at Dow Jones -- my sense were

8 these negotiations were like many others that you

9 undertake. There were a number of meetings. There

10 was a lot of give and take.

11 In the negotiations where we were

12 successful in finally concluding them, I'd say neither

13 of us got exactly what we walked in there wanting, but

14 both of us walked away with a compromise that was

15 acceptable to both parties.

16 But they were, you know, very businesslike

17 -- a number of meetings. I mean, we probably -- I

18 don't remember exactly how many, but -- but probably

19 three, four, maybe more sessions between the parties

20 -- between each of the parties, with BMI and with

21 ASCAP.

22 Q Did you ever gain the impression in your

1 negotiations with ASCAP that ASCAP was not seeking to
2 obtain fair and reasonable compensation for its
3 members?
4 MR. SCHAEFFER: I object.
5 THE WITNESS: Never.
6 CHAIRPERSON GRIFFITH: Wait just a moment.
7 THE WITNESS: Sorry.
8 CHAIRPERSON GRIFFITH: Don't answer,
9 ma'am.
10 THE WITNESS: Sorry.
11 MR. SCHAEFFER: How would she know? This
12 is the most misleading kind of testimony. What
13 subjectively went on in the --
14 MR. RICH: I'll withdraw the question.
15 CHAIRPERSON GRIFFITH: Thank you.
16 BY MR. RICH:
17 Q In either the ASCAP or BMI negotiations in
18 1992, to your recollection, did the discussions ever
19 entail anything other than a fee -- a combined fee
20 covering public television and public radio as one
21 joint enterprise for purposes of fee setting?
22 A No. That has never been acceptable to

1 public broadcasting. That was not a subject of
2 discussion there.
3 Q Same question as to 1987, the 1987
4 negotiations.
5 A Right. To the best of my recollection, in
6 all honesty, I can't distinguish between all of the
7 various negotiations. Occasionally, there might be
8 some noise about that, but never any serious
9 discussion of that.
10 MR. RICH: Will the Panel permit me to
11 inquire, although it is outside of, technically, the
12 scope of the direct, about the witness' best
13 recollection of discussions about the no precedent
14 language in the agreement?
15 MR. SCHAEFFER: I would object.
16 CHAIRPERSON GRIFFITH: Mr. Kleinberg, do
17 you have any position with respect to that, sir?
18 MR. KLEINBERG: I assume this is not --
19 you're talking about --
20 MR. RICH: Just ASCAP.
21 CHAIRPERSON GRIFFITH: Oh, just ASCAP.
22 MR. SCHAEFFER: I would certainly object.

1 It's not in here. I have no idea -- that's the whole
2 purpose of direct written testimony. If it's not in
3 there and nobody argues it --
4 MR. RICH: Well, we couldn't conceivably
5 have anticipated --
6 JUDGE GULIN: Well, I assume it's
7 something that will be brought up on rebuttal anyway.
8 But I think your objection is perfectly valid, if you
9 want to stick with it.
10 MR. SCHAEFFER: I do want to stick with
11 it.
12 MR. RICH: Very well.
13 CHAIRPERSON GRIFFITH: The objection is
14 sustained.
15 MR. RICH: Very well.
16 BY MR. RICH:
17 Q Now, how, during your tenure at PBS, Ms.
18 Jameson, did PBS go about collecting music use data
19 concerning the music contained in the PBS programming?
20 A The producers forwarded that information
21 to the General Counsel's office at PBS.
22 Q What form did their documentation take?

1 A It's a music cue sheet generated -- I
2 think there is probably one of those around here.
3 Q Is an example of such a cue sheet found at
4 Tab 9 of our exhibit book?
5 A Indeed. This is a music cue sheet for
6 NOVA.
7 Q Now, according to your written testimony,
8 since 1993, these cue sheets have been compiled in
9 something called the MURS -- M-U-R-S -- database, is
10 that correct?
11 A Music usage reporting system, right.
12 Q What does that stand for?
13 A Music usage reporting system, I believe.
14 Q And what range or what scope of
15 programming has been entered into the database, to
16 your knowledge?
17 A All originally broadcast PBS programs.
18 Q On a yearly basis? Tabulated yearly, I
19 mean?
20 A Tabulated annually.
21 Q All right. And to your knowledge, is the
22 MURS database, as we term it, the basis for the music

1 use analysis presented by PBS and NPR in this
2 proceeding?
3 A It is.
4 Q And are you aware of the process that was
5 used in this proceeding to obtain certain music
6 information for the year 1992?
7 A I am. Let me just tell you what happened.
8 We had -- when we finished -- concluded the previous
9 negotiations, it was 1992. And so on a going forward
10 basis, this was a matter of allocation of resources
11 within the department.
12 We determined that we would begin
13 collecting -- inputting the database for 1993, I think
14 just in the course of undertaking the negotiations and
15 using some of the same folks for those negotiations
16 who also did the music usage data input. You know, we
17 were behind in inputting that data. So we determined
18 we wouldn't do it and we started -- we inputted for
19 '93 forward.
20 Then, when we were getting ready -- we
21 were, I guess -- I can't remember at what point, but
22 clearly at some point when we realized we were not

1 likely to be resolving this in a settlement with ASCAP
2 or BMI, we decided we'd have to do something to -- to
3 replicate what happened in 1992 with respect to music
4 usage.
5 So at that point, we retained Dr. Jaffe,
6 as I recollect, to come up with a methodology that we
7 could then use to input data that would be an accurate
8 sample for 1992 music usage.
9 Q Ms. Jameson, I neglected to ask you one
10 additional question relating to the BMI public
11 broadcaster negotiations in 1992. Is it your
12 recollection that public broadcasting first concluded
13 a deal with ASCAP and then, figuratively speaking,
14 walked down a block to BMI and said, "Here, take your
15 share of that deal"?
16 A It is not. That is -- it is not. That is
17 not the way negotiations are conducted with these
18 parties.
19 Q Is it the way they were conducted, though,
20 between these particular parties in this particular
21 instance?
22 MR. SCHAEFFER: Now he's leading her.

1 MR. RICH: I'm just trying to clarify her
2 answer. I didn't think it was clear.
3 MR. SCHAEFFER: She did --
4 CHAIRPERSON GRIFFITH: It is leading,
5 though. The objection is sustained. Do you want to
6 rephrase it?
7 MR. RICH: I'll let the witness' answer
8 stand.
9 BY MR. RICH:
10 Q In your written testimony, Ms. Jameson, at
11 pages 6 and 7, you describe the role performed by the
12 Corporation for Public Broadcasting, is that correct?
13 A I do.
14 Q What is CPB's role in the funding of the
15 public broadcasting system?
16 A Historically, the corporation has always
17 paid the music royalties on both performing rights as
18 well as the synchronization rights for public
19 television and for public radio. And I don't know if
20 you want me to talk about -- they do pay them, and
21 there is a reason for that. I mean, it's also
22 included in the Public Broadcasting Act that they

1 will, indeed, pay those royalties.

2 Q And generally, how is CPB itself funded?

3 A Almost all of CPB's funding comes from the

4 appropriation from Congress. They have one other

5 program called the CPB Annenberg Project, which has

6 been funded by a foundation, but most of their funding

7 and most of their operations is -- is directly related

8 to the Congressional appropriation.

9 Q Now, with reference to page 8 of your

10 testimony and the data there depicted, can you

11 identify the trends in the funding of CPB over the

12 past 10-year period?

13 A Well, as you can see, I mean, in their own

14 way it looked like it was going to go up, and then it

15 very well went down. So that, effectively, at the end

16 of 19 -- by 1999, the funding was less than what it

17 had been in 1992.

18 Q And your footnote addresses, on page 8,

19 footnote 5, pending FY2000 appropriations. Is there

20 an update on that that you can provide the Panel?

21 A Yes. Both the House and Senate have

22 indeed approved that appropriation for FY2000 at

1 $300 million, and the President has signed it. That
2 doesn't mean it might not be subject to some
3 rescission by -- by either Congress or the
4 administration. But at this point, it has been
5 appropriated.
6 Q And, I'm sorry, did you identify the
7 number, the level?
8 A $300 million.
9 Q Thank you.
10 A The same as in the footnote.
11 JUDGE DREYFUS: I have one question,
12 counsel.
13 When you listed the items to be considered
14 during negotiations, such as music use and CPI and
15 previous rates, do you see that -- did you list the
16 appropriations that you would get from -- the
17 appropriation from the Congress?
18 THE WITNESS: I think all of the economics
19 were -- were --
20 JUDGE DREYFUS: So that would be
21 considered also?
22 THE WITNESS: Absolutely.

1 BY MR. RICH:

2 Q Now, in terms of CPB's --

3 A This was a very important one, given that

4 that's where we're going to fund it.

5 Q In terms of CPB's own funding initiatives,

6 the money it receives and then doles out, to what

7 degree are those initiatives constrained by

8 legislation?

9 A They are very constrained, as it were.

10 Q Can you describe --

11 A Yeah.

12 Q Can you describe that, please?

13 A The Public Broadcasting Act, which if any

14 of you have had the pleasure of looking at it, it's

15 just a few sections. It's very complicated. But

16 what's happened over the years is that, effectively,

17 Congress has told the corporation what it's going to

18 do with its money. So that the great bulk of the

19 money actually goes through a statutory pass through

20 to stations, both to public television and to public

21 radio stations.

22 So, I mean, that's where the bulk of its

1 money goes. It retains a substantial sum of money for
2 international programming on the television side. It
3 has long since now given NPR the -- that
4 responsibility on the radio side. Those funds, as you
5 know, go through NPAGs to public radio stations.
6 It also retains some funds for what it
7 calls system support, and that, indeed, is where --
8 it's also called the six percent fund. That's where
9 the music royalties get funded. That's where the
10 funding goes to reimburse the stations for the cost of
11 operating the satellite in our connection system for
12 television. And, currently, the corporation is using
13 some of those funds to help the stations transition to
14 digital television.
15 Q Now, specifically, historically, where
16 have the music license fees paid to ASCAP and BMI come
17 from?
18 A From that six percent system support --
19 Q System support fund?
20 A That's correct.
21 Q And what other activities, by statute,
22 does that fund have to --

1 A Well, like I said, they just -- it has to
2 fund -- it also uses -- the other thing that's
3 mentioned in that part of the statute is the
4 interconnection expenses. I'm not sure it specifies
5 television, but indeed it just funds television
6 interconnection expenses, and its supporting -- it
7 supports a lot of things, but one of them, in
8 particular, right now -- one that's getting a lot of
9 focus -- is transition to digital broadcasting.
10 Q Final couple of questions back to the 1992
11 negotiations. Did BMI, in 1992, ever raise as an
12 issue in the negotiations the fact that ASCAP had
13 certain open license arrangements with one or more
14 commercial broadcasters?
15 A Not to my recollection.
16 Q Did BMI -- strike that.
17 MR. RICH: I have no further questions.
18 CHAIRPERSON GRIFFITH: All right.
19 MR. SCHAEFFER: Mr. Kleinberg is --
20 CHAIRPERSON GRIFFITH: Mr. Kleinberg?
21 MR. KLEINBERG: I'm going to go first, if
22 it's okay.

1 CHAIRPERSON GRIFFITH: Please.

2 MR. KLEINBERG: I'll stay here, if that's

3 okay with everybody. If my voice trails out, please,

4 just let me know.

5 CHAIRPERSON GRIFFITH: All right. Thank

6 you.

7 CROSS EXAMINATION

8 BY MR. KLEINBERG:

9 Q Ms. Jameson, with respect to the BMI

10 license agreement and negotiations, and particularly

11 with respect to the one in 1992, am I correct that

12 that agreement contained, as prior agreements had

13 contained, a confidentiality provision?

14 A It did.

15 Q And that was a provision that was insisted

16 on by BMI as part of the negotiations?

17 A It was.

18 Q And let's direct the Panel's attention to

19 Exhibit 16 in the Public Broadcasting book, which you

20 referred to already. And I believe you've identified

21 Exhibit 16 as the BMI license agreement with Public

22 Broadcasting and NPR for -- dated October 19, 1992,

1 correct?

2 A That's correct.

3 Q And is it also correct that that agreement

4 was really constructed or written in two parts?

5 A It is. There is a confidential agreement

6 and then there is a -- the agreement itself.

7 Q The license agreement is the first nine or

8 10 pages of the document, and then there is where the

9 signatures appear?

10 A That's correct.

11 Q And then there is a blank page that says,

12 "Schedules Omitted"?

13 A Where did you say that was?

14 Q Right after the signature block page.

15 A Yes, I see it. Right.

16 Q And then, in fact, there is -- the next

17 part of the exhibit is denominated "Confidential

18 Agreement Proprietary to the Parties," correct?

19 A That's correct.

20 Q And that's the part of the license that

21 contains the monetary terms, correct?

22 A That's correct.

1 Q And that confidential agreement, which was
2 signed by you on behalf of PBS, and Sidney Brown on
3 behalf of NPR, and Marvin Berenson on behalf of
4 Broadcast Music, stated in paragraph 4 as follows,
5 "The parties shall jointly and severally make every
6 reasonable effort to maintain the effectiveness of the
7 license agreement and the confidentiality and
8 effectiveness agreement against the claims or actions
9 of any other person or entity, and no such claim or
10 action, however concluded, shall alter the obligations
11 of the parties to each other as established in these
12 agreements, except in response to lawful process of
13 any legislative body or court.
14 "This writing shall be kept strictly
15 confidential by the parties, and its terms shall not
16 be voluntarily revealed to any person, organization,
17 or governmental or judicial body, including, but not
18 limited to, the Copyright Royalty Tribunal, nor shall
19 it be shown, nor its terms by disclosed to any person
20 who has no business or legal need to know the terms,"
21 and continuing on.
22 That was the language that was requested

1 by BMI and agreed to by Public Broadcasting, correct?
2 A That's correct.
3 Q And this mirrored the same language that
4 was in the prior BMI-Public Broadcasting agreements as
5 well?
6 A That's true, yes.
7 Q And is it also correct that this agreement
8 with the fee in it was never filed with the Copyright
9 Office, as required by statute?
10 A That's correct.
11 Q The only thing that was filed with the
12 Copyright Office was the first 10 pages of the
13 document, which didn't include the fee, is that
14 correct?
15 A I know that we -- we certainly kept this
16 particular portion of the -- the fees themselves
17 confidential. But I don't know, Mr. Kleinberg -- is
18 that your --
19 Q Yes.
20 A Yes. Is whether or not there was some
21 confidential procedure that you could -- because I
22 didn't actually follow the documents myself. But --

1 so if you say that, you know, all that got filed in
2 the early part, and the confidential part didn't, I'd
3 have to believe. And I really don't know the exact
4 procedure. I do know that we did maintain the
5 confidentiality of these fees.
6 Q And the Copyright Royalty Tribunal was the
7 predecessor to the CARP?
8 A It was.
9 Q And in your written testimony, you
10 referred in page 6, footnote 4, that BMI and Public
11 Broadcasters agreed, for purposes of this proceeding,
12 to waive the confidentiality provision of the '92
13 agreement, correct?
14 A That's my understanding.
15 Q And that occurred at the commencement or
16 around the time this proceeding was commenced last
17 fall?
18 A Yes.
19 (Witness laughs.)
20 Q Well, since that's --
21 A Yes, it's here.
22 Q When you can figure out the date of the

1 document --

2 A Right.

3 Q -- I assume that that is relatively the

4 same time period.

5 And do you also recall that as part of the

6 confidentiality of the agreement, the music use data

7 that was -- and related cue sheets that were provided

8 by Public Broadcasting to BMI was considered

9 confidential as well?

10 A That we provided you what -- in terms of

11 the discovery process?

12 Q The music cue sheets. You said certain --

13 under the prior agreement, certain information was

14 provided --

15 A Right.

16 Q -- to BMI and --

17 A Right. That's correct, yes.

18 Q -- and that was subject to confidentiality

19 as well.

20 A That's correct. Yes. Yes.

21 Q And absent agreement from --

22 A My understanding.

1 Q -- Public Broadcasting, BMI would not have
2 been free in this proceeding to utilize that data,
3 because it was subject to the confidentiality
4 provisions of the agreement?
5 A The cue sheet data? Given that it's
6 subject to this provision, I guess that's the case,
7 although I will have to say because it was BMI that
8 wanted that, if BMI had ever suggested that -- that
9 they needed to use that cue sheet data, I don't -- I
10 can't think of any reason that we would have had any
11 objection to that. We weren't the ones that wanted
12 the confidentiality provision.
13 Q Do you see in the footnote 4 on page 6,
14 you write, "Similarly, BMI has been permitted by PBS
15 and NPR to use, as it wishes in this proceeding, such
16 music data as were provided it pursuant to those
17 licenses"?
18 A Right.
19 Q And do you recall that as a part of the
20 efforts at the commencement of this proceeding, in
21 order for BMI to get to use the music data, it had to
22 agree to waive the confidentiality and allow PBS to

1 use the license fee?

2 A Right. I do.

3 Q And would you agree with me that absent

4 that waiver, the fee in the BMI license agreement

5 would not be available to this CARP for purposes of

6 any part of this proceeding?

7 A Say that again. Absent --

8 Q Absent a waiver of the confidentiality

9 provisions of the agreement, which we just read, which

10 it's indicated that the information in the agreement

11 was not to be made available to any legislative or

12 judicial body, including the Copyright Royalty

13 Tribunal.

14 A I guess what I don't know the answer to is

15 whether or not there is some legal process that the

16 CARP could use in order to obtain it. But barring

17 that, yeah.

18 Q I'll give you that.

19 A That seems to be what it says.

20 Q Subject to lawful process, which the

21 agreement says, absent that lawful process, or the

22 voluntary agreement of the parties, the license fee

1 for 1992 would not have been available to the CARP in
2 this proceeding, correct?
3 A I guess not.
4 Q Now, you've testified about your
5 negotiations -- strike that.
6 Who were you representing in these
7 negotiations you've been testifying about?
8 A PBS, but also Public Broadcasting. I
9 mean, NPR was at the table, as was the Corporation for
10 Public Broadcasting. We were all there, and some
11 negotiations -- there were times when I would be the
12 spokesman on behalf of all of us, and other times my
13 colleagues would be.
14 Q And you indicated that in the reference to
15 the 1992 negotiations neither side got what they
16 wanted. And is that your testimony with respect to
17 PBS or Public Broadcasting, and BMI?
18 A When I said that -- I mean, it is -- it's
19 a generalization as to how I think perhaps most
20 successful negotiations take place and become
21 successful. It is rare that you walk into a
22 negotiation and get everything you want, so I was

1 speaking fairly generally. But that's only basically
2 to say that you -- you know, as the one who pays the
3 royalties, you always want to pay less, and the one
4 who's getting them, you always want more. So --
5 Q Well, my question was specifically related
6 to the negotiations with BMI in 1992, and whether you
7 are saying that Public Broadcasting didn't get what it
8 wanted from BMI with respect to those particular
9 negotiations.
10 A I think it's fair to say that given that
11 we concluded them successfully that we were satisfied
12 with the outcome.
13 Q My question was a little bit different
14 than that.
15 A Okay.
16 Q You said, "Neither party got what they
17 wanted."
18 A Well, I don't -- I would say that that is
19 not -- I didn't mean to be taken that literally, and
20 maybe I should have been a little more careful in how
21 I couched my response. As I said, those negotiations
22 were concluded successfully, so in the end it was what

1 we wanted and we wouldn't -- we wouldn't have settled.
2 We would have litigated.
3 Q Now, with reference to the BMI
4 negotiations in 1992 that you testified about, you
5 indicated that the license agreements actually,
6 between ASCAP and Public Broadcasting, and BMI and
7 Public Broadcasting, bear sort of the same dates in
8 October, I think.
9 A They do.
10 Q My question is: when did you reach
11 agreement, or an agreement in principle, or an
12 understanding of an agreement, as opposed to when you
13 actually signed the license agreement?
14 A I've been trying to recollect that, and I
15 will tell you that I -- I don't have an -- it's been
16 impossible for me to really recollect exactly when it
17 happened. I knew that we were running up against this
18 October timeframe, and it also took us several weeks
19 to get the agreements themselves finalized and signed,
20 etcetera, so as to meet that timeframe.
21 So my recollection is that this had to be
22 sometime in the August/September timeframe, but I

1 can't tell you exactly when.

2 Q Did I understand your testimony to be that

3 as between PBS and BMI, and PBS and ASCAP, that you

4 had not reached agreement -- Public Broadcasting with

5 ASCAP -- prior to the time you had an agreement

6 reached with BMI?

7 A I can't tell you which one -- who we

8 reached agreement with first. I think it is fair to

9 say that given the size of the -- of the respective

10 royalties, you know, we were always -- we were -- we

11 were concerned about reaching agreement as to the --

12 both entities. ASCAP we paid substantially more funds

13 to, so it was of great concern to us.

14 But I can't remember whether we reached

15 agreement with ASCAP first or BMI first, or whether,

16 you know -- how close in time those were. I suspect

17 they were very close. My recollection is is those

18 negotiations, while they were, you know, hard fought,

19 arms length, at the same time weren't embittered or

20 prolonged. I think that they were -- that we had

21 several businesslike meetings and concluded our

22 agreements.

1 Now, I do know that in the -- that
2 periodically -- and one thing that happens in all of
3 this is trying to remember what happened in the
4 previous negotiations, and, you know, the one in the
5 '80s and the one in the early '90s, and the last one,
6 and they all kind of get smushed together. But it's
7 always important, for BMI as well, to know that
8 whether -- how we're coming with ASCAP, and vice
9 versa, for ASCAP to know how the negotiations are
10 coming with BMI.
11 Q Isn't it, in fact, the case -- and
12 particularly with reference to the '92 negotiations --
13 that BMI was overly inquisitive about the arrangements
14 that had been reached with ASCAP, and whether
15 arrangements had been reached?
16 MR. RICH: Could I -- just because I
17 missed the question, may I hear it --
18 MR. KLEINBERG: Let me restate the
19 question.
20 MR. RICH: Thank you.
21 BY MR. KLEINBERG:
22 Q Isn't it, in fact, the case, Ms. Jameson,

1 with reference to the '92 negotiations, that BMI
2 wanted assurances from Public Broadcasting that, in
3 fact, BMI would be treated, relative to ASCAP, fairly
4 in terms of the license arrangements that were being
5 negotiated?
6 A That is an assurance that BMI has always
7 asked for. That's right. And it has always been
8 quite passionate about that.
9 Q And that is an assurance that you and
10 others on the negotiating side for Public Broadcasting
11 gave to BMI in 1992, is that not correct?
12 A That's correct. That's correct.
13 Q And that BMI would not have agreed to the
14 number that it agreed to -- the $785,000 -- without
15 having received the assurance from Public Broadcasting
16 that that reflected the relative music shares that had
17 been discussed by the parties?
18 MR. RICH: Objection.
19 CHAIRPERSON GRIFFITH: On what basis?
20 MR. RICH: It asks for what BMI would have
21 agreed to. It's asking her to get into BMI's mindset.
22 MR. KLEINBERG: Based upon the

1 negotiations, I'm asking if that was the impression
2 that she had as a result of all of these negotiations
3 you talked about.
4 JUDGE DREYFUS: You can ask her for her
5 understanding.
6 MR. RICH: That wasn't how it was phrased,
7 however.
8 CHAIRPERSON GRIFFITH: Yes. Okay. For
9 her understanding.
10 Your understanding, ma'am?
11 THE WITNESS: I can -- I can say, you
12 know, unequivocally, that it was extremely important
13 to BMI, that it was a major -- it was a major point
14 for BMI to have that assurance.
15 BY MR. KLEINBERG:
16 Q And do you recall in -- strike that.
17 You indicated that BMI did not -- I think
18 you used the word "dispute" the music number or music
19 share number that you had talked about, which is the
20 approximate 20 or 21 percent that is in our affidavit
21 for BMI?
22 A That's my recollection.

1 Q And do you recall that number actually
2 being discussed with BMI's representatives in the
3 negotiations, that BMI's share was in the range of 20,
4 21 percent?
5 A Yeah. It was -- it's hard -- it's been
6 about five or six years, but it would had to have --
7 let me think. Let me think about this a little bit,
8 whether we used the actual number. I know we -- I
9 know we -- what I can say is I know we assured BMI
10 that the fees that we were agreeing to would
11 relatively reflect the share of music usage.
12 Specifically as to whether it was 21
13 percent or not, I -- I can't really -- can't really
14 say accurately. It's just too -- too far back to
15 specifically recollect.
16 Q Well, your written testimony says on
17 page 5 that the then most current music data covering
18 the year 1991 revealed that ASCAP represented some
19 79 percent and BMI some 21 percent of combined ASCAP
20 and BMI music cues in programming originally broadcast
21 by PBS and distributed by PBS to its member stations.
22 While not necessarily representative of

1 the universe of music used -- music used by Public
2 Broadcasting -- this programming was used by all
3 parties in this negotiation. And by that you're
4 referring to those -- the PBS numbers, right?
5 A Right. Right. The 79/21, that's correct.
6 Q Now, do you recall that in the '92
7 negotiation BMI's representatives informed you and
8 others that BMI had been receiving complaints from its
9 radio -- commercial radio and television licensees,
10 including cable, that PBS had an unfair advantage
11 because of the level of the fees it was paying?
12 A No. I recall in every negotiation that we
13 would hear that -- hear complaints about maybe
14 commercial radio stations complaining, but not because
15 of the rates.
16 Q So you don't recall being told by BMI that
17 its commercial licensees in radio and television were
18 complaining to it, to BMI, that PBS had an unfair
19 advantage because of its fees?
20 A I really -- I don't recall.
21 Q Do you recall that -- being told that BMI
22 had received complaints that dollars being paid to the

1 performing rights societies by PBS were very low
2 compared to the commercial broadcasters?
3 A Being told that what we paid were low
4 compared to commercial broadcasters? Surely. I mean,
5 we -- every negotiation, again, you know, there are
6 certain refrains. That's one of them.
7 Q And do you recall being told that the
8 commercial broadcasters had complained to BMI that
9 public broadcasting programming had changed in a way
10 that made it unfair for them to continue to pay such
11 low music performing rights licenses relative to the
12 commercial broadcasters?
13 A That -- that -- that does not ring a bell.
14 Q Do you recall being told that BMI had
15 received complaints from its commercial licensees
16 about the amount of advertising on public
17 broadcasting?
18 A Again, I don't -- I don't recall that.
19 Q Do you recall saying to BMI that PBS could
20 control the network advertising; however, the local
21 affiliates were pushing beyond the envelope and
22 sometimes crossed over the line?

1 A Well, I would dispute that I ever used the
2 word "advertising," because I can tell you I never
3 did. Very careful about that. But --
4 Q How about the subject matter?
5 Substituting the word "advertising" for --
6 A Underwriting.
7 Q -- "corporate underwriting"?
8 A Are you talking about '92?
9 Q Yes.
10 A I mean, this is -- again, as I said to
11 you, the behavior -- the underwriting behavior of
12 Public Broadcasting stations has been a constant
13 refrain. I wouldn't dispute that I might have, at one
14 time or another, admitted that some stations were more
15 on the edge of the envelope than others. But I
16 certainly wouldn't generalize that, because I think
17 that that's the rare exception, not the rule.
18 Q But that subject matter, you recollect,
19 did come up in --
20 A Again, as I said, I think underwriting and
21 the commercialization of public broadcasting, in every
22 negotiation I have ever been in, those are things that

1 you continually hear time and time again. It makes
2 for a strong argument when you're sitting on the other
3 side of the table, even if it's not necessarily the
4 case.
5 Q Is it also, in fact, the case that during
6 the 1992 negotiations that you and others for Public
7 Broadcasting expressed the view that the Corporation
8 for Public Broadcasting had limited resources
9 available for the payment of music licensing fees?
10 A We have always articulated what the
11 statute says, and we -- I mean, obviously, the funding
12 history for the corporation is self-evident. So,
13 indeed, there is a finite amount of funds available
14 for that.
15 Q And do you recall the BMI negotiator
16 saying, "What about the stations themselves paying it?
17 And how about their revenue being utilized or tapped
18 into to pay for the license fee"?
19 A Mr. Kleinberg, I will tell you, I -- you
20 know, I remember that from the last negotiation, but
21 I can't go back to '92 and '80 -- whatever it was,
22 '88, and try to --

1 Q And do you recall --

2 A -- be specific.

3 Q -- saying that you couldn't or wouldn't

4 negotiate along those lines -- that is, with the

5 stations themselves bearing up -- bearing any part of

6 the license fee?

7 A Again, I can't say specifically. I mean,

8 I -- like I said, the '92 negotiations didn't strike

9 me -- I mean, if we go back to '92, those negotiations

10 were not the most difficult ones I have ever sat

11 through. They were -- you know, like I said, they

12 were businesslike. Some of the stuff that -- some of

13 the things you're saying strike me as more of what

14 I've heard in the last round last year.

15 Q Now, you testified also in your direct

16 case about the parties, and in particular I assume

17 you're referring to BMI's reliance on the music use

18 data from the PBS programming for radio, correct?

19 A On behalf of the whole public

20 broadcasters, not -- yes, that's right.

21 Q Including radio?

22 A That's right.

1 Q Isn't that --

2 A That's correct.

3 Q And that for purposes of the negotiation,

4 those numbers that came out of the PBS study or

5 analysis -- with the 20 percent, for example, for BMI

6 -- was treated as the proxy for radio, insofar as that

7 was part of the overall negotiation?

8 A Well, since we -- you know, since we pay

9 as public broadcasting and not as public radio and

10 public television, it was treated as a proxy for the

11 whole system. And I will tell you, in my recollection

12 of all of these negotiations, I have never seen

13 anybody -- BMI, ASCAP, or Public Broadcasting -- come

14 forward with any data with respect to radio.

15 Q That was my next question. Isn't it, in

16 fact, the case, with reference to 1992, and even

17 before, that there wasn't discussion or the sharing of

18 information about music use or music data on public

19 radio as part of the negotiations?

20 A Just antidotes that, you know, hit the

21 refrain, so --

22 Q And I think you dropped into one of your

1 answers to Mr. Rich's question something to the effect
2 that in negotiating separate fee for radio and
3 television would have been unacceptable to public
4 broadcasting. Is that what you said, "unacceptable"?
5 A I don't know what word I used. I must
6 say, I would say it's anathema. That would be --
7 Q And you would acknowledge that public
8 radio and public television are different?
9 A They are.
10 Q They're not the same entity, right?
11 A They are not. That's correct.
12 Q Actually, they compete with one another to
13 a certain extent for viewership and audience, don't
14 they?
15 A I don't think we think of it that way. I
16 don't -- you know, I guess if you look at the -- if
17 you look at commercial broadcasters, you'd say that
18 you're all competing for eyeballs and ears, but I
19 don't think we -- we think of it that way.
20 Q Well, the money that's --
21 A We're sort of sister and brother, as it
22 were.

1 JUDGE GULIN: What is your objection to
2 dividing the fees in that manner? It's just going to
3 be paid by CPB anyway. What is it that's anathema
4 that it be --
5 THE WITNESS: Well, I mean, if it -- if I
6 go back and try to recollect all the horrors that --
7 I guess part of it is that right now, it
8 is quite simple, it's easy. It's been this way for a
9 long time, and that's not a reason not to change, I
10 recognize.
11 But one of the things that -- you know, it
12 has really worked for us not to have to go through,
13 you know, trying to administer these two separate
14 things. I suspect that -- I mean one thing it would
15 probably mean for public radio particularly is, you
16 know, just a whole administrative infrastructure that
17 doesn't current exist to try to track this data.
18 It is not that simple to do. I think
19 another thing -- you know, if I had a little more time
20 to think of it, maybe I'll come up with it after. But
21 I know we had --
22 JUDGE GULIN: I'm not asking you to come

1 up --

2 THE WITNESS: No, I understand. But we --

3 JUDGE GULIN: -- just to testify.

4 THE WITNESS: No, no; I understand. But

5 we had actually ourselves worked through, you know,

6 some of the difficulties that it would pose. And

7 unfortunately, right now, I'm just simply not

8 recollecting them.

9 JUDGE GULIN: Okay.

10 THE WITNESS: I've been away from PBS for

11 a little bit and -- but that -- you know, really,

12 there are legitimately a lot of administrative

13 difficulties with respect to that.

14 You know, you also will end up, I suspect,

15 just internally, you then -- it's more turmoil within

16 public broadcasting itself as with respect to the

17 allocation of that. And then -- and will the

18 corporation continue to carry the freight is also

19 another issue with respect to that.

20 But I will give that some thought and, if

21 I remember, see if I can't further enlighten you and

22 myself.

1 BY MR. KLEINBERG:

2 Q Not to be overly technical about this, but
3 since you were the general counsel of PBS, it is in
4 fact the case that the Corporation for Public
5 Broadcasting is not the licensee or a licensee for the
6 BMI or ASCAP license?

7 A That is correct.

8 Q They're not even a signatory to those
9 licenses, are they?

10 A That is correct.

11 Q And in fact, the licensees, under the
12 statute, are the public television and radio stations
13 themselves, and the license also covers public
14 broadcasting service to the extent it may be --

15 A I'd have to go back to the statute, but
16 there are -- there are statutory definitions that
17 include PBS, NPR; and I don't believe it includes CPB,
18 but I could be wrong. So -- but certainly not a
19 signatory to the agreement.

20 Q And I take it from -- well, strike that.

21 You've indicated that the fee historically
22 has been paid by the Corporation for Public

1 Broadcasting and that it has been paid on a unitary
2 basis.
3 Are you aware as to whether the
4 Corporation for Public Broadcasting or others had done
5 any internal allocations of the license fee as between
6 public radio and public television?
7 A To the best of my knowledge, there is no
8 such allocation.
9 Q And you aware that the Corporation for
10 Public Broadcasting maintains reams of statistics and
11 data as to public television on the one hand and
12 public radio on the other in terms of the information
13 that it presents to Congress and others, not just --
14 A Anything --
15 Q -- lumped together into one big --
16 A That's correct, that's correct.
17 Q So the lumping together, if you will, of
18 the music license fees and the non-allocation, if you
19 will, to radio or TV, is that something of an anomaly
20 in terms of the record keeping and books and records
21 of the Corporation for Public Broadcasting?
22 A You mean the music?

1 Q Yes.

2 A Well, my -- this is really a guess, but
3 historically, it's been done this way I think for all
4 the parties -- for ASCAP, for BMI, for Public
5 Broadcasting. We had certain music usage data. It
6 was television.

7 And as a result, all of the parties -- all
8 the parties were content to accept that as the proxy
9 for public radio and public television. And I don't
10 think it was the Corporation that had anything to do
11 with that.

12 I think it was just the manner in which --
13 you know, good record keeping not just for public
14 broadcasting, but for the societies. And you know,
15 relative to ASCAP, BMI's general operations, I mean,
16 this is, you know, small change.

17 So, I mean, I think it makes some economic
18 sense to do it this way.

19 Q And that's in terms of the efficiencies of
20 administering the fee if it were to come from --

21 A No, that has to do with this collecting --

22 Q That's my question is --

1 A -- music usage data. I mean both for
2 public broadcasting and for the licensing societies,
3 you have this one database that you can rely upon as
4 opposed to trying to collect all the information as
5 well from NPR and stations.
6 And I think everybody agreed that that
7 just made sense. And I think one of the agreements --
8 I don't remember whose it is -- I mean, there is some
9 right to go back and sample stations if you want to do
10 that.
11 I'm not sure it's ever been done.
12 Q Well, there was a requirement under the
13 license agreements that information be provided --
14 music use information --
15 A Absolutely.
16 Q -- separately from -- as from television
17 and radio, correct?
18 A Well, I have to go back and look. I don't
19 remember the particulars.
20 Q Well, if you -- let's look. I mean, I
21 don't want you to guess about that. Let's look at the
22 license agreement.

1 JUDGE GULIN: PB 16?

2 MR. KLEINBERG: Yes.

3 BY MR. KLEINBERG:

4 Q And what I direct you to is the last page

5 of Exhibit 16.

6 A Page nine?

7 Q It's the -- no, the last page of the

8 exhibit before Tab 17 is a letter signed by you and

9 Mr. Berenson of BMI and -- in which NPR and Public

10 Broadcasting Service agree that, from time to time,

11 PBS and NPR may furnish to BMI copies of standard

12 music cue sheets for programs distributed by PBS and

13 for programs produced and distributed by NPR.

14 And that BMI will, within a reasonable

15 time after receipt of any such cue sheets, mark the

16 cue sheets and return the cue sheets as marked --

17 A Right.

18 Q -- to PBS or NPR as appropriate.

19 Is that what you were referring to?

20 A Yes.

21 Well, actually that wasn't what I was

22 referring to. This is something different. I mean,

1 PBS obviously does this and sends those cue sheets on
2 to BMI. What I was referring to, and I think it may
3 be in the ASCAP agreement, is some ability to actually
4 sample stations as opposed to via PBS, NPR.
5 Q I'm curious, as a result of this sort of
6 unitary approach to it, why so many people went to
7 these negotiating sessions on behalf of all these
8 different parties if everybody was sort of all the
9 same?
10 You know, why didn't one person just
11 negotiate the whole deal on behalf of --
12 A Because they are separate entities and we
13 have separate boards of directors to whom we report.
14 Now there are times, as we have here, we agree on one
15 counsel. And I think in those negotiations, like I
16 said, we would occasionally be spokesman -- all of us
17 have an interest.
18 And I think -- you know, I will tell you
19 that one of the grave fears is the one you just
20 posited, is that somehow it might get split between
21 radio and television and you needed to be there just
22 in case there was any possibility of somebody

1 suggesting that.

2 Q And I take it from your prior testimony

3 that you would have been prepared to litigate the

4 issue with performing rights societies as to the

5 separate license fees if they had been insisted upon?

6 A Mr. Kleinberg, it never came up, so I --

7 you know, I really --

8 Q Oh, I'm sorry; I thought it had come up.

9 A Well, I mean, but it wasn't a real

10 possibility in those negotiations. I mean, it might

11 have gotten -- you know, it may have been a --

12 Q Well, you said --

13 A -- a ghost of a mention in the early

14 stages when people were still sabre rattling a little

15 bit. But when you got to the serious -- you know,

16 down to the more serious end of the negotiations, it

17 was never a real possibility.

18 So it wasn't anything I really had to

19 consider.

20 Q Now the money that's paid for the license

21 fee, you said, comes from the Corporation for Public

22 Broadcasting?

1 A Correct.

2 Q And you said, to your knowledge, it's not

3 allocated as between radio and TV?

4 A That's right.

5 Q That money though, to the extent it's used

6 to pay the music license fees -- other witnesses --

7 and I think you probably have heard that today --

8 would have been available then for distribution by the

9 Corporation for Public Broadcasting to radio and/or TV

10 stations?

11 A Not without a change in the statute.

12 Q I'm sorry?

13 A Well, there would have to be a change in

14 the statute.

15 Q So if -- so if the money wasn't otherwise

16 used to pay the license fees, who got it?

17 A The current statute says it will be used

18 for copyright royalties. And if the statute weren't

19 the case, you know -- actually I don't know that it

20 would go to the stations because the truth is, is that

21 six percent fund tends to be funds that stay at the

22 corporation.

1 It's not the money that goes to stations.
2 Q Well, I thought I had understood someone
3 suggesting in their prior testimony that this money
4 was being taken away from the stations.
5 If the fee increases being sought by ASCAP
6 and BMI in this proceeding were achieved, that would
7 require extra money to be spent by the Corporation for
8 Public Broadcasting, and that would deprive the
9 stations of that money which they would otherwise get.
10 MR. RICH: Objection to the form.
11 CHAIRPERSON GRIFFITH: All right, the
12 objection is to the form of the question.
13 Do you want to state specifically --
14 MR. RICH: Yes, I believe the purport of
15 the question is to ask -- he was incorporating, he
16 believes, testimony of another witness which --
17 CHAIRPERSON GRIFFITH: Right.
18 MR. RICH: And I'm not sure if he's asking
19 her whether she heard the witness say that or whether
20 she has independent knowledge of the subject.
21 CHAIRPERSON GRIFFITH: Mr. Kleinberg?
22 MR. KLEINBERG: I'll withdraw the

1 question.

2 CHAIRPERSON GRIFFITH: Thank you.

3 JUDGE GULIN: Actually, I'd like to hear

4 the answer.

5 JUDGE DREYFUS: Yeah, I'd like to hear the

6 answer too.

7 JUDGE GULIN: Why don't we just put it in

8 the form of a hypothetical question? If someone

9 testified --

10 MR. KLEINBERG: I'll adopt --

11 (Laughter.)

12 BY MR. KLEINBERG:

13 Q Question: If someone had testified --

14 A Yeah.

15 Q -- that, if the fees being sought by ASCAP

16 and BMI were granted, and additional monies above what

17 has been the license fee were required to be paid,

18 would not the money that was going to have to be paid

19 for those increases be taken from monies that would

20 otherwise go to the stations?

21 A I think if that were to happen, the system

22 would be faced with a crisis and they would have to

1 figure out how it was going to happen. I don't think--

2 JUDGE DREYFUS: Who is "they?"

3 THE WITNESS: The PBS board, the NPR

4 board, the Corporation for Public Broadcasting's board

5 of directors and the thousand stations involved.

6 JUDGE DREYFUS: Wouldn't it come from the

7 $250 million?

8 THE WITNESS: Well, you can't take it if

9 it's not there. If you end up using all of that six

10 percent fund, if you use the interconnection expenses

11 to operate the satellite system -- I mean, six percent

12 is a finite amount of money.

13 Right now it's all being used. It's being

14 used for interconnection; it's being used, like I

15 said, for transition to digital; it's being used to

16 affect what are called more efficiencies within public

17 broadcasting to get stations to operate more

18 cooperatively and to essentially converge some of

19 their back office operations, etc.

20 If you use, you know, all of that fund,

21 then somebody's got to pay for some of that. You

22 know, you've got to figure out what aren't you going

1 to do. I mean, this is not like -- you can't raise
2 anybody's rate.
3 JUDGE DREYFUS: We're just asking where
4 it's going to come from.
5 THE WITNESS: No, I understand.
6 JUDGE DREYFUS: Is it going to come from
7 part of that six percent?
8 THE WITNESS: Well, it will come -- to the
9 extent the Corporation for Public Broadcasting's board
10 of directors, which it's their budget, is willing to
11 allocate, you know, whatever funds they have to
12 basically say okay, we won't pay for interconnection
13 of the satellite system in order to make that up or --
14 if it's of that magnitude; or, you know, we'll have to
15 do something about the transition to digital;
16 Or, I mean, the other side is the
17 corporation could arguably take the position that
18 they're not going to use that fund and they can go to
19 Congress and see what, you know, they can do there.
20 And then you have to figure out who is it
21 going to get paid and what is it you're not going to
22 do in order to make up those additional funds.

1 JUDGE DREYFUS: Well, public
2 broadcasting's position here, as a fall back position
3 apparently, is roughly a four percent increase over
4 previous years.
5 THE WITNESS: Right.
6 JUDGE DREYFUS: Where is that four percent
7 going to come from?
8 THE WITNESS: Now I think in the case of
9 four percent, the corporation -- and I'm -- my
10 understanding is, and they probably should be speaking
11 for themselves -- is that they will fund that; that
12 that is considered by CPB and the public broadcasters
13 to be a fair and reasonable increase.
14 So that will come from the six percent.
15 And the corporation will pay it in its entirety. It's
16 a question of, you know, the magnitude of the increase
17 and whether or not it can be affordably funded from
18 the funds available to the corporation or whether you
19 have to find other sources.
20 CHAIRPERSON GRIFFITH: Mr. Kleinberg, do
21 you have a great deal more to do?
22 MR. KLEINBERG: I have some amount to do,

1 not a great deal. And at the Panel's --

2 JUDGE GULIN: Fifteen minutes, more than

3 15 minutes?

4 MR. KLEINBERG: I think I'd be --

5 JUDGE GULIN: We're not going to hold you

6 to the minute, but --

7 MR. KLEINBERG: Right, right, right.

8 JUDGE GULIN: -- I want to know if it's 15

9 minutes or more like an hour and a half.

10 MR. KLEINBERG: No, it's not an hour and

11 a half. But I'm happy to take -- I'm happy to take a

12 break if that accommodates everybody.

13 CHAIRPERSON GRIFFITH: We want to keep you

14 happy, Mr. Kleinberg.

15 We'll take our luncheon recess at this

16 time, all right?

17 (Whereupon, the proceedings recessed for

18 lunch at 1:00 p.m.)

19

20

21

22

1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 (2:05 p.m.)

3 CHAIRPERSON GRIFFITH: Mr. Kleinberg.

4 MR. KLEINBERG: Thank you.

5 CROSS EXAMINATION (continued)

6 BY MR. KLEINBERG:

7 Q Ms. Jameson, before the lunch break you

8 had indicated that -- I think you used the word

9 "heard" the refrain from the performing rights

10 societies in negotiations that they -- PBS and public

11 broadcasting -- was comparable to the commercial

12 broadcasters and that you would rebuff or reject that

13 comparison or that analysis.

14 Is that correct?

15 A I'm not so sure that what we heard was

16 they were comparable to so much as perhaps the refrain

17 was becoming more alike.

18 Q And you responded negatively to that

19 commentary?

20 A Absolutely. Still would.

21 Q And --

22 A Still would.

1 Q Still would, okay.

2 And isn't it also the fact, Ms. Jameson,

3 that public broadcasting and, in this regard, PBS

4 itself has sought to be treated the same as commercial

5 broadcasters in the satellite carrier rate adjustment

6 proceeding before the CARP last year?

7 A That's very true.

8 Q And in that proceeding, the fair market

9 value of the programming that PBS distributed which

10 was retransmitted on the satellites to home dishes and

11 which, by the way, contained copyrighted music of the

12 performing rights societies, you said the fair market

13 value in that case of your product was equal to or if

14 not greater than the value of the commercial networks

15 -- ABC, CBS, NBC, correct?

16 A Mr. Kleinberg, that is true; but I don't

17 think it's fair to just answer it by saying that's

18 what we said. It is indeed what we said.

19 That is a different marketplace than this

20 marketplace. And in that particular proceeding, what

21 you were -- I think what's being considered is what is

22 the value of those various programming feeds to the

1 direct broadcast satellite retransmitter.

2 And under that circumstance, we maintain

3 that the value of that programming to the satellite

4 carrier was as valuable as the other network feeds

5 that they were providing and asked for the same rate.

6 Here the issue is what's the value of the

7 music used by public broadcasters.

8 Q In the same programming --

9 A That's correct.

10 Q -- that you claimed you should be

11 compensated for and the exact same amount penny for

12 penny as the networks received from the satellite

13 carriers, isn't that correct?

14 A That's what we were asking for, that's

15 right.

16 But that is apples and oranges. That's a

17 very different proceeding.

18 Q So the apples and oranges were -- or are

19 that, in that proceeding, you were trying to get

20 compensated for the value of the programming which

21 included the copyrighted music; whereas, in this

22 proceeding, you're having to pay for the value of the

1 music in that same programming.

2 Is that the apples and oranges that you

3 see?

4 A The apples and oranges are --

5 JUDGE DREYFUS: Hold it.

6 THE WITNESS: You're dealing with two

7 different marketplaces. In the satellite proceeding

8 -- and I don't proclaim to be an expert on all of that

9 proceeding. But in that proceeding, the question is,

10 is what value is it to the satellite retransmitter to

11 have available to it the PBS program service?

12 And how valuable is it to that satellite

13 retransmitter in terms of marketing his programming

14 services to viewers? Here what you're dealing with is

15 a noncommercial marketplace. That is, noncommercial

16 broadcasting.

17 And what is the value of music used on --

18 in its broadcast service? What is the value to it of

19 the music it uses and what's the fair rate that it

20 should be paying in this noncommercial marketplace for

21 those -- for the music usage.

22 BY MR. KLEINBERG

1 Q You would agree with me that it was the
2 same signal in terms of the PBS feed --
3 A I agree that the programming included on
4 the satellite feed is for the most part -- it's not
5 identical, but it is for the most part. It's very
6 comparable and some of it is much the same as what's
7 on the satellite feed.
8 Q And you did not take the position -- by
9 you I mean PBS -- in that proceeding that, because of
10 the differences in public and commercial broadcasting,
11 the programming was worth less in terms of
12 compensation when others under the compulsory license
13 are required to pay for carrying that program, is that
14 correct?
15 A No, we would -- our position was -- is
16 that we should be compensated at a comparable rate.
17 MR. KLEINBERG: I have no further
18 questions of the witness at this time.
19 CHAIRPERSON GRIFFITH: All right.
20 MR. SCHAEFFER: I have one or two.
21 CHAIRPERSON GRIFFITH: All right.
22 CROSS EXAMINATION

1 BY MR. SCHAEFFER:

2 Q First of all, you had mentioned that you
3 had recalled that there was some requirement to
4 provide for reporting of music usage. And I think you
5 corrected yourself and thought it might be ASCAP's
6 license.

7 And I think if you look at Exhibit 11 at
8 paragraph four, page five, I wonder if that's the
9 provision you were talking about?

10 In the 1992 --

11 MR. RICH: That would be 13.

12 MR. SCHAEFFER: Thirteen?

13 MR. RICH: Exhibit 13X.

14 THE WITNESS: Tab 13?

15 MR. RICH: Okay.

16 MR. SCHAEFFER: It's the same page.

17 THE WITNESS: Page five.

18 Right, that's right; that provision does
19 provide that.

20 BY MR. SCHAEFFER:

21 Q Also would you turn, as long as you're
22 there, to Exhibit 17?

1 A Exhibit 17.

2 Q You see this has been testified to at some
3 length in this case, the public radio programming for
4 the fiscal year 1987.

5 Was that available to the public
6 broadcasters at the 1992 negotiations?

7 A I don't have any recollection of having
8 seen it during those negotiations. I really -- I
9 can't tell you.

10 Q So when you've testified that there was no
11 radio data available to the public broadcasters, it
12 may be that there was no -- at least as far as you
13 were concerned, there was -- no one brought to your
14 attention the existence of these reports, is that
15 correct?

16 A If they existed, I don't recollect having
17 seen them at the time. Or since then, for that
18 matter. This is the first time I've --

19 Q Why don't you just take a quick look at
20 it. Was there -- refresh your recollection as to
21 whether or not somebody did bring it to your attention
22 and whether there was some reason that these reports

1 were not, to your recollection, used in the
2 negotiations with ASCAP and BMI.
3 A Well, as I said, I don't have any
4 recollection of having seen these before. And that
5 doesn't mean they weren't -- you know, I just don't
6 recollect --
7 Q You don't recollect one way or the other?
8 A No, I don't.
9 Q But if the testimony is, as I believe it
10 is from the Public Broadcasters, that this data was in
11 existence in -- at the time you were doing these
12 negotiations with the performing rights organizations,
13 you had no explanation as to why it wasn't used in the
14 negotiations, is that correct?
15 Did you testify --
16 A I mean, not having really looked at it
17 very closely, even now, you know, I can't even say
18 what its relevance is. But I do not have any
19 recollection of having seen it during the
20 negotiations, nor do I recollect as to why it might
21 not have been used.
22 Q All right. Because the reason I asked is,

1 you will recall, you testified there was no radio data
2 available to public broadcasters in connection with
3 the negotiations, and this happens to be a document
4 that's relied upon by Dr. Jaffe and Public
5 Broadcasters in this proceeding.
6 And I'm just trying to probe. Was there
7 something wrong with the data? Was there a reason it
8 wasn't? Or maybe it's your recollection that's not
9 accurate. Or what? It just seems strange.
10 A I don't have any explanation. I really
11 don't.
12 Q Okay.
13 A You know, like I said, NPR was at the
14 table as well, so --
15 Q You've testified that, in your opinion, in
16 this proceeding, it is for the arbitrators --
17 JUDGE GULIN: Let me just interrupt one
18 second.
19 MR. SCHAEFFER: Sure.
20 JUDGE GULIN: My recollection of your
21 testimony is it had to with the apportionment of music
22 use of ASCAP versus BMI. Is that correct? Isn't that

1 what --

2 THE WITNESS: Well, I said that we used --

3 yeah, we had PBS music issue its data to -- as a proxy

4 for music usage.

5 MR. SCHAEFFER: I think the record, Mr.

6 Arbitrator, will show that there was also a statement

7 there was no radio music use data.

8 JUDGE GULIN: In general.

9 MR. SCHAEFFER: In general.

10 In believe I'm correct and the record will

11 be the best --

12 THE WITNESS: You may be correct. I

13 didn't recollect that there was any.

14 BY MR. SCHAEFFER:

15 Q And was your recollection -- am I not

16 correct, it was your recollection there was no music

17 use data in 1992?

18 A I don't remember having seen any.

19 Obviously my focus was much more on television than it

20 would be on radio anyway given that I was the general

21 counsel of PBS.

22 Q All right, well let's move on.

1 You've testified that the function of this
2 Panel is to determine the value of the copyright
3 licenses in the noncommercial market, correct? Is
4 that your view of what the function of the Panel is?
5 A I mean, I don't want to get into arguing
6 what the function of the Panel is. That's a question
7 of law, not a question of fact.
8 But it seems to me that what -- the whole
9 issue here is what's reasonable -- what are reasonable
10 fees to be paid for the music used by the qualified
11 systems.
12 Q Assuming that the Panel felt itself that
13 the fees which were negotiated in the past were
14 subject to question as to whether or not they were
15 truly market fees, what other source than commercial
16 broadcasting would they have to look to?
17 MR. RICH: I object.
18 CHAIRPERSON GRIFFITH: On what basis?
19 MR. RICH: The question is better directed
20 to an expert witness. She's testified as a fact
21 witness as to circumstances surrounding prior
22 negotiations and other matters.

1 She's not here as an expert for Mr.
2 Schaeffer to opine on other theories of rate setting.
3 MR. SCHAEFFER: She's testified that she
4 was the general counsel of PBS. She was involved in
5 numerous of these proceedings. She's obviously expert
6 in the subject. I thought the Arbitrators should have
7 her views and it would certainly be enlightening on if
8 they couldn't rely on the agreements or didn't choose
9 to rely on the agreements, either case, what else
10 would there be to rely upon.
11 JUDGE GULIN: Okay, I don't think through
12 this process she has an economic theory to offer, but
13 we can certainly find out if she has an opinion.
14 CHAIRPERSON GRIFFITH: The objection's
15 overruled.
16 THE WITNESS: I'm not an economist. I
17 haven't developed any methodology that you might use
18 in the absence of --
19 BY MR. SCHAEFFER:
20 Q And you have no theory?
21 A -- the market data which you have
22 available.

1 Q Okay. Now you've suggested that the fees
2 for the licenses of ASCAP and BMI should come from the
3 Committee for Public Broadcasting. And it is true, is
4 it not, that the Committee for Public Broadcasting
5 gets all of its funds from the Federal Government?
6 A The Corporation for Public Broadcasting.
7 Q I mean the corporation.
8 A It does, it does.
9 Q Are you aware that, in this proceeding, at
10 page 14 of his testimony, Mr. Downey asserts that "the
11 relationship of public television income to the value
12 of programming, let alone music use, is quite
13 indirect. For example, the significant portion of
14 public television's funding, which is governmental,
15 depends on the strength of the national or local
16 economy or political" --
17 JUDGE GULIN: Mr. Schaeffer, I think
18 you're starting to read a lot now. It would be a lot
19 better to --
20 THE WITNESS: Where are you?
21 MR. SCHAEFFER: All right, let me do that.
22 BY MR. SCHAEFFER:

1 Q Would you look at 14 of Mr. Downey's in
2 the direct testimony?
3 A I have to find it.
4 Q And then I won't even have to repeat it;
5 you can just read it for yourself because I'm sure
6 everybody's tired of hearing the sound of my voice.
7 If you look at the second sentence from
8 the top, there's a sort of long first sentence. And
9 would you just read to yourself, and everybody can,
10 the part that starts "the relationship through
11 financing equation" at the bottom of that paragraph.
12 A All right.
13 Q Doesn't it seem contradictory to you that
14 PBS is proposing that the license fees to ASCAP and
15 BMI be limited to the very funds, government
16 appropriations, that PBS claims has the least
17 relevance to music use?
18 MR. RICH: Objection; both
19 mischaracterizes our position and is directed to the
20 wrong witness. Let him ask these questions of Mr.
21 Jaffe.
22 CHAIRPERSON GRIFFITH: Mr. Schaeffer, do

1 you have any response?

2 MR. SCHAEFFER: I think it's a perfectly

3 permissible question, but I will.

4 I withdraw the question.

5 CHAIRPERSON GRIFFITH: All right, thank

6 you.

7 MR. SCHAEFFER: I have no further

8 questions.

9 CHAIRPERSON GRIFFITH: Any redirect?

10 MR. RICH: One or two.

11 CHAIRPERSON GRIFFITH: All right.

12 MR. RICH: Maybe three.

13 REDIRECT EXAMINATION

14 BY MR. RICH:

15 Q Ms. Jameson -- we always get trapped when

16 we numerate how many we have.

17 Would you just turn to Exhibit 13, please,

18 in the book just to the signature page. This is the

19 1993 to 1997 ASCAP agreement.

20 A Right.

21 Q And at page seven, is that your signature

22 on behalf of Public Broadcast Service?

1 A It is.

2 Q I just want to make sure the record is

3 totally clear about the six percent system support

4 money and how that comes from. Take FY99, which I

5 think your testimony indicates there was a $250

6 million dollar --

7 A Appropriation.

8 Q -- appropriation, correct?

9 Do I understand you to be saying that the

10 system support monies by statute is six percent of

11 that sum for that year?

12 A Six percent of the $250 million dollars,

13 that's correct.

14 Q Which, by my math, is $15 million dollars?

15 A That's about right.

16 Q And historically, is it also your

17 testimony that, of that -- that that $15 million

18 dollars is intended to be directed to fund a number of

19 activities, --

20 A Right.

21 Q -- one of which is copyright license fees?

22 A It is.

1 Q And historically -- am I correct in
2 understanding you, that historically that $15 million
3 has helped to fund in fact the fees that are payable
4 to ASCAP and BMI?
5 A It has been used to fund all the fees that
6 have been payable to ASCAP or BMI, to SESAC, to Harry
7 Fox, you name it.
8 Q So that if, for example, the preexisting
9 fee levels were to continue in place at or around
10 3.775 million dollars, it would be that percentage --
11 that proportion of the $15 million dollars for FY99
12 would be devoted to music performing rights fee
13 payments, is that correct?
14 A Right. So effectively you're saying it's
15 around $4 million now, is that --
16 Q Yes.
17 A Collectively? So it's four of the $15
18 million --
19 Q Okay.
20 A -- right now that -- well, that's as to
21 this. It's more than that when you add the other
22 payments as well, but that's the ball park.

1 Q And I take it the balance of the monies,
2 such as they are in any year, are put to good uses for
3 other purposes?
4 A The other $11 million or so gets used for
5 -- as I said, to pay for the operation of the
6 satellite interconnection system and for public
7 television.
8 And I think as you all know, probably more
9 than you care to know given these proceedings, all of
10 the stations are interconnected by satellite and PBS.
11 And all of those -- half of those expenses are
12 reimbursed by the corporation to stations.
13 And then again, part of that system
14 supports fund gets used for other things. Some of
15 that money -- I didn't mean to mislead earlier. Some
16 of that money may stay at the corporation, but much of
17 that money -- if they're doing, for example, this
18 Futures Fund support for the transition to digital
19 television, I mean, they will make discretionary
20 grants.
21 So they will decide who will get some --
22 JUDGE DREYFUS: Who's "they" again?

1 THE WITNESS: I'm sorry, the corporation,
2 the Corporation for Public Broadcasting.
3 JUDGE DREYFUS: Their board of directors
4 ultimately?
5 THE WITNESS: Well, their board -- that's
6 right, the board will approve the budget and they will
7 determine how those funds get utilized. And some of
8 it may indeed go to the stations.
9 JUDGE DREYFUS: So the board can change
10 the six percent if they wanted to also, right?
11 THE WITNESS: Well, they can't change the
12 six percent totally because -- I mean, the statute
13 says -- the Public Broadcasting Act, which is an act
14 of Congress, says, you know, there's going to be this
15 six percent and it's going to be used for thus and so.
16 It also says that, you know, 75% of your
17 money, CPB, is going to go to the stations for their
18 discretionary use in their communities. So, you know,
19 they can -- they have some flexibility within the six
20 percent, but there are some statutory guidelines
21 Congress has given them for what they're going to
22 fund.

1 BY RICH:

2 Q Finally -- sorry.

3 A That's fine.

4 Q Finally, Ms. Jameson, when you testified
5 earlier and in response to Judge Gulin about the lack
6 of radio music data earlier on, what sorts of data did
7 you have in mind that were lacking to PBS and to NPR
8 as of that time?

9 A Well, we didn't have -- to the best of my
10 recollection, there was no music reporting system like
11 we had in public television.

12 You know, and like I said, nobody else
13 came to the table with anything that might have been
14 comparable to the database that we had created with
15 respect to the use of music in public television. So
16 --

17 Q The database which was built off of music
18 cue sheets, in other words?

19 A That's right, the MURS system.

20 Q Thank you.

21 MR. RICH: I have no further questions.

22 CHAIRPERSON GRIFFITH: All right.

1 MR. SCHAEFFER: I have one. Unless Mr.
2 Kleinberg has --
3 RECROSS EXAMINATION
4 BY MR. SCHAEFFER:
5 Q Some years ago, there was a proposal that
6 CPB get no funding at all from Congress. Do you
7 recall that?
8 A Sure, many times.
9 Q And if CPB got no funding from Congress,
10 who would defray the costs to the copyright owners
11 under Section 118 of copyright?
12 A If there were no Federal funding -- I
13 mean, you're really imagining a very different world.
14 But I think it would be a very different public
15 broadcasting system. You would probably see -- I
16 mean, if there were music usage, certainly the rights
17 holders would have to be compensated.
18 I think you would see a significantly
19 different public broadcasting service and probably
20 significantly less usage of a lot of things, not just
21 music.
22 Q The funds would be paid by the -- come

1 from the stations, wouldn't they?

2 A Well, they'd have to come from somewhere,

3 and the stations pay -- stations are -- these are

4 membership organizations, and I suspect that that

5 would be one source.

6 MR. SCHAEFFER: No further questions.

7 CHAIRPERSON GRIFFITH: All right, ma'am,

8 you may step down. Thank you very much.

9 THE WITNESS: Thank you.

10 CHAIRPERSON GRIFFITH: You're free to go.

11 (The witness was excused.)

12 MR. SCHAEFFER: Could we just shift our --

13 MR. RICH: Your Honor, seeing the

14 proverbial light at the end of the tunnel, we're

15 pleased to call what I think is the last witness in

16 the direct cases of the parties, Professor Adam Jaffe.

17 CHAIRPERSON GRIFFITH: All right, Mr.

18 Jaffe.

19 Whereupon,

20 ADAM JAFFE

21 was called as a witness and, after having been first

22 duly sworn, assumed the witness stand, was examined

1 and testified as follows:

2 DIRECT EXAMINATION

3 MR. RICH: Mr. Jaffe, would you state your

4 full name for the record, please?

5 THE WITNESS: It's Adam B., as in

6 Benjamin, Jaffe.

7 JUDGE GULIN: Do you need some water, Dr.

8 Jaffe?

9 THE WITNESS: I think somebody's getting

10 me some. Thank you. I'm anticipating that I may be

11 doing some talking.

12 MR. RICH: Unheard of for a professor.

13 BY MR. RICH:

14 Q What is your profession?

15 A I'm an economist.

16 Q Please briefly describe your educational

17 background.

18 A I have an undergraduate degree in

19 chemistry from MIT, a masters degree in technology and

20 policy from MIT and a Ph.D. in economics from Harvard.

21 Q Do you teach?

22 A Yes, I do.

1 Q Where?

2 A I teach at Brandeis University just

3 outside of Boston.

4 Q And prior to Brandeis, did you teach?

5 A Yes.

6 Q Where?

7 A Before I went to Brandeis in 1993, I was

8 on the faculty at Harvard first as an assistant

9 professor and then as an associate professor from 1985

10 until 1993.

11 Q At Harvard previously and Brandeis

12 presently, what level courses did you and do you

13 teach, and in what principal areas?

14 A Well, I've taught undergraduate courses,

15 I've taught masters courses at the Public Policy

16 School. I've taught at Harvard Kennedy School. And

17 Ph.D. courses both at Harvard and at Brandeis in the

18 area generally of microeconomics.

19 I teach courses in industrial

20 organization, anti-trust economics, regulatory

21 economics, as well as the economics of innovation and

22 technological change.

1 Q Do you also do economic consulting work?
2 A Yes, I do.
3 Q With whom?
4 A I'm a principal in a small economics
5 consulting firm in Cambridge called the Economics
6 Resource Group, or ERG.
7 Q And have you spent time professionally in
8 Washington, D.C.?
9 A Yes; while I was at Harvard, I was granted
10 academic leave for a year in 1990-91 because I was
11 asked to serve as senior staff economist at the
12 President's Council of Economic Advisors here in
13 Washington.
14 Q And how long did you serve in that
15 capacity?
16 A It was an academic year, about --
17 approximately ten months.
18 Q And are you involved with any academic
19 journals?
20 A Yes, I'm on the board of editors of The
21 American Economic Review, as well as associate editor
22 of The Journal of Industrial Economics.

1 Q Am I correct, sir, that your full
2 curriculum vitae including your various consulting
3 relationships and many articles and publications
4 appears as Appendix A to your testimony?
5 A That's correct.
6 Q Have you testified previously as an expert
7 economist?
8 A Yes, I've testified -- yes, I have.
9 Q On what sorts of matters?
10 A I've testified in front of various public
11 utility commissions, the Federal Energy Regulatory
12 Commission, as well as courts on issues relating to
13 competition in various industries.
14 In addition to sort of classic testimony
15 work, I'm also the primary statistical consultant to
16 the Copyright Clearance Center, which is an
17 organization which is, in some ways, analogous to the
18 societies.
19 It collects copyright royalties on behalf
20 of publishers and other rights holders for the
21 photocopying of printed copyright material. And I've
22 worked for them over a decade now and was responsible

1 for designing the statistical methodology that CCC
2 uses for charging for royalties for the photocopying
3 of copyrighted material.
4 Q Have you and I come to know one another in
5 that capacity?
6 A Yes.
7 Q And have you had occasion to provide
8 expert consulting advice in relation to television
9 music licensing matters?
10 A Yes, I've been working as a consultant to
11 both the Television Music Licensing Committee, which
12 is the organization of the local stations that I think
13 we've heard about, as well as a group of cable
14 services with respect to their music licensing issues.
15 MR. RICH: At this point, I would offer
16 Dr. Jaffe as an expert economist to provide testimony.
17 CHAIRPERSON GRIFFITH: Any voir dire?
18 MR. SCHAEFFER: No voir dire.
19 MR. KLEINBERG: No voir dire.
20 CHAIRPERSON GRIFFITH: All right, thank
21 you.
22 MR. RICH: Thank you.

1 BY MR. RICH:

2 Q Could you please generally describe the
3 analysis you were asked by the Public Broadcasters to
4 perform in this matter?

5 A Yes, I was asked to look at the
6 information before me and to form an opinion as to the
7 appropriate fee based on reasonable market value for
8 the broadcast performance rights that the public
9 broadcasters need to acquire from ASCAP and BMI.

10 Q And in undertaking that assignment, what
11 sorts of materials and information did you review?

12 A Well, I looked at the original CRT
13 proceeding, the one proceeding that has occurred with
14 respect to these rights. I reviewed, although I was
15 already somewhat familiar with, some of the rate court
16 proceedings that ASCAP has previously been involved
17 with, as well as various data that was provided to me
18 by the public broadcasters.

19 Q Now from the experience you've described
20 and given the opportunity you've had to review the
21 materials you've just identified, have you had the
22 opportunity to review aspects of the television

1 marketplace and qualities of the television
2 marketplace with respect to the licensing of music
3 performing rights?
4 A Yes.
5 Q And have you drawn certain conclusions as
6 to how that marketplace functions?
7 A Yes.
8 Q And what are those conclusions as they
9 bear on this proceeding?
10 A Well, as discussed in my direct testimony,
11 one of the things that I wanted to understand was, in
12 general, what is the nature of the existing market
13 transactions that have occurred between the licensing
14 societies and broadcasters regarding rights for
15 broadcasting of music.
16 And looking at that, it's clear to me as
17 an industrial organization economist that, although
18 there have been a series of agreements in both the
19 noncommercial side and in the commercial side that the
20 societies have entered into with various broadcasters,
21 that those are, in a sense, market transactions.
22 They are what we've called arms length

1 transactions in which the parties entered voluntarily,
2 but that the licensing societies enter those
3 transactions with significant market power because of
4 the fact that they control a repertory which the
5 broadcasters need to have access to and do not, as a
6 practical matter, have access to on a competitive
7 basis because there is not a market -- an active
8 market in which to take --
9 The public broadcasters, as an example,
10 they can go and, as a practical matter, see
11 competition among different providers of music rights
12 in order to choose who they're going to purchase music
13 from.
14 And in that context, it's my opinion that
15 the agreements that have been reached, although they
16 are indicative in some ways of the value placed on the
17 rights by both parties, if anything are an
18 overestimate of what those rights would be worth if we
19 actually had a competitive market for music rights.
20 Q Have you formed an opinion with respect to
21 the methodology that should be applied from an
22 economic standpoint for determining the market value

1 of music performing rights for the noncommercial
2 broadcasting entities involved in this proceeding?
3 A Yes, I have.
4 Q And what is that opinion?
5 A Well, my opinion is that given that we
6 have over a decade of experience in which the parties,
7 both of the societies on the one hand and the
8 noncommercial broadcasters on the other, have
9 negotiated and have reached agreements regarding the
10 value that they will agree to place on the rights
11 being conveyed, that, from an economic point of view,
12 the most appropriate approach is to take those
13 previous agreements voluntarily agreed to as a
14 starting point and then to examine whether there are
15 any significant changes in economic circumstances
16 since the last set of such agreements were reached in
17 order to determine whether any adjustments to those
18 previously agreed to fees are necessary.
19 Q And why did you determine that, in the
20 absence of other bench marks, that you view as
21 preferable the prior arms length agreements between
22 the parties are the optimal place to start?

1 A I guess I wouldn't even say it's in the
2 absence of other bench marks that I would consider
3 preferable. It seems to me the way you would approach
4 it is you would always prefer to start from voluntary
5 agreements between the parties that are involved that
6 were made in the exact context that -- in which the
7 current valuation is being made.
8 That would always be the preferred
9 starting point. And I would go to other bench marks
10 only if I was faced with a situation where I didn't
11 have available to me previously freely negotiated
12 agreements.
13 Beyond that, in this particular case, it's
14 not just that we have one agreement; we have a pair of
15 agreements that were negotiated in 1992. And as Ms.
16 Jameson testified, the two agreements are quite
17 mutually consistent in terms of what they imply about
18 the value of music use at least based on the data that
19 appears to have been available to the parties at the
20 time.
21 And those agreements themselves were, in
22 some sense, the lineal descendants of a previous

1 sequence of agreements which, in many ways, although
2 the fees were adjusted from agreement to agreement,
3 were quite similar in terms of the general level of
4 fees that they represented.
5 So it seems to me it's a clear case where
6 we have quite a strong basis in previous agreements in
7 precisely the context that is relevant. And I have
8 not seen any evidence that would suggest to me that
9 those agreements didn't represent the value that the
10 parties put on the rights being conveyed.
11 And so I don't see any reason to go afield
12 to look for other bench marks.
13 Q Starting from those bench marks, how did
14 you devise -- or what did your methodology entail in
15 terms of developing an appropriate fee proposal
16 governing 1998 to 2002?
17 A Well, I basically looked at two categories
18 of considerations. One was the intensity of music use
19 in public broadcasting to the extent that we could
20 determine how that had changed since 1992.
21 And the other was the overall programming
22 expenditures of the public broadcasters as an indicia

1 of the overall pie that they have available for the
2 various different creative components that go into
3 their broadcasting.
4 Q Can I ask you, preliminary to discussing
5 in some more detail, how you examined those factors?
6 I take it from your written testimony that you begin
7 from a fee base which comprises the overall fee levels
8 agreed to between public broadcasting and ASCAP, BMI,
9 is that correct?
10 A That is correct.
11 Q What number is that starting number in
12 your analysis?
13 A Well, on a five year basis it's $18.875
14 million dollars.
15 Q And I guess my initial question then is
16 why did you work from an overall combined fee as
17 opposed to moving forward to determine fees from the
18 separate fee experience of ASCAP and BMI?
19 A Well, there are really two reasons.
20 First of all, from the point of view of
21 the broadcasters, they really don't care how much of
22 the money goes to BMI and how much of the money goes

1 to ASCAP. What they care about is how much they have
2 to pay in total for being able to put their programs
3 on containing music.
4 Secondly, in terms of the way that the
5 industry has evolved, BMI and ASCAP measure music on
6 a non-comparable basis. There really is no way to
7 examine in parallel how the BMI fee and how the ASCAP
8 fee should evolve that would be accepted by both BMI
9 and ASCAP that would add up to the total amount of
10 music use that the broadcasters know from their own
11 data is actually occurring.
12 I mean, we've seen that in the submissions
13 in this case by ASCAP and BMI which measure music in
14 different ways and which essentially never join the
15 issue of the extent to which any increase in the music
16 that one of them claims is occurring with respect to
17 their repertoire represents a reduction in the music
18 -- in the repertoire of the other party despite the
19 fact that overall it almost has to be the case and in
20 fact is the case mathematically that, to a significant
21 extent, increases in the music use of one society are
22 in fact connected to decreases in the music use of the

1 other society.

2 So from the point of view of the

3 broadcasters, it was both no reason to and actually

4 quite a difficult task to try to do it in separate

5 pieces for BMI and ASCAP.

6 Q Starting then from your $18.875 million

7 dollar base, several questions back I believe you

8 indicated you wanted to examine changes in several

9 factors. Could you just once more indicate what those

10 were?

11 A Yes, music use broadly defined, and I

12 looked at a number of indicators of that; and

13 programming expenditures.

14 Q Why did you select programming

15 expenditures as one of the key elements necessary to

16 examine for adjustment?

17 A Well, the way I look at it is the

18 programmers -- now I'm talking broadly now of all

19 public television, all of public radio -- they acquire

20 various inputs to make programs. They need actors,

21 they need directors, they need sets, and they need

22 music, and they need a bunch of other stuff.

1 They have a budget available to do that.
2 And to the extent -- putting aside changes in the
3 actual music use, which we'll come back to, if that
4 weren't changing, if we keep the music royalty payment
5 proportional to that overall budget for programming
6 expenditures, then what we're saying is that music is
7 going to continue to get the same share of that pie
8 that it got in the voluntarily agreed to agreements in
9 1992.
10 Conversely, if we didn't maintain that
11 relationship, if we either increased or decreased the
12 music royalties relative to that overall pie of
13 programming expenditures, then some other creative
14 element is going to have to get -- more or less,
15 depending on whether we're talking about an increase
16 or a decrease relative to that pie.
17 And in the absence of any change in music
18 use, it seems to me that there's no basis to think
19 that that proportion should change over time. And so
20 I felt that the programming expenditure was the best
21 indicator of the size of that pie that is available
22 for the various creative elements that go into making

1 programming on a commercial broadcast.

2 Q Why did you determine not to look at, in

3 lieu of program expenditures, changes in public

4 broadcasting's revenues over time?

5 A Well, it seems to me that the relevance of

6 revenue would be potentially as an indicator of what

7 is available for programming expenditure. But since

8 we have the data on programming expenditure itself, it

9 seems to me more direct to just look at programming

10 expenditure.

11 And, as we've heard a little bit about I

12 guess from Ms. Jameson, there are various reasons why

13 public broadcasting in toto doesn't spend all of its

14 money on making programs. There are other things that

15 it has to do.

16 So it seemed to me that it was -- it would

17 be indirect to look at revenues and more direct to

18 look at the programming expenditures themselves.

19 Q Now in your written testimony, you also

20 indicated that you considered but rejected measures

21 for fee setting that somehow tied the revenues of

22 public broadcasting to those of commercial

1 broadcasting.

2 Could you comment on that, please?

3 A Yes. I mean, as I indicated earlier, it

4 seems to me that when you have in your possession an

5 indication of the value of the rights in the precise

6 context that you're being asked to value them in the

7 first instance, there isn't an apparent reason to go

8 afield to look for another context.

9 But beyond that, it does seem to me that

10 the fees paid to the commercial broadcasters are not

11 necessarily representative of the value that these

12 parties place on these rights in this particular

13 context.

14 As we heard from the various witnesses who

15 work in the public broadcasters, they are not -- they

16 don't do the same thing that the commercial

17 broadcasters do. They're not in the same business.

18 They don't have the same incentives.

19 They don't have the same objectives. And

20 they certainly don't face the same economic

21 environment. They are not in the business of selling

22 advertising in a competitive advertising market.

1 You know, it's true that they do get
2 revenues from underwriting, but that's a very
3 different economic phenomenon where both their
4 incentives and the market dynamic in which they are
5 operating is quite different than in the advertising
6 context.
7 So it just doesn't seem to me to be
8 probative to go to the commercial setting.
9 Q And I take it you in fact examined changes
10 in the two areas you've identified; that is,
11 programming expenditures by public broadcasting and
12 music use over the period of the prior license term?
13 A That's correct.
14 Q And before we get into the details of
15 that, are there any changes which -- from the text and
16 data in your written testimony which you want to
17 apprise the Panel about.
18 And, in connection with that, with the
19 Panel's consent, I'd like to hand out a document which
20 we supplied this morning to our respective counsel on
21 the other side labeled Corrected Testimony of Dr. Adam
22 B. Jaffe.

1 Could you describe --

2 A I couldn't remember if there was a

3 question pending, I'm sorry.

4 Q Let me pose one at this point.

5 Could you describe --

6 JUDGE GULIN: Excuse me, Mr. Rich.

7 I assume there's no objection to this --

8 you want this to be substituted for prior --

9 MR. RICH: We will propose, after the

10 witness walks through it, that this be substituted.

11 JUDGE GULIN: Okay.

12 MR. RICH: What we did was reproduce the

13 entirety of the testimony and the blacklined version

14 indicates those number changes. If the witness will

15 walk us --

16 JUDGE GULIN: You're not anticipating any

17 objection to that?

18 MR. RICH: I can't speak for my --

19 MR. KLEINBERG: No, no. Subject to

20 finding something that we haven't already seen in it,

21 no objection. I have no objection to it going

22 forward. I mean, we've looked through it and I don't

1 think anticipate we'll find anything we haven't been
2 told about.
3 JUDGE GULIN: So at this point we can
4 strike from the record the prior testimony of Dr.
5 Jaffe and substitute this version, or do you want to -
6 -
7 MR. RICH: We would propose that.
8 JUDGE GULIN: You want to wait until after
9 testimony?
10 MR. KLEINBERG: I don't have any
11 objection.
12 JUDGE GULIN: Okay.
13 MR. RICH: Thank you very much.
14 CHAIRPERSON GRIFFITH: So ordered.
15 MR. RICH: Fair enough.
16 Just physically, Mr. Stein reminds me we
17 did not re-append Exhibit A which was your curriculum
18 vitae.
19 THE WITNESS: That is correct.
20 MR. RICH: So hopefully that will not be
21 stricken from the record, but we'll -- the rest of it
22 is a substitution.

1 Thank you.

2 BY MR. RICH:

3 Q Dr. Jaffe, would you describe first at a

4 general level what types of changes -- and there were

5 two areas, I take it --

6 A Right.

7 Q -- that needed correction and we'll

8 discuss?

9 A Well, as I indicated, there were these two

10 categories that I looked at for adjustments from 1992.

11 And unfortunately, I'm sorry to say, I have

12 corrections to make in both areas.

13 So there's one set of corrections that

14 relate to music use and one set of corrections that

15 relate to the programming expenditure data.

16 The music use correction I will describe,

17 but let me just start by saying it doesn't affect any

18 of the ultimate conclusions. It changes slightly the

19 numbers; but since my conclusion regarding music use

20 was qualitative rather than quantitative, it doesn't

21 change that conclusion.

22 It actually strengthens it. The numbers

1 go more in the direction that I indicated. But it
2 ultimately doesn't really change anything.
3 The programming expenditure correction,
4 because I did use the programming expenditure to
5 calculate a recommended fee, actually results in a
6 change in the level of the recommended fee.
7 Q Can you tell me what necessitated the
8 change in the programming expenditure data? And if
9 you care to make reference to your corrected --
10 A Yes.
11 Q -- testimony as you discuss it, feel free.
12 A Yes.
13 The easiest -- needless to say, a change
14 like this will affect various different places in the
15 document, and the document has been blacklined to
16 indicate all of those changes. But the easiest place
17 to see what actually happened is to look at Appendix
18 B which is at the very end of the document.
19 If you'd look on page one of Appendix B,
20 you'll see that the basic total numbers for
21 programming and production costs in public
22 broadcasting have changed --

1 JUDGE DREYFUS: One second.

2 THE WITNESS: It's at the very back.

3 MR. RICH: Six pages from the rear.

4 MR. STEIN: After the tables.

5 THE WITNESS: If you look right in the
6 middle of page one of Appendix B, there's a sort of an
7 embedded table there which gives the total CPB
8 tabulated programming and production cost for both
9 radio and television and then a total of those two for
10 each of the years 1992 to 1996.

11 And fundamentally, the three numbers that
12 change here are the 1993 television number is changing
13 by a trivial amount. That change actually doesn't
14 affect anything in the testimony. But as long as we
15 were making the changes, I am correcting the number.

16 It is changing by less than 1/10th of one
17 percent.

18 The 1996 numbers for both television and
19 radio are changing by a small but not trivial amount.
20 The overall change in the total is a little over two
21 percent. And the reason why this change is being made
22 is because, in final preparation literally this

1 weekend for my live testimony, one of the things we
2 did was go back and look at the station by station
3 individually reported numbers to CPB which we had not
4 looked at when I did my original testimony.
5 I had gotten totals from CPB. Then, as
6 part of production in this case, those individual
7 station totals were produced to the music societies in
8 December. I was sent a copy of that production but,
9 frankly, never looked at it because I assumed that
10 those numbers were the same as the numbers that I had
11 gotten a total for from CPB.
12 And in doing the checking over the
13 weekend, we noticed they were not the same. We had
14 some, frankly, frantic conversations with the CPB
15 accounting people on Monday, confirmed that the
16 numbers that were in my testimony were not precisely
17 correct, and so we've now corrected those numbers.
18 BY MR. RICH:
19 Q Just so the record is clear, the numbers
20 that are precisely correct are the numbers for which
21 the underlying data were provided to ASCAP and BMI in
22 December, is that correct?

1 A Right, that's my understanding.

2 Q Okay. And likewise, with respect to 1993,

3 there was a difference between what you had as summary

4 data and what those data cumulated station by station

5 provided?

6 A That's correct.

7 Q And that's what's reflected in the change

8 for 1993?

9 A Yes.

10 Q And with respect to the second category,

11 do you want to summarize the impact on the overall fee

12 of the change?

13 A Sure, just so we review what the effect of

14 this is.

15 As I explained in my direct testimony, I

16 didn't use these totals for programming and production

17 cost as they stand because there was an accounting

18 change in 1996 which makes the numbers for 1996 not

19 directly comparable to the data for 1992 through 1995.

20 So if you turn over to page two of this

21 appendix, right at the top there, this shows there was

22 a version of this in my original testimony where I

1 showed that what I did was I made an adjustment to the
2 1992 to '95 numbers to make them comparable to the
3 1996 numbers.
4 Basically it involves removing from the
5 '92 to '95 numbers small amounts on the order of three
6 to four percent which represent not actually monies
7 that the stations spent, but rather programs they were
8 given that they put a value on or services that they
9 were given -- for example, the use of somebody's
10 studio which they've put a -- which they have put a
11 value on.
12 And the '92 to '95 numbers, though they
13 were called expenditures or production costs, included
14 within them imputed amounts for these in kind
15 contributions. The '96 numbers, because the FASB
16 changed the rules, do not include those amounts.
17 Since what I wanted to do was get an
18 accurate measure of the trend in expenditures, it was
19 important for me to do this in a way that was
20 comparable over time, so I had removed those in kind
21 contributions from the '92 to '95 numbers.
22 And what you see on the top of the

1 corrected Appendix B is that I've taken the corrected
2 totals from the prior page, made the same adjustment;
3 and the net effect of all of that is whereas
4 previously I had concluded that when you estimate the
5 overall trend over a five year period, I had
6 previously concluded there was a 4.8% increase in
7 production expenditures, and I've now recalculated
8 that to be approximately 7.2% basically because the
9 '96 number has gone up and none of the other numbers
10 have changed materially.
11 Q And if you translate that percentage into
12 an outside limit reasonable fee, as you would view it,
13 for public broadcasters as against the base of $18.875
14 million dollars, what does this correction do to the
15 prior -- to your prior stated top limit reasonable
16 figure?
17 A It increases it from $19.8 million to
18 $20.2 million dollars over the five year period.
19 Q About a cumulative $400,000 increase over
20 five years?
21 A Relative to what we -- what I had
22 previously testified?

1 Q Yes.

2 A Right.

3 Q Increasing the prior stated number by

4 $400,000 over -- cumulatively over five years?

5 A That's correct.

6 Q Thank you.

7 Now what necessitated the change in the

8 music use data?

9 A Okay, the music use change is different.

10 In just continuing to work with these data, we noticed

11 that there were two cues from Sesame Street, two

12 individual uses of music which we now believe -- and

13 I'll explain to you in a minute how we know this --

14 were respectively 13 seconds and 15 seconds that were

15 entered into the PBS electronic database as 13 hours

16 and 15 hours, or 3,600 times more seconds than they

17 should have been.

18 We know -- we're pretty sure that 13 and

19 15 are the right numbers because we could actually

20 find that same -- they were theme cues. We can

21 actually find the exact same theme cue in other Sesame

22 Street episodes, and they are 13 and 15 seconds.

1 And the fact that the number came out to
2 precisely 13 and 15 hours I think confirms that
3 somebody made a mistake in entering that data into the
4 electronic database. Those numbers are so huge that,
5 in fact, those two cues, even though it's just two
6 cues, affected the overall average minutes per hour of
7 PBS broadcasting by a noticeable amount.
8 And we'll see -- we can look at it later
9 when we go through the actual numbers. Again, it's
10 not a huge effect; it's a few percent. But it's a
11 noticeable effect on the average music minutes per
12 hour in 1996.
13 Correcting these huge outliers reduces the
14 music minutes per hour in 1996 which is the last year.
15 And so my previous conclusion that basically music use
16 is flat or possibly declining when we look at multiple
17 indicators is unchanged by that.
18 I would still say it's flat or possibly
19 declining, but the numbers are actually even less than
20 before with respect to the trend.
21 Q So formulaicly or mathematically, this has
22 no impact on moving the fee proposal you generate

1 previously, correct?

2 A That's correct.

3 Q And does this correction affect any of the

4 analysis of cues as opposed to minutes which you

5 previously presented?

6 A No, it doesn't change the count of the

7 number of cues because the cues are all still there.

8 It just changes the minutes because these two cues are

9 now recorded as much shorter.

10 Q Thank you.

11 Now why don't we cycle back a little more

12 methodically through the methodology by which you did

13 the adjustments and as are reflected in the tables and

14 charts here starting with the expenditure data.

15 Tell us how you -- where this data come

16 from and how you worked with it subject to your

17 testimony now about the corrections that were just

18 made.

19 A Okay, well the data are collected by the

20 CPB from the individual stations. The individual

21 stations on both the TV side and the radio side are

22 required, as a condition of their grants from the CPB,

1 to provide this financial information to CPB.

2 And they tabulate it in their normal

3 course of business. They tabulate both revenue data,

4 which we've actually heard some about from other

5 witnesses, and they also tabulate this expenditure

6 data.

7 And we originally, when I did my testimony

8 in the fall, got these totals for each of these years

9 from the accounting department at CPB based on these

10 underlying station reports.

11 As I indicated, there was this change in

12 1996 where, on the revenue side, they were no longer

13 permitted to recognize as revenue these donations of

14 in kind either programs or services. Whereas,

15 previously what would have happened, if a station was

16 given some programming, they would enter into their

17 revenue an estimate of the value of that programming.

18 And then, to keep their accounting books

19 in order, they would enter a corresponding entry in

20 their production expenditures for the same amount as

21 if they had somehow spent that money on programming

22 expenditures.

1 So when they reported the totals to CPB,
2 included within the programming expenditure totals
3 would be these amounts which were implicitly not
4 actually spent but which were the value of something
5 that was given to them.
6 Now what happened then in '96, FASB
7 changed the rule. They weren't permitted to include
8 on the revenue side these in kind contributions so, of
9 course, there was no corresponding entry on the
10 expenditure side because it was only there to begin
11 with, in some sense, to offset the revenue entry.
12 But what we were able to do is we went
13 back and the people at -- the account people at CPB
14 worked with us on this. We went back to the earlier
15 reports and we looked, just for example, at, say, 1992
16 where the total reported --
17 Q Where are you looking, please?
18 A Okay, I'm now back on this same Appendix
19 B that I illustrated the corrections on.
20 If we look at 1992, for example, the total
21 reported expenditure in 1992 is about $830 million
22 dollars. What we did was we went back and we looked

1 at the revenue reports for the same year.

2 And we found that, in the revenue reports

3 for the same year, there was approximately $19.5

4 million dollars worth of donated programs that were

5 counted as revenue -- that's at the top of page two in

6 the first column there -- and approximately nine and

7 a half -- a little less than nine and a half million

8 dollars of local on air production that was donated

9 that was in the revenue reports and which implicitly

10 was present in the expenditure numbers.

11 So what we did was we subtracted from the

12 $830 million dollar reported programming expenditure

13 number both the 19½ and the 9½ to get the figure of

14 $801 million for 1992, which is shown there. And then

15 we --

16 Q I take it you did the same procedure for

17 each of the years '93, '94 and '95?

18 A You took the words right out of my mouth.

19 We did the same thing for the subsequent years.

20 Now there's two ways you could then use

21 that to look at the growth rate. You could just take

22 the last year over the first year and look at the

1 percentage increase.

2 On the corrected numbers, I think that's

3 about 6.8%. If you just compare 1996 to 1992, the

4 increase is about 6.8%. Since these numbers move

5 around a little bit, I believe it's more precise,

6 instead of just comparing it first year and last year,

7 to estimate statistically a trend line through the

8 data which smooths out year to year fluctuations.

9 If you estimate that trend line and then

10 calculate the percentage increase on the trend line,

11 it's a little different. Instead of 6.8%, it's 7.2%.

12 Q And is that trend line depicted in revised

13 Figure 1, corrected Figure 1?

14 A Yes, so we can -- I think we're now done

15 with Appendix B. You can go flip back earlier in the

16 testimony --

17 JUDGE DREYFUS: Before being done with

18 Appendix B, --

19 THE WITNESS: Oh, sure.

20 JUDGE DREYFUS: -- I'm sure they had their

21 reasons for requiring the in kind to be backed out,

22 but why does it make sense for our analysis, for your

1 testimony before us, --

2 THE WITNESS: Right.

3 JUDGE DREYFUS: -- to back it out?

4 THE WITNESS: Well, I think there's two

5 parts to that question. I think clearly you want to

6 treat the five years in a consistent way.

7 So given that the numbers were reported,

8 you know, for four years in which this was included

9 and one year in which they weren't, you had to make a

10 correction one way or the other so that you were --

11 because what I care about is the trend.

12 I don't actually care so much about

13 whether the overall right number is about $800 million

14 or whether the overall right number is $750 million.

15 What I care about is how much has it changed since

16 1992.

17 And it would be clearly incorrect in terms

18 of looking at the change over the period if you had

19 incomparable accounting data for the last year and the

20 previous four years.

21 So for a starting point, you clearly want

22 to do it in a way that's comparable. Now, in

1 principle, there are two ways you could have made it
2 comparable. I could have tried to get an in kind
3 contribution number for '96 and added back in to the
4 calculated expenditures.
5 I actually don't remember, as I sit here,
6 whether we even had access to that number. It seemed
7 to me that since what I was looking for was this
8 notion of the pie that was available for the various
9 different creative inputs, that since these in kind
10 contributions are not money that the stations can
11 choose to spend on whatever they want to choose it on,
12 it's something that gets handed to them, it would be
13 more appropriate to take it out.
14 Now, that said, let me just finish and
15 then I'd be happy to explain further.
16 As long as you make it consistent, it
17 would not make any difference whether you added it to
18 '96 or took it out to the earlier years. Because what
19 we're talking about is about three or four percent.
20 So unless that three or four percent was changing
21 itself by a huge amount -- you know, doubling or
22 tripling or something, it wouldn't affect the trend

1 line.

2 So in fact, whether you added it in for

3 '96 or took it out for '92 to '95, as long as you did

4 it consistently over the five years, you'd get a very

5 similar answer.

6 JUDGE DREYFUS: Okay. My question is

7 true: it's not money, as you say, but it is

8 programming activity, is it not? And therefore,

9 wouldn't it make more sense to add '96 in?

10 THE WITNESS: You could look at it that

11 way. I mean, as I say, I don't actually, as I sit

12 here, remember whether -- given that the accounting

13 change was made, whether anybody knows what that

14 number is for 1996.

15 I don't actually know. But I do feel

16 pretty strongly that, even if you knew what that

17 number was, if you added it back in, in terms of the

18 growth rate, this 7.2%, you'd get a very similar

19 answer to what I got.

20 JUDGE DREYFUS: Thank you.

21 BY MR. RICH:

22 Q You were going to cycle back into some of

1 the figures and tables, I think, at this point?

2 A Right.

3 So if we go to Figure 1, this just shows

4 you -- which is now -- okay, to give you a road map,

5 the figures are right after the test. So the document

6 ends on page 23 and then the next page, which I'm

7 afraid is not actually numbered, is Figure 1 and the

8 other figures follow consecutively.

9 Figure 1 shows this trend line estimation

10 that I've done. You can see that the data do show a

11 slight increase with some bops up and down in

12 particular years. And then the next page basically

13 shows, for anybody who cares, how this statistical

14 analysis was actually done to estimate the trend line.

15 What the trend line does is estimates

16 statistically that the increase from year to year is

17 approximately 1.39% per year which then, cumulated

18 over five years, gives the 7.2% figure that I had

19 mentioned earlier.

20 Q Now, you next analyzed changes in music

21 use on public radio and public television, is that

22 correct?

1 A That is correct.

2 Q Looking at radio first, what analysis did

3 you perform?

4 A Okay, well we've had some discussion, I

5 guess, today about the availability or lack thereof of

6 data on music use on radio. I did not have access to,

7 from the public broadcasters, any information on the

8 actual music use -- actual cues or durations of music

9 uses on radio.

10 So what I did was look at the information

11 which basically Mr. Jablow has already discussed with

12 you which looks at the formats of the broadcasts on

13 all of the stations -- all of the public radio

14 stations.

15 And this has been illustrated in Figures

16 2 and 3 in my testimony which basically shows that if

17 you look at a combined overall of music format, so

18 these are programs -- as I understand it, these are

19 programs that are basically music programs versus

20 programs that are basically news and information.

21 And I do not contest -- or I'm not

22 claiming that the news and information programs

1 contain no music, but I do think it is a reasonable
2 inference that they typically contain less music per
3 hour than the music programs.
4 What Figure 2 shows is that the programs
5 that are music programs have been declining slightly
6 -- not a lot, but slightly -- as a fraction of the
7 total programs on public radio between 1992 and 1996.
8 And then Figure 3 simply takes the music
9 portion and again, as I think we discussed with Mr.
10 Jablow, breaks it down into different components of
11 music. And what we see is that, you know, some of
12 those have declined.
13 A couple have increased slightly. But
14 when I look at the overall picture provided by these
15 data, which are the only data that I have as an
16 indication of music use on radio, seem to me to
17 indicate that there is no basis to believe that the
18 overall music use on radio has increased since the
19 agreements were negotiated in 1992.
20 If anything, the inference would probably
21 be that it has declined slightly; but certainly it has
22 not increased.

1 Q Now looking next to television, I take it
2 here you did have actual music data to work with?
3 A That's correct.
4 Q What data were you provided with?
5 A Well, I was given basically two data sets
6 by PBS, one of which was the so-called MURS, M-U-R-S,
7 data that we heard about --
8 Q From Ms. Jameson?
9 A -- from Ms. Jameson.
10 Thank you, I was blanking for a second.
11 Which basically is based on underlying cue
12 sheets provided by producers for individual program
13 episodes that are broadcast by PBS. And that -- the
14 way that database works is a particular episode, say,
15 of Sesame Street basically appears in that data set
16 once containing the underlying music information that
17 corresponds to the creation of that episode.
18 In addition, I was given data from PBS
19 which they refer to as release data or their feed data
20 which basically shows what programs -- which episodes
21 were fed by PBS into its national feed in each year
22 from '92 to '96.

1 So that in these data, a particular
2 episodes, of course, could appear more than once
3 because a particular Sesame Street episode may be sent
4 out by PBS more than once.
5 What I did was basically merge those two
6 databases.
7 Q Before you talk about the merger, Ms.
8 Jameson testified that the MURS database began in '93.
9 Your music use analysis for television begins in '92,
10 is that correct?
11 A Yes, thank you.
12 Q How did you go about obtaining music use
13 data for 1992?
14 A I forgot about that part, sorry.
15 As Ms. Jameson testified, they did not
16 have in their electronic database music information
17 for 1992. So what I did was design a stratified
18 random sample of the episodes that we know were
19 produced in that year and basically asked the people
20 at PBS to pull the paper cue sheets corresponding to
21 this random sample of episodes and then those cue
22 sheets were entered into the electronic database

1 basically for my benefit.

2 So that what we have for 1992 is a sample

3 of the larger universe of paper cue sheets. For the

4 years '93 to '96, my understanding from PBS is we have

5 all the data that they have because, as Ms. Jameson

6 testified, on an ongoing basis, after the completion

7 of the previous negotiations, they were routinely

8 entering these data into their database.

9 Q And is -- in your testimony, do you

10 anywhere describe the sampling process you employed

11 with respect to 1992?

12 A Yes, further on in Appendix B, which is a

13 general kind of technical description, there is a

14 discussion of exactly how that sampling was performed.

15 Q All right. Now you were going to talk

16 about how you merged, I take it, the so-called release

17 data which was the data on the programs fed by PBS

18 into the system with the music cue sheet data.

19 Could you discuss that, please?

20 A Yes, that's correct.

21 What I wanted to do was to get as complete

22 a picture as I could of the music use in the feed

1 given the music use information that I had. Now it
2 turns out that even though -- well, for '92 I had only
3 a sample.
4 And even for later years, even though I
5 have all of the music information that PBS has, I did
6 not necessarily have cue sheet information for every
7 program in the feed. Part of that, I think, is just
8 because no human system is perfect and they don't
9 necessarily have every last cue sheet.
10 Part of it is because there are programs
11 in the feed, say, in '92, '93, '94 that were
12 originally produced in 1990 or 1991. So the cue sheet
13 information from those programs was never entered into
14 this database; but nonetheless, they show up as being
15 fed to the stations in subsequent years.
16 So what I did was, to do the best job I
17 could, I took all the programs in the feed. If I
18 could find the exact episode -- you know, the Barney
19 episode in which, you know, they go to the moon -- and
20 PBS has a code number which identifies uniquely the
21 episode.
22 If I could find that exact episode in the

1 music data, bingo; they were merged and that was the
2 music information for that episode.
3 If there was an episode of Sesame Street
4 that was in the feed that I couldn't find in the music
5 data either because the cue sheets were lost or
6 because it was produced earlier in time, what I did
7 was I assumed that the music use in that episode was
8 equal to the average music use in all of the Sesame
9 Street episodes in that year that I had data for.
10 Because it seemed to me that that was --
11 in absence of information on the specific episode, the
12 next best thing was another episode of the same
13 series. And in the circumstance -- for example, one
14 time broadcast of some special.
15 If I didn't have the cue sheet, I couldn't
16 resort to another episode of the same series, what I
17 did was I utilized the average music use for all
18 programs of that program type. And PBS has a set of
19 program types which I'll indicate in a minute.
20 And so if it was a children's program,
21 then I assumed it had the average music use of all
22 children's programs in the absence of other

1 information. If it was a news program -- and so
2 forth.
3 Now if you look at Table 1 and Table 2
4 which are -- the tables are after the figures. So
5 Table 1 and Table 2 are just before Appendix B and
6 after Figure 6.
7 Okay, what Table 1 does is summarize sort
8 of this matching process. And what it shows is, if
9 you look at the first row -- put 1992 aside for a
10 second. What it shows is, for '93 to '96, between say
11 a quarter and a half, depending on the year, of the
12 individual episodes, I found that exact episode in the
13 music use data.
14 So I know exactly what music was in that
15 particular episode. When you go -- and of course that
16 number is much smaller for 1992 precisely because I
17 had only a sample of the data for 1992.
18 If you go to the next row, that says okay
19 well if we could match it, either the exact episode or
20 at least the same series, what fraction or match? And
21 you see that it's only 50% in '92, but it's 80 to
22 almost 90% in the later years.

1 Q Just going down in any column, these
2 numbers -- these percentages cumulate?
3 A No, that's not correct.
4 If you look, for example, at '93, the 78%
5 for matched within the series includes the 27%.
6 Q That's what I meant to suggest. I'm
7 sorry.
8 A Oh, you don't add these numbers up.
9 Q Okay.
10 A It's -- okay. Okay, I guess you were
11 right. I'm sorry; I misunderstood.
12 And then if you see the next row,
13 essentially if I'm willing to impute a program type --
14 the only programs I couldn't match were the ones that
15 basically had incomplete information in the release
16 data itself, so somehow the duration of the program
17 was not properly recorded or -- you know, and that's
18 a tenth of a percent of the programs.
19 If you turn to Table 2, you can see the
20 actual program types that were used for this analysis.
21 So there's one, two, three, four, five, six, seven --
22 there are nine program types. These are tracked by

1 PBS in its normal -- in its release database as a
2 normal matter.
3 I've used their categories. And so that's
4 how the imputation was done for those episodes where
5 I couldn't even find another episode of the same
6 program. And as long as we're here, because I'm not
7 going to return to Table 2, if you look in the lower
8 panel of Table 2 which gives average minutes of music
9 per hour by program type, and you go all the way over
10 to 1996, you see there's a 31 in italics.
11 What that means is that, in children's
12 programming in 1996, on average 31 minutes out of
13 every hour were music of some sort. Before I made my
14 correction for the two errant Sesame Street cues, that
15 number was 33 instead of 31.
16 So that's the small change that resulted
17 from those two Sesame Street changes.
18 Q That's the only change in the music data,
19 is that right?
20 A Well, that is the only change. It
21 manifest itself in a couple other places where we look
22 at totals and so forth.

1 Q Sure. Just so I'm clear, Dr. Jaffe, Table
2 2, the data here provides a basis for understanding --
3 is it the third category down on Table 1, basically
4 the process you used to develop music use data --
5 A Well, Table 2 does two things. Table 2
6 does two things. It indicates the categories that
7 were used in the third row of Table 1. It also
8 provides actual information for those categories. And
9 as discussed in my direct testimony, these categories
10 differ significantly in their music intensity.
11 Children's programming and cultural
12 programming in particular tend to be quite music
13 intensive. And part of what's been going on on PBS
14 over the last five years is an increase in children's
15 programming and a decrease in cultural programming.
16 And that has had some effect on what's
17 happening in terms of the music use.
18 Q Do you want to continue with your -- the
19 conclusions you derived from this television music use
20 analysis?
21 A Okay, so now we've talked about how I
22 constructed the database. Now I'd like to talk about

1 what I did with it. So if we now go back to the
2 figures, we looked at Figures 2 and 3 which related to
3 radio.
4 The next figure is Figure 4 which is PBS
5 program hours by program type, which indicates the
6 point I was just beginning to allude to, which is that
7 there have been changes in the mix of programming that
8 PBS puts into its feed over this '92 to '96 period.
9 The top line that's sort of diamonds is
10 children's programming which increased from about 30%
11 of all programming hours in '92 to about 33% of all
12 programming hours in '96. And there have been other
13 changes in terms of music use.
14 The most important other change is that
15 cultural programming, which are the solid boxes,
16 declined from about 14% in 1992 to about 11% in 1996.
17 And these changes in the programming mix are part of
18 what's driving any overall changes in music use on
19 PBS.
20 Q And I think it's implicit in some of the
21 tables that you showed the Panel, but I take it you
22 determined -- in how many dimensions did you determine

1 to measure music use change?

2 A Well, the data that I have, which I think

3 are fundamentally the data that appears on a cue

4 sheet, are the number of "cues" which is basically the

5 number of discrete instances of music that occurred in

6 a given episode, I guess an anachronism from the days

7 in which someone cued these on a record player; as

8 well as the number of total minutes of music --

9 duration of music added across all the cues.

10 And for each of these cues, they have an

11 indication of the type of music use whether it's a

12 theme, a feature use or a background use. And so what

13 I did, basically taking a fairly agnostic kind of big

14 picture look, was to say okay, I'll look at cues, I'll

15 look at duration and I'll look at each of these three

16 categories with respect to both cues and duration and

17 see if I can get a general picture of what's going on

18 in the music use.

19 We know from some of the testimony in this

20 case and from other work I've done that the societies

21 typically put a greater value on feature music uses

22 than on the other uses. And so, in some sense, it's

1 important to distinguish the feature uses from the
2 other categories, and that's part of the reason for
3 doing this break out by the different music uses.
4 Q Can you tell us the results you came up
5 with on your cues and minutes analysis?
6 A Yes. Figures 5 and 6 illustrate what's
7 been happening to the cues and to the minutes over
8 time for each of the different categories and for the
9 total. So if we focus first on Figure 5, which is the
10 cues -- so this is just the number of discrete uses of
11 music per hour in the PBS feed.
12 What we see is that, overall -- well, I
13 guess what I would say is what we see is basically
14 there doesn't seem to be any change. If you look
15 carefully, there is a slight decline over the period
16 in the total cues.
17 And there is also a slight decline in the
18 number of feature cues between 1992 and 1996. But the
19 basic picture you get from the cues is one of
20 constancy. There doesn't seem to be a major change
21 when measured as the number of discrete uses of music.
22 If we turn to Figure 6 which is duration,

1 the picture is slightly more complicated. There is --
2 overall, if you just add up all these minutes mixing
3 together feature minutes, background minutes and theme
4 minutes, there is a slight increase in fact in the
5 total minutes.
6 But that increase conceals a significant
7 increase -- it's a mixture of a significant increase
8 in background music and what is actually a non-trivial
9 decline in the feature music use. If you look at --
10 the actual numbers behind the graph are on the next
11 page where they're given in numbers.
12 You can see that the feature minutes per
13 hour in the first column in the second panel, second
14 row, was 4.8 approximately in 1992; declined to about
15 3.7 in 1996, which is, you know, roughly speaking,
16 something like 20% decline in the feature minutes.
17 So the conclusion I take away from this is
18 we look at cues, we basically see flat. We look at
19 minutes, some categories are up, some are down. The
20 aggregate is up, but the most valuable category is
21 clearly down.
22 And so my conclusion qualitatively from

1 that is that basically there has been no significant
2 change in the value of music per hour on the PBS feed.
3 Q I want to make something clear that I
4 should have earlier in your responses, which is, am I
5 correct that all of the analysis reflected on all of
6 these figures and tables is an analysis solely of that
7 portion of overall music use which is BMI and ASCAP,
8 is that correct?
9 A Yes, that's a good point.
10 In the MURS database, we have records for
11 cues that are public domain and SESAC. Those were
12 just completely excluded from this analysis. So this
13 is looking only at trends in ASCAP and BMI music in
14 the aggregate over this period.
15 Q Now Professor Jaffe, taking everything
16 you've done overall into account, that is where you
17 began and how you adjusted, what is your overall
18 conclusion with respect to reasonable fees for the
19 public broadcaster for the 1998 to 2002 period?
20 A Well, as I indicated, I think we have a
21 clear bench mark to start from which are the
22 agreements negotiated in 1992. I looked at two

1 categories of economic circumstances that might have
2 changed in the interim that we would want to reflect
3 in the next cycle of fees.
4 The music use information on radio, we
5 have no terrific data; but the data we have indicates
6 that probably music use has been declining, if
7 anything, but probably hasn't changed much.
8 When we look at TV in terms of the PBS
9 feed, what we see again is a slightly mixed picture.
10 Certain categories of use are up, but the most
11 valuable type of use on a minutes basis is down.
12 And so I would conclude that no adjustment
13 overall is necessary for any change in music
14 intensity. That leaves the program expenditures that
15 we talked about. And as I indicated, when we look at
16 the trend, there's a 7.2% increase in program
17 expenditures over the five year period.
18 So it seems to me the appropriate thing to
19 do is to take the $18.875 million that the parties
20 agreed to 1992, increase it by 7.2%, and the resulting
21 figure is -- just to be sure; I don't do it from
22 memory -- is $20.2 million dollars.

1 MR. RICH: No further questions.
2 CHAIRPERSON GRIFFITH: All right.
3 Do you want to take a recess?
4 MR. KLEINBERG: That would be great.
5 CHAIRPERSON GRIFFITH: Okay, we'll take a
6 recess.
7 (Whereupon, the foregoing matter went off
8 the record at 3:29 p.m. and went back on
9 the record at 3:43 p.m.)
10 CHAIRPERSON GRIFFITH: Mr. Rich, are you
11 finished?
12 MR. RICH: Yes, I am.
13 CHAIRPERSON GRIFFITH: All right.
14 JUDGE GULIN: I just have a few questions.
15 I'm sure counsel will follow up.
16 BY JUDGE GULIN:
17 Q Dr. Jaffe, I guess the premise for your
18 opinion here today is that the 1992 agreements
19 represented reflective rates that were fair market
20 rates negotiated by the parties. And therefore, it
21 can be used as a benchmark and the only thing that
22 needs to be done is to adjust it to reflect current

1 conditions.

2 And as you see it, there are really only

3 two factors that need to be factored in, that is, of

4 music usage and program expenditures.

5 Now prospective program expenditures, you

6 indicated that the reason that is an appropriate

7 factor to look at is because you believe that

8 expenditures from music should receive the same

9 proportion of the pie now that it did in 1992. Is

10 that correct?

11 A Yes, I mean to be completely candid, as I

12 discussed in my testimony, I don't think this is --

13 this is not Newtonian physics. I don't think anybody

14 could say -- I don't have an economic theorem I could

15 cite that articulates that principle, but it seems to

16 me as a benchmark, as a guide to how to think about

17 it, that seems to me to be a sensible way to think

18 about it as any other I can come up with.

19 Q Well, that presumes, does it not, then

20 that the percentage of the pie allocated for music

21 represented a fair market percentage back in 1992 and

22 if that's the case how can we possibly know that?

1 A Well, I think the only basis we have for
2 knowing that is that -- is what the parties agreed to
3 when the scale of the noncommercial broadcasters as
4 measured by its program expenditures was what it was.
5 Certainly it's an indication of the magnitude and/or
6 scope of the programming activities that were involved
7 related to the license agreements that were struck and
8 those agreements were struck and agreed to, so it
9 seems to me that implicitly and I guess it really is
10 only implicitly the parties are saying that whatever
11 share of the overall programming expenditures, those
12 royalties represented corresponded to or at least were
13 not inconsistent with the valuations that they each
14 respectively put on the music rights relative to these
15 other creative interests.
16 Q And what if the ratio of expenditures for
17 programming to revenues in 1992 were lower than it is
18 now, would that affect your analysis?
19 A Well, as I said, I think that to me you
20 know if it is true, first of all, one possibility is
21 that if programming expenditures exactly track
22 revenues it doesn't matter which one you look at, you

1 get the same result.

2 So the question is if they deviate, which

3 one is better? It seemed to me that the programming

4 expenditures are the closest to what the music is

5 involved with and used for. I mean we know from

6 certain testimony we've heard in the last couple of

7 days that some of the revenue of these entities and in

8 particular the revenue that accounts for the

9 difference between revenue and programming

10 expenditures has to do with a variety of activities

11 and actually has nothing to do with broadcasting. And

12 it seems to me that it's more sensible to stick to the

13 thing that is clearly connected to what we're talking

14 about here which is music and broadcasting rather than

15 to look at this revenue number which clearly contains

16 a bunch of other things that some of which may be

17 related to broadcasting, but aren't actually

18 programming expenditures and some of which are really

19 not related to broadcasting at all.

20 Q How about if we looked only at revenues

21 which relate to broadcasting? How about if we look at

22 private revenues and exclude Government revenues?

1 Let me ask you this further, don't
2 revenues reflect matters other than simply
3 expenditures, for example, audience share, ability to
4 pay, and aren't those factors that are relevant to
5 changes in circumstances now as opposed to a fair
6 market analysis in 1992?
7 A Well, I think there are a couple of --
8 there are a couple of different issues. I think in
9 terms of ability to pay, potentially revenues affect
10 ability to pay although I think frankly based on the
11 testimony I've heard none of us completely understand
12 how ultimately the total revenues of CPB would relate
13 to how these things get paid for. But there might
14 well be a connection there.
15 In terms of other aspects of broadcasting,
16 I guess the way I think about it is for example
17 audience. I think that ultimately if public
18 broadcasting in its entirety increases its audience
19 and as a result of that increases its revenues through
20 pledge drives and so forth, ultimately that will get
21 reflected in production expenditures. They're going
22 to spend that money on more programming, if they've

1 got more audience to show it to.

2 Now in any given year there's surely not

3 going to be a direct relationship and the question is

4 if that money comes in for whatever reason and is

5 spent on something else, should we or shouldn't we

6 include it? I'll be completely honest with you. If

7 you wanted to say you should track it based on

8 revenues, I can't rule that out. I mean it seems to

9 me that production expenditures are closer to the

10 thing that we're really kind of focused on here, but

11 I don't think there's an absolute answer to that

12 question.

13 Q Our function here really when you think

14 about it, isn't it in a sense to try to be clairvoyant

15 and to think what would happen if there was no

16 compulsory license? What would the parties agree to?

17 A I think that's right. If there were no

18 compulsory license and there was a mechanism for them

19 to meet in a market, and resole this through market

20 transactions, I think that's right.

21 Q And do you have any doubt that revenues

22 would come into that equation?

1 A I guess --

2 Q That would be something considered by the

3 parties?

4 A I think it might well be. One way to look

5 at it is -- I think as Ms. Jameson testified, when

6 you're actually in a negotiating situation, you

7 probably look at a lot of things and you probably, you

8 now, try to get a general sense of the whole lay of

9 the land. When you're going to do a calculation in

10 this somewhat artificial mode, as you put it, being

11 clairvoyant and substituting for the market, you have

12 to make a decision as to not just generally what to

13 look at, but mathematically how to do it.

14 Some things, I think, clearly would be

15 inappropriate, for example, mathematically to make a

16 CPI adjustment and to make an adjustment for

17 programming expenditures I think would make sense

18 because to a significant extent inflation is reflected

19 in the programming expenditures.

20 Other things like saying well I think

21 revenues or broadcasting related revenues is a better

22 indicator of this pie that I was talking about than

1 programming expenditures, then I think that's a
2 judgment call. And I made the call, as I said, based
3 on what seems like it's closest to sort of what we're
4 really about, but I think it's really just a judgment.
5 CHAIRPERSON GRIFFITH: I object to the
6 word "clairvoyant".
7 THE WITNESS: That is not a term of art.
8 CHAIRPERSON GRIFFITH: Mr. Kleinberg?
9 MR. KLEINBERG: Thank you.
10 BY MR. KLEINBERG:
11 Q Thank you. Dr. Jaffe, let me follow up
12 with some of the questions you were just answering and
13 focus you in on the subject matter of audience size.
14 A Okay.
15 Q As a factor that might be looked at as an
16 appropriate measure of the value of the music
17 contained in the programming which is broadcast to
18 audiences.
19 Do I understand you to suggest or to say
20 that you would be comfortable analyzing in some
21 fashion the audience size data that is available with
22 respect to public broadcasting just as you say you now

1 might be comfortable with looking at revenue as well
2 as programming expenditure?
3 A Well, I think the difficulty is revenue is
4 analogous to programming expenditure. I think of it
5 as in effect another way of measuring the same concept
6 and I could see, at least in principle, although I
7 think it's not as good, I could see substituting
8 revenue for expenditure.
9 The difficult with audience is that to me
10 audience will be reflected ultimately in revenue and
11 expenditure and you can't combine the two because that
12 would be double counting, because you can't sort of
13 say, well, I'm going to increase it because the
14 programming expenditure and I'm going to increase it
15 due to audience because clearly to some extent those
16 two things are bound up together. So the issue
17 ultimately is what is the best, again, mathematical
18 way to deal with this, I think, as a practical matter,
19 you know, I think revenue is not as good, but is
20 practical. I think audience is a quantum step away
21 from what we care about in some sense which is sort of
22 the resources here that are available and so I would

1 have -- I can't -- I would certainly agree with you
2 that in some general way if you were just looking at
3 this qualitatively it would be something you would
4 look at, but in terms of having to do what the Panel
5 has to do which is make a calculation, I don't see as
6 a practical matter a way to incorporate audience size
7 that really would be economically sensible.
8 Q Well, what if you didn't make it
9 cumulative in the sense of adding it on to some other
10 adjustment, but rather looked at it as a factor to
11 consider and for example, as you probably are aware,
12 what Dr. Owen did was to look at three different
13 factors and come up with a range of possible
14 adjustments in total, that could be done, rather than
15 saying well, make an adjustment for audience size or
16 make an audience for revenue and you get into all the
17 double counting.
18 I'm getting -- my question to you is
19 whether you object to analyzing audience size or
20 audience share in terms of the available information
21 that might be relevant to the Panel as they go through
22 the process of tryin got figure out this clairvoyant

1 task of what the value is of the license.

2 A No, I understand your question and I guess

3 what I would say is that if you were to look at

4 audience as I discussed with Judge Gulin, one

5 possibility is if you looked at audience it actually

6 grew at about the same rate and one conceptual

7 possibility is it actually grew about the same rate as

8 these other indicators in which case it wouldn't

9 matter what you looked at. It only matters if it's

10 different and if you found, over the period that

11 audience grew much more than programming expenditures,

12 unlike the case with revenue where I think you could

13 say well, they could have used that money for

14 programming expenditures, the fact that they didn't,

15 maybe I'll ignore that. I don't see how you get from

16 that increase in audience, if it didn't produce a

17 corresponding increase in either revenue or

18 programming expenditures, how you get from that to

19 saying that in this negotiation the value to the

20 broadcasters would necessarily be higher or the

21 ability to pay as the Judge indicated would

22 commensurate be higher.

1 So I have a harder problem -- while I
2 certainly agree with you, it's something that in some
3 qualitative way is relevant. I guess I have a problem
4 with the notion of saying well let's calculate the
5 growth rate of audience, calculate the growth rate of
6 expenditures and say that the right answer is a range
7 between those two.
8 Q Well, I'm not focusing necessarily now on
9 how you would utilize audience share, but focusing
10 more on the concept of audience size or audience
11 share. Let me ask you whether you would agree with me
12 that there is a relationship between the programming
13 and its constituent inputs and the audience that's
14 achieved as a result of the broadcasting of that
15 program. Would you agree with that concept?
16 A I would.
17 Q And you've sat through some of the
18 testimony of the last few days and heard about the
19 fact that the public broadcasting entities have these
20 entire departments that are directed to research an
21 analysis of audience size, audience trends. And they
22 look at Nielsen ratings in dailies coming in in major

1 markets and monthly, you heard all that testimony,
2 didn't you, the last couple of days while you were
3 sitting there?
4 A Well, I don't know that I heard testimony
5 that anybody has a department which is devoted to
6 audience size, but I certainly did hear testimony that
7 one of the things that the research departments do
8 look at is the audience that the broadcasters reach.
9 Q And I take it you would agree with me from
10 listening to that testimony that audience size was a
11 matter of some denotation of resources by the public
12 broadcasting entities in terms of analysis and
13 evaluation of that subject matter, correct?
14 A Yes, I would agree with that.
15 Q And you testified, I believe, strike that.
16 As an economist, is it your opinion that it would be
17 economically inappropriate or invalid to look at
18 audience size in terms of trying to determine the fair
19 market value of music performing rights in this CARP?
20 A Well, I guess what I said is that it might
21 well be appropriate to look at it, as I indicated. I
22 don't think that this is an exact science. I think

1 that if you found when you looked at it that there was
2 a significant difference between the growth rate and
3 audience and the growth rate in expenditures, I think
4 the appropriate conclusion to draw would be that at
5 least for this time period there does not appear to be
6 a connection between that increase in audience and
7 increase in resources and that the most appropriate
8 conclusion would be not to factor it directly into the
9 calculation of the fee.
10 Q Wouldn't the connection be that there was
11 a relationship between the quality of the programming
12 itself and its constituent inputs and the increased
13 audience size? Wouldn't that be a logical deduction
14 to draw from increased audience size and not a
15 corresponding increase in programming expense?
16 A I don't think that's necessarily true. I
17 mean I think that, for example, as I understood what
18 Mr. Jablow was saying, what he believed to be the case
19 is that what tends to increase audiences for public
20 radio stations is switching formats, in particular,
21 switching to the news formats that seem to produce
22 larger audiences. Now that doesn't necessarily mean

1 it's in some sense higher quality programming. I
2 think that -- and if it is higher quality programming
3 in some sense I don't see any necessary conclusion
4 that it's because the music is better or higher
5 quality. It could be other things that are higher
6 quality. So I guess I don't -- I still don't really
7 see the necessary link that leads you to the
8 conclusion that it's really the appropriate way to
9 calculate the adjusted value.
10 Q I'm talking about it as being a factor to
11 look at and --
12 A But I think I agree with you, that if you
13 ask me is it a factor you might want to look at, I
14 said yes. But what I said was if when you looked at
15 it you found that it pointed in a qualitatively
16 different or quantitatively different direction than
17 expenditures that it would not necessarily be
18 appropriate to adjust the fee to correspond to that.
19 Q And if the audience factor and the
20 expenditure factor were in the same range, would you
21 not derive as an economist some degree of additional
22 comfort that what you were concluding from looking at

1 one factor or the other was more likely to be correct?
2 A Maybe, yes, could be.
3 Q And I understand that you testified,
4 excuse me, you looked at the 1978 CRT proceeding
5 involving ASCAP.
6 A Yes.
7 Q And related materials that were in the
8 record. Did you look at the testimony of Dr. Baumol
9 who was the economic expert for the public
10 broadcasting entities in that case and that's been
11 referred to as --I think his testimony is cited or
12 included as one of the PBS exhibits by reference. Did
13 you read Dr. Baumol's testimony?
14 A I don't actually think I did, no.
15 Q Who is Dr. Baumol?
16 A He's an economist.
17 Q A well known economist?
18 A He's a very well known economist.
19 Q A very well respected economist?
20 A A very well respected economist.
21 Q Were you aware that Dr. Baumol was the
22 expert for public broadcasting in the 1978 ASCAP case?

1 A I was aware it wasn't me and I think I was
2 aware it was somebody, but I don't actually remember
3 whether I ever knew who it was.
4 Q I take it -- well, let me ask you this.
5 As you reviewed that file, did you or do you recall
6 that among the methodologies proposed in 1978 by
7 public broadcasting through Dr. Baumol was to look at
8 the audience size of public broadcasting in comparison
9 to the audience size of the commercial broadcasters?
10 A I don't recall that one way or the other.
11 Q And as you sit here today would you find
12 that if such a comparison was engaged in, that that
13 would be economically inappropriate as part of the
14 inquiry that CARP might engage in in this proceeding?
15 A Well, I think the 1978 context was a
16 different context. I mean there you had, in effect, a
17 blank slate. I mean as I indicated in my direct, if
18 we didn't have a previous set of negotiated agreements
19 between these parties we would have a much harder
20 problem. We'd have to do something and obviously the
21 approach that I suggested would not be available to
22 us. As I understand it, tat was the situation in a

1 sense that was phased in 1978 was that there was no
2 previous agreement to look to as a precedent and so I
3 think what you would do in that circumstance would be
4 different than what you would do in this circumstance.
5 Q Well, let's mark that and we'll get back
6 to that in a minute, but isn't it true thought that
7 there was something else to look at in 1978 and in
8 fact, the CRT did look at and that was the existing
9 agreement between other music licensing societies and
10 PBS?
11 A I forget, to tell you the truth.
12 Q Well, I tell you and I can go through
13 this, but I don't want to belabor it right now and
14 maybe I'll gather this all up for you tonight, but
15 I'll represent to you as the opinion in the 1978
16 proceeding indicates that the CRT in that case looked
17 at the SESAC-ASCAP agreement, PBS agreement, excuse
18 me, and they also looked at, at the urgings of one of
19 the parties, the BMI-PBS agreement. It so happened
20 that they didn't find the BMI agreement to be
21 particular relevant because of the way it was
22 structured. It was contingent on what the ASCAP

1 agreement was. Is that --

2 A That was the part that I remembered and I

3 couldn't exactly recall how that played out which was

4 why I wasn't sure of the answer to your previous

5 question.

6 Q Well, let's go back to the question we

7 mentally marked or I tried to mentally mark.

8 A Okay.

9 Q Which was if you had a blank slate, with

10 no prior agreements, where would you look?

11 A Where would I look?

12 Q Uh-huh.

13 A I haven't given that a lot of thought. I

14 would try to find contexts that, you know, that were

15 from an economic standpoint comparable. I might try

16 to find other kinds of arrangements between the

17 noncommercial broadcasters and other supplies of

18 inputs. If I didn't know what I know in this case

19 which is that when the noncommercial broadcasters

20 negotiated at arm's length with the music societies

21 over a period of 15 years, they reach agreements that

22 are at levels that are very different than the

1 apparently corresponding levels of commercial
2 broadcasts. If I didn't know that, I might well look
3 at commercial broadcasting as one potential benchmark.
4 But that was not an assignment that I was faced with.
5 That's like saying if you had to get to the moon, but
6 you weren't allowed to use a rocket ship, how wold you
7 do it? I mean I haven't spent a lot of time focused
8 on that problem.
9 JUDGE GULIN: Let's get back to audience
10 share for a second. You said that it might be
11 appropriate to look at audience share when there were
12 no prior agreements and there were no contexts to look
13 at.
14 THE WITNESS: It might -- I think what I
15 said was that obviously if you didn't have a good
16 prior agreement in the same context, you'd have to
17 look at something.
18 JUDGE GULIN: You'd have to look at
19 something.
20 THE WITNESS: And maybe audience share
21 would be one of the things you'd look at, yes.
22 BY MR. KLEINBERG:

1 Q Actually --

2 A But still it would have to be audience

3 share compared to what.

4 JUDGE GULIN: To commercial broadcasters.

5 THE WITNESS: Well, again that gets back

6 to if I didn't know what I know which is when the

7 parties freely negotiate, they clearly reached

8 agreements that indicate they think the value is very

9 different in this context than in commercial. If I

10 didn't know that, if you tell me that part of my brain

11 gets excised and I'm ont allowed to think about that

12 fact --

13 JUDGE GULIN: No.

14 THE WITNESS: Then I might well go to

15 commercial, but given that we know that the parties

16 themselves have shown that they don't consider those

17 situations comparable, I have a hard time.

18 JUDGE GULIN: What I'm having a hard time

19 with why would it be okay to look at it, in your

20 opinion, when there are no prior agreements, but it

21 would not be okay to look at the change in audience

22 share.

1 THE WITNESS: I misunderstood your
2 question then, I'm sorry.
3 I thought based on Mr. Kleinberg's
4 question we were going back to audience share to
5 commercial as the fundamental benchmark.
6 I think the issue of change in audience as
7 an indicator for how to adjust the previous agreements
8 in the same context is a different issue and there, I
9 guess, the answer I would give which I gave to an
10 earlier question was clearly it's something that you
11 might want to look at if you found that it indicated
12 something quite different than the expenditures, you'd
13 have to decide well, what do I make of that. And I
14 guess my view would be that again the expenditures
15 seem much closer to the economics of what's going on.
16 But I agree with you, that's a different issue from
17 the issue of would you use the reference to commercial
18 in terms of audience share.
19 BY MR. KLEINBERG:
20 Q Let's go back though to practically the
21 beginning of your testimony where you said after
22 getting this assignment you familiarized yourself with

1 aspects of the television market place including
2 looking at the existing market transactions for
3 commercial and noncommercial broadcasters.
4 A Yes, I did.
5 Q Well, what was the relevance of looking at
6 that since you knew you were dealing with public
7 broadcasting? Why were you looking at the commercial
8 marketplace transactions?
9 It was your testimony that you knew that
10 you were dealing with public broadcasting?
11 A Frankly, because we expected you guys were
12 going to raise it and I wanted to be aware of what the
13 issues were there.
14 Q Who expected you to raise it?
15 A In my thinking about it, I guess I'm not
16 sure where privileged discussions come in here, but it
17 was, as my testimony indicates, that we anticipated
18 that might be an argument that would be made by the
19 societies. It's quite frankly an obvious argument
20 because it is true that the fees are higher in that
21 context. So your incentive is clearly to try to make
22 that argument and I wanted to think about it and think

1 about, figure out what I thought of it.

2 Q And when you surveyed the landscape of the

3 market place of television, well, first of all, it

4 seemed to me you specifically excluded radio from the

5 calculation here of what you looked at. Was that an

6 intentional thing that you only looked at the

7 television marketplace?

8 A No, actually, I think I looked at some of

9 the radio rate court stuff, but I don't remember

10 specifically.

11 Q Is it fair to say you concentrated your

12 efforts in that learning regard to television?

13 A If you're talking about the commercial

14 side of it, I think that's right, yes.

15 Q And you went on to say that these

16 commercial and noncommercial agreements are in a sense

17 market transactions in which the licensing societies

18 entered into, but that they had sufficient market

19 power?

20 A I don't know that I used the word

21 sufficient. I said that from an economic point of

22 view, those negotiations took place in a context in

1 which the societies had market power and that
2 therefore one would expect that the agreements that
3 were reached would be, if anything, at levels higher
4 than would be if you had a competitive market in which
5 the owners of music rights were competing to sell
6 those rights to users.
7 Q Which agreements did you look at and reach
8 the conclusion that the licensing societies had supra
9 competitive prices or market power?
10 A I don't think that's a conclusion that I
11 made with respect to any specific agreement. It's a
12 conclusion based on the structure of the market that
13 all of these negotiations take place in that context
14 in which the -- I mean in the last few years it gets
15 a little more complicated on the commercial side, but
16 certainly with respect to the noncommercial
17 broadcasters they have essentially not had an option
18 as to whether or not to take these licenses and that's
19 a classic situation of market power.
20 Q Did you look at the rate court decisions
21 involving ASCAP and various music users in the
22 broadcasting side?

1 A Yes.

2 Q Is it your testimony that the decisions

3 and fees resulting from those rate courts constitute

4 fees that are supra competitive?

5 A Well, I think that that's a tricky

6 question.

7 Q Well, can you try and answer it?

8 A I'm about to try to answer it.

9 Q Can you try and answer it with a yes or a

10 no first?

11 A Yes. I think probably overall they are

12 fees that are supra competitive, but it's a

13 complicated question. As we saw in, for example, the

14 decision that I quoted in my direct testimony the

15 Judges who made those various decisions were not

16 unaware of the argument that I have just made about

17 the likelihood that market power would be present if

18 these, when these fees are negotiated. And so it's

19 hard for me to put myself inside their heads and

20 figure out to what extent when they made their

21 decisions regarding fee levels, looking at various

22 things including agreements that had been negotiated

1 between the parties that was one of the things they
2 looked at. it's hard for me to figure out whether
3 well, maybe they've appropriately adjusted in their
4 heads for market power and therefore one can conclude
5 that in terms of the rate court decisions, those have
6 in effect been cleansed of market power. I don't know
7 how I would figure that out.
8 Q Well, isn't that your understanding of
9 what the outcome was in those cases, that the courts
10 were, in fact, arriving at a fair market value result
11 that was cleansed of market power?
12 A That was certainly what they were trying
13 to do. You asked me my opinion as an economist as to
14 whether they had achieved that objective and what I
15 told you is I think that's very hard to know.
16 Q Well, let me ask you specifically with
17 respect to the Buffalo Broadcasting decision in the
18 ASCAP rate court that Magistrate Dolinger decided
19 several years ago to the local television industry.
20 Is it your opinion as a professional economist that
21 the rates that came out of the ASCAP rate court in
22 that case did not represent the fair market value as

1 determined by Magistrate Dolinger for those rates?

2 A I haven't done any quantitative analysis

3 that I could put on that, but since that was basically

4 based on an extrapolation from earlier agreements I

5 think it's quite possible that those fees are super

6 competitive.

7 Q And do you know, excuse me, and how about

8 with respect to BMI. What is your testimony with

9 respect to BMI's market power with respect to

10 commercial broadcasters?

11 A Well, I think BMI is in a similar

12 situation to ASCAP, if anything, prior to the last few

13 years since there was no rate court for BMI, one could

14 argue that there was an even greater likelihood that

15 voluntarily reached agreements with BMI would reflect

16 the market power that BMI had because with respect to

17 ASCAP there is sort of a limit on the amount of market

18 power because the buyer could always go to the rate

19 court and so although rate court is costly, there

20 would be some limit on the extent to which ASCAP could

21 extract super competitive rates because of the option

22 of the rate court and since that option was not

1 available for BMI, if anything, I think that probably
2 BMI might have had more market power than ASCAP.
3 Q And you've cited to the show time ASCAP
4 rate court decision in your written testimony as
5 something that you're familiar with, correct?
6 A I believe that's correct, yes.
7 Q Do you recall that in fact in the Showtime
8 proceeding Magistrate Dolinger as affirmed by the
9 United States Court of Appeals for the Second Circuit
10 rejected Showtime's objection that the price for the
11 BMI blanket license reflected a degree of undue market
12 power similar to that of ASCAP doubting that BMI "has
13 or chooses to exert the type of leverage that Showtime
14 attributes to it"? Do you remember that?
15 A Actually, I don't, no.
16 Q Is it still your testimony that BMI
17 exercises market power with respect to Showtime in the
18 context of the license agreements that were entered
19 into?
20 A I don't think I expressed an opinion with
21 respect to any specific agreement that BMI reached.
22 I think what I said was that as a general matter and

1 I'm speaking very qualitatively here, I have not in
2 any way, in the quantitative calculations that I've
3 done, I have not attempted to make an adjustment for
4 this factor. I've treated the agreements that were
5 reached with the Public Broadcasters as an appropriate
6 base. All I've done is make a qualitative observation
7 that overall there is reason to believe that there's
8 market power here and I think I would have, with all
9 due respect to Judge Dolinger, I think that that
10 conclusion, I would stick with that conclusion,
11 notwithstanding his decision in that case.
12 Q I hold my tongue because you may well get
13 that chance with Magistrate Dolinger.
14 Let's move on. You are still working for
15 the Television Music License Committee, right?
16 A That's correct.
17 Q And you're working for various cable
18 suppliers that are in the rate court proceeding with
19 ASCAP, correct?
20 A That is correct.
21 Q Have you expressed a few yet that the
22 conclusion of Magistrate Dolinger in the Showtime

1 decision with respect to BMI market power is
2 incorrect?
3 MR. RICH: I would ask at a minimum for a
4 clarification if it involves communications with
5 counsel in those cases. I think it will intrude on a
6 privilege, at least a work product and possibly
7 attorney-client and if it's a matter of has he
8 publicly expressed it in any court proceeding that
9 would be a different question.
10 MR. KLEINBERG: I'm not inquiring into
11 your privileged communications.
12 MR. SCHAEFFER: But there's no privilege
13 between expert and --
14 MR. RICH: You've asserted otherwise in
15 this very case, Mr. Schaeffer.
16 JUDGE GULIN: You've asserted otherwise as
17 well.
18 CHAIRPERSON GRIFFITH: Other than your
19 privileged communications, have you expressed this
20 opinion anywhere?
21 THE WITNESS: Well, I can make it easy.
22 I'm not sure which are privileged and which aren't.

1 The fact of the matter is I haven't expressed this
2 opinion. The work that I've done for the TV Committee
3 and the Cable Services has involved an analysis of
4 music use data and we have not even approached the
5 issue of what's the right fee and so it hasn't come
6 up.
7 BY MR. KLEINBERG:
8 Q Now Dr. Jaffe, you understand, I take it
9 that the task of the CARP is to determine as best as
10 it can the fair market value of the performing rights
11 licenses for BMI and ASCAP for public television and
12 public radio, correct?
13 A Yes.
14 Q And do you also understand as a matter of
15 your experience that fair market value is often
16 referred to as the price at which property or goods or
17 services would change hands between a willing buyer
18 and a willing seller neither being under a compulsion
19 to buy or sell and both having reasonable knowledge of
20 all relevant facts?
21 A I think that's a reasonable
22 characterization.

1 Q Now, you said you approached your task
2 here by looking in the first instance as the most
3 logical starting place, the prior agreements between
4 the parties, correct?
5 A Yes.
6 Q And then you went on as Judge Gulin
7 pointed out and said and you wanted to you adjust or
8 see if there were any adjustments based upon current
9 or changed circumstances, correct?
10 A Yes.
11 Q What did you do to analyze or inform
12 yourself about the circumstances surrounding the
13 agreements themselves, the prior agreements?
14 A Well, with respect to the music use
15 information, I've basically based my analysis of
16 changes on beginning in 1992 which is, in fact, the
17 year in which as Ms. Jameson testified, the previous
18 agreements were negotiated and similarly with the
19 programming expenditure data, I've looked at changes
20 since 1992.
21 So I think in terms of those factors, I
22 have consciously chosen as the base for looking at

1 changes, the time period in which in fact the previous
2 agreements were negotiated.
3 I have also in the context of my more
4 general analysis of the changes in noncommercial
5 broadcasting looked at the general pattern of changes
6 over the last 10 or 15 years and as we heard testimony
7 earlier much has changed, but much is still the same.
8 I mean in many ways what we have is a history of
9 public broadcasting in which it has grown to some
10 extent. These tensions between its public purpose and
11 its desire to raise funds through underwriting have
12 always been there and so I think in a qualitative way
13 I've looked more generally not just in 1992, but back
14 to the 1980s and seen a picture in which basically the
15 economic environment in which public broadcasting has
16 operated and the issues between it and the music
17 licensing societies have essentially -- I think Ms.
18 Jameson used the phrase this morning, "there's been a
19 refrain" that the issues have been very similar over
20 a relatively long period of time.
21 Q What consideration did you give to the
22 circumstances that were affecting BMI as it entered

1 into and participated in the 1992 negotiations with
2 PBS and NPR and the other Public Broadcasters?
3 MR. RICH: Can I ask for clarification
4 perhaps of Mr. Kleinberg whether he's asking what this
5 witness knew of what was in BMI's head? Is that how
6 I understand the question?
7 CHAIRPERSON GRIFFITH: I understood the
8 question to be you wanted to know what information or
9 what efforts he took to find out anything which
10 surrounded --
11 MR. KLEINBERG: Yes, that's exactly what
12 the question was.
13 CHAIRPERSON GRIFFITH: Those agreements.
14 MR. RICH: Okay.
15 CHAIRPERSON GRIFFITH: Okay.
16 THE WITNESS: Well, I think as I've
17 already indicated with respect to music use, I've
18 looked at the 1992 music use data. With respect to
19 the broader issue of the environment in which BMI
20 operated, I'm aware of and I looked at BMI's general
21 history with respect to the negotiations with PBS and
22 with other parties. I don't think -- I mean I'm not

1 sure what else. I can't think of anything else I did
2 specifically addressed to BMI.
3 BY MR. KLEINBERG:
4 Q Well, your written testimony seems to
5 suggest and perhaps incorrectly that all you did was
6 to familiarize yourself with the fact that there was
7 a prior agreement that was entered into with the
8 signatures of the performing rights societies and the
9 Public Broadcasters and then move on from there in
10 terms of the analysis that you've done. Is that an
11 unfair characterization in terms of what you did to
12 familiarize yourself with the circumstances that the
13 parties may have been confronting as they entered into
14 the negotiations and licensing in 1992?
15 A I think it's a little unfair. As the
16 testimony indicates I didn't just look at 1992. I
17 looked at a sequence of agreements going back through
18 the period of the 1980s and I think as the testimony
19 also indicates, I looked at the broader framework of
20 music licensing and I am aware from my work on music
21 licensing the evolution of BMI's situation vis-a-vis
22 the rate court and so forth and the negotiations and

1 litigation for that manner that BMI was involved with
2 the commercial broadcasters.
3 Q Do you agree that it's possible for a
4 party to enter voluntarily into an agreement that is
5 at below market prices?
6 A I mean now we're getting to, I guess it
7 was conceivable, we discussed this morning. I mean
8 yes, it's possible. I think that in general when a
9 party enters into an agreement I have an understanding
10 of the structure of BMI and its obligations to its --I
11 can never remember whether you call them members or
12 affiliates, but the composers who you are in effect
13 the agent for.
14 When I see an entity enter into a sequence
15 of agreements over a period of years, on behalf of its
16 members, I see no evidence that they are telling their
17 members on whose behalf they're operating that there
18 is some reason why we did this even though we think
19 it's not the right value.
20 I think the appropriate economic
21 conclusion is that they entered into those agreements
22 because while they would have liked to have gotten

1 more, they thought the level of those agreements was
2 within the range of fair market value. Otherwise,
3 they would have at the very least tried to somehow
4 explain to their management or their members while
5 they were doing it, and probably more likely they
6 would have taken some recourse, particularly since
7 from your position in this case we're not talking
8 about agreements that were 10 percent or 20 percent
9 below fair market value. I mean if your position in
10 this case were to be accepted, implicitly, the
11 agreements of the 1980s were off by factors of
12 hundreds of percent and I don't understand, it does
13 not seem to me economically plausible that you would
14 have agreed to fee levels that were that far off from
15 fair market value.
16 Q Well, let's focus on the general concept
17 first and we'll get to the specific next. Do you
18 agree or not that an entity, a party can enter into an
19 agreement voluntarily at a below market transaction
20 price?
21 A I think I gave you a clear yes as to that
22 previously as a hypothetical possibility.

1 Q Okay, and tell the Panel under what
2 circumstances you would conclude or be doubtful about
3 whether a prior voluntary agreement is, in fact, one
4 that reflects fair market value?
5 A Well, I think the presumption would be in
6 the absence of other evidence that parties, rational,
7 well managed, significant economic organizations do
8 not, in fact, enter into economic arrangements that
9 are to their disadvantage relative to fair market
10 value.
11 Now you asked me is it hypothetically
12 possible. Yes, I could imagine it's hypothetically
13 possible and if you ask me to speculate, sort of in
14 general on the kinds of circumstances that could apply
15 to that I could do that. I don't really see its
16 relevance here. We have no evidence in this case with
17 respect to the parties at hand that there were any
18 unusual circumstances that to my mind would suggest
19 that there's reason to sort of throw out the basic
20 presumption that parties act in their own
21 self-interest.
22 Q As this goes, I get to ask the questions,

1 as you know.

2 A So you want me to just, in general, think

3 of things.

4 Q Well, you're the expert. I want you to

5 tell me under what circumstances you could conceive of

6 as being possible that a prior voluntary agreement

7 should nonetheless be disregarded as a fair market

8 transaction.

9 A Well, for example, I think if it could be

10 shown that the party in question clearly made that

11 decision on the basis of invalid information that was

12 in their possession, that they thought was valid, but

13 in fact, is incorrect, I could imagine that that would

14 be relevant.

15 I suppose if the agreement was signed by

16 someone who was not mentally competent or not a duly

17 appropriate officer of the organization. I mean I

18 think most of the other things I could think of that

19 would tend to make the organization accept what would

20 otherwise be a low fee, would be things that I would

21 interpret not as meaning it wasn't a market fee, but

22 as meaning that the market fee was low at that time

1 and maybe those are changed circumstances. So if I am
2 a seller of grapefruits and you know, there's some
3 weather condition that leaves me with tremendous
4 numbers of grapefruits that I just have to get rid of
5 or they're going to spoil, then I will sell them at a
6 low price which may not be indicative of the market
7 price more generally, but I would interpret that still
8 as that was the market price at that time and whatever
9 made that time inappropriate is a changed
10 circumstance. It would have to be taken into account.
11 Q You said one possibility would be invalid
12 information. How about mistaken information, same
13 thing? Mistaken belief about --
14 A Of something that was material to the
15 valuation of the parties.
16 Q How about circumstances like lack of
17 alternatives in terms of the available options, do the
18 deal or go to court, go to a CARP, for example?
19 A Well, I think we all recognize that with
20 respect to these negotiations that there is, in
21 effect, always a litigation option. The litigation
22 option, to some extent puts a bound on what people

1 will otherwise agree to, but the fact of the matter is
2 that the standard, if you've gone to a CARP, was fair
3 market value, as I understand it or the CRT which was
4 the predecessor of the CARP, so the notion that you
5 would accept something that was very far from your
6 belief with respect to market value because your only
7 option was to go to a venue in which what the outcome
8 was supposed to be was fair market value doesn't make
9 a whole lot of sense to me.
10 Q What about the transaction costs in
11 pursuing alternative options? Don't they enter into
12 the balance?
13 A The transaction costs would enter into to
14 the scale of those costs, so that if th cost, a few
15 hundred thousand dollars to go to that alternative,
16 then you might well accept an alternative that was a
17 few hundred thousand dollars or whatever the
18 appropriate number is below the fair market value, but
19 there's clearly a limit to the extent to which that
20 would come into play.
21 Q What about the political costs, for
22 example, taking on a litigated fight with a

1 governmentally funded entity such as pubic
2 broadcasting? Where does that factor into the
3 analysis?
4 A Well, again, I'm having a hard time with
5 your questions knowing whether I'm supposed to answer
6 them in sort of this hypothetical abstract or with
7 respect to the facts of this case, because we kind of
8 seem to be going back and forth.
9 With respect to some hypothetical
10 abstract, I would imagine that that would be something
11 organizations would take into account.
12 Q As a result of your familiarization and
13 work in the commercial marketplace transactions and
14 with view of the landscape of ASCAP decision making in
15 the rate court, I take it that you have familiarized
16 yourself with those circumstances in which other music
17 users such as the local television stations have
18 sought to distance themselves from prior voluntary
19 agreements that they had with ASCAP on various
20 grounds. Do you know what I'm talking about?
21 A I am aware that that has occurred, yes.
22 Q And you know that the local television

1 industry voluntarily entered into what was called the
2 Shenandoah arrangement with ASCAP which was approved
3 by the rate court as fair and reasonable and then in
4 the Buffalo Broadcasting case when ASCAP sought to
5 have that agreement looked to as the appropriate
6 benchmark the stations objected and said it wasn't the
7 appropriate benchmark for various reasons. Are you
8 familiar with that circumstance?
9 A I don't remember the details. As you've
10 indicated there were reasons and I don't remember what
11 those reasons are now.
12 Q Do you remember among the reasons was the
13 cost of litigation that they had, instead of signing
14 the agreement, they could have gone to the ASCAP rate
15 court, but that would have been very expensive?
16 A That may have been one of the factors, I
17 don't remember.
18 Q Do you remember that one of the reasons
19 was that they were tired, that local television
20 industry was tired because they had been through prior
21 litigation with ASCAP and they were worn out and
22 tired?

1 A It may have been. I don't know.

2 Q Let's get to the specifics. When you sat

3 down and looked at the prior -- before you do that let

4 me ask you this, hypothetically again.

5 Among the circumstances that you might

6 look at with respect to a prior agreement, what would

7 you do with respect to an agreement that had a

8 confidentiality provision in it or some kind of

9 provision that was in it to prevent the agreement from

10 having any precedential effect. Would you consider

11 that as an appropriate factor that might make reliance

12 on the prior agreement inappropriate?

13 MR. RICH: I would object. It's a

14 compound question.

15 CHAIRPERSON GRIFFITH: Can you make it any

16 simpler?

17 MR. KLEINBERG: I'll do my best.

18 BY MR. KLEINBERG:

19 Q Let's assume that agreement that a

20 confidentiality provision in it which precluded the

21 parties to the agreement from ever referring to the

22 agreement or making it public in any proceeding,

1 including any rate court or related type of
2 proceeding. Would that be a factor that you or
3 circumstance that you would feel might bear on whether
4 the agreement of the transaction should be regarded as
5 the appropriate benchmark for some subsequent
6 proceeding?
7 A I think it's unlikely that would be a
8 significant consideration. I mean these contracts and
9 royalty contracts in general often contain
10 confidentiality provisions. That's a very common
11 occurrence and again, I don't understand economically
12 how that would explain why a party would agree to any
13 significant deviation from what they honestly and
14 truly believe is the true market value of the
15 commodity or service they're conveying.
16 Q What if that was among the circumstances
17 that is the confidentiality and -- or the other
18 circumstances. Would you look at all of them, I take
19 it in terms of evaluating whether there was any reason
20 that you might not derive such great satisfaction out
21 of the prior agreement and its fair market value, is
22 that fair?

1 A Sure, hypothetically, you'd look at
2 whatever combination of circumstances were relevant in
3 a particular context.
4 Q As you approached your task here, I didn't
5 see anything in your written testimony that reflected
6 your analysis of the circumstances of the type that we
7 talked about when you focused on the prior agreements.
8 I didn't see any analysis of any of the surrounding
9 circumstances that affected the parties and in
10 particular I'm referring to BMI. Is that correct?
11 A Well, I think there is relatively little
12 on that in my direct testimony. I think as I
13 indicated it seems to me as an economist, the starting
14 presumption is that rational parties agree to
15 agreements that reflect what they think the value is.
16 If I had, when I looked, if I had found evidence that
17 was contrary to that typical presumption, I think I
18 would have discussed it, but in the absence of any
19 such evidence I guess I didn't see the need in the
20 direct report to say this is what you would normally
21 expect and I haven't found anything abnormal here. So
22 that's not the way the report was written. I mean I'm

1 aware that you have in your filings raised various
2 considerations that you believe to be reasons why the
3 previous agreements don't reflect market value and I
4 don't find those reasons compelling, but obviously I
5 hadn't been exposed to those arguments at the time I
6 wrote the direct report.
7 Q Indeed, you said in your direct report
8 that you didn't know all the rationales for the
9 agreement or the agreements that were entered into in
10 1992, didn't you?
11 A I couldn't possibly know all of the
12 rationales on behalf of all the various parties, but
13 I think the question is still at a basic level is
14 there any evidence to suggest that the fundamental
15 presumption that parties don't give things away should
16 be dropped in this case and as I say I still haven't
17 seen any evidence that is compelling on that point.
18 Q Well, I'm focusing now on what you did as
19 the expert when you went through the analysis that you
20 did, not what you think now.
21 A I understand.
22 Q We'll get to that.

1 A I understand.

2 Q And my question to you is what you did to
3 investigate the surrounding circumstances relating to
4 the licensing agreements before you made the
5 conclusions that you made in the report. That's my
6 question and I think from your testimony that your
7 answer is you didn't do that much in terms of finding
8 out or asking anybody what were those circumstances
9 although you subsequently at least become familiar
10 with what BMI claims in its case or the surrounding
11 circumstances, is that fair?

12 A I don't think that is fair. I think my
13 previous answers speak for themselves. I looked into
14 and understood to the best of my ability without
15 having the ability to sort of do a Vulcan mind meld
16 with people at BMI what I knew about what was
17 happening both with respect to PBS, with respect to
18 the broadcasters generally, with respect to BMI and
19 its various music licensing agreements and litigation.
20 I looked at all of that. I looked at the agreements
21 themselves and in looking at all of that, I didn't see
22 anything that said to me, gee, here's an agreement

1 where somebody voluntarily gave away the store for the
2 following reasons. And so in my direct testimony I
3 said that I think it's a reasonable inference that
4 they agreed to these levels because they thought it
5 reflected the value.
6 Q What litigation did you familiarize
7 yourself with about BMI?
8 A Well, I was aware -- there was antitrust
9 litigation involving BMI. There --
10 Q When was that?
11 A I forget, really 1980s sometime. I don't
12 remember exactly when that was.
13 Q What litigation was it?
14 A As I recall BMI sued the Television Music
15 Licensing Committee claiming that it was, in fact,
16 somehow violating the antitrust laws.
17 Q That's what you recall from the litigation
18 that you looked at?
19 A That was one thing.
20 Q What else did you look at?
21 A I think you sued one of the networks at
22 one point. I don't remember the details of that. As

1 I say, what I found was nothing that seemed to bear on
2 the question of some reason why you would have entered
3 into an agreement that was not market value. So I
4 haven't sort of made a point of filing all that stuff
5 away in some organized fashion, because it didn't seem
6 to be material.
7 Q Well, how did you know if it was material
8 if you didn't know what it was?
9 A Well, what I'm saying is as I sit here
10 today I don't remember all of it because it didn't
11 seem to be relevant when I looked at it.
12 Q Did it come to your attention at the time
13 you were doing this analysis that BMI had been sued by
14 the CBS television network along with ASCAP in 1969
15 and it involved an anti-trust litigation that
16 continued until 1981?
17 A I was certainly aware that CBS had sued
18 the societies. And at the time I probably saw the
19 dates, but I don't remember the dates as I sit here.
20 Q And were you aware that the local
21 television industry had commenced an anti-trust action
22 against BMI and ASCAP in 1978 and that went on until

1985?

A I looked at a bunch of things. I probably was aware of that. I don't remember, as I sit here, whether that's true or not.

Q And were you aware that the National Cable Television Association and the Disney Channel and the Black Entertainment Television sued BMI in 1990 for anti-trust violations in the District Court in Washington and that litigation ended in 1991?

A Actually that one I don't remember.

Q Never heard of the NCTA case?

A I don't remember whether I had seen it or not.

Q Are you familiar that in that case the cable television anti-trust challenges to the blanket license were rejected by the court?

A Now that you mention it, I am aware that at some point the cable television had made anti-trust challenges that were rejected. I didn't remember which case it was or when it was brought.

Q And were you aware that as you went through your analysis of this license from 1992 that

1 BMI was involved in litigation with HBO, the Family
2 Channel, the Rainbow Channel and Arts and
3 Entertainment in 1989 over anti-trust matters and
4 licensing matters?
5 A I mean I think what I would say is I'm
6 very much aware that BMI has been involved in a lot of
7 litigation over the last 15 years. In fact, it seems
8 to be more or less the mode of operation in this
9 context and I don't deny for a minute that BMI was
10 involved in numerous different litigation proceedings
11 as both a plaintiff and a defendant and I don't -- I
12 mean I accept all of that as true.
13 Q But you didn't give weight to any of that
14 in terms of your analysis as to the appropriateness of
15 the 1992 license agreement as a benchmark?
16 A No, I don't. With -- I mean with all due
17 respect, there are lots of lawyers that can handle
18 litigation. BMI and ASCAP, as well, have shown their
19 ability to use litigation when they think it is
20 appropriate and necessary to protect their rights.
21 And if anything it seems to me if you look at that
22 what it shows is that BMI is a party which is not at

1 all hesitant to use litigation if it thinks that's the
2 appropriate outcome and I don't see how the fact that
3 it was involved in other litigation, maybe they had to
4 use different lawyers, but I don't really see how that
5 would be a reason why they would accept a fee
6 significantly less than the fee that again,
7 hypothetically, they think is the correct market value
8 and I haven't seen any evidence that suggests that
9 that was, in fact, what they were doing at the time.
10 Q Dr. Jaffe, do you know the difference
11 between a plaintiff and a defendant?
12 A Yes, I do.
13 Q BMI was a defendant in these litigations,
14 do you understand that?
15 A The ones that you mentioned, yes. That's
16 correct.
17 Q So what does that have to do with its
18 willingness to be involved in litigation? Are you
19 suggesting that BMI went out and started all those
20 litigations?
21 A I guess it's true, my previous answer I
22 was generalizing to both ASCAP and BMI, but I also

1 believe that BMI was a plaintiff and maybe not in the
2 specific ones you indicated, but BMI has also been
3 willing to be a plaintiff in litigation when it felt
4 that that was appropriate.
5 Q What litigation?
6 A I don't remember the specific cases as I
7 sit here.
8 Q When did you first become aware of the
9 confidentiality provision in the 1992 BMI license
10 agreement?
11 A I think I reviewed the agreement itself at
12 some point early on. I don't remember exactly when,
13 but it was back last summer or some point when I
14 started working on the project.
15 MR. SCHAEFFER: Could you speak up? I
16 can't hear.
17 THE WITNESS: I'm sorry. I believe I
18 reviewed the agreement itself early on in my work on
19 the project. I don't remember exactly when it would
20 have been, but it would have been back several months
21 before my report was filed.
22 BY MR. KLEINBERG:

1 Q As is it your testimony that you reviewed
2 the confidentiality provision of the agreement at that
3 time?
4 A I think so.
5 Q Are you aware that the confidentiality
6 part of the agreement is the part that had the license
7 fee in it?
8 A Yes.
9 Q Are you aware that the waiver of that
10 agreement, waiver to use that agreement wasn't given
11 until the fall of this year?
12 A I don't remember the timing, no.
13 Q So when did you look at it?
14 A I don't remember. I'm telling you it was
15 before my report was filed.
16 MR. SCHAEFFER: Can you speak up? I'm
17 really having trouble hearing you.
18 THE WITNESS: I'm sorry. I don't
19 remember. It was before my report was filed. I don't
20 remember exactly when it was.
21 BY MR. KLEINBERG:
22 Q And what consideration did you give to the

1 confidentiality provision and the things that you
2 heard testified today about during Ms. Jameson's
3 testimony about how that became part of the agreement?
4 MR. RICH: Objection.
5 CHAIRPERSON GRIFFITH: The basis of your
6 objection, please?
7 MR. RICH: Number one, it's been asked and
8 answered. Number two, he's asking what temporally
9 what consideration he gave to something, including
10 testimony he heard today.
11 MR. KLEINBERG: I'll restate the question.
12 CHAIRPERSON GRIFFITH: All right.
13 BY MR. KLEINBERG:
14 Q What consideration did you give at the
15 time that you reviewed the confidentiality provision
16 to its relationship, if any, to the task that you were
17 performing?
18 A Well, I think as I explained a few minutes
19 ago I don't think the presence of a confidentiality
20 agreement says much of anything about whether parties
21 to an agreement thought that the monetary compensation
22 contained in the agreement was or was not fair market

1 value.

2 Agreements of this sort are often

3 confidential and I don't understand as a matter of

4 economic logic why the fact that you could keep it a

5 secret would explain why you would be willing to agree

6 to a fee that you felt was not appropriately

7 compensatory.

8 Q What if it couldn't be used against you in

9 subsequent proceedings?

10 A But you're still giving away

11 hypothetically in your store, you're giving away

12 relatively large quantities of money over a five year

13 period that your members are entitled to. And I don't

14 understand why the fact that you could keep it secret

15 in the future would explain why you'd be willing over

16 a five year period to give away your members' money.

17 Q And that's the conclusion you drew at the

18 time that you looked at it back in the summer or

19 whenever you said you looked at it?

20 A It's hard for me. I've been thinking

21 about this now for seven months. It's hard for me to

22 parse it out in terms of exactly what I thought when,

1 but that certainly seems to me probably what I thought
2 then, yes.
3 Q You probably thought about it then and
4 discounted it as having any particular application.
5 Is that what you're saying?
6 A Yes.
7 Q And did you examine whether that provision
8 was contained in any prior agreements that BMI and the
9 Public Broadcasters have?
10 A I can't remember, as I sit here, if I
11 looked at that or not. As I sit here today I don't
12 remember whether it is or isn't and I don't remember
13 whether I ever knew whether it ever was or wasn't.
14 Q Do you understand from the work you've
15 done that part of the job of the CARP is to insure
16 that there is no subsidy in the license fee?
17 A Yes, I do understand that.
18 Q And you've reviewed the legislative
19 history or are aware that that's part of what Congress
20 provided?
21 A I don't think I've looked at the
22 legislative history. I am aware that that is part of

1 the mandate of the Panel.

2 Q And what would you define a subsidy as?

3 A Well, as an economist, a subsidy basically

4 means somebody being forced to convey property to

5 somebody else at a value that's below the market

6 value, the fair market value of that commodity. So

7 frankly, from an economic point of view I don't really

8 see the requirement that there be no subsidy,

9 analytically, as being very different from the

10 underlying charge to value in this case music at its

11 appropriate fair market value because if something is

12 valued at its appropriate fair market value, then from

13 an economist's point of view there is no subsidy.

14 Q Are you comfortable with the proposition

15 that a party could voluntarily give a subsidy, rather

16 than be compelled to do so?

17 A I guess if we're talking about the context

18 of -- which I have been assuming we are of these

19 voluntary arm's length transaction between private

20 parties, I don't understand what it would mean or why

21 somebody would give a subsidy. I mean the Post Office

22 gives subsidies to various people and presumably they

1 do that voluntarily, but the Post Office isn't a
2 private entity, you know, and so in looking at an
3 agreement between the PostOffice and a bunch of
4 mailers, I wouldn't necessarily conclude to begin with
5 that that was a market transaction. I think if we see
6 private parties, excuse me, engaging in a market
7 transaction, I don't see why I would expect that one
8 of them would just give a subsidy to the other.
9 Q Are you aware that public broadcasting has
10 taken the position over the years that because it is
11 a public broadcasting entity it's entitled to
12 discounts from its suppliers for its goods and
13 services?
14 A I am aware of that, but I would think that
15 any private supplier making a judgment as to whether
16 or not to do that if they gave such a discount would
17 not do it because they thought they were subsidizing
18 public broadcasting unless they claimed a charitable
19 deduction for it. They would do it because they had
20 made a market decision and this happens all the time.
21 I mean universities get things at prices that are
22 different than other people because private parties

1 make a market decision that it's a good business
2 decision for them to sell that commodity at that
3 price, presumably because they think that its value in
4 that context to that user is potentially lower and
5 they can therefore increase their overall profits by
6 engaging in that kind of discounting. But I wouldn't
7 call that a subsidy.
8 Q What analysis have you done about whether
9 those kinds of discounts have historically over the
10 years been given to public broadcasting by various
11 purveyors of goods and services?
12 A I'm generally aware. Well, there's two
13 questions. You ask me am I aware that they have sort
14 of said they should get it and I think I am aware of
15 that.
16 I am not actually aware of whether anybody
17 has actually given them such subsidies, so I haven't
18 -- sorry, has given them such discounts. So I haven't
19 --
20 Q Easy slip of the tongue.
21 A So I haven't done any analysis of that.
22 Q So you don't know whether that -- strike

1 that.

2 I take it your review of the 1978

3 materials from the prior CRT did not enlighten you in

4 any way with respect to Professor Baumol's

5 consideration of this issue of discounts for the

6 public good?

7 A I think we already have established, I

8 don't think I read Mr. Baumol's testimony and I don't

9 recall any other references to that, no.

10 Q Do you recall being made aware that --

11 strike that.

12 You were here this morning, Dr. Jaffe,

13 when Ms. Jameson talked about the Satellite CARP

14 proceedings so I know you're prepared to deal with

15 that subject. And what analysis had you given to the

16 position that the public broadcasting system was

17 taking in the Satellite case with respect to the

18 evaluation of its programming and how that relates to

19 what's before this Panel?

20 MR. RICH: I object to the form of the

21 question.

22 CHAIRPERSON GRIFFITH: In what way, what

1 form?

2 MR. RICH: The gratuitous, "I know you

3 heard this and therefore you're prepared to testify

4 about it."

5 CHAIRPERSON GRIFFITH: Can you rephrase

6 the question, please?

7 BY MR. KLEINBERG:

8 Q You did hear the testimony today, correct?

9 A That is correct.

10 Q Have you had an opportunity -- strike

11 that. Were you aware prior to today of the Satellite

12 Adjustment case?

13 A Yes, I was.

14 Q And were you aware that in that case PBS

15 took the position that its programming should be

16 valued for purposes of transmission of that

17 programming at the exact same amount as the commercial

18 networks?

19 A I was aware of that, yes.

20 Q And were you aware actually that Congress

21 had put public broadcasting and the commercial

22 broadcasters in the same category for purposes of that

1 compulsory license?

2 A I don't remember. I don't think -- at

3 some point -- I read the decision. I may have at some

4 point known that that was why they were there. I

5 don't, as I sit here, remember whether I knew that or

6 not.

7 Q And you know that the programming that was

8 involved is the same programming in which the music

9 that we're talking about is incorporated, correct?

10 A Yes.

11 Q And do you agree that the music to the

12 extent it is incorporated in that programming is a

13 contributor to the value of that programming insofar

14 as it is distributed by a satellite and other

15 broadcasting media?

16 A Yes, that's correct.

17 Q And I take it then you would agree that to

18 the extent that that programming garners revenues that

19 are at a different rate or level or at the commercial

20 rate that that is a reflection of the value, in part,

21 of the musical component of that programming, is that

22 also correct?

1 A I don't think that's quite right. I mean
2 I think the issue in this proceeding is what is the
3 value of the music in a transaction between the rights
4 holders and PBS. And certainly in some general way
5 that is connected to the value of the programs, at
6 least the value of the programs to PBS.
7 Now that's a very different question from
8 what is then the value of those programs in a
9 completely different context, that is the context of
10 the satellite rebroadcast which I believe to be of
11 relatively minor significance overall in terms of
12 public broadcasting. So I don't see any necessary
13 connection between the value of those programs in that
14 particular context of the satellite rebroadcast and
15 the value of even those same programs in PBS's normal
16 context and certainly not the value of the music
17 that's in those programs.
18 Q How about the comparison or the alignment
19 of PBS to the commercial networks as a reference point
20 in those proceedings. Do you see any -- well, do you
21 agree for purposes of that proceeding it was
22 appropriate to compare and line up public broadcasting

1 television with the commercial television networks?

2 A I haven't studied that issue. I really

3 don't have an opinion on that.

4 Q Well, based upon what you know and all of

5 the testimony that you've given about the differences

6 between public broadcasting and commercial

7 broadcasting, on the television side, are you able to

8 conclude that there are any circumstances in which it

9 would be appropriate to say that the two media are, in

10 fact, comparable?

11 A Well, you told me a second ago Congress

12 said they were in the same box or something. If

13 Congress said it, certainly that would be one

14 circumstance.

15 I haven't studied that question and I'm

16 not going to opine on something I haven't looked at.

17 Q But you have studied the question about

18 whether public broadcasting and commercial

19 broadcasting are similar for purposes of this

20 proceeding?

21 A I guess what I would say is you know I

22 have looked at that sufficiently to feel quite

1 confident that there are more than enough differences
2 to explain why it could well be the case that private
3 parties and private transactions would agree that the
4 value of the music to one is different from the value
5 of the music to the other. I haven't done any sort of
6 comprehensive analysis of the differences between
7 commercial television and noncommercial television.
8 I certainly haven't looked at the question of the
9 value of those different kinds of programming in the
10 satellite rebroadcast context.
11 Q You are prepared, I take it, to say that
12 there are circumstances in which it is appropriate to
13 consider commercial television and commercial radio as
14 comparable to public broadcasting?
15 A I don't know that there are such
16 circumstances. I think what I said was as a
17 hypothetical possibility I would not rule it out. I
18 don't, as I sit here, know that there are any such
19 circumstances.
20 Q You can't conceive of any such
21 circumstances today?
22 A I didn't say that. I mean what I said was

1 --

2 Q Strike that. I used the word conceive.

3 You used the word know.

4 You don't know of any such circumstances

5 today, right?

6 A That's correct.

7 MR. RICH: May I inquire, given the hour

8 --

9 MR. KLEINBERG: Yes, I would like to stop

10 now.

11 (Laughter.)

12 CHAIRPERSON GRIFFITH: How much more, how

13 much longer do you have?

14 MR. KLEINBERG: I'll have some more

15 tomorrow morning, but I'm confident, I believe, that

16 we will be able to finish everything up. I think

17 being able to break will assist in that process. I

18 would guess I will try and be done myself within 90

19 minutes tomorrow at the outside.

20 CHAIRPERSON GRIFFITH: Mr. Schaeffer?

21 MR. SCHAEFFER: I'm sure we'll be taking

22 examination but I assume it to be about an hour.

1 CHAIRPERSON GRIFFITH: How about Dr.
2 Boyle, is he going to be here tomorrow?
3 MR. RICH: No. He comes back during
4 rebuttal.
5 CHAIRPERSON GRIFFITH: Rebuttal. I keep
6 forgetting that. Okay.
7 Is there any argument on the motion --
8 JUDGE GULIN: Tomorrow.
9 MR. KLEINBERG: No, he can argue it.
10 Three witnesses in one day.
11 CHAIRPERSON GRIFFITH: All right, is there
12 argument after the completion of the case? Do you
13 want to start tomorrow morning at 9:30.
14 MR. RICH: Well, I would only urge in that
15 sense that I'm indifferent to that as a matter of
16 timing, but that since we're all eager to get done
17 with the witnesses, maybe that ought to be --
18 MR. SCHAEFFER: I agree with Mr. Rich.
19 MR. KLEINBERG: I would agree with that
20 actually myself.
21 CHAIRPERSON GRIFFITH: All right, 9:30
22 tomorrow morning, is that convenient for you, sir?

1 THE WITNESS: That's great.

2 CHAIRPERSON GRIFFITH: Nobody wants 10

3 o'clock?

4 MR. KLEINBERG: I want it, believe me, I

5 want it.

6 CHAIRPERSON GRIFFITH: 9:30 tomorrow

7 morning, gentlemen. Thank you, ladies and gentlemen,

8 thank you very much. Thank you, sir.

9 (Whereupon, at 5:07 p.m., the hearing was

10 recessed to reconvene tomorrow, Thursday, April 2,

11 1998 at 9:30 a.m.)

12

13

14

15

16

17

18

19

20

21

22

CERTIFICATE

This is to certify that the foregoing transcript in

the matter of:	Hearing: Adjustment of the Rates for Noncommercial Educational Broadcasting Compulsory License, Docket No. 96-6 CARP NCBRA
Before:	Library of Congress Copyright Arbitration Royalty Panel
Date:	April 1, 1998
Place:	Washington, DC

represents the full and complete proceedings of the aforementioned matter, as reported and reduced to typewriting.

Copyright Arbitration
Royalty Panel

Noncommercial Compulsory
License

04-01-98

p2494-2825 WP5.1

Neal R. Gross & Co.
(202) 234-4433