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In the Matter of: . :
: CRT Docket No. 79-1
DISTRIBUTION OF CABLE ROYALTY FEES :
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2033 K Street, Northwest
Room 538
Washington, D.C.

Tuesday, August 19, 1980

The hearing in the above-entitled matter commenced
at 10 a.m., pursuant to notice.

BEFORE:

- MARY LOU BURG, Chairman
- THOMAS C. BRENNAN, Commissioner
- DOUGLAS E. COULTER, Commissioner
- CLARENCE L. JAMES, JR., Commissioner
- FRANCES GARCIA, Commissioner

ORIGINAL

1 APPEARANCES:

2

3

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Counsel for BMI

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ALBERT CIANCIMINO
Counsel for SESAC

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C O N T E N T S

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<u>WITNESS:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RE CROSS</u>
Paul Fagan				
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E X H I B I T S

	<u>ASCAP's</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>
1			
2			
3	No. 1	5	6
4	No. 1a	7	7
5	No. 1b	7	7
6	No. 2	10	10
7	No. 3	11	11
8	No. 4	15	15
9	No. 5	17	17
10	No. 6	33	34
11	No. 7	68	68
12	No. 8	91	91
13	No. 9	92	92
14	No. 10	95	95
15	<u>BMI's</u>		
16	No. 1	54	54
17	No. 2	64	64
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P R O C E E D I N G S

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2 CHAIRMAN BURG: We will come to order. As agreed
3 to by the Performing Rights Society, ASCAP will present its
4 case first.

5 MR. KORMAN: Thank you, Madam Chairman. I am
6 Bernard Korman representing ASCAP. With me, Gloria Messinger,
7 Assistant General Counsel of ASCAP and Mr. Ciancimino. Our
8 witness this morning is Paul Fagan.

9 CHAIRMAN BURG: You have been sworn.
10 Whereupon,

11 PAUL FAGAN

12 was called as a witness and, having been previously duly sworn,
13 was examined and testified as follows:

DIRECT EXAMINATION

14 BY MR. KORMAN:

15 Q Dr. Fagan, we are concerned today with a question
16 of the share that ought to be allocated by the tribunal of
17 the music share four and a half percent among ASCAP, BMI, and
18 SESAC.

19 You have been giving thought to that question?

20 A Yes.

21 Q Directing your attention to the Year 1978, and
22 by way of preliminary background, can you tell the tribunal
23 how ASCAP's income or license fee revenues compared with BMI's
24 overall for that year?
25

1 A I can't precisely, but I can make an estimate
2 at those numbers. The reason I can't precisely is that the
3 ASCAP fiscal year is a calendar year. The BMI year, fiscal
4 year, is a year ending on June 30.

5 Looking at the report, the ASCAP report, for the
6 Year 1978, and looking at the BMI report for the years ending
7 June 30, 1978, and June 30, 1979, I can make an estimate of
8 what the BMI income is from license fees for the calendar
9 year 1978 by taking one half of the amount for the fiscal year
10 and ending June 30, 1978, and taking one-half of the year,
11 fiscal year ending June 30, 1979.

12 Q Have you in fact done that and is that available
13 in writing?

14 A Yes, I have.

15 MR. KORMAN: Madam Chairman, I would offer in
16 evidence ASCAP Exhibit No. 1 a schedule marked ASCAP Share
17 ASCAP Plus BMI License Fees Calendar Year Ending December 31,
18 1978.

19 MR. DUNCAN: May we have your indulgence a moment?
20 We don't admit to the objection but by not doing
21 so we don't suggest we agree with the exhibit.

22 CHAIRMAN BURG: So noted.

23 BY MR. KORMAN:

24 Q Dr. Fagan, would you tell us what the schedule
25 shows in terms of the total amount of revenues that we are

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speaking about for ASCAP and for BMI?

A We will, it shows that ASCAP's income from license fees for Fiscal Year '78 was 114,107,000, and the estimate for BMI, estimating as I described previously, would be 70,548,000 for a total for ASCAP and BMI of 184,655,000 for both.

The division is between ASCAP and BMI would be in the ratio of 61.8 percent for ASCAP and 38.2 percent for BMI.

Q I move the admission of that exhibit. I take it was admitted.

CHAIRMAN BURG: Yes it was.

(ASCAP Exhibit No. 1 was marked for identification and received in evidence.)

BY MR. KORMAN:

Q Again, in connection with overall numbers Dr. Fagan, I show you, or will in a moment, a letter from Arthur Young and Company, addressed to the Board of Directors and Members of ASCAP, dated March 30, 1979, to which is attached a financial statement.

I ask you to describe the statement for us, please?

CHAIRMAN BURG: Is this going to be an exhibit?

MR. KORMAN: Yes.

CHAIRMAN BURG: May we have a copy?

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THE WITNESS: This is a report sent to the --

MR. DUNCAN: Excuse me, Madam Chairman. May we have a moment to look at it to see if we have an objection?

MR. KORMAN: For the record, Mr. Reporter, we would call that Exhibit 1A rather than Exhibit 2.

CHAIRMAN BURG: I beg your pardon?

MR. KORMAN: I said, Madam Chairman, we would like to call that 1A.

CHAIRMAN BURG: The sheet here will be Exhibit 1A.

MR. KORMAN: The first exhibit showed the breakdown between ASCAP and BMI and this is Exhibit 1A.

MR. DUNCAN: We have no objection to its admission, again, with the same understanding. We are not agreeing with the accuracy of the information.

CHAIRMAN BURG: So noted.

MR. KORMAN: I hope my friend will agree to the accuracy of Exhibit 1B which will be in two parts. The first part is the BMI Annual Report for the Year Ending June 30, 1978, and the second part of Exhibit 1B is a schedule for the year ending June 30, 1979, BMI's Statement of Operations and Retained Earnings.

MR. DUNCAN: No objection, Madam Chairman.

MR. KORMAN: Perhaps, I should state I don't concede the accuracy of the numbers.

COMMISSIONER JAMES: May I ask a question of

1 Mr. Korman?

2 Why is there a difference of \$2 million on
3 Exhibit 1 and then on the Exhibit 1A one has the 114 million
4 and the other 116 million on the receipts?

5 MR. KORMAN: The 116 million includes interests
6 and member dues. Dues are a minor part of that. You may
7 recall dues are \$10 for writers and publishers \$50.

8 MR. DUNCAN: I note for the record Mr. Korman
9 is sponsoring the exhibit. I think he should not do so
10 with the limitation.

11 MR. KORMAN: I was being facetious. I will
12 accept those numbers as being accurate.

13 BY MR. KORMAN:

14 Q Would you look at Exhibit 1A and B. These
15 establish a particular relationship between revenues
16 between ASCAP and BMI for the Year 1978, is that right?

17 A Revenues from license fees, yes.

18 Q What was that again?

19 A In the ratio of 61.8 for ASCAP and 38.2 for
20 BMI.

21 Q Directing your attention specifically to local
22 television and to local television rates, with respect to
23 ASCAP, how are local television rates worked out with the
24 local television industry in brief?

25 A Generally, through time, the system or the
process has been one by which a committee is formed by the

1 NAB to represent the local television interest and a committee
2 is formed by the ASCAP Board of Directors to handle the
3 negotiations for ASCAP.

4 These committees meet. They meet several times.
5 They work out a license agreement.

6 Q Directing your attention to the agreement on the
7 basis of which fees were paid for 1978. Can you tell us
8 a bit about the gestation, the background of that so-called
9 Shenandoah proceeding agreement?

10 A Yes. I think I described this earlier in a public
11 hearing. So I will make it brief. A license agreement was
12 hammered out in the latter part of 1969. It covered the
13 period 1962 all the way through 1977 with a re-opener in the
14 end of '73, in the middle someplace.

15 That agreement was reached after some rather
16 lengthy delays where there was litigation involved, and such
17 litigation went up to the Supreme Court. The actual
18 negotiation, I would say, took place in the period 1967
19 through '69.

20 Q So, it took about three years to hammer out the
21 terms of that agreement?

22 A Two or three years, yes.

23 Q That was because there had been some audit disputes
24 and they were trying to get language to determine how those
25 questions would be disposed of in the future. I am trying
to lead the witness to get this over quickly.

1 A One thing that took time was discovery on both
2 sides. There was a request for data, objections, trips to
3 the court and back and analyzing the material for discovery.
4 It took awhile.

5 Q It resulted in a fairly complicated, lengthy
6 agreement?

7 A It resulted in a fairly lengthy agreement, but
8 the objective of the agreement was to make it simple, less
9 complicated. I think it achieved, if not the former, the
10 latter objective.

11 MR. KORMAN: Madam Chairman, I would like to
12 offer in evidence an agreement called ASCAP Local Stations
13 Blanket Television License Agreement.

14 I offer that as Exhibit 2.

15 No objection?

16 MR. DUNCAN: No objection.

17 MR. KORMAN: I move it into evidence.

18 (ASCAP Exhibit No. 2 was marked for identification
19 and received in evidence.)

20 BY MR. KORMAN:

21 Q This is the agreement you referred to?

22 A Yes.

23 Q In '60s, was BMI involved in that litigation
24 that went to the Supreme Court?

25 A No, it was not; not that I know of.

1 Q They were not a party?

2 A That is true.

3 Q Do you know anything about the BMI agreement for
4 local television that was the basis on which fees were paid
5 by local television stations to BMI in 1978?

6 A Yes.

7 Q Do you have a copy of that agreement before you?

8 A Yes, I do.

9 MR. KORMAN: I would like to move ASCAP's
10 Exhibit 3, a document headed Broadcast Music in Local
11 Television Stations Television License Agreement.

12 Any objection?

13 MR. DUNCAN: May we have the tribunal's indul-
14 gence?

15 CHAIRMAN BURG: Yes.

16 MR. DUNCAN: No objection.

17 (ASCAP Exhibit No. 3 was marked for identification
18 and received in evidence.)

19 BY MR. KORMAN:

20 Q Directing your attention to page 32 of Exhibit 3,
21 would you describe to us what that page marked Exhibit 5 is
22 all about?

23 A Yes. That is the BMI license fee report form
24 for the stations holding the agreement to submit to BMI
25 monthly.

Q Can you describe it more for me?

1 A Yes. That report form advertises the amount to
2 report to BMI to the amount reported to ASCAP.

3 First Line 1 reads, net receipts responses after
4 deduction: Line 13 or Line 15 on attached ASCAP report in
5 parenthesis. It indicates the ASCAP report itself would
6 be attached. Line 2. Total amount due to ASCAP (Line 16 or
7 18 of attached ASCAP report) that would be the amount of
8 fees reported to ASCAP for the moment.

9 Then Line 3 is 58 percent of Line 2 above. That
10 is 58 percent of the amount reported to ASCAP. Then, 4 is
11 one or 9 percent of Line 1.

12 Now, 1 or 9 percent of Line 1, I believe would
13 also be larger than 58 percent of Line 2. So, it would be --
14 excuse me.

15 Fees payable to BMI lesser of Lines 3 or 4.
16 I believe that means in every case the amount would be 58 per-
17 cent of the amount reported to ASCAP.

18 Q So it is your understanding -- by the way, do you
19 know when this agreement was worked out by BMI with the
20 broadcasters?

21 A It was reported in the Trade Press in '71.

22 Q You understand it to be a '71 agreement?

23 A Yes.

24 Q The ASCAP agreement was completed in '69?

25 A That is correct.

1 Q It appears that the BMI agreement was to take
2 58 percent of the ASCAP fee as the BMI fee for local
3 television?

4 A That is correct.

5 Q Incidentally, Dr. Fagan, in looking at that
6 agreement on page 24, paragraph 19, is an audit provision.
7 Is that correct?

8 A Yes, it is.

9 Q Do you know whether BMI's prior agreement had
10 an audit provision?

11 A I don't think it did.

12 Q Do you know whether BMI had a staff of auditors?

13 A I have not heard that they had.

14 Q Do they really audit television stations?

15 A I don't believe so.

16 Q Dr. Fagan --

17 A I believe there is a provision, excuse me, pro-
18 viding if there is a payment on an ASCAP audit the station
19 will be required to pay BMI 58 percent of that amount.

20 Q Does ASCAP receive any fee from BMI for performing
21 that service?

22 A I know they do not.

23 Q So, Dr. Fagan, in overall dollar terms you
24 testified that the ASCAP share of license fees is 58.1 percent.
25 What is the ASCAP fee from local television based on the

1 agreements?

2 A If we take for ASCAP a ratio of 100 and BMI
3 a ratio of 58 because those are the terms in the agreement,
4 the ratio of 58 to 100 or those numbers, 100 plus 58 would
5 total 158.

6 ASCAP would be 63.3 percent and BMI 36.7 percent
7 expressed as percentage.

8 Q Going back a moment, the audit adjustment you
9 referred to is paragraph 16 on page 23; is that correct?

10 A Yes, it is.

11 Q Would you read that into the record, please?

12 A Paragraph 16. "Audit adjustment. All audit
13 adjustments are to be made using the division between
14 basic net receipts and increments applicable to the year
15 to which the adjustment relates. Licensees shall promptly
16 report to BMI any amount paid to or received from ASCAP by way
17 of audit adjustment, the basis for the claim, and the year to
18 which such payment is attributable and two, pay to or
19 receive from BMI the amount required by virtue of such audit
20 adjustment."

21 Q Have you put on paper, Dr. Fagan, or is there on
22 paper a schedule showing the ASCAP share of local television
23 license rates?

24 A Yes.

25 MR. KORMAN: I would like to offer that in

1 evidence as Exhibit 4.

2 MR. DUNCAN: No objection.

3 CHAIRMAN BURG: All right.

4 (ASCAP Exhibit No. 4 was marked for identification
5 and was received in evidence.)

6 BY MR. KORMAN:

7 Q So, when you look at overall figures, Dr. Fagan,
8 are you talking about ASCAP 61.8 and local television
9 63.38; is that right?

10 A Right.

11 Q Is there a ready explanation as to why it is
12 lower overall?

13 A I think, basically, because in ratios the BMI rate
14 is higher relative to the ASCAP rate. That is than any other
15 area. That has the effect of pulling up the overall average.

16 Q In the negotiations with users, particularly with
17 local television, Dr. Fagan, the users often refer to
18 certain factors as justifying a reduction when they talk to
19 us.

20 One of those factors is share performance; is
21 it not as between ASCAP and BMI?

22 A Well, the different groups that we negotiate
23 with use different arguments depending on what suits them
24 at the time which is understandable. Radio when we negotiate
25 with them, they talk about share of performance, particularly

1 short performances. It is referred to there. They also when
2 you are negotiating with radio say they should pay less
3 because look at what television pays. Their use of music
4 is so much different and they should pay more.

5 When you negotiate with the television people,
6 they say you should charge us less because look at how much
7 music radio uses and we don't use as much. There are different
8 arguments advanced in different negotiations.

9 I don't recall on the television side that share
10 of performances was a factor, and radio has been a factor.

11 Q If we were to look at share of performances
12 based on the ASCAP survey of performances, Dr. Fagan, what
13 would that teach in terms of the relationship between ASCAP
14 and BMI local television performance?

15 MR. DUNCAN: Objection. I am not sure what your
16 survey is referring to. If he could identify, it might help.

17 MR. KORMAN: I am not referring to any special
18 survey. I am referring to the survey of performance that
19 ASCAP makes regularly for the purpose of distributing royalties
20 to its members.

21 MR. DUNCAN: All right.

22 THE WITNESS: In the ASCAP survey of performances
23 in local television, the tally is made of performances work
24 performed and the stations' sample and the programs on such
25 stations.

1 BY MR. KORMAN:

2 Q Has there been a schedule prepared?

3 A Yes.

4 MR. KORMAN: I would like to offer in evidence
5 ASCAP's Exhibit 5, a schedule marked ASCAP's Share of
6 Performance Credits by Quarter 1978.

7 CHAIRMAN BURG: All right.

8 MR. CIANCIMINO: Madam Chairman, there is no
9 indication on the document submitted that it refers to local
10 television.

11 THE WITNESS: It is local television and it
12 should.

13 MR. DUNCAN: Do I understand this is a survey done
14 in-house by ASCAP?

15 MR. KORMAN: This is a survey done by ASCAP in-
16 house, yes.

17 CHAIRMAN BURG: For local television?

18 BY MR. KORMAN:

19 Q Dr. Fagan, describe that for us?

20 A Each quarter, descriptions are, of royalties,
21 are prepared based on survey of performances. This is a
22 result of survey of performances on local television. What
23 ASCAP does in the survey of local performances is to have an
24 outside firm design a sample, select the particular stations
25 on a random basis and the particular days of the quarter and

1 the particular times of day. The sample. They then direct
2 that we look to our cue sheets for programs that we have
3 cue sheets. And also to audio tapes of the programming to
4 ascertain what was performed.

5 These performances are then tallied applying the
6 evaluating formulas which specify, for example, the weight of
7 the feature performance, the weight of the theme performances,
8 the weight of the background performance and so on, this
9 schedule gives the results of those tallies on a quarter-by-
10 quarter basis for 1978.

11 MR. DUNCAN: Your Honor, I don't mean to only
12 object. I understand this is the in-house survey. The witness
13 says an outside firm designed the sample. I submit that is
14 not consistent unless I misunderstood.

15 MR. KORMAN: I think the tribunal is familiar with
16 the design of the survey. Let me take a moment to see if I
17 can clarify it.

18 As Dr. Fagan has testified, the actual design
19 of the survey is done by actual consultants on an ongoing
20 basis. Those consultants in recent years --

21 MR. DUNCAN: Your Honor, Mr. Korman is not under
22 oath. I would request the questions be put to the witness.

23 BY MR. KORMAN:

24 Q Dr. Fagan, the survey I have represented as part
25 of ASCAP's ongoing survey conducted for royalty distribution

1 purposes is designed by whom and carried out by whom?

2 A I think I mentioned before the design of the survey
3 is made by outside people. They have periodically reviewed
4 that altered the design and the survey.

5 The selection of the stations to be included in
6 the survey, the selection of the days and time of day and for
7 the programs to be included are also selected by outside
8 people.

9 The programs once listed are then submitted to
10 ASCAP. It is ASCAP which tallies the performance. They
11 apply to cue sheets when cue sheets are available. It
12 reads tapes where taped cue sheets are not available and tapes
13 are. It processes these performances applying the various
14 evaluations in-house. I question here, really, the definition
15 of what is in-house and what is not in-house.

16 CHAIRMAN BURG: Mr. Duncan, is that satisfactory?

17 MR. DUNCAN: I will cross-examine the witness.

18 He says outside people, I would like to know who?

19 MR. CHAIRMAN BURG: You are not objecting?

20 MR. DUNCAN: No.

21 MR. KORMAN: Among the outside people involved,
22 is the United States District Court.

23 MR. DUNCAN: I am going to enter a continuing line
24 of objection to Mr. Korman's testimony. I want to get through
25 this, but I am not going to have him testify at will.

1 BY MR. KORMAN:

2 Q Is the ASCAP survey monitored by anyone outside
3 of ASCAP?

4 A Yes. The survey is reviewed periodically by
5 Robert Nathan Associates. These reviews are submitted to
6 and in turn reviewed by distribution advisors appointed by
7 the Southern District Court.

8 Q Who are they, doctor, now?

9 A Leon Capland in New York and one on the West
10 Coast.

11 MR. KORMAN: May I offer the name?

12 MR. DUNCAN: Yes.

13 MR. KORMAN: Statuf Statler.

14 THE WITNESS: Yes. . .

15 BY MR. KORMAN:

16 Q They do what?

17 A They review the survey and distribution of a
18 society.

19 Q Do they file with the Court on operation of the
20 survey?

21 A Yes.

22 Q Who comments, if anyone, on the report?

23 A The Department of Justice.

24 Q What happens with those?

25 A They are reported with the reports to the members.

1 Q They are distributed and sent to the members?

2 A Yes.

3 Q How often?

4 A Twice a year.

5 Q Directing your attention to Exhibit 5, Dr. Fagan,
6 what does that show us?

7 What does that mean to you?

8 A Would you identify?

9 Q ASCAP Share of Performance Credits by Quarter
10 1978. I am seeking a summary.

11 A The table shows of the performances processed for
12 the year 1978, and using the ASCAP evaluating rules, 68.3
13 percent were in the ASCAP repertoire. It is impossible to
14 have all cue sheets.

15 Our figure of 68.3 percent. It is probably 3 or
16 4 percentage points high because of not having all perform-
17 ances processed. What I am saying is as the records come
18 out, these are the exact numbers --

19 Q Excuse me.

20 What do you mean?

21 A The record of performances from the computer.
22 This would tie in to our records. What I am saying to you
23 is that in the tallying of the performances, there are
24 some that are missed which would have the effect of reducing
25 the ASCAP share of performances.

1 Q By how much?

2 A I think three or four percent.

3 Q When you say that, did you make an effort to
4 ascertain the extent of that reduction?

5 A What we do each quarter on network television is
6 to take the one week of the quarter and tally all performances
7 to get an idea of how much slippage there is in the perform-
8 ances not tallied.

9 In looking at that figure through time and
10 remember that in local television you have a lot of programming
11 that was previously on the network, looking at those figures,
12 I come to three or four percent.

13 COMMISSIONER GARCIA: Would you repeat that for
14 me?

15 THE WITNESS: Yes. For some time now, long before
16 the Copyright Tribunal was established, we had been checking
17 one week in each quarter of network performances to compare
18 what we tallied, actually tallied, for that week.

19 What it would be hypothetically if we tallied
20 everything to know exactly what we were missing in our
21 tally. We have done that each quarter for many years. We
22 find that the difference between what we tally and what we
23 don't tally applied here would be three or four percentage
24 points. We are trying to see to what extent there is puffery
25 in these numbers.

1 BY MR. KORMAN:

2 Q Dr. Fagan, we have talked, here we talked about
3 non-ASCAP. What does that mean?

4 A BMI, SESAC; Italian Book Company. Everthing.
5 It would not include public domain.

6 Q Everything that was copyrighted?

7 A Yes.

8 Q Would you summarize for us, Dr. Fagan, ASCAP's
9 proposal? What it is that we are asking the tribunal to do
10 and please don't omit SESAC?

11 A Basically, what we are saying is that it is ap-
12 propriate, we think, for you to look to how the market
13 values the respective repertories.

14 These values are really determined by the amount
15 paid for the repertories. In this proceeding, I think we
16 are talking about basically local television programs from
17 distant signals transmitted over cable systems.

18 We think that the rates are charged by ASCAP,
19 BMI and SESAC for the stations whose signal is carried by
20 the cable system is an appropriate benchmark for you to look
21 at.

22 When we looked at that, looking at just ASCAP and
23 BMI, it came to 68.3, 37.3 ratio. We think the same kind
24 of analysis should be used for SESAC. We don't have the
25 figures on SESAC. That is why we did not use them. If we

1 had SESAC figures, we would have put them in there. Some
2 of the money that is paid into the copyright office that is
3 being distributed here is based on the distant signals of
4 public television systems.

5 As you know, the rate for 1978, for public broad-
6 casting was \$250,000 for BMI, \$50,000 for SESAC and a rate of
7 \$1,250,000 for ASCAP. As you also know, the ASCAP rate was
8 not for the full year. It was not paid for the full year.

9 It was only paid for the period beginning
10 June 8, through December 31, 1978. I think also that some
11 consideration should be made to the fact that when BMI made
12 its agreement with the local television industry, it did so
13 a couple of years after ASCAP made its agreement.

14 If the sequences were different, I can't say
15 for sure that the results would be different, but certainly
16 it would be a minimum figure for ASCAP. We would think it
17 would be something more.

18 Q You mean by more --

19 A ASCAP would have a higher percentage. I might
20 add on that point that when ASCAP negotiates, it is selling
21 its repertory on the best terms it can sell its repertory
22 recognizing that it has to be reasonable.

23 There is a requirement in our consent degree that
24 it be reasonable. If a user or group of users thinks other-
25 wise, they can go to court to get a determination on fee.

1 We don't say our rates should be X because BMI
2 gets Y. We are selling our repertory on what we consider to
3 be reasonable terms.

4 Q Dr. Fagan, as far as you know in broadcasting,
5 the agreements have also been negotiated first by ASCAP and
6 later broadcasters have sat down and reached terms with
7 BMI except in public broadcasting?

8 A I think that is correct. Yes.

9 Q In the case of SESAC, for a moment, Dr. Fagan,
10 when they licensed television, do we have any numbers as to
11 information, what it is they are licensing in television?

12 A In television, I believe they license the syncro-
13 nization right and the performing right. As to numbers, I
14 just don't know what their collections are in local television.

15 Q Is it your thought that the tribunal ought to
16 consider those numbers in its conclusion here? What are you
17 recommending?

18 A I recommend that the tribunal get total amounts
19 paid to SESAC, BMI and ASCAP and think of the relationship
20 among those numbers for 1978.

21 Q Dr. Fagan, I have one other subject I want to
22 turn to briefly.

23 There have been, as you may recall, some talk
24 about unclaimed shares. I believe you were in the room when
25 I referred to the fact that there are instances in which

1 particularly for older songs, one of the writers may belong
2 deceased with no known survivor or estate that can be located.
3 The writer may never have been a member of ASCAP.

4 I told the tribunal that those works were in the
5 ASCAP repertory and that the share that would have been paid
6 to the missing writer interest, let's say, a compositionner
7 interest with a composer, author and publisher being the
8 three interested parties.

9 If the composer were not found, his 25 percent
10 interest in the performance let's say of the work would not
11 be shared by the co-writer and publisher but rather would go
12 into the general pot to enrich the share of all others.

13 Do you remember that?

14 A Yes, I do.

15 Q Can you tell us -- first those works are
16 claimed are they not?

17 A Yes, they are.

18 Q They are claimed as part of the ASCAP repertory
19 even though not all of the interested writers are present?

20 A That is correct.

21 Q Do you know if there is a significant amount of
22 money is involved in such works?

23 A I am sure there is not. It is very small. The
24 works may be large, but the amount of money involved would be
25 small.

1 MR. KORMAN: I have no further questions.

2 May I consult for a moment before I say that.

3 Hold that statement.

4 CHAIRMAN BURG: All right.

5 MR. KORMAN: We are finished with Dr. Fagan for
6 the moment.

7 CHAIRMAN BURG: The chair would like to announce
8 at this point that cross-examination will be limited to counsel
9 of the same class with the exception of the unclaimed shares
10 issue and then other counsel may cross-examine on that
11 particular issue.

12 MR. KORMAN: May I note for the record our
13 direct case has taken 50 minutes. In view of the time arrange-
14 ments we had discussed informally.

15 MR. DUNCAN: Your Honor, may we have five minutes.
16 It well may be we will not cross at all.

17 CHAIRMAN BURG: Of course. We will recess.

18 (A five-minute recess was taken.)
19
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1 CHAIRMAN BURG: Mr. Brennan, do you have any
2 questions of this witness?

3 COMMISSIONER GARCIA: Dr. Fagan, in looking at
4 Exhibit 1A and Exhibit 1B--

5 THE WITNESS: The final report?

6 COMMISSIONER GARCIA: Yes, for ASCAP and BMI.

7 THE WITNESS: Right.

8 COMMISSIONER GARCIA: In ASCAP, in Arthur Young's
9 opinion, opinion, ASCAP, I noted where it takes on a modified
10 cash basis. If the statements were comparable, both BMI and
11 ASCAP, would the 114 million change significantly?

12 THE WITNESS: What?

13 If the period are comparable?

14 COMMISSIONER GARCIA: No. The accounting. You are
15 on a modified cash basis. BMI is on strictly the accrual
16 basis.

17 THE WITNESS: I don't think so, Commissioner.
18 Frankly, within one year, you could have changed being on a
19 cash or accrual basis. We looked at it through a five-year
20 period to see if there would be new changes. The longer the
21 period, the smaller the difference on the two different methods.
22 We did look at it. We don't believe it would make a signifi-
23 cant difference.

24 COMMISSIONER GARCIA: You took that into considera-
25 tion in your computation.

THE WITNESS: It did not figure that into the com-
putation at all. We looked to a longer period to make sure
there were not aberrations in cash basis to accrual basis which
would give a result out of line with the other years.

1 COMMISSIONER GARCIA: Also, Mr. Fagan, you mentioned
2 earlier, the public broadcasting, the 50,000 for SESAC and
3 250,000 for BMI.

4 THE WITNESS: Yes.

5 COMMISSIONER GARCIA: Wasn't the BMI tied into
6 the amount that ASCAP received?

7 THE WITNESS: It was for subsequent years tied in
8 in respect to particular performances. 1978, as I recall it,
9 was fixed. '79 was subsequent to an adjustment payable I be-
lieve in 1980. I think in November of '80.

10 I have not heard and I don't know whether any ad-
11 justment has been made for 1979.

12 COMMISSIONER GARCIA: Do you recall what that ad-
13 justment would be?

14 THE WITNESS: Yes. It was an adjustment to be made
15 as certain kinds of performances change. BMI performances
16 change relative to ASCAP performances. It excluded certain
17 kinds of music. It weighed features as one and background as
one fraction. I don't remember the particular fraction.

18 CHAIRMAN BURG: Pending Commissioner Coulter's
19 return, Mr. Duncan.

20 MR. DUNCAN: We have no questions.

21 CROSS-EXAMINATION BY COUNSEL FOR SESAC

22 BY MR. CIANCIMINO:

23 Q Dr. Fagan, I have a couple of questions.

24 In your direct testimony, Doctor, you stated that
25 to your knowledge SESAC licenses local television rights and
includes in that license both performance and synchronization
rights. Is that what you testified to?

1 A That was my understanding. Yes.

2 Q Can you tell us what the basis of your understand-
3 ing was?

4 A Your statements and the public broadcasting hearings.

5 Q Did that involve local television licensing as the
6 type of licensing that you do through the licensing that was
7 introduced here today?

8 A No. It involved local, public broadcasting per-
9 formances as well as network performances. My understanding
10 was that your statement before that hearing was that it
11 included synchronization rights.

12 Q Was it your understanding that my statement before
13 that hearing was limited to the licensing of PBS?

14 A It was my understanding that your licenses covered
15 all uses.

16 Q With PBS.

17 A And affiliated stations.

18 Q If I were to show you a local television license
19 which I can file with the commission as part of our own
20 orientation proceeding and was used by SESAC and television
21 licenses station that does not include, would that change
22 your mind?

23 A Yes, it would.

24 Q You refer to the survey, the inhouse survey so-
25 called that ASCAP does and giving the Tribunal figures, you
26 testified that these figures do not include public domain
27 work; is that correct?

28 A That is correct.

29 Q Who determines at ASCAP whether work is public

1 domain?

2 A It would be the index department coupled with the
3 cue sheets as you know. Many of these programs are cue sheets.
4 If it is a copyrighted arrangement, it should be noted on the
5 cue sheet that it is a copyrighted arrangement.

6 Q Have you ever seen these cue sheets changed either
7 to indicate that sign thought to be PBS not or sign thought to
8 be ASCAP is not.

9 A Yes.

10 Q Does this happen quite often?

11 A I don't know what you mean by quite often. It
12 happens.

13 Q Now, if something is indicated on a cue sheet as
14 public domain, does ASCAP make an investigation as to the
15 status of that piece of music to confirm whether or not it is
16 public domain?

17 A It depends upon the situation. If a work is on a
18 film, let's say, and comes in as public domain, their would be
19 no check on that. I don't know where you would go to check
20 on that.

21 Q That's what I'm asking.

22 A The other way would be where information came in as
23 public domain and a member claimed that it was their arrange-
24 ment. Then, you would investigate.

25 Q Also, Dr. Fagan, you suggested to the Tribunal are
regarded to percentage granted to SESAC, this be done more or
less in the same manner that you suggested it be done with
regard to ASCAP and BMI.

Namely, a percentage of the current revenues

1 received by the negotiations; is that correct?

2 A A percentage of the revenues received in 1978.

3 Q ASCAP and BMI license local television are the
4 basis of the percentage of that station's income; is that
5 income after certain deductions?

6 A Right.

7 Q Do you know the basis upon which SESAC licenses
8 those stations?

9 A I don't think it is on the basis of information.
10 I think it is on market size and other factors as well. I'm
11 not that conversant with them.

12 Q You are accurate in that respect. It is not based
13 on income. May I pose a hypothetical to you?

14 If over the course of the last ten years or twenty
15 years, the fact is used by ASCAP and BMI, namely, a percentage
16 of income, have been much kinder to ASCAP and BMI to the fact
17 other used by SESAC, namely, market population, et cetera,
18 would that not affect the suggestions that you have made to
19 the Tribunal in as much as the gap in income would not neces-
20 sarily reflect the performance value of the repertory but
21 rather than spiraling income of certain radio and television
22 stations as opposed to a fixed fee type situation than SESAC?

23 A That's not my understanding that SESAC fees are
24 fixed forever. It is my understanding that they change from
25 time to time. We are in negotiations with the industry.

Q They are based on determinant that cause a fixed
annual fee. If during the course of the year the station's
income doubles, the fee to SESAC would remain the same?

A Yes.

1 Q Would that not affect the outcome of your suggestion
2 to the Tribunal?

3 A I don't think so, really. It seems to me you are
4 selling the SESAC repertory to a group of licenses.

5 Are you getting what you are able to work out as a
6 fair deal for you?

7 Whatever the structure of that deal. To say that
8 it is so structured so it does not change year to year and
9 month to month, I don't think it would have a bearing.

10 MR. CIANCIMINO: No further questions.

11 CHAIRMAN BURG: Mr. Korman..

12 REDIRECT EXAMINATION BY COUNSEL FOR ASCAP

13 BY MR. KORMAN:

14 Q You referred to having looked back through time a
15 bit in reference to Commissioner Garcia's questions. I offer
16 as ASCAP 's Exhibit 6 a schedule headed, "ASCAP Share of ASCAP
17 Plus BMI License Fee Revenues in Thousands, 1974-1979."

18 Was this, Dr. Fagan, is this schedule reflective of
19 the inquiry you told Commissioner Garcia was made?

20 A Yes, it is.

21 Q Could you comment briefly on it?

22 A Well, what we have done here is to take for the
23 period beginning in '74 and do the same thing that we did for
24 1978 to see if there were big variations year to year. This
25 is based on actually anything.

Commissioner Garcia asked about cash and accural.
I think this would indicate that there is not that big an
impact.

MR. KORMAN: I have no further questions. I move
the admission.

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1 CHAIRMAN BURG: It has been admitted.

2 [ASCAP Exhibit 6 was marked for identification and
3 received in evidence.]

4 MR. KORMAN: I have no further questions. I have
5 no further witnesses.

6 CHAIRMAN BURG: Thank you, Dr. Fagan.

7 Mr. Duncan, you may proceed.

8 MR. DUNCAN: I am Mr. Duncan of Peabody, Rivlin,
9 Lambert, and Meyers, representing Broadcasting Music, Inc.
10 With me are Michael Fabor and Joel Winik who previously
11 appeared before the commission as has Mr. Chapin, the General
12 Counsel of BMI. I would like to call as our first

13 I would like to call as our first witness Mr. Edward
14 Cramer.

15 CHAIRMAN BURG: Mr. Cramer, have you been sworn
16 before?

17 MR. CRAMER: I don't think so. I appeared at the
18 outset but I was not a sworn statement.

19 Whereupon,

20 EDWARD CRAMER,

21 was called as a witness and, being first duly sworn in the
22 above cause, testified on his oath as follows:

23 DIRECT EXAMINATION BY COUNSEL FOR BMI

24 BY MR. DUNCAN:

25 Q For the record, would you state your name?

A Edward M. Cramer, C-r-a-m-e-r.

Q What is your position or connection with broadcast
24 music?

A President and Chief Executive Officer.

1 Q How long have you occupied that position?

2 A Since March 31, 1968.

3 Q Prior to joining BMI, what was your occupation?

4 A A lawyer.

5 Q What was the nature of your practice?

6 A Initially after I taught for a short time, I joined
7 a law firm with you and we represented among other clients BMI.

8 The majority of my practice was in the entertainment field.
9 After seven or eight years, I left and formed my own firm and
10 became special counsel to BMI and remained in that capacity
11 until I became president of the company.

12 I have had association of 29 years with the company.

13 Q Do you have a prepared statement, Mr. Cramer?

14 A Yes.

15 Q Is it a 13-page document entitled, "Statement of
16 Broadcast Music, Inc."?

17 A Yes.

18 Q Is it signed by you?

19 A Yes.

20 Q You adopt it as your statement today.

21 A I do.

22 MR. KORMAN: Excuse me a moment.

23 BY MR. KORMAN:

24 Now, this is referred to, Madam Chairman, as a 13
25 page statement, that is to considering Appendices A through G,
26 which I would say are at least a couple of pounds. In view of
27 the time limitations, I would like to ask for a one minute
28 recess to consider whether I will make a motion.

29 CHAIRMAN BURG: We will grant a one minute recess.

1 [A one minute recess was taken.]

2 MR. KORMAN: Madam Chairman, obviously in a minute
3 I have not had an opportunity to absorb all of this information.
4 I assume when Mr. Cramer was asked if he adopted the statement,
5 he is being asked as well as to the 13 pages to appendices.
6 Some of these are clearly objectionable even at a quick glance.

7 I suggest that we proceed and hear Mr. Cramer's
8 testimony. I would like to reserve the right to object to
9 such portions of this material as I believe should not be
10 admitted.

11 CHAIRMAN BURG: Certainly.

12 MR. DUNCAN: Your Honor, I have not offered any-
13 thing into evidence, yet. I asked Mr. Cramer if he prepared
14 the statement. He answered, "Yes." Obviously, at the time,
15 if and when I move it into evidence, I will properly identify
16 them.

17 CHAIRMAN BURG: The chair suggested, too, is that
18 you proceed.

19 BY MR. DUNCAN:

20 Q Would you read paragraph--or summarize--the state-
21 ment that you have prepared?

22 A Yes. Yes. A brief lead note on background. BMI
23 began operations in 1940 as a competitive source for music
24 licensing. Prior to that time, there were fewer than 150
25 music publishers and slightly more than 1,000 songwriters
eligible to share the performance rights income. There were
many more writers and publishers in the country but it was
BMI who opened up the market to these composites and publishers.

We fostered the "democratization of American music"
by providing a meaningful opportunity for an economic incentive

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1 to compositors and publishers who were to establish the founda-
2 tions of today's rhythm and blues, country, Latin, jazz, and
3 rock'n roll music; music that has gained the greatest popu-
4 larity in history.

5 I might add I saw a program broadcasted over the
6 service All You Need Is Love and the episode on Ten Pan Alley.
7 The authors pretty much repeat what I said here.

8 Today, starting from zero beginning BMI representa-
9 tives approximately 60,000 affiliated writers and publishers.
10 It's repertory include over one million compositions. Measure
11 had by the performance of its music. BMI's open door policy
12 has made it the world's largest music organization.

13 In this proceeding, we are involved with the distri-
14 bution of cable income particularly music. We are arguing
15 over what share of the four and a half percent fee of the
16 CATV copyright fees we are to get.

17 As I understand it, claims have been filed by BMI,
18 ASCAP and SESAC. Our claims are set forth in an appendix,
19 in filings dated July '78 and July '79. It is our contention
20 that BMI should receive 47 and a half percent, ASCAP, 47 and
21 a half percent and SESAC, in the reserve, should receive five
22 percent.

23 It was not until the hearing this morning that I
24 learned what ASCAP's request was. I still don't know what
25 SESAC's request is. In the July 25 notice in phase one of
26 this proceeding, the Tribunal outlined the combination of
27 factors applicable to it's distribution determination.

28 In the current and subsequent cable distribution
29 proceedings, the Tribunal stated the primary factor to be

1 considered are the harm caused to the copyright owners by
2 secondary transmission by copyright works by cable systems,
3 benefit derived by cable system from secondary transmission
4 of certain copyright works and through the marketplace value
5 of the works transmitted.

6 In addition the Tribunal offered the following
7 secondary factors, one, the quality of the copyright program-
8 ming material and, two, time related considerations.

9 It is our view that the factors relating to benefit
10 and quality do not appear to constitute the most appropriate
11 pay size for distinguishing between the repertories of the
12 performing rights societies if phase two notwithstanding their
13 relevancy in phase one.

14 Nevertheless, in the overall value or popularity
15 in music compositions in television motion pictures and other
16 television programming properly reflected such factors then
17 a sustaining argument can be made that BMI's repertoire pro-
18 vides greater benefit and quality to cable television users.

19 Similarly, BMI's leadership role in prominent
20 featured television roles and films supported, unless adequately
21 compensated, this use by cable television would cause greater
22 detriment and harm and to other BMI users and others.

23 First, with respect to quality, the BMI repertory
24 is a cross section of artistic genius. For example, William
25 Schuman, the first Pulitzer Prize winner in music, in the
classical field to Jerry Bock and Sheldon Harnich, "Fiddler on
the Roof," John Kander and Fred Ebb, "Cabaret", or Charlie
Small, "The Wiz" in Broadway; or such contemporary trend-
setters as John Williams, "Star Wars," and currently the new

1 conductor of the "Boston Pops"; or Kenny Gamble and Leon Huff
2 in rhythm and blues; or Charlie Daniels, Kris Kristofferson
3 or Willie Nelson in the country field; or the Statler Brothers
4 in gospel. These are illustrative of those we represent.

5 BMI includes universally recognized giants and we
6 are prepared to submit a list of those as an appendix. We
7 believe the marketplace considerations of value constitute
8 a more appropriate basis for comparison. Such considerations
9 are described in detail in a moment.

10 In addition to time related considerations, BMI
11 conducted a survey addressing actual music use which supports
12 the conclusion set out in our claim. This survey shows that
13 BMI has approximately 46 percent of the music used on local
14 television.

15 MR. KORMAN: Excuse me a moment. I missed what you
16 said before you gave the conclusion. Did you say you commis-
17 sioned the survey?

18 THE WITNESS: Conducted a survey.

19 MR. KORMAN: Do you have a copy of it before you as
20 to its results?

21 I think the Tribunal's rules require we have an
22 opportunity to see it before reference is made to it.

23 MR. DUNCAN: I'm not sure the rules require that.
24 If Mr. Korman waits for the next sentence, I believe it will
25 be-- We will present a witness to introduce and support the
survey.

MR. KORMAN: May I have an answer to the survey?
It was a special survey; was it?

THE WITNESS: Yes. We produced a survey for this

1 purpose.

2 MR. KORMAN: Of performances in the year 1978.

3 THE WITNESS: Yes.

4 MR. KORMAN: I did not hear the answer. If it is
5 not for 1978, Madam Chairman, I am going to object to any
6 testimony.

7 MR. DUNCAN: The witness said it was for the year
8 1978.

9 CHAIRMAN BURG: He said that.

10 MR. KORMAN: May I see the survey while in written
11 form?

12 MR. DUNCAN: He is alluding to it in passing. He
13 is merely informing the Tribunal that there is a survey. It
14 is coming next.

15 THE WITNESS: As far as our market share, quite
16 simply stated, BMI dominates the contemporary music scene.
17 That is a flat statement. In the last decade, most popular
18 music has been written by BMI affiliated composers. Starting
19 with the year 1972, we have compiled list of the hit charts
20 appearing in all the leading trade publications, Variety,
21 Billboard, Record World, and Cash Box. The composite of
22 these polls for each of the years show consistently over 60
23 percent of the hits.

24 Now that is on the hit charts, now we come to per-
25 formances, such creative leaders as Paul Simon, the Bee Gees,
26 Paul Anka, and last year's big winner, Bernard Edwards and
27 Mr. Rodgers. I noted in this week's trade Diana Ross at the
28 top of the charts. We dominate the AM radio market.

29 Far in excess of fifty percent of the performances

1 on AM are licensed by BMI. Our share of the FM market is
2 almost fifty percent.

3 The music that people want to hear is the music
4 that enhances today's most popular television and film produc-
5 tions. BMI has definitely opened a leading position in
6 licensing music for the most widely distributed films: Films
7 which eventually become television ratings. In 1972, for
8 example, 17 of the top 25 leading films featured prominently
9 themes, scores, and songs by BMI affiliated that record in '72
of dominance in the field of motion pictures continues today.

10 Variety, 1979, carried a list of the 30 all time box
11 office film champions. Twenty-three of the thirty contained
12 BMI licensed music. Similarly, season after season, most of
13 the music created for television has been licensed by BMI.
14 Again, starting in '69, 70 season themes and scores for 45
15 of the 60 television programs were offered by BMI affiliated
16 composers and that record continues today. We have specific
17 details to support all of these.

18 These prime time television presentations features
19 BMI have formed a basis for syndicated T.V. programming during
20 '78 on a non-network basis by television stations and cable
21 systems. I started out by saying we were founded after nearly
22 a forty-year period in which ASCAP dominated the performing
23 rights industry.

24 As a newcomer, we did not have bargaining power.
25 We executed earlier licenses with broadcasters at rates con-
siderably lower than those established by BMI.

CHAIRMAN BURG: I think you mean by ASCAP.

THE WITNESS: Growth of the popularity of the music

1 in the last three decades, it is the leader and its arrange-
2 ments more clearly affect that fact. Our license fees have
3 gradually increased in response to our dramatically increased
4 market share.

5 As late as '68, however, there was a wide disparity
6 between broadcast license fees paid to BMI and ASCAP. I joined
7 BMI in '68. Immediately I instituted a program aimed at re-
8 negotiating license contracts to more accurately reflect actual
9 market conditions. My first efforts were in radio.

10 In 1968, ASCAP received two percent of the adjusted
11 gross and BMI, 1.09. Over the years, through a series of
12 account renegotiations, radio rates today have been brought
13 into virtually parity.

14 Today, BMI receives 1.7 of adjusted gross and
15 ASCAP 1.725. I point out radio negotiations because they are
16 evidence of a philosophy underlying our contract negotiations.
17 It is not correct to say that we always follow the ASCAP at
18 all. In the last radio, once we were first, we, BMI, recog-
19 nized the licenses would not easily bear the burden of a
20 single big incremental rate to reflect our market increases.

21 Therefore, we attempted to raise our rates gradually
22 until the license fees actually reflect the market share. The
23 same considerations are applicable to local television license
24 fees.

25 Prior to 1972, BMI was receiving approximately
31 percent of the total fees paid to ASCAP and BMI for music
usage. The difference in that year did not reflect BMI's
then current market share. In the negotiations leading to the

1 '72 agreement which took several years, television broadcasters
2 insisted that the contract terms, the operational terms, of the
3 BMI contract be the same as those contained in the ASCAP agree-
4 ment.

5 I took the position that I found the then new ASCAP
6 agreement, which they insisted upon, to be totally unworkable.
7 You received in evidence this morning a printed copy of that
8 contract. Along with the contract, there is an explanation
9 book which is about three times the size of the contract. I
10 found it unworkable. They insisted upon it. So, we compromised.

11 They insisted that we adopt the contract. We agreed
12 that for the initial terms of the contract, they would pay us
13 58 percent of the ASCAP payment. In effect, this payment was
14 approximately 37 percent of the total fees paid to ASCAP and
15 BMI for music use instead of approximately 31 or a 18 percent
16 increase over the prior rates.

17 Again, the figure in that year was not truly repre-
18 sentative of BMI's market share, but it was a substantial
19 increase. It was acceptable to us as a step in the goal of a
20 more properly structured license fees just as we did in radio.

21 Now, the gap between BMI and ASCAP's fees in tele-
22 vision licensing also reflected an additional factor not present
23 in radio. Until the early 1960s, BMI music was excluded vir-
24 tually excluded. There are minor exceptions from films and
25 television programs produced by motion picture companies. The
only one I can recall offhand was *Bambie*. We had a few songs
in that. We put out buttons that said BMI and filmed in the
words to say *Bambie*. I think that was our big film prior to
the '60s.

1 When we began negotiations for the '72 contract,
2 the primarily source of non-television programming were the
3 productions of pre-1960 vintage. Those programs were
4 dominated by ASCAP music, but this situation has changed
5 dramatically in the decade of the '70s and the distribution
6 that you make in 1980 for 1978 in my view has to reflect the
7 current programming, environment, not the environment in the
8 late '60s, early '70s, when the contract was negotiated. The
9 period since BMI is predicated that it would play a leading
10 role in motion picture and television service during the '70s
11 was correct, but the television market in the '70s underwent
12 a dramatic change.

13 During the '50s and into the '60s, and maybe early
14 '70s, there was a lengthy time gap between a motion picture
15 film to theatre and subsequently availability to television.
16 In more recent years, the more gap between the first run of
17 the film and the television appearance has narrowed. ABC
18 announced for the coming season, Jaws, Norma Rae, Saturday
19 Night Fever, all BMI licensed entity.

20 This gap has narrowed. It is not uncommon for a
21 television motion picture to reach television in a year or two.
22 Generally only local syndication was made for television. The
23 episodes of major series occurred simultaneously with new
24 episodes. For example, there are new episodes of Laverne and
25 Shirley and older ones are in syndication at the same time.

 While virtually no BMI work got into television
until the '80s, a great amount now is contained in televised
motion pictures and series then at the time, the 1972 con-
tract was negotiated. While renegotiations of the '72 local

1 television contracts were held in abeyance because of
2 pending litigation, television representatives have taken the
3 position that they were paying, while they were paying both
4 BMI and ASCAP too much, they alleged BMI was not receiving
5 its fair share.

6 With these considerations in mind, I suggest it
7 would be improper to base an unfair, to base BMI's share on
8 current cable royalties on agreements in '72 which represented
9 a compromise and we are based on data from the '60s.

10 Now, another example of the current marketplace
11 conditions and trends is found in the negotiations leading
12 to the establishment of the public broadcasting payments for
13 music use. Prior to any proceeding before this Tribunal, a
14 compromise was sought between the public broadcaster service,
15 the performance rights organizations and others.

16 A tentative agreement was reached under which these
17 rights organizations would receive collectively 300,000 from
18 PBS for the first two years and 400,000 for the next two years.

19 MR. KORMAN: I object. These are settlements
20 which were not to be revealed. These are settlement discus-
21 sions which I think Mr. Lattman brought forward in part.

22 I objected at that time. Whatever was agreed to
23 for settlement purposes was under long established rule of
24 law does not bear repeating. I am shocked and amazed that
25 Mr. Cramer would refer to these figures.

MR. DUNCAN: Madam Chairman, as I think Mr. Korman
well knows, there is more to what the witness is testifying
to than mere settlement.

BY MR. DUNCAN:

1 Q State why these are not settlement negotiations?

2 A These were placed in the record before the Congress.
3 There is nothing new in this. This story has been told many,
4 many times and is a matter of record. They were not really
5 settlement negotiations.

6 The proposed split, whichever body agreed to except
7 BMI, except BMI, was 90,000 for BMI. For performing rights
8 for 90,000 for ASCAP and 90,000 for Harry Fox and SESAC for
9 performing rights and synchronization was 30,000.

10 As ASCAP agreed, we did not. In order to avoid this
11 proceeding before the Tribunal and before rates were fixed,
12 BMI then ended the negotiated agreement with PBS under which
13 PBS paid us \$250,000 for the year 1978 as was testified to
14 here this morning.

15 I had no idea what the Tribunal would do at the
16 time. I decided to accept the 278 percent increase over what
17 was previously agreed upon. Maybe I was right. Maybe I was
18 wrong. That is what I took.

19 On the other hand, ASCAP went before the Tribunal
20 and got one million, two hundred and fifty thousand dollars,
21 but under our agreement with PBS, there are fluctuating fees.
22 For the year 1979, BMI will be collecting more than \$500,000
23 under its agreement reflecting a one hundred percent increase
24 in '78 payment.

25 BMI, in the contemporary music, is recognized in
respect to jukebox collections. In '78, ASCAP proposed a
stipulation whereby BMI and ASCAP would share equal amounts
of the royalty funds. It is understood the larger portion
of music played on jukeboxes is BMI repertory. We accepted

1 the stipulation which is a part of the record.

2 I submit the foregoing provides clear support for
3 the proposition that from a position of relative obscurity in
4 television in the early '80s, BMI has established the position
5 of parity with the other major performing rights organizations.
6 I was pleased to note the other day I received a communication
7 from the British Performing Rights Society. It announced
8 to its members for the first time in its history it received
9 more money from BMI than ASCAP and the payments from BMI to
10 the British Society were the largest in the world.

11 MR. KORMAN: What year?

12 THE WITNESS: 1978.

13 MR. KORMAN: Do you have the letter here?

14 THE WITNESS: It was in the general distribution
15 from PBS for '78.

16 MR. KORMAN: If it is not here, I move it has been
17 stricken.

18 MR. DUNCAN: It has not been offered.

19 MR. KORMAN: I move the testimony be stricken.

20 MR. DUNCAN: Under the rules of the Tribunal, any
21 evidence is admissible as relative and non-cumulative.

22 The witness testified to a letter that has been
23 widely distributed.

24 MR. KORMAN: I move for it to be stricken. The
25 basis on which it was paid by BMI has nothing to do with this
Tribunal. I recognize this is going to be for the Tribunal
to value, two repertories in one day of hearing no matter
how poetic we may be. I suggest that we stick to the realities
of the marketplace.

1 CHAIRMAN BURG: Mr. Korman, I will overrule your
2 objection.

3 THE WITNESS: It is our position to base any
4 allegations today on data that is no longer relevant to broad-
5 casting and cable television practices who ignore the realities
6 of the modern music marketplace which is one criteria.

7 While proof offered do not necessarily lend them-
8 selves to testing procedures in BMI, view the record supports
9 clearly parity treatment for the major music organizations.
10 It is that equality of treatment that I request.

11 MR. DUNCAN: With the Tribunal's permission, I
12 would like to introduce these exhibits and offer the packet.
13 Exhibit A referred to on page two of the statement are the
14 filings with the commission. I think there is not a problem
15 with respect to them.

16 Exhibit B is the earlier statement.

17 MR. KORMAN: May we take them one at a time? I
18 have no objection to Appendix A.

19 CHAIRMAN BURG: He has moved to Exhibit B.

20 MR. DUNCAN: Exhibit B is also on file and there
21 would be no objection to that. Exhibit C is alluded to on page
22 five.

23 Mr. Cramer, I would ask you to state what it is
24 and how it was compiled?

25 THE WITNESS: Appendix C or Exhibit C is a sampling
afterwards, one by BMI affiliates over the years beginning in
1972. These are done in a normal course of business by our
public relations department in collaboration of other depart-
ments of the company. They are normally kept on file and are

1 available to me at all times. I have seen them in the past,
2 in the years that they were compiled.

3 BY MR. DUNCAN:

4 Q These were based on BMI records.

5 A That's correct.

6 MR. KORMAN: I object to the admission of that.

7 MR. DUNCAN: On what grounds?

8 MR. KORMAN: The words BMI award, BMI songs may
9 have received from '72 have absolutely no bearing. If we had
10 a list of all awards of ASCAP and BMI for each year, I would
11 have no objection. I think, frankly, the songs that won awards
12 in '72 are irrelevant. We have no notification as to how many
13 awards were given that year for music. I notice that there is
14 no list of Oscars for '72. I assume ASCAP won, as it nor-
15 mally does, the Oscar for each year.

16 THE WITNESS: It did not win the Oscar this year and
17 I will go back and get it for you.

18 MR. KORMAN: This exhibit has no relevance before
19 the Tribunal possibly with the exception of '78. I see BMI
20 won an Oscar that year. I would that exhibit, if admitted, to
21 be putting in ASCAP's awards for that year.

22 CHAIRMAN BURG: Mr. Korman, I am going to overrule
23 your objection. We will decide what weight to give these
24 awards.

25 MR. DUNCAN: Thank you, Your Honor.

BY MR. DUNCAN:

Q Turning to Appendix D, Mr. Cramer referred to page
six of your testimony, would you identify that?

A Yes.

1 That is BMI share of the radio market for the
2 years '72 and '78 and the first quarter of '79.

3 MR. KORMAN: Objection.

4 THE WITNESS: Those are compiled routinely and
5 quarterly and recapped for me annually.

6 MR. KORMAN: I object on two grounds at least.

7 First, the years involved; '72. Second, I have
8 no idea how these numbers were computed. Mr. Cramer has not
9 told us how they were computed. I want to know what share of
10 radio market purports to be. He is obviously not talking about
11 radio fees but performances I suppose. As far as I see, they
12 are simply numbers.

13 I would ask for a ruling. Radio ought not to come
14 into this at all. We are talking about cable television.

15 MR. DUNCAN: Your Honor, the thrust of ASCAP's
16 proposition was that the award in this proceeding should be
17 based on license fees, franchise fees, received by ASCAP and
18 received by BMI. The thrust of our proposition is that that
19 is not a fair and accurate measure due to the changes which
20 have occurred since the late '60s and between that time in
21 1978, the year in question and indeed to the present time.

22 What we want to show here is in television radio
23 in terms of awards that BMI has achieved sustaining parity
24 with ASCAP by these various measures and criteria. I don't
25 think that Mr. Korman's objection goes to admissibility.
He is able to cross-examine on these.

 I would ask they be admitted on the grounds I've
stated. We are showing the role BMI plays in the total music
field. For that purpose, radio is, of course, relevant.

1 MR. KORMAN: I renew the objection. Radio, cer-
2 tainly these earlier years are not relevant. We have no indi-
3 cation as to how the numbers were derived. We have a sheet
4 of paper. Mr. Duncan has mischaracterized our proposition.

5 We said the Tribunal ought to look to what was
6 paid in television.

7 COMMISSIONER BRENNAN: I missed your statement
8 about irrelevance to radio.

9 MR. KORMAN: There was nothing in the record the
10 Tribunal indicated on which the Tribunal could base a portion
11 of royalties to rating.

12 COMMISSIONER BRENNAN: How is that irrelevant to the
13 pending matter?

14 MR. KORMAN: The Tribunal's decision statement,
15 "The Tribunal finds that the record made in this proceeding
16 provides no basis for allocation of royalty fees to com-
17 mercial radio."

18 Perhaps Commissioner Brennan would like to state
19 the reasons for that conclusion. In any event, as I under-
20 stood it, what has been said there is no data with respect
21 to distant signal as the radios and thereof no way have a
22 portioning amount. Perhaps there is some other meaning. In
23 any event, it seems to me, as I read the decision, radio with-
24 out any showing as to which radio stations has been carried
25 as distant signals is irrelevant.

COMMISSIONER BRENNAN: I don't see the relevance
to that current point.

CHAIRMAN BURG: I will rule. You are overruled.
You may cross-examine.

1 MR. DUNCAN: Thank you.

2 BY MR. DUNCAN:

3 Q Directing your attention to Exhibit E on page seven
4 of your exhibit, would you describe what it is?

5 A Yes. This is a list of leading films for the
6 year in question which contained BMI music. This is compiled
7 routinely at BMI, retained there and kept up to date. A list
8 of the films licensed by BMI.

9 MR. KORMAN: Are some of these-- I will object.
10 It seems these films contain music in the ASCAP repertory as
11 we-- To have an exhibit headed "Films" containing BMI music
12 where the witnesses know it contains ASCAP music is certainly
13 misleading.

14 I object. That's unless he shows which half ASCAP
15 and how much is there.

16 MR. DUNCAN: That's a perfect question for cross-
17 examination.

18 CHAIRMAN BURG: Mr. Korman, on that basis, I am
19 going to overrule.

20 BY MR. DUNCAN:

21 Q Looking at Exhibit F, Mr. Cramer referred to on
22 page seven, would you state what that is and what it purports
23 to show and how it is compiled?

24 A Yes. Again, every year, we do an analysis of the
25 prime time programming. We see which has BMI music and we
make such a list. That is what we have done here. It is done
every year, ever season.

Q Based on company records.

A Yes.

1 Q You are familiar with the contents in general.

2 A Yes, I am indeed.

3 MR. KORMAN: I object on the grounds of relevancy.
4 The list goes back to the years '69 and '70. As to the year
5 '78, since it is on television at that time, it seems that is
6 irrelevant, too. This is all network programming. The whole
7 thing is irrelevant.

8 MR. DUNCAN: Relevancy is in the eyes of the be-
9 holder. ASCAP Exhibit 6 found it perfectly relevant to go
10 back to '74 to show what the breakdown in license fees was.

11 COMMISSIONER GARCIA: Exhibit C was an exact
12 answer to my question.

13 MR. DUNCAN: That's correct, but it was admitted
14 into evidence. We are showing the changes that have come
15 about between the early '70s and 1978 as affording a different
16 basis for making a distribution between the two claimants. I
17 think it can hardly be said it is irrelevant because it does
18 not cut the way Mr. Korman wants. It shows a trend.

19 CHAIRMAN BURG: The final relevancy, Mr. Korman
20 and Mr. Duncan, will be determined by the Tribunal. I will
21 overrule and suggest that you get at it.

22 BY MR. DUNCAN:

23 Q Appendix G is referred to on page 13. That is a
24 letter from Mr. Korman to Madam Chairman; counsel relating to
25 jukeboxes.

MR. KORMAN: I object to that. It is Mr. Korman.

MR. DUNCAN: It is both parties. With that, I
move the admission of Mr. Cramer's statement as submitted and
also the attached appendices.

1 CHAIRMAN BURG: What number are you going to give
2 this?

3 MR. DUNCAN: Appendix a is Exhibit 1, BMI's
4 Exhibit 1.

5 CHAIRMAN BURG: Can't we include the whole document?

6 MR. DUNCAN: That's fine.

7 CHAIRMAN BURG: I have Exhibit 1.

8 [BMI Exhibit 1 was marked for identification and
9 received in evidence.]

10 COMMISSIONER COULTER: Mr. Cramer, you have stressed
11 that you feel the market conditions are the reasons for your
12 getting 47.5 share. Could you justify again why the market
13 conditions are reflected in the revenues of ASCAP as again
14 BMI.

15 THE WITNESS: In terms of the local television
16 revenues, those were set in a contract negotiated nearly ten
17 years ago.

18 COMMISSIONER COULTER: That has not been changed
19 since?

20 THE WITNESS: For reasons set forth in my earlier
21 testimony, that has not been changed. It did represent, at
22 the time, an approximate 18 percent increase which following
23 the pattern used in other areas, we anticipated gradual eleva-
24 tion of that rate over time exactly as we did in radio and in
25 other areas we were at parity.

In the early '70s, when that was negotiated, it
represented a big jump forward as much as we thought we were
entitled to. Unfortunately, we are frozen to that right now.

1 If we had free and open negotiations with television, which we
2 don't because of litigation pending, it might more accurately
3 reflect. If the contract were negotiated today, clearly in
4 any view that would be a sound position, but that is not what
5 we are dealing with. We are dealing with a contract negotiated
6 nearly ten years ago and reflected stale data at the time.

7 There has been enormous growth during that period.
8 To base payment to us on usage on that old data is just unfair
9 to us.

10 COMMISSIONER COULTER: You said part of your conten-
11 tion is BMI music and ASCAP music are about equal.

12 THE WITNESS: On local television that's my under-
13 standing. Yes, sir.

14 COMMISSIONER COULTER: You said in general it is
15 about equal.

16 THE WITNESS: No. In radio, the material I sub-
17 mitted to you about radio clearly indicates and I can't be-
18 lieve anyone will dispute our share of the market in AM is
19 substantially higher. We have close to 50 percent. How much
20 of the balance is ASCAP, SESAC and public domain, I don't know.
21 I am sure we don't have much in FM but in music over the radio,
22 we are dominant. The same as I indicated earlier. Motion
23 pictures; your films, just look around.

24 COMMISSIONER COULTER: Is the usage in public
25 broadcasting about equal?

THE WITNESS: No. I don't think so. Not at this
particular time.

COMMISSIONER COULTER: Why would that be different?

THE WITNESS: The programming patterns in public

1 broadcasting are a little different. The gap is narrowing.
2 In one year, we doubled our income, but programming patterns
3 are different. I don't know what it will be next year. The
4 more music used will represent in our view an increase share
5 for us in that market, but it is not quite the same.

6 COMMISSIONER COULTER: What you are able to rene-
7 gotiate freely with public broadcasting is substantially
8 less than what ASCAP gets?

9 In '79, there was a free negotiation. Is the dif-
10 ference between ASCAP and BMI music that great in public
11 broadcasting?

12 THE WITNESS: No, we negotiated the contract with
13 public broadcasting at a time when I had no idea what rates
14 would be fixed for ASCAP. So, I did not negotiate for a rate
15 less than what ASCAP was getting. I knew what we were tendered
16 and what was agreeable; \$90,000. When I could come up with
17 \$250,000 which was 257 percent better, maybe I made a mistake,
18 but I took it at that time.

19 COMMISSIONER COULTER: I am talking about '79.
20 The contract provided for a revision not of the way com-
21 puting additional payments. We don't go back every year and
22 renegotiate that. That was the contract that was initially
23 negotiated and has provision for re-examination every year
24 but not for renegotiation.

25 What is the difference between re-examination and
renegotiation?

THE WITNESS: We can't terminate the contract.
They can't terminate the contract. It is not a new contract
every year. There is a formula in that contract. That

1 contracts continues for five years.

2 COMMISSIONER COULTER: The formula allows for a
3 hundred percent jump.

4 THE WITNESS: You bet. I expect to get a bigger
5 jump.

6 COMMISSIONER COULTER: I don't know. That sounds
7 like renegotiation to me.

8 THE WITNESS: No. That's the formula. I am not
9 renegotiating anything. Nobody sat down with us and says
10 what are you going to pay for 1979. I want a million and you
11 come to 250,000. Instead, a formula is applied. That is how
12 we came up with that figure. What it will be fore 1980,
13 will be from a formula.

14 COMMISSIONER COULTER: Would it be possible for
15 me to have the general terms of that formula?

16 THE WITNESS: Yes. It is on file. I don't know
17 the details in my head.

18 COMMISSIONER COULTER: You don't recall the general
19 terms.

20 THE WITNESS: No, it is a formula you have to
21 apply. I just don't have it committed to memory. It is a
22 rather lengthy formula. It is not like three lines. It is
23 rather extensive. The mathematics are worked out in detail.
24 I don't have it to memory. It is on file. We filed it with
25 the Tribunal when we made the agreement.

COMMISSIONER COULTER: I know it is filed with us,
but are you saying the difference in '79 between \$500,000 and
ASCAP received, 1.3 million, does not reflect the real usage
of the music?

1 THE WITNESS: Not open commercial television.

2 COMMISSIONER COULTER: No. I am talking about
3 public broadcasting.

4 THE WITNESS: No, I won't say that. It may for that
5 year.

6 COMMISSIONER COULTER: The difference between the
7 music of BMI and ASCAP in public broadcasting is that much
8 kind of what it is in commercial broadcasting.

9 THE WITNESS: For that particular year, Dr. Fagan
10 testified. He put the \$250,000 figure for the record. I
11 wanted to clarify that for the record. It was not \$250,000
12 for last year. It was \$500,000 representing a substantial
13 increase.

14 MR. KORMAN: Fagan; it was \$250,498, subsequently
15 adjusted for later years.

16 CHAIRMAN BURG: Sustained.

17 COMMISSIONER COULTER: Thank you.

18 CHAIRMAN BURG: We will recess until 2:00 o'clock.

19 [Whereupon, a recess at 12:20 p.m., until 2:00
20 o'clock, p.m., the same day.]

21

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1 CHAIRMAN BURG: Mr. Korman, are you ready for cross
2 examination?

3 MR. KORMAN: Madame Chairman, we have a problem. We
4 are ready to begin. Unfortunately, there is a good deal of
5 material in the appendices. Some of the questions that I would
6 like to put to Mr. Cramer, I am unable to put to him at this
7 time. I think I would be able to in about an hour. I am won-
8 dering whether it would make sense to ask BMI to put on its
9 second witness now and hold Mr. Cramer in reserve, finish with
10 the second witness who is going to testify as to the survey and
11 then ask for a brief recess. Then we would like to begin and
12 complete the fairly brief examination of Mr. Cramer.

13 CHAIRMAN BURG: Mr. Duncan?

14 MR. DUNCAN: We have no objection.

15 CHAIRMAN BURG: All right. The tribunal has no objec-
16 tions, either. You will call your next witness. Mr. Cramer
17 will be held in abeyance.

18 MR. DUNCAN: This is on the assumption that we will try
19 to finish to day?

20 CHAIRMAN BURG: Indeed.

21 MR. DUNCAN: I would like to call Mr. Alan Smith, please.

22 CHAIRMAN BURG: Mr. Smith, would you remain standing
23 to be sworn.

24 Whereupon,

25 ALAN SMITH

was called as a witness and, having been duly sworn, was examined
and testified as follows:

DIRECT EXAMINATION

BY MR. DUNCAN:

Accurate Reporting Co., Inc.

(202) 726-3801

1 Q For the record, Mr. Smith, would you state your name,
2 please?

3 A Alan H. Smith.

4 Q Where are you employed?

5 A Broadcast Music, Incorporated.

6 Q How long have you been employed there?

7 A A little over four years.

8 Q What is your position and responsibility?

9 A I am vice president of licensing of BMI.

10 Q We have filed in connection with an earlier proceeding
11 a statement of your biography. Would you read that into the
12 record.

13 A I joined BMI in May 1976 as director of special pro-
14 jects. In that capacity I worked on a variety of assignments,
15 including every major area within the country. Prior to joining
16 BMI, I spent nearly 25 years with NBC as a television writer
17 and producer. In the seven years immediately preceding my
18 joining BMI, I was with the NBC news election unit and directed
19 all of the NBC news elections, technical projects with a major
20 emphasis on electrical data processing.

21 I spent some 14 years with the Today Show as a writer
22 and manager; and producer and writer; and producer of a number
23 of television specials with many of the broadcast pioneers and
24 professional journalists.

25 Q In connection with this did you participate in a sur-
vey relating to the actual use of BMI license compositions during
1978?

A Yes, I did.

1 Q Do you have a copy of that survey before you?

2 A I have a copy of the narrative in front of me, yes.

3 Q Does that narrative contain a description of the
4 methodology and conduct of the survey?

5 A Yes.

6 Q Does that narrative description consists of three
7 pages?

8 A Yes.

9 Q Would you read that into the record.

10 (This is copy)

11 A Broadcast Music, Inc., Survey.

12 In addition to providing a general description of
13 BMI's leading position among music performing rights organi-
14 zations, BMI has also undertaken a survey of actual use of BMI
15 licensed compositions during 1978. The survey was conducted
16 under the supervision of Dr. Richard F. Link, BMI's statistical
17 consultant, in liaison with Alan H. Smith, BMI Vice-President,
18 Licensing. Background summaries for both Dr. Link and Mr. Smith
19 have already been made a part of the record herein. Based on
20 the survey results, BMI's share of music contained in the local
21 television programming normally carried by cable systems is 46
22 percent. On a base which excludes public domain, privately
23 licensed, unidentified and SESAC works.

24 The methodology underlying BMI's analysis is simple
25 and straightforward. In the normal course of the operation of
BMI's collection and payment system on behalf of it approximately
60,000 affiliated writers and publishers, an independent public
accounting firm regularly requests detailed program logs from

1 a randomly selected sample of local television stations.
2 Additionally, BMI also requests and receives "cue sheets" from
3 various sources including program and film producers. These
4 "cue sheets," which are maintained on file, list all musical
5 works performed in the specific program or film and are used
6 to analyze the content of all television program logs.

7 For this particular survey, a random, seven-day, com-
8 posite week was selected based on the 1978 FCC TV composite
9 week which was as follows:

10 Sunday, February 6, 1977
11 Monday, March 14, 1977
12 Tuesday, May 24, 1977
13 Wednesday, April 6, 1977
14 Thursday, September 1, 1977
15 Friday, October 21, 1977
16 Saturday, July 16, 1977

17 Since the FCC's 1978 composite week was actually a composite of
18 1977 dates, the survey week used by BMI was adapted to calendar
19 1978 by shifting all dates back one day. Sunday, February 6, 1977
20 became Sunday, February 5, 1978; Monday, March 14, 1977 became
21 Monday, March 13, 1978 and so forth.

22 All television program logs which had previously been
23 received for these selected sample days were then used for the
24 survey. The program logs represented a cross-selection of
25 varying sized markets falling within approximately 25 states.
The aggregate number of cable systems served in 1978 by the
survey stations was 1,124. A listing of stations surveyed,
date, and number of cable systems served is provided as an
attachment.

Since the vast bulk of all music used on local tele-
vision appears within two broad programming categories, feature
film or general entertainment, the analysis - for sake of

1 practicality - was confined to these two programming areas.
2 Music content of each non-network program - as reported on the
3 sample logs - was determined by using "cue sheet" or other
4 program information already in BMI files. BMI personnel whose
5 normal responsibility is the analysis of these "cue sheets"
6 were used for this project. All music usage was categorized
7 as either "BMI" or "Other".

8 The data show performances in the sample totaling
9 4,896. For the purpose of this study only, any single timed
10 use of music was considered as one "performance". BMI licensed
11 music accounted for 1,960 performances out of the total. As a
12 matter of administrative practicality, BMI maintains accurate
13 information for only that music licensed by it. There was no
14 precise mechanism available, therefore, for any allocation of
15 the "Other" category into its various components.....e.g.
16 Public Domain, ASCAP, SESAC, etc.

17 Based on the experience of BMI personnel, who regu-
18 larly analyze program content of the same type used in the
19 survey, 10-15 percent of local television-used music is not
20 licensed by either BMI or ASCAP. Under these circumstances,
21 BMI took the compromise view that 12 percent of the performance
22 total should be excluded from the computation as being neither
23 BMI nor ASCAP licensed material. Thus, the base was reduced
24 to 4,308 performances of which BMI's 1,960 represent approxi-
25 mately 46 percent.

(End of copy)

That, Madame Chairman, concludes my statement.

Q Your conclusion from this of music played in your

1 sample, 46 percent was licensed to BMI?

2 A That is correct.

3 MR. DUNCAN: Madame Chairman, I move the witness'
4 statement be put into evidence.

5 MR. KORMAN: I cannot hear.

6 MR. DUNCAN: I move the witness' statement be put
7 into evidence and particularly the attachment; and ask that it
8 be marked Exhibit 2.

9 MR. KORMAN: Madame Chairman, I guess based on the
10 Chair's prior rulings that I should simply note my objections
11 to its relevance and observe the balance for cross.

12 CHAIRMAN BURG: That is a wise decision.
13 Thank you.

14 MR. DUNCAN: No further questions.

15 CHAIRMAN BURG: All right.

16 (Broadcast Music, Incorporated Survey
17 Exhibit 2 was marked for identification
18 and received into evidence.)

19 CHAIRMAN BURG: Mr. Coulter?

20 BY COMMISSIONER COULTER:

21 Q Do you have any idea as to who licensed that 10-15
22 percent?

23 A I am sorry?

24 Q On page three you mentioned that based on the experi-
25 ence of BMI personnel 10-15 percent of local television music
is licensed either by BMI or ASCAP. Is it logical to conclude
that is SESAC music?

1 A No, sir. We estimate only that it is neither BMI or
2 ASCAP. The remainder is public domain, privately licensed,
3 SESAC, whatever.

4 Q Is there much privately licensed music outside of
5 SESAC?

6 A I could not assign specific proportions, sir.

7 Q But there is some?

8 A There is some I am told.

9 Q Thank you.

10 CHAIRMAN BURG: Commissioner Garcia?

11 COMMISSIONER GARCIA: No.

12 CHAIRMAN BURG: Mr. Korman.

13 CROSS EXAMINATION

14 BY MR. KORMAN:

15 Q Mr. Smith, a footnote on page three, you stressed it
16 as you read your statement. You said, 'For the purpose of this
17 study only, any single timed use of music was considered as one
18 performance.' Why do you say that?

19 A Because it is a true statement.

20 Q I assume that, sir. Why do you call attention to the
21 fact that you counted any single timed use as one performance.
22 Isn't that what you normally do at BMI?

23 A There are a variety of a small percentage of cue
24 sheets or logs that do not provide timing. They simplicate
25 a frequency.

Q Most do provide timing?

A I am told most do.

Q Do you know that for a fact?

A I know what I am told.

1 Q But do you know for a fact that most cue sheets do
2 indicate separate timing for cues?

3 A I do not as a matter of normal course of events ana-
4 lize cue sheets.

5 Q You have seen cue sheets?

6 A I have seen a number.

7 Q Most separately timed cue?

8 A Most do.

9 Q For purposes of this analysis, did you not include
10 each cue as a separate performance?

11 A I don't quite follow the question.

12 Q The statement says, 'any single timed use of music
13 was considered as one performance.'

14 Let me make it simple. Suppose you had a cue sheet
15 for a half hour program listing 15 separate cues of duration
16 from two seconds to three seconds. Would each be counted as
17 a performance? Would that program have five performances?

18 A Yes.

19 Q If there were an untimed cue sheet where there is
20 background music or maybe a timed cue sheet, if there was a
21 30 minute program, where the background score was written by a
22 single composer, and it was 27 minutes in duration, that also
23 would be one performance?

24 A In the very unlikely situation that would occur, yes.

25 Q For feature performances each feature performance--
oh, do you know what I mean by feature performance? Would you
state your definition?

A Feature performance in this instance as indicated on
the cue sheet is that---

1 Q The cue sheet indicates whether it is feature?

2 A Yes.

3 Q Suppose there is no cue sheet? It is not a film. It
4 is a Lawrence Welk show?

5 A If there is not cue sheet, we have no information.

6 Q The cue sheet accompanies a film and shows the back-
7 ground music whereas Lawrence Welk or Name That Tune, not as a
8 cue sheet but program, they would list the compositions. Have
9 you seen such programs, sir?

9 A I have.

10 Q Those programs where there are feature-use of Lawrence
11 Welk for example. It is in syndication?

12 A Yes.

13 Q Do you know whether it was the most popular syndication
14 in 1978?

15 A I do not.

16 Q Would it surprise you by the Nielsen ratings it had
17 last year?

18 A I could not comment on that.

19 Q A cue of two second duration was given the same weight
20 as a feature performance?

21 A Each occurrence was given the same weight. Each
22 occurrence was one.

23 Q In BMI's payment schedule, are you familiar with
24 that, sir?

25 A Loosely.

Q Let me show it to you. Is there a schedule that you
know of later than the one dated June 1, 1977?

1 A Not to the best of My knowledge.

2 Q As far as you know, is it one dated June 1, 1977, the
3 one that would apply for the year 1978?

4 A To the best of my knowledge, yes.

5 MR. DUNCAN: May I see that your honor?

6 CHAIRMAN BURG: Yes.

7 COMMISSIONER COULTER: I am sorry Madame Chairman,
8 we don't have a supply of these. We have only the one the
9 witness and I am holding. We will make copies for the tribunal.
10 I would like to move this document as ASCAP Exhibit 7 into
11 evidence. Whatever the next number is.

12 CHAIRMAN BURG: All right.

13 (ASCAP Exhibit 7 was marked for
14 identification and received into
15 evidence.)

16 CROSS EXAMINATION

17 BY MR. KORMAN:

18 Q Mr. Smith, directing your attention to page one, do
19 you see under roman numeral four a rate of payment for U.S.
20 Television Feature Performances?

21 A I do.

22 Q It is in two parts, one for local; for popular songs,
23 it is 24 and for network there are other rates. Do you see
24 that?

25 A I do, but it has no bearing ---

Q I am just asking if you see it .

A I do, but it has no bearing on the survey.

Q BMI for payment of affiliates does draw this distinc-
tion among different types of performances, does it not?

1 A As I said earlier, I am loosely familiar with the
2 payment system. The purpose of the survey is to measure
3 performances, not payment.

4 Q There are a variety of ways of measuring performances;
5 are there not?

6 A The performance is a performance.

7 Q Is it really? Why not pay the affiliates the same
8 amount for use as for feature performances?

9 A Are you talking about performance, not payments?

10 Q The performances are equal, but the payments are not
11 to be?

12 A The payment schedule will, as I've said before, and
13 the distribution system is not something with which I have any
14 direct concern.

15 Q I understand, sir. On page three, under the heading
16 D, do you notice rates for something called background? That
17 begins with "Background music is music used other than as
18 feature or theme."

19 A I am sorry. Where are you?

20 Q On page three. The pages are not numbered, but it
21 is the third page.

22 A Yes, I have that.

23 Q BMI has separate rate difference for feature use for
24 background performances when it pays its affiliates; is that so?

25 A You are asking me to testify on something, as I've
said, is not an area that I am completely familiar with.

1 Q Are you familiar with the term "a special credit work"?

2 A No, I am not.

3 Q Did you know that BMI has such things?

4 A If I am not familiar with the term, then I have
5 already answered your question.

6 Q On the last page of this schedule, sir, "a special
7 credit work", paragraph VIII, subparagraph B, it describes these
8 works as show music and move works. Do you see that, sir?

9 A I am sorry. I have four pages. They don't appear to
10 be in the same order as you have.

11 MR. DUNCAN: May I suggest that we number the pages
12 the same as Mr. Korman's.

13 CHAIRMAN BURG: Please do.

14 MR. DUNCAN: Madam Chairman, the pages are numbered
15 I think the same as for counsel and the witness.

16 CROSS EXAMINATION

17 BY MR. KORMAN:

18 Q Mr. Smith, the tally that said was made, was made by
19 treating each time performance the same?

20 A That is correct.

21 Q There was no other tally made in any other fashion, for
22 example by use of the BMI weighting rules; was that done?

23 A No, it was not done.

24 Q Do you know why?

25 A There was no need.

Q Was that your decision?

1 A That was a statistical decision.

2 Q Link's decision?

3 A Link's decision. As we said, it was simple, straight-
4 forward means of measurement.

5 Q On the first page of the statmeent, sir, there is a
6 footnote to the sentence that says: "Based on the survey result,
7 BMI's share of music contained in this local television program-
8 ming normally carried by cable systems if 46 percent." The foot-
9 note says, "On a base which excludes public domain, privately
10 licensed, unidentified and SESAC works." Explain that please?

11 A I thought I already had.

12 Q Could you again? Because I don't understand it.

13 A Based on conversation with the people who normally
14 analyze these logs day in and day out, some 10-15 percent of the
15 music appears within these logs, local television is not BMI or
16 ASCAP insofar as we can determine. Therefore, it is something else

17 Q I can see if it said privately licensed or public
18 domain on the cue sheet or SESAC, but how can it be unidentified
19 on a cue sheet? Does the cue sheet say "music unidentified"?

20 A There are times we receive a program log that simply
21 indicates there is a piece of music.

22 Q I see. You are speaking now not of a cue sheet from
23 a producer, but a program log from a station?

24 A I indicated there are a number of sources that we
25 used.

Q If you did include these other uses of music, do you
have any idea of what the percentage would have been for BMI?

1 A Out of the total universe?

2 Q Yes.

3 A The total universe, I believe that number is about
4 40 percent.

5 Q Is there some document that shows that?

6 A No, but you can calculate it as quickly as I can.

7 Q I don't know the size of the portion which was
8 excluded, that is my problem.

9 A That is rather clear in the statement.

10 Q Is it?

11 A Yes.

12 Q Where?

13 A Page three. The data shows performances in the same
14 sample to the Link 4,896 units, performances whatever you want
15 to call them, BMI accounted for 1,960. The total sample was
16 4,896. 1,960 divided by 4,896 is about 40 percent, I believe.

17 MR. KORMAN: I have no further questions.

18 MR. DUNCAN: No redirect.

19 CHAIRMAN BURG: Excuse me. Mr. Ciancimino.

20 CROSS EXAMINATION

21 BY MR. CIANCIMINO:

22 Q In answer to Commissioner Coulter's questions with
23 regard to the 10 to 15 percent of music not ASCAP or BMI, you
24 said some of that is from privately licensed music. I ask you
25 this, aside from the three performance organizations and per-
haps occasionally a license from the Italian Book Company. To
your knowledge, is there any one particular private license that
you can cite to this tribunal?

A To my knowledge, no.

1 MR. CIANCIMINO: I have no further questions.

2 CHAIRMAN BURG: Mr. Duncan?

3 MR. DUNCAN: No redirect.

4 CHAIRMAN BURG: Thank you Mr. Smith.

5 MR. KORMAN: Madame Chairman, we seem to be proceeding
6 with good speed. I don't think I am going to be long with
7 Mr. Cramer. I do need about 15 minutes so that I can communi-
8 cate by telephone before I reorganize my cross.

9 CHAIRMAN BURG: Before I answer that, Mr. Duncan, do
10 you have any other witnesses?

11 MR. DUNCAN: No.

12 CHAIRMAN BURG: What I might do is ask Mr. Ciancimino
13 if you prepared to proceed at this time.

14 MR. CIANCIMINO: Would you like me to?

15 CHAIRMAN BURG: Why don't you come up here. We can
16 hear it better.

17 Have you been sworn before?

18 MR. CIANCIMINO: I think during orientation.

19 CHAIRMAN BURG: Well, let's do it again.

20 Whereupon,

21 MR. CIANCIMINO

22 was called as a witness and, having been duly sworn, was
23 examined and testified as follows:

24 MR. CIANCIMINO: First I ask the tribunal's indul-
25 gence. I have a bit of a throat problem. If I cannot be heard
at any time, I appreciate being so told. I feel like the quiet
of the storm here, or the calm after the storm. I have no
particular brilliant observations to make or to offer to this
tribunal. Some observations perhaps are of interest. Obviously

1 there is no particular method that will scientifically and
2 accurately measure the share that each organization is to
3 receive. It seems at best, the tribunal must come up with an ed-
4 ucated estimate. In order to arrive at this educated estimate,
5 one might look at the amounts received by the three origani-
6 zations in other areas of music licensing. However, it would
7 really be a disortion of fact and misleading to use an industry
8 where the basis for licensing that industry difference between
9 ASCAP, BMI, and SESAC.

9 For example, in the area of commercial tele-
10 vision and radio both ASCAP and BMI license the user on a
11 percentage of the income. SESAC's rates are not tied into a
12 percentage of the income. They are have a fixed annual rate
13 which is based on several factors.

13 Among them the market area that the stations serve at
14 the advertising rate of the station. Thus, in the fifties
15 and the sixties when the income of television stations soared,
16 ASCAP and BMI's income also astromonically increased. Whereas,
17 income to SESAC increased at a much more modest pace, since
18 it was not tied to the income of the stations.

18 Since none of three orrganizations has recently
19 drastically increased its rates, it is obvious that the increas-
20 ingly widening gap between the revenues of ASCAP and BMI and
21 those of SESAC can only be attributed to the different methods
22 of licensing and not to the change in the performance value of the
23 repertories it serves. Therefore, any attempt to analogize the
24 revenues received for radio or television or those re-
25 ceived from cable is completely erroneous.

25 You can only compare revenues if the factors used are
the same. In this regard, it might be more helpful to the

Accurate Reporting Co., Inc.

1 tribunal to look to areas where the factors have been
2 the same.

3 In recent years, negotiations were concluded with
4 several organizations representing colleges and universities
5 on a national level. These negotiations were conducted entirely
6 by ASCAP, SESAC, and BMI, but the same factor was used. That
7 is a per student rate. What were the results of these
8 negotiations? ASCAP received six cents per student. BMI, 5 and
9 one half cents, SESAC, 2 cents or about 14 percent of the total
10 fees paid.

11 To be perfectly accurate, there was a second level
12 of payment that ASCAP and BMI was to receive from colleges and
13 universities for certain live performances on campus. However,
14 this was more than offset by the fact that SESAC license was
15 based on total student involvement, whereas, ASCAP and BMI was
16 based on only full-time student enrollment. That was part of
17 the negotiated agreement.

18 Based on my own experience in the area of pay-tele-
19 vision such as Home Box and Home Theater at or, our rates have
20 been 10 to 15 percent of the total fees paid by these television
21 systems.

22 Finally, the two instances on record before this
23 tribunal are well known to it in the area of noncommercial,
24 nonpublic broadcasting, the difference was 45 to each ASCAP
25 and BMI and 10 to SESAC. Juke Box was 47 and one half to each
and five percent to SESAC.

I would suggest now that a fair allocation of monies
by the tribunal would be 10 percent to SESAC, 45 percent to
ASCAP, and 45 percent to BMI.

1 CHAIRMAN BURG: Repeat that, please.

2 MR CIANCIMINO: Ten percent to SESAC, 45 percent to
3 ASCAP, and 45 percent to BMI.

4 COMMISSIONER JAMES: What was your first one, before
5 the first one?

6 THE WITNESS: The same.

7 COMMISSIONER JAMES: What was that in connection with?

8 THE WITNESS: Noncommercial, non PBS.

9 A couple of other items I would like to mention.

10 That is regarding my questions put to Mr. Smith. I have been
11 in the area of music licensing for twenty years, I have not
12 met the animal called private licensing in the area of tele-
13 vision licensing. There is no such animal. If there is one,
14 he is quite rare.

15 Secondly, as I indicated in my questioning this
16 morning, the ASCAP license to local television does not include
17 synchronization rights, but solely performance. There is an
18 additional fee paid because it is separate. The confusion was
19 brought about by PBS negotiations. Those negotiations were
20 setforth on page 126 Mr. Cramer's statement.

21 The 90, 90, 30 split to SESAC did include
22 performance and synchronization rights. At the time SESAC
23 negotiated the first deal to be negotiated with PBS, we thought
24 we were getting as good a deal as Mr. Cramer thought he was
25 getting. We went about from thirty thousand to fifty thousand
which was almost double. If we had the foresight to know what
we would be awarded to ASCAP, I don't know whether BMI or SESAC
would have made their original deals, but that is neither here

1 nor there; suffice to say at the time SESAC did accept \$50,000
2 from PBS, the projected availability of all monies due to PBS
3 for licensing was in the area of \$500,000. We projected our
4 \$50,000 based on 10 percent which also came to roughly the
5 amount that we would have received if we had given PBS the
6 50 percent discount of our commercial rates. This I testified
7 to during the PBS proceedings.

8 That is really all I have to say at this particular
9 moment. I am here as a witness. I am pleased to answer any
10 questions or cross examination by any parties present.

11 COMMISSIONER COULTER: Mr. Ciancimino, it is not
12 clear to me how ad rates and market size over a period of
13 time won't be related to a stations income.

14 THE WITNESS: Keep in mind the ad rates and
15 the market classification that are a part of the basic rate
16 schedule. A station might after five years jump from one
17 category into a higher category if after five years their rates
18 have increased.

19 What we are talking about here are multiples of
20 hundreds. The top rate up to I think a year ago was \$6,000.
21 That is, that a station could pay to SESAC. So a station could
22 be making theoretically millions of dollars.

23 COMMISSIONER COULTER: I thought you based your
24 system on their market area?

25 THE WITNESS: Yes, but it is a fixed rate categori-

1 zation. It might pay \$160 a year. \$10 to \$50 might pay \$150
2 a year. A station, as I said, might quadruple.

3 COMMISSIONER COULTER: Without changing the ad rate or
4 triggering them into something new?

5 THE WITNESS: That is a possibility. A realistic
6 approach would quadruple their advertising rate.

7 COMMISSIONER COULTER: What?

8 THE WITNESS: Their advertising rate.

9 COMMISSIONER COULTER: That is how you correlated yours

10 THE WITNESS: Yes, but the increases to SESAC
11 jumping from one category to the category the station is now in
12 might be measured in \$100 or \$200 of an increase. A percentage
13 of the station's income might be measured in thousands of
14 dollars.

15 COMMISSIONER COULTER: But why given the increase
16 in the rates would you not increase your rates?

17 THE WITNESS: We have a fixed rate system. Every
18 station in the United States is on a rate schedule which has
19 advertising rates going down the left column and across the top
20 as market area served. As they meet, that is the rate they pay.

21 COMMISSIONER COULTER: You don't change that fixed
22 schedule over a period of time?

23 THE WITNESS: No. Beginning last year, we insti-
24 tuted a system where there is an annual adjustment. Up to then
25 you could only adjust after a five year period.

1 A A million or a million and one half.

2 Q Could you be more precise?

3 A I couldn't ---

4 Q Would you furnish that to us by letter and to the
5 tribunal?

6 A I would object to that.

7 MR. KORMAN: I have asked ASCAP what it is going to
8 do with a portion of these fees, I think it is for the amount
9 SESAC collected from local television stations in 1978. I have
10 requested that information.

11 CHAIRMAN BURG: You, Mr. Ciancimino, refuse?

12 THE WITNESS: I object because SESAC is a private
13 corporation.

14 CHAIRMAN BURG: So be it.

15 MR. KORMAN: I am not terribly curious about it.
16 It can be furnished in camera to the tribunal so that you would
17 know it. Does Mr. Ciancimino have any objections to that?

18 A At this time I cannot commit the company to doing
19 that.

20 Q Would you discuss that with them. Let us know
21 whether you are going to do it?

22 CHAIRMAN BURG: I think perhaps first the tribunal
23 will make a decision as to whether it wants to see that
24 material. We will inform you people and Mr. Ciancimino if it
25 does.

RESUMED CROSS EXAMINATION

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BY MR. KORMAN:

Q Referring to the colleges and universities pay-tele-
vision, are you aware that the rates are as expensive as ASCAP
and BMI?

A So is SESAC's.

Q By express terms of the agreement?

A Yes.

Q To college and universities?

A I believe so. I know Home Box, we have the same
language.

Q What is the difference? You stated I think in the
college, university area SESAC's fee is computed based on total
student enrollment and ASCAP's and BMI's only on full-time
student enrollment?

A That is correct.

Q That is not correct, is it?

A I think I just testified to that.

Q Doesn't the ASCAP agreement state full-time equivalent
which is intended to pick up part-time students?

A Part-time is not the equivalent.

Q No, but it aggregates them?

A I am not familiar with that. I know everytime we
have run into that situation from colleges and universities
who have had to pay us more based on higher enrollment, we have

1 received quite a bit of discussion from them on that point.

2 MR. KORMAN: I have no further questions.

3 CHAIRMAN BURG: Thank you.

4 Mr. Duncan.

5 MR. DUNCAN: We have no questions, your honor.

6 CHAIRMAN BURG: Thank you, Mr. Ciancimino. You have
7 no other witnesses, so we will have to take our recess now to
8 give Mr. Korman some time. It will be a brief recess, and then
9 we will come back with Mr. Cramer and that should wrap it up.
10 Bear in mind whatever time you ask for may not necessarily be
11 granted. But how much time do you think you will need?

12 MR. KORMAN: 15 minutes.

13 CHAIRMAN BURG: It is now ten minutes to three.
14 Five minutes after three o'clock.

15 (A fifteen minute recess was taken.)
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1 CHAIRMAN BURG: Back on the record. First of all,
2 Mr. Cramer, you might return to the stand.

3 Whereupon,

4 EDWARD M. CRAMER

5 was called as a witness and, having been previously duly sworn,
6 was examined and testimony resumed as follows:

7 CROSS EXAMINATION

8 BY MR. KORMAN:

9 Q. Mr. Cramer, would you turn to page 8 of your state-
10 ment? The last sentence of the last full paragraph reads:
11 "BMI receives 1.7 percent of adjusted gross station revenues,
12 and ASCAP's share has been decreased to 1.725 percent -- do
13 you see that statement?

14 A. Yes.

15 Q. Is it a correct statement with respect to the radio
16 fees paid in total to ASCAP and to BMI?

17 A. I'm not sure.

18 Q. That is to say only those two, 1.7 percent for BMI,
19 or 1.725 percent for ASCAP, or has something been left out?

20 A. That statement is correct.

21 Q. Does BMI receive a sustaining fee from radio stations?

22 A. No.

23 Q. Does ASCAP?

24 A. I believe so.

25 Q. Do you know what total the fee amounts to?

A. I don't know.

Q. If I say it is not less than ten percent, would you
have reason to doubt it?

1 A. Of what?

2 Q. Of the total fee.

3 A. You don't mean it is a 10 percent rate do you?

4 Q. No. When you look at what compares with 1.7 that
5 BMI receives, the figure for ASCAP is 1.9 when you add in the
6 sustaining fee.

7 A. I have no way of knowing what the sustaining fee
8 could have been.

9 Q. Did you negotiate that agreement?

10 A. In 1968 -- was two percent also the sustaining fee
11 added to that?

12 Q. I will be the witness and answer truthfully, yes.

13 A. If it was, it was on the same basis. If it was
14 there in '68, the sustaining fee, it was there when it was
15 readjusted. I have no way of knowing that, in effect,
16 increased the rate to 1.9. If that is what you tell me, that
17 may be true. I just don't know.

18 Q. I represent to you that it is true, Mr. Cramer. I
19 suggest 1.7 against 1.9 may not be described as virtually one
20 party as 1.725 might be. Would you agree with that?

21 A. Would you repeat that?

22 Q. Your preceding sentence to the one I read said,
23 "Today the rates have been brought into virtual party."

24 A. That is correct.

25 Q. You mean the commercial fee?

A. That is correct.

Q. Without looking at the sustaining fee?

A. That is correct.

1 Q. ASCAP receives a significantly larger sum. We are
2 talking about millions of dollars more in radio. We are talking
3 about ten percent, a sustaining fee.

4 A. I don't know when you say millions.

5 Q. Per year.

6 A. I can't tell you.

7 Q. Do you know what ASCAP's radio collections were in
8 1978, approximately?

9 A. No.

10 Q. Do you know what BMI's were?

11 A. I don't have it at my finger tips.

12 Q. Approximately?

13 A. In the twenty-some millions.

14 Q. If ASCAP's were \$30 million commercial fees and there
15 was a ten percent sustaining fee, that is three million as a
16 matter of arithmetic.

17 A. That is simple arithmetic.

18 Q. Look at the appendix, if you would? For the purpose
19 of keeping this short, look at 1978. Appendix E. is the one
20 headed " Films Containing BMI Music," and on the first page it
21 begins with the year 1972, do you see that?

22 A. Correct.

23 Q. For the year 1978, the list begins with "Close
24 Encounters of the third Kind," which is No. 1. It runs through
25 "27 Capricorn One." Do you see that?

26 A. Yes.

27 Q. Variety, a leader in regionals to directors; "The
28 Many Worlds of Music," Issue No. 1, 1979." Is that all one
29

1 source?

2 A. No. There is a semicolon.

3 Q. Who publishes "The Many Worlds of Music"?

4 A. BMI. At the bottom of every year in the exhibit,
5 there is the identification of the BMI magazine when this infor-
6 mation first appeared. So, that is true on every one of those
7 exhibits that is attached here. Those were prepared in the
8 formal course at the time, not especially for these hearings,
9 we took them from the magazine.

10 Q. What were they taken from, a Variety issue, a
11 particular date? I'm not on the BMI mailing list. So, I don't
12 see that publication. If I wanted to find out how many films
13 were listed, I would want to go look back and see. You picked
14 27. Were those all?

15 A. I don't know.

16 Q. Do you know whether this was \$100?

17 A. I don't know.

18 Q. Do you know what years they had ASCAP millions?

19 A. What year?

20 Q. '78.

21 A. Looking at this, there were some because we were
22 careful where there were dual authors. For example, looking
23 at 1978--I'm looking at "The Towering Inferno." It says,
24 Towering Inferno--

25 Q. Which number is that, sir?

A. It is the one you told me to look at, 1978. I'm
sorry. I am looking at the wrong one. I looked at the next
page. We are looking at '78. I switched to the wrong page.

1 In 1978 there is one called, "Pete's Dragon, No. 14. The song
2 was written by Joel Hirschorn and Al Casha. There were two of
3 them. We identified Hirschorn as BMI in the exhibit. Al Casha
4 is not BMI. I happen to know Al Casha is with ASCAP. The one
5 with the beard is BMI, and the other is ASCAP Hirschorn, with
6 the beard, is BMI, and Casha is ASCAP. So, we identified it
7 that way.

7 Q. Except you did not mark ASCAP on the list? .

8 A. No. We marked where there were BMI writers. We did
9 not take credit for those who were not BMI.

10 Q. No. 26, "Revenge of the Pink Panther," which I have
11 associated with Henry Mancini. I don't see his name. BMI's
12 licensed selection is what I see. I don't know what to make of
13 that.

14 A. Those were miscellaneous BMI music you did in that
15 particular film. This is not exclusive. This was not a list
16 of exclusive. Where exclusive, it appears quite obvious from
17 the document itself. They were not exclusively licensed by
18 BMI.

18 Q. You can't tell us how many were also licensed by
19 ASCAP?

20 A. Sitting here, I don't purport to be an expert on the
21 millions in that catalog. Some, I know here, are definitely
22 BMI. "Close Encounters of the Third Kind," definitely.
23 John Williams' "Saturday Night Fever," I think, was all, and
24 "Star Wars."

24 Q. "The Goodbye Girl," by David Gates, ASCAP?

25 A. I don't know. I did not mention that.

1 Q. Mr. Cramer, we asked only the "Revenge of the Pink
2 Panther" to get a feel for what is involved here. In our
3 office, you can check this, and I realize there is not much
4 time. If your numbers come out differently, you might advise
5 us by letter. Our office tells us all of it is ASCAP; 3,358,
6 seconds are exclusive, and 107 seconds are licensed films by
7 ASCAP and BMI. One is ASCAP, and one is BMI affiliate writer.

8 In that case, Mr. Cramer, you have a rather startling,
9 to me, indication of a film that is virtually, entirely ASCAP,
10 which is on this list as an example of the films containing
11 BMI music. Assuming the numbers are right, what do you think
12 the Tribunal ought to make of that fact?

13 A. What fact?

14 Q. The disparity in terms of music content in that
15 film if it were weighing, in some way, Henry Mancini's contri-
16 bution who wrote the theme and virtually all the background and
17 some who wrote 197 out of the 3,358 seconds in that film.

18 A. That is one example on this list of those works which
19 we do not exclusively license. But if you take the list in
20 its totality, it cannot be disputed that the preponderance of
21 films contain BMI exclusively licensed music.

22 Q. How can we tell that?

23 CHAIRMAN BURG: Just a minute.

24 MR. DUNCAN: He has to have the opportunity to
25 finish his answer.

CHAIRMAN BURG: Continue.

THE WITNESS: To that extent, the answer is as I
stated. There have been no refutations of the basic facts

1 stated herein.

2 CHAIRMAN BURG: Now, Mr. Korman.

3 BY MR. KORMAN:

4 Q. Mr. Cramer, you said a few minutes ago you did not
5 know how many films were published in Variety, isn't that
6 right?

7 A. Right.

8 Q. You listed 27 here, and that shows predominance of
9 BMI; 27 out of how many?

10 A. Of those top films for that particular year. For
11 example, I have today's chart with me -- of the weekly, sometimes
12 there are 50. Sometimes there are less.

13 Q. Mr. Cramer, looking at No. 18 called the "BMI
14 License Selection," that is intended to indicate, I take it,
15 there is also ASCAP music in there?

16 A. Undoubtedly so.

17 Q. That is Paul Williams' work, did you know that?

18 A. No.

19 Q. Turning to the Appendix C, and for 1978, this is the
20 appendix sampling of BMI awards.

21 A. All right.

22 Q. Do you know how many BMI awards were given out in
23 1978?

24 A. No.

25 Q. BMI apparently won one because it lists one out-
standing achievement in music composition for the special
"Babe." You have been handed an ad called "You Can't Win Them
All, but Four Out of Five Isn't BAD;" indicating that ASCAP
won four out of five that year. I move this into evidence as

1 ASCAP's Exhibit No. 7 or 8.

2 MR. DUNCAN: Would you identify the source?

3 MR. KORMAN: This appeared in the Hollywood Reporter
4 of November 3, 1978.

5 CHAIRMAN BURG: Mr. Korman, you owe us one exhibit
6 don't you?

7 MR. KORMAN: Yes.

8 CHAIRMAN BURG: This one, taken into consideration,
9 would be 8.

10 (The document, ASCAP Exhibit No. 8 was
11 marked for identification and received
12 in evidence.)

13 BY MR. KORMAN:

14 Q. In 1978, when Oscars were awarded for 1978, Mr.
15 Cramer, when would they have been awarded?

16 A. I don't know when the Oscars are awarded. Whenever
17 they have that show on television. I really don't know.

18 Q. I suggest to you, sir, they are awarded in the
19 Spring of the year for the preceding year. I hand you, or
20 Mr. Zelenko has handed you, an advertisement from ASCAP of
21 April 10, 1978 advertising headed, "It Is Not Everyday that an
22 ASCAP Writer Wins an Oscar, Just Every Year." It lists the
23 Oscar winners from 1938 through 1977, the last award then made.
24 The last, I suggest to you, sir, would have involved the
25 composition that might have been on television in 1978. Would
you agree with the latter statement?

26 A. I don't follow that.

27 Q. What I'm saying, sir, is any Oscar award winning

1 song which won for the year 1978 would have involved a recent
2 motion picture which would note a film reeled in 1978, which
3 would not have been on local television.

4 A. Yes. That is probably right. Yes, sure.

5 MR. KORMAN: Has the Oscar ad been moved? If not,
6 I move it now.

7 CHAIRMAN BURG: Any objections?

8 MR. DUNCAN: No objection.

9 CHAIRMAN BURG: So, moved. That is No. 9.

10 (The document, ASCAP Exhibit No. 9, was
11 marked for identification and received
12 in evidence.)

13 BY MR. KORMAN:

14 Q. Mr. Cramer, you have seen, I'm sure, a document
15 headed "An ASCAP List of Members at Various times." This is
16 dated 1979. I show you that. Rather than list for the record
17 and take everyone's time, I would like to move into evidence
18 the ASCAP member list. Mr. Cramer mentioned prominent affili-
19 ated writers with BMI. I don't want to take everyone's time to
20 go back and list Gerschwin, Kern, Rogers and Hammerstein,
21 Cole Porter, Arthur Schwartz, Schwartz and Detes; the more
22 recent stars, John Denver, Carol King, Stevie Wonder.

23 MR. DUNCAN: I don't want to interrupt. There is a
24 procedure and process. He is trying to introduce testimony on
25 cross. I have no objection to that. I understand his deci-
sion to shorten the proceedings. We will stipulate that
ASCAP has well-known people.

CHAIRMAN BURG: He did not want to take the time.

1 BY MR. KORMAN:

2 Q. Let me ask Mr. Cramer whether he knows these particu-
3 lar younger writers are members of ASCAP, Bob Dillon?

4 A. Probably all.

5 Q. Neil Diamond, Billy Joe, Michael McDonald, Paul
6 McCarthy, Stevie Wonder; I mentioned Paul Williams, Marvin
7 Hamlish, Sonny Throck Morton; groups, Earth, Wind and Fire,
8 the Commodores. Those are all members of ASCAP.

9 A. As you say, Paul McCartney is not. I believe, at
10 the time, that they are.

11 Q. Do you recognize these names as ASCAP members who
12 who are prominent as film composers; Elmer Bernstein?

13 A. Mr. Bernstein is an ASCAP writer. I don't know
14 in 1978 whether he was with ASCAP or BMI He switches back and
15 fourth frequently.

16 Q. He came over in '78.

17 A. That is one of the problems.

18 Q. Leonard Rosenman?

19 A. I don't know whether he was a writer in '78 or not.
20 Mr. Rosenman has switched back and forth several times.

21 Q. I represent to you that he was a member of ASCAP,
22 having come back prior to '78. Quincy Jones?

23 A. Same answer. Mr. Jones is an ASCAP writer and a
24 BMI writer. I think he has switched back and forth. What he
25 was at the time in issue, I can't tell you.

Q. He came back in '78.

A. All right.

Q. Here are some that never left: Henry Mancini, in 80

1 pictures.

2 CHAIRMAN BURG: Mr. Korman, would these writers
3 rather switch than fight?

4 MR. KORMAN: We will be through in a moment.

5 MR. DUNCAN: I'm going to object. There are ways to
6 do this.

7 BY MR. KORMAN:

8 Q. I'm asking does he know John Hamlin, Alan and Marilyn
9 Bergman, Miklos Rosa, Hal David, Burt Bachrach, Michelle
10 LeGrand. May I have an answer to that question, sir?

11 A. They are not BMI writers now. I believe Paul Williams
12 was. He is probably now in ASCAP, too. But the rest, to the
13 best of my knowledge--I'm almost sure--are with ASCAP. If you
14 tell me they are, I'm not going to quarrel with you.

15 MR. KORMAN: I would like to move the member list as
16 Exhibit No. 10.

17 MR. DUNCAN: We have not seen it. Do you know if
18 this purports to be the members for the year 1979, is that
19 correct?

20 MR. KORMAN: Yes.

21 MR. DUNCAN: We have no objection.

22 MR. KORMAN: It is dated March 1979 on the third page,
23 Mr. Duncan. I have no further questions.

24 CHAIRMAN BURG: This is

25 (The document, ASCAP Exhibit No. 10 was
marked for identification and received
in evidence.)

CHAIRMAN BURG: You have further questions,

1 Mr. Korman? Mr. Ciancimino?

2 MR. CIANCIMINO: No questions.

3 CHAIRMAN BURG: Thank you, Mr. Cramer. I'm sorry.

4 Redirect?

5 REDIRECT EXAMINATION

6 BY MR. KORMAN:

7 Q. Directing your attention to ASCAP's Exhibit No. 9,
8 the first page thereof, look on the bottom line, the year 1968,
9 musical score "Oliver." Do you happen to know who wrote the
10 musical score for "Oliver"?

11 A. Yes.

12 Q. Who wrote it?

13 A. Lionel Park, Licensed through BMI, and ASCAP is
14 listed here as getting an Academy Award for the musical score
15 because John Greene had something to do with it. "Oliver"
16 is a musical licensed by BMI. There is no indication of that
17 here on the list.

18 Q. Would you look also on the bottom line, the year
19 1972, best song, "The Morning After"? They list Al Casha as
20 co-writer.

21 A. Yes.

22 Q. Who was the other co-writer, if you know?

23 A. I do know. Joel Hirschorn, with the beard, BMI.

24 Q. Absolutely correct. Are there any others on there
25 that you know? Directing your attention to the second page.

A. I'll look at the second page. Again, I suppose this
is something all advertising people do to make it look good.
1973-14; best song, "You May Never Love Again," Al Casha,

1 a co-writer with Joel Hirschorn with the beard. I'll look at
2 the next score, an adaption of Marvin Hamlisch, where in fact,
3 it was Scott Joplin Through BMI, and the other material, three
4 quarters of the material. Mr. Schuler a BMI writer. I'm not
5 an expert on this.

6 MR. DUNCAN: We have no further questions,
7 Your Honor.

8 RE CROSS EXAMINATION

9 BY MR. KORMAN:

10 Q. When did Scott Joplin's estate move to BMI?

11 COMMISSIONER BRENNAN: Mr. Korman, I have a standing
12 objection.

13 CHAIRMAN BURG: Mr. Korman, You have had your
14 chance. Thank you, Mr. Cramer.

15 MR. DUNCAN: Your Honor, that concludes BMI's
16 presentation.

17 CHAIRMAN BURG: We will adjourn until tomorrow
18 morning at 10 o'clock in this room.

19 (Whereupon, at 3:40 p.m., the hearing adjourned to
20 reconvene at 10:00 a.m., the next day.)
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NOTARY PUBLIC D.C.-MD

September 15, 1980

Copyright Royalty Tribunal
1111 20th Street, N.W.
Suite 450
Washington, D.C. 20036

Dear Commissioners:

Because of the gross inaccuracies found in the transcript of the hearing of August 19, 1980, we are submitting a corrected copy of that hearing.

Please accept our apology for any inconvenience this may have caused the Tribunal.

Sincerely,

Lisa A. Walker
Lisa A. Walker